TRUST LEGISLATION

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

SIXTY-THIRD CONGRESS

SECOND SESSION

ON

TRUST LEGISLATION

IN TWO VOLUMES

SERIAL 7—PARTS 1 TO 24

INCLUSIVE

VOL. 1

WASHINGTON

GOVERNMENT PRINTING OFFICE

1915

CONTENTS.

SERIAL 7, PARTS 1 TO 24, INCLUSIVE.

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.
R. 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.
L. C. DYER, Missouri.
GEORGE S. GRAHAM, Pennsylvania.
WALTER M. CHANDLER, New York.

J. J. SPEIGHT, *Clerk.*

TRUST LEGISLATION.

SERIAL 7, PART 1.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Tuesday, December 9, 1913.

The committee this day met, Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. Mr. Morgan, we had promised to give you a hearing on your bill this morning, and you may proceed at this time.

STATEMENT OF HON. DICK T. MORGAN, REPRESENTATIVE IN CONGRESS FROM THE STATE OF OKLAHOMA.

Mr. MORGAN. Mr. Chairman and gentlemen of the committee, in the Sixty-second Congress, January 28, 1912, I introduced H. R. 18711, entitled "A bill to regulate the commerce of certain corporations, and for other purposes." Among other things the bill created an "interstate corporation commission," composed of seven members, and gave to the said commission extensive power of supervision and control over the large industrial corporations doing an interstate business. On the 20th of February, 1912, I delivered in the House of Representatives a speech in which I explained the provisions of my bill and advocated its enactment into law. So far as I know this was the first bill introduced in the House creating such a commission, and so far as I know I was the first to advocate in a formal speech in the House the creation of such a commission. On the 7th day of April, 1913, the first day of the first session of the Sixty-third Congress, I reintroduced this bill. The new bill is H. R. 1890.

On July 2, 1890, the so-called Sherman antitrust law was approved. More than 23 years have come and gone. In the meantime we have not added a single line to our Federal laws which materially increases, extends, or enlarges the actual control of the National Government over the great industrial corporations. In the 23 years that have elapsed since the enactment of the Sherman Antitrust Act our greatest corporations have been formed. Our industrial institutions have largely increased their monopolistic power. In these 23 years no other public question has attracted more attention. It would seem that the time had passed for discussion, agitation, and denunciation, and that Congress should now proceed with constructive legislation.

The Sherman antitrust law as administered by the courts has neither prevented nor suppressed nor controlled private monopoly in this country. In spite of the law, great combinations possessing a large degree of monopolistic power have been formed. They are doing business in the United States to-day. Business has been concentrated and competition is no longer the chief factor in controlling prices of many products in common use.

The failure of the Sherman antitrust law to accomplish what its authors designed it should accomplish, may be attributed to two things: First, to defects in the law itself, and second, to the lack of a proper administrative body to administer and enforce the law. Our duty is plain. We must supplement the law with additional statutory provisions, and we must create some kind of an administrative board or commission to enforce and administer the law.

To my mind the first proposition for this committee to decide is whether or not we shall favor the creation of some kind of a board or commission to aid in the enforcement and administration of existing laws, and laws that may be enacted hereafter. If we decide that an interstate trade or corporation commission shall be created to aid in administering antitrust laws, then we can take up the question of what power and jurisdiction shall be given this commission, and what laws shall be enacted to prevent, suppress and control all monopolistic concerns.

I have reached the conclusion that we will never make any substantial progress in either preventing, suppressing or controlling monopolistic concerns until we shall have organized a Federal commission, with extensive powers, to administer our laws on the subject.

I shall therefore first present some arguments in favor of creating such a commission and, second, will discuss the power that should be given the commission, and the provisions of H. R. 1890.

The great political parties, through declarations made in national platforms are, I think, fairly committed to the commission plan. The Republican and Progressive Parties are committed by specific declarations and the Democratic Party by implication.

The Republican Party in its national platforms has repeatedly declared for additional legislation for the supervision, regulation, and control of the trusts.

In 1912 the Republican national platform declared:

> The Republican Party favors the enactment of legislation supplementary to the existing antitrust act, which will define as criminal offenses those specific acts that uniformly mark attempts to restrain and to monopolize trade, to the end that those who honestly intend to obey the law may have a guide for their action and that those who aim to violate the law may the more surely be punished.

In the enforcement and administration of Federal laws governing interstate commerce, and enterprises impressed with a public use engaged therein, there is much that may be committed to a Federal trade commission, thus placing in the hands of an administrative board many of the functions now necessarily exercised by the courts. This will promote promptness in the administration of the law and avoid delays and technicalities incident to court procedure.

In its first national convention the Progressive Party declared as follows:

We therefore demand a strong national regulation of interstate corporations. * * *
To that end we urge the establishment of a strong Federal administrative commission of high standing which shall maintain permanent active supervision over industrial corporations engaged in interstate commerce or such of them as are of public importance, doing for them what the Government now does for the national banks and what is now done for the railroads by the Interstate Commerce Commission.
* * *

The Democratic Party has declared for legislation——

Mr. CARLIN (interposing). Do you mean that that means the fixing of the price of the product in the way in which the Interstate Commerce Commission fixes the rate?

Mr. MORGAN. I was simply reading the declaration of the Progressive platform.

Mr. CARLIN. I thought you were expressing yourself as in favor of the idea.

Mr. MORGAN. I will state that in my bill there is a provision relating to the regulation of the prices, and I will refer to that in the latter part of my argument.

The Democratic Party has declared for legislation that can not be effectively enforced or administered except through some kind of a national administrative board or commission.

I especially call attention to the following declarations:

In the Democratic platform of 1892 it declared as follows:

We demand the rigid enforcement of the laws made to prevent and control them (trusts and combinations), together with such further legislation in restraint of their abuses as experience may show to be necessary.

The Democratic platform of 1896 contained this:

The absorption of wealth by the few, the consolidation of our leading railroad systems, and the formation of trusts and pools require a stricter control by the Federal Government of those arteries of commerce.

In the platform of the Democratic Party of 1900 we find the following:

Existing laws against trusts must be enforced and more stringent ones must be enacted, providing for publicity as to the affairs of corporations engaged in interstate commerce, requiring all corporations to show, before doing business outside the State of their origin, that they have no water in their stock, and that they have not attempted and are not attempting to monopolize any branch business or the production of any article of merchandise; and the whole constitutional power of Congress over interstate commerce, the mails, and all modes of interstate communication shall be exercised by the enactment of comprehensive laws upon the subject of trusts.

The Democratic platform of 1904 has the following:

We demand a strict enforcement of existing civil and criminal statutes against all such trusts, combinations, and monopolies, and we demand the enactment of such further legislation as may be necessary to effectively suppress them.
Any trust or unlawful combination engaged in interstate commerce which is monopolizing any branch of business or production should not be permitted to transact business outside of the State of its origin. Whenever it shall be established in any court of competent jurisdiction that such monopolization exists, such prohibition should be enforced through comprehensive laws to be enacted on the subject.

The Democratic platform of 1908 contains the following:

We therefore favor the vigorous enforcement of the criminal law against guilty trust magnates and officials and demand the enactment of such additional legislation as may be necessary to make it impossible for a private monopoly to exist in the United States. Among the additional remedies we specify three: First, a law preventing a duplication of directors among competing corporations; second, a license system which will, without abridging the right of each State to create corporations or its right to regulate as it will foreign corporations doing business within its limits, make it necessary for a manufacturing or trading corporation engaged in interstate commerce to take out a Federal license before it shall be permitted to control as much as 25 per cent of the products in which it deals, the license to protect the public from watered stock and to prohibit the control by such corporation of more than 50 per cent of the total amount of any product consumed in the United States; and, third, a law compelling such licensed corporations to sell to all purchasers in all parts of the country on the same terms, after making the allowance for the cost of transportation.

And the Democratic Party, in its platform of 1912, states:

* * * We favor the declaration by law of the conditions upon which corporations shall be permitted to engage in interstate trade, including, among others, the prevention of holding companies, of interlocking directors, of stock watering, or discrimination in price, and the control by any one corporation of so large a proportion of any industry as to make it a menace to competitive conditions. * * *

I submit, Mr. Chairman and gentlemen of the committee, that the Democratic platform declarations call for a program that can not be carried out except through a Federal commission with extensive jurisdiction over our great industrial corporations.

Mr. CARLIN. Was that the Democratic platform which you just read?

Mr. NELSON. That was not the last platform?

Mr. MORGAN. That was 1908. In other words, you can not have a license system, with all these many provisions which have been declared for, unless there is some administrative body to carry it out, and hence I conclude that the Democratic Party is for this and both the Progressive and Republican Parties have specifically declared for a commission.

The plan of creating a national commission has been indorsed by Senators and Representatives in Congress, by prominent Government officials, by prominent editors, by distinguished citizens, scholars, political economists, business men, and especially by men at the head of some of our greatest industrial corporations. Senators Newlands and Bristow have introduced bills in the Senate providing for the creation of such a commission. Representatives Gardner, of Massachusetts, Murdock, of Kansas, Martin, of South Dakota, and myself have introduced bills in the House of Representatives.

I have not made a recent search; there may be others who have introduced similar bills.

The Senate Committee on Interstate Commerce, under Senate resolution 98, Sixty-second Congress, held an exhaustive hearing on the subject of antitrust legislation, and Senator Cummins, for the majority of the committee, made a report in favor of the creation of such a commission. The hearings of this committee have been printed in two large volumes, making a total of 2,779 pages of printed matter. One hundred and three persons were heard by the committee. Among those who appeared before the Senate committee and indorsed the plan of creating a commission to aid in administering antitrust laws, the following may be mentioned: Hon. Seth Low, New York, head of

the Civic Federation; Elbert H. Gary, chairman of board of directors of the United States Steel Corporation; George W. Perkins, New York, of the International Harvester Co. Among prominent lawyers who appeared before the committee and indorsed the commission plan may be mentioned Samuel Untermeyer, Louis D. Brandeis, Victor Morawetz, William B. Hornblower, and Francis L. Stetson. Among educators and political economists who appeared before the committee and indorsed the plan of Federal trade commission may be mentioned the following: Charles R. Van Hese, president of the University of Missouri; John H. Gray, professor of economics, University of Minnesota; John Bates Clark, professor of economics, Columbia University; J. Lawrence Saughton, professor of political economy, Chicago University; Prof. James H. Gore, former professor of mathematics in Columbian University. To these may be added the editor of the Outlook, Lyman Abbott.

One hundred and three persons appeared before the Senate committee at this hearing. Among those who were interrogated as to the advisability of establishing a national commission, a very large majority expressed themselves favorable to the proposition.

Ex-President Theodore Roosevelt has frequently expressed himself in favor of such a commission.

The business interests of the country are favorable to the proposition to create a national trade commission. This is proven by the replies received by the National Civic Federation to inquiries sent out to 1,006 manufacturers, merchants, bankers, and business men throughout the country. Out of 892 answers, 614 declared in favor of the commission, 278 against it. (See note, Senate Hearings, pp. 499, 500.)

The report of the majority of the Senate Committee on Interstate Commerce, Sixty-second Congress, indorsed the plan of creating an interstate trade commission. The committee was composed of the following members: Moses E. Clapp, of Minnesota, chairman; Shelby M. Cullom, of Illinois; W. Murray Crane, of Massachusetts; George S. Nixon, of Nevada; Albert B. Cummins, of Iowa; Frank B. Brandegee, of Connecticut; George T. Oliver, of Pennsylvania; Henry F. Lippitt, of Rhode Island; Charles E. Townsend, of Michigan; Benjamin R. Tillman, of South Carolina; Murphy J. Foster, of Louisiana; Francis G. Newlands, of Nevada; James P. Clarke, of Arkansas; Thomas P. Gore, of Oklahoma; Clarence W. Watson, of West Virginia; and Atlee Pomerene, of Ohio.

Senators Pomerene, Tillman, and Gore filed brief additional views, in which Gore and Tillman declared that at that time they did not desire to commit themselves to the proposition of creating a commission.

The minority of the committee, consisting of Crane, Brandegee, Oliver, and Lippitt, filed a minority report, in which they simply declared they can not agree in the report, with no special reference to the proposed interstate-trade commission.

On the proposition to create a Federal commission the majority report says:

> There are many forms of combination and many practices in business which have been so unequivocally condemned by the Supreme Court that as to them and their like the statute is so clear that no person can be in any doubt respecting what is lawful and what is unlawful; but as the statute is now construed there are many forms of

organization and many other practices that seriously interfere with competition and are plainly opposed to the public welfare concerning which it is impossible to predict with any certainty whether they will be held to be due or undue restraints of trade.

The committee does not conceal the difficulty of reaching an agreement concerning the details of the legislation just outlined, but it has no hesitation in reporting that legislation of a general character pointed out is both wise and necessary.

The committee further reports that if the additional legislation, the general scope of which has been pointed out, is enacted it will be very desirable to accompany such legislation with a measure establishing a commission for the better administration of the law and to aid in its enforcement. It may be fairly said that there is need of such a commission, even though the present statute is not supplemented in any manner; but it is apparent that if the new legislation is enacted the need of a commission will become more imperative.

A Federal commission is demanded, if for no other purpose than to aid in the dissolution and reorganization of unlawful corporations.

If we do not enact any additional statutes, to supplement the Sherman antitrust law, we should create a commission to aid the courts in administering and enforcing that law. Twenty-three years of comparative failure on the part of the existing executing and judicial machinery to effectively and successfully enforce and administer the laws against unlawful combinations should be sufficient to convince us that some additional administrative machinery is absolutely necessary, because we are bound to assume that the Department of Justice and the courts have made a reasonable effort. We must conclude that there is something wanting in our administrative machinery. It seems, therefore, that the proposal to create a commission is a proposition upon which all might agree. It is a plan that could be consistently supported alike by those who favor amending or supplementing the Sherman Anti-Trust Law and those who are opposed to any amendments or supplemental statutory provisions.

The Senate Committee on Interstate Commerce, Sixty-second Congress, in its report on S. R. 98, found on page 15 Senate hearings, on this point aptly says:

> One of the most serious problems in connection with suits brought under the antitrust act is to find the proper method of disintegrating combinations that have been adjudged unlawful. The dissolution of a corporation of a series of associated corporations must often involve the consideration of plans for reorganization in order that the property which has been unlawfully employed may thereafter be lawfully used in commerce. The courts are not fitted for the work of reconstruction, and whatever jurisdiction they now have, or that may hereafter be conferred upon them with respect to such matters, it can not be gainsaid that a commission, the members of which are in close touch with business affairs and who are intimately acquainted with the commercial situation, might be extremely helpful in the required readjustment.

A Federal commission would be desirable to do the work committed now to the Bureau of Corporations, even if no additional duty were conferred upon it and no additional power given it. I say this without intending any reflection whatever upon the valuable work that has been done by the Commissioner of Corporations. Even in the work of investigation, of recommendation, of gathering statistics, of the preparation for reports, of wielding the weapon of publicity, the work of an independent commission of three or five men would carry more weight and inspire more confidence than the work of a single commissioner. It would be a good piece of constructive legislation and mark an advancement in legislation for the proper control of our great industrial corporations if, without any additional

regulative or prohibitory statutory legislation against trusts, we should merge our Bureau of Corporations into a commission and give this commission the additional power to aid the Department of Justice and the courts in the enforcement and administration of the Sherman antitrust law as it now exists.

The Senate committee in its hearings on page 14 supports this view in its report in the following language:

If the Bureau of Corporations were converted into an independent commission composed of trained, skillful men and clothed with adequate authority, there could be gathered more complete and accurate knowledge of the organization, management, and practices of the corporations and associations engaged in national and international commerce than we now have. In saying this the committee does not need to disparage the work of the Bureau of Corporations as hitherto carried on, but valuable as the work has been it is believed that a greater service could be rendered by a commission with a distinct organization, with adequate appropriations, and adequate authority. Moreover, it is clear that the constant inquiry into and investigation of interstate commerce in order to ascertain whether the law is being violated should be more closely connected with prosecutions for violations when found to exist than at the present time.

If we shall add materially to our statutory laws pertaining to many of the large industrial corporations, a Federal commission becomes imperative and indispensable.

With the present laws not effectively enforced and administered, it would be the height of folly to expect satisfactory results by simply enacting additional laws. A few laws well enforced will bring better results than many laws which remain largely a dead letter on the statute books. Suppose we prohibit interlocking directories and holding companies, or provide a license system for corporations engaged in interstate commerce, or enact a Federal incorporation law, or pass laws regulating and controlling all combinations and trade agreements, where are we to get the executive and administrative machinery to administer and enforce these laws? It is not in existence now. It must be created by congressional enactment. Nothing better has been suggested than a commission to do this work.

An interstate trade commission would be a potent factor to insure that the cost of living should not be excessive.

The country has heard much about the high cost of living. Assuming that the cost of living is excessive, what is the remedy? The producers, the farmers, are not getting exorbitant prices. The difficulty is between the farmer and the consumer. Large corporations to a great extent have control of the transportaion, manufacture, sale, and distribution of our important food products. Many of these corporations possess large monopolistic power. Many of these corporations may not be unlawful under the Sherman Antitrust Act, and may not be doing business contrary to its provisions. At the same time their prices may be largely arbitrary—not controlled by any effective competition. If these corporations were placed under a commission with ample power of supervision and control, the consumer would be protected from excessive prices. Because a commission, even without power to fix prices, would be a most potent factor in restoring and maintaining competition as a factor in controlling the prices of all food products, merchandise, and manufactured articles.

The Interstate Commerce Commission is a model for our guidance. The success which has attended the work of this great commission

abundantly justifies the Nation in creating a similar commission to supervise, regulate, and control the gigantic industrial corporations of our country.

Twenty-six years ago a great controversy was in progress in this country. The parties engaged in the contest were the people and the railroads. The time had come when it must be decided who was supreme, the people or the railroads. Congress, reflecting the sentiment of the people, created the Interstate Commerce Commission. In the act creating the commission Congress also promulgated three fundamental rules of conduct which the railroads were required to obey. These cardinal rules required of the railroads, first, that they should give to the public reasonable and just rates; second, that they should give to individuals and localities equality of rates; and, third they should give to all impartial privileges and facilities.

Before its enactment the great transportation companies of this country had it in their power to levy annually upon the people of the United States millions of dollars of unjust tribute. They could with perfect impunity give special rates, rebates, drawbacks, and other preferences which would enrich one man and impoverish another. There was not a syllable of law that regulated the rates or controlled the practices or restrained the acts of our great railways in their interstate business. The railway managers were absolute in their power, supreme in their authority.

All this has been changed. The people are now supreme. They are freed from railway domination. They are masters of the railways, not their subjects.

The people of the United States are now in a second great struggle. Their antagonist at this time is our great industrial corporations. These gigantic organizations are strongly intrenched. They have untold wealth. They have unlimited resources. They have able leadership. They have the confidence which comes from many victories already won. They are equipped in every way to make a long, stubborn, and effective fight. The interests of 90,000,000 people are at stake. In this great crisis the country turns to the National Legislative Assembly. Let us not disappoint the people in their expectations. Let us give them the same instrument of warfare, the same weapon in battle, the same fighting machine that they used so successfully and effectively in their contest with the great railway corporations. Let us create a great interstate corporation commission, clothe it with ample power and jurisdiction, and direct it to proceed forthwith to bring our gigantic industrial corporations into subjection. To guide these great business institutions in conducting their business let us proclaim by legislative enactment that their prices must be reasonable and just, that all must be given like privileges and advantages, and that the National Government will not tolerate practices or methods in business that are unfair, unjust, or unreasonable, or that are against public policy or dangerous to the public welfare.

Many of our industrial corporations are in fact, though not in the eye of the law, public agencies, institutions that are impressed with a public use, and are in truth and in reality quasi-public corporations. Whatever law we may enact, it should contain a clause declaring that industrial corporations, of a certain size or character, are quasi-public corporations, and shall hereafter be regarded in the same class with

our railways, telegraph and telephone and all public service and public utility corporations. We must in some way make a distinction between the gigantic corporations possessing large monopolistic power, and controlling the manufacture, sale, and distribution of the necessities of life, and the great majority of the smaller corporations which possess little, if any, monopolistic power, and which are in no way in a position to impose any great burdens upon the people through excessive prices. Out of nearly 300,000 industrial corporations in the United States perhaps 300 to 500 would cover all the industrial corporations which really possess such monopolistic power as to be able to injure any great part of the public through the possession of monopolistic powers. Let us separate the sheep from the goats. Let free competition, untrammeled by governmental control, reign among our lamblike industrial corporations, but let us bring all other corporations under the yoke of governmental control.

The great corporations largely control the productive forces of our country. The wealth produced naturally flows into the corporations. Measured by the stocks and bonds they have issued, our corporations own $92,000,000,000 of our national wealth. This is more than double the $41,000,000,000 at which all our farms and farm property is doubled. Seventy-two billion dollars of wealth is owned by two classes of our corporations; that is, transportation and communication corporations and manufacturing corporations.

The census of 1910 shows that one-third of our manufacturing establishments employ 90 per cent of the 7,000,000 wage earners in these establishments and produce 95 per cent of all our manufactured products. In round numbers, 10 per cent of our manufacturing establishments employ three-fourths of the labor in such establishments and produce four-fifths of the product.

One per cent of our manufacturing establishments employ one-third of the labor, and produce nearly one-half of our manufactured products.

I do not believe in Government control of private business. I do not believe that would ever be necessary. All progress would cease if we should destroy the incentive for individual initiation, for individual effort and energy. But corporations are artificial persons. When they attain a certain size, and acquire large control over the production of a product in common use, they cease to be strictly private concerns. They have become impressed with the public use. they have become public agencies and quasi-public corporations, and as such should be placed under the supervision and control of our Federal Government.

Mr. McCOY. What is the salary of the members of the Interstate Commission?

Mr. MORGAN. $10,000, I think.

Mr. McCOY. I notice that your bill fixes the salary of the proposed commission at $7,500.

Mr. MORGAN. If the committee wishes to proceed further at this time, I will take up and explain the detailed provisions of my bill.

Mr. FLOYD. I wish to say, Mr. Morgan, that I have—and I think the other members of the committee have, too—listened with great interest and much pleasure to your arguments, but the House is in session at this time, and the members of the committee desire to be

on the floor of the House, and I suggest that you proceed with the discussion of the detailed discussion of the provisions of the bill at the next meeting of the committee next Thursday morning.

Mr. MORGAN. If that is satisfactory to the committee, I am willing to do so.

(Thereupon at 12.35 o'clock p. m. the committee adjourned until Thursday, December 11, at 10.30 o'clock a. m.)

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Washington, D. C., Tuesday, December 16, 1913.

The committee met at 11 o'clock a. m., Hon Henry D. Clayton (chairman) presiding.

Present: Representatives Carlin, Floyd, Dupré, McGillicuddy, Mitchell, Nelson, Danforth, Morgan, Volstead, Peterson, FitzHenry, McCoy, and Thomas.

STATEMENT OF MR. SAMUEL GOMPERS, PRESIDENT AMERICAN FEDERATION OF LABOR.

The CHAIRMAN. A few days ago a request was made that the committee hear Mr. Gompers and some of his associates this morning, and I see they are here present. I do not know how much time they will want. We are a very busy committee, but there is no disposition on the part of the committee to be unreasonable about the matter or the length of the time occupied. With that announcement, we will hear from Mr. Gompers and his associates now.

Mr. GOMPERS. Mr. Chairman and gentlemen of the Judiciary Committee, let me say in the beginning that it is not our desire that there should be hearings, and that which we have to present we shall want to do so very briefly and occupy but a very small portion of your time. It is not with the intention of submitting an argument that I asked my associates to request an opportunity of making a statement. In my judgment everything that can be said upon this subject has already been said.

The CHAIRMAN. Upon what subject, Mr. Gompers? You have not indicated up to this time upon what subject or to what bill you are speaking.

Mr. GOMPERS. I am speaking to a part of the bill known as the Bartlett-Bacon bill, H. R. 1873, Sixty-third Congress, first session, introduced by Mr. Bartlett April 7, 1913, and referred to this committee and ordered printed.

I will say that all that can be said either in favor of the bill or all that can be urged against it is in print and in the hearings before the Judiciary Committee of this House of the last Congress or of some previous Congresses; also in print are the hearings of the Senate Judiciary subcommittee. My intention this morning is simply to say that the bill H. R. 1873 by Representative Bartlett is, in the judgment of the men and women of labor who are primarily affected by court decisions and court interpretations of the Sherman antitrust law, the best bill thus far drafted covering the subject.

We have endeavored to secure legislation at the hands of Congress for lo these many years respecting the subject of the position of these voluntary associations of working people, the associations organized not for profit, and to have voluntary associations placed on an equality before the law with other voluntary associations in the United States—the position these associations occupied prior to the interpretations placed upon the Sherman antitrust law by the Federal courts, which interpretation placed the voluntary organizations of working people within the pale of the Sherman antitrust law.

We have suggested to Members of Congress; we have framed our suggestions in the form of amendments from time to time, amendments to the existing law; we have had bills drafted and introduced into both Houses of Congress; we have had, or rather the committees of both Houses have had extensive hearings, and out of one form and another of the arguments and conferences compromises have been reached, particularly in regard to one form of the judicial procedure affecting the issuance of injunctions and interlocutory decrees, which finally developed into what was termed the Wilson bill; that is, the bill introduced by Mr. William B. Wilson, of Pennsylvania, in the Sixty-first and Sixty-second Congresses. To insist upon our full demand was deemed inadvisable and impracticable at that time by a number of Congressmen, whom we felt were frankly inclined toward the legislation we sought; and, as I say, compromises were effected which in any event left the question of the position of the labor associations, the labor organizations, entirely out of consideration.

Like all other groups of men or individuals, citizens, we are human. We have our faith and we have our principles, or at any rate that which we believe to be principles, and we endeavor, in so far as they affect us politically, to seek political relief from injustice at the hands of Congress. In pursuance of that purpose we have opposed certain Members of Congress; that is, the men whom we knew were opposed to the legislation we sought and believed essential to our very existence as organized bodies of citizens engaged in laudable work. We announced to all whom it might concern that we should oppose and we have opposed certain gentlemen for reelection to Congress because we differed from them and they differed from us; whether they were right or we were right is not the question, but we believed they were wrong, and, as a matter of political duty as well as duty to ourselves, we sought their retirement as Representatives or Senators.

We have also undertaken to advocate the election of men whom we believed to be more sympathetically inclined, and more regardful of the rights or to the justice which we, as organized workers were entitled. We have gone into many of the districts and States to be helpful in them in order that the legislation might be passed which, we are firmly convinced, is necessary to our existence as associated working people. And we have gone further. We have gone to the various national conventions of the great political parties in our country, and we have endeavored to persuade these conventions to declare in favor of the legislation which we were seeking. While I am sure it is not new to you gentlemen, yet I think it necessary that I should read the declarations of the political parties bearing upon the legislation under consideration before your committee this morning, which we believe is best expressed in H. R. 1873. If I should read a few lines more than is contained in the declarations specifically bearing upon the

subject, I trust that I may be pardoned because there are some of the lines in the general declaration which seem to have little connection with the specific subject, and yet probably in the next line or two the matter is again referred to. Let me say in explanation, that we appeared upon this subject the first time before a national convention of a political party at Chicago in 1908, before the Republican National Party convention before the committee on platform, and submitted our requests for declarations to be incorporated in the platform. That party convention gave no heed to the subject; on the contrary, what the convention declared was practically a reaffirmation of the wrongs and the injustice against which we were protesting, so that we had nothing, no comfort, no sympathy, no promise of any sort from that convention. From there we went to the Democratic National convention at Denver, and the party there made a declaration. Because that declaration is reaffirmed in the party platform of the Democratic National convention of 1912, it will not be necessary to read the declaration of 1908. The declaration of the Republican Party convention of 1912 was practically nil upon the subject.

Mr. CARLIN. When you say the Republican Party, whom do you mean?

Mr. GOMPERS. The regular Republican Party.

Mr. CARLIN. Then by that do you mean to distinguish the others as irregular?

Mr. GOMPERS. Hardly. Why not take a man at his own wording? They call themselves Progressives.

Mr. CARLIN. You were not referring to them just a moment ago?

Mr. GOMPERS. I have not yet, not up to this moment, but I intend to. The Democratic Party's platform of 1912 contained these declarations:

We point to the record of accomplishments of the Democratic House of Representatives in the Sixty-second Congress. We indorse its actions and we challenge comparison of its record with that of any Congress which has been controlled by our opponents. It has passed a bill to prevent the abuse of the right of injunction. It has passed a law establishing an 8-hour day for workingmen employed in all national public work. We repeat our declarations of the platform of 1908 as follows: "The courts of justice are the bulwark of our liberties and we yield to no one in our purpose to maintain their dignity. Our party has given to the bench a long line of distinguished jurists who have aided in the respect and confidence in which this department must be jealously maintained. We resent the attempt of the Republican Party to raise a fancied issue respecting the judiciary. It is an unjust reflection upon a great body of our citizens to assume that they lack respect for the courts. It is the common function of the courts to determine the laws which the people enact, and if the laws appear to work economic, social, or political injustice, it is our duty to change them. The only basis upon which the integrity of our courts may stand is that of unswerving justice and protection of life, personal liberty, and property, and as judicial processes may be abused we should guard them against abuses. Experience has proved the necessity of a modification of the law relating to injunctions, and we reiterate the pledges of our platforms of 1900 and 1904 in favor of a measure which passed the United States Senate in 1896 relating to contempt in Federal courts and providing for trial by jury in cases of indirect contempt. Questions of judicial practice have arisen, especially in connection with industrial disputes. We believe that the parties to all judicial proceedings should be treated or judged impartially and that injunctions should not be issued in any cases in which an injunction would not issue if no industrial disputes were involved. The expanding organization of industry makes it essential that there should be no abridgement of the right of the wage earners and producers to organize for the protection of wages and the adjustment of labor conditions, to the end that such labor organizations and their members should not be regarded as illegal combinations in restraint of trade."

There are a number of other declarations of the party convention affecting the interests of the working people, but that which I have just concluded reading contains the declarations of the national convention of the Democratic Party upon the subject affecting the legislation sought by us, as I say, in Mr. Bartlett's bill, H. R. 1873.

I want to read, because of the interest, as well as the declaration, a part of the platform of the Progressive Party of 1912, upon this same subject. It says:

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 dispute existed. We believe that a person cited for contempt in labor disputes, except when such contempt was committed in the actual presence of the court, or so nearly thereto as to interfere with the proper administration of justice, should have a right to trial by jury.

The declaration of the Progressive Party upon the subject of the right of association as differentiated from the corporations, trusts, and combinations affected by the antitrust law of 1890:

We favor the organization of the workers, men and women, as a means of protecting their interests and of promoting their progress.

From a careful perusal of these declarations it will be observed that the national convention of the Republican Party totally ignored the questions affecting labor's demands for the principles of justice and human liberty. The declarations of the Democratic Party upon these questions is a reaffirmation of its favorable platform planks of 1908, while that of the Progressive Party is equally outspoken and favorable.

What I wish to convey by the submission of the declarations of both the Democratic and of the Progressive Parties is that if ever an election in any country turned upon an issue upon which the people have decided, it was in regard to the faithfulness with which great political parties shall adhere to their declarations and party platforms. The Democratic Party, although not receiving a majority of all the votes in the popular vote for the presidency, yet received the large number of votes which resulted in electing as the President of the United States the gentleman whom the Democratic Party nominated. In addition, the Progressive Party candidates received nigh upon 3,000,000 votes, and adding the vote of the Progressive Party to that of the Democratic Party, the two parties which declared for this legislation cast nearly, I should say, if not more than two-thirds of the votes cast by the people in that election.

Mr. CARLIN. Which party did the labor people support?

Mr. GOMPERS. The labor interests opposed particularly the reelection of Mr. Taft, and in order to accomplish that as best we could, we aided in every way in our power the election of Mr. Wilson.

I say that when the elections were held and later Mr. Wilson was inaugurated as President, he called a special session of Congress to deal with two great questions, in which the party had been interested and pledged. Now, since April, I think it was, when the special session began, though we are vitally interested, yet because the party management, or congressional managers, believed that they ought not to have their attention diverted from these two specific measures, the tariff and the currency, we have been patient and have permitted Congress, without objection or any agitation, to proceed with that legislation at the special session.

We were given to understand that when the decks of Congress were cleared of these two questions in the special session, which at that time we all believed would probably have been ended in probably a month or two, or three—that at any rate at the regular session Congress would take up seriously and with the very best of intentions and purposes this legislation.

As a result of our work in this line of agitation and opposition on the one hand to the election of the candidates of the Republican Party, and cooperation or support to the successful candidate for the presidency, we reported the result of that work to the convention of the American Federation of Labor, held at Rochester in December, 1912. The convention, without a dissenting voice, and after mature deliberation, approved and indorsed every action and every utterance of those who were intrusted with the work of pressing home upon the people and upon the representatives of the people the legislation we desired as really one of the great conditions upon which our organized lives depended. Indeed, they could do little else at that Rochester convention, for the delegates were in large measure the representative men who carried out that line of work in their respective cities, districts, and States.

Then again, in the last convention of the American Federation of Labor held at Seattle, Wash., which closed only about two weeks ago, the entire subject was again reviewed, and the status of this legislation in Congress reported to the Seattle convention. After the subject-matter had been reviewed by a committee, and considered by that committee with great deliberation, it reported to the convention that every effort of the organized labor movements of America should be concentrated upon the effort to induce Congress to enact the Bartlett-Bacon bill.

Gentlemen, I am not a pessimist. By temperament, or by training, or perhaps a little combination of both, I am inclined to look always upon the brightest side of things. But because I do so is no reason that I must be unconscious of the conditions by which we are surrounded, or that I should fail to understand something of cause and effect. Gentlemen, to-day, as has been the fact for more than five years, the organizations of working people exist at the whim, the fancy, or the mercy of any administration.

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.

Mr. WEBB. Are there any suits pending in the courts now looking to this end, Mr. Gompers?

Mr. GOMPERS. There are no suits now pending, but an organization of working men, 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 furore, 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. CARLIN. Where was that suit brought, Mr. Gompers?

Mr. GOMPERS. I can not tell you just now.

Mr. NELSON. May I ask whether there were other matters in the case, or were they dissolved purely as an organized labor organization?

Mr. GOMPERS. As an organization, their agreements with employers were cited as part of the conspiracy in restraint of trade, just as the Supreme Court held in the case of Loewe *v.* Lawler, commonly known as the hatters' case, the court cited the fact that out of the 83 manufacturers—hat manufacturers in the United States—the organization, the union of hatters, had unionized, as the court seemed pleased to call it, 73 of their establishments.

While my verbal memory may not be absolutely accurate, in so far as concerns the intent and purpose of the language, the language of the United States Supreme Court in that case, said:

> So far had conspiracy proceeded that out of 83 hat manufacturers 73 of them were unionized by this association, called the United Hatters of North America.

And mark you this fact. We know what the unstandardized law of wages means; we know what effect an agreement has upon wages; we know that unless there is some established scale of wages, established by some authority, by some power, some force, some group—that unless a scale of wages and condition of employment is established calling for a minimum wage, employers who are willing to pay a higher wage will be compelled to meet the competition of the employer who pays unfairly low wages, so that the only way by which the hatters in that case and workmen generally in other cases can maintain and support the employer who is willing to pay a fair wage and grant fair conditions, is to use the power of associated effort to influence the employer who is unwilling to pay a higher wage. In other words, the more generally that scale could be introduced the more secure was the fair employer, and the more secure was the better paid workman in the receipt of a fair wage and fair conditions. Yet, because the union did that thing, made agreement with employers, the fact that they had succeeded in establishing a minimum scale of wages, minimum hours of labor and other conditions of employment, and secured more generally fair standards prevailing in the trade for the protection of the fair manufacturers, as well as the better paid workers—these facts were cited and held by the court as proving that the conspiracy had progressed to the extent to which I have already mentioned of which the court made mention.

Mr. WEBB. That was a combination between the labor organiza- and the manufacturers, was it not?

Mr. GOMPERS. These 73?

Mr. WEBB. Yes.

Mr. GOMPERS. Yes, sir; the agreements were agreements made year after year with these manufacturers. It was really what has become to be known as collective bargaining.

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 working men, 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 humanitarian 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 work men 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 pursued; 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. MCCOY. This bill refers also to associations of agriculturists and would permit them to combine to enhance prices. I never understood why they were coupled in a bill with voluntary associations. What is the theory of that?

Mr. GOMPERS. Let me cross my fingers, so I will not forget what I have to say. In 1890, I think, or in 1889, when the bill in various forms was before Congress—the bill now known as the Sherman antitrust law—I was on earth, and so were a number of men who were

engaged in agricultural pursuits and men who spoke for them. We often had conferences and talks, and we mistrusted some of the gentlemen who had declared that they were with us, and we wanted to have the distinct exclusion from the operation of that law of the organizations of working people and the organizations or the associated efforts of agriculturists and horticulturists, who held simply the products of their own labor, not those who were dealing with the agricultural or horticultural products, the result of the labor of others. I might be interesting to say that such an amendment was adopted by the Senate in the bill then before that body, in Committee of the Whole, and after general congratulations that that result had been attained, that every objection had been overcome, and that the bill could now come before the Senate, everybody was satisfied that the real thing that was sought would be accomplished; that is, the control of what the world, by common consent and understanding, regards as a combination illegal in character and really in restraint of trade. Now, that bill was recommitted to the Judiciary Committee of the Senate, and when it was again reported to the Senate that provision was omitted. We say that we have been in cooperation with the associated farmers of the country; the Farmers' National Union, the Society of Equity, and others have all been with us and we with them. We should like to see the Bartlett-Bacon bill enacted.

Let me call your attention, gentlemen, for a moment to this. Under the provisions of the Sherman antitrust law, as it is now interpreted, the hatters were mulcted in the sum of $224,000 by Mr. Loewe, a manufacturer, who claimed that his firm was damaged in the sum of about $80,000 by reason of a strike and because in California, in San Francisco, another voluntary association of workmen declared that they would not purchase Loewe's hats from a certain dealer; would not give him their patronage if he, this storekeeper, continued to sell Loewe hats. These threefold damages were awarded, and the case is again to come up before the United States Circuit Court of Appeals, probably within a few weeks or months, on final appeal. That is the present status of the case. The $224,000 awarded is threefold damages, and the costs of the court, amounting in all to about a quarter million of dollars. This is the third suit, the third time it comes up before the Federal courts, and you can imagine what that means to us as working people. In so far as the suit is concerned, as it is introduced in the court, it is proved on the official records of the courts and the hearings before Congress that the whole scheme was devised by that organization which has so recently been thoroughly discredited, the so-called Anti-Boycott Association, an auxiliary to the National Association of Manufacturers; they have borne the high cost of it; not one dollar of it was paid by Mr. Loewe, except as he may have been assessed in that Anti-Boycott Association and in the National Association of Manufacturers.

Out of the strike of the shirt-waist girls in Philadelphia, where an effort was made to abolish the awful conditions in that industry, some splendid women who were not working women helped to encourage these girls in their fight that they were making, and they were sued by one of the shirt-waist manufacturers for a sum of over $50,000, claiming threefold damages under the law. Under the provisions of the law Mr. C. W. Post, the gentleman who makes out of his peculiar

ingredients what he calls a breakfast food and the dope which he calls coffee, brought suit for $250,000 against the American Federation of Labor and against the Buck's Stove & Range Co. jointly, because as a minority stockholder of that company Mr. Post declared that that company should have sued us for the amount they lost during the dispute between the company and the men of our movement, and that he was therefore deprived of this monetary advantage. Accordingly, he sued the company and us jointly for $250,000 and demanded the threefold damages; in all, $750,000.

Mr. FLOYD. Where is that suit pending?

Mr. GOMPERS. That suit is not now pending. It was in the Federal courts of St. Louis. I will say, so far as that suit is concerned, we think it is now entirely removed from any further progress; but the fact is that the suit was brought and had to be defended and fought up to the Federal court of appeals.

Any man, any employer, any business man who can show to the satisfaction of a jury that he has been injured in his business by the action of working people, can claim threefold damages, and, as in the case in point, in the hatters' case, men have been ruined, men who never have had much, but had a little equity in homes and a little money in their savings banks, but have lost all in defending these suits. In addition, are the criminal provisions of the Sherman antitrust law, which I believe are set out in sections 1, 3, and 7 of the criminal provisions—I think it is section 7—by which anyone adjudged guilty can be sentenced to a fine of $5,000 and one year's imprisonment, simply because of his activities, such as nothing more than agreeing that he will not work, if you please. In New Orleans only a few years ago, men were indicted, working men were indicted, for no other reason than that, without violence, without any destruction of property, they supported a number of workmen who refused to work below the standard scale of wages provided for that kind of work The men were indicted because they did that. That was a conspiracy in illegal restraint of trade under the provisions of the Sherman antitrust law. I have been met with the statement "Well, these men were not prosecuted." That is true, but they were indicted, and when men are indicted their liberty is impaired.

In Jacksonville, not more than a year and a half ago, a number of men were indicted under the provisions of the Sherman antitrust law for the very selfsame condition of affairs.

In Kentucky, only about two years ago, a number of farmers were not only indicted and tried, but convicted and sentenced to various terms of imprisonment because of alleged violation of the Sherman antitrust law in that they had agreed not to sell the product of their own labor under a certain price.

Mr. MCCOY. Was it strictly their own labor, or was it the labor of themselves and such men as they hired?

Mr. GOMPERS. I understand it was the product of their own labor, and in any event now, supposing, for the sake of the argument in the case of these men it was not entirely the product of their own labor, but the provisions of the Bartlett-Bacon bill, to which I have referred, provide purely as the product of their own labor.

Mr. DUPRÉ. It will not exempt from punishment Mr. Hahn and Mr. Brown, who were sentenced a few days ago as cotton poolers.

They were sentenced to a fine of $4,000 for a combination of cotton; they did not produce it.

Mr. GOMPERS. You have me up in the air.

Mr. DUPRÉ. I will waive the question.

Mr. GOMPERS. I do not know anything about it. I have been on the go so much; I have been out of Washington now for nearly seven weeks, and many of the things which have occurred in the meantime have escaped me, and that I suppose is one of them.

Here is a case: You know the awful struggle of some years ago through which the miners of the country passed—that is, from 1887 until 1901 and 1902—a period of about 14 or 15 years, I should have said. For 30 years, within my own recollection and observation, the men in the mining industry were the most impoverished of any in all the country. Their wages were reduced in season and out of season. They became demoralized—I do not wish to use a stronger term; only anyone who observed the conditions as they existed then would apply a stronger term. In 1897 I began in the bituminous fields to inaugurate a movement for the purpose of establishing a minimum scale. Oh, what a struggle it was; what a terrific struggle, involving privations and sacrifices. But the miners were accustomed to live on little, and it did not involve so very much to live on a little less. Finally an agreement was reached, and it made sure its work; its influence extended into the anthracite regions, and there the movement went along. And it finally produced results several years afterwards, when the miners went out on their strike in 1901. We all know what that meant. We all know not only the sufferings of the miners, but that the terrible conditions prevailing in the anthracite coal regions were exposed to the world's horror. They made a struggle, an heroic effort. We know how that coal strike either affected or threatened to affect all of us. The strike came to an end. It was adjusted. Certain improved conditions came about in the hours of labor; in the conditions of employment; in the right to expend their labors where they would, where they preferred, and so on. It improved their condition, so that the miners generally of the United States occupy about as good a position, as good an average position, in the economic and material world as do the workmen of most other trades and among the best paid trades. Now, you know the conditions there were in West Virginia; you have read them; some of the committees of Congress have made investigations.

The same conditions in a degree existed in Colorado, and now the miners, the coal miners, are threatened with a reduction in wages, due to the conditions which have prevailed and still prevail to a large extent in West Virginia and which prevail in Colorado. Now either they must concede to these employers of these districts—after these hard won battles—concede to these employers the right to reduce wages, or they must try to secure better wages and better conditions for these miners in West Virginia and in Colorado. And, gentlemen, because the miners in their organization, the United Mine Workers of America, prefer to appeal to their employers to secure better conditions for the working miners, the officers of this organization have been indicted by the Federal grand jury as criminal conspirators in illegal restraint of trade under the provisions of the Sherman anti-trust law. They may send these men to jail; may send them to prison; but is that going to solve the question? Is that going to

satisfy the need? Is that going to rid the country of any inconvenience which may be occasioned by the exercise of the activities of the working people, either individually or as a group, or as an association? Does any man fancy to himself that after all the struggles which have been made by the working people to secure for themselves the improved conditions in their work, in their lives, and in their homes, that they are going to give up these associations without a struggle?

Our organizations of labor in the United States are purely American in character, in conception, in growth, in development, in ideals, in idealism, in methods, and in operation. Indeed we hold and declare, much to the chagrin of some who in other countries and in our own, do not understand us—we hold and declare that this American labor movement of ours is purely American in government, in administration, in convention. We might liken it to Congress in the makeup of our organization, which is similar to our Federal Government. If I could take a moment of your time to indicate what I have in mind, I would do it. Let me say that we have, like the municipality, our local unions, or the central bodies of these local unions, which constitute the local movement and government; the State federation, which corresponds to the State government in territorial scope; we have our international unions, which form the integral part of the Federation and which have each of them their own self-government; and the American Federation of Labor, a federation of them all, possessing only such powers as are conceded to the American Federation of Labor by these affiliated and constituent bodies, and every other right and every other power reserved to themselves. So, I may say, we have the initiative and the referendum; we have a convention and we deal with the subjects affecting us, not only as workmen and work women, but affecting us as citizens. I venture to say, gentlemen, that if you will examine first the report of the executive council of the American Federation of Labor, made at the Seattle convention, which as I have said closed its work about two weeks ago—the convention held from November 12 to 22, 1913, inclusive—you will find here that the printed official proceedings of that convention, covering about 412 pages, deal with the questions affecting us, not only as workers, but as citizens and men, and deal comprehensively and I believe practically and wisely with a number of the great questions affecting us as a Nation. I am willing that this record of ours, a true record of the proceedings of this convention to which I have referred, shall be submitted for criticism to any humanitarian, to any economist, to any patriot who really loves liberty and justice and who aims to work for the progress of our Republic by law and with a due regard for human welfare and the advancement of our country. I challenge the world of critics and opponents to find a flaw, to find one minor chord, which does not express the highest and the best thought and hope for all the people of our country and our time.

Our organizations are going to exist. You can not drive them out of existence. Enact any law you please, make them criminal conspiracies and instruct the officers of the Federal Government with its Army and Navy, if you please, to drive out these organizations, and you will find that it can not be done and will not be done. All history illustrates this one fact, that whatever associated effort existed at

any given time in the history of the world; any associated effort which existed for the purpose of propagating the idea of liberty; the idea of freedom; the idea of human justice; the idea of bettering the lot of the poor devil who produces the wealth of the world—every effort to crush them out may have apparently succeeded, but what was then before them? The open movement of men who asked consideration for that which they had to present became the underground secret organizations, which held their meetings in subterranean passages or in woods and forests and had to bury their records, which only in the recent past have been unearthed and given to the world.

We aim in our movement to epitomize the struggles of labor throughout the ages. We aim to express the best thought and the hopes of the wage-earning masses of our country. We aim to accomplish the improvement of the condition of the toiling masses by gradual, natural, and evolutionary process. We present our demands to the conscience of the American people, and the declarations which I read here this morning as coming from the conventions of the national Democratic Party and of the national Progressive Party, these declarations were not made as a divination; it was not a personal inspiration; it did not come out of the clouds; these declarations were made in response to an agitation and a deep-seated feeling among the people of our country that these declarations, this legislation, were necessary. In response to that general feeling and that general demand the declarations were made.

Now, we come before you. We know that in many countries there have been formed among the working people, not only the organizations which I have tried to outline, but also other kinds of organizations, some of them supposed to be industrial, some of them supposed to be political. Indeed political parties have been founded under various names—the Independent Labor Party of England, the Socialistic Party of Germany and of Austria and of other countries; in the American labor movement, the American Federation of Labor. We are endeavoring to carry out our movement upon the theory recognized in American governmental work and development; that is, you say to us that there is no such thing as a wage-working class; the traditions in our lives preclude the possibility of asserting there are two or more classes; you say to us that there is no privileged class in the United States. I shall not attempt now to discuss or to criticise or to deny that proposition; but I do say that we are of your fellow-citizens and that a large part of your fellow-citizens, an overwhelming number of the voters of our country, have indorsed our legislative proposition by their votes. We ask relief. We ask that their will be put into effect by the enactment of this legislation, which is so essential for our very existence, our normal existence, that we may continue our work along our lines and with the highest and the best motives and purposes and achievements, and thus, judging our future by our past, we shall proceed in the orderly development of our work and movement and bring hope and comfort and better conditions in the life of our fellow-workers. We ask that we may be permitted to go on with our work. We do not ask any immunity for any criminal act which any of us may commit; we ask no immunity for anything; but we have the right to existence, the lawful, normal existence as a voluntary association of workers, organized not for profit, but organized to protect our lives and our normal activities.

Mr. WEBB. Does this bill give you what you want? I understand from reading it that it gives you the right to fix your own standard of wages among yourselves; fix your own hours of labor among yourselves. But, now, does this bill give you the right to go further and do what I interpret your remarks mean you want done; that is, after you have formed this agreement among yourselves as to hours of labor and wages, to go still further and contract with a manufacturer, or with manufacturers, that they shall pay this particular wage and adopt these particular hours; and that if they do not adopt these wages and hours of labor, that you have the right to boycott them; and if they do adopt them they shall have no right to employ anybody else except one of your organization and upon the wages and the hours specified in your contract with them? Is that what you want accomplished, and is that accomplished in this bill?

Mr. GOMPERS. We think that that which we ask is accomplished in the bill—the right to own ourselves; the right to contract, whether singly or collectively, for our labor power; the right to control our wages and to expend them just as we will, without regard to the let or hindrance of anyone.

Mr. CARLIN. Mr. Webb referred to the right to boycott. Do you think that is included in this bill?

Mr. GOMPERS. I think it is. Of course, like the Quaker whose dog had stolen his piece of meat. He declared that it was against his faith to inflict pain upon him, but he said: "I will give thee a bad name, thou mad dog, mad dog," then began following up the dog and running after him and all the time shouting, "Mad dog, mad dog, mad dog," and the crowd joined in yelling, "Mad dog, mad dog," until some fellow took a club and struck the poor animal across his head and killed him. We call it boycott; then we hear of the primary and the secondary boycott. Boycott, as we have come to understand it, is not exactly as we undertake to exercise it. The question of the boycott, as we expected to exercise it and have the right, we hold, to exercise it, is the right either singly or collectively to bestow or withhold patronage upon anybody or from anybody. If we have our wages and go into a store and say: "We do not like the cut of your jib; we do not like your physiognomy; we do not like the color of your hair; or you are bald-headed, and we do not like to deal with a bald-headed man and we are not going to give you our patronage"—that is all there is to it. Or whether we say: "You are selling this book, which we regard as immoral or improper. We believe that in the manufacture of the book sweatshop conditions prevailed. We believe it is the work of some rum seller—put it as you please, upon any hypothesis, upon any ground, and unless you stop selling that book produced in that way, why, we will not only not buy that book from you, but we will not buy any other book from you. We will not buy any other book from you." What vested right has this man in my patronage or in the patronage of anyone else that the patron can not withhold it and bestow it as he pleases? That is all we understand and propose to exercise under the provisions of this bill when enacted into law.

As a matter of fact, let me describe to you what the American Federation of Labor has ever done, and the extreme cases which it has ever done in the case of what is known as boycott. An organization of working people, sometimes not so very well organized, if they

over get into trouble with employers respecting them as wage earners, they appeal to us for aid. We first make an investigation, and then, after making an investigation and learning the cause of the trouble, endeavor to adjust it. If we fail in adjusting the dispute, and we find that the cause is that of the working people themselves, why we simply do nothing; if we fail in adjusting the dispute, and find that our own people were at fault in part or in whole, the matter is dropped; but if we, after our investigation, find that we were not only unable to adjust the difficulty, but that the difficulty was caused by and provoked by the employer, why we declare that we have made the effort of adjustment and have failed; that we have made an investigation and found that so and so was at fault; that he was unfair to his employees, and we say: "Secretaries of unions will please read this notice at their meetings and friendly and labor papers please copy." Now, after that would appear once, there was a list in the American Federationist under the title "We do not patronize this list." This I am quoting substantially. I do not want to be understood as quoting the exact language, but the essence and purport of it. "The following list of business men have manifested their unfair attitude toward their working people, and we have declared that we will not patronize them."

That is the sum total. There has never been from the American Federation of Labor, either by word or deed, or in print or in any other form of utterance or expression, a word that ever went forth of greater import or purport than I have mentioned just now, and yet under the process of injunction and the interpretation of the Sherman antitrust law by the Federal courts, we have been deprived even of doing that. We have gone along; we have increased in the memberships of the unions affiliated to the American Federation of Labor; more than a quarter of a million of men have come into our federation within this past year, and then we are asked: "If that be a fact, and you speak of it as if you are proud of it" (and I am), "why do you ask this legislation?"

I repeat that I am an optimist; I believe in the good and in the true and in the final outcome of the things, but you have got to do your duty and prevent the possibility of what may come. We may not always be fortunate enough to have men in the administration of the affairs of our country that shall deal fairly with these great problems and questions of these organizations.

Mr. CARLIN. Right along that line can you tell the committee what is the condition of labor to-day in the country? Is there any unusual amount of unemployed?

Mr. GOMPERS. I think not, sir; that is, not to any appreciable extent. Of course, one poor devil out of work, so far as he is concerned, the whole world might be out of work. He is suffering, and his family is suffering. I suppose there is not any change, any governmental change, which can be made in anything affecting industries at all, but what during the transition period some people will feel the effects of it.

Mr. CARLIN. But nothing beyond the normal?

Mr. GOMPERS. I think there is a little beyond the normal, but I am very sorry to find that there are some numbers of my fellow workers unemployed. It may be a little beyond the normal, but I

apprehend that it is due more to transition from one condition to another, rather than to any real depression.

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.

Mr. CARLIN. In other words, you want to be exempt from the operation of the Sherman antitrust law?

Mr. GOMPERS. Yes, sir.

Mr. CARLIN. That is the only law which affects your operations, so far as your discussion goes this morning?

Mr. GOMPERS. Yes, sir. I hold that it first was the intention of Congress that the voluntary association of workmen and workwomen and of agriculturists and horticulturists with respect to the product of their own labor should not come under the provisions of that law, and that the Senate passed such an amendment. Then the House of Representatives, on one or two occasions, passed by a practically unanimous vote such an amendment. If you will look up the Congressional Record you will find an amendment, the Littlefield amendment to the Sherman antitrust law. When an amendment was offered we asked the Republican Members, then in control of legislation, to incorporate this amendment in their bill, and they refused, each one of them. Then we went to the Democrats and asked them whether they would. The amendment was offered to the bill from the floor and the amendment adopted, I think, with but eight or nine dissenting votes, and so I say that, as a matter of fact, at one time the Senate adopted the amendment while the present act was a bill before the Senate—adopted the amendment, and at other times, on one or two occasions, the House, by specific terms, adopted the amendment, and did so practically by unanimous vote.

We hold that it is a very far-fetched interpretation to characterize the officials of the voluntary associated workers and to place them under the same category as the trusts and corporations. How can there be a trust among workers in so far as their own labor power is concerned? A trust, as I understand it, is a combination to control products. Labor power is not a product. Labor power is inherent in and inseparable from the human body, the human heart, and the human soul. How can there be a trust in such a nonexisting thing, which does not exist and does not make itself manifest at all until it is exercised in the production of something?

Mr. MORGAN. May I ask this question right along that same line? As I understand these prosecutions and judgments and indictments against labor organizations are based upon provisions in the Sherman antitrust law?

Mr. GOMPERS. To a great extent; yes, sir.

Mr. MORGAN. Would it be satisfactory or accomplish the same purpose for you, instead of enacting the provisions of this bill, if you would simply amend the Sherman antitrust law by adding a clause something like this: "*Provided, however,* That nothing herein shall apply to labor organizations or agricultural or horticultural organizations." Would that cover the same ground as this bill?

Mr. GOMPERS. Substantially, yes, in so far as that is concerned; but yet the Bartlett bill is the result of the work of Senator Bacon and Representative Bartlett. There is not anything that we have to hide, and we have no desire to hide anything we do. We tell you that we have tried to prevail upon Senators and Representatives to favor the principles of the bill for which we are contending—these rights—we have tried to prevail upon them, tried to get them to see our point of view. Now, then, we had a number of bills—the Clayton bill, by the honorable chairman of this committee, passed in the House; the contempt bill, passed in the House in the last session. Neither of them gained much headway in the Senate.

Mr. CARLIN. You considered those good bills, though?

Mr. GOMPERS. Yes, dealing with these specific subjects. They did not, however, affect the status of the labor organizations, and I want to say that in this bill we endeavored to prevail upon Senator Bacon and upon Mr. Bartlett to advocate and support the passage of the Wilson bill—the bill by Mr. Wilson, of Pennsylvania—in the Sixty-first and Sixty-second Congresses, and they declared that they could not see their way clear to support that bill. They said that a bill could be drafted that would meet the subject in its entirety and cover it fully, both as to the question of relieving the organizations from the present status under the Sherman antitrust law and remedying the abuses of the issuance of injunctions and so forth, and so these two gentlemen collaborated and the Bartlett-Bacon bill is the result. I am sure I am not betraying any confidence when I say that our views were sought upon the bill and we were very glad to give it our indorsement, and, as I said, both at the conventionof the American Federation of Labor and——

Mr. CARLIN. The only way we can safely legislate for the future is to be certain we have learned proper lessons from the past. How has the legislation of this Congress, so far as we have gone, affected your organizations?

Mr. GOMPERS. I think it has been sympathetic and constructive. I ought to say in connection with that, sir, that for this legislation, good as it is, we could have waited a year, or five years if necessary, for some of it, providing the legislation affecting our very vitality were enacted. I might have to go without pie or beefsteak for some years and I could manage to get along without them, but I could not very well get along if you should deprive me of every means of nourishment.

Mr. CARLIN. This bill, or a bill accomplishing the same results in effect, were it passed in connection with what already has been passed,

I take it from what you have said, you would consider the whole subject of legislation favorable to the workingman?

Mr. GOMPERS. I think so; yes, sir. And I will say this, I would have a very hard time, I think, if I attempted to recall or to state all these splendid pieces of legislation which have been enacted. There have been more than those affecting the workers directly and specifically. What this bill really will mean if enacted into law is that it will just unfetter us and give us the right to live. If we now or at any other time are guilty of any criminal act; if we are guilty of any unlawful act; of any act that any other man or group of men can not perform, why we are subject to the general laws, as is every other citizen or group of citizens.

Mr. CARLIN. Is it not true that the present Congress has, at least in one measure which passed this extra session, given its approval to the principle involved in this bill? I refer to the provisions in the general deficiency bill?

Mr. GOMPERS. Yes, sir; the declaration—the question of the $300,000, for whatever purpose it might be expended, was practically insignificant, but it was a declaration on the part of Congress that that money should not be applied for the prosecution of men engaged in normal work, which is, in work not unlawful. It was a declaration that meant much; it was significant, and this is the logical sequence.

Mr. CARLIN. Do you not think it was practically an indorsement of the bill you support?

Mr. GOMPERS. There is no question about that.

Mr. MORGAN. I should like to pursue my question a little further, that I may have a little better understanding. I understand, then, that the provisions of this bill really go further than a provision would which would simply provide that the provisions of the Sherman Antitrust Act should not apply to labor organizations. In other words, there are some additional provisions in here that give you affirmative relief, so to speak, that you would not get simply by passing a proviso that the Sherman Antitrust Act shall not apply to labor organizations?

Mr. GOMPERS. Yes, sir; that is just the situation. The bill accomplishes the relief at once instead of by two separate measures. I may not be a very competent judge of the phraseology or the construction of a bill, but if I have any knowledge at all worthy of consideration I think that it is really one of the very best constructed bills that I have ever read, of any in which I have been interested. I do not know that I have anything to add.

Mr. CARLIN. Just one other question, Mr. Gompers. From your point of view, and the point of view of labor, does the workingman see anything in the outlook in the country in a business way to discourage labor at all?

Mr. GOMPERS. No, as balm in Gilead.

Mr. CARLIN. As balm in Gilead. In other words, everything looks hopeful?

Mr. GOMPERS. Yes, sir. I have spent some little time in trying to demonstrate to people who would not see that their conditions have been improved. I delivered a lecture on last Friday afternoon in New York bearing upon that phase of the subject, the improved

conditions which have come, but I am satisfied that we are going to have better conditions for the people of our country. I suppose that some people will be affected by the legislation of the Congress; will be affected by the activities of the working people in insisting upon improved conditions as a reward for labor, and the service they are performing to humanity. Somebody is going to be affected. It is an ill wind that blows no one good, and there is not any balmy day that brings relief to the millions that will not affect some poor individual very badly; there is not a thing that you can do that will not affect some one; but when legislation and human activities contribute so much to the welfare and the opportunities of the people, the incidental one who suffers, he is to be pitied, but the misfortune can not be helped.

I will say this in closing, that we are very anxious that this legislation shall be enacted at an early date. For Heaven's sake, if you are sympathetically inclined and will enact this legislation, please do not defer it until so late a day in Congress that when it shall pass the House it must run the gaunlet of the Senate, and then, in the closing hours of the Sixty-third Congress, we find our bill shunted aside, and that we have got to begin over and over again.

Mr. CARLIN. This same bill has been introduced in the Senate, has it not?

Mr. GOMPERS. Yes, sir.

Mr. CARLIN. And the Senate have the opportunity to act as early as they please. I think this committee, if they act at all, will act promptly and at an early day, and it might be well for you to look after the Senate a little now. Get them stirred up.

Mr. GOMPERS. We will try that, but for Heaven's sake do not let us be hung in the air. If Congress does not want to enact this bill, I do hope that it will be said early.

AFTER RECESS.

The committee met at 12.30 o'clock p. m., Hon. Henry D. Clayton (chairman) presiding.

Present: Representatives Carlin, Floyd, Dupré, McGillicuddy, Mitchell, Nelson, Danforth, Volstead, Henry, McCoy, and Thomas.

STATEMENT OF HON. A. O. STANLEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF KENTUCKY.

Mr. STANLEY. Mr. Chairman and gentlemen of the committee, I have a bill before this committee which I ask to be amended by inserting "from and after January first, nineteen hundred and fifteen," or some other such date as the committee may deem fit.

The CHAIRMAN. What is the number of your bill?

Mr. STANLEY. H. R. 5703.

The CHAIRMAN. You want the text of it amended so as to make it effective January what time?

Mr. STANLEY. I would suggest January 1, 1915, or such time as the committee may deem advisable. That is a matter of detail.

The CHAIRMAN. The text of the bill is what?

Mr. STANLEY. The bill provides that no person who is engaged as an individual or as a member of a partnership or as a director or other officer——

[H. R. 5703, Sixty-third Congress, first session.]

A BILL To prohibit persons engaged in the manufacture and sale of railroad cars, locomotives, railroad rails, and structural steel, or in the mining and sale of coal, from becoming directors or other officers or employees of railroads engaged in interstate commerce.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after June thirtieth, nineteen hundred and eleven, no person who is engaged as an individual or as a member of a partnership, or as a director or other officer or an employee 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 and selling coal, shall act as a director or other officer or employee of any railroad company which conducts an interstate-commerce business.

SEC. 2. That any person who shall be guilty of a violation of this law shall be punished by a fine of $100 a day for every day during which he shall act as a director, officer, or employee of the railroad company, 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.

This is a very short bill; it says in very few words exactly what it means, and if this committee means to enact any legislation forbidding interlocking directorates, combinations between industrial concerns which are manifestly pernicious, why it will enact this measure. I have taken occasion to call the attention of the committee to these particular abuses because it is the most manifest, the most indefensible, the most crying offense of the kind in the whole range of combinations in restraint of trade, the immediate effect of which is to maintain at an exorbitant price the cost of a product. The evil results of the close relationship between common carriers and those who produce the things which common carriers use has been illustrated so often, has been demonstrated so often, that it would be a waste of time for this committee to hold hearings on the subject. In addition to that, I do not believe that there is a liberal railroad man in the United States who will come before this committee and oppose this measure. When I was chairman of the committee which investigated the steel corporation men like Percival Roberts, a director in the United States Steel Corporation and a director in the Pennsylvania Railroad, admitted that this sort of thing was an abuse, a bad practice—the close relations between industrials and carriers. Mr. Wood, the vice president of the Pennsylvania Railroad, when asked the direct question if common carriers should be permitted to own and operate industries or if industries should be permitted to own and operate common carriers waited, as Judge Danforth will remember, for a moment or two before answering; he weighed his words very carefully and then said, in effect, that the practice was indefensible. Julian Kennedy, in my opinion the greatest engineer engaged in the business of constructing great steel plants, flour mills, blast furnaces, and so forth in this country and in Europe, who constructed the furnaces at Gary and the furnaces for the Carnegie steel plant, who constructed like works in Indiana and China, dwelt at length upon this abuse. The Interstate Commerce Commission, in its report of February 22, 1911, Mr. Prouty, calls attention to this

evil resulting from the close relation existing between the makers of supplies for railroads and the common carriers, as follows:

The vice president of a railroad company testified during the hearing that his company could buy locomotives of the best two concerns; that on account of the freight rate, as a practical matter, it could buy Bessemer steel rails of only two companies; that structural iron of the larger sizes could only be procured from four or five companies; and that in the purchase of cars he was confined to seven or eight independent plants. It is well understood that in recent years the price of structural steel in larger sizes and of steel rails has been uniformly maintained. It is also well understood that the same men who are potential in the United States Steel Corporation and the American Locomotive Works are influential in directing the policy of our railroads.

Now, if, to use the popular nomenclature, the Steel Trust is to determine the price which shall be paid for rails and for bridges; if the Locomotive Trust is to determine the price of engines, the Car Trust of cars, and the Labor Trust of labor; and if the railways have only to meet the demands made by these combinations and charge over to the public by an increase of rates whatever is paid, a most unfortunate situation has developed. There is nothing in all this which enables us to say that railways do pay extravagant prices, and if we are satisfied that present rates do not yield an adequate return we should, notwithstanding these conditions of monopoly, unhesitatingly approve an advance; but in view of the monopolistic character of the business we should pro ceed with caution.

This bill seems to be an amplification of the commodities clause of the present act. The commission is of the opinion that unjust discrimination and undue preference will exist so long as a carrier competes with others in the marketing of commodities or properties. The producer or manufacturer who has no interest in a carrier must base his calculations upon his experience in producing or manufacturing, plus the lawful transportation charges of the carriers. The carrier that engages in the manufacture or production and also in the transportation can combine the two in such a way as to profit by the carriage if it does not profit by the manufacture or production, or to profit by the manufacture or production if it does not profit by the carriage.

The commission is of the opinion that carriers ought not to have any interest in the commodities which they transport. This does not go quite so far as to say that the law ought to prohibit a manufacturer or producer from owning some interest in the carrier, or an officer or director of the carrier owning some interest in the manufacturing or producing industry, but such interest ought not to be controlling.

Mr. WEBB. You have no doubt about the constitutionality of the bill?

Mr. STANLEY. None in the world. Mr. Webb, I take it that this committee has often reviewed the sweeping statements of the Supreme Court touching the plenary power of Congress over interstate commerce, from Gibbons and Ogden on down. You will remember such expressions, I think, in the Baunan case, in which the court holds that in interstate commerce there are no States. I take it that Congress has the same power over the public highways constructed from ties and rails that it has over a public highway called a navigable stream, and that it can use its own discretion in seeing who shall operate that highway and who shall not, and upon what terms and conditions it shall operate.

I hold that in a strict sense there is no such thing as a quasi public corporation, as that term is usually used. There is no such thing as a corporation that is half private and half public. A quasi public corporation is a public corporation, and it is private only in the sense that the officers of the corporation, those who direct and manage its affairs, are paid out of the earnings of the corporation and not from the public Treasury, but in every other sense they are absolutely public servants; and that he who operates an interstate highway is a public servant, a Federal officer, and that he and his business is absolutely in your hands and you can say who shall be its president, who

shall be its directors, who shall be its employees, and what shall be their charges, or legislate as to any other detail of their business with the absolute assurance that you are firmly upon jurisdiction defined and settled by innumerable decisions of the Supreme Court of the United States.

Mr. NELSON. Maybe you are just prohibiting a form of it as a director; but supposing the same party owns the two concerns, the stock, then how would you reach the evil?

Mr. STANLEY. I have other measures; I have now a bill which will shortly be presented to this committee which goes at length into that question. I do not mean to say, gentlemen, that this bill is sufficient to reach the whole matter.

Mr. NELSON. It merely reaches the directory form?

Mr. STANLEY. I merely reaches one phase of the directory form. I wish to be very brief here to-day, but I will say that this bill is not adequate at all to reach the evils incident to interlocking directorates. But you have two evils that confront you; first is the pernicious results of the intimate relations between those who are engaged in a public and those who are engaged in a private business. Now I hold, as a general proposition, that no man should occupy the dual relation of a comptroller in a public and in a private business. I hold that no man should have the right to operate a public business and a private business at the same time having a pecuniary interest in both, for the simple reason that it is easy enough for him in that event to pervert the business of the public through the aggrandizement of the private industry. He has two pockets in the clothes of the same man, one filled from the proceeds of the public business and the other filled from the proceeds of the private business. Now suppose the Interstate Commerce Commission, having plenary power to say how much he shall put in this pocket, puts a ban upon his earnings in the public pocket, if he can secretly divert the earnings of that public business to the private pocket he will inevitably do it, will he not? And that is exactly what they have done; and that will be remedied by legislation much more elaborate than this bill. This bill is intended to reach simply this: The manufacturers of the apparatus by which public carriers are operated; their rails and their cars and their locomotives and their fuel. In other words, I mean that the men who supply the tubes for their boilers and the plates for their boilers and the rails and the spikes and the like are also the men who sit on the boards of directors of these concerns.

Now, the Interstate Commerce Commission says that we will look at your earnings in order to determine the fairness and justice of your rates. It is impossible for the Interstate Commerce Commission to fix the tolls of a railroad like it fixes the tolls of a turnpike. It has the same power exactly, I maintain. You can say to the turnpike company: "You shall charge so much for a horse, so much for a head of stock, so much for a vehicle drawn by two horses, so much for an automobile of a certain horsepower", and so on; but you can not say to the railroad: "You shall charge so much for hauling a carload of sand and so much for hauling a ton of rails, and so much for hauling this, that, and the other thing"; it is a more complex business, and you are bound to give to the roads a wide discretion in the classification of freight and in the fixing of its tariffs, because they are affected by other roads reaching the same points. They

are affected by the competition of water carriers; they are affected by the cost of construction, and you can not lay down those simple hard and fast rules. And so, as an inevitable result, the Interstate Commerce Commission has looked at the capitalization of a railroad, and if it is anything like justly capitalized you will find from all of these advanced-rate cases that they then have said: "If you are making, say, 7 per cent on your preferred stock and paying 5 per cent on your bonds, your returns are the most available measure of the justice of your rates"; and they have said: "You may earn so much upon a fair or an approximately fair capitalization."

Now, the railroads know that their earnings, their nominal earnings, are in fact the measure of their tariffs, and if they earn 10 per cent on their preferred stock and 4 or 5 or 6 per cent on their common stock it will not be long before some man will come in and complain of the rate, and he will call attention to their enormous earnings, either based on their capitalization or based on the train mileage or based on the ton mileage, or based on some of the standards by which the earnings of roads are measured. In that event, if the earning is excessive, the rate probably will be cut; but if the railroad shows that by these various standards it is only earning what other roads are earning, the Interstate Commerce Commission will say that this rate is only a fair compensation for the services rendered and for the capital invested. So, do you not see it is to the interest of great railroad companies to conceal their earnings, and there is no more perfect measure of the concealing of that earning than for the same man who owns the railroad to also own and operate the concerns that supply the railroad; and they can by diverting the earnings of the railroad to the betterment of the private enterprise—that is, supplying the railroad with rails or cars or engines—they can put into another pocket, so that it can not be seen by the commission, any amount of net earnings, and as a result the earnings of the railroad appear normal, but no one knows how much has been paid for supplies at the exorbitant figure. And, as the Interstate Commerce Commission has shown you, the best proof of the fact that the railroads themselves are not concerned about the cost of their own equipment and operation is that notwithstanding the fact that T rails, for instance, such as you may use in mines and on these streets, go up and down; notwithstanding the fact that these little T rails that they use in your coal mines, for instance, must be run through the roller just the same number of times as a rail that is 120 pounds to the yard. The relative cost of producing a ton of small rails is much greater than a ton of large rails, because there is the same amount of labor expended, practically. They must be cut and the holes must be bored in them, yet 1 ton of these little-car rails will contain three times as many rails as a ton of these massive rails used on the railroad, and yet the little rail is made at a greater cost but sells at 20 per cent per ton less than the big rail, and it only does that for the reason there is an understanding between the maker and the user of the rail that it shall not be sold for any less, as the Interstate Commerce Commission said.

Mr. DANFORTH. How are you going to stop this practice by this proposed bill? Take this bill, I say?

Mr. STANLEY. This bill will stop it in this way. It will prevent the man who is making the rail, or making the locomotive, or making the plates, from having any interest in or any control over the rates of this company, or over its operation.

Mr. DANFORTH. Have you not got to forbid that man being a stockholder and owner of the two enterprises before you can reach that?

Mr. STANLEY. I would.

Mr. DANFORTH. But this bill will not do it?

Mr. STANLEY. I do not mean to say that this bill will do the whole thing.

Mr. MORGAN. It puts in a dummy, does it not?

Mr. STANLEY. No; it is productive of good results.

Mr. DANFORTH. What is to prevent them from putting in a dummy?

Mr. NELSON. Assuming that you do not follow it with a provision of ownership of stock, would it not be very easy to get around your bill?

Mr. STANLEY. It will stop a great many of the bad practices. For instance, I will give you an instance now from the Department of Justice, and which has been passed on by the Interstate Commerce Commission.

The Louisville & Nashville has a freight agent who is in charge of a boat line, and the boat line charges the same rate that the railroad does. Here is a man who is making these cars; he is also an agent and director in the company that is using them. It is very easy for him to sit one day as the director of the railroad company and the next as the director of the manufacturing company—and that is the way prices are fixed—and fix the price the railroad shall pay for his rails—and it is very easy the next day for him to sit as the director in the manufacturing concern and fix the price that he shall charge for the rails. He is both buyer and seller.

Mr. NELSON. I am somewhat in favor of your position, but it seems to me you ought to unite the two remedies, so there will be complete relief.

Mr. STANLEY. I do not mean to stop here. I mean to say that this relief, this thing you can pass now, and the further relief will come. And I will tell you that I have talked with the President about it, and I do not think I betray any confidence when I say that I am sure he is not opposed to it. I would go further, much further, and I would provide, and will provide, that no man—that no concern that is engaged in the business of manufacturing or producing anything of value suitable for commerce—shall be an officer or a director in any concern engaged as a common carrier; and that no man holding stock in any common carrier and also holding stock in any industrial concern supplying that common carrier shall vote his stock in the common carrier. I would go further than that. But I did think that this specific measure, with a heavier penalty than is provided in the other bill, should be passed. You will recall but recently an investigation into the affairs of the Pennsylvania Railroad, in which it developed that the officers of the railroad were also officers of these coal companies, and the frightful abuses that resulted from it, and it is a notorious fact that all over the country you have men employed in coal companies who are also interested in railroads.

Mr. FLOYD. I will ask if it did not develop the fact that they were not only officers, but owned the entire stock in the coal companies?

Mr. STANLEY. Yes; that condition prevails in my country. And whenever you find a railroad owning, by stock ownership or otherwise, a coal mine in any particular section, the other coal mines wither and decay; they can not stand the pressure.

I now wish to call your attention to a statement of the Interstate Commerce Commission, not in reference to this bill, but touching the general principles of a bill pending.

I have a great many bills before this committee now, but in collaboration with some of this committee I am trying to weld them all into one measure, so you can reach them more adequately than you would by taking up separate bills, but I think this bill should be passed first for several reasons. In the first place, there is much talk that we are going to smash business, and I fully appreciate the fact that in legislation affecting the detail of these great businesses of this country we are sailing between Scylla and Charybdis. Any ill-digested legislation smashing the heads, you see, even though it strikes at abuses, will cause trouble, cause consternation in this country, and it might cause panics. For this reason I think it is advisable for this committee to carefully weigh not only the facts that the legislation is meant to remedy an existing abuse, but that the remedy is such as to prevent the abuse, like a skillful surgeon would take out a cancer and leave legitimate operations uninjured and undistrubed. This bill, while it is intended only to prevent one single, solitary abuse, is so simple, so directly aimed at a thing so manifestly wrong, that I believe it will cause no fright to business; in fact that it will reassure business, because no great business man is going to fail to see that he can not be harmed unless he means to profit by not only what ought to be unlawful, but what is merely dishonest; and at the same time it will remedy one particular phase of the situation that needs immediate remedying. I thank you.

Mr. FITZHENRY. A great many courts hold their meetings this month and next month, and should this matter not have immediate attention?

Mr. STANLEY. Yes; I think it ought to have immediate attention.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Friday, December 19, 1913.

The committee this day met, Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. You may proceed, Mr. Morgan.

STATEMENT OF HON. DICK T. MORGAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OKLAHOMA—Continued.

Mr. MORGAN. Mr. Chairman and gentlemen of the committee, I appreciate the courtesy you have extended me and I have reduced to writing what I wish to say, which will be the quickest way of presenting the matter. While perhaps you will not all agree with my ideas, I think in the main you will find that the propositions which I

will present are at least different from the propositions in any of the other bills on this question.

In my address before the committee on the 9th of December, upon my bill, H. R. 1890, I confined my remarks mainly to the provision of the bill which creates a national commission to have supervision over our large industrial corporations. I attempted to show that such a commission should be created without discussing in detail what power or jurisdiction should be given the commission. I took the position that a commission was desirable—even though no additional statutes were enacted to further regulate these corporations.

I presented ten propositions in support of my contention for the creation of such a commission. These ten propositions stated very briefly are as follows:

1. The Republican and Progressive platforms of 1912 specifically indorsed such a commission and the Democratic national platforms have declared for a program of antitrust legislation, which could not be enforced or administered successfully without additional executive and administrative machinery.

2. That the commission plan had been indorsed by Senators and Representatives in Congress, Government officials, editors, educators, political economists, merchants, bankers, manufacturers, and business men generally.

3. That the business interests of the country were favorable to the creation of such a commission, including not only merchants, manufacturers, and bankers, but the men at the head of some of our great industrial corporations.

4. That the majority of the Senate Committee on Interstate Commerce, Sixty-second Congress, after an exhaustive hearing on the subject, reported in favor of the creation of such a commission.

5. That a commission would be useful if for no other purpose than to aid in the dissolution and reorganization of unlawful corporations.

6. That the commission was desirable to do the work now assigned to the Bureau of Corporations, so that without any additional restrictive or prohibitory legislation, it would be wise to merge the Bureau of Corporations into a commission, and give the commission the additional work of aiding the courts in the dissolution and reorganization of unlawful corporations.

7. That any additional restrictive, prohibitory, or remedial legislation on the subject makes a commission imperative and indispensable.

8. That a commission, without any power to fix or regulate prices, would be a potential force in restoring and maintaining healthful and effective competition, as a factor in regulating the prices of all food products, merchandise, and manufactured articles, and thus the commission would aid in solving what is now known as the high-cost-of-living problem.

9. That the incomparable achievements of the Interstate Commerce Commission, in largely solving the problems of railway charges and practices justifies the placing of our large industrial concerns under the supervision of a similar commission.

10. That many of our industrial corporations are in fact quasi-public corporations, and should be made such by statutory enactment, and hereafter be classified with railways, telegraph, telephone, and other public-service and public-utility corporations.

SALIENT PROVISIONS OF H. R. 1890.

I will now discuss some of the salient provisions of the bill (H. R. 1890) which I have introduced. Some of these provisions may be enumerated as follows:

1. The creation of the commission (sec. 1), and the provisions which define the corporations which shall be subject thereto (sec. 1).

2. The declaration that all corporations subject to the commission are quasi-public agencies or corporations (sec. 2).

3. The provision requiring such corporations in conducting their business to use only such practices, methods, and means as are just, fair, and reasonable and not contrary to public policy or dangerous to the public welfare, and making it unlawful to do otherwise (sec. 4).

4. The provision requiring such corporations to deal justly and fairly with competitors and the public and prohibiting the granting of special privileges or advantages which shall be unjustly or unreasonably discriminatory as between individuals or sections of the country (sec. 5).

5. Giving the commission power to enforce these provisions, and to make rules and regulations not in conflict with the Constitution and laws of the United States, to aid therein, and by such rules and regulations to prohibit any particular or specific act or acts, practice, method, or device that is contrary to any of the provisions of the act (sec. 9).

6. Requiring such corporations to sell their products at just, fair, and reasonable prices, and making it unlawful to do otherwise (sec. 3).

FIRST. THE COMMISSION AND CORPORATIONS SUBJECT THERETO.

Section 7 creates the "Interstate Corporation Commission." The name is immaterial. With equal propriety it might be called the Interstate Trade Commission, the National Industrial Commission, the Federal Trade Commission, the Federal Antitrust Commission, or by any other name that will not confuse it with the Interstate Commerce Commission.

The commission consists of seven members. Each member is allowed a salary of $7,500 per annum. The number on the commission, the salary of the members, the length af their terms, and many other details are minor matters.

Every corporation engaged in interstate commerce, not subject to the jurisdiction of the Interstate Commerce Commission, whose gross annual receipts or the total annual gross receipts of whose subsidiary companies are in excess of $5,000,000 are made subject to the provisions of the act. Some other test might be adopted to fix the kind and character of the corporations which shall be made subject to the commission. In determining what corporations shall be placed under the commission, gross receipts should be considered, but in addition thereto we might well consider the capital invested, and the nature and character of the business.

The terms of the law should be such that only corporations which may be clearly classed as public agencies, or quasipublic corporatians should come under governmental control. So far as may be consistent with the public good, we should leave the business of the country free

from governmental control, giving to individual initiative, energy, ability, and ambition the widest field possible in the development and management of the business and commerce of our country.

SECOND. CORPORATIONS SUBJECT TO THE COMMISSION SHALL BE DECLARED QUASI PUBLIC AGENCIES OR CORPORATIONS.

If we are to assume governmental control of any of our industrial corporations it must be done on the ground that the business of such corporations have become impressed with a public use and the corporations themselves have ceased to be merely private concerns, and must henceforth be regarded as quasi public corporations.

It is maintained that these corporations are creatures of the times; that they are the natural product of twentieth century conditions; that they are the offspring of science, discovery, and invention; that they are the natural result of the wonderful improvement in transportation and communication facilities; and that they typify the advanced civilization of the age.

It is further claimed that they are useful; that they are economical; that they avoid waste in production; that they are favorable to labor in securing steady employment, remunerative wages, short hours, and favorable conditions under which to labor.

As other nations have large corporations, it is asserted that we must have them or we can not compete in the markets of the world. All these things may be true. If so, the more certain it is that the giant corporations, with hundreds of millions of capital, controlling the production, distribution, and sale of products in common use among all our people, possessing unquestionably large monopolistic power in the control of prices, are quasi public corporations, and as a matter of wise public policy should by law be declared to be such.

THIR FAIR, JUST, AND REASONABLE PRACTICES.

The Federal Government long ago entered upon the policy of controlling the practices of industrial corporations engaged in interstate business. The Sherman antitrust law controls the practices of such corporations. That law forbids the doing of certain things. When we prohibit corporations from doing certain things, we thereby assume the right to control the practices and methods of such corporations. So far, however, the law only prohibits certain acts. We have not fixed any standard by which the business methods of such corporations shall be judged. There are those who seem to think that we should confine our legislation to statutory provisions prohibiting industrial corporations from doing this or that thing. It is well enough to prohibit certain acts—to make certain things unlawful—but we should do more than this. We should by law promulgate a rule of business morality, create a standard by which the methods and practices of industrial corporations shall be judged. I have attempted to do this in section 4 of H. R. 1890. This section is as follows:

SEC. 4. 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 in the management, control, regulation, promotion, or extension thereof, shall be just, fair, and reasonable and not contrary to public policy or danger-

ous to the public welfare, and every corporation subject to the provisions of this act in 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, 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

These great business corporations should not be permitted in conducting their business to engage in practices, use methods, or resort to devices that are not just, fair, and reasonable. Big business should have a high standard of business ethics. Whether corporations have souls or not, they should be compelled, in the management of their business and in all means, methods, schemes, devices, and contrivances used for the enlargement and extension of such business to keep clearly within the bounds of the principles of sound morality. While I believe the business of this country is, in general, conducted along lines of high moral principles, Congress might well promulgate a new code of business ethics for the guidance of the managers of the great industrial corporations.

FOURTH. JUST AND FAIR TREATMENT TO THE PUBLIC AND COMPETITORS.

Section 5 of H. R. 1890 supplements section 3 in fixing a standard for our industrial corporations to follow in dealing with the public. Think of it. At the present time there is no law except the Sherman Antitrust Act which in any way limits, restricts, regulates, or controls the business methods of industrial corporations. So long as they do not violate some general criminal statute or the provisions of the Sherman antitrust law, corporations may resort to all kinds of acts and practices which are unfair to competitors and inimical to the public. They may, with perfect impunity, treat competitors unfairly and discriminate against localities, and be guilty of all kinds of business immorality. And we are talking about big business—about corporations with immense capital—having a large degree of monopolistic power. Why not enact a statute which will crystallize the sentiment, the judgment, and the conscience of a nation into a rule of action for the guidance of these great business concerns in dealing with competitors and the public? This I have attempted to do in section 5 of my bill, which is as follows:

SEC. 5. That every corporation subject to the provisions of this act shall deal justly and fairly with competitors and the public, and it shall be unlawful for any such corporation to grant to any person or persons any special privilege or advantage which shall be unjust and unfair to others, or unjustly and unreasonably discriminatory against others, or to enter into any special contract, agreement, or arrangement with any person or persons which shall be unjustly and unreasonably discriminatory against others, or which shall give to such person or persons an unfair and unjust advantage over others, or that shall give to the people of any locality or section of the country any unfair, unjust, or unreasonable advantage over the people of any other locality or section of the country, or that shall be contrary to public policy or dangerous to the public welfare, and any and all the acts or things in this section declared to be unlawful are hereby prohibited.

This section is modeled after sections 2 and 3 of the act of February 4, 1887, entitled "An act to regulate commerce" (24 Stat. L., 379). The two sections are as follows:

SEC. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation

for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines.

These provisions in the "Act to regulate commerce," with supplemental legislation along the same line, have resuletd in driving from the railway transportation business by far the greater part of the practices and methods of railway corporations, about which, for a long time, there was so much just complaint. There is now little complaint of unfair discrimination as between individuals or sections of the country.

In other words, the provisions in the act creating the Interstate Commerce Commission, which I have quoted, under the administration of the Interstate Commerce Commission, have resulted in the main in giving to the public just and reasonable rates, to individuals and localities equality of charges, and to all impartial privileges and facilities.

May we not fairly conclude that by promulgating similar fundamental rules of action for the guidance of our mammoth industrial corporations, and by creating a like commission to administer and enforce these rules of action, we may expect equally good results upon the methods and practices of our great industrial institutions?

FIFTH. POWER OF COMMISSION TO MAKE REGULATIONS.

One paragraph in section 9 of H. R. 1890 is as follows:

The commission is hereby authorized and empowered to make and establish rules and regulations not in conflict with the Constitution and laws of the United States to aid in the administration and enforcement of the provisions of this act, and may, by such rules and regulations, prohibit any particular or specific act or acts, practice, method, system, policy, device, scheme, or contrivance that is contrary to any of the provisions of this act.

Under this provision of the bill the commission not only has power to make rules and regulations to aid in administering and enforcing the provisions of the bill, but may by such rules and regulations prohibit any particular or specific act, practice, method, system, policy, device, scheme or contrivance, which is contrary to any of the provisions of the act.

It will be well for Congress to prohibit any known act or practice hitherto indulged in by corporations, by which the public has suffered, but it is safe to say Congress will cover by enactment only conspicuous abuses. The commission should therefore have power to prohibit

by rule things which are contrary to the general rules enunciated by the law. Congress acts with deliberation. It takes time to enact laws. The commission can act quickly. Besides, the corporations may adopt new practices which are offensive. If they are contrary to the broad rules of action, enunciated by the law, the commission may quickly make a rule that will make the practice unlawful.

SIXTH. CONTROL OF PRICES.

We come now to consider the question of whether or not the Government shall undertake to exercise any control whatever over the prices at which corporations, subject to the supervision of the commission, shall dispose of their products. I desire to present a number of propositions which have led me to the conclusion that the commission should have certain power to regulate prices.

So far the Federal Government has not assumed to exercise any control over the prices at which industrial corporations dispose of their products. We have proceeded on the theory that competition shall be the one great force upon which we shall rely for the regulation of prices. Our policy has been to restore and maintain competition. Unquestionably existing laws have not been adequate to do this. In spite of the Sherman Antitrust Act, in spite of the weapon of publicity as wielded by the Bureau of Corporations, in spite of prosecutions, proceedings, findings, decrees, and judgments rendered in the United States courts, combinations have been formed, concentration of business has continued, industrial corporations have enlarged their capital, increased their output, extended their business, perfected their machinery, equipment, facilities, and organizations, and persisted in acquiring those things which added to their arbitrary control and domination of the prices, at which they sell their products. Competition is not the controlling factor in the fixing of prices of many articles in common use among the masses of our people. It can not be denied that many of our great industrial corporations, largely controlling the manufacture, sale, and distribution of many articles in common use, possess arbitrary power to fix the prices at which they sell such articles. This is a power that should not be lodged in the hands of individuals, firms, associations or corporations. The National Government is derelict in its duty if it does not exercise every constitutional power to prevent it.

We rail against monopolies from the housetops. We defiantly brandish in the faces of these big corporations, we brandish defiantly the sword of competition. They refuse to be frightened, and proceed to take possession of additional territory on the map of the industrial world. Thus for more than a quarter of a century this process has been going on. Competition has been losing ground. The sphere of its influence has been lessened. The field wherein its power is dominant and supreme, has constantly diminished. Competition has fought its great decisive battle, and met its Waterloo.

Those who advocate some governmental control over prices do not contemplate that we shall abandon competition as the one great factor in the regulation of prices. Our policy is to reenforce competition, with a certain degree of governmental supervision and control. We propose to enact a law that will meet conditions as they are. We can not change these conditions in a moment, in the twinkling of

an eye. No one would advocate the enactment of antitrust laws that would produce an industrial cataclysm. And yet no other kind of legislation will eliminate monopoly as an important factor in fixing the prices consumers pay for many of the articles in common use among our people.

I take it that we all agree that prices should not be controlled by monopolistic industrial conditions. Governmental control of prices should never enter the field where competition is efficient and effective. Control should only be assumed in the domain where competition has ceased to be an efficient and effective force.

Mr. CARLIN. Is it your idea that this commission ought to fix retail and wholesale prices of articles?

Mr. MORGAN. My idea is that we should by law declare that the corporations which we make subject to this commission shall dispose of their articles at reasonable and just prices, just as we declared that the railway corporations shall make their charges reasonable and just.

Mr. CARLIN. For instance, what would you require a sugar corporation to charge for sugar or a grain corporation to charge for flour?

Mr. MORGAN. I would require them to charge a reasonable price. For instance, assuming that a large monopoly exists among the great packing companies in disposing of their products, I would have them by law required to sell at reasonable and just prices, and the commission could pass upon the question as to whether those prices were reasonable and just with the same degree of accuracy and just as practically as a commission can declare that a certain railway rate is just or unjust.

The CHAIRMAN. But there is this difference between products and railways. Now, a railroad is engaged in a public business. It acts in a public capacity and with that view it is given the right to construct railroads, a right of condemnation, and it is a public servant. But a man engaged in the manufacture of sugar or in the production of flour or in the production of wheat is not acting in any sort of a public capacity.

Mr. MORGAN. Now, Mr. Chairman, that, of course, is a very forcible and apt suggestion, but a corporation is an artificial person created by law and that corporation by virtue of the privilege of the law is engaged in interstate commerce.

Mr. CARLIN. Does not your bill apply to persons as well as corporations?

Mr. MORGAN. No, sir; and then only to corporations whose annual receipts are in excess of $5,000,000.

Mr. MCCOY. Potentially and individually a partnership can indulge in just as evil practice as a corporation. Why not make it apply to individuals as well as corporations?

Mr. MORGAN. Well, history and experience show that individuals and firms can not extend their business in such a way as to get control of the great articles in common use among the people. It never has been done.

Mr. CAREW. Is not the Nelson-Morgan Co. a partnership?

Mr. MORGAN. I do not understand that.

Mr. CAREW. That is my information.

Mr. CARLIN. Then your bill also provides for a commission to fix the price of labor.

Mr. MORGAN. No, sir; it is confined strictly to fixing the prices of those corporations which we shall declare by law to be quasi-public corporations. In other words, that is the only theory upon which we can proceed unless we go into the entire field of controlling prices of all articles sold by all individuals. But in order to do that we must proceed upon the theory that corporations like the United States Steel Corporation, the Standard Oil Co., and the International Harvester Co., by virtue of the control which they have gained over the manufacture, sale, and distribution of products in common use among a hundred million people, have been in fact and should be in law regarded as public corporations.

Mr. WEBB. Is that the only class of corporations that you define as public, the big ones? How would you define a public corporation?

Mr. MORGAN. I have defined it in my bill by declaring that a corporation in order to come under the provisions of this law, under its restriction and control, must have an output of $5,000,000 annually.

Mr. NELSON. How many different corporations would come under the provisions of your bill?

Mr. MORGAN. According to some estimates I have made, probably 300 corporations.

Mr. NELSON. And would one commission be able to regulate the price of the product of 300 combinations so large as that?

Mr. MORGAN. I thould think so.

Mr. NELSON. Would you not have to consider wages in order to fix the value and prices?

Mr. MORGAN. Certainly.

Mr. NELSON. And raw material?

Mr. MORGAN. Yes, sir.

Mr. NELSON. And taxation?

Mr. MORGAN. Yes, sir.

Mr. CARLIN. And transportation?

Mr. MORGAN. Yes, sir.

Mr. NELSON. Would not you have to go into all the different details of the business?

Mr. MORGAN. Did not we have to consider all those things in fixing a reasonable price for the transportation corporations or communication corporations? It is only a question of detail and organization.

Mr. CARLIN. Well, right there, on that question of detail and organization. If you only apply this remedy to corporations all these gentlemen would have to do would be to change their form of organization from a corporation to a partnership.

Mr. MORGAN. Of course, Mr. Chairman, I am talking about general theories. Now, if the committee or Congress should seriously think of undertaking the proposition that I have proposed, then we could all get together and suggest the remedies for such things as you have in mind. Those things are to be worked out in detail; it could not be expected that one person in preparing a bill of this kind could meet every proposition that could be presented.

Mr. DANFORTH. Mr. Morgan, as suggested by Mr. Carlin, would not that necessarily force this commission to consider the prices fixed by partnerships?

Mr. MORGAN. Well, I think not. No; I think not.

Mr. DANFORTH. Did not these corporations, when they were partnerships, and most of them were at one time, do practically as large a business as they are doing now as corporations, and did not they control the output?

Mr. MORGAN. Well, under my bill I say "corporations," and if that question comes up we can say, "Any corporation, association, or firm having business of this size."

Mr. CARLIN. If the principle of your bill is applied to human efforts all along the line, because if it is a good thing for one class of business it is a good thing for all classes of business, you would eventually fix the prices of all articles?

Mr. MORGAN. Well, I do not think that is a matter of argument now. We have entered upon the policy of fixing the prices of transportation, communication, and public-service corporations, and we are doing that successfully. Now, then, this proposition is just as practical as the other one. There are many details to be worked out.

Mr. VOLSTEAD. Are we not doing nothing more than equalizing the prices? My experience has been that about all we did was to compare one price with another, and if the price complained of was higher than the general average of prices in that locality, under those circumstances the Interstate Commerce Commission would reduce it in order to equalize prices. I think that is pretty nearly as far as we have gone.

Mr. MORGAN. Yes, sir; that is probably as far as we would go, but it is not far enough.

For one, I am ready to take this step. In the preparation of H. R. 1890 I have provided for a plan of limited control of prices of the products of industrial corporations, placed under the supervision of the commission. Section 3 of my bill covers this ground and is as follows:

SEC. 3. That the price or prices at which any corporation subject to the provisions of this act shall sell or dispose of any article of merchandise, or any product whatsoever, shall be just, fair, and reasonable, and it shall be unlawful for any such corporation to sell or dispose of any article of merchandise, or any product whatsoever, at a price or at prices that are unjust, unfair, or unreasonable, and every corporation subject to the provisions of this act is hereby prohibited from so doing.

Assuming that we shall declare by law that all corporations placed under the control of the commission are quasi-public corporations, my plan is to regulate their prices much as we regulate the rates and charges of railway and other public-service corporations.

When the Congress of the United States enacted the first law giving the Federal Government supervision and control over the great railway corporations, it imprinted upon the pages of our Federal statutes a few simple rules which have ever since controlled the charges and practices of all our great railway systems. In the very first section of the act to regulate commerce, approved February 4, 1887, and which created the Interstate Commerce Commission, Congress declared:

All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just.

And every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

Ever since February 4, 1887, in all the controversies and proceedings before the Interstate Commerce Commission and in the United States courts, the one great question in controversy has been, Are the rates and charges of the railways reasonable and just? That is the test applied to every charge for service in railway transportation. The Interstate Commerce Commission, the courts of the land, the shippers, and the public generally have come to understand what is meant by just and reasonable charges. So in the preparation of my bill I reached the conclusion that the great industrial corporations, dealing in the necessities of life, possessing such control over a business that competition was not the greatest factor in price-making, should at least be required to dispose of their goods, wares, and merchandise at just and reasonable prices. Have I gone too far? Is it an infringement upon any natural right? Is it in conflict with the Constitution of the United States to require artificial persons—corporations—engaged in interstate commerce, and which have the same monopolistic power possessed by quasi public corporations, to dispose of their products at prices that are reasonable and just? Certainly not.

Would the Federal Government be asking too much of industrial corporations desiring to engage in the great interstate commerce of this Nation, reaching out to the homes of one hundred millions of people, that they should dispose of their products at prices that would be regarded as just and reasonable.

Is this radical legislation? Is it impractical? Will such legislation curb individual initiation, discourage enterprise, and prevent the growth and expansion of trade, commerce, and industry? I think not. Are we afraid of a shadow? Are we not halting before imaginary dangers?

The provisions of my bill give the commission power, on final hearing, to fix what shall be a reasonable price. In this I have simply followed the law which gives the Interstate Commerce Commission the power to fix the rates or charges of railways, telegraph and telephone companies, a power that was not conferred upon the commission until the act of 1910, passed by the Sixty-first Congress.

Now, that is the one proposition upon which all proceedings for a quarter of a century have turned in controlling the charges of railway transportation. Prior to that time the transportation corporations, so far as the national law was concerned, could do anything that they pleased. So, for the first time Congress declared in the very first section of that bill that their charges should be reasonable and just.

Mr. FITZHENRY. Was not that the law before that statute was passed?

Mr. MORGAN. I do not so understand it. I may be mistaken, but at the present time there is no restriction upon the price. Under the law the Steel Corporation may charge any price it pleases for steel rails. Instead of charging $28 a ton, they could charge $100 a ton.

Mr. WEBB. You look to the fixing of rates of railroads as a solution of the question?

Mr. MORGAN. I think it has contributed largely to that end.

Mr. WEBB. There are between five and ten thousand complaints pending before the Interstate Commerce Commission in regard to railroad rates, and it will take them about 10 years to pass on them.

Mr. NELSON. If that is satisfactory, how about this failure in New England, with reference to the New Haven Road?

Mr. MORGAN. As I understand that matter up there, it is a matter for the commission. I have provided here that their practices shall be reasonable. Of course, there is no way to entirely control a man from doing things that are wrong. You can not do that by any criminal statute.

Mr. VOLSTEAD. I am inclined to think that they might have done something in the New England situation if they had given the Interstate Commerce Commission some control over the stocks and bonds and the purchase of subsidiary lines. There has been always some question as to how far the United States Government can go in controlling internal affairs of corporations. There has been no attempt to do it.

Mr. WEBB. Here is just one public-corporation system, the railroads, controlled by a strong commission, which, nevertheless, is five or ten thousand complaints behind. Now, if you had a commission controlling 300 corporations, if the same proportion was maintained, when would they ever settle the complaints before them? It seems to me that Gabriel would blow his horn before they ever passed upon all of them.

Mr. MORGAN. We might meet that to some extent by limiting the number of corporations to be covered by this law.

Mr. VOLSTEAD. It is my impression that the railroad business is probably as expensive and requires as many adjustments as would be required with your bill. Now, do not understand me to be in favor of or expressing any opinion on the proposition of fixing the prices of goods, but I do believe this: That a commission could serve a very useful purpose in preventing discrimination and in regulating the issue of stocks and bonds, and so forth.

Mr. WEBB. Suppose under your bill that a corporation which comes within your definition or inclusion should divide itself up into a dozen smaller corporations and should locate each one in a different State and confine its sales to those States, would your bill reach them?

Mr. MORGAN. Well, we would have the Sherman antitrust law still in force. I do not propose that that law should be repealed.

Mr. NELSON. But it does virtually repeal it, because if you prevent price fixing——

Mr. MORGAN (interposing). Well, that is one objection. Some people think that if you attempt to fix prices it will mean a legalized corporation——

Mr. NELSON (interposing). The Sherman law forbids an agreement as to prices in restraint of trade, and if your commission passes upon them and says, "These are the prices which all shall charge," are not you virtually repealing that law?

Mr. MORGAN. No; I do not think my commission would go that far at all. My bill provides two things. Of course, it first provides that these prices shall be reasonable and just. Then, it not only gives the commission the power to decide whether a certain price is reasonable and just, but it gives the commission power to fix what is a just price. Now, it might be well, Mr. Chairman, in starting out, to do as

we did with the Interstate Commerce Commission. The bill originally creating that commission only gave the commission the power to decide whether a certain rate was just and reasonable or not, with no power to say what a just rate should be.

In other words, they had no power to fix rates. That power was not given to the Interstate Commerce Commission until 1910 in the Sixty-first Congress, when for the first time we gave the commission the power to fix what should be a reasonable rate. They were given the power to investigate on their own initiative and fix a rate, when prior to that time they did not have that power. Now, I think perhaps it might be well in starting out to give this commission the power to investigate, for instance, the price of steel rails, and then make an order or judgment or finding whether or not that is a reasonable rate for steel rails.

Mr. McCOY. How long would you have a decision remain in force?

Mr. MORGAN. Until reversed by the commission. It could be reversed at any time by the commission. Of course, we do not think we can fix the price of all articles, but it seems to me that these corporations which possess a large monopolistic control over the prices of products that go out and reach every home in the land should be regulated.

Mr. VOLSTEAD. Suppose they should sell their products to another corporation. Suppose one company manufactured rails and sold them to a consuming company?

Mr. MORGAN. Well, I say that I have only given an outline of my plan and there are a great many other things that are left to be worked out in detail. There are a great many little things to be added to the main proposition.

Mr. VOLSTEAD. I mean a manufacturing company and a selling company. That has been a common practice.

Mr. MORGAN. Yes, sir; I know that.

If after 23 years of experience it was found necessary to give this power to the Interstate Commerce Commission, to insure just and reasonable railway charges, why is it not both wise and safe to give this power to the commission that is to have jurisdiction over the so-called trusts?

I do not believe in extravagant and exaggerated expressions. I do not pose as a reformer. I am not an alarmist. I am not a radical. I am naturally conservative. But I believe in practical legislation. I believe in progress along constructive lines. We have had a revolution in the nature and character of our industrial concerns. Our business methods have changed.

Mr. NELSON. If it has taken 23 years for the Interstate Commerce Commission to get its powers and begin to operate, what would be the geological age in which your commission would begin to operate?

Mr. MORGAN. I will answer that by saying that the Interstate Commerce Commission was a new proposition when it was established. It was entirely in a new field of governmental action and it went on step by step until it responded to the demands of the growth of public sentiment, Congress enacted new laws, and no doubt in the future Congress will enact other laws relating to the commission.

The instrumentalities used in commerce and trade have changed. But our laws have not changed. Interstate business is largely under

control of the gigantic business concerns—great corporations—mammoth industrial organizations, wielding incomprehensible power in the business and commercial world. This power under proper control may be used for the glory of our country—or unrestrained it may be used for the expolitation of the public and oppression of the people.

Few people realize to what extent the corporations control the business of this country. Few persons fully comprehend how these great corporations now touch every avenue of trade, commerce, and business, receive tribute from every avocation, calling, and profession of life, and draw support and sustenance from every home and fireside in the land.

The corporations of the country, after deducting all the cost of labor, material, losses, and every other expense, made an annual net profit of $3,213,247,000. Industrial and manufacturing corporations alone make an annual net profit of $1,309,819,000. They employ 7,000,000 persons, and their annual products are worth $21,000,000,000. The corporations of the country, by a conservative estimate, own one-half of the wealth of the Nation. Probably not one-tenth of the people own any interest in these corporations. The corporation is a great business invention which has aided steam and electricity as mighty forces in the production of wealth and in the extension of commerce.

But the great business invention needs some improvements. We must invent some new attachments—that will make this modern machine, for the production of wealth, a more perfect and reliable invention for the equitable distribution of wealth.

Mr. McCoy. Have you looked into the question of how the stock of the Steel Corporation, for instance, or the Pennsylvania Railroad, the New Haven Railroad, the New York Central Railroad, or the other big railroads, is distributed? The statement is commonly made that the stocks and bonds are widely distributed and not concentrated.

Mr. Morgan. Yes; I understand they are widely distributed and I have tried to find some way whereby we could ascertain the number of persons actually interested who in any way own any stock or bonds.

Mr. McCoy. I believe that information is all available.

Mr. Morgan. Well, it might be for a few of the large corporations. For instance, I presume a great railway company could tell how many people own stock in the aggregate number, but as to the percentage I do not think there are any statistics.

Mr. McCoy. I know that you can get it somewhere in regard to some of the corporations. I know that because I have read a statement within 10 days and I have a notion that it is in one of those articles that Mr. Brandeis has been writing for Harper's Weekly.

Mr. Morgan. Well, I think those are general. Now, as to the number of people in the country interested. Take the 40,000,000 people who are on the farms. Forty per cent of the people are on the farms. Now, very few farmers own stock in corporations——

Mr. McCoy (interposing). Now, just a minute, if you will permit me right there. Do you not think that in dealing with that particular phase of the matter that it would be more satisfactory not to take 90,000,000, because, according to the statistics that would mean

about 14,000,000 male adults. Would it not be better to deal with the male adults in the country, because women and children are not apt to and are not expected to own these stocks and bonds?

Mr. MORGAN. Well, you would get the same results. Suppose there are something like 6,000,000.

Mr. MCCOY. Yes, sir.

Mr. MORGAN. Now, you take the industrial corporations and manufacturing corporations. They employ 7,000,000 persons. Now, those are supposed to be adults old enough to work. I do not know what per cent of those 7,000,000 persons have any interest in large corporations and I would like to know how I could find out. I do not suppose more than 1 in 10 of those wage earners owns any stocks. There are about 1,500,000 persons employed by the railroads. I do not know, but I just presume that there is not 1 out of 10 of the railroad men that own any of the stock. I would like to get at the figures.

Mr. MCCOY. They are wise men: they do not want to take the risk.

Mr. MORGAN. Now, here are corporations with ninety-two billions of stocks and bonds. If the great corporations own $92,000,000,000 worth of stocks and bonds, that must represent half the wealth of this country. Now, those corporations have a net income of over $3,000,000,000 a year. The report of the Commissioner of Internal Revenue shows the profits of these corporations, and upon that $92,000,000,000 they have a net profit of nearly 4 per cent, which would indicate that after all it comes to very nearly representing that much wealth. So that a large amount of wealth is in the hands of corporations and it is centered in large corporations with the wonderful power that these corporations have of drawing something from every home in the land. You can not get out of that.

It seems to me that all of these things which I have mentioned would justify us in declaring that certain of these corporations that have attained a certain power or a certain size ought to be controlled. There are a number of industrial concerns over which we ought to exercise some control in the matter of the price at which they sell their products. Now, that $5,000,000 limitation in the bill is just arbitrary, and you can make it $10,000,000 if you want to. I think it is a reflection upon us that we permit these corporations to go on with this immense power, and I am not extravagant in my belief, but I believe the time has come when the National Government should put a limit upon that power or else destroy the corporations. We all know that we are not going to enact legislation that is going to wipe out these corporations immediately. It will only take a long series of years. But we can work it out. I do not see any reason why we could not declare that prices of certain articles sold by certain corporations shall be reasonable and just, and then leave the power in the hands of the Government to say that their price is just.

Mr. WEBB. Would it not be much simpler to fix a limit of the capital stock of a corporation doing business than to go into the matter of fixing prices?

Mr. MORGAN. Well, there are a great many people who believe that these great corporations are useful as instrumentalities to extend our Government business throughout the world and that they are

really beneficial to the wage class and give them better employment, better wages, and better conditions under which to labor. If they are really economical propositions, and I am not discussing that proposition, and if you limit the capital then you will say we are only going to do business on a small scale.

Mr. WEBB. Your law is aimed at big corporations, those whose capital stock runs up into the millions?

Mr. MORGAN. Yes; because we believe that the small corporation can not exercise a dangerous influence upon the people.

Mr. WEBB. Then you would break up a large corporation by limiting the stock? You would eliminate the bad and keep the good classes?

Mr. MORGAN. Yes, sir; and we will get what benefit we can out of the large industrial concerns, and take away the sting—take away their power to do any injury to the great masses of the people.

Mr. MCCOY. One of the complaints about the price fixing and adjustment, too, I think, has been that the Standard Oil Co., for instance, in order to drive competitors out of a given territory will put their price so low that the competitor can not remain in a district.

Mr. MORGAN. I would declare a thing like that unlawful. It is unlawful to sell in one locality at one price and in another locality at another price.

Mr. MCCOY. Does that come within your bill?

Mr. MORGAN. Yes, sir; because my bill declares that all these plans, devices, and contrivances for the extension of their business shall be fair and just and the commission shall decide whether a certain practice is fair or unfair or just or unjust, and if it is unjust or unfair they will prohibit it.

Mr. WEBB. Would you put a universal one price on coal, for instance?

Mr. MORGAN. I certainly would not. For instance, you take the price at which the West Virginia coal fields would sell their coal. That would be a proposition like a certain railroad that the Interstate Commerce Commission might be considering.

I have no conception that they shall say that coal shall sell at a certain price. Every man who brings his case up before the commission will say, "Our labor cost is so much, our expenses are so much, we have made so much profit," and then the commission shall decide whether it is reasonable or just.

Mr. CAREW. Do you not see that there is a difference between fixing transportation rates and fixing rates on certain shifting conditions as must relate to matters of trade? Conditions shift so much more rapidly there than in transportation.

Mr. MORGAN. Of course there is a difference; but, for instance, take the question of steel rails. I think it has been said that for 10 or 12 years the price has been $28 a ton.

Mr. NELSON. There is one difficulty that I want to get right on. The Steel Trust is well equipped, but there are independent companies. Would you fix the price on a commodity so as to satisfy the Steel Trust with its equipment and make it profitable and reasonable to them, or would you consider the price charged by some poor devil of an independent who was struggling along?

Mr. MORGAN. If the Steel Corporation can make more profit than a small concern I do not think that the commission would put in a

price there that would wipe out the small concerns. They would have to take that into consideration, and public sentiment would not demand that they should do otherwise. This question of reasonable price is, after all, a matter with the conscience of the Nation as to what is fair and just.

Mr. NELSON. Now, you use the expression "fair and just." Would anybody know what fair and just meant? Would not that leave it up to anybody's discretion?

Mr. MORGAN. I think so.

Mr. NELSON. Would not that leave a tremendous range of discretion?

Mr. MORGAN. Is not that the test under which the Interstate Commerce Commission has decided every case and under which the highest courts of this land have decided these great railroad rate cases?

Mr. NELSON. But even they also said they could not do that unless they knew the valuation of the railroads.

Mr. MORGAN. Yes, sir.

Mr. NELSON. And would not you then have to value all these combinations?

Mr. MORGAN. You would have to value them, I presume, but you would apply the same principle, you would need the same facts and work it out on the same basis as you would in the case of a railroad corporation. Yes, it has capital, it has labor, it has expenses of all kinds the same as the Steel Trust has.

Mr. NELSON. Did you read the statement of the coal operator, I think his name was Vinson, before the Interstate Commerce Commission?

Mr. MORGAN. Yes, sir.

Mr. NELSON. Do you not recall that he advised a commission for the coal fields alone?

Mr. MORGAN. Yes, sir.

Mr. NELSON. And he said it would keep that commission busy to fix prices?

Mr. MORGAN. Yes, sir; in West Virginia.

Mr. NELSON. Now, how in the world could you expect the commission to take up the Tobacco Trust, the Sugar Trust, the Oil Trust, the Steel Trust, and all the others and decide the prices?

Mr. MORGAN. That is a matter of organization. Now you take the steel corporation. That is a mammoth concern with $1,400,000,000 capital, representing more wealth than the 1,750,000 people of Oklahoma. They have an immense business and it is all organized until it is run almost to perfection. We can have the commission and organize the same kind of work, and the work would be divided and one class of men would do one class of work and there would be no difficulty at all, no duplication of work, because after all there are not many of these large corporations.

Mr. PATERSON. The steel corporation produces steel rails at $28 a ton and the independent companies produce them for $30 a ton. Would you fix the rate at $30 a ton or $28 a ton; and if so, do you think it would be fair to the independents?

Mr. MORGAN. Of course, there could not be but one price. The commission would probably not be justified in fixing a price for the trust that would not be fair to the independents. That would apply to large corporations, too; they would not fix such a price that they

would have to go out of business, although in the course of time some small corporation might have to go out of business for the public good. I do not know how far that would go. Now, it is a fact that the United States Steel Corporation can manufacture steel at $2 or $3 or $4 per ton cheaper than the other companies. Then the one great force of that company is to fix the price of iron and steel products which go into every home in the land in one form or another. They have that power to tax the people. It is just another form of drawing the sustenance and products of labor from the people, and no such power should be in any corporation or artificial person if it is to be left unrestricted.

Mr. PATERSON. What we want is a remedy.

Mr. MORGAN. I think I have done my best to find a remedy.

Mr. PATERSON. Where is your remedy? If that great steel corporation can produce steel cheaper than any other company how are you going to have any competition?

Mr. MORGAN. I would, of course, give this commission the power to take up the question as to whether their prices were reasonable, and if they were making an unreasonable profit I think it ought to be brought down.

Mr. PATERSON. Well, you will admit now that if the small competitor can not compete with the steel corporation that it would be put out of business.

Mr. MORGAN. Well, you know that free competition results finally in a monopoly, and if the steel corporation was turned loose it would be an absolute monopoly in a few years, because it has the power to drive out every competitor.

Mr. WEBB. If your commission would fix one price for all the steel products in the country it would not be sixty days before the steel corporation would be without a competitor in the field.

Mr. MORGAN. Do we not recognize the fact that the prices of steel and iron are higher than they would be if we reduced to some extent the price charged by the trust, because if the probabilities are that those minor corporations are making more profit than they should——

Mr. WEBB (interposing). But you state that the Steel Trust can produce cheaper iron and steel. Suppose you cut the price 20 per cent. You have to cut it on the independent corporations to the same extent and they can not live nearly as well as the larger corporations under the cut price.

Mr. MORGAN. If you reduce the profit of the independent companies you also reduce the profit of the larger corporations.

Mr. WEBB. But you must have a standard price.

Mr. MORGAN. Yes, sir.

Mr. WEBB. The large corporation being better able to stand the cut, the big fish have the advantage in price over all the other fish in the water.

Mr. MORGAN. Yes, sir.

Mr. NELSON. I notice you have studied the subject a good deal and undoubtedly there are a great many other men who believe that ultimately we must fix the price.

Mr. PATERSON. That is the way with me.

Mr. NELSON. Now, one objection to that is this: If you fix a maximum price it must be 6 per cent or 8 per cent?

Mr. MORGAN. Well, assume something like that.

Mr. NELSON. Now, when a monopoly has a fixed price of 6 per cent or 8 per cent, what inducement is there to progress in the business?

Mr. MORGAN. Well, of course, from an economic standpoint, one of the objections made is that any restriction of price of individual business will tend to retard and discourage individual initiative and individual effort, and when the profits of a great corporation are limited they have no inducement to extend their business.

Mr. NELSON. Why should they? They have their fixed earnings and if they go into a new departure which necessitates an outlay of money they still get their 6 per cent or 8 per cent just the same.

Mr. MORGAN. Yes; but would it not be better for the people to have something of that kind than to be in a position where there are corporations that have an undue power to tax them? However, that is not the question. That may be met in some other way.

Mr. PATERSON. Inventions often reduce prices?

Mr. MORGAN. Well, they are supposed to in the long run, although some inventions have raised the prices or kept them up.

Mr. NELSON. We have argued that these great special interests should keep out of politics; but if some one is to fix prices, and their business, their dividends, their very life depends upon some public official, would not that drive them into politics to protect themselves?

Mr. MORGAN. Well, there is something in that; but we have assumed control of the transportation corporations, the public-service corporations, the public-utilities corporations, and of the banking institutions, and now we are about to pass a great banking bill with far-reaching effect. Now, some people argue that that is putting the banks into politics. Perhaps there is something in that, too; but as we have got to put power somewhere, we ought not to allow an artificial organization of men and capital to attain a power which they can exercise independently to the detriment of the great masses of the people. It seems to me that we must either absolutely wipe out these corporations and keep them within limited size and power or we must exercise governmental control over them. There is no more danger in this kind of control than there is in controlling the transportation companies. The Post Office Department has recommended that we assume control and operation of telegraph and telephone companies. Now, the probabilities are that in modern times and under modern conditions——

Mr. NELSON (interposing). Just a minute. You ultimately desire competitive conditions?

Mr. MORGAN. Yes, sir.

Mr. NELSON. And your bill is only a temporary method of reaching competition and breaking up these corporations?

Mr. MORGAN. Yes, sir.

Mr. NELSON. Or do you stand for regulative monopoly?

Mr. MORGAN. No, sir; I do not believe in monopoly.

Mr. NELSON. I mean regulated monopoly.

Mr. MORGAN. I do not believe in regulating monopoly. I do not believe in any complete monopoly. Now, we understand that there is every degree of monopoly existing. We say monopoly, but perhaps we have no real perfect or complete monopoly existing.

Mr. NELSON. The Aluminum Trust is a monopoly.

Mr. MORGAN. I do not know that.

Mr. VOLSTEAD. You mean in connection with iron?

Mr. NELSON. I mean in its own field.

Mr. MORGAN. It is a question of real monopoly. We have certain corporations which possess such monopolistic power that it is unsafe to permit them to go on unrestricted.

Mr. NELSON. But you want to keep the Sherman law?

Mr. MORGAN. Yes, sir.

Mr. NELSON. That indicates that you want competition?

Mr. MORGAN. Yes, sir; I do not think that is inconsistent. We have not destroyed all competition in the railroads.

Mr. FITZHENRY. Your bill is very largely administrative and does not suggest any economy.

Mr. MORGAN. Except probably the fixing of prices.

Mr. VOLSTEAD. I think one of the most important points is in regard to preventing unfair discrimination among localities. Of course, the commission would have the power to carry that out.

Mr. FITZHENRY. That is an administrative feature of the bill?

Mr. MORGAN. No; I declare that these practices must be fair and just and reasonable, which is not the case now, only so far as the Sherman antitrust law prohibits combinations in restraint of trade. There are thousands of other things that they can do and are doing now which are not prohibited. Now, I think we ought to declare by a general law, just as we have in regard to railways, that these unreasonable practices shall not be permitted, and leave it to the commission to decide whether it is fair or not. We declared that there should be no rebates in the railroads, and we also declared against unjust discrimination. The commission could find that a certain act was an unjust discrimination even though it be not prohibited by law.

Now, Mr. Chairman, that is all I have to say, and I desire to thank the committee for its courtesy for granting me this hearing.

The CHAIRMAN. We are much obliged to you, Mr. Morgan.

(Thereupon the committee adjourned.)

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Thursday, January 29, 1914.

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

The CHAIRMAN. This is the day which was fixed by the committee for the beginning of hearings on the antitrust measures, and Representative Stanley was invited to be here to deliver his views on the subject and in behalf of the various bills which he has introduced. Representative Henry, of Texas, was also invited to be present, but since he is unable to be here to-day, he has sent the chairman a note, which will be incorporated in the record at this point.

(The letter referred to is as follows:)

HOUSE OF REPRESENTATIVES, COMMITTEE ON RULES,
Washington, D. C., January 29, 1914.

Hon. H. D. CLAYTON,
Chairman Committee on the Judiciary,
House of Representatives.

MY DEAR MR. CLAYTON: Allow me to thank you for the courteous invitation extended to me to present my views on the needed legislation touching the antitrust problems.

It would give me great pleasure to appear to-day and enlarge upon the features embraced in the bill introduced by me some weeks ago, but I am unavoidably taken out of the city for a day or so and will not have the privilege of addressing the committee as suggested. I am inclosing copy of an address delivered by me before the South Carolina Bar Association on January 24, 1913, which I beg leave to call to the attention of the committee. This address embraces my views rather fully on the subject, and I do not know that I could add much to what I said on that occasion that would be of interest at this time in regard to the pending bills. It seems to me that my remarks on that occasion are in almost complete accord with the bills prepared by yourself and associates during the present month.

Very truly, yours,

R. L. HENRY.

(In accordance with the request of Mr. Henry, his address is here printed:)

ADDRESS OF HON. ROBERT LEE HENRY, OF TEXAS, BEFORE THE SOUTH CAROLINA BAR ASSOCIATION, ON JANUARY 24, 1913.

PENDING PROBLEMS IN FEDERAL LEGISLATION—ARGUMENT AGAINST INTERLOCKING DIRECTORATES AND VOTING TRUSTS AND FOR PROPER REGULATION OF INTERSTATE CORPORATIONS.

Mr. President and members of the South Carolina Bar Association, the invitation to address this association is one of the greatest honors that has ever come to me during my public career, and I shall endeavor to justify your courtesies by uttering no unworthy word here to-night. For the first time coming to a State whose history is replete with patriotic deeds, statesmanship, and the fame of distinguished lawyers, I am thrilled with the obligation of the hour and am not unmindful of the duties resting upon our honorable profession. In the course of my remarks there shall be no tinge of rancorous partisanship, but the times demand that I speak in candid and courageous fashion while treating the pending problems in Federal legislation, which is my theme for the evening.

Never in our history did the solution of public questions call for greater patriotism and braver speech than now. Clinging to the Constitution as fashioned and handed down by South Carolina's immortal men, in conjunction with those of her sister States, I shall deal with the great Federal issues now demanding solution in no veneered and dubious language. With that immortal instrument as my chart and guide I shall speak as one who loves his country and her institutions.

OUR ANTITRUST ACT.

Monopoly first began to prey upon the people in the time of Queen Elizabeth. Privileges of monopoly were granted by her to courtiers and servants till they became intolerable and were terminated by the wrath of the people in the enactment of the "statute of monopolies" in 1624. Our antitrust act is but the outgrowth of the spirit against monopolies which secured the passage of those ancient laws. Twenty-five years ago gigantic monopolies and conspiracies against trade in alarming proportions began to infest this country. Such types as the Standard Oil Trust, the Sugar Trust, and the Beef Trust raised their heads and began to gnaw at the vitals of commerce and trade. The people demanded their utter destruction, with no spirit looking to moderation of their ravages. In obedience to that demand, Congress passed what is known as the Sherman antitrust law, and on July 2, 1890, it was approved by Benjamin Harrison, the President.

THE SHERMAN ACT.

It has been construed in more than a hundred decisions, and the Supreme Court has held its provisions clearly constitutional. It has never been amended and should not be repealed. It can be supplemented and bettered. Every citizen should hug it to his bosom as a Magna Charta among our Federal statutes. This act came into being after months of profound study and by practically unanimous consent in the Congress of the United States. It is the Nation's will, and court and citizen should respect and uphold it.

Its origin and history are most interesting. The principles embraced in its provisions should be accredited to Senator Sherman, whatever critics may claim to the contrary, for on December 4, 1889, he introduced Senate bill No. 1, entitled "A bill to declare unlawful trusts and combinations in restraint of trade and production."

This was the beginning of the struggle against monopoly in Federal legislation, out of which the final bill emerged after various processes of amendment. History should record the truth and set this legislation down to the credit of the Ohio statesman. And patriots of whatever persuasion should preserve and perfect it to meet the emergencies of the hour.

The original Sherman bill, in section 3, denounced violations of its provisions as a felony and provided for "imprisonment in the penitentiary for a term of not more than five years, or both * * * fine and imprisonment, in the discretion of the court." We are not to-day more extreme than Senator Sherman, and yet the trusts and monopolies have increased a thousandfold in numbers and enormity of greed since his day.

On January 14, 1890, Senator Sherman reported his bill to the Senate, and it was there considered from week to week. On March 21, 1890, he reported from the Committee on Finance a substitute for his original bill. Whereupon Senator Reagan, of Texas, offered a substitute for the Senate committee's substitute. His bill set out at great length the acts constituting a trust and conspiracy against trade, and bristled with luminous and efficient definition. It, too, denounced violations of its provisions as a felony, and in certain and comprehensive language provided penalties. The pending amendments were considered on various occasions in the Senate, and on March 25, 1890, by a vote of 30 yeas to 12 nays, the Reagan substitute was added to the Sherman bill. On March 27, 1890, the Senate again resumed consideration of the bill, and upon motion of Senator Walthall, of Mississippi, the entire subject was referred to the Committee on the Judiciary.

THE SUBSTITUTE.

On the 2d day of April, 1890, Senator Edmunds reported a substitute of eight sections for the original bill and amendments. That substitute was and is the identical Sherman law of to-day. No matter what Senator wrote this or that language in the final draft, it was, after all, the culmination of the purpose and genius of Senator Sherman, whose inspiration was to reach and strike down monopolistic spirit abroad in the land. In multifarious forms the Senate considered the substitute reported from the Judiciary Committee. It passed that body and then went to the House. It there passed with amendments and went through two conferences, which finally struck out the amendments after debate clearly revealed that the act was understood to reach transportation companies doing an interstate business, and prohibited "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations," whether "reasonable" or "unreasonable." The conference report was agreed to, and the bill passed in exact form as reported by the Senate Judiciary Committee. By unanimous vote of 240 ayes the House passed the bill on June 20, 1890.

In closing the debate in the House, Mr. Stewart, of Vermont, said:

"The provisions of this trust bill are just as broad, sweeping, and explicit as the English language can make them to express the power of Congress on this subject under the Constitution of the United States."

Inflexible rules of reason and logic inevitably lead to the conclusion that its very first section prohibits "every combination in restraint of interstate or international commerce."

FIGHT BY THE TRUSTS.

The law having passed and the people vindicated in their demands for such legislation, the struggle on the part of the trusts to undo the achievement began. The first conflict came in the Knight case, which was lost to the Government on account of bad pleading and mismanagement on the part of the governmental officers. Emboldened by this accidental success, the trusts increased their defiance of the national will and prepared for further conflict in attacking the law.

JUSTICE PECKHAM'S DECISION.

Next came the case of the United States against Freight Association, decided by the Supreme Court in 1896. Justice Peckham, in a luminous decision, upheld the constitutionality of the law, which was vigorously assailed by trusts and monopolies. He said:

"When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language.

and no exceptions or limitations can be added without placing in the act that which has been omitted by Congress."

He said further:

"In other words, we are asked to read into the act by way of judicial legislation an exception that is not placed there by the lawmaking branch of the Government. * * * This we can not and ought not to do."

And in patriotic language he adds:

"If the act ought to be read as contended for by defendants, Congress is the body to amend it and not the court by a process of judicial legislation wholly unjustified."

The majority of the court agreed and upheld the law as written by Congress. Justice White registered his dissent stoutly, contending that the word "unreasonable" should be interpolated immediately before the word "restraint." He courageously took his stand in 1896, and the opinion speaks for itself.

Not content with this defeat, the trusts and monopolies renewed the attack for the purpose of dismembering the law and thwarting the will of the people. In 1898 the Supreme Court decided the case of the United States against the Joint Traffic Association. Again, Justice Peckham delivering the opinion of the court, the constitutionality and validity of the statute were sustained. In emphatic language the court reaffirmed the decision in the case of the Trans-Missouri Freight Association and reasserted that the word "unreasonable" can not and must not be supplied before the word "restraint" in the act.

WHAT THE COURT SAID.

The court said:

"This court with care and deliberation and also with a full appreciation of their importance again considered the questions involved in its former decision. A majority of the court once more arrived at the conclusion it had first announced, and accordingly it denied the application. And now for the third time the same arguments are employed, and the court is again asked to recant its former opinion and to decide the same question in direct opposition to the conclusion arrived at in the Trans-Missouri case. * * * As we have twice already deliberately and earnestly considered the same arguments which are now for a third time pressed upon our attention, it could hardly be expected that our opinion should now change from that already expressed."

And so in 1898 Justice White again dissented. The decisions were reaffirmed in numerous instances and became the settled rule of conduct. In 1907 the court again reaffirmed the decision in the Joint Traffic and Freight Association cases and said, in the case of the Shawnee Compress Co. *v.* Anderson (209 U. S. Rep.):

"It has been decided that not only unreasonable but all direct restraints of trade are prohibited, the law being thereby distinguished from the common law."

And with emphasis the Supreme Court said in the Northern Securities case:

"All contracts of that character, whether they are reasonable or unreasonable, are prohibited."

THE WORD "UNREASONABLE."

The trusts and monopolies meantime became disheartened at the action of the courts and subtly approached another forum. They came to Congress and caused a bill to be introduced supplying the word "unreasonable" where they had failed to insert it by judicial amendment. This bill was introduced at the second session of the Sixtieth Congress, in 1909. In the face of the decision of the courts, the bill proposed "that no prosecutions under the first six sections should be maintained for past offenses unless the contract or combination be in 'unreasonable' restraint of trade or commerce." The Senate Committee on the Judiciary, reporting against this proposed amendment, as well as others equally untenable, said:

"To amend the antitrust act as suggested by this bill would be to entirely emasculate it and for all practical purposes render it nugatory as a remedial statute. Criminal prosecutions would not lie, and civil remedies would labor under the greatest doubt and uncertainty. * * * To destroy or undermine it at the present juncture, when combinations are on the increase and appear to be as oblivious as ever to the rights of the public, would be a calamity."

Thus appealing to the courts and Congress to amend the act by writing the word "unreasonable" therein, dismal defeat in every effort met the emissaries of the trusts and monopolies.

From the first decision on this statute to the oil and tobacco cases, the courts have strongly held that the mere tendency to stifle competition brought the acts within the prohibition of the law, regardless of the fact whether such acts were reasonable or unreasonable. All reasonable citizens agree that ordinary purchases and sales, formation of partnerships and honest corporate organizations do not violate the Sherman

Act, although by incidental effect that may restrain as between parties interstate or foreign commerce. Monopoly is not constituted by size alone. The act is not violated where persons or corporations attain dominancy in business by normal and honest methods of enterprise. Such acts and agreements lack the elements of conspiracies constituting monopoly, combination, and intent to destroy competition and restrain trade.

WHAT "AGREEMENT" MEANS.

The Senate committee meant and the oil and tobacco cases mean, to state it in honest fashion, that the injection into the acts of whether an agreement or combination is reasonable or unreasonable renders it, as a criminal or penal statute, indefinite and uncertain, and hence nugatory and void, and would be tantamount to repealing that part of the act. For there is no older and better settled principle of the law than the rule that there can be no crime unless the act is one which the party must know in advance is criminal. It must be definite and certain. Since the Supreme Court has amended the act by writing the word "unreasonable" therein, it may be well feared that the criminal parts can not be enforced.

The defense of reasonable restraint will be made everywhere, and there are certain to be as many rules of what is reasonable as there are judicial forums in the country. The cases against the Standard Oil Trust and the Tobacco Trust had reached the Supreme Court in 1910. The trusts and monopolies rallied for one more effort in that forum and trained their guns against the provisions of the Sherman law. They made demand that the national will and legislative policy be thwarted by judicial amendment and that by a "modern rule of reason" only unreasonable trusts and monopolies be prohibited by law. Their advocates divided trusts and monopolies into "good" and "bad" and said the good ones are reasonable and only the bad ones can be unreasonable. Another battle was fought in the field of jurisprudence, and, with a changed personnel, the Supreme Court yielded to monopoly where thrice before they had refused to surrender. And in the year 1911, with a largely changed Supreme Court, the host of trusts and monopoly won a triumphant victory.

Before proceeding to state my views and analysis of the oil and tobacco cases, permit me to add that no man has a higher regard for the judiciary than that entertained by me. No patriotic citizen can afford to arouse prejudice against the courts. In the last analysis they are the palladium of our rights and liberties. Nor, on the other hand, should any reasonable man make a fetish of the judicial office. Judges are not above public opinion and criticism. Hence, fundamentally, I make no difference between the judicial and other offices, for they are all but creatures of the people's will and clothed with powers to be executed as trustees in behalf of the public under the Constitution and laws.

In the year 1911, after 15 years of weary waiting, Chief Justice White had his way and by a bare majority of one planted the decision of the court where he had stood in his dissenting opinion in 1896. In plain language he inserted the word "unreasonable" before the word "restraint," as he strongly contended was appropriate that year. In this judicial struggle it suits me to stand where the court stood in 1896, and where Justice Harlan took his stand in 1911. After exhaustive and patient study, my mind leads me to the inevitable conclusion that I must concur in the position assumed by that lamented justice, who in intellect ranks with America's greatest jurists.

WHAT JUSTICE HARLAN SAID.

In order that I may not transcend the proprieties of the occasion, permit me to reiterate what the public heard this eminent jurist say in the debate occurring in the Supreme Court the day the opinions were handed down. He said:

"With all due respect for the opinions of others, I feel bound to say that what the court has said may well cause some alarm for the integrity of our institutions."

Further along he said of the trusts and monopolies:

"They at once set up the baseless claim that the decision of 1896 disturbed the 'business interests of the country' and let it be known that they would never be content until the rule was established that would permit interstate commerce to be subjected to reasonable restraints."

With irrefragible logic he said:

"The only answer which in frankness can be given to this question is that the court intends to decide that its deliberate judgment 15 years ago, to the effect that the act permitted no restraint whatever of interstate commerce, whether reasonable or unreasonable, was not in accordance with the 'rule of reason.' * * * I have the authority of this court for saying that such a course of proceedings on its part would be 'judicial legislation.'"

Then he adds:

"I said at the outset that the action of the court in this case might well alarm thoughtful men who revered the Constitution. I meant by this that many things are intimated and said in the court's opinion which will not be regarded as otherwise than sanctioning an invasion by the judiciary of the constitutional domain of Congress—an attempt by interpretation to soften or modify what some regard as a harsh public policy. This court, let me repeat, solemnly adjudged many years ago that it could not, except by judicial legislation, read words into the antitrust act not put there by Congress."

Then, in patriotic warning, he threw out this statement, which is confirmed by my career as a representative of the people at Washington:

"After many years of public service at the National Capital, and after a somewhat close observation of the conduct of public affairs, I am impelled to say that there is abroad in our land a most harmful tendency to bring about the amending of constitutions and legislative enactments by means alone of judicial construction."

WHAT ROOSEVELT SAID.

The opinion of the court in the Tobacco case reaffirmed the victory achieved in the Oil case. It added nothing new in the application of the law. Indicating the view taken by the country of these opinions, allow me to quote a flamboyant announcement from a distinguished ex-President. In the Outlook he said:

"It is contended that in these recent decisions the Supreme Court legislated. So it did, and it had to, because Congress had signally failed to do its duty by legislating. * * * Where the legislative body persistently leaves open a field which it is absolutely imperative, from the public standpoint, to fill, then no possible blame attached to the official or officials who step in, because they have to, and who then do the needed work in the interest of the people. The blame in such cases lies with the body which has been derelict and not with the body which reluctantly makes good the dereliction."

Hamilton in his wildest dreams of absolutism never advanced the doctrine that the Supreme Court should legislate. Aye, more! This distinguished ex-President urges that not only shall the Supreme Court legislate where Congress fails to act or acts as he would not approve, but that executive officers and others officials shall make good the needed legislation by their action and usurpation. Away with such doctrine! Again I say, let us hug to our bosoms the Constitution of our fathers. Let the three departments occupy their spheres. Executive officers have no rights except those of executive character. Legislative officers have no prerogatives of power except those pertaining to legislation. Judicial officers have no rightful domain for exercise of their powers except in the judicial field. When they transcend that they should be scourged back by public opinion and criticism to their constitutional limitations, and the people invariably, with righteous indignation, should hold all officers within their corporate spheres. Any other view will wreck this Government, and we owe it to ourselves here and elsewhere to assert our conception of duty in courageous and candid action. This same gentleman in his article divides trusts and monopolies into good and bad, scouts the idea of a return to wholesome laws of competition, and proposes in lieu thereof the combination of good trusts and monopolies and the supervision of all by a small governmental commission to regulate them and give the good ones certain freedom and license. These doctrines are vicious and against the genius of our institutions and civilization. Our duty is in the other direction.

We must, to preserve our liberties, return to the ancient doctrine of competition and decree that combinations must be destroyed and private monopoly perish from the earth. Never should we assert that these vast monopolies and trusts may seek refuge under the wings of a small governmental commission of men with thousands of cases piled before them in every conceivable form of litigation, where private litigants are too poor to assert their rights.

If it be said that the courts should be above just criticism and that we should not raise our voices as sovereigns against them, let me remind you that they have not always been regarded as inviolate by the American people.

THE DRED SCOTT CASE.

More than 50 years ago Chief Justice Taney rendered a decision that provoked criticism and drew that great tribunal into the maelstrom of violent public discussion. To illustrate the feeling then engendered, let me remind you of some things said and done at that time. Mr. Blaine says:

"The aversion with which the extreme antislavery men regarded Chief Justice Taney was strikingly exhibited during the session of Congress following his death. The customary mark of respect in providing a marble bust of the deceased to be placed in the Supreme Court room was ordered by the House without comment or objection. In the Senate * * * the proposition to pay respect to the memory of the judge who had pronounced the Dred Scott decision was at once savagely attacked by Mr. Sumner. Mr. Sumner said: 'Taney would be hooted down the passages of history and that an emancipated country would fix upon his name the stigma that it deserved. He had administered justice wickedly, had degraded the judiciary, and degraded the age.'

"Mr. Sumner's protest was vigorously seconded by Mr. Hale, of New Hampshire, and Mr. Wade, of Ohio. The former said that a monument to Taney 'would give the lie to all that had been said by the friends of justice, liberty, and downtrodden humanity' respecting the iniquity of the Dred Scott decision. Mr. Wade avowed his belief that the 'Dred Scott case was got up to give judicial sanction to the enormous iniquity that prevailed in every branch of our Government at that period.'

"He insisted that the people of Ohio, whose opinions he professed to represent, 'would pay $2,000 to hang the late Chief Justice in effigy rather than $1,000 for a bust to commemorate his merits.'

"Mr. Sumner concluded the debate and said that in listening to the Senator from Maryland he was 'reminded of a character known to the Roman Church who always figured at the canonization of a saint as the devil's advocate.' He added that if he could help it 'Taney should never be recognized as a saint by any vote of Congress.' A vote was therefore abandoned on the 23d of February, 1865.

"Nine years after these proceedings, in January, 1874, the name of another Chief Justice, who had died during the recess, came before Congress for honor and commemoration. All the Senators who had spoken in the previous debate were gone, except Mr. Sumner, who had meanwhile been chosen for his fourth term, and Mr. Wilson, who had been elevated to the Vice Presidency. The bill was passed without debate and with the unanimous consent of the Senate."

All these harsh things were said, although the decision was absolutely correct and has never been overruled.

RECALL OF JUDGES.

With proper regard and respect for the judiciary, I must assert that those officials are more responsible for the specter of the recall of judges stalking through the country than any other influence in the Republic. There would be lack of candor in my remarks if I failed to declare that, in my humble judgment, the action of the Supreme Court in nullifying long and well-established adjudications in the income-tax decision and the antitrust cases is almost entirely responsible for stirring up the living issue of recall. If the court had not uprooted their former decision and thereby defied the national will as expressed in congressional enactment and changed by judicial construction and amendment plain words and acts, recall sentiment would not be so rife this day. It is not fair to charge that what some choose to call the rabble, the masses, have altogether aroused this sentiment. I repel the impeachment and defend the right of the people to discuss and seek solution of these problems. Without here discussing the necessity and desirability of recalling judges, long since I have concluded that there should be a speedier and more effective remedy than the cumbersome process of impeachment where impeachment will not lie.

REMOVAL BY ADDRESS.

There should be the cumulative remedy of "removal by address" for nonimpeachable cases by a majority vote of the House and Senate, as is done in England and many States of the Union. This would go far toward putting the Government more directly in the hands of the people and vesting sovereign final action where it appropriately belongs. This method of dealing with judges unfit for office has evolved an almost perfect judiciary system in England, where the judges rank with the world's greatest, and has worked with magic effect in States where it has been adopted and whose judges are unrivaled by the other Commonwealths. It is therefore commended as a supplementary remedy for the ponderous method of impeachment.

REMEDY FOR THE DEFECTS.

Having thus briefly outlined the history of our Federal antitrust statute and judicial construction touching the same, permit me to point out some apparent defects challenging attention and remedy.

First, it is essential to safeguarding the people's rights that the Sherman law should be amended or supplemented so that the "rule of reason" written therein by the Supreme Court shall be entirely eliminated and place the meaning of the statute where the framers intended it should be. The language should be written in such plain and unequivocal fashion that courts will never hereafter construe the word "unreasonable" into the wording thereof, either before the word "restraint" or anywhere else in the act, so that he who runs may read therein that all restraints of trade and commerce by trusts and monopolies, whether reasonable or unreasonable, shall be forever prohibited.

Congress should proceed to speedily repeal the judicial amendment which has maimed this important law. The act should be retained with all its present efficiency without the slightest impairment. Contracts and combinations now prohibited by it should so continue under its prohibitions, but there should be further accurate definitions so as to define with the utmost precision acts constituting a trust, monopoly, and combination. There should be no doubt and uncertainty left either in the minds of the courts or the offenders, and those engaged in business should be apprised of the exact limits of their activities under the law.

PROVIDE ADEQUATE PENALTIES.

And then adequate penalties should be provided and the stigma of a felony placed upon violators, as first proposed by Sherman, Reagan, George, Walthall, Vest, and others. The penitentiary should be designated as the place of abode for a term of years, ranging from 2 to 10 years, for those criminals who will not respect the majesty of this statute. We might not convict all offenders, but we would succeed in numerous cases and deter many from violating the law.

When the first act was passed there were not many trusts in existence. Amongst the larger ones were the Beef Trust, the Oil Trust, and the Coal Trust. Since that day they have grown until their capital stock amounts to billions and billions of dollars. With the Dingley and the Payne-Aldrich High Tariff Acts constituting a wall of protection around the Republic, our country has become a veritable breeding ground, seething and reeking with monopoly and combinations in restraint of legitimate trade and commerce. Two or three bankers in New York City have accumulated vast amounts of wealth and have taken under their wings the great railroad and industrial corporations of the country and are manipulating their finances. They run the daily balance in those banks to hundreds of millions of dollars. Four or five years ago these corporations and trusts deposited their funds in the localities where domiciled. But now they are compelled to pile up their deposits in these banks, under whose complete dominion they are now conducting their affairs. So manifest is this concentration and abuse that more than two years ago, before the startling developments were made before the Pujo Money Trust Committee, an eminent American statesman, Woodrow Wilson, said:

"The great monopoly in this country is the money monopoly. Our system of credit is concentrated. The growth of the Nation, therefore, and all our activities are in the hands of a few men, who, even if their action be honest and intended for the public interest, are necessarily concentrated upon the great undertaking in which their money is involved, and who necessarily, by very reason of their limitations, chill and check and destroy genuine economic freedom. This is the greatest question of all, and to this statesmen must adjust themselves with an earnest determination to serve the long future and the true liberties of men."

These were brave words, and we should proceed to take them as their meaning implies.

TESTIMONY OF MORGAN.

J. Pierpont Morgan and his partner, George F. Baker, admitted before a committee in Washington that they dominated and controlled practically all of the great interstate railways and industrial corporations and trusts through interlocking directorates, voting trusts, and various financial conspiracies. They have solemnly sworn before the congressional committee at Washington that in the aggregate they hold 385 directorates in 41 banks and trust companies, having total resources of $3,832,000,000 and total deposits of $2,834,000,000; 50 directorships in 11 insurance companies, having total assets of $2,646,000,000; 155 directorships in 31 railroad systems, having a total capitalization of $12,193,000,000 and a total mileage of 163,200; 6 directorships in 2 express companies and 4 directorships in 1 steamship company, with a combined capital of $245,000,000 and gross income of $97,000,000; 98 directorships in 28 producing and trading corporations, having a total capitalization of

$3,583,000,000 and total gross annual earnings in excess of $1,145,000,000; and 48 directorships in 19 public-utility corporations having a total capitalization of $2,820,000,000 and total gross annual earnings in excess of $428,000,000; in all, 746 directorships in 134 corporations, having total resources or capitalization of $25,325,000,000. To put it in perhaps more graphic form, it has been established before the Pujo committee, and Morgan, Baker, and their allies forced to there admit, that a phase of their conspiracy and Money Trust may be fairly put as follows:

THE GREAT SEVEN.

The following seven institutions have total resources of $1,398,000,000: J. P. Morgan & Co. (and Drexel & Co.), deposits, $163,000,000; Guaranty Trust Co., $292,000,000; Bankers' Trust Co., $205,000,000; First National Bank, $149,000,000; National City Bank, $247,000,000; Chase National Bank, $125,000,000; National Bank of Commerce, $190,000,000; that the Mutual and Equitable Life have combined resources of $1,091,000,000, making a total in these nine institutions of $2,489,000,000. The business of making large issues of securities of the great interstate corporations has during the past five years been conducted mainly on joint account between J. P. Morgan & Co., the First National Bank, and the National City Bank of New York; Lee Higginson & Co. and Kidder, Peabody & Co., of Boston; and the Illinois Trust & Savings Bank and the First National Bank of Chicago. This only partially illustrates their tremendous concentration of money and credit. Aye, more, not only do these gentlemen and their allies dominate business and finance, but they have grasped the reins of government and have given us a government by and for the trusts. Candor compels me to say that you may compare with fairness these identical men who control the Money Trust and they square completely and exactly with the names of those who financed the presidential campaign of 1904 for The Outlook editor, who now believes in emasculating the Sherman law by judicial amendment. The names of Morgan, Rockefeller, Stotesbury, Rogers, Archbold, Perkins, and others are found in the Money Trust group and the Political Trust group and fit into one another as the hand in the glove. Proof before the Pujo committee and the Clapp election committee reveal these two groups as being similar and joined together as the Siamese twins; and yet they are one and the same coterie. These things were first denied, but established by proof before these committees; all confess them.

INTERLOCKING DIRECTORATES.

George F. Baker, one of Morgan's partners and allies in the Money Trust, said at Washington that the banking credit of the country, amounting to $23,000,000,000, is virtually under complete sway of a small group of men in New York; that the leading banks, because of interlocking directorates, act in harmony in the control of large transactions; that the Nation's transportation interests in the same manner are under concentrated control and that the vast industrial enterprises are likewise dominated by this all-powerful association. He proudly boasted and explained the various devices employed to evade the law, or, as he phrased it, to "conform with the law." He admitted that in 50 years his single bank had collected $86,000,000 of profits upon a $500,000 capital; that banks were consolidated, despite the law, through the creation of holding companies; that there is a certain "concentration of power, in which Mr. Morgan is the overshadowing figure," and that the safety of the national interests lies solely in the personnel, the good intentions of these men. At last it is flaunted in the faces of the American people that these men have the safety of the Republic in their grasp and that we must trust to their goodness for our happiness and prosperity.

SOME OF THE PROBLEMS.

These things foreshadow some of the problems in Federal legislation, and we must meet them as men and patriots. Jackson won his fight and the Nation still lives. Wilson will win his and our institutions will survive and bless the generations yet to come. Turn where you will and there is a saturnalia of trust organization and monopolistic conspiracy. As Sir John Culpeper said in the Long Parliament, we may say of the trusts and monopolies now:

"They are a nest of wasps—a swarm of vermin which have overcrept the land. Like the frogs of Egypt, they have gotten possession of our dwellings and we have scarce a room free from them; they sup in our cups; they dip in our dish; they sit by our fire. We find them in the dye vat, washbowl, and powdering tub. They share with the butler in his box. They will not bate us a pin. We may not buy

our clothes without their brokerage. These are the leeches that have sucked the Commonwealth so hard that it is almost hectical."

These conditions point to the plain duty of Congress in some respects. We can drive out of interstate and foreign commerce every corporation with fictitious and watered stock, those whose capital stock is so great as to make them approximate monopoly, all holding companies, and all corporations whose stocks are owned and controlled by holding companies and other corporations. We can place a limitation on the capital stock of these corporations and banks; we can prohibit the holding and voting of the stock of these banks by other corporations; we can prevent interlocking directorates. We can prohibit their consolidating in the roundabout way now in vogue which piles up money in their vaults amounting to many millions of dollars to the detriment of the entire country. We have power under the Constitution to prevent this interlocking of directorates and coalescing of stocks and interests, and should hasten to apply it by congressional action. We know the facts, and a comprehensive law will bring the relief so manifestly just to the people. We can and should destroy protectionism and bring this country to a tariff strictly and only for revenue.

All these things will be consuming and burning political issues during the next few years and will not down till the appropriate legislative remedies have been devised and applied and the Government restored to the hands of the people, where their just rights will be safeguarded under a wise and courageous administration.

By a strange coincidence of history there have come out of the bosom of New Jersey the great trusts, the holding companies, and the gigantic monopolies. From this proud Commonwealth have come the dragon's teeth, and now it seems as if in the very providence and wisdom of God there has come from her borders the giant this year sent forth to exterminate the dragons infesting the land. When history is finally recorded, Jackson and New Jersey's governor will stand forth as the two great figures triumphing in memorable struggles as the champions of popular rights. We must have no class legislation and arraying of class against class. We must have no clamor against legitimate wealth honestly acquired. There must be no unjust attack against corporations and corporate powers within the limits of their granted charter rights. There should be no hysteria in our procedure. And still trusts and monopolies must be disintegrated and utterly eradicated. The conflict is and should be irrepressible.

As a legislator and an American I dedicate my energies to the people in this struggle, and with the Constitution as my guide and the sanctity of the law as my inspiration, I have enlisted in the contest until absolute equality for every citizen is again our watchword from ocean to ocean.

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.
R. 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.
L. C. DYER, Missouri.
GEORGE S. GRAHAM, Pennsylvania.
WALTER M. CHANDLER, New York.

J. J. SPEIGHT, *Clerk.*

TRUST LEGISLATION,

SERIAL 7, PART 2.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Thursday, January 29, 1914.

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

The CHAIRMAN. Representative Stanley is here, and if it is the pleasure of the committee, we will hear him at this time.

STATEMENT OF HON. AUGUSTUS O. STANLEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF KENTUCKY.

Mr. STANLEY. Mr. Chairman and gentlemen, the chairman has kindly consented that I shall be allowed to present to-morrow morning my authorities in support of the contention which I shall make this morning. I desire to appear at such a time as will suit the convenience of the committee. I can, without making verbatim citations, present my reasons for the adoption of the bill H. R. 12121. At a subsequent date I hope to be able to present to the committee my views on the subject of holding companies. I shall not discuss the question of holding companies at this time, in one way or another, but will confine myself to a discussion of the bill to which I have referred.

In my opinion the most necessary thing to the successful enforcement of the Sherman Act is to restore it to its pristine vigor, which

can be done by the interpolation of a few words. In that you will avoid what is the possible obiter dictum in the Standard Oil case, and subsequently in the American Tobacco Co. case, in which the word "unreasonable" or "undue" is interpolated into the act of Congress. I can do that by so wording an amendment to that act as to make it mean exactly what the court has repeatedly said it did mean, and a short review of the decisions on this subject will show this committee conclusively that the act has been repeatedly interpreted to mean exactly what it says, that all restraints of trade are a violation of the act.

The use of the words "reasonable" and "unreasonable" and many of the arguments defending their insertion in the act are in a way "catch phrases," and commend them unduly to popular consideration. There seems to be an idea in the public mind that there is an effort on my part in introducing this bill or that it is the intention on the part of those who favor it to exclude reason from the act, to permit an unreasonable construction, or that the act as interpreted prior to the Standard Oil and Tobacco cases had not a reasonable construction.

The fact that for more than 10 years from the decision in the Trans-Missouri Freight Association case until the Standard Oil and Tobacco cases, the Supreme Court of the United States in discussing this question repeatedly refused point blank to give it that construction is an answer to that argument. For to admit that to interpret the act according to its plain meaning is unreasonable is to admit that for 10 years in construing it the Supreme Court of the United States and the astute judges of the other Federal courts acted without reason and ignored the "rule of reason" from the interpretation of the act.

It is a pregnant fact that both in cases before the Supreme Court of the United States and in bill after bill before this House there has been a repeated attempt to write that word "unreasonable" into the act.

An act was reported in this House by Mr. Hepburn, supported by a great many labor organizations, in which the word "unreasonable" was written into the act, and upon a hearing in this committee it was found that the alleged act to relieve labor organizations from the operation of the Sherman Act was in fact prepared by Messrs. Morowetz and Stetson and submitted to the president of the United States Steel Corporation before it ever saw a committee of this House.

If you will examine the reports of the Industrial Commission, you will find a repeated and persistent effort to write the words "reasonable" and "unreasonable" into the act, and the reason for that is not far to seek.

A court can determine, gentlemen, when a contract operates as a direct restraint of trade. A court can determine when the purpose of the act is to restrain trade and when the restraint of trade is merely collateral and is not the design of parties to it. Courts have had no difficulty in determining when contracts made and acts done were made and were done with the purpose of creating a monopoly, or of restraining trade, and when there was material restraint of trade.

But when courts attempt to determine that such actual or material restraint of trade is unreasonable, they leave the question of law and go into a question of fact which requires the most expert knowledge

for its determination. Railroads may make combinations in restraint of trade, combinations and contracts such as were evidenced in the Joint Traffic Association case, and the Trans-Missouri Freight Association case, and the Northern Securities case, and upon the face of the pleadings, upon an inspection of the contracts, upon the formation of the holding companies, courts can determine, without difficulty, that the purpose and effect of such contracts is to enable the parties to them to make rates independent of the law of supply and demand by their arbitrary fiat, and not such rates as would prevail under normal conditions of business. But if that court should further attempt to find whether or not the rate arbitrarily fixed was reasonable, they would be lost in a maze of technical discussion from which they could not escape without the most elaborate inquiry, if at all.

A few days ago I was in Kentucky in a case in which the Imperial Tobacco Co. was indicted under a statute intended to prohibit combinations in restraint of trade, but the Kentucky statute is so worded as to make the offense consist in raising or lowering the price of a commodity or actually limiting its production. In other words, the restraint must have some tangible result before the parties to it can be held responsible. It became necessary to prove that this company had reduced the price of the product purchased below the cost of production or had reduced it below that for which it would have sold in an open market. For two weeks we heard evidence as to the cost of producing a pound of tobacco, and as to what was the market price of that product. It happened there was no open or competitive market. Some company was arbitrarily fixing the price everywhere in that community, and to determine what the cost of production was you had as many opinions as you had producers of tobacco. There was a contract plainly in restraint of trade, made between the Imperial Tobacco Co. of Great Britain and the Imperial Tobacco Co. of Kentucky, whose plain purpose was to restrain trade. There was no question about that. But to determine the extent to which prices were actually affected—i. e., that there was an unreasonable restraint of trade—was a question of fact that was almost impossible of determination.

More than that, you will find that since the opinion in the Standard Oil case the objections to the enforcement of this act by Chancellor Day, and by all others who are opposed to a rigid enforcement of the Sherman Act, are based almost without exception upon the argument that that law punishes an "unreasonable" restraint of trade, and that that is a matter of opinion as varied as the number of judges upon the bench, that no two juries will ever be of the same conclusion as to just what is a reasonable or an unreasonable restraint, that no two judges will form the same opinion, and that to convict a man because some judge who has no technical knowledge of the business considers an act reasonable or unreasonable is a mistake; that the whole act is a farce.

But, when you come to the naked question of whether a contract was made for the purpose of restraining trade, and whether it does restrain trade, you have a very much simpler and easier problem.

The history of this act demonstrates the correctness of my position. Take the first case in which the question was sharply raised, the Trans-Missouri Freight Association case.

In that case the Government, in its petition, filed a contract made by freight associations west of the Mississippi River and running from the Gulf of Mexico to the Canadian line. In that contract it was recited that the rates fixed by the association were just and reasonable and were made for the purpose of protecting the best interests of the shipper and the carrier alike.

The defendants admitted the making of the contract, but plead that by its terms it provided only for such restraint of trade, if it did restrain trade, as was reasonable and as was not undue; that it provided against exorbitant rates; that it provided against such charges as were excessive; and that under the common law no reasonable restraint of trade could be punished; and for that reason, there being no such restraint as defined by the common law, it could not be in violation of the Sherman antitrust act, which was, in a way, declaratory of the common law.

Justice Peckham in the decision in that case—and I will call attention to the text of that decision to-morrow—stated that there were but two questions before the court. First, Are common carriers included within the provisions of the Sherman act, or are they provided for in the various transportation acts? Second, Were reasonable restraints of trade forbidden by the Sherman act? In that decision Justice Peckham declares that it was the province of Congress to determine whether it would include or exclude reasonable restraints of trade; that the law plainly stated that every contract and every combination and every effort to create a monopoly or to restrain any part of the commerce between the States, is contrary to the law, and that admitting this restraint to be reasonable, it was no excuse for the making of the contract, which was plainly in violation of the act.

A short time after the rendition of this opinion, the Joint Traffic Association entered into a similar contract, carefully prepared and rich in provisions that excessive rates should not be charged, that nothing should be done by the parties to the same, some 25 or 30 railroad companies, to unduly burden the shipper, and alleging with much unction that the whole arrangement was especially designed for the purpose of enforcing just, equitable, and reasonable tariffs upon all freights carried by all the lines.

Again, the defendants answered that they were not within the provisions of the Sherman Antitrust Act, that the rates were reasonable, that the contract showed that an unreasonable rate could not be charged, and that case, coming up on the pleadings, it was maintained by the Government that this association should be dissolved because it had entered into a conspiracy to maintain alleged "reasonable" rates.

The greatest lawyers in the United States argued at great length before the Supreme Court of the United States that the country was frightened by the radical position of the court taken in the former case of the Trans-Missouri Freight Association; that to prohibit common carriers from entering into any contract, whether reasonable or unreasonable, was to destroy their business, that their stocks were being depressed, that a condition of uneasiness akin to panic prevailed on account of this unprecedented decision.

Again Justice Peckham rendered the decision. In that decision he said this question had but a short time before been presented to

the court in the Trans-Missouri Freight Association case, in an appeal for a rehearing it had again been decided, and that the decree then rendered was in effect a third determination of the same question.

Justice White, in a profound and elaborate opinion, expressed his dissent. His opinion in the Trans-Missouri case is a much abler presentation of his side of the case than his subsequent decisions in the Standard Oil and Tobacco Company cases; it is more concise and more powerful.

Mr. NELSON. May I interrupt you there?

Mr. STANLEY. Certainly.

Mr. NELSON. That point was directly in issue in those cases?

Mr. STANLEY. That was the only point.

Mr. NELSON. How was it in the Tobacco and Oil cases?

Mr. STANLEY. It was not an issue at all.

Mr. MCCOY. May I ask you a question there?

Mr. STANLEY. Certainly.

Mr. MCCOY. The Supreme Court has never yet decided, if I understand correctly, as a matter of an actual decision, that there is any distinction to be put into the act between reasonable and unreasonable, has it? In other words, the opinions in the Tobacco case undertook to make a distinction between reasonable and unreasonable restraints, but there has never yet been a decision of the court, a binding decision of the court, that there is any such distinction?

Mr. STANLEY. No, I think it is obiter dictum in this case. A great many people, however, entertain a different opinion.

Mr. MCCOY. Is it not true that the Supreme Court decided that only, that on the facts shown in this case, the law was violated?

Mr. STANLEY. That is all.

Mr. MCCOY. They did not hold that they were unreasonable restraints, but were restraints within the act?

Mr. STANLEY. If I understand correctly, it is a peculiar thing in that case, that the Standard Oil Company made no plea that there was any reasonable restraint of trade. It was either an absolute and cruel and far reaching monopoly, or it had acquired a control of those properties by legal methods. Its defense was not that it did not control commerce in petroleum, or its by-products, but that it secured that control by legal methods. The question as to the control of commerce in petroleum would have been ridiculous if presented, because from the day of the Standard Oil decisions in Ohio, when they attempted to reach the same result by putting their business in the hands of trustees instead of a holding company, the courts have held it to be a far-reaching monopoly.

Mr. MCCOY. Then my further question would be, in the absence of a decision of the Supreme Court to the effect that under the law you can discriminate between reasonable and unreasonable restraints, why should there be any amendment?

Mr. STANLEY. Many doubt the extent to which this decision is to be considered as obiter dictum.

At the same time, there is much in the decisions in both those cases; in fact, if I remember correctly, the court expressly says that in so far as previous decisions of the court have excluded the rule of reason, or have excluded the right of the court to determine whether the restraint is due or undue, reasonable or unreasonable, the former decisions of the courts are amended if not overruled to that extent.

Mr. McCoy. Just one more question, and I will not interrupt you further.

Mr. Stanley. I am glad to have you ask me questions.

Mr. McCoy. Do you think that the title of the act, which was, as I remember it, "An act to prevent unlawful restraint of trade," was properly used by the Supreme Court in interpreting the act?

Mr. Stanley. I think not, and that question——

Mr. McCoy (interposing). Admitting for the sake of the argument that the use of the title was proper; that is, that the consideration of the title was proper, would not that necessarily lead to the conclusion that the court was right in saying that there was a distinction to be made, under the act, between reasonable and unreasonable?

Mr. Stanley. I doubt if I would go that far. I think there was an unfortunate use of the title, and I doubt the propriety of using the word "unlawful" in the title; I very much doubt whether the use of the word "unlawful" in the title of the act would justify the conclusion that by unlawful monopolies was meant such monopolies as are not reasonable, and by unlawful restraints is meant such restraints as are not reasonable.

In the first case decided, the Trans-Missouri Freight Association case, Justice Peckham expressly says that the wording of the title should not be used to construe the meaning of the act in which the language is unequivocal.

Mr. Chandler. You stated, I believe, in the introductory part of your remarks, that repeated attempts had been made to amend this act and to insert the words "reasonable or unreasonable," and that these attempts had been defeated. Do you know whether at the time of the passage of the act in 1890 an attempt was made to have inserted in the act the words "reasonable restraint of trade"?

Mr. Stanley. I will not be positive, but I think the debates in Congress will show that the matter was discussed; but I am not positive.

Mr. Chandler. Is it not a fact that in the briefs in the Tobacco cases it is asserted that that was a fact, and the court's attention was called to the fact that an attempt was made to insert the word "reasonable," and that it had been defeated?

Mr. Stanley. You are probably right about that. I do not recall the matter positively, in regard to the debates at the time of the passage of the act. In the Standard Oil cases the question in regard to the words, "reasonable or unreasonable" was not mentioned.

Mr. Chandler. Would the Supreme Court, in determining the intention of Congress in passing an act, be bound by subsequent attempts, subsequent to the passage of the act, to insert the word "reasonable", or only by the attempt made at the time of the passage of the original act? That is, the Congress which passed the act is the Congress whose acts are to be interpreted by the courts and not any subsequent Congress.

Mr. Stanley. I think the debates in the House touching upon this act would be only considered material by the Supreme Court in their determining any possible ambiguity in the language of the act, just as you would determine the meaning of a word in the act by a study of the conditions of the times and the interpretations of the word at the time of the passage of the act. The debates of Congress would be material only in clearing up any latent ambiguity in the language.

Mr. CHANDLER. The judicial branch of the Government, as I understand it, has no right to try to usurp legislative functions by putting meanings into an act which Congress did not intend. But in determining what Congress intended the court considers the debates in the Congress which passed the act and debates in subsequent Congresses which are not construed by the court?

Mr. STANLEY. Yes, sir; I think that is right.

Mr. CHANDLER. And the repeated attempts which you say were made in subsequent Congresses to amend the act are not to be considered?

Mr. STANLEY. Various efforts were made to amend the act in subsequent Congresses. I mention this to show you that those interests which are endeavoring to escape the operation of the law have seen that by the interpolation of the word "unreasonable" into the act the effective enforcement of the act was rendered impossible, because you can not enforce an act to punish an unreasonable restraint of trade. It is impossible to determine in a court of justice, in any proceeding of normal length, what is an unreasonable restraint of trade, and if the burden of proving that the restraint is material and actual and that in addition thereto it is unreasonable falls upon the plaintiff, his case is lost in the beginning.

Mr. MCCOY. In order to clear up the question of the use of the debates in the decision of the case, did not the Supreme Court say, in the Standard Oil case, that the debates could not be considered?

Mr. STANLEY. The Supreme Court has repeatedly held that debates in Congress are not binding on the court and are admissible only for the purpose of determining the meaning of ambiguous language in the act.

The CHAIRMAN. I think the rule in regard to that is as follows:

> Although debates may not be used as a means for interpreting a statute (United States *v.* Trans-Missouri Freight Association, 166 U. S., 318, and cases cited), that rule in the nature of things is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law; that is, the history of the period when it was adopted.

This quotation is taken from the case of the Standard Oil Co. *v.* United States (221 U. S., p. 1).

Mr. STANLEY. In other words, statements indicating the conditions prevailing at the time of the passage of the act are relevant in determining its meaning.

Mr. MCCOY. Is that not exactly what they limited the use of the debates to, namely, to ascertain what the evil was which it was sought to remedy by the act, but not to make use of the debates for the purpose of ascertaining the meaning of a word or a phrase which might be ambiguous?

Mr. STANLEY. I think it would be perfectly competent to clear up an ambiguity. But that is elementary law.

Suppose the court should be called upon to determine, in the case of the United States Steel Corporation, now pending, that volume of trade has been unreasonably restrained by any act of this company, a volume of trade that is like the flow of the Mississippi River, including hundreds of millions of dollars' worth of property, vast transportation lines, an industry covering a continent, that its underlying and interlacing relations with hundreds of other companies, its secret sales, its hold upon the market and upon the trade, was undue

and unreasonable. No mortal man can tell to-day what would be the price of any commodity under the law of supply and demand where the law of supply and demand no longer operates. In the steel investigating committee we developed the fact that steel rails for 10 years had sold for $28 a ton, but we were never able to determine just what would be a fair price for steel rails. Most of the men who had technical knowledge in that matter who were called before us were experts depending for their living upon the favor of some of these concerns, and they hesitated to testify. To determine what was the real price of the article, what it would bring in the open market, unaffected by artificial and arbitrary conditions, was absolutely impossible, and yet those facts are essential, those facts must be determined before you can pass rationally upon whether the restraint is reasonable or unreasonable.

Mr. CAREW. If it appeared that one set of men had the entire control of the situation, such as you have indicated, irrespective of the price or the cost, would not that be unreasonable and restraint? As I understand the common law, the condemnation of monopoly, is not because of the price for which the article was vended, but because of the power it gave the individual. If the steel company has entire control, do you not think that might be regarded as unreasonable irrespective of the price?

Mr. STANLEY. No; the steel company might have absolute control and not try——

Mr. CARLIN (interposing). What percenatge of the business does the steel company control?

Mr. STANLEY. The steel company controls approximately one-half of the output of finished steel. They abstain from control of the finished products in order that their absolute control over the price of the semifinished product shall not be manifest. In other words, the price of all steel products is determined absolutely by the price of pig iron. Steel billets are sold at so much above the cost of conversion.

Mr. CARLIN. What percentage of the pig-iron production does the steel company control?

Mr. STANLEY. They control it all; and they say they absolutely control the price of pig iron. They do not produce all the pig iron, but they produce a good proportion of it. Then they produce about 2,000,000 tons more of steel than pig iron.

Mr. CARLIN. What percentage of pig iron do they produce?

Mr. STANLEY. Approximately 60 per cent of the pig iron, and the rest of the pig iron is produced by companies that do not sell pig iron. The price of pig iron is fixed by a certain medicum of that iron in the open market. They have the capacity for producing more pig iron than steel, but they abstain from producing two or three million tons of pig iron a year and buy the rest of the pig iron in the market—by taking up all the marketable pig iron, fix its price.

Mr. CARLIN. Do you favor giving the Trade Commission the power to fix the price of the product?

Mr. STANLEY. No, sir.

Mr. MORGAN. As I understand your position, Mr. Stanley, you think we should enact laws that will absolutely prohibit every kind and character of contract which in any way restricts trade?

Mr. STANLEY. Yes, sir; that is what we did prior to the Standard Oil decision, and nobody was hurt.

Mr. MORGAN. You think that would be wise legislation now?

Mr. STANLEY. It is safe and sane, by experience. We are not trying to do some new thing. We are getting back to the pristine vigor of the act.

Mr. MORGAN. Should we not now, as we propose to legislate, consider, not what Congress intended to enact by the Sherman anti-trust law, but what should be enacted now for the good of the people?

Mr. STANLEY. Yes.

Mr. MORGAN. As the Supreme Court has construed this, should it rather not be a question or a controversy as to whether they are right or wrong, or what Congress intended, but what is best now? Is not that the proposition?

Mr. STANLEY. I will take that question up now. I claim that the only act that is at all effective is an absolute prohibition. By an absolute prohibition I do not mean to intimate that every contract which in any way restrains trade will bring the man who is a party to it into the courts, or subject him to harrassing litigation. It does not follow that when we prohibit all contracts in restraint of trade that contracts which restrain trade incidentally or in no pernicious degree to the normal discharge of business will necessarily bring the parties to them into court.

Mr. MORGAN. Why not?

Now, here is the proof that such an act will not be injurious to the best interests of business. For 10 years that act was repeatedly held to be just what it said, and no man suffered.

Mr. MORGAN. Was not the business public all the time violating it?

Mr. CHANDLER. Unconsciously.

Mr. CAREW. Would not the word "maximum" have the same effect as "unreasonable?"

Mr. STANLEY. I want to answer all your questions, and I will take them up one at a time.

Take up the first question; that is, Do the demands of business now require the writing of the word "reasonable" or "unreasonable" in that act? I will refer from memory now to a decision, and I will take pleasure in giving you the decision in full in support of what I say. The Supreme Court of the United States, and the Federal courts in some decisions, have held with emphasis that commerce is like a great stream, that it is illegal to impede its free and uninterrupted flow, that it shall flow untrammeled and uninterrupted; and Justice Harlan, in the Northern Securities case, said that any commerce, foreign or domestic, interstate or between nations, shall not in any way, anywhere, by any device, be impeded in any degree, and yet that law as at first interpreted by Judge Lurton and by Judge Day and Justice Peckham and by Justice Harlan remained on the statute books, and we have four volumes of Federal decisions on the subject, and there has not from the beginning until the end been a single case in which the court ever held that any defendant was guilty of a trifling invasion of that act, and yet now we are to emasculate this act to meet a condition that never occurred in 20 years in the enforcement of that act.

The common law on the subject is misleading, and the history of the common law is absolutely necessary to a correct understanding of the decisions which interpret it. You must remember that a monopoly, as discussed by Lord Coke, was a patent—nothing more; a monopoly of

business in a community where people seldom went 50 miles beyond their homes, as a rule, where the production of all the necessaries of life, of clothing, of implements of all kinds, all the major transactions, the production of iron and steel, were confined to a community of blacksmiths. The conditions rendered it absolutely impossible for any one man to get control of a business beyond the narrow circle of his immediate environment, and for that reason cases under the common law usually died with some man's selling out his rights to operate a shop or a mill, to engage in a profession in his community.

Mr. CAREW. Did not the making a monopoly the manufacturing of playing cards involve the whole realm of that subject?

Mr. STANLEY. A monopoly, to be effective, had to be by royal grant. It was not by the energy of an individual who gained control of thousands of miles of railroad and vast resources of coal and iron.

The power of the individual to take away from his competitor a legitimate business was unheard of; it was a physical impossibility. It never existed, and for that reason the monopolies with which Lord Coke dealt were royal grants.

Now, if I may digress. England never had more than 100 years of despotism in her whole history from the time of Bradicea and Canute until the end of the Wars of the Roses. Kings had little power. They were practically controlled by masterful barons who made and unmade them.

The invention of gunpowder made the yeomen the peer of the knights on horseback, and the power held by the barons and by the nobility was gone. In England it was gradually absorbed by the people. They took a part of it at Runnymede on the Thames, and in subsequent Bill of Rights.

In France, under Richelieu and Mazarin it was centered in the throne. For a while it appeared that the English Kings would become heirs to the powers of the barons, and so you found the Tudors the absolute monarchs from Henry VII to Elizabeth, and the most absolute among them was Queen Elizabeth herself. No English monarch ever exercised so absolute a sway.

Mr. NELSON. Before that time was there much granting of monopoly rights or patents?

Mr. STANLEY. Very little.

Mr. NELSON. Was she not compelled by public sentiment, to cease?

Mr. STANLEY. That is what I am coming to. She granted the right to make playing cards, and every conceivable thing, to various of her favorites. She recited that it was for the benefit of trade?

Mr. MCCOY. What was the condition of the law in regard to monopoly at the time of the adoption of our Constitution—I mean the law in England?

Mr. STANLEY. I am coming to that further on. I wish to get through with this proposition. Those Royal grants became intolerable, and the common people raised in rebellion for the first time against the autocratic and arbitrary monarch. She declared the Royal grants were the immediate jewels of her crown, and they were defended by the wisest man ever born of woman—Sir Francis Bacon. He admonished the Commons it was not for them to challenge the prerogative of an English Queen, that they should come as suppliants.

But he could not quell it, and at last in what is called her golden speech, that wise monarch, seeing she could no longer stem the tide of inveterate opposition, agreed that each and every one of her grants

should be turned over to the courts, and that they should determine the question. Lord Coke attempted to distinguish between the grants that were reasonable and unreasonable or undue in their restraint of trade, and in the various decisions in which he discussed monopolies, he admits it can not be done. He uses this strong language, "That there is not any degree in mischief." He declares that all monopolies are evil.

Mr. MORGAN. Is it not a fact——

Mr. STANLEY. Let me go on a little further. They found that you can not control monopolies by prohibiting those that were undue and unreasonable by leaving every royal grant to the determination of a court of chancery. In the reign of her successor, James I, they passed an act against monopoly, and I will submit that to the committee to-morrow. It is as sweeping and as drastic and as absolute in its definitions as the Sherman Act or the present act, for the reason that they found that even then you could not have good and bad trusts, and you could not have reasonable and unreasonable monopolies.

The judges in that day in their vain attempt to classify restraints of trade as reasonable and unreasonable admit their failure by the act of James I.

Mr. FLOYD. The question I wanted to ask you was this, Mr. Stanley. The Sherman law is written in language as broad as you contend for, without any exception?

Mr. STANLEY. Yes, sir.

Mr. FLOYD. And the courts for 10 years interpreted it in that broad light, and then finally under this interpretation given in the Standard Oil case, a question of unreasonable restraint of trade was interjected into it. How can we prepare a statute in any broader terms than the Sherman law? If they put this interpretation into the Sherman law how are we going to prevent them from making a similar interpretation of any new law?

Mr. STANLEY. You can incorporate into the law the words "in any degree;" that would do it, in my opinion.

Mr. FLOYD. In what section of your bill?

Mr. STANLEY. My bill provides that after the words "shall restrict any part of the commerce of the United States" the words "in any degree" shall be inserted, and I further provide that all evidence showing or tending to show that the alleged restraint was due or undue, reasonable or unreasonable, shall be admissible only for the purpose of determining a quantum of damages, or the degree of punishment, and for no other purpose whatsoever.

Mr. MCGILLICUDDY. Suppose you say, "in any degree;" what is to prevent the court from saying that you mean in any reasonable degree?

Mr. STANLEY. The further provision that that evidence shall be heard for one purpose only and for no other.

Now, I wish, hurriedly, to call attention to another matter. Outside of the difficulty or impossibility of determining whether a restraint is reasonable or unreasonable——

The CHAIRMAN. There has just been a call of the House, and the committee will have to adjourn at this time. We will hear Mr. Stanley further to-morrow morning.

(Thereupon, at 12.05 o'clock p. m. the committee adjourned until to-morrow, Friday, January 30, at 10.30 o'clock a. m.)

Mr. STANLEY. It will not do to assume that the defense that a contract is not in unreasonable restraint of trade will not again be made, when we consider that it was the first defense that ever was made to this act and that it has been constantly repeated. In the case of the United States *v.* The Trans-Missouri Freight Association, decided by the United States Supreme Court on March 22, 1897, which was the first great case under this act, and in which the court interpreted this law. In that case but two defenses were made by the Trans-Missouri Freight Association, first that the law did not apply to railroad companies, and second that the restraint of trade contemplated by the contract into which these carriers entered was not undue or unreasonable.

Said Justice Peckham:

The next question to be discussed is as to what is the true construction of the statute, assuming that it applies to common carriers by railroad. What is the meaning of the language as used in the statute, that "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations is hereby declared to be illegal"? Is it confined to a contract or combination which is only in unreasonable restraint of trade or commerce, or does it include what the language of the act plainly and in terms covers—all contracts of that nature?

We are asked to regard the title of this act as exhibitive of its purpose to include only those contracts which were unlawful at common law, but which require the sanction of a Federal statute in order to be dealt with in a Federal court. It is said that when terms which are known to the common law are used in a Federal statute those terms are to be given the same meaning that they received at common law, and that when the language of the title is "To protect trade and commerce against unlawful restraints and monopolies," it means those restraints and monopolies which the common law regarded as unlawful and which were to be prohibited by the Federal statute. We are of the opinion that the language used in the title refers to and includes and was intended to include those restraints and monopolies which are made unlawful in the body of the statute. It is to the statute itself that resort must be had to learn the meaning thereof, though a resort to the title here creates no doubt about the meaning of and does not alter the plain language contained in its text.

It is now with much amplification of argument urged that the statute in declaring illegal every combination in the form of trust or otherwise or conspiracy in restraint of trade or commerce does not mean what the language used therein plainly imports, but that it only means to declare illegal any such contract which is in *unreasonable* restraint of trade, while leaving all others unaffected by the provisions of the act; that the common-law meaning of the term "contract in restraint of trade" includes only such transactions as are in *unreasonable* restraint of trade, and when that term is used in the Federal statute it is not intended to include all contracts in restraint of trade, but only those which are in unreasonable restraint thereof.

The term is not of such limited signification. Contracts in restraint of trade have been known and spoken for hundreds of years both in England and in this country, and the term includes all kinds of those contracts which in fact restrain or may restrain trade. Some of such contracts have been held void and unenforceable in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. Contracts may be in restraint of trade and still be valid at common law. Although valid, it is nevertheless a contract in restraint of trade and would be so described at common law or elsewhere. By the simple use of a term "contracts in restraint of trade," all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress.

The court goes on to say:

The arguments which have been addressed to us against the inclusion of all contracts in restraint of trade, as provided for by the language of the act, have been based upon the alleged presumption that Congress, notwithstanding the language of the act, could not have intended to embrace all contracts, but only such contracts as were in unreasonable restraint of trade. Under these circumstances, we are therefore asked to hold that the act of Congress excepts contracts which are not in unreasonable restraint of trade, and which only keep rates up to a reasonable price, notwithstanding the language of the act makes no such exception. In other words, we are asked to read into the act by way of judicial legislation an exception that is not placed there by the lawmaking branch of the Government, and this is to be done upon the theory that the impolicy of such legislation is so clear that it can not be supposed Congress intended the actual import of the language it used. This we can not and ought not to do. That impolicy is not so clear, nor are the reasons for the exceptions so potent as to permit us to interpolate an exception into the language of the act, and to thus materially alter its meaning and effect. It may be that the policy evidenced by the passage of the act itself will, if carried out, result in disaster to the road and in a failure to secure the advantages sought from such a policy. Whether that will be the result or not we do not know and can not predict. These considerations are not, however, for us. If the act ought to be read as contended for by the defendants, Congress is the body to amend it and not this court by a process of judicial legislation wholly unjustifiable.

Justice White, in a dissenting opinion in this case, clearly understood the full force and import of the strong and lucid finding of Justice Peckham.

Said Justice White:

To state the proposition in the form in which it was earnestly pressed in the argument at bar it is as follows: Congress has said every contract in restraint of trade is illegal. When the law says every, there is no power in the courts, if they correctly and apply the statutes, to substitute the word "some" or the word "every." If Congress has meant to forbid only restraints of trade which were unreasonable, it would have said so. Instead of doing this it has said *every*, and this word of universality embraces both contracts which are reasonable and unreasonable.

Notwithstanding the fact that all restraints of trade, whether reasonable or unreasonable, were held to be in violation of the law, and notwithstanding the fact that the question was argued so exhaustively and decided so emphatically by Justice Peckham in the case of the United States *v.* The Trans-Missouri Freight Association, the same question was again presented in a case similar in all essential respects—the United States *v.* The Joint Traffic Association—in which thirty-odd railroads entered into an agreement which provided in terms for rates which were reasonable.

The opinion in this case was rendered by the same justice who decided the trans-Missouri case. He again insisted that this question had been previously deliberately decided.

In that decision he says:

Finally, a reconsideration of the questions decided in the former case is very strongly pressed upon our attention because, as stated, the decision in that case is quite plainly erroneous, and the consequences of such error are far-reaching and disastrous, and clearly at war with justice and sound policy, and the constructions placed upon the antitrust statute have been received by the public with surprise and alarm.

We will refer to these propositions in the order in which they have been named.

As to the first, we think the report of the trans-Missouri case clearly shows not only that the point now taken was there urged upon the attention of the court, but it was then intentionally and necessarily decided. The whole foundation of the case, on the part of the Government was the allegation that the agreement there set forth was a contract or combination in restraint of trade, and unlawful on that account.

Then, a little later in the decision, the court says:

The extract from the opinion of the court above given shows that the issue so made was not ignored, nor was it assumed as a concession that the agreement did restrain

trade to a reasonable extent. The statement in the opinion is quite plain, and it inevitably leads to the conclusion that the question of fact as to the necessary tendency of the agreement was distinctly presented to the mind of the court and were consciously, purposely, and necessarily decided. It can not, therefore, be correctly stated that the opinion only dealt with the question of the construction of the act, and that it was that the agreement did to some unreasonable extent restrain trade.

And again the court said:

Finally, we are asked to reconsider the question decided in the trans-Missouri case and to retrace the steps taken therein because of the plain error contained in that decision and the widespread alarm with which it was received, and the serious consequences which have resulted or may soon result from the law as interpreted in that case.

It is proper to remark that an application for a reconsideration of the question but lately decided by this court is usually based upon a statement that some of the arguments employed upon the original hearing of the question have been overlooked or misunderstood, or that some controlling authority has been either misapplied by the court or passed over without discussion or notice. While it is not strictly an application for a rehearing in the same case, yet in substance it is the same thing. The court is asked to reconsider a question but just decided after careful investigation of the matter involved. There have heretofore been in effect two arguments of precisely the same questions now before the court, and the same arguments were addressed to us on both those occasions. The report of the trans-Missouri case shows a dissenting opinion delivered in that case, and that the opinion was concurred in by three of the members of the court.

That opinion, it will be seen, gives with great force and ability the arguments against the decision which was finally arrived at by the court. It was after a full decision of the questions involved and with a knowledge of the views entertained by the minority as expressed in the dissenting opinion that the majority of the court came to the conclusion it did. Soon after the decision a petition for a rehearing of the case was made supported by a printed argument in its favor, and pressed with an earnestness and vigor and at a length which were certainly commensurate with the importance of the case.

This court, with care and deliberation and also with a full appreciation of their importance, again considered the questions involved in its former decision.

A majority of the court once more arrived at the conclusion it had first announced, and accordingly it denied the application; and now for the third time the same arguments are employed and the court is again asked to recant its former opinion and to decide the same question in direct opposition to the conclusion arrived at in the trans-Missouri case.

The learned counsel while making the application frankly confess that the argument in opposition to the decision in the case above mentioned has been so fully, so clearly, and so forcibly presented in the dissenting opinion of Mr. Justice White that it is hardly possible to add to it, nor is it necessary to repeat it.

The fact that there was so close a division of opinion in this court when the matter was first under advisement, together with the different views taken by some of the judges of the lower court, led us to the most careful and scrutinizing examination of the arguments advanced by both sides, and it was after such an examination that the majority of the court came to the conclusion it did.

It is not now alleged that the court on the former occasion overlooked any argument for the respondent or misapplied any controlling authority. It is simply insisted that the court, notwithstanding the arguments for an opposite view, arrived at an erroneous result which, for reasons already stated, ought to be reconsidered and reversed.

As we have twice already deliberately and earnestly considered the same argument which are now for a third time pressed upon our attention, it could hardly be expected that our opinion should now change from that already expressed.

The idea that the Sherman Act was intended to be declaratory of the common law and to provide penalties for the acts which, under the common law, were simply void, and that the terms used in the act should be interpreted as they had previously been interpreted under the common law, was exploded in the earliest decisions rendered upon this subject. Said Judge Morrow:

It is not limited to contracts and agreements that were unlawful at common law, nor to restraints and monopolies in violation of State statutes.

In U. S. *v.* Trans-Missouri Freight Association (166 U. S., 290-327; 17 Sup. Ct., 540) the Supreme Court, referring to this title, said:

"The title refers to and includes, and is intended to include, those restraints and monopolies which are made unlawful in the body of the statute. It is to the statute itself that resort must be had to learn the meaning thereof, though a resort to the title here creates no doubt about the meaning of and does not alter the plain language contained in the text."

The first and second sections of the act are as follows:

"SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding $5,000 or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States or with foreign nations shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

In the freight association case, supra, it was contended that this statute in declaring illegal every combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, did not mean what its language imports, but that it only meant to declare illegal any such contract which is in unreasonable restraint of trade, while leaving all others unaffected by the provisions of the act. The court discusses this question and arrives at the conclusion that—

"When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is limited to that kind of contract alone which is unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress."

It is therefore no defense of a contract or combination, alleged to be in violation of the act, to say that, in view of all the circumstances and conditions, the contract or combination imposes only a fair and reasonable restraint upon trade and commerce. The question is, Does it impose any restraint whatever? If it does, no matter how little or reasonable it may be, it is within the prohibition. This interpretation is in harmony with the other provisions of the statute which make it unlawful to monopolize or attempt to monopolize any part of the trade or commerce among the several States or with foreign nations. The contract under consideration in the freight association related to traffic rates for the transportation of persons and property by competing common carriers by railroad; but the doctrine of the case applies as well to articles of commerce—the subject of transportation—as it does to the business of transportation itself; and the clear and positive purpose of the statute must be understood to be that trade and commerce within the jurisdiction of the Federal Government shall be absolutely free, and no contract or combination will be tolerated that impedes or restricts their natural flow and volume. * * * It is not, however, necessary to multiply authorities dealing with this statute. They are numerous, and they all clearly establish the doctrine that commerce among the several States and with foreign nations must be absolutely free and untrammeled, except as it may be regulated by Congress.

In the case of the United States *v.* The Addyston Pipe & Steel Co. (85 Fed., 278) the most elaborate endeavor was made to present conditions under which trade might actually be restrained without unduly or unreasonably affecting competition or limiting competition. These specious and yet plausible arguments were reviewed by the learned Judge Taft, afterwards President of the United States.

Judge Taft said, in the opinion on that case:

The contention on behalf of defendants is that the association would have been valid at common law and that the Federal antitrust law was not intended to reach any agreements that were not void and unenforceable at common law. It might be a sufficient answer to this contention to point to the decision of the Supreme Court of

the United States in United States *v.* Trans-Missouri Freight Association (166 U. S., 290; 17 Sup. Ct., 540), in which it was held that contracts in restraint of interstate transporation were within the statutes whether the restraints would be regarded as reasonable at common law or not.

A little farther along in the decision Judge Taft said:

The argument for defendants is that their contract of association was not, and could not be, a monopoly, because their aggregate tonnage capacity did not exceed 30 per cent of the total tonnage capacity of the country; that the restraints upon the members of the association, if restraints they could be called, did not embrace all the States and were not unlimited in States; that such partial restraints were justified and upheld at common law if reasonable and only proportioned to the necessary protection of the parties; that in this case the partial restraints were reasonable, because without them each member would be subjected to ruinous competition by the other.

The learned judge, admitting that all these things might be true, asserts with emphasis that under the Sherman Act there can be no excuse for its violation. He says:

Upon this review of the law and the authorities, we can have no doubt that the association of the defendants, however reasonable the prices they fixed, however great the competition they had to encounter, and however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill-advised competition, was void at common law, because in restraint of trade and tending to a monopoly.

The plain purpose of this act was not simply to punish combinations after they had produced an intolerable monopoly or had so restrained trade as to render their interference with it confessedly without reason or excuse, but to prevent any impeding or hampering of the natural flow of commerce. The purpose of this act was to protect trade between the States from any and all interference, from every character and description of restraint, and 14 years ago Justice Day, in deciding the case of the Chesapeake & Ohio Fuel Co. *v.* The United States, treated this interpretation of the law as settled beyond further question or cavil. In the course of that decision (115 Fed., 619) Justice Day said:

Is the contract in restraint of trade within the meaning of the law? As we understand the decisions of the Supreme Court of the United States, the construction of the statute is no longer an open question. At the common law contracts were invalid when in unreasonable restraint of trade, and were not enforced by the courts. (See opinion of this court, per Taft, circuit judge, in U. S. *v.* Addyston Pipe & Steel Co., 29 C. C. A., 141; 85 Fed., 271-279; 46 L. R. A., 122.) By the constitution of the United States, Congress is given plenary power to regulate commerce between the States and foreign nations. In the exercise of this power Congress may prevent interference of the States with the freedom of interstate commerce, and may likewise prohibit individuals, by contract or otherwise, from impeding the free and untrammelled flow of such trade. In the exercise of this right Congress has seen fit to prohibit all contracts in restraint of trade. It has not left to the courts the consideration of the question whether such restraint is reasonable or unreasonable, or whether the contract would have been illegal at common law or not. The act leaves for consideration by judicial authority no question of this character, but all contracts and combinations are declared illegal if in restraint of trade or commerce among the States. (U. S. *v.* Trans-Missouri Freight Association, 166 U. S., 290; 17 Sup. Ct., 540; 41 L. Ed., 1007. U. S. *v.* Joint Traffic Association, 171 U. S., 505; 19 Sup. Ct., 25; 43 L. Ed., 259. Addyston Pipe & Steel Co. *v.* U. S., 175 U. S., 211; 20 Sup. Ct., 96; 44 L. Ed., 136.)

While this is the general rule to be deduced from the authorities, it is to be remembered that the Supreme Court has also declared:

"An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect commerce." (U. S. *v.* Joint Traffic Assn., 171 U. S., 505, 568; 19 Sup. Ct., 25; 43 L. Ed., 259.)

The question is in each case, Does the contract or combination have the necessary effect to restrain interstate commerce? A contract or combination which interferes

with the freedom of interstate commerce and hinders or prevents its free enjoyment to the extent that it does so restrains that commerce and is illegal. It was the policy of the common law to discourage monopoly and to refuse to enforce contracts which had the effect to suppress competition. It was believed and declared by those who built up that system of jurisprudence that the public interests were best subserved when commerce and trade were left unfettered by combinations and agreements which had the effect to destroy competition in whole or in part. It was in the same spirit and with the same end in view that Congress passed the act under consideration, which is aimed to maintain interstate commerce on the basis of free competition, and contracts which have the necessary tendency to restrain that freedom are within the contemplation of the law. The courts are not concerned with the policy of such a law. It is not for them to inquire whether it be true, as is often alleged, that this is a mistaken public policy, and combinations, in the reduction of the cost of production, cheapened transportation, and lowered cost to the consumer has been productive of more good than evil to the public. The Constitution has delegated to Congress the right to control and regulate commerce between the States. In the exercise of this right it has declared for that policy which shall keep competition free and leave interstate commerce open to all, without the right to any to fetter it by contracts or combinations which shall put it under restraint.

Judge Thayer, in the case against the Northern Securities Co., comments upon the wide and sweeping provisions of this act as indicative of the deliberate purpose of Congress to—

brand as illegal every contract and combination in the form of trust or otherwise, or conspiracy in the restraint of trade or commerce among the several States or foreign nations. Learned counsel on both sides have commented on the general language of the act, doing so, of course, for a different purpose, and the generality of the language employed is, in our judgment, of great significance. It indicates, we think, that Congress, being unable to foresee and describe all the plans that might be formed and all the expedients that might be resorted to to place restraints on interstate trade or commerce, deliberately employed words of such general import as, in its opinion, would comprehend every scheme that might be devised to accomplish that end.

Further down, the opinion says:

Moreover, in cases arising under the act, it has been held by the highest judicial authority in the Nation, and its opinion has been reiterated in no uncertain terms, that the act applies to interstate carriers of freight and passengers as well as to all other persons, natural or artificial.

To the same effect Judge Shepherd, in a charge to the jury in the case of the United States *v.* The American Naval Stores Co. (172 Fed. Rep., p. 455), says:

As to what constitutes a restraint of trade under the statute, the act prohibits any combination which obstructs the free flow of commerce between the States, or restricts in that regard the liberty of a trader engaged in business.

The prohibitory provisions of the act under consideration apply to all monopolies, combinations, or conspiracies in restraint of interstate or foreign trade or commerce, without exception or limitation, and are not confined to those in which the restraint is unreasonable. The Government need not show that a conspiracy is entered into for the direct purpose of restraining trade or commerce, if such restraint is its necessary effect.

Every possible doubt remaining as to the all-embracing sweep of this act was removed by Justice Harlan in the Northern Securities case.

It does embrace and declare to be illegal every contract, combination, or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates in restraint of trade or commerce among the several States or with foreign nations.

The act is not limited to restraints of interstate and international trade and commerce that are unreasonable in their nature, but embraces all direct restraints imposed by any combination, conspiracy, or monopoly upon such trade or commerce.

That railroad carriers engaged in interstate or international trade or commerce are embraced by the act.

That combinations even among private manufacturers or dealers whereby interstate or international commerce is restrained are equally embraced by the act.

That Congress has the power to establish rules by which interstate and international commerce shall be governed, and, by the antitrust act, has prescribed the rule of free competition among those engaged in such commerce.

And again, in the case of the Continental Wall Paper Co. *v.* Lewis Voight & Sons Co., Judge Lurton said:

As to the first point, it need only be said that the legality of the contract between the combining companies at common law, as imposing only a reasonable restraint upon the freedom of competition, is not a defense, if the dominant purpose of the agreement and the direct result of its operation is to directly and not incidentally restrain freedom of commerce between the States or with foreign nations.

Prior to the decision in the Standard Oil case some Federal judges at least had gone so far as to declare that the question of reasonableness or unreasonableness of the restraints was not even a matter for their consideration, was not a material fact or factor in the determination of cases charging a violation of the act.

In the case of The United States *v.* The American Tobacco Co., in the United States District Court for the Southern District of New York, the court said, in rendering its decision:

Every combination restraining competition in interstate trade is a combination in restraint of interstate commerce. As said by Mr. Justice Harlan in the Northern Securities case (193 U. S., 197-337; 24 Sup. Ct., 436, 457; 48 L. Ed., 679):

"To destroy or restrict free competition in interstate commerce was to restrain such commerce."

As was stated by the court in The National Cotton Oil Company *v.* Texas (197 U. S., 115, 129; 25 Sup. Ct., 329, 382, 49 L. Ed., 689), in speaking of the purpose of the State and Federal statutes against combination, said:

"According to them, competition, not combination, should be the law of trade. If there is evil in this, it should be accepted as less than that which may result from the unification of interests and the power such unification gives."

This construction of the statute confines the duty of this court in applying it within very narrow limits. We have only to inquire whether the evidence shows a combination restraining competition. There is no necessity for going further. Other inquiries are immaterial. The combination may not reduce the prices to the growers of raw materials, may not increase the prices charged to consumers, may not seek to exclude all others from the field, may be free from coercion or oppression, and yet if it restricts competition, if it restrain trade, reasonably or unreasonably, it falls within the statute. The statute declares unlawful every combination in restraint of trade. It contains no word of limitation or qualification, and the Supreme Court of the United States has decided that the courts have no right to attach them to it.

And Judge Lurton, in the case of Bigelow *v.* Calumet & Hecla Mining Co. (Fed. Rep., 167, p. 724), said:

We shall assume at the outset that the authoritative decisions of the Supreme Court have so construed this antitrust act as to give it a broader application than the prohibition of contracts and agreements in restraint of trade at the common law. It is not essential that the restraint shall be unreasonable within the well-understood definition of an unlawful restraint before the statute. Under this act the validity of an alleged combination or contract in restraint of trade, interstate or foreign, is to be determined by the terms of the statute which forbids any such contract or combination without respect to its nature or beneficial results.

In all the history of the Supreme Court, few judges have displayed greater learning, more exalted patriotism, or a more genuine abhorrence of those insidious forces which tend to undermine and destroy the social fabric than John Harlan, and that justice has rendered no greater decision than his emphatic dissenting opinion in the Standard Oil case.

It was argued in that case and it has since been maintained that the interpolation of the word "reasonable" is a minor matter. It

was intimated then that it would not produce disastrous results, as it is suggested now that it has not materially impaired the force and effectiveness of this act.

Justice Harlan, in his dissenting opinion in the Standard Oil case (221 U. S., p. 82), says:

> In my judgment, the decree below should have been affirmed without qualification, but the court, while affirming the decree, directs some modifications in respect to what it characterizes as minor matters. It is to be apprehended that those modifications may prove to be mischievous. In saying this, I have particularly in view the statement in the opinion that, "it does not necessarily follow that because an illegal restraint of trade, or an attempt to monopolize or a monopolization resulted from the combination and the transfer of the stocks of the subsidiary corporations to the Securities corporation, that a like restraint of trade or attempt to monopolize, or monopolization would necessarily arise from agreement between one or more of the subsidiary corporations after the transfer of the stock by the New Jersey corporation". Taking this language, in connection with other parts of the opinion, the subsidiary companies, are thus, in effect informed--unwisely, I think—that although the New Jersey corporation, being an illegal combination, must go out of existence, they may join in an agreement to restrain commerce among the States f such restraint be not "undue."

In this opinion he shows that the act as thus interpreted ceases to become a warning and becomes a temptation to those who would throttle commerce and establish a monopoly.

After quoting extensively from the opinion of Justice Peckham, to which I have already referred, the court continues:

> I have made these extended extracts from the opinion of the court in the Trans-Missouri Freight case in order to show beyond question that the point was there urged by counsel that the antitrust act condemned contracts, combinations, trusts, and conspiracies that were in unreasonable restraint of interstate commerce, and that the court in clear and decisive language met that point. It is adjudged that Congress had in unequivocal words declared that "*every* contract, combination in the form of trust or otherwise, or conspiracy in restraint of commerce among the several States" shall be illegal, and that no distinction, *so far as interstate commerce was concerned*, was to be tolerated between restraints of such commerce as were undue or unreasonable and restraints that were due or reasonable. With full knowledge of the then condition of the country and of its business Congress determined to meet and did meet the situation by an absolute statutory prohibition of "*every* contract, combination in the form of trust or otherwise in restraint of trade or commerce." Still more; in response to the suggestion by able counsel that Congress intended only to strike down such contr cts, combinations, and monopolies as unreasonably restrained interstate commerce, this court, in words too clear to be misunderstood, said that to so hold was "to read into the act by way of *judicial legislation* an exception not placed there by the lawmaking branch of the Government." "This," the court said, as we have seen, "*we can not* and *ought not* to do."

It has been argued at some length that the present efforts to eliminate the qualifying expressions "undue" and "unreasonable" is tantamount to demanding a construction of the act, tantamount to compelling the trade and commerce of the country to comply with an autocratic, unreasonable regulation.

Those making that suggestion and argument, have, in my opinion, failed to follow the long line of decisions to which I have referred, in which the Federal judiciary, without variance, and without dissent for 15 years, have uniformly held that it was not the intention of Congress, nor was it the province of the courts, to insert these words or to give to the act the construction interpreted in what I consider the obiter dictum in the Standard Oil case.

In the language of Justice Harlan, in the Standard Oil case (221 U. S., p. 98):

> The court says that the previous cases above cited, "can not by any possible conception be treated as authoritative without the certitude that *reason* was resorted to

for the purpose of deciding them," and its opinion is full of intimations that this court proceeded in those cases, so far as the present question is concerned, without being guided by the "rule of reason" or "the light of reason." It is more than once intimated, if not suggested, that if the antitrust act is to be construed as prohibiting *every* contract or combination, of whatever nature, which is in fact in restraint of commerce, regardless of the reasonableness or unreasonableness of such restraint, that fact would show that the court had not proceeded in its decision, according to "the light of reason," but had disregarded the "rule of reason." If the court, in those cases, was wrong in its construction of the act, it is certain that it fully apprehended the views advanced by learned counsel in previous cases and pronounced them to be untenable. The published reports place this beyond all question. The opinion of the court was delivered by a justice of wide experience as a judicial officer, and the court had before it the Attorney General of the United States, and lawyers who were recognized on all sides as great leaders in their profession.

The same eminent jurist who delivered the opinion in the Trans-Missouri case delivered the opinion in the Joint Traffic Association case, and the association in that case was represented by lawyers whose ability was universally recognized. Is it to be supposed that any point escaped notice in those cases, when we think of the sagacity of the justice who expressed the views of the court or of the ability of the profound and astute lawyers, who sought such an interpretation of the act as would compel the court to insert words in the statute which Congress had not put there, and the insertion of which words would amount to "judicial legislation"? Now, this court is asked to do that which it has distinctly declared it could not and would not do, and has now done what it then said it could not constitutionally do. It has, by mere interpretation, modified the act of Congress and deprived it of practical value as a defensive measure against the evils to be remedied. On reading the opinion just delivered the first inquiry will be that, as the court is unanimous in holding that the particular things done by the Standard Oil Co. and its subsidiary companies in this case were illegal under the antitrust act, whether those things were in reasonable or unreasonable restraint of interstate commerce, why was it necessary to make an elaborate argument, as is done in the opinion, to show that according to the "rule of reason" the act as passed by Congress should be interpreted as if it contained the word "unreasonable" or the word "undue"? The only answer which in frankness can be given to this question is that the court intends to decide that its deliberate judgment 15 years ago, to the effect that the act permitted no restraint whatever of interstate commerce, whether reasonable or unreasonable, was not in accordance with the "rule of reason." In effect the court says that it will now, for the first time, bring the discussion under the "light of reason" and apply the "rule of reason" to the questions to be decided. I have the authority of this court for saying that such a course of proceeding on its part would be "judicial legislation."

The law as amended by judicial interpretation is inevitably undermined. It may be true that the latent weakness due to this change has not yet been made manifest in the decision of any particular case; it may be that the exquisite structure of this act, insidiously undermined, is not yet visibly broken or shattered. It is undermined, nevertheless, and it is folly to wait until it topples about our heads before attempting to repair the injury.

Justice Harlan graphically describes the weakness and confusion which must inevitably result from the interpretation of Justice White:

But my brethren, in their wisdom, have deemed it best to pursue a different course. They have not said to those who condemn our former decisions and who object to all legislative prohibitions of contracts, combinations, and trusts in restraint of interstate commerce, "You may *not* restrain such commerce, providing you are reasonable about it; only take care that the restraint is not undue." The disposition of the case under consideration, according to the views of the defendants, will, it is claimed, quiet and give rest to "the business of the country." On the contrary, I have a strong conviction that it will throw the business of the country into confusion and invite widely extended and harrassing litigation, the injurious effects of which will be felt for many years to come. When Congress prohibited *every* contract or combination or monopoly in restraint of commerce, it prescribed a simple, definite rule that all could understand, and which could be easily applied by anyone wishing to obey the law and not to conduct a business in violation of the law. But now it

is to be feared that we are to have, in cases without number, the constantly recurring inquiry—difficult to solve by proof—whether the particular contract, combination, or trust involved in each case is or is not an "unreasonable" or "undue" restraint of trade. Congress, in effect, said that there should be *no* restraint of trade *in any form*, and this court solemnly adjudged many years ago that Congress meant what it thus said in clear and explicit words, and that it *could not* add to the words of the act. But those who condemn the action of Congress are now, in effect, informed that the courts will allow such restraints of interstate commerce as are shown not to be unreasonable or undue.

It remains for me to refer more fully than I have heretofore done to another and, in my judgment, if we look to the future, the most important aspect of this case. That aspect concerns the usurpation by the judicial branch of the Government of the functions of the legislative department. The illustrious men who laid the foundations of our institutions deemed no part of the National Constitution of more consequence or more essential to the permanency of our form of Government than the provisions under which were distributed the powers of Government among three separate, equal, and coordinate departments—legislative, executive, and judicial. This was at that time a new feature of governmental regulations among the nations of the earth, and it is deemed by the people of every section of our country as most vital to the workings of a representative Republic whose Constitution was ordained and established in order to accomplish the objects stated in its preamble by the means, *but only by the means*, provided either expressly or by necessary implication, by the instrument itself. No department of that Government can constitutionally exercise the powers committed strictly to another and separate department.

I said at the outset that the action of the court in this case might well alarm thoughtful men who revered our Constitution. I meant by this that many things are intimated and said in the court's opinion which will not be regarded as otherwise than as sanctioning an invasion by the judiciary of the constitutional domain of Congress—an attempt by interpretation to soften or modify what some regard as a harsh public policy. This court, let me repeat, solemnly adjudged, many years ago, that it could not, except by "*judicial legislation*," read words into the antitrust act not put there by Congress, and which, being inserted, give it a meaning which the words of the act as passed properly interpreted would not justify. * * *

Nevertheless, if I do not misapprehend its opinion, the court has now read into the act of Congress words which are not to be found there; it has thereby done that which it adjudged, in 1896 and 1898, could not be done without violating the Constitution—namely, by an interpretation of a statute changed a public policy declared by the legislative department.

After many years of public service at the National Capital and after a somewhat close observation of the conduct of public affairs, I am impelled to say that there is abroad in our land a most harmful tendency to bring about the amending of constitutions and legislative enactments by means alone of judicial construction. * * * Mr. Justice Bradley wisely said, when on this bench, that illegitimate and unconstitutional practices get their first footing by silent approaches and slight deviations from legal modes of legal procedure. (Boyd *v.* United States, 116 U. S., 616, 635.) We shall do well to heed the warninge of that great jurist.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Friday, January 30, 1914.

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

The CHAIRMAN. The committee will hear Congressman Stanley further this morning. You may proceed now, Mr. Stanley.

STATEMENT OF HON. AUGUSTUS O. STANLEY, A MEMBER OF CONGRESS FROM THE STATE OF KENTUCKY—Resumed.

Mr. STANLEY. Mr. Chairman and gentlemen of the committee, it is a source of surprise to me, or it was at least a source of surprise, that in the teeth of the most emphatic, the most exhaustive and unequivocal statements of the Supreme Court of the United States

that it would not, under any circumstances or conditions, or for any reason, write into the antitrust act of 1890 any condition by which combinations restraining trade would be tolerated if they would restrain it reasonably; that notwithstanding the fact that the courts, sometimes impatiently, sometimes elaborately, but always emphatically, both the Federal courts and the Supreme Court of the United States refused to put such a construction on the law.

Is it not worthy of the consideration of this committee, is it not a pregnant fact, that the greatest lawyers in America, representing in the total billions of capital and the production and transportation industries of a continent, should continually go into the teeth of what they knew was the law in what appeared for 15 years to be a vain endeavor to get the Supreme Court of the United States to grant this permit to restrain trade if they would do so beneficently, moderately, and reasonably?

If this had been a little thing, if it had been an unimportant thing, if it had been a privilege which amounted to nothing, or to but little, you would not have had this continual reiteration of their demand. It was because those interests which fretted under the simple, sweeping, and drastic provisions of the Sherman Antitrust Act wished to evade it, and because combinations in the form of holding companies, and those interested in them, knew that if ever that interpretation was placed upon the Sherman law it was doomed to be a dead letter.

And I say to this committee, notwithstanding the new decisions that have been rendered, that if, when you are through with your deliberations, holding companies can be organized, trade can be restrained at discretion, or, if you please, at the peril of him who restrains, with no other limitation placed upon him than that he shall correctly guess that the court that passes upon his conduct will not consider it unreasonable. This activity, this earnest, patient, insistent endeavor to induce the Supreme Court to do a thing that it said forty times over it would never do, was not confined to the Supreme Court.

In Congress after Congress they came, offering everything. This is not the first time, gentlemen of the committee, that great combinations in restraint of trade have come to Congress—"in honorable and voluntary surrender." They did it in 1908.

Survey the history of the irrepressible conflict between labor and capital, what have the large manufacturing and transportation concerns opposed so continuously and so viciously as the efforts of labor to organize in their several departments?

You have seen before this committee contests in which there was much temper on both sides between representatives of organized labor and of organized capital. The inquiry into the activities of the National Association of Manufacturers will show that this organization was created primarily to prevent the wholesale organization of labor. From the Homestead strike to the tinners' strike in New York a few years ago in the Steel Corporation, there has been one continual warfare.

And yet, although that contest had continued for 20 years, companies engaged in transportation and production alike came before the House and Senate and offered to surrender to organized labor, and to take specifically from under the operation of the Sherman Act every labor organization, if you would only permit them to write the

words "reasonable or unreasonable" into the organic law. They made concessions that they had refused in national conventions. If you will examine——

Mr. CARLIN. Who made that offer, Mr. Stanley?

Mr. STANLEY. If you will examine the Hepburn bill of March 23, 1908, you will find that it only applies to concerns having capital stock; excludes labor organizations from the operation of the act.

Why should they agree that no labor organization should henceforth be subject to the operation of the Sherman Act, notwithstanding the fact that the Supreme Court had repeatedly held that it could be? The act has been used with tremendous effect against labor organizations. To-day the most earnest plea labor organizations are making before this committee is that they shall not be included in the terms of the Sherman Antitrust Act, and you have bills looking to that end before you.

This Hepburn bill provided more than that. It provided, in section 10—and the bill in the House and the Senate was the same—you will remember the act; the bill provided, in section 10—

That any corporation or association registered under this act and any person not a common carrier under the provisions of the said act approved February fourth, eighteen hundred and eighty-seven, or the acts amendatory thereof or supplemental thereto, being party to a contract or combination hereafter made, other than a contract or combination with a common carrier, filed under section eleven of this act, may file with the Commissioner of Corporations a copy thereof if the same be in writing, or if not in writing, a statement setting forth the terms and conditions thereof, together with a notice that such filing is made for the purpose of obtaining the benefit of the provisions of this section. Thereupon the Commissioner of Corporations, with the concordance of the Secretary of Commerce and Labor, or of his own motion and without notice or hearing or after notice and hearing, as the commissioner may deem proper, may enter an order declaring that in his judgment such contract or combination is in unreasonable restraint of trade or commerce among the several States or with foreign nations. If no such order shall be made within thirty days after the filing of such contract or written statement, no prosecution, suit, or proceedings by the United States shall lie under the first six sections of this act for or on account of such contract or combination unless the same be in unreasonable restraint of trade or commerce among the several States or with foreign nations; but the United States may institute, maintain, or prosecute a suit, proceeding, or prosecution under the first six sections of said act for or on account of any such contract or combination hereafter made of which a copy or written statement shall not have been filed as aforesaid, or as to which an order shall have been entered as above provided.

No corporation or association for profit or having capital stock and registered under this act, that hereafter shall make a combination or consolidation with any corporation or association, shall be entitled to continue its registration under this act unless without delay it shall file with the Commissioner of Corporations, pursuant and subject to the provisions of this section, a statement setting forth the terms and conditions of such combination or consolidation, together with a notice as hereinabove provided.

The part of that section to which I particularly call your attention is that part which says:

If no such order shall be made within 30 days after the filing of such contract or written statement, no prosecution, suit, or proceeding by the United States shall lie under the first six sections of this act, for or on account of such contract or combination, unless the same be in unreasonable restraint of trade or commerce among the several States or with foreign nations.

Mr. NELSON. Was that the act which President Roosevelt then recommended to be passed?

Mr. STANLEY. Yes, sir; and that act was still-born. That act that came into Congress heralded by organized labor, backed by millions of money, specifically supported by the President of the United States, slunk away in the darkness, and it has been a phantom ever since;

and I will tell you why, because in the course of that investigation this little colloquy occurred, which you will find on page 11 of the hearing on the Hepburn bill, in the Sixtieth Congress, first session:

The CHAIRMAN. Right there, Mr. Low, if there is no objection, who are the people that actually participated in the preparation of the bill? Who are the men who actually drew it?

Mr. LOW. We conferred with Mr. Gary, of the United States Steel Corporation.

The CHAIRMAN. E. H. Gary, president of their board of directors?

Mr. LOW. E. H. Gary, who is likely to be here this morning. He is in Washington, and I think he came on on purpose for this meeting. The lawyers actually engaged in the drafting of the bill were Mr. Stetson——

The CHAIRMAN. That is, Francis Lynde Stetson?

Mr. LOW. Francis Lynde Stetson and Mr. Morawitz.

The CHAIRMAN. Victor Morawitz?

Mr. LOW. Victor Morawitz. Prof. Jenks, of the federation, was in constant collaboration upon the subject. We also kept in close touch with the administrative departments of the Government through the Bureau of Corporations.

The CHAIRMAN. That is, Mr. Herbert Smith?

Mr. LOW. Mr. Herbert Knox Smith; yes.

So it transpires that this bill, which came very near getting through the House and Senate—this bill that actually eliminated organized labor from the operation of the act—was drawn by the same men, by the same pens that drew the charter of the United States Steel Corporation, and the charter of the Northern Securities Co., and who are the attorneys for the Steel Corporation now.

Mr. CARLIN. I do not exactly gather whether you favor excepting labor from the operation of the Sherman law, or whether you are opposed to it.

Mr. STANLEY. I favor excepting them, but that is not germane to this question. What I am trying to get before this committee is this, that in spite of the intense opposition of great manufacturing concerns to excluding labor organizations from the operation of this act they came and offered that as a precious inducement, to use a mild term, to Congress and to organized labor as the "king's ransom" they were willing to pay for this amendment to the act.

The plain purpose of Mr. Stetson and of Mr. Gary in eliminating organized labor from the operations of the Sherman Antitrust Act was to secure its influence, to popularize this thing that was meant to emasculate, and did emasculate, the Sherman Act.

Mr. CARLIN. The same proposition to exclude labor from the operation of the Sherman law is pending here now. Do you think that exclusion ought to be allowed?

Mr. STANLEY. Yes; but I do not care to discuss that question now. I desire, if we can, to stick to this proposition.

Mr. CARLIN. That is the very question you have been discussing.

Mr. STANLEY. I am not discussing the merits of that question at this time. I am simply trying to show this committee that notwithstanding the fact that the great producers fear and dread the exclusion of organized labor, yet are they willing to give even that up if in consideration for that sacrifice they could get the interpretation placed upon the Sherman Act which has been placed upon it.

Mr. CARLIN. I think I understand the point. The thing I am trying to get clear in my mind is whether you think this committee ought now to write into the bills pending an exception of labor organizations from the operation of the Sherman Antitrust Act.

Mr. STANLEY. Yes; undoubtedly.

Mr. NELSON. Would you not include also the exemption of farm organizations?

Mr. STANLEY. Yes, I would. I do not care, however, to discuss that question now, because that is a great big question in itself and I desire to confine myself at this time to the proposition that if you leave the words "unreasonable" or "reasonable" in the Sherman Antitrust Act, no matter what you do, or how much defining or enumerating you do, that you have emasculated this most wonderful piece of legislation. It is a jewel in itself, and I would not add another section to it; I would simply change this procedure, change a few words in such a way as to make it mean, unequivocally, what it meant before, so that a court could not misconstrue it.

Mr. CARLIN. The committee is seeking information, and we ask questions along the lines concerning the things which are in our minds. There is pending before this committee what is known as the Bacon-Bartlett bill, which provides for the exemption of labor organizations and agricultural and horticultural associations from the operation of the Sherman law. You have given a great deal of thought to this subject, and the committee would like to have your views on that matter.

Mr. STANLEY. I will be glad to give them to you, if they are worth anything. I can not too strongly indorse such a measure. Capital is organized. Without the right of organization, without the right to bargain cooperatively for the price of its body and soul, labor is helpless.

There are single corporations to-day employing more men than were ever commanded by any one man during the Civil War.

If 200,000 men must be taken separately and each individual known only by his number, often speaking a foreign tongue, must be forced to right his own grievances, however great they may be, labor is at the mercy of capital.

Mr. NELSON. May I interrupt you there?

Mr. STANLEY. Yes.

Mr. NELSON. What do you say to the argument that the wages of the workmen and the products of the farm constitute capital and therefore should come under the same rule which applies to trusts, to wit, that capital is not to combine?

Mr. STANLEY. The wage is capital when it is in the pocket of the employer, perhaps, but the sweat of the toiler and the time from dawn until dark of a living human being is not capital in any legitimate sense.

Mr. CARLIN. You are talking about combination and the evils of it. You think that there would be no evil in permitting those who produce the foodstuffs upon which the people have to depend for existence, and cooperating among themselves——

Mr. STANLEY (interposing). If any set of men were to get together and agree to organize a monopoly in the sale of wheat or corn. I would condemn it. With all respect, Mr. Chairman, I hope you will permit me to discuss that bill which is before you, rather than a matter which has no relation to the subject in hand.

Mr. CARLIN. The committee has not limited you in time. We are giving you our time, and with the view of getting information I was asking you some questions.

Mr. STANLEY. I appreciate that.

Mr. CARLIN. You will have to reserve the right to the members of the committee to ask questions for such information as you can give them.

Mr. STANLEY. I admit that.

Mr. CARLIN. Your argument was very interesting, but there are some things that we want to know which you have not reached yet, which may be developed by interrogatories.

This question of cooperative agricultural associations is proposed here seriously for legislation, and bills covering that matter are pending here now.

Mr. STANLEY. Then I will talk about that.

I assisted in the preparation of the first articles of incorporation of the first association ever formed for the protection of the tobacco planter, in 1903 and 1904. I assisted in writing the articles of incorporation of the first planters' protective association ever engaged in the sale of tobacco. I have assisted in the formation of quite a number of those concerns. They are purely defensive.

They can be formed, in my opinion, without violating the Sherman Act, by simply creating an association, to act as a broker to handle their products.

A combination was formed which depressed the price of tobacco from 6 cents to 3 cents a pound in 90 days. You will find in the diary of Thomas Jefferson that he sold tobacco for 6 cents a pound, and tobacco down in that country had in all that time since then never brought much less than 6 cents a pound.

The country was divided into magisterial districts. There was one buyer in each district, and there was no secrecy in regard to the plans and purposes of the buyers. They said, "Nobody can buy here except this man." If a public road ran through a man's farm, one buyer would buy tobacco on one side of the road and another buyer would buy the tobacco on the other side of the road.

Mr. NELSON. You are speaking of the present time, or was that in the time of Thomas Jefferson?

Mr. STANLEY. Since the time of Thomas Jefferson by a good many years. There was an agreement entered into by the representatives of the tobacco monopoly in Europe, by the Imperial Tobacco Co., a monopoly in Great Britain, and the American Tobacco Co., a monopoly in the United States, by which they agreed that they would send out buyers, no two to go into the same district. They would price the tobacco and take it and then throw it into a clearing house, and each fellow would select what he needed from that clearing house and would get it at the same price paid for it by the buyer.

They concluded that tobacco could be raised for 3 cents a pound. That would mean about 20 cents a day to the man who raised it, and he had to work all day long to get that. There was misery and destitution and horror all over that country. Many left the country. A man for a full year's work got less than a hundred dollars, in many instances, and those farmers agreed to place their tobacco in an association, giving the association the absolute right to sell it when they thought best. They held the tobacco for three years and sold it at a reasonable price. I do not think the Sherman Antitrust Act ought to affect such an association. It was rendered necessary by the cruel violation of the Sherman law, and it was all that was left for them to do.

Mr. CAREW. What shall we say to that immense class of business people in this country who are sincere and who want definiteness more than they want anything else? For better or worse, they want something absolutely definite; they want to know what they can do and be sure of what they can not do.

Paralysis is a frightfully definite thing, but license and liberty are indefinite. I presume by repealing everything we could fix that. But somewhere there is a mean for which they are searching, and I would be very happy to have somebody state where it lies.

Mr. STANLEY. I am "delighted," as an ex-President of the United States would say, at that question.

The one thing that made the Sherman law a terror to evildoers was its definiteness. To make it indefinite was the prime purpose of the proposed amendment.

Those two words, "undue" and "unreasonable" have created a fog about this law which those who fear it hope to make impenetrable, asserting that since we can not determine what is reasonable or unreasonable, that the law is an absurdity.

They take out those two words, and for fifteen years the courts had no difficulty in interpreting this act.

Put in the word "reasonable," and the enforcement of the law is impossible.

Mr. CARLIN (interposing). Do you not think that since the Knight case they have had a very different line of decisions?

Mr. STANLEY. I will come to that Knight case.

Mr. NELSON (interposing). Before you leave that point, I wanted to clear up this particular matter in my mind. What effect is the writing of the word "unreasonable" into the statute to have on the penalty?

Mr. STANLEY. As a penal statute it renders it impotent, and my authority for that statement is Senator Nelson, among others. I call the attention of this committee to a report made by the Senate Committee on the very bill in which it attempted to write the words "reasonable or unreasonable" into the act.

Senator Nelson, in his report, dated January 26, 1909, and being Report No. 848, Sixtieth Congress, second session, at page 10, says:

> The antitrust act makes it a criminal offense to violate the law, and provides a punishment both by fine and imprisonment. To inject into the act the question of whether an agreement or combination is reasonable or unreasonable would render the act as a criminal or penal statute indefinite and uncertain, and hence, to that extent, utterly nugatory and void, and would practically amount to a repeal of that part of the act. Justice Brewer in the case of Tozer v. The United States (52 Fed., 917), makes this perfectly clear and plain. In this case the defendant was indicted for violating the interstate commerce act. In stating the facts, the court says: "The Missouri Pacific charged the Chicago, Burlington & Quincy Co. only 34 cents for carrying the sugar from Hannibal to Hepler, while it charged the Hayward Grocers Co., and others living in Hannibal, 46 cents for doing a like work; and it was held (in the lower court) that this constituted a giving to one person an undue and unreasonable advantage, and subjected one to unjust and unreasonable disadvantage, within the denunciation of section 3 of the interstate commerce act."
>
> And upon this the court holds: "But, in order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act can not depend on whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty. In the case of Railway Co. v. Dey (35 Fed. Rep., 866, 876), I had occasion to discuss this matter, and I quote therefrom as follows: 'Now, the contention of complainant is that the substance of these provisions is that if a railroad company charges an unreasonable rate it shall be deemed a criminal and punishable by fine, and that such a statute

is too indefinite and uncertain, no man being able to tell in advance what in fact is, or what any jury will find to be a reasonable rate. If this were the construction to be placed on this act as a whole, it would be certainly obnoxious to complainant's criticism, for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it.'"

Defendant was guilty in the lower courts. The decision was reversed.

See also the following cases bearing upon this point: Cook *v.* State (26 Ind., 278); Louisville & Nashville R. R. Co. *v.* Commonwealth (99 Ky., 132); Louisville & Nashville R. R. Co. *v.* Railroad Commissioners (16 Am. & Eng. Ry. Cases, 1); Ex parte Andrew Jackson (45 Ark., 158).

And while the same technical objection does not apply to civil prosecutions, the injection of the rule of reasonableness or unreasonableness would lead to the greatest variableness and uncertainty in the enforcement of the law. The defense of reasonable restraint would be made in every case, and there would be as many different rules of reasonableness as cases, courts, and juries. What one court or jury might deem unreasonable another court or jury might deem reasonable. A court or jury in Ohio might find a given agreement or combination reasonable, while a court or jury in Wisconsin might find the same agreement and combination unreasonable.

In the case of the People *v.* Sheldon (139 N. Y., 264), Chief Justice Andrews remarks: "If agreements and combinations to prevent competition in prices are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult in any case to establish the invalidity although the moral evidence might be very convincing."

The following cases take the same grounds: Judd *v.* Harrington (135 N. Y., 105; 34 N. E., 790); Leonard *v.* Poole (114 N. Y., 371; 21 N. E., 707); De Witt Wire-Cloth Co. *v.* N. J. Wire-Cloth Co. (Com. Pleas N. Y. Supp., 277).

To amend the antitrust act, as suggested by this bill, would be to entirely emasculate it for all practical purposes, and render it nugatory as a remedial statute. Criminal prosecutions would not lie and civil remedies would labor under the greatest doubt and uncertainty. The act as it exists is clear, comprehensive, and highly remedial. It practically covers the field of Federal jurisdiction and is in every respect a model law. To destroy or undermine at the first juncture, when combinations are on the increase and appear to be as oblivious as ever of the rights of the public, would be a calamity.

Mr. CARLIN. What happened in the cases against Patterson?

Mr. STANLEY. They put him in jail.

Mr. CARLIN. Under the Sherman law, did they not?

Mr. STANLEY. I do not think, Mr. Chairman—I can not see that because they happened to hold that Patterson was in unreasonable restraint of trade upon the facts presented in his case that that is any reason why we should say that because certain notorious malefactors have not escaped this yawning breach in a righteous act, we should leave it open.

Mr. CARLIN. I understood you to argue that the Sherman law was not effective as a criminal statute, and I simply wanted to point out that case.

The CHAIRMAN. Take the case of the wire pool; there convictions were had.

Mr. STANLEY. Because some men are convicted under the statute, it does not prove that many who are guilty will not be convicted. Because some men have not seen fit to make a defense of unreasonableness, is no reason why that defense should be permitted to stay in the act.

Mr. CARLIN. Do you know of any case of criminal prosecution where a demurrer to the indictment has ever been sustained under the Sherman law for any such reason as you have assigned?

Mr. STANLEY. I presume—yes—you mean since the Standard Oil decision?

Mr. CARLIN. Yes; I mean——

Mr. STANLEY. I do not know that I recall any.

The CHAIRMAN. Take the case of the naval stores.

Mr. STANLEY. I have that case here.

The CHAIRMAN. There the criminal prosecution was upheld.

Mr. STANLEY. That was prior to this case, and in the case of the naval stores the court deliberately instructed the jury that they could not consider whether an act was reasonable or unreasonable.

Mr. NELSON. These instances which have been mentioned occurred before the Standard Oil and Tobacco cases?

Mr. STANLEY. Nearly every one of them; the naval stores did.

Mr. CARLIN. The Patterson case has occurred since.

Mr. STANLEY. That is one I recall.

Mr. CARLIN. Take the instance of the indictment of the officers of the Steel Trust. There there was a demurrer to the indictment; the court overruled it: and they went to the jury, and they were acquitted by the jury. In the case of the Sugar Trust in New York, there there was a demurrer to the indictment, and the demurrer was overruled, and they went to the jury, and it was a hung jury. That is the Parson case. I think there has never been an instance brought to the attention of the committee where a demurrer to an indictment has not been sustained where the indictment was brought under the Sherman law.

Mr. STANLEY. I have the Naval Stores case. It is in 172 Fed. Rep., 464. In that case the court said:

> I charge you, further, that the prohibitory provisions of this act under consideration apply to all monopolies, combinations, or conspiracies in restraint of interstate or foreign trade or commerce, without exception or limitation, and are not confined to those in which the restraint is unreasonable.

Mr. CARLIN. The court charged the jury in accordance with your contention, but against your view of the amendment.

Mr. STANLEY. How is that?

Mr. CARLIN. The court charged the jury exactly what was the law.

Mr. STANLEY. At that time that was the law; there was not any question about it.

Mr. FLOYD. Was that a report on the Hepburn bill from which you were reading awhile ago?

Mr. STANLEY. Yes, sir.

Mr. FLOYD. Congress has never amended the act; it stands to-day.

Mr. STANLEY. The Hepburn bill did not pass.

Mr. FLOYD. I know. The Sherman act has never been amended; it stands to-day just as definite and certain, so far as language is concerned, as when it was first written.

Mr. STANLEY. I understand.

Mr. FLOYD. What I am at a loss to know is how you can by an amendment make it any more certain; if the court construes that definite statute in a way that imposes conditions or limitations, how can you, by reasserting that, make it any more definite than it is now?

Mr. STANLEY. If we are to take the position that the Supreme Court is never to be bound by the plain import of any statute because in one case it failed to be so bound, Congress might just as well adjourn. We are going through a hollow mockery. If laws are never to have a simple interpretation, if the Supreme Court of the

United States, with the bridle off, is to give effect to its own ideas, notwithstanding anything that we may do, we are in an appalling condition and we had better quit doing it.

Mr. CARLIN. Can you give us an illustration of what you would consider, under the definition of the Supreme Court, a reasonable restraint of trade?

Mr. STANLEY. I never try at that sort of mental gymnastics, because it is pernicious; it is immoral to try it. It is the most abominable kind of causistry to attempt any such conception. It is the finest instance I know of of legal causistry.

Nothing has ever tended, Mr. Chairman, to undermine and to destroy all ethical advancement, whether it be divine or human, as this centuries old effort to write "reasonable" or "undue" or some other term or limitation before an essentially pernicious thing.

As I see it, monopoly is larcenous. Larceny, in its broad sense is the taking of the property of another without a sufficient consideration. It has as many forms, they are as multitudious, as cupidity can suggest and ingenuity can contrive.

Mr. CARLIN. I think you have misconceived my question. I was trying to direct your attention to what is a fact, namely, that the Supreme Court has never yet found a reasonable restraint of trade. I was just wondering if, in the imaginations of men, or even in the minds of those who have been thinking seriously on the subject, whether a reasonable restraint of trade could be found.

Mr. STANLEY. It is liable to be found and it is liable to occur.

Mr. CARLIN. You have no illustration in your mind?

Mr. STANLEY. No; and I will show you how pernicious the reasoning is. You know that the ancients attempted and afterwards learned ecclesiastics attempted to relieve humanity from the simple and sweeping provisions of an antisin act handed down from Mount Sinai to Moses on a certain occasion, and they attempted to write "reasonable" and "unreasonable" before various acts. There is no doubt that there are occasions when deceit and falsehood are excusable and sometimes commendable, but there is nothing that so destroys truth, that hides her beautiful and perfect outline in a poisonous fog like reasoning on when it is right to lie.

Mr. CARLIN. You have been arguing before this committee that the use of the word "reasonable" by the Supreme Court has opened the door to innumerable and menacing and injurious restraints of trade. For that reason I asked you to point out some restraint of trade to which that has opened the door, by way of illustration.

Mr. STANLEY. It has opened the door to every restraint of trade not manifest on the surface. I am willing to admit for the sake of the argument that there have been 10,000 cases before the court, yet the mere fact that these people happened not to get by a defective statute does not cure the defect, and if it is manifest to the lawmakers——

Mr. CARLIN (interposing). I agree with you about that. But since we have not yet discovered, by a decision, a reasonable restraint of trade, I was wondering whether or not you could give us an illustration of one. The court itself has never found one.

Mr. STANLEY. Suppose the court should attempt to find one. Men who have studied not the human law, but the divine law, with Bibles on their knees, attempted for a century to find what was a

reasonable or a justifiable falsehood; to find what was a reasonable or justifiable theft; to find what was a reasonable bearing of false witness; and when they were through, it is the consensus of opinion of all mankind that it was casuistry, that it was pernicious, that it was deceptive of the chaste, plain, simple definitions given by God Himself. The human conscience is not enlightened by such sophistry, and it is not sharpened by the drawing of such fine distinctions. Such inquiries take you not into the light, but into a labyrinth of utter darkness.

Mr. CARLIN. Do you admit that you have no illustration in mind of an unreasonable restraint?

Mr. STANLEY. I admit that I have never once dreamed of trying to find it, using such mind as I have, and such knowledge of the law as I have. Suppose I should—suppose I should spend weeks and months in trying to find what is a reasonable restraint of trade, or just now far combinations could go in putting a ligature about the throat of commerce that would not strangle it fatally or materially? Would that knowledge, would such a statement, furnish to those who are anxious to restrain it as far as possible and keep out of jail be of very useful service to the committee or to the industrial conditions of the country? Suppose this committee should confine its efforts to trying to determine restraints of trade which were not in violation of the act as construed by the Supreme Court in the Standard Oil and Tobacco cases; this committee could not be engaged in a worse work. That would be doing exactly what some of the greatest legal minds of the country have been engaged in for the last 20 years.

We would be engaged in advising avaricious organizations just how near the precipice they could go, just how they could steer the bark between the Charybdis of the law and the Scylla of monopoly. That character of advice has been very valuable, and it has enabled those who write the charters of great corporations to make rings around the less carefully drawn acts of Congress. I do not wish to tell them; I do not care to say how near the precipice they may go. I say it is no part of our business to find just how far these people can go. Think of it. Remember the thing that restrains trade is the holding company, an engine powerful enough to absolutely destroy competitive conditions, because it has done it.

Suppose you should say that a holding company may reduce prices *thus far*. A holding company may have so many subsidiaries; directors may interlock to the extent of 10 per cent, and that if they go no further, it will not be an unreasonable restraint of trade. Do you not see that you say to these people, "you may use these things that are pernicious, you may go around with a deadly weapon upon your hip or poison in your pockets, with the power of life and death in your hands, and you may use them in this way."

No. If the thing is pernicious, if it is mischievous, and if it is indefensible, you should prohibit it. You should say to the combinations in restraint of trade not, "Thus far shalt thou go and no farther; thou shalt sin in this degree and receive an indulgence to monopolize trade but not unduly." That is simple sophistry.

Mr. CAREW. Are we going to an era now where we think the courts and prosecuting attorney will furnish a remedy and erroneously

relying upon that engine and that manifestation of power instead of legislating in order to make it not to pay to monopolize?

You remember reading, no doubt, where they used to hang men in London for paring coins, and finally they milled the coins, and made the coins no good if they were scraped off, and they did not have to hang any more men.

We have a bill here that practically means every small man in the United States as against all the combinations, and if they attack and destroy every one of those, if it is an interstate concern, they must attack all, the object being to protect those men by making it a very expensive operation to attack them with the purpose of injuring or destroying their business?

Mr. STANLEY. I think the certainty of the punishment is the thing.

Mr. CAREW. But the setting of them against each other; instead of the prosecuting attorney, we have the business heads of all the Nation, in a small way, to be an army against those combinations, and to be able to protect themselves.

Mr. CARLIN. He is directing your attention to a bill which is pending here.

Mr. STANLEY. I do not know about that bill.

Mr. FLOYD. You speak of the holding company; that is a very vital thing. I was going to ask you whether you are in favor of prohibiting all holding companies, absolutely?

Mr. STANLEY. I am in favor—oh, no. There are a great many cases where the holding of the stock of a corporation is necessary and legitimate. I would only prohibit one corporation from holding the stock in another corporation where the holding of the stock was no part of its legitimate business.

Mr. FLOYD. I wanted to get your idea.

Mr. MORGAN. You mean you would not permit competing companies to hold the stock of each other?

Mr. STANLEY. I do not know that I would say that.

Mr. MORGAN. Have you a paragraph in your bill expressing your ideas as to holding companies?

Mr. STANLEY. Oh, no; defining them. I say specifically in my bill what companies can hold the stock of other companies and what companies can not hold the stock of other companies.

Mr. MORGAN. Have you the bill before you?

Mr. STANLEY. No; I will take that up next Thursday.

Mr. MORGAN. Coming back to the point of your argument, what reason was there apparent in the mind of the court that led the court to argue for this word "unreasonable" in the statute, especially as in any way curative of the statute?

Mr. STANLEY. None in the world. It was not even before the court in that case.

Mr. MORGAN. The court, of course, construed the statute in order to get at the legislative intent, saying that the common law was a part of the statute. If we insert language which shows that the legislative intent is not to have the word "unreasonable" in there, would it not be likely that the Supreme Court would not again read the word into it?

Mr. STANLEY. I am certain of it. I think you have hit the crux of it.

We must not assume that because the Supreme Court in a single instance has by an obiter dictum absolutely disregarded the plain letter of the law it will always do so. Such an admission would nullify Congress. For us to say that we will not pass any act restraining you or anybody else because no matter how plain we make it the Supreme Court is going to unmake it would be the monstrous and absurd.

Mr. CARLIN. What I have been trying your mind to is what is in the minds of many of the members of the committee. That is, first, whether the criticism of the Supreme Court is just, in view of that fact that it has never yet found a reasonable restraint of trade, and in every case has found the restraint unreasonable, and whether or not you are not getting into a realm of conjecture rather than getting away from it when we undertake to disturb the line of decisions which have been as wholesome as those we have had.

Mr. STANLEY. What cases have you had since the decision of the Standard Oil case?

Mr. CARLIN. The American Tobacco Co. case.

Mr. STANLEY. What case have you had that——

Mr. CARLIN (interposing). I think that the American Tobacco cases.

Mr. STANLEY. It is the same result. What case have you had since that? You have had the Union Pacific case, the reorganization of the Union Pacific, that was so absolutely monstrous that it seemed to be simply a case of common larceny. There was no question in regard to reasonable restraint of trade there. It was a question of one company having purloined another company without paying for it.

Mr. DANFORTH. The point Mr. Carlin is raising is this: Why change a law which has been so far administered wisely until there is an unwise administration of the law under this statute? You say there has not been a case——

Mr. STANLEY (interposing). Shall we wait until the thing happens that we know must happen before we attempt to remedy it?

Mr. DANFORTH. How do you know that?

Mr. STANLEY. Because we know that the minute the question comes up before that court of an admitted restraint that is not apparent the defense of unreasonableness will be made, and that the minute it is done it is a precedent, and some other case comes up and it is not reasonable, until you go on and on, as you have done in Pennsylvania, with the nullification of the liability of employers, until it was practically impossible for an employee to be hurt in any way for which his employer was liable.

Mr. CARLIN. Those statutes are all in regard to definite, existing conditions, and are intended as remedies for evils which exist.

Mr. STANLEY. This statement of mine, that this interpretation of the act renders it nugatory, renders it void, indefinite, indefinable, arbitrary, worthless, is not the statement of a radical, wild-eyed crusader against combinations of all kinds. I do not think anybody will accuse Chancellor Day of being a radical, and he takes the same view I take. Let me read you what he said about it:

A few days ago the President of the United States is reported to have stated in a public speech that our great business men were guilty of lawlessness. Lawlessness can by no justice or truthfulness be applied to men who find themselves in violation of a statute that for 21 years no one has defined, and which finally the Supreme Court

of the United States, unable to interpret it beyond a guess, brushed aside as a troublesome thing, by saying men must use their reason in interpreting it, leaving to one man with power of prosecution to say whether reasoned reasonably. (The Law Journal, March, 1913.)

Mr. DANFORTH. We are talking about legislation which is proposed, and you bring in to us bills which you want to discuss. What we are trying to get is how those bills are going to improve the present law, and what Chancellor Day has to say about it does not seem to me to have any bearing on them, because what we want to know is whether your bills will strengthen the law.

Mr. STANLEY. My bill renders the law definite and certain, if any restraint.

I say that to say you may restrain trade, you may materially restrain and actually restrain trade, if you do not unreasonably restrain it, is to instruct the man who is about to restrain it and to invite him to do it and to tempt him, to conjecture with him, putting words into the act which render it difficult of interpretation, and leaves him hanging between the realm of what is innocence and what is guilt.

Mr. DANFORTH. Mr. Carlin is trying to get from you any case in which the plain words of the Sherman Act have been violated, and you admit that there is no such thing. We all know there is no such thing, but you say there may be such a thing, and therefore you propose to give further definitions of what shall be restraint of trade.

But, as Mr. McGillicuddy said to you yesterday, what is there to prevent a court, in a surmised case, translating its words just as you say they have, translating the words of the Sherman Act by putting in the word "unreasonable" or "undue"? They can go on and interpret the act with your amendment, if it should become a law, as Mr. McGillicuddy suggests, and as you say they have already interpreted the Sherman Act. They have not put the words in yet.

Mr. STANLEY. I did not understand Mr. McGillicuddy to suggest that this bill that I have introduced would be as incapable of remedying the evil as if it had not been introduced.

Mr. DANFORTH. No; but he said, What is there to prevent the court from doing the same thing in that case? We are going into a very uncertain realm, because you will admit the court never has interpreted that statute as having the word unreasonable in it; but you say they have declared an obiter dictum which shows in which direction their mind is tending, and therefore you believe they are slipping from their high pedestal, and you propose to give them the benefit of this additional legislation; and, as Mr. McGillicuddy said yesterday, what would prevent the court from interpreting that statute with your amendment in exactly the same way that you say they are prepared to interpret the Sherman law?

Mr. MCGILLICUDDY. I think Mr. Stanley understood me. The law already is against restraint, in part; your amendment reads that they shall not restrain trade in any part. What added strength would it be if you say they shall not restrain it in any degree?

Mr. STANLEY. I add, you "shall not restrain any part of the commerce of the United States in any degree." The court has said that this law has divided commerce into certain divisions, and it meant that these various parts of commerce—of production, of transportation, and things like that—should not be restrained, that no part should be restrained. None of these vast divisions were sufficiently

defined. I say that none of the various parts of the commerce of the United States shall be restrained in any degree.

Mr. McGILLICUDDY. They will come back and say, "in any reasonable degree."

Mr. STANLEY. Oh, but, Mr. McGillicuddy, we can not assume that the Supreme Court of the United States will always refuse to interpret the plain language because it once may have done so. If that be true, if we are going to say the Supreme Court will do that, why pass any act at all which the Supreme Court is to pass upon? Have we reached the sad condition prophesied by Thomas Jefferson?

Mr. McGILLICUDDY. If that is true, as quick as the personnel of the court changes with respect to one person, they will go back to the original interpretation of the Trans-Missouri case.

Mr. STANLEY. I hope they will; I believe it will do no harm to put it in there.

Mr. CARLIN. Is your bill based upon the fear of what is possible to happen, rather than upon anything that has occurred?

Mr. STANLEY. It is based upon my regret for a condition that now exists.

Let me call your attention with reference to what this interpretation has done for the law in a report of this committee, and I do not think people will accuse Mr. Littleton of being radical. He says of Justice White's decision in the interpretation of the law: "He does not denounce contracts or agreements."

In speaking of the effect of Justice White's decision, Mr. Littleton said:

> For a time at least, the distinctly business section of the country stood still in a state of uncertainty and doubt; those concerns already organized, in many instances, fearful of prosecution; those concerns which were in contemplation, arrested lest they should trangress the law. The immediate bewildering consequence was that a dense fog of uncertainty settled down and completely enveloped American enterprise.

Chancellor Day says the same thing, that when we read "reasonable" or "unreasonable" into the law we have placed an impossible task upon the courts and given an uncertain guide to business.

Mr. FLOYD. The word "unreasonable" has never been written into the law. It is not in the power of the court to write a word into a law; they must construe the law as already written, and that law is as definite as what you proposed; it prohibits every restraint of trade in every degree.

Mr. STANLEY. Do you mean to say that an act can not be construed by a court in such a way as to give it the same effect as if it had been actually written as the court construed it?

Mr. FLOYD. No; I do not mean that; but I do mean to say that, notwithstanding Justice White's declaration on the subject, that no case in which that point has been raised has been held adversely on the ground that the restraint complained of was not unreasonable. Then, why the law?

Mr. STANLEY. Certainly so great a lawyer as my colleague, the gentleman from Arkansas, will not contend that it is conclusive? I do not believe that you will say to me that because the court, in the few cases involving the Sherman antitrust law that have been passed by the Supreme Court of the United States since the decision in these two cases, has not found a reasonable restraint of trade, that that is conclusive evidence that such a thing does not exist and will not occur, and that if it does occur it is not a dangerous precedent?

Mr. FLOYD. I would not contend it is conclusive, but it might be a strong reason why we should not disturb the existing law, already definite in its terms, and try some new experiment, until the evil that you complain of had actually occurred in a decision of the Supreme Court. The Supreme Court, by a change of the personnel of the court——

Mr. STANLEY (interposing). Might go back to its former interpretation.

Mr. FLOYD. Might go back to its former interpretation.

Mr. STANLEY. I do not believe that we should, by enactment, crystallize into law the dictum of Justice White--and that is what I consider it—that there is a reasonable restraint of trade, either by legislation or by judicial interpretation.

Mr. FLOYD. I would bitterly oppose that.

Mr. STANLEY. I would.

Mr. FLOYD. This is a different proposition.

Mr. STANLEY. Without using those terms we can make it so manifest that Congress and the people do not mean to tolerate this thing of reasonable restraint of trade that it would be impossible for that interpretation to be repeated.

I wish to call attention to this act. It not only provides that Congress shall not restrain trade in any degree, but——

Mr. FLOYD. Which bill?

Mr. STANLEY. The bill H. R. 11757. This act provides that:

All evidence showing or tending to show that such restraint was partial, or that it was not undue or unreasonable, shall be admissible for the purpose of determining the quantum of damages or the character of punishment to be inflicted, and for no other.

Then the act, or the sections referred to, will read, when amended, in this way:

A BILL To amend an act of July second, eighteen hundred and ninety, entitled "An act to protect trade against unlawful restraints and monopolies."

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 amended as follows:

Section two is amended by inserting in line three, after the word "monopolize," the words "in any degree."

Section four is amended by striking out, after the words "respective districts," in line five, the words "under the direction of the Attorney General," and by adding, after the word "premises," in line sixteen, the words "Any person who shall be injured in his business or property, or shall be threatened with such injury, by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may bring suit in equity in any district court of the United States in the district in which the defendant resides or is found to prevent and restrain violations of this act and for other appropriate relief.

"All evidence showing or tending to show that such restraint was partial, or that it was not undue or unreasonable, shall be admissible for the purpose of determining the quantum of damages or the character of punishment to be inflicted and for no other," so that said sections when amended shall read:

"SEC. 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize in any degree any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

"SEC. 4. 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, 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. Any person who shall be injured in his business or property, or shall be threatened with such injury, by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may bring suit in equity in any district court of the United States in the district in which the defendant resides or is found to prevent and restrain violations of this act and for other appropriate relief.

"All evidence showing or tending to show that such restraint was partial, or that it was not undue or unreasonable, shall be admissible for the purpose of determining the quantum of damages or the character of punishment to be inflicted and for no other."

Certainly you have not changed or weakened the act.

We all do admit that if the Supreme Court ever should decide that this, that, or the other actual restraint of trade was not injurious to the public and not unreasonable, they would be setting a precedent leading to inevitable injury and fraught with menace and danger.

Mr. MORGAN. Since the rendering in the decision in the Standard Oil case has there been a cessation, to some extent, of the formation of combinations in restraint of trade? Is not it the fact that practically since that time the formation of these combinations in restraint of trade have practically ceased? What has been the effect of the decision upon the acts of our business men?

Mr. STANLEY. If it had been appreciable, I have not been able to see it.

Mr. MORGAN. Can you think of any new combinations that have been formed?

Mr. STANLEY. Yes; Senator La Follette gives a list of several thousand.

Mr. MORGAN. Have they been formed since that decision was rendered?

Mr. STANLEY. Many of them have. That was three or four years ago. These various holding companies are formed every day.

Mr. MORGAN. Is it not a fact that a great many of these companies are going to the Department of Justice and are dissolving their concerns in harmony with the law as construed by the Attorney General.

Mr. STANLEY. I hear that.

Mr. MORGAN. Has not that been going on to a greater extent than ever before, since the rendering of that decision?

Mr. STANLEY. There are more of them coming now to the Attorney General to show just what they are doing and to get such terms as he may deem advisable, and I am the last man to criticize the Attorney General. I think it advisable that we should "beware of the Greeks bearing gifts."

Mr. MORGAN. Do you think the Attorney General has authority, under the law, to make those agreements outside of the courts' decisions and to arrange compromise agreements?

Mr. STANLEY. Certainly he can——

Mr. MORGAN. I do not mean——

Mr. STANLEY (interposing). I do not care to discuss the propriety of the Attorney General's acts.

Mr. NELSON. What specific authority has the Attorney General in the case of a large combination such, for instance, as the American Telephone & Telegraph Co. to agree that he will permit it to go on as it is, if it will not take over the other?

Mr. STANLEY. May I read you a little section of this act, and let that be my answer?

I take from the Attorney General by the terms of this act all exclusive authority over its operation, so that he has no more authority in that direction than any district attorney has.

Mr. NELSON. If he has such power, you are going to repeal it?

Mr. STANLEY. If I were the Attorney General—and I am glad I am not—I should prefer in every case to make a court record of every dissolution of a holding company. But I am not criticizing the Attorney General for what he has done or is doing.

Mr. FLOYD. Incidentally you have mentioned one matter, and I want to ask you a question in regard to that. You propose to amend the Sherman Act by taking all the authority existing in the Attorney General now to institute these suits. You take away from the Attorney General all authority vested in him now to institute these suits for the dissolution of the corporations, and you lodge it in the district attorneys of the respective judicial districts of the United States?

Mr. STANLEY. No; I would not do that.

Mr. FLOYD. You say section 4 is amended by striking out, after the words "respective districts," in line 5, the words "under the direction of the Attorney General," and by adding, after the word "premises," in line 16, the words:

Any person who shall be injured in his business or property, or shall be threatened by such injury by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may bring suit in equity in any district court of the United States in which defendant resides or is found to prevent and restrain violations of this act and for other appropriate relief.

All evidence showing or tending to show that restraint was partial or that it was not undue or unreasonable shall be admissible for the purpose of determining the quantum of damages or the character of punishment to be inflicted, and for no other

I understand from that that you strike out the authority of the Attorney General and invest it in the attorneys?

Mr. STANLEY. I will say, if you place that interpretation upon it, I would leave the Attorney General with the authority to institute proceedings, but I would not confine it to him.

Mr. MORGAN. Has the Attorney General any authority to institute proceedings himself under the present law? The Sherman antitrust law requires United States attorneys to institute the proceedings under the direction of the Attorney General.

Mr. STANLEY. Yes; under the direction of the Attorney General; a private party can not institute proceedings under section 21.

Mr. FLOYD. The district attorney has no authority to institute a suit unless he is directed to do so by the Attorney General, and the Attorney General enforces the law through the district attorneys. It seems to me you can give the Attorney General the same power of direction he has now, and give the district attorney authority independent of the Attorney General in case the Attorney General did not direct the suit.

Mr. STANLEY. I agree with you entirely, and the act should be so amended. In drawing the act it was my intention to give to the

district attorney, to take away from the Attorney General the sole power to institute such actions, but not to take away from him the power to institute as many as he may like.

Mr. MORGAN. I have a question I would like to ask you for information. Suppose there is an industrial firm in New York and another one in Oklahoma engaged in the same business. The firm in New York buys the product of the firm in Oklahoma, takes complete possession and runs the business. Suppose the New York firm, with offices in Oklahoma is doing business in Kansas, and that the Oklahoma firm is doing business in Kansas. Would it be a restraint of trade, and do you want to limit a transaction like that?

Mr. STANLEY. It is hard to answer those hypothetical questions.

Mr. MORGAN. Is it not a concrete illustration? As I understand it, you want to prohibit every contract that limits or restricts trade between two persons engaged in interstate commerce?

Mr. STANLEY. No, never.

Mr. MORGAN. Wouldn't that be a degree——

Mr. STANLEY (interposing). Would you punish a man for cutting a riding switch from a forest?

Mr. MORGAN. Suppose that a man said no man can cut any twig?

Mr. STANLEY. Then suppose he does do it?

Mr. MORGAN. Then I would punish him.

Mr. STANLEY. The law says, for instance, that a man shall not go over a bridge at a gait faster than a walk. Would you punish the man who goes any faster than a walk, the least bit faster than a walk, over a culvert?

Mr. MORGAN. Yes, sir.

Mr. STANLEY. Then you would read out of the law just what was intended to be in it?

Mr. MORGAN. It seems to me, logically, that is just what you are doing.

Mr. STANLEY. That is exactly what I am not doing. I am including all of them, and leaving it to the common sense of judges to pass trifling cases when brought into court.

Suppose you try with other things. Suppose you say you shall not steal unreasonably; you shall not commit an assault unreasonably; you shall not trespass upon a man's property unreasonably; you shall not go at an unreasonable speed over a bridge—do you not see what an impenetrable fog you would get into?

Mr. MORGAN. Should not the Supreme Court differ in putting this word "reasonable" in the law. Would you say it is to be left to the common sense of judges, the question, is that not what the Supreme Court did in their decision?

Mr. STANLEY. No, sir; instead of leaving it to the common sense of a jury or of a court—instead of leaving it to the common sense of a litigant, as it has done in acts forbidding any wrongful thing—they have tried to write into the law and say how far you can go without getting into forbidden territory.

It is not the rule. The rule is that only good things, only things which are commendable, shall be reasonably used. We are so constituted that the love of wife or child or the taking of sustenance must all be exercised reasonably.

Emerson has said that every faculty must answer for its use in life. We must be temperate in everything, we must be reasonable

in the use of legitimate things, but the vice of this act is that it attempts to provide for the reasonable use of an illegitimate thing.

Mr. MORGAN. There is where you are wrong, I think.

Mr. STANLEY. Monopoly is illegitimate. It is a form of larceny.

Mr. NELSON. I would like to bring out this fact, which seems to be overlooked. There is here a real emergency; the Supreme Court in two cases, the Standard Oil case and the Tobacco case, specifically interpolated into the law the word "unreasonable" which Congress had refused to put into the law, and they not only did that, but they practically reversed a long line of previous decisions, where the very question was whether certain acts were reasonable or unreasonable.

Mr. STANLEY. And made junk of them.

Mr. NELSON. That made the emergency immediate and important.

Mr. STANLEY. I agree with you. We can put it off. We can say if we want to that these people are going to voluntarily come and lay down their arms and give up this coveted power and we will wake up at our peril.

Take this question; that very question is discussed in the case of United States *v.* Standard Oil Co., in the decision of Justice Hook, of the United States Circuit Court, as reported in 173 Fed. Rep., at page 194, when he says:

> The true test to apply to a case under the first section is not whether the restraint upon competition imposed by the contract or combination in question should be regarded as reasonable or unreasonable, but whether it is direct and appreciable. Contentions of the reasonable and unreasonable are much too diverse to afford a stable, uniform rule for construing a law which contains no mention of those terms. So much depends upon the point of view, that it frequently happens that what appears to one to be wholly unreasonable is thought entirely reasonable by another. If the restraint is direct and appreciable, and not merely incidental to some contact having a lawful purpose, it falls clearly within the prohibition of the statute, and there is no room for further construction. There are many contracts which, in the days when the common law was forming, would have been adjudged contrary to public welfare, as being in restraint of the narrow trade of those times, but which, in a commercial age, like the present, have such a negligible effect in that direction as to be no longer evil within the meaning of the law. Their effect is so indirect and inappreciable that it is properly referable to the class de minimis, and it is not to be supposed Congress had them in view when it legislated to preserve freedom of competition in the broad field of interstate and foreign commerce. Vital principles, however, have not changed; the change is merely in the conditions upon which they operate.

Mr. MORGAN. I have that decision from which you have just quoted. You take the reasoning of Justice White and Judge Hook; what Judge Hook there calls direct and appreciable restraint, is that not in reality the same thing, largely, as Justice White would claim to be what is not undue or unreasonable? In other words, is that not largely a difference of words?

Mr. STANLEY. Oh, no; there is a vast difference. You can easily enough tell when a stream is impeded, because you can see the thread of the current. You put a ligature about an artery, and you can tell when the artery is affected; it is appreciable when you can clearly see it. But an unreasonable impeding of the circulation is another question. It must depend upon the effect upon the health of the man. Is it an unreasonable restraint of trade? It must depend upon its injurious effects upon the broad field of commerce, and the minute you attempt to establish that fact in a suit against one of

these concerns you will find the full effect of that word "unreasonable."

(Thereupon, at 12 o'clock m., the committee took a recess until 1.15 o'clock p. m.)

AFTER RECESS.

Mr. STANLEY. Now, this effort to limit arbitrarily, the restriction upon monopoly, to such combinations as were not out of reason, as were not manifestly pernicious, is as old as monopoly.

The arguments were made to Queen Elizabeth when she first created these pernicious things. She stated that she had never granted the right to control the manufacture of any commodity, or its transportation, except upon such proof as appeared to her to conclusively prove that it was beneficial to the realm. In other words, that while restriants was manifest as it was bound to be where there was a monopoly granted, that it was not undue and unreasonable.

All of her monopolies were submitted to my Lord Coke to determine what were absolute restraints of trade, unreasonable and undue, and in which case they should be rendered void, and what restraints were commendable and reasonable and beneficial.

In passing upon that great question that great jurist, Lord Coke, attempted to take the monopoly of the manufacture of playing cards and the monopoly of coal and the monopoly of glass and the monopoly of soap and the monopoly of leather, and a hundred others, and to separate them into reasonable and unreasonable restraints, and after an exhaustive effort he abandoned the task, in utter and supreme disgust.

To quote his own language, and I wish to call your attention to that, "the end," said Lord Coke, "of all these monopolies," reasonable and unreasonable—

is for the private gain of the patentees; and although provisions and cautions are added to moderate them, yet it is mere folly to think that there is any measure in mischief or wickedness, and therefore there are three inseparable incidents to every monopoly against the commonwealth. First, that the price of the same commodity will be raised, for he who has the sole selling of any commodity may and will make the price as he pleases. Second, the incident to a monopoly is that after the monopoly is granted the commodity is not so good and merchantable as it was before, for the patentee, having the sole trade, regards only his private benefit and not the commonwealth. Third, it tends to the impoverishment of diverse artificers and others who before, by the labor of their hands in art or trade, had maintained themselves and their families and who now will of necessity be constrained to live in idleness and beggary. (9 Coke's Reps., p. 163.)

The result of this effort of Lord Coke to find a measure in mischief and to determine what is a reasonable and what an unreasonable monopoly was that on March 24, 1624, King James approved the celebrated statute of monopolies, and that act is more drastic, and if anything, more sweeping and more absolute in its terms than the Sherman Antitrust Act. That statute provided, in section 1:

All monopolies and all commissions, grants, licenses, charters, and letters patent to any person or persons, bodies politic or corporate, whatsoever, of or for the sole buying, selling, making, working, or using anything within the realm or walls, or of any other monopolies, and all proclamations, exhibitions, restraints, warrants of assistance, and all other matters whatsoever any way tending to the instituting or strengthening, furthering, or countenancing of the same, or any of them, are altogether contrary to the laws of the realm, and so are and shall be utterly void and of noneffect and in no wise to be put in execution.

Now, I wish to call your attention to this bill I am sure you would not consider Mr. Littleton radical. In March, 1912, Mr. Littleton, who was a member of the Steel Investigating Committee, and also a member of the Judiciary Committee, said:

I would strike out section 4 of the present law, thus taking from the Department of Justice the exclusive power to bring action for the violation of law. I would make it law for any man whose business is damaged by unfair practices of another to bring an action in a court of competent jurisdiction for an injunction instead of leaving it solely to the inert Department of Justice.

I see no reason why a private individual who can bring an action under the seventh section can not also bring an action under the fourth section. I see more reason why a private individual should have a better right to prevent an injury than to collect damages after the injury has occurred.

Mr. FLOYD. In the bill prepared by the subcommittee we have a similar provision, giving the individual the right to bring suit the same as the Government under the fourth section of the bill, and we have also another provision making a decree of the Government——

Mr. STANLEY (interposing). I understand. That provision in my bill is taken from one of the bills reported by the committee. I have not gone into it, but I do not see exactly how you can make that effective without redrafting that portion of section 4 of the Sherman Act which provides that suits can only be instituted at the instance of the Attorney General.

Mr. FLOYD. You agree also, by the provisions of your bill, that the power ought not to be taken away from the Attorney General, but the district attorneys ought to be given the power independently?

Mr. STANLEY. That is it, exactly. I hope this bill will be reported, and, from what the members of the committee have said, I believe it will be. It has never been suggested that the law was too drastic as previously drawn, that the word "unreasonable" should be there.

The most that has been said is that we need not apprehend that their emasculation of the law by virtue of the decision in the Standard Oil case, and in the subsequent decisions, have tended to allay that alarm. It is not intended by any member of this committee, so far as I can see, that the law shall be emasculated, but that we have every reason to believe it is probably still intact.

It is the hope of every Member of Congress that the law will be subsequently interpreted as it was previously interpreted. Why not provide, then, that a restraint in any degree shall be contrary to the act? You certainly can not affect any of the terms now clearly understood. Why not, in addition, provide that the reasonableness or unreasonableness of the act shall be admitted for the only defensible purpose conceivable, and that is to show premeditation, as if it were a criminal case, and say that trade is not materially hurt. It is proper for a man accused of forming a contract in restraint of trade to show that the effect of it is not materially to injure and destroy competition. That is a matter for the consideration of courts in determining the extent of the man's guilt, whether he shall be fined or imprisoned, and the extent of the fine, if any. This bill is wonderfully elastic.

Mr. FLOYD. Will you permit me to interrupt you right there?

Mr. STANLEY. Yes.

Mr. FLOYD. Your amendment to section 2 contemplates the insertion of the words "in any degree"?

Mr. STANLEY. Yes, sir.

Mr. FLOYD. That is the only change in it?

Mr. STANLEY. Then it provides further that "all evidence showing or tending to show that such restraint was partial, or that it was not undue or unreasonable, shall be admissible for the purpose of determining the quantum of damages or the character of punishment to be inflicted, and for no other," so that the sections, when amended, shall read in this way:

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize in any degree any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both such punishments in the discretion of the court.

SEC. 4. 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 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 determining of the case; and, pending such petition and before final decree, the court may at any time make such temporary restraining orders or prohibition as shall be deemed just in the premises. Any person who shall be injured in his business or property, or shall be threatened with such injury by any other person or corporation, by reason of anything forbidden or declared to be unlawful by this act, may bring suit in equity in any district court of the United States in the district in which the defendant resides or is found to prevent and restrain violations of this act and for other appropriate relief.

All evidence showing or tending to show that such restraint was partial, or that it was not undue or unreasonable, shall be admissible for the purpose of determining the quantum of damages or the character of punishment to be inflicted, and for no other.

Mr. NELSON. You put that in to show the legislative intent?

Mr. STANLEY. Yes.

The act is certainly not weakened in any way by the addition of those words. It in no way affects the substantive part of it.

I thank you, Mr. Chairman and gentlemen of the committee, for your very kind, patient, and courteous attention, and I hope you will give the bill favorable consideration.

(Thereupon, at 2 o'clock p. m., the committee adjourned to meet to-morrow, Saturday, Jan. 31, 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.
R. 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.
L. C. DYER, Missouri.
GEORGE S. GRAHAM, Pennsylvania.
WALTER M. CHANDLER, New York.

J. J. SPEIGHT, *Clerk*.

TRUST LEGISLATION.

SERIAL 7, PARTS 3 AND 4.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Washington, D. C., January 31, 1914.

The committee assembled at 11.30 o'clock a. m., Hon. Henry D. Clayton (chairman) presiding.

Present: Representatives Carlin, Floyd, McGillicuddy, Taggart, Peterson, Mitchell, Morgan, and Chandler.

The CHAIRMAN. Mr. Levy, the committee will be glad to hear you now.

Mr. CHANDLER. Mr. Chairman, I should like to say that I am obliged to leave the committee meeting, as I must go to the House; but I agree in general with the views of Mr. Levy.

STATEMENT OF HON. JEFFERSON M. LEVY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK.

Mr. LEVY. Mr. Chairman and gentlemen of the committee, I appear before you this morning in advocacy of the bill H. R. 12106, introduced by me, providing for the investigation of combinations, monopolies, trusts, and mergers, and to protect trade and commerce against unlawful restraints. Under my bill if six or more persons, citizens of the United States and resident therein, and of full age, are of opinion that a combination exists and that the prices have been enhanced or competition restricted by reason of such combination, to the detriment of consumers or producers, such persons may make application to any district court judge for an order directing an investigation into such alleged combination.

The CHAIRMAN. Do you not follow, Mr. Levy, somewhat the Canadian law on the subject of trusts in your bill?

Mr. LEVY. Yes, sir. That law has been in active force for some years in Canada, and they have been able to control the situation

there. The present Sherman law has been the cause of panic and disaster to the entire country; it has interfered with commerce and retarded our progress and advancement 20 years.

On May 8, 1911, which was about 10 days before the Supreme Court rendered its famous Standard Oil decision, I introduced into the House a bill (H. R. 9073) amending sections 1, 2, and 3 of the act of July 2, 1890, by an insertion of the word "unreasonable." At the time the bill was introduced I stated that if this amendment to the Sherman law were passed it would place it in the power of juries to determine each specific case, what combination would be reasonable or unreasonable in the particular case viewed in the light of the circumstances surrounding it, the nature and effect upon the public or the combination, and the inducements prompting the parties to enter it. The construction would be under the rules of the common law, which is the growth of centuries. The Sherman law, if amended as I proposed, would be following the common law in respect to conspiracies and restraint of trade and as further providing remedies for the punishment of such conspiracies, and would be of very great use in respect to preventing the continuance of illegal combinations and of punishing the parties thereto.

The fact that our able Supreme Court inserted in their Standard Oil decision the word "reasonable" is additional proof of its wisdom. This body—the great bulwark of our liberties—has shown the prescience by this decision to prevent the utter destruction of our commercial activities. The rights of property—the very foundation stone of civilization—would be trampled upon and destroyed without this just interpretation placed upon the Sherman law, and we would find ourselves bordering upon barbarism in using the weapon of the law as the force to deprive men of their vested rights.

If legislators, in their desire to pander to the violent demands of socialism or communism, pass laws not based on reason, then we should give praise in grateful reverence to our forefathers that they provided us an organization which would restrict such evil tendencies and call us back to the fundamental principle that all just laws framed in truth and justice must be based on right reason.

Under the law, before the Supreme Court decision, all the associations organized by farmers in the various parts of the country for the sale of local produce would have been declared illegal. If the court had decided the Standard Oil case without taking into consideration "reasonable restraining of trade," all classes of business would have been destroyed; all corporations and all firms would have been dissolved; and the business world would have been in chaos. In view of all this, in my judgment, every patriotic and reasonable citizen ought to be in favor of returning to the principles of the common law. The French Revolution was brought about, to a great extent, by such obnoxious and drastic legislation as some of our legislators to-day are proposing, and it is astounding that intelligent men should for one moment propose or agitate more drastic legislation than the present Sherman law. The bill introduced by me is a more liberal proposition and gives an opportunity to the people who are injured by combinations to recover damages. In Great Britain the common-law practice applies to all business interests, and why, then, should the business of this country be harassed by unreasonable propositions which can only injure trade?

I would like to read, for the information of the committee, an extract from a speech made by the distinguished ex-chief justice of the State of New York, Hon. Edgar M. Cullen, which I noticed in the New York Herald of to-day, this morning.

It is a question of whether individual liberty is still to obtain in America. Nevertheless, unless I am utterly mistaken, there is now a strong tendency in courts, legislatures, and worst of all, in the people themselves, to disregard the most fundamental principles of personal rights. Judicial decisions are made, statutes are enacted and doctrines are publicly advocated which when I was young would have shocked our people to the last degree. In those days liberty was deemed to be the right of the citizen to act and live as he thought best, so long as his conduct did not invade a like right on the part of others. To-day, according to the notion of many, if not most people, liberty is the right of part of the people to compel the other part to do what the first part thinks the latter ought to do for its own benefit.

As I have stated, I think the Sherman law has been the cause of the increased price of commodities; for example, it has doubled the price of oil; it has put up the price of coal in my city some $2 a ton—the Sherman law and the Hepburn law together. And I believe that all this increase has arisen from legislation.

For instance, here is what it cost one railroad alone—the Pennsylvania Railroad; its yearly carrying charges imposed upon it by recent legislation, equal the interest on $32,000,000. Now, that is going on all over the country. In Seattle, when the Hepburn law was put in force, there was a coal famine; it put coal up to $18 a ton at the time. And the price has never come down to the level which existed before t at law was passed.

Mr. CARLIN. Do you favor the repeal of the Sherman law?

Mr. LEVY. No; we can not very well go back to the common law, because we have the statutes in the States; but if Congress should adopt my bill, it would protect us. That is on the line of the common law principles; and it is along the line of this Canadian law, which is in force and which has been very successful. I have been in favor of this all the time.

I do not believe in imposing penalties upon business that are too severe. At present people do not know—they do not really comprehend what the Sherman law is. Only recently, some six or seven weeks ago, I had a conversation with the Attorney General on this same line of thought, and he said, "Well, everyone knows what the law is." I said, "I must differ with you there." He said, "The Sherman law has been in force 23 years, and the people have had an opportunity to understand it." I said, "Well, there is no lawyer who knows exactly what the Sherman law is." He said, "Well, I will advise the people on the subject." And he did. He came out in a statement a little later.

The principle I have advocated is, if the punishment is severe, let the parties go to the Attorney General, and let him point out——

Mr. CARLIN (interposing). Have you read the proposed interstate trades commission bill, Mr. Levy?

Mr. LEVY. No, sir; I have not.

Mr. CARLIN. Well, that bill gives all the powers of investigation to the interstate trades commission and makes it advisory to the Attorney General—somewhat along the lines of your bill.

Mr. LEVY. Yes. Well, I originated—in fact, when the great panic came on during President Roosevelt's administration I went to see the President in relation to it. I said, "Why not grant an amnesty

and explain to the people what the Sherman law is?" He said, "That is a good idea. You go up and see Mr. Hepburn in the House and tell him about it." And I saw Mr. Hepburn, and Mr. Hepburn said, "Well, I will make a speech upon the subject." And he did make a speech, and business and trade began to go on again. The confidence of the public was restored.

The whole theory this past year has been based upon the question of securing the confidence of the public more than anything else. I think to-day if you will pass the resolution which I have heretofore offered in the House, in relation to withdrawing the suit against the United States Steel Corporation, why, you will have 500,000 more employees at work in this country. There has never been a more disastrous investigation than that investigation which went on in the case of the Steel Trust, because it threw many hundreds of thousands of people out of employment. And business is just coming into life again, because the President of the United States understands the situation, and how to bring us out from under this cloud of uncertainty and distrust which has enveloped us. That is the whole situation.

These are my views, gentlemen of the committee. If there is any further information I can give the committee, I will be very glad to do so. Of course, you will understand that I am very largely interested in the subject, because the city of New York is the greatest manufacturing city in the world. I will just read you a few statistics showing the enormous interests involved in that city. Of course, it is hardly necessary, as the members of the committee are familiar with the facts, but I would like to have it go in the record.

The metropolitan district of New York embraces 616,928 acres, of which 183,555 acres lie within the city proper. The population of the metropolitan district of the city of New York in 1910 was 6,674,000; and it is to-day about 7,500,000, or about 14 per cent of the population of the whole country.

Mr. TAGGART. Do you mean 14 per cent or one fourteenth of the population?

Mr. LEVY. One-fourteenth of the population of the United States. That is why New York is so predominant.

Mr. CARLIN. Just what do you mean when you say that it is "predominant"?

Mr. LEVY. I mean it is always to the fore, and always leading in progress in everything. For instance, in New York, in the metropolitan district, there were, in 1909, 31,782 manufacturing establishments, which gave employment to 948,706 persons. During the year, they paid out $607,755,267 in salaries and wages. Of the persons employed, 789,174 were wage earners. Of course, these figures have greatly increased since that time. These establishments turned out products valued at $2,970,143,382, to produce which materials costing $1,710,324,660 were utilized. The value added to those materials was thus $1,259,813,722. New York is the greatest manufacturing city in the world. Are there any other questions the members of the committee would like to ask me?

The CHAIRMAN. Do you think you can adapt this act to provide for the investigation of combines and monopolies, trusts and mergers, the Canadian act, from which you say your bill is largely taken——

Mr. LEVY (interposing). Yes, sir; it is somewhat taken from that act; it is not entirely the same.

The CHAIRMAN. The Canadian act assented to on May 4, 1910—do you think you can make the provisions of that act which you have embodied in your bill applicable to conditions in the United States?

Mr. LEVY. I think I could, with the amendments which your committee can suggest. Now, there may be a question whether the persons damaged should not have to go to court to have a jury decide as to the amount of their damages. I leave those questions to your committee. My bill is a mere suggestion to your committee, and you can correct it as you deem proper; that is my idea. I do not want to claim the bill as being entirely my own; I had just as soon have it go out as the bill of the Committee on the Judiciary. All I want to do is to ease up business and have the confidence of the public restored. That is the situation.

Mr. FLOYD. Mr. Levy, Mr. Stanley appeared before our committee yesterday, and he very strenuously contended that the Supreme Court have already written the word "unreasonable" into the Sherman law?

Mr. LEVY. Yes, sir.

Mr. FLOYD. Do you agree with that contention?

Mr. LEVY. Yes, sir; I think they have construed it in that way.

Mr. FLOYD. Well, will you tell us what is the necessity of any direct legislation on the subject?

Mr. LEVY. Well, I think if you take this bill that I have proposed——

Mr. FLOYD (interposing). As I understood you, you said that you had introduced a bill; and I am not familiar enough with that to know whether you would put the word "unreasonable" into the Sherman law?

Mr. LEVY. Yes, sir.

Mr. FLOYD. Have you a bill here in which you propose to do that?

Mr. LEVY. That was at the last session of Congress, and before the decision of the Supreme Court.

Mr. FLOYD. The decision in the Standard Oil case. In other words, you think, in view of the decision of the Supreme Court of the United States in the Standard Oil case, that there is no necessity of adding that word to the text of the Sherman law?

Mr. LEVY. Yes, sir.

Mr. FLOYD. And you propose now this Canadian system as a modification of that?

Mr. LEVY. Yes, sir; and one reason for that is because the Sherman law gives no relief to the people damaged by the combination, where my bill does give them relief.

Mr. FLOYD. Well, the Sherman law, section 7, provides that anybody injured under the provisions of the Sherman law may obtain damages.

Mr. LEVY. It does in a way; but it is not as direct as this proposition, because under my bill there is a commissioner appointed by the President, and there are boards of investigation, appointed after investigation by the court in the regular channel—the Secretary of Commerce then appoints this board, which determines whether the law has been violated; and for the first offense the guilty parties are fined the amount of damages suffered by the persons applying for the investigation, and the second time they are punished as in the case of a misdemeanor. That is my theory. I think this law would be more liberal to the people than the present law.

Mr. CARLIN. The difficulty with your bill is that it is unconstitutional as it is drawn.

Mr. LEVY. Well, that is the reason I say I shall be glad to have amendments by the committee. I drew the bill up hastily, more for the benefit of the public and for the benefit of your committee than anything else, with the idea that your committee would look into the subject and correct it. And I think some other officials have looked into the subject also. My bill is for the purpose of trying to bring the uncertainty in the public mind to an end—the uncertainty which any lawyer would have to-day, so that if anyone should come in and ask him any question arising under the Sherman law, he could not answer it with certainty.

Mr. MORGAN. Under your bill, you provide that any six persons can bring a suit?

Mr. LEVY. Six persons can bring a complaint.

Mr. MORGAN. Yes, a complaint. Well, let us take the United States Steel Corporation, for example, doing business all over the United States.

Mr. LEVY. Yes, sir.

Mr. MORGAN. Now, in every place where there is a judge—and there is one in every locality—any six persons might combine together and bring a complaint against that corporation: is that not correct?

Mr. LEVY. Yes, sir.

Mr. MORGAN. And that company might therefore have 10,000 suits pending against them before this board or commission, each one brought by a separate set of six persons.

Mr. LEVY. That would be prevented by the commissioner, who would be appointed by the President of the United States, by and with the advice and consent of the Senate, and would be under the authority of the President; and he would be the one who would have the power to perform the duties provided for in this act, and recommend the appointment of board of investigation; and when these six people came in their complaint would be acted upon; and if any more people should afterwards come in against the same company, he could say, "An investigation is going on now," and they could come in before this board of inquiry which had been appointed, you see?

Mr. MORGAN. And whoever introduced the proceeding first—your idea would be that the whole thing would depend upon that proceeding?

Mr. LEVY. Yes, sir. I do not say that my bill is perfect at all; but I say that this committee might make it perfect. It would be something that would relieve the people, who are at the present time uncertain as to the provisions of the law. And I claim that the whole effect of the law has been to increase the price of commodities in every way.

But I think that your legislation here is in a fair way to correct that; that is my idea. I think the record of our party in this Congress has been good. You will hear the Members on the other side of the House talking about bad times. Well, we are going to have good times now, because we are going to give the people an opportunity to have prosperity. And I believe that what this committee will do will help toward that end.

(Thereupon, at 11.45 o'clock a. m., the committee adjourned until Monday, February 2, 1914, at 10.30 o'clock a. m.)

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Monday, February 2, 1914.

The committee this day met, Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. Gentlemen of the committee, Senator Sheppard, of Texas, is here this morning, and he has two of his constituents who wish to be heard on the matter of holding companies. They want to give their views as to what would be correct legislation in regard to that branch of the so-called trust question. We will also be glad to hear from Senator Sheppard if he desires to say anything.

Mr. SHEPPARD. I merely want to present Mr. Proctor and Mr. Batts and say that the committee may rely on anything they say.

STATEMENT OF MR. F. C. PROCTOR, OF BEAUMONT, TEX.

Mr. PROCTOR. I will try to present the matter as concisely as possible. I am connected, as general counsel, and have been for some nine years, with an oil enterprise. Its history, I think, demonstrates that some character of business enterprises are required and compelled to adopt the holding-company form of organization, and that it is entirely lawful and not in violation of our antitrust laws at all. In brief, the history of this enterprise is this: In 1901 the originators of it found oil on the coast of Texas——

The CHAIRMAN (interposing). Have you given the name of your company?

Mr. PROCTOR. I will give it. There are several corporations in the enterprise, but it is generally known as the Gulf Oil Enterprise. In 1901 they found oil on the coast of Texas and they began to produce oil. They found that they did not have an adequate market for it in its crude shape and that it was necessary for them to go into the refining business. Their oil-producing company had as broad powers as Texas law permitted; that is, simply to produce oil and sell the production. They wanted to make an investment, which ultimately resulted in several million dollars, to refine oil. Their producing company could refine the oil which it produced, but it did not have the power to buy oil. This necessitated the creation of another company by exactly the same people, which was the Gulf Refining Co., with power to buy and refine oil and sell the refined products. They went into this business, which was successful, and naturally they wanted to enlarge the trade and went to the near-by State of Louisiana. Louisiana has a license tax law which levies 1 per cent upon the gross receipts from sales by foreign oil companies, but it does not apply to domestic oil companies.

Our competitors in Louisiana were exempt from that law, one because it was a domestic corporation, the Standard Oil Co., of Louisiana, and the other because—although it was a Missouri corporation—it had been admitted to do business in Louisiana prior to the passage of this license tax law, and under a statute which gave it equality with other domestic corporations. We were therefore compelled, in order to do business in competition with our competitors, to create a Louisiana corporation for that purpose. In other words, we could not sell oil in competition with them when we were subjected to a burden which they were not subjected to, and that

burden, as you can well see, might amount to a very large sum when the capital is turned over frequently during the period of a year. This consequently made necessary a third corporation. The oil in Texas began to play out and we were required to go to Oklahoma to get oil and to build a pipe line there for that purpose. That pipe line had to go across Indian lands and Congress had given to the Secretary of the Interior, and to the Secretary of the Interior alone, power to grant rights of way over Indian lands. The Secretary's regulations were that these rights of way would only be granted to pipe-line companies proper and not to producing or refining oil companies. We could not go over these Indian lands with a pipe line except by compliance with these regulations, and that meant the organization of a pipe line company. So we now had four companies, and that condition continued until Oklahoma was admitted as a State of the Union.

Under its constitution the power of condemnation for rights of way is conferred upon domestic pipe-line corporations but denied to such foreign corporations. Consequently our pipe-line company, which was a Texas creature, and which had built a pipe line into Oklahoma, was in a situation where it could not exercise the power of eminent domain to reach a new oil field. It was essential to the enterprise that we be in a position to reach a new oil field and consequently had to have this power of eminent domain. That necessitated the creation of an Oklahoma pipe line company, and that made five corporations we had to build up. Then there came the problem of financing the project. A good many million dollars had to be borrowed for the purpose of constructing this pipe line, with the building of the necessary tanks for a reserve supply of oil, and so forth, and the trouble was that no one of these corporations could offer adequate security. In Louisiana the company owned the Louisiana property; the refining company owned the refinery; the producing company owned the production or wells and the pipe-line company the pipe lines, and so forth; but none of these were good security in themselves; they were good security only in conjunction with the other complements of the main business. No one of these corporations had the right to issue joint bonds with the others and under the law no one had the right to guarantee the bonds of the others.

The problem, therefore, was in fixing upon some plan whereby men would be willing to loan money upon the whole enterprise; and after the most careful thought which the management, with my advice, could give it, we found no plan except that of a holding company.

Mr. CARLIN. Where was the holding company?

Mr. PROCTOR. In the only State where it was possible, New Jersey. Every other enterprise we have is the creature of the local State except the New Jersey company. Incidentally, I may say we are doing business in New Jersey, so far as that is concerned, but the holding company referred to is purely and simply a holding company and with no operating powers at all. It was brought into being for the purpose of financing the project. It exchanged its stock for stock and bonds of the different branches of the business which I have mentioned and issued its own bonds and pledged the stock and bonds of the other companies as security.

Mr. CARLIN. What was to prevent your company from taking out one charter and doing all of these things under one corporate name?

Mr. PROCTOR. Well, I will put it to you in this way. In the first place we could not have gotten such a charter in Texas. In Texas the oil business is seemingly divided into fragments. You get one company to produce oil, another company to refine oil, and another company to transport oil through pipe lines—three separate organizations.

Mr. CARLIN. And under the laws of Texas they can not be one organization?

Mr. PROCTOR. No, sir; they can not do anything in Texas except that for which chartered. We could not go elsewhere and get a corporation with all of these powers, because when it came to be admitted to do business in Texas it could only have the powers of one corporation—that is, a foreign corporation can be admitted to do business in Texas only to the extent that a domestic corporation can do business. If we had gone somewhere and gotten one corporation with all of the adequate powers to really conduct one enterprise, one result would have been that in Louisiana, for instance, we would have been subjected to this license tax of 1 per cent. Suppose, for illustration, we had created a Louisiana corporation for that purpose, namely, to conduct the entire business; then we would have been in this situation, that we could not have had the power of eminent domain in Oklahoma.

Mr. CARLIN. Do not the statutes of Oklahoma confer the power of eminent domain upon foreign corporations under certain conditions?

Mr. PROCTOR. No, sir. The constitution of Oklahoma prescribed this, that the power of eminent domain should only be granted to domestic corporations. They did, however, include a provision that the legislature might amend such clause within five years and, incidentally, I never knew of any other constitution that could be amended by the legislature, but in Oklahoma that right exists. At the last session of the legislature, about six months ago, they passed a constitutional amendment which provides that a foreign corporation, upon meeting the requirements which may be imposed by the corporation commission of Oklahoma, should have the power of eminent domain. That is a very recent thing, and I do not know what the corporation commission of Oklahoma has indicated as essential in that regard. So I can not answer you that it is absolutely impossible for a foreign corporation to have the power of eminent domain in Oklahoma, but at the time we created our corporation it was absolutely impossible.

The CHAIRMAN. I would like to know how it is that a holding company could not be chartered in Texas, because the scheme you have outlined, as I understand it, is not contrary to its antitrust law and is not contrary to our antitrust law.

Mr. PROCTOR. It is not; it is simply the absence of a statute in that regard. Our antitrust law is like all other antitrust laws; the spirit of it is this, that it prohibits any form of combination which works a restraint of trade and stifles competition, and here there never was any competition stifled because there was never any competition to stifle. You see, the same individuals brought into being these successive corporations, and they were forced by the laws to do it. There never was any competition between them; there never was a time that they were competitors, and there never was the acquisition of plants or facilities of others or anything of that sort. It was simply the same people, with the same money, carrying out the same enter-

prise. I am certain there are many, many illustrations in the United States of the same thing.

Mr. FLOYD. If I understood your explanation in regard to Texas law, it was that the oil business in Texas, under the antitrust law, had to be divided up; that a company had to specify and limit its operations to the particular things specified.

Mr. PROCTOR. The antitrust law has nothing to do with it, but such is a result of the Texas general incorporation laws.

Mr. FLOYD. And I inferred from what you said that it would not be proper, under the corporation laws of Texas, to include as the objects of the company the production of oil and at the same time the selling or refining of it?

Mr. PROCTOR. It could not be included in the same charter?

Mr. FLOYD. That is the way I understood you.

Mr. PROCTOR. There would have to be distinct corporations——

The CHAIRMAN (interposing). And each corporation would discharge a separate function?

Mr. PROCTOR. Yes, sir.

The CHAIRMAN. And therefore they are not competitors?

Mr. PROCTOR. Not at all.

The CHAIRMAN. And there is no combination in restraint of trade?

Mr. PROCTOR. No, sir; it is a legal situation. In the State of Texas there has never been any thought that it is violative of the policy of our laws or anything of that sort. It is simply a situation which is forced upon us in order to do the different branches of the business. If you ask me why the law is that way, I will answer that it may be because of taxation. We have had for considerable periods of time different forms of taxation as respecting pipe-line companies and producing companies. We now have a form of taxation which affects a producing company differently from a refining company. The purpose of Texas in requiring separate charters may be that the State taxing authorities may properly tax the different branches of the business.

Mr. FLOYD. I understood you to say before the hearing commenced that you had a brief on the subject, and if so, I would suggest that you have it incorporated in the record in connection with your remarks.

Mr. PROCTOR. It is substantially what I have said, except that it is probably more concise.

Mr. FLOYD. Well, I would be glad if you would hand it to the stenographer and let him print it in connection with your remarks.

Mr. PROCTOR. I just want to say that it is not our purpose in appearing before the committee to ask any modification or change in the law; nothing of that sort. I just thought this would give an illustration of many instances which I believe are present in our industrial life where holding companies are absolutely necessary and absolutely lawful, and that holding companies are the only means by which some enterprises can do business in a good many States. Our enterprise is doing business in most of the States east of the Mississippi and in several States west of it, and it has succeeded. It is well recognized, as the result of a great many governmental investigations and in the trade generally, as an honest competitor of the Standard Oil companies, and we are simply at a loss to know what we would do if there was any prohibition against holding companies. I do not know how we could grow or even go on.

Mr. FLOYD. In that connection I want to bring out clearly this fact: As I understand it, your company is a competitor of the Standard Oil Co. and in no way allied with it?

Mr. PROCTOR. We are absolutely connected with them in no way. As you gentlemen understand, investigations have been made by the Bureau of Corporations and the Department of Justice, and I think there is a great deal of testimony on that subject in the Standard dissolution suit. However, that is a fact which I state to you positively. It is absolutely independent of the Standard Oil Co. and has never been allied with it. That is recognized in the trade and is recognized as the result of these investigations.

Mr. PETERSON. I notice this in the antitrust law of Texas:

When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such common management or control tends to create a trust as defined in the first section of this act.

Where any corporation acquires the shares or certificates of stock or bonds, franchise or other rights, or the physical properties, or any part thereof, of any other corporation or corporations, for the purpose of preventing or lessening, or where the effect of such acquisition tends to affect or lessen competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise.

Seeming to indicate that that might be done if it was not in restraint olf trade.

Mr. PROCTOR. Absolutely; yes, sir.

Mr. PETERSON. And you are not doing business in restraint of trade, as I understand?

Mr. PROCTOR. Not at all, sir. However, I have very carefully considered the section you read, and it prohibits the acquisition of stocks in two concerns where it results in the restraint of trade or results in the stifling of competition. But, as you will note, it inferentially permits it to be done; a fair inference is that it is entirely permissible and legal where it does not do those things. The policy of the State is further indicated by an act of the legislature in which the State permits the organization of a holding company to control stocks of corporations doing business in other States. We could hardly assume that Texas would claim the right to create a holding company to control stocks of companies doing business in New Jersey and at the same time deny to New Jersey the right to create a holding company to hold stocks of companies in Texas. I think the policy is indicated in that regard.

Are there any other questions?

The CHAIRMAN. No; and we will now be glad to hear from Mr. Batts.

(The brief filed by Mr. Proctor is as follows:)

FEBRUARY 2, 1914.

To the Chairman and members of the
Judiciary Committee of the House of Representatives:

In the President's antitrust message suggestion is made that holding companies should be prohibited. We believe the President had in mind that the holding company is frequently used as a device to violate the antitrust and monopoly statutes, and that his suggestion really means that Congress should consider it is advisable to enact legislation to more efficiently correct such abuse. We do not wish to be understood as here suggesting any modification of the present antitrust laws which prohibit the use of the holding company device, as all other devices, for the creation of a monopoly or destruction of competition in interstate and foreign commerce. Our proposition is simply that there should be no absolute prohibition of holding com-

panies. Because of restrictions imposed by State legislation either for the purpose of raising revenue or for the carrying out of some purely local policy, enterprises whose operations extend to many States are compelled to adopt the holding company form of organization as the only lawful means of growth.

Many such instances are presented in our industrial life. In fact this applies to nearly all lines of industry in which products are shipped from one State in bulk and not in original packages and are distributed and sold in another State, thus requiring the enterprise to do a local business in the latter. An illustration of the foregoing is the experience of one enterprise which is engaged in the oil business.

Because oil is found in only a few localities it is obvious that the greater part of our country must be supplied by shipments from such favored places. Frequently the crude oil is transported to another State, refined, and the refined product sold therein or shipped to other States for sale, but the same observation applies if the oil be refined in the State in which it is produced and the refined product be shipped to and distributed in other States. These products, either crude or refined, are transported in bulk (only a very small part being sold in original packages), and the distribution and sale of such products constitutes a doing of local business in the State to which they are shipped. This is the only economical way of doing such business and is that which the competition of others forces, with the result stated that the business of distribution and sale of the refined products in each State is wholly subject to regulation, taxation, etc., by the State in which it is done. (General Oil Co. *v.* Crain, 209 U. S., 211.)

"The Gulf Companies" is the oil enterprise referred to. In 1901 the originators of such enterprise found oil on the coast of Texas. They incorporated in said State an oil company with powers to produce oil and sell such production. Under the laws of Texas no greater powers could be obtained for that corporation, nor could any corporation of another State be admitted to do business with any broader powers. Because there was an inadequate market for their crude-oil production they determined to refine their oil and sell such refined products. Their producing company could refine the oil it produced, but had no lawful power to *buy* oil for refining. They expected to make ultimately a refinery investment of several million dollars, as was in fact done. No such investment could safely depend upon receiving its crude-oil supply from one source, which might become exhausted, and hence it was essential that this refining business should have the power to *buy* oil from others. Accordingly, these same people incorporated in Texas another company with power to buy and refine oil and sell the refined products.

Meeting with success and desiring to enlarge their market, they naturally began to sell oil in the adjacent State of Louisiana. The latter imposes a license tax in favor of the State and the parishes or municipalities aggregating 1 per cent of the gross receipts from sales of oil, both crude and refined, by foreign corporations, but this tax is not imposed upon domestic corporations. (Wolff's Revised Laws of Louisiana, sec. 7 of act 127 of 1898 and sec. 15 of act 171 of 1898.) Of course such a tax would impose a very large burden, since 1 per cent would be taken each time that the capital used in Louisiana was turned over. One of our competitors, the Waters-Pierce Oil Co., was not subject to such tax because, although a Missouri corporation, it had been admitted to do business in Louisiana on terms of equality with domestic corporations prior to the passage of such license-tax law. Another, the Standard Oil Co. of Louisiana, is a corporation of the latter State. Obviously, our people could not compete on such unequal terms, and they were therefore compelled to create a Louisiana corporation to transact the business of the enterprise in that State.

Later the oil production in Texas greatly decreased, and to protect the very large investment which had been made in the refinery, ships, tank cars, oil stations, etc., as also a large trade which had been built up, these people found it necessary to construct a pipe line to the Oklahoma fields to get oil. This pipe line had to cross Indian lands. Under an act of Congress the Secretary of the Interior alone could grant the right of way thereover. The regulations of the department and insistence of the Secretary was that such right of way would only be granted to a corporation assuming the obligations of a common-carrier pipe line. Neither the producing nor the refining company had such powers, and hence it became necessary to create a pipe-line company, and the same was incorporated in Texas.

A difficult financial problem then presented. The construction of this pipe line, with its necessary tankage and reserve supply of oil, required several million dollars, which had to be borrowed. Neither the producing company nor the refining company, nor the latter's Louisiana adjunct, nor such pipe-line company could offer the adequate security for this loan, because each owned but a part of the property of the entire enterprise, and such part was not a good security except in connection with the other complements of the entire enterprise. Neither did these corporations have power to issue any joint bonds or to guarantee the payment of each other's bonds. Yet the enterprise,

as a whole, was ample security. The only practicable and lawful mode of financing such project, and that which we were forced to adopt, was the organization of a holding company, which exchanged its stock for the stocks and bonds of the other companies and issued its own bonds for the amount required, securing payment thereof by pledge of the stocks and bonds of such other companies, thus giving the parties who advanced the money a virtual lien upon the entire enterprise.

Another chapter is that after the construction of such pipe line Oklahoma was admitted as a State. Its constitution gave the power to condemn for rights of way to pipe-line companies incorporated in Oklahoma, but denied such power to those elsewhere created. The danger therefore presented that our pipe-line company, created in Texas, might not be able to reach a new oil field. This made necessary the creation of an Oklahoma pipe-line company to do business in that State.

Other like difficulties arising from local legal requirements could be mentioned, but we think the foregoing is all that is necessary to show:

First, that the adoption of the holding company form of organization was not voluntary, but forced upon the enterprise in order to comply with local laws; and,

Second, that each successive corporation was brought into being by the same people to conduct a part of the same enterprise. There was no merger with nor acquisition of a competitor. It was not *combination* to stifle competition, because there was never any competition between these corporations to stifle. It was mere *growth*.

The enterprise referred to has prospered; its capitalization is large, but it is engaged in the business in which both economy of operation and the ample resources of its competitors would make success impossible without ample means. But its capitalization is honest, and each dollar thereof represents a full dollar of value received. The enterprise is selling oil in most of the States east of the Mississippi, and in several west of the same. These States contain fully 60 per cent of our people, all of whom we think receive some benefit from this competition. In the many governmental investigations this enterprise has been found free from any Standard Oil connection, and it is recognized in the oil trade as one of the two largest, if, indeed, not itself the largest competitor of such companies.

We know that the holding company is a device frequently adopted to violate the antitrust law, but the foregoing exhibits that it is likewise capable of use in an entirely innocent manner. In this case, and many others, it is indeed the only available means for growth of a competition. We can not control, and should not even attempt to influence local policies, but must meet the legal requirements of the States in which we operate. Of course, a national incorporation act may give relief to such a situation, but all of us must admit that there is grave doubt of the power of Congress under the commerce clause of the Constitution to give adequate relief when the latter must practically go to the extent of regulating what has heretofore been considered a purely local business done in a State. Besides, such a measure would carry with it a governmental supervision over all business, a step which we think the country is not now prepared to take and as yet the absolute necessity therefor has not been demonstrated.

We earnestly insist that the prohibition against holding companies should not be absolute. If made absolute, it presents the problem: How can legitimate enterprises grow which operate in many States? In fact, how can this particular enterprise maintain its present position as an important factor in the rapidly increasing competition in the oil trade of the United States?

We, therefore, respectfully submit that in legislation against holding companies, the prohibition should be restricted to the acquisition by them of stock in competing concerns, whereby an existing competition is destroyed. The prohibition thus limited would reach the evil in the use of such device, and would not hinder the growth of legitimate enterprises.

Respectfully submitted.

F. C. PROCTOR, *Beaumont, Tex.*,
R. L. BATTS, *Austin, Tex.*,
Counsel for the enterprise referred to.

STATEMENT OF MR. R. L. BATTS, OF AUSTIN, TEX.

Mr. BATTS. I also represent the Gulf Co.

The CHAIRMAN. What is your address?

Mr. BATTS. Austin, Tex. This matter has been covered by Mr. Proctor, except perhaps I might make a further explanation of the laws of Texas. There is no general power of incorporation in Texas; the purposes for which incorporation may be had are specifically

indicated in about 71 paragraphs, indicating directly what each corporation may be formed for, and there being an inhibition against the formation of corporations for more than one of these purposes. That will explain why at least two of these corporations were formed——

Mr. SHEPPARD (interposing). Is that a constitutional inhibition or a statutory inhibition?

Mr. BATTS. A statutory inhibition. There is simply an absence of authority to incorporate except for those specified purposes. A holding company is not prohibited, but no provision is made for it. It is simply the absence of a provision on the subject.

I may say, with reference to the antitrust laws, that it is perfectly well understood in Texas that these oil corporations that are in competition with the Standard Oil Co.—that is to say, the Gulf Co. and the Texas Co.——

Mr. CARLIN (interposing). What was the name of the other company?

Mr. BATTS. The Texas Co.

Mr. CARLIN. There was another one, was there not, some time ago?

The CHAIRMAN. The Waters-Pierce Co.

Mr. BATTS. That was a subsidiary company of the Standard Oil Co.

Mr. CARLIN. What connection did you have with that company, if any?

Mr. BATTS. I represented the State in its litigation with the Waters-Pierce Co., and I think I know the policy of the State in regard to its antitrust laws. The formation and business of the Gulf Co. has been under constant supervision, and in Texas the antitrust laws have been enforced with great vigor. I think it can be said that no large concern that has at any time violated the antitrust laws in Texas has escaped litigation in the State. But there is not the slightest suggestion that this gulf oil enterprise is violating the law.

Mr. CARLIN. What finally happened to the Waters-Pierce Co.?

Mr. BATTS. It was put out of business. The State collected about $1,800,000 in penalties and it was put out of business and not permitted to do business in the State.

Mr. PETERSON. Has it been reorganized and is it doing business in any form?

Mr. BATTS. It is in business outside of Texas.

Mr. PETERSON. I mean, in the State of Texas.

Mr. BATTS. No; not so far as I know. The physical properties were sold and a new concern organized. I do not know what connection the stockholders of the Waters-Pierce Co. have with the new concern, but I feel sure that the Standard's connection was absolutely destroyed.

Mr. FLOYD. If I understand you, your connection with that case was as a representative of the State of Texas?

Mr. BATTS. Yes, sir.

Mr. FLOYD. In prosecuting the case?

Mr. BATTS. Yes, sir.

Mr. FLOYD. And the companies you represent never had any business relations with the Waters-Pierce Co.?

Mr. BATTS. None whatever.

Mr. FLOYD. Or with the Standard Oil Co.?

Mr. BATTS. No. The firm of which I was a member, Gregory & Batts, was especially employed by the State in the litigation against the Waters-Pierce Co.

I have nothing further to say, Mr. Chairman, unless some one desires to ask questions, which I will be glad to answer if I can.

Mr. SHEPPARD. I want to state that Mr. Batts is the editor of the Annotation of the Texas Statutes, which is accepted as the standard work on that subject throughout the State, and he is peculiarly qualified to speak regarding Texas law.

Mr. PROCTOR. We are very much obliged to you for this opportunity of being heard.

(Thereupon 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.
R. 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.	L. C. DYER, Missouri.
JOSEPH TAGGART, Kansas.	GEORGE S. GRAHAM, Pennsylvania.
LOUIS FITZHENRY, Illinois.	WALTER M. CHANDLER, New York.

J. J. SPRIGHT, *Clerk.*

TRUST LEGISLATION.

SERIAL 7, PART 5.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Tuesday, February 3, 1914.

The committee this day met, Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. We are now ready to hear you, Mr. Frissell. Please give your name, address, and occupation.

STATEMENT OF MR. A. S. FRISSELL, PRESIDENT OF THE FIFTH AVENUE BANK, NEW YORK, N. Y.

Mr. FRISSELL. My name is A. S. Frissell; I am president of the Fifth Avenue Bank, New York City.

The CHAIRMAN. You may proceed in your own way and give us the benefit of your experience in regard to the matters which are under consideration by the committee.

Mr. FRISSELL. I think all I need to do is to read you a paragraph from a speech made by then Gov. Hughes, who, you know, opposed the combinations of the insurance companies and who much improved our banking law. It will give you his idea on the point of inter-

locking directors. Gov. Hughes made this speech at Youngstown in 1908. He said:

When, however, we consider these other remedies that are proposed for trusts, we find ourselves journeying in a land of dreams. Again the magician of 1896 waves his wand. At a stroke difficulties disappear and the complex problems of modern business are forgotten in the fascination of the simple panacea.

The first suggestion is that the law could prevent a duplication of directors among competing corporations. However advisable it may be to have independent directorates of competing corporations, it would seem still more important to have independent stockholders, for the majority of the stockholders of a corporation choose the directors.

If a law were passed preventing the duplication of directors it would easily be evaded in the selection of men who would represent the same interests. The most ordinary experience shows that it is not necessary to serve on a board of directors in order to control its proceedings.

That is really all I have to say. The difference between a director who advises and helps the officers of a bank to serve the customers and stockholders and a director who bosses the directors, and insists upon the improper use of bank funds to be used for individual purposes, is that the second director can do so if the officers are weak enough or are dummy directors. In a bank managed properly the officers will be helped by able, intelligent directors. I think you will find it especially true in the smaller towns where these men are interested in so many things, interested in almost everything in a small town or city, and where they have to be interested in those things in order that the enterprises may prosper. They are selected for almost everything that comes up.

Mr. CARLIN. Is it your idea that our bill does not go far enough?

Mr. FRISSELL. It goes too far.

Mr. CARLIN. We do not touch the subject of stockholders.

Mr. FRISSELL. A director can not be in two banks——

Mr. CARLIN. The argument of Gov. Hughes suggests going further than we have gone, and controlling in some way the stockholders.

Mr. FRISSELL. That is a question I can not go into. This matter is a remedy that will not help you.

Mr. CARLIN. You think our bill goes too far?

Mr. FRISSELL. I do not think it meets the point. Let me take our bank as an illustration. The Importers and Traders' National Bank is a conservative bank of 50 years and more standing, and some of the directors living in the neighborhood thought they would start a bank, and so they took some of the men from the Importers and Traders' Bank, and the cashier became the president of the little bank up town. They served without pay at first. The first president served without pay for eight years, and the second president served without pay for eight years, and I have been with them for 38 years. As time went on, a good many of our employees—our messengers and other employees—left our bank and went down town and became more important even than I in my position am, and afterwards we took them in as directors.

As the members of our board died off we took in the sons, who were important men down town. These men have been of much help to us, and there is nothing wrong or irregular about it. They only help us, and they do it for the interest of the bank all the time. That is about all of my story.

Mr. CARLIN. I do not exactly understand your position. You say we have gone too far?

Mr. FRISSELL. I am not saying what you have done.

Mr. CARLIN. You propose a measure which goes much further than we do.

Mr. FRISSELL. I beg your pardon.

Mr. CARLIN. I thought you read Gov. Hughes' remark with approval.

Mr. FRISSELL. He said you could not do anything unless you could get the stockholders, and you could not succeed in that in the measure you propose.

Mr. CARLIN. How do you propose getting hold of the stockholders?

Mr. FRISSELL. I do not say anything about that; it is a pretty hard question.

Mr. CARLIN. You would not have read it to this committee unless you approved of it.

Mr. FRISSELL. I read what was said about interlocking directors; I do not say anything more about it.

Mr. CARLIN. Do you approve of Gov. Hughes' remark or not?

Mr. FRISSELL. Yes, I do. I have here a list of the directors, some of them important men down town, and most of them would be taken away from us by that bill, and it would be very hard on us.

The CHAIRMAN. This bill does prevent the interlocking of bank directors.

Mr. FRISSELL. Of a bank, under the new law, with a State bank or trust company.

The CHAIRMAN. You do not think that is a desirable thing to do?

Mr. FRISSELL. Certainly it would upset us to a large extent. Of course, we could go on, and I think it might work very well in a great many of the smaller cities and towns of the United States. You asked me yesterday what the remedy was, but that is too much for me.

Mr. McCOY. Do you think there have been any evils resulting from the interlocking of directors of banks, trust companies, and insurance companies?

Mr. FRISSELL. Oh, yes; I have read the articles in Harper's Weekly about the Money Trust, and, of course, I am familiar somewhat with the Pujo committee investigation, but that will not be affected by this law.

Mr. McCOY. Can you suggest any way of getting at those who, for the sake of the argument, we will assume, indulge in wrong practices, in interlocking directorates, and letting go those who have interlocking directorates but have not indulged in any bad practices?

Mr. FRISSELL. Gov. Hughes was not wise enough; neither am I.

Mr. McCOY. You think there is a wrong, but you can not suggest a possible remedy?

Mr. FRISSELL. I think there are remedies for all wrongs, but this is a remedy which will not cure the evil.

Mr. McCOY. What do you sugest as a remedy?

Mr. FRISSELL. I am not wise enough to suggest a remedy. I do not see how you are going to keep people from holding stock, and when a person holds stock I do not see why he can not vote on it.

Mr. McCoy. We have the power, so far as the Federal bank system is concerned, to say who shall be directors, and to say how the directors shall be elected. Would you suggest a remedy along those lines, getting at the stock rather than the director who has been elected by the stock?

Mr. Frissell. I have not studied the question, and I certainly could not present any views on it offhand. It is a very important subject.

Mr. Carlin. What is the capital stock of your bank?

Mr. Frissell. $100,000.

Mr. Carlin. And what is the amount of your deposits?

Mr. Frissell. Between fifteen and sixteen millions.

Mr. Carlin. You have a list of names there of members of the board of directors of your bank whom you say are members of the directorates of other banks?

Mr. Frissell. Of banks and trust companies.

Mr. Carlin. Will you give those names to the reporter to be published in the record?

Mr. Frissell. I think the members of our board of directors who are also directors of other banks and trust companies are as follows: John D. Crimmins, 40 East Sixty-eighth Street; James G. Cannon, president of the Fourth National Bank; Thomas S. Van Volkenburg of P. Van Volkenburg & Co., 17 Battery Place; William H. Porter of J. P. Morgan & Co.; Henry P. Ickelheimer, of Heidelbach, Ickelheimer & Co., 49 Wall Street; Howard C. Smith, of Hathway, Smith, Folds & Co., 45 Wall Street; Cornelius N. Bliss, jr., of Bliss, Fabyan & Co., 32 Thomas Street; Alfred E. Marling, of Horace S. Ely & Co., 21 Liberty Street.

Mr. Carlin. What is the surplus and undivided profits in your bank?

Mr. Frissell. Over $2,000,000; the book value of the stock is $3,500,000.

Mr. Carlin. The capital stock of your bank is $100,000, and that has an actual value of $3,500,000?

Mr. Frissell. It sells above $4,000.

Mr. Carlin. $4,000 a share?

Mr. Frissell. Yes, sir.

Mr. Carlin. The amount actually paid in was $100 a share?

Mr. Frissell. $200. We paid in $100,000 surplus.

Mr. Carlin. How old is your bank?

Mr. Frissell. It was started in 1875.

Mr. McCoy. There was a series of years in which you did not pay any dividends?

Mr. Frissell. Fifteen years. We have never bought nor sold any stocks. We have done nothing but a conservative sort of banking business. We have done nothing in the way of speculating or underwriting or anything of that sort.

Mr. Carlin. You do not pay the officers any salaries—that is, the president?

Mr. Frissell. We did not pay the president any salary for many years.

Mr. Carlin. Do you pay the president a salary now?

Mr. Frissell. Oh, yes; I am paid a salary. I have to support myself on my salary.

Mr. NELSON. I would like to inquire whether you live in New York City?

Mr. FRISSELL. I do.

Mr. NELSON. You do not believe, then, that preventing the interlocking of directors will effect any change in the ownership of the banks which are working together now, do you?

Mr. FRISSELL. No; because you see, the stock—unless you can get at the stockholders you can not prevent the stockholders from electing the directors.

Mr. NELSON. Will they be affected if that law is passed?

Mr. FRISSELL. I do not know.

Mr. NELSON. What will they likely do? Will they elect a dummy board, or what will they do?

Mr. FRISSELL. You mean in our concern?

Mr. NELSON. Generally; in your concern and others?

Mr. FRISSELL. In our concern, we are not in the system, and that allows our directors, where their interests are greater elsewhere—I mean to say the directors in a national bank will have to go out of our bank, if their bank continues as a national bank.

Mr. CARLIN. If those directors do withdraw because of their relations with the national banks, what Mr. Nelson wants to know is whether you will elect real or dummy directors?

Mr. FRISSELL. I do not know what we will do; I can not promise what we will do.

Mr. NELSON. Let me use some other word than dummy. Will any of the gentlemen who own stock be represented by proxies?

Mr. FRISSELL. I do not know. I do not see how they can.

Mr. NELSON. If they are represented by proxies, will they not still own the stock?

Mr. FRISSELL. I am only the president of the bank, I am not the bank. We would naturally get in new men, but I would rather not do that; I want to keep the organization working.

Mr. NELSON. Are you quite familiar with the banking system in N. w York?

Mr. FRISSELL. Yes.

Mr. NELSON. Of late it has been said that Mr Morgan and various men representing the Morgan firm have resigned from the directorship of various other banks.

Mr. FRISSELL. They have.

Mr. NELSON. Do you think that that means that the Morgan firm will no longer control any other business institutions?

Mr. FRISSELL. I do not think I can express an opinion about what their control will be of the banks and trust companies. I do not know anything about it. I do not know. It is perfectly easy for them to if they want to, because all they have to do—they do not hardly need dummy directors if they have the stock.

Mr. CARLIN. You do say that so far as your bank is concerned it drives these men out of your board of directors?

Mr. FRISSELL. Yes.

Mr. CARLIN. It would likely bring new men in?

Mr. FRISSELL. Which is a very unhappy thing to have to do.

Mr. CARLIN. You do not mean to say that you would bring just dummies into your board of directors?

Mr. FRISSELL. I have not gone as far as that.

Mr. CARLIN. Let us understand you. Would your stockholders elect men to your board of directors who are mere dummies, or will they elect men who are to be real directors?

Mr. FRISSELL. I rather imagine that, considering the consensus of the present administration, they will be apt to do what the administration finally asks them to do. They have always done that. They have always given their proxies to the administration, and I do not see any reason they should not continue to do that.

Mr. CARLIN. I do not think you understand my question. When you come to elect new directors of your bank, as you say you will have to do, is it your opinion that the stockholders of your bank will elect dummies or real directors?

Mr. FRISSELL. It is possible we may reduce our board.

Mr. CARLIN. Then, if you reduce the board you would not reduce it to a board of dummies?

Mr. FRISSELL. No; we would keep in the directors who would stay with us, you know.

Mr. CARLIN. How many of your directors are not directors in national banks?

Mr. FRISSELL. Perhaps five.

Mr. CARLIN. How many directors have you on your board?

Mr. FRISSELL. Eleven.

Mr. CARLIN. Of the five directors who are not directors in national banks, how many of them are directors in railroads?

Mr. FRISSELL. I do not think any of them are directors in railroads.

Mr. CARLIN. Then, if this law goes into effect, you will only have those five directors who will be qualified to serve on the board?

Mr. FRISSELL. Five or six. Some of them may stay with us instead of going with the other people.

Mr. CARLIN. You would not seriously say, Mr. Frissell, that when you come to fill the vacancies occasioned by the resignation of these men that your stockholders would elect dummies in their places?

Mr. FRISSELL. I do not say that; I have not thought the question out.

Mr. McCOY. Mr. Frissell, do you have any particular line of business into which most of your loans go?

Mr. FRISSELL. We loan on everything.

Mr. McCOY. Is there any one line of business—say, the woolen or cotton or any other particular line of business—into which a large proportion of your loans go?

Mr. FRISSELL. We buy paper all the way from Portland, Me., to Portland, Oreg., and paper of dry goods, groceries, and other leading lines, leather and things like that.

Mr. McCOY. Do your deposits and your surplus go principally into buying commercial paper or to make loans to depositors?

Mr. FRISSELL. The business is coming more and more uptown, so we are loaning a larger proportion to our customers. We still loan to houses on merchandise stocks, and buy a good deal of paper.

Mr. McCOY. So far as the loans are concerned—the loans which you make to your customers who are moving up in your direction, on Fifth Avenue—is it not perfectly possible to get into the directorate those who are in business on Fifth Avenue, in that neighborhood, and to get from them just as sound business advice so as to

extend credit safely as you can get from a downtown bank director who is also in your bank?

Mr. FRISSELL. I will say very frankly that when the president and vice president and cashier of the Importers & Traders Bank were directors all I had to do in getting any proposition to them—if it seemed to be a sensible proposition—it would go right through the board. The people who are bankers on the board, if they agree on anything it goes right through the board. They are all good bankers, and that is all that is necessary; the rest of the board will follow us naturally.

Mr. CARLIN. Most of the directors are dummies now, in effect, if that is the case.

Mr. FRISSELL. I think you will find that in every board there are two or three leaders, and unless there is some reason to object they generally do what those men recommend. Naturally, in the banking business they follow——

Mr. CARLIN (interposing). You have 11 directors, and under your present system, when two or three of the leaders say a thing is all right, the balance acquiesce?

Mr. FRISSELL. I do not hardly think it goes as far as that. The officers make the loans, and they meet at certain times and criticize anything that is bad. There is a good deal of paper taken on approval and discussed in the board.

Almost all the loans to customers are made offhand. Only the very doubtful loans go before the board. A good deal of paper is bought on approval by the board, and the matter is discussed in the board as to whether or not it is good paper. Very rarely anything gets as far as that that is not good, unless it is put on purpose before the board.

Mr. MCCOY. The Importers & Traders Bank is a big bank?

Mr. FRISSELL. Yes.

Mr. MCCOY. It keeps in very close touch with credit ratings all over the country. That is a fact, is it not?

Mr. FRISSELL. Yes.

Mr. MCCOY. Assuming that no director of the Importers & Traders Bank could be on your board——

Mr. FRISSELL (interposing). There is only one director on there now.

Mr. MCCOY. Assuming that no one of them could be, do you think there would be any practical impossibility in getting his advice or that of the Importers & Traders Bank, regardless of the directorate?

Mr. FISSELL. I have said we have had a good many clerks who go out from us and who are now officers in other banks, and I am on very good terms with all of them. If you are on the board you know that the consultation over things is of much more value than talking with them one by one.

Mr. MCCOY. Aside from your peculiarly favorable situation, because you have sent so many men out into these other banks, is it not true that people in the banking business do get from each other information, and properly?

Mr. FRISSELL. Oh, I have no doubt the officers could run a bank without any directors, if you want to put it that way.

Mr. CARLIN. They do that very largely anyway, do they not?

Mr. FRISSELL. Oh, no; I do not say that.
Mr. CARLIN. My question is, Do they not do that very largely?
Mr. FRISSELL. I do not say that.
Mr. CARLIN. Do you deny that?
Mr. FRISSELL. Yes; I think I will deny that.
The CHAIRMAN. Banks could not be operated without directors having a voice in their management and having active participation in the management of their affairs without violating the law?
Mr. FRISSELL. Our directors are there whenever there is a meeting.
Mr. McCOY. Is the Fifth Avenue a State bank or a national bank?
Mr. FRISSELL. A State bank.
Mr. CARLIN. Do you pay your directors for attending the meetings?
Mr. FRISSELL. Yes.
Mr. CARLIN. Is it a nominal sum?
Mr. FRISSELL. Not very nominal; it has been $20.
The CHAIRMAN. Is there anything further you desire to say, Mr. Frissell?
Mr. FRISSELL. No, Mr. Chairman; I think that is all I care to say.
The CHAIRMAN. We are very much obliged to you for appearing before us.

AFTER RECESS.

The committee reassembled, pursuant to taking recess, at 2 o'clock p. m.
The CHAIRMAN. Representative Borland, of Missouri, desires to present some gentlemen who will address themselves to the subject of the proposed legislation.
Mr. BORLAND. Mr. Chairman and gentlemen of the committee, I asked permission of the chairman of the committee to present to the committee the secretary of the National Retail Merchants' Association of the United States, representing the country merchants and the retail merchants, and give them an opportunity to present their views relative to trust legislation. I do not intend to make any argument myself; I am going to leave these business men to the questioning of the committee. The head of their delegation is Mr. John R. Moorehead, of Lexington, Mo., who is the national secretary of the Retail Merchants' Association of the United States. I will now introduce Mr. Moorehead to the committee.

STATEMENT OF MR. J. R. MOOREHEAD, OF LEXINGTON, MO., NATIONAL SECRETARY OF THE RETAIL MERCHANTS' ASSOCIATION OF THE UNITED STATES.

Mr. MOOREHEAD. Mr. Chairman and gentlemen of the committee, I want to thank Mr. Borland particularly for having arranged this hearing to-day and to thank the chairman and the members of the committee for granting us the privilege of being heard.
Last Saturday I had notice that the Committee on Interstate and Foreign Commerce of the House of Representatives would hear us in relation to the trade commission bill to-morrow, but upon arriving here we found that you would hear us to-day in regard to these bills, but we find ourselves here with only a few of the delegation

we expect to be here to-morrow, and the various retail interests are not represented in as large numbers as we expected.

I am here to speak for all of them, however, having come out of a conference recently held in which I was directed to come to Washington and present, not only to the committees of the House and Senate but to the President of the United States as well, a brief containing the ideas and facts appertaining to the little business man of this country as he is affected by the antitrust laws; and as these laws affect him so do they affect the smaller communities of the country which are feeling the pressure and the strain of depopulation and the trend of business away from the country and the country towns to the city, into the hands of larger aggregations of capital.

In order to be brief, I have here the statement which I had the honor of presenting to President Wilson on the 19th of January last, and to which he gave a most respectful hearing, and inasmuch as it is short and contains the argument which I have to present to this committee, I am going to ask your permission to read the statement which I presented to President Wilson.

The CHAIRMAN. That statement will be included in the hearings in its entirety, and I believe the members of the committee have also been furnished a printed copy of it, and I think it would save your time and be just as well if you incorporate it in the record at this point without reading.

Mr. MOOREHEAD. Very well, then, Mr. Chairman, I will do that.

(The statement referred to is as follows:)

Mr. PRESIDENT: I come here as a retail merchant from a small community and also bear a commission from the representatives of some 250,000 retail merchants, the greater part of whom are in business in like communities to my own, in every State in the land.

I come as the result of a conference held in Chicago on December 18 last, which consisted of representatives from retail associations of butchers, grocers, jewelers, druggists, plumbers, hardware dealers, implement dealers, lumber dealers, and coal dealers.

While these represent a great army in themselves, there are at least a million and a quarter retail merchants, all told, in the country, the great majority of whom are in business not for the purpose of making money, or more money, but for the purpose of making a living for themselves, their families, and their dependents, and I believe that what I shall say in behalf of those I represent directly, will have the approval of all, among whom organization to no great extent exists.

Those who have sent me here have been encouraged to take this step by what you have recently had to say in your book entitled the "New Freedom," in which you have set forth in the last chapter thereof more fully than I can hope to do, just what the small business men and the smaller towns of the country are now in most need of. And I take this occasion, first, to thank you in their behalf for the very explicit stand you have taken for the small business man, and the smaller community and will ask your indulgence if I call your attention to some of the conditions existing to-day, and affecting the business interests of those I represent.

RETAILERS ARE LEADERS IN UPBUILDING.

I believe you will agree with me when I say that the retail merchants of the many thousands of communities in our country are in the forefront of every good work and purpose which tends to the building up of the communities in which they live, in the direction of better schools, better home conditions, better churches, better roads, and a better place in which to live. They are law-abiding at home and can not afford to be otherwise, and have no more desire to violate a State or national law than a city ordinance.

I have said that there are a million and a quarter, at least, of this class of our citizenship. If each firm were represented only by a single person with the average of five to a family, there would be six and a quarter million people in the immediate families of this great army of retail merchants. But there are many more dependent upon each for a livelihood under the head of clerks and assistants in every way, which would certainly more than double the sum mentioned. In other words, there must be at least 12,000,000 or 15,000,000 of our population directly dependent upon and drawing their support, in whole or in part, from the revenue derived from the distribution of merchandise through the small retail merchants, and every one of them is a consumer.

And yet we know that this is but a part of those who look to the retail merchant directly and indirectly for a means of support. They pay more taxes, more insurance, more rent, and contribute more in proportion to the value of their property than possibly any other class in our country.

There is no cause presented in any community, anywhere, in which the retail merchant is not the first upon whom a demand is made, and he is more often than not the leader of the movement in every good work that goes to make a town and the surrounding country prosperous and contented. This is the only class of our citizenship that really lends any great sum of money without interest, and solely upon personal security. I refer to that universal practice of extending credit to the consumer. The great department stores and mail order houses may contend that this is bad business, and an expensive method of distribution. Yet, what would the people in and about every community in the land, farmers, laborers, and every other class of our people do in time of stress, when the strike is on, when the crop fails, and they have no ready money with which to buy for cash? Their credit is not good at such or any other time with the mail-order houses.

If we take the number of post offices in the country as a criterion, there are nearly 60,000 communities in this country from the small hamlet to our greatest city.

The population as given by our last census upon its face is somewhat misleading and merits more minute investigation. The total population as given by our last census is, in round numbers, 92,000,000, 53.7 per cent of which is given as rural and 43.3 per cent as urban, or, in round numbers, 42,500,000 urban population and 49,500,000 rural. This total urban population includes the population only of 2,405 of our cities and towns, all towns of less than 2,500 being counted as rural. There are 11,785 incorporated towns of less than 2,500 population in this coutry containing 8,000,000 people counte das rural which in all fairness should be added to the urban population as given in the census. This accounts for only 14,000 towns and cities. It does not account for the remaining 45,000 unincorporated towns and villages, and it does not account for the great suburban population surrounding our great cities, and to a more or less extent, every community in the land. There certainly must be at least eight or ten millions more of our population thus accounted for, which, added to the 42,500,000 urban population, as given in the census, and the 8,000,000 living in the 11,784 towns, makes practically 60,000,000 of our 92,000,000 population as being actually urban. In other words, one-third only of our population can fairly be said to be rural. Of these 60,000,000, 20,300,000 live in the 50 cities of our country containing more than 100,000 population each, and 40,000,000 in all of the other small cities, towns, and villages.

RURAL HOME MARKET LARGER THAN CITY MARKET.

I call your attention to this fact to show you that there are twice as many people living in the smaller cities, towns, and villages as live in our 50 great cities.

I call your attention to this fact for the further purpose of showing you that the home market of our farming population, living about these smaller cities and towns, is just twice as great as the city market, and yet we hear much that would lead one to believe that all of the people in this country to be fed by the producers on the farm are to be found in the great centers where the high cost of living seems now, more than ever, the one great thing talked about and to be considered. Yet, the fact is, as I have tried to show you, the home market of the farmer is his largest and best market, right at his door where he can bring his produce every working day in the year and sell it to the customer direct, without the intervention of any middleman whatsoever, and secure

therefor every cent without any profit of commission to any middleman whatsoever. And yet, Mr. President, for the last 10 or 20 years there has been carried on in this country such a campaign of advertising, education, misrepresentation, and denunciation of the retail merchants, who are neighbors, friends, and kinsmen of the people of the towns and surrounding country, to such an extent that there are millions of our people to-day, particularly living upon our farms, who will not buy a dollar's worth of the necessities required from the home merchant if the cash is at hand to send away from home. They never give us a chance to supply their wants and are generally ashamed to admit they do this thing, which in itself shows the practice is wrong. It is a fact that only when the crop fails, or when the strike is on and the cash is gone, do many millions of our population ever think of patronizing the home merchants.

This campaign has great resources behind it. It has brought a great revenue to the metropolitan and farm press and magazines of the country. We are not here criticizing these great agencies for taking the business, but we do desire to enter a protest against those who employ these agencies to advertise their wares where they are not known, and where they have no interest, pay no taxes, support no schools, give nothing to charity, and have no interest whatever in the prosperity of any local community, and at the same time fill their advertising with denunciations of the home merchant and misstatements and falsehoods as to the superiority of their own wares over those that might be purchased at home.

Much has been said in recent years about the encroachment of big business upon little business, and the concentration of great power in our banks.

I believe I am speaking for everyone whom I represent to-day when I say that they are more than rejoiced that you and your administration and the Congress that is assembled here at this time are attempting to do much along the line of curbing the greed of great aggregations of capital in monopolizing not only the business but the money of the country. You and all with you are to be congratulated that the country has received with approval your work and labors in the direction of tariff revision and currency reform.

MENACE OF DISTRIBUTION MONOPOLY.

There is, however, we believe another tendency to monopoly in this country to which the press and public men of the day have given scant attention. I refer particularly to that very evident disposition on the part of great aggregations of capital to monopolize the distribution at retail of merchandise of every kind. The agencies and powers at their command are unlimited. To indicate to you that this is their goal, I quote from a letter recently written by a mail-order house to a citizen of Iowa, as follows:

"We think and know that if you will give the matter consideration, you will agree with us that a business of this kind, conducted as this one is, is the ultimate solution of the high cost of living, and we do not think it would mean the ruination of the small towns, or any reduction in land values, to have trade centralized. On the other hand, we are under the impression that it would be a benefit to all. The retail merchant at the present time belongs to that great class of middlemen which are neither producers or consumers.

"We know that the time will come when, except on a very small scale, the middleman will be entirely eliminated. You will naturally ask, 'What will become of the country merchant?' In reply to this question we would say that he would become a producer, perhaps be a farmer, or engage in some other business that would mean that he would give something to the community instead of taking away from it, as he now is."

I submit to you, Mr. President, that if the head of any of the great trusts of this country should so declare its policy toward the public, that the press of the country would display such a piece of news under double headed columns, and the editorial pages would burn with condemnation at the proposal of such a cold-blooded, premeditated policy.

As you have said, and to which we can not object, we care not how big business may become, but when business becomes big by denunciation and misrepresentation of the little business man it is wrong in every sense, and when fully understood, we believe, will not have the approval of the great body of our people. There is no question, Mr. President, but what to-day the lines are being formed for a monopoly and control of the retail business of the country, first, and more particularly, through the great mail-order houses.

Much has been said relative to the interlocking directorates and the financing of great enterprises in Wall Street, but nothing has appeared particularly to date, directing the attention of the country to the fact that the great mail-order houses of to-day are, practically ever one of them, financed in Wall Street. The chairman of the board of directors of the greatest mail-order house in the country sits as the president of one of our New York banks, and two of the others who are bidding for the trade of the entire country have recently been financed by the much discussed and talked about J. Pierpont Morgan & Co.

To such an extent has the business of these great enterprises increased, some by hundreds and even thousands per cent, that our factories, wholesale and jobbing houses are subject to their dictation. They force discrimination against the small dealer.

FIRST COST NOT ALL THE COST.

The plea set up by theose who control these enterprises is that by their great purchasing power and concentration of distribution the necessities of life are distributed more cheaply to the consuming public. I am here to deny, when we take into consideration every phase and every result of this method of merchandising, that this is true. There is something besides first cost to the consumer in considering this problem of distribution. Assuming for the sake of this argument that merchandising along these lines will not result in depreciation of quality and will foster cheapness of price, yet are we not compelled to take into account many other phases of the equation? If cheapness were the only element entering into a problem of this kind, laying aside all other results growing out of the concentration of business into a few hands, it is in your power and in the power of Congress further to cheapen the necessities of life of every kind and character. In considering the revision of the tariff you took into account the fact that many articles of consumption would be cheapened by a reduction. If taking off a part of the tariff would cheapen some article, following that line of argument, you would have been warranted in removing all tariff duties whatever. You might, with the approval of Congress, cheapen many things in this country if you would enact a maximum instead of a minimum wage law. Certainly cheap wages would mean cheaper products to the consumer. But cheap wages, I am sure, is not the only thing sought for, because there are many other things to be taken into consideration when we come to deal with the matter of reduction in wages to our laboring people.

Congress and State legislatures might cheapen many things by abolishing the eight-hour law and laws regulating the hours of work for girls and women. Many things might be made cheaper if we should repeal our immigration laws and permit a horde of Chinese, Japanese, and Hindus to come into our country and take the place of our working men at half the wage. If cheapness is the only thing to be desired, why should our good State of California be so solicitous about the influx of the Japanese?

I claim, Mr. President, that every argument that could be brought against putting our country on a strictly free-trade basis; against making a maximum instead of a minimum wage for our laborers; against requiring our men and women to work more than eight hours; against repealing our immigration laws, is a valid argument against the concentration of the distribution of merchandise, at retail, into the hands of great mail-order houses and department stores to the elimination of the million and a quarter retail merchants, independent business men, their own masters, owning and controlling their own business, helping to build up and foster every good work in the 60,000 communities of our land.

OTHER ISSUES ARE INVOLVED.

I submit there are other questions and issues involved in such a possibility besides that merely of cheapening of merchandise as the one thing to be desired. Even if the claims which we have heard for so long from these aggregations of capital were in any sense true, which we do not admit, especially when made at a sacrifice of quality and without any service rendered such as is rendered every day by every retail merchant in every community, they could not be justified upon other valid grounds.

What are the moral, the social, the religious, the political, and the economic problems involved in the possibility of the concentration of the distribution of our great centers through the department stores and mail-order houses? Only to touch upon these questions, might we not ask how would this country be benefited morally by the concentration of business and population to a greater

extent than is now taking place in our great cities? Would it be a good thing for anyone to have merchandise retailed in the large city by employing women and girls at meager wages, rather than through the country merchant who is his own master?

Much has been said about the decline of the country church. It is time somebody was demanding to know about the decline of the town church. What about the social conditions that are going to be crowded upon us, even to a greater extent than they now exist owing to the concentration of population in our great cities? How much improvement is there going to be in the politics of the country when the cities become greater than all of the balance of the country? What of the many economic problems that are going to be put up for solution by the city, by the State and the Nation as a result of this very patent concentration? And, if the policy of the mail-order house is to continue and prevail, how shall we hope to cope with these many-sided questions which are now already a burden not only to the cities themselves, but the State and the Nation as well?

The towns of the country have already started down hill. The business men whom I represent all see this as they have never seen it before. They are discouraged and even desperate as to the prospects for the future, not only of their business, but of the communities in which they live. The boy and the girl early become restless in anticipation of the time when they shall go to the city to engage in business, and the outlook for keeping the boy not only on the farm but in the town and away from the great crowd of the city is anything but reassuring.

LOSSES IN RURAL POPULATION.

I have spoken of the decline of the town. I have recently made some investigations as to the decline of the towns in nine of our principal States and with the exception possibly of a few of our western States, where immigration has been greatest, I believe the same conditions prevail throughout the land. The result is as follows, as shown by the census of 1900 and of 1910:

State.	Number of towns.	County seats.	Number of counties.
Wisconsin	816	25	71
Missouri	540	41	114
Iowa	564	40	99
Indiana	639	22	92
Michigan	677	27	83
New York	746	16	61
Illinois	788	28	102
Ohio	1,136	11	88
Pennsylvania	1,520	7	67
Total	6,956	217	777

Here we have in 9 States 6,956 towns which have lost population, notwithstanding the fact that the population of the whole country increased in the period mentioned 21 per cent.

There is another feature to this table which emphasizes the situation, and it is that out of the 777 county seats in these 9 States, 217, or nearly 28 per cent of them, have lost population, notwithstanding the fact that the county seat is in many ways the center of most of the activities of the county unit along the line of politics, courts, and collection of taxes, and in other directions.

And, strange to say, this tendency of the decline of the towns is greatest in the richest and most thickly settled parts of the States. Seeing these tendencies to eliminate the small retail merchants and substitute therefor the larger mail-order house, it became apparent to those who had long been engaged in association effort amongst the retailers that some concerted action should be taken looking to the stemming of the tide that not only has set in against them but threatens to engulf the country towns. This finally brought together some two years ago representatives from 35 States, representing more than a quarter of a million merchants, to consider collectively what policy should be pursued and what action, if any, should be taken. After two years of effort and cooperation, bringing us to this day and hour, when it seems to be your purpose and that of

Congress to amend the Sherman antitrust law, I have come to present the case of not only the small business men but every man of every kind who is interested in his preservation, in the preservation of the home trade and the home town, which, we believe, carries with it the preservation of many of our American institutions.

SHERMAN LAW DEFEATS ITS OWN PURPOSE.

We believe that the Sherman antitrust law was enacted to curb and hold in check big business. We do not believe that it was ever intended that this law should be used by big business to intimidate and prevent small business men from joining hands in defense against a stronger competitor; yet this is the actual situation as we find it to-day.

I make bold to assert that, notwithstanding the most diligent and painstaking investigation on the part of the Bureau of Corporations, nothing has been found touching the activity of retail associations, especially in the Western States, where this investigation has been most searching, that would indicate an attempt to control prices or the fostering of any policy inimical to the public weal. They have not denied that they have made common cause against what they believe to be a common enemy, and it has not been shown that they have ever varied from the truth. They have freely admitted upon all occasions that they are doing everything they believe to be legal and proper to protect themselves, their families, and their communities against an aggression that was indeed threatening their very existence. In doing so, they may have overstepped the law, but if they have it is because they have had no one in authority in the government of the States to whom they could go and submit any proposition at any time as to whether or not their acts were violative of the antitrust law.

If it is lawful for a commercial agency to report me, as a retailer, to the entire commercial world for having failed to meet a note promptly, pay a debt, or for having given a mortgage or a deed of trust, should it be any less our right and privilege to make a similar report to our membership relative to the manufacturer, jobber, or wholesaler from whom we have purchased goods and for which we have paid, should we ascertain that he has sold merchandise to us at one price, to a mail-order house at a less price, and to the consumer at another price? Wherein would be the injustice in giving the widest publicity to an act of this kind, which we can not construe as being otherwise than double dealing, un-American, and unfair in every sense? The honest manufacturer, jobber, or wholesaler in this country (and there are few who are not) would scorn the adoption of any such secret methods. The great majority of them prefer to be open-handed, open-minded, and ever ready to give a square deal to those from whom they have derived their greatest support and prosperity. But, unfortunately, there are bushwhackers in business, as well as snitch lawyers and quack doctors in the professions, and it would seem that the present antitrust law as applied to the little man in business is putting a premium (thought not intentionally) upon this method of merchandising.

Believing that if any action is taken at this session of Congress looking to amendments to the Sherman law, that these amendments will be the law of the land for years to come, I have come here to present the side of the retailer in order that he may have consideration at your hands and in the make-up of anything that may be added thereto.

You may ask if we have a remedy. I can only suggest to you that in the absence of any particular policy which Congress may desire to adopt, that at least the little man in business be permitted, under any changes that may be made, to make a common defense against a competitor who shows by his actions that his ultimate aim and purpose is to destroy the little business man, and along with him the community in which he dwells.

Would it be too much to make it specific that it would not be a violation of the antitrust law to tell the truth, and to disseminate such truthful information through the agencies of the association, and further, that it should not be unlawful to give the widest publicity to the business policy and purposes of all persons, firms or corporations doing an interstate business?

Heretofore when we have wanted to know the meaning of the law, we have been told that it is not the province of the Department of Justice to interpret the law, or to give legal opinions, but to enforce the law. Uncertainty is the watchword. We have no desire to be lawbreakers, but we do desire and plead

for a law that at least our own lawyers can tell us what it means. It were better that we should be disbanded altogether than to be subjected to suspicion by the public and possible prosecutions by the Government at all times.

SPECIAL COMMISSION SUGGESTED.

We have already seen a change in the attitude of our great transportation companies brought about through the supervision by the Interstate Commerce Commission. The day of rebate and discriminations in favor of special interests and favored commercial centers has passed. Secrecy has ever been the cloak under which big business works oppression. The Interstate Commerce Commission has been the medium through which abuses in one branch of our commercial life have been corrected, and the great agency in this direction has been publicity. I am here as a representative of the small merchants of this great Nation. We ask that the antitrust law be amended and among other things, it be provided that a commission be created and this to the end that the small business interests as well as the great business interests of the country be conducted open and above board. If something of this character is accomplished at this session of Congress, then indeed may your own hope find realization as you express it in the "New Freedom." I refer to that paragraph wherein you say:

"In all that I may have to do in public affairs in the United States, I am going to think of towns such as I have seen in Indiana, towns of the old American pattern, that own and operate their own industries, hopefully and happily. My thought is going to be bent upon the multiplication of towns of that kind and the prevention of the concentration of industry."

Mr. President, your vision will not find fulfillment unless unrestricted publicity as to practices and policies be given to all branches of industrial activity. In closing, permit me to state that this is the first time in the history of the country when the small merchant class has come directly to the President and discussed its needs. On behalf of this class, and indeed the rural life that the country merchant typifies, I thank you for this privilege and this opportunity.

Mr. MOOREHEAD. President Wilson, in his book on the New Freedom—I presume you have read that——

The CHAIRMAN. I have.

Mr. MOOREHEAD. He sets forth our case much more fully than I could hope to, and he speaks of the strength and the power and the wealth of this Nation being in the country rather than in the cities.

The CHAIRMAN. Mr. Moorehead, this is what the committee desires: We are attempting to frame legislation——

Mr. MOOREHEAD (interposing). Yes, sir.

The CHAIRMAN. We would like to know what is wrong about the present antitrust law of which you complain, and we would like to know what you suggest as a remedy.

Mr. MOOREHEAD. The present antitrust law can not be violated, as we look at it, by a great aggregation of capital; for instance, a great mail-order house or a great manufacturing institution acting alone. But they can, by their methods, absolutely destroy their small competitors, and the small competitors have no remedy.

The CHAIRMAN. What are the methods of which you complain?

Mr. MOOREHEAD. One of the principal methods is the publication of misleading and untruthful advertising.

Another is a discrimination in price, to an extent that the little man could not hope to meet the price of the large buyer.

Now, we understand very well that there should be a discrimination in price between the man who can buy large amounts of any item and the men who can not buy such large amounts, but that dif-

ference should not be so great as to amount to a profit or a total of the gross profit of the little man.

The CHAIRMAN. Then you would think this committee ought to favor an amendment fixing the prices—the retail prices of commodities?

Mr. MOOREHEAD. No, sir; when I, for instance, with my competitors undertake to get together in an organization or an association to combat the methods of the mail-order houses, we can get into a conspiracy; but we may be fighting one man, for instance, and he can not get into a conspiracy; he can not violate the law, but he can say to us, "If you interfere with my business and my methods of business I will hold you responsible under the Sherman antitrust law"; and our hands are tied. We can not even tell the truth.

The CHAIRMAN. Then, what legislation do you desire?

Mr. MOOREHEAD. We would like to see honesty in advertising. We would like to see—I understand from the public prints that it has been proposed in your committee that it be made a specific violation of the Sherman law to give any information, however truthful it may be, about anybody else's business, to make that unlawful. We believe that publicity would cure more ills and do more to help the little man fight his battles than any other one thing that could happen. We believe that secrecy is what big business wants to have.

I have no doubt that you will be asked not to make any reference or recommend action looking to the exposure or making public of the business acts of a larger competitor by the small competitor, but you will be asked to make such a thing illegal.

Gentlemen, I trust that you will not finally permit such a thing to be put over on the little business man of this country. I have tried to set forth in this argument which I presented to President Wilson and which has been incorporated in the record of this hearing just what the little man means to the country and just what the small towns of this country mean to it—most of you gentlemen live in small communities—and just what economic, social, and political problems we are finding in this concentration of business and population in the great cities.

Mr. CARLIN. Have you read the bills which have been prepared and which are before this committee?

Mr. MOOREHEAD. I read them only about an hour ago.

Mr. CARLIN. Do you not think that section 10 of bill No. 1 would give you some relief?

Mr. MOOREHEAD. I am not prepared to say.

Mr. CARLIN. I will read the language of that section to you:

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 persons 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 goods, wares, or merchandise of a competitor or competitors of the seller.

Mr. MOOREHEAD. I am not up on forms of law. I do not know whether that would cover the case or not.

Mr. CARLIN. The intention is to liberate the retailer and give him a right to sell anybody's goods he wants to sell and to prevent a contract which would require him to sell exclusively a particular line of goods.

Mr. MOOREHEAD. That may be the difficulty of some lines of retailing, but that is only incidental to the great problem.

The business that is big enough, the aggregation of capital that is big enough to say to the manufacturer: "You sell us your product at such a price. If you do not do it, we will manufacture that product ourselves." That is the main thing. And what is the result?

Mr. CARLIN. You do not catch the idea of this section. The idea is that the manufacturer shall not say to any one man that he shall sell the particular line of goods of that particular manufacturer exclusively. It liberates the retailer. It liberates the retailer from that situation and allows him to buy goods of anybody he wants to and sell them in his store.

Mr. MOOREHEAD. I think that may be all right, but where that might be relevant to one case, there would be hundreds of cases that would not be on that line.

Mr. CARLIN. I am calling your attention to that one thing now, and ask you whether you do not think that would be helpful?

Mr. MOOREHEAD. I see no objection to it now.

That is not to be compared to the big question. Here is the proposition: As I started to say, the manufacturer may be intimidated to sell his goods to a large distributor by having it said to him, "You must sell us these goods at such a price, or we will make them ourselves." What is the result? The big buyer gets the goods at cost, and that gives him a tremendous advantage over the little fellow.

Mr. CARLIN. We have attempted to reach that condition in a different section.

Mr. MOOREHEAD. I hope you will.

Mr. CARLIN. I will read you that section:

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 purchasers or of the seller.

Mr. MOOREHEAD. You would have to prove he was attempting to destroy the competitor.

Mr. CARLIN. Or to injure him.

Mr. MOOREHEAD. Or to injure him. It would be a very difficult matter for me, as a little retailer, to do that.

In the first place, I would not have the money or possibly be in a position to gather the evidence to prove that the man had actually done that intentionally. The fact that I would have the right to say to a hundred or a thousand men dealers in my line of business that such and such a manufacturer or mail-order house has done this thing, knowing it to be the truth, would help to correct a condition of that kind a great deal easier than a lawsuit.

Mr. NELSON. You desire permission to organize rather than to bring about the dissolution of the other fellow?

Mr. MOOREHEAD. We do not want to dissolve anybody. We understand fully that everybody has a right to sell goods. We have never denied, and do not deny, the right of the manufacturer to sell to the consumer, if he wants to, or to sell to a mail-order house at a price less than he sells to me, if he wants to, but when I have certain

information, and know that it is true, and disseminate it to my fellow merchants, I am subject to the Sherman law.

Mr. NELSON. You want to be relieved from that?

Mr. MOOREHEAD. I want to be relieved from that, especially when I know I am telling the truth. If I did not tell the truth, he would have action against me for libel, but when I am telling the truth, I do not believe the Sherman law should say you are violating the law, when the big fellow can not violate it, claiming he is doing it by himself.

The CHAIRMAN. What specific right or privilege do you want conferred upon the retailer?

Mr. MOOREHEAD. The right to give publicity.

The CHAIRMAN. What do you mean by that, and how?

Mr. MOOREHEAD. Through organizations or personally; in any way, by publication or by letter.

The CHAIRMAN. Giving publicity to what?

Mr. MOOREHEAD. To any act of any competitor that tends to injure me in my business.

The CHAIRMAN. Can you not do that now?

Mr. MOOREHEAD. No, sir; that is exactly the proposition.

The CHAIRMAN. Why can you not, in your own individual capacity, put your own advertisement out, contradicting the advertisement of which you complain, if the other advertisement is not true?

Mr. MOOREHEAD. I could do that in a county paper, but I would not have money enough to spend for advertising against his millions; I could not combat that.

The CHAIRMAN. I am trying to get at what particular thing you complain of, or what you want done; what particular remedy you desire.

Mr. MOOREHEAD. Give us the right to disseminate the truth.

The CHAIRMAN. You have that right now.

Mr. MOOREHEAD. As an individual I might, but with a dozen, a hundred, or a thousand, in my line of business, I would not have that right.

The CHAIRMAN. The dissemination of the truth is in no wise a restraint of trade.

Mr. MOOREHEAD. I quite agree with you.

The CHAIRMAN. Nor a monopoly.

Mr. MOOREHEAD. I quite agree with you on that, but that is the contention of the Government in a case that is in the courts, that we are in restraint of trade, even though it may be the truth.

Mr. FLOOD. Is there a case of that kind?

Mr. MOOREHEAD. Yes, sir.

Mr. FLOOD. Against your association?

Mr. MOOREHEAD. Against an association in which I am interested.

The CHAIRMAN. What is the case?

Mr. MOOREHEAD. You gentlemen are all familiar with the fact that the Bureau of Corporations has for a long time been investigating all kinds of associations. They have been in the offices of every line of business in this country, and they have had access to all the papers of the different organizations, so far as I know. They have seen fit to bring to a head what they term a violation of the antitrust law against the retail lumber associations, which has culminated in an indictment against the secretaries of those associations, the with-

drawal of which indictment was one of the last acts of Mr. Wickersham, for the simple reason, I have no doubt and nobody who is interested in the matter has any doubt whatever but what those indictments were procured by our competitors, or largely by our competitors.

There is a civil suit instituted in place of a criminal suit now pending against one of the retail lumber associations of the country, in which every retail organization of this country of every kind is interested, in which the issue is the right of an organization to disseminate information, however true it may be, as being in restraint of trade under the Sherman law.

Mr. VOLSTEAD. Was not that information as to the fixing of prices?

Mr. MOOREHEAD. No, sir. Nowhere within the last six years, so far as I know, has any member or any agent of the Bureau of Corporations found, in any retail association of any kind, in anything that has been made public, so far as I know, any attempt to fix the price of any commodity whatever.

Mr. VOLSTEAD. Not to fix the price of lumber?

Mr. MOORHEAD. No, sir; never. I can say it never was done in that line of business or in any other line of business.

Mr. FLOYD. You say suits have been brought?

Mr. MOOREHEAD. Yes, sir.

Mr. FLOYD. And indictments were had, in one instance, which were dismissed?

Mr. MOOREHEAD. Yes, sir.

Mr. FLOYD. Have any suits been instituted, any prosecutions been had or indictments been brought, where any court has held that to disseminate truthful information at the instance of an organization is against the Sherman law? If it was false, of course, I concede that ought to have been done.

Mr. MOORHEAD. As far as I know that has not been shown.

Mr. BARRY. I think there was one case.

Mr. FLOYD. In what case?

Mr. BARRY. The case known in the trade press as the Eastern case, which was decided adversely to the lumber men by the lower courts, and which is now before the Supreme Court.

Mr. FLOYD. Where did that case originate?

Mr. BARRY. In New York City.

Mr. VOLSTEAD. What is the accusation in that case?

Mr. BARRY. The accusation was that they maintained a black list. I know nothing about the details of that case, and am not representing anybody interested in it.

Mr. VOLSTEAD. Some years ago when this case was started, I remember the lumbermen complained that the prices were being fixed, and I am very much surprised—of course, this relates only to my section of the country—that there was any dispute about that, or any denial that it was the contention of the Government that they were fixing prices and distributing through the mail regularly the various figures as agreed on.

Mr. MOOREHEAD. I have no question but that you have had that impression.

Mr. VOLSTEAD. There is no question but that the lumbermen had that impression; whether or not it was true I do not know.

Mr. MOOREHEAD. I think the Government officials when they started into the case had that impression, but they have never found anyone to indict.

Mr. VOLSTEAD (interposing). Were not the indictments brought upon that kind of charges?

Mr. MOOREHEAD. I do not so understand. I think the indictments were brought out of a mere feeling that would be brought out in such a fight; it was done, I think, to get back at their competitors; and I think when the Attorney General saw that he dismissed the matter.

Mr. VOLSTEAD. The newspapers in my part of the country must have been misinformed.

Mr. MOOREHEAD. I know the newspapers all over the country have the same impression, that I am in cahoots not only with my local competitors, but with my competitors all around me, although the fact exists that I have not been on good terms with my local competitors in seven years.

Mr. DANFORTH. Can you not give us an illustration of the kind of truthful information which you want to have the right to publish, but which you can not, as you claim, now publish? Give us a concrete illustration.

Mr. MOOREHEAD. I will be very glad to do so.

There has existed since the Civil War a large sash and door factory at Davenport, Iowa, a jobbing house known as U. N. Roberts & Co. Some 8 or 10 years ago that business passed to the younger generation of the family who own the original business.

They conceived the idea that they would operate a mail-order house, selling direct to the consumer out of the office through which they were selling to the retail merchant, and they established such an organization.

In order to get a name under which they could operate in the same office, they took the middle names of the young men who were going to operate the mail-order house and gave it the name of Gordon, Van Tyne & Co., out of the middle names of the firm that owned the Roberts Co. They were operating a business, selling to the retailers throughout the country, and the jobbers, and from the same office selling to the consumer under the name of Gordon, Van Tyne & Co., using such advertising matter as this: "We own our own timberlands; we manufacture our logs into lumber; we make the lumber into doors and windows; and we sell direct to the man who uses them"; and in the case I referred to awhile ago, in which the proprietors of this same organization gave the principal information against the lumber association, he testified:

It is true you own the largest mill in the world?—One of the largest.
Your catalogue says the largest; is that true?—One of the largest.
You say you own timberlands; is that true?—As individuals, we own some timberlands.
How much; 1 acre, 2 acres, or thousands of acres?—I do not know exactly.
As vice president of the Gordon, Van Tyne Co., you say you do not know how many acres you own? How many acres do you think?—Over 10,000, but they have never been logged.

There is an advertisement which says they own their own timberlands, they saw their own timber, but this man testifies under oath that the timberlands they own in the family have never been logged.

Mr. FLOYD. If you published that fact to the world, would it be in violation to the Sherman law?

Mr. MOOREHEAD. I have no doubt in saying to the gentleman that this firm was responsible for that indictment against the lumber secretaries, and also the civil suit which has been brought. We are up against it.

Mr. MCGILLICUDDY. What part of the Sherman law is that a violation of?

Mr. MOOREHEAD. I am not able to tell you, because the question has not been decided.

Mr. FLOYD. Is it not a fact that you are asking for legislation before the question has really been adjudicated? You say the indictments were dismissed?

Mr. MOOREHEAD. The civil suit is pending.

Mr. FLOYD. It is before the Supreme Court?

Mr. MOOREHEAD. There is one suit known as the Eastern suit, in which there are other interests involved.

Mr. FLOYD. I can conceive that if in publishing this information you could instruct the members of your organization throughout the country not to deal with these people and attempt to create a boycott you might come within the provisions of the law, but it is inconceivable to me that upon the straight proposition that you tell the truth about another man's business, you would come within the purview of the Sherman Act.

Mr. MOOREHEAD. You are right at the point for which we are contending. That is, that all we want is the right to tell the truth. We do not desire to keep a black list.

Here is the proposition. Dun or Bradstreet can report me for not paying a debt, for being slow pay, or being in trouble with my wife, and things of that kind that would absolutely ruin my credit. But when I come back and attempt to speak the truth about a matter of this kind I am confronted with the Sherman law, and I can not fight it by myself; I can not afford to.

Mr. FLOYD. I want to repeat what I have said, that you have cited no case in which the court has held that fact to be a violation of the Sherman law.

Mr. MOOREHEAD. No, sir.

Mr. FLOYD. You have stated that some of your competitors—that you believe that one of the suits which has been brought was inspired by some of your competitors who tried to bring that within the provisions of the Sherman law.

Mr. MOOREHEAD. That is the way it looks to us.

Mr. BARRY. We were distributing that information, and the Government held against us on the ground that it was conspiracy in restraint of trade. These are the words of McCutcheon, and he brought the information, and I am one of the fellows in it. We distributed that information, and the case is now pending before the Government claiming that we violated the Sharman law in so doing. We distributed the information through the association.

Mr. FLOYD. Has any court decided that case, any Federal court, or is it simply stated——

Mr. BARRY. Only in so far as the Eastern case, so called, involves the same question. That has been passed upon by the Federal court

and is now up into the Supreme Court of the United States on appeal. This other case is held up pending the rendering of a decision in the Eastern case.

Mr. FLOYD. I understand that in the Eastern case there were other questions involved.

Mr. MOOREHEAD. I presume there are; I do not think there is any question about that, but we are not representing them.

Mr. BARRY. We have spent $100,000 now.

Mr. FLOYD. I can see the necessity of a remedy if the courts should take the view of the complainants. But until the courts have taken that view and held that view of the law it would seem to me that any action on our part to remedy a condition which, to my mind, does not exist would be premature.

Mr. MOOREHEAD. Our reason for being here is that you are going to make amendments to this law, they are going to be the law of the land until the court says they are not the law, and that is the reason we are here. If it is premature, it is because we believe this is our only chance to get in.

Mr. FLOYD. We are glad to have you here and to have your views, but what I suggested was that so far as the matter of these cases is concerned they have not yet been finally decided, but that does not detract from the value of your information. We want every phase of information we can get.

Mr. MOOREHEAD. We are here because we were advised to come at this time, and we thought the amendments were going in and that they were going to be made, regardless of the decision of this or any other case.

I presume if you would make plain a new law it would even supersede a decision of the Supreme Court that might be rendered on a case begun five years ago.

Mr. BOLMAN. Until this question is brought to an issue, the committee will hardly see the necessity and wisdom of changing it until it is demonstrated that the Sherman law does actually prevent the dissemination of that information.

You can probably easily conceive of an instance where that might work a terrible hardship for a long time, through its lack of directness, even though the issue has not been brought to a conclusion.

That is illustrated in this case, this case against the lumber associations of the West.

Now, as a matter of fact, that was brought three years ago. In other words, three years ago we were brought face to face with the possibility that we were violators of the law and we were warned, and are warned by the prosecuting attorneys, that the dissemination of that information is in violation of the law, and that we are liable to prosecution, and in this instance that contention is made.

Now, being face to face with that situation, we would have no safety in going ahead and doing what we might construe was within the law, when, at the same time, we would realize that the court might take the opposite view, and, for telling the truth, we would be in the meshes of the law.

It seems to me we are entitled to the elimination of confusion, and that is one thing that I think we might properly plead for at this time, that there be a definition as to what constitues a violation of

this law. Our hands are tied, and out in Chicago now the prosecuting attorney has this very matter. We are pleading for a conclusion of that case, so that it may be determined by the courts whether we are violating the law. The officials of the Government in Chicago are sitting down and simply saying that some of the issues involved in that case are involved in the eastern case, and that they are not going any further against us until they see whether the final decision of the Supreme Court clarifies the issues on which we have made our case. If it does, and it is decided against the Government, we will drop the case against you, they say; if it is not, we will go on with the case.

On the other hand, we can never know until this certain case is concluded, and we will not then know whether we are violators; we will only know whetherthe Government elects to continue the prosecution of these cases. It is easy to conceive that the volume of business in the courts may be the reason for tying this case up for two or three years more.

Mr. NELSON. Is this the only thing they are complaining of?

Mr. BOLMAN. That is the only thing, I think.

Mr. NELSON. Not that you are getting together as an association and conferring, with respect to territory, and so forth?

Mr. BOLMAN. Absolutely not. I will tell you the origin of that case. That case was founded on the organization of the Secretaries' Bureau in the West. That was a bureau of the secretaries of the various trade associations which could disseminate among the members such information, to be specific, as, for instance, that Jones, a lumberman in the South was selling to Sears, Roebuck & Co. If that information was furnished to the various members of that organization, the dissemination of that information, according to the officials of the Government, constitutes a restraint of trade, even though it might be truthful information.

For instance, I am in the lumber business at Leavenworth, Kans. Of course, you know, if I learn that the Jones Lumber Co., for instance, are selling to Sears, Roebuck & Co., or any other factories, and they are shipping to my customers, and at the same time attempting to sell to me, in other words, being in my service and at the same time being my competitor, the minute I hand that information in to a secretary, or he hands it to me, we are forming a combination in restraint of trade, according to the construction of the Government officers.

The law permits me to act on that information, but it is impossible for me to secure it. I am a local man in a local community. The minute I employ other counsel, other associations' counsel, in the shape of a secretary to gather that information, and keep it on the association's files, so that he might hand it to me voluntarily, that association is a combination in restraint of trade, according to the construction of the Government.

Mr. VOLSTEAD. I presume this is the situation. The contention, of course, is that you are preventing, for instance, this concern in Iowa from selling to other members of your association by advertising it as unfair in competition?

Mr. BOLMAN. Yes.

Mr. VOLSTEAD. What you want, then, is practically what the labor men want. You want to be able to say that certain persons shall not sell to the consumers?

Mr. BOLMAN. No; we do not want to publish an unfair list. We want simply the ability to publish that information. So far as that contention is concerned, I have been a member of associations for seven years, and member of the Southwestern Lumber Dealers' Association. That is only one of the associations. I have been a director for several years. I have never heard during my membership or during my directorship any discussion of the question of division of territory or the setting of prices or of a boycott.

Mr. VOLSTEAD. The proposition is to boycott anyone who sells directly to the consumers?

Mr. BOLMAN. No, sir; I think the association would not object if the law specifically prevents any attempt at a boycott or combination. If I, for instance, know that the man from whom I am buying lumber is trying underhandedly to take my customers away, and at the same time he comes and on the quiet attempts to take a customer away from me when he is selling me goods, I do not need any association or boycott to keep me from buying from him.

Mr. NELSON. Would not what you want result in this—and, of course, I am looking after the interest of the consumer, too—what you wish is to have certain information and the right to disseminate information that will make it impossible for a jobber or wholesaler to sell the consumer, and the consumer would have to buy from the retailer, or else the wholesaler would be punished by your withdrawal of patronage.

Mr. BOLMAN. By my individually withdrawing it?

Mr. NELSON. Individually.

Mr. BOLMAN. Certainly.

Mr. NELSON. That would result in every retailer knowing what is being done so that he can withdraw his patronage from the wholesaler who is selling direct to the consumers?

Mr. BOLMAN. That would be within the choice of the retailer.

Mr. MOOREHEAD. Every item of consumption in the country is in competition. We are in competition in every way every day. There is practically not a single thing that is not in competition.

Mr. NELSON. With the present status of combinations in the country, unless you are permitted, as retail merchants, to combine to meet the larger units of capital you must quit your business?

Mr. MOOREHEAD. I think we are quitting very rapidly. Several thousand towns in nine States have lost population, and the merchants are a discouraged set of men.

President Wilson has seen that proposition, and has seen that the towns are going down hill, and that the little men are discouraged. We are not asking anything in order to put the other fellow out of business. We just want a chance to fight for our life. That is all we want. We can not fight with our hands tied, because the other fellow can not violate the law, and we do violate it, according to the construction of the Government, whenever we get together to fight our own battle.

Mr. NELSON. I have always believed that you gentlemen in local places, in cities, got together and agreed on prices of various articles, or that there was a sort of gentlemen's agreement of some kind.

Mr. MOOREHEAD. Perhaps so.

Mr. NELSON. You deny that there is anything like that in any part of this country.

Mr. MOOREHEAD. I deny that any association undertakes to do anything of that type. It may be done by an individual in a community, but the association has no knowledge of it, and does not encourage it in any way. I do say that, absolutely.

Mr. NELSON. In the lumber business, in the Northwest?

Mr. MOOREHEAD. I do say the association has never had anything to do with the fixing of prices or the controlling of territory.

Mr. NELSON. But you do not deny that you will divert your patronage from the wholesaler who sells to a consumer?

Mr. MOOREHEAD. If I knew it.

Mr. VOLSTEAD. Of course, we had the tariff fight in 1909, and we had a lot of those cards of the lumber associations sent to various sections, all over the Northwest, with the same identical prices on all the cards, and those cards were scattered all over the western country.

Mr. MOOREHEAD. Those things did not originate in any retail association.

Mr. VOLSTEAD. They originated, I think, in St. Paul and Chicago. I think those were the places. I remember comparing two coming from different places. They were identical and they were sent all over the western country.

Mr. MOOREHEAD. Perhaps so, but that was not done by any association or organization.

Mr. VOLSTEAD. It was done by some lumber association; I can not give you the name of it at the present moment. The cards purported to have come from the secretary of two different lumber associations with two different headquarters.

Mr. MOOREHEAD. I can say that is not the case in the suit now pending, which is against the secretary of an association in that country, and that has never been the contention by the Government. They did not find that. They have never found anywhere anyone in the lumber associations; they have not found anyone in the hardware associations, or in any of the other associations; they have never found in those associations anywhere that at any time, anywhere, any association has attempted to control the price of anything. Our whole method is to protect ourselves against the big fellow.

Mr. NELSON. Let me ask you this question in regard to the matter of the technical operation of the business. How do you agree upon prices in a retail business? Is it by suggestion from the wholesaler that such and such an article ought to bring such a price?

Mr. MOOREHEAD. No, sir; never.

Mr. NELSON. How do you fix your prices so that they are uniform in a city?

Mr. MOOREHEAD. I could not tell you how it is done. It is probably done by the local people in a particular city; it is not done outside.

Mr. BARRY. I would like to ask if you know of any place where that is true?

Mr. VOLSTEAD. You can find plenty of that out in my country during the last year or two.

Mr. MOOREHEAD. I know it is generally true that in any line of business the retail merchants in any community are usually fighting like cats and dogs for all the business there is in a community—fighting among themselves. There may be cases where they may attempt to fix a price. That is one of the unfortunate things about a law of this kind, if they fix a price, and get only the cost, they are just as guilty as otherwise.

Mr. VOLSTEAD. We have had large concerns that control the lumber yards from one end of the State to another. Take, for instance, in the State of North Dakota—I do not come from that State—but there are lumber yards there, running from one end to State to another, controlled by such concerns—not as warehouses—but there are others who control yards in that fashion.

Now, of course, we have the warehouses. We have C. B. Walker, and we have Shevlin & Co., and, of course, they practically control the lumber interests, and the question of competition is absolutely outside of any consideration at all.

Mr. MOOREHEAD. I do not know anything about that situation; but I am positive about this: That the retail association in that country, which covers that territory, has nothing to do with the conditions, and in many cases the public has exaggerated ideas of the value of a retail association of any kind. If it were not for the insurance feature of the Northwestern Lumbermen's Association, those very men would question whether they would pay $5 a year to stay in it.

Mr. VOLSTEAD. Those same men run the retail yards?

Mr. MOOREHEAD. They are saving hundreds of dollars by a mutual insurance proposition which is holding them together. That is the only thing that is holding the retail yards in that association, is the insurance feature. It saves us a great many thousands of dollars, and I know those men would not hang together if it were not for that.

Only 60 per cent of the lumbermen in my State belong to that association. If the associations were worth only one-tenth of what the public believes they are, they could not afford to stay out for $500 a year.

Mr. VOLSTEAD. What State do you come from?

Mr. MOOREHEAD. I come from Missouri. It is true everywhere, however.

Mr. VOLSTEAD. I am talking about the situation in Minnesota.

Mr. MOOREHEAD. If it were not for the insurance feature, I believe there would not be any association.

Mr. BARRY. It seems to me that there is just a little wrong impression being left here.

I do not think this Judiciary Committee would be warranted in considering retailers, except as what affects us would affect the community. That is the only reason for it. That proposition ought to be left clear in your mind. If the retailer can not have the trade of the consumer, he can not stay there. He will have to quit. If he quits, what is the effect on the community? He is quitting by the score.

You centralize the distribution. You say the largest aggregation of capital in this country is devoted to the distribution of goods. You centralize it through the fellow you say we boycott. If a man slaps me in the face, I do not need an association to tell me to slap back.

Mr. NELSON. There is a very interesting condition of things going on in the country. I would like to inquire, inasmuch as you are one of the retailers of the country, where the excessive cost to the consumer comes in. For instance, in Minnesota, a Member of Congress from that State told me that some farmers sold their potatoes up there and sewed up the bags and inside the bags they said, "I get 27 cents for a bushel of my potatoes. When you buy them, Mr. Consumer, please let me know what you pay," and they received letters back from Kansas and from other States, saying, "We paid $1.30," or something of that kind. Who makes the large part of the increased cost to the consumer, the retailer or the wholesaler or the transportation company?

Mr. MOOREHEAD. I do not think the transportation companies get a very great amount of it, and I do not think the retailer does. You can not put your finger on a retail merchant who has gotten rich, you can not find more than one in a thousand. If he gets an exorbitant price he is not helping his community.

I know last year that some potatoes came to Kansas City, 40 car loads, and stood on the railroad tracks, and could not be sold at any price. I know a retail grocer in Kansas City said to his customers, "I would be glad to present you with a bushel of these potatoes," and he had bought them for 15 cents. But the papers in Kansas City did not give that merchant credit for helping out the consumer, and those potatoes rotted because there was no sale for them. I do not know who they belonged to; if they belonged to the commission man he lost it.

Mr. PETERSON. Is it not a fact that your association, or some other association, issues a catalogue which simply states the price of all kinds and qualities of lumber, and that there is a discount and that the retailer understands that that is allowed on different kinds of lumber which are catalogued, and in that way the price is fixed, and the price is fixed to the consumer or the retailer?

Mr. MOOREHEAD. Absolutely, a retailers' association has never done anything of that kind.

Mr. PETERSON. That is done, is it not? There is a catalogue of that kind?

Mr. MOOREHEAD. No, sir. The various manufacturers of lumber issue price lists. You probably would not understand why there would be a discount. Here might be a few items on the list, and that printed list might be printed for a month. If the price changed to-day, for instance, instead of getting out a new list, they will say it will be a dollar higher or lower, and it has nothing to do with the retailer's price to the consumer. It would be only the manufacturer quoting his cost price, whether he is a member of an organization or not. I want to disabuse your mind of that idea.

Mr. PETERSON. Your idea that the list is issued by the wholesaler and that the retailers' association has nothing to do with it?

Mr. MOOREHEAD. I say, absolutely nothing.

Mr. PETERSON. I wondered where that came from.

Mr. NELSON. Do not those figures tend to fix a suggestive price, and the consumer naturally pays that price, but the retailer would get it at a lower price?

Mr. MOOREHEAD. That is what a retailer would have to pay for it. He would have to add his profit. It only indicates what the stuff is worth to the retailer.

Mr. PETERSON. Does not the retailer take that list, which does not show any discounts, and show it to his customer, and say, "That is what I have to pay," when it is not, and he is deceived in that way by the circulars?

Mr. MOOREHEAD. There might be a discount from the price list and the retailer might tell an untruth about it. He could do that anyway, but it would be absolutely fatal in the lumber business. If I should write to a manufacturer for prices, it would take him half a day to quote me prices given on a price list. He would simply say, here is a price list, you may get the prices from that. But it would take him half a day to quote all the prices, if he did not have a price list. Every business is done in that way. They have price lists that they send out. It has absolutely nothing to do with the prices that the retailer makes to the consumer, or what the consumer has to pay; absolutely nothing.

I know you gentlemen down here in Congress have been possessed with these ideas about the lumber business and other lines of business. I know we are in the limelight, and I know why the Government brought the suit against the lumber people rather than against somebody else. It was because public opinion had been directed that way by this firm and others. We are trying to straighten ourselves out.

Mr. PETERSON. I would like some one to give me the information as to how the prices are fixed.

Mr. MOOREHEAD. They are absolutely not fixed by the retailers to the consumer, except possibly where two or three retailers in a community might fix the price, as far as this association is concerned. I want to bring home to you a personal case in which a campaign of this kind has crippled me in my town and in my county. A banker in my town walked into my office a few weeks ago. He said, "I have just written the largest draft I have ever written to be sent to a mail-order house." I said, "What did you write it for?" He said, "For $1,140." I said, "Whom did you send it to?" He said, "Sears, Roebuck & Co." I said, "For whom did you send it?" He said, "That is none of your business." I said, "What did he buy it for?"

But he would not give me any satisfaction. I do not think there is any farmer in that town or in that community who can build a house without my finding it out some day. That man had read the catalogues and had read about the propositions, and had probably heard some public man talking against the lumber business, and he had probably said to himself, "I am not going to give Moorehead a chance. I am going to send my order away," and he did. I would have been glad to have furnished him his lumber for $1,140, and I would have made more money out of it than the other fellow made out of it.

That just shows how I have been injured in this way within the last 30 days. And that is going on with every retail man, every retail merchant in the country. That man will not buy a dollar's worth at home because he has been educated to believe that the home man is a greater thief than the man away from home——

Mr. NELSON (interposing). Let me give you a concrete illustration: In my home city of Madison, Wis., could I, as a consumer, buy of a wholesaler there?

Mr. MOOREHEAD. I doubt if a wholesaler would sell to you.

Mr. NELSON. Why not?

Mr. MOOREHEAD. I might say a wholesaler in any line.

Mr. NELSON. Why should he not, if I want to buy a large bill of goods?

Mr. MOOREHEAD. Because he thinks there is some justice and there ought to be some ethics in business. If you wanted to buy bricks——

Mr. NELSON (interposing). You mean to say he would not want to offend the retailer?

Mr. MOOREHEAD. He has sold them to the retailer, and if he sells them to you, the retailer will lose out. It is his policy——

Mr. NELSON (interposing). Do you believe that the consumer should necessarily pay the money to the middleman?

Mr. MOOREHEAD. He does not have to.

Mr. NELSON. This compels him to, in the case which I have cited, if he can not get it from the wholesaler.

Mr. MOOREHEAD. He can get any item you might mention from a mail-order house, from any mail-order house in the country anywhere.

Mr. NELSON. I know it is oppressive on the retailer, but we have got to look to the greatest good of the greatest number.

Mr. MOOREHEAD. Yes, in that way; you want to look, it seems to me, to the community, necessarily, as the important thing.

Mr. NELSON. The gist of your complaint is that you have not the right now to publish the fact that a person has sold to a consumer in your neighborhood?

Mr. MOOREHEAD. Yes, sir. I do not think we have it. That is the contention of the Government. We are not going to violate the law.

Mr. PETERSON. The Government contends that by doing that you restrain trade; that is the contention?

Mr. MOOREHEAD. Yes, sir.

Mr. PETERSON. In the way of a boycott upon the wholesaler; that is the contention of the Government? It is the contention, is it not, that your association can combine for the purpose of restraining trade by advertising those that sell at retail, the mail-order houses; that is the Government's argument, is it not?

Mr. VOLSTEAD. Of course, your objection is not to the sale by the mail-order houses. Your objection, I presume, is that the wholesale dealers selling lumber occasionally sell to the consumer instead of to the retailer, and it is that fact which you desire to publish to the other members of the association?

Mr. MOOREHEAD. There are plenty of people engaged in that business, altogether.

Mr. VOLSTEAD. It would not be of any value whatever to publish the fact that Sears, Roebuck & Co. were selling lumber?

Mr. BARRY. Would it not be of value to us to know what our competition is?

Mr. MOOREHEAD. We are forced to do business without knowing what our competitors' methods are. We want to know.

We do not want anything else. Have we any right to get that information? We are asking you to give us that right.

Mr. BARRY. I took this matter from a paper at the hotel. Here is a man who says that we want $3.50 for a sash. Our advertisement is running in a local paper, and we say we sell that for $1.75, and we pay the freight. That is a case in point. This man says we want $3.50 for the sash. That is the kind of advertising there is all over the country. People do not come to us.

Mr. MOOREHEAD. That advertisement will show that they will sell storm sash at that price, and people will not go to the local dealer.

There were $276,000,000 worth of goods shipped from Chicago in the year 1912.

The CHAIRMAN. How are you going to compel a man to patronize you rather than somebody else?

Mr. MOOREHEAD. We do not ask that.

The CHAIRMAN. That seems to be your complaint.

Mr. MOOREHEAD. We do ask that this man be not permitted to put forth untruthful matter.

The CHAIRMAN. Do you want to stop a man advertising his goods and wares for sale?

Mr. MOOREHEAD. No, sir; not that; but compel him to tell the truth about it.

The CHAIRMAN. Then you want to censor that part of the press that relates to advertising?

Mr. MOOREHEAD. No, sir. There are a great many papers which are standing for just what we are asking for—honesty in advertising.

The CHAIRMAN. Everybody stands for that, I presume, and it is well enough to make a declaration, but to formulate some legislative proposition to meet the evil of which you complain, that is the difficulty.

Mr. MOOREHEAD. I understand the difficulty thoroughly under which you labor.

The CHAIRMAN. A magazine article, an essay, or a stump speech is one thing, but to write a legislative proposition to meet the conditions complained of is quite a different thing.

Mr. NELSON. The difficulty arises in this, that you have to compete with a tremendous business which has great resources of capital, which is concentrated and which can buy very cheap, because it buys in large quantities and can sell cheap because it buys so much at one time.

Mr. MOOREHEAD. They could sell cheap.

Mr. NELSON. They do sell as cheap?

Mr. MOOREHEAD. Some things, perhaps.

Mr. NELSON. You are disorganized, and one by one you can not compete with that competition?

Mr. MOOREHEAD. That is it exactly.

Mr. NELSON. So that you have got to be either permitted to organize to meet this power or we have got to dissolve that power?

Mr. MOOREHEAD. You could not dissolve that power. We would not ask that. We understand the mail-order house is here to stay forever. We understand the parcel post has facilitated the business of the mail-order house. We have got to fight. We are up against severe competition. They do not have to combine in order to put us out of business. Not only that, it would not only be the matter of putting us out of business, but what about the communities where we are located?

The CHAIRMAN. I sympathize with your efforts to have the people in the various communities patronize the dealers in those communities. That is right and proper. The merchants there are their fellow citizens, and they are the taxpayers and contribute everything that comes to good citizenship, to the benefit and upkeep of the community. I quite sympathize with that. But how to keep the mail-order houses from competing with the local merchants—I do not think you can do that.

Mr. MOOREHEAD. You can not do that. We welcome that competition, but the thing we want is a chance to fight back, and we do not want our hands tied.

The CHAIRMAN. How can you compel local people to buy from local merchants?

Mr. MOOREHEAD. You can not do that. We do not want you to attempt to do that.

The CHAIRMAN. That is what you seem to want; you want them to buy from you.

Mr. MOOREHEAD. We would like to be able to tell the truth about the methods of our competitors. That is all we want.

Mr. DANFORTH. Have you any suggestions to make in the way of legislation?

Mr. MOOREHEAD. We would like to have a law permitting us to do that.

Mr. DANFORTH. Have you prepared a draft of a bill or a law which you think would fill the bill in your case?

Mr. MOOREHEAD. I have not prepared that. I am a retail merchant and not a lawyer, and would not know how to prepare that.

Mr. DANFORTH. I am asking you whether you have anything to suggest.

Mr. MOOREHEAD. Yes; we have.

Mr. BOLMAN. The law we have to suggest to you is the law that has been in operation in Canada for three years. Up there they adopted our Sherman law, thinking that we were all wise and had the right law. They found it did not suit their needs, and they adopted a law up there which is known as the trades combine act.

The gist of that law is this: It provides that if any six people in any community are of the opinion that a combine exists in any trade, they may make application to the judge, stating these facts over their signatures. It is then the duty of the judge to have a temporary hearing, and if, in his judgment, sufficient evidence has been adduced to warrant the hearing, the matter is referred to three men appointed by the minister of labor, and they constitute a board to hold that hearing. The facts are submitted. If those complained against are found to be doing what they should not do, the sentence is that they shall desist. If they repeat the acts, they are then punished.

That is a law that we ought to have in this country. Of course you know we could not operate the railroads in this country under the Sherman law. You know they had to be turned over to the Interstate Commerce Commission. You know also that you pay exactly the same rate to go from Washington to any other point by whatever route you may go. If you want to go to San Francisco from Washington, you pay the same rate, no matter what road you travel on. Why? They had to confer to make these rates; every one of them

had to be arranged in a conference. These rates are made by agreement specifically contrary to the Sherman law.

What we have to suggest, prefacing my statement first with these remarks, that we hope to get through the proposed Interstate Trade Commission, which, I understand, is proposed to be organized along the lines of the Interstate Commerce Commission which has control of the railroads, a law somewhat similar, only adapted to our institutions, a law somewhat similar to the Canadian law. We hope that will come about. We hope that the Congress of the United States will never take the position that it is a crime to make a profit, or that it is a crime to agree on a price if the price is reasonable, because prices for railroad fares are agreed upon absolutely, publicly and openly. Why should not a charge by a merchant be fixed in the same way?

Mr. VOLSTEAD. Would you have that commission fix the price of your goods?

Mr. BARRY. Absolutely, no. No commission can fix that.

Mr. VOLSTEAD. The Interstate Commerce Commission does that now as to railroad rates.

Mr. BARRY. They permit the railroad to charge a certain price, if that, in their judgment, is a reasonable price for the railroad to charge. If it is a reasonable price, they permit it.

The CHAIRMAN. You would not have this trade commission fix a maximum price?

Mr. BARRY. No.

Mr. NELSON. The Interstate Commerce Commission says whether the rate proposed to be charged by the railroad is reasonable.

Mr. BARRY. That is what we want this commission to do.

Mr. NELSON. Is that not determining the price?

Mr. BARRY. Yes; but after a hearing.

The CHAIRMAN. I have asked for a tentative proposition.

Mr. BARRY. This is what we propose as a tentative proposition:

That nothing in the foregoing shall be held to interfere with such cooperation by and among corporations, firms, or individuals as may be sanctioned by the Interstate Commerce Commission.

The CHAIRMAN. What is the number of the bill to which you propose that amendment?

Mr. BARRY. It is No. 2; I believe it has not been introduced.

Mr. FLOYD. You are reading something not in the bill, but something which you propose.

Mr. BARRY. This is a definite proposition. I am offering you as a definite proposition that anything in this bill, or in any amendment, shall not apply to such cooperation by corporations, individuals, or firms, as may be sanctioned by the Interstate Commerce Commission, or by the Interstate Trades Commission—that is the commission which will have to do with us.

Mr. CARLIN. In other words, you want to give them the discretion.

Mr. BARRY. Just as the Interstate Commerce Commission has the discretion. It can not be done otherwise. If we think that an article is worth $1.25, and the Interstate Trade Commission finds that is a reasonable price and sanctions it, we will have their sanction to that amount. That is one definite thing we would like to have from the hands of this committee.

The CHAIRMAN. That leaves in the hands of the commission the power to fix the price.

Mr. BARRY. In just so far as the Interstate Commerce Commission fixes the price, and no further. A price ought not to be regarded as a crime, a fair price. A fair rate on lumber from Kansas City to Chicago is not regarded as a crime.

The CHAIRMAN. I am just saying that the power you propose to give this commission is the power to fix the price. We are not talking about what is a crime, but we are talking about the power of that body.

Mr. BARRY. I am asking that the trade commission shall have the same power as that which is now enjoyed by the Interstate Commerce Commission.

Mr. PETERSON. That would be a maximum price.

Mr. BARRY. They can fix any price.

Mr. VOLSTEAD. How do you imagine they are going to do that?

Mr. BARRY. They are not going to do that.

Mr. VOLSTEAD. If they did not, why would not such an arrangement as that practically legalize all the monopolies you can imagine, because the commission would be absolutely helpless so far as the general bulk of articles are concerned throughout the country. It seems to me it would wipe out the Sherman Act completely.

Mr. BARRY. It applies to all the abuses. You look in the Congressional Record on page 2598 in the sessions of 1888, and then go on for the next two years, and you will find all kinds of discussion in regard to that matter, and I defy you to find a place where it says it is a crime for a man to get a profit. The small man seems to be the octupus. It does not give us an equal opportunity. We are standing for equal opportunity; that is all.

Mr. FLOYD. If I understand Mr. Morehead, his complaint is that the mail-order house puts out false advertisements, exaggerating the value of their goods, and if the retail dealers' association even publishes the truth about these houses they are now liable to be held under the terms of the Sherman Act.

Mr. MOOREHEAD. That is it, sir.

Mr. FLOYD. Now, I want to ask you this question. What remedy would the proposed legislation you suggest afford you over the mail-order houses? What would prevent the mail-order houses, after your local merchants had entered into an agreement as to price, from underselling in those communities and destroying your business, as you say they do now?

Mr. MOOREHEAD. They do not undersell us except on some leader; but not on any item that the retail merchant has had equal opportunity to figure on. We are complaining that we do not have an equal opportunity to figure on those. The merchant in your town, for instance, does not have an opportunity.

Mr. FLOYD. What is there in the existing law, the present Sherman Act, to prevent you from fixing any kind of price you agree upon on any commodity you sell?

Mr. MOOREHEAD. None whatever.

Mr. FLOYD. Have you not absolute freedom in the fixing of the price of your commodities, according to that law?

Mr. MOOREHEAD. With myself, but not with another man.

Mr. FLOYD. When you go into a domain of entering into an agreement with the other man, have you not come within the purview of the Sherman Act?

Mr. MOOREHEAD. Yes, sir.

Mr. CARLIN. Providing it is interstate trade.

Mr. FLOYD. Yes; providing it is interstate trade.

Mr. BARRY. Yes, sir; we do.

Mr. FLOYD. Do you object to the present Sherman law which prohibits monopoly?

Mr. BARRY. The issue is not there. The trouble is with the people who are selling goods by mail at high prices which they are advertising at low prices, and if we attempted to get that information before the people we are held to be in violation of the Sherman law.

Mr. FLOYD. You are on another proposition. I am talking about your proposition to create a commission similar in functions to the Interstate Commerce Commission, which will declare what will be a reasonable price on industrial commodities just as the Interstate Commerce Commission declares what will be a reasonable rate to be charged by the railroads. How does that relieve in any way the difficulty and embarrassment arising out of the conditions described by Mr. Moorehead? That does not seem to me to touch the proposition. After you had entered into your agreement, by permission of this commission, to fix a certain price on commodities, what would prevent the mail-order houses anywhere in the country from underselling you with a different price right in your own community?

Mr. BARRY. Nothing whatever, if that is the disposition about it. We want the opportunity to send out the information which we have in regard to that, and which we are prevented from sending out now.

Mr. FLOYD. That is a different proposition. If you amend the law so as to enable you to get the information without coming under the ban of the Sherman Act so that your association can go out over the country and get information—I mean true information—as to this man's commodities, the character of his goods, their real value, and any other truthful information, of course you do not insist upon the right to give out this information?

Mr. BARRY. Not at all.

Mr. FLOYD. And you would circulate that information among the members of your association, and if you are given that permission expressly by law, and you have the trade commission also created, which can say what will be a reasonable price and what shall be an unreasonable price, the commission you propose would not undertake to prevent a man from selling his goods at the lower price?

Mr. BARRY. Certainly not.

Mr. FLOYD. Then, after you obtained this information, and after you had gone to this commission and gotten it to say a certain price which you had agreed upon among yourselves was reasonable, and to sanction it, what method would you resort to to avoid the competition of the mail-order houses?

Mr. BARRY. We do not care to prevent that at all.

Mr. FLOYD. Unless you have some means of averting that competition—the destroying competition—after you have the competition, what better attitude or condition would you be in than you are now?

Mr. BARRY. We would have the right to confer under the law.

Mr. FLOYD. The law gives you that. You can circulate the information.

Mr. BARRY. Not now.

Mr. FLOYD. I am assuming you have the law. How could you checkmate that competition? If you had the information, how do you propose to checkmate it by merely having a commission to sanction certain prices among yourselves?

Mr. BARRY. Corporation does wonders, Judge. It passes laws in Congress. To cooperate is all we are asking for. Without cooperation we, as individuals, are simply chewed up by these large aggregations of capital. We may never sell at the price the commission says we may. We will always beat the price the mail-order house puts down. We simply want the chance to get the information; that is all.

Mr. CARLIN. To boil this matter down, as I understand your proposition, you think it ought to be unlawful for big business to combine, but you think it ought to be made expressly lawful for little business to combine.

Mr. BARRY. We do not want to combine.

Mr. CARLIN. You do not want to combine?

Mr. BARRY. No, sir.

Mr. CARLIN. Is not the cooperation you speak of a combination?

Mr. BARRY. No, sir.

Mr. CARLIN. What is it, then?

Mr. BARRY. It is an exchange of information; it is the dissemination of information. Now, we are forced to act in the dark.

Mr. CARLIN. But you want to act in combination?

Mr. BARRY. No; we do not. The conditions—for instance, in Mr. Moorehead's territory, may be radically different from the conditions in my Territory. We want to be able to know who our competitors are, what they are doing, and how they are doing it. It is now in the compilation which the committee has made, and which is now in the hands of the members of the committee.

Mr. VOLSTEAD. I do not see anything in it that would justify any such claim for it which was made. There is nothing in here that would authorize such commission to in any way absolve anybody from any violation of the general principles of the Canadian law, which is the same practically as the Sherman antitrust law. It is simply a method of investigating the facts and certifying them to the court, so that the court may pass judgment upon them.

Mr. BARRY. It really puts that in each individual district of the country. A man who talks about your being a trust and having your prices all fixed in combination is given an opportunity to put his name to that piece of paper and have it determined in the local community.

Mr. VOLSTEAD. It is determined by a court.

Mr. BARRY. No; first by a commission of six.

Mr. VOLSTEAD. They find the facts and they submit them to the court. But that is not material.

Mr. BARRY. That is the law we would be glad to have. It does not authorize the fixing of prices, but it sanctions the cooperation that may be undertaken by the people in the local town, if the commission finds they are reasonable. Suppose there are 20 men——

Mr. VOLSTEAD (interposing). They use the word "undue" and our Supreme Court has now used the word "reasonable," which would, no doubt, mean the same thing.

Mr. BARRY. If they find that they have not been doing anything wrong, that is the end of the case. We are ready to go before any commission at any time and establish a right to do that.

Mr. VOLSTEAD. That is the way our courts do.

Mr. BARRY. If that is the case, gentlemen, why not give us that? If that is simply a repetition of the Sherman law, why not, as an entity of our citizenship doing much for the building up of this country, if that is the case, why not give it to us?

The CHAIRMAN. Under the order of the House, bills relating to the trades commission have been referred to the Committee on Interstate and Foreign Commerce, and doubtless you can bring this matter up before them when you appear before that committee to-morrow.

Mr. BARRY. Would you suggest that?

The CHAIRMAN. I do not suggest that. I just say perhaps you can do that. We would be very glad to draw any legislation here that would help the small merchant.

Mr. BARRY. Not so much the small merchant as the communities.

The CHAIRMAN. I may not make myself wholly intelligible, but if you will give me a little time I will undertake to tell you what is in my mind.

We sympathize with your efforts, and I was referring more to Mr. Moorehead's line of discussion than to this. He wants the small man to have a fair showing. How are you going to do that? How are you going to make the local people buy from the local merchant, rather than send their money to a mail-order house? How can you do that by legislation?

Mr. BARRY. You can not. All you can do is to prevent false statements being made.

Mr. CARLIN. There is a statute against that now.

Mr. BARRY. Gentlemen, if you pick up any magazine you will see that advertising where they say "We will save you 50 per cent over your local dealer's price." You can read that in almost any magazine. Take the case of the company which manufactures a house called the Aladdin House, made by the Northwestern Construction Co. In all their advertisements they say they save so much over the local dealer, and they say they have mills in Oregon, and States like that. I got a report from Dun's on that company. It showed that $40,000 of the assets of that company were in patents and the remaining $15,000 were in various odds and ends, anything but liquid assets. And yet they are selling Aladdin houses and they say they will save you so much and ship them direct from their own mills.

The CHAIRMAN. How would you prevent those people from thus offering their goods and wares?

Mr. BARRY. That is what we are asking for; how it might be framed up, how it might correspond with the other statutes I do not know.

The CHAIRMAN. You would have to have some bureau to which the advertisement would have to be submitted and have it censored that way.

Mr. BARRY. There would certainly have to be some tribunal to pass on that.

The CHAIRMAN. How can you make such a thing practical?

Mr. BARRY. I should think a United States court should get at all the facts through a grand jury just as they could do in the case of a crime.

The CHAIRMAN. Are you going to make it a crime for a man to advertise his goods decently, to say he is selling his goods lower than the local merchants, is that what you want?

Mr. MOOREHEAD. If he misleads them I do not see why, just as if you were to pass a counterfeit to-morrow.

The CHAIRMAN. You want a statute saying these people must stop selling goods cheaper than a local merchant?

Mr. MOOREHEAD. Oh, no.

Mr. CARLIN. There is a criminal statute in existence that provides that where the mails are used for fraudulent purposes, that shall be a crime. The illustration you give is clearly an illustration of the use of the mails for fraudulent purposes, and an indictment can be had in any community to reach that very trouble. It seems to me that the trouble is not that we should have new laws, but invoke the laws already in existence.

Mr. MOOREHEAD. It looks that way, as being illegal, but nobody has undertaken to enforce a law of that kind.

Mr. CARLIN. You can go further and you can apply to the Postmaster General for a fraud order, and he has the power to issue such an order, excluding those dealers from the mail, and he does things of that sort now.

Mr. BOLMAN. Does that law apply to merchandise advertising? It prevents the promoter from painting his scheme in the flowery language that so many of them use, but that law, I think, does not apply to merchandise in any way. It is not applicable there. Why it is not so I have not a mind legal enough to say.

Mr. CARLIN. What business are you in?

Mr. BOLMAN. I am in the lumber business at Leavenworth, Kans. I have purely a local business and do not manufacture—I simply buy lumber by the carload and sell it at retail.

Mr. CARLIN. How many lumber dealers are there in your town?

Mr. BOLMAN. Three.

Mr. CARLIN. And you want the right to combine with the other two, as I understand it?

Mr. BOLMAN. That is Mr. Barry's proposition; yes, sir.

Mr. CARLIN. Now, then, do you mean when you combine that you want the right not only to combine but to agree with the other two as to what price the joint commodities shall be sold?

Mr. BOLMAN. Always with the remedy open to the people, provided for in the appointment of a local commission. Instead of compelling the people to come to Washington to seek that redress, or to go to the United States prosecuting attorney and get him to bring an action, they can apply to their local judge and get an investigation.

Mr. CARLIN. The people can do that now under the Sherman law. If you have a combination that is engaged either in whole or in part in the lumber business, engaged in interstate trade, anybody could complain to the Government prosecuting attorney and he has the right to invoke the aid of the grand jury to investigate those conditions right in the community where you are located.

Mr. BOLMAN. Sure. The only difference here is it does not make any difference what combination he is in, whether it is reasonable or unreasonable, it is equally a violation.

Mr. CARLIN. That is the point we are driving at. You want a tribunal somewhere that can say your combination is a combination that is a reasonable one?

Mr. BOLMAN. Yes, sir; we do.

Mr. CARLIN. Then, to boil it all down, you want some tribunal to say there is a good trust somewhere and a bad trust?

Mr. BOLMAN. If that seems the best way; yes. Now, we are small units and irrespective of what local conditions may exist in particular instances, because all lumbermen of the United States are not good lumbermen, as the lumbermen are not all good citizens, and as no other class are all good citizens, we want that in for the purpose of protecting our customers, and we believe for the purpose of preserving our communities and preserving ourselves also. It is simply that thereby we could effect a reasonable combination of sufficient strength to enable us to meet this outside competition.

Mr. CARLIN. Would it be well to go further and allow combinations among those people who cut the lumber in the forests—the real lumber owners—and have some tribunal fix the price at which you shall buy from them?

Mr. BOLMAN. Now, if you will permit me, I will say I am not prepared to argue that question, because I do not know all the conditions that surround the lumber-manufacturing industry.

Mr. CARLIN. From your information, then, would it not be as proper to allow the men from whom you had to buy to fix the price against you as it would be to allow you to fix the price against the consumer?

Mr. BOLMAN. Yes, certainly; because I am not coming here to ask for what I would want you to deny to other men.

Mr. NELSON. You would limit the questions, would you not, that the commission could go into?

Mr. BOLMAN. Certainly.

Mr. NELSON. Then, how many commissions do you think we would have to set up here?

The CHAIRMAN. Do I understand from what you said that this is your idea: You want the right to combine; your local dealers in your town want the right to combine in the trade in which you are engaged so as to shut the foreign men out of competition in your local market?

Mr. BOLMAN. Yes, sir; that is really a frank statement of the case.

Mr. CARLIN. In other words, you want to preserve the consumers in your own town for your own purposes?

Mr. BOLMAN. Yes, sir; because if we do not preserve them for the local merchant, what is going to become of the local merchant, and what is going to become of your town?

Mr. CARLIN. In other words, then, if he is to be skinned you want him skinned by the fellow in your own town instead of merchants away from you?

Mr. BOLMAN. If you think the merchant would engage in skinning him, we want to.

Mr. CARLIN. No; I do not say he would; but I say there is danger of it in your combination.

Mr. BOLMAN. Let me ask you: If that trade is not preserved in your home town, where is it going?

Mr. CARLIN. Is it not a good idea to let in competition instead of shutting out competition?

Mr. SCEARCE. Mr. Chairman, Mr. Moorehead came here with a written statement that he had prepared after a conference with all the representatives of the retail interests of the country; and I think that that statement reflects the views of the retail interests better than any of us, individually, can present them.

Mr. NELSON. That is what you stand for, and the others are individual opinions?

Mr. SCEARCE. The others are individual opinions. And at the close Mr. Moorehead has a concrete and specific recommendation here that I think he ought to present to you, so that we can get this in the proper light, and so that we will not be misunderstood by presenting these various personal views.

Mr. CARLIN. What business are you in?

Mr. SCEARCE. I am simply in the retail lumber business, but I was present at this conference.

Mr. CARLIN. What business is Mr. Moorehead in?

Mr. SCEARCE. Mr. Moorehead is in the lumber business.

Mr. CARLIN. Are these other two gentlemen in the lumber business who have spoken?

Mr. MOOREHEAD. We expected all these retail interests here to-morrow. This hearing to-day is 24 hours ahead of our understanding.

Mr. CARLIN. I know that, but I am trying to find out who we are hearing to-day?

Mr. MOOREHEAD. These gentlemen here are lumber dealers except Mr. Stebenthal, who is an implement man. We expected the grocers and others to be here to-morrow; but I would be glad for you to hear from Mr. Stebenthal, because the implement men ask you to make it specific that it would not be a violation of the antitrust law to tell the truth and disseminate truthful information through any agency, and it should not be unlawful to give the widest publicity to the business policies and purposes of firms and corporations doing an interstate business.

Mr. CARLIN. In what form would you put that as a legislative proposition?

Mr. SCEARCE. As an addition to this bill; provided, however, that it shall not be unlawful to give the widest publicity to the business policies and purposes of firms and corporations doing an interstate business. Now, the man who does not want his business made public has something about his business that is wrong.

Mr. CARLIN. That is not against the law now.

Mr. SCEARCE. The contention we are up against is this: If we disseminate information we have a lawsuit on our hands.

Mr. CARLIN. Yes; you have a lawsuit on your hands if you give out information to the public.

Mr. SCEARCE. And if you give information to the membership and not to the public.

Mr. CARLIN. They are not suing you for telling the truth.

Mr. SCEARCE. I think they are. To get right down to brass tacks, that is what it amounts to.

Mr. CARLIN. What is the style of the suit?

Mr. SCEARCE. The Government *v.* The Northwestern Lumbermen's Association.

Mr. CARLIN. The purpose of that suit is to dissolve the association?

Mr. SCEARCE. No, sir; I think not.

Mr. CARLIN. What is the purpose?

Mr. SCEARCE. The character of it, as I recall, is a prosecution of the members for furnishing information, as being against the Sherman law. Understand, I am not an officer of any association——

Mr. CARLIN. But there is not anything in the Sherman law to prevent you giving information to anybody you please. What I suspect they are really doing is filing a suit against the Northwestern Lumbermen's Association to dissolve your organization because you operate in restraint of trade—because you are a trust?

Mr. SCEARCE. Yes.

Mr. CARLIN. Now, is not the effect of your association to-day to make uniform prices for lumber?

Mr. SCEARCE. Never, sir.

Mr. CARLIN. Do you gentlemen sell at different prices?

Mr. SCEARCE. We say we do—everyone of us.

Mr. CARLIN. Do you gentlemen living in the same town sell lumber at different prices?

Mr. SCEARCE. I say we do.

Mr. BOLMAN. We have several lumbermen in our town selling at different prices.

Mr. MOOREHEAD. Now, it is possible for five or six or seven to get together and fix the price, but it would not be an interstate proposition at all; but they could not do it for any great length of time, because of the mail-order competition. As I said before, we are in competition with every dollar's worth of stuff we sell.

Mr. CARLIN. And competition is the only thing that prevents you from maintaining a high price?

Mr. MOOREHEAD. I am not asking you to shut it out. I know you can not do it, and it is getting stronger all the time.

Mr. CARLIN. You are the president of this association?

Mr. MOOREHEAD. No, sir; I am the secretary of the association that was gotten up just among the various retail associations to get the gentlemen together to come down here.

Mr. CARLIN. What we are trying to get into your mind is: This committee is exceedingly anxious to help you along proper lines, but before they can do that they have got to know what you want. If you want to continue combinations in the form of a trust, or to have the right to conspire in restraint of trade, or to continue monopolies, of course, you would not get any help here.

Mr. MOOREHEAD. Certainly; I understand that.

Mr. CARLIN. And it is for that reason we are trying to get at exactly what you do want. It turns out the Government, through the Attorney General's office, I suppose, has brought suit against your association.

Mr. MOOREHEAD. One of the lumber associations; not mine—one of the retail lumber associations with its headquarters located in Minneapolis.

Mr. CARLIN. They are doing the same thing you are doing, however, are they not—the one that suit has been brought against?

Mr. MOOREHEAD. I am not an officer in any lumber association. I am a retail lumberman, but not an officer or official of any kind in any lumber association and have not been for a good many years.

Mr. CARLIN. Have you a local association in your town of lumbermen?

Mr. MOOREHEAD. No, sir. As I said to you a while ago, I have not been on intimate terms with my competitor in seven years.

Mr. CARLIN. How many competitors have you in your town?

Mr. MOOREHEAD. Just one.

Mr. CARLIN. And you and he have not been able to get together?

Mr. MOOREHEAD. No, sir. And I would say further, in four times out of five, not only in the lumber business, but in any other line—groceries, hardware, or anything else—the merchants are fighting for business rather than maintaining a price. Now, do not get away from that thing, gentlemen, because it is true. They are not only fighting among themselves, but they are fighting these mail-order houses away from home.

Mr. CARLIN. Your association wants the society to fix a reasonable price?

Mr. MOOREHEAD. I have no hope of anything of that kind. If we had the right specifically and knew we could make a common fight for our rights without violating the law, that is all we want. We can not afford to violate the law. We have not the money to fight those things out. We have not the money to fight even collectively, and what we want, gentlemen, is: Do not permit the amendments to the Sherman law to say that everything that a competitor may do must be kept secret and that it is a felony to tell the truth about your competitor. If you do you are going to give the big business and the mail-order houses of this country just what they want.

The CHAIRMAN. Have you heard any suggestion that any such thing as that was contemplated by anybody? Have you seen any bill formulated anywhere?

Mr. MOOREHEAD. Yes, sir; the papers have been full of it—that that had been suggested to this committee.

The CHAIRMAN. Where and how?

Mr. MOOREHEAD. That it be unlawful for anyone to reveal—obtain any information or reveal any information he may obtain about his competitor's business.

The CHAIRMAN. On the contrary, every measure of the sort here provides for publicity.

Mr. MOOREHEAD. Yes, sir; I hope you will.

The CHAIRMAN. Well, there are measures here for publicity. No such suggestion as you made a while ago has been made to the committee.

Mr. MOOREHEAD. I think it will come, Judge. It is in the interstate-commerce act that it is a felony for me to gain any information from a railroad agent about any shipment of goods. It is a felony for the agent to give it to me, and it is a felony for me to use it after I get it, as a private citizen, under section 15 of the interstate-commerce act.

Mr. CARLIN. It is a felony to get it from that source, but it is not a felony for you to get it under the act by the Government, obtained for your use.

Mr. MOOREHEAD. Mr. Chairman, I would like you to hear now from Mr. Stebenthal.

STATEMENT OF MR. F. R. STEBENTHAL, OF EAU CLAIRE, WIS.

Mr. STEBENTHAL. Mr. Chairman and gentlemen of the committee, I wish to thank the committee for the privilege—perhaps it is one in a lifetime—of appearing before such a distinguished committee which has really in their hands the future welfare of the small towns and the small dealers of the country.

Now, I represent some 35 of the dealers who are directly on the firing line with the producers of the country—the farmers. We hand out to them the implements, machinery, with which they till the soil to produce the wealth of this country, and I want to say to you that under the acts of Congress as they stand to-day, which handicap us and tie our hands, the retail implement business is not a profitable one. Statistics will show that 25 per cent of the retail implement men in this country go out of business each year. The president of the National Implement Manufacturers' Association, Mr. Craig, of Wisconsin, said the other day the last thing he would offer to one of his boys as a business venture would be to enter into the retail implement business; and, in order to make a success of it, it would require more brains and tact than it would to be the manager of a railroad.

Gentlemen, only two implement dealers out of every hundred in these United States make a competency sufficient to do them in their old age. Why? Because of the competition that we are compelled, under the laws, to accept without any defense whatever, without anything to defend ourselves with. The organization I represent—I want to read to you what it is composed of, just to disabuse your minds of the fact that we are here representing a class of men that wishes you to give them any special favors. We only want the right to make an honest living, without the laws that are placed upon the statute books to govern big business being used against the little business that everybody knows it ought to be the privilege of you gentlemen to protect.

The small town and the small dealer are up against a great deal harder competition than those gentlemen told you about. Yet we want to be law-abiding. I want to show you we are organized only for one purpose. We realize the convenience and the necessity of the retail implement, vehicle, and hardware dealer in every community. We are interested in the promotion of the general welfare and the production of the retail implement, vehicle, and hardware business. We recognize the legal right of the manufacturer, the wholesale dealer in implements, vehicles, and hardware to sell in whatever market and to whatever person he pleases, to any purchaser and at whatever price they see fit.

Now, we restrict no one. Our meetings are entirely open. We get together for the purpose of discussing the questions that are inimical to our business and for our best interests. We only meet around the table the same as you have here, and we talk about matters of

business. We never attempt to fix a price. We know it is unlawful. Such a thing has never been done by the Implement Dealers' Association. Yet the great Government of the United States comes in and takes all of our books and records and investigates us to see if we are not a trust in restraint of trade. We are continually hampered by agents—I think of your Bureau of Commerce—that are doing that. They attend our meetings. We invite them very freely. They never have been able to find anything against us. We have never been indicted; we do not want to be. But what we want at your hands is just the consideration you would give to one of the dealers in your home towns when you knew of their struggles.

We have no form of legislation to give you, for the reason we are not attorneys; we are not Congressmen; we are ony hard-working men who stand for their own interests and would like the opportunity, simply the opportunity, to do what they believe to be right at home and to gain an honest living. This gentleman (Mr. Nelson) lives in my State. Now, then, he asked if he could buy from his dealer at home, his wholesaler. Yes. But would it be right for the wholesaler to give him the wholesale price and charge me the wholesale price, or to charge him the retail price?

We only ask at your consideration, gentlemen, that in getting after the big business—which we are with you on in every particular—do not kill the little business in doing so.

Mr. CARLIN. We are with you on that, and are not going to do it.

(Thereupon, at 4.30 o'clock p. m., the committee adjourned until to-morrow, Thursday, February 5, 1914, at 10.30 o'clock a. m.)

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Thursday, February 5, 1914.

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

The CHAIRMAN. The committee will be in order. Mr. Finneran and Mr. Nixon are here this morning and desire to be heard. Gentlemen, which one of you will proceed first?

Mr. STEWART. Mr. Chairman, Mr. Finneran will speak first.

STATEMENT OF MR. JAMES F. FINNERAN, OF BOSTON, MASS.

Mr. FINNERAN. Mr. Chairman and gentlemen of the committee, I am president of the National Association of Retail Druggists. I am only an ordinary, everyday retail druggist and have to work for a living, like all the rest of them. Perhaps I may not be able to explain clearly some of the points that I would like to bring out, and if I do not explain them thoroughly I hope you will pardon my lack of knowledge of official procedure in matters of this sort.

Our organization is composed of 15,000, in round numbers, retail druggists, mostly east of the Mississippi River. Seventy-five per cent of those men conduct what is known as the family drug store, any I think you gentlemen all agree that there is a necessity for the family drug store. The other 25 per cent are in the larger centers. We are troubled very much by what we call unfair competition

through a line of stores commonly called chain drug stores. There are many of those systems in various parts of the country. Prof. Nixon—who, by the way, is chairman of our legislative committee—comes from Massachusetts and knows about New England and about these chain drug stores there, and I expect he will give the members of the committee many of the details regarding these stores. I desire to make a general statement in behalf of our association.

For 15 years we have believed that the sort of competition brought against the small man by these so-called cut-price stores was unfair. In advertising they claim that they are enabled to buy goods in large quantities and thereby are enabled to undersell us. It is a fact that no one to-day actually knows the bottom price on many commodities which are sold in the drug store. There is a supposed retail price, but the public does not know what the retail price is, because the price printed on a package of Gillette blades, a package of Baker's chocolate, or a package of patent medicines, as sold in the drug store, indicates absolutely nothing to the public. They really do not know what the price is at all, because in one store it is 49 cents, in another store it is 39 cents, and in some cases 33 cents

There are all sorts of rebates given. I am a retailer in the city of Boston and have 34 employees in my store, so that you will understand that I have a fairly large business, and I am frank to say that we get rebates. But the question in our minds—and I think it is the question that is in the mind of every merchant—is, What is the price, after all? We use the slang expression, "gunning around" from one wholesale house to another and from one manufacturer to another in order to find out if possible what is the best price at which we can buy certain goods. Now, our point is this: Would it not be an absolutely fair proposition that the manufacturer of an article should have the right to say what the price is all along the line? For instance, railroads say that if you send a carload of freight over the road it will cost you so much for a certain distance, and would it not be a fair proposition for the manufacturer to say that a carload of his goods could be bought at a given price and that every one might know it? The same thing is true if a man takes a half of a car or takes a quarter of a car, and the same should be true of the various trade-marked, copyrighted, and patented articles that are sold in the retail drug store of to-day.

I think all of you gentlemen must be acquainted with such a store, because you must patronize one. I do not see how any one could get along without patronizing a retail drug store, because it carries such a multiplicity of merchandise, much of which is trade-marked, patented, or copyrighted. While perhaps the prices do not always interest you as to whether an article costs 35 cents or 50 cents, still I think you at times may have a feeling that you do not know just what the price is, because you buy it at various prices.

Now, let me state the position of a retailer. For instance, he is enabled, we will say, to sell Gillette razors at $5. He has a very friendly feeling toward that manufacturer because he makes a reasonable profit, but immediately the profit is cut out from under him by what we consider unfair competition he loses interest in that razor, and rightly so, because it does not make any difference whether he is a big man or a little man he must have profit.

The CHAIRMAN. You have spoken about the Gillette razor. The concern that manufactures that razor sells it to you under a contract that you will sell it in the retail trade at a particular price, does it not?

Mr. FINNERAN. They did; but as I understand it, under the Sanatogen decision of the Supreme Court, that contract is not worth the paper it is printed on. As a matter of fact, in our own city Gillette razors were sold at $3.37.

The CHAIRMAN. I know about that decision, but do they undertake to do that now? That is what I am trying to get at.

Mr. FINNERAN. No; they sell them at $5 in Boston, but it is one of those so-called gentlemen's agreements that enabled them to get it back, and it is nothing else than that.

The CHAIRMAN. They still have a gentlemen's agreement?

Mr. FINNERAN. Oh, yes; and the gentlemen's agreement goes. It is simply a gentlemen's agreement that you will sell it at $5 and thereby make some profit.

The CHAIRMAN. What do you pay for Gillette razors when you buy them?

Mr. FINNERAN. The price of a Gillette razor is $5, and a man buying a small quantity gets 25 per cent off the retail price, making it $3.75. In quantities there is 10 and 5 off additional, bringing it down to approximately $3.33, I think it is.

The CHAIRMAN. Do you know what it costs to manufacture that razor?

Mr. FINNERAN. I have not the slightest idea.

Mr. DANFORTH. Those men, then, sell at just what they pay for them?

Mr. FINNERAN. Yes.

Mr. DANFORTH. $3.33?

Mr. FINNERAN. Yes, sir.

Mr. DANFORTH. And they are selling for that price in Boston?

Mr. FINNERAN. No; not now, because, as I say, there is a gentleman's agreement. A representative of the Gillette people went about and said, "Gentlemen, there is no fun for anybody in selling Gillette razors at less than cost to the ordinary small man, and if they are sold at less than cost we get the ill will of everyone. We want the good will of the dealers; we want them to sell our razors and sell at a profit. We believe more are sold at $5 than are sold at $3.33, and we believe more will be sold at $5 than at $3.33."

Mr. FLOYD. Previous to the decision of the Supreme Court holding that that kind of a contract was unlawful, what kind of contracts did you have with the Gillette Co.?

Mr. FINNERAN. We had no contract, except this little statement as made by your chairman.

Mr. FLOYD. In other words, you bought the razors with the understanding that you would sell them at the price fixed by the company from which you bought them?

Mr. FINNERAN. Yes, sir.

Mr. FLOYD. If you violated that understanding what did they do? What was the punishment imposed upon you?

Mr. FINNERAN. A suit at law, and the court would decide what the damages were.

Mr. FLOYD. Was it not more than that? Was it not understood that they would not sell you any more razors?

Mr. FINNERAN. I do not know as to that; I would not like to say that because I do not know. To answer your question perhaps a little more in detail, I do not see how they could prevent that, because their razors were sold through jobbing houses, and it would be very easy for a man to send to a jobber, without giving his name but sending his money, and getting the razors at the 25 per cent off.

Mr. FLOYD. You paid for your razors in advance, but still the man you bought them from fixed the price at which you should sell them?

Mr. FINNERAN. The manufacturer fixed the price.

Mr. FLOYD. That might be nice for the manufacturer and for the retailer, but what do you think about the consumer?

Mr. FINNERAN. I think it is absolutely fair to the consumer.

Mr. FLOYD. Does it not absolutely destroy competition?

Mr. FINNERAN. It seems to me, Mr. Congressman, that it would increase competition.

Mr. FLOYD. How could it increase competition among that class of razors? If they all had to be sold at the same price by every one, how could there be any competition?

Mr. FINNERAN. Well, you mean increased——

Mr. FLOYD (interposing). So far as the consumer is concerned.

Mr. FINNERAN. You mean, increased competition in Gillette razors, or between Gillette razors and other razors? I want to get that clear.

Mr. FLOYD. You have expressed your view about it. What do you think the consumer thinks about that?

Mr. FINNERAN. I think the consumer believes, when he is buying a Gillette razor at $3.33, that he is getting a bargain, and he is; there is no question about that. But the point I want to make is this: That when he comes in to buy a Gillette razor at $3.33 it is almost impossible for him to get it. In other words, he has to fight to get what they advertise at a reduced price in order to bring him in the store, and when they get him there they try to substitute something else.

Mr. CAREW. What do you think he thinks about it when, after paying $5, he hears that another fellow has bought it for $3?

Mr. FINNERAN. I think he feels badly; I think he feels badly nearly $2 worth. But there should be a price at which every one would sell it. I do not care whether it is $3, $5, or 50 cents. But it seems to me, as far as the competition end of it is concerned, that if Gillette razors were sold at $5, and they could not be bought for any less than that, that some inventive genius would get up another razor and sell it in actual competition with the Gillette razor, with the ultimate result that the razor that gave the best value for the money would be the one that would sell.

Mr. FLOYD. Suppose the manufacturer of this new razor did the same thing that the other manufacturer did? Do you not think that the consumer gets the worst of it under that kind of a system?

Mr. FINNERAN. I do not think that is the way it works out.

Mr. CAREW. How would you feel if bakers charged a dollar a pound for bread?

Mr. FINNERAN. I do not think you could get them to do it.

Mr. CAREW. But suppose they did it?

Mr. FINNERAN. I would feel very badly if they did it.

The CHAIRMAN. As you know, in times past, in some communities where bread was scarce, they put up the price enormously and there have been bread riots.

Mr. FINNERAN. I think that is absolutely true.

The CHAIRMAN. But you said they would not do it.

Mr. CAREW. Do you know whether or not the Gillette people had any thing to do with the instigation of the barber strike in New York City, so that men would be obliged to shave themselves with safety razors?

Mr. FINNERAN. I do not. That is a thought that never came into my mind.

Mr. NELSON. Your proposition is to let the wholesalers suggest the price of products so they will be uniform throughout the country?

Mr. FINNERAN. My proposition is that every manufacturer shall say to the public what the price of his goods shall be.

Mr. NELSON. And that the druggist shall follow that price?

Mr. FINNERAN. From start to finish.

Mr. FLOYD. Let me pursue the question a little further. You buy from the wholesaler or manufacturer and you insist that he should have the right—although you pay for it when it becomes your property—to fix the price down to the consumer?

Mr. FINNERAN. I do; yes.

Mr. CAREW. For your benefit, so that you will make a larger profit?

Mr. FINNERAN. I think that is true. There is an economic proposition there.

Mr. FLOYD. What would you think of a system in this country which allowed a man who raised horses or cows to fix the price at which his horses or cows should be sold down to the last purchaser?

Mr. FINNERAN. I think he does that now.

Mr. FLOYD. Do you mean that when you buy a horse from a man he should have the right to fix the price at which you are to sell that horse in the future?

Mr. FINNERAN. No; I only mean between himself and the purchaser.

Mr. FLOYD. Should that be allowed after you get the property in your hands? I concede that if a man furnished goods to you as an agent that he might very well control the price at which you sold them, but when you pay your own money for the property and it is yours, just as absolutely as your house or your horse, what right has a man to insist that he should fix the price at which the property is to be sold to subsequent purchasers, and even to the last consumer?

Mr. FINNERAN. If it is a good thing for the public it is all right, and we have always contended that it was.

Mr. NELSON. I would like to have you show how it is a good thing for the public.

Mr. FLOYD. I will concede that it is a good thing for the manufacturer and a good thing for you, but what I would like to be enlightened upon is how it is a good thing for the man who has to pay the arbitrary price fixed by the manufacturers.

Mr. FINNERAN. As long as we have mentioned Gillette razors—we can mention any quantity of things along the same line——

Mr. CAREW (interposing). You could say Armour's hams.

Mr. FINNERAN. Yes; or Heinz pickles, because I think they are interested in those things. As we see it, the man who advertises goods at cut prices has absolutely no intention of selling them to the public unless he is absolutely obliged to do so. In other words, when you enter their stores——

Mr. CAREW (interposing). Leave him out. Let us deal with the man who is buying it to use it.

Mr. FINNERAN. I was coming to that; I can not explain the second part of it without making the first part of it clear.

Mr. CAREW. We agree with you on your first proposition. It is a good thing for everybody who sells it.

Mr. FINNERAN. But the point is that everybody does not sell the razor at $3.33, and ultimately the man who desires to buy it is really, by cajolery, or by something else, induced to buy something else in its place. It is a clear case of substitution.

Mr. CAREW. You are anxious to protect him against his own folly?

Mr. FINNERAN. To protect the public against the ingenuity——

Mr. CAREW (interposing). Of your own trade?

Mr. FINNERAN. Yes; that is just the whole proposition; that is just exactly what happens.

Mr. MCCOY. Is not this the proposition that is involved in the Gillette safety-razor matter: The Gillette people, for instance, spend thousands and hundreds of thousands of dollars in advertising, and that is an expense of the business which a man with another article does not go to at all. Gillette advertises his razor and makes a market for his razor by advertising. Then, we will say, a druggist has a lot of other goods besides Gillette razors which he wants to sell but which have not been advertised in that way, and in order to get people in to buy those other things he sells the Gillette razor at what it costs him or at a less price. In other words, he steals the advertising expenses of the Gillette people in order to sell his other goods at a profit, and it really involves a question of unfair trade and unfair practices.

Mr. CAREW. Mr. McCoy, let me ask you a question. Do you understand that this gentleman is here to protect the Gillette safety razor people——

Mr. FINNERAN (interposing). Not particularly.

Mr. CAREW (continuing). From having the benefits of their advertising stolen by these various druggists?

Mr. MCCOY. No; he is here, as I understand it, for the purpose of asking that the Gillette Razor Co., the Kodak Co., and all those concerns that have created an enormous business—and, therefore, are able to sell their goods for less than they otherwise would sell them—shall be able to keep on doing that—that is, those companies have created a business through advertising and have thus been able to sell goods at a less price. I believe, myself, that it reduces the price of razors, kodaks, and all those things, because these men have built up such an enormous business.

Mr. NELSON. You think that by virtue of this advertising the Gillette Razor Co. has reduced its price?

Mr. MCCOY. I imagine it has, because every concern that builds up an enormous business is able to sell cheaper, and probably does sell cheaper.

Mr. NELSON. Is it not more true that by advertising it is able to keep up its price?

Mr. MCCOY. It is able to keep it up and it is able to keep it down, if you will permit the paradox. But it is true that a man who is making 50 articles can not begin to sell them as cheaply as if he were making 5,000,000 of them and selling them. But it seems to me that it is just like stealing the advertising which a man has done to create a market for his goods. It is very much like stealing his patent or his copyright.

For instance, a case was decided somewhere in Illinois or Indiana the other day where a man had started to advertise his goods by putting this sign in the trolley cars, written in one word, "Stopyourkicking." Everybody knew, of course, when they saw that sign that it was to be followed by his advertisement of whatever it was he wanted to sell, but before he reached that point some smart man came along and put up a sign, saying, "Stopyourkicking," and then put in his own advertisement. That was a clear case of larceny. The court decided that under the rule which it applied in unfair competition cases that it would not enjoin the man, but I think that was a clear mistake. The man who came along and got the benefit of that advertising took the other man's money as clearly as though he had put his hand in his pocket. It is certainly so in the case of these Gillette razors, and all these other cases where they attempt to fix the price, and that is only possible in connection with goods advertised at large expense; it is only in those cases where there has been an enormous expense for advertising.

The CHAIRMAN. It might be well for the committee to hear the witness.

Mr. MCCOY. Well, of course, if the members of the committee can not develop things which the witness suggests, all right. The other members of the committee were talking about the matter, and I thought I would. I beg the committee's pardon. I will quit.

The CHAIRMAN. I did not mean it in that way, but I hope the members of the committee will confine themselves to questions directed to the witness.

Mr. FLOYD. I want to ask one question in connection with that. Assuming your premise to be correct, do you think that the Gillette Co. causes the general public to pay for that advertising?

The CHAIRMAN. This debate between Mr. Floyd and Mr. McCoy will be entirely in order when we meet around the committee table to discuss the matter among ourselves, but I do not think it is fair to the witness that we precipitate a discussion of this sort and deprive him of his opportunity of being heard. That is what I had in mind.

Mr. MCCOY. I wish the witness to consider what I said in the nature of a question, and I will now ask him whether my argument is sound?

Mr. FINNERAN. I think Mr. McCoy's argument is sound, and as he has covered it so thoroughly, I do not see any necessity for going into that question.

Mr. FLOYD. If Mr. McCoy's argument is sound and the man who is competing with the Gillette Co. is getting the advantage of their advertising, or, as Mr. McCoy says, stealing their advertising, do you not think it is better for the general public that that should occur

than that the Gillette Co. should force the public, by these uniform prices, to pay for all of it?

Mr. FINNERAN. I will agree to that if that is the correct condition of affairs as they exist, but I do not agree that it is the correct condition of affairs.

Mr. FLOYD. My question was based on Mr. McCoy's argument.

Mr. MCCOY. I want to say, in answer to Mr. Floyd, that what I said about bringing the public into business places to buy goods would not apply to getting the public in to buy other razors. What they do is to sell not only the Gillette razors, but dozens of other things that they advertise at the reduced price, a well-known article which is thoroughly advertised, in order to get people in not to buy a competing product, but to buy other things which they sell in their business.

The CHAIRMAN. I would suggest that we let the witness go on now.

Mr. NELSON. I want to ask the witness a question. If I follow you correctly, you wish to have what we might call a trade agreement; that is, the wholesaler to suggest the prices at which you would all sell some article in your drug store—is that it?

Mr. FINNERAN. Well, not just exactly that.

Mr. NELSON. What is your point, then?

Mr. FINNERAN. My own idea is this: Say, for instance, you are a manufacturer of a certain article; you alone, without any combination with these other gentlemen who are manufacturing similar or dissimilar goods, if you please; you alone decide that your article should be retailed at $5; to your mind it is an article of merit and you believe that it should be advertised at that price. Now, I believe that you——

Mr. NELSON (interposing). And it is your idea that he should fix that price for the retailers?

Mr. FINNERAN. He would fix it all along the line.

Mr. NELSON. And they would all agree to that price?

Mr. FINNERAN. They would have to if the law was to that effect.

Mr. NELSON. Suppose that was a very excessive price, and almost so that it would prevent the ordinary man from paying the price? Would you not have somebody to regulate that or to say whether it was excessive or not?

Mr. FINNERAN. I would have absolutely no objection to that.

Mr. NELSON. Then you would consent to the fixing of a maximum price in your business?

Mr. FINNERAN. Yes; I have absolutely no objection to that at all. But I do think, as to the $5 proposition—to answer this gentleman directly—as I said before, that competition would easily adjust it. If a man were selling something at $5 that was not worth it he would soon find a competitor selling something else at $3, and that $3 article would naturally be the one that would sell. It would take but a short time for the public to become acquainted with the value of the two articles. That is true of any article; I do not care whether it be food or drink, or something to wear, or something in the line of medicines.

Let me give you a little experience of my own. I wanted to buy a well-known make of thin summer underwear. I knew it was advertised in the newspapers, but I did not know it was advertised

in that particular store at cut prices. However, that make appealed to me, and I went into that store to buy it. I wanted two suits of my particular size and they were laid out before me, and then immediately I was shown something which could be bought at the same price and that was said to be a great deal better. Now, I did not know that they were being sold at 38 cents; I knew they were being advertised in the newspapers at 50 cents a garment, and I was perfectly willing to pay that. But I was worked on very, very hard, and it was with considerable reluctance on the part of the salesman that I got my two suits of thin summer underwear, paying the cut price, which I did not know anything about in this particular case. Now, I compared those right there. That is a case in which a comparison can be made, and——

Mr. CARLIN (interposing). Did the retailer make a profit at the cut price?

Mr. FINNERAN. No; there was absolutely no profit at all. They cost something like $4.50 a dozen and were sold at 38 cents; they cost him, I think, about 37½ cents. That is the trouble in the retail drug business. We are selling to-day, in order to meet competition in Boston, articles which cost us $8 a dozen at the regular jobbing price.

That is what the small man is compelled to pay because he can not buy in large quantities. Now, we are selling some of those articles at 59 cents which cost us 66⅔ cents. We are selling any number of articles along that same general proportion, and articles which are listed at $1.75 a dozen we are selling at 11 cents. My particular firm is doing that because we are right in the hotbed of the chain-store proposition in Boston. We happen to have 12 stores in one chain and 5 or 6 in another in Boston alone. Recently they had a cut-price war in cigars and cigarettes. They took well-known cigarettes and well-known brands of cigars and sold them at ruinous prices. The result was that everyone else had to stop selling those brands and the public was injured in that way and the manufacturer was injured also, because no man can do business in a small way, or in a big way, unless he makes some profit.

Mr. NELSON. What do they do with the prices after the cutthroat war is over? Do they raise them after they have driven out competition?

Mr. FINNERAN. Yes; that is the modus operandi always. You can follow that away back to the time when the American Tobacco Co. first started. That was their process of eliminating competition, cutting prices until they got competitors out of the way and then up went the prices. I think you gentlemen are absolutely conversant with all of that.

Mr. MORGAN. Are you here asking legislation; and if so, what kind of legislation do you want? I do not know that I quite understand.

Mr. FINNERAN. We would desire that in some way the price be fixed on an article from the time it is manufactured until the time it gets to the consumer, and that the price would be made public.

Mr. MORGAN. Do you want us to pass a law providing that every manufacturer shall fix prices?

Mr. FINNERAN. Yes; if he cares to and they are branded goods.

Mr. MORGAN. You want us to give him the privilege of fixing prices?

Mr. FINNERAN. Yes, sir.

Mr. MORGAN. Do not manufacturers have that privilege now?

Mr. FINNERAN. I understand not.

Mr. MORGAN. There is no law against it, is there?

Mr. FINNERAN. I do not know how they can do it, because, as I understand, the Supreme Court has said they can not do it.

Mr. CARLIN. The Supreme Court, in the Strauss case, decided in December, 1913, said they could not contract to do it.

Mr. MORGAN. The Supreme Court decided you could not enforce that contract, but that still gives everybody the privilege of making what this gentleman calls gentlemen's agreements, does it not?

Mr. CARLIN. But they can not enforce such agreements.

Mr. MORGAN. But in effect they do enforce them, he says.

Mr. FINNERAN. No; they do not enforce them, because gentlemen do not always stay so. Something happens. I do not know what does happen, but perhaps they doubt the word of each other.

Mr. MORGAN. Do you base this on a principle of public good or do you think——

Mr. FINNERAN (interposing). Public good, purely and simply.

Mr. MORGAN. You think a manufacturer ought to have the right to contract to sell his article at the price he wants it sold?

Mr. FINNERAN. Yes; first, for the public good, and, secondly, for the sake of the business. I have been in the drug business for a great many years, and I have personally been all through the various phases of this cut-price proposition. I have done my share of what is called substituting, and I have been obliged to do it in order to live.

That is what all these large chain-store propositions have been obliged to do; they have been obliged to substitute. We all hire the cleverest men we can behind the counters to convince you that the particular article you come in and ask for is not what you ought to have.

Now, the National Association of Retail Druggists do not want that to continue. We would like to be able to hand to you anything you come in and ask for, and not be obliged to cajole you and try to force you into taking something which perhaps is not as good.

Mr. MORGAN. As I understand it, then, you want a law that will legalize those contracts when they are made?

Mr. FINNERAN. Yes.

Mr. MORGAN. And you think that with such a law there would still be free competition and that each man could make his own profit?

Mr. FINNERAN. Yes, sir. I have talked with manufacturers, and every man who is an advertiser and every man who has a trade-marked article would be delighted to have everyone know that his goods were not being slaughtered and that they could get just what they were paying for. You realize that that is not so now.

For instance, I observe that Mr. Ingersoll advertises in the papers to a considerable extent, but when a man buys an Ingersoll watch at 75 cents he does not believe he is getting a dollar watch. Men do not believe that; they do not believe they are getting the dollar watch when they buy it for 75 cents. Now, Mr. Ingersoll, as a manufacturer, does not want any misunderstanding in the minds of his possible customers as to whether they are buying a 75-cent watch or a dollar watch.

Mr. FLOYD. While you are talking about watches, will you permit a question?

Mr. FINNERAN. Yes, sir.

Mr. FLOYD. I was told by a reputable jeweler—and that was before this decision was rendered which has been referred to—that the wholesalers not only fixed the price to the jobber, but fixed the price to the retailer—that is, the price at which he must sell it in the market—and that if he violated that agreement the result was that he could not buy another watch in the United States.

He showed me a card that was sent out by the establishment which fixed these prices, the retail prices, and they offered a reward of $10 to any person who would furnish them reliable information as to any of their customers who had been guilty of fixing their own prices. Do you know of any such system as that under the old practices?

Mr. FINNERAN. Not as far as watches are concerned, but I do know about other things.

Mr. FLOYD. Do you know about other articles?

Mr. FINNERAN. Yes.

Mr. FLOYD. He said to me: "I buy these watches and pay my own money for them, but if I decide to go to a larger town and want to dispose of this stock and should dispose of it to my neighbors who have been my customers for years at prices which are not set by these establishments I could not buy another watch in the United States." Do you think that kind of a system is fair?

Mr. FINNERAN. Absolutely not. I think that if a man wants to sell out he ought to have the right to sell out in bulk.

Mr. CARLIN. Do you think that the manufacturer of the Ingersoll watch ought to have the right to contract with the dealer in the sale of his watch so as to prevent that dealer from selling anybody else's watch?

Mr. FINNERAN. No, sir; I think that is absolutely wrong.

Mr. CARLIN. We have a provision in the bill prohibiting that.

Mr. FINNERAN. Yes; I saw that, and I was very glad to see it in the bill. I think that is in the interest of the public, and that it is a very wise proposition.

Now, gentlemen, I think you must consider retail druggists a part of the public. There are 45,000 retail druggists in the United States; that is, proprietors of stores. That means, as far as proprietors and employees are concerned, 200,000 men in the retail drug business, most of whom are small men. Most of them have families, or they are a part of families whom they support. They have fathers and mothers that they must help, or they may have a wife and children to provide for. So that as a national association and as a class of men we are a part of the public, and I think we deserve some consideration from that point of view.

The small merchant, I think you gentlemen all agree, is a necessity; he is a necessity in order to keep competition up. If the small merchant in the line of groceries, in the line of cigars, in the line of drugs, etc., can not exist and can not be in your particular neighborhood because he is driven out by what I call unfair competition, it may be rather difficult at times for you to get what you need in the line of those things, and especially in the line of drugs. They do

not have telephones all over the United States, and they do not have messenger boys, even where they do have telephones, and in such an event you have to go yourselves or get some one to go for you.

The CHAIRMAN. If a man is driven out, as suggested by you, who takes his place?

Mr. FINNERAN. No one takes his place except the one big store that drives him out.

Mr. McCOY. What would you say about a bill that would require all patent medicines to have printed on their exterior a statement of the ingredients that they contained?

Mr. FINNERAN. I do not think that would be fair, because I think every man is entitled to the benefit of the work of his brain, and if that were required he would be really giving away to his competitors some of the things he had worked out.

The CHAIRMAN. Does not the pure food and drug law now require you to give some information?

Mr. McCOY. Only where you use poisons.

Mr. FINNERAN. Not only that, but in regard to a number of other things. There are probably about 500 items, when you take into consideration the article itself and its derivatives, that must be mentioned on the label, and not only that the article contains such a thing but how much it contains to the fluid or solid ounce. That we have no objection to. Incidentally I might say the druggists had something to do with the framing of that. I do not mean to say that we dictated to Congress or anything of that sort, but they suggested to various gentlemen who were in Congress at that time certain things that it might be proper to put in—that is, what might be stated as to the preparations and what might not be stated.

Mr. McCOY. Your general notion is that persons engaged in interstate commerce in these articles in which you deal should be required—as railroad companies are—to list their prices?

Mr. FINNERAN. Yes; so the public may know.

Mr. McCOY. And then stick to those prices?

Mr. FINNERAN. Yes, sir. We believe, as I said before, that it would be fair to everyone to do that?

Mr. DYER. You are connected, I believe, with the retail druggists' association?

Mr. FINNERAN. Yes, sir; I am president of the National Association of Retail Druggists.

Mr. DYER. What has been the effect upon the retail druggists' trade because of the business done by mail-order houses through the parcel-post system?

Mr. FINNERAN. It has been very disastrous.

Mr. DYER. What portion of the trade would you say has been affected?

Mr. FINNERAN. Mainly in the smaller centers.

Mr. DYER. Not in the big cities, of course?

Mr. FINNERAN. No; mainly in the smaller centers. I think Prof. Nixon will tell you his experience in his own town, not especially as applying to mail-order houses, but as to the reduction in the sales of patented and proprietary articles now as compared with 15 or 20 years ago.

Now, gentlemen, I had no intention of particularly touching on many of these things, and perhaps I may have taken some of the thunder from my friend Nixon. I know he is much more interesting

to listen to than I am, but I do want to leave this feeling in your minds: In the first place, that I am only an everyday, ordinary, working druggist, and that I believe, after many years of study of the proposition, that cut prices and the giving of these various rebates, which enable these people to get different prices and better prices, is destroying competition. It is not making competition, but it is actually destroying competition.

Mr. CARLIN. We have a provision in the bill against rebating.

Mr. FINNERAN. But we wish you would go still further and make a provision which we believe to be fully as necessary as that, if not more so—that is, to make some provision whereby the prices may actually be known from the manufacturer to the public, just the same as you now have a law which makes a great railroad tell the public what it can do over its line in any ordinary case of business. A railroad simply says to a man, "We can transport a carload of freight, or a half a carload, or a quarter of a carload, a certain distance at a certain price."

We only ask that that same general publicity be given as far as the sale of merchandise is concerned, and that no secret rebates should be allowed any more than secret rebates are allowed in connection with the railroads.

Mr. CARLIN. Do you believe it would be better for the retail merchant to have his prices fixed by the manufacturers?

Mr. FINNERAN. Most assuredly, because in the last analysis he would then know what he could pay his employees. Now, a man does not know——

The CHAIRMAN (interposing). That is, on proprietary articles, you mean?

Mr. FINNERAN. A proprietary article; a trade-marked article or a copyrighted article. I do not know of any way you could go any further than that, but still I ask that you go as far as possible. I can not help the committee on that because I am not a lawyer.

Mr. FLOYD. Let me ask you this general question: In all those lines of industry where there have been great aggregations of capital has not that been the practice for the last 10 or 15 years, or at least until the decision of the Supreme Court which held it to be unlawful?

Mr. FINNERAN. Yes, sir; I think that is practically so. However, I do not know it to be so.

Mr. FLOYD. You want to restore the privilege you have been enjoying for several years?

Mr. FINNERAN. No.

Mr. FLOYD. Until the Supreme Court held it to be unlawful—is not that the fact?

Mr. FINNERAN. No.

Mr. FLOYD. Is it not a fact that in many lines of industry that is the precise thing that was done; that is, that manufacturers fixed prices to the jobber, to the retailer, and to the consumer? Has not that been done for the last 10 or 15 years?

Mr. FINNERAN. As I said before, I have understood that to be so, but I do not know it to be so.

Mr. FLOYD. Now, the Supreme Court, in the decision to which your attention was called by Mr. Carlin, held that that kind of a contract was an unlawful contract under the Sherman Act, and what you really want us to do is to legalize it.

Mr. FINNERAN. Yet the Supreme Court of the United States was not very unanimous in that decision. I do not want to criticize them at all, only——

Mr. FLOYD (interposing). There were three dissenting judges, I believe.

Mr. FINNERAN. Well, in the case I have in mind, I think it was four to five.

Mr. FLOYD. Well, if it is five, the decision would have been in your favor.

Mr. FINNERAN. The Supreme Court of the State of Washington has just rendered a decision in the case of a particular flour manufactured in that State. It was held that it was not collusion between the manufacturers of that flour and other manufacturers of flour to keep the price up.

Mr. FLOYD. I would not object to any man selling at any price as far as he himself is concerned; but what I object to is any company, any individual, or any association trying to control the price of an article after the ownership of it has passed into other hands. I do not think it is any of their business.

Mr. FINNERAN. That is just what the Supreme Court of the State of Washington has recently decided, that it is good business to do that.

Mr. FLOYD. But the Supreme Court of the United States has held that you can not do that in interstate commerce.

Mr. FINNERAN. I realize that. Now, gentlemen, I have taken up fully as much of your time as I expected to, and I will not talk any longer.

Mr. DYER. What is your judgment as to what should be done to retail druggists who violate the law, provided a law such as you advocate should be enacted?

Mr. FINNERAN. Some penalty should be provided.

Mr. DYER. You think they should be punished?

Mr. FINNERAN. Yes, sir. Not necessarily retail druggists, but any merchant, whether a druggist or some one else. I do not mean to say that I am talking about this question simply from the druggists' point of view; I think it applies to every small merchant.

I thank you very much.

STATEMENT OF MR. C. F. NIXON.

Mr. NIXON. Mr. Chairman and gentlemen of the committee, one of the late questions was somewhat along this line: Are not great monopolies built up by the maintenance of prices? Was that the question?

Mr. FLOYD. No. The question was this: For the last 10 or 15 years, in many lines of industry, have not manufacturers and wholesalers fixed prices at which their customers shall sell and also the prices at which retailers shall sell to the consumer? I asked whether that was not the fact.

Mr. NIXON. That may be possible in some cases, but it seems to me that against that you can put corporate monopolies, such as the Standard Oil Co. That monopoly was based entirely on ruinous cutting of prices, and it seems to me that the attitude that we, as retail druggists, should take is that our business should not be

monopolized along the same lines that the Standard Oil Co. has followed.

We submit that a retail monopoly is in process of making, by ruinous cutting of prices of trade-mark, copyrighted, and patented goods having an advertised price, that 94 chain drug stores of one corporation, 49 of another, and innumerable cigar stores are now operated on this basis. We further submit that it is better to prevent the formation of a monopoly rather than wait until it is an accomplished fact.

Mr. CARLIN. What would you say about the Sugar Trust—that there should not be any competition?

Mr. NIXON. I have no doubt that arguments could be used on both sides. In my State we had some independent oil dealers and the Standard Oil Co. came into that section and sold oil for a less price than the price at which it could be produced, simply to drive these people out of the markets. Now, it seems to me that that is unfair competition, but that is the basis of pretty much all of the great monopolies of this country. I would like to state to you briefly just what the condition is in New England and in New York State, a condition which, unless stopped, will eventually spread all over the country. We have in New England three great interstate corporations that are seeking to establish a monopoly in the sale of goods in which we are interested—the cigar-store companies and two great chain drug stores. Now, what is their method? So far as the proprietary articles are concerned they are used simply as a club for establishing business. To make it as brief as possible I will state what was done in the city of Lowell, Mass.

One of these great chain drug stores sent a man to Lowell, who stood in front of the principal store in Lowell for three weeks with a mechanical enumerator in his pocket counting the customers who went into that store to find out whether it was of sufficient caliber to interest them. They found that it was. They went to the owner or proprietor of the building and leased the store over his head, and the man knew nothing about it until he was given one month's notice to move out. It was the oldest-established business in Lowell. His father was there before him. In a month's time he was obliged to take up his bed and walk, if I may use the expression, and has gone onto a side street. In another store they did exactly the same thing, except that in this particular case, they did not get the store. But what did they do? They obliged the present occupant to increase his rent 50 per cent. In Cambridge, Mass., a druggist's rent was jumped from $7,000 to $12,000 because of pressure brought by these people. Now, if they do not succeed in obtaining locations they make a proposition to the owner of the building of such a character that if the present occupant decides to stay he will become a bankrupt. Now, when they got established in Lowell, what did they do? They took the proprietary goods, costing from $8 to $9 per dozen—I wanted to bring you an exact copy of the advertisement so that you would know that what I am saying is exactly so, but I was unable to get it, and I hope you will take my word for it—but those goods were sold as low as 49 cents per package, the wholesale dozen price of which was $8 or $9 a dozen.

Now, the question has been raised here, What effect will certain legislation have upon the consumer? If a consumer buys a package

of one of those articles he is certainly so much in, but if he buys anything else he pays a good profit. Is that a fair proposition? On the consumer's side, as Mr. Finneran has told you, perhaps 6 times out of 10 the consumer never gets what he asks for, as he is coaxed into buying something else sold at a big profit. They had, perhaps, so many dozen of a certain package that was advertised at 49 cents apiece for sale. The first customers get them, and the great mass of customers that come after them never get them, because the supply was exhausted. At 10 o'clock in the forenoon the supply is exhausted, and then they proceeded to sell some other articles on which they would make a profit.

Mr. CARLIN. Suppose we were to follow your argument to its logical conclusion, and fix the price of every article that is sold by every retail druggist, or allow it to be fixed at one given price, what would become of competition among the druggists?

Mr. NIXON. I do not ask for that.

Mr. CARLIN. I know; but you are asking it for patented and copyrighted articles. While you are only asking it for certain articles, others are asking it for certain other articles, and, in the last analysis, we will have the prices of every atricle in your store fixed and we will have the prices of every article in your competitors' stores fixed. In that event, I ask you, What becomes of competition?

Mr. NIXON. In answer to that question, I will say that I would like to see the retail trade of the country placed on exactly the same basis that the small manufacturer is placed by the United States law.

Mr. CARLIN. Are you willing to carry your argument to the last analysis and ask for price fixing on everything?

Mr. NIXON. No, sir.

Mr. CARLIN. Then you think price fixing on a few things would be good and on other things would be bad?

Mr. NIXON. I have asked it on particular lines of goods because it is simply used as a club to form a monopoly. I have here some statistics to show you what has been going on in the past 10 years, covering New England and New York State principally. There is a system of chain drug stores——

Mr. NELSON (interposing). What is that system? What is it called?

Mr. NIXON. It is known in New York as the Riker-Hegeman Co., and in New England it is known as the Riker-Jaynes Co.

Mr. NELSON. Are they together or are they separated?

Mr. NIXON. They are together, but they are operated under different names in different States.

Mr. NELSON. Who are they owned by?

Mr. NIXON. They are not owned by pharmacists.

Mr. NELSON. What is the rumor about them?

Mr. NIXON. The rumor is that Henry Flagler was president of this company before he died, and that they are owned by Wall Street financiers.

Mr. NELSON. He was a director of the Standard Oil Co. before he died?

Mr. NIXON. Yes, sir.

Mr. MCCOY. I remember he had an office in New York.

Mr. NIXON. Yes, sir. These people operate 94 stores.

Mr. NELSON. Might I pursue that inquiry a little further, because I want to see to what extent this combination goes? Is it not the understanding in the retail trade that the tobacco companies are operating in the same way?

Mr. NIXON. Yes, sir; they are controlled by the same people.

Mr. NELSON. In other words, the surplus money made by the Tobacco Trust is put into chain stores?

Mr. NIXON. Yes, sir; that is exactly what we claim. Now, they are operating 94 stores in this district. The financial reports state that they are doing a business of $17,000,000 a year, which makes an average of $180,000 a year per store. The ordinary retail drug store does a business of from $15,000 to $25,000 a year.

Mr. CARLIN. Will you permit this interruption? What this committee wants to ask of you is whether you approve or do not approve—and the question seems to be justified by your argument—a general price fixing of all commodities which enter into a retail drug business?

Mr. NIXON. No; I do not ask that.

Mr. CARLIN. Wait a moment; you have not heard my question.

Mr. NIXON. I beg your pardon.

Mr. CARLIN. Now, if you should favor that it would mean that your prices would be fixed and the prices of all others engaged in the retail business in the town in which you are located would be fixed, and I only ask you in all fairness if, under those circumstances, competition would not be entirely eliminated?

Mr. NIXON. I think it would.

Mr. CARLIN. Now, if we were to concede your request now and allow partial price fixing in the articles which you name, how could we in good conscience refuse price fixing in the articles which you do not name, but in which others are interested? It is the principle I am laying before you now.

Mr. NIXON. It is a difficult question to answer. Of course, as I said before, I do not ask for that ultimate——

Mr. CARLIN (interposing). We want to help the little fellow in business; we want to help him get big.

Mr. ALONZO A. STEWART. May I be allowed to answer that question? I think I am better able to answer than Mr. Nixon.

Mr. CARLIN. Yes.

Mr. STEWART. What I think these gentlemen are after is this: That in certain lines of commodities the Government has granted to the owners thereof a monopoly. Now, where the Government has granted a monopoly to the individual, such as a monopoly under a copyright, a patent, or a trade-mark, the Government should compel the owners of the protected article to make the public price at which they sell to the public, so that every man who is compelled to purchase those things should know at what price he must buy them, and that no secret rebate is being paid.

Mr. CARLIN. I understand you are in favor of a partial price fixing and you want it confined to patent articles and copyright articles. But I am discussing the principle. What more reason is there for fixing the price to the consumer of one article than there could be for fixing the price to the consumer of another article? If price fixing is a good thing it ought to go all the way down the line, and if it is a bad thing it ought to stop.

Mr. STEWART. In reply to that, if monopoly is a good thing along certain lines, which the Government grants, why not all the way down the line?

Mr. CARLIN. Yes; but monopoly is not a good thing under any circumstances, and therefore it ought not to be permitted.

Mr. McCOY. If you will pardon me, I think that you and Mr. Carlin are talking about different propositions. Your contention, as I understand it, is that in those articles on which you can get patents or copyrights or trade-marks, you claim that the Government should provide that there should be an advertised schedule by the manufacturer of those articles?

Mr. STEWART. Yes, sir.

Mr. McCOY. But you have not gone to the extent of contending that those manufacturers should fix the price at which there should be a resale?

Mr. STEWART. That is a question to be decided.

Mr. McCOY. There are two propositions—one is that he should sell an article at a uniform price and the other is as to whether or not he should be allowed to fix the retail price.

Mr. STEWART. Yes, sir.

Mr. McCOY. Your statement applies to one class.

Mr. STEWART. Yes, sir.

Mr. McCOY. As I understand you, as in interstate shipments the railroads are required to schedule their rates, so in interstate commodities the manufacturer should be required to schedule his rates. Then would come the question after that as to whether or not he would be allowed to fix the price of the resale of those goods.

Mr. STEWART. That is what I am saying.

Mr. CARLIN. Now, you, perhaps, have not read this bill.

Mr. STEWART. I have.

Mr. CARLIN. Because if you only want to go as far as Mr. McCoy indicates, the bill requires that now.

Mr. STEWART. Not altogether; not the publicity feature of it.

Mr. CARLIN. But it does compel the price to be uniform?

Mr. STEWART. Yes, sir.

Mr. CARLIN. And you approve of that?

Mr. STEWART. Yes, sir.

Mr. CARLIN. And you go a little further and fix the price at which the wholesaler should sell to the retailer and the price at which the retailer should sell to the consumer?

Mr. STEWART. Yes, sir.

Mr. CARLIN. Now, if we are going to do that with these few articles which you name—and the principle you contend is good—why should not we do it with the articles which you have not named? Will we not find ourselves in the last analysis fixing the prices of certain things and leaving other things unfixed? In the case of the lumber merchants who were here the other day, they desired to fix the price of lumber; and in the last analysis we would have to fix the price, I expect, of a pleasure smile.

Mr. STEWART. The only point of difference is that where the Government grants a special privilege in the shape of a monopoly they ought to couple with it the necessity of uniformity of price.

Mr. CARLIN. Is not the effect of the bill as we have drawn it—you say you have read it?

Mr. STEWART. Yes.

Mr. CARLIN. To compel uniformity in every class of commodity? Does not that of itself compel the publication of the price?

Mr. STEWART. Not necessarily.

Mr. CARLIN. Then, if there is a difference in price anywhere they would be indictable under the statute.

Mr. STEWART. Yes, sir; if you could find it out.

Mr. CARLIN. If you did not find it out, it could not be doing much harm.

Mr. STEWART. Well, I do not know about that. If you go as far as you can in transportation that is a step in the right direction.

Mr. CARLIN. You think that is a step in the right direction?

Mr. STEWART. Yes.

Mr. CARLIN. Now, in the second paragraph of the bill it prohibits contracts which would require retailers to sell exclusively one kind of goods. We are now prohibiting that and allowing the retailer to sell all goods in free competition. Do you think that is a good thing for the retailer?

Mr. STEWART. I think so.

Mr. CARLIN. Then the retailers agree with everything we have here as far as we have gone?

Mr. STEWART. Yes, sir.

Mr. CARLIN. They agree that it is a good thing.

Mr. STEWART. Yes, sir.

Mr. NIXON. That is very true indeed. Our only point is that we feel that under present conditions monopolies are being formed through the chain stores, which will drive us out of business. In Boston we have 20 of those chain stores. They pay the largest rentals of any stores in Boston, except, of course, the department stores, and at the same time they say that they are doing a benefit to the public by selling goods without profit. Now, how do they do it? Do they cut rates on everything? They cut rates, but on every single article of goods they make or get control of they get absolutely the full price for.

Mr. CARLIN. Now, Mr. Nixon, we want to be fair with you and I know you want to be fair with us. What we are trying to get you to say is this: If we were to go to the point that you ask, namely, to require partial price fixing in the drug business, how could we fix it in the grocery business?

Mr. NIXON. We have asked that only on trade-marked, copyrighted, and patented goods. Now, you might say that everybody could patent or copyright their goods; they might make such provisions, if they wished.

Mr. CARLIN. But if all goods were patented or copyrighted then your argument would apply to all.

Mr. VOLSTEAD. Of course, any article can be copyrighted.

Mr. NIXON. Yes, sir.

Mr. CARLIN. Now, we want to help you, and you say the legislation we propose will help you. I want you to think over the general problem that confronts the legislature and that confronts the country in the last analysis, and I ask you again, in all fairness, would you have us protect price fixing in your business and not do the same thing in the other businesses?

Mr. NIXON. No, sir.

Mr. NELSON. In other words, you are not going beyond the question of trade-marks?

Mr. NIXON. No, sir.

Mr. McCOY. Let me ask you this, Mr. Nixon: Assuming that a man had a monopoly of an entire trade, you would not ask for that privilege for him, would you? To make it clearer, Ingersoll has a monopoly of the Ingersoll watch, but not of the watch business.

Mr. NIXON. Exactly.

Mr. McCOY. Now, let us suppose that Ingersoll had a monopoly of the entire watch business. You would not then ask that for him?

Mr. NIXON. No, sir.

Mr. McCOY. In other words, by granting the right to fix the resale price you do not thereby create a monopoly in any line of business, but you simply protect the man who is making one of fifty different articles of the same kind?

Mr. NIXON. Yes, sir.

Mr. McCOY. Now, is it not the fact that in the case where they advertise goods to be sold at less than cost that practice is almost universally confined to those articles on which a large amount of money has been spent in advertising?

Mr. NIXON. Yes, sir.

Mr. McCOY. So that practically what they are doing is to take away from the man the benefit of his advertising?

Mr. NIXON. Exactly; that is what it does.

Mr. McCOY. So that if we should go the limit and permit every man to copyright or trade-mark his goods and then to provide that he might fix the resale price, competition in flour and hams, for instance, would still remain?

Mr. NIXON. Exactly.

Mr. McCOY. But the man who made the best flour or produced the best hams would get the larger business, or the larger part of the business of his competitor who did not make as good flour or produce as good hams?

Mr. NIXON. Yes, sir.

Mr. McCOY. In other words, competition would not be cut out, and the man who advertised his goods would be protected——

Mr. CARLIN (interposing). Oh, no; when it got to that point we would have fixed the price of every copyright or patent.

Mr. McCOY. Let us suppose that there are 50 brands of smoked hams and that every one of them is protected by a trade-mark and that each one of the producers or sellers of the 50 brands of ham could fix the retail price. Now, I am assuming that they do not combine, but that each one fixes the price of his own ham. There would still be competition among 50 men.

Mr. CARLIN. But suppose the Government should fix the price. He says he wants this done just like the Interstate Commerce Commission fixes rates.

Mr. NIXON. Oh, no; I did not say that.

Mr. McCOY. No; he said that on the analogy of the Interstate Commerce law they claim that the wholesaler should schedule his prices for the public; not to fix them, but to schedule them so that each man could buy on even terms with every other man.

Mr. CARLIN. Oh, I understand. Competition in each one of these articles would remain just the same, only each man would be able to get the benefit of his own advertising.

Mr. VOLSTEAD. In other words, if he paid $5 to put a patent on his goods, he could make a monopoly of them.

Mr. NIXON. On his own goods.

Mr. McCOY. But not on all goods of a similar kind.

Mr. VOLSTEAD. But if each one puts a trade-mark on them then all of them could make a contract for the resale.

Mr. McCOY. Each one could make a contract for the resale. That would not be a combination.

Mr. VOLSTEAD. They would not have to combine at all. The Washburn-Pillsbury and the other companies could go on and do the same thing.

Mr. McCOY. But the competition would still remain among the 50 flour producers.

Mr. VOLSTEAD. No; it would not.

Mr. CARLIN. Under your system, Mr. McCoy, there would be no competition among the retailers in the same town on the same articles.

Mr. McCOY. Oh, yes; because the retails instead of buying the Washburn flour would buy the other flour if it was better, or, if it was just as good, but lower in price.

Mr. FLOYD. Yes; but if there were 20 drug stores all selling listerine at the same price there would be no competition.

Mr. McCOY. Not in listerine.

Mr. FLOYD. There would be none in Lyon's tooth powder.

Mr. McCOY. None whatever; but Mr. Lyon has spent a million dollars in advertising, and why he can not get the benefit of his advertising I can not see. Now, he is protected in the use of the word "Lyon's" without any advertising.

Mr. CARLIN. But now the public has the right to buy it in any store it chooses at any price at which the store wishes to sell it. Now, we want to fix the price to the seller.

Mr. McCOY. The suggestion is not that the Government fix the price, but that Mr. Lyon, having spent all this money, ought to get the benefit of his advertising.

Mr. VOLSTEAD. He gets it now.

Mr. NIXON. No; he does not.

Mr. McCOY. He sells his tooth powder for $3 a dozen. Now, some man in the retail business will advertise to sell it for $2.50 a dozen. Now, why does he do it? Is he giving away 50 cents for the benefit of the public? Not at all. He is using the advertising for which Mr. Lyon has paid to get customers in his store so that he can sell to them other goods on which he does not cut the price at a very high price. In other words, he is stealing Mr. Lyon's advertising.

Mr. VOLSTEAD. That is competition.

Mr. McCOY. No; that is theft.

Mr. CARLIN. Now, if you fix the price of those goods with which the public is familiar, to carry your argument to the last analysis, would you not have to go on and fix the price of those goods on which the public lacked information?

Mr. McCOY. Now, suppose they do——

Mr. CARLIN (interposing). Then would you not destroy competition?

Mr. McCOY. Not at all. You would not destroy competition in cotton goods, because there are hundreds of manufacturers in the cotton business manufacturing, for instance, shirtings. Now, I would protect every one of those manufacturers in his advertising, but you get your competition because here are fifty or a hundred cotton manufacturers who would compete with each other.

Mr. CARLIN. He is not talking about the manufacturer; he is talking about the retailer.

Mr. McCOY. I know, and I am talking about the retailer. You say that this would prevent competition, but I say no. You do not see that 10,000 other people will compete with him in the cotton-goods business or in razors or listerine. The consumer does not need to buy Lyon's tooth powder; he can buy any other kind of tooth powder.

Mr. CARLIN. He can have his teeth extracted.

Mr. McCOY. Yes, sir; he can go to the dentist and have them extracted.

Mr. NELSON. Mr. Nixon, what percentage of the drug-store trade is copyrighted or patented articles?

Mr. NIXON. Ten years ago the percentage in my business was in the neighborhood of between 40 per cent and 50 per cent of proprietary goods. To-day the percentage in my business—I know this statement is exactly accurate—is 7 per cent. Now, where has the rest of that 33 per cent gone? And yet I live 18 miles from one of those cut-rate drug stores.

Mr. NELSON. Your competitor is a chain of stores owned by capitalists who have made their profits in other lines of business—oil or tobacco?

Mr. NIXON. Yes, sir.

Mr. NELSON. Now, if you can not stand the competition on the patented or copyrighted articles, how can you stand it as to your articles which are not patented?

Mr. NIXON. Well, the advertising of a pound of Epsom salts for a certain price has no effect upon the public mind because they do not know what it is worth, but if you advertise a 25-cent article for 12 cents the public mind is impressed with the belief that you are selling all the other goods in the store on the same basis. I want to show you why the advertising of low prices on certain lines of goods does not do the same thing on other lines of goods.

Mr. NELSON. I want to know why they could not cut so low on everything as to drive you out of business.

Mr. NIXON. They can not because other goods have not a fixed retail price.

Mr. NELSON. Then, really, you can not stand the competition of these strong companies in other respects.

Mr. NIXON. Oh, yes; but this is the great club——

Mr. McCOY (interposing). The answer to that is that if they sell everything below cost they will soon go out of business themselves.

Mr. NIXON. Yes, sir.

Mr. NELSON. But is it not a fact that because of their tremendous resources they can sell their goods very low?

Mr. NIXON. Yes; because of secret rebates. Some dealers buy certain goods for $8 or $9 a dozen, and if they buy it in large quantities they get a 10 per cent discount. The larger the store the greater the discount. My friend Finneran gets a greater rebate because he does a larger business. It is the same as in the railroad business, and I do not see why the same principles can not be applied to our line of business as in the other lines of business.

Mr. MCCOY. Do you mean to say that Mr. Finneran is able to buy the same quantity and quality of goods for a less price than you can?

Mr. NIXON. Yes.

Mr. MCCOY. You would hardly call that a rebate, then?

Mr. NIXON. Well, if his output is large enough, and if he buys in 10-gross lots he can get a larger discount because of the future possibilities of his business, because I live in a small town and he lives in a large town.

Mr. MCCOY. If he buys 10 gross he pays one price, and if you buy 10 gross you pay a higher price?

Mr. NIXON. Yes, sir.

Mr. MCCOY. In other words, then, they do not sell at the same price and in the same quantities to everybody?

Mr. NIXON. No.

Mr. MCCOY. And they take into consideration the fact that his business is likely to grow very large and yours is not?

Mr. NIXON. Yes, sir.

Mr. MCCOY. And that is why you want the schedules published?

Mr. NIXON. Yes, sir; it seems to me that is exactly on the same principle as railroad rebates. I do not see why the same principle can not be applied to cover every article that is sold in America. Now, you advertise teas at a certain price, but it does not cut much figure with the public, because there are so many varieties of tea that you do not know what they are really worth. But if you take a well-known article that is sold at a certain price and sell it at a lower price, the public will think that I have been "roasting" them, as the saying is, when getting a fair profit. You will find that goods that retail for $1 are rarely sold for more than $8 or $9 a dozen at wholesale. I was talking with the buyer of one of the largest stores in Worcester a few days ago about shirt waists. They pay from $8 to $9 per dozen for shirt waists, and ladies buy them and pay $1 apiece for them. It is no more than they should pay. The actual cost of doing a retail business, as I said a while ago, is 25 per cent.

Mr. MCCOY. In other words, you claim that these are not exorbitant prices.

Mr. NIXON. Yes, sir; but we are made to appear as charging exorbitant prices. When we sell an article for a dollar and one of the chain drug stores sell it for 49 cents, the public believes that the chain drug store is making a profit when they are selling below cost. I live 18 miles from one of those stores and in 10 years the percentage of my line of proprietary goods has dropped from 45 per cent to 7 per cent.

Mr. MCCOY. It comes down to the question of stealing another man's appetite.

Mr. NIXON. Yes, sir; that is the whole story.

Mr. NELSON. Have you looked into this question of chain stores outside of the drug stores? Do you know whether that is going on in all lines of industry?

Mr. NIXON. I do not know that it is. At the present time it seems to be confined to this particular line of goods. I might say, however, that it goes into other lines in this way: These chain drug stores are practically developing into department stores. They carry large lines of bathroom material and all sorts of things that you would find in an ordinary department store. In very many of those stores you will find the drug department occupying, perhaps, one-tenth of the space and these proprietary goods are simply used as a bait to draw the public there.

Mr. NELSON. If the Government could destroy this chain of stores under the Sherman law, either as operating in restraint of trade or as monopolies, would not that be entering upon price fixing?

Mr. NIXON. Well, that would answer our purpose. We are fighting for existence. We do not care how it is brought about. I represent 40,000 druggists in the United States.

Mr. CAREW. You would not want the Government to fix the prices?

Mr. NIXON. No; but it seems to me that the Government could allow the fixing of prices in the case of patented goods. I do not know why it could not be so. That is all we ask.

Mr. CAREW. You mean patented goods?

Mr. NIXON. Patented, trade-marked, and copyrighted goods. That includes not only medicines but tooth powders and other toilet preparations. The normal price for tooth preparations is from $1.75 to $2 a dozen. It seems to me rather hard to meet the competition of 12 cents a box.

Mr. CAREW. If we were to attempt to fix prices, we might fix them high or fix them low. The question of fixing them low would be a serious question.

Mr. NIXON. We are perfectly willing to leave the supervision of this whole price proposition with a proper commission. I believe a proper commission would be fair. As I said, the actual cost of doing business in a drug store is 25 per cent in the retail business. That is about the average. In the country it is lower and in the cities it is 30 per cent and higher. In the city, drug stores are required to be in good localities, where they must pay high rents. They must have expensive fixtures and they must be well lighted. We have simply got to stop doing business or have some relief in some way. Now, if there are no other questions I will take up no more of your time. I thank you for the hearing you have accorded me.

Mr. STEWART. Some of the gentlemen want to know whether they will have permission to file a written brief with the committee.

Mr. MCCOY. All right; they can do so. The committee is ready to hear from anyone who desires to be heard.

STATEMENT OF MR. J. R. MOOREHEAD, NATIONAL SECRETARY NATIONAL FEDERATION OF RETAIL MERCHANTS, LEXINGTON, MO.

Mr. MOOREHEAD. Mr. Chairman, I understand the hearing yesterday was because we had just arrived in the city. Only a part of our delegation arrived here yesterday, but we appeared before

the committee because the committee said they could hear us then. There are present before the committee now Mr. John A. Green, secretary National Retail Grocery Association, and gentlemen representing the plumbing interests and the coal interests, retailers all.

Mr. McCoy. We will listen to them in any order you suggest.

STATEMENT OF MR. JOHN A. GREEN, SECRETARY NATIONAL RETAIL GROCERS' ASSOCIATION.

Mr. Nelson. Will you give us some idea of the extent of the organization you represent?

Mr. Green. We control possibly 100,000 members throughout the United States engaged in the grocery business, some of them being general merchants, but nearly all of them carrying groceries to some extent.

Mr. Nelson. Does your organization extend to all of the States of the Union?

Mr. Green. All over the country. Well, there are several States which are not affiliated with the national organization, but we have about 40 or 42 States that are connected with that organization.

Mr. Nelson. Do you have an organization in Wisconsin?

Mr. Green. Yes, sir.

Mr. McCoy. Your organization contains members not only from the cities but from country towns?

Mr. Green. Yes, sir; all through the States. The secretary for the State of Wisconsin, Mr. Slattery, is located in Milwaukee. We are here in reference to these bills, and especially this one, which we do not quite understand.

Mr. McCoy. Which one is that?

Mr. Green. This is the one introduced by Mr. Clayton.

Mr. McCoy. Is it a committee print? What is at the top of it?

Mr. Green. No. 2 of the committee print, tentative bill by Mr. Clayton, in regard to the restraint of trade. We feel that we have been refused—when I say refused, I mean by that—take, for instance, the lumbermen's organization which was here yesterday. They have been held in contempt because they attempted to disseminate some information through their secretary.

Now, we think that we ought to have the right to disseminate truthful information to our members if we have some truthful information to disseminate. We do not wish to violate the law. We are not in an organization to raise prices at all, but to educate our members as to the best methods of doing business, and other things of the same kind.

Mr. McCoy. The lumbermen were found against because the purpose of the information, as I understand it, was to get the retail dealers to cease patronizing the wholesale concerns which sold to users and consumers.

Mr. Nixon. I take it for granted that what you say is true, although I do not know very much about it, only that they are held in contempt for circulating this information. I have had a great deal of experience in the grocery business; I have been at it for 20 years, and I have looked into the matter in all its phases. I believe that the present system of distribution in the United States is the best and cheapest method on the face of the globe. Now, I am not

saying that in an offhand way. I have looked into it in other countries and through modern enterprise there is a system come in vogue, from manufacturer to wholesaler, to retailer, and then to consumer. We have been met in the last few years by a growing institution that is reaching out in some way through what I consider fraudulent advertising—I will say untruthful advertising—and they have gotten hold of the business.

Now, if we are doing business in the most economical way, it is not because we have a system that we are agreed upon, but it is because we have a system that has become a necessity through modern evolution of that kind of business. The wholesaler, as you all know, assembles in large quantities goods from all parts of the globe under one roof. The retailer gets his supplies from one place. It would be impossible for me to get my nutmegs from one country and my spices from another country. But the plan is to cut down the expenses so that we can buy our products in the least expensive way. Now, if there have crawled into our business certain methods of other businesses, have we the right to say when we know that a man is selling to us and also selling to our customers at the same price or lower? I think we have the right, when we have information that is detrimental to our business, to disseminate that information. Nearly 90 per cent of the dealers are small dealers, and 10 per cent are the large combination houses or mail-order businesses, as they are known in common parlance.

Mr. VOLSTEAD. What sort of information do you refer to as being detrimental to your business?

Mr. GREEN. Well, if I am buying from you, you should not become a competitor of mine.

Mr. NELSON. You mean if he is a wholesaler?

Mr. GREEN. Yes. You should be a wholesaler; you should stay in your own field. But, further than that, I do not think that you should be allowed to buy a hundred car loads cheaper than I can buy 50 car loads. If that is going to be the case the business of the country is going to be put in the hands of the fellow who has got the money and the small fellow is going to be driven out of business.

Mr. NELSON. What you are talking about now is caused by lack of capital?

Mr. GREEN. Yes, sir; and our inability to defend ourselves.

Mr. MCCOY. In other words, you want to be permitted to give information to the retail grocery store in regard to those wholesalers who are practically competing with retailers?

Mr. GREEN. Well, not particularly so much as manufacturers.

Mr. MCCOY. Well, say manufacturers?

Mr. GREEN. Yes.

Mr. MCCOY. You want to let all in a similar line of business know what the people who make the goods are doing in the selling of them in such manner as to bring about practically a wholesale competition with the retailer. Is that the information you want to give?

Mr. GREEN. I want to give out information that I am being discriminated against in regard to prices. That is, that somebody will sell to somebody else at a less price than he will sell to me.

Mr. MCCOY. That everybody knows.

Mr. GREEN. Yes; but I am not allowed to say anything about it to our members. Take the case of the northwestern lumbermen who

were before the committee yesterday. They were tied up because they disseminated information through their secretary.

Mr. McCoy. I think you are mistaken about the sort of thing they were brought into court for. I do not imagine that any complaint was made that any lumbermen were selling in car-load lots at a lower price than that at which they were selling 50-car-load lots. That everybody knows was done. I know about the lumber case. In fact, I know the secretary of the organization. But what they complained of in that case was that information was being given out to retailers that the big producers of lumber were selling to the men who actually put the lumber into the buildings.

Mr. GREEN. Yes.

Mr. McCoy. Instead of selling to these men who used it.

Mr. GREEN. Yes, sir.

Mr. McCoy. They gave out that information?

Mr. GREEN. Yes, sir.

Mr. McCoy. And you want to give out similar information to that which was given out to the retail lumber dealers?

Mr. GREEN. Yes, sir.

Mr. NELSON. What you want to get at, in effect, no matter how it is done, is to protect yourself from the wholesaler or manufacturer selling direct to the consumer in your territory?

Mr. GREEN. Not particularly in our territory.

Mr. NELSON. Well, we are speaking frankly about these matters. You believe it unfair that you should compete with a manufacturer of whom you buy your goods?

Mr. GREEN. Yes, sir.

Mr. NELSON. Now, I am looking at it along a larger line. Here is the producer on the one hand and the consumer on the other.

Mr. GREEN. Yes.

Mr. NELSON. Now, there is danger when we work that out. The manufacturer will take his share, the wholesaler his share, and the retailer his share of profit, and that will enhance the cost of living to the consumer to such an extent that he suffers by it. How are you going to protect the consumer when each organization is able to load down the cost because of its power?

Mr. GREEN. That is not our idea. That is the very farthest from our minds.

Mr. NELSON. But how is the consumer going to come out in this matter?

Mr. GREEN. That is one of the greatest questions before the American public to-day; that is, the right of the manufacturer to name the price at which his product shall reach the consumer.

Mr. NELSON. You are in favor of that?

Mr. GREEN. I am, on staple commodities. That question is receiving more consideration at the present time than any other one thing. What we want—and I speak specifically for our own trade—is a fair remuneration for the services which we render the public. My experience and my observation has taught me, both in other countries and in this country, that the minute that we do not render that service, when there is any cheaper means of getting that stuff to the consuming public, we will not be here to enter a protest.

Mr. NELSON. In other words, you do not complain against fair competition, but against pretending competition or unfair competition?

Mr. GREEN. Well, both pretended and unfair competion. This bill will practically prohibit our telling our members of conditions that might exist in the trade detrimental to our welfare.

Mr. McCOY. What words are there in the bill that cover that point?

Mr. GREEN. The words "every contract," "combination in the form of trust or otherwise," "conspiracy in restraint of trade or commerce," and the word "monopolize." Now, we do not monopolize, but this provision will apply to our association. It is on the first page of the bill; that is, the first two or three words there—the third, fourth, and fifth lines.

Mr. McCOY. This particular bill, if it should become a law, would not put you in any worse situation than you are now in under the Sherman law.

Mr. GREEN. Yes; but we are trying to better that situation. We thought that by coming here and talking this thing over there might be some relief.

Mr. McCOY. In other words, you hoped that we might so amend the Sherman law as to give you some relief?

Mr. GREEN. Yes, sir. Now, I have had introduced in several State legislatures throughout the country a measure prohibiting untruthful advertising, and I hope the day will come when we will have it here. I saw recently in a catalogue an advertisement for a stove. In the advertisement it weighed so much, but in the store it weighed a great deal less. You could not tell the difference except by going in the store and feeling the stove. I saw an advertisement in a paper recently for a sash for a greenhouse, and the price was $1.20. That was the statement made in the paper. The merchant was asking $3.50 for it. Now, it was advertised for $1.20 in that very paper, but he was asking $3.50 for it. Now, if we can have the privilege of informing our members as to what is the truth of these matters, the minute we begin to disseminate any information of that kind we will be fined, just the same as the Southern Wholesale Groceries.

Mr. McCOY. I think you are entirely mistaken in assuming that any law, the Sherman law or any other law, would prevent your stating, at the risk of being indicted for criminal libel, perhaps, that a certain man was advertising to sell one thing whereas he was selling another. There is nothing in the Sherman law as to that. As you have the lumber case in mind, I am quite clear that the one thing that you are complaining about that is now forbidden by law is the notification to the retail dealers of the names of those who pass over their heads and sell to the consumers. Now, if you make a statement about it you take the risk of having some man indict you for criminal libel, or having a civil suit for libel. But aside from that risk you take no risk under the Sherman law if you say that John Jones advertises a stove to weigh 50 pounds when, as as matter of fact, it weighs 25 pounds. As a matter of fact, all the dealers of the country could get together and make that statement, and if you told the truth no law could reach you, provided you did it in good faith.

Mr. GREEN. Is it a fact that we can assemble and discuss just such questions as we are talking about now?

Mr. McCOY. Well, if I were your attorney I would advise you that you could do that with perfect impunity so far as the Sherman law is concerned.

Mr. GREEN. Suppose the Department of Justice comes into your office every three or four weeks or even three or four times a year and wants to look through. Some time ago a gentleman came in and gave me his card and went through our office and looked all over. We were very glad to have him, of course.

Mr. McCOY. What was he looking for?

Mr. GREEN. He was looking to see whether we had anything in restraint of trade. He looked at our books and papers and we were very glad to show them to him.

Mr. McCOY. What do you think he suspected?

Mr. GREEN. I do not know.

Mr. McCOY. How did he happen to come to your store?

Mr. GREEN. Oh, he did not come to our store; he came to the office of the association.

Mr. McCOY. Oh, I thought he came to your store.

Mr. GREEN. No; he came there twice in the past year. He came to the office and not to the store. I have nothing to fear from anybody. I opened up our books to him and was glad to do it.

Mr. NELSON. You represent the grocerymen?

Mr. GREEN. Yes, sir.

Mr. NELSON. Do you know of any locality where the local grocerymen get together and fix prices, or agree upon prices?

Mr. GREEN. I do not believe there is a place in the United States where they do that.

Mr. NELSON. Now, outside of that, what could the Department of Justice be looking into your affairs for?

Mr. GREEN. Well, I do not know. We have always been given to understand, in fact, I was told by an attorney, that they had no right to take up the question of the expenses of our business. However, I like to show a man the cost of my business.

Mr. NELSON. Would not that come back to the question of prices?

Mr. GREEN. No; that is not the question of prices. It is a question of conducting your business to get the most out of it. A man should understand his business. For instance, he may go along and he will say, "I am buying this stuff for 20 cents and I will sell it at 21 cents and I will make a penny." Now, is it restraint of trade if I say, "Here is what I do in my store," and show my expense account?

It is true enough, goodness knows, all over the United States, that unless a man advertises it is impossible to build up his business.

Mr. NELSON. What leads you to think this comes under the prohibition of the Sherman law?

Mr. GREEN. We have been given to understand that, and by pretty good lawyers.

Mr. NELSON. But that is neither in restraint of trade nor a monopoly.

Mr. GREEN. That is all we are in business for; that is all our association stands for, to educate our people as to the best methods of doing business, and to try and secure such legislation as is considered of benefit. We believe it is to our benefit to advertise.

Now, you take bill No. 2, which provides that no person——

Mr. VOLSTEAD (interposing). I think you mean the first section of No. 1.

Mr. NELSON. Yes; that is what you want, I think.

Mr. GREEN. Yes; I will read it:

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.

That means that somebody else shall buy cheaper than I can buy.

Mr. VOLSTEAD. How do you figure that would operate? Do you think that would be of any value to the grocers?

Mr. GREEN. I do not quite understand your question.

Mr. VOLSTEAD. Do you believe that section would be of any value to you?

Mr. GREEN. No; I do not think it is. The fact that big combinations can buy cheaper than I can buy is a thing that should not exist, I think.

Mr. VOLSTEAD. Do you think this measure would tend to prohibit that?

Mr. GREEN. No.

Mr. NELSON. You are in favor of the section, however, that prevents discrimination in prices?

Mr. GREEN. Yes; we are in favor of that.

Mr. NELSON. You are in favor of that proposition?

Mr. GREEN. Yes, sir; we are against discrimination in prices. I do not know how much this is going to cover. Now, as I said before, we have certain lines of business——

Mr. NELSON (interposing). That would do this, would it not? If you are handling or if you are selling some article, a combination that sells that article in one place at one price would not be able to come into your locality and sell it at a cutthroat price, and if that is so, would not that protect you?

Mr. GREEN. Yes, sir.

Mr. NELSON. That is what this is intended to accomplish.

Mr. VOLSTEAD. Let me ask you whether this section would accomplish anything of that kind?

Mr. CARLIN. Yes; that is intended to cover that particular case.

Mr. VOLSTEAD. I do not believe it would be very effective. How would you be able to prove that it was "with the purpose or intent to thereby injure or destroy a competitor, either of such purchaser or of the seller?"

Mr. CARLIN. You could do that in the same way you could prove anything else. Take the Standard Oil case. Everybody knows what the effect of that was.

Mr. VOLSTEAD. I know, but here is a grocer, and he buys from one of those concerns. How is he going to be able to prove that he sold at a lower price for the purpose of injuring somebody else?

Mr. GREEN. I do not know how you are going to prove that.

Mr. VOLSTEAD. How are you ever going to be able to prove that it is done for the purpose of injuring or destroying a competitor?

Mr. CARLIN. As I said, you could prove that in the same way that you could prove anything else.

Mr. GREEN. There is another thing I would like to discover, and that is whether the wholesaler is selling to the consumer. I ought to know that. He either wants to sell to me or to the consumer, but he ought not to sell to me and then be a competitor of mine, and I want the privilege of discovering that information.

Mr. NELSON. Would you object to his selling only to consumers?

Mr. GREEN. That is a different thing. We can not do anything with a man of that kind.

Mr. NELSON. You would not object to that?

Mr. GREEN. I do not know. You mean a man——

Mr. NELSON (interposing). A manufacturer selling directly to consumers.

Mr. GREEN. Well, I do not know why he should.

Mr. NELSON. I just wanted to get your views on that situation.

Mr. GREEN. Well, if a manufacturer wants to sell to the customer or to distribute his product throughout the country I do not know how we are going to stop him; but at the same time I do not know why it should be done, because we have an economical distribution now and the most economical, I think, that can be devised. However, if some one person undertakes to do his business in some other way, we can not stop him, as far as I know. But I am not in favor of it, by any means.

Mr. MCCOY. When Mr. Low appeared before the committee yesterday he spoke very strongly in favor of cooperative stores; that is, stores, as you know, organized by consumers. What is your view about such stores?

Mr. CAREW. Dealing directly with the wholesalers.

Mr. GREEN. They are a failure, and I will tell you why, if you will permit me to do so.

Mr. MCCOY. I did not mean to go into the question whether or not they are failures, but would you prevent their coming into existence?

Mr. GREEN. I do not know why they should come into existence.

Mr. MCCOY. He said they were an enthusiastic success.

Mr. GREEN. Well, I think he must be mistaken about that.

Mr. NELSON. You have a right to differ from Mr. Low, and we want your views.

Mr. GREEN. Let me talk to you for two or three minutes about this thing.

Mr. MCCOY. Regardless of whether they are a success or a failure, would you undertake to prohibit their existence?

Mr. GREEN. Well, I do not know; I do not know whether I would or not; that is, I do not know whether I would attempt to stop the beginning of them, because time tells when they are down and out. They can not succeed in this country. They will never succeed, and I will tell you why in two or three minutes. I was in England four years ago. I have been to England since, and I am going again. I went there on purpose to study trade conditions, and, in addition, of course, I went for a good time. But when I was in England a motion was made in a cooperative society in the city of Jarrow, which is in the north of England, a few miles from the city of Newcastle. You have often heard the saying, "Carrying coals to Newcastle." The city of Jarrow is near Newcastle. A lady got up and moved that the minimum wage of a girl from 12 to 14 years of age be 5 shillings a week. A gentleman got up and supported the motion, and he said that he had to admit one thing, and he was ashamed to do it, that girls 18 and 19 years of age—young women—were willing to begin at the minimum wage of 5 shillings a week, $1.25. Now, that could not go into effect without going into the general board. The general board took it up and discussed it, but the board turned

it down because of the fear that it would interfere with dividends that they had to pay. A condition of that kind can not exist in America.

Mr. McCoy. Conditions pretty nearly as bad do exist, but that is aside from the question I asked. I could take you into places in New York where girls, lots of them, and families, do not earn more than $1.75.

Mr. Green. Let us as American citizens blush with shame that such a thing exists.

Mr. McCoy. That condition ought never to be, but it does not affect the question whether or not you should put a stop to these things.

Mr. Green. I wish some plan could be devised whereby we could stop that thing.

Mr. Carlin. Look at section 10 and tell us whether your association approves of that section or not.

Mr. Green. I will read it:

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 the goods, wares, or merchandise of a competitor or competitors of the seller.

Mr. Carlin. You understand that, do you?

Mr. Green. In case there was a cooperative store started that I should not object to their getting goods?

Mr. Carlin. Oh, no. The point is that a manufacturer shall not sell you his goods and require you to contract with him to sell his goods exclusively. This provision would give you the right to sell his competitors' goods or anybody's goods you pleased.

Mr. Green. Well, personally, I would not want any manufacturer to stop me from buying goods from any manufacturer.

Mr. Carlin. Then you think that is a good provision?

Mr. Green. Yes; I do not think there is anything wrong about it in any particular. Now, if you have no questions, I will give way to the gentleman who wants to be heard.

Mr. Volstead. If you want to give any further explanation as to why cooperative stores could not exist in this country, I would like very much to hear it.

Mr. Green. Will you allow this gentleman to speak who wants to catch a train? And then I will resume my statement.

Mr. Moorehead. I would like to introduce to the committee Mr. Trainor, of Baltimore, Md.

STATEMENT OF MR. JOHN TRAINOR, OF BALTIMORE, MD.

Mr. Trainor. My name is John Trainor, of Baltimore, Md., and I am engaged in the steam and hot-water heating and plumbing business. I in part represent the National Association of Master Plumbers on this occasion, also my own interest.

Mr. Nelson. Officially, what is your position in the plumbers' association?

Mr. Trainor. I am just a member at present. I was formerly national president. I am engaged in private practice, but under our

rules a man who has occupied the position of president is a member while he lives, pending good behavior. So that is the only position I have at present.

Mr. Chairman and gentlemen, I was handicapped a little bit by not hearing what was going on. I did not hear the questions and I did not hear the answers of previous speakers very well. It was because of my hearing. I am not deaf, but I am a little hard of hearing to-day. So I do not know the nature of the questions that have been propounded.

However, we feel that this bill is intended to be a sort of interpretation of the Sherman Act as it applies to trade. There is something in regard to the present Sherman Act and its interpretation by the Department of Justice that troubles us very greatly. Some years ago we were cited to come before the department, and after making our objects and purposes known they seemed to be entirely satisfactory to the department.

Mr. McCoy. Have you a written constitution and by-laws?

Mr. Trainor. Yes, sir.

Mr. McCoy. Can you file those with the committee?

Mr. Trainor. Yes, sir; we would be very glad to do so. However, we have not them with us this morning.

Mr. McCoy. Well, send them to the committee. I would like to ask Mr. Green to do that also.

Mr. Green. I will be glad to do so.

Mr. Trainor. Here is one of our troubles: Certain manufacturers and mail-order houses, I will not say conspire, but do make a business arrangement amongst themselves that they will distribute their goods through certain channels, the mail-order house taking a certain percentage of the manufactured article, with the understanding that the balance of the goods turned out by that concern shall be sold at a certain price to us as contractors and retailers at a very much higher price.

Mr. Carlin. Do they not go further and fix the price at which they shall be sold?

Mr. Trainor. They try to sometimes, but we do not cooperate with any price fixing. We will not tolerate that. We have been in existence for a great many years and we have never tolerated the question of fixing prices. We believe that open competition should exist amongst men legitimately engaged in business. If somebody else has less overhead charges and can afford to sell goods at a lower price to the consumers than others can or will sell, we believe that he ought to have the right to do so. We object to manufacturers combining with mail-order houses in order to make a restricted distributing agency. We believe in having open competition, and that if a man bids lower than his competitors he should secure the business.

Mr. McCoy. Let me ask you this question: Does each manufacturer, say, of bathtubs, pick out a different man in Baltimore, or do they all pick out the same man?

Mr. Trainor. Oh, no; he might not pick out any of them, and many of them sell on a fair basis.

Mr. McCoy. Are there several manufacturers of a given article who get together and pick out one man in Baltimore, or do they get together and say, "I will pick out one man," another says, "I will pick out another," and the third says, "I will pick out a third." In

other words, is there a combination among the manufacturers on the one hand and among the big dealers on the other, or does each manufacturer pick out an individual?

Mr. TRAINOR. I think that each manufacturer that picks out anybody picks out an individual on his own account, or some manufacturer arranges with a mail-order house and the mail-order house will get certain discounts for a certain percentage of their output.

Mr. McCOY. Then, who picks out the man in Baltimore that he wants to handle the goods?

Mr. TRAINOR. The manufacturer.

Mr. McCOY. Then why does he go to a mail-order house, say, in Chicago, to pick out a plumber in Baltimore to handle his goods?

Mr. TRAINOR. The manufacturer picks out the mail-order house to sell a certain percentage of his goods. The mail-order house will probably pick out one small town at a time, or a large town for that matter, and sell goods at such low prices that they will destroy competition in that town.

Mr. MCOY. Is the man who picks out the man in Baltimore who has the exclusive handling of the goods the man who makes the goods?

Mr. TRAINOR. It is the man who makes the goods, and he sells the balance of his goods that the mail-order house can not take.

Mr. McCOY. But the mail-order house does not pick out the contractor?

Mr. TRAINOR. No, sir; he only makes the arrangements that he will do certain things, and then when he has competition destroyed in a certain town he can fix the prices to the consumer to suit himself. There must be some goods delivered in every town or city for stock and convenience, and neither the manufacturer nor the mail-order man is willing to do that, because that would entail constant expense; they want the small dealer to do that.

Mr. CARLIN. In return for that he gets a contract from this particular man that he will not handle anybody else's goods?

Mr. TRAINOR. Yes, sir.

Mr. McCOY. Do you not think that section 10 of our bill would prevent that? You see, under that section if he does the thing complained of and it is proven, it would be a violation of the law. That is, if we succeed in getting this bill enacted.

Mr. TRAINOR. Well, I believe, if it is proven, we have a remedy that can be legally applied. We respect our Government and our laws as much as any men in the world. We would feel disgraced if the Department of Justice ever brought suit against us and brought us to trial, even though we were exonerated. If, in addition to that No. 10, we were allowed to make the facts known in the case, the plain honest facts, just to publish them and circulate them without recommendation or remedy, I believe that trade rules could be better adjusted. Personally, I would not deal with any manufacturer in the world who would sell me goods and stock up my establishment and then go out in the open market and sell my customers as low or lower than the price at which I buy my goods from him and thereby destroy my business to this extent. The first duty of the Government is to protect its own people. There is such a large number of people in the retail or contracting business that no aggregation of trade or money should be permitted to destroy them.

Mr. CARLIN. On the other hand, you feel that you should have the right to buy goods from whomever you please?

Mr. TRAINOR. Yes, sir.

Mr. CARLIN. Under this section, do you not think that your whole case would be met if we gave you permission to make public the prices charged?

Mr. TRAINOR. Yes; I mean the difference in price charged the mail-order house, the consumer, and the retail trade. I was one of the committee that was cited before the Department of Justice some years ago, and our offense, or what they thought was an offense, was to publish in our bulletin the names of the manufacturers and wholesalers in plumbing and heating supplies, simply with a heading, for the information of our members.

Mr. CARLIN. Does your association deal with the Sanitary Manufacturing Co.?

Mr. TRAINOR. Yes, sir; that is, where the Sanitary Manufacturing Co. will do business with us, because in some towns they will not do business with us at all. They have some kind of an arrangement whereby they sell to jobbers, and in those towns we have to go to the jobber that handles their goods. But we were told that this brown book that we published, while it was not a black list, it looked like a white list. Now, we simply wanted to keep our members informed as to who was dealing in goods and wares in a wholesale way. I do not purchase from wholesalers who retail, and the reason I do not purchase there is that I would be foolish to help a competitor who had already the advantage of a wholesale profit to further enable him to crush me out of business by giving him a profit on the job on which he was competing with me. Indeed, I could not live at all if the manufacturers were to deliver goods in every building in which I was working. The end of it all would probably be that I would be one of their distributing agents working in their employ.

Mr. CARLIN. You think he ought to have a right to select his customers?

Mr. TRAINOR. Yes, sir.

Mr. CARLIN. Then you approve of section 9?

Mr. TRAINOR. Yes, sir; but we want to get some clearer interpretation of it whereby we know what is legal for us to do.

Mr. CAREW. As I understand it, the thing you want to do is to publish the truth?

Mr. TRAINOR. Yes, sir; the unvarnished truth, and we will be glad if the Government investigates it at any time it thinks proper.

Mr. CAREW. And the truth in your case consists of a list of names Now, what do your members understand by that? What is understood by that list?

Mr. TRAINOR. They understand that those are the concerns that are engaged in manufacturing and wholesale dealing in our supplies; nothing else.

Mr. CAREW. And the fact that a man's name is omitted from that list is information to your members that he is a wholesaler who is also a retailer?

Mr. TRAINOR. Yes, sir.

Mr. CAREW. We all know that a wink is as good as a nod to a blind horse.

Mr. TRAINOR. Yes, sir; perfectly true.

Mr. CARLIN. In other words, the effect of that is to boycott the fellow whose name does not appear in your publication?

Mr. TRAINOR. Not at all.

Mr. CAREW. I do not want you to be afraid of that word "boycott."

Mr. TRAINOR. Well, I do not like the use of the word. I believe it was originally applied by the labor organizations, and I think it is a very obnoxious word.

Mr. NELSON. They are perfectly frank in admitting what it is. They call it a boycott.

Mr. TRAINOR. That is right. We want to give out the information to our members that they need not deal with our competitors unless they wish to.

Mr. NELSON. Now, the real truth is that you want to be able to tell the world, without being in violation of the Sherman antitrust law, that certain gentlemen are not only selling wholesale but are selling retail?

Mr. TRAINOR. Yes. And are consequently competitors of ours.

Mr. NELSON. And the retailers will understand that and will then withdraw their patronage?

Mr. TRAINOR. Well, that might be the final result. In the last analysis it might be so. The Department of Justice said to us that it looked like we meant it for a white list instead of a black list, and they advised us not to publish it, and we stopped it immediately.

Mr. NELSON. Well, I am not excusing anybody, but I want to get at this point: How far can we protect farmers, laboring men, and merchants against the operation of the Sherman law where they simply wish to control their own patronage?

Mr. TRAINOR. Well, I do not know.

Mr. NELSON. You justify this right to publish a white list on the ground that you have a perfect right to control your patronage?

Mr. TRAINOR. The principles of self-preservation dictate that. We are willing to say that if any manufacturer will come into our town and open a retail business and pay his own expenses there, that is not so bad. We raised that point with the Department of Justice that our competitors in the wholesale business who were also selling at retail did not pay any license fees and contributed nothing toward the support of the State, and hence it was unfair competition. If they will be subject to a retailers' overhead expenses that we are subject to, we do not care how they sell their goods, or at what price—they will then be on a footing with us.

Mr. NELSON. Where does the consumer come out in all this?

Mr. TRAINOR. We would be delighted if the commission would investigate the subject for the reason that we think the consumer would be far better served by allowing the retailer to be successful in business.

Mr. NELSON. But how?

Mr. TRAINOR. The consumer would have the advantage of a local man experienced in the selecting of goods as to their suitability as well as proper construction.

Mr. NELSON. But might not that man put the goods up so high as to be excessively high to the consumer?

Mr. TRAINOR. There are 600 men holding master plumbers' licenses in the city of Baltimore, and with such an enormous number of men

in active competition with each other there could not be any fixing of prices, as each person would be eager for the business.

Mr. MORGAN. In other words, the number of people would insure competition?

Mr. TRAINOR. Yes, sir. And then, again, the consumer is dealing with some one who is expert in his line. They would recommend an article that is suitable for the purpose and they install it at as low a price as they can and live, because if they raise the price their neighbors will get the business. If the goods are to be sold by the mail-order house or by combination stores or by distributing stations, there is no one of experience locally to look after the business, and the consequence is the business would probably be unsatisfactory for even if the price was right they could not give good service. The effect of all of the business arrangements that have been made with mail-order houses has been to raise the price for articles of equal merit, because the competition is destroyed by putting inferior goods in competition with a superior article, as in the case where the manufacturer will not sell to us at all but picks out an agent in one city to handle one part of his goods and the mail-order house the balance.

In large cities there may be two or three agents for it. We have to go to the jobber and buy these goods. You can not buy them from the manufacturer. We believe that in that case where we have to pay for construction and it requires skill and experience and scientific knowledge, such as it does to fit up a modern building for office purposes or governmental purposes, or more important still, homes for the people——

Mr. NELSON (interposing). Let me ask you this question: You are a plumber?

Mr. TRAINOR. Yes, sir.

Mr. NELSON. Do you have to buy of a plumbers' trust?

Mr. TRAINOR. I do not think so. I think the so-called Bathtub Trust was intended to be a trust fixing the price of every enameled article. We had to buy from them and pay their prices while they existed.

Mr. NELSON. So your competitor now is the mail-order house?

Mr. TRAINOR. Yes, sir. The mail-order house is our worst competitor. They bring discredit upon a business such as I am in. They will send their catalogues to people who do not know how to pick out fixtures, and when they are delivered on the ground we can not put them in as they are frequently unsuitable. The mail-order house will not take them back and the unfortunate person who bought them tries to make an arrangement to use them somewhere else. There are valves in these automatic flush tanks intended for high pressure, and they are sent to small suburban towns where the water pressure is 10 or 15 or 20 pounds and they will not operate at all, and the consumer suffers from that, and vice versa.

Mr. CARLIN. In effect, any person whose name does not appear in your publication is debarred from doing business with your association. Is not that true? Have not your members agreed among themselves not to buy of anyone whose name did not appear in your publication?

Mr. TRAINOR. Absolutely not, and I do not believe that 20 per cent of our members who have seen the publication when published.

There has not been any publication for about five years. We at that time stopped the publication of the so-called "brown book."

Mr. CAREW. Did you ever try to do it by word of mouth?

Mr. TRAINOR. If you mean if anybody asked me who was the wholesale dealers in my town, I told him. I would tell anybody who had a right to inquire if they asked me to-day.

Mr. NELSON. You would tell them the truth, too; you would not give them the name of anybody selling to your customers?

Mr. TRAINOR. No. I have not, however, had any trouble with anybody selling to my customers. No manufacturers ever sent any goods to my building for my customers, as I have always refrained from doing business that way, because I knew I could not pay my expenses and educate my family unless I could furnish and install plumbing in the right way as a retail merchant; that is, unless I furnished the materials myself, or had some interest in the operation that was going on. Of course I have some responsibility, because if I break one of the fixtures I have to restore it, and if I did not furnish it or have profit in it the owner would suffer the loss.

Mr. MCCOY. What do you think of the publication in the Federationist, the paper of the American Federation of Labor, of the "We don't patronize" list, which they were forbidden to publish in the Buck's Stove & Range case?

Mr. TRAINOR. Well, I would answer that by stating that it reminds me of a story I once heard about a farmer who used a big farm for pasture, and one day when he was out plowing on his farm the steer bull who was the superintendent of the cattle on the farm was wandering around. The railroad had come through there recently. As the train came in the bull raised his head and ran out on the track, lowering his horns. Afterwards there were some grease spots found along the track. The old farmer touched his horses and said, "Get up"; then, looking at the grease spot, he said, "I admire your spunk, but I question your judgment." So I admire the spunk of the gentlemen, but I question their prudence but do not see how else they could protect their interests.

Mr. MCCOY. But they are not publishing it now. There is not anything different in essence between the kind of list that you want to publish and the "We don't patronize" list of the Federationist.

Mr. TRAINOR. Well, I do not know what the relative merits are. We simply want to publish the facts without any special inducement to anybody to circulate them.

Mr. MCCOY. Well, would you approve of the circulation of that list by the labor unions?

Mr. TRAINOR. Well, I think not, in the face of the interpretation of the Sherman law.

Mr. MCCOY. I am not asking you the legal proposition, but assume that the Buck Stove & Range case had never been in the courts at all. What would stop you publishing your list would stop them, too, would it not?

Mr. TRAINOR. Yes, sir.

Mr. MCCOY. Now, would you care to see the law amended so as to give your organization the right to publish your list and also to give the labor organization the right to publish their list?

Mr. TRAINOR. I would like to see the law framed, if it would not be disastrous to the interests of the people of this country, so as to enable a business like mine, plumbers and heating association men,

to protect their interests so that they might succeed financially and in the service of the people themselves——

Mr. McCoy (interposing). Well, you are getting away from the point. You claim that you want to have and you ought to have the right to publish a list of names of manufacturers from whom goods can be bought wholesale.

Mr. TRAINOR. Yes, sir.

Mr. McCOY. Now, you have admitted that by implication——

Mr. TRAINOR (interposing). No; pardon me, Mr. McCoy. I said from manufacturers who wholesale their goods.

Mr. McCOY. Very well. You want to publish the list of manufacturers who wholesale their goods?

Mr. TRAINOR. Yes, sir.

Mr. McCOY. And from that you want your members to infer that they had, in their own interest, better not buy from anybody else. Now, that is exactly what the labor organization wanted to do in advertising their "We don't patronize" list. They claimed that the firms and corporations named under that heading had treated labor unfairly, and that, therefore, labor, in its own interest and for its own protection, should not buy the goods produced by those people. Now, is there anything essentially different between the two plans, so that you could approve of your plan and disapprove of their plan?

Mr. TRAINOR. Yes, sir. The difference is that we make no attempt, and never did, to fix prices, and that is their main object. They have nothing to sell but their labor, and they are trying to actually fix the prices in dollars and cents. We would be perfectly willing to be dissolved the moment we attempted to fix the prices.

Mr. McCOY. Now, on that "We don't patronize" list are the names of many with whom the labor organization quarreled, not because of wages but on account of conditions being insanitary or dangerous or otherwise bad in the places of employment. Would you be willing to see them in a position where they could publish a list of persons who did not have proper sanitary conditions in their factories?

Mr. TRAINOR. Well, I know so little about labor organizations that I do not know what they would like to have.

Mr. McCOY. Well, I am assuming that they list manufacturers who do not provide safe quarters or safe machinery. Now, would you give them the right to publish a list of such manufacturers?

Mr. TRAINOR. I certainly would, if that is what they want to accomplish—to have proper housing and proper treatment for the workmen.

Mr. McCOY. Then, the only way in which you would restrict them would be in publishing a list of names of those whom they did not patronize because those persons did not pay high enough wages?

Mr. TRAINOR. Judge, I would not restrict them at all, because I do not know what other way the men would have of getting their just reward. It might be absolutely necessary for them to do that too, but I am not prepared to assume that.

Mr. McCOY. But assume, for the sake of argument, that it is necessary for the labor men to publish a list of that kind in order to get proper wages, would you approve of that list?

Mr. TRAINOR. I would approve of it is it was necessary for them to maintain themselves in a proper way as American citizens.

Mr. BARRY. I might suggest that a parallel case may be found in the publications of Dun and Bradstreet. I think that is a parallel case. We want to operate under the same law as the credit associations operate under.

Mr. McCOY. And then those have an entirely different reason, because the man who sells the goods to him would be likely to lose his money?

Mr. BARRY. Sure; that is a parallel case. All we want to do is to operate under the same, identical law that the credit associations operate under. We can not conduct these credit associations as retail merchants, and we get around it by organizing an association. Our association does for us exactly what Dun and Bradstreet do for their customers.

Mr. McCOY. I am not taking the stand that you ought not to have the right, but I was simply trying to develop your idea.

Mr. BARRY. We do not have any "we do not patronize" agreement. Dun and Bradstreet with their customers have no agreement. They may tell you a man is not worth a dollar, and I have the right to tell you a man is not worth a dollar. Our association tells a member that such and such a man does so and so. I have no agreement, implied or otherwise, to buy or not to buy.

Mr. McCOY. I did not say that you have not a right to do that or that you ought not to have it, but would you extend the same right to the labor organizations?

Mr. BARRY. Certainly.

Mr. McCOY. To the extent of that "We do not patronize" list?

Mr. BARRY. There is an agreement——

Mr. McCOY. There is no agreement whatever. They have the different labor organizations throughout the country, and they do not get together and agree that they will not patronize these various people against whom there are complaints, but they just publish that list. Sometimes they will discipline a man in a labor organization if he does patronize, but in a great many cases they do not attempt to enforce any such discipline at all, but they leave it to the laboring man to buy or not to buy, but they give him the information, and they claim they have the right to do it. In other words, they claim they have a right to boycott. The word "boycott" has a perfectly well-understood meaning in the language to-day and we might as well use it. You are claiming the right to boycott the manufacturer who is also a retailer. They claim the right to boycott the manufacturer who does not treat them as they think they ought to be treated. Is there any essential difference, and ought a law to be so framed as to permit the one and restrain the other?

Mr. TRAINOR. The only difference I see is this, that out of a membership extending all over the country, fluctuating from 10,000 to 15,000, we have never disciplined anybody for buying or not buying, and have no by-laws to do it.

Mr. McCOY. That is entirely aside from the point. They do not discipline everybody. They may discipline some, but they do not claim the right to discipline everybody.

Mr. TRAINOR. They have a tendency——

Mr. McCOY. Then, I will eliminate that. Suppose a labor organization does not claim the right and does not exercise any power of discipline over its members. Just leave all that out. Suppose their by-laws provided that no man should be disciplined because he bought

from an unfair manufacturer or bought goods from any unfair manufacturer, ought the labor organization to have the right to publish "We do not patronize" lists?

Mr. TRAINOR. Unquestionably. As you say, they were not inflicting any unfair penalties. If the penalties are removed, there can not be very much discipline, and unquestionably for their own preservation they ought to have that right. They might as well disband if they do not have the right to inform their members.

Mr. NELSON. Theirs goes to wages and yours goes to price.

Mr. TRAINOR. No; ours does not go to price.

Mr. NELSON. Does it not? Are not your agreements that if this wholesaler sells at a less price or sells at the same price to your consumer that you pay him as a buyer, you are objecting to that difference in price?

Mr. CAREW. It goes to the defense of your own interests anyway.

Mr. TRAINOR. We are objecting to that difference; there is one point. If the wholesaler would also compete for the small business as well as the large business, he would be on a footing with us, so far as overhead are concerned in small business, but when he only comes in and takes big business and combines to take only big business, such as supplies for this House Office Building and other large buildings, and lets us work out our salvation on small and troublesome business, he makes it then almost impossible for us to make a living at all. In the case of the laboring men, they get some compensation. We would not get enough to exist at all. They are, however, trying to better their condition, and when they do it within bounds I think they ought to have the right to do so legally.

Mr. MCCOY. You have some business left?

Mr. TRAINOR. Yes; some business.

Mr. MCCOY. Then you are on a parity with the laboring man. You have some business left and he has some opportunity to work for starvation wages. You are complaining of starvation in your business and he is complaining of starvation for himself and family.

Mr. TRAINOR. That is right; in that respect we are on a parallel.

Mr. CAREW. You are willing to go in the boat with them?

Mr. TRAINOR. Surely; we want every man to have his rights, and there should not be any iron-clad arrangement. There ought to be free competition, absolutely fair and free.

Mr. CAREW. Plenty of publicity?

Mr. TRAINOR. Yes; and I have been 35 years engaged actively in it, and I would agree to let this left hand be cut off before I would go into a combination to increase the price to the consumer. That is the sentiment that prevails in our organization. There is not a man now living, or who ever did live, who could come forward at any time to say that we ever tolerated the fixing of prices. We want competition to be free and open, and the man who has capacity for business, who has surrounded himself with a good organization in the way of competent men, efficient help, and modern machinery, and applies himself closely to it, we want him to sell his goods at any price he can sell them so he can make a living; then the consumer will get his own in the shape of low prices and good service as well.

Mr. CARLIN. The association that just preceded you wanted the prices fixed in such cases. You do not approve of price fixing?

Mr. TRAINOR. I do not believe in any price fixing, unless in the case where there was discrimination; and if there was discrimination that had for its ultimate purpose the wiping out of certain enterprises, such as small retailers, I say that in case it could be proven that there was discrimination in the price to an extent that would make it impossible for the small man to live, and big business was buying at a vastly different price—so much so that they could not exist in competition at all—then I think the Government should step in and regulate that condition.

Mr. NELSON. Right there, if the Government fixes a price large enough for the little man to live, might that not be an extraordinary price for the big concern which had resources and opportunities that the little man did not have?

Mr. TRAINOR. We do not want the Government to fix a price at all, except in the one emergency. You misunderstand me. We want them to stop discriminating. We do not say that the Government should regulate the cost at, say, 90 cents; but we think they should say if the manufacturer is selling at 80 cents to one distributor he should be compelled to sell it under the same conditions to other distributors at about the same price, varying a little for very large orders.

Mr. CARLIN. And for railroad transportation?

Mr. TRAINOR. Surely; and spot cash, and all that.

Mr. MCCOY. Would you have discrimination made for cash sales beyond the mere rate of interest and the deferred payments?

Mr. TRAINOR. Yes; there might be a small difference for cash.

Mr. MCCOY. I mean beyond the mere discount at 6 per cent?

Mr. TRAINOR. No; because were that allowed I fear money could so easily be assembled in one place that the captains of finance would get a hold and buy it all up, and then retail-price fixing would begin.

Mr. MCCOY. I understood you to say you would make a discrimination in favor of the man who pays cash?

Mr. TRAINOR. I say that it would hardly be fair to tell a manufacturer on that point that he should refuse to sell his goods at a small extra discount, if he got spot cash.

Mr. MCCOY. Would you make the discount any larger than the rate of interest at 6 per cent on the anticipated payment?

Mr. TRAINOR. I do not think I would. It ought not to be so much that the man who bought it at the standard price could not live in competition with it, and it would then be possible for him to live.

Mr. MCCOY. I just want to ask one more question, and that is that your association will notify all its members that the committee in Congress has a very hard job, because some people are asking for one thing, other people are here saying they do not believe in it, and we have people pulling this way and that and the other way; and I want to ask you whether you see any escape from socialism?

Mr. TRAINOR. Well, I hope there is some escape, but there are signs there is going to be difficulty with it. I have, however, an all-abiding faith in the wisdom of Congress and patriotism of the people generally to take care of that question. At the same time, I would say to you, in answer to the reasoning you just gave expression to, that we marvel that you can give so much time to us and preserve so much patience when there are so many interests to be heard that I

really feel as though it would almost turn a man's head to listen to it, because it is so very much out of harmony.

Mr. McCoy. We would very much rather listen to you than to solve your problems.

Mr. Trainor. If you will so fix the law so that we may live and that as honorable citizens we may not be afraid all the time to do that which we are now afraid to do, and which our lawyers can not even tell us what would comply with the existing law, we will then be happy, because we are willing to comply with any conditions other citizens similarly situated in this country have to comply with.

Mr. Carlin. I understand you have approved of the bill, so far as it has gone, and simply think you ought to have this other feature?

Mr. Trainor. That is right. We do not think we ought to be made criminals by law for giving out truthful information with regard to the classifications of business or business men or of advertisements that may go out when they are grossly false. We feel that when we tell the exact truth and have no penalties, either implied or in any other way, and when you understand that there are only about 10,000 plumbers in our association, or 11,000, probably, now, and that there are approximately 25,000 to 30,000 plumbers outside of it, and that even of that ten or eleven thousand that we have you must know that there is a very small percentage of them that meet at one and the same time, and that there are men who belong to the association for 10 or 12 years and never attend but two or three meetings. We have no bureau of information that goes around and keeps them posted. It is only a case of a little journal that we used to have published, and it had very useful technical information in it, and this list of wholesalers in our business was primarily intended, when we first published it, to be a bureau of information as to where we could get the goods, because when we started there was no Sherman Act. Hence we were not thinking about the Sherman Act.

Instead of having the larger and more prominent members—people engaged in the plumbing business—having to advise every new man when he came in where he could get certain makes of toilets and tanks, etc., he would get it out of that book, and he could correspond and know just where to write and get everything. So we were not thinking about the Sherman Act then. We established that in 1884.

Mr. Carew. Did any of these unfair wholesalers ask to have their names printed in that list at any time?

Mr. Trainor. Not that I know of.

Mr. Carew. It was never refused any of them to have their names put on if they asked for it?

Mr. Trainor. No; because nobody asked to have their names put on. We simply put them in ourselves. They could advertise if they wished to, and they could advertise any goods they had, but we never did run an advertising bureau.

Mr. Carlin. Would you have inserted the name in your list of any gentleman you considered an unfair dealer, had he asked you?

Mr. Trainor. We never had any "unfair dealers"; pardon me if I answer you that way. We did not say he was "unfair" simply because he was a retailer. We wanted him to exclusively be a retailer when he started to retail. We simply treated him as a competitor. That is a frank, honest statement, but we did not ask anyone else to

refuse to deal with them, and we know that lots of our men did continue to deal with them, and very often had to, because they may be the only supply house in the town that had a supply of goods and we do not stop anybody from buying goods from them; but it meant to those who had better business ideas that it was bad policy to help the man along in business who was your competitor and thereby trying to destroy you with his unfair business advantage and everything of that sort.

Mr. NELSON. You are perfectly willing that the Sherman Act should operate against your getting together to fix the price?

Mr. TRAINOR. Absolutely; and desirous it should do so. The only thing we want to know is, what is the law?

It is exactly the same way in everything. We want it to be made so plain that those "who run may read." If we then violate any rules provided for in the Sherman Act we submit ourselves to punishment.

Mr. NELSON. And if you are not permitted to get together and fix prices conditions within your own ranks will protect the consumers?

Mr. TRAINOR. That is right.

Mr. NELSON. And did you complain also that the wholesaler was discriminating by giving better prices to your competitor?

Mr. TRAINOR. Yes. The wholesaler and the mail-order house is the only complaint we have got. For if a man goes into our business in a retail way and inaugurates unsound business competition, he will not last long. He will make an assignment.

Mr. McCOY. What is the remedy for the mail-order house?

Mr. TRAINOR. The mail-order house should not be permitted, I think, by law to fool people by dishonest and untruthful advertising, and the mail-order house, we think, should not be permitted to enter into an agreement or combination with the manufacturer to give them certain goods, which is always the seconds or the thirds, at such a low price, taking, maybe, 60 per cent of the output of that factory, at a price that just keeps the factory running, and they always take the defective goods, and then they should not be permitted to advertise those goods as anything else than what they are; and as a condition precedent to this sale, the other 40 per cent would be sold to us or to some distributing agent at a sufficient advanced price to make a handsome profit for the factory on its entire business, and in the last analysis the consumer pays it all.

Mr. McCOY. There is a practice in some of the big storehouses of taking all the seconds from manufacturers, is there not?

Mr. TRAINOR. How is that?

Mr. McCOY. I say that in some of these big concerns which operate a chain of stores, the very thing which they do which enables them to sell cheaply is to take the seconds and thirds and not the firsts, from manufacturers; is that not a fact?

Mr. TRAINOR. That is right; that is exactly what they do; but they do not tell the people that they are seconds and thirds. The photograph of them looks fine in a catalogue.

Mr. McCOY. Suppose one of those chains of stores did not advertise at all. How would you reach them on selling seconds?

Mr. TRAINOR. If he did not advertise at all and did not violate the principles of good business in buying by combination, and fitted up a retail store in each town where the public could make personal inspection of what they were buying, I think in that case he might tell the people, if they selected them in there, anything he pleased that

might sell the goods, as if he told them an untruth he would have to stand the consequence with his customer. That is the work of the salesman.

Mr. McCoy. You object to the printed lie, but a lie by word of mouth you would not object to?

Mr. Trainor. I object to any lie; but the printed lie does affect the people very seriously. They think they are getting a great bargain in any article they do not see in advance, when, as a matter of fact——

Mr. Nelson. What part of the criminal law prevents your showing up these people that lie or refuting their lies?

Mr. Trainor. I do not think there is any machinery you have to bring them to account to the law, unless it be the Department of Justice, and they have got their hands pretty full. They do not have time to look after those things, and in the case of an advertisement they do not know the lie when they see it.

Mr. Nelson. You do not concede that there is anything to prevent your association from showing up the lies of these fellows, provided you do not advertise something that can be construed as boycott?

Mr. Trainor. If we can tell that to our members we do not want anything more than that, but that is what we think we can not do now. If we could plainly list the wholesalers in our line, whether we like their business methods or not, we would not fail to list every man who is a wholesaler.

Mr. Nelson. In other words, you are fearful of this, that if you publish a list of the liars, that will be equivalent to a blacklist?

Mr. Trainor. Yes; we published the other end of it when we did publish anything. We publish the men that were in the wholesale business only. We had not a word about anybody else. If we knew of another man in the country who was not a wholesaler, but was retailing goods, we would not put him on, whether we had any business with him or not. We were perfectly willing, in that list we published, to put any name on it in any part of the country that confined his business to wholesaling or manufacturing, whether they treated our members good or not.

Mr. Carlin. The difficulty we are having is that some retailers have asked us to make the law so that prices shall be fixed to the consumer. You are now representing another class, saying that you think that is a wrong thing and ought not to be done. Our difficulty is in reconciling those two objections.

Mr. J. W. Barry. That was for copyrighted articles.

Mr. Carlin. Anybody can get a trade-mark, practically. Speaking in reference to the retail drug stores, the man who just preceded you, said that the retail drug stores have the price-fixing idea, which you retailers seem to object to.

Mr. Trainor. A man controlling any article ought not to be permitted to charge a greater price in one city than in another, or in the same city, barring the cost of transportation and similar things

Mr. Carlin. That is the law as we have written it.

Mr. McCoy. What they do claim the right to do is to say that their articles shall be sold at only one price.

Mr. Carlin. That is to the wholesaler—one price to the jobber, and one price to the retailer, and one price to the consumer.

Mr. Trainor. Yes, as to the price of the wholesaler, jobber or retailer, but not as to any price to the consumer. I know this situa-

tion, if it is any information to you. I know of a patented article, and a very useful one. It is a gas water heater, which is practically in every modern house of to-day, and they have a list price—the manufacturer's price—and it can not be bought from anyone else except the people who manufacture it. They give, say, 15 per cent off the list, and the article costs $100 in one city, less 15 per cent, and in another city they sell it with no discount. We do not think that is right.

Mr. CARLIN. There are two of those heaters. Can you give me the names?

Mr. TRAINOR. The Pittsburgh is one, and the Rudd is another. Bealer & Humphrey manufacture other types of heaters.

Mr. CARLIN. The Pittsburgh and the Rudd are the two largest sellers, are they not?

Mr. TRAINOR. Yes; the Rudd has won through the United States courts in its infringement proceedings, and has got judgments against several of the other companies. The Pittsburgh concern, I believe, is paying a royalty to the Rudd now on the thermostatic valves. They are the invention of Rudd, and he, of course, has been sustained by the courts in that. The jacket and the general shape and design of the heater are not patentable, and, of course, other people can make them.

Mr. MCCOY. Why does he sell it at a bigger discount in one territory than any other if he is eliminating competition? The courts have only decided the case within the last six months. It was tried in the district courts of New York, and I do not know whether they have the same price now or not, really, but when they had competition how could they sell cheaper in one territory than in another?

Mr. TRAINOR. My own judgment is that in one territory there was great demand; everybody put them in. Natural gas, for instance, in some localities, was an inducement, and they were within reach of everybody, and there, when they knew that architects and everybody else recommended them, they sold at list price. In territories where they were not so popular, where they had to keep men working up the territory, they had added expense.

Mr. MCCOY. And there they sold at a discount?

Mr. TRAINOR. They did, but they put that in with the expense so as to get them introduced and get the public generally to know of the advantages of the heater, and then afterwards intending to put the price up, I suppose.

Mr. MCCOY. Is that objectionable?

Mr. TRAINOR. If it was only for temporary purposes, it would not hurt anybody much.

Mr. MCCOY. That is the way you get business, is it not?

Mr. TRAINOR. I only mentioned that. You asked me something about it, and I just added this. I have not any complaint to make about that.

Mr. GREEN. The gentleman on the right asked me a question, and I said I would answer when the gentleman got through. If you do not object I will answer now. Your question was what?

Mr. VOLSTEAD. Whether it would not be possible to have mutual associations among farmers or consumers, the same as they have in Europe, to purchase or to sell articles?

Mr. GREEN. Cooperative stores, I think you have referred to?

Mr. VOLSTEAD. Cooperative stores.

Mr. GREEN. The reason cooperative stores will not exist or succeed in this country is that Americans demand service. The public demands a service that the cooperative stores can not supply. Men who would go into the cooperative stores no doubt do so with the very best intentions. We have under no considerations tried to stop them. We know it is simply a matter of a few days, and a little experience.

Mr. MCCOY. How about cooperative buying? Suppose all the farmers in the State of Minnesota formed an organization for purchasing everything that they used, so that they can purchase at wholesale price. Would you think that there was anything objectionable in that?

Mr. GREEN. We never have said anything about it. We do not think it is the right thing to do. We think we can give them a better service. It is up to them. I am only giving my experience and all I have seen, and I have seen a very great number, and within the last year or probably 15 months I have seen four go under in the city of Cleveland.

Mr. VOLSTEAD. What I wanted to know is the difference between this country and the European countries, where they do flourish. Would it make it possible for them to flourish here? I am not expressing for or against them, but the idea has been expressed here that they ought to be encouraged. I want to know why they can not succeed here when they do succeed in Europe. There can not be any question that they do succeed there.

Mr. GREEN. I wish it were possible for every one of you to go and study the thing on the ground, because you would see things in a very much different light. The consumers over there are not getting their goods any cheaper than they do get them out of the independent stores. That is probably a broad statement to make, but it is a fact, nevertheless, and I could prove it to you very quickly if you were there and I could get you the data that will prove it to you. They depend on the dividend, and I have had it said to me over there that they do not object to paying a little more, provided they get the dividend at the end of the year or six months, or whenever the dividend is declared. They have an organization of wholesalers and manufacturers there, just the same as we have here. That is the cooperative stores, mind you, just as much so; and they have succeeded as a corporation and not as an individual buying exchange—mark you, but as a corporation, owning their own shops, owning their own manufacturing establishments, owning their own distributing plant, and owning their own buildings where they retail the goods at the store, and those who belong to the store do trade at the store by paying about a pound, which is about $5, for becoming a stockholder and getting a percentage or a dividend, or whatever you might call it, every six months.

Mr. MCCOY. On what—on the £5?

Mr. GREEN. On the stock or on the purchases they have made. And I say again, positively, that they are not getting their goods cheaper than they bought them at the independent store, and in some instances at a bigger price than the independent retailer will ask them for the same goods. It is a great corporation. We look on the cooperative store over there as an independent proposition, like as if we were starting a cooperative store here among ourselves—the men sitting in this room. That is our idea of the cooperative store in England.

It is very far from that. It is one of the biggest corporations on the face of the globe in the food manufacturing and distributing business.

Mr. VOLSTEAD. Is there only one?

Mr. GREEN. One cooperative store? Oh, no; there are several of them. There is a great store in London and great exchange stores throughout England. I forget the names of them. I can give them to you, however.

Mr. VOLSTEAD. Are they connected in any way?

Mr. GREEN. The question whether they are connected I am not capable of answering. I only understand them as separate propositions.

Mr. FITZHENRY. Do they do a credit business?

Mr. GREEN. Oh, yes; they do a credit business.

Mr. VOLSTEAD. How is it with respect to Denmark?

Mr. GREEN. I do not know what the situation is in Denmark. I never went there, but I take it for granted that the same conditions exist there as they do everywhere else. The business of manufacturing and distributing has got down to such a point that there is no possibility of creeping in anywhere at the less expense, unless the consumer himself is willing to assume that expense.

I will not take more than two minutes more. I wish to thank you and to say that if you want to get the information I have it. I have studied the question; I have spent my money and my time to get it, not because I expected to come here, but for my own information and for the information of the men who are engaged in the same business I am.

Mr. MCCOY. Can you set it out in writing, if you do not want to take the time now?

Mr. GREEN. Yes. I would be very glad to give you any information along the cooperative line. I will send you what literature I may have.

Mr. MCCOY. We do not want literature, but what we would like to have, I think, Mr. Chairman, is a summary of his investigations, stated in his own language in the shape of a brief, if you please, to be printed in the record.

Mr. GREEN. Yes; I would be very glad to send it to you.

The CHAIRMAN. We could not undertake to print, you know, all the literature on that subject or any other.

Mr. MCCOY. Not on the trust question, at any rate.

Mr. CARLIN. We will be glad to print your views, and the country will get the benefit of it.

Mr. GREEN. Well, thank you. It is a great question; and, as I said before, here are millions of capital just waiting for an outlet, and if our system of distribution in this country was not the most economical we would not be here to talk about cooperative ideas two minutes. The American people wil have service, and we are here to give it to them.

Mr. MCCOY. If you will permit me, if it won't interrupt, right on that point: You are complaining, I think, or some of the gentlemen who have spoken here have complained, of the mail-order store. Is not that an attempt on the part of capital to find an investment in the line of a cheaper method of distribution?

Mr. GREEN. Exactly.

Mr. MCCOY. Well, then; does not that dispose of your argument that your present method of distribution is not the cheapest?

Mr. GREEN. The fact that we have been able to hold our production or distribution to the extent of 80 or 90 per cent, is, I think, evidence that we can not overlook.

Mr. McCOY. Why should you object to the mail-order house getting the other 10 or 15 per cent of the business?

Mr. GREEN. The fact of the matter is this, what we we are contending for: We want to get our goods at the same rate they are getting theirs. I contend that no man has the right to buy a hundred cars at less than I can buy a car.

Mr. McCOY. Then, if I understand your argument, you want to interfere with the movement of capital along the lines which it will take unless restricted?

Mr. GREEN. No, no. I do not want to interfere with any line of capital—just like this man in the story of the bull and the locomotive—to interfere or to try to restrain capital in any line.

Mr. McCOY. Let me see if we can get together. You claim that the present system of distribution of goods is the most economical, and that therefore it exists. The mail-order house, I presume, claims that the present system, of which you are a part, is not the most economical, and therefore there is room for the mail-order house. They also claim that the greatest economy to consumers can be brought about by wholesale purchasing, and therefore they want the right of purchasing at wholesale, in any quantity they please, and get the benefit of the wholesale price.

Mr. GREEN. That is, from the mail-order house?

Mr. McCOY. I am only now trying to present what I suppose is the argument of the mail-order house. I do not imagine that the mail-order house can buy a hundred carloads of flour any cheaper than you can, but it can buy a hundred carloads of flour cheaper than you can buy 50 carloads of flour. Is that what you complain of?

Mr. GREEN. Well, I presume they have been doing that, but I will not say that, particularly.

Mr. McCOY. Is that what you complain of?

Mr. NELSON. He said distinctly that he could not get a hundred carloads of flour for the same price that they would sell it to the mail-order house.

Mr. GREEN. It is the discriminatory position.

Mr. McCOY. I did not understand that.

Mr. GREEN. Yes.

Mr. McCOY. You claim that if the mail-order house buys a hundred carloads of flour it gets that hundred carloads cheaper than you can buy the hundred carloads of flour?

Mr. GREEN. I almost contend that—I say they can get it cheaper than I can buy five carloads.

Mr. McCOY. Do you object to that?

Mr. GREEN. I do not know why I should not.

Mr. McCOY. I just wanted to follow your argument. The reason why it could get a hundred carloads at a cheaper rate than you could get five carloads is because it can, therefore, distribute cheaper than you can distribute?

Mr. GREEN. That is just exactly where we can get together. The mail-order house buys a hundred carloads; I want five. They are one individual; we are a thousand individuals. They get a hundred carloads cheaper than my thousand can get 10,000 carloads, because I am the individual.

Mr. McCoy. Then, why would not the logic of that argument lead to the retail grocers getting together and forming a buying organization?

Mr. Green. Now, you are coming back——

Mr. Carlin. Do you think you ought to buy one box of soap at the same price at which you could buy a carload of soap?

Mr. Green. I beg your pardon.

Mr. Carlin. Do you think you ought to buy one box of soap at the same price at which you could buy a carload of soap?

Mr. Green. You are putting it in a different way now. Let me say this: A wholesaler doing a wholesale business will buy a carload of soap. Why should I, a retailer, be in shape—other than the common everyday discount, which anybody could get, be subjected to a different price than you, the wholesaler, who is able to buy a few more boxes than I am?

Mr. Carlin. Your position is that you ought to be able to buy a carload as cheaply as anybody could.

Mr. Green. Exactly.

Mr. McCoy. Then why should there not be a 10,000-carload basis?

Mr. Green. That is what I am contending, that 80 per cent of the purchasers of this country, as opposed to 10 or 20 per cent——

Mr. McCoy. We have got to push the argument along a little bit further. There is an economy, I assume—I have never been in business—in dealing with the one individual, is there not?

Mr. Green. Yes; I presume that is true, as far as it goes.

Mr. McCoy. Would that not justify a lower price for a thousand carloads to one individual than 1,000 carloads to 10 individuals?

Mr. Green. I question that very much. Take the city of Washington, if you want to. Some one individual is able to buy a car lot, and here are all the rest of us who are able to buy 80 per cent more than that one. It does not cost very much more to load on the wagons and distribute; it does not take very much more.

Mr. McCoy. I assumed for the sake of argument, that it was easier to do business with one man than to do it with 10, because of the overhead charges which would come in. Of course, if it is not cheaper, my suppositious statement would not go for anything.

Mr. Green. It is not very much cheaper where I have looked into it at the different points of distribution. When it comes to selling it around, it does not take very much more for a carload going to different points than it does for a carload going to one point.

I know that you are tired. I feel that I am just imposing on you.

Mr. McCoy. Not at all; I think what you have said is very interesting. I confess it increases our difficulties, because you differ with some other people, but we want to get all points of view.

Mr. Green. I want to give you the benefit of my experience as much as possible, and we are here to assist you.

Mr. Carlin. Have you any plan by which we can reduce the cost of living?

Mr. Green. I question that very much. I have a little clipping that will show you the conditions long ago. The gentleman asked me something about the "high cost of living," and whether there was any way to get the goods to the consumer cheaper. Of course, you gentlemen here ought to know that as far as we are concerned there is only one person in whom we are interested. The consumer does not know anything about the manufacturer. He knows nothing

at all about the wholesaler in a general way, but he does know about the retailer, and they are the only ones that we want to be interested in, and all our thought is given to what we can do, and the great question before us all to-day is, How can we get to the consumer the stuff that we have to sell, at a price that will compare with the money that they have to pay? But the high cost of living has been a contention for a great many years, and this is a clipping that I got just a couple of days ago:

Voted, That if the Standard for the whole of the Next Quarter, should continue is advanced of one farthing upon Each part in the kitchen, provision yet continuing dear. October 8, 1695.

Voted, That the Standard is allowed the whole of the two columns & sizings & detriments, for balancing the difficulties & extraordinary charges of the extraordinary Charges by reason of the dearness of provisions for some years last past. May 5, 1698.

It has come down to us from all the ages, and we are still fighting the high cost of living, and to sum up just exactly what I said—the thing we find honestly and conscientiously in every part of our country and in all countries, and I tell you men there is no possible way of getting the stuff to the consumer at a less cost under the prevailing conditions to-day from the manufacturer to the jobber, to the retailer, to the consumer.

You take myself, for instance. I made this statement in Kansas the other day: For 10 years I have been running a store of my own; for 20 years I was on the Cleveland market from 2 to 5 o'clock every morning from April to November. Where would you get a hired man and put him in the cooperative store that will do that? What do we get out of it? You take a man who has been in business 30 years, and at the end of 30 years he owns his own home and maybe a house or two and has got a little income; in 30 years in almost any other line he can retire.

Mr. VOLSTEAD. Could not some of the material be sold by the producer to the consumer and cut out some of the cost?

Mr. GREEN. If I knew and could suggest any way or could find any way to get to the consumer the stuff he should have, I would be the first one to inaugurate it. I want to thank you.

Mr. McCOY. Mr. Green, if you want to, I am sure this committee would be glad to have you formulate your ideas about cooperative buying and selling. Mr. Seth Low, who was here yesterday——

Mr. GREEN. I am sorry I did not meet the gentleman.

Mr. McCOY. He was quite enthusiastic in regard to cooperative selling and cooperative buying, and his enthusiasm was based apparently on what he had observed in England and, I believe, in Germany and in other places.

Mr. GREEN. Yes; I have been in Germany, France, and Italy.

Mr. McCOY. In other words, as I stated a few moments ago in more or less a joking way, you can see that this committee and the Congress is confronted with some very grave problems?

Mr. GREEN. I do.

Mr. McCOY. That the interests of different people and different lines of business and in different grades of the same business cross each other in as many varieties of ways—innumerable varieties. What we are aiming to do is to get them all into the same line, and it is almost a superhuman task.

Mr. GREEN. Is there any way of getting these diversified interests together themselves—the representatives from each line; these who are of this different opinion? We can write and talk and hear, but if you sit at a table and you and I can talk across the table, you and I will not take but a little while until we can formulate some plan or idea that will bring out something; and I have thought several times if the men who are far apart on these great economic questions could only sit together, I believe that is the solution.

Mr. McCOY. I have urged that privately with employers of labor a great many times, and I do not see why it could not be done with you in your case, but, of course, on the other side of the whole proposition is the consumer, and you will find amongst consumers a variety of opinions, and how you are going to get them represented except by what you can read in the newspapers is very hard to see, but at any rate I hope the gentlemen who come here will believe that, as I think they will and as I think to be a fact, namely, we are trying to get a solution of that problem that will be fair, and I confess that sometimes I am at a loss to see where a solution is.

Mr. GREEN. No; it is a great problem, and I want to thank you again, and I have always met with the greatest courtesy before the committees in the House here.

Mr. CAREW. You know you are a consumer on your own account?

Mr. GREEN. Yes; I am quite a consumer.

Mr. McCOY. Is there anybody else here who desires to be heard?

Mr. MOOREHEAD. We have a representative of the retail coal dealers here, and there is some legislation that is specifically directed toward that line, and he would like to be heard for a few minutes.

STATEMENT OF MR. PETER BECK, PRESIDENT BECK COAL & LUMBER CO., HARVEY, ILL.

Mr. McCOY. What is your business?

Mr. BECK. I am president of the Beck Coal & Lumber Co., of Harvey, Ill. Originally our business was coal exclusively, but we added lumber to it.

I am also here in behalf of the retail coal dealers of Illinois and Wisconsin. There are 4,000 retail coal dealers, approximately, in those two States, and we have an association, known as the Illinois & Wisconsin Retail Coal Dealers' Association, of which, however, not a large percentage of dealers are members—perhaps 600 in all—and I believe this is the first time that retailers of any kind have been represented over a table of this kind, and certainly not the coal dealers, and we have had continually for years to fight the vilification of the press, who have been hooting at the retail dealer, and all that sort of thing. Our associations have gone together and promulgated correct-weight ordinances in various cities, and wherever there have been dealers who were liable to take advantage of weights we made it impossible for them to do so. So, in Illinois and Wisconsin, so far as those propositions go, we have had a good effect. It is almost a rarity that you can pick up a paper which says anything about the "short-weight coal dealer."

Before coming here I thought it would be of interest to myself to see what spread of margin we had between cost price on cars and delivered price to consumers about 15 years ago. I looked it up, and I found about 15 years ago we had approximately 25 cents a ton more

spread between the cost of coal to us on the car and the cost to consumers delivered than we have to-day. At that time we were paying teamsters $2 per day; now it is $2.75. We bought a good team, I see by our records, for $250; I bought a team two months ago for $500 which was no better. At that time we were paying for hay $8 or $10 a ton; we are now paying $18 to $26; and, consequently, all things have increased, and we are making a far less margin of profit to-day than we have ever made before.

In Chicago—and we are close to Chicago—as in all other large cities, on the hard-coal question, the producing companies maintain their big stock and distributing yards of their own. They practically fix the price, and as far as the retailer is concerned it is too low. They can make nothing out of retail distribution; they make it, if there is anything made—which I am not prepared to say about—in the process of production, but they fix the price by selling at $1.25 per ton more delivered to the consumer than it costs the dealer on cars. That is in hard coal. Every year we keep pretty careful cost accounts. I prepared a little statement for my own information of costs of handling coal this year, and we found it as follows: Interest, 5 cent per ton; salaries, 30 cents per ton; unloading, 8 cents per ton; depreciation, rent, taxes, and supplies, 10 cents per ton; bad accounts, 5 cents per ton; shrinkages and slate, 5 cents per ton; hauling, 50 cents per ton, or a total of $1.13. That, gentlemen, is what it costs us to handle 8,000 tons of coal.

Mr. McCoy. A profit of 12 cents?

Mr. Beck. We had on hard coal 12 cents; on soft coal, not on all, because in summer we sell less. What I mean by "spread" is a dollar between cost on car and delivered to the consumer. Where we take more to the consumer—10 or 15 or 20 tons—we have been selling at a ratio of a dollar, but in the winter time, when we are obliged to store large quantities of coal, we have to meet the demands of the consumer. We have to have that on hand. It is necessary, in order to prepare that coal, to rescreen it. That amounts to considerable labor, and involves also considerable loss in the coal.

Then, there is another feature in soft coal, and that is pretty nearly every car we receive is short on an average of 1½ tons per car. It is loaded in open car. The coal is probably correctly weighed at the mines, in most instances, but a good deal is shaken off by the jarring and pulling of cars, and a lot is stolen in transfer yards.

Mr. McCoy. How many tons average in the car?

Mr. Beck. An average of 1½ tons.

Mr. McCoy. What is the size and capacity of those cars?

Mr. Beck. The car runs from 35 to 50 tons; an average is 42 or 43 tons—more than any other weight. On soft coal, in the winter, when practically all of it has to be delivered from our yards, we get a "spread" of $1.75. It is what we have always got, and there has never been any agreement or price talked of by dealers, but all over Chicago you will see the price dealers charge usually runs $1.75 above the market. Sometimes it is $1.50 and sometimes $2, according to whether a dealer may have too large a quantity of coal on hand or not. Just now, under the weather conditions, we have too large a stock of coal, and we have advertised that on 2-ton lots we will sell at a dollar below these prices in order to move it. I will say this: That the ability of the average consumer to pay cash is

very slight; only about 10 per cent of our customers have taken advantage of that.

In order to properly take care of our trade we make contracts in the summer time. After years of experience we find that certain kinds of coal are consumed—in the East it is practically all anthracite; in the Middle West the larger amount of it is soft coal, but quite a number have to have anthracite. We sell about 2,200 tons of anthracite and from 6,000 to 8,000 tons, according to the weather, the balance being soft coal. In order to be prepared to take care of our trade we have commenced to store coal. We have a storage capacity of 3,000 tons, and with the soft-coal man we make a contract to take one car a day in May, two cars a day in July, and two cars a day in August, according to the amount we handle, and so on through the winter. We take that coal and pay for it. We have that on hand there to sell. If the weather conditions are warm, then we will not sell that coal. If the weather conditions turn suddenly cold, as it did a year ago the first of January, our town would absolutely suffer for coal, unless our stock and that of one or two other dealers carried such a proportion in stock, it could not be gotten. The mines could not produce coal to supply the demand, and the railroads could not haul the coal and get it to the market to meet the demand. So we are therefore obliged to store and maintain a stock of coal for the benefit of our consumers, and that costs money. We can not do otherwise if we want to properly serve the consumer.

If, gentlemen, after we have stored coal like that and bought from certain concerns whose coal we have found very desirable and that the consumer likes and demands, and have that stock of coal on hand, and that very mine operator comes into our town and sells the consumer in car lots a number of carloads, that very coal that we have stocked there, what happens to us? It either puts us clear out of business or increases the cost of doing business so that when we have to take care of the consumer that does not buy that way we have to charge a higher price. This year we have lost money on account of weather conditions, because the tonnage has been 25 per cent less. We can not reduce overhead expenses. We have got to have that and to maintain a certain proportion of tonnage, and so anything that materially reduces the volume of business we are doing increases our operating expenses and increases the expense to the consumer. If those people from whom we have purchased come in there and sell coal direct to the consumer, which they have a perfect right to do—I do not question that one minute—but if, after having sold to us, they sell to the consumer, they put us out of business.

If it were practical at all for coal to be distributed from the mine to the consumer directly, every coal-producing concern in the country would have direct distributing points; but stop and think how impossible that is. Capital involved in such an investment would be enormous and out of the question, and they could not serve the consumer by so doing, because the consumer generally demands a variety of grades, and this one concern would only be handling their own grade.

I have here a sample of the advertising that we, as dealers, run up against. A dealer from Sycamore, Ill., mailed to our office three copies of newspaper advertisements. One of them was sent to

him and two of them were sent to his trade. This advertisement is by the Martin-Howe Coal Co. [reading]:

Guaranteed coal, on time delivery.
You can get Tecumseh, the guaranteed coal. Highest in B. t. u.'s and lowest in ash and moisture of any coal on the market for the money, plus our absolutely prompt and unfailing delivery.

A very good advertisement for the dealer, excellent for the producer, and good coal of fair quality, but one of his customers brings in this [reading]:

Big fight on the price of coal—

Mailed at the same time—

Consumers saving money. When we quoted our low prices direct from the mine to the consumer on our famous Tecumseh coal we stirred up the coal combine. They assailed us in print, calling us "scalpers" and "mail-order shippers," because we sell direct from the mine and save our customers from $10 to $50 per car. We do this by our direct-sales plan, which eliminates all middlemen, dealers, and it hurts them. So they attack us.
Now, are we "scalpers"? Here are the facts.

This advertisement came to another consumer [reading]:

Save jobber's and dealer's profits. Why be at the mercy of local price fixers when you can get the finest soft coal in the world direct from the mine at mine prices? Why take any unknown, wasteful, poor grade that may be "worked off" in your town, when you can come to headquarters and get coal of guaranteed quality at a lower price?
Mine price only $1 per ton and up, according to grade needed. You can order any amount, from one carload up, at present low prices and have it shipped any time you say before September 1. If you don't need a whole car yourself (about 25 tons) get some neighbors to order with you and divide up. This way you get any amount you want, when you want it, at rock-bottom price.

There is absolutely no objection from our standpoint to people such as these, who own mines, shipping the consumer; nor is there any objection to the establishment of a cooperative yard to handle the coal if they want to; but it is unfair, unjust, and beyond all business principle to ask us to go in and buy our coal from these people, our competitors, when they are selling under our very noses, and it should be perfectly just for us to warn some other dealer, maybe a friend of mine or maybe in general, that these people are after our "goat," in order to keep them from behind our backs, where they would stick a knife in us.

And yet we took these very advertisements to our attorney, Mr. M. F. Galligher, of Chicago, and asked if we were liable under the Sherman Act for just making a photographic copy of those advertisements and mailing them to dealers of Illinois and Wisconsin—no remarks, just mailing those advertisements—and he said, "Gentlemen, with the construction that the Department of Justice seems to be putting on it in its present suits you might be liable." We did not do it. It is just and right to meet on an equal ground, face to face, the men who come out and get behind our backs and do that kind of work. The retailer has been asleep. He has been content to sit down in his little surroundings and just look around at just what he sees there, and has not been ready to go out and defend himself before the general public.

The mail-order houses, backed by Wall Street, are reaping immense profits. The lumbermen are getting at the same thing. They were never able to sell us in our district, but the way in which they

quote their customers there is not any way of making an approximate estimate. They never furnish a list, but their methods of advertising are such that they get the consumer.

Mr. FITZHENRY. Were those advertisements printed in the Chicago papers?

Mr. BECK. In the Chicago Tribune.

Mr. FITZHENRY. All three of them?

Mr. BECK. All three of them.

Mr. FITZHENRY. Did you ever submit the matter to the Post Office Department?

Mr. BECK. No; we have not done that.

I refer to bill No. 1, before this committee. Unquestionably the framers of this bill had some excellent reason for putting a particular phrase in it. I do not doubt but what the reason for it is very good, but I do not think it possible for any man, no matter how intelligent, nor how anxious he may be to serve everybody correctly, to see every aspect of every particular line of goods. You have, on the second page of this bill, at the end of section 9——

Mr. MCCOY. What line?

Mr. BECK. Oh, the line? I am commencing on line 6, page 2.

Mr. MCCOY. Excuse me; is that bill No. 1?

Mr. BECK. That is bill No. 1.

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.

Gentlemen, that means that after I have stored my coal for the winter's use, not all of it, but I have given an order to-day to my operator with whom I deal on this particular brand of coal I have been advertising, taking a certain amount in the summer time when the demand is light and storing it, and then I base my order on my winter's requirements. If after I have done this, some 4 or 5 or 25 or 40 or 50 people from our town want that coal and go down there and they say, "Gentlemen, we have our coal there in the hands of Beck Coal & Lumber Co., and it is there for distribution."

But those people reply, "Well, but you will have to sell us, because it is provided under such an act." He can not refuse to sell under that act. It may do that particular consumer some good, but it does other consumers an infinite amount of harm, because it has increased the price to them, if it is continued, $1.50. That is one reason why it is unfair.

Another reason is this: Three years ago the concern called "Harmon Coal Co." was organized in Chicago to do a mail-order business. I know that you gentlemen very well know what the "Hocking Valley" coal is, which comes from the Hocking Valley. It is one of the best bituminous coals in the East, and also one of the most extensively used. W. S. Harmon wrote letters to consumers in Minnesota, Iowa, Wisconsin, and Michigan something similar in effect to this, only a little bit stronger. He called the dealer a whole

lot of worse names than this. Then he said "Break the trust up by buying W. S. H. Hocking." and quoting a price approximately less than a dollar a ton below what that could be had for at the mines. Under the interstate-commerce law it is unlawful and punishable by prison to attempt to find out from a railroad or for a railroad man to give the information as to source of a shipment on the railroad. And immediately the retailers of various cities said "Here is Harmon shipping in Hocking Valley coal" to this town, but it is not that coal. We can tell by the looks of it," and they said "Send in car numbers, etc." We said "It is illegal; we can not trace those cars. We are not permitted to find out." However, we were able from other sources than the railroad to find out, and we found that the bulk of that coal came from Cuba, Ill., from a little mine that produced coal that is not fit for general domestic use, a sort of steam coal.

Mr. McCoy. You could reach that matter through the Post Office Department.

Mr. Beck. We could? We did not attempt it. We wanted originally to find out where he shipped from, but we can not do that any more.

Mr. FitzHenry. What was the trade name of that?

Mr. Beck. "W. S. H. Hocking," the initials of W. S. Harmon.

Mr. FitzHenry. Is that the name that all Hocking coal is sold under?

Mr. Beck. It is sold as "Hocking Valley" coal. The idea was to give the impression that it was Hocking Valley coal.

Mr. FitzHenry. Did the advertisement say so?

Mr. McCoy. Hocking was a well-known trade name for that coal?

Mr. Beck. That is so.

Mr. McCoy. And the impression could not be anything else than that it was Hocking Valley coal?

Mr. Beck. That is it.

Mr. McCoy. The Post Office Department can get at anybody who uses the mails in that way. I assure you they are pretty drastic when they get after them. They are more drastic now than in the past.

Mr. Beck. We found those shipments simply originated at some small mines at Cuba, Ill., and Terre Haute, Ind., and equally low-grade coal, and we then informed all our trade it was not Hocking Valley, but that it was simply Indiana and Illinois coal he was shipping.

Mr. McCoy. I do not want to interrupt you. I just want to ask you if your lawyer advised you that you could not give that information without violating or running the risk of violating the Sherman Act?

Mr. Beck. We did not. We informed the persons who wrote us.

Mr. McCoy. I do not want you to act on what I say, because you are not paying me anything for the advice, but I feel reasonably certain that if you were to inform the trade generally that somebody is selling as "Hocking" coal something that is not Hocking coal it would not be a violation of the Sherman Act.

Mr. Beck. At that time the prosecutions were commenced against the Northwestern Lumber Dealers' Association, and that was the

reason for our lawyer telling us to go carefully on that and we do not know yet what the results are going to be in that case.

Mr. McCoy. They did not go after that lumber association, as I am informed, for telling people that such a practice as you have just testified was going on?

Mr. Beck. Practically the same thing; that is just exactly what they are under prosecution for.

Mr. McCoy. For saying that some dealers in lumber are selling spruce as "pine" or what not?

Mr. Beck. They are saying that, and also saying that some manufacturers in lumber are making a practice of selling the retailer in one town at one price and selling a mail order at another price.

Mr. McCoy. And that is what they are after, and that sort of thing has been held in the southern district that the Reader Lumber Co. being a dealer——

Mr. Beck. I know that.

Mr. McCoy. And now the organization of retail lumber dealers engaging in that practice was held to be an organization in combination in restraint of trade, but if it had confined its activities strictly to giving information about fraudulent practices, such as would be recognized as fraudulent in any court of law, under any circumstances, I feel reasonably certain that giving that information would never be held to be a restraint of trade under the Sherman Act.

Mr. Beck. You are probably right on that, but I think that the other phase of it is no less a proper right.

Mr. McCoy. I do not say it is not. I was only meeting your case of this Harmon Co., which was advertising the sale of this Hocking coal and selling something else.

Mr. Beck. This is the point I was coming to on that: We do not or would not and would not dare to attempt to tell the trade from whom they bought that coal.

Mr. McCoy. No; I presume if you and your organization was to do that very thing under that decision up there you would be held to violate.

Mr. Beck. That is just the point. Here I am buying one coal, I am advertising liberally, and I run a set of moving pictures, free to school children when they are accompanied by adults, and these pictures show a complete trip through the mine, all the process of mining and preparing a particular grade of coal that I am furnishing to my trade, "Pyroline," and they are interesting pictures, about 40 views, and they are furnished by the miner or producer of the coal. That is one of my methods of advertising.

We have handled that coal five or six years, and have worked up a big trade, because it takes well. W. S. Harmon, I do not know whether he tried it with them, but he tried to buy his coal from other reputable producers, and they said, "We will not sell you. You can not have our coal. We are not going to permit you to hock it over the country as a substitute for something else." He was able to get coal from some small operators, producing a grade of coal that they could not easily dispose of.

Mr. McCoy. Was he planning to sell coal under your name "Pyrolite"?

Mr. Beck. Oh, no; he was trying to sell it for "W. S. H. Hocking." There are none of these mail-order houses who can sell coal

unless it is a substitute. Their expense of advertising and everything is so enormous that they can not touch the retailers' methods, without doing some such thing as that.

Mr. McCoy. I just want to suggest that you take the matter up with the Post Office Department. I think you will get a speedy remedy for that.

Mr. Beck. It is possible we could get a speedy remedy, but we could not if some particular coal operator wanted to connive with them and wanted to indulge in that sort of practice, and if the provision you have in this bill goes through he would be compelled to sell to just such fellows as that.

Mr. McCoy. You know what they do in the Post Office Department if they are satisfied that a man is using the mails for deceptive advertising. They issue a "fraud order" against him, and he can not get a single piece of mail, and I have had it under observation in another committee, and it is very effective.

Mr. Beck. We are getting some suggestions, I guess we have not thought of carrying out.

Mr. McCoy. It is the most effective thing I know of to put a man out of business to issue a fraud order against him in the Post Office Department.

Mr. Beck. Mr. DeWoody, of Chicago, has all the advertisements circulated by Harmon. I never got him to take any actions.

Mr. Dyer. Mr. Beck, do you not think if that last part of this section you were reading, which you object to, refusal could be had from selling to such a person as you have mentioned, on the ground they were not a responsible firm, corporation, etc.?

Mr. Beck. They might be financially responsible.

Mr. Dyer. Things enter into that besides financial capacity.

Mr. McCoy. I do not think any man could take the risk of going to jail under the Sherman Act by refusing to sell a man whom he thinks is financially capable.

Mr. Beck. I think if this act goes through he would have to sell him.

Mr. McCoy. A mere matter of cash.

Mr. Beck. I have one customer I will not sell. I have sold him to my sorrow, as he has some ways of doing business I can not stand for. He makes all sorts of complaints and everything else. He accuses me, even if I put overweight on the wagon, and I come back and go to a lot of expense taking the coal out and find it weighs all right; or he may find he is discovered and remove some of the coal and then assert it is short weight. We do not want to sell that customer; we do not want to have anything to do with him. I can not see exactly why a mine operator producing coal should be compelled to sell everybody if the wholesale grocer should not be compelled to sell everybody, or the wholesale shoe dealer, etc., are not also under the same act.

Mr. McCoy. It is looked upon as being a different sort of thing. It is looked upon in the same way that any so-called natural product is looked upon, and that is why it is in there. As you know perfectly well, lots of people claim no private individual has anything to do with the natural products; that they ought to be a Government monopoly. It was with that idea in mind that the framer was led to place such a provision in the bill.

Mr. BECK. It is no matter who produces the coal so far as the retailer is concerned. It would make no difference whatever who produced that coal, whether it is the Government, whether it is an enormous monopoly, or whether they are individual producers, the problem that concerns us is distribution of the coal.

Mr. MCCOY. That accounts for classifying coal in a different classification from that which you put on groceries and other things, because coal is a natural product. I am not justifying it, but I am saying that is the underlying thought.

Mr. BECK. I see that point.

Mr. MCCOY. The same way with iron ore and such things as are in the earth and simply have to be taken out.

Mr. BECK. Gentlemen, I have got to the point where I want to say something, and that is simply this: That a retailer ought to be given the right of publicity, the right to tell the truth, so that when a retail coal man—and the same applies to every other class of trade—prepares himself to take care of the coal-consuming public, or whatever consuming public they may be, in the best possible manner, to have the material right there when they need it and when they want it, delivered just as they want it. And we are obliged to give credit; we can not get out of it. I have tried every possible way. I have advertised that I could cut down office expenses 50 per cent if I could sell for cash. It does not do any good, because the trade has not got the cash at the time that they want the coal. Whenever you inject into a local situation such a thing as shipping in a lot more coal than we are prepared for you increase our cost of doing business, and if you go on you increase the cost to the consumer. In other words, a party of consumers can go and buy a dozen car lots of coal at slightly less price, but very little less, because at any time I am prepared to meet anything of that kind. If anybody wants a carload of coal we do not want to get anything out of it except the teaming. We are willing to take it and deliver it for the sake of the teaming; but it is not even giving us the worth for our teams, so that our teams may be earning a living. Then, take the advantages of tonnage. We get a favorable increase on the cost of doing business on the other customers, and the other customers can not buy for cash and they have to pay the difference. And I claim, therefore, that we are entirely justified in our request to ask the right and permission to give publicity in anything of this kind; that if a mine operator wants to be a retailer, let him be a retailer; let him retail his coal, but he must not expect from the retailer his trade when he is retailing to the consumers' trade. He can not expect it; he has not a right to expect it, and it does not benefit the consumer, but makes him all the worse off in the increased cost of living by so doing, and it is because the retailer has never appeared before the public, because he has permitted all these things to go on in the newspapers, misrepresenting him, and have the consumer generally get the idea that he is to blame for the whole thing, that his condition at present is deplorable.

There are hundreds of country towns where business is growing less every year, and business men are going out of it, moving elsewhere, or, as one mail-order house said in their letter—Montgomery Ward & Co.—that they are going to put the retailer out of business; that if there is not business enough for the retailer, let him be a

farmer or do something else. I think Mr. Moorehead has the original letter.

Last year a very severe cold spell came on us, and there was a terrific dearth of coal all through the Middle West—Illinois, Iowa, Wisconsin, Michigan, and Minnesota. Why? Because the local dealers were, any number of them, afraid to store coal during the summer time. They know there are a lot of those shipments coming into town, and they can never tell what is coming in. The cold weather came; the mines could not produce coal fast enough, and the railroads could not deliver coal fast enough, and there was considerable suffering. We had 2,300 tons on hand, and before the end of the winter, despite all our efforts to get the coal in, our bins were empty.

I thank you for this opportunity to speak. It is certainly a great privilege to a young man who never saw Washington before and who had no thought of coming here to have this opportunity.

Mr. McCoy. To get off onto another branch of the matter, if you are through on that?

Mr. Beck. I am.

Mr. McCoy. Do you see any difference in the situation now from what it was before the law was passed forbidding railroad companies to own and operate mines?

Mr. Beck. I do not believe that I do. Our hard coal is the only thing affected by that, and, of course, we have to pay the price for hard coal. There is this one thing about it that perhaps makes it better for the retailer and consumer, although this committee might look upon it as being inimical to the consumer, and that is the fact that we always know what price that coal is going to be. We know that in the warm season a lot of overproduction is not going to reduce the price and make us face a loss, as we have this year.

Mr. McCoy. As a matter of fact, there has not been any change in the situation so far as ownership is concerned, because the Supreme Court has held that a separate coal company may be authorized and the stock in it may be held by the railroad company.

Mr. Beck. There is one thing I would like to ask in connection with that, and that is a question for the Interstate Commerce Commission to answer: Why, for about an equal distance, we only pay $2.05 freight for coal from West Virginia, and we have to pay $3.25 on hard coal from Pennsylvania?

Mr. McCoy. There are a lot of those questions. I live in one of the Oranges in New Jersey, and I believe we have to pay on coal that goes through—at least more for coal similar to what goes through—to Jersey City than they pay in Jersey City.

Mr. Beck. That is the tidewater arrangement they have on that. I can not say there is any difference, because so far as we know it is just the same ownership of hard coal (anthracite) to-day as it has always been, and we are buying it through the same sources, and we do not know any difference.

Mr. McCoy. Mr. Volstead says he thinks that somebody suggested the parcel post had had some effect on the general situation we have been discussing. Is there anybody here who has any views to express on that point?

Mr. Volstead. Some one intimated that during the hearing.

Mr. BECK. It has been a tremendous benefit to the large mail-order houses, we know.

Mr. VOLSTEAD. He had some figures on the subject. He may not be present here now.

Mr. TRAINOR. I believe the parcel post is a decided benefit to the mail-order houses, and I believe it is a decided benefit to the people, too. I think that part of it is operating all right. I know of a good many articles that come through the parcel post with very satisfactory results, and very economically. I really think that the parcel post is going to supply a useful place, to help to regulate the cost of living and the safe transportation and prompt transportation of a class of goods that it is suitable to carry.

Might I ask if the proceedings of this hearing will be published?

Mr. McCOY. They will be printed.

Mr. TRAINOR. Would it be asking too much for you to send us some copies?

Mr. McCOY. The clerk, Mr. Carlin, will take your name and will be glad to mail them to you.

I do not know whether there is anyone else here who would like to be heard. If so, we will be glad to have them say so.

Mr. MOOREHEAD. I have the original letter from Montgomery Ward & Co., which I would like to read to this committee, as declaring the purpose and aims and object of that mail-order house against the retail merchant. May I read it?

Mr. McCOY. Certainly.

Mr. MOOREHEAD. If you please. [Reading:]

[Established 1872 by A. Montgomery Ward and Geo. R. Thorne. Montgomery Ward & Co., New York, Chicago, Kansas City, Fort Worth, Tex., Portland, Oreg. Originators of the catalogue business.]

CHICAGO, *September 26, 1912.*

H. S. WEBSTER, *Norway, Iowa.*

DEAR SIR: Your letter has been received by Mr. Curtis, and he is very sorry to know that you do not think it is to your advantage to place your orders with a mail-order house.

When this business was established, 43 years ago, it was with the intention of supplying the farmer and the man living in small towns with city merchandise at city prices. At that time the country merchants were charging prohibitive prices and giving merchandise of a poor quality.

We are pleased to say that during recent years the average merchant has changed his policy and is at the present time giving the consumer more and better values for his money. However, it will be impossible at any time for the small dealers to equal our price or our qualities. We buy in large quantities only, and of course are able to get our goods at a reduced price. We give our customers the benefit of this reduction. In several cases we have found that the manufacture of certain articles has become to thoroughly monopolized that we can no longer purchase them at a reasonable price. In cases of this kind, in order to still give our customers a reasonable price, we have taken over the manufacture of some things ourselves and sold them to our customers at a price lower than they could be purchased at wholesale.

You will find this true by actual comparison of our stoves, paints, hardware, and more particularly tools. Our vehicles also are manufactured in our own factory, and are sold to the consumer at just about the average wholesale price.

We think and know that if you will give the matter consideration you will agree with us that a business of this kind, conducted as this one is, is the ultimate solution of the high cost of living, and we do not think that it would mean the ruination of the small towns or any reduction in land values to have trade centralized. On the other hand, we are under the impression that it would be a benefit to all. The retail merchant at the present time belongs to that great class of middlemen which are neither producers or consumers.

We know that the time will come when, except on a very small scale, the middleman will be entirely eliminated. You will naturally ask "What will become of the country merchant?" In reply to this question, we would say that he would become a producer; perhaps be a farmer or engage in some other business that would mean that he could give something to the community instead of taking away from it, as he now is.

We wish that you would go over these matters as we have stated them to you and give it a little more thought. We think that in the end you will agree with us and that you will see that the real solution of the present problem, "high cost of living," comes in the centralization of trade.

We thank you for your courtesy and frank reply to our letter, and sincerely hope that you still may be able to see your way clear to favor us with an occasional order.

Yours, very truly,

MONTGOMERY WARD & Co.

Mr. McCOY. The committee will now stand adjourned until 10.30 o'clock to-morrow morning.

(Whereupon the committee adjourned to meet to-morrow, Friday, February 6, 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.	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 6.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Tuesday, February 3, 1914.

The committee this day met, Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. The committee will hear to-day, from Mr. Levy, of New York.

STATEMENT OF FELIX H. LEVY, ESQ., OF NEW YORK, N. Y.

The CHAIRMAN. Please give your name and address to the reporter, and state anything which you may think proper, showing your familiarity with the Sherman antitrust law.

Mr. LEVY. I am a practicing lawyer in New York City. My address is 37 Liberty Street. I was special assistant to the United States Attorney General, and special counsel to the Department of Justice from March, 1905, to June, 1907, for the special purpose of prosecuting the Tobacco Trust.

In October, 1911, I was counsel for the independents in the tobacco industry in opposing the disintegration decree of the Tobacco Trust in the proceedings before the Circuit Court of the United States

in the city of New York, which resulted in the adoption and approval by the court of that decree, after it had been proposed by the trust and virtually accepted by the then Attorney General. Quite recently, terminating last Friday, I was counsel for one of the great trade associations, the National Wholesale Jewelers' Association, against which the Department of Justice last June began a prosecution under the Sherman antitrust law, and that prosecution was terminated last Friday, January 30, 1914, by the entry of a decree upon the consent of counsel for the two associations that were interested.

From June, 1913, to January, 1914, I was very active in defending that proceeding.

Those are the three more important matters in which I have worked under the Sherman law. And I have had other incidental experience under it.

I am prepared to give you my views, Mr. Chairman and gentlemen of the committee, with reference to the pending bills before your committee. I understand that is the matter which the committee is called upon to consider.

The CHAIRMAN. We will be very glad to hear from you in regard to that, Mr. Levy.

Mr. LEVY. In view of the fact that I shall find it necessary to point out several grounds of objection to many, if not all, of the pending bills now under consideration before your committee, I think it proper to say that, in doing so, I shall make such criticisms from the standpoint of one who regards the Sherman law with favor and who believes that, on the whole, it has been a highly beneficial statute. Moreover, I shall make such criticisms from the standpoint of one who is a follower of the present national administration and an admirer of the present head of the national administration, as a Democrat, and a southern Democrat, although I live in New York City and practice law there.

I have said that I regard the Sherman antitrust law as a statute which has been, on the whole, highly beneficial to this country. In support of this statement, I refer, by way of illustration, to the case of the Northern Securities Co., the powerful holding company which in the year 1904 was disrupted by the order of the Supreme Court. The court based its action solely upon the provisions of the Sherman law. If that law had not been enacted and had not then been in existence, the Northern Securities Co. would in all probability have been permitted to continue in undisturbed existence, and would thereby have served as a basis and an example for a similar union of the remaining railway systems of this country.

The result would soon have followed that all of such systems would have been brought within the grasp and control of a few powerful individuals. The menacing and dangerous situation would then have been presented that less than perhaps a dozen men would have controlled, at their own will and pleasure, the entire railway facilities of this country. It is impossible to make an accurate estimate of the dangers which would have ensued from such a situation, dangers which were averted solely by reason of the existence of the Sherman antitrust law. Similarly, it can not be doubted that if the Sherman law had not stood in the way of the continued and undisturbed existence of the great Standard Oil Trust and the great Tobacco Trust

(although I realize that the dissolutions of those iniquitious combinations were most unsatisfactory), and of other like combinations, ingenuious, resourceful, and powerful individuals would have extended even further the alarming conditions which have so greatly disturbed the economic student within the past few years—conditions which I think may justly be called disturbing because of the reasonable fear which they engendered that substantially all of the important industries of this country and its banking and financial facilities would be placed within the control of a very small number of individuals.

In making the suggestions which I shall make here to-day, I trust I will be pardoned for saying that they are based, not upon merely academic views concerning the operations of the Sherman law, but upon an active professional experience as a lawyer with the practical operations and enforcement of that law.

My professional experience with respect to the Sherman law has been both as a Government prosecutor and in private practice. From March, 1905, to June, 1907, as I have already said, I was a special assistant to the Attorney General, and special counsel to the Department of Justice in the prosecution of the Tobacco Trust. In that capacity I assisted in conducting grand-jury investigations, both in New York City and in Nashville, Tenn., of various phases of the operations of the Tobacco Trust. As a result of those investigations, which were, of course, based upon the Sherman antitrust law, I assisted as one of the Government counsel in the finding, and in the trial, of indictments for violation of the criminal section of the Sherman law, which were found by the grand jury against certain subsidiary companies of the Tobacco Trust and their officers. I will refer to this criminal prosecution later on in connection with my consideration of the bill now before you, which aims, in the popular phrase, to make guilt personal.

In private practice I was, subsequently, in November, 1911 (to which I have also previously referred), of counsel for independents in the tobacco industry in opposing the confirmation by the United States circuit court in New York City of the plan of disintegration of the Tobacco Trust which was proposed by them, and substantially approved by the then attorney general.

Still later, in June, 1913, I was counsel for the National Wholesale Jewelers' Association in the Sherman law proceedings, which were instituted by the Government against it and also against the National Association of Manufacturing Jewelers. This case terminated, as I have already mentioned, last week, on January 30, 1914, by the entry of a decree upon consent of counsel for the defendants.

As a basis for the suggestion which I shall urge that the Sherman law in its present form is a most drastic and efficient statute and, therefore, does not require amendments as to its substantive provisions (and in saying that I do not allude to the suggestions of bills for prohibiting interlocking directorates and the like, because they do not constitute amendments of the Sherman law), I deem it important to point out that, in spite of the "rule of reason" and the claim that the Sherman law was thereby weakened and, as is often said, emasculated, the antitrust statute was found quite drastic enough to meet the very mild situation presented in the Jewelers' case.

These associations are trade associations or boards of trade. The country is full of them. They represent various business houses and various industries, very substantial concerns, and differ from the kinds of concerns that make up the typical trust. We will say there will be a jobbing house in Duluth and another in Minneapolis and in other cities and they will get together and form a national association.

Mr. NELSON. For what purpose?

Mr. LEVY. I will explain. In this case the defendants were the two great national trade associations in the jewelry industry—one the wholesalers and the other the manufacturers. The Government charged that these two associations and their members had come to an understanding whereby retailers would be precluded from buying directly from manufacturers. The wholesalers contended, and it was conceded that the contention had great force, that on account of the large number of articles in the jewelry business the most economical method of distribution was through the wholesaler. The Department of Justice insisted, however, that these claimed economic advantages were immaterial and that the Sherman law forbade any agreements or understandings by which the free flow of interstate commerce was materially and directly restrained, without regard to any benefits which might ensue.

The Government made no claim of wicked or oppressive conduct, such as has notoriously characterized many, if not all, of the great typical trusts like the Standard Oil Trust and the Tobacco Trust.

The Government charged—there were two associations in the jewelry industry, one the National Wholesale Association and the other the Manufacturers' Association, and the Government said those two associations had gotten together in some understanding or agreement to prevent the retailer in the jewelry business from buying directly from the manufacturer. The Government charged that the wholesalers got together in their association, consisting of 172 firms scattered all over the country, firms constituting the Wholesalers' Association—the Government charged that they got together and said, We will notify the Manufacturers' Association that if they sell directly to any retailer in jewelry we, collectively, will not buy from that manufacturer.

That, in substance, was the situation. I have the bill here and the decree, and I will put them in the record if you desire.

It presented a somewhat but not entirely novel situation, in which the Sherman antitrust law was being invoked, not against the typical trust, but against this board of trade arrangement, a very common thing and, as they argue, a very beneficial thing. But I will not dilate upon that.

My point now is, if the committee please, that the Sherman antitrust law was drastic enough, clear enough, efficient enough to reach that mild situation, where these boards of trade were not organized for profit, where there was no intimation of oppressive of immoral business practices, and the Government prevailed in its suit and we consented to the decree. The Government first asked for a grand-jury indictment and later modified that to an equity decree, realizing that the firms involved were of undoubtedly high standing.

My one point is that the Sherman antitrust law was sufficient to meet that mild situation, and, therefore, of course, as we have lately

seen, it is equal to meeting the situation in regard to the telephone company, and the New Haven Railroad, and the Eastman Kodak Co., and the General Electric Co. I mention these specific names, because they have been subjects of attack by the Department of Justice, although I am not sure about the Kodak Co.

As I have already said, the Government made no claim of wicked or oppressive conduct in the Jewelers' case, such as has notoriously characterized many, if not all, the great typical trusts like the Standard Oil and the Tobacco Trust.

Despite all these facts, which show that extremely mild situation—one, in fact, which many claimed was on the whole beneficial and not hurtful to the trade and commerce of this country, and despite the fact that the Sherman law when enacted was aimed entirely at the great typical trusts, and did not have in contemplation those great trade associations, or boards of trade, whose other activities, even the Government conceded to be commercially beneficial—in spite of all those circumstances, the Sherman law, so far from needing strengthening, or more precise and exact definition, was found to be sufficiently clear, drastic, and far-reaching to bring within its prohibitions the comparatively mild situation which was presented in that case.

In trades like the jewelry trade, grocers, and the hardware trade, where the articles dealt in are exceedingly numerous—thousands of different articles, all more or less small, and not of very great value—everybody concedes that the wholesaler is a commercial necessity. He has come to be a central bureau for extending credits and the like, because manufacturers can not deal directly with thousands of retailers.

The result thus reached shows conclusively that the Sherman law, as it stands to-day upon the statute books, interpreted and defined as it has been during the past 24 years by judicial decisions, which decisions are merely the continuations of countless similar decisions upon the subject of restraints of trade and attempts to monopolize, which have been rendered by the State courts of this country from the time of the adoption of our Constitution and by the courts of England for centuries past, under the ancient common law of England, is a statute of drastic and far-reaching effect, with its provisions adequately defined and readily applied. It seems safe to say that in these respects it is a statute far more efficient and easy of application than most of the statutes with which courts are dealing every day. As it stands to-day on the statute books, the Sherman law is more nearly a self-enforcing statute than any important statute that can be mentioned.

I hope I may be pardoned for saying that my experience of 20 years with the Sherman law convinces me that that statement is absolutely correct. I shall even be bold enough to say—I am going to say that in the aspect presented by the President, in his recent message stating the position of the administration toward the business interests of the country, as one in which mutual cooperation is invited, based, however, upon proper observance of the Sherman law—I say that attitude, plus the attitude of the Department of Justice in its rigid requirement that the terms of the Sherman law shall be obeyed, as in the Jewelers' case; I say that with the clarity which the Sherman law now reached, it is difficult to conceive a more

efficient and, as I would call it, self-enforcing statute or a more desirable situation. Certainly, in the Kodak Co., the General Electric Co., the New Haven Railroad, the Jewelers' cases, it has been self-enforcing, because there the defendants surrendered and laid down without contest.

Accordingly, in my judgment and if time permits, I shall to-day try to show it by a detailed exposition of the subject, as to the substantive provisions of the Sherman law, there exists to-day no need whatever of any amendment by way of definition or other similar modification; but, on the contrary, unless the attempt so to define or modify the statute be made with the most scientific and discriminating care, and perhaps even then there will arise the most serious risk that such definitions or modifications will cause fundamental disturbance in the interpretation and construction of the Sherman law, which might readily result in a renewal of the long years of litigation and uncertainty in the interpretation of the law as thus amended, which so lamentably marked the first 10 years of the history of that statute after its enactment in 1890.

If the committee please—and I do not mean to bore the committee; I am here to treat the matter as a lawyer, and I have no other interest in the subject than a lawyer ought to have in a legal subject—I am going to give you a survey of the course of the Sherman law as indicated by three or four prominent decisions.

It is the uniform opinion of those who have carefully studied the subject that no statute was every passed by Congress involving a question of substantive law, which received more thoughtful attention at the hands of profound and capable lawyers in Congress than the antitrust law which was adopted by Congress and became a law on July 2, 1890.

It may be broadly asserted that, with the exception of such parts of the statute as relate to matters of procedure and practice, and with the further exception that the second section of the statute is, in an immaterial sense, an enlargement of the common law, the statute itself amounts to no more than a declaration of the common law upon the subject of restraints of trade.

It is well settled that in the Federal jurisprudence the common law with relation to crimes has no existence. It was on account of this fact and the further fact that prior to the passage of the Sherman antitrust law there was no Federal statute governing the subject; that until the act of July 2, 1890, there was no jurisdiction in the Federal Government to prevent or to punish restraints of trade or unlawful conspiracies and combinations to restrain trade.

In the course of the debates in the Senate which culminated in the passage of the law, Senator Sherman said:

> It does not announce a new principle of law, but applies old and well-recognized principles of the common law to the complicated jurisdiction of our State and Federal Government.

In the course of the same debates Senator Vest, of Missouri, said:

> We have affirmed the old doctrine of the common law in regard to all interstate and international transactions and have clothed the United States courts with authority to enforce that doctrine by injunction. We have put in, also, a grave penalty.

The statement is ventured that all of the prevailing decisions of the United States Supreme Court under that law would have been

decided in the same way in which the Supreme Court has decided them, if the Sherman law, so far as its substantive provisions are concerned, had merely provided in proper phraseology that the existing common law on the subject was declared to be the law of the United States and had provided appropriate penalties.

The whole body of the law of the State of New York up to a few years ago, when a rage for innovation sprang up, was contained in these three lines, which is a clear crystallization of the entire common law on the subject of restraints of trade:

> If two or more persons conspire * * * to commit any act injurious * * * to trade or commerce * * * each of them is guilty of a misdemeanor.

The revisers of the Penal Code of the State of New York, able lawyers of their day, who drew this provision, stated that it was intended to be merely an embodiment of the common law.

My point is this, that those words are really no different in their effect than the Sherman law as it stands to-day. Each of them contained words that have been adjudicated over and over again in thousands of decisions. Under that simple provision of the Penal Code of the State of New York, I could cite to you scores of New York decisions where restraints of trade were checked and punished criminally and civilly under that simple statute just as effectively as under the Sherman law; and the New York statute has been found quite drastic enough to reach the practical situations involving restraints of trade that have come before the criminal courts and the civil courts of the State of New York without any amplification such as has been suggested in the bills now pending before your committee.

I will now proceed to show why it was that in the face of the real simplicity of the Sherman law that the subsequent confusion arose. It arose out of the Knight case. (U. S. *v.* E. C. Knight Co., 156 U. S., 1.)

The first case of importance, in fact, the first case of any description, under the Sherman law, which received the attention of the United States Supreme Court was the case of the United States *v.* E. C. Knight Co., popularly known as the Sugar Trust case. In that case it was charged by the Government that the defendants—

> being in control of a large majority of the manufactories of refined sugar in the United States, had acquired through the purchase of stock in four Philadelphia refineries, such disposition over those manufactories throughout the United States as gave it a practical monopoly of the business.

The court below dismissed the bill, the Circuit Court of Appeals dismissed the bill, and the Supreme Court affirmed the dismissal. It is a most perplexing and confusing decision. The lawyers on this committee appreciate, I am quite sure, that it is a confusing decision. The best view was that it related only to manufacturing; the case was very imperfectly tried; and inasmuch as it related only to manufacturing within the State of Pennsylvania, it seemed to be an intrastate and not an interstate transaction.

The subsequent history of the Sherman law shows that the effect of this decision was most unfortunate. The confusion and the erroneous impressions which were caused by it are best exemplified by the statement contained in a report made to the House of Representatives by Attorney General Harmon on February 8, 1896, in response

to a resolution of the House adopted on January 7, 1896, requesting the Attorney General to report what steps, if any, had been taken by him—

to enforce the law of the United States against the trusts, combinations, and conspiracies in restraint of trade and commerce, and what further legislation, if any, is needed to protect the people against the same.

In this report the Attorney General said:

The act of July 2, 1890, commonly called the Sherman antitrust law, as construed by the Supreme Court—

Thereby evidently referring to the Knight case—

does not apply to the most complete monopolies acquired by unlawful combination of concerns which are naturally competitive, though they in fact control the markets of the entire country, if engaging in interstate commerce be merely one of the incidents of their business, and not its direct and immediate object. *The virtual effect of this is to exclude from the operation of the law, manufacturers and producers of every class, and probably importers also.* * * * The limitation of the present law enables those engaged in such attempts to escape from both State and Federal Governments, the former having no authority over interstate commerce and the latter having authority over nothing else.

The sentence which says, "the virtual effect of this is to exclude from the operation of the law manufacturers and producers of every class, and probably importers also," makes clear that the learned Attorney General misconceived, and it is perhaps proper to say, that he quite naturally misconceived the true scope of the Sherman law as a result of the unfortunate decision in the Knight case.

Putting it in plain English, the Attorney General reported that as a result of the decision in the Knight case the Sherman law did not apply to any industrial combinations at all, and apparently applied only to transportation, because, to use his own language it—

does not apply to the most complete monopolies acquired by unlawful combinations of concerns which are naturally competitive, though they in fact control the markets of the entire country if engaging in interstate commerce be merely one of the incidents of their business, and not its direct and immediate object.

Subsequent decisions of the Supreme Court, notably in the Addyston case, the Traffic cases, the Standard Oil case, the Tobacco case, and many others clearly show that the opinion thus expressed by the Attorney General was erroneous. This circumstance is of importance when it is considered that, as a result of this misconception, which it may be added, was shared by the profession generally, the Sherman law was for a long time deemed to be inapplicable to the many varieties of trusts and other industrial combinations which soon thereafter, and probably because of that decision, began to increase until nearly every branch of trade came under their domination.

It seems safe to assert that no single circumstance was so potent in depriving the Sherman law of the effectiveness which was subsequently imparted to it by later decisions of the Supreme Court as the decision in the Knight case. My point is that the Knight case caused this confusion, and I will show how it was afterwards corrected and the law restored to its drastic state.

In all of the conspicuous cases involving attacks by the Government under the Sherman law against trusts or industrial combinations the Knight case has been cited by the defendants as justifying their contention that the Sherman law is not applicable to such trusts or industrial combinations. Indeed, counsel for defendants in some

of such cases have boldly asserted that the adjudication by the Supreme Court in the Knight case had become a rule of property and that to overrule it would make wrecks of the enterprises inaugurated by the combinations then under attack.

There can be no doubt, however, that beginning with the Addyston case the Supreme Court, in a uniform line of decisions culminating in the Standard Oil and the Tobacco cases, has distinguished the force and application of the Knight case to such an extent as, for all practical purposes, to overrule it.

It is a fact well recognized by expert students of the subject that the misconception which the decision of the Supreme Court in the Knight case caused was responsible in a very high degree for the fact that thereafter the Sherman law remained for many years virtually a "dead letter" upon the statute books. Instead of serving as an effective deterrent to the continuance of monopolistic combinations, as its framers intended it to be, the Sherman law, as thus seemingly devitalized by the Supreme Court in the Knight case served, for several years thereafter and until the misconception caused thereby was by later decisions corrected, rather as high evidence of the impotency of the Federal jurisprudence to cope with the subject at all.

In the Addyston case the court below followed the Knight case and dismissed the bill. The circuit court of appeals reversed, the Supreme Court sustained the reversal and set aside the authority of the Knight case as denying to the Sherman law the power to reach industrial combinations. The court said the Sherman law did have that power.

The decision in the Addyston case thus first corrected the widespread misconception which had theretofore existed with respect to the applicability of the Sherman law to industrial or trade agreements or combinations. It is highly important to note that from the time of the decision in the Addyston case no misconception or doubt any longer existed, or at any rate needed to exist, and that thereafter the decisions of the Federal courts in construing the Sherman law as bearing upon industrial agreements and combinations of the kind which were then and ever since have been so common, moved forward in an unbroken line to the effect that such agreements were within the purview of the Sherman law, and that combinations or agreements such as characterized the Sugar Trust and other like combinations were forbidden by that law.

The check upon the enforcement of the Sherman law which had been placed upon it as a result of the Knight case was thereby removed. Unfortunately, however, in the meantime the Sherman law had for all practical purposes become dormant and impotent, so that the promotion and formation of industrial combinations and trusts proceeded with renewed vigor, and the industries of the country were virtually taken out of independent and competitive ownership and placed under the control of monopolistic combinations.

I repeat the assertion that this result, the evil effects of which are still so manifest, is attributable to the decision in the Knight case more than to any other circumstance.

The CHAIRMAN. Mr. Levy, the committee do not desire to interrupt you in the manner of presenting your argument, but the article

from which you are now reading to the committee seems to be already in print and will be put in the record; and inasmuch as you have told us that you had some criticism to make of such measures as the ones before us, would it discommode you to print in the record the text of the article you are now reading and give us your views on the measures before us?

Mr. LEVY. I realize that this course is taking up time, and I am very anxious to curtail it as much as possible. It would be a little difficult to change my course of presenting the matter, but I am going to do it.

The CHAIRMAN. We are liable to be called over to the House at any moment.

Mr. LEVY. I realize that. I will just allude to it but will not read it, because you have suggested that it be put in the record. I will simply hurry along and refer to the printed document, and pass on then to the decisions in the Oil and Tobacco cases, in which the "rule of reason" was enunciated, and then follow your suggestion, which is a very proper suggestion.

I wish to invite the attention of the committee to the argument which I set out here, to the effect that the "rule of reason," instead of weakening the statute, has strengthened the statute. I can not now elaborate on that, but it is set out fully and adequately in the printed article which will be annexed to my testimony. But I will allude to the fact that since the Tobacco case was decided there have been 8 or 10 decisions by the United States Supreme Court, beginning with April 22, 1912, and extending to June 9, 1913, every one of which lays down the principle of the Sherman law more drastically than before the "rule of reason" was enunciated in the Tobacco case.

All that will appear in this pamphlet that I speak of.

Mr. CARLIN. You do not think, then, that any legislation should be had to affect the rule of reason?

Mr. LEVY. I do not, sir. If I could read to you one single decision of the Supreme Court in a very recent case, in which they laid down the doctrine more vigorously than ever, and then refer back to these jewelers' cases, in which they said a good motive is immaterial; that the fundamental thing that is material is the fact that it is in restraint of trade—you will see that the Sherman law covers all that, even since the rule of reason was invoked. This single citation ought, I think, to appeal to lawyers. This is a decision by the Supreme Court in the Bathtub Trust case. I am afraid I am taking up too much of the time of the committee, but it is the only way I can handle it. I find the committee, perhaps, thinks I am taking up too much time.

The CHAIRMAN. No; we would like to hear that.

Mr. LEVY. This decision is as follows:

The others it is not necessary to review or to quote from, except to say that in the very latest of them the comprehensive and thorough character of the law is demonstrated and its sufficiency to prevent evasions of its policy "by resort to any disguise or subterfuge of form" or the escape of its prohibitions "by any indirection." (U. S. *v.* American Tobacco Co., 221 U. S., 106, 181.) Nor can they be evaded by good motives.

That is going very far.

Mr. CARLIN. What case are you citing from?

Mr. LEVY. I am citing from Standard Sanitary Manufacturing Co. *v.* United States.

Mr. CARLIN. That is the Bathtub case?

Mr. LEVY. That is the Bathtub case (206 U. S., p. 20), decided just about a year ago.

> The law has its own measure of right and wrong, of what it permits or forbids, and the judgment of the courts can not be set up against it in a supposed accommodation of its policy with the good intention of the parties and, it may be, of some good results.

That was written after the rule of reason was invoked, and I say it leaves the law with teeth in it, to use the popular phrase.

Mr. NELSON. What did the Supreme Court intend to do by writing the rule of reason in it?

Mr. LEVY. The primary object in the Tobacco case, in which the Chief Justice laid down the rule of reason, was, as he himself states, to bring within the scope of the Sherman law many of the outlying elements of the combination which otherwise, by a strict construction of the statute, could not be brought into it. It is there stated that unless the statute be read in the light of reason many of the obnoxious features of the assailed combination could not be brought within the prohibitions of the Sherman law, but by looking at it in the light of reason, that would be done. My own view is that every statute on the statute books has to be looked at in the light of reason. All of these statutes, which I will not refer to—all conspicuous statutes—are looked at in the light of reason. And so here I insist upon the proposition that the effect of the rule of reason upon the Sherman law was not to emasculate, not to weaken, not to narrow, but to strengthen and to broaden that law.

Mr. NELSON. In these previous cases was not the question of unreasonableness directly at issue, and did not the courts hold that that was in question?

Mr. LEVY. I do not know what case you refer to where the question of unreasonableness was at issue, unless you mean the two traffic cases. As a matter of fact, the whole doctrine, as Mr. Carlin well knows—I think he said so to-day, if I remember—is all obiter. That is a curious thing about it. I lay down that proposition, that the whole discussion of unreasonableness and reasonableness is purely obiter dictum; wherever it came up it came up as obiter, in every single case, where it came before the courts for decision.

The CHAIRMAN. It was not necessary to have said anything about the rule of reason in the Standard Oil case or any of the rest.

Mr. LEVY. I will say this, as I said in the earlier part of this discussion, that the Chief Justice pointed out that many of the outlying elements of the Tobacco Trust would not have come within the prohibitions of the Sherman law except by invoking the rule of reason.

Mr. NELSON. Do you, in your printed argument, take that up in detail?

Mr. LEVY. Yes, sir.

Mr. NELSON. Then I will not ask you about it.

Mr. LEVY. We proceed from that to a detailed consideration of the pending bills.

Mr. MCCOY. I suggest that we take in right at this point your printed brief.

Mr. LEVY. If that is desired, I have two copies of it here.

(Same appears at end of witness's testimony.)

Mr. NELSON. There are a few questions I would like to ask you before you pass on to the next point.

First, what authority is there for the Attorney General consenting to such dissolutions as in the Tobacco and Oil cases?

Mr. LEVY. There were no consent decrees in the Tobacco and Oil cases.

Mr. NELSON. There was a refusal to bring the appeal, but how about these other cases?

Mr. LEVY. I will name those others in which that took place: The General Electric Co., the Eastman Kodak Co., and perhaps in the Telephone case and in the New Haven case. I have no personal knowledge except in the case in which I was of counsel—the Jewelers' case. In all these cases I think the Attorney General was well within his rights.

Mr. NELSON. What is his authority? Is it the general law?

Mr. LEVY. Let me illustrate briefly by just what was done in the Jewelers' case.

Last June the Department of Justice began a grand-jury inquiry in New York City of this situation in the jewelry industry. The defendants went to the Department of Justice and said: "Do not do that; we are law-abiding people; we are all responsible business houses." They said: "We will do whatever you like; we will stop these practices if you say they are wrong." The Government said: "We will suspend action and see if you are in earnest about it." They were satisfied that they were in earnest about it, and they had negotiations down here with the Department of Justice in Washington. The department said: "We will tell you what we want. You have got to discontinue this practice, that practice, and the other practice." They said: "Very good; we will do that." The Attorney General, in effect, said: "I will draw up a bill in equity, and if you will consent to a decree under that bill the matter is ended." That was done. I think that is within his rights. We could have resisted it if we disagreed with the department's view of the Sherman law.

Mr. NELSON. It gives him authority to determine, as a judge, to what extent they are violating or not violating the law.

Mr. LEVY. Not except with our approval.

Mr. CARLIN. This fact would always be true: After the bill was filed an answer admitting the allegations of the bill would be all that was necessary to bring about a decree without any court proceedings?

Mr. LEVY. Even there, Mr. Carlin, it is a fact that after that bill was filed—I have a copy of it here—I interposed an answer, and then to conform with my agreement, I withdrew the answer and consented to the decree.

Mr. CARLIN. Your answer denied the bill, did it not?

Mr. LEVY. Yes; in part. It was a formal answer in equity. But no harm was done, because we were there to protect our rights. Each association had its own counsel.

Mr. NELSON. The harm would be done to the country, would it not? You folks, of course, would look out for your interests.

Mr. LEVY. I can not see there in that case——

Mr. NELSON (interposing). I am not referring to that specific case.

Mr. LEVY. Yes, sir.

Mr. NELSON. But, generally, what do you say as to the policy of the Department of Justice or the Attorney General consenting to these "consent decrees"?

Mr. LEVY. If I understand the question aright, you mean lest in some future day an Attorney General, misusing his power, might throw away the rights of the people by making some improper bargain, as it were?

Mr. NELSON. And the effect of this decree as to violations that have been taking place without his knowledge.

Mr. LEVY. My answer to that is that such a power is vested in every executive officer, although he might, of course, misuse it. Certainly the Attorney General can do it in other kinds of suits.

Mr. CARLIN. How could he do otherwise, Mr. Levy? Take the case I spoke of. Suppose after filing the bill an answer is filed admitting the allegations of the bill; there would be nothing to do but take the decree.

Mr. LEVY. Pro confesso.

The CHAIRMAN. Under section 4 of the Sherman antitrust law there seems to be ample authority given to the Attorney General to do what he did do. It says:

The several circuit courts of the United States—

The circuit courts are now abolished and the district courts of the United States are substituted for them—

are hereby vested with the 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.

Mr. LEVY. Of course, as I understand the question, Mr. Chairman, it goes beyond that. The question is whether it is safe to intrust him with such power after beginning such proceedings.

The CHAIRMAN. It goes on further and says:

Such proceedings may be had by way of petition setting forth the case and praying that such violations shall be enjoined or otherwise prohibited.

This consent decree is "otherwise prohibiting it."

Mr. LEVY. But I still understand the question to go somewhat further than that; that is, is it safe, and ought there not to be some legislation taking away from him that power to enter into a bargain without suit?

Mr. NELSON. Take this illustration: You were appearing for the independent companies in the tobacco case?

Mr. LEVY. Yes, sir.

Mr. NELSON. There the Attorney General refused to take an appeal?

Mr. LEVY. Yes, sir.

Mr. NELSON. And you earnestly tried to get to the Supreme Court. Now, in a consent decree why could not the Attorney General give the right to come in there that way, and then compromise the case by agreeing to a settlement?

Mr. LEVY. And the argument was pushed further in the tobacco disintegration proceedings. It was there said that the Attorney

General not only had that right, but that he could have even discontinued the action.

I will say to you gentlemen, as lawyers, everyone of us has got that right. When we as lawyers bring a suit for Brown or Jones or Robinson, we have a right to discontinue it whenever we like, such is our control over the proceedings. Therefore you can not take that power from the Attorney General. If it is to be supposed that he would misuse or abuse the power by dishonest bargaining—and when I use that word I am speaking of some remote possibility—if he were to do such a thing it would be no more than any other dishonest attorney might do. I do not know how you are going to prevent it.

Mr. CARLIN. Is not this true, that whether the decree be by consent without proof, upon the mere filing of an answer, or whether it be after proof the Attorney General is the final judge of the character of the decree the Government should take, after he concludes his case, subject, of course, to the approval of the court?

Mr. LEVY. And possibly some supervision by Congress, perhaps; but with respect to this litigation——

Mr. CARLIN (interposing). Congress can not supervise each individual decree.

Mr. LEVY. It could not.

Mr. CARLIN. Therefore, practically speaking, the Attorney General, either in a litigated case or one that is not litigated is the man who is entrusted with the drafting of the decree.

Mr. LEVY. Necessarily, so far as the Government's rights are concerned.

Mr. NELSON. Right there, supposing that in this telephone suit other parties felt themselves seriously aggrieved, insisting that the Attorney General had compromised with a trust; would you not think some way should be devised by which an agrieved person would be able to file a bill and have that reviewed?

Mr. LEVY. There is no such bill before this committee, or any suggestion of that kind.

Mr. NELSON. I know, but we are not limited to the bill?

Mr. LEVY. So I understand.

Mr. NELSON. I want to know whether you would like some such remedy?

Mr. LEVY. I want to say to the committee that I strove strenuously to arrive at some such remedy in the Tobacco disintegration proceedings.

Mr. NELSON. You would like to have that in this bill?

Mr. LEVY. I would like to have done that in that case. Senator Cummins introduced a bill in the Senate giving the independents who joined in that suit the right to appeal, and also directing the Attorney General to appeal. The bill never became a law.

The CHAIRMAN. Did the bill pass the Senate?

Mr. LEVY. It did; but not the House.

Mr. CARLIN. I call your attention to the fact that there is now pending before the Commerce Committee a bill creating an interstate trade commission.

Mr. LEVY. Yes, sir; I have that in my hand now.

Mr. CARLIN. That bill does give to that commission the power to review and supervise a decree before it is entered by the court, but only in the event that the court approves it.

Mr. LEVY. And then only in an advisory way.

Mr. CARLIN. Of course it does not give them final and controlling power over the decree, but it gives them reviewing power to call to the attention of the court the character of decree which would be most helpful.

Mr. LEVY. No different than the Bureau of Corporations has today.

Mr. CARLIN. Oh, yes; the court has no power to refer a decree to the bureau.

Mr. LEVY. The Attorney General referred to it in the Tobacco case and got a report from the Bureau of Corporations on vital and essential parts of that decree and used it.

Mr. CARLIN. That was before a master?

Mr. LEVY. No, sir; that was before the full bench of the circuit court, while the dissolution plan was under consideration. I am going to read that in a moment.

The CHAIRMAN. Did the approval by the bureau embrace a plan of settlement in that case?

Mr. LEVY. It was an approval by one of the officers of the Bureau of Corporations whom the Attorney General called upon for a special investigation and report upon a part of the plan of settlement, as the chairman has called it. We call it a decree of dissolution. The terminology makes no difference.

Mr. NELSON. Are you familiar with the consent decree in the Telephone case?

Mr. LEVY. There has been none. I mean that there has been none announced. They have made certain recommendations that are going to be put in the decree, perhaps—I am not sure of that.

Mr. NELSON. Suppose that is the case?

Mr. LEVY. Yes, sir.

Mr. NELSON. Is it likely that the telephone combine has absolutely surrendered and is no longer violating in any way the Sherman antitrust law as to monopolies or otherwise?

Mr. LEVY. I will answer that in this way: I am informed that they have made concessions, have yielded their position, beyond that which a decree would have driven them to do. That is only hearsay, however.

Mr. NELSON. But would you say that they have now agreed to hereafter conform to the Sherman antitrust law?

Mr. LEVY. That is my understanding. Let me illustrate that by digressing for a moment and referring to the recent occurrence with regard to the Sugar Trust. No doubt all the members of the committee have read of the negotiations for the settlement of the suit against the Sugar Trust, which suit has been pending for a year or two back. They declared a willingness to conform to the wishes of the Government, but in the course of the negotiations, it is said, the Attorney General made certain demands with respect to the proposed dissolution of the Sugar Trust to which the Sugar Trust refused to accede. The result was that the negotiations were abandoned and the suit has been resumed. I cite that as showing that in these cases the department is asking for a full measure of enforcement of that law.

Mr. McCoy. Is not this about the fact with reference to that proposition, that some human being has finally got to decide whether the Government is getting all it is entitled to?

Mr. Levy. I see no escape from that.

Mr. McCoy. You can push it along to the trades commission, and if they do not seem to be doing all right, you can push it along to somebody else, and keep pushing it along, but after all some human interest has to protect the Government?

Mr. Levy. It devolves upon some person to assume that responsibility.

The Chairman. This bill would curtail the opportunity for corruption?

Mr. Nelson. How can you impeach a Government official for the mere misuse of discretion in a lawsuit of that kind?

The Chairman. I say corruption?

Mr. Levy. This is not a question of corruption.

Mr. McCoy. But the court has the final say; the Attorney General says, "This is our decree," but the court can differ with him.

Mr. Levy. The court will not do it.

Mr. McCoy. They can?

Mr. Levy. The court entered the jewelers' decree last week simply on motion of the district attorney, with my consent.

The Chairman. In the Union Pacific Railroad Co. case recently the court accepted the plan of the Attorney General, and, as I understand it, finally adopted it.

Mr. Levy. That was not a consent case, Mr. Chairman, it was litigated.

The Chairman. Yes; but the findings of the opinion—there was some sort of opinion or agreement drawn up by the Attorney General and the various attorneys in that case, was there not?

Mr. Levy. Yes, sir; that is right.

In the Tobacco case Judge Noyes said:

I am largely governed by the views of the Attorney General, who stands here as the spokesman and representative of the Government.

Mr. Nelson. In case he had erred, what would be the fact as to any reparation or penalties as to that concern?

Mr. Levy. The fact is that in the Tobacco Trust case the Attorney General did err radically. And it is well to point to recent history shown by public statements that the present Attorney General is now setting to work to correct these errors. That is in connection with the Tobacco case; the only way to do it in other cases, apparently, if there is a way, is by legislation—directing an appeal, or directing the subsequent Attorney General to appeal, after the time has elapsed. In the Tobacco case that was the purpose of the Cummins bill which passed the Senate and was referred to this committee by the House. That is a different proposition. I confess at the moment I am hardly prepared to discuss it, but that does present an interesting question. As was said a while ago, responsibility must be reposed in some human being. If he misuses the power dishonestly or corruptly, he ought to be and often is punished.

Mr. Carlin. He is punished politically, is he not?

Mr. Levy. He is punished politically, but I dare say it would be a violation of his oath of office, and he would be subject to impeachment.

Mr. NELSON. He could not be impeached on a question of discretion?

Mr. LEVY. Oh, not at all. If it was a matter of discretion and it had been honestly exercised, that would be a different thing. It would have to be corrupt.

I will only say that in these recent consent cases there is no question but that the Department of Justice is asking for the fullest measure of what the Sherman law would give it.

In the Jewelers' case they first asked for a dissolution of the two great jewelry associations. It would have been a dreadful thing to break up these concerns and would have accomplished no good purpose. The department at first insisted upon a dissolution. After reflection they said, "No; we will waive that point."

They were not animated by any malice, nor were they bargaining away the rights of the people. I take it that this entire discussion relates to what might possibly arise in the future.

Before taking up specifically the pending bills now before your committee, I shall allude only in the briefest way to the fact that the Democratic national platform apparently confirms the view that the "rule of reason" constitutes judicial legislation whereby the word "unreasonable" has been written into the statute and the force and efficiency of the statute thereby weakened, thus making amendment necessary. The plank of the platform relating to this subject is as follows:

> We regret that the Sherman antitrust law has received a judicial construction depriving it of much of its efficacy, and we favor the enactment of legislation which will restore to the statute the strength of which it has been deprived by such interpretation.

This statement of the Democratic national platform asserts that the "rule of reason" in the Oil and Tobacco cases weakened the antitrust statute. I submit, however, that when the platform was written the true situation had not as yet been developed, for it was later that the circumstances arose which made it clear that the "rule of reason" had not weakened the Sherman law.

An interesting admission of this fact, and, if I may say so, a strong justification of the claim that the Democratic Party is absolved from observing this plank of its last national platform, is found in the fact that the New York Tribune, a recognized organ of the Republican Party, in an issue of recent date (Jan. 15, 1914), said:

> The Democratic platform, to carry out which the antitrust laws are being drafted, was written before the present situation arose.

Inasmuch as this statement is made by a leading Republican organ, it indicates that no Republican opposition can be based upon the contention that the Democratic Party is compelled to carry out this particular requirement of its platform, because, as the Tribune correctly says, that plank in the platform was written before the present situation arose. The "present situation" which is referred to has been brought about by the fact that since the platform was written in 1912 there have been numerous decisions of the Supreme Court showing that the "rule of reason" has not weakened the Sherman law, and, in addition, numerous important corporations have voluntarily acquiesced in the strict and drastic interpretation placed upon

the Sherman law by the Supreme Court and the Department of Justice, thus showing that no uncertainty exists in this respect, as viewed from the standpoint of those corporations, and also showing that the "rule of reason" has not in fact relaxed or mitigated the drastic character of the Sherman law.

In making the statement that the requirements of the Democratic national platform ought not any longer to be deemed to be controlling by reason of the changed situation which has been pointed out, I limit my remarks in this respect entirely to that part of the platform which has been referred to. As I shall hereafter point out, the changed situation which has been brought about since July, 1912, has not in any way affected the recommendations of the platform with respect to the subjects of holding companies, interlocking directorates, and the like. I will mention this subject more fully a little later.

I will now take up a detailed consideration of the four bills now under consideration before your committee and submit my comments thereon.

Mr. CARLIN. With reference to the bills under discussion, the interstate trade commission bill is not before this committee.

Mr. LEVY. Shall I discuss that?

Mr. CARLIN. No; that is before the Commerce Committee.

The CHAIRMAN. The bill you have before you now is a bill to supplement an act entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890. That is the bill you have before you.

Mr. LEVY. Yes.

The CHAIRMAN. There are three of these bills.

Mr. LEVY. Yes.

The CHAIRMAN. Take up that one first.

Mr. LEVY. Both as to phraseology and as to substance?

Mr. CARLIN. As to substance; the phraseology is only tentative.

Mr. LEVY. Yes. Now, as to substance——

Mr. CARLIN (interposing). Or as to phraseology either.

Mr. LEVY. They are intermingled, Mr. Carlin.

Mr. CARLIN. All right.

Mr. LEVY. The first part of section 9 is criticizable, in my opinion, in respect of the words in the first line of page 2, namely, "for any person." If you carry that subject down to line 5 and take up the verb "injure" you have it reading: "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 with the purpose or intent to thereby injure a competitor to discriminate in price," etc.

That goes way beyond the purpose of the Sherman law. That is not a combination at all.

Mr. CARLIN. That is supplemental, entirely, to the previous act?

Mr. LEVY. Does the committee contemplate that an act of a single person in endeavoring to injure his competitor should be made unlawful? That goes beyond the accepted doctrine of restraints of trade, Mr. Carlin. My language was not well chosen. I said "beyond the Sherman law"; I should have said "beyond the doctrine of restraints of trade."

Mr. FLOYD. That is proposed to supplement the Sherman law?

Mr. LEVY. Yes, sir.

Mr. FLOYD. Section 9. In section 8 of the Sherman law it is said that the word "persons" where used in the act shall relate to corporations?

The CHAIRMAN. Here is the exact language:

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.

Mr. LEVY. I fully understand that, sir; but nevertheless it includes individual persons. It says that the word "person" shall include corporations, and it also includes an individual person. Is it the intention of the committee that the law governing restraints of trade shall be extended so that a natural person, as the law has it, shall be prohibited from discriminating in prices between different purchasers, even with the intent of injuring a competitor? That is the competition that is the very life of trade. The vice of it is when it is done by a combination. Of course, it is an injurious thing if the Standard Oil Co. sells lower in Texas and higher in Arkansas, dependent upon whether they wanted to crush out opposition in Texas and not in Arkansas. But that is a combination. But is it now to be said that one man can not do that as this bill proposes? The Sugar Trust decision in New York, in the One hundred and twenty-first New York Reports, expressly distinguished that. I mean the difference, in this respect, between what a corporation and an individual can lawfully do.

Mr. CARLIN. We are dissolving the corporation now. Suppose they go on and continue the same thing; we want to reach the evil, whether the evil is the result of a combination or otherwise.

Mr. LEVY. Even though represented by the act of an individual?

Mr. CARLIN. Of course if he does these things that are unlawful, whether he is a corporation or an individual would make no difference. That is what the bill would mean.

Mr. LEVY. To my mind—I have just noted it here—the result would be to prevent a single individual, without any element of combination or conspiracy being present, from discriminating in price for the purpose of building up his business. That would never do, if you will permit me to say so.

The CHAIRMAN. You would substitute "corporation or association or combination"?

Mr. LEVY. No, sir, Mr. Chairman; I would get into it appropriate language so as to make it applicable to combinations. I would get back into it the words "restraint of trade." Of course, you gentlemen will think that I am wedded to the present phraseology of the Sherman law, and I am largely. I would get it back into the broad present scope of the present Sherman law. Therefore, I will extend this criticism by the further criticism that everything sought to be covered by this supplemental bill is improper because——

Mr. CARLIN (interposing). Of course this bill goes beyond the Sherman law.

Mr. LEVY (continuing). I will say this, if it goes beyond it, it goes beyond it in respects that are not desirable, I mean as to those things that everybody will agree are innocuous and harmless; that as to those things that are noxious and harmful the Sherman law to-day covers every part of this bill, except the part about res judicata.

Of course, that is a different thing. That is, very probably, good legislation. But this part here is attempting to enlarge the doctrine of restraint of trade in a way that is going to be hurtful and is going to injure the Sherman law itself, because you have set up as section 9 of the Sherman law—as an addition to the Sherman law—a brand new doctrine, one never heard of before, with relation to restraints of trade.

If the fact is that upon the dissolution or breaking up of one of the great combinations one of the elements into which it is resolved shall be a single individual, and he carries with him the power which was held by the combination, and it is thought the individual should be checked, that is a different proposition, but one which experience shows does not happen.

The court of appeals in New York said in the Sugar-Trust case, in One hundred and twenty-first New York Reports, that we need not fear what one individual is going to do, we can take care of him. No individual is going to embark the necessary wealth in such a vast enterprise as the Standard Oil or the Sugar Trust.

So I say, again with deference, that that point would lead to injury and a hurtful result, more specially since everything in that section is now adequately covered by the Sherman law. That is to say, the main thing, discrimination as to price, is fully covered to-day. It came up in the tobacco case, in the Standard Oil case, and in all the others which I now recall.

Mr. CARLIN. Do you think, then, that there is anything in the present statute to regulate the sale of commodities at the same price in different communities?

Mr. LEVY. I say this—that there are plenty of cases that hold that it is an unlawful restraint of trade to do that if it be done as the result of combination or unlawful agreement, but not if it is done by an individual. But I say that the very thing you want to prohibit and prevent here is fully prohibited and prevented by the Sherman law as it stands to-day if you establish the fact that a combination is present, and I take it that that element is a sine qua non in the whole discussion. Of course, I may be wrong. It is news to me, I am frank to say, that the committee aims at an individual. In the wisdom of the committee that may be sound; but I do not agree with it. It is news to me to find that that is aimed at and contemplated, because all the books and experience say that that is not necessary.

I will pass on to the next, if the committee wishes.

The first proviso, on page 2, lines 13 to 18——

The CHAIRMAN. Line 6 is the first proviso.

Mr. LEVY. Yes; I was wrong. That is the third proviso. Lines 13 to 18—I say this with great deference, too—that is obscure, and its purpose and results are very uncertain and doubtful:

> That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in interstate or foreign commerce from selecting their own customers.

Mr. CARLIN. Except as to mining propositions. When it comes to mines, we have a different rule there.

Mr. LEVY. You are getting yourselves on a broad sea there, and that is why, in my argument earlier in the afternoon, I said that the Sherman law, in these previous decisions, is broad enough, and in cases of combinations nobody ever escaped from the Sherman law,

or the common law of England, that tried to do these things and who was prosecuted therefor.

Mr. CARLIN. Did the Sherman law ever require miners to sell their products to any responsible persons that applied to them?

Mr. LEVY. No, sir.

Mr. CARLIN. This bill does.

Mr. LEVY. That does not relate to the doctrine of restraints of trade. That is another proposition. In this again, Congress is embarking not only on a broad sea but a different sea. I, frankly, am not prepared to discuss it, but I will say that it is not a part of the Sherman law discussion.

I will pass on to the next.

Section 10, pages 2 and 3, lines 19 to 25, and so forth.

I contend, if that is analyzed and if it is aimed at a combination, which apparently it is not, it is already covered by the Sherman law; but if it is aimed at an individual, this section 10, it controverts a host of decisions which approve exclusive selling agencies if no element of combination in restraint of trade is present.

I cite as an illustration Knox hats and Dunlap hats. As I read that section, the results will be that if Dunlap or Knox or somebody else wishes to make a retail merchant his exclusive selling agent, it would be deemed unlawful. The bill reads:

> 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 the goods, wares, or merchandise of a competitor or competitors.

I take it, and the law always has been, that, for example, Knox, the hatter, if he is an individual and not a combination, has that right and ought to have that right. Why should he not? What harm does it do? Why can not Knox, as an individual, say to the retailer, "I will give you my goods and you can sell them, providing you will be my exclusive selling agent, and will not sell the hats of my competitor, Dunlap; I do not want to help out his business by allowing him to put his hats up for sale alongside of mine." I say it is all right for an individual to do that. It was a different matter for a trust, like the Tobacco Co., to say to the jobber, "You can have our goods only on condition that you do not deal in the goods of any independent manufacturer." That was wrong, because they had gained a power there by combination which gave them an undue and unfair advantage over the individual competitor, and if left unchecked would have resulted, necessarily, in the crushing of all of those competitors. But this is different as to an individual.

Mr. FLOYD. You think this is right in the case of the Tobacco Trust, but it would be wrong as to Knox, because the Tobacco Trust is a combination.

Mr. LEVY. If Knox is an individual—that is, a natural person—I say that the law does not prohibit it and ought not to prohibit it, but if there is a Knox hat company, and it is a combination in restraint of trade, then the law ought to forbid that, and the Sherman law does forbid that. This amendment does nothing new except what might be economically hurtful, if it is aimed at an individual.

Mr. VOLSTEAD. Would not that apply to a corporation?

Mr. LEVY. It should apply to a corporation if the element of combination was present.

Mr. VOLSTEAD. Assume that the United States Steel Co. is not a combination; would it be proper to apply it in that case?

Mr. LEVY. If it did not have the element of unlawful combination present it ought not to be applied to it. Of course there my argument is being pushed to its extreme, and properly so, because there we would have a combination of vast power. Suppose some persons should organize a little grocery company—a corporation, but not an unlawful combination—it would simply be good business for it to discriminate in prices for special reasons, and it ought to have the right to do that, and the law does not forbid it. And it would be, I say, an unnecessarily hurtful thing if it did forbid it.

Mr. CARLIN. You seem to overlook one fact, namely, that you tie the hands of the merchant by keeping him from going into other lines of business by that contract.

Mr. LEVY. You mean the person who receives the goods?

Mr. CARLIN. The seller of the goods, the retail merchant, has his hands tied by that character of agreement.

Mr. LEVY. An exclusive selling agency is usually a privilege, if it does not emanate from a combination which forces it upon him.

Mr. CARLIN. Whether it emanates from a combination, a corporation, or a person, this bill bespeaks it as an evil; it says a contract of that sort shall be deemed, hereafter, in restraint of trade.

Mr. LEVY. If it is meant to reach an individual doing this thing, I would simply say that the courts hesitate—not on economic grounds, but on legal grounds—I would say that the law as it stands to-day covers all it should cover on that proposition, namely, combination.

In so far as it includes corporations that in themselves are combinations, the principle is sound, but that is already in the Sherman law.

Mr. CARLIN. If they are not in those combinations you think that ought not be prohibited?

Mr. LEVY. It ought not.

Mr. VOLSTEAD. In your judgment if it is a combination in restraint of trade, then this section does not add anything to the Sherman Act?

Mr. LEVY. It does not. Permit me to say one word on that. It would not only not add anything, but would tend to obscure it, because it might be that ingenious lawyers might interpret it to have in some way changed that law.

Mr. CARLIN. There is nothing in the Sherman law that prohibits that character of contract being made by anybody.

Mr. LEVY. I do not understand you.

Mr. CARLIN. I say there is nothing in the Sherman law that prohibits that thing prohibited in this section from being done.

Mr. LEVY. Oh, yes; there is.

Mr. CARLIN. Will you point it out?

(Mr. LEVY. I will point it out. Let me make the point clear. You say there is nothing in the Sherman law that prohibits a combination from doing that thing?

Mr. CARLIN. Oh, no; that prohibits this character of contracts being made which we prohibit in this section. There is something

in the Sherman law prohibiting combinations in restraint of trade, but we are prohibiting certain contracts from being made, whether made by a combination in the form of a trust, or whether made by an individual or a corporation. This provision, if we adopt it, means that that character of contract can not be made.

Mr. LEVY. You mean even on the part of a natural person?

Mr. CARLIN. Yes; by anybody.

Mr. LEVY. I fully concede that the Sherman law does not cover that phase of it. I say it covers everything but the prohibition against the natural person or individual.

Mr. McCOY. Your point is that in the Standard Oil Co. case and in the Tobacco case this sort of practice indulged in by those companies was considered to be one of the things as showing that they were illegal?

Mr. LEVY. Yes, sir.

Mr. CARLIN. That was simply one of the elements of proof?

Mr. McCOY. It was one of the elements of proof, and therefore it was not necessary to put it in here as one of the circumstances, because it is already one of the things that will be taken into consideration.

Mr. LEVY. Precisely right, unless the committee intends to enlarge that power and prohibit that practice on the part of individuals.

Mr. CARLIN. Or on the part of the corporations.

Mr. LEVY. Not only that—pardon me—if you mean to bring into that that natural persons can not do this thing, this act is necessary.

Mr. CARLIN. Suppose you meant to bring in a corporation that was not in the form of a trust?

Mr. LEVY. Yes, sir; it would undoubtedly do that.

Mr. CARLIN. So that it goes beyond an individual?

Mr. LEVY. Yes, sir; I take it that you mean a corporation of the kind I have instanced, namely, a corporation composed of different members of a family, or something of that sort; that that is not a corporation in the form of a trust; it is not a combination.

Mr. CARLIN. There are thousands of corporations that are not combinations in the form of trusts.

Mr. LEVY. Yes, sir.

Mr. CARLIN. Large ones as well as small ones?

Mr. LEVY. Yes, sir.

Mr. CARLIN. Now, then, this would apply to them?

Mr. FLOYD. Now, then, Mr. Levy, I want to ask you a question. This provision relates to section 2 of the Sherman Act. Section 2 reads:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by fine not exceeding $5,000 or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Now, as I understand that prohibition, it is against individual persons.

Mr. LEVY. Your point is that this new section would make that apply to individuals?

Mr. FLOYD. I am speaking of the old section.

Mr. LEVY. Oh, no.

Mr. FLOYD. The section reads: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize" would be a violation of section 2 of the Sherman Act, for some individual with sufficient money to monopolize or attempt to monopolize any line of industry.

Mr. LEVY. Not if he did the things you name in this section 10; that would not be an attempt to monopolize.

Mr. FLOYD. It would not be? Suppose a man had enough money as an individual to buy individually and monopolize a certain line of industry, would he not be guilty of a violation of the law under section 2 of the Sherman Act?

Mr. LEVY. On the contrary, the decisions say exactly the reverse. In the One hundred and twenty-first New York, in the sugar-refining case, the court says the exact opposite; it says that an individual may do these things and not be guilty of a restraint of trade.

Mr. FLOYD. Construing the Sherman law?

Mr. LEVY. No; construing the common law.

Mr. FLOYD. Construing the common law; but I am asking you about this language: "Every person who shall monopolize, or attempt to monopolize," shall be guilty, or "who shall combine or conspire with any other person or persons." That is a different state of facts.

Mr. LEVY. That does not include, sir, the case of a natural person "fixing a price," or the conditions named in this new section 10. That is my answer.

Mr. CARLIN. You think we go too far?

Mr. LEVY. Yes, sir. That is my contention.

I now proceed to section 11. Section 11 says: "That nothing contained in section 9 or section 10 hereof shall be taken or held to limit or in any way curtail the meaning and effect of the provisions of section 2 of this act."

The question would arise, Is it to curtail the meaning and effect of the provisions of section 1 of this act? That is not a very serious criticism, but it is worth pointing out, and perhaps I had better pass on. It is not needful for me to discuss that. I do not urge any of these things controversially, but by way of fair criticism.

Mr. CARLIN. I understand.

Mr. LEVY. In section 12 there is something I think needs more consideration. I think in general it is useful legislation, but it presents difficulties.

Now, as to the language of it. I do not know whether I ought to take up the time of the committee as to mere phraseology, but the phraseology is defective.

The CHAIRMAN. We will be glad to hear you on it.

Mr. LEVY. Shall I speak about the phraseology?

The CHAIRMAN. We will be very glad to hear you.

Mr. LEVY. It now reads, beginning in line 17: "The existence of such illegal contracts"—

Now, I am going to complete the sentence and leave out other words. I will repeat:

"The existence of such illegal contracts shall (line 20) constitute (line 21) conclusive evidence of the same facts."

It seems to me that the sentence reads wrong. The sentence ought to be, "A judgment obtained in that action," etc. I will read it again in that form:

"That a judgment obtained in such a suit shall constitute the conclusive evidence."

I also think the latter part should read: "It shall constitute res judicata."

The phraseology, I think, should be changed. In a practical sense, I think there is some danger in that provision. I have in mind that a judgment of that sort would be entered in a contested case and just before the expiration of the enlarged period of limitation a private suit would be started and that judgment be invoked as res judicata. The conditions may then be entirely different. For instance, the Elecetric Co. case—I instance that because it is a very representative case of a successful commercial enterprise which was enjoined and declared an illegal combination a few years ago—a dealer suing it for damages on facts happening yesterday or last week, and invoking the decision as res judicata, which was decided on facts which arose years ago and which may have been abandoned. To my mind that suggests dangerous possibilities, which I think could be avoided by changing the whole scheme and giving private individuals a right to intervene. That is to say, that during the pendency of that action let a private party come in and intervene with the right to prove his damages and recover judgment for such damages, conditioned on the judgment in the case going against the defendant to the effect that it is an unlawful combination.

Mr. CARLIN. Then you would require him to suspend his action pending the outcome of the Government suit?

Mr. LEVY. Yes.

Mr. CARLIN. Would you do that here?

Mr. LEVY. You wait until the Government suit is disposed of.

Mr. CARLIN. We just require him to wait until the Government suit is concluded, or permit him to do so if he wants to do so. His rights under the Sherman law still exist; he can sue, if he wants to.

Mr. LEVY. Suppose he brings his suit to-day for things that happened years ago, and invokes, as res judicata, a judgment entered three years ago; then the defendants come into court and show it is no longer an unlawful combination; would it be fair and just to that defendant to say, "You are conclusively bound by that judgment of three years ago, although we know you are reformed," and the injury done to that man was the result of proper competition?

Mr. CARLIN. You would not take away from him his rights under the Sherman law, would you? Would you deprive the individual of the rights he has under the Sherman law?

Mr. LEVY. No.

Mr. CARLIN. He has a right to sue for damages?

Mr. MCCOY. Your point is that his rights have accrued subsequent to the doing of the wrongful acts?

Mr. LEVY. Correct.

Mr. MCCOY. And that the rights which he thinks he has are based entirely on a new state of facts, and if he has a remedy under the Sherman law he would still have it and would not have the benefit of the decree based upon its previous acts?

Mr. LEVY. Exactly.

Mr. CARLIN. Your contention is he ought not to have the benefit of it?

Mr. LEVY. I say it is a dangerous thing.

Mr. CARLIN. He does have it, and you say he ought not to have it?

Mr. LEVY. If he is to have it he ought to have the right to intervene, to come into the main action, and stand by until the Government gets through, and take his damages if the Government wins.

Mr. FLOYD. If you will pardon a suggestion from me right there, it never occurred to me that anyone whose cause of action originated after the decree would have that right. This is intended to benefit those whose cause of action occurs previous to the rendition of the decree and covers the period that was involved in litigation previous to the rendition of the decree; and for that reason we should extend the statute of limitations in order that the party may wait. But this is drafted with the idea that the cause of action originated from practices of the corporation previous to the time that the decree was obtained.

Mr. LEVY. The bill does not say so.

Mr. CARLIN. It does if you will read section 13 in connection with it. You see we suspend there the statute of limitations.

Mr. LEVY. Mr. Carlin, that does not limit the right of the plaintiff in the later suit, because you enlarge the statute of limitations.

Mr. FLOYD. That would be implied.

Mr. LEVY. That would be a doubtful implication, to my mind.

Mr. FLOYD. But it never occurred to me, as a lawyer, that anybody whose cause of action arose after the rendition of this suit could rely upon a decree rendered to show what is still an unlawful combination or practice.

Mr. CARLIN. Do you think that we ought to say that that section only applies to causes of action which arose prior to the decree?

Mr. LEVY. Yes, sir.

Mr. FLOYD. If you will pardon me, it says that in these express terms, on page 4, lines 7 and 8. It says:

> 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 7 of said act, of under section 13 of this act, against any defendent in a suit wherein a decree or judgment has been obtained as aforesaid.

Mr. LEVY. No, sir. Pardon me. If you will read the whole of that sentence I do not think it refers back at all. The whole of that sentence is this:

> 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 2, 1890, and who at the time or previous to the institution of any such suit by the United States aforesaid, has a cause of action under section 7 of said act, or under section 13 of this act, against any defendant in a suit wherein a decree or judgment has been obtained as aforesaid, the statutes of limitation shall be enlarged.

That does not retroact. That does not correct the point I have mentioned with regard to the previous sentence. That merely enlarges the statute of limitations as to any occurrences prior to the beginning of the suit. The same words ought to be used in the previous sentence.

Of course my point is plain. I do not know whether I ought to amplify it. I repeat, that in my judgment that section is open to criticism.

Mr. FLOYD. Let me ask you further on that; you say it does not apply to the previous occurrences?

Mr. LEVY. I do not think so.

Mr. FLOYD. If a party has a cause of action previous to the suit or at the time of the commencement of the suit and he was not excepted from the provisions, why, then, you say he could not get the advantage of this decree if it were rendered, beyond the period of limitations.

Mr. LEVY. Oh, he is not excepted from it; I do not claim that.

Mr. CARLIN. Then another fact is it must be between the same parties. If a decree is entered and dissolution takes place, different parties are then operating and he would not have the same parties in litigation; it would be a suit as between different parties entirely.

Mr. LEVY. He could reach them all.

Mr. CARLIN. We only give him the benefit of this matter from the suit as between the same parties.

Mr. LEVY. I think that it does not say so.

Mr. CARLIN. Therefore, your suggestion creates an impossibility, because it involves different parties.

Mr. LEVY. No; even if it is the same party; take again the Kodak case——

Mr. CARLIN (interposing). I am assuming that the decree is one of dissolution.

Mr. LEVY. The case against the Electric Co. was a mere matter of injunction; the case against the Jewelers Associations was not a dissolution, nor the case against the Electric Co.; it was only an injunction. The Du Pont Powder Co., I am not sure about—I think that was a dissolution. The subject is not very clear, but I think intervention would be the best course.

The CHAIRMAN. How far did the injunction relieve in the Kodak case?

Mr. LEVY. I can answer better in the Electric case.

The CHAIRMAN. How far did it go?

Mr. LEVY. Certain practices were enjoined.

The CHAIRMAN. They enjoined the restraint of trade?

Mr. LEVY. Yes, sir; it was a mere injunction, as I recall it.

Mr. CARLIN. Refer to lines 19 and 20 on page 3:

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.

That is what that means when the parties are the same.

Mr. LEVY. I say all of them. They are the same.

Mr. CARLIN. Then you admit, so far as the dissolution is concerned, there is nothing in your point with reference to dissolution?

Mr. LEVY. It is different, Mr. Carlin. That is right. I do not say the objection is cured, but it is a different situation.

Mr. CARLIN. You say you admit it, so far as that is concerned?

Mr. LEVY. Probably.

Mr. McCOY. I do not understand that to be the meaning. Suppose the Government sues the Standard Oil Co.; to the extent that judg-

ment would be res judicata against the Standard Oil Co. it may be used as evidence against somebody else?

Mr. LEVY. By somebody else.

Mr. MCCOY. Or by somebody else. Now, it makes no difference if somebody else is a different body from the Government. It says "to the same extent." In other words, to the extent that it does create an estoppel against the Standard Oil Co. and the Government in that action it can be used; in other words, as to those matters which are res judicata.

Mr. LEVY. I think Mr. Carlin's point is this——

Mr. CARLIN (interposing). I make no such contention as Mr. McCoy does.

Mr. MCCOY. Let us see to what extent the judgment is res judicata. It is res judicata as to those things given in evidence on material points. Is that so?

Mr. LEVY. As to those things which were litigated or should have been litigated and as between the same parties.

Mr. MCCOY. As between those parties?

Mr. LEVY. As between the parties to the suit. But you gentlemen are going further.

Mr. MCCOY. I am arguing on your side of the proposition. What I want to say is this: That lines 20 and 21 here mean that a judgment is evidence of certain facts between the parties to the suit. Now, what this means, as I understood it when I read it, was to the same extent it is evidence in a suit between different parties. Otherwise the section does not mean anything.

Mr. LEVY. That is correct.

Mr. MCCOY. Because we are endeavoring to give the benefit of a finding in a suit by Smith against Jones to Brown in his suit against Jones.

Mr. LEVY. As I take it, Mr. Carlin's point, if you will permit me to state it, is that where the Government had sued A and gotten a judgment and thereafter X, a private person, sues the defendant A and seeks to make the judgment res judicata, Mr. Carlin's point is that in a dissolution case A will no longer exist and it will not be applicable to such a case.

Mr. MCCOY. Now you are coming to an entirely different point. A corporation never can so dissolve that you can not have a remedy against it for a wrong.

Mr. LEVY. I have had that in mind, too. Even though you dissolve a corporation the remedy against it will survive.

Mr. MCCOY. Certainly. The Government can not wipe out a corporation and thereby wipe out the rights that people have against the corporation.

Mr. CARLIN. Suppose you destroy the assets?

Mr. MCCOY. That is a practical consideration, but as a legal consideration a third person can always proceed against a corporation; he still has his cause of action.

Mr. CARLIN. But he could not use his judgment.

Mr. LEVY. I will point out a further objection on page 4, line 1, namely, these two words, "or involving."

A little reflection would show that is dangerous phrase, I should think. I doubt whether it is wise that a judgment should be res judicata in other proceedings brought under the provisions of the

Sherman law, but you go even further and say, "In any other proceeding involving the provisions of this act." It is pretty hard to say how far that may go. Again I have no specific danger in mind, but I do think that is very dangerous.

Mr. CARLIN. You say there are a number of new provisions here, and the act specifically referred to would not be sufficient to cover the newer provisions which we are adding unless we do that.

Mr. LEVY. My objection is to more than simply the words "or involving;" it is too vague and indefinite for practical purposes. The Sherman law might come in merely collaterally, and it would even then be res judicata under this bill.

In line 8, page 4, the word "of" is omitted. I do not know whether you want criticisms like that or not. In line 12 the word "obtained" should be "rendered."

At the end of that paragraph I have got here "How about appeal?" You have enlarged the time and provided that the statute 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.

That is a new provision in the law. That has not often been done. I do not know that it has ever been done. I offer the suggestion, How long would it be suspended in case of an appeal?

Mr. CARLIN. It does not affect that at all.

Mr. MCCOY. It simply enables the private defendants to go on and appeal as soon as the Government got judgment.

Mr. LEVY. That is right. He would wear out the statute of limitations if you put that in there.

Mr. FLOYD. His judgment would come after he had used this evidence some time, and the appeal in his case would be the same.

Mr. LEVY. Would you not want the statute of limitations suspended until the final judgment is passed upon on appeal, if an appeal has been taken? In other words, would not you want the words "final judgment" to be used in a colloquial or lay sense; that is, the final determination of that suit?

Mr. CARLIN. I think that is the intention of it.

Mr. LEVY. In our New York decisions the final judgment would be the judgment of the court of appeals. You would not have it extended during the time of the appeal from that judgment?

Mr. CARLIN. Otherwise the benefits of the section would be useless.

Mr. LEVY. Your language does not make that so.

Mr. CARLIN. That is the effect of it. If there happens to be an appeal in these cases it involves the decree itself.

Mr. FLOYD. It says "until after the date of the final decree or judgment in such case"—line 16—"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 court."

Mr. CARLIN. You could not give the man the benefit of it otherwise. There must be a finality. The decree must be final if it is worth anything to him at all.

Mr. LEVY. What is the intention of it—that the "final judgment" here means judgment entered on the appeal or judgment entered in the court below?

Mr. FLOYD. Final judgment; whatever is the final judgment. Until it is appealed from the judgment of the lower court would be the

final judgment. If it is appealed from later in the higher court, it would be the judgment in the higher court.

Mr. LEVY. I offer this suggestion: Under our procedure in the State of New York the question would arise whether that did not mean final decree in the court below.

Mr. MCCOY. I do not think so. For instance, in this case, a man, after his complaint is dismissed in New York, has still a year to bring another action. Now, then, suppose he appeals from the dismissal and goes to the appellate division, and goes to the court of appeals, and the judgment dismissing the complaint is affirmed, they have held that he then has a year within which to begin another action.

Mr. CARLIN. There is no final decree in the court below until that appeal is settled, or else it becomes final where there is a failure to take appeal.

Mr. LEVY. Let me remind you that there is both an interlocutory decree and a final decree of a court of equity. The latter is a final decree, although it is a decree of the lower court. I merely offer the suggestion that this provision should apply after the right of appeal has been exhausted, and there be a real finality to the proceeding.

Mr. MCCOY. Here is what would settle that, it seems to me, Mr. Levy: In line 12 it says, "The statutes of limitations applicable to such cases shall be suspended during the pendency of such suit."

A suit is pending as long as the right of appeal remains open.

Mr. LEVY. That may be. I think there is something in that.

Mr. MCCOY. Even though the complaint may have been dismissed.

Mr. LEVY. That may be; though it would still leave open the question whether "final decree" was used as applying to the degree of the court below or the decree entered after an appeal.

With respect to section 13, I would say broadly now, looking at it frankly but with a somewhat critical eye, for the committee wishes me to give it the benefit of critical suggestions and not fault finding suggestions, that that is rather dangerous, as giving power to individuals which could be readily misused; for certainly within the last few years the Department of Justice has stood ready enough and willing enough to set the powerful machinery of the Department of Justice in motion, as was evidenced in the jewelers' case.

Mr. CARLIN. The criticism we have had with reference to that section is that it does not go far enough.

Mr. LEVY. Not giving the individual sufficient rights?

Mr. CARLIN. That is to say, it has been contended by some that we ought to give the individual the same right to sue for an injunction that the Government enjoys.

Mr. LEVY. I do not know whether you gentlemen are familiar in your practice with the "strike" suits that are often brought in New York by private parties.

Mr. CARLIN. We have attempted to reach that by requiring a bond as a preliminary to injunctive relief.

Mr. LEVY. Mr. McCoy knows recently in New York there was a very severe stricture by the Supreme Court against a person in Wall Street for beginning such a strike suit.

Mr. CARLIN. That is a thing we want to dwell upon, because I think that is what was in the mind of the committee in drafting this

section, that if a suit was filed for injunction a temporary restraining order could be had in order that no damage should come pending suit.

Mr. LEVY. That is true.

Mr. CARLIN. It is contended that if there was immediate necessity for the granting of a restraining order, and it could be shown by the bill to the satisfaction of the court that it ought to be granted, the court ought to have the power to grant it; but in that case he shall require a bond of the party.

Mr. LEVY. Under our practice in New York we have to give a bond always. If the bond was made big enough I would perhaps withdraw the objection and say it is all right.

Mr. CARLIN. Of course we could not say in the statute just how much the bond should be in each case. That depends on each individual case, and we have left it to the courts.

Mr. LEVY. If that discretion is properly exercised by the court it would perhaps furnish a practical correction and perhaps it would be all right, although I am frank to say that I wonder at Mr. Carlin's statement that the criticism has been made that the power here sought to be given is not broad enough; because, based on my own experience, I do not know where injury has happened in this respect from the law in its present state.

Mr. CARLIN. The suggestion has been made to the committee that we ought to give to the individual power not only to sue for dissolution, but he should have the right to implead the United States in his suit.

Mr. LEVY. In this administration notably, even more than in preceding administrations, the Government has stood ready in proper cases to put at the service of individuals the machinery of the Department of Justice under the Sherman law to prevent such things.

Mr. CARLIN. Then you would not favor giving the individual the right to bring a dissolution suit and implead the Government in that suit?

Mr. LEVY. I certainly would not. I think it entirely unnecessary.

Mr. CARLIN. Nor would you give him the right to enjoin or restrain a man from interfering with his business?

Mr. LEVY. Not under the Sherman law, because it is unnecessary.

Mr. CARLIN. Assuming it is unnecessary, what is your objection to giving the individual that right if a case arises in which the authorities would not act?

Mr. LEVY. I would summarize my objection by citing the case of "strike" suits. I use that phrase in the interest of brevity.

Mr. CARLIN. Under that provision would that character of suits be possible, where there is a bond required?

Mr. LEVY. If a man sues a great combination like the Sugar Trust, no judge could exact from him a sufficient bond to cover the damages that might result from such a suit. The bond would have to be $25,000,000, or some such figure, and no individual would be able to furnish a bond for that sum of money.

Mr. CARLIN. The bond would not be exacted unless an immediate restraining order would be asked.

Mr. LEVY. I realize that.

Mr. CARLIN. There is no bond unless he goes on with his suit.

Mr. LEVY. Suppose he asks for a temporary restraining order, the court says, "You must give a bond." He says, "How much?" The court says, "This company is worth $25,000,000; if you stop it from doing business you will do it damage to the extent, say, of $5,000,000; so you must give a bond for $5,000,000." He can not do it. On the other hand, if the court says, "Give a bond for $10,000," which a man could do, it would be no protection to the defendant. The court could not exact a sufficient bond, because it would necessarily be too big; no individual could give a bond big enough to meet the exigencies of such a situation.

Mr. MCCOY. Your objection would lie against ever giving an individual a right to in any manner get an injunction?

Mr. LEVY. Yes, sir; I think so, because it would be both unnecessary and dangerous.

Mr. MCCOY. But you do not object to granting injunctions pendente lite, on giving proper bond—I mean in the average case?

Mr. LEVY. No.

Mr. MCCOY. Then, I can not see why there should be any difference in a case of this kind.

Mr. LEVY. Because these usually involve such vast sums of money, it would encourage dishonest people. It would be all right in the hands of honest persons, particularly if it were needed. But the point I want to emphasize is that I can not see why it is needed in cases under the Sherman law.

Mr. CARLIN. In order to have a temporary injunction he would have to show that there was threatened loss or damage, and that it is immediate, and that the danger of irreparable loss or damage is immediate.

Mr. LEVY. That is right.

Mr. CARLIN. He would first have to make that showing?

Mr. LEVY. Yes, sir.

Mr CARLIN. If he made that showing, he would not have the character of suit you describe; he would have a bona fide suit.

Mr. FLOYD. Do you know of the suit where Mr. Earle, receiver for the Realty Trust Co.——

Mr. LEVY (interposing). Of Philadelphia?

Mr. FLOYD (continuing). Went into court and finally got a large judgment for damages?

Mr. LEVY. Yes, sir.

Mr. FLOYD. I have no doubt that Mr. Earle would have liked to have had the power to go in and enjoin them from committing this injury. He subsequently was awarded damages.

Mr. LEVY. I am familiar with that case, and the illustration is, I admit, a good one against my own position, because in that case Mr. Earle, receiver for the Realty Trust Co., sought to get the Department of Justice under the last administration to bring the suit, and they would not do it. Later on he brought a private suit for treble damages under the Sherman law.

Mr. FLOYD. And got $2,500,000?

Mr. LEVY. It was settled privately, I believe, for $2,500,000.

Mr. FLOYD. In that case the individual had the right to go ahead with his suit. I think that is one of the best things of the bill.

Mr. LEVY. The suit was under section 7 of the law as it now stands. The case instanced by Mr. Floyd is a notable but unusual illustration, because there the Department of Justice expressly refused to move against the Sugar Trust.

Mr. FLOYD. Mr. Levy, under section 7 of the Sherman Act a party is given the right to recover damages.

Mr. LEVY. Yes, sir; treble damages.

Mr. FLOYD. For wrongful acts committed by any of these illegal combinations against him?

Mr. LEVY. Yes, sir.

Mr. FLOYD. It is the intention of the provision to give him a right to prevent the committing of that damage and not have to wait until they have injured him and then try to recover damages.

Mr. LEVY. Theoretically that would be an advantage, but not practically.

Mr. FLOYD. That is the purpose of it, and if there are cases, and I can conceive that there might be, in which the Government would not use this great authority, we ought to give the individual, if he sees proper, the right to enjoin them from interfering with his business. It would not involve the whole power of the Standard Oil Co.; it would only involve districts in so far as it was interfering with their particular business is concerned.

Mr. LEVY. Mr. McCoy's illustration makes me waver in my view, but I am bound to say that the case he cites is the only one I have heard of where the right could have been usefully employed by individuals. I know of no others. I know of a case in North Carolina, in a suit for treble damages, where it might have been used. But both of those suits were begun after the Government won its suit.

Mr. CARLIN. Do you think that the right of the individual to injunction in common law was abridged by the Sherman law?

Mr. LEVY. Was abridged?

Mr. CARLIN. Yes.

Mr. LEVY. Well, he did not have a right at common law. I will change that, that the Sherman law as framed gave no such rights.

Mr. CARLIN. Except to the Attorney General?

Mr. LEVY. Except to the Attorney General.

Mr. CARLIN. Is it contended, having given no one else the right except the Attorney General, that it is prohibitive to all others having it?

Mr. LEVY. I rather think so.

Mr. CARLIN. Is that your view of it?

Mr. LEVY. I should think so.

Mr. MCCOY. I do not see why.

Mr. LEVY. You mean that the absence of it in the Sherman law would still leave it in the power of the individual to sue out an injunction?

Mr. MCCOY. If he had it before he should have it now. In other words, I think the teeth of the Sherman law was the criminal provision. After they had forbidden these acts they could not have gone further and given the Government the right exclusively to enjoin, because they had that right anyhow.

Mr. LEVY. No; because there is no common law in the United States.

Mr. McCoy. Well, I do not agree with you on that.

Mr. Levy. Not so far as crimes are concerned, anyway.

Mr. McCoy. Not so far as crimes are concerned, but I say that is the teeth of the Sherman Act. Of course there is no common-law crime in the United States, and they wanted to make these things crimes, and then they went further and did the other things; but I can not see why any right of the individuals to an injunction against these combinations was taken away by the Sherman Act simply because the law gave the Government the right to enjoin them.

Mr. Levy. I confess I have not looked up the point. I think there is force in your point, Mr. McCoy. You mean based upon the fundamental principles of the common law, if under the common law an individual injured my business I could come into court and make him stop that?

Mr. McCoy. I say that if before the Sherman law was passed he had that right, it was not taken away from him by the Sherman law because the Government was given the right by the Sherman law.

Mr. Levy. That is perfectly true, if the right existed previously.

Mr. McCoy. If it did exist, and it did in some cases, because it was used.

Mr. Levy. That may well be.

Shall I pass to the next bill?

Mr. Carlin. Suppose you skip the definitions bill.

Mr. Levy. Only with the statement, Mr. Carlin, that I believe the point I made previously applies forcibly to that.

Mr. Carlin. What is that?

Mr. Levy. Let me just say this in relation to this, that I, as a lawyer, speaking scientifically, am unable to discover why it was that the authors of the bill limited these definitions to these four things. They seem to have picked out these four conspicuous restraints of trade. Why did they limit this to these four, especially since the four are now, in the fullest sense of the word, covered by the Sherman law?

Mr. Carlin. Do you think that holding companies are likewise covered by the Sherman law?

Mr. Levy. If they use their power to restrain trade, but not otherwise; because no doubt in your practice you must be counsel for some company that owns the stock of another company where they are transacting everyday business and do not attempt to restrain trade.

Mr. Carlin. There are some holding companies that are not in restraint of trade.

Mr. Levy. That is what I say.

Mr. Carlin. Is it not your opinion that the Northern Securities case settles the law as to holding companies?

Mr. Levy. It said that a holding company could be in and of itself a combination in restraint of trade. It did say that; that is right.

Mr. McCoy. I want to ask you something about the bill that says:

That the words "every contract" (line 9) shall be deemed to include any agreement (line 17), 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.

Suppose a man was engaged in the hat business, to take your illustration, individually, and formed a partnership.

Mr. LEVY. This would prohibit it. I have written in the margin, Mr. Carlin, with great deference, "Destroys all contracts." I think it would.

Mr. CARLIN. What line is that?

Mr. LEVY. Paragraph 4, page 2, "Trade relations bill."

Mr. CARLIN. Do you practice law in New Jersey?

Mr. LEVY. No, sir.

Mr. CARLIN. Have you had occasion to read "The Seven Sisters"?

Mr. LEVY. I have read them.

Mr. CARLIN. Do you recognize any similarity between those?

Mr. LEVY. I think I do. To proceed, in line 18, page 2, the language is certainly wrong. The word "they" is wrong. There is something wrong about it. It does not read right. The subject of that sentence does not harmonize with the word "they." I do not know what it is at the moment, but it does not read right.

Mr. CARLIN. I will explain what I understand it to mean.

Mr. LEVY. I understand it.

Mr. CARLIN. It relates back to two or more persons.

Mr. LEVY. The sense is plain, but as a matter of grammar and correct phraseology the word is wrong.

Mr. CARLIN. What would you put there?

Mr. LEVY. I would substitute for the word "they" such corporations, firms, or persons."

Mr. MCCOY. Would you not say "by which it is undertaken directly or indirectly to restrain trade"?

Mr. LEVY. I think if you will make it say what it means, "corporations, firms, or persons," it would be right, except that the political economy of that provision is most unwise.

Mr. CARLIN. You do not approve of that?

Mr. LEVY. No; I do not approve of that.

Mr. CARLIN. Then you think that that definition does mean something?

Mr. LEVY. I say, Mr. Carlin, as far as it means anything, it goes beyond the Sherman law in a way that this committee, I make bold to say, does not mean it should go; that as far as this committee wants it to go to the Sherman law amply covers it, and you can get many citations of authority to support that statement.

Mr. CARLIN. Have you any additional paragraphs you think ought to be added to these definitions?

Mr. LEVY. If I wished to make such definitions exhaustive, I would have to reproduce every decision that has been written since the early ancient history of the common law on the subject of restraints of trade. In fact, it is impossible to give any specific definitions of what shall constitute restraints of trade, just as the courts, to use a trite illustration, have always found it impossible to give definitions of fraud.

One of the best presentations illustrating this point is contained in the statement made by Senator Pomerene, of Ohio, in conjunction with a report submitted to the United States Senate by the Committee on Interstate Commerce, of which Senator Pomerene was a member. This report was submitted to the Senate on February 26, 1913, pursuant to Senate resolution No. 98, and is as follows:

With the report in general I am in accord. But there is one feature of it about which I desire to be more explicit, and that is the paragraph discussing

the certainty of the provisions of the Sherman law as applicable to certain cases and its uncertainty as applicable to others.

I approve the view that "There are many forms of combination and many practices in business which have been so unequivocally condemned by the Supreme Court that as to them and their like the statute is so clear that no person can be in any doubt respecting what is lawful and what is unlawful."

There are other forms of organization and acts which seriously interfere with competition, such as interlocking directorates, watering of stock, selling of merchandise in one locality at a less price than in another, and other practices which are so contrary to sound business principles and good morals that they can and should be specifically controlled or prohibited by statute. As to these, in the interest of certainty, there should be other and further legislation. But, whatever may be the additional legislation, there will be many other contracts, combinations, and practices in "undue and unreasonable restraint of trade," which it is impossible for Congress to define by statute, because any attempt to so define them will, in practice, be found to exclude many other contracts, combinations, and practices which are equally inimical to the public good. As to these, we must always depend upon the sound wisdom and discretion of courts and juries for relief, just as in the past we have been obliged to trust to their judicial administration.

To illustrate: We know that legislatures and courts have constantly refused to define fraud because the multiplicity of acts and circumstances involved in human affairs make it impossible of definition.

The same may be said with equal truth as to what constitutes "undue or unreasonable restraint of trade."

It is said with a great deal of force that men are not always able to tell in advance whether certain acts are in "undue or unreasonable restraint of trade." But however difficult this may be it is no reason why they should be left for decision to the selfishness of interested parties uncontrolled by judicial decision under the principles of the common law or under the broad provisions of the Sherman law.

In criminal cases it is often difficult to say in advance whether a given state of facts constitutes a reasonable doubt. But is that a reason why courts and juries should not attempt to say in a specific case whether there was, in fact, a reasonable doubt or not?

In negligence cases it is equally difficult to say whether a given state of facts constitutes contributory negligence on the part of the plaintiff or reasonable care on the part of the defendant. But can this be urged as a reason for not leaving special cases to the judgment of the court and jury?

In my judgment what is "undue or unreasonable restraint of trade" must, in many cases if not in most cases, be left largely for judicial determination, and sound judgment and good morals will be a sufficient guide for those who are actuated by a proper public spirit rather than by selfish motives.

While I believe there can be some additional legislation along the lines indicated, I am firmly of the opinion that the Sherman law is a clear and certain guide for reasonable men who desire to comply with the law and do not exert themselves to evade its provisions.

Mr. CARLIN. You started to say that you thought there were a number of other things which ought to be included and that the committee ought not to stop with those four. What other things have you in mind?

Mr. LEVY. I will show you. In paragraph 2, page 2, of the second bill, you say: "to limit or reduce the production or increase the price of merchandise or of any commodity." The bill says the words "every contract" or "combination," etc., shall be deemed to include any combination or agreement between corporations, etc., to do the things that I have just read; that is, to limit or reduce the production or increase the price of merchandise or of any commodity. I will ask you why did you leave out the words "or increase" after the word "reduce," in line 12? Why should not you have made it read, "to limit or reduce or increase the production or increase or reduce the price of merchandise or any commodity"? It should cover increasing the commodity, so as to prevent flooding the market, and thereby

crushing out competition. But you have limited it to reducing the commodity and increasing the price.

Mr. CARLIN. Because we want to do all we can to stimulate or increase the production.

Mr. LEVY. On the part of a combination intended to flood the market and crush a competitor for the moment?

Mr. CARLIN. I have never heard of such a case.

Mr. LEVY. It is done. I have heard of cases where the price is reduced to crush a competitor.

Mr. CARLIN. I have never heard of producing more of a necessary article in order to reduce the price.

Mr. LEVY. Oh, no. I say they increase the production in order to flood the market and drive the competitor out of business. They flood the market, and the price goes down and the competitor can not live.

But the argument goes more correctly to the next line, "or increase the price of merchandise or of any commodity." Why not "reducing"? Why not prohibit the reduction of the price where it is done by a combination in order to crush a competitor?

But the great criticism I have to offer to this bill and the principle I am arguing here is that the minute you take a statute like the Sherman law or any other statute like it and try to add schedules to it, or specific definitions, you immediately get into trouble.

Mr. CARLIN. You think we ought to enlarge the definitions, in other words?

Mr. LEVY. No; you ought to throw it all out, the whole bill, because you can not properly define restraints of trade. You can not define the methods by which a man can do a wrong. You must say the thing is wrong that is in restraint of trade, and do not say to a man, "You must not restrain trade by doing A or by not doing B or by doing C," because you can not hope to define every manner in which a man may restrain trade no more than, as Senator Pomerene has said, you can define contributory negligence or fraud, which, of course, is a conspicuous illustration.

Mr. CARLIN. Your argument, in its last analysis, would seem that we are making the Sherman law more rigid?

Mr. LEVY. Oh, no; you are making it more obscure and uncertain. You are attempting, of course, in the best of good faith, to make it more rigid. I say you can not make it more rigid, because it is now rigid and drastic to the last degree of human possibility.

Mr. CARLIN. You mean more elastic?

Mr. LEVY. No; I mean sufficiently drastic. That is why I dwelt upon the Jewelers' case, because, as I said, it merely followed the late decisions of the Supreme Court, where it said, though the motives were good and beneficial results followed, nevertheless the Sherman law prohibited it. I say that the Sherman law is drastic to the last degree of human possibility, largely because it is framed in general language, every syllable of which has been adjudicated by a long line of decisions, and when you attempt, in the best of good faith, to enlarge or define it you are bound to meet with difficulties; and I will furnish you right here an illustration of that in paragraph 2.

I say that again, with all deference and proper respect for the committee, that when you left out the words "or reduce," at the beginning of line 13, on page 2, you left out an important feature, which

Mr. Carlin has referred to and which is contained in another bill—the trade-relations bill—where you declare that it shall be deemed an unlawful restraint of trade to reduce or discriminate in the prices of commodities; and yet under this bill you left out that very important feature. You make it unlawful to increase the prices of merchandise or any commodity; you should, in my judgment, have made it unlawful to increase or reduce prices, if such act be part of a conspiracy or combination in restraint of trade.

Mr. CARLIN. This bill makes it unlawful to limit or reduce the production or increase the price of any commodity.

Mr. LEVY. Yes, sir. By this bill you make it unlawful to limit or reduce production or to increase the prices of merchandise.

Mr. CARLIN. And that is as far as this bill goes.

Mr. LEVY. Yes, sir. That is incomplete, and in itself makes that clause improper; moreover, it furnishes a splendid basis for the broader argument that you can not amend the Sherman law, except with great risk of damage to it. And further than that, the Sherman law does not need this amendment. Every one of those four paragraphs in section 1, Mr. Carlin—and I submit this with due deference and will prove it if the committee wishes—is now covered by the Sherman law, so far, at least, as this committee would want it to apply. That is a broad assertion, I admit; but it is the fact.

Mr. NELSON. Could you give us a citation of the cases in which it has been held directly that the Sherman law covers those points?

Mr. LEVY. I will do so if the committee wishes.

Mr. CARLIN. You say the Sherman law covers these points as far as this committee would want to go?

Mr. LEVY. Yes, sir. I mean by that, so far as you would want to try to curb the acts of combinations in restraint or trade, or, broadly, restraints of trade; in other words, what you gentlemen are really in good faith tying to do.

Mr. NELSON. And what do you conceive that to be?

Mr. LEVY. Combinations in restraint of trade?

Mr. NELSON. No; what do you conceive it to be that we are trying to get at?

Mr. LEVY. Well, to put it broadly, I think you are trying to get at the great, typical trusts. Then you are going a step further and trying to reach all those ramifications of trusts or things that grow out of trusts. The Department of Justice is going further than you gentlemen. I thing that what you are aiming at are the great, typical trusts, by the operation of which the regular flow of trade and commerce is interferred with. I purposely use broad language, because I am trying to meet the broad purpose which you gentlemen are aiming at. I am sure that it is not a matter of trickery with this committee, but that you are acting in good faith in trying to break up these obnoxious trusts, but I say that they are now being effectively broken up by the Department of Justice under the Sherman law as it now stands.

Mr. CARLIN. Do you think the Sherman law alone is sufficient, so far as the typical trust is concerned?

Mr. LEVY. I certainly do.

Mr. NELSON. You conceive, then, do you, that if we let the Sherman law alone the 800 or more trusts now in existence will voluntarily dissolve and go back to a condition of competition?

Mr. LEVY. Well, I do not know how many of such trusts there are. But if they are attacked by the Department of Justice, it has the power to make them surrender; the adjudications on the subject are so plain that they can not resist the Government; it would be the height of folly for them to resist the Government. I will ask you, for example, why the New Haven Railroad, the General Electric Co., the telephone company, and, if you please, these trade associations, have given up?

Mr. NELSON. Well, we do not know to what extent they have surrendered.

Mr. LEVY. But an inquiry would, I am sure, show that they have surrendered in good faith. I can speak, of course, definitely and officially with respect to these trade associations. We submitted to a very burdensome decree in respect of the things that were complained of. There is no doubt about that; and I may add that the Department of Justice did its duty in the matter most splendidly.

Mr. NELSON. These boards of trade, are they not formed to some extent to confer as to prices and to keep up certain prices?

Mr. LEVY. No, sir; not the ones that I alluded to.

Mr. NELSON. Do you mean the wholesale organizations?

Mr. LEVY. Yes, sir; the wholesale grocers, druggists, jewelers, dry goods and hardware dealers, and others have these national associations. Their main purpose is to maintain the distribution of their products through the wholesaler.

Mr. NELSON. To do what?

Mr. LEVY. To keep the distribution from the manufacturers so that it would be made through the wholesalers alone.

Mr. NELSON. So that the wholesalers would be able to levy a tax in the shape of a profit upon the article?

Mr. LEVY. Well, not necessarily. In that system there are, of course, both evils and benefits. But I see what you were alluding to, you were referring to the unnecessary profits of the middlemen, were you not?

Mr. NELSON. Yes.

Mr. LEVY. So far as they are unnecessary, they are of course an evil.

Mr. NELSON. And do they not also tend to prevent a sale direct to the consumer?

Mr. LEVY. No: not the wholesalers' associations.

Mr. NELSON. Well, could I as an individual consumer go to any wholesaler in this city who is a party to one of these trade agreements and buy goods from him?

Mr. LEVY. No; that would be by virtue of a retailers' association. Of course, the point you have in mind is quite correct. The wholesalers' association would not try to prevent the direct sale to the consumer; but the retailers' association would try to prevent the consumer getting the article direct.

Mr. NELSON. The retailer would bring pressure on the wholesaler, and the wholesaler would say to the consumer who desired to buy direct from him, "We can not do this because we are bound by an agreement with the retailer not to do so."

Mr. LEVY. That is true to some degree, and that is economically hurtful to some extent.

Mr. NELSON. Of course I am a Republican; but these gentlemen (the Democrats) have tried to reduce the cost of living by a change in the tariff. But as a matter of fact, do not your boards of trade and your wholesalers' associations and retailers' associations take up or absorb any benefit which might otherwise accrue to the consumer?

Mr. LEVY. No, sir; they say the contrary; they say that what they desire is to protect the consumer——

Mr. CARLIN (interposing). Pardon me, Mr. Levy; but it is by means of these hearings that our committee gets information, and I do not ask these questions for the purpose of interruping you——

Mr. LEVY. Certainly; I understand that, Mr. Carlin.

Mr. CARLIN. And you have been more or less in the public eye as an expert in these matters, and I want to ask you this question: Whether you had in mind the omission of that paragraph that we should have provided for prohibiting the fixing of prices all the way down to the consumer?

Mr. LEVY. I have not had it in mind. Price maintenance comes up in connection with this trade-association work that I have mentioned. I do not yet know how to meet that trouble, although I have given it much thought. That question did not come up in the Sherman-law suit which has just been terminated. There was no fixing of prices there.

Mr. CARLIN. What I had in mind was, Were you thinking of Mr. Brandeis's suggestion to the committee as to making it legal—the fixing of prices?

Mr. LEVY. I was not. That is a question that is difficult to determine, and, frankly, I did not have it in mind.

I will pass to section 3 of the bill, and say that there is some phraseology there that I think is bad. In line 5, on page 3 of committee's tentative bill No. 2, the words "said punishment" should come out, I think; it seems a surplusage. That is a mere formal criticism, of course.

The CHAIRMAN. It is surplusage, but it does not do any harm.

Mr. FLOYD. It follows the exact verbiage of the Sherman law, does it not?

Mr. LEVY. No, sir; I think this must have been a misprint. In the Sherman law the provision is "by a fine of not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments." This seems to be a misprint.

The CHAIRMAN. I think the words "said punishment" should be omitted.

Mr. FLOYD. Well, Mr. Levy, the word ought to be "punishments" also, instead of "punishment."

Mr. LEVY. Yes, sir. Now, as to section 4, on page 3, I have a much broader objection. That is the section that has been popularly called the "section to reach personal guilt." And the particular criticism I have to offer on that section is that the Sherman law unquestionably covers that feature, because I hold in my hand here [indicating] an indictment under the Sherman law. I have taken the trouble to bring it along with me.

I must repeat that I have no brief for the Sherman law in one way or another, except my conviction that it is effective.

Now, with respect to that section 4 of the bill, the "personal guilt" section, the purpose of it—as has been stated—is to bring home to a particular individual in a corporation, who did the wrongful act,

the criminal consequences of that act; and that, of course, is a praiseworthy purpose and one that ought to be carried out.

But I contend that that is done now by the Sherman law. Here [indicating paper in witness's hand] is an indictment in the case of The United States *v.* McAndrews & Forbes Co., and J. S. Young Co., and their respective presidents, and it would be interesting to read it to a committee composed wholly of lawyers, as showing the direct and specific way in which the offenses against the Sherman law were brought home to the two presidents of those two subsidiary corporations who were indicted.

Mr. McCoy. But how about the board of directors, Mr. Levy, which authorized the doing of the illegal acts which other people carry out, can you reach them under the Sherman law?

Mr. Levy. They would be indictable just as surely as you got the proof against them. Of course, without the proof you could not do anything against the officers or directors under this proposed bill; while, if you had the proof, you could punish them under the Sherman law.

The Chairman. Mr. Levy, are you familiar with the National Cash Register case?

Mr. Levy. Yes, sir; broadly speaking, I know something of it. The same thing was done there, I think. I speak with hesitation of that case, because I have no personal knowledge of it; whereas in this McAndrews and Forbes case I helped draw and try the indictment.

Mr. McCoy. Were the officers convicted in that case under the Sherman law?

Mr. Levy. The companies were convicted, but the two individuals were acquitted, because the sentiment in New York at that time—1906—was such that they could not be convicted.

Mr. McCoy. What did the judge charge the jury as to personal guilt of the officers?

Mr. Levy. Well, the case is clearer than if he had merely made a strong charge; because the indictment was demurred to, and the court overruled the demurrer to the indictment, and said that the indictment was proper and legal. And then he charged the jury that if the individuals did the things here specifically set forth, "If you find that they committed those acts you must find them guilty." The verdict which the jury brought in was, of course, an utterly absurd and ridiculous thing after that charge. It was—

We find the two corporations, namely, the McAndrews Co. and the Forbes Co. guilty, and we find their respective presidents not guilty.

That is absurd on its face.

Now, I will show you how they brought home personal guilt there. I will read one paragraph of the indictment:

And the said grand jurors aforesaid, upon their oaths aforesaid, do further present that, further, in pursuance of the said unlawful combination, and to effect the object of the same, and as an act on his part of engaging in the same the said Howard E. Young—

On such and such a date—

at and within the said city of Baltimore, unlawfully did sign his name, to wit, H. E. Young, to a certain letter directed to the said other defendant in the city of New York, which letter is as follows.

And there was the offense charged. In other words, the president of one company wrote to the president of the other company, substantially, "Do this, that, or the other thing"—which constituted a restraint of trade; and their guilt was thereby made personal, under the Sherman law.

Now, how you can do that better under this section of committee bill No. 2 I do not know.

And when you get through with that, I will point out the first line in that section, being line 7 on page 3, which says, "That whenever a corporation shall be guilty of the violation of any of the provisions," etc.; and I will ask this: What do the words, "Whenever a corporation shall be guilty" mean? How is this guilt to be determined—by another indictment, by a separate equity suit, by a determination in the trial of the indictment against the individual? You have got dangerous language there. Read it again: "Whenever a corporation shall be guilty of a violation of any of the provisions of this act, the offense shall be deemed to be also that of the individual," etc., who authorized it, etc.

Now, I submit again to the committee, with the greatest deference and purely as a legal proposition, what does that mean? Observe, that I have passed from the broader proposition that the Sherman law, as this indictment in my hand proves, sufficiently covers "personal guilt"; and I ask, what do you mean by "Whenever a corporation shall be guilty," and how are you going to determine it? In other words, what is the use of that section 4? Why not leave the Sherman law alone upon this point?

I have here the report of the Department of Justice brought down to January, 1914, and you will find in it a report of a number of indictments against individuals brought under the Sherman law. I will read you some which have been recently found:

On December 1, 1913, an indictment was brought against a number of individuals in Colorado. On July 1, 1913, an indictment was found against the cotton-pool people in New York, which you gentlemen will doubtless remember. On June 25, 1913, an indictment was found in Oklahoma—and so on up to to-day they are finding indictments right along under the Sherman law; so why should you go further?

Mr. NELSON. Let me ask you this question, Mr. Levy: You would practically have the Sherman law stand as it is, would you not?

Mr. LEVY. Yes.

Mr. NELSON. Well, outside of the Knight case, which you say brought the law into confusion, you see no other need of further legislation to help matters, do you? Or, let me ask this question: How, then, do you account for all these trusts that are now in existence, in spite of the Sherman law, since the Knight case was decided?

Mr. LEVY. The reason was that the Knight case threw the whole Sherman law into obscurity. That case was decided in 1895; and not until 1899 did the Supreme Court declare, in the Addyston Pipe case, that the Knight case did not have the meaning which the legal profession had thought it had. So in the meantime these trusts grew bigger and bigger.

Now, from 1899 to 1904 was the period of their greatest growth. Nobody paid any attention in the profession to the provisions of the Sherman law——

Mr. CARLIN. Do you think the Knight case means anything now?

Mr. LEVY. I will say that the Knight case to-day is overruled in substance and effect. But the overruling of the decision in that case took such a long time to bring about that meanwhile all this obscurity as to the law arose; there was great doubt and obscurity on the part of the public and the profession. But there is now no real obscurity on the part of trust magnates and trust lawyers as to what the Sherman law means.

Mr. CARLIN. Nobody doubts that the Knight case has been overruled, do they?

Mr. LEVY. It has been overruled in substance, though not in words. It has been overruled; but in the meantime this confusion sprang up——

Mr. NELSON (interposing). Let me ask this question: Speaking at least for myself, as a member of this committee, I want to reach certain results. Do you believe that with the Sherman law remaining as it is now, these trusts—notably the Oil Trust and the Tobacco Trust and the Beef Trust——

Mr. LEVY (interposing). And the Sugar Trust.

Mr. NELSON. Yes; and the Sugar Trust. Do you believe that they would be dissolved?

Mr. LEVY. I have not any doubt of it.

Mr. NELSON. Without any further legislation?

Mr. LEVY. Absolutely so, in the manner in which you undoubtedly mean.

Mr. NELSON. Well, if they are monopolies?

Mr. LEVY. Then they could be broken up. The Sherman law is adequate to make them dissolve, and it has never failed when suit was brought. I will make an interesting assertion in that connection: The Government has never lost any of these suits; it always wins them.

Mr. NELSON. Then, in your judgment, it depends upon the activity of the Attorney General's office?

Mr. LEVY. Undoubtedly it does: and that was why in the earlier years of the Sherman law it went all askew. In the interest of brevity I have dwelt only on the Knight case, but there were also the Whisky Trust cases, in re Greenhut, and the case of in re Patterson, which was not a Whisky Trust, but the National Cash Register case—the same Patterson who has now been convicted. In the early days of the Sherman law the courts dodged it, and the executive officers of the Government were not vigilant. I am now adopting the suggestion which has been made by a member of the committee and which I did not feel justified in offering in the first place myself. But it was out of those things that the confusion grew. Those decisions were all wrong. But since 1899 the decisions have been correct, and since that time they have been correctly understood—or, at any rate, since the year 1911.

Mr. NELSON. Now, let us just follow that thought out. You say you have yourself found that the Department of Justice would not enter an appeal in certain cases?

Mr. LEVY. In that one case.

Mr. NELSON. In the Tobacco case?

Mr. LEVY. Yes.

Mr. NELSON. And yet you still wish to confine the right to institute suits to the Department of Justice, do you not?

Mr. LEVY. Yes.

Mr. NELSON. Well, why not broaden the law and permit outside parties to come in and, in a measure, take away this sole power of bringing suits from the Department of Justice?

Mr. LEVY. Well, Mr. Carlin will bear me out when I say that I have yielded somewhat in my view as to placing the right to bring an equity suit in an individual. I yielded somewhat to a suggestion which Mr. Carlin made. It was a new suggestion to me.

Mr. NELSON. Then you would agree to that, to taking this monopoly of bringing suits away from the Attorney General?

Mr. LEVY. I am inclined to think that in the light of this past experience I would. But it is a thing that ought to be worked out with the greatest care and caution.

The CHAIRMAN. Then, again, would you allow the judgment in a case brought by the Government to be used by private parties?

Mr. LEVY. No; I suggested the right of intervention instead.

The CHAIRMAN. Yes; I understand.

Mr. MCCOY. Well, suppose the law was so amended as to permit an individual plaintiff, or some plaintiff other than the Government, to intervene. How would you frame the law so as to prevent the usual control which any party to a suit has over that suit, and prevent the private party from being able to hold back the Government in any way, if he saw fit to do so?

Mr. LEVY. That can be done. And, as a matter of fact, it has been done in the same bill from which, apparently, the committee framed the clause we are now considering. I say that with some hesitation, as it is not any concern of mine, and perhaps it is not quite right to speak of the sources this committee has drawn upon in framing its bills. But in the bill which I have before me here, which contains a provision for res judicata, there is also contained a provision with reference to intervention, with the safeguards to which Mr. McCoy refers.

Mr. MCCOY. Do you refer to the Lenroot bill?

Mr. LEVY. No; I refer to the La Follette bill; I have it here.

The CHAIRMAN. The La Follette bill in the Senate is the same as the Lenroot bill in the House.

Mr. LEVY. This is the bill introduced by Senator La Follette on August 19, 1911.

Mr. CARLIN. The same bill was introduced by Mr. Lenroot in the House.

Mr. LEVY. Yes. That contains a provision for intervention by private parties, and also a provision for res judicata.

Mr. CARLIN. Mr. Levy, the committee is probably going to adjourn at 5 o'clock; and we are very much interested in your remarks, and if you have not concluded when we adjourn, I for one would be glad to fix some other time for you to come before the committee again, so as to give you every chance to be heard.

Mr. LEVY. I should be very glad to do so.

The CHAIRMAN. Mr. Levy, I suppose the committee would like to hear further from you, and perhaps you would like to have further time; but it is now 5 o'clock and we will have to adjourn in a few minutes.

Mr. LEVY. Yes, Mr. Chairman. My attitude is simply this, that I have a deep interest in this subject, purely from the scientific and professional standpoint. From that point of view, I will say that if I can help this committee in any way in arriving at a correct determination of the points involved, I shall be only too glad to do so; it will be a real privilege and a pleasure. I think there is danger of a serious error in some of this proposed legislation.

Mr. McCOY. Was there anything further that you had in mind to say besides what you have already said?

Mr. LEVY. I would like to follow my remarks with a criticism that I will read from Dean Lewis, of the University of Pennsylvania.

Mr. McCOY. Could you not just put that in the record?

Mr. LEVY. Yes; if the committee desires.

The CHAIRMAN. What is the paper you refer to?

Mr. LEVY. It is a criticism made by Prof. William Draper Lewis, dean of the University of Pennsylvania Law School.

The CHAIRMAN. To which bill does it apply?

Mr. LEVY. I think it criticizes all of them. It is contained in a newspaper extract. I can hardly discriminate as to what part is relevant and what part is not, and I will therefore leave it to the committee to determine what part shall go in.

Mr. McCOY. We can have the whole article incorporated in the record.

(The article referred to is as follows:)

Take another illustration. One of the proposed acts is designed to take out of the Sherman Act what is popularly known as "the rule of reason," which it is alleged that the Supreme Court read into the act when it held that only unreasonable restraints of trade are unlawful. This bill declares that hereafter the words "conspiracy in restraint of trade or commerce" and the word "monopolize," as used in the Sherman Act, shall include any combination or agreement between corporations, firms, or persons engaged in trade or business between the States for certain enumerated purposes.

SHOWS FLAWS IN THE PENDING BILL.

The second of these enumerated purposes is "to limit or reduce production." That contracts designed to limit or reduce production are frequently improper efforts to restrain trade or produce monopoly may be freely admitted. But the words of this proposed statute would prevent a number of manufacturers selling their goods in different parts of the United States and engaged, perhaps, in manufacturing different articles, being resident in one locality, from agreeing to close their mills at 1 o'clock on Saturday or to limit the number of hours that they work their help. Of course, the drafter of the act did not intend this result, but the question is not what the drafter intended, but what the act says.

Or again, the fourth prohibition is against making any agreement by which corporations, firms, or persons "directly or indirectly undertake to prevent a free and unrestricted competition among themselves." We may here also admit that in a large number of cases such agreements are agreements in restraint of trade, which should be and now are prohibited under the Sherman Act, but the proposed amendment would prevent two persons heretofore rivals in business from entering into a partnership, even though their combined business did not represent a fraction of 1 per cent of the volume of business in the United States or in any way tend toward monopoly.

Or it would prevent one business man buying the good will of another similar business under an agreement with the seller that the seller would not, after receiving the money for the good will, turn around and compete with the

purchaser in the same locality. Such agreements might, under certain circumstances, tend to monopoly, but normally, where they represent transactions between small purchasers, they are properly regarded as reasonable agreements not in any way tending to unlawfully restrain trade.

Mr. LEVY. Beyond what I have already said, there would be only general views that I might want to present. I will offer the suggestion that after the record of to-day is printed I might take it up and want to come back again before the committee.

Mr. MCCOY. I will make the further suggestion that there will be hearings of the committee at which other witnesses will be heard, and you can also get a copy of those, and after reading them you can come before the committee again if you so desire and give a further expression of your views in the light of what those witnesses say.

Mr. LEVY. I think that will be a good arrangement. Mr. Chairman, is that satisfactory?

The CHAIRMAN. I think that is a good idea, and we will have that understanding then.

(Thereupon, at 5.05 o'clock p. m., the committee adjourned until 10.30 o'clock a. m., to-morrow, Wednesday, February 4, 1914.)

APPENDIX.

THE FEDERAL ANTITRUST LAW AND THE "RULE OF REASON."

[By Felix H. Levy, New York City. Reprinted from the Virginia Law Review for December, 1913.]

At this time, when the subject of trust decisions and trust legislation as embodied in the Sherman antitrust law is occupying a large share of public attention, any additional light which can be thrown upon a situation which, by reason of an almost infinite variety of opinion, has become somewhat confused, ought to be deemed pertinent and timely. The views here set forth are presented in the hope of shedding some light upon that situation. They are given as the result of the writer's professional experience, derived both from the position occupied by him as a Government prosecutor under the Sherman antitrust law and from the position later occupied by him as counsel for defendants in prosecutions instituted by the Government under the law. The writer indulges the hope that the practical experience upon which these observations are based will render them of some value.

I. THE CONDITIONS WHICH BROUGHT ABOUT THE PASSAGE OF THE SHERMAN ANTITRUST LAW.

The Federal antitrust law (act of July 2, 1890, 26 Stat., 209, c. 647) has been known popularly as the Sherman antitrust law, because the bill which culminated in that law was introduced in the United States Senate by Senator Sherman, of Ohio. The bill thus introduced by him was, however, completely changed by the Judiciary Committee of the Senate, and as adopted by both Houses of Congress was totally different from the form of the bill as first presented by Senator Sherman.

The changes thus made were principally the work of Senators Edmunds and Hoar. It is the uniform opinion of those who have carefully studied the subject that no statute was ever passed by Congress involving a question of substantive law which received more thoughtful attention at the hands of profound and capable lawyers in Congress than the antitrust law which was adopted by Congress and became a law on July 2, 1890.

The immediate occasion which brought about the passage of this law was the existence at that time of a number of vast aggregations of capital which had then monopolized or bade fair soon to monopolize many important branches of trade in this country. The most conspicuous examples of these combinations

were the Sugar Trust, the Whisky Trust, and preeminently the Standard Oil Trust.

Without attempting to enter into any consideration of the debates which the passage of the antitrust law occasioned in Congress it must suffice to say that the most confident expectations were therein expressed that the passage of this law would speedily put an end to these monopolistic combinations and to the evil conditions to which they gave rise.

We shall, however, try to point out, in the cursory survey which we shall make of the subsequent history of that law, why that expectation was in large measure disappointed.

For the present purpose it will not be necessary to quote the text of the law beyond the portion which follows:

"An act to protect trade and commerce against unlawful restraints and monopolies.

"*Be it enacted, etc.*, That every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations is hereby declared to be illegal."

The foregoing extract will furnish a sufficient basis for presenting the apparently conflicting views of the courts with reference to the construction of that statute.

It may be broadly asserted that, with the exception of such parts of the statute as relate to matters of procedure and practice, and with the exception that the second section of the statute is in an immaterial sense an enlargement of the common law, the statute itself amounts to no more than a declaration of the common law upon the subject of restraints of trade.

It is well settled that in the Federal jurisprudence the common law with relation to crimes has no existence. It was on account of this fact and the further fact that prior to the passage of the Sherman antitrust law there was no Federal statute governing the subject; that until the act of July 2, 1890, there was no jurisdiction in the Federal Government to prevent or to punish restraints of trade or unlawful conspiracies and combinations to restrain trade.

In the course of the debates in the Senate which culminated in the passage of the law, Senator Sherman said (Senate Debates, Mar. 21, 1890, 21 Cong. Rec., p. 2456):

"It does not announce a new principle of law but applies old and well-recognized principles of the common law to the complicated jurisdiction of our State and Federal Government."

Senator Vest said (Senate Debates, Apr. 8, 1890, 21 Cong. Rec., p. 3146):

"We have affirmed the old doctrine of the common law in regard to all interstate and international transactions, and have clothed the United States courts with authority to enforce that doctrine by injunction. We have put in also a grave penalty."

The statement is vencured that all of the prevailing decisions of the United States Supreme Court under that law would have been decided in the same way in which the Supreme Court has decided them, if the Sherman law, so far as its substantive provisions are concerned, had merely provided in proper phraseology that the existing common law on the subject was declared to be the law of the United States and had provided appropriate penalties.

The scope of this paper makes it impossible to expand this contention at this time. Its propriety and correctness may, however, be shown concisely by a reference to the fundamental provision of the laws of the State of New York governing the subject, which is contained in the following provision of the penal law of that State, to wit:

"If two or more persons conspire * * * to commit any act injurious * * * to trade or commerce * * * each of them is guilty of a misdemeanor."

The revisers of the penal code of the State of New York, able lawyers of their day, who drew this provision, stated that it was intended to be merely an embodiment of the common law.

The courts of that State, in construing the quoted provision, have repeatedly declared that it represented merely a declaration of the common law, and they have in innumerable cases construed it in the most comprehensive manner as being sufficient to prevent and to punish, in a degree quite as drastic as the Federal courts have done under the Sherman antitrust law, all restraints of trade that have been submitted to them for decision.

II. THE SUGAR TRUST CASE.

The first case of importance, in fact the first case of any description, under the Sherman law, which received the attention of the United States Supreme Court, was the case of United States *v.* E. C. Knight Co. (156 U. S., 1), popularly known as the Sugar Trust case. In that case it was charged by the Government that the defendants, "being in control of a large majority of the manufactories of refined sugar in the United States, had acquired through the purchase of stock in four Philadelphia refineries such disposition over those manufactories throughout the United States as gave it a practical monopoly of the business."

The Supreme Court held:

"That the result of the transaction was the creation of a monopoly in the manufacture of a necessary of life, which could not be suppressed under the provisions of the act of July 2, 1890. * * * In the mode attempted in this suit, and that the acquisition of Philadelphia refineries by a New Jersey corporation and the business of sugar refining in Pennsylvania bear no direct relation to commerce between the States or with foreign nations."

Putting it briefly, the substance of the decision seems to be that the situation there presented involved an intrastate and not an interstate transaction, and was therefore not within the purview of the Federal antitrust law.

The subsequent history of the Sherman law shows that the effect of this decision was most unfortunate. The confusion and the erroneous impressions which were caused by it are best exemplified by the statement contained in a report made to the House of Representatives by Attorney General Harmon on February 8, 1896, in response to a resolution of the House adopted on January 7, 1896, requesting the Attorney General to report what steps if any, had been taken by him "to enforce the law of the United States against the trusts, combinations, and conspiracies in restraint of trade and commerce, and what further legislation, if any, is needed to protect the people against the same." In that report he said:

"The act of July 2, 1890, commonly called the Sherman antitrust law, as construed by the Supreme Court" (thereby evidently referring to the Knight case) "does not apply to the most complete monopolies acquired by unlawful combination of concerns which are naturally competitive, though they in fact control the markets of the entire country, if engaging in interstate commerce be merely one of the incidents of their business and not its direct and immediate object. *The virtual effect of this is to exclude from the operation of the law manufacturers and producers of every class, and probably importers also.*" (Italics mine.) * * * "The limitation of the present law enables those engaged in such attempts to escape from both State and Federal Governments, the former having no authority over interstate commerce and the latter having authority over nothing else."

The italicized portion of the above quotation makes clear that the learned Attorney General misconceived, and it is perhaps proper to say that he quite naturally misconceived, the true scope of the Sherman law as a result of the unfortunate decision in the Knight case.

Subsequent decisions of the Supreme Court, notably in the Addyston case, the Traffic cases, the Standard Oil case, the Tobacco case, which will be discussed post, and many others, clearly show that the opinion thus expressed by the Attorney General was erroneous. The circumstance is of importance when is it considered that, as a result of this misconception, which, it may be added, was shared by the profession generally, the Sherman law was for a long time deemed to be inapplicable to the many varieties of trusts and other industrial combinations which soon thereafter, and probably because of that decision, began to increase until nearly every branch of trade came under their domination. It seems safe to assert that no single circumstance was so potent in depriving the Sherman law of the effectiveness which was subsequently imparted to it by later decisions of the Supreme Court as the decision in the Knight case.

In all of the conspicuous cases involving attacks by the Government under the Sherman law against trusts or industrial combinations the Knight case has been cited by the defendants as justifying their contention that the Sherman law is not applicable to such trusts or industrial combinations. Indeed, counsel for defendants in some of such cases have boldly asserted that the adjudication by the Supreme Court in the Knight case had become a rule of property and that to overrule it would make wrecks of the enterprises inaugurated by the combinations then under attack.

There can be no doubt that, beginning with the Addyston case, the Supreme Court, in a uniform line of decisions culminating in the Standard Oil and the Tobacco cases, has distinguished the force and application of the Knight case to such an extent as, for all practical purposes, to overrule it.

It is a fact, well recognized by expert students of the subject, that the misconception which the decision of the Supreme Court in the Knight case caused, was responsible in a very high degree for the fact that thereafter the Sherman law remained for many years virtually a "dead letter" upon the statute book. Instead of serving as an effective deterrent to the continuance of monopolistic combinations, as its framers intended it to be, the Sherman law, as thus seemingly devitalized by the Supreme Court in the Knight case, served for several years thereafter, and, until the misconception caused thereby was by later decisions corrected, rather as high evidence of the impotency of the Federal jurisprudence to cope with the subject at all.

III. THE ADDYSTON CASE.[1]

The first case which was presented to the Supreme Court under the Sherman law affecting an industrial agreement or combination in restraint of trade, after the decision in the Knight case, was the Addyston case. It was decided by the Supreme Court on December 4, 1899, nearly six years after the decision in the Knight case.

The case was heard upon an appeal from a decision of the Circuit Court of Appeals, the opinion in which was written by Judge Taft (later President Taft). As indicating the important bearing which the Knight decision was deemed to have at that time with respect to the Sherman law, the following is quoted from the opinion of Judge Taft in reversing the decision of the court below which dismissed the bill. Judge Taft said (85 Fed., 296):

"The learned judge who dismissed the bill at the circuit was of opinion that the contract of association only indirectly affected interstate commerce, and relied chiefly for this conclusion on the decision of the Supreme Court in the case of United States against E. C. Knight Co."

And further (85 Fed., 297):

"We have thus considered and quoted from the decision in the Knight case at length, because it was made the principal ground for the action of the court below and is made the chief basis of the argument on behalf of the defendants here."

Judge Taft then proceeded, and, so far as we are aware, it was the first time that any court had so done, to put aside the Knight case as an authority for the general proposition which was urged by the defendants in the Addyston case and which was substantially to the same effect as is set forth in the extract above quoted from the report of Attorney General Harmon. He does so in the following language (85 Fed., 299):

"To give the language of the opinion in the Knight case, the construction contended for by defendants would be to assume that the court, after having in the clearest way distinguished the case it was deciding from a case like the one at bar, for the very purpose of not deciding any case but the one before it, then proceeded to confuse the cases by using language which decided both. We can not concur in such an interpretation of the opinion."

For the first time, then, the narrow limits of the Knight decision were defined, and for the first time the authority of the Knight case as denying to the Sherman law the power to repress industrial combinations or agreements in restraint of trade was negatived.

When the Addyston case reached the Supreme Court that court disposed of the defendant's contention with respect to the Knight case in the following language (175 U. S., 211, 238):

"We are also of opinion that the direct effect of the agreement or combination is to regulate interstate commerce, and the case is therefore not covered by that of the United States v. E. C. Knight Co."

Justification for the space here devoted to the Addyston case is to be found in the fact that the decision in that case first corrected the widespread misconception which had theretofore existed with respect to the applicability of the Sherman law to industrial or trade agreements or combinations. It is highly important to note that from the time of the decision in the Addyston case no misconception or doubt any longer existed, or, at any rate, needed to exist, and that

[1] Addyston Pipe & Steel Co. v. U. S. (175 U. S., 211).

thereafter the decisions of the Federal courts in construing the Sherman law as bearing upon industrial agreements and combinations of the kind which were then and ever since have been so common, moved forward in an unbroken line to the effect that such agreements were within the purview of the Sherman law and that combinations or agreements such as characterized the Sugar Trust and other like combinations were forbidden by that law.

The check upon the enforcement of the Sherman law which had been placed upon it as a result of the Knight case was thereby removed. Unfortunately, however, in the meantime the Sherman law had for all practical purposes become dormant and impotent, so that the promotion and formation of industrial combinations and trusts proceeded with renewed vigor and the industries of the country were virtually taken out of independent and competitive ownership and placed under the control of monopolistic combinations.

We repeat the assertion that this result, the evil effects of which are still so manifest, is attributable to the decision in the Knight case more than to any other circumstance.

At the risk of digression, the Addyston case, as decided by Judge Taft in the Circuit Court of Appeals, must again be alluded to in order to point out that the opinion written by Judge Taft is a memorable contribution to the juridical literature of this country, not only because in it he first clearly pointed out the proper limitations of the Knight case, but because he therein presented a most masterly exposition of the common law and the statute law bearing upon restraints of trade. His opinion may well serve as a textbook upon the subject of unlawful restraints of trade.

IV. THE TRAFFIC CASES.[1]

In discussing the Addyston case before discussing the Traffic cases, we have departed from the correct chronological order, both of the Traffic cases having been decided by the Supreme Court prior to the Addyston case. This departure has been made because the decision in the Knight case did not in any way affect the decisions in the Traffic cases, whereas, as above shown, the Knight case was an important factor in the Addyston case, and it was therefore deemed more logical to treat the Addyston case out of its chronological order so as thereby to supplement the consideration of the Knight case.

Just as the Knight case has been here discussed because of its great importance in its bearing upon the subsequent interpretation of the Sherman law, and just as the Addyston case has been here discussed because it corrected the misconception which had so disastrously affected the administration of the Sherman law, so now we adduce the Traffic cases as constituting an outstanding feature of importance in the history of the Sherman law. This outstanding feature is the circumstance that in the Traffic cases, the Supreme Court for the first time laid down the principle that, under the Sherman law, *every* restraint of trade, whether *reasonable* or *unreasonable*, is unlawful

A further notable circumstance in connection with the decisions in the Traffic cases is that in the Trans-Missouri case, Mr. Justice White (now Chief Justice White) declared in precise terms the "rule of reason" which subsequently, in the opinions written by him in the Standard Oil case and the Tobacco case, was advanced by him in the most conspicuous and controlling manner, as the guiding principle by which the Sherman law must be interpreted.

It thus appears that the now famous "rule of reason" as enunciated by the Chief Justice in the Oil case and the Tobacco case, was not promulgated in those cases for the first time, but had been previously enunciated in the plainest terms by him in his dissenting opinion in the Trans-Missouri case. For whatever historical value this fact may have, we quote the following from the opinion of Mr. Justice White in the Trans-Missouri case (166 U. S., 290, 351):

"Hence, from the reason of things, arose the distinction that where contracts operated only a partial restraint of the freedom of contract or of trade they were not, in contemplation of law, contracts in restraint of trade. And it was this conception also, which, in its final aspect, led to the knowledge that reason was to be the criterion by which it was to be determined whether a contract which, in some measure, restrained the freedom of contract and of trade, was in reality, when considered in all is aspects, a contract of that character or one which was necessary to the freedom of contract and of trade."

Thus in substance Mr. Justice White laid down the principle of the "rule of

[1] United States v. Trans-Missouri Freight Association (166 U. S., 290); United States v. Joint Traffic Association (171 U. S., 505).

reason"; but, later on (id., p. 355) he lays down the principle in specific terms thus:

"If the *rule of reason* no longer determines the right of the individual to contract or secures the validity of contracts upon which trade depends and results, what becomes of the liberty of the citizen or of the freedom of trade?"

And again (id., p. 356):

"It follows that the construction which reads the *rule of reason* out of the statute embraces within its inhibition every contract or combination by which workingmen seek to peaceably better their condition."

We shall subsequently, in connection with a discussion of the oil and the tobacco cases, speak further of the "rule of reason" in those cases so conspicuously put forward by the Chief Justice.

Students of the subject have found it difficult to reconcile the comprehensive manner in which the prevailing opinions in both of the traffic cases (each of them written by Mr. Justice Peckham) declare that the distinction which existed at common law between reasonable restraints of trade and unreasonable restraints of trade did not exist under the Sherman law, with the statement contained in the second of the traffic cases (United States *v.* Joint Traffic Association, 171 U. S., 505), wherein Mr. Justice Peckham said (id., p. 568):

"* * * the act of Congress must have a reasonable construction or else there would scarcely be an agreement of contract among business men that could not be said to have, directly or remotely, some bearing upon interstate commerce and possibly to restrain it."

Moreover, Mr. Justice Peckham, in his opinion in the Joint Traffic case (171 U. S., 505, 568), declared that various examples, which were suggested by counsel, of contracts theretofore lawful, which would be rendered illegal if the distinction between reasonable and unreasonable restraints of trade were abolished, had "little or no bearing upon the question under consideration."

In the dissenting opinion rendered by Mr. Justice White in the Trans-Missouri case (166 U. S., 290), he cited many similar examples of particular classes of contracts which at the common law were considered partial or reasonable restraints of trade and therefore lawful. He did this for the purpose of showing that, under the construction placed upon the Sherman law by Mr. Justice Peckham, abolishing the distinction between reasonable and unreasonable restraints of trade, such classes of contracts theretofore deemed lawful would thereafter be deemed unlawful.

In the Joint Traffic case, wherein Mr. Justice Peckham made the statement that the class of contracts of this description "have little or no bearing upon the question under consideration," Mr. Justice White again dissented. He did not, however, render any opinion, apparently resting his dissent upon his opinion in the Trans-Missouri case, inasmuch as the two cases were similar.

In the dissenting opinion of Mr. Justice White in the Trans-Missouri case, there is set forth a most scholarly presentation of the distinction which prevailed at common law between a partial and reasonable restraint on the one hand, and a general or unreasonble restraint on the other hand, the former being at common law lawful and the latter unlawful.

It is perhaps a bold assertion to make, but the assertion is nevertheless made, that the subsequent history of the Sherman law shows that the subject, as set forth in the traffic cases, of the distinction between reasonable and unreasonable restraints of trade has proved to be entirely academic. It has had no practical bearing upon the interpretation or enforcement of the Sherman law in any case that has since come before the courts.

In every case under the Sherman law which has been decided since the decisions in the traffic cases were rendered, the decisions, which have been generally, if not uniformly, in favor of the Government, have rested upon a state of facts which would have necessitated a finding that such restraints were unlawful even if the common-law distinction between reasonable and unreasonable restraints had been explicitly maintained and upheld. In other words, the assertion is confidently made that no subsequent case has been presented under the Sherman law, wherein the Government has prevailed, where a different result would have been reached if the Sherman law had in terms provided that only *unreasonable* contracts, etc., in restraint of trade were forbidden. Every case which has been submitted to the courts, in which the Government has prevailed, has been based upon a situation which even at common law would have been declared to constitute an *unreasonable* restraint. Hence, we repeat, the distinction referred to has, in practice, proved unimportant.

V. THE STANDARD OIL AND THE TOBACCO CASES.[1]

These cases, decided by the Supreme Court in 1911, constituted the first cases in which any of the great trusts were subjected to attack in the Supreme Court under the Sherman law, with the exception of the abortive attack upon the Sugar Trust and the Knight case. They are notable particularly on account of the formal enunciation therein by Chief Justice White of the "rule of reason" as the controlling principle for the interpretation of the Sherman law.

Upon this ground, the opinions in both cases, each of them written by the Chief Justice, were sharply assailed by Mr. Justice Harlan as constituting "judicial legislation." (Harlan, J., in dissenting opinion in the Oil case, 221 U. S., at p. 99.)

Mr. Justice Harlan, moreover, assailed the decisions by declaring that the court "has, by mere interpretation, modified the act of Congress and deprived it of practical value as a defensive measure against the evils to be remedied"; and, again (Oil case, p. 104):

"* * * that many things are intimated and said in the court's opinion which will not be regarded otherwise than as sanctioning an invasion by the judiciary of the constitutional domain of Congress—an attempt by interpretation to soften or modify what some regard as a harsh public policy."

Mr. Justice Harlan also asserted that the decisions were in effect an overruling of the decisions of the court in the Traffic cases.

These criticisms of Mr. Justice Harlan were contained in the dissenting opinion rendered by him in the Oil case. In the Tobacco case, which was decided later, the Chief Justice, *the entire court except Mr. Justice Harlan concurring*, thus replied to that part of Mr. Justice Harlan's dissenting opinion in the Oil case which asserted that the majority opinion in the Oil case constituted in effect an overruling of the decisions in the Traffic cases (Tobacco case, p. 179):

"In that case (Standard Oil case) it was held, without departing from any previous decision of the court, that as the statute had not defined the words restraint of trade, it became necessary to construe those words, a duty which could only be discharged by a resort to reason. We say the doctrine thus stated was in accord with all the previous decisions of this court, despite the fact that the contrary view was sometimes erroneously attributed to some of the expressions used in two prior decisions (the Trans-Missouri Freight Association and Joint Traffic cases, 166 U. S. 290 and 171 U. S. 505). That such view was a mistaken one was fully pointed out in the Standard Oil case and is additionally shown by a passage in the opinion in the Joint Traffic case as follows (171 U. S., 568): 'The act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing on interstate commerce, and possibly to restrain it.'"

As to the remaining criticisms of Mr. Justice Harlan to the effect that the resort to the "rule of reason" has "deprived the statute of practical value" and has "softened or modified" the policy underlying that statute, we assert that an examination of the opinions in the Oil and the Tobacco cases, and particularly the opinion in the Tobacco case, will make clear that, instead of depriving the Sherman law of practical value and of softening or modifying it, the effect of the two opinions has been to *strengthen and enlarge* the scope of that law.

In the opinion in the Tobacco case (p. 175), the Chief Justice said:

"If the Antitrust act is applicable to the entire situation here presented and is adequate to afford complete relief for the evils which the United States insist that situation presents, it can only be because that law will be given a *more comprehensive application than has been affixed to it in any previous decision*."

And, again (Id., p. 178):

"But the difficulties which arise, from the complexity of the particular dealings which are here involved and the situation which they produce, we think grows out of a plain misconception of both the letter and spirit of the antitrust act. We say of the letter, because while seeking by a narrow rule of the letter to include things which it is deemed would otherwise be excluded, the contention really destroys the great purpose of the act, *since it renders it impossible to*

[1] The Standard Oil Co. v. United States (221 U. S., 1); United States v. American Tobacco Co. (221 U. S., 106).

apply the law to a multitude of wrongful acts, which would come within the scope of its remedial purposes by resort to a reasonable construction, although they would not be within its reach by a too narrow and unreasonable adherence to the strict letter."

And, again (id., p. 180):

"In truth, the plain demonstration which this record gives of the injury which would arise from, and the promotion of the wrongs which the statute was intended to guard against, which would result from giving to the statute a narrow, unreasoning, and unheard of construction, as illustrated by the record before us, if possible, serves to strengthen our conviction as to the correctness of the rule of construction, the rule of reason, which was applied in the Standard Oil case, the application of which rule, to the statute we now, in the most unequivocal terms, reexpress and reaffirm."

It seems too clear for discussion that these emphatic statements of the Chief Justice make it clear that the "rule of reason" was invoked not for the purpose of restricting or narrowing the force of the statute as previously construed, but, on the contrary, for the purpose of broadening and enlarging it.

As above quoted, the Chief Justice said that in the Tobacco case the statute "will be given a more comprehensive application than has been affixed to it in any previous decision." The reasoning which follows this statement shows that the purpose of such statement and the purpose of invoking the "rule of reason" was to bring within the condemnation which the court was about to give to the assailed combination, certain elements and features of the combination which would escape such condemnation if the narrower rule of construction laid down in previous cases were maintained. The court therefore declared its purpose to broaden and enlarge the scope of the statute by viewing it in the "light of reason" so as thereby to ascertain the true intent of Congress in enacting the statute. The court then declared that the statute, thus viewed, brought within its scope all of the elements and features which would otherwise not be included therein.

It is submitted that it is difficult to imagine how the reasoning thus pursued and the result thus reached by the Chief Justice can be construed as involving a curtailment or narrowing of the scope of the statute.

Adopting the objections made by Mr. Justice Harlan, critics of the "rule of reason" have declared that the result of the engrafting upon the statute of the "rule of reason" has been to emasculate that statute. This assertion has been repeatedly made in the two Houses of Congress. The criticism has, however, been met by students of the Sherman law, who have based their position upon practical experience in the administration and interpretation of that statute, with the diametrically contradictory assertion that the "rule of reason" has given additional vitality and vigor to the statute. They assert that, as stated by the Chief Justice in the Tobacco case (p. 181) in view of the general language of the statute and the public policy which it manifests, there is no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since *resort to reason* renders it impossible to escape by any indirection the prohibition of the statute.

In other words, they say that, viewed in the light of reason, the statute is now made to penetrate any device or subterfuge which might otherwise successfully conceal a purpose to violate the statute.

Viewed from another standpoint, it is difficult to comprehend the reason for the clamor which has been raised against this feature of the Oil and the Tobacco cases, inasmuch as the subsequent decisions of the courts, based expressly upon the decisions in the Oil and the Tobacco cases, have not in the slightest degree relaxed or abated the vigor and force of the statute from the vigor and force which it possessed prior to the rendering of those two decisions.

In a number of very recent cases involving a variety of different situations decided by the Supreme Court since its decisions in the Oil and Tobacco cases, the statute has been interpreted and enforced with the same degree of strength as before the "rule of reason" was announced. These cases are the following:

United States *v.* Terminal Railroad Association, 224 U. S., 383, decided April 22, 1912; Standard Sanitary Manufacturing Co. *v.* United States, 226 U. S., 20, decided November 18, 1912; United States *v.* Union Pacific Railroad Co., 226 U. S., 61, decided December 2, 1912; United States *v.* Reading Company, 226 U. S., 324, decided December 16, 1912; United States *v.* Patten, 226 U. S., 525, decided January 6, 1913; Virtue *v.* Creamery Package Mfg. Co., 227 U. S., 8, decided January 20, 1913; United States *v.* Winslow, 227 U. S., 202, decided February 3,

1913; United States v. Pacific & Arctic Railway Co., 228 U. S., 87, decided April 7, 1913; Nash v. United States, 228 U. S., 373, decided June 9, 1913.

Forcible illustration of the fact that the Supreme Court has not, in these later decisions, regarded the statute as having been "softened or modified" by the "rule of reason" is found in the following extract from the opinion of the court in the case of Standard Sanitary Manufacturing Co. v. United States (supra), in which Mr. Justice McKenna, referring to previous decisions, said (p. 49):

"The others it is not necessary to review or to quote from, except to say that in the very latest of them the comprehensive and thorough character of the law is demonstrated and its sufficiency to prevent evasions of its policy 'by resort to any disguise or subterfuge of form' or the escape of its prohibitions 'by any indirection' (United States v. American Tobacco Co., 221 U. S., 106, 181). Nor can they be evaded by good motives. The law has its own measure of right and wrong, or what it permits or forbids, and the judgment of the courts can not be set up against it in a supposed accommodation of its policy with the good intention of the parties, and, it may be, of some good results. (United States v. Trans-Missouri Freight Association, 166 U. S., 290; Armour Packing Co. v. United States, 209 U. S., 56, 62.)"

We have said above that it is difficult to understand the reason for the clamor which has been raised against the "rule of reason" which was invoked in the Oil and the Tobacco cases. We apprehend that this clamor is well justified when the *ultimate* results of those two cases are considered; but that such clamor is misdirected when the "rule of reason" is made the object of its attack. The just basis for such clamor and, in fact, the just explanation of the widespread dissatisfaction with the operations of the Sherman law which seems to exist, is the manner in which the decisions of the Supreme Court in the Oil and Tobacco cases have been *executed*. This is notably true in the Tobacco case.

There is a general belief that in the execution of the Supreme Court's decision in the Tobacco case by the circuit court, the administrative officers of the Government failed to carry out the declared purposes of the Supreme Court, and that, as a result, the so-called dissolution or disintegration of the Tobacco Trust has proved to be, in large part, unsatisfactory. The same remarks apply, with some modifications, to the final result in the Standard Oil case. The notable consequence has been that these notorious trusts are thought by the community generally to have escaped the punishment which they deserved. The community has attributed the blame for this unfortunate condition upon the Sherman law itself, and the exponents of the victims of these combinations have declared that these decisions show that the Sherman law has been weakened and requires strengthening by amendment. As a matter of fact, the complaints of these victims have ample ground, but their criticism should not be directed against the Sherman law, but rather against the manner in which that law was put into effect in the two particular cases in question.

CONCLUSION.

Summarizing the views which have been thus set forth, it appears that the Sherman law having been enacted in the year 1890 to meet a situation which was then deemed by Congress to be most grave and threatening, with respect to the alarming growth of huge aggregations in restraint of trade, the statute remained practically dormant until, in the year 1895, the Supreme Court, for the first time, considered it in the Knight case. That case resulted in a decision by the court which was generally, if not universally, accepted as meaning that the Sherman law did not apply to industrial or trade combinations and agreements in restraint of trade. Encouragement was thereby given to persons engaged in business on a large scale to proceed in the monopolistic practices which were then in vogue; and to other persons, to extend the field of their operations by creating new and even larger combinations, whose purposes were to engross or control the particular branches of industry which were thereby affected. The next development in the history of the Sherman law was that, in the year 1899, the Supreme Court considered and decided the Addyston case, and for the first time made it evident that the previously existing views based upon the Knight case were erroneous and that the Sherman law did, in fact apply, as its framers intended that it should apply, to industrial or trade combinations and agreements in restraint of trade. In the same year the Supreme Court considered and decided the two Traffic cases, and gave, as was then generally believed, an even

wider scope to the Statute by declaring that it applied to all restraints of trade, whether the same were reasonable or unreasonable.

In spite of these plain declarations by the Supreme Court of the comprehensive scope of the antitrust statute as affecting not merely common carriers but also industrial combinations of the kind which were then and ever since have been so common, the great impetus which had been given, by the misconceived purport of the Knight case, to the formation of industrial combinations, was not checked. On the contrary, it proceeded with renewed vigor, so that in the period from 1899 to 1904, the number and the size of the industrial combinations created were far greater than before that period.

The limits of this paper have not permitted of any consideration of the circumstance that in the year 1902, under the administration of President Roosevelt, a policy of drastic and general enforcement of the Sherman law was begun. Under this new policy a suit was brought by the Government on March 10, 1902, in the Circuit Court of the United States for the District of Minnesota against the Northern Securities Co. to dissever the union of the Great Northern Railway Co. and the Northern Pacific Railway Co., which union was in effect brought about by the formation of the Northern Securities Co. as a holding company of the stock of the two railway companies. On March 14, 1904, the Supreme Court affirmed the decree of the circuit court which granted the injunction prayed for by the Government, and thereby brought about the dissolution of the securities company.

During the remainder of the Roosevelt administration the Government instituted more than 40 prosecutions under the Sherman law as compared with a total number of only 18 prosecutions instituted by the Government from the time when the Sherman law was enacted in 1890 to the commencement of the Roosevelt administration in 1901. It may be noted that it was during this period of great activity under the Roosevelt administration that the suits against the Standard Oil Co. and the Tobacco Trust were begun.

For the first time, then, the business community was aroused to a recognition of the drastic and far-reaching force of the antitrust statute. Lulled into the belief that the statute lay on the statute books as an idle and impotent thing—a belief quite justified prior to the Addyston case because of the mistaken conception of the law as defined in the Knight case—the business community was rudely awakened to a recognition of the fact that the antitrust law constituted a statutory provision of the most drastic nature. It was perhaps natural that widespread criticism should arise and that the contention should be made that the law had not been properly understood by the business community. It was further contended that conflicting decisions of the courts had rendered the meaning of the statute indefinite, obscure, and uncertain, so that the community at large could not and did not understand its meaning.

It was perhaps natural that these expressions of alarm and protest should have been made, but it is difficult for the student of the Sherman law to understand the basis for the contention that the law was obscure or indefinite in its meaning. Except for the conceded obscurity occasioned by the Knight case, it may be safely asserted that none of the subsequent decisions of the Supreme Court were in any respect vague or uncertain, nor did they in any manner depart from the uniform line of construction to the effect that the Sherman law, as did the common law for centuries before it, condemned and forbade the wrongful and harmful practices employed by huge aggregations of capital.

The limitations of this paper must make it suffice to say that, beginning with the decision in the Northern Securities case, a great variety of cases were begun by the Government under the antitrust statute, the decisions in which almost uniformly upheld the force of the statute as contended for by the Government. These decisions culminated, in the year 1911, in the decisions of the Oil case and the Tobacco case.

In these cases the true force and effect of the statute was defined more vigorously, although not upon any new principle, than in any of the previous decisions. In them, as has been pointed out above, the Supreme Court declared the "rule of reason" as being the guiding principle for the interpretation of the statute.

Whatever doubt or uncertainty may have existed prior to these decisions, experts of the antitrust statute assert that there can no longer be reasonably made any contention or claim that the statute is any longer uncertain or doubtful in its meaning. Aside from the discussion, more or less prevalent, that the distinction between a reasonable restraint and an unreasonable restraint has caused uncertainty—a distinction which, for all practical purposes, as has

been shown above, is merely academic—it is confidently asserted that the meaning and the construction of the statute have been made perfectly plain. It has been well said that "the act under the interpretation of the Supreme Court is clear enough already, save for those who will not understand it, and * * * that in attempting more explicit legislation Congress may stumble upon difficulties of which it now has very little idea."

No attempt has been made in this paper to consider or discuss the economic policy which underlies the antitrust statute, nor the wisdom of the drastic manner in which the statute has been enforced by recent and existing national administrations. But in so far as is concerned the question of the present certainty of the meaning of the statute and its efficiency to meet the conditions which it was intended by its framers to meet, without and amendment as to its substantive provisions, we venture to assert that the history of the statute, as outlined in the foregoing pages, shown that no such amendment is necessary.

By the statement above made that no amendment is necessary, reference is had only to the substantive provisions of the act. No opinion is expressed with regard to the advisability which appears to be under general consideration in Congress at this time, of enacting new and supplementary legislation relating to interlocking directorates, holding companies and similar subjects, for the reason that such proposed legislation is not germane to the subject which has been here discussed.

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 7.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Monday, February 9, 1914.

Mr. CARLIN. Now, Mr. Bennett, we will hear you. Give your name, address, and occupation to the reporter.

STATEMENT OF MR. JAMES E. BENNETT, ATTORNEY AT LAW, 150 NASSAU STREET, NEW YORK CITY.

Mr. BENNETT. My name is James E. Bennett: I am an attorney; my address is 150 Nassau Street, New York City. I am almost ashamed to speak after the Amalgamated Copper Co. has been heard here, because I am so small, and the people I repre-ent are so small. I represent a number of manufacturers of printing presses who are corporations, manufacturers of bookbinders' board, an importer of paper, a manufacturer of ladies' waists, and a few little corporations like that, organized all the way from $30,000 up to $3,000,000. We never worried about this trust legislation we have seen so much about in the newspapers from time to time until some man called our attention awhile ago to the fact that we were engaged in interstate commerce, and that while the bill apparently was aimed at the trusts it looked as though some of the shot would scatter and

hit us; and in the last two or three days we have been considering among ourselves whether these tentative bills would strike us. Just this morning I had the pleasure of reading a bill introduced by Mr. Morgan of Oklahoma, which was referred to the other committee, the Committee on Interstate and Foreign Commerce. Of course, if that bill was adopted, I would take the next train back to New York, and I would be perfectly content, because that only affects corporations whose gross business amounts to $5,000,000 per annum or over. The largest corporation I represent does not do a business of more than $3,000,000 per annum, so that if that $5,000,000 clause was put in this bill we would rest perfectly comfortable. I do not know whether that bill is going to be adopted or not, so I would like just a moment or two of your time to find out whether your bill does strike us, and if it does not we will not be hit even by bird shot.

In the first tentative bill, section 9, it is provided:

That is 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.

Now, I will tell you how we sell a printing press and then, perhaps, you genetlemen can tell me whether we have been discriminating in price. You probably are familiar with the names of many of the large printing-press manufacturers of the country, like R. Hoe & Co., Gauss & Co., of Chicago; the Cottrell Co., of Rhode Island: the Potter Co., of Plainfield, N. J.; and the Scott Co., of Plainfield.

Now, let us assume that the chairman—who is not here, so we can speak of him—is in the printing business in Chicago, and he lets it be known that he wants to buy an ordinary flat-bed, two-revolution press, the kind they use in printing these hearings. Now, you read our catalogues, and you will find that we have a fixed price, but it is only true in the catalogues. Anything you hear to the contrary is not true. Now, we go to this man in Chicago, and the Scott Co. is there, the Hoe Co. is there, the Babcock Co. is there, the Miehle Co. is there, the Whitlock Co. is there, and we look over his plant, and see what we have to do, whether we have to take out a window, etc. The normal price of the press is somewhere around $3,000. We work on that man. We have a salesman there and we work on the foreman, and we work on everybody that we think has a little pull, and finally he signs up with us for some one of the presses.

Now, we will say the price fixed on is $3,000, and we will say that the Miehle Co. sold the press. Now, another man in Chicago, three months afterwards, wants to buy a press and we go there and go through the same thing, and we sell him a press for $2,500. Competition happens to be a little bit stiffer, and maybe his credit is better, because these presses are all sold on time. Anyhow he gets it for $2,500. Now, it is the same press. Are we guilty of a discrimination in price or are we not? It says here that we are if we injure a competitor. Now, we never knowingly help a competitor. We have the option here to injure or destroy him. He may say that we are injuring the Miehle Co., because the first press was sold for $3,000, while the Babcock Co. got the second press for $2,500. Now, the Miehle Co. claims that they have been injured to the extent of $500 because

that price was not maintained. I do not know whether it can be maintained or not. The worst of it is that there is no way under heaven that I can tell whether the courts are going to uphold the interpretation that you may put upon this law. That is why we are worried about this provision in regard to discrimination in price.

Mr. CARLIN. Well, you understand what that section means, do you not?

Mr. BENNETT. No, sir; I do not.

Mr. CARLIN. It means just what it says.

Mr. BENNETT. Well, you were not here, unfortunately for me but fortunately, perhaps, for you, a while ago when I made a dissertation on that subject.

Mr. MORGAN. Would you not think that includes you as well as anybody else?

Mr. BENNETT. I am perfectly free to admit that I have talked over this matter with the vice president of the Miehle Co., the president of the Cottrell Co., the secretary of the Hoe Co., the general manager of the Babcock Co., and the general managers of other companies, and they are absolutely of the opinion that these words "discriminate in price," in connection with the other language here, would absolutely prevent our method of sale.

Mr. CARLIN. Do you mean to say that you sell the same printing press at different prices in different sections of the country?

Mr. BENNETT. We sell at different prices in the same section of the country. Now, we will take Mr. Jones and Mr. Brown. They both want to buy a printing press. Mr. Jones has good credit and Mr. Brown has not. We sell most of our printing presses on time. We will sell you a $3,000 at $250, and you pay us $50 a month until the balance is paid, if your credit is good. Another man may insist on having $1,000 down and he will charge more. The competition to sell a machine to the man whose credit is not so good is not very keen. If the competition is good he is going to get a less price. This has been the history of all of the concerns in the country. I have been interested in printing-press concerns for about seven years, and that is the way they do business.

Mr. CARLIN. There is nothing in this bill that would prohibit you from fixing a credit price and a cash price.

Mr. BENNETT. Yes, sir; but we have no such prices.

Mr. CARLIN. Provided the prices were the same in every section of the country.

Mr. BENNETT. Yes, sir. But during the life of the printing-press companies they have never been able to do that. If the Government were to tell us that the price of a 42 by 50 bed two-revolution press should be $2,000, no more and no less, we would be satisfied and go home to-night. If they should say that a small pony revolution press, 24 square sheet, shall sell for $1,750, no more and no less, everywhere in the country, we would be satisfied. We are not permitted to agree on any price ourselves. No. We would run right plumb up against the Sherman law, if we do agree; if we do not agree it looks as though we would get hit here. I will not say that we are between the devil and the deep sea because this committee might be on one side or the other. I do not know where we would be.

Mr. FLOYD. This would allow you to fix the prices of your commodities to suit yourselves, independent of the prices fixed by your competitors. The purpose of this legislation is to prevent you from discriminating, but it does not attempt to fix your prices.

Mr. CHANDLER. Your intention is not to injure or destroy, as I understand your statement, but it is to protect yourselves in your simple business dealings with your customers.

Mr. BENNETT. It is to protect ourselves, and if our competitor loses a contract because we are selling one man a press at $2,500 instead of $3,000, our competitor can not complain that we are injuring him.

Mr. CHANDLER. When you are trying to make a sale do you have the competitor in mind or are you simply dealing independently?

Mr. BENNETT. We never sell a press with the competitor in mind; we sell it to get the sale. But he might claim that we were cutting prices and injuring him.

Mr. CARLIN. He might claim it, but the object of this legislation is to require you to sell your presses at the same price, plus transportation, all over the country, and your competitor must do the same thing.

Mr. VOLSTEAD. Suppose there are two men in the same town and one buys a press at $2,500 and the other buys it at $3,000. I presume the man why buys it at $3,000 might claim that he was hurt.

Mr. CARLIN. This would prevent that very thing. That is exactly what this provision is intended to do.

Mr. BENNETT. But suppose we sell a press to-day at $3,000. What is to prevent us from changing our price and selling it to-morrow at $2,500 and the next day at $3,000? Suppose we get up a little schedule and say, "Price for February 9, $3,000"; to-morrow we get up a little schedule and we say the price is $2,500; and the schedule for the following day is so and so; who is going to say it is not?

Mr. FLOYD. That is all right if that price is uniform throughout the United States.

Mr. BENNETT. But we never sell more than one press a day, and if we did we would be millionaires.

Mr. CARLIN. As I understand you, what you want is the right to sell a half dozen presses in the same town at different prices.

Mr. BENNETT. We want the right to come here and sell a printing press to the Government Printing Office or to the Star Co. in open competition, and get the best price we can, irrespective of any price we have gotten before; and this will prevent us from doing that.

Mr. CARLIN. That is exactly what it is designed to do.

Mr. BENNETT. Well, I thought we wanted competition.

Mr. CARLIN. But that provision has some regard for the fellow who is doing the buying.

Mr. BENNETT. Well, let us say that it is intended for that purpose. What price are we going to fix? The lowest price we have ever sold it for or the highest price?

Mr. CARLIN. That is your business.

Mr. BENNETT. Then everybody is going to fix the best price. Now, where is the man who is purchasing the press going to find himself? Where is he going to get off? This is going to come just as near as the Sherman law can come to getting us together and making fixed prices.

Mr. CARLIN. But you can not get together, because that is prohibited.

Mr. BENNETT. Yes, sir; but——

Mr. MORGAN (interposing). Do you not think that this would drive you together, not by mutual agreement, but——

Mr. BENNETT (interposing). I will say that we are nearer together now than ever before.

Mr. CARLIN. If you come together it will drive you to jail.

Mr. BENNETT. I am free to say that this is the only thing they have agreed in in a hundred years.

Mr. DANFORTH. Your idea is that if the price is fixed for each man you have stifled competition.

Mr. BENNETT. Yes, sir; and the mere fact that we have fixed the price is going to be evidence that we are guilty.

Mr. CARLIN. And if you attempt that, it would not only be evidence of being guilty but you would be guilty.

Mr. BENNETT. Yes, sir; but what would we do?

Mr. CARLIN. I think you would compete. That is what I think you would do.

Mr. BENNETT. Well, if we compete, then prices are going to be hit or we are going to try to get around them and we are going to change our prices every time we sell a press; we are going to get up a new schedule. Of course, in New York City we are all engaged in interstate traffic. New York is a place to sleep, and everything is sold to New Jersey and other States.

Mr. CARLIN. You say New York is a place to sleep?

Mr. BENNETT. Yes; if you get on the top floor. Now, all of us being engaged in interstate commerce, suppose we were all compelled to file with the Interstate Commerce Commission a schedule of prices. That is the only way the Interstate Commerce Commission can govern the railway companies and other common carriers. They are compelled to file tariffs. That is the only way you can make us live up to that.

Mr. CARLIN. Mr. Bennett, if we can not make you live up to it, you have no complaint. I would not let that worry me.

Mr. BENNETT. No; the lawyer never lets the troubles of his client worry him, but he has always the right to tell them to the judges, hoping that the judges will come his way. I think I have made it clear how we think the discrimination in prices affects us in our business.

Mr. VOLSTEAD. Suppose we strike out the words in the fourth and fifth lines, "with the purpose or intent to thereby injure or destroy a competitor"; would that materially affect you?

Mr. BENNETT. So that it will read, "to discriminate in price between different purchasers of commodities in the same or different sections or communities," and stop there?

Mr. VOLSTEAD. I mean strike out the provision regarding the intent to injure.

Mr. BENNETT. Of course, if it were not written in the law the judges would put it in.

Mr. FLOYD. It would then hurt you worse than if it was written in the law.

Mr. BENNETT. Then they would smear it all over the landscape. I understand the committee is trying to shoot a rifle shot at some trust, and I do not want them to shoot bird shot.

Mr. FLOYD. Here is the evil we are trying to correct: In many instances large concerns will reduce the price of their commodities in a certain territory in order to drive out and destroy a competitor.

Mr. BENNETT. Yes.

Mr. FLOYD. There are some notable instances in which that has been done to reduce the price below the cost of production, and in many States statutes have been passed to prohibit that. This follows the wording of the New Jersey statutes. In some States it says, "If it is reduced below the cost of production." We followed the language of the New Jersey statute.

Mr. BENNETT. Do you know how this New Jersey statute has affected the price of gasoline?

Mr. FLOYD. No; I do not. I will hear you on that when I have finished my statement.

Mr. BENNETT. I beg your pardon.

Mr. FLOYD. You can lower your prices every day or every week, or raise them, but if you lower them or raise them in one place you must lower them or raise them uniformly.

Mr. BENNETT. We can change them the next day.

Mr. FLOYD. You can change them the next day, but you would have to sell them uniformly all through the country. You could not sell one press here at one price and another press in New York on the same day at a different price. Of course, you would have to allow for the cost of transportation.

Mr. MORGAN. Is your business done on a percentage of profit?

Mr. BENNETT. Yes, sir.

Mr. CARLIN. What is your percentage of profit?

Mr. BENNETT. The percentage of profit in the printing-press industry—when I say any percentage of profit that includes the money available for dividends or salaries of officers—is about 5 per cent. Some of the companies are small and do not pay any dividends and some of them are big and do not pay any dividends, but the average percentage of profit is about 5 per cent on the capital invested. Those are the latest figures for 1912.

Mr. CARLIN. Let us take the question of cost of production of a printing press that you sell at $2,500. What would that cost you to produce?

Mr. BENNETT. It depends upon the manufacturer—the Whitlock Co., in Derby, Conn., and they get very cheap help. Of course, it is good help around there, but they do not average over 30 cents an hour, and they turn out 15 or 18 presses a month. They have only certain patterns. The Babcock Co., at New London, Conn., has an average cost of 45 cents which they pay their laborers. The rest of the work is about the same.

Mr. CARLIN. How many companies are there manufacturing printing presses in this country?

Mr. BENNETT. Well, when you talk about printing presses, they run all the way from the little things printing cards to the big sextuple presses printing newspapers.

Mr. CARLIN. I mean job-printing presses.

Mr. BENNETT. The Hoe Co., the Scott Co., the Duplex Co., and the Gauss Co. are the four companies manufacturing practically all the newspaper presses. The Miehle Co., of Chicago, and the Babcock Co. and the Whitlock Co. are the three companies that manufacture the flat-bed presses that publish the ordinary books and things like that. Then there are, I should judge, about 18 manufacturers of job presses; that is, what we call a job-and-platen press. It has a small circle up here [indicating], where the inking rollers do the inking, and then it comes down this way [indicating], and the printing surface comes up like this [indicating]. You may have seen them in the shops. The business is divided among those three about equally. The Cottrell Co., of Rhode Island, makes book presses for work that is hardly touched by any other company. It is almost in a class by itself, like the Saturday Evening Post and the Ladies' Home Journal, Sears, Roebuck & Co.'s catalogues, and an enormous amount of cheap book and catalogue work that has to be run through about 20 miles an hour.

Mr. DANFORTH. You were going to tell us about the price of gasoline in New Jersey as affected by the New Jersey statutes.

Mr. BENNETT. A man told me last week that he was riding out in his car, and they stopped at a small garage in the country, where he could buy only a few gallons of gasoline at a time, and he paid a very large price. When he came to town he would buy it from 2 to 4 cents cheaper per gallon, because they could afford to sell it more cheaply by reason of selling large quantities. He says that now the price is uniform, and he is paying the same price in the country, and the city price is the same as the country price.

Mr. DANFORTH. That has helped the consumer?

Mr. BENNETT. That has helped the man who is running the car.

Mr. VOLSTEAD. I hope that is true outside of New Jersey.

Mr. BENNETT. I do not want to take any more of your time than is necessary, because I do not think that my matter is of such tremendous importance as those of the great big companies.

Mr. MORGAN. How do you think this ought to be changed now?

Mr. BENNETT. I would leave it as it is, or else I would put a little more to it. I like your suggestion of $2,000,000 and you could even make it $3,000,000 and we would be satisfied.

Mr. MORGAN. If it was put down to $1,000,000 it would take out most of them.

Mr. BENNETT. Yes, sir. Only three of our companies in the printing-press business do an annual business of $1,000,000.

Mr. MORGAN. None of those concerns could in any way be called a trust?

Mr. BENNETT. No, sir. The only trust they have is in their customers, and it is frequently misplaced.

Mr. MORGAN. There is no fixing of prices, and there is really very great competition at this time?

Mr. BENNETT. Yes, sir. We have competition on competition. There is never a press sold, except the small job press, that there are not three or five bidders bidding on the contract, sometimes on large Government presses.

Mr. MORGAN. Would you not think that for the National Government to make a law that would be an interference in or a supervision

over all the small concerns in large cities would be a great aggravation and a great expense to the Government without any results accomplished?

Mr. BENNETT. Are you referring to this bill?

Mr. MORGAN. This bill is supplementary. This bill includes all corporations and persons doing an interstate commerce business, which you say would include the small concerns. Now, the other bill puts all of you under the supervision of that commission. Then you would open your books to them and they would have the right to take action.

Mr. BENNETT. Well, we are going to object very, very strenuously before anything like that is done, and I think we would rather test the constitutionality of the law before we would open our books, because our competitors are so keen that we can not afford to let any of our competitors see anything inside of our business. Of course, we would obey the law if we had to.

Mr. VOLSTEAD. Assuming that you should eliminate corporations doing business of less than $3,000,000 annually from the operations of a provision like this, would there not be some question as to the constitutionality of the rest of the measure?

Mr. BENNETT. I think there would be a very severe question about it, but, of course, I am not a constitutional lawyer and I would not want to say. I think that it might possibly be a constitutional question.

Mr. VOLSTEAD. Could you not make a distinction provided that distinction was based upon good reasons?

Mr. BENNETT. Yes.

Mr. VOLSTEAD. I presume that a corporation that does not do more than a $1,000,000 worth of business a year might still be such a monopoly as one who does a business of $100,000,000 a year.

Mr. BENNETT. That might be true if it was in a small line. But the reason I would agree to that would be because it would let all of us out. Now, there is another thing that is very serious, and that is in the next section, section 10, page 2, committee bill No. 1: What shall be deemed an attempt to monopolize trade? For any person to make a sale, fix a price, discount, or rebate. You see, that narrows us down to "a person, a sale, a price." Now, I will tell you how we sell presses west of Pittsburgh. Here in the East we can sell our presses by our own agents. We have agents in Philadelphia and New York and in the East, and they do not work for anybody else. West of Pittsburgh the territory is so large that none of us has our own agents and we make a deal with a type foundry, a concern which has to sell accessories to printers. For instance, the Babcock Co. goes to the Barnhart Type Foundry and says, "You are going all through our section. Now, you handle our presses and we will sell you our presses f. o. b. factory in New London at a fixed price, and we will give you an exclusive territory provided you do not sell a similar press." Now, that is the agreement we have been working under for years and years and it has proven satisfactory. Under this bill that would make us liable under the law. The matter of keeping agents out here is very expensive. You can not sell printing presses by mail. That being so, we are prohibited in section 10 from doing our business that way.

Mr. FLOYD. Now, you say you establish an agency?

Mr. BENNETT. Well, the Barnhart Foundry Co. handles all kinds of type and frames for holding type, and all kinds of accessories of a printing shop, and we will go to this Barnhart Co. and say, "Here, west of Pittsburgh, you represent us. You sell Babcock presses and we will give you this territory exclusively. We will not sell a press in that territory. If we get an inquiry we will turn it over to you and you will sell the press; but you are not to sell any other flat-bed press in there. You have got to devote all your interest to our concern." Now, I believe that this section 10 would absolutely prevent that agreement.

Mr. FLOYD. If you sell them to him and he is not your agent then he is a purchaser from you on a contract that he will not deal with anyone else, and the provisions of this bill would undoubtedly reach you on that kind of a deal.

Mr. CARLIN. That is the very thing we are trying to reach.

Mr. BENNETT. Yes; and I think you are wrong in trying to reach such a thing. For instance, the Babcock Co. sells to the Barnhart Co. and the Barnhart Co. sells to the little printers all through the West, because the Barnhart Co. has agencies in Washington, Kansas City, and St. Louis. They can buy and sell small things. Their man can sell a hundred dollars worth of goods and he has paid his way, but our man can not do that. If they get an inquiry for a press, the Barnhart people will do all they can to sell the press, and they know all about the prospective purchaser's credit in the particular town in which they are located. They may give him five years' credit, but we could not do that, because we would not know anything about his credit. Now, what I am telling you is not theoretical. We have found that the best thing is to have a fixed price with the Barnhart Co., f. o. b. our factory, because they know the cost of transportation and they take all that chance, and they can get as much money above our price as the conditions will permit.

Mr. CARLIN. And this bill would prevent you from entering into such a contract?

Mr. BENNETT. Well, but that contract has 10 years to run, and how we are going to get out of it I don't know. I suppose the Barnhart Co. and ourselves will have to occupy adjoining cells. It was a perfectly legal contract when we made it. I would like to know whether the Constitution means anything when it says that contracts shall not be impaired. This is trying to set aside a perfectly legal contract between business men.

Mr. CARLIN. That is true of every criminal statute. It simply makes a crime of something that has heretofore not been a crime.

Mr. BENNETT. Yes; but if you let it be generally known throughout the country that this is a criminal statute you will not have an empty room here. The reason the people are not here is that they do not know about this. You gather together a hundred business men in any lunch room or club and tell them that these bills will hit them and they will laugh at you. I went up to Syracuse the other day and in a smoking car I talked to various men in various lines of business. When I told them about these bills they thought I was crazy, and one German said, "I can not tell what it means, because it has too many words in it." That was when I showed him a copy

of one of the bills. I told him that it might strike him because he was a manufacturer of varnish and sells it all through New York, but he told me that it would not hit him because varnish is an unstable commodity.

Mr. CARLIN. You would perhaps be surprised to know that the greatest opposition has come from gentlemen who want to compel the fixing of prices all the way down to the retailer.

Mr. BENNETT. Yes, sir; but I am not asking you to fix it. I am frank to say that I would make a trip down here every day this week, and my client would pay me a very handsome bonus if I could make you enact such legislation. But I know it would be useless. I have had a little too much experience to bay for the moon, because I know you would not stand for it. As I have already explained, sections 9 and 10 hit our business. I have a client who manufactures umbrellas who would be hit in the same way as we would be, except that he has some fixed price for selling goods. Of course, in poor seasons he will sell at whatever prices he can get, above cost, in order to keep his factory going. Now, he would have to get out a schedule of prices every day in order to keep within this law.

Section 13 provides:

> 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.

Now, suppose we sold a $10,000 press in St. Louis. Suppose we sold the same press in Kansas City for $9,000. Should our competitor get an injunction against us for quoting such a price? Could the man in St. Louis get an injunction because his plant would be injured by reducing the value of his plant by $1,000? This looks a little bit far-fetched, but what surprises us in the law business is how far-fetched will the law go. A business man will very often have a case which will develop something that we thought would be impossible. It looks to me like it would be possible for any disappointed competitor to get out an injunction against the successful bidder.

Mr. CARLIN. You could not be hurt by the injunction because that section requires him to give bond.

Mr. BENNETT. But suppose he won. Suppose the judge says that is what the law means. Then we would be hurt to the extent of the $1,000, and the $1,000 would hurt us. Of course it would be an irreparable loss, because if we did not make the sale the competitor would make the sale.

There is another thing in our business. We hardly ever make a clean sale. I do not mean that there is anything dirty about the business. I mean that if we sold any one of you gentlemen a new press you would give us back the old press, because there are very few men starting in the business these days. They are nearly all old hands. Whenever you buy a new press you have to give back your old one and you get a discount. There is where you come in with the "discount or rebate." The Miehle Co., the Whitlock Co., and the Babcock Co. might agree that the price would be $3,500 for a press that would ordinarily sell for $3,000. They will not agree together, but they will all fix the price at $3,500. Mr. Jones says, "I have an old Campbell press made 30 years ago. I want to buy a

new press from you, and I want to know how much you will give me for my old one." Now, some man might give him $350 for it, and another man might give him $250, and another might give him $750. Would that be an absolute discount or rebate on the press? Of course they would not want the old press. They would have no use for it. They would take it home and sell it for junk or throw it away, when they might have allowed him $750. They are doing that every day when they make a sale. That is the way they make them.

The New York Times has just bought a plant and put a new press installment in there, and the binding part of that contract was that the man who installed their new plant must take their old plant away exactly as it stands. Under those conditions some of the bidders were prohibited from bidding. They could not handle such a thing. Naturally the man who put in the old plant could handle the old press, and of course he was the one who put in the new press. Was that a discount or was it a rebate, or what? Every one of his competitors would say that he was guilty of accepting a rebate; and being a large deal, they might try to say that he was trying to make a deal with the Times. I would not care if they thought the newspaper was guilty, but the Hoe Co. might be found guilty of what they considered a legitimate deal. Section 10 would prevent the buying back of second-hand presses under any such conditions as those. Section 12 limits this whole business to one sale. One sale across the border would be enough. I think that is getting down pretty small. One sale across the border makes it interstate commerce. My only suggestion to this bill is that it be eliminated by putting in a $3,000,000 limitation or that that section of the bill be eliminated. We can not get any assistance out of it; we are simply innocent bystanders, hit by stray rifle shots intended for the big fellows.

Mr. DANFORTH. How about your customers?

Mr. BENNETT. The Typothetæ, an association of master printers, recently wrote us a letter and asked us to raise the price of our presses so that there would not be so many kikes getting into the business. Of course, we did not do it, although we would have been very glad to do it. Mr. Hearst, in New York, last year, bought a printing press for something like $15,000 or $20,000, a big sextuple press that ran through a 20-page edition at the rate of 90,000 an hour, complete, folded, run out, pasted together, all ready for the boy to put under his arm, where his father, 20 years ago, in California, bought a press from the same maker, that ran through a 16-page edition at the rate of 72,000 an hour, for $40,000. The competition is such and the prices are so low that the business manager of the New York Sun told a friend of mine that he bought a color press some time ago for a very low price, and he said the manufacturer ought to have had $10,000 for it. We do not sell to the National Government twice at the same price. The Government has not bought any presses for some time, though. The Government sends out and asks for bids, and we send in bids, and the lucky man gets it. The next time we send in bids again. The bids are never alike. You look over the Government records and you will be surprised how infrequently the Government buys the same press at the same price. Of course, under this bill we would have to be very careful in bidding with the Government. We would have to fix a price that would stand for all eternity.

Mr. FLOYD. Mr. Bennett, you do not seem to understand that bill as I do. It only relates to the prices that you fix and not to the price that somebody else fixes. You can fix that price high or low, or whatever you choose, but you can not sell to one individual at one price and to another individual at another price. You can cut under the other manufacturers, you can undersell every one of them, provided you maintain the same prices throughout the country.

Mr. BENNETT. Yes.

Mr. FLOYD. You can do that by lowering your price.

Mr. BENNETT. How often can we lower our price?

Mr. FLOYD. As often as you deem proper.

Mr. BENNETT. Then there will not be any fixed price.

Mr. FLOYD. It would be the same all over the country.

Mr. BENNETT. But we could lower it every day.

Mr. FLOYD. Yes, sir; all over the United States.

Mr. CARLIN. You can not lower your price in Washington and raise it in New York on the same day.

Mr. BENNETT. We never sell two printing presses on the same day.

Mr. CARLIN. Then this bill will not affect you.

Mr. BENNETT. If the interpretation of the committee is that we can change our prices every day we are perfectly satisfied, because if we can do it every day why can not we change them every half day, every morning and every afternoon? And if that is done, why not change them every hour?

Mr. CARLIN. You could not do that.

Mr. BENNETT. Why not?

Mr. CARLIN. That would be a ludicrous proposition.

Mr. BENNETT. I think it is ludicrous on the face of it.

Mr. CARLIN. And the statute would be meaningless on the face of it.

Mr. BENNETT. I think it is now, unless you can provide some way of maintaining supervision over us, otherwise the first proposition in the bill is ludicrous, for the reason that it can not be put into successful operation. I do not think you can hit the trusts with it.

Mr. CARLIN. Suppose we should say that you could only do this once a month or once in six months or once a year. Would you like that better?

Mr. BENNETT. No, sir; I would not, but I see that is the only way to make it workable. Of course, if you did it that way, the country would not stand for it. I would not have it that way; no, sir. I am frank to say I would not have this bill hanging over any of the companies I represent, because it is fraught with too much danger. We are treading on too thin ice all the while; we are hampered in our business not from any moral injury but because of the wording of the statute.

Mr. CARLIN. The same complaint was made of the Sherman law, and gentlemen said they did not want to violate the law but they did not know what it meant.

Mr. BENNETT. They are finding it out now.

Mr. CARLIN. That is simply a method of argument adopted by gentlemen who do not want to understand the law and who want to discredit it, and yet, you know, there is no difficulty about understanding the Sherman law.

Mr. BENNETT. I agree with you on that. We agree now that if we fixed our prices at the same price we would be running contrary to the Sherman law.

Mr. FLOYD. You mean that if you and your competitors fixed your prices the same?

Mr. BENNETT. Yes, sir.

Mr. FLOYD. This has no relation to your competitor's prices.

Mr. BENNETT. I am not so sure about that.

Mr. FLOYD. It gives you the right to fix your price higher or lower than the prices of your competitors.

Mr. BENNETT. Yes.

Mr. FLOYD. And maintain them.

Mr. BENNETT. Yes.

Mr. FLOYD. And that would prevent you from selling at one price in one locality and at a different price in another locality. The purpose of this legislation is to prevent you from discriminating among your own customers to the injury and detriment of some other persons.

Mr. BENNETT. Suppose it cost more to sell it in some other place.

Mr. FLOYD. Provision is made for the difference in the cost of transportation.

Mr. BENNETT. Yes; for transportation. But suppose an agent in Chicago sells a press for $3,000. Suppose we send a representative to Kalamazoo once, twice, or three times a year. Suppose we send him five or six times in the course of a year and he finally stays there. Now, competition is keen and if we had a man for five weeks staying in Alabama, for instance, staying at good hotels, and he finally sells a press, we will have to get more for that press than if we had not gone to all that expense. Taking into consideration the conditions surrounding the sale, we would have to change our price. We can not have a fixed price. It is the same way in church organs.

Mr. FLOYD. Now, when you had to send a man to Alabama four or five times, did you sell your press at a higher price or at a lower price?

Mr. BENNETT. We had to. We tried to get a higher price.

Mr. FLOYD. But what did you do?

Mr. BENNETT. It went to the Gauss Co., of Chicago, at $18,000, and they lost about $5,000. If those salesmen had only been wise and got around a table and said, "Don't let any of us bid lower than $25,000," and stuck to it, they would have been all right. The difficulty is that the other fellow might reduce his price, and we would have to reduce ours. All our business is done on bids, written or oral bids. It all depends on little accessories that are thrown in to make an inducement to the buyer, and that would all come in under "discount and rebates." We would have to change all our rules for selling presses.

Mr. FLOYD. And your competitors would have to do the same thing?

Mr. BENNETT. Yes, sir; but it would not work out to the benefit of the consumer, so far as I can see. If it would, then we would get more money. This bill would prevent us from having an agent take on exclusive territory and handle it where we could not sell him the presses beyond a certain price. How we would do business in a large

territory where we could not have agents, I do not know. We have the Barnhart Co. doing business south of Chicago. We have the International Type & Paper Co. doing business for all South America, and they buy their presses f. o. b. New York. How would a company with a total invested capital stock of $1,000,000 cover all that territory personally? They could not, and the only way they can do it is by having agents, and they must have a man who will boost that press as against all other presses.

Mr. FLOYD. Then, if this law was enacted, your competitors would be excluded the same as you would be.

Mr. BENNETT. Oh, then how would we cover South America?

Mr. CARLIN. That is your job.

Mr. BENNETT. That is the German's job. They have already sold six presses in South America. We are paying our men an average of 40 cents, and the Germans are paying 14 cents, and we do not get any consideration under the tariff. This will shut out our foreign business. What is the Government for? Is the Government just to stand up and put spokes in our wheels? We are paying some of our men $6 a day to erect presses.

Mr. CARLIN. The Government is not putting spokes in your wheel, but putting a chain on it to keep your wheels from running recklessly and wild.

Mr. BENNETT. You are putting this kind of a chain, one running from the body down to the wheel. I have tried the chains, and I know what they are; they are brakes. Now, what I am telling you is true. It is the German's business to look after the trade in South America, and he is going to lick us.

Mr. CARLIN. Are you competing in your presses in the foreign market?

Mr. BENNETT. In South America and Australia. The French, English, and Belgian labor is so much lower than ours that we can not meet their competition.

Mr. CARLIN. Are they making your presses?

Mr. BENNETT. Yes, sir; they are making our presses. They came to the world's fair and copied them. They are now selling them from $500 to $1,000 cheaper in Argentina. The Babcock Co. had an offer in the Argentine Republic for a press at $3,000, the same price they gave here. The Germans got the contract, and they installed a Babcock press for $2,000. We did not get the order. There they have got the Babcock press down there, and they only paid $2,000. Our Government does not help us any.

Mr. CARLIN. How could we help you in that case?

Mr. BENNETT. You could not help us. All the Government can do is to hurt us or leave us alone, and they have not apparently any intention of leaving us alone, and that is the reason I am down here. Now, as to paragraph 4 of section 2 of the second bill, I have the same objections that I had to the first bill.

Mr. CARLIN. Mr. Bennett, your doctrine of leave us alone is the doctrine of the highwayman, is it not?

Mr. BENNETT. It would be if we were highwaymen.

Mr. CARLIN. I say you are not, but is not that what the highwayman wants?

Mr. BENNETT. What do you want? Do you want to be left alone? Are you a highwayman?

Mr. CARLIN. Oh, no; I am speaking of the doctrine of the highwayman.

Mr. BENNETT. Yes; but I do not think you ought to refer to us in connection with highwaymen. It is the tendency of this tentative bill to say that we are all guilty first.

Mr. CARLIN. I am talking about your doctrine of let us alone. It is the fundamental doctrine of the highwayman.

Mr. BENNETT. It is the fundamental doctrine of Magna Charta and the fundamental doctrine of the Constitution of the United States, which until recently was considered a very fine thing. We are entitled to life, liberty, and the pursuit of happiness, and to have property without having it seized unless you can show that we are guilty of something. These bills say that we must be searched first, and if you find nothing on us, maybe we are not guilty, and they will search us again. That is why I want to appear before the other committee on the other bill permitting us to be searched and chased all over the United States and served with subpœnas.

Mr. CARLIN. You object to all this legislation, do you not?

Mr. BENNETT. Certainly; why not?

Mr. CARLIN. You object to the Sherman law?

Mr. BENNETT. No, sir; I am absolutely willing to be bound and hog tied by the Sherman law, because that is based upon open competition and fair dealing among men. We are perfectly willing to be bound by it, and the courts seem to have no trouble in finding out what the Sherman law means.

Mr. CARLIN. But if you apply your doctrine of let us alone, what would be your method of doing business?

Mr. BENNETT. Let us alone unless we are guilty.

Mr. CARLIN. But suppose we wiped the Sherman law off the statutes? What would you do then?

Mr. BENNETT. Well, I think the Sherman law is putting into statutory form the old common law, and anything that goes to honesty and fair dealing between men and individuals is fair. We can all be investigated by grand juries after you have found some sore spot. That is why we object to paragraph 4, on page 2, second bill. "Directly or indirectly" is the same as saying "knowingly or unknowingly." The remarks which have gone before apply to this same paragraph. I believe this would absolutely hamper all the business of the companies I represent, and any other companies doing business over a State line. I want to call your attention to section 4 of the second bill, page 3. That is the section Mr. Ryan spoke of. It says:

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 that also of the individual directors, officers, and agents of such corporation.

We have the same law in New York State, except the law goes ahead a little bit further and says that this shall not apply to any director who is absent or who votes against it at the meeting. If this means that if any agent of the company goes out and does some unauthorized act—it might mean that—or if any director is liable because some officer does something which has not been referred to the board of directors, yet the board of directors has supervision over it—I do not know, but I think there ought to be something in there limiting it to persons guilty of the acts. Now, I desire to thank you,

gentlemen. My object in coming here was to learn as well as to try to give some information, to try to find out the position of the small businesses in the country. I appreciate the opportunity you have given me, and by your questions you have aided me in finding out the standing of these companies and how they would probably be affected by this legislation.

STATEMENT OF F. A. GOOD, PRESIDENT NEBRASKA LUMBER DEALERS' ASSOCIATION, COWLES, NEBR.

Mr. CARLIN. Please give your name, address, and occupation.

Mr. GOOD. My name is F. A. Good; my address is Cowles, Nebr. I am a retail lumber dealer myself, in a small town, and president of the Nebraska Lumber Dealers' Association.

Mr. Chairman and gentlemen of the committee, I appear before you to-day as the representative of about 400 retail lumber dealers in the State of Nebraska, who own and operate their own yards and keep on hand such supplies of builders' materials and coal as the needs of their several communities seem to warrant.

We feel that if there is a readjustment of the Sherman antitrust law contemplated, that our tradespeople should be heard in a matter that may be of vital importance to their business and also the life and existence of small towns all over our land; and we are lead to believe that in many instances the operation of the said law in the past has followed the lines of least resistance and has proven a menace to small business which was in no way contemplated, and has been skillfully side-stepped by most of those great aggregations of capital, whose regulation and restraint was the sole object of the said bill, or, in other words, the great trusts have been unusually thrifty and the small dealers have seen their business slipping away from them and toward a great centralized market.

We come to you representing a set of men whom we believe more frequently than any other are found to be the leading aggressive men of their community, contributing liberally to churches, charities, good roads, schools, etc., and heavy payers of taxes, rent, and insurance. Also liberal grantors of credit, which frequently amounts to a sum as large as the amount of capital that they have invested in their entire stock, and this is done without any interest returns whatsoever for the money.

Our contention of unfairness to our business in the working out of the Sherman law is that of the possibility of our becoming violators of the said law by the distribution of information through our association to its members; for example, John Jones, a manufacturer, sells to me, a retailer, several cars of lumber; then, either directly or through John Doe at, say, Omaha, he also sells to my customer, the consumer, and at the present time I am safe in saying that the fear of this law's possible scope or interpretation by the courts is so great that no association would dare to inform its members of the bare fact that John Jones was both a wholesale and a retail dealer in lumber.

The business of the retail lumberman is to purchase of the manufacturer of lumber his product in car lots, and to keep this in stock in the towns, supplying the tributary trade at such times as they

may need the same, and in such quantities and under such conditions of payment therefor as the customer's needs may demand. In this assembling of stock for our Nebraska trade, we bring together a variety of woods; for instance, in the ordinary frame building the dimension lumber is fir from the Pacific coast, yellow-pine sheathing and inside finish from the Southern States, white pine for outside finish from Idaho or Wisconsin, and shingles and siding from Washington or Canada.

The experience of good builders is that these woods are the best for the several parts of the building. And, now, if a party in, we will say, Omaha, wishes to sell building materials to the consumer he must do one of the two things, either assemble at Omaha a stock from the widely divergent parts of our country that he may reship to the consumer from, or he must ship from some one mill all of the materials that will enter into the structure.

The first of these methods in no wise eliminates the middle man but removes the business from his local community to a centralized point, in this instance, Omaha; and the latter makes it necessary for the builder to use materials that in good practice are not adapted to the uses to which they will be put, and in either event the customer is not better served; in fact, the service that is rendered from a point 200 miles from the customer, such as exists between my own locality, as it relates to Omaha, or 1,500 miles, as it exists between my own locality, as it relates to the manufacturers, will ever prove more unsatisfactory than service at the door of the consumer.

We call your attention now to the absolute disregard for truth that these trimmers or business pirates practice. For your information we will say that there are many grades of lumber; in white pine, for instance, there exist grades A, B, C, D, and numbers 1, 2, 3, 4, and 5; and in the other woods a somewhat similar list. These grades, by long practice, means much to the manufacturer or retailer of lumber and but little to the average consumer, who almost invariably is not informed on the grade subject.

Let us consider that a customer is a farmer. The expression "No. 1" with him invariably means the best; so that when he finds "No. 1" lumber quoted to him at a less price than his local merchant is quoting on the best in his stock he is led to believe that the home price is too high; and hence orders from the people quoting a less price; and, being unable to correctly grade the stock when it arrives, as we have said, a lower grade than even No. 1 is usually substituted; and if a question is raised as to grades their letter that the stock is their No. 1 lumber and that they do not recognize any other than their own grading rules is expected to be final.

Advertisements of lumber issued from these mail-order people are almost always accompanied by lies of the grossest character, with the evident intent to discredit the home lumber dealer and to make the consumer believe that there is existing a greater lumber trust that is making an exhorbitant profit on the consumer's business; for instance, advertisements are common such as this:

All the lumber for a house like this—picture given—for $490. Your lumberman would charge you $800 for this.

This door, $0.99; your lumber dealer would charge you $2 for the same.

This list of rank untruths might be extended indefinitely, but what we wish to call your attention to is the fact that this is allowed by our

laws or their interpretation; but if our association writes a letter to its members saying that John Jones Co. are retailers of lumber, an exact truth, that the lie stands unafraid; but truth is indicted in our courts.

We believe that the service from the sawmills to the consumer of lumber as conducted at present presents no possibilities of elimination.

Probably over 90 per cent of the lumber dealer's stock in trade is shipped to him directly from the manufacturers with no intervention of any other party whatsoever; and the two profits, the mill's and retailer's, are all the ones that are levied against the material from the forest to the consumer.

It is a probable fact that less than 40 per cent of the lumber used on jobs might possibly be shipped direct from the mill in car lots to the consumer, the other 60 per cent being used in a smaller way so that a local lumber yard must ever be a necessity to the community and also to the manufacturer, for no mill, even if freight rates were not prohibitory, could maintain a local shipping station at the factory caring for trade often 2,000 miles distant, and the establishment of a nearer distributing point would only reestablish a middleman at a point less convenient by far to the consumer than a local concentrating point for the various products immediately at his door.

That no moral right is possessed by a manufacturer to sell to both a retailer and then also to the consumer who is a customer of the retailer is evidenced by the skulking manner that this modern pariah adopts, who advances with outstretched hand to the merchant, saying, "My brother," and then with his concealed hand sticking the knife underneath his fifth rib.

It has been said by many of good authority that publicity is a solution to the great trust question. We do not pretend to know, but of this we are sure, that it is not justice when no effort whatever is made to punish a dealer who publishes false descriptions of his goods and lying allegations about his even unknown competitor while this party so maligned may be indicted for making a statement of truth that John Jones is both a wholesale and retail merchant.

For the past several days I have been in our beautiful Capital City and have wandered exultingly through its majestic halls, gazed at the statues of the men who have immortalized freedom, and read from the inscriptions on the walls the condensed wisdom of the ages. One beautiful mosaic I have found that so nicely depicts the basic principle that should, I feel, underlie all legislation that I call your attention to its apparent motif. Law is depicted as a woman of radiant countenance and wearing the ægis, enthroned upon a dias. She holds a palm branch toward truth with her lilies, peace with an olive branch, and industry with cap and hammer, and a sword is interposed against skulking fraud, discord, and violence.

Mr. CARLIN. The committee has no questions to ask.

Mr. GOOD. In a general way, I just wanted to call attention to an item or two which I have not heretofore referred to, that we, as lumber dealers, feel that the legislation before the committee and Congress has much to do with the interpretation of the laws, and we, wishing to be law-abiding citizens, would like any measure adopted wherein publicity is a feature or the investigation of our organization made a possibility.

I understand that some evidence has been placed before the committee in regard to the difficulties encountered by a dealer who tries to get into the lumber business. That gives rise to suspicions that there is such a thing as a lumber trust, and in respect of my own position, both as to getting into the lumber business and as regards a would-be competitor who would like to get in, I feel it would be of interest to make a simple brief statement. I make the allegation that it is the banker or the financial backing that a man has as to whether or not he secures the support when it is necessary to put him into a business and not the antagonism of the dealer that is already in. No banker will knowingly loan his money for an enterprise which promises disaster; and in most instances, in fact in all of the instances, where I have known of another man trying to get into the lumber business and being restrained, which he alleges was due to the lumber men or the lumber associations' activity, was in every case due to the fact that banking interests refused to advance him the backing that was necessary to carry on his trade with.

I thank you, gentlemen, for the privilege of making this talk to you.

However, I would just like to make this additional statement, that in talking with several Members of Congress and of the Senate here from my own State I found that in every instance they were not aware that the statements which I made in regard to publicity were a fact and that we were subject and liable to criminal prosecution for stating an exact truth in regard to business conditions as they existed.

Mr. Hall, secretary of the association, is also here.

STATEMENT OF E. E. HALL, SECRETARY, NEBRASKA LUMBER DEALERS ASSOCIATION, LINCOLN, NEBR.

Mr. HALL. I will not take up any of your time.

Mr. CARLIN. Mr. Hall, just come up where we can hear you, please.

Mr. HALL. I think I will not take up any of the committee's time. Mr. Good has been over the ground, and I understand it has also been gone over before by other delegations. As Mr. Good has said, we have come some 1,500 miles and have been here several days, we felt we would like to appear before the committee. I thank you for giving us an audience.

Mr. CARLIN. If you have anything you want to say, we will hear you.

Mr. HALL. I have nothing to add to what President Good has already said; I thank you.

Mr. CARLIN. I want to ask you a question about publicity, which these gentlemen want. As I understand it, that was the right to publish a periodical which gave the names of individuals you dealt with?

Mr. HALL. Not necessarily. What we want is to disseminate the information among our membership as to who are our competitors.

Mr. CARLIN. Which, in effect, would be those parties whom you did not want to deal with?

Mr. HALL. We naturally would not want to deal with them if they were competitors of ours.

Mr. CARLIN. Is that the object of the publication?

Mr. HALL. Is it what?

Mr. CARLIN. Is that the object of your publication?

Mr. HALL. The object of our publication was to make a man take one course or the other—either become a retailer or confine himself to the wholesale trade and not be both.

Mr. CARLIN. Then, you published in your circular the firm or corporation or individual who dealt in the wholesale and retail trades?

Mr. HALL. We would like to do that.

Mr. CARLIN. That is what you did do once?

Mr. HALL. We did not do it; we would like to.

Mr. CARLIN. I thought you did have a publication and it was prohibited.

Mr. HALL. No.

Mr. CARLIN Are you not mistaken about that?

Mr. HALL. No, sir.

Mr. CARLIN. Some gentleman made that statement.

Mr. HALL. That is what we would like to do.

Mr. GOOD. We have no national organization or association.

Mr. HALL. We have no national association.

Mr. CARLIN. As the matter stands, that, in aspect, means boycott then?

Mr. HALL. What is that?

Mr. CARLIN. The effect of that would mean boycott.

Mr. HALL. Boycott against a man who was trying to do two-faced business only.

Mr. CARLIN. And you want the privilege of boycotting him?

Mr. HALL. We want the privilege of making him confine his trade either to the wholesale or to the retail business.

Mr. CARLIN. And if he does not, to boycott him?

Mr. HALL. Certainly.

Mr. FLOYD. In other words, your retailers' association wants the privilege of publishing a list of those men who engage both in the wholesale and retail business?

Mr. HALL. That is the idea, exactly.

Mr. FLOYD. And if you can circulate that information about among the members of your association, you are confident that retailers will boycott the man who is doing that?

Mr. HALL. It certainly would. It would be foolish for a man to buy from a wholesaler who is also selling to his own customers. We are trying to meet competition from retailers. We do not fear any competition from retailers, but we can not live in the face of competition by wholesalers who sell to us and also sell to our customers. As Mr. Good has told you, a large proportion of our trade is not of such a character that the customer can purchase, in any event, of the wholesaler. It is absolutely necessary——

Mr. CARLIN. How would the consumer be affected?

Mr. HALL. What is that?

Mr. CARLIN. How would the consumer be affected if you should be given the right you ask for?

Mr. HALL. Oh, so far as my experience goes, he would fare just as well as he does at present.

Mr. CARLIN. There would not be any prospect of him faring any better, would there?

Mr. HALL. I do not get your question.

Mr. CARLIN. Would there be any prospect of him faring any better than he is now?

Mr. HALL. He might fare a good deal worse, under conditions carried to its legitimate conclusion under this Sherman law, because it would carry a large percentage of business to the wholesaler, and in that event the retailer would be obliged, in the nature of things, to get a larger percentage on the remaining share of his business, which is a small business—a business which can not be shipped in carloads. You understand that the lumber business differs from other businesses in this, that in the majority of businesses a man can ship in his stuff locally, whereas in the lumber business in order to make any money or save any money, under any conditions, he must order it by the carload as the dealer does, and get a carload rate on it. About 40 per cent, I imagine, as near as I can estimate, of the business might be purchased by carload lots. In that event the buyer would have more or less of it left on his hands, because it is impossible to make out a bill which fills his exact wants; or he would be short. If there were no lumber yards in his neighborhood and he had to depend on the wholesaler, he would be obliged, at considerable expense and loss of time, to ship his lumber in locally, with a freight rate of perhaps two or three times what the carload rate is and the risk of damage in transit also.

Mr. CARLIN. I think we understand you, Mr. Hall.

Mr. HALL. I thank you, gentlemen.

(Whereupon, at 1.25 p. m., the committee adjourned to meet Tuesday, February 10, 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 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 8.

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

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

The CHAIRMAN. The committee will be in order. We have Mr. Seth Low with us this morning, and we will be very glad to hear from him now.

STATEMENT OF MR. SETH LOW, OF NEW YORK CITY.

Mr. LOW. Mr. Chairman and gentlemen of the committee, I am here in response to the invitation that has been given to discuss your tentative bill No. 2, 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.

I confess, Mr. Chairman, a certain feeling that it is not altogether wise to attempt to add definitions to the Sherman law; partly because of the reason that was outlined here last night, that because of the many litigations under it its meaning has become pretty definite already; and partly because we in the Civic Federation, who have been studying this matter for a good while, have come to exactly the same conclusion which was reached in Congress when

the Sherman law was passed, that it is very difficult to define, and that it is better to leave the language of the law in general phrases. I think that Congress, before the Sherman law was passed, discussed very fully the propriety of forbidding this thing and that thing and finally came down to the general language which is now in the law.

Prof. Clark and myself are members of a committee of the National Civic Federation, which has been studying this question for a year or two. We kept certain definitions in our draft bill for a year or more; but finally took them out in order to substitute for definitions the language of the interstate-commerce law, which, as you remember, forbids the railroads from making or giving—

any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality in any respect whatsoever.

Or subjecting—

any particular person, company, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

We think that under the clause a great many unfair practices have been obliterated from railroad practice. Perhaps you recall the report of the Interstate Commerce Commission filed, I think, last week, in regard to the use of sidings and tracks belonging to industrial organizations. They said that they thought these practices amounted to rebating, but whether they did or not, they certainly were an undue or unreasonable preference or advantage in favor of these concerns as against all others. In other words, this practice, which could not have been in mind when the interstate-commerce law was passed, is in the process of being brought to an end under that general language. Therefore, it seems to me that if more is needed than the Sherman law now contains, that is the form in which to embody it in any new bill. I think that if an interstate-trade commission is created, and was given authority to administer that clause, it would be able to put an end to one unfair practice after another in general business.

That leads me to the next thought that I want to express in connection with these definitions. I am especially concerned with the fourth paragraph, which begins on line 17 of page 2 of the bill concerning which I am speaking.

Possibly you remember, gentlemen, that 20 years or more ago we used to have a great many international rifle matches, and in one of those matches the score was very close. The last man to shoot took very careful aim and hit the bull's-eye, but his record did not count because he hit the wrong target. I think that is exactly the mistake with paragraph 4 of this bill. It hits the bull's-eye all right, but I think it hits the wrong target. It is penalizing combinations instead of penalizing unfair practices, or forbidding—if penalizing is not the word—combinations instead of forbidding unfair practices. This is an age of combinations. I remember Mr. Choate saying facetiously not long ago that the only new society he wanted to join was one which would aid in preventing the formation of other new societies. This fourth section is so broadly worded that agreements entirely innocent in themselves, and which, perhaps, have never been in the minds of the framers of this bill, would be forbidden.

I would like to illustrate that proposition along the three lines with which I have had some little intimacy. I have been related to

all of them in rather a detached way, and yet I know something about them. First, from the point of view of the railroads; second, from the point of view of labor unions; and third, from the point of view of farmers. I want to show you, if I can, how seriously that fourth paragraph would affect those different interests and probably in ways that have not been thought of. My acquaintance with the railroad problem is, after all, very superficial. I have merely come in contact with a good many railroad men because of my activities in connection with the bill to create a United States board of mediation and conciliation, which was discussed before this committee, you recall, last summer. But I know that they feel that under this fourth section practices which are approved by the Interstate Commerce Commission and which are really, as they think, essential for their work would probably be forbidden. For instance, the Interstate Commerce Commission passes upon railroad rates. Railroads no longer make rates in combination, but they do confer in advance in regard to rates before they are published and submitted to the Interstate Commerce Commission for consideration. They fear that that would be impossible under this paragraph, and that it would be impossible to conduct the railroads' business in any other way. They do not want to enter into agreements with each other which are forbidden by the Sherman law; but they want the privilege of discussing in advance the rate from New York to Chicago, for example, so that the different lines that are competing with each other may publish tariffs that the Interstate Commerce Commission can pass upon readily. I only refer to that as opening up a line of inquiry to your committee which is quite important, and I am quite sure the railroads themselves will develop it amply.

When it comes to the effect of this definition upon labor unions I think you are confronted with a situation of the utmost consequence to the welfare of our people. Let me read that fourth proviso:

> 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.

Now, how does that bear upon the policy of collective bargaining on behalf of labor unions? That certainly is an agreement to prevent free and unrestricted competition among themselves on the subject of wages, and that is reflected directly in the price of the article that is produced; and I should think that definition, if it stands, would make it absolutely unlawful for organized labor to protect its interests by uniting together in the matter of securing better wages and better hours of work. It seems to me that in considering the relation of labor unions to the Sherman law there is a very broad distinction which must be recognized, unless we are to drift into a situation that will be full of embarrassment to the country.

Mr. CARLIN. May I ask you a question right there?

Mr. LOW. Yes; certainly.

Mr. CARLIN. We have pending before this committee at this time a bill known as the Bartlett bill, which expressly exempts labor

unions from the operation of the Sherman law and also agricultural and horticultural associations. Are you familiar with that bill?

Mr. Low. No, sir; I am not. Of course, if you take labor unions and farmers out from under the law what I may say would have no application in those cases.

Mr. CARLIN. What I am driving at is this: Do you favor doing that?

Mr. Low. I want to say in regard to the labor unions, which I would like to finish with before I take up the farmers' side of it—which I shall come to later—that I favor absolutely taking out from the law—if it is there—any doubt whatever as to the right of laboring men to combine for the sake of shortening hours, improving wages, and the conditions of labor; for collective bargaining as to these things, if you please. But if labor enters into the field of boycotting, as it sometimes does, or has done in the past, which is a direct interference with interstate trade, then I think the law forbidding restraint of trade should apply. I do not think that the law should permit labor to interfere in that way with interstate trade any more than it permits anybody else to do so. Take, for example, the Danbury hat case, which is a very notable case in labor circles. That was a case in which the different branches of the American Federation of Labor pursued those hats all over the country; they not only attempted to prevent their own membership from buying those hats, but they went into the Pacific States and other States and they said to dealers who bought those hats, and to second, third, fourth, and fifth parties, "You can not have our trade if you handle those hats at all."

Now, that, I think you can perceive, is a direct interference with interstate trade; it was so held to be by the Supreme Court of the United States. I do not think that labor, because it is labor, has any right to do that. If you recall, the Anthracite Mine Commission discussed that question of the boycott, and they differentiated between what they called the direct boycott and the secondary boycott. They said that it probably was legitimate, in their judgment, for the members of a union to decline to buy of anybody that they were dissatisfied with; that they could do it themselves as members of a union as properly as they might do it as individuals; but that when it came to the secondary boycott and they pursued the merchandise beyond the limits of the original quarrel they were entering a field that was not only improper but unlawful.

Mr. CARLIN. If you take exception to the fourth section just tell us how you think the thing could be accomplished.

Mr. Low. I do not think I should use the fourth section at all. I think that you are getting into trouble that you can not foresee. I am simply illustrating what the effect would be in directions that I happen to know something about. On the other hand, let me show you the vital importance of this question on the other side. I look upon a corporation as a union of stockholders; and that they form the corporation for the purpose of collective bargaining through officials of their own choice. I do not for the life of me see why labor should not have the same privilege of combining for collective bargaining that the stockholders of a corporation have. But that very right is in question under the Sherman law at the present time.

Some of you have heard of the so-called protocol in New York City. It was an arrangement made at the end of a long strike between the shirt-waist manufacturers, or cloak manufacturers, and their employees providing for arbitration between the employers and shirt makers, and as a part of the arrangement there is a board of appeals. Under that protocol for two years or more industrial peace has been maintained in a trade that before was constantly in trouble; and not only industrial peace has been maintained, but the conditions of pay for these women workers and the conditions under which they labor have been greatly improved. Yet an independent manufacturer, who is not a party to the arrangement, has begun a suit under the Sherman antitrust law as it stands to-day to test the legality of the protocol under that law. It seems to me that labor ought to be able to do just what stockholders are entitled to do in forming a corporation. They ought to be able to unite and combine for the purpose of collective bargaining as to everything affecting their wages, hours, and conditions of employment.

The CHAIRMAN. I do not want to interrupt, Mr. Low, but I would like to have you tell us what is being done or sought to be done under that protocol.

Mr. LOW. I have not read the document for a very long time, Mr. Chairman, and I am not sure that I can speak with entire accuracy. But it is an agreement between a great body of cloak manufacturers and shirt-waist manufacturers with the unions of workers, by which they agree, under certain regulations set out in the protocol, to employ not members of the union only but to give them the first chance. Then the organizations representing the laborers agree with the manufacturers who are parties to the protocol to establish boards of arbitration to pass on all disputes. The protocol further provides that if this primary board of mediation and arbitration fails to settle the dispute there shall be an appeal to a small board of which Mr. Brandeis, as I recollect, is one of the members. Under that protocol, as I say, not only have wages been increased for a large body of women who were very poorly paid, but the conditions of work and labor have been immensely improved. It would be, in my judgment, and, I think, in the judgment of almost everybody in New York City who knows anything about it, a most profound misfortune if that sort of an agreement were to be declared unlawful. As I said, it is being questioned by an independent manufacturer who is not a party to the protocol, under the Sherman law as it stands, without any regard to these definitions; but, if these definitions are adopted, I feel absolutely certain that that effort at collective bargaining, and all others, would fall under the condemnation of the law. It seems to me that this country can not afford to permit capital to combine and then say to labor, "You can not combine in order, with your united strength, to negotiate with capital as to what wages shall be paid, as to the hours of labor, and the conditions under which work shall be done." Yet all of those things do limit competition among themselves; they do affect wages; they do affect the cost of things; and I think that this definition would make unlawful every movement of that kind.

Now, if I may, I would like to take up the farm side of the proposition, and in order that you may perfectly understand——

The CHAIRMAN (interposing). Mr. Low, before you go into that, I would like to call your attention to the bill which was introduced in the House by Mr. Bartlett on April 7, 1913. It is H. R. 1873 and is entitled, "A bill to make lawful certain agreements between employees and laborers, and persons engaged in agriculture or horticulture, and to limit the issuing of injunctions in certain cases, and for other purposes." I would like to have your views in respect to that measure.

Mr. LOW. Mr. Chairman, I have never seen this bill, and it would be very difficult for me to discuss it offhand. If you please, I will take it home with me and write you my impressions of the bill; or, with your permission, I will continue the presentation of my views from the farmers' standpoint; and if you will allow my friend, Mr. Clark, to be heard after I have finished I will look over this bill, and, perhaps, later on I can give you my views on the bill. Will that be agreable to you?

The CHAIRMAN. Yes; I suppose that will be satisfactory to the committee.

Mr. LOW. For the last seven years or more I have been carrying on a farm at Bedford Hills, in New York, because I wanted to come in contact with the agricultural and farming problems of the country. I have succeeded in making that farm more than self-sustaining. I do not say that it pays the interest on all the investments in my home or even in the farm buildings, but it more than pays its expenses; it pays a part of my taxes and other expenses up there. In doing that I very soon became aware of what, I think, is the fundamental problem of the farmer. I am speaking now of the small farmer; it does not affect me at all or other men with capital. But the fundamental problem of the farmer, certainly in the eastern part of the country, and, I suspect, more or less all over the Union, is this: That he buys at retail and sells at wholesale. He has to pay retail prices for everything he gets and then has to take wholesale prices for what he sells. I submit to the committee that there is not another business in the country that can do that. Imagine what would happen to any manufacturer, or any railroad, if they had to pay retail prices for coal and everything that they purchased, and then had to sell their product at the wholesale price of the day. That is the problem with which the farmer is confronted. That was the problem that confronted Denmark and all the European countries. In Europe, where the pressure has been greater, they have solved it through cooperation. They form cooperative societies which have two objects. In the first place, they want to buy together so as to get things at wholesale rates instead of at retail rates; then they want to sell together, so that they can get the benefit of businesslike care in the handling of their products.

Mr. CARLIN. How has that affected the consumer?

Mr. LOW. The consumer does the same thing; he combines to buy direct and at wholesale. As I was going to say to you, however, these cooperative associations on the part of consumers would be absolutely forbidden under this proposed law. The details of cooperation are a little different in almost every country. England is especially notable for these cooperative associations of consumers.

They were founded in Rochdale 50 or 60 years ago, and they there have become enormous. They have cooperative associations for purchasing in common in every little place. Those societies are organized through a general society, and that general society does its own manufacturing; it has grown to be so large that it maintains its own steamship line; and I think I am correct in saying that its annual turnover is hundreds of millions of pounds. Now, what I want to point out is that those people do not combine, either the consumers or the farmers—for the purpose of monopoly. Not a single cooperative association aims at monopoly; it aims at something very different. What it wants to do is to enable the small farmer to buy his plow, to buy his fertilizer, and buy his seed at prices that a man with capital has to pay and at no higher prices. The members agree to give all of their business to the cooperative association, otherwise that association does not know on what scale it can operate nor what expense it can carry. As I see it, under this section 4, that would be absolutely impossible.

Then these cooperative associations perform another function for the farmers. You remember the late Seaman A. Knapp, of the Agricultural Department, who did so much to spread the knowledge of better farming, especially throughout the South.

The CHAIRMAN. You mean the father of the farm demonstration work?

Mr. LOW. Yes; the father of that movement. He used to say that farming is "one part science, three parts art, and four parts business." Now, there are very few men who can combine those different parts effectively. It is not so hard for a farmer to have the science he must have, nor to get the art that he must have; but to add to these the business qualifications that lead to success is an immensely difficult thing, and that is one very great reason why farmers get such small incomes. But the cooperative association carries on the business side of his affairs for the farmer. You take the cooperative associations for eggs in Denmark, for instance. The farmers give all of their eggs to this association, and the first thing the association does is to create a standard. They say to the farmer, "We will not take any old eggs you have; we want eggs that will candle free from defects." After a week or two the farmer understands that, and only good eggs are sent to that association.

Then the scale upon which they operate is so great that they can employ the most skilled expert in the disposition of eggs that Denmark can command. They grade their eggs; they keep in contact with wholesale markets everywhere; and they sell on a great scale. The result has been that Denmark has risen, within 50 years, from a country that was on the brink of despair into the most prosperous country of farmers to be found on the face of the globe. They have actually captured the London market for many things; and now Ireland by the same process is doing the same thing. I assure you, gentlemen, that if you want the greatest possible agricultural production kept up in this country, you have got to make it possible for our farmers to learn how to do that thing and to permit them to do it with the utmost possible freedom. The State of New York only last year passed a law especially authorizing cooperative associations; but this paragraph would make it absolutely impossible; that law would be a dead letter on the statute books. I do not

think you at all realize the injury that would be done to the country if these definitions make such things impossible. I am only illustrating how far these definitions go in regard to the lines I know something about; but I imagine, if you come in contact with men who know about other lines, you will be apt to find that they are of the same opinion, and that it is a great deal safer to stand on the Sherman law alone with its general phraseology. Take, in addition, if you like, the general phraseology from the interstate commerce act which I quoted, which does not aim at combinations per se, but at unfair practices, for that is the real target. I believe in that way you will accomplish very much better results.

Now, in order that what I have said to you may not be misunderstood, I want to say further that besides carrying on my own farm I have organized among my neighbors a cooperative association. We call it the Bedford Farmers' Cooperative Association. I am president of it. Five of us began by putting in $400. We now have 146 members, with a capital of $25,000. I should suppose that no fewer than 100 men have less than $100 worth of stock. You can see we are not monopolizing anything. On the other hand, we have created a competition which did not exist. Now, this bill would not affect that association at all, and for this reason: The region where I am is a suburban region, and many of the farms are owned by people, like myself, who live a part of the year in the city; and we do not want to make it impossible for the tradespeople to maintain their stores and to carry on merchandising as they used to do. Therefore we do not ask, and have never asked, our members to give all of their business to this cooperative association, and they do not do so. All we are anxious to do is to have a steadying effect upon prices there, such as the Erie Canal for so many years had in New York State.

Mr. CARLIN. The illustrations you have given relate almost entirely to cooperative associations that are intrastate in their operations, and this paragraph would only affect, if at all, such as would engage in interstate commerce.

Mr. LOW. I beg your pardon, but I can not imagine a cooperative association that would not have to buy fertilizers outside of the State, or that would not have to buy seeds outside of the State, or that would not have to buy agricultural implements outside of the State. There is not one of them that could buy all of those things within the State.

Mr. CARLIN. But this paragraph would not prevent them from buying: it is the selling that would be affected.

Mr. LOW. But this says:

Undertake to prevent a free and unrestricted competition among themselves.

Mr. McCOY. Is there not an association on the Eastern Shore of Maryland which has for its purpose the selling of goods in all the markets of the East?

Mr. LOW. I think very likely there is such an association.

Mr. McCOY. I remember seeing in a magazine a description of the operations of that farmers' organization, that if the prices are too low in New York, due to an oversupply of any commodity, the central organization is so geared as to find out that fact and it does not ship to New York but ships to Chicago.

Mr. Low. That is it precisely.

Mr. THOMAS. In Kentucky we have a cooperative law in reference to tobacco, by which the farmers are permitted to pool their tobacco and sell to an agent. They sell that tobacco all over the world, and since the passage of that law the price of tobacco is nearly as high again as it was; the farmers get nearly as much again for their tobacco as they did.

Mr. Low. I do not think that could be continued to be done under these definitions.

Mr. THOMAS. I do not either.

Mr. Low. That is my point. I think that these definitions have such a wide reach that this committee might spend a year before they learned the effect they would have. They might have an effect that you would never think of.

Mr. NELSON. You have dealt largely with labor and farmers' organizations in the cases you have mentioned. Have you mentioned any organization of capital that would be injured?

Mr. Low. I spoke of the railroads and the embarrassment that would be likely to be placed in their path, which I think they will develop themselves.

Mr. NELSON. Have you anything in mind outside of the railroads?

Mr. Low. No. I only speak of the things I happen to be familiar with. I have not been in business for a great many years, either as a director or engaged in it, so that I am not able to follow the matter further. But I hope I have succeeded in showing you the immense importance of these definitions, and the further fact that they will have an effect that nobody has thought of in framing that language. I think the unrecognized and unrecognizable effects are so serious that that language ought not to be kept in the bill.

Mr. MORGAN. Mr. Low, I would like to call your attention to bill H. R. 1890. In that volume of bills and resolutions relating to trusts you will find it on page 85. That is a bill which was introduced by myself, and I think that sections 4 and 5, on pages 86 and 87, are largely along the line suggested in the beginning of your statement, relative to the provision in the interstate-commerce act for making a general definition of practices that are unreasonable or unjust. I will read the sections to you and wish you would glance over them as I read:

SEC. 4. 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 in the 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 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, 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.

SEC. 5. That every corporation subject to the provisions of this act shall deal justly and fairly with competitors and the public, and it shall be unlawful for any such corporation to grant to any person or persons any special privilege or advantage which shall be unjust and unfair to others, or unjustly and unreasonably discriminatory against others, or to enter into any special contract, agreement, or arrangement with any person or persons which shall be unjustly and unreasonably discriminatory against others, or which shall give to such person or persons an unfair and unjust advantage over others, or

that shall give to the people of any locality or section of the country any unfair, unjust, or unreasonable advantage over the people of any other locality or section of the country, or that shall be contrary to public policy or dangerous to the public welfare, and any and all the acts or things in this section declared to be unlawful are hereby prohibited.

Mr. Low. I have done so, and as far as I can judge from a rapid reading of those sections they are on the same line as the provision I read in the beginning of my remarks, and I think much to be preferred over section 4, which I have been discussing. The only observation I have to make is that I do not think that they go one particle beyond this phrase in the interstate commerce law, and the interstate commerce language has been defined in the courts; and, therefore, if you adopt this language you will know pretty well what you are doing. If you adopt the language of the bill which I have been discussing I do not think you will know at all what you are doing. I think you will simply start a great deal of litigation to find out what your definitions mean.

Mr. MORGAN. Your idea is that you would adopt language similar to the language contained in the interstate commerce act, which attempts to define practices which are unduly discriminatory, and then leave it to the commission or the Department of Justice to administer it?

Mr. Low. That is my idea; yes. I think that system would work perfectly, and then you could deal directly with the cutting out of unfair business practices.

Mr. CAREW. You think the Sherman law is pretty nearly sufficient as it is?

Mr. Low. I think——

Mr. CAREW (interposing). Do you think the recent construction is correct?

Mr. Low. You mean as to the light of reason?

Mr. CAREW. Yes.

Mr. Low. I do. There is no theory so perfect that in its application to human affairs it does not have to be modified; and it seems to me it would be impossible on a subject like this to pass any law which the courts must not administer in the light of reason. Otherwise we would be living in a world which, perhaps, Mr. Dooley correctly described when he said he hoped the time would come that it would be "possible to distinguish between an American business man and a burglar otherwise than by thumb prints." I think everything human must be administered in the light of reason, and I think that applies to laws as well as to every other human contract.

Mr. MORGAN. What is your view as to whether or not some governmental board or authority should be permitted to approve certain trade agreements before they are entered into or become valid? What do you think about the importance of that to the business interests of the country?

Mr. Low. I think it is very important; and in speaking yesterday on the interstate-trade commission bill I pointed out, in connection with natural products, like coal and timber, that that is not only desirable, but that it is of the utmost consequence. In two addresses made at the last annual meeting of the National Civic Federation it was pointed out that in the coal mines only 40 per cent of the coal in the seam is taken out under existing conditions, because the oper-

ators are unable to agree as to the price of coal at the pit's mouth, and therefore the prices are much lower than they ought to be in order to permit a payment to the miners of a large enough sum to justify them in working on coal that is difficult to get out. Europe has been all through that. It was exactly the same in Belgium, France, and Germany. A few years ago a large portion of their coal was not being mined, and for the same reason the protection of life and limb was very inadequate. They have since adopted a policy of permitting trade agreements under Government regulation, and the result is that they now get out all the coal in the mine and have fewer accidents to the miners. I think that is a thing we ought to do, and do as quickly as public opinion can be brought to sustain it. I think that in the matter of coal mining and in the matter of forestry we are pursuing a policy that makes low prices to-day at the expense of the people who are to come after us; they will have to pay much more than they ought to pay.

Let me say one word about the forestry situation. When I was last in Germany I talked with an American lady who is the widow of a Prussian who had a large estate in Silesia, which she is now carrying on. She told me that in that part of Prussia the estates are very large—30,000 or 40,000 acres—and she said that in an estate of 40,000 acres 4,000 acres would be given up to timber, to trees, and that the 4,000 acres would be divided into 100 plats of 40 acres each. One plat of 40 acres, she said, would be cut down at the end of the hundredth year, one plat of 40 acres would be planted each year, and every five years the trees would be thinned out. She said, "I have planted my 40 acres this year, and I know as well as I know anything about the future that those trees will grow for 100 years, and that at the end of the hundredth year they will be cut down." In that way Prussia and other countries that have adopted those methods are continually replenishing their supply of timber. In Baden-Baden I asked about the Black Forest—how that was controlled and owned. I was told that part of it belonged to the State of Baden, another part to the city of Baden-Baden, and that another part was privately owned. They told me that the parts owned by the State, by the city, and by private owners were administered under laws laid down by the State, "because," they said, "if a private owner cuts down two or three trees in the middle of his holding that lets in the wind and immediately the wind does damage all through the forest."

In other words, it is a recognition of the fact that the only way to get proper forestry is through Government regulation. Of course, I appreciate the difficulty in our country growing out of our Federal system. I suppose Congress could only legislate in regard to the forests which are still held by the Nation; but that does not forbid Congress from giving a good example. The habit of uniform State legislation is growing and can be developed, and if Congress will set a good example in these matters and will permit trade agreements, under Government regulation, a great deal can be done in the public interest. If you undertake to permit trade agreements, I do not see yet how you are going to stop short of fixing prices, and I shrink from that in its application to general business, but I do not see any objection when it relates to a natural product like coal, iron,

or wood. Coal and iron we can not reproduce; wood we can reproduce, but only very slowly; and it seems to me we ought to put all of those matters in a class by themselves. I would very greatly like to see this trade commission, if one is created, authorized to permit trade agreements relating to those subjects, and to regulate them, and to regulate prices, if you please, in connection with them. Beyond that I do not see my way to go at the moment.

This forest question is a very vital one. Some years ago I remember a public man saying to me that he had been asked by a great body of owners, men who owned contiguous stretches of forest land, about the conduct of their business. They said, "We want to conduct our forests in harmony with the most practical methods of modern forestry; none of us can do it alone; together we can do a great deal. Are we at liberty to enter into an agreement to do that together?" They said, "Under the Sherman law can we do it?" My friend said to them, "I can not tell you, and no other living man can tell you." This was years ago, before there had been so many decisions. He said, "You must do it at your own risk; but 10 years from now you may be put in jail for making a mistake as to the meaning of the law." I think those questions are of very vital importance to the United States of to-morrow. What is really taking place is that we are getting coal, iron, and wood cheaper to-day than we should, and to-morrow is going to pay more for it. And the great wastefulness of it is dreadful. As I have said to you in two addresses made at our annual meeting the statement was made that 40 per cent of the coal in every mine in the country is not now mined, and it is permanently lost because it is not economical to go back and get it.

The CHAIRMAN. We would be very glad if you would examine the Bartlett bill, to which I have called your attention, and let us hear from you on that.

Mr. LOW. I will.

The CHAIRMAN. We have with us Prof. Clark, of Columbia University.

STATEMENT OF JOHN BATES CLARK, PROFESSOR OF ECONOMICS, COLUMBIA UNIVERSITY.

Prof. CLARK. Mr. Chairman and gentlement of the committee, what I have to say will be said briefly and will have to do altogether with the economic side of the problem. I am not competent to discuss it on the legal side; I must defer to lawyers in that region. All that economics ought to be able to do is to point out what ends it is necessary to attain, and then hand over to lawyers and lawmakers the method of attaining them.

It was a very great delight to discover in the series of bills which have recently been presented a purpose which, to the best of my belief, is in absolute harmony with the requirements of economics, with present conditions and economic tendencies; and the question which arose in my mind had to do with the method of attaining the ends. The problem in all such legislation is, on the one hand, whether more is attempted than can possibly be attained or, perhaps, more than ought to be attained; or whether, on the other hand,

the effort not to ask too much and fail results in asking too little and failing on the other side.

Now, I take it that the object of intelligent men is to deal with monopolies in the making and not to wait until they are fully made and try to unmake them. That may be necessary if they have already been made on a large scale; but it is a very unsatisfactory and difficult process, with uncertain results; and it will not be necessary in the future if we deal with monopolies in the process of development. I take it that the object of breaking up trusts into fragments—if it succeeds and if it leaves effective competition behind it—is to do something that will never have to be done again, since it will have been done once for all. The later work will be one of prevention.

Now, there are two ways, as I can see, by which this problem of dealing with the trusts in the making may be approached, and both are legitimate; but one is enormously more important than the other.

The more important one consists in identifying monopolistic acts and putting an end to them; the other is dealing with combination as such without special reference to the means by which it is brought about. In attacking the process of creating a monopoly you may possibly still have monopoly introduced—that is, you may not include within the prohibitions of the law all the means of repressing competition that there are and you may have a trust or monopoly as a consequence. It is necessary, therefore, to deal with a combination that has gone to the length of a monopoly without reference to the question how it was created. Nevertheless that will be a relatively simple problem if identifying and preventing monopoly in the making proves successful.

Now, history has something to say as to attacking combinations as such. Certain old English laws have fallen into forgetfulness and are difficult to identify at present; nevertheless at the time when manufacturing business was conducted in guilds and in very small shops with a master workman, a journeyman, an apprentice or two and now and then two or three hired workmen there were laws which forbade partnerships. Under those conditions the law did forbid all combinations of the master workmen on the ground that it extinguished competition between those who formed the partnerships and without reference to the question whether any essential harm was done by it. It was discovered at once that if the partnerships competed vigorously with other partnerships no essential harm was done, and that the public was adequately protected. It was discovered in due time that in many instances the competition which took place between the larger units was more vigorous and afforded a better type of protection for the public than did the competition which existed between the master workmen. The real distinction, therefore, which the law needed to draw was between that amount of partnership building which would sacrifice the interests of the public by creating a monopoly—by extinguishing competition outside of the partnership—and that which did not do it at all but left competition in full vigor. And the laws became a dead letter. They have stood on the statute books for centuries without having any effect or having any attention paid to them.

There are some very familiar and well-known ways in which trusts can grow to the proportions of a monopoly; and, without attempting

to recite them at all, I will say that there are two which are so familiar that they stand quite in the foreground in the public mind. One is local competition—cutthroat competition in a limited territory, where a rival is working, accompanied by a sustaining of prices elsewhere; and the other is what used to be known as the factor's agreement; that is, an agreement not to sell a product to anybody who will buy a similar product from anyone else. Now, the working of that may, perhaps, be illustrated by a hypothetical case, which resembles real cases so extremely well that it is worth while to introduce it. Suppose there is a manufacturing concern operating in about three States; there is a trust producing a similar product operating all over the country and in foreign countries. In addition to having a larger area of operation it has a larger variety of products. The small competitor has only one kind of product and the trust has 20 kinds of products. It could almost afford, if necessary, to give away the one kind on a large scale, if it were necessary to carry out its purpose and acquire a complete monopoly. Now, under those conditions, the trust has two possible ways of easily crushing the local competitor. One is to enter his territory with cutthroat competition and make it impossible for him to sell his product at a rate that will pay the cost; the other is to refuse to sell any of the trust-made products to the rival's customers and so bring about a boycott of the independent producer by the merchants who have been handling his products.

Let us suppose it does the latter. Suppose it sends its agents to the customers of the independent producer and gives them notice that if they buy any more from the local producer they can not have any of the trust-made products, which they need to have in order to conduct a successful mercantile business. That plan will produce a more immediate effect on the local producer and will be done with even less cost to the combination than the former method of cutthroat competition. It is cheaper and quicker in some cases. In some cases it is not as sure as the other, and the other has to be resorted to. Now, I should not have a particle of objection, from a theoretical and economic point of view, to the making of independent definitions of those things and forbidding them, provided I was satisfied it would not be necessary to bring suits in order to secure an interpretation of the language of the new statute. The language of the interstate-commerce law might suffice, though that, I suppose, would be introducing it in a new sphere of operation. Nevertheless it has been construed and, perhaps, would be all that is necessary. If it were not all that is necessary it would be proper to introduce other terms, provided they were clear and were not terms that are so totally new as to require suits at law for giving them fixity of meaning.

The problem I would like to raise is whether, under the Sherman law as it stands and the construction that is now put upon it by the courts, that local competitor, in the hypothetical case I mentioned, could bring the trust to terms, or whether he would find it cheaper and better to leave the field. The latter has been the history of a great many similar cases. They have not been able to resist. Some have struggled on, lost a great deal in the struggle and then yielded; some have yielded at once and saved that loss by accepting industrial extinction. Where the conditions are as perfect as they would be

in the hypothetical case I have supposed the question is presented whether the interstate commerce law and the Sherman law—if the language of the interstate commerce law were made to apply to the case—would be sufficient to enable that man easily to bring an action that would at once restrain the trust from doing what it was doing, and so give him adequate protection and enable him to go on in safety in his business. If it would, that is all that is needed; and it is a lawyer's question whether it would or not. I am not going into that legal problem, but I do know this: Unless something in the law will accomplish exactly that result and enable a person who is confronted with such a condition as the one described to get redress quickly and cheaply, and not be forced to wait for a complete monopoly to grow up before taking action, we shall have very troublous times.

Mr. CARLIN. I want to call your attention to page 6, and ask you to look at section 13, which appears on that page, with a view to having you read it and tell the committee your opinion of it.

Prof. CLARK. That section, which I had read before, struck me as meeting the case which I raised.

Mr. CARLIN. Now, I wish you would turn back to section 10. I think you will find that we have covered there another idea which you have advanced.

Prof. CLARK. I may say that I think my honored predecessor, the chairman of the committee of the National Civic Federation, will agree with me that that particular definition was the one we held longest and attached most value to in our own bill, but that we took it out in deference to the view held by a majority of the committee that it would not be needed in connection with the phraseology that we afterwards used.

Mr. CARLIN. That section expresses your idea?

Prof. CLARK. Yes, sir; absolutely on that point.

Mr. CAREW. You approve of that?

Prof. CLARK. I certainly do.

Mr. MORGAN. Mr. Low, who preceded you, said that you would have something to say with reference to excepting farmers and agricultural associations from the operation of the law.

Prof. CLARK. Personally, I entirely agree with Mr. Low in that particular. I think that something must make it perfectly clear that the combination which we forbid is not a combination of that kind. A law would not be very likely to affect the farmers if the operation of it were such as to take effect only where a monopoly, either national or local, were in the process of building up. However, it is entirely possible to do the thing which I understand is pending, namely, introduce a bill to except them in terms.

Mr. MORGAN. Would you apply that to labor organizations as well?

Prof. CLARK. In so far as the labor unions, of which Mr. Low spoke are concerned, I certainly would. I do not happen to believe in the secondary boycott any more than Mr. Low does. I was going to say that, with regard to mere combination, the law has historically worked from the side of opposition to union itself rather than from that of opposition to unfair practices leading to sinister kind of union, and has encountered very grave difficulties for that reason.

Mr. CAREW. Do you not think there is great danger that the definition in section 10, at the bottom of page 4, might be misapplied? Do you not think that a great many men indulge in those practices who by no means approach a monopoly in any degree?

Prof. CLARK. I am not able to say how many such persons do not have some sort of monopoly in view, local or general.

Mr. CAREW. If my butcher says to me, "I will give you cheaper meat if you buy all your meat from me," would not that fall within that definition?

Prof. CLARK. I should say it would, but I should also think——

Mr. CAREW (interposing). Do you think that such conduct on the part of my butcher is to be condemned?

Prof. CLARK. I was about to say, in another connection, something which applies to this. We have got to apply a distinction, which is akin to the distinction made by the courts under the rule of reason.

Mr. CAREW. Then you think the Sherman law, as now construed by the courts, is sufficient in that regard?

Prof. CLARK. To that broad question I should not be willing to answer "Yes." I think that such an addition to the efficiency of the Sherman law as is contemplated by the major portion of these bills is eminently desirable.

Mr. CAREW. Is not the necessity for these definitions to a large extent done away with by the new construction of the Sherman law—that it condemns only things which are unreasonable and undue?

Prof. CLARK. I would not care to say "Yes" to the question if put even as broadly as this; but I think——

Mr. MCCOY (interposing). Are you familiar with the contention of Mr. Reed, which appeared in the current number of the Atlantic Monthly, which is, as I understand, to the effect that it is only because of corporate powers as now granted by the various States that monopoly is possible, and in that connection I would call attention to Senator Williams's bill, which is on page 459 of this volume; a bill which, I understand, Mr. Reed drew and which Senator Williams approves?

ADDITIONAL STATEMENT OF MR. SETH LOW.

Mr. LOW. Mr. Chairman, may I interrupt one moment? I want to catch the 12.30 train if I can, and my friend, Mr. Clark, is able to stay as long as you want him. May I ask to be permitted to speak about this bill you referred to me, interrupting Mr. Clark for a moment?

The CHAIRMAN. Yes.

Mr. LOW. I have looked over this bill of Mr. Bartlett's very hurriedly, Mr. Chairman, and I am perfectly in sympathy with the first six lines: "That it shall not be unlawful for persons employed or seeking employment to enter into any arrangement, agreements, or combinations with the view of lessening the hours of labor or of increasing the wages or of bettering their condition." I think that ought to be the law of the land. This question in regard to horticultural and agricultural combinations, it seems to me, could better be expressed in another way; that is, in recognizing the propriety of cooperative associations for farmers, because I do not think we want to establish classes in the country, where some Americans have

rights that all Americans have not. I think you would accomplish what is intended, by saying in the law that nothing shall prevent the formation of cooperative associations on the part of farmers for the purpose of buying more cheaply and of selling their products to better advantage.

In regard to the use of injunctions in labor disputes, I am not a lawyer, and I hesitate to say anything more than this: That I think the writ of injunction in the past has sometimes been abused in labor strikes. I think it has been given a wide reach that goes far beyond what is proper in many cases.

Mr. BARTLETT. With reference to the criticism of the first section, I will say that that exact language was taken from an amendment offered by Senator George, and also by Senators Sherman and Aldrich, in 1890, to the very act known as the Sherman Act, and if the language is faulty it is because I have followed the example of those distinguished lawyers and Members of the Senate.

Mr. LOW. Of course, the committee will appreciate that I have never seen this bill before, and am not capable of criticizing it as a lawyer.

Mr. BARTLETT. I hope you will criticize it.

Mr. LOW. But in regard to injunctions, I think that many injunctions have been issued in cases of strikes which went much too far, and that in some way the abuse of the injunction should be restrained. Whether the use of the injunction should be forbidden, is a question for lawyers, and I am not able to answer.

I would like to point out that in the first section of this bill you say:

> That it shall not be unlawful for persons employed, or seeking employment, to enter into any arrangements, agreements, or combinations with the view of lessening the hours of labor, or of increasing their wages, or of bettering their condition.

Do you not want to make it lawful for employers to enter into such arrangements with employees? Under the strict meaning of the definitions that I was discussing earlier, laborers might have the right to make such agreements, but employers might find themselves deprived of that right.

Mr. CARLIN. I think that is a valid criticism.

Mr. LOW. So I think you must make it apply to both sides.

Mr. MCCOY. Mr. Gompers appeared before the committee in support of this bill some time ago, and said that if this bill should become a law it would legalize the secondary boycott, or what a recent book, I believe, now describes as the "tertiary boycott." I do not know how far we are going to get in that enumeration.

Mr. LOW. Mr. Gompers, of course, is vastly better informed on all those questions than I am; but on the question of boycotting we frankly disagree. He thinks it ought to be the right of labor unions to boycott, but it does not seem to me they should have that right unless everybody else has it—I mean, to interfere with commerce by way of restraint of trade. If everybody else has the right to interfere with commerce by way of restraint of trade, then I think labor unions should have the same right; but I do not think they should have it if no one else can have it.

Mr. MCCOY. Of course, a strike is a boycott of the primary kind.

Mr. Low. Well, hardly. A strike is not a boycott. I think the right of striking is recognized everywhere. It is a personal right, and I am personally in sympathy with the phraseology of this act from lines 15 to 21, where it says:

> In construing this act the right to enter into the relation of employer and employee, to change that relation, and to assume and create a new relation of employer and employee, and to perform and carry on business in such relation with any person in any place or do work and labor as an employee shall be held and construed to be a personal and not a property right.

I think is ought to be a personal right; I do not think it is a property right at all.

I would say about section 2 what I have said about section 1. I am in doubt whether that language in regard to horticulture or agriculture would tend to make a favored class of producers or not. I do not believe that the former ought to have rights that other Americans have not; but I do think they are entitled to form co-operative societies and to agree to give to them all their business for the purpose of purchasing more cheaply together and for the purpose of selling what they produce to better advantage. I am not a lawyer, and with all respect to the lawyers who have suggested this language, I think it would be better to change that phraseology so as to permit in terms the formation of such cooperative associations of producers and of consumers, because I think they have and ought to have the right to combine in order to buy more cheaply, to buy at wholesale and distribute economically what they produce. I think you will recognize the propriety of cooperative associations of consumers as well as of producers; because they certainly have the right or ought to have the right to buy together for the purpose of getting things more cheaply, just as producers should have the right to combine together for the purpose of getting better prices for their products. It is very vital, of course, as far as the farmers are concerned and in its effect upon agriculture. You take these gentlemen in Kentucky who raise tobacco; they can not afford to raise tobacco unless they can get an adequate price; and it is the same way with every other producer. You must encourage generous production by enabling the producer to get all that his goods are worth. I come right back to what I said at the beginning, that the trouble with the farmer is that he has to buy at retail and sell at wholesale. That is not reasonable; and cooperative societies are formed to change that, so that under cooperation the small farmer can get his plow as cheaply as the man who has a bigger business. That must be encouraged. When cooperation is thoroughly well developed, a man who produces a small amount of tobacco can get as good a price as the man who raises a great deal of tobacco.

Mr. Nelson. Would not that tend to eliminate the middleman?

Mr. Low. It never has. It is a curious thing that wherever co-operation flourishes the middleman flourishes also. I do not think there should be any discrimination on either side, but would say that you should recognize cooperative associations for the purpose of buying to greater advantage and for the purpose of selling to greater advantage.

Mr. McCoy. And leave the abuse of it to the general phraseology of the bill?

Mr. Low. Yes; that would be my suggestion, and I think in that way you would avoid a sort of criticism which I have seen aimed at this bill—that it is class legislation. It is not class legislation if you word it right. I do not think anybody can say it is class legislation to say that laboring men can have the same right to combine for collective bargaining as stockholders have. That is good sense; it is not class legislation. Neither is it class legislation to say that farmers and consumers can combine for the sake of buying more cheaply or selling to greater advantage. That is not class legislation; everybody ought to have that right. But when you phrase it as this bill does, especially as to agriculture, it looks as though you were giving rights to the farmer that other Americans do not have, and that I am sure this committee does not want to do. As I said before, I think you can leave the abuse to this general phraseology. If those associations when formed become offenders against the Sherman law, then they can be brought to book under the Sherman law.

The CHAIRMAN. If you give them express authority to buy anything, you think this general provision of law will make that right?

Mr. Low. I think it would. I never heard of a cooperative association in any part of the world that entered into the business field in a way to bring it under the condemnation of the Sherman law.

Mr. CAREW. You say it is not class legislation because everybody has the right to do it?

Mr. Low. They have the right to do it now.

Mr. CAREW. Do you say that under the present law they have that right?

Mr. Low. I think so, yes; absolutely. There are cooperative associations of consumers all over the country. There are a great many of them in the neighborhood of New York City. I have known of them to be carried on among dwellers in large apartment houses. Instead of dealing with a dozen different grocerymen and a dozen different milkmen and having a dozen different grocery wagons and a dozen different milk wagons coming up to that apartment house at various hours, they appoint a purchaser for themselves, and all of them will buy from the same place, so there is very often a difference in price in their favor. But under this definition you would make it a breach of the law for them to do that.

Mr. PETERSON. Will not a combination of farmers be rather a local affair?

Mr. Low. I think a combination like that must be mainly, if not altogether, a local thing. They would hardly do anything else.

Mr. PETERSON. It is State-wide in Mr. Thomas's case.

Mr. THOMAS. How is that?

Mr. PETERSON. This combination of farmers, of tobacco growers, in your State is a State affair; it is not a local affair?

Mr. THOMAS. It is under a pooling act of the Kentucky Legislature. They bring their tobacco to a warehouse, it is sold to an agent, and it goes all over the world.

Mr. PETERSON. Has that ever been declared unreasonable?

Mr. THOMAS. It has never been decided in the United States courts. It has been declared all right in the State courts of Kentucky.

Mr. CAREW. That only deals with sections in the State of Kentucky and with particular kinds of tobacco?

Mr. THOMAS. It deals with all sorts of tobacco. We raise all sorts of tobacco—dark tobacco, light tobacco, and also burley tobacco.

Mr. LOW. I am very much obliged to you, Mr. Chairman and gentlemen of the committee, for having heard me this morning.

The CHAIRMAN. We are much obliged to you, Mr. Low, for having appeared before us.

PROF. JOHN BATES CLARK—Continuing.

Mr. McCOY. Prof. Clark, coming back to what I was asking you about a while ago, are you familiar with the contention of Mr. Reed, of which I have spoken?

Prof. CLARK. I am not familiar with all of it. I have read the parts to which you called my attention. It is a passage that, as I read it off-hand, makes the impression that it would be rather effective; but I do not know that my opinion is worth much as formed in that off-hand way.

Mr. McCOY. That is about the economical situation, theoretically?

Prof. CLARK. Yes; the proposed bill is evidently intended to secure the economic subject that is essential.

Mr. McCOY. Have you ever thought at all about the proposition as to whether or not the existence of corporations with these unlimited powers is the thing which has led to monopoly in this country, and without which monopoly could not have existed?

Prof. CLARK. Off-hand, I should say it would be too much to assert that that was the sole and only thing. It is enormous in the facility it gives for creating monopoly, and the disposition of the States to bid over each other for corporate fees, etc., and to offer larger and larger powers, has enormously increased the tendency to consolidate into monopolies companies formerly independent.

Mr. McGILLICUDDY. Professor, I was a good deal interested in your definition of a trust. Will you turn to page 313 of this list of bills and regulations relating to trusts (H. R. 12121) and read the definition of the restraint of trade given on that page, and tell us if you approve of it. You will notice that definition is that—

"A restraint of trade" as used in this act, or the antitrust act of eighteen hundred and ninety, shall be deemed to include every restraint of trade as defined by common law, and every restriction of trade or of competition which tends in fact to the creation of a monopoly or to impair the freedom of trade between the States or with foreign nations.

Prof. CLARK. Off hand and merely as an economist, and not as a lawyer, I should say that lines 7 and 8 were exactly in line of the necessities of economic law. When it comes to the various possible constructions that may be put upon the "restraint of trade," I prefer to retire from the field.

Mr. NELSON. On that very point, I would like to ask you this question: The Sherman law prohibits every restraint of trade. The Supreme Court has read into that the words undue or unreasonable. When a judge interprets the law in order to discover whether some alleged violation is undue or unreasonable, what will he have to draw upon, his legal knowledge or his economic views?

Prof. CLARK. I should say that, with a background of legal knowledge which would be a very essential thing, he would here use his economic knowledge.

Mr. NELSON. One judge might have certain views about certain acts economically, and another judge would have, perhaps, wholly different conceptions of the economic situation; might that not be true?

Prof. CLARK. That, of course, is true and a person's a priori deductions will color somewhat his opinions drawn from facts. Nevertheless, it is a question of fact he would have to decide.

Mr. NELSON (interposing). If every restraint is prohibited, the line is fixed and it is not a matter of discretion as to the economic situation?

Prof. CLARK. I was about to suggest one thing which perhaps has an application there. If we look at the problem simply from the side of the combination and say that one combination shall be adjudged reasonable, because it does reasonable things, while another combination is unreasonable it does not need, in theory, to be arbitrary at all.

There is many a line which it is perfectly possible to draw clearly in theory, but it will take a good deal of skill and judgment to draw such lines in practice. That I conceive to be the situation here. I do not think there is any haziness whatever in the scientific delimitation of the reasonable conduct, but I do see that conditions shade each other by such imperceptible degrees that any court would be liable to more or less of error in applying the principles. I do not see how it is possible absolutely to avoid this, and yet I do not think it will be possible to have a tolerable condition unless the law brings the action of corporations into line with what is described as the rule of reason.

I suppose it is pretty well established that such specific acts are illegal when they help to create monopolies. What does this mean? Does it mean creating a nation-wide monopoly, or does it mean creating a monopoly somewhere, say in any place where competition formerly existed? If the prohibition of monopoly applies locally as well as nationally, that fact of itself is almost sufficient for our purposes, and the thing that does not create monopoly anywhere is reasonable, and a thing which does create monopoly anywhere is unreasonable.

Mr. MORGAN. What do you mean by a monopoly? For instance, take the United States Steel Corporation. Do you regard that as a monopoly? What do you mean by a monopoly?

Prof. CLARK. Personally I do not at present regard the United States Steel Corporation as a complete monopoly in the full sense of the law or in the full sense in which I could use the term in economics, because it is possible for a purchaser to get steel from an alternative source.

If, however, I am mistaken in thinking that is really an independent source, and if some occult arrangement exists whereby the appearance of independence in the case of producers outside of the trust does not amount to anything, it is a monopoly.

Mr. MCCOY. In discussing this matter have you left out of consideration the fact that in the first section of the Sherman law it applies to restraints of trade, or do you consider the restraint section and the monopoly section as being practically one and the same thing?

Prof. CLARK. That really raises a question in the history of law. I greatly doubt whether, if we were beginning now, de novo, to make laws the phrase "restraint of trade" would ever be used. No economist would ever want it to describe what he objects to. You can express what the economists want much more certainly.

Mr. McCOY. Is not the restraint-of-trade phrase a valuable thing to have, because it refers to one of those things which may not have created a monopoly but which has a tendency to create a monopoly? So, as though you might be given a different phrase, the word in itself shows whether it has reached the monopolistic stage, and it is something that ought to be forbidden.

Prof. CLARK. As used in the law, I do not see how we can avoid taking account of its historic significance, and I think we are forced still to use it. If it describes what has a tendency to create a monopoly, it is entirely available.

Mr. McCOY. Then the United States Steel Corporation might be under the ban, whether or not it has reached the monopolistic stage?

Prof. CLARK. If it were on the way to the monopolistic stage, with a strong probability of reaching it, it would.

Mr. McCOY. What difference does it make, so long as you can see that human beings are constituted so that whatever they have the power to do for their own benefit they are likely to do? You do not need to go into the realm of probability any further than that.

Prof. CLARK. No; I should not.

Mr. McCOY. If a restraint of trade has a tendency to lead to monopoly, and if it exists, it ought to be made unlawful?

Prof. CLARK. I shall very likely display my ignorance of the history of the law, although I have so fully acknowledged that already that it will not do much harm if I go outside of my province and give an opinion where a jurist's opinion is worth much more.

The restraint of trade which, as I think, is probably at the bottom of the old and almost prehistoric statutes against partnerships was a belief that they restrained competition between the persons who went into the combinations. Now, if competition outside of that limit is reduced materially, so that the public is injured, that is a thing requiring prohibition by law. If general competition in the production of an article is not reduced materially, and the public is not injured, I should not say that the stopping of the competition between the partners did require prohibition by law.

Mr. McCOY. Then you get somewhat into the position that Mr. Nelson talks about, do you not, and a whole lot of things would occur that——

Prof. CLARK (interposing). Well, we are back——

Mr. McCOY (continuing). Which has to be determined on an economic basis, rather than a legal basis.

Prof. CLARK. Certainly you have got to depend on your knowledge of the economic situation.

Mr. CAREW. Would not that be a matter capable of proof; would not that be a matter of fact?

Mr. McCOY. That is another point that I was coming to, in regard to these definitions.

Mr. CAREW. As I understand it, the Government is compelled to prove it is an economic injury?

Mr. McCoy. The Government's contention in the Standard Oil and other cases, has always been that every restraint of trade, regardless of whether or not it was economically injurious to indulge in it or not, was forbidden.

Personally, that is my own view of the act. I do not think that the Supreme Court of the United States has said anything whatever, so far as any decision that is binding on anybody is concerned.

Mr. Nelson. I would like to have one other point cleared up, if I may, Professor.

Prof. Clark. I shall be very glad to give whatever information I have on it.

Mr. Nelson. You spoke of reaching monopolies in the forming rather than after they were completed.

Prof. Clark. Yes, sir.

Mr. Nelson. Did you mean, by saying that, that you would also affect the dissolution of those already formed?

Prof Clark. I assume that the law will continue to work to that end as at present.

Mr. Nelson. You did not mean to say that we should attempt to prevent those that were forming and allow those that are formed to remain?

Prof. Clark. No; that would be a large camel to swallow, after straining at a gnat.

I have in mind to add only one thing, and that is, that, in applying the rule of reason, we are not without the possibility of testing the effect of a combination locally, as well as generally.

It will not be at all impossible to find whether, in that hypothetical case in which I supposed a certain manufacturer operating in three States was unable to operate after a trust invaded that field, that the monopoly building was going on within that area, although we might have had a great many other States in which the extinction of competition were not going on. In that case we could not have broken that combination merely on account of that one act, as creating a national monopoly. Yet it ought to be condemned. It established a monopoly in one field and a like procedure would extend it to other fields.

Mr. McCoy. The Supreme Court has made use of exactly that kind of a thing in two great decisions, and as I recollect those decisions they did go particularly into what had actually happened, but they laid more stress upon the contention that having got that far there was a tendency to a monopoly, and therefore they restrained those corporations largely regardless of what had actually happened and because of the power which they had in view of the various contracts and agreements they had made.

Prof. Clark. Yes, sir. We may say monopoly is that monopoly does in any case; and, to go further, monopoly is that monopoly is able and naturally impelled to do.

Mr. McCoy. In other words, they paid more attention to the first section of the Sherman law than to the second section, and they said the conditions mentioned in the second section might be brought about because of the power they have had.

Prof. Clark. My judgment is that, from the economic side, we should recognize the situation created by the law as now construed

as relatively safe but not absolutely so, although indefinitely better than it was for a long time after the trusts were formed.

Mr. VOLSTEAD. Would not this have a tendency to force combinations now existing to incorporate as one corporation rather than continue to exist as separate corporations?

Prof. CLARK. May I ask which particular section you refer to?

Mr. VOLSTEAD. Take the first bill, which prohibits acts done by combinations and specifies various things that they must not do as a combination. Would not the tendency of this class of legislation be to consolidate into one corporation these various combinations that now exist?

Prof. CLARK. In so far as that is possible under the law; in so far as the consolidated corporations would escape the law and the unconsolidated ones would fall under it, that is the effect. The law did that to a tremendous extent in the early history of trusts in America.

Mr. VOLSTEAD. I would like to ask your views in regard to prohibiting one corporation from owning the stock of another corporation as a means of building up large aggregations of capital.

Prof. CLARK. I should say that was a thing which had so much inherent danger that it had better be prohibited.

Mr. VOLSTEAD. My impression is that the English common law prohibited that use of corporate funds.

Prof. CLARK. I have never personally believed that additional facilities for doing business were worth as much to the country as would suffice to atone for the danger which impended at the beginning of the formation of the trusts and would materialize in real monopoly but for an improvement in the law. I think combination would have been certain to run into abuses that would have harmed the country more than it has been harmed or with good legislation is likely to be harmed.

Mr. VOLSTEAD. This act may have the effect of creating larger aggregations of capital as one corporation.

Prof. CLARK. That might be conceivable.

Mr. VOLSTEAD. And in that way make more perfect the monopoly now existing in many lines?

Prof. CLARK. Any views of mine in that connection presuppose that we can and shall deal with any immensely large monopolies of the country in some way.

I would like to add that the sole objection which I have urged against any part of the series of tentative bills under consideration applies to a phrase in bill No. 2. Four general purposes of combination are specified as bringing a combination under the condemnation of the proposed law. The fourth of these would seem to prohibit any combination or partnership between independent producers, even though competition were not less effective after they had combined than it was before. Competition has been rendered comparatively ineffective in some part of the market for the goods produced; a natural economic law fixes the prices of them and protects the public from extortion. After A has ceased to compete with B, and C has ceased to compete with D, A and B in partnership may compete so vigorously with C and D in partnership as to afford an undiminished guaranty of fair prices. An economist must distinguish between the combination which reduces the total amount

and efficiency of competition and that which does not, and the law will need to take account of that same distinction.

The CHAIRMAN. We are very much obliged to you, Prof. Clark, for having appeared before us and given your views so extensively on this subject.

Prof. CLARK. I am very glad to have been able to appear before you, Mr. Chairman, and I appreciate the courtesy of the committee very much.

(Thereupon, at 12.20 o'clock p. m., the committee took a recess until 2 o'clock p. 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 G. 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 9.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Tuesday, February 10, 1914.

The committee this day met, Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. Will you please give your name and address to the reporter.

STATEMENT OF MR. FRANK W. WHITCHER, OF BOSTON, MASS.

Mr. WHITCHER. My name is Frank W. Whitcher; my address is 14 Albany Street, Boston, Mass. I am representing the National Leather and Shoe Finders Association, whose headquarters are at St. Louis. I am the treasurer of that organization.

I am here, gentlemen, to ask you to consider, and to consider strongly, the question of the establishment and maintenance of the resale price upon branded and trade-mark goods.

This organization which I represent is composed of small dealers in leather for the shoe-repairing trade and the small tools which go to that class of trade, and also dealers in findings and supplies which are sold to the retail shoe stores. These dealers who make up this organization have stores in most of the cities of the country. They

are men of moderate caliber, with a capitalization ranging anywhere from a thousand to $50,000 or $75,000, although the average, I should say, is not over $25,000 or $30,000.

They are small people, as the world would term it, and this organization was formed because of the necessity these men found for protecting themselves in the matter of credit, so much of the repairing trade being a poor class of trade, the class to which they had to sell. They get together once a year to compare notes as they gather in their annual convention, and to study the question of freight and other questions of that kind. A good deal of the stuff they handle is like nails, and such things, which are rather heavy, and on account of which the item of freight is quite an item, and matters in relation to the kind of stores, etc.

This organization has no connection with the United Shoe Machinery Co. whatever, and in fact, would be considered competitors of that concern.

Now, the reason I bring this question to you is because it is a question of service. It is a question of service to the public which everybody in business renders. This service can not be rendered in a satisfactory way to the public if deteriorated goods are going to be delivered. In our line of business there are a great many items which have been developed, and, considering the quality of the article, a price has been made which renders, I presume, to the manufacturer a fair margin, and to the jobber, but it rarely renders a margin of over 20 per cent. That is a little closer than any dealer in our line of business can afford to handle goods, but competition has forced it down to that point.

In other words, it costs our people to-day on an average of 15 per cent to do business, and if they get 20 per cent they have to be satisfied. In fact, some goods are sold at a very much less margin than that.

The reason I am speaking of the establishment and maintenance of prices on branded and trade-marked goods is this: A reliable article, we will say, is offered to the public; it is used by the public, and it renders the service for which it is intended. It makes good. Pretty soon some competitor of ours may make another article similar to that and call it just as good. They come out with that other article and they sell it for a less price.

Then another competitor takes the article, which is a standard article and on which a reputation has been obtained, and he cuts the price. If he is only making 5 per cent he will sometimes get out if he is allowing a margin of 20 per cent, but sometimes he will cut it to 10. That forces his competitor to do the same thing; then there is a seesawing, and finally it will get down as low as I will cite to you in the case of the Sullivan rubber heels.

The price which most of the people over the country charge for those goods ranges from $3 to $3.25 a dozen on the men's, and on the women's from $2.75 to $3. They cost $2.70, and if they are sold for $2.75 there is a margin of only about 2 per cent. Other makes of heels are sold in the same way.

You ask why the public is injured by that. The dealers are saying that that is all they can give, and this article is put at a lower price, and it is sold at a lower price to the retailer, and the manufacturer of the original goods finds he is losing trade, and the result

is that he studies in order to see if there is not some way whereby he can reduce his price.

Mr. CARLIN. Mr. Whitcher, have you read bill No. 1?

Mr. WHITCHER. I have not had time to go over it. I only arrived in Washington this morning, and I did not know that I was to come before your committee so soon, and I have not had a chance to go over the bills.

Mr. CARLIN. You will find in section 9 of that bill a provision which, while it is not a price-fixing provision by any means, requires the fixing of the same price——

Mr. WHITCHER (interposing). I understand that is where the large dealers try to kill off the small dealer.

Mr. CARLIN. That is one of the things. What I am trying to call your attention to is the fact that this committee has not undertaken to take up such an idea as a price-fixing scheme, because we have not believed the Government ought yet to take hold of individual business.

Mr. WHITCHER. No; but I thought your committee were considering, among other things, the question of the permission for the establishment of resale prices and the maintenance of them on branded and trade-marked goods.

Mr. CARLIN. Only so far as bill No. 1 relates to that subject, and we have not undertaken to give authority for fixing prices. Your position, as I understand you, is that you want a price-fixing scheme all the way down to the consumer.

Mr. WHITCHER. Our position is that without it there is a lower standard of goods.

Mr. CARLIN. You approve of the Brandeis idea, in other words?

Mr. WHITCHER. I most thoroughly do in that particular respect.

Mr. FLOYD. Has not that practice been condemned under a decision in connection with the Sherman law?

Mr. WHITCHER. I think it has, and that is one of the reasons I am here, because the manufacturers of branded goods have established prices which were only fair to the trade, and the cutting of those prices to-day is rendering trade unprofitable and the credits of the people poorer. And with poorer credit and less money to work on, and less margin of profit, the public is not properly served, and, further, with the cut prices on these goods, the standard of quality has deteriorated and the public at large does not receive the service they are entitled to.

Mr. FLOYD. We are making laws, and laws should be general. The man who handles patented goods has a special privilege against every other dealer in the nature of a monopoly. He already has that privilege.

Mr. WHITCHER. Does he have the right to establish a resale price?

Mr. FLOYD. No, sir; but he has a monopoly in law to manufacture that particular commodity.

Mr. WHITCHER. Yes, sir.

Mr. FLOYD. And you want to give him, do you not, an additional privilege over every other man who handles the goods, or would you favor a law that would allow the man who manufactured patented articles, who produced agricultural commodities, for instance, to fix the price to the consumer in each instance?

Mr. WHITCHER. I would, if he has a brand or trade-mark of his own.

Mr. FLOYD. Why give those men who are already given a special privilege over the man who has not those privileges in law, why give him additional privileges? Those men have already certain exclusive privileges by reason of patents and trade-marks, and yet you want to give them an additional privilege.

Let me ask you this question: What right has any man, after he sells an article to another man and receives the money for it, to control the price of that article in the hands of the man who bought it?

Mr. WHITCHER. What right has a man to sell a piece of real estate with restrictions on it?

Mr. FLOYD. I am not talking about real estate; that is a different position. If a man sold a piece of real estate in fee simple, he has not any restrictions on it. You propose to sell this trade-marked article, and after its ownership has passed to another individual you want the man who has sold it to be given the right under the law to control the price of the commodity in the hands of the retail dealer—to control the price at which the retail dealer shall sell that article to the consumer?

Mr. WHITCHER. The reason of that, which is a fair one, it seems to me, is this: When the manufacturer of the article is injured by the cutthroat competition, it is caused by allowing everybody to sell at whatever price they please.

Mr. FLOYD. I will not argue with you for a moment the question as to whether or not it will be an advantage to the manufacturer of the patented article. But it seems to me you have overlooked a great majority of the people in this country who are consumers, who have to buy those articles.

Mr. WHITCHER. No, sir; the consumer is the very party I was looking out for, in order to protect him, so that he can get the article in the original form in which it is manufactured and not in a deteriorated form, because the manufacturer is forced to lower his prices.

Mr. FLOYD. If you are going to do that might not that evil be prohibited by other laws preventing him from doing that?

Mr. WHITCHER. That would be coming back to the manufacturer. I do not know about that.

Mr. FLOYD. If we are going to have any freedom of contract left in this country at all, or any individual liberty, how can we have it under the system you propose of allowing the manufacturer at the top to fix the price to the jobber, and then letting it run along down from the jobber to the retailer and compel the customer to buy at the arbitrary price fixed by the manufacturer?

Mr. WHITCHER. The arbitrary price fixed in my business by the recent decision of the Supreme Court of the United States was so close that it rendered no more than a fair margin to our dealers, and you get competition, no matter whether the price is fixed or not.

I think the establishment of a price on a good article makes the other manufacturers want to supercede in quality the article which has previously had the call of the trade. In other words, it lifts the trade up to that standard of quality, whereas the cutthroat competition drives the standard of quality down to the price.

If a standard article sell at, say, $3 a dozen, and the dealer makes only 25 cents on it, and it costs him 15 or 20 cents to do his business, I think you will agree that that is a fair margin of profit on those goods. If the price was fixed where he was getting 5 cents, the manufacturer could not hold his position nor could the jobber prevent the retailer from selling at the lower price, because the greater the inducement the stronger is the sentiment to get the trade away from the other man. If the article is sold at $2.75 would you attempt to do business on the basis of a 5 cent or a 2 per cent margin? No. You do not think I am going to take something I can sell and make only 10 or 12 cents a dozen on it, and that is the least I can afford to do business on. I will throw out those goods. Then the manufacturer of standard goods has lost his business.

Mr. CARLIN. Do you think the Government of the United States is under any obligation to make laws which will enable individuals to make a profit where they can not make it in fair competition with other dealers?

Mr. WHITCHER. I think myself, sir, that the time is coming when the Government has got to make a law which will permit the establishment and maintenance of resale prices on branded and trade-marked goods for the protection of the individual purchaser and to keep up the standard of quality, otherwise the standard will be reduced.

Mr. CAREW. Who will reduce it?

Mr. WHITCHER. The dealer reduces it.

Mr. CAREW. You gentlemen make it?

Mr. WHITCHER. It forces the price down to so close a margin that it is thrown out by the trade and poorer substitutes are used.

That is being done. Rubber heels are being sold to the repairers at 12½ cents a pair, and the nominal price to the public is 50 cents. The dealer supplies the 12½-cent heel for 50 cents, and the public is injured.

Mr. FLOYD. I have used both kinds, and the cheaper one wears on the shoe easier.

Mr. WHITCHER. Then you have an exceptional one.

Mr. FLOYD. As I understand, the custom of a great many concerns is to do the very thing you claim they ought to have the right to do, and which was done previous to the recent decision of the Supreme Court of the United States, and they have been doing it for a number of years.

Mr. WHITCHER. I think it has been the custom.

Mr. FLOYD. I want to ask you this question, if you approve of this kind of proceeding? A jeweler in my district was talking to me on the subject, and he told me his manufacturers not only fix the price to the jobber, but they fixed the price at which he was allowed to sell to the customer. They required him to buy his watches and pay cash for them, and yet if he sold below the price they fixed the result was a complete boycott, and he could not buy another watch in the United States.

Mr. WHITCHER. No, sir; I did not mean to sanction a thing like that.

Mr. FLOYD. This man showed me a card containing his price list, and at the bottom of that card it said:

We will pay a reward of $10 to any person who will furnish us reliable information of any of our customers who have been guilty of cutting prices.

Mr. WHITCHER. You are coming back to the manufacturers there.

Mr. FLOYD. He said, "I am here in a small town and I have a stock of jewelry that will be suitable to the people in this town." And he said, "If I desire to sell out and go to another town where I would have to have a more expensive and different class of jewelry, and if I desire to sell these goods—they are mine—and if I desire to sell them to my neighbors and friends who have been trading with me for years a little below the price fixed, I could not buy another watch in the United States if I did that."

Do you want to establish and maintain such a system as that in the United States?

Mr. WHITCHER. No, sir; I should oppose that as strongly as possible.

Mr. FLOYD. Will not that be done, and has not that been done, when you did exercise the power to control the price?

Mr. WHITCHER. No, indeed.

Mr. CARLIN. What penalties do you fix for violation? Suppose we gave you the right to fix the price to the consumer, and that was violated, what penalty would you fix for that violation?

Mr. WHITCHER. I do not know.

Mr. CARLIN. Suppose they sell at a lower price, what would you do to them, what do you think we ought to have as a penalty for that?

Mr. WHITCHER. I think the manufacturer would have a cause for redress against the dealer in a case like that. I would cite particularly the situation in a case of which I have a copy, which came up in Washington, which was the case of a flour-mill company against a dealer. That company sold to the dealer at a special price in carload lots, and they had a resale price at which that flour was to be sold to the consumer, and that dealer cut the price and they brought suit for damages and the supreme court of Washington gave them the decision. The decision was in their favor.

But I do not believe that it would be possible, from my own experience in merchandising, to establish any but a fair price on branded and trade-marked goods.

Mr. CARLIN. What penalties would you fix? If we were drawing a statute to protect those contracts to be made, we would have to fix either a civil or a criminal penalty for the violation of that statute. What is your idea as to the penalty?

Mr. WHITCHER. I think that would be according to the injury which had been done to the manufacturer.

Mr. CARLIN. You would make a civil penalty?

Mr. WHITCHER. I think I would.

Mr. CAREW. According to whose injury?

Mr. WHITCHER. The manufacturer's.

The price of the goods is lowered, the people get the impression that the quality of the goods is lowered.

Mr. DYER. The manufacturer would not own these goods that were sold, and as Judge Floyd has stated, the actual and vital abuses come from the manufacturer. You can not maintain a civil action for damages in such a case.

Mr. WHITCHER. I think the law which causes—that when the title passes to the dealer, limiting the rights of manufacturer, that that is all wrong. I think the manufacturer should have the same right

to dispose of his goods, something to protect the reputation he has maintained, subject to a restriction which will help him hold that reputation. He would have the same right as a man owning real estate, who might want to establish certain restrictions in regard to his neighbors.

Mr. DYER. You disagree with the Supreme Court of the United States in those decisions which they recently rendered on this point?

Mr. WHITCHER. I believe that for better public service, for the good of the people at large, the quality of goods sent out by the manufacturer should be maintained, the quality which the advertising and the reputation of the goods have obtained, should be delivered to the user continually.

Mr. VOLSTEAD. Is it not true that if that were done nearly everybody producing an article could fix the ultimate price to the consumer, because you can get a trade-mark on almost any sort of an article?

Mr. WHITCHER. I appreciate that, too. It seems to me it is a question of fair or unfair business methods or morals. I think you will all agree with me that it is unfair for a chain of department stores to advertise a special line of goods, goods which have a standard reputation, at a price less than actual cost price. That is a direct injury to the manufacturer, because it gives the impression to the public that the standard of those goods has been lowered.

Mr. DYER. You want a law that will prevent unfair competition; is that not what you want?

Mr. WHITCHER. That is all I want. In our own business the lines of business do not change.

Mr. CARLIN. You think a price-fixing law is the law that will do that; that is your remedy?

Mr. WHITCHER. On branded and trade-marked goods.

Mr. MITCHELL. Did I understand you to say that you competed with the United Shoe Machinery Co.?

Mr. WHITCHER. They have gone into the manufacture of findings, somewhat.

Mr. MITCHELL. Do you produce any machinery? Are you putting any shoe machinery on the market at all?

Mr. WHITCHER. Nothing but some little tools.

Mr. MITCHELL. Do you manufacture tools?

Mr. WHITCHER. Some small tools. The United Shoe Machinery Co. manufacture largely power machinery. They make the goods that go with the machinery, but the finders buy goods and handle goods which are made by independent people.

Mr. MITCHELL. Is the United Shoe Machinery Co. your chief competitor?

Mr. WHITCHER. No. There are a lot of people who make these different things. The United Shoe Machinery Co. are not people who are aggressive in the findings business. They do not slaughter prices, do not cut prices as the chain department stores do.

Mr. MITCHELL. Do you regard the United Shoe Machinery Co. as a monopoly?

Mr. WHITCHER. Not in the finding trade.

Mr. MITCHELL. In the machinery trade, the shoe machinery trade?

Mr. WHITCHER. I can not say much about the United Shoe Machinery Co., because I am not in close touch with them.

Mr. DYER. What is your company?

Mr. WHITCHER. Our association is the National Leather & Shoe Finders' Association.

Mr. DYER. A Missouri corporation?

Mr. WHITCHER. It is not a corporation.

Mr. DYER. It is located in the city of St. Louis?

Mr. WHITCHER. Oh, no. The members are in almost every State of the Union.

Mr. DYER. I understood you to say in your opening statement it was a St. Louis concern.

Mr. WHITCHER. The headquarters are in St. Louis.

Mr. DYER. Who is the head of the organization?

Mr. WHITCHER. Mr. Henry Cline, of Chicago, is president; Mr. P. W. Hubert, of St. Louis, is chairman of the executive committee; and Mr. George A. Knapp is the secretary; and I am the treasurer of the association.

Mr. DYER. What shoe companies are they connected with?

Mr. WHITCHER. Mr. Knapp is simply the secretary of the organization, and he has nothing else to do but attend to the work connected with that office. Mr. Hubert's business is as manager of the findings department of the James Clark Leather Co., of St. Louis. Mr. Henry Cline is at the head of the firm of Henry Cline & Co., of Chicago.

Mr. DYER. Your organization is not a corporation?

Mr. WHITCHER. No; it is just an association of dealers who get together once a year to have a social time and to discuss trade conditions and consider credits and anything whereby they can improve the general conditions in the trade.

Mr. DYER. It is not controlled by the shoe manufacturers?

Mr. WHITCHER. Oh, no; it has nothing to do with them; we do not buy anything of them. We come closer to the individual people than any other trade connected with that general business, excepting the shoe stores.

Mr. DYER. How many stores in the city of St. Louis do you think are members of your association?

Mr. WHITCHER. I should say six or eight.

Mr. DYER. What are the names of some of them?

Mr. WHITCHER. There is the James Clark Leather Co., the Standard Leather Co.—I can not tell you all of them offhand.

Mr. DYER. No retail merchants belong to it?

Mr. WHITCHER. No. They supply the goods to the repairers and the retail shoe stores.

Mr. DYER. Do you maintain a repair shop in St. Louis?

Mr. WHITCHER. No; they supply the repair shops.

Mr. CARLIN. Have you been in the habit of making exclusive sales contracts with your customers?

Mr. WHITCHER. No. We, as dealers, have not. What we want is a chance to prevent the man of irresponsible finances, the man who wants to come in and put in a little stock of goods, say, amounting to a thousand or two thousand dollars worth, and to hang around and then sell them at a cutthroat price, and then clear out. It is that sort of irresponsible dealers who do the most harm.

Mr. CARLIN. You want to choke off the little fellow?

Mr. WHITCHER. No, sir; not a bit. We want the little fellow to make the money. We are the little fellow. We do not make any money on goods which are sold on a margin of 5 cents a dozen profit, and the quality of the goods is likely to be deteriorated on so close a margin.

Mr. CARLIN. Your association is not chartered?

Mr. WHITCHER. No, sir; it is just an association of men for the purpose of getting together and discussing matters in connection with the improvement of trade conditions.

Mr. CARLIN. What is the object of it?

Mr. WHITCHER. One of the chief objects is to keep records of credits, because the repairing trade is a trade which is very shifty. If a man in one city clears out and does not pay his bills, and then clears out with the goods, a record of that transaction would go to the secretary of the association.

Mr. CARLIN. You keep a black list?

Mr. WHITCHER. No; we do not keep a black list, as it were. If you were doing business, you would want to know whether you could sell a bill of goods to a man and be reasonably sure of getting your money. Then you would want to know something about his character, whether he is a thrifty man and a good workman.

Mr. CARLIN. But if he has not paid heretofore, you put him on your unreliable list?

Mr. WHITCHER. Yes; I presume we would have a memorandum of that. You can not call it a black list any more than you could call Dun's Agency a black list, because that gives you information which every merchant has to know for his own protection.

Mr. MITCHELL. I understood you to say that the United Shoe Machinery Co. is a competitor of yours?

Mr. WHITCHER. Yes; they are in the little goods they make.

Mr. MITCHELL. Do you know who supplies the machinery to these repair shops, most of it?

Mr. WHITCHER. Yes; there is the Universal Machinery Co., of St. Louis, and there is the Champion Machinery Co., of St. Louis.

Mr. MITCHELL. Is not most of it supplied by the United Shoe Machinery Co.?

Mr. WHITCHER. No.

Mr. MITCHELL. It is not?

Mr. WHITCHER. No; not to the repair trade. They have what they call the United Shoe Machinery Repair Co., in which they put the goods out on lease. All the other people sell their goods. The lease price is prohibitive to most of the small men. They do not do business enough to warrant them in paying their price.

Mr. MITCHELL. In the findings trade are they your chief competitor, the United Shoe Machinery Co.?

Mr. WHITCHER. No.

Mr. MITCHELL. Is it some of the smaller dealers?

Mr. WHITCHER. The chief competitors are dealers, not the manufacturers. The dealers themselves need something to let them get a fair price on that kind of business.

Mr. CARLIN. How have you done that up to this time?

Mr. WHITCHER. Up to the time of the decision of the Supreme Court of the United States the dealer would say, "Here, we can not

make any money on your goods unless you will make a price which can be maintained and and which will give us a fair margin of profit." Then he will say, "What is a fair margin of profit?". Then the other man will say, "Twenty per cent on your goods is the least we can afford to handle them for."

Mr. CARLIN. Do not the dealers agree among themselves first as to what should be a fair margin?

Mr. WHITCHER. I do not think so. I think if a man was coming to sell me goods, and I had been handling his goods at 5 per cent I would say to him, "No; I am going to push the other man's goods."

Mr. CARLIN. You are talking with reference to the manufacturers. Was there an understanding or agreement between the dealers as to the margin of profit for which they would distribute these goods?

Mr. WHITCHER. No. There is no understanding among the dealers as to these prices.

If I were talking with a man from San Francisco or Los Angeles I would say, "How much do you have to add to your goods for freight, and how much can you get in your section?" And he might tell me. I might say, "We can not get anything like that in our section because we are so close to the markets and the goods can be delivered in a couple of days, where in your case, out on the Pacific coast, it takes three or four weeks."

Mr. CARLIN. When you make your contracts with the repair-shop man, do you compel him to agree that he will sell the goods at a certain price before you will supply him?

Mr. WHITCHER. We do not make any contract like that. We supply the shoe store. The people who manufacture the goods advertise them at so much, as in the case of the O'Sullivan heels.

Mr. CARLIN. What I am driving at is how have you protected yourselves before unless you did require something like that of the repair man? Unless you did something like that, it looks as if you would be in the same position now as before.

Mr. DYER. Did you make an agreement with them by which the repair man would sell at a certain price?

Mr. WHITCHER. No; we did not. The repair man will buy the goods from one dealer or another at so close a margin that there is no profit to the dealer. You must understand that there is a manufacturer, there is a jobber, there is a retailer who supplies the repair man.

Mr. CARLIN. I am trying to find out how you penalize the repair man who sold your goods at less than you thought he ought to sell them.

Mr. WHITCHER. We are not trying to penalize the repair man; but he delivers a cheaper article and gets the full price for it.

Mr. CARLIN. How did you prevent that before the recent decisions of the Supreme Court of the United States?

Mr. WHITCHER. The reason that the repair man sold—the repairer used to put in the best goods, and the cutting in price——

Mr. CARLIN (interposing). You are not answering my question.

Mr. WHITCHER. If you will allow me to go on and answer you in my own way I will get to it.

The cutting of the price would lower the standard of the other goods, giving the repairer an opportunity to buy the deteriorated goods, and that allowed him to make more profit, and yet the public did not get the best quality of goods.

Mr. CARLIN. How, then, did you prevent that before these recent decisions of the Supreme Court?

Mr. WHITCHER. We did not attempt to prevent it.

Mr. CARLIN. Well, then, the conditions will continue just as they have been heretofore?

Mr. WHITCHER. I do not think so. I think the people will take the goods branded and trade-marked; and if the trade likes them, and if the public use them and like them, and the dealer makes a reasonable profit on them, he is going to continue to sell those goods, and he will sell them to the repair man, and they will go through to the public. If the dealer does not make that profit on the standard goods, he will push the lower class goods.

Mr. CARLIN. What is the difference between your condition now and your condition prior to the recent decisions of the Supreme Court of the United States? How have those decisions changed the operation of your business?

Mr. WHITCHER. Just this way: That the public do not get the best goods—the goods which they used to get. That is where the public is injured.

Mr. CARLIN. Did they get them before the decisions of the Supreme Court?

Mr. WHITCHER. Yes; because the dealers made the profits on the good goods and pushed them. Now, on account of the cutting of the prices on the good goods, they push the cheaper grades of goods.

Mr. CARLIN. How did the dealers prevent the cutting of prices before the recent decisions of the Supreme Court?

Mr. WHITCHER. A manufacturer would say to us, "If you do not maintain my resale price on these goods, I will not supply you with them," or "If you cut the price, it is an injury to my reputation, and I ought to have redress."

Mr. CARLIN. What was his redress before? Did he not refuse to sell you any more goods?

Mr. WHITCHER. When he was permitted to establish prices he refused to sell us the goods. Now he can not do that. Am I not right?

Mr. CARLIN. I think you are to this extent, I think he can fix the price to the first purchaser, but beyond that he loses control whether he is a patentee or otherwise.

If you will read bill No. 1 I think you will have a better idea of what we are attempting to do, and it may be that you will find we have already provided for some relief.

Mr. WHITCHER. I should say you have provided for relieving monopolies, but there are quantities of people who have developed a reputation on some special article, which is only the monopoly which the trade gives them.

Mr. CARLIN. Take a patented article, that is a monopoly?

Mr. WHITCHER. Yes.

Mr. CARLIN. The patentee has that monopoly now, so far as his sales to first hands go, but he has not, beyond that. The only difference between you and the Supreme Court is that you want them to go on as they have been doing, and not only monopolize the market but monopolize by agreement as to prices.

Mr. WHITCHER. You know there is competition between manufacturers of patented goods. Then the competition changes and

somebody else comes in, and there are, perhaps, half a dozen patented articles of the same kind, and the standard is lowered. I do not believe that you can controvert my statement that the public is not served unless the dealer can get a fair margin of profit for doing his business. He will attempt to put in goods—he is in business to make money. He will put in cheaper and deteriorated articles every time when he can make them go. If he can make a better or bigger profit on the cheaper goods he does not care.

Mr. CARLIN. If we are to do what you are asking would not this be the final result? In other words, if we were to give the proposed trade commission the right to fix the price at which you shall sell your goods would not the demand from the public force you to sell at a lower price rather than at a higher price, which is what you want to do?

Mr. WHITCHER. No.

Mr. CARLIN. Have you stopped to reflect what effect a demand by the public would have on a commission of that sort, for prices lower than, in your judgment, would make a fair and reasonable profit to you?

Mr. WHITCHER. They would unquestionably be taken care of by the manufacturers of cheaper goods. If people want cheaper goods they will be delivered to them, but it would not necessarily force a manufacturer of goods to put his prices down.

Mr. CARLIN. If the commission had power to fix the price of what you are selling, the quality would have to be considered, and they would fix the price on the low quality lower than the price on the article of high quality?

Mr. WHITCHER. Certainly.

Mr. CARLIN. When public sentiment came in and declared that your prices were not low enough, do you not think you are shooting at the wrong target, that the commission would be more inclined toward the consumer than toward the dealer?

Mr. WHITCHER. On articles of large consumption that might be so, but on our articles the business is not large enough to create a public sentiment.

Still I do believe that—for instance, in the automobile trade I understand they used to establish their prices in that way, but, of course, that is quite a large industry. The time will have to come, if the dealers are going to make a fair living out of their business, when something to prevent cutthroat competition will have to be established in order that the public may be properly served.

Mr. CARLIN. That may be true, but what I am trying to point out to you is that when you put such a power in the hands of a commission, which is responsible to public sentiment, you may find yourselves worse off than you are now, when you are able to handle your own business to suit yourself.

Mr. WHITCHER. I do not think so.

Mr. CARLIN. In other words, you think that business would be better off if managed by the Government than if managed by yourselves?

Mr. WHITCHER. No. I think if we had the right to register our prices that we would get for the goods, and the Government would lock into those prices, and if they wanted to change——

The CHAIRMAN (interposing). If you once concede that power to the Government, suppose the Government would say, "Twenty per cent is too much margin, we will cut that profit down to 15," then the business goes along in that way, and after a while the public demands that there be another reduction, and then it will be cut to 10. Your business then is entirely at the mercy of the Government official who is in that particular department of the Government, and who is running your business.

Mr. WHITCHER. You would then eliminate every man except a strong financial man, and he would have a monopoly.

Mr. CARLIN. That is what we think.

Mr. WHITCHER. That is one side, but on the other hand, do you want a powerful financial concern to do the business? Is the public satisfied with people who simply put in cheap stuff because they have——

The CHAIRMAN. The people who do not pay their bills and put in cheap stuff would not survive in business very long.

Mr. WHITCHER. In my opinion every trade, and we are in many respects seriously injured financially because there is not large enough business, and they may be seriously injured unless they can have some protection, because there is excessive cutthroat competition.

Mr. CARLIN. You know that the small capitalist has to have a larger percentage of profit than the large corporation with large capital?

Mr. WHITCHER. No; I do not know that in our line, sir.

Mr. CARLIN. Let me illustrate. You have, we will say, $10,000 invested in your business. Now, you have got to live and your family has got to live, and you could not live on a $10,000 investment at 5 per cent and support your family?

Mr. WHITCHER. No.

Mr. CARLIN. But a corporation with a million dollars of capital and a number of stockholders who have their money in other big investment could very easily live on a 5 per cent income from that business.

Mr. WHITCHER. Yes.

Mr. CARLIN. Therefore, you see the small man with small capital must necessarily have a larger profit than is necessary with a large corporation with large capital. Is that not true?

Mr. WHITCHER. Of course, conditions vary in various lines of business. A good many of our small men live in the back of their stores, and all of their family work in the business. Consequently it is very often those men who make the prices. They will make the goods and sell them if they can only make a half a dollar on a sale.

Mr. MITCHELL. They are satisfied with half a loaf if they can not get the whole loaf.

Mr. WHITCHER. Yes.

Mr. CARLIN. This committee wants to help business.

Mr. WHITCHER. Yes; we believe that or we would not be here.

Mr. CARLIN. That is our desire. The question arises, What is the best way to help business?

Mr. WHITCHER. Yes, sir.

Mr. CARLIN. You seem to think the best way is to turn the business over to the Government, and let the Government fix the profit at which the man shall do business?

Mr. WHITCHER. I suppose it would be so if it went as far as that. I know how it has worked in the past.

The CHAIRMAN. How would you stop it when you started in that direction?

Mr. WHITCHER. I think there probably would have to be some regulation of the percentage of profits, according to the line of business.

The CHAIRMAN. You sell those supplies which are used in soling and half-soling shoes?

Mr. WHITCHER. We sell some of those; yes, sir.

The CHAIRMAN. Here is a cobbler who half-soles a pair of shoes, say, for $1, and you consider that reasonable?

Mr. WHITCHER. It is too reasonable. He ought not to do it.

The CHAIRMAN. I am just using that as an illustration. You consider that reasonable, using the best quality of leather, we will say. Suppose the public thinks that 75 cents would be enough, then, this commission would say that he could not charge beyond 75 cents.

Mr. WHITCHER. That is for a different grade of article.

Mr. CARLIN. The same illustration would apply to any grade.

The CHAIRMAN. It does not make any difference about the grade of the article. We are talking now about the power to fix the price. When you concede the power of the Government to fix the price, you are turning over your business to the Government.

Mr. WHITCHER. I realize that, in a sense, it would be better policy for people in our business to turn over their business to Government management rather than lose money in it.

The CHAIRMAN. And have Socialism at once.

Mr. WHITCHER. We do not want socialism.

The CHAIRMAN. Where would there be much individualism remaining when that condition of affairs was brought about?

Mr. WHITCHER. There has been in the past—we have had that privilege up to the time of the last decisions of the Supreme Court, and it worked very well.

The CHAIRMAN. The Government did not fix the price.

Mr. WHITCHER. They prevent the establishment of a price by people making branded and trade-marked goods. Those people do not have any right to protect their reputations. When you have sold those goods, some irresponsible man or some man of no character can take those goods and sell them at 50 cents on the dollar.

Mr. CARLIN. But you do not have to sell to an irresponsible man.

Mr. WHITCHER. I understood there was a law——

Mr. CARLIN (interposing). You do not have to sell your goods to a certain man unless you want to.

Mr. WHITCHER. Are you sure of that?

Mr. CARLIN. Absolutely sure of that. We have a provision here that applies to the products of the mines which does that, but that is as far as anybody has dared go.

Mr. WHITCHER. I can refuse to sell to an individual if he puts the cash money down, because he sells those goods at a cut price?

Mr. CARLIN. Not on the ground that he will cut the price.

Mr. WHITCHER. If I know his reputation to be that?

Mr. CARLIN. You can not make that character of contract. There is no statute which compels you to sell to everybody who applies for your goods, either responsible or irresponsible; but when you commence to contract with a man to prevent price cutting, then you do get into the meshes of the law, because that character of contract is prohibited.

Mr. WHITCHER. Then, how about labor; why not let them be amenable to the law just as we are? You allow labor organizations to go ahead and say to a manufacturer, "You shall not run your mill except in this way."

Mr. CARLIN. That is a large question. Mr. Gompers delivered quite a lengthy address on that subject before this committee, and I commend the reading of that to you. He speaks of their attitude.

Mr. WHITCHER. Our people come now pretty close to the laboring class, and we think we are entitled to the protection that labor interests would be entitled to.

Mr. CAREW. You would be in favor of including them in the exemption?

Mr. WHITCHER. I should be very glad to have them included in an exemption of that sort. If the manufacturers of branded and trademarked goods are not going to be permitted to establish prices for a fair profit, I think our men would be very glad to unionize and get the privilege of getting together to see what profit they can make on their goods.

Mr. CARLIN. You think the Government ought to fix the price of labor?

Mr. WHITCHER. I do not know. I realize this is all tending toward socialism.

Mr. CARLIN. You are a business man, and we have great respect for you and your opinions, and we are trying to find out what just such gentlemen as you are thinking about.

Mr. WHITCHER. I thank you for your kind expression, Mr. Carlin.

Mr. CARLIN. Are you thinking along the line that Government ought to fix the price of labor?

Mr. WHITCHER. No; I am not ready to say that. I am thinking along the line of service to the people.

Mr. CARLIN. If the Government is to fix the price of products of labor, how can that be done without taking into consideration the price of labor?

Mr. WHITCHER. Of course, a proposition to establish minimum wages is something the Government is undertaking. I think the Government has gone too far in all this matter of control. I think the large trusts who are trying to knock out the small people should have a certain amount of regulation, but when it comes down to the question of right of contract or of distribution of goods, competition always regulates the profits which dealers can make, and I think the Government is stepping in too far. I do think you should let us alone and give us the privilege of getting a fair remuneration for our work. There seems to be almost a tendency directly toward socialism.

Mr. CARLIN. Without intending any disrespect to you or the gentlemen you represent, that is the principle of the highwayman; all he asks the Government to do is to let him alone. He will take

care of himself, and he will get a proper reward for his efforts. On the other hand, the public demands that they should be protected from a fellow who thinks he should be left alone.

Mr. WHITCHER. But the public wants the service. The public does not want to have delivered to it goods which are made to represent the genuine article and which they suppose is the genuine article, but which is sold for a good deal less price than the genuine article brings.

Mr. CARLIN. If you had the power to write a statute to remedy these evils with which you are familiar, what would you write into the law?

Mr. WHITCHER. You mean regarding these men that I have been talking about?

Mr. CARLIN. Regarding business generally, including them?

Mr. WHITCHER. I would want to consider that very carefully before committing myself.

Mr. CARLIN. Will you do that and send it to us? Draw such a statute as you think will cover that; suppose you draw a tentative statute.

Mr. WHITCHER. I think I would have to ask to be excused from doing it here.

Mr. CARLIN. Suppose you do that, then, after you return home, and send it to the clerk of the committee, so that the committee may have your ideas on that subject.

Mr. WHITCHER. I will endeavor to do that. I think I am taking up too much of your time, gentlemen. I trust you will pardon me for doing so.

I do feel and want to instill in your minds the fact that there is another side to this question; that the dealer needs some protection in order that he may render the best service to the public, so that the public may receive honorable goods and reliable goods, similar to what it has been getting in the past, without forcing down the quality and forcing down the price, which comes from cutthroat competition.

(Thereupon the committee took a recess until 2 o'clock p. m.)

AFTER RECESS.

The committee reassembled, pursuant to the taking of recess.

The CHAIRMAN. The committee will hear this afternoon from Mr. A. G. Thomas and one or two other gentlemen, from Sandy Springs, Md.

STATEMENTS OF MESSRS. A. G. THOMAS, CHARLES KIRKE, AND J. W. JONES, OF SANDY SPRINGS, MD.

The CHAIRMAN. We are very glad to have you with us, gentlemen. Mr. Thomas, you are a banker, and I suppose you have come this afternoon to talk about the bill relating to interlocking directorates?

Mr. THOMAS. Yes, sir.

The CHAIRMAN. We will be very glad to have you make your statement in your own way.

Mr. THOMAS. I am sure you have had representatives of large corporations before you, and I come to you this afternoon to speak in

behalf of the small national banks in rural communities, and I will cite my home bank as an example. I live only 18 miles from this city, in Montgomery County, Md.

The CHAIRMAN. What is your town?

Mr. THOMAS. We have a little village at Sandy Springs, Md., with a population of about 40 people.

The CHAIRMAN. Where is your bank located?

Mr. THOMAS. At Sandy Springs.

The CHAIRMAN. What is the capital stock of your bank?

Mr. THOMAS. $25,000.

The CHAIRMAN. It is a national bank?

Mr. THOMAS. It is a national bank; and we have deposits of about $100,000.

The CHAIRMAN. Your community is a farming community?

Mr. THOMAS. Yes; it is. My family have been there for about 200 years. There is no industry or manufacturing or commerce there; there is no monopoly or anything that would be affected by the bill before you.

We have there simply a small national bank, and I want to explain the situation we are in.

We had, about 45 years ago, an old savings institution there with 26 directors. We are not allowed to loan a cent to any director, and we never have during all these years. We are required to invest our money in lands and mortgages in the county or State, municipal or railway bonds. Our savings bank is only open two days in the week for business.

We are not allowed to discount paper, and we can not do a business that a commercial or a national bank does. That has been going along there for a long time, and the bank has been going along in a very prosperous condition.

We have been loaning money to the community, to hundreds of people, and it has been a great aid to them in helping them to pay for their homes or for their farm implements and things of that kind, and also has furnished them with a means for a safe place for a deposit of their funds.

We have always paid 4 per cent. We have not any capital. All our surplus belongs to the book holder.

About 10 years ago we needed a commercial bank, and we started this small national bank in a community there where there are no capitalists, and where there are not many men fitted to be bank directors, where it is pretty hard to get enough directors to serve; and when you take 26 men in a community like ours you get almost everybody capable of doing any business.

We started our national bank with nine directors, and three of those are directors in the old savings-bank institution under a State charter. As far as I can see, from the conditions of the bill now pending before your committee, we can not hold these positions, if I read the bill correctly. We would like to impress that upon you.

Mr. CARLIN. What savings bank are you a director in?

Mr. THOMAS. The old savings bank at Sandy Springs.

Mr. CARLIN. How much money have they?

Mr. THOMAS. They have deposits of a million dollars. They have been very successful. That bank is in a community 10 miles from a railroad.

Mr. CARLIN. And it is a community with 40 inhabitants?

Mr. THOMAS. Yes; with 40 inhabitants.

The CHAIRMAN. And your national bank has only $25,000 capital?

Mr. THOMAS. That is all we have.

The CHAIRMAN. What are the deposits in the commercial bank—in the national bank?

Mr. THOMAS. About $100,000. The banks are entirely separate. We keep our banks entirely separate.

Mr. CARLIN. There is no stock in the savings bank?

Mr. THOMAS. None at all, and the deposit is limited. The limit is placed at $500 a year, and the maximum is $4,000. You can not deposit more than $5,000 in that bank, so that is a kind of close corporation.

The point is that there are a great many other places similarly affected. There are thousands of these small banks that are affected as we are. If we should separate, as proposed in this bill, it will almost cripple one of the banks, because we have not a sufficient number of capable men to fill the places as directors. That is a point we would like you to consider.

Mr. CARLIN. We have a case of this kind in a national bank: A bank has $100,000 capital and has on deposit $1,400,000.

Mr. THOMAS. That is not in a rural community?

Mr. CARLIN. No; that is in New York.

Mr. THOMAS. I am speaking for the rural communities. I think there ought to be an exception made, in the case of a capital of $50,000 and under, in a rural community, because we are doing exactly for the farmers what the new proposed rural-credits law is proposed to do. We loan to whoever wants to borrow for anything; when they need money we loan it to them.

Mr. CARLIN. What do you do with that $1,000,000 you have in the savings bank?

Mr. THOMAS. We loan it. I have here a copy of our last statement. We have about $200,000 in railroad bonds, about $150,000 in State, county, and municipal bonds and some industrial bonds, but not a very large amount of industrial bonds. We have been very successful there. We are strictly a farming community. There is no business there at all except country stores and a few county mills that grind some of the wheat. We do not loan to persons in the city on notes. All our business is confined to our citizens, so far as the national bank is concerned, and we have gotten along very well.

Mr. CARLIN. I never would have suspected that you had a million dollars on deposit there.

Mr. THOMAS. To the credit of the community I will say that we have deposits in this little bank in 15 States in the Union. We have a deposit in San Francisco. We had a deposit in China last year. We have a deposit in New Orleans and one in Boston, and all along this coast. There are a great many boys raised in Sandy Springs, and there is nothing there for those boys to do but farming, so those boys go out in different parts of the country. We raise the boys and send them out in different parts of the country. I suppose there are 75 or 100 of them who have gone from Sandy Springs, and they know the class of people that live there. We are an economical plain

people, and these men outside in the different States know what a sturdy community that is.

Mr. KIRKE. Sixty per cent only can be invested in farm mortgages in Montgomery County.

Mr. THOMAS. That has been criticized by a good many people.

Mr. CARLIN. How many of the men who are directors in the savings bank are also directors in the national bank?

Mr. THOMAS. I think there are five.

Mr. CARLIN. And the savings bank has 26 directors?

Mr. THOMAS. They had 26 originally. They have died off until now there are only 20.

Mr. CARLIN. And how many directors are there in the national bank?

Mr. THOMAS. There are 11. That makes 31 men all together who are directors in the two banks.

Mr. CARLIN. And six of those men would be all that would be affected?

Mr. THOMAS. Yes; I think six would be all that would be affected.

Mr. CARLIN. In the exercise of your option of being a director in either one or the other, your idea is that six men would leave the national bank and stay in the savings bank?

Mr. THOMAS. We would not know what to do. I went to see the new Comptroller of the Currency, Mr. Williams, who is a personal friend of mine, and I asked him what the result would be, and he said, "You will have plenty of time to straighten that out." I said, "When a man is dead he has not plenty of time to straighten it out."

Mr. CARLIN. You are given two years.

Mr. THOMAS. I know that. I do not know what we would do. I am in both banks.

Mr. CARLIN. Do the directors in the savings bank receive any salary?

Mr. THOMAS. No. There is a small per diem.

Mr. CARLIN. That is for attendance upon the meetings?

Mr. THOMAS. Yes; when they attend the meetings. We do not pay very large salaries. We served for nothing for a great many years.

Mr. CARLIN. Do the directors in the national bank receive a per diem?

Mr. THOMAS. They receive a small per diem. We supervise and take care of the funds of a great many people who can not take care of their own, very largely children and widows and workingmen. We have about 3,500 pass books, and a large number of our depositors are very small depositors. We are started for that purpose, and we have been quite successful. We are a plain, economical people.

Mr. CARLIN. Would it meet your approval if we would exempt savings institutions?

Mr. THOMAS. That would help very much to solve it. There are quite a number of national banks throughout the county.

The only objection I have to the currency bill is that we are required in our county to contribute so much to the capital stock of the reserve bank, and that takes that much out of our community which we could keep there and loan to the people who need it. That is the only objection I have to the currency bill. It seems to be

taking it from the rural community and concentrating it in these large banks.

Mr. KIRKE. I would like to ask whether there would be any line drawn in regard to small banks in rural communities?

Mr. CARLIN. Oh, yes. If we should except savings institutions, that would meet your case?

Mr. THOMAS. Yes; but at the same time, that is not the only case, because throughout the country there are hundreds of these little banks that will suffer as well. I know of some in Carroll County and one in Frederick County.

Mr. CARLIN. If they were to suffer the same as you may suffer from interlocking directorates in savings institutions——

Mr. THOMAS (interposing). There are also trust institutions.

Mr. CARLIN. How old is your savings institution?

Mr. THOMAS. Forty-five years old.

Mr. JONES. We do not and have not loaned a dollar to a director.

Mr. THOMAS. We publish a statement every year and everybody sees what we are doing. We are examined thoroughly.

Mr. CARLIN. You have 40 inhabitants in your community, and 31 directors in the two banks, and a million dollars on deposit in one of the banks.

Mr. JONES. There are only 40 inhabitants in the village of Sandy Springs.

Mr. CARLIN. Sandy Springs has 40 inhabitants?

Mr. JONES. Yes, sir.

The CHAIRMAN. You may proceed with your statement in your own way, Mr. Thomas.

Mr. THOMAS. I do not think what we are doing there would come under the conditions that this law is supposed to cover. We are not doing anything there in violation of any law in regard to the restraint of trade. There is no combination, we could not have a combination, and it does not seem to me that we ought to come under this sweeping law, as we are not doing any harm.

The CHAIRMAN. You mean the law prohibiting interlocking directors?

Mr. THOMAS. Yes, sir; the law prohibiting a man from being a director in the old savings bank and in the national bank.

The CHAIRMAN. How many directors of the national bank are also directors in the savings institution?

Mr. THOMAS. I think there are five.

The CHAIRMAN. Each concern has five directors?

Mr. THOMAS. No. We have 11 directors in the national bank.

The CHAIRMAN. You have 11 directors in the national bank?

Mr. THOMAS. Yes; and 20 in the old savings institution. Last year the average age of the directors was 72 years, and so I think we may safely say that Osler is not always correct in his theory.

Mr. CARLIN. The capital of the bank does not always represent its operations.

Mr. THOMAS. No.

Mr. CARLIN. That is what I meant when I referred to the bank with $100,000 capital and $1,400,000 deposits. So it would not reach the evil to exempt the banks of certain capitalization, because a bank with a small capitalization may have enormous deposits.

Mr. THOMAS. Yes; that is true.

Mr. CARLIN. Nobody wants to hurt a rural bank; we want to help them; but the difficulty is to get a rule of action based upon any concrete proposition that does not affect them after all. If we were to leave it to the capital—take your savings institution, which happens not to have any capital stock; if it had any capital it would be a small capital.

Mr. THOMAS. Yes.

Mr. DANFORTH. What is the nature of the savings bank in your community?

Mr. THOMAS. We are chartered under the State law.

Mr. DANFORTH. What is the State law? Are you a money-making institution?

Mr. THOMAS. No.

Mr. DANFORTH. Have you any stockholders?

Mr. THOMAS. No.

Mr. DANFORTH. It is what is known as a mutual savings bank for the benefit of the depositors?

Mr. THOMAS. Yes; everything belongs to the depositors; it is not a money-making institution at all.

Mr. DANFORTH. And the directors do not receive any salary?

Mr. THOMAS. The active ones do; the president and secretary and treasurer do.

Mr. DANFORTH. The officers do, but not the directors?

Mr. THOMAS. Yes; they receive a per diem for attending the meetings.

Mr. DANFORTH. That is, the executive committee?

Mr. THOMAS. Yes; the finance committee. The directors meet quarterly and receive a per diem, a small per diem.

Mr. CARLIN. They are debarred from borrowing any money from the institution?

Mr. THOMAS. Yes.

Mr. DANFORTH. You do not loan money on anything but bonds and mortgages?

Mr. THOMAS. That is all.

Mr. DANFORTH. You do not do that, even, with your own directors?

Mr. THOMAS. No; a director can not give a mortgage.

Mr. DANFORTH. That is like the law we have in New York State.

Mr. THOMAS. Yes; I believe it is.

Mr. CARLIN. Have you any idea how many institutions such as yours exist in this country?

Mr. THOMAS. You mean the savings banks?

Mr. CARLIN. Yes; a savings bank on the cooperative plan.

Mr. THOMAS. Our bank was copied really from the old savings bank of Baltimore; we took our rules from the rules of that old bank. We are only open two hours a day twice a week—on Monday and Thursday afternoon from 2 to 4 o'clock. That is the only time we are open to the public.

Mr. CARLIN. They can only make deposits during those hours?

Mr. THOMAS. Yes; they can only make deposits during those hours. Of course, a good deal of business is done by check and mail, but that is the only time we are open, and our national bank is only open four hours in the morning; it is not open in the afternoon at all.

The CHAIRMAN. What is your idea in limiting the amount that anyone may deposit to $500 a year?

Mr. THOMAS. Because we do not want to have to take care of the money of parties who are able to take care of their own. We originally started with the purpose of caring for the money of the laboring people, or widows or children who could not take care of their own money. If a man has three or four or five thousand dollars he can generally invest it in a good mortgage himself. We do not take over $4,000 at any time. The interest can accumulate as long as the depositor chooses to allow the money to remain in the bank. We have stuck to that rule for 45 years, and we have gotten a good deal of money even with that rule. The secret is that when it once goes in there it usually stays.

Mr. CARLIN. It so happens that just now there came from a banker in Utica, N. Y., a similar request, relating to savings institutions, and he submitted a brief on that subject. We did not have in mind the savings institutions when these tentative drafts were put out to the public.

Mr. DANFORTH. You mean the mutual savings institutions. There are in the West institutions under the name of savings banks which really do a discount business.

Mr. CARLIN. Those are different concerns, but we did not have in mind the mutual cooperative association.

Mr. THOMAS. There are some in the States.

Mr. CARLIN. They are run for profit?

Mr. THOMAS. They are run for profit.

These other institutions, the mutual institutions, are run to help the people; it is more on the order of a charitable institution. There was nothing paid for many years to any of the directors or anyone else.

We are very fond of that bank. We often stop work on our farms to see if the bank is properly run.

Mr. DANFORTH. Does not your Maryland State law limit the amount of deposits a savings bank may take?

Mr. THOMAS. I did not catch your question.

Mr. DANFORTH. I asked you whether your Maryland State law does not limit the amount of deposits a savings bank may take?

Mr. THOMAS. No; I think not.

Mr. DANFORTH. You may take an unlimited amount?

Mr. THOMAS. Some of the Baltimore banks have as much as $15,000.

Mr. DANFORTH. Does not the law limit the total amount an individual may deposit?

Mr. THOMAS. I think not.

Mr. DANFORTH. The New York State limit is $3,000.

Mr. THOMAS. Yes; I think it is. I am quite familiar with the savings institution near Boston, which is similar to ours.

Mr. DANFORTH. I believe Massachusetts has the same kind of a law.

The CHAIRMAN. Is there anything else you desire to say, Mr. Thomas?

Mr. THOMAS. No, Mr. Chairman; I think not.

The CHAIRMAN. You want to be allowed to have your directors who are directors of your national bank to be also directors in your savings institution?

Mr. THOMAS. Yes; of the mutual savings institution. Of course, if you can not draw a line as to the location and capital of national banks, we would be glad if you would relieve us in that way.

Mr. CARLIN. What do you think of the principle of preventing interlocking directors?

Mr. THOMAS. I think it is a good plan where monopolies are formed, in the case of large cities and large corporations. I am very glad to say that some of the directors think they have been directors in the institution long enough and are getting out.

Mr. KIRKE. Would anything be achieved by not allowing the directors of national banks to borrow from their own banks?

Mr. CARLIN. It would go a long way. On the other hand, that would drive out directors in many communities.

Mr. DANFORTH. There is a limitation on it now.

Mr. CARLIN. They can only borrow up to 10 per cent of the capital.

The CHAIRMAN. Is there anything more you desire to say, Mr. Kirke?

Mr. KIRKE. I think, Mr. Chairman, Mr. Thomas has covered the subject pretty thoroughly. I am led to hope, if you can not see any way by which you can limit capital, taking into consideration the fact that they are in a rural community—if you can not see any way to arrange that I would be glad if something could be done in the way of relieving these mutual savings banks.

Mr. THOMAS. We do not altogether like to be classed with the people who have the opportunity to do and are doing wrong.

Mr. CARLIN. If the evil we are trying to remedy does not reach the rural community, the rural community is not injured at all, but if it does reach there it ought to be remedied there as well as elsewhere.

Mr. THOMAS. That is the only objection I see to the law. You include people who have not had any possible chance for doing wrong, even if they wished to do so.

The CHAIRMAN. If this exception were put in the bill—if we put a clause in like this, "And a person who is a director in any State bank other than a mutual savings bank having no capital stock"—you think that would meet the case?

Mr. THOMAS. That would cover our case very nicely, and if that is the best you can do, we will be very glad to have you do that.

Mr. CARLIN. You think the rural national banks ought to be excepted?

Mr. THOMAS. Yes; I do. In many communities there are so few people who are capable of managing a bank that I think an exception should be made in that case. That is the trouble with a great many banks. We have not any capital at all outside of our community. No capitalist has anything to do with us. We are doing a great deal of good to the community where we are located. We are furnishing the money to lend just exactly where it is needed, among the agricultural people.

Mr. CARLIN. Does your savings institution lend your national bank any money?

Mr. THOMAS. No; we do not deal with each other. We keep separate accounts entirely. We are so separate that we do not keep an account with any of the banks in New York. I mean the two banks do not keep accounts in the same bank in New York.

Mr. CARLIN. What rate of interest does your savings bank pay?

Mr. THOMAS. Four per cent.

Mr. DANFORTH. If this bill, as it is drawn, against interlocking directorates were enacted into law, are there enough citizens in your town to enable you to have dummy directors, so that you can still continue to do business in both banks?

Mr. THOMAS. I do not know much about dummy directors.

Mr. DANFORTH. You could put your sons in as directors in the national bank, and have them do business under your instructions.

Mr. THOMAS. Would that be allowed? I would not know what to do if we were called upon to make the separation.

Mr. DANFORTH. Would you not feel that it was enough of a family affair if you put your son in the institution in which you were the less interested?

Mr. THOMAS. A son can not always do what his father has been doing.

Mr. DANFORTH. Do you not think if you put your son in there he would be liable to do what you instructed him to do?

Mr. THOMAS. It might be said that there were too many people of one name connected with the two institutions.

Mr. CARLIN. The son might be as hard-headed as the father, sometimes.

Mr. DANFORTH. You could in that way really keep up your family interest in the two institutions?

Mr. THOMAS. Yes; we could do that.

Mr. DANFORTH. My question was simply asked to see if it did not occur to you that the dummy-director business would interfere very seriously with the effectiveness of this provision.

Mr. THOMAS. Suppose we were to go out of the national-bank system entirely and start a State bank. Would this law affect us?

Mr. CARLIN. No.

Mr. THOMAS. We do not want to do that. We want to stay in the national-bank system.

Mr. KIRKE. The national bank meets the requirements of the community there. We want to remain in the national-bank system.

(Thereupon, at 3.30 o'clock p. m., the committee adjourned until to-morrow, Wednesday, February 11, 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.
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. SPRIGHT, *Clerk.*

TRUST LEGISLATION.

SERIAL 7, PART 10.

COMMITTEE OF THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Wednesday, February 11, 1914.

The committee this day met, Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. Representative Metz desires to be heard briefly this morning. The committee will now be glad to have him give his views.

STATEMENT OF HON. HERMAN A. METZ, MEMBER OF CONGRESS FROM NEW YORK.

Mr. METZ. Mr. Chairman and gentlemen, I will not take up much of your time, but I did want to touch upon the question of fixing prices. I have listened to the discussion here the past day or two on that subject with much interest—the question of whether an owner of a patent or trade-mark has the right to fix a retail price, and I want to point out that when an owner fixes a price it is an advantage to everyone instead of a detriment, and that the prohibition under the decision of the Supreme Court recently is a handicap upon everyone interested.

Take the case of drugs or pharmaceutical preparations. I mention this because I am most familiar with the products protected by trade-marks or patents in that line, although of course the same argument can be made for automobiles, rubber heels, groceries,

canned goods, etc.; in fact, for any article of commerce on which there is a patent or a trade-mark.

The patentee of a drug is protected to the extent that the drug can not be manufactured by anyone else, although in some cases infringing drugs are brought in from Switzerland and France in violation of his patent. But that, of course, is a matter for civil action, and every patentee has a right to sue and get redress. There has been a custom in existence establishing a fixed price for these drugs to the consumer, whether it be the general public or the physician. The retailer is allowed a correspondingly lower price and the wholesale distributor or jobber usually gets a further discount from that figure. The manufacturer or producer could not distribute directly to the physician or to the consuming public; the transportation charges, etc., and the number of accounts to be carried stand in the way. Therefore, he distributes through the wholesale druggist or the jobber in the various cities of the country. The wholesaler or jobber is allowed 10 per cent off and, for larger quantities, an additional 5 per cent from the price fixed to the retailer. Considering that the wholesaler assumes the risk of collections, it is easily worth that discount to distribute. The wholesaler buys in bulk and repacks into smaller packages, bringing down the transportation charges by shipping with other goods, and in that way helps the retailer. The retailer is supposed to maintain a fixed price on those products which go into direct consumption.

Under present conditions retail druggists complain right along that someone else is handling certain goods at less than the prescribed price. The manufacturer can only say that he is sorry, but can do nothing. Really it does not affect us. In saying "us," I mean the holders of the trade-mark or patent rights. If such goods are called for they will be sold and procured from us, but it hurts the retailer in the first instance. The goods are handled by dry-goods houses, department stores, and syndicate drug stores. The effect of not allowing the fixing of the price is demoralizing. We are striving to prevent monopoly, but the retailer can not buy the quantity the syndicate drug stores or the department stores buy; they buy direct and get the best price and then freeze out not only the wholesaler but the retailer as well by selling at or near cost. The result is that the smaller dealer is driven out all along the line, and particularly so in the drug business.

What goods go into a prescription the consumer rarely knows; he does not know the cost of these goods and does not care; it does not interest him. In this instance, he has to pay whatever the druggist sees fit to charge.

If the goods are trade-marked, however, and sold directly to the laymen as so-called "patent" medicines—most of which are not patented at all—a certain price is fixed, say $1 a bottle, which was the price of the goods cited by the Supreme Court. If the dry-goods house begins to sell at 89 cents, the druggist is put out of business. We are continually grumbling that the druggist is a fancy goods dealer and not a pharmacist, but he is compelled to carry everything but drugs; he is compelled to do so by this cutting on the part of his competitors in order to exist at all. He certainly can not get $1 a bottle if the dry-goods store is selling at 89 cents, and he can not afford to do business in a small way on department-store basis.

As I said before, the owner of a trade-mark or patent is not directly hurt, because the articles must come from him—whether he sells it to the legitimate wholesaler and through him to the retailer, or to the quantity-buying retailer direct. But this retailer, in selling below the prescribed price, is narrowing the distribution and driving out the smaller dealer, by not giving him a chance to make a living.

In Germany there is a fixed rate of profit which must be allowed the pharmacist on drugs—and over there he is purely a druggist. The druggist is allowed 40 per cent profit on the price fixed to the consumer, and the wholesaler or jobber who sells the retailer is allowed 15 per cent profit from the price charged to the retailer. The German Government allows this, realizing that the limited volume of business done by the druggist makes the larger percentage of profit necessary; but it restricts the number of licensed pharmacists—and a pharmacist is a pharmacist and not a fancy goods dealer.

In this country there is no such limitation; anybody can open a drug store who is a licensed pharmacist; all he needs is to pass the examination of the State board of pharmacy, or hire some one that has passed it to run the store for him. The result is that here competition is much keener, not only among the druggists themselves, but because of the further competition which they meet through the department and syndicate drug stores.

The consuming public gets no advantage of any kind on the goods that go into prescriptions; the cutting of prices may give them some small advantage on advertised or so-called "patent" medicines, but it is a broad question whether they would not be much better off if they could not buy some of these things at all. This is one instance, at least, where the fact that you can not fix a price is of no benefit to anyone, but hurts everyone connected with the trade, excepting the owner of the patent or trade-mark himself. The patent law has given him the monopoly which he is entitled to.

If a man has a copyright or a trade-mark, he must have established it. He could not establish a trade-mark overnight, because it takes time and costs money. He must have a peculiar quality of goods and advertise them, and he ought to be able to get his money back in some way. If the price of his product is prohibitive, or he advertises something the cost of which is exorbitant, some one else with a similar article will soon come along without a trade-mark and undersell him. That is legitimate competition; so that a man, even if he has established a trade-mark or copyright, is limited by legitimate competition. He should have the right, however, after he has established the trade-mark or copyright, to fix the retail price to the consumer, and if any retailer does not maintain that price, he ought to have the right to restrain him from selling those goods.

There is another danger, however, so far as drugs are concerned, and that is that job lots of goods which have been lying around and become spoiled, possibly, or are of uncertain quality through age, will be peddled out at a lower price than that at which the fresh article could be bought, and very often great danger results and great damage is done, whereas if the right price had been maintained the peddler would have had no object in taking a chance on such drugs, but could have returned them to the manufacturer and obtained

fresh goods, and thus the public would be protected. It is the cut-price dealer in the market who does more damage than anyone else, and I am bringing this before you to show that it is necessary to differentiate between an article that is not consumed and one that is turned into the body for purposes of health or as food. Automobiles and rubber heels and goods of that sort, of course, are on a different basis. But I do want to point out, on the kind of articles I have referred to, that the owners of such patents and trade-marks ought to be allowed to fix a price and see that the price they establish is maintained. And it is really no detriment to the consumer, but a protection to him, that the price as fixed by the manufacturer is maintained by the middleman and the retailer, who are the legitimate people to put these goods before the consumer.

That is all I have to say, and I thank you for the opportunity to be heard.

Mr. DANFORTH. What is your remedy?

Mr. METZ. That is up to you. I do not know. But do not stop us from fixing a price, and I will handle the matter so far as my business is concerned, if I can refuse to sell a man who will not maintain that price.

Mr. DANFORTH. What suggestions have you to give to the committee?

Mr. METZ. Make a law that will not allow cutting prices on such products, and say so plainly; under the recent decision of the Supreme Court it can not be prohibited. I heard Judge Adamson yesterday in the Committee on Interstate and Foreign Commerce say, "If in doubt about a law, consult a lawyer and find out." What lawyer's opinion is worth a continental if I can not rely upon his advice, when the Supreme Court decides five to four that a statute makes wrong to-day what for years was assumed to be right. No man ever doubted that a manufacturer or producer of trade-marked or patented goods had the right to fix the reselling price, and now, on a five-to-four decision, he is prohibited from doing so. Suppose one of the five judges should have changed his mind? The law would have been the other way. I will concede that you have no right to fix the price on free goods in open competition, but no one would have thought before the rendering of that decision that you could not fix a price upon a trade-marked product, but you see how doubtful these things are when the Supreme Court decided five to four. There must have been at least two lawyers arguing the case, one on each side, and one of the two guessed right. If this is the law, it should be made so clear that we will know just where we are at, and if expressly given permission to fix a price there will be no question.

Mr. VOLSTEAD. If we give you that permission, why should we not give it to everybody else?

Mr. METZ. On all patented and trade-marked goods you ought to, and I want you to consider that I do not mean my own goods only.

Mr. VOLSTEAD. The patented article has an advantage over every other article. Why should we give it an advantage beyond that?

Mr. METZ. Why not extend the advantage to the owner also, to the one who distributes to the public when he does not do it directly?

Mr. VOLSTEAD. You have the advantage. You have the monopoly in the manufacture and sale.

Mr. METZ. I have the monopoly and the trade-mark, but the other man—the middleman—who acts as a distributor for me, has no protection and is driven out of business.

Mr. VOLSTEAD. If you get it, the farmers ought to have it.

Mr. METZ. If they have the same goods, they ought to have it.

Mr. VOLSTEAD. They can trade-mark even flour.

Mr. METZ. Certainly; if you can make a name for your flour, you have a right to get the benefit of that. The trade-mark is not a mere name; it is the making of the name known.

Mr. VOLSTEAD. Would that not be simply legislating to create a monopoly?

Mr. METZ. No; you have given a monopoly when you give a trade-mark or a patent. That is why I get a patent.

Mr. VOLSTEAD. You have a monopoly of the trade-mark, but you may not have much of a monopoly when you get out in the sale of your goods.

Mr. METZ. If I can sell at a fixed price and make my goods known, I have a monopoly. I ought to be able to go further and say at what prices those goods shall be resold. If I sold direct to the retailer, I could fix the price. I know it is sound to claim that when you part with the goods the man who buys them may do what he pleases with them, and that seems logical. The retailer buys from the wholesaler or jobber; I can fix my price to the wholesaler and hold it, but he wholesales it to the retailer, and the court has held that you can not fix it beyond the first sale. There is logic in that undoubtedly, but the effect on the middleman is what I am looking at.

Mr. DYER. Is not that good reasoning and good sense?

Mr. METZ. Suppose I sold to the retailer direct and did not need a middleman, then I could fix my price?

Mr. DYER. You could fix your price to the retailer if you sold direct to him?

Mr. METZ. Certainly.

Mr. DYER. But you could not govern his price?

Mr. METZ. You can not do this business direct. I can not distribute in every little town in the country. If I did, the consumer would pay many times more for the goods than he does now. He would pay all the charges overhead; he would pay all the charges for transportation. You have got to have jobbers; you have got to have the wholesaler to break up the package and ship the goods with other goods. He is the one I am trying to look out for; and I also want to protect the retail druggist against the dry-goods house and the department store, the cutter, the peddler, and the faker, who get into that business by taking away from them the business the retailer ought to have and sending it back into the proper channels. It is a difficult question, but one we ought to consider.

Mr. VOLSTEAD. We ought to have the information.

Mr. METZ. I am giving you the information. That is one point; how to handle it is another. I have no fault to find with the court.

Mr. CARLIN. May I ask you a question?

Mr. METZ. Certainly.

Mr. CARLIN. In buying your goods you want to buy in a competitive market, do you not?

Mr. METZ. We do not buy these goods; we produce them.

Mr. CARLIN. You buy the ingredients with which you produce them?

Mr. METZ. Oh, naturally; the raw materials.

Mr. CARLIN. You want to buy in a competitive market?

Mr. METZ. Certainly; we have to.

Mr. CARLIN. Your position is that when you sell you want to sell in a noncompetitive market?

Mr. METZ. Only when I have the rights under the patent or under the trade-mark law.

Mr. CARLIN. Anybody can get a trade-mark.

Mr. METZ. Ah. But it is worth nothing unless he can justify it and prove the value of his product.

Mr. CARLIN. Why not have trade-marks for everything?

Mr. METZ. If you had a certain trade-mark on a hat and you wanted $5 for it, and I saw another for $3, I would buy the $3 hat in a minute. You must make a name for your hat, and you have got to have money to do it with. If you are a clever advertiser, and I am fool enough to believe your ad and want your hat, I ought to have to pay for it.

Mr. CARLIN. Your position is that you would not want a monopoly created for the fellow from whom you buy, but you want us to create a monopoly for you?

Mr. METZ. If in the same position, certainly I would, on the same goods. If he has a product which is trade-marked and I want that particular product I should be willing to pay his price. If everyone pays the same price, no one is injured.

Mr. CARLIN. It does not make any difference to you what the price is?

Mr. METZ. With everyone paying the same price, I should not care.

Mr. VOLSTEAD. The consumer would be injured by it.

Mr. METZ. He need not buy my stuff; he is not compelled to.

Mr. VOLSTEAD. If everybody charged the same?

Mr. METZ. That is the point. No one is injured, and the price regulates itself. When you get beyond a reasonable profit somebody else is going to come up and take the business.

I want to protect the man who is the legitimate distributor and nobody else, that is all. You are creating monopolies by giving these big fellows opportunity to buy quantities, and then not compelling them to maintain a selling price. Why should a man who buys one package pay the same price as the man who buys 100? That is what one of the "Seven Sisters" bills in New Jersey does. It says you must simply consider the cost of transportation and not quantity. It is impossible to make every large producer or dealer a direct distributor, you have got to have the middleman. Although there may be inequalities here and there, on certain goods prices should be fixed by the manufacturer, to which jobbers and retailers are forced to adhere. This will protect not only the middleman, but the public as well, and give a much better guaranty of quality than where prices are unrestricted.

If I have made that point clear, that is all I have to say, and I thank you for the hearing.

STATEMENT OF HON. THOMAS F. KONOP, MEMBER OF CONGRESS FROM WISCONSIN.

Mr. KONOP. Mr. Chairman, I want to present to you this morning Mr. Eben R. Minahan, of Green Bay, Wis., who represents the independent oil men, and who wishes to discuss some phases of the proposed legislation.

The CHAIRMAN. We will be very glad to hear him.

STATEMENT OF MR. EBEN R. MINAHAN, GREEN BAY, WIS., ATTORNEY FOR BARKHAUSEN OIL CO.; ALSO REPRESENTING THE WESTERN JOBBERS' ASSOCIATION AND THE INDEPENDENT PETROLEUM MARKETERS' ASSOCIATION.

Mr. MINAHAN. Gentlemen of the committee, I represent particularly the Western Jobbers' Association and the Independent Petroleum Marketers' Association. Both of these are associations of independent oil jobbers and distributors, men who engage in the buying and selling of petroleum products. We thought of coming here principally after reading Mr. Stanley's bill, H. R. 12121, and I shall address most of my remarks to the provisions of that proposed bill. I did not know until this morning of the rather similar provision in the bill 12123, which I believe is Judge Clayton's bill. That also contains a provision prohibiting price-cutting, but I am not familiar with that provision and its connection——

Mr. FLOYD. What is the number?

Mr. MINAHAN. No. 12123, page 313, of the document you are looking at.

Mr. FLOYD. The other bill introduced by the chairman of the committee?

Mr. MINAHAN. That is 12123. I do not know the page.

Mr. MCGILLICUDDY. Page 319.

Mr. FLOYD. That was not introduced by the chairman.

Mr. MINAHAN. I see. At any rate, that is the one I meant. My attention was called to it by reading, while I sat here, the minutes of Mr. Bennett's statement to this committee a couple of days ago.

Mr. FLOYD. Both of those bills were introduced by Mr. Stanley.

Mr. MINAHAN. My first proposition, gentlemen, that I want to be kept in mind in considering Mr. Stanley's bill (H. R. 12121) is that an antidiscrimination law is necessary to prevent business from crushing competitors by the practice of local price cutting, independently of the corporation or person entering into any contract or combination in restraint of trade. In this Stanley bill, which I am talking about, it is provided that if it be established that any person, firm, or corporation has entered into any contract or combination in restraint of trade then it shall be unlawful as to any of such persons, firms, or corporations which shall discriminate by selling at a lower price in one locality than in another for the purpose of injuring a competitor, after making due allowance for the difference in grade, quality, or quantity and in the cost of transportation; and I wanted to call the committee's attention to a proposition with which you may be perfectly familiar—but I want to mention it, nevertheless, to be sure—that a person, firm, or corporation may be large enough and

strong enough so that it can injure and crush a competitor by a local price cutting, irrespective of whether such person, firm, or corporation has entered into any contract or combination in restraint of trade. In other words, I want it to be kept in mind that the contracts and combinations in restraint of trade are one and a distinct method of acquiring a monopoly, and that local price cutting is another and equally distinct method of creating a monopoly; and, as a matter of fact, the one is older than the other. In fact, as was pointed out by the South Dakota Supreme Court when their local statute was held constitutional, the one is really the result of the other. I refer to the case of State *v.* Central Lumber Co.

Mr. VOLSTEAD. What is the citation?

Mr. MINAHAN. One hundred and twenty-third Northwestern, 504, South Dakota. That case went to the Supreme Court of the United States (vol. 226, 157), and only a year ago was affirmed, and the constitutionality of that State statute was thereby affirmed.

I refer you to the language of Judge Whitting, of the Supreme Court of South Dakota:

Mr. CARLIN. Is your proposition that you want to prevent local price cutting?

Mr. MINAHAN. That is my proposition.

Mr. CARLIN. What is your remedy?

Mr. MINAHAN. The very sort of statute that is contemplated by this bill, except that it be not limited to price cutting by one who has entered into a contract or combination in restraint of trade.

Mr. CARLIN. Have you read the tentative bill No. 1 of the committee?

Mr. MINAHAN. I do not know that I have, unless it is the bill that I just now referred to—12123.

Mr. CARLIN. No; that is the Stanley bill. You read section 9 of the tentative bill No. 1, and I think you will find it covers what you are after.

Mr. DYER. What section?

Mr. CARLIN. Section 9 of No. 1.

Mr. VOLSTEAD. That is the first section of that bill.

Mr. MINAHAN. I will not take your time to read it now. If that be the fact, then, of course, that would not be any criticism on Stanley bill 12121, but, as I say, I had read that other bill before I came to Washington, but this tentative bill I had not read at all, and it was only suggested to me, that possibly there was a bill covering that proposition, but I want to keep that entirely clear before the committee, so it will not be assumed, at least, that the Stanley bill, 12121, covers that proposition. It can not cover it, on account of the fact that there are two distinct things there to be kept in mind.

Mr. FLOYD. Now let me ask you a question in that connection: As I understand you, you are not criticizing the Stanley bill insofar as it prevents the combination, but you think it ought also to include individual corporations doing the same thing?

Mr. MINAHAN. Exactly. I think that it ought to go a little bit further; that the descrimination ought not to be limited only to those who have entered into a contract or combination in restraint of trade; that is, the prohibition of discrimination by such persons.

So that, if as is suggested, that identical proposition is included in section 9 of tentative bill No. 1, then if both bills become laws, of course my proposition would be enacted into law, but with the idea that possibly one might displace the other, I want to leave that idea with the committee.

Then, I want to suggest two reasons, very briefly, why there should be a Federal antidiscrimination law, lest it should be argued by somebody that the Federal act is not necessary, in view of the number of State acts. There is an antidiscrimination law in Wisconsin, and in Michigan, Minnesota, Iowa, and some of the other States near about us there, but we are finding now that in a State even, where competition is pretty strong, that the price all over the State is lowered, so that that competitor shall not become strong enough to spread over the State line and into another State. For instance, the price of gasoline in Michigan is 1 cent less all over the State of Michigan now to the consumer than it is in the State of Wisconsin. Then, there is one other practice that makes necessary absolutely a Federal statute.

Mr. CARLIN. A Federal statute would make it the same all over the country?

Mr. MINAHAN. The Federal statute would make it the same all over the country; yes.

The practice now that is bothering the independent oil dealer more than anything else, since the antidiscrimination law in the State was passed, is the practice of going to one of the independent's customers with a proposed contract that is a little bit under the local market, and if he takes that contract, making the contract subject to acceptance by an office of he concern outside of the State, so that the contract becomes an interstate contract; and then, although the goods are shipped from the local storehouse, yet is it so far an interstate transaction that it is impossible to reach it by the State law.

I want to pass on to a proposition that affects both bills or any bills that have been introduced. It is a question of the phraseology of the law, and that really explains my being here. I am attorney for the Barkhausen Oil Co., an independent oil concern, with its principal office at Green Bay, Wis., and we have had a little practical experience with the working of the Wisconsin antidiscrimination law, which caused these associations to send us here to give to you what facts we have gleaned from that experience. It is an advantage, of course, and rather an unusual advantage to know in advance of framing a law what contentions may be made regarding the phraseology of it. I want to give you that—I want to give you a little bit of the history of what has happened under the Wisconsin law, and what I am saying now is directed to the phrase in the law, "cost of transportation." It would seem at the outset that that was very clear, and yet there are some very serious propositions that are going to arise under it.

The Standard Oil Co. sold gasoline at Green Bay, Wis., for 15 cents a gallon; it sold gasoline at Hurley, Wis., for 14.8 cents a gallon. Now, Hurley is considerably farther from Whiting, Ind.—the common point of production—than is Green Bay. As a matter of fact, it costs twice as much to transport it by rail to Hurley as it does to

Green Bay. In exact figures, it costs $0.0066 a gallon more to take it to Hurley than it does to Green Bay.

Mr. CARLIN. If shipped in carloads?

Mr. MINAHAN. If shipped in carloads; yes. That is the way they ship—in tank cars. We figure if the price at Green Bay was properly 15 cents, that the price at Hurley ought to be 15.66 cents; or, as they run it to only three figures, 15.7 cents. The price at Hurley was, as I said, 14.8 cents, and we called the matter to their attention, and they declined to change it, so we filed a formal verified complaint with the attorney general, asking that the matter be investigated and that the corporation be ousted from the State for discriminating against us. We had an informal conference with them on that proposition before Attorney General Owen. It is now pending with the attorney general, and they explained the difference between the Hurley and Green Bay price by saying that the cost of local cartage in Hurley is less than the local cartage in Green Bay.

Mr. CARLIN. Local cartage.

Mr. MINAHAN. Local cartage from the distributing plant to the consumer. A Senator to whom I talked yesterday asked me if the attorney general did not laught at them. I told him that he did not; and after a little reflection one will see there was more show of reason behind that contention than one would at first think. They say that "cost of transportation" means actual transportation expense. We have contended all the time—and we find it has been in the mind of the legislators who passed these laws in the States—that that phrase means the freight charges, freight rates, from the point of production to the plant, and that it has nothing to do with local cartage any more than it has to do with the rent they pay for the plant or any othe rexpense they may have at the particular city. That is why we think the phraseology of any antidiscrimination statute that is passed, instead of being "cost of transportation" or "actual cost of transportation" should be "common-carriers' rates."

The South Dakota law provides for the equalizing of distance and the elimination of freight rates, so that there is precedent for that language in a statute. That is the statute that was declared constitutional by the Supreme Court of South Dakota, and the constitutionality affirmed by the Supreme Court of the United States a year ago, in 226 United States, 157.

Mr. FLOYD. What is the exact phraseology of the South Dakota statute?

Mr. MINAHAN. South Dakota?

Mr. FLOYD. Yes; on that particular point.

Mr. MINAHAN. I can give it to you.

Mr. CARLIN. What is the style of that case?

Mr. DANFORTH. Have you the name of the case?

Mr. MINAHAN. Yes; I have it. That is the one I gave a little while ago. State *v.* Central Lumber Co. (123 N. W., 504, South Dakota; 226 N. S., 157). The South Dakota law provides in the usual manner that a commodity in general use shall not be sold at a lower rate in one section than another:

After equalizing the distance from the point of production, manufacture, or distribution and freight rates therefrom.

Mr. CARLIN. They used the expression "freight rates"?

Mr. MINAHAN. "Freight rates."

Mr. CARLIN. That appears to me to be a better expression than "common carrier."

Mr. MINAHAN. Possibly, and still is not that exactly what you mean when you say "freight rates"?

Mr. CARLIN. They may deliver by local common carriers.

Mr. MINAHAN. That is important in a proposition I have, which rests on that identical point.

Mr. CARLIN. That was what was running in my mind.

Mr. VOLSTEAD. I will ask you whether that point was raised in the South Dakota case?

Mr. MINAHAN. No; the interpretation or construction of the language of those statutes had never been raised until it was raised, as I said, in our proceedings in Wisconsin.

Mr. VOLSTEAD. Might there not be some question as to the constitutionality of an act that would place an additional handicap, such as increased cost, for instance, of local distribution?

Mr. MINAHAN. It does not occur to me that that can be so. The constitutionality of those acts has uniformly been upheld by not only South Dakota and the United States Supreme Court, but by the Supreme Court of Iowa, by the Supreme Court of Nebraska, and by the Supreme Court of Minnesota, upon the ground that within the police power of the State is the power to prevent monopoly; and this legislation is all directed toward the prevention of monopoly upon the theory that the legislature may say to those persons, firms, or corporations who have been engaged in the practice of underselling at one point and recouping their loss at another, that "You shall sell for the same price all over this State."

There is one known commodity or price or item, is what I mean. That may yet be eliminated, so as to give all of the people of the State the price to which they, by reason of their location, may be entitled, a means of transportation that is open to all alike, to the big fellow and the little fellow, and that is the freight rate, because we have now transportation companies engaged in no other business than transportation, that are required to publish rates which are open to all alike, and which rates themselves are subject to some control with reference to the amount.

Mr. VOLSTEAD. Do you believe that we could pass a law that did not make any allowance for freight rates?

Mr. MINAHAN. I confess that that is a proposition that never occurred to me before, and those constitutional questions are questions on which one can not very well hazard a guess which would amount to anything.

Mr. CARLIN. I did not catch that question. What was it?

Mr. VOLSTEAD. Whether we could pass a law without reference to freight rates, fixing the price—that is, by the police power—that would extend that far.

Mr. MINAHAN. In that connection I will point out this much, with reference to that cartage charge: It would be conceded, I think, that we would interpret the law to mean that the local expenses of the plant are eliminated. That certainly has been passed on by these courts. They did not assume for a moment that the rental of the

land upon which the plant stands, or anything of that sort, would form an independent element of the price. The idea of the legislation is that all of the overhead expense goes into the basic price to which the cost of transportation from the point of production may be added.

Mr. VOLSTEAD. It may be spread over the whole product?

Mr. MINAHAN. It may be spread over the whole product, and that we have got to do in order to prevent this practice. In other words—I speak of the Standard Oil Co. because I represent the oil men, and when we think of the other fellow we think in terms of the Standard Oil Co.—suppose the Standard Oil Co. should say they want to put each plant on its own feet, and make this proposition: "Here is what we want to do: We want to send all this gasoline to Green Bay, Oshkosh, Fond du Lac, and these other little towns for a certain price, and then let each one of those plants sell it at whatever price they can sell at a profit." It would be right and just that we permit them to do that, if we were able to do it; but to attempt to do such a thing would throw us into such a mass of figures and computations that the administration of the law would be a fizzle. So that, in order to curb the practice, it has been necessary to say, "You shall sell all over the State, not for the same price, but for the same price, eliminating a known quantity—the cost of transportation"; but we want to say "freight rates."

Mr. WEBB. Can you think how it is and why it is that within a radius of a hundred miles of Washington two or three different prices for gasoline prevail and that we find different prices here in this city—some 17, some 19, some 20; and I think over in Richmond they sell it for 25 cents, but the Standard Oil Co. sell at 22 or 22½ cents? Have you any explanation for that?

Mr. MINAHAN. I do not know whether in the East you have a difference in grades which would account for that or not. That difference in price was mentioned to me yesterday or the day before. But we go up against those identical propositions, or did before our State antidiscrimination law went into effect; there was absolutely no uniformity of price whatever.

Mr. CARLIN. You believe in uniformity of price?

Mr. MINAHAN. I believe in the antidiscrimination law. I think that the antidiscrimination law is absolutely the only legislation that can be passed so that the independent oil dealer and independent in other lines may call their souls their own.

Mr. MORGAN. Mr. Minahan, I think that in Oklahoma—the State which I represent, in part—they have a law which throws the oil-distributing companies under the corporation commission, and recently the commission made an order fixing the prices at which the oil should be sold in the various sections and parts of the State, which applied to all companies. What would you think about that as a proposition to protect the people in fixing the price of oil?

Mr. MINAHAN. Right offhand I would think that would be a little bit more than is necessary. We never want to get any legislation designed solely to protect the independent oil men. All this legislation is designed to protect him merely for the purpose of benefiting the community at large, not to fix the price at which he will be able to do business. The one object of the antidiscrimination law is

aimed at the evil practice of destroying a competitor by underselling at one place and recouping the loss at another.

Mr. MORGAN. You represent independent companies?

Mr. MINAHAN. Yes.

Mr. MORGAN. I suppose you assume there is no danger in the independent companies and that all the danger is in the big companies?

Mr. MINAHAN. Sometimes we assume that; it is not necessarily so, of course.

Mr. MORGAN. In our State, as I understand it, the bulk of the business is done by the independent companies, but these independent companies were selling at different prices and in various ways and it became necessary that the State should actually fix the prices, and within the last six weeks the corporation commission assumed jurisdiction and the companies did not resist it; they agreed to the order.

Mr. MINAHAN. I am not sufficiently familiar with legislation for fixing prices of service or commodities or public utilities to give an opinion, but I should imagine that would be a lot harder proposition to work out than the antidiscrimination law, and what I should say now is really directed at a different evil.

Mr. MORGAN. Your object looks more directly to the protection of the independent companies than the consumer?

Mr. MINAHAN. We are inclined to do that, all of us, but I know that it would be folly for me to come before this committee or any other body and ask for protection for the independent oil dealer; so that I come here with a proposition which, I say, is proper for the protection of the public, and I am advancing that, of course, as the attorney for the independent oil dealers. But I would not advance a proposition unless I was satisfied that it was directed toward the welfare of the people themselves. Any other proposition that we might advance would be temporary and foolish.

Mr. MORGAN. Let me ask one more question. Do those independent companies fix prices according to what would give them a reasonable profit, or do they, as a rule, sell simply under the prices fixed by the Standard Oil Co.?

Mr. MINAHAN. Oh, they just trail the Standard.

Mr. MORGAN. That is a fact, is it not?

Mr. MINAHAN. That is the fact.

Mr. MORGAN. That the Standard fixes the price?

Mr. MINAHAN. There is no question about it.

Mr. MORGAN. And the independent companies are compelled, practically, in order to do business, to follow along their trail?

Mr. MINAHAN. So much so that they often have to sell without a profit, and when oil goes up so that they can get a profit they are glad to sell for the extra tenth.

Mr. MORGAN. Then do you think, for the protection of the public, it might be wise as to those great concerns for the public, through the Government, to exercise some control over the price, in order that the price-fixing monopoly of the large concerns would not be unreasonable?

Mr. MINAHAN. Well, I presume if such a thing is feasible that that is almost Utopia. If we could do that with all of our industries and all of our concerns, guaranteeing our people the commodities in

general use and all the necessities of life at a reasonable price—if such a thing were possible by legislation, short of Socialism, or even Socialism—that is what ought to be done.

Mr. MORGAN. If we should place simply those large concerns under some restrictions as to price and leave the great mass of business to competition, would not that reach all the real danger that exists, and would it ever be necessary to go further?

Mr. MINAHAN. You refer to something I have noticed in the press about corporations doing $5,000,000 a year of business, or something of that sort?

Mr. MORGAN. Something along that line.

Mr. MINAHAN. I confess I have not given sufficient thought to that so that I could say anything that would be of any value to this committee.

The CHAIRMAN. Have you read the tentative bill now before the committee, known as No. 1?

Mr. MINAHAN. No; Mr. Chairman, I have not. I regret that, too, because I wanted to be prepared to go into the subject with you fully, but I did not read it. I have not any excuse for it except——

The CHAIRMAN. This bill proposes to supplement the anti-Sherman trust law by adding section 9, in the following words:

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.

Mr. CARLIN. What do you think of that?

Mr. MINAHAN. I think that is subject to the same criticism in phraseology—in the phrase "cost of transportation."

Mr. CARLIN. I agree with you about that: but do you think that that latter provision there, which applies to the products of mines, would apply to the oil business—the last five lines—

but this provision shall not authorize the owner or operator of any mine engaged in selling its products in interstate or foreign commerce to refuse arbitrarily to sell the same to a responsible person, firm, or corporation, who applies to purchase.

Mr. MINAHAN. No; because the person from whom everybody buys petroleum products is a refiner, and he is not always connected with the person who takes it from wells. So, while oil wells might comes within the terms, to my mind it would not really make any difference, because the price fixing is done by the refiner. You see, the oil business is a little bit different from the mining business. While some of the oil companies own their own wells, and do take the crude from the wells and refine it, a great many refiners do not

necessarily own their own wells, but buy the crude in the market, so that they are a separate institution really from the person or corporation that takes the oil from the oil wells.

Mr. CARLIN. Then if that were amended to meet your criticism in reference to freight rates it would have your approval, would it?

Mr. MINAHAN. With one further suggestion. I noticed, I think, in reading it, the Wisconsin law says, "A competitor, or one who in good faith intends to become a competitor."

For instance, the Barkhausen Oil Co. put a plant at Ironwood, Mich., which is right across the river from Hurley, Wis. They are practically one city, except the river and the State line divides them. The price there dropped some cents before the plant was erected. Under such a law the dropping of that price to keep out a competitor who had manifested an intent of going in there would be as much an offense as though it were done to one who was already in there, but under this law——

Mr. CARLIN. In that one particular business, under that act—you have that in mind?

Mr. MINAHAN. The Wisconsin act?

Mr. CARLIN. Yes.

Mr. MINAHAN. Oh, no; the Wisconsin act includes not only selling but buying and selling, and is aimed at the buyers of milk, butter, butter fat, poultry, and the like. So that you are not only prohibited in Wisconsin from selling a commodity in a general use lower in a community than another, but likewise from buying a commodity in general use lower in one community than in another.

If I am not taking too much of your time I wanted to go a little bit further into that question of the cost of transportation and that cartage item, because that may become a more serious proposition as your deliberations go on than you may anticipate now.

Here is the thing in the oil business that makes that pretty important: They have a central distributing plant, a big tank, that they fill up in these little towns along the railroad, and then they have a tank wagon, and they draw from the oil tank into the wagon, and they distribute it out around the town, and not only do that around the town, but out to the little towns in the country. If we are right in our contention that they can not include as an independent element of their price anything but freight rates, that requires them to sell at the same price at these little towns out 5 or 6 miles as it does in the city where their plant is. And that will illustrate to you the reason that is back of their contention that they ought to be permitted to impose a cartage charge. And at first it occurs to one that it is entirely proper that they should do that. The thing that we do not like about this cartage charge is that in the nature of things it is likely to be elastic.

Mr. CARLIN. Under their own control entirely?

Mr. MINAHAN. That is it; it can be expanded or contracted to meet competitive conditions. While I am not going into that argument fully—we are arguing it quite fully before the Attorney General—I wanted to suggest it to you, so that if the argument were made that it will be understood it is not unanswerable; because it is entirely proper, when you analize it to the end, that this cartage should be included in the general basic price. While we would keep away

from unnecessary interference with business, yet in order to prevent the practice it becomes necessary sometimes to go a little bit farther than we had originally intended. The result would be to require them to carry that item in their general overhead charge.

Mr. CARLIN. Let me ask you this question: Suppose that we confine it to carriers and do not allow anything on the cost of the product, that might in the last analysis compel them to sell that product to the independent distributers, who could, being entirely intrastate dealers, deliver the product plus the cartage—indeed, they would have to deliver it plus the cartage.

Mr. MINAHAN. In order to live.

Mr. CARLIN. In order to live, and would not that be the result?

Mr. MINAHAN. Not necessarily so; it may be claimed that that might result.

Mr. CARLIN. Would not that be true of your own company, that you would have to do that, unless you could add the cartage to the price of your oil, and you would have to go out of the cartage business and leave that to some independent person, who could add the cartage charge?

Mr. MINAHAN. No; not any more than the local grocery man does. If you go to a grocery store and buy a dozen bananas for 10 cents and take them in your hand and walk away with them, you are not getting them any cheaper than if you should walk into the grocery man's store and order a dozen bananas and have them sent 4 miles out to your home. The grocery man performs that extra service as a part of his overhead expense and as a part of his means of getting business, and the independent oil dealers—I can not speak for all of them; I know about the business of the Barkhausen Oil Co.—it follows the price that it finds, that the Standard Oil Co. has fixed, of course.

Mr. CARLIN. You follow the Standard Oil Co.'s price, do you not?

Mr. MINAHAN. We have to as a matter of fact.

Mr. CARLIN. The trust always fixes the price at a certain figure, plus the freight rates?

Mr. MINAHAN. It is not always plus the freight rates. For instance, the city of Shawano has a 12½-cent rate from Whiting. The city of Green Bay is on a 10-cent rate from Whiting. That would make a difference of pretty nearly 0.2 cent a gallon. If the price of gasoline in Green Bay is 15 cents you would expect to find the price in Shawano at 15.2 cents. The Standard Oil Co. have a plant at Shawano. They sell gasoline there for 15.1 cents, and they load it on a tank wagon and drag it over the country for a distance of 22 miles to Green Valley, Wis., and sell it there at 15.1 cents. Sometimes they do, and sometimes they do not charge cartage.

Mr. CARLIN. Why should they do that now when they really are the price fixers—they lead and you follow?

Mr. MINAHAN. They do that because they want to get it down to where is does not even pay to follow. We are not in business at Green Valley, but a concern we know of that is in business near Green Valley—7 or 8 miles—went over there and took a tank wagon to Green Valley, and finding the price 15.1 cents turned around and hauled it back 7 or 8 miles, thinking they could better afford to do that and sell it at the place they were then located at, several miles

away, than sell it in Green Valley at 15.1 cents. That may be the reason it went to 15.1 cents. They do that elsewhere. We have received letters from independent oil men in which they say that where previously the cartage charge was a quarter, and a half, and three-quarters of a cent higher, when they sent it out into the country where they have competition there is no cartage charge; and a man who wrote me is a man who was previously in the employ of the Standard Oil Co., and he knew whereof he spoke.

Mr. CARLIN. Your idea is that nothing should be allowed for cartage, but that it ought to be charged into the overhead expenses?

Mr. MINAHAN. That is it exactly. In order to accomplish the end of the law, I think it necessary to do that. But it is the result of that construction was a wrong so great, in the minds of the average man, that it would be sufficient reason for not passing such a law—if that item of cartage were deemed important enough, it could, I think, be taken care of by a proviso in the law.

I do not want to go bond for this phraseology, because I have not thought this proposition over long enough so that I know whether it would hold water or not, but it occurred to me that if that cartage item is so woefully important (we do not think that it is; we think that its importance is artificial, and created for the purpose of making it hard to get these laws through and correctly interpreted when they are through), but if it is important, then we can add a proviso to that law like this: Provided that if any person, firm, or corporation engage in the sale and distribution of a commodity in general use shall file with some governmental body or officer, which shall be designated to receive such report, a schedule of cartage charges, based upon zones, which shall have a designated radius from the point of distribution; and if such a person, firm, or corporation shall uniformly charge such cartage price within such zones, then, in addition to the foregoing allowances, of grade, quality, and common carrier rates, there shall be a further allowance of such cartage. In other words, if it is so wonderfully important, let us make a special provision for it just as we do for freight rates.

Mr. CARLIN. I do not know the items that enter into the cost of oil, but it has always occurred to me that cartage in the rural sections must of necessity be quite an item, where you have to employ a man and two horses, and provide those animals with feed and the man with his pay.

Mr. MINAHAN. As a matter of practical fact, I think that the oil men find that a great many of their country hauls are cheaper than their city deliveries, and that is for this reason—how much does a tank wagon hold?

Mr. HASTINGS, Jr. From 400 to 600 gallons.

Mr. MINAHAN. Mr. Hastings tells me that a man can load up a tank wagon in the morning with 400 or 600 gallons and go out 7 or 8 miles and deliver that to one or two customers out there, all of it, and return and probably be back to the plant before the fellow in the city, who has loaded up his tank wagon with 400 or 600 gallons of oil, has peddled his load in smaller amounts around the town; and that is because the country dealer has quite uniformly put in little underground storage tanks of 200, 300, 400, or 500 gallons capacity. So that they find, as a matter of practical fact, that it does not cost

them any more to deliver out in the country, and that a man may go out with his 400 or 600 gallons and get back and have his money in the same time that a fellow can do it in the city. That is not always the case, but it is on the average. So, it is not a matter of such great importance; if it were, then it would be charged all of the time.

For instance, when the Standard Oil Co. said to us at Madison that the difference between the Hurley and Green Bay price was the difference in cartage, we asked them some questions. Before that they said to us, "We found there was a little mistake at Hurley, and we have raised the price a half a cent." Raising it half a cent would still leave it 0.36 cent under what we claimed it ought to be under that law. So we said to them, "Do you mean to say that the cost of cartage accounts for that 0.36 cent that you are still low at Hurley?" And they said "Yes;" and we said, "Do you mean to tell us that it costs you, by actual computation, figured to four decimals, 0.36 of a cent a gallon less to deliver gasoline and kerosene at Hurley than it does in Green Bay?" And they said, "We do;" and we said, "Do you always figure your cost of cartage as closely as that?" And they said, "Always;" and we said, "Do you always include it in the price as an independent item?" And they said, "We do." Then we said, "The price of gasoline in Green Bay, Hilbert, Berlin, Fond du Lac, Oshkosh, Two Rivers, Manitowoc—towns within a radius of 50 or 75 miles; towns of 30,000 or 40,000 and towns of maybe 1,500—all on a 10-cent rate from Whiting, Ind., the price in all of those places is 15 cents; do you want us to understand that you claim that the cost of cartage, by actual computation to the fourth decimal, is identically the same in all of those towns?" And they said, "Yes; why, yes." We told them very frankly that it did not look reasonable to us.

Mr. CARLIN. It must be different as to coal, where, for instance, the cartage would seem to me to be quite an item.

Mr. MINAHAN. You mean that this cartage proposition, as applied to the coal business, would be, if not important in the oil business, more important in the coal business?

Mr. CARLIN. Yes. We are speaking now with reference to the adoption, of course, of a general rule.

Mr. MINAHAN. That is the problem. We see the thing from our particular angle, but we do not always think of it as it affects everybody else. I do not know enough about the coal business to speak with authority. Of course, there is really only one business that is handled the way the oil business is handled, and that is just the oil business. As the Supreme Court, in one of those cases that I mentioned in Iowa, Minnesota, or South Dakota, said, it is unique that there is not any other business which is handled in just the same way. Now, in the coal business, for instance, the little local coal dealer that does the delivering, he never mines it, and I do not know just exactly the way he does do business; but it is not done from a central distributing plant in exactly the same way that the oil business is carried on. Of course, he has his coal yard, but very frequently those fellows buy from a larger dealer right in the same town. They do not deal with the jobber or the miner.

Mr. MORGAN. Mr. Minahan, fundamentally why should not a man have a right to make his price according to the cost of transportation plus the cost of cartage? Would not that be fair?

Mr. MINAHAN. It would; I said that; and it would be fair to go further and say to him, "Here, if it costs you $500 a month for ground rent in this town and only $200 ground rent in that town, that town ought to get the benefit of it"; but, as I have said, that item has got to go overhead, because it is not a fixed charge like common-carrier rates. There are some things we have got to put into overhead expense.

Mr. MORGAN. Why have you got to?

Mr. MINAHAN. We have got to make a workable law—make a law that can be administered—one that will accomplish the destruction of the evil it is aimed at. We do not want to interfere with business any more than we have to.

Mr. MORGAN. We are striking at unfair competition, where one concern is destroying another with unfair competition?

Mr. MINAHAN. Yes.

Mr. MORGAN. Have we not got to take into consideration the expense of running the business at a given city? It certainly would not smack in any way of unfair competition to take into consideration the rent a man pays and cartage and the other conditions at that city?

Mr. MINAHAN. No; if you can do that and limit and define it positively so that it can not be made a charge which can be contracted and expanded to meet competition, we are perfectly willing it should be done; but what we want to keep away from are the items that are elastic.

Mr. MORGAN. Suppose one merchant pays $50 a month, and another pays $100, or one merchant owns his establishment and his real property and business house, and another does not. The law does not take notice of those things, but lets each man sell as cheaply as he can according to the conditions.

Mr. MINAHAN. Yes: I think it is perfectly right, and we do not want to interfere with that proposition any more than we have to; but if in order to prevent what we know to be abuses, we have to encroach upon their desired method of doing business, why, that is a result directly of legislation, but the legislation is the necessary and direct result of their evil practices.

Mr. MORGAN. Let me ask you another question. I noticed awhile ago, when you gave offhand the form of the law that you would enact, you said: "Provided any person, firm, or corporation engaged in the sale or distribution of articles in common use." Was that done intentionally?

Mr. MINAHAN. I have fallen into that because most of the State statutes are framed in that manner.

Mr. MORGAN. You will observe, I think, that these laws we have tentatively here do not use any expression like that. It includes all the kinds and characters of business, articles, and products, but does not tend to limit its application. Have you thought of that matter? Do you think it would be wise, in as much as the prevention of monopoly is the protection of the people against general abuses—to put that kind of a phrase in the statute we pass?

Mr. MINAHAN. I would say, offhand, probably not; that it might precipitate you sometimes in the administering of a law into a pretty serious question as to whether or not a commodity was within legal

definition a commodity in general use. I presume there might be some trouble with that phrase.

Mr. CARLIN. You probably have heard a great number of people say they want the Government to fix the price of products—want to take that privilege away from you and have the Federal Government fix the price. You would not favor that, would you?

Mr. MINAHAN. I do not know what I ought to say as attorney for the independent oil men. I don't know what their interests demand. Apart from my duty to my client to examine things in that light, I should say that my inclination would be against such a thing as that.

Mr. MORGAN. May I ask one question? You said here repeatedly that the Standard Oil Co. fixes the prices and that you follow in their trail. Do you not think it would be about as fair for the Government to fix the price as that the Standard Oil Co. should fix it?

Mr. MINAHAN. It would be a whole lot fairer; there is no question about that.

Mr. MORGAN. Then, why not do it?

Mr. MINAHAN. I do not know whether that would be the proper remedy or not, whether we ought to say that somebody has got to control it and let the Government do it, or whether we ought to let it go back into the competitive channels again; and if that can be done, perhaps that course would be better; I think monopoly can be prevented by taking away the weapons of monopoly.

Mr. MORGAN. Suppose a trade commission had jurisdiction over the Standard Oil Co. and big concerns, and that that commission could fix the price, but would have no jurisdiction over smaller concerns, because they are not monopolies; do you not think it practicable for the Government to supervise the prices of those few big concerns?

Mr. MINAHAN. That is really too big a proposition for me to get hold of. I have not thought of and I have not considered the advisability of the trade commission or of the Government fixing the prices.

There is one more matter I want to draw your attention to, connected with our friend "costs of cartage." I will say that the cartage alone is not of such great importance to us, because, although they can squeeze from 0.3 to 0.5 of a cent out of us sometimes on cartage, they can do a lot worse to us, perhaps, than that. While they might on the cartage squeeze us, we might perhaps have a fair opportunity of making them show us the figures, as they have undertaken to do now in Wisconsin, although they were asked on the 2d of January, and they have not been able to show it yet, but they say that this phrase, "cost of transportation," means actual transportation expenses, and that is one thing that interested us when we saw this word "actual" in the bills that I refer to. If there is any question about the phrase "cost of transportation," whether or not that means "actual transportation expense," it seems to me that putting the word "actual" before "cost of transportation" rather helps their interpretation than ours, so that, at any rate, I think the word "actual" ought to be omitted.

Mr. FLOYD. How would you differentiate between cost of transportation and actual cost of transportation?

Mr. MINAHAN. I do not think that it can be differentiated. But the fellow who says to you it means "actual transportation expense"

will say to you, "Why, cost of transportation, you know what that means. There was no necessity for putting the word *actual* in there, unless it meant *actual expense.*" Do you not see?

Mr. FLOYD. Would that include cartage?

Mr. MINAHAN. Yes; that would include cartage and everything else. They would say, "If it was not necessary to include 'actual,' what was the sense of putting 'actual' in there?" That would be their argument.

We are in a port town—Green Bay. The Standard Oil Co. there has two large distributing tanks of a million and a half gallons capacity each. The Standard Oil Co. is big enough to own tank steamers, and they bring their kerosene and gasoline to Green Bay in a tank steamer. They run that tank steamer up to their big tank of a million and a half capacity and just shoot it full of gasoline or kerosene. The Standard Oil Co. owns these tank steamers. The Standard Oil Co. is not by tank steamer a common carrier of kerosene and gasoline. There is no common-carrier tank steamer on Lake Michigan.

Now, then, they say to us, "If we can not make this cartage charge, why, we will have to take that out of our price, and that will cut your market; and if we can make the cartage charge, then we will have to make the price on the basis of actual transportation. That means we will have to put in a price based on actual transportation expense; that means we will have to base our price at Green Bay not on rail rates but boat rates; and since the boat rates are about one-tenth of the rail rates, we will have to take the bottom out of your market in Green Bay in that way," leaving us the privilege of dropping the proceeding and crawling out of the first hole handy, because, if we were right in our interpretation, they would drop the bottom out of the market in Green Bay; and if we were wrong, they would cut the heart out of us with boat transportation prices.

Now, the question is whether there will be permitted——

Mr. MORGAN. Just there, when you want to put in "common carriers," you want to make it so that the Standard Oil Co. will not apply the cost of transportation to the cheap cost which they have in transportation in their own steamers, but must add to it the cost of railroad transportation?

Mr. MINAHAN. That they shall sell at the same price in Green Bay as in the rest of the State, eliminating common-carrier transportation. That is a thing that is open to them and their competitors alike.

Mr. MORGAN. Would it not be better for the public to apply the proposition of actual cost of transportation and get the benefit of the cheapness of cost on this production; make the Standard sell and take into consideration the cheap cost of transportation?

Mr. MINAHAN. A benevolent despotism is regarded as the ideal form of government.

Mr. MORGAN. Then you think the main object of this is to make it operate to the benefit of the independents and keep them in business?

Mr. MINAHAN. Not at all. I am not so short-sighted as that. I will explain that proposition to you this way: It is a favorite argument of the monopolists, and I have heard it many a time before, that the people are entitled to the advantage of their location and

they are entitled to all the economies that big business can give them, and all that sort of thing. There is no question about it, and the only trouble is that the people have not been able to get it. If the Standard Oil Co. could bring kerosene and gasoline to Green Bay and sell it there cheaper on account of boat transportation, if they did not go ahead and abuse their unlimited power, boosting the price when they do not have a competitor, we would not have a look-in on that proposition. But here is the idea: Just as soon as you recognize the right of the Standard Oil Co. to bring that in upon their exclusive lines of transportation you admit their right to obtain monopoly.

Mr. MORGAN. Mr. Minahan, in effect, do they not have a monopoly now? You say that prices are fixed by them, and it is simply a monopoly, only they give you the privilege of distributing these goods and taking part of the profits out of the monopoly.

Mr. MINAHAN. Exactly; we say that they have a monopoly, but we are going to take out one of their fangs, so they will not sting the people; there is the idea.

Mr. MORGAN. Will they not still have the fixing of prices?

Mr. MINAHAN. They will. I do not argue for a minute that the antidiscrimination law is a panacea for all of our ills against monopoly, but I say it is a very effective check on monopoly, because you take off one of its strong right arms.

Mr. CARLIN. Otherwise you could not do it?

Mr. MINAHAN. Exactly.

Mr. MORGAN. If prices are fixed by monopolies, how does that benefit the people?

Mr. MINAHAN. While it may be a monopolistic price and all that, although the old economists did not always want us to think so—there is a difference between actual and potential competition. They used to say that monopoly would not get its price above what was right, because of potential competition, the competition that would spring up, but they are not half as much afraid of potential competition as they are of the fellow who is actually there on the ground and alive; and if you can keep the independent alive and in the field you have a force for keeping the price down to somewhere near what is right, because those independents are there.

Mr. MORGAN. Take this proposition: Is it not a fact that under the present law, or even if your own suggestions here should be enacted, that the Standard Oil Co. could drive every independent company out of business if they wanted to?

Mr. MINAHAN. They could not be making a profit in the State. I believe they would have to sell pretty low in order to drive the independents out, and still make a profit.

Mr. MORGAN. Would not their better facilities of transportation that you refer to, alone give them sufficient extra profit to drive you out of business?

Mr. MINAHAN. That is limited now to two ports in Wisconsin, with all of the lake front that Wisconsin has, and that is connected with the proposition I was going to make after the one I had entered upon. The Standard Oil Co. said, "Oh, the people of Green Bay are surely entitled to the advantage of their location," and we acknowledge the beauty of the sentiment, but there is the idea: Ke-

waunee is right across the peninsula from Green Bay, 33 miles, on Lake Michigan. The Standard Oil Co. has no competitor there. They have a little tank there by the railroad track, and they run in a tank car, and load it into that tank and use that tank as a distributing center. Why do they not stop their steamship there? If transportation is so much cheaper, why do they not stop their steamships there? They do not want to, because they use their transportation facilities more in the nature of a club. But just as soon as it might be established that this phrase "cost of transportation" means actual transportation expense, and that they not only might, but, under the law, would be compelled to put in a price based upon boat transportation, then what competitor will ever go into Kewaunee? If any competitor goes into Kewaunee, in goes another tank, and then the tank steamer will stop there and fill the tanks up; down goes the price to the tank steamer transportation basis, with which we might be able to compete and barely live, and he might not. The very fact that they can do that is going to keep a competitor out of Kewaunee. Nobody is foolhardy enough to go into Kewaunee, because they know just as soon as they do, in comes the tank steamer, and down goes the price, and competition is bound to run dry. That results in keeping competition out of Kewaunee.

Mr. CARLIN. Where does your company get its oil?

Mr. MINAHAN. From a great many different independent refiners, but rarely ever from the Standard Oil Co. itself. Of course, when we do buy it from the Standard, we buy it in tank cars directly from their refineries.

So, I say it is a beautiful sentiment that the people on the Lake should get the advantage of their location. They never will until a competitor comes in; and the reign of low prices will end with his funeral. When he is gone, if one of these tanks springs a leak, or they do not care to stop a tank steamer, or it happens to be too stormy, in would come the tank cars by rail, and then the price would go up to the rail price again. It would be simply leaving it in the power of the Standard Oil Co. to crush its competitor at will.

Mr. CARLIN. It has no competitors if it fixes its own prices.

Mr. MINAHAN. It has competitors, although it fixes its own price. It has fixed prices with reference to competition. For instance, here was the price of 15.1 cents at Green Valley. They have a monopoly; they fixed the prices at Green Valley. Why do they drop it to 15.1 cents? Their competitor was not underselling them; their competitor was selling at their price, but they want the business, so the very existence of that competitor who is willing to take their business is reason enough for them to cut the price. When we went into Hurley and Ironwood, they sold 30.000 or 40.000 gallons a month. The first month we were there we sold 15,000 gallons. They can not afford to let us take half of their business, and that is why they dropped the price.

Mr. CARLIN. If they sold at the same price to the public, they would not be losing a great deal, if you bought that oil from the Standard Oil Co. They would just simply be shifting their customer.

Mr. MINAHAN. We buy the oil from the refiner; we would not buy from the local plant, but buy in tank cars from the refiner, and put it into our own plant and then compete, and that is only done in

stress of circumstances when we need it. We ordinarily buy from the independent refiners. There are scores of those. I do not know exactly what the proportion of the output is, but I think there are scores of independent refiners from whom they customarily buy all of their products.

Mr. CARLIN. But if the average independent buys his product from the so-called competitor, there is really no competition—just simply a change of customers.

Mr. MINAHAN. I have not speculated on the possibilities of that, because it is a rare circumstance when it is done, I know. I do not know whether an independent could buy from the refinery of the Standard Oil Co. and still compete with it in the local trade or not. Of course, they could fix the price so a fellow could not do that.

Mr. CARLIN. Does not the Standard Oil Co., including the independent companies they sell to, control about 90 per cent of the refined oil?

Mr. MINAHAN. I really have not any idea.

Mr. HASTINGS, Jr. I could not give you the percentage; they might control that much of the crude, but they would not control 90 per cent of the refined products.

Mr. CARLIN. I thought that was the figure.

Mr. HASTINGS, Jr. That might be so based upon the crude production.

Mr. CARLIN. Not as producers but as refiners?

Mr. HASTINGS, Jr. The Standard Oil Co. make their money on the control of the crude oil and pipe lines.

Mr. MORGAN. They do not own any oil wells?

Mr. HASTINGS, Jr. Oh, yes; they do.

Mr. MORGAN. They do own the oil wells?

Mr. HASTINGS, Jr. Yes, sir; they own the biggest majority of wells in the country.

Mr. MORGAN. That is contrary to my idea. I thought that they were not so much the owner of wells as that they buy the oil from the owners of the wells. I thought they bought the crude oil.

Mr. HASTINGS, Jr. They do buy a great deal of crude oil. They control nearly all pipe lines, and the owners of wells have got to give it to them, because they can not go anywhere else. The oil has got to go in the pipe lines, and the owner of the well has got to turn it over for the amount of money they offer.

Mr. MORGAN. Take the situation in Oklahoma. The Standard does not own very many wells in that country, but the Standard buys their oil?

Mr. HASTINGS, Jr. Buys their oil; that is true to a large extent in Oklahoma and Kansas.

Mr. FLOYD. Right in that connection, Mr. Morgan, a gentleman who was in the oil business in your State told me this—I do not know whether it is correct or not—that when a man discovered a rich oil well in Oklahoma he could not sell a gallon of oil to the Standard until he incoporated his company or well, and that when he incorporated a company that he could not sell a gallon until he had made a perpetual contract with the Standard to give it the entire output, and then he said he could furnish it all the oil he could produce. Do you know whether that is the condition?

Mr. MORGAN. I do not.

Mr. FLOYD. A man engaged in the oil business told me that was a fact—that they made contracts then to take the entire output, but this corporation would own the well, and that the Standard would have the exclusive contract to take the entire output of the well.

Mr. MORGAN. I noticed in the Tulsa papers that there is a good deal of trouble about the price the Standard pays—that they fix the price.

Mr. CARLIN. Mr. Minahan, have you made all the suggestions you care to make to the committee?

Mr. MINAHAN. I have just one more point to discuss, and that is the consideration of the freight proposition or cost of transportation. It is important that it be kept in mind that it seems to be the present-day theory that one of the things we have got to do to unharness ourselves from the hold of monopoly is to divorce industrial and transportation activities. And in connection with my argument on this boat-transportation proposition, I want that kept in mind, that that is an illustration of the importance of keeping the activities of industrialism and transportation separate. If the Standard Oil Co. is to engage in the buying and selling of petroleum products it can not be to our interest to permit it also to engage in the business of transporting such products by tank steamers; and the price must either be based on the common carrier transportation that is open to the competitor or else they must be compelled to become common carriers and carry it for us, too. I think that is all.

Mr. FLOYD. Do any of the independent refineries own pipe lines?

Mr. MINAHAN. I am not in a pipe-line district, and I really do not know very much, if anything, about it.

Mr. FLOYD. The Standard Oil Co., I understand, has a pipe line from Oklahoma to New York City.

Mr. HASTINGS (of Green Bay, Wis., who was with Mr. Minahan). It goes to Bayonne, N. J.

Mr. FLOYD. They own that pipe line?

Mr. HASTINGS. Yes.

Mr. MORGAN. The pipe lines are common carriers.

Mr. FLOYD. The cost would be very different by transporting it through pipe lines and transporting it by the ordinary common carrier, such as the railroads, or even boat lines. It would be a much cheaper means of transportation and one which would give them an advantage in transportation; and, construing the statute as you do, they would still have that advantage, although it might be an unfair advantage.

Mr. MINAHAN. It is not an unfair advantage so long as they are charging only the common carrier transportation that is open to competitors. We object to the phrase "cost of transportation." We insist that instead of the words "actual cost of transportation" there should be the phrase, in any antidiscrimination law, "common carrier rates" or "common carrier transportation rates." And if it were thought that such a phrase would exclude a cartage allowance in a business where cartage should not be excluded, then a proviso could be put in which would provide for a further allowance for cartage, provided it be based upon a schedule previously filed. If

you do not do that, if it is to be left elastic, then it would not be any good at all; but it would not hurt anybody if they scheduled a uniform cartage charge and adhered to that.

Mr. VOLSTEAD. How do you establish that a rate is fixed with the intention of destroying a competitor?

Mr. MINAHAN. How do I connect those two?

Mr. VOLSTEAD. How do you establish it?

Mr. MINAHAN. Well, we have not reached the point yet in our proceeding where we have got to establish it. In our case in Wisconsin, we have in mind that we will prove that the price was higher before we went in there. We can prove that. We can prove that they knew we were coming in there when they lowered the price, and we can prove that the price now is lower than it ought to be, and proving those facts, I think their intent in lowering the price can properly be inferred. Of course, the intent in everything must be proven by circumstances and facts. You never can put a witness on the stand to say what the intent was unless you should happen to get them in an admission.

Mr. VOLSTEAD. I presume it would not be possible to prove it at all.

Mr. MINAHAN. No. I do not suppose you could put a witness on the stand and have him say they did it with one intent or with another intent.

Mr. CARLIN. It seems to me that if you were to succeed in eliminating the cost of cartage you would be at a greater disadvantage than you are.

Mr. MINAHAN. I do not think so.

Mr. CARLIN. Because of the very suggestion you made a few moments ago, that if cartage is not to be included in the price to the consumer, then necessarily it would be excluded.

Mr. MINAHAN. Not at all.

Mr. CARLIN. And that would bring the price lower still and compel you to sell at a lower price, unless we had some method by which we could compel it as an overhead charge, and I doubt whether we could compel that. But if we eliminate it, which we probably have the right to do, it would enable them to exclude it from the price to the consumer. You understand, I am taking it from your standpoint.

Mr. MINAHAN. I understand the angle from which you are asking me to look at it, but notwithstanding that, the idea is that they are going to sell their product at a price that brings them a profit, and when they do so we can likewise be in business and make a profit. They can lower the price at any time they wish; they can cut their price in two on any theory; and so, if we take the cost of cartage out of their price as an independent element, it will simply go back into one of the other elements, because, you know, there are in fact two elements in the retail price. We will take this proposition:

Let us suppose that the Standard Oil Co. does business all over the State of Wisconsin and has competitors all over the State of Wisconsin. If that were true this law would result in their having a flat base price for Wisconsin, and the price in any city would be the flat base price plus transportation from Whiting, Ind., to that city. It is our position that there would be those two elements in the

price. They say there are those two elements, and also a third element. Now, if that third element should be eliminated as a distinct item of the retail price it will go back into the base price; it will surely be in there, but it will be in there as a part of one of the two elements of the price and not as an independent third element of it. Making it a distinct element is what gives it elasticity.

Mr. VOLSTEAD. How would this suggestion strike you? Suppose you put in a provision that if they did sell at less in different localities or to different individuals in the same locality that it would be prima facie evidence that they did intend to injure or destroy a competitor?

Mr. MINAHAN. Well, now, you are tackling me on a legal proposition which I am not able to handle.

Mr. VOLSTEAD. It seems to me it is going to be extremely difficult to prove the intention to injure or destroy a competitor.

Mr. MINAHAN. I do not think——

Mr. VOLSTEAD (interposing). They might be able to prove, on the contrary, that they did not intend to do so, but it might be well to put the burden on them instead of on the one attacking the practice.

Mr. MINAHAN. I see your proposition, and that may be entirely proper. But if these propositions are submitted to juries or the courts and they can not find an intent, where the reasonable inference from the facts is the intent, then we can not hope to get away and never can get away from monopoly. We never can get away from monopoly until our people are educated to get away from it; until the people understand that they have got to get away from monopoly. The people ought to be made to understand that proposition and that the responsibility is upon them. If you give the people a law whereby they can test monopoly for themselves and they do not do it, then the people can not rid themselves of monopoly. That is my theory.

The CHAIRMAN. We are very much obliged to you. Mr. Jones desires to be heard for 15 minutes.

STATEMENT OF MR. CHARLES H. JONES, OF BOSTON, MASS.

Mr. JONES. I am a shoe manfacturer. Since arriving here this morning I have hastily examined the bills that have been prepared by the chairman of this committee, as I understand it, and I will only take time to refer to those points that seem to affect or apply to the industry in which I am engaged—that is, the manufacture of shoes.

In section 10 of the first bill it is provided:

> 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 the goods, wares, or merchandise of a competitor or competitors of the seller.

In the business in which I am engaged the merchandise is not sold, but machinery is leased on condition that you shall not use other people's machinery. It would seem to me that if you so desired it would

be possible to cover that point in this section. The machinery we use is leased to us and the price is made dependent on the fact that we use only machinery of a certain company. Now, I do not think that would come under this section as now written.

Mr. FLOYD. They do not sell, but they lease?

Mr. JONES. They lease the right to use the machinery.

Mr. FLOYD. They lease the shoe machinery on the sole condition that they are not to handle any——

Mr. JONES (interposing). That you will not use any other person's machinery in connection with it.

Mr. MORGAN. That is patented machinery, I suppose?

Mr. JONES. Some is and some is not, sir. They tie it all together, patented machinery and unpatented machinery.

It seems to me that section 12 of this bill is of extreme importance to our business. That is the section that provides that whenever in any suit or proceeding, civil or criminal, brought on behalf of the Government, a final judgment or decree is rendered against any corporation to the effect that any corporation has entered into a contract, combination in form of trust or otherwise, or conspiracy in restraint of trade, that a private individual can use that evidence up to a certain point. I understand that some people have declared that section to be unconstitutional, but I know that some very good lawyers say it is perfectly constitutional. But we consider it of the utmost importance. The big corporations with which we deal are not especially afraid of the Government in a great many cases, because the Government's procedure is very slow, it is very cumbersome, and before the Government can actually get into operation, to save themselves they can change their method and accomplish something else, but they are afraid of the man they are wronging. If a man is a real sufferer from the acts of the corporation and has the right to proceed against the corporation they will take notice of that. Under this act it is possible to use information that the Government has obtained, information which an individual could not possibly obtain for himself; that is, an individual can not summon witnesses and obtain information that the Government gets in all these suits. If Government information and evidence were available for the use of individuals, it would have a very strong deterrent effect upon the acts of a great many of these corporations.

I am not discussing these things as a lawyer, because I am not a lawyer, but as they strike me as a manufacturer.

Now, section 13 provides—

That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief.

That, I understand, they do not have now; that every action that is brought against these trusts must be brought by the Government. The fact that under this bill an individual, firm, corporation, or association shall have the right to proceed strikes me as exceedingly useful and important.

Mr. CARLIN. Then you favor bill No. 1 as a whole? You think it is good legislation, do you?

Mr. JONES. Yes; I think it is first rate. It meets the conditions under which we are operating in a great measure.

Now, taking up bill No. 2, I will refer particularly to the third section, which provides:

To prevent competition in manufacturing, making, transporting, selling, or purchasing of merchandise, produce, or any commodity.

I think that section should provide for making, transporting, selling, leasing, or purchasing of merchandise, produce, or any commodity.

Mr. CARLIN. What bill is that?

Mr. JONES. It is No. 2, sir; and it is on the page that is numbered, at the bottom, with the roman numeral 10.

Mr. CARLIN. From what line are you reading?

Mr. JONES. Line 14, under the heading:

Third. To prevent competition in manufacturing, making, transporting, selling, or purchasing of merchandise, produce, or any commodity.

It would seem to me proper to put in there, "selling, leasing, or purchasing of merchandise," in order to make it a little more inclusive.

Mr. MITCHELL. Carrying out the idea suggested in your previous remarks?

Mr. JONES. Yes; it is the same suggestion. Whether it would apply or not, I do not know.

The next is No. 3, providing legislation regarding interlocking directorates. Interlocking directorates operate unfavorably in our business. We believe that directors of banks, of one bank or one trust company, should not be directors in another bank or another trust company. It happens that in our community one or two individuals are directors in a large number of enterprises, and if a merchant for any reason incurs the disfavor of a particular director it means that that director carries his prejudice against him in all the boards of which he happens to be a member, and it prevents a man's request for credit receiving favorable consideration. That is an experience I have had and seen on boards of which I have been a member and I know that occurs frequently. There are always pros and cons when a man asks for credit at a bank. Some of the directors will say the bank should favor his claim, while other directors will say that the bank should not extend the credit to him. Some director will cite the experience had with a man in another institution, and that often settles the matter, as far as the man's credit is concerned.

Mr. MCCOY. Is that true of trust companies as well as of banks?

Mr. JONES. I think so.

Mr. MCCOY. Do not the trust companies loan on collateral?

Mr. JONES. Yes; but they loan on paper, too.

Mr. MCCOY. On two-name paper?

Mr. JONES. On single-name paper; at least they do in our community. Of course, there may be nominal indorsements of a corporation, or something of that sort, but it is practically single-name paper.

Mr. WEBB. Trust companies are usually connected with some bank, are they not?

Mr. JONES. Not directly, but they are often closely affiliated, and I think they are very generally so affiliated in our community. It has worked out in a number of instances that a man has been denied

credit because of hostility to him as a result of the fact that some man had something against him because of happenings in another board. That often times cuts out a man from obtaining the consideration he would otherwise obtain.

In Boston the consolidation of banks has gone to great lengths. One of our banks, the Shawmut Bank, is now composed of over 30 banking institutions which it has absorbed and consolidated, and others, although not to the same extent, have consolidated a great number of smaller institutions, so that a man's banking opportunities there are rather limited, as compared with the size of the community; that is, there are very few places where a large operator or a big merchant can go in the city of Boston and get credit unless he finds that the institutions are interlocked in some way, so that on account of any prejudice held against him for any reason, not necessarily on account of his financial condition, he is unable to obtain the necessary credit.

Mr. CARLIN. And he may be enabled to get credit that he is not entitled to for the same reason?

Mr. JONES. Certainly; and it frequently happens that some do get credit because of the friendship of one of these interlocking directors.

Then the only other observation I care to speak about in regard to these interlocking directorates is this: That where bankers are selling securities of a corporation it does not seem to me proper that they should be members of the board of directors of that corporation. I have seen that in our community, and under those circumstances they makes their own prices as buyers and sellers. It is certainly doing the corporation and the public an injustice in that direction. I think a banker that is handling the securities of a company ought to keep off its board of directors.

Now, the bill providing for the creation of a commission——

Mr. CARLIN (interposing). That bill is not before this committee.

Mr. JONES. I see.

Mr. CARLIN. The first three bills only.

Mr. JONES. Then I will not say anything in regard to that bill. However, there is one suggestion in regard to House bill 12106, a bill introduced by Mr. Levy, of New York.

Mr. CARLIN. That is a commission bill, is it not?

Mr. JONES. It says here, "Referred to the Committee on the Judiciary."

Mr. CARLIN. I understand, but does it not provide for a commission?

Mr. JONES. Yes.

The CHAIRMAN. Well, that is before the Interstate Commerce Committee, and I might say, with respect to bills providing for commissions, that I do not think this committee will consider them.

Mr. JONES. There is one clause in that bill which I think is very important. There is in this bill, which is marked as being referred to the Judiciary Committee——

The CHAIRMAN (interposing). There are several bills which have been referred to this committee relating to the creation of an interstate-trade commission, but the jurisdiction of that subject belongs to the Interstate Commerce Committee, and your remarks on that subject had better be made before the Interstate Commerce Com-

mittee of the House. I make that suggestion to you, although we are willing to sit here and hear you.

Mr. JONES. Well, I will not talk about those bills, then.

The CHAIRMAN. It would be of no avail, because the committee is not going to consider the matter of perfecting bills which relate to an interstate-trade commission and, therefore, any arguments along that line ought to be made elsewhere than here. Have I made myself plain?

Mr. JONES. Quite plain, sir. If those bills are not to be considered here I do not want to say anything about them.

Mr. MITCHELL. Did you not want to say something about the patent question?

Mr. JONES. Yes; it was the clause relating to patents that I wanted to discuss. It might be well to mention the matter so you can see my idea. It is in relation to section 21 of H. R. 12106, which is as follows:

That in case the owner or holder of any patent issued under the patent law has made use of the exclusive rights and privileges which, as such owner or holder, he controls, so as unduly to limit the facilities for transporting, producing, manufacturing, supplying, storing, or dealing in any article which may be a subject of trade or commerce, or so as to restrain or injure trade or commerce in relation to any such article, or unduly to prevent, limit, or lessen the manufacture or production of any article or unreasonably to enhance the price thereof, or unduly to prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation, storage, or supply of any article, such patent shall be liable to be revoked.

Now, that particular clause would prevent a practice that exists in our community at the present time and on which many of the monopolies rely for their protection. They say they have the right to attach any condition they wish to the use of the article which they have patented, and one of the conditions which they do attach is that you shall not use it except you use it in connection with some other things which they have but which are not patented. It seems to me that this is a very proper restraint. Now, we do not desire to limit in any way a man's right to use his patent, but we think the owners of patents should be forbidden to do what they are now doing generally, not only as regards our shoe machinery, but in other lines of business.

Mr. MITCHELL. Are there not a number of these companies that have combined their patents, and after they have combined say that they form a monopoly that is not in violation of law?

Mr. JONES. Yes. I heard it stated in court by counsel for one of these companies that all of the machinery which they had and which they were leasing was covered by patents, and that they had a right to tie them together in any way they saw fit. Then there are companies that have articles that are patented and articles that are not patented, and they claim the right to use the unpatented articles in connection with the patented articles.

Mr. MITCHELL. As a matter of fact, have not a number of the patents terminated?

Mr. JONES. Yes; the patents on certain parts of the machinery do terminate, and then they supply other additions and changes which they claim give them a continuing patented situation. They claim these patents never expire. But if a man who is outside had the

right to use the patents after they had actually expired, and if they were not tied up with existing patents, he could make machinery for himself and could use it without paying tribute for it. We claim the right to use an unpatented article; that is, an article on which the patent has expired. For instance, the McKay sewing machine, which was a patented machine and which brought its owners millions of dollars in royalties and revenue, could not be used until the patents expired, but when they did expire the machine became public and we did use it freely, without paying any royalty to anybody.

Mr. WEBB. Did not the Committee on Patents, about a year ago, report a bill of this sort?

Mr. JONES. I think so; but I have never heard of it since.

Mr. WEBB. It has been on the calendar ever since, and I think it met that very objection.

Mr. JONES. Yes; I remember the bill, but nothing seems to have been done with it. It struck me that perhaps something might be incorporated in the bills you have before you which might overcome that difficulty.

I thank you, gentlemen.

AFTER RECESS.

STATEMENT OF WILLIAM DRAPER LEWIS, ESQ., DEAN OF THE UNIVERSITY OF PENNSYLVANIA LAW SCHOOL.

Mr. LEWIS. I reside in Philadelphia and am dean of the law school of the University of Pennsylvania. Mr. Chairman, I shall confine my remarks to the three bills introduced by you, sir——

The CHAIRMAN (interposing). They have not been introduced.

Mr. LEWIS. Or, rather, the tentative bills, I should say; the three tentative bills before the committee. The object of the first of the three bills, as I understand it, is to prevent trusts and monopolies and unfair restraints of competition by interlocking directorates.

Mr. CARLIN. That is bill No. 3 in our volume of bills.

Mr. LEWIS. Yes. Now, I wish to say at the start that with that object I have entire sympathy. The first section of this bill, if I understand the object of that section, is to prevent unfair trade restraints or undue restraints, and also to prevent monopoly by interlocking directorates between public-service companies—railroads and other public-service companies—and the corporations which sell them supplies. Again, with that I have entire sympathy. If this first section merely said, in general language, that interlocking directorates between public-service corporations engaged in interstate commerce and the corporations or associations that sold supplies to those corporations and prohibited them there would be no suggestion from me.

My difficulty with this first section is, in the first place, that it only prevents certain classes of interlocking directorates between corporations of a public-service nature and the corporations that sell them supplies. For instance, a person who is a member of a corporation engaged in the manufacture and sale of lubricating oil, which is bought by the railroads to a very large extent, would, as far as I can see, not be prohibited by this section from being a director of

the corporation—public service or railroad company—in that case a railroad company—that bought supplies from the corporation of which he was a director. I think it should be so worded as to cover all of the classes of interlocking directorates which you wish to prevent.

The other objection to the section as drafted is this: That instead of preventing the evil in general language it attempts to specify exactly what kind of corporations shall not have interlocking directorates. It says, for instance:

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.

Now, that would prevent, for instance, this: It would prevent a person who was a director of a coal company doing business on the Pacific coast exclusively from being a director, officer, or employee of a railroad in a part of the country which by no possibility would use the coal from that coal company of which he was a director, officer, or employee. It would——

Mr. CARLIN (interposing). Unless his influence was great enough to induce them to do so.

Mr. LEWIS. Unless his influence was great enough to induce them to do so, but there are some absurdities that even he, as a joint director in that case, could not do, to haul coal to Alabama, for instance, for the purpose of supplying a railroad there, that coal being taken out of mines thousands of miles away, and it would be distinctly "carrying coals to Newcastle." In other words, you are preventing by that exact language which you use a situation which, existing under the most extraordinary conditions, is not a situation which tends to produce monopoly or unfair restraints of trade in any way, shape, or form.

Take, for instance, a more likely illustration. You prevent a man who is a director of a structural steel manufacturing corporation from being a director of a public-service corporation. Now, I may be a director of a small corporation which owns one ferryboat which runs, we will say, across the Delaware River in interstate commerce. Therefore, by this language, you prevent me from being a director of a structural-steel corporation. Now, there is no possibility of any business dealings between those two companies. There is no possibility that that situation, which you there prevent, is ever going to do what I understand is the general object of this scheme and with which, as I say, I am in entire accord. But if I am a director of a public-service corporation it practically does prevent competition between those who sell supplies to my company, if I am also a director of the company that is selling my company those supplies.

You are here preventing something where, by no possibility, my company, which is a structural-steel company, could sell to the corporation of which I wish to be, and of which the owners which me to be, a director. In attempting to designate the exact directorates that can not interlock or by defining the wrong, or by enumerating the ways in which you think the wrong may be committed, I think

you are running into the danger of passing a statute which will prevent a large number of perfectly legitimate business transactions, and the point of view I have is that legislation designed to prevent monopoly and unfair restraints of trade ought not to do that unless it is absolutely necessary, which I do not think it is. There is no use of passing a statute which prevents thousands of business transactions which are perfectly legitimate, and a statute which unecessarily irritates the entire population by preventing acts which are perfectly innocent in themselves and very often beneficial in themselves.

Now, to further illustrate that same point, I call your attention to section 4. That section is intended to prevent interlocking directorates between corporations engaged in the same business, and, again, I think we will all admit that interlocking directorates between corporations engaged in the same business is very often a method by which monopoly is secured and where it is a means of obtaining monopoly. It should be prevented.

Now, with that perfectly laudable object back of this fourth section, it prevents interlocking directorates between corporations that are or have been "natural competitors." What do you mean by natural competitors? If you mean, as I assume those words must mean, that two corporations are, in a sense, natural competitors if they both sell their products in the same locality and they are engaged in the same kind of business, and you are attempting to prevent those two corporations from having a common directorate, I say that you are going far beyond what is necessary to hit the evil and that you are doing something that may prevent the very thing you are trying to help, which is competition. For instance, two corporations exist in one town; they both are engaged in the same manufacturing business; they both sell goods in the same general territory; they are competing with each other, but taken together they may represent but a fraction of that entire industry in that locality. There may be another big corporation in that locality in the same business. Now, you prevent the two corporations that are weak from practically running their business as one corporation through the means of similar directorates. Do you want to do that? It seems to me that it is not interlocking directorates which are per se the evil in all cases. It depends entirely upon the conditions whether interlocking directorates between corporations, even where they are engaged in the same business and have been competing with each other prior to the time of the interlocking directorates, are evil. It is a practical question, depending upon the particular facts of each case, as to whether that interlocking directorate is going to help competition or hurt it.

Mr. CARLIN. Your criticism of the first paragraph is that we have not gone quite far enough?

Mr. LEWIS. Yes, sir.

Mr. CARLIN. That we have limited the statute by specifying the different corporations; that we should have made it general to all corporations that sell supplies to railroads; and your last criticism is that in section 4 we have gone too far?

Mr. LEWIS. Yes; except that in both instances, it seems to me, you have committed the same vice, which is destructive of the efficiency

of the legislation absolutely, and that vice is this: That it attempts to specify the ways in which the wrong which you want to prevent can be committed. By your first paragraph you——

Mr. CARLIN (interposing). Your idea is that we ought to permit cooperation between two small competitors as against one large competitor?

Mr. LEWIS. My proposition is, sir, that combination is one of the secrets of industrial efficiency; that your problem, and the problem of legislation, is to prevent it from being used, as it is often used, to attain monopoly; that the way to do that, so far as this interlocking-directorates bill is an example, is to state, in general language, that interlocking directorates for the purpose of unfairly restraining trade or attaining monopoly is prohibited, and then leave to some other body the right to ascertain whether in any particular cast it is being attained, with sufficient power to——

Mr. CARLIN (interposing). In other words, you would lodge such discretion in a trade commission?

Mr. LEWIS. Yes; I believe that should be left to the discretion of a trade commission and that it can not be answered in any other way.

Now, if I may refer to the other two bills, not entirely, but largely as illustrations of the same thought, of perfectly legitimate objects, which are in the minds of the draftsman of the bills, being carried out in a way which does not accomplish the objects which the draftsman had or apparently had in mind. I refer now to bill No. 1, a bill which is supplemental to the Sherman Act and which adds to that act sections 9, 10, 11, 12, and 13, and it is especially to section 9 that I desire to call attention. That bill attempts to prevent unfair trade practices which lead to monopoly, not by saying that unfair trade practices which lead to monopoly are wrongful, but by specifying two unfair trade practices which in the past have led to monopoly and which, I think, we will all admit should be prevented. Therefore, as far as it is a bill to prevent unfair trade practices, I wish to point out that it only deals with two of them and that it deals with them in the way of specifying exactly what the unfair trade practice is in most elaborate language. Instead, for instance, of the first section—which will become section 9, if passed, of the Sherman Act—merely saying that discriminations in price not due to cost of distribution are hereby prohibited, and then leaving it to a commission to apply to the individual cases, it starts out by saying:

> 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 communties, with the purpose or intent to thereby injure or destroy a competitor, either of such purchaser or of the seller.

Now, the criticism of that language is that it uses too many words. The words, when you come to define them, if you use too many of them, become loopholes for getting out of the wrong you are trying to prevent. The fact that you have to prove, for instance, "the purpose or intent to thereby injure or destroy a competitor" is an unnecessary addition. If you are discriminating in prices and the discrimination is not due to differences in cost of distribution then you should be stopped, because you are doing an unfair trade prac-

tice and it is an unfair trade practice that inevitably leads to monopoly. But the most dangerous part of this ninth section is contained in the provisos. The first proviso says:

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.

Now, the word "quantity" there could be used as a loophole to make all kinds of discriminations. You do not really mean to permit any discrimination at all. I do not think that. The draftsman of the act surely must intend not to prevent differences in prices depending upon differences in cost of production or distribution. Is it not the purpose of this section to prevent discrimination in prices? Therefore, why in the proviso say that you can discriminate under any circumstances? If you need a proviso there, why not merely say, "That nothing herein contained shall prevent differences in prices due to cost of distribution," and stop there? I do not see any particular reason why they should be there. I think it would be better to leave out all of the provisos, because I can see no use in having them there.

The next proviso 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.

Well, there is nothing in this section 9 that prevents that, therefore, why say so? Why leave in your language a loophole by which people can evade and do the very thing you are trying to prevent?

But I wish to say, since I have criticized the first bill, and in a sense criticized bill No. 3 and also bill No. 1, that this bill is, because it uses more general language to describe the crime or thing to be prevented, especially section 10, unquestionably, from the point of view of my criticism, not nearly so much subject to that criticism as the other two. The vice of trying to define crime by enumerating the ways in which that crime can be committed, whether it is the crime of assault and battery, the crime of restraining trade or doing anything to monopolize—the vice of that is, I think, principally shown in this second bill, which, as I understand it, is an attempt to more particularly define the word "monopolize" and the words "restraint of trade" in the Sherman Antitrust Act. It says here in this first paragraph:

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.

The first purpose, for instance, as defined in this way is:

First. To create or carry out restrictions in trade or to acquire a monopoly in any interstate trade, business, or commerce.

Now, if all the manufacturers who produce a certain article should get together and fix prices they would undoubtedly be carrying out

restrictions in trade, and they would be prevented by these very words from forming that combination. That is a good thing, but the Sherman Act already prevents that. Therefore, for any clarification of the Sherman Act, you do not want to use that exact language, because by using that exact language you also prevent this, which I do not think you want to prevent: Where any person, who does not represent one one-thousandth of the total production in an industry, sells out his business, and he makes the ordinary contract with the man who buys his business that that man will not again enter the business which he sells in competition with the man to whom he has sold that business; that he shall not sell his business and then turn around and compete with the man to whom he has sold. That is a perfectly legitimate business transaction. It does not tend to monopoly, except in cases where the sale involves the sale of the business of a corporation or person that represents complete control over the industry. That is monopoly, of course, at the start. But in that class of contracts, in 99 cases out of 100, you have a perfectly legitimate business transaction, and yet that transaction, as far as I can see, is specifically prohibited by this act.

Take, again, the second restriction:

To limit or reduce the production or increase the price of merchandise or of any commodity.

That such contracts, generally speaking, tend to monopolize and to unfairly restrain trade, we all will admit, but in so far as they do they are now prohibited by the Sherman Act, and by attempting to make the Sherman Act clearer, by defining more particularly the ways in which it can be done, you really have not prevented anything which the Sherman Act does not prevent. And furthermore, so far as I can see, in that section you prevent manufacturers from doing what a number of manufacturers in the city of Philadelphia did last year, or a little over a year ago. They got together and said, "We will not work our women more than 10 hours a day." That limited their production, and by this language you are preventing that. Do you want to prevent that? As far as I can see, that is what you are attempting in this bill.

But the most extraordinary section, the one that, to my mind, will produce the most extraordinary results, is the fourth section, which provides:

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.

Of course such agreements as that are often the basis of monopoly. That is admitted. But as here worded it does what the Sherman Act avoided, it prevents the formation of a partnership between two men who are in the same business, although their combined business may not represent one one-thousandth of the industry. Is not a partnership agreement between two persons an agreement between two persons to limit free competition and to obviate competition between themselves? Take, for instance, this situation: You have two corporations; they are engaged in the same business——

Mr. CARLIN (interposing). How would you remedy the evil you say we create there?

Mr. LEWIS. I should remedy it by the only way, as far as I can see, that it can be remedied.

Mr. CARLIN. By putting discretion in the hands of a commission?

Mr. LEWIS. Before that, let me state this: That the difficulty with the Sherman Act is not along the lines we are discussing; that is, whether it can be efficiently administered or not. The difficulty is that it leaves to a body—in the case of the Sherman Act a court—the right to take the rather indefinite words relating to the restraint of trade and monopoly and apply those words, as shown in the underlying principle that is expressed in them, to the concrete facts of each case as it arises; to mold the law, in other words, or mold its application so that new methods of doing an old wrong can be met. The vice of the Sherman Act is not that it specifies exactly the way in which restraints of trade can be carried out, but I think it will be admitted that this legislation, especially this second bill, proceeds upon the theory—and it is no fault of the draftsman, if I may say in the presence of the chairman, that he has drawn a bill which produces results under this exact language which I think he nor any member of the committee wishes to produce, restraints of certain kinds of partnerships; for instance, the consolidation of two corporations which are, in their consolidated form, not approaching a monopolistic position in that industry. But the vice is this attempt to define the crime, not by stating the underlying principle which makes the thing wrong but by specifically pointing out certain prominent ways in which often, but not necessarily always, that crime is committed. If you try to do that you complete, apparently, your catalogue of the ways in which the crime is going to be committed, but some ingenious person will always invent another way that you did not think of to commit the crime, and, furthermore, by the attempt of exactly pointing out you will prevent a lot of things which are not crimes at all.

Mr. CARLIN. To analyze your argument, I understand you to say that there are good combinations and bad combinations, and that in the last analysis there ought to be some discretionary power to determine that fact and then leave the Sherman law just as it is?

Mr. LEWIS. I would like to answer that in this way: That besides the difficulty of these acts trying to define a crime by pointing out the ways in which it may be committed, there is also this often more fundamental difficulty, that the whole attempt to settle the trust problem or monopoly problem is by legislation of this character. As I understand this legislation it is based on this general assumption, that the whole trust problem, the whole monopoly problem, can be solved if you can get at the different forms of combination and dissolve them. I do not believe you can, because I believe that back of monopoly there is something very much more than merely combination. I admit that monopoly practically always involves some kind of combination. You have got to have some kind of corporation or unit of the business; you have got to have more than one person. It is conceivable that one person may attain monopoly, but that is not the practical conception. I admit you have got to have some form of combination; therefore I think it was entirely natural that the framers of the Sherman Antitrust Act should pro-

ceed upon the theory that if they could dissolve the combination it would end monopoly.

But the practical history of that act has shown that is not true; that when you dissolve the combination you leave something, and you leave something in the possession of those who combined and that they combine in another form, and that you have not ended your monopoly any more than the proceedings against the Standard Oil Co. and its dissolution has ended the situation of monopoly in the oil business. There is just as much to-day as there always was. Now, what is it that you left? You have left the basis on which the monopolistic power of that combination rested. In other words, those who combine to form a monopoly must have some basis on which to rest their monopolistic power. That monopolistic power depends sometimes on combinations alone, but very rarely. Sometimes it depends on the willingness to carry out unfair trade practices and the ability so to do; sometimes it depends upon an entirely different factor, the possession of an economic factor in the industry which is essential to production. I can illustrate that by a single example. Take, for instance, all the producers of a certain manufactured article combining to regulate prices, the illustration which I previously gave. Now, their combination is the secret of that monopoly. What you want to do is to break up that combination. Or you may have a large corporation and that corporation may have a monopoly because of its willingness to use its financial strength unfairly or to engage in unfair trade practices. Now, merely breaking up that corporation and leaving those persons who have been willing to do those unfair practices to combine in some other form and carry them out in another way does not end your monopoly. Again, your monopoly may depend upon some perfectly lawful and in itself innocent thing; it may depend upon the lawful acquisition of a patent, for instance, which is essential in the business.

Mr. CARLIN. I understand you to entertain the idea that because a rigid statute may affect some innocent parties there ought to be a discretionary power vested somewhere?

Mr. LEWIS. No, sir; that is not correct. The thought that I am trying to make clear is this: A corporation which, as a matter of fact, produces only 40 per cent of all the product of the industry may absolutely control the price of the product of that industry, although it only does produce 40 per cent. It may have, as far as the consumer is concerned, all the baleful effects of an absolute monopoly, just as though it produced every article that was produced in that industry, not because of unfair trade competition but because it may possess the economic factor essential in that industry. For instance, it may possess the natural resources, a monopoly of the natural resources on which the raw product of that industry depends; it may possess all the economic factors which enable it to absolutely dictate the prices in that industry. Now, the conception of those who drew the Sherman Act was, and the conception, as far as I can see it, under these bills still is, that you can remove that sort of business by dissolving that corporation. You can not do it. You can dissolve the corporation; you can ruin the business organization which may in itself be a good thing; it is only producing 40 per cent of the industry and it may be an efficient business organization. The only way in which

you can practically stop the monopoly is not by breaking up the combination but by ordering it to do that which will loosen its hold on the economic factor which gives it its monopolistic power—in one of my illustrations, for instance, the patent.

Mr. CARLIN. Would you do that by statute?

Mr. LEWIS. Yes.

Mr. CARLIN. How?

Mr. LEWIS. This will bring my rather lengthy remarks to a close. It seems to me you have got a problem that is entirely too difficult, as an administrative problem, to handle by the machinery of our courts; that the courts, crowded with other business, have neither the time nor the possibility of obtaining knowledge of industrial conditions sufficient to do the three administrative things that you have got to do if you are really going to prevent monopoly in this country, and these three things are: First, the investigation of whether a monopoly exists. The present machinery of the courts is not sufficient for that. That is admitted by practically everyone who has looked into the subject. Second, What is the basis on which the monopolistic power depends? Does it depend on unfair competition? Does it depend on the possession of economic factors, largely the control of transportation facilities, largely of patents, or largely of natural resources? The basis of such power must be ascertained. Now, if you have those two things answered, the body that has had the duty of finding out those two facts should also have the duty and right to issue a direct order prohibiting, in the case of unfair trade competition, the unfair trade. In the case, however, where the monopoly depends on the possession of natural resources, then it should direct the sale of those natural resources, with permission to others to obtain, at reasonable prices, the natural resources which are necessary to enable them to compete. If it is in the case of patents, for instance, it should have the same right; it should issue an order directing that the use of the patented article to the rival should be granted on reasonable terms, each order molded to the necessities of the case, but a direct order from the body that ascertained the facts. Now, those three——

Mr. CARLIN (interposing). Boiled down, does not that mean just what I asked you, that you want to have a commission created, a trade commission? That is what you have in your mind, is it not?

Mr. LEWIS. Yes, sir.

Mr. CARLIN. And that such a commission should have discretionary power to give immunity to those they think are conducting a good business and to prosecute those who are conducting a bad business?

Mr. LEWIS. No, sir; I can not——

Mr. CARLIN (interposing). Or, putting it the other way, to permit those things to be done which the commission thinks should be done and prohibit those things which the commission thinks should not be done?

Mr. LEWIS. No, sir; I say no to both those questions, and for this reason: We have no funds to give to a body of men—call them a commission or what you will—for the purpose of wandering around the country ascertaining what is beneficial to be done—a sort of roving commission. I am just as much opposed to that as anyone could possibly be; and, therefore, if I answered yes to your inquiry, it

might be that I should be held as advocating the creation of a commission with powers of that character. I believe that what you regard as wrong should be defined in a statute in the way that you define any other wrong—in more or less general language, it is true, but language which the courts or other bodies charged with the administration of that law could apply.

I believe that you should create a commission, but that you should not give that commission wandering powers; that you should give them power merely to administer the laws that you pass, and that the first law, for instance, should be an unfair trade-competition law; that you should give to that commission power to ascertain whether an unfair trade practice, as defined in the bill which you have passed, is being practiced, and that when they have ascertained that fact you should give them no discretionary power at all, except the duty or power of issuing an order prohibiting it.

Mr. CARLIN. In other words, you would take the Sherman law as the basis?

Mr. LEWIS. No.

Mr. CARLIN. Would you amend the Sherman law?

Mr. LEWIS. No; I would leave it as it is. I would leave the Sherman law as it is to be administered as it has been administered, but face the fact that the Sherman law has failed to solve the trust problem or the problem of monopoly, and then I would really try to solve that problem by passing legislation which would do it. The bills which I suggest, therefore, have nothing to do with the amendment of the Sherman antitrust law. They would, first, establish a commission, second, define what unfair trade competition is, and, third, I would give that commission this power, and only this power, to investigate on its own complaint, or on the complaint of anyone else, whether a monopoly existed. I would leave the Sherman Act to be administered as it is, but I would have this commission given the power to determine whether a monopoly existed, and if a monopoly existed the duty——

Mr. CARLIN (interposing). Does it not follow that they should have the power to say that one did not exist?

Mr. LEWIS. Yes.

Mr. CARLIN. Does not that mean immunity when one does not exist, in their judgment?

Mr. LEWIS. No; because you can give your Attorney General, or the other law officers, the power to bring prosecutions under any acts which you pass defining unfair trade competition.

Mr. CARLIN. I understand that; but I do not see how you can create a commission with powers to determine whether a monopoly exists unless it carries with it the power to determine when one does not exist.

Mr. LEWIS. As far as the action of that commission is concerned, yes; just as when you direct your Attorney General to bring prosecutions if he believes that an act has been violated or determines, in his opinion, that there is reasonable probability of the act being violated. So that the commission would investigate, either on its own motion or on the complaint of anybody else, and if they thought that a monopoly did not exist then, as far as the machinery of that com-

mission goes, you would not have any prosecutions by that commission.

Mr. CARLIN. Then you would not allow another piece of machinery to take it up and determine otherwise, would you?

Mr. LEWIS. Personally I believe that any Attorney General would be very much influenced and guided by the opinion of that commission, and I am entirely willing to let the matter rest in that case on the basis of the ninth paragraph.

Mr. FLOYD. In other words, you would create a commission, with the power to appeal to the courts of the country?

Mr. LEWIS. No. The commission merely, I would suggest, should have this power: It should have the power to investigate whether the monopoly exists; it should have the power to find out what is the basis of the monopoly, and if it is unfair trade, then the power to issue an order prohibiting it.

Mr. CARLIN. And if it is fair trade, then they should have the power to issue an order permitting it?

Mr. LEWIS. No; they would not have to do that. But they would break their oath of office, like any other administrative officer, if they found an act to exist and did not issue an order. They would be like any other administrative officer.

Mr. CARLIN. To bring this down to simple words, you would give it power to determine between the good and bad things being done?

Mr. LEWIS. No, sir; no more than any other body charged with the duty of administering an act. You say to a court, "If this act is done, you should issue an order to prevent it." The court investigates and finds out, in their opinion, if it is done. The court may be mistaken, but it has no discretionary power. Neither would this commission if the commission finds that unfair trade practices have been committed; it becomes its absolute duty to issue the order.

Mr. CARLIN. You are aware of the fact that there have been distinguished gentlemen in the politics of our country who contend seriously that there are good trusts and bad trusts, and I take it from your argument that you have about reached the same conclusion, that there are good combinations and bad combinations, and there ought to be a discretionary power vested somewhere to determine that fact without making a rigid rule which would apply to all combinations.

Mr. LEWIS. Of course I can not say whether my idea agrees with anybody else's or not.

Mr. CARLIN. I suppose you know who I mean?

Mr. LEWIS. I have not had any personal talks with him about combinations and I would have to ask him to explain exactly what he meant. If he means by a "good combination" a combination which does not produce monopoly, which does not produce unfair restraint of trade, which increases productive efficiency in this country—if he means by that "good," I agree with him. If, however, he feels some monopolies are good and some are bad, I disagree with him. Therefore, I would have to know how he uses those words.

Mr. FLOYD. You say you are in favor of giving this new commission authority, on their own initiative or on a complaint of others, to investigate the affairs of corporations and, if they find they are

engaged in unfair discriminative practices, to make an order prohibiting that?

Mr. LEWIS. Yes.

Mr. FLOYD. Suppose the company pays no attention to that order, what are you going to do?

Mr. LEWIS. That is a matter I was going to speak of. When an administrative order has been issued by an administrative officer under a statute prohibiting an act, and the company refuses to obey the order, the commission should have the right—the administrative body should have the right—to appeal to the courts to enforce the order. Now, the question of whether the courts would or would not enforce the order would come before the court, and the court would have to determine the question whether the commission had not abused its power by issuing the order. If they found it was an abuse of their power, then the court would refuse. In other words, you have got to allow—you ought to allow—an appeal to the courts to determine whether or not the commission has or has not exceeded its power. In other words, you have got to do for that trade commission, if you give them this power, what, in a slightly different form, you have done when you created the Interstate Commerce Commission and gave it the power to prohibit rebates and unfair trade and unfair practices. Now, the courts are the ultimate enforcers of the order, and if the courts think the determination of the commission is not in accordance with law, then they ought not to enforce it; and, of course, you have to have the appeal in that way to the courts. That is both right and proper.

Mr. VOLSTEAD. Is it your idea that the order of the commission would be binding upon the court so far as to the findings of fact?

Mr. LEWIS. Yes. I think where you have a trained body of men to investigate a certain fact, and they have investigated it in the manner in which, for instance, the Interstate Commerce Commission investigates a certain fact or things within its province, that then its findings of fact should be final as findings of fact but not as findings of law. In other words, on the facts as found, is the order a proper order under the law, should be a conclusion. In other words, the conclusion that the act done was unfair is a conclusion of law; what is done is a conclusion of fact; but that it is unfair is a conclusion of law based upon those facts. Therefore, if on the acts which were investigated by the commission they found that the company did a certain thing, then the fact that they did that thing ought to be final; but the commission's conclusion that that thing is an unlawful thing to do, because unfair, being a conclusion of law, should have a review in the courts.

Mr. VOLSTEAD. Would you have a review of the facts, too?

Mr. LEWIS. Personally, no, sir; I should not allow a review of the facts.

Mr. VOLSTEAD. Would there be some question of the right of a commisison of that kind to foreclose a corporation on findings of fact?

Mr. LEWIS. I should meet that by requiring this, that the commission should not come to any conclusion without holding an inquiry and giving to the coropration against whom the complaint had been or against whom the order was asked to be issued, the right to subpœna witnesses, the right to appear before it. In other words,

to give them all the safeguards of a full hearing on the facts and on the law, and then, on the law, let them have an appeal to the courts. But that point I wish to emphasize is this, that the creation of the expert machinery to investigate the facts and then to make an appeal on it from the facts to a body that is admittedly not expert, is nonsense. It results practically in this, that any sensible court practically never does review the facts? They do review the conclusions of law on the facts. It is useless machinery and useless expense to enable a double investigation, first by the body who had to investigate it and then by the old body, the court, which is crowded with other work and hardly fitted for an intelligent review of the facts, but intelligently fitted for a review of the law.

Mr. CARLIN. You stated that the commission should make an investigation, and if they found a certain practice was unfair, they would make an order prohibiting it.

Mr. LEWIS. Yes, sir.

Mr. CARLIN. Do you understand that there is any law now which makes any kind of a practice unfair as long as it does not conflict with the Sherman Antitrust Act?

Mr. LEWIS. Yes; there are a great number prohibited by the courts themselves. Unfair trade practices is a large branch of the law of torts, which has grown up by the individual decisions of separate judges, just like most of our law of torts has grown up. The Sherman Antitrust Act may add, and I think does add, a little to what I think we might designate the common law tort of restraints and monopolies, but outside of the Sherman Act there are a large number of unfair trade practices. Now, I do not think, sir—may I illustrate one of them?

Mr. CARLIN. Yes.

Mr. LEWIS. One of them would be, for instance, the old law of trade-marks, which grew out of unfair trade practices. The selling of my goods under your name, which is an unfair trade practice, has grown up entirely by the individual decisions of individual judges. I do think this, sir, that the courts in the last 25 years have not quite kept pace with the changed economic conditions. There is a necessity therefore, for the devising of an act which will indicate certain practices (which are now doubtful as to whether the courts will regard them as unfair) as being unfair. One of the illustrations of those practices, or two of the illustrations, are in this bill No. 1, to which I referred. In other words, discrimination in price as between the purchasers from a seller. I think that describes it; discrimination in price. Discrimination in price may often be unfair, and I do think it is necessary for us to pass a statute which will say it is unfair, because it is doubtful in the courts.

Mr. CARLIN. You are familiar with the interstate commerce act, so-called?

Mr. LEWIS. Yes, sir. I do not pretend to be an expert on it.

Mr. CARLIN. You know there is a certain section there which declares against unjust discrimination?

Mr. LEWIS. Yes, sir.

Mr. CARLIN. And makes unjust discrimination unlawful?

Mr. LEWIS. Yes.

Mr. CARLIN. Now, there is no such provision under the Federal Government which makes that law—there is no such law by Federal

statute which makes any kind of discrimination unjust in interstate commerce.

Mr. LEWIS. No; there is no such statute.

Mr. CARLIN. I mean by industrial corporations.

Mr. LEWIS. No, sir; there is no such statute for industrial corporations.

Mr. CARLIN. Now, then, what do you think of declaring by statutory act a similar provision to industrial corporations that we have ascribed to common carriers?

Mr. LEWIS. As I have said, sir, the essential steps, in my opinion, at least the essential steps to meet the problem of monopoly—one of them is the passage of a statute which will make it absolutely certain that unfair trade practices done by persons engaged in interstate commerce are prohibited by Federal law. If you are interested on that subject, House bill 9300, introduced by Mr. Murdock, reads in this way—and that bill I should regard as one of the essential steps—it is, "That unfair or oppressive competition in commerce among the several States and with foreign nations, as hereinafter defined, is hereby declared unlawful." Then, in defining what is unfair trade competition, "That unfair or oppressive competition as used in this act is hereby defined to include the following business practices and transactions." Now, then, the business transactions, which are some seven or eight in number in that bill, are defined not in particular but in general language. I do think you ought to define them in general language, and I believe such a bill as this is the central step.

Mr. Chairman, I have taken up a great deal of your time, and there are other gentlemen here who have come with me and will follow me. I have nothing more to say personally, unless it is the desire of the members of the committee to ask me some questions. I am very much obliged to you, gentlemen.

The CHAIRMAN. I want to ask you a question, Mr. Lewis. You say that we ought to define these practices, all these things that are enumerated in this last bill. How would we define them any more specifically than the bill itself does?

Mr. LEWIS. I think I can illustrate that, sir, by the difference between the way the matter of interlocking directorates is defined in the bill which you introduced, sir, and which I referred to as being wrongful and the way in which it is spoken of and pointed out as a form of unfair competition, which is prohibited in House bill 9300. In that bill it is stated that unfair or oppressive competition is, among other things, "(G) The destruction of competition through the use of interlocking directorates." "A destruction of competition through the use of interlocking directorates"—I am not certain whether that is not too narrow a definition to avoid all possible trouble, but the difference between that and an entire bill pointing out exactly certain kinds of interlocking directorates which are prohibited illustrates the difference between the points of view of Mr. Murdock's bill and the bill which you introduced, sir.

Mr. CAREW. You think Mr. Murdock's bill, H. R. 9300, is a good bill, do you?

Mr. LEWIS. Yes; I think it is a good bill.

Mr. CAREW. What do you think of reading section 3 of that bill, at top of page 2, and then skipping over to subdivision 8? Do you think that is a good example of definition?

Mr. LEWIS. I think that is absolutely essential to any bill that you pass.

Mr. CAREW. You say you think that is a good example of definition—unfair or oppressive competition as used in this act is hereby defined to include any other business practices involving unfair or oppressive competition.

Mr. LEWIS. May I answer that question?

Mr. CAREW. Yes.

Mr. LEWIS. I wish to answer it in this way: At the present time you have at the common law the general rule, not defined more particularly except in this general nature by the courts, that unfair and oppressive trade practices are unlawful. The courts hold that power to-day, being responsible only to themselves to take a practice as it arises under the facts presented to them, and to say whether it is unfair. If you are going to create a power to prevent unfair trade practices, why, it is all right to indicate in your bill, as has been done here, in all these letters down to and including "G" that certain practices described in general language are unfair; nevertheless, unless you have the particular "H," which you have referred to, sir, what do you do? You tie the hands of your commissioners and confine them merely to prohibiting a certain class of unfair trade competition and not all.

Now, suppose that in the exercise of the very broad discretion which you now lodge in your courts, and by this act, if you adopt this bill, you will lodge in the commission the power to determine any other practice as being unfair and they determine that it is—it is a new practice which you did not know anything about now; it is unfair—and they prohibit it, there is still the right of appeal to the courts. And what will the courts do? This "H" is merely expressive of the common law of what unfair trade practices are to-day. In that indefinite sense of "unfair" the courts will determine whether or not the commission was right in holding this particular practice unfair. If they differ with the commission, then they will not enforce the order of the commission and the commission withdraws it order. If they agree with the commission, that the commission wisely exercised that discretion, they will sustain the order. You have protected the individual and you have created a commission with sufficient power to meet new forms of old wrongs, an old wrong of unfair trade competition which has been going on for centuries as they arise.

The CHAIRMAN. What you propose, then, is for us to allow the courts and this commission to develop a common law in the future of what they consider unfair?

Mr. LEWIS. I propose you should not let the courts, because the courts are new doing it—you should allow the courts to be assisted by the commission, first to determine the fact whether it is unfair, with the right of appeal to the courts.

Mr. VOLSTEAD. And would you have the commission investigate al violations of the Sherman Antitrust Act?

Mr LEWIS. Certainly; I think, sir, the administrative task put upon this commission by this bill 9300 and the bills 9299 and 9301, the administrative task which carries out the theory which I have been trying to explain here, is one which completely meets the trust problem. I should not advocate the abolition of the Sherman Act,

but I think that practically the adoption of these three bills will render further proceedings under the Sherman Act largely unnecessary by effectively preventing monopolies. Now, such proceedings are the only means we have. Therefore, to answer your question direct I should allow the Sherman Act to be administered exactly as it is adminitered now.

Mr. VOLSTEAD. How would you be able to draw the line between the new legislation and the old? It seems to me that the Sherman Act in some form or other covers everything that we are asked to legislate into law at the present time.

Mr. LEWIS. The Sherman Act entirely proceeds from the position that combinations of all forms are bad and should be destroyed, and my own view is that it is entirely inadequate to meet the problem of monopolies, and any atempt to amend, as these three bills do, is not even clarifying it and in no wise meets the trust problem. Therefore, I must differ with you, sir, when you say that the Sherman Act covers the thing which you are trying to do, if what you are trying to do is to prevent monopoly in this country.

Mr. CARLIN. I will ask you if you have ever examined bill 1890, found in this large book on page 85, at the bottom of the page?

Mr. LEWIS. I do not think I have. [After a pause.] No, sir; I have not examined that bill.

Mr. CARLIN. I would like you to read section 4 and see if that covers to some extent your idea. [After a pause.] Now, what do you say of section 4? It seems to be along the same line you have in mind.

Mr. LEWIS. That every practice, method, means, system, policy, device, scheme, or contrivance used by any corporation within the meaning of this act in conducting its business, or in the management, control, regulations, promotion, or extension thereof, shall be just, fair, and reasonable, and not contrary to public policy or to the injury of public welfare, etc. Yes. In other words, as I understand this section 4, it is that there is a doubt to-day whether unfair trade practices between two persons engaged in interstate commerce is contrary to the laws of the United States.

Mr. CARLIN. Yes.

Mr. LEWIS. And that it ought to be made by some declaration contrary, and that this does that; and that does it in very general language, as far as my hurried reading enables me to say. Therefore, I should say that section, as I have read it, standing entirely apart from the rest of the bill, which I have not read, is in general accord with the purposes of House bill 9300, as far as that purpose is defined, to make such acts unlawful.

Mr. CARLIN. That is Mr. Murdock's bill.

Mr. LEWIS. Yes. This bill is the central administrative step. It not only makes those acts unlawful, but it gives the commission the power of administration of those acts.

Mr. CARLIN. This bill in another provision does the same thing.

Mr. LEWIS. That I do not know, sir.

Mr. MITCHELL. Did you prepare any of those bills, Mr. Lewis?

Mr. LEWIS. No, sir; I did not. Those bills were prepared by Mr. Murdock, all three of them. He asked the legislative reference committee of the Progressive Party, of which I am chairman, to assist

him by progressive criticisms in the preparation of those three bills, and we lent him assistance. But they are Mr. Murdock's bills. I have been consulted in their preparation, but I have not prepared them.

Mr. CAREW. Have not the courts, as already constituted, found a sufficient remedy for these unfair practices you refer to as having been developed into an unfair system?

Mr. LEWIS. Yes.

Mr. CAREW. You refer to falsification and fraud, assault and battery, and things of that kind, things which have been condemned by the common law. That is what you mean by "unfair"?

Mr. LEWIS. That may be part of the unfairness. Falsification is, strictly speaking, always an unfair trade practice, if done for the purpose and with the result—as taking the name of your rival's goods as your own.

Mr. CAREW. What other practice would you call unfair?

Mr. LEWIS. The boycott is unfair.

Mr. CAREW. Any other?

Mr. LEWIS. Underselling for the purpose of driving your rival out of a market is unfair.

Mr. CAREW. That is a new one.

Mr. LEWIS. Yes. I use that illustration so that I might answer your question, sir, as to whether the courts, as already constituted, have found sufficient remedies for these unfair practices. I think what has happened is this, that in most tort cases the courts have discretion to mold general principles to meet circumstances. They keep the law abreast of the actual necessities of the subject, and they did so in unfair trade competitions up to about 25 years ago, when the increasing complications put the courts a little too far behind to meet the existing conditions.

Mr. CAREW. Pardon me for a moment. Now, in the case where the courts have, according to you, kept up to public sentiment, isn't it a fact that all men have agreed, of course, that falsification is wrong, and that tort is wrong?

Mr. LEWIS. Yes.

Mr. CAREW. But of these new unfair practices you want to condemn, isn't there quite a disargeement among men as to whether they are unfair, as to whether, if you condemn them, you will not hamper ordinary business life? Is not that the reason the courts have not kept right up, as far as the Progressive Party has—isn't it because we are not all agreed upon those things?

Mr. LEWIS. I think that this is true—I think that a boycott which is a trade boycott of saying of one trader to a person who is buying goods from him, I will not sell to you if you buy from the other man—that that process unfortunately some few courts have not held as being unfair, while others have held as being fair.

Mr. CAREW. A great many individuals regard it fair, don't they?

Mr. LEWIS. I do not think there is now any serious doubt among any persons who have investigated our industrial conditions at all but what it is wrong.

Mr. CARLIN. What do you think about a boycott by the labor unions?

Mr. LEWIS. I think the courts have always held the boycott of labor unions unlawful. They have not always held a trade boycott unlawful.

Mr. CAREW. There is a very vigorous fight in favor of labor unions. A great many men believe it to be unlawful to boycott. What you want us to do is to crystallize the law to your difinite ideas, although a great many men have hesitated and have not made up their minds.

Mr. LEWIS. I assume that the bill put in by the chairman makes a trade boycott unlawful and makes discrimination in price unlawful. The present opinion, and I believe it is the great weight of opinion on that subject, is that to effectively prevent monopoly you have got to direct the courts to go that far and prevent those things, those practices, if you are ever going to prevent monopoly.

Mr. CARLIN. This committee is being asked to except labor unions and agricultural and horticultural associations from the operations of these statutes and the Sherman law. What do you think of that proposition?

Mr. LEWIS. I think of that proposition, sir, that as far as you are contemplating, if you are contemplating the establishment of a commission, that the problem of monopoly, if that be a monopoly, and the problem of the regulation of competition between traders is one distinct problem, and that you should deal with it along these lines; that the problem of the labor market, if I may put it that way, is another distinct problem, while there are many features that are somewhat similar. Therefore I believe, personally—you ask me the question—that this bill should confine itself to trade conditions and not to labor conditions.

Mr. CARLIN. Now, there is a similar bill pending here, known as the Bartlett-Bacon bill, which could be taken up as a separate subject, which would except labor and agricultural and horticultural societies.

Mr. LEWIS. Except, you mean?

Mr. CARLIN. Yes; except them from the operation of these laws.

Mr. LEWIS. They do not carry on business, as I understand—these agricultural associations.

Mr. CARLIN. I am not going into that. This bill exempts them from the operation of the Sherman law.

The CHAIRMAN. Yes. Mr. Seth Low was in the other day, and he described a farmers' cooperative association in which they formed an organization for the purpose of buying and selling things for the use of the farmer. He takes the ground that they should be exempted—that such an organization should be exempted.

Mr. CAREW. Now, the gentleman has intimated, Mr. Chairman, that he thinks there should be one law for traders, and another law for laboring men, and another law for farmers, and, I assume, another for lawyers.

Mr. LEWIS. May I respond to that? I think I can probably save the committee some time.

Mr. CARLIN. I will ask you whether you think that wise legislation or not—bill 1873?

Mr. LEWIS. My answer to that is this: The production and selling of commodities is one thing; that the regulation of the purchase and sale of labor, wages, and that problem is another problem; and that

they ought to be dealt with, therefore, separately. I do not believe in a separate law for lawyers. I see no necessity for it. Now, you ask me in regard to this bill, and I am going to ask to be excused from a direct reply, because it is a subject which I have not had an opportunity to investigate. If these persons engaged in agriculture are engaged in business, and it is their business and not some voluntary association apart from their business that is being regulated, then I think they should be regulated in any act which regulates business. But if these associations are associations not for carrying on a business—I think the words "carrying on" embraces what I mean—if their association is not for the carrying on of business, if they are like labor unions, for instance, who do not carry on business, then I do not think we should deal with them in this legislation.

The CHAIRMAN. As I heard them described—these farmers' cooperative societies—they, through their cooperative store or their organization, buy and sell pretty largely agricultural implements for themselves, they say, and they dispose of their products by this cooperation.

Mr. CARLIN. Or combination.

Mr. LEWIS. I now see what kind of an association they are, and my answer would be, why the difficulty you are in with these associations is the difficulty of the Sherman Antitrust Act, which condemns all combinations, whether engaged in commerce or not. I do not know whether these associations lead to monopoly, but if they do not lead to monopoly they should not be condemned.

Mr. CARLIN. Mr. Gompers has admitted before this committee his associations can not exist, labor organizations can not exist under the Sherman law except by license of the Attorney General's office. Now, what I am trying to get you to say is whether they ought to be exempted from the Sherman Antitrust Act.

Mr. LEWIS. Certainly. It is not an association for the purpose of carrying on or conducting a business. As to the regulation of labor unions, they could not be regulated in a bill devised to regulate business. Now, if the Sherman Antitrust Act is to regulate business, if that is its object—combinations in business—why, it should not apply to labor unions. I have always understood that was the object of its framers. I entirely approve of the object, if not wholly with the solution as a complete solution of the problem; but I do not think it ought to include labor unions.

Mr. CARLIN. You think the labor unions ought to have the right to exercise a boycott? That is provided in the Bartlett-Bacon bill.

Mr. LEWIS. That is a wholly different thing. What to do with the labor unions is another matter. That, I understand, is not the object of the legislation now in contemplation. The object of the legislation now in contemplation, and what I am here primarily to suggest in regard to, is legislation in regard to the regulation of business. Labor unions are not in business. Now, whether laborers should go around and boycott other laborers—that is another question.

Mr. VOLSTEAD. That is the question in that bill.

Mr. LEWIS. I think it ought to be dealt with as a separate matter. You should not deal with it as a part of the antitrust legislation.

Mr. CARLIN. But they ask to be exempted from the operation of the statutes which they contend——

Mr. LEWIS. What statutes?

Mr. CARLIN. The Sherman antitrust law.

Mr. LEWIS. I agree with that. If that is the question, I think they ought to be exempted from the operation of the Sherman Antitrust Act, and for this reason the Sherman Antitrust Act deals with business and these associations are not in business. Therefore, they should be excluded. A decision of the Supreme Court is that they are under the act. Well, I do not think that was the intention of the framers of this act. I have no criticism of the decision, in view of the language of the act, but I do not believe it was the real intention of the framers; and even if it was I am a very strong believer for solving problems by an attempt at least to analyze them when they are different. Now, your labor problem in this country is one problem, and is a big problem.

We are not here this afternoon, as I understand, to discuss that problem. The other problem, the regulation of business, the prevention of monopoly in business, is entirely a distinct problem, and you will never solve either of them unless you separate them. Therefore if that bill takes the labor union out of the Sherman Antitrust Act, why, I agree with it to that extent.

Mr. VOLSTEAD. If they legalize the secondary boycott, are you in favor of that proposition? That is practically the main feature in that bill.

Mr. LEWIS. I am opposed to boycotts of all kinds, as far as I have been able to see boycotts.

Mr. VOLSTEAD. My understanding is that is the only reason why they held these labor organizations were amenable to the Sherman Antitrust Act. I say that because I think you ought to understand what you are asked about before you answer it.

Mr. LEWIS. Even if I do not wholly sympathize with all they are asking, I do sympathize with this: Here is a statute to regulate business, and here is an association that is not in business and it is being regulated. It has no special problems that have been considered by the legislature. Two things that have no relation to each other have been put together and, unwittingly, I believe, and I am in entire sympathy, without making any snapshot judgments as to what should be done in the situation, that to solve this broad situation you should have your trade bills—and I understand the Sherman Antitrust Act is one of them—separate from labor bills.

Mr. CARLIN. Labor is one of the instruments of business, just exactly as common carriers are instruments of commerce.

Mr. LEWIS. Yes.

Mr. CARLIN. Therefore we have gotten them now into the meshes of the Sherman law, and they are protesting against that and asking relief, and in asking that relief they are, of course, asking to be permitted to continue their practices of the boycott; and I am asking you whether you think that excepted class, with that privilege, ought to be considered in this legislation, or whether we should enact any legislation?

Mr. LEWIS. I should answer the first question that you should separate them from the Sherman Antitrust Act and take up their special problem and go to the bottom of it, if we can, to see what is

the reason why they wish to be exempted from boycott legislation, find out whether the so-called boycott in their case is a real boycott or not, whether they are trying to get away from a name, or whether they are trying to continue a crime and be immune from the crime. That you will never find out until you separate the labor problem by itself.

Mr. CARLIN. You know what a boycott is in common acceptation?

Mr. LEWIS. Yes.

Mr. CARLIN. That is what I am talking of now, just as we commonly understand it, and that is what I am trying to get you to express an opinion on, as to whether you approve of labor unions being permitted by statute to exercise that power.

Mr. LEWIS. I do not think, if I may say so, that we do understand entirely what we mean by saying "boycott." We know what we mean by a boycott in trade. It is the exercise of economic pressure on customers to deal with you and not to deal with the other fellow. It is saying to a man: "I won't deal with you if you deal with him." Now, that it wrong. Let me give you one illustration which shows you that you should separate the problem of labor from the problem of business.

Mr. CARLIN. Mr. Lewis, I do not want to interrupt you, but I am trying to get from you a simple answer.

Mr. LEWIS. I refuse a simple answer to a question that is not clear and can not be clear, and any answer made can not be clear until the complications involved in the question are clear.

Mr. CARLIN. I am trying not to make the question complicated. I am trying to get your idea upon the propriety of legislation permitting what you commonly understand to be a boycott, without going into the realm of what might be considered a boycott.

Mr. LEWIS. I am trying to give two simple illustrations to show the necessity of separating the two problems in dealing with them separately, and the difficulty of answering generally "yes" or "no" to your question in regard to labor.

Mr. VOLSTEAD. We have had a grocers' association, a druggists' association, a lumbermen's association, a plumbers' association, and various other associations, some of them voluntary, none of them engaged in business, appear before us and demand the right of boycott. Now, is there any reason that occurs to your mind why there should be a different rule applied to labor organizations and to those associations?

Mr. LEWIS. If you will let me give my illustrations, I think I can show to you there are at least differences in the problems which should be considered. The illustration is this, where a number of laborers undertake to work on a building. The building is being constructed and is being constructed by our labor. A person is put on that building we do not wish, and we say to the owner, or the person who employs us, "If you do not discharge that person, we will strike;" that is a boycott, is it not?

Mr. VOLSTEAD. No.

Mr. LEWIS. That is my understanding of "boycott." It shows you how difficult words are.

Mr. VOLSTEAD. I suppose that is a primary boycott, but it is not a secondary boycott.

Mr. LEWIS. That might be held a boycott in general terms, and is one which the courts in most cases have held to be and in some cases not. They have differed on the problem.

Mr. CAREW. What do you think about it?

Mr. LEWIS. As I use the word "boycott" in its broad sense, that is a boycott. If I answered the gentleman's question "no," for instance, if I could not make any distinction, I would be put by any use of the word "boycott" into the position of saying under those circumstances those laborers have not the right to do that. I think they have in many circumstances.

Mr. CARLIN. What circumstances, for instance?

Mr. LEWIS. I think if this is true, that they have a right to do that unquestionably in those circumstances—that this building in which the occupation of building is dangerous they would have the right to see that the men they work with are men who are skilled in that business. Else their lives are in danger. Therefore, they have, of course, in the construction of that building the right to say that same thing. Now, if their motive is merely to injure this man who comes to them, if that is the only motive—they have some grudge against him—why you have another set of circumstances.

Mr. CARLIN. Suppose, taking your illustration—I do not think it is what I had in mind, exactly—suppose it is admitted that these men who are occupied in the construction of the building are men of equal capacity and equally good habits, but a portion of those men are members of a union and another portion are not members—do you think, then, they have the right to prevent that building from being constructed or their members from going on with the work, or that they should have the right by statute.

Mr. LEWIS. I think a man should have the right to work with those he wants to or not, as he chooses.

Mr. DYER. And you have a right to prevent others from working?

Mr. LEWIS. We do not have the right to prevent others from working, certainly not.

Mr. DYER. Is that a boycott?

Mr. LEWIS. For instance, I think he has the right to say, if my cook does not like my butler, I think my cook has the right to come to me and say, "I will go, unless you discharge the butler." That is a different problem entirely. Then, if I am going in the market and I am selling tobacco and I come to you, a retailer, and say, "If you want my tobacco—I know my tobacco is necessary to you; you can not go into the retail tobacco business without my tobacco—and I come to you and say, "buy my tobacco and only mine, or I won't sell any tobacco to you at all," that is one class of problem. The cook problem I put to you is another problem. You have got to separate them.

Mr. CARLIN. Take the case of your cook: Do you think your cook ought to have a statutory right, after exercising a personal privilege of retiring from your employ, to go around to your customers, whom you deal with in business, and say, "That fellow is not friendly to cooks and we do not want you to deal with him; and if you do, we won't deal with you any more." Do you think he ought to have that right?

Mr. LEWIS. I think that is another problem.

Mr. CARLIN. I know it is another problem, but I am asking you if you think he ought to have a statutory right to do that?

Mr. LEWIS. I will answer that question in this way; I do not know the circumstances which justify that. I am not an expert on that subject, and I will state frankly to this committee I have not given to that subject the thought which would enable me to reach a conclusion, and to advocate before you legislation one way or the other. I would be interested to hear those who are connected with labor unions and see what their point of view is and why they want this privilege which apparently is a secondary boycott, as has been explained; and after I heard their reasons and gave time to the subject, I might come to the conclusion, probably would, as my instinct is, that it is not. I guess the instinct of pretty nearly every one, labor unions and everybody else, that has thought of the thing, is it needs a good deal of justification to support it; but I do not say here it is a good or bad thing positively. My opinion on that matter is an opinion which is distinctly not an opinion of an expert. I have never looked into it up to the present time to ascertain and come to a positive conclusion why that secondary boycott was regarded as necessary. It should be justified by some positive reasons, or it is a wrongful boycott; I admit that. But, farther than that, I do not like to go.

Mr. CARLIN. I will not press you any further, but my reason for pressing you as far as I did, was I understood you to say you were a member of the executive committee of the legislative committee of the Progressive Party.

Mr. LEWIS. Yes.

Mr. CARLIN. It was the position which you held in that connection that led me to suspect, perhaps, that you had considered labor questions along with other questions.

Mr. LEWIS. That committee considers, sir, and gives information when we are asked by legislators who are members of the Progressive Party, to assist in the preparation of any legislation to the best of our ability, members of the committee who have some prior knowledge of that subject, who has been asked to help them. That is the extent of our province. They have been asked by Mr. Murdock to make suggestions as to certain bills, and the three gentlemen who are here before you to-day have devoted some time to that subject and therefore feel we can speak to you, but on the question you ask in regard to labor unions, we do not feel we can speak to you.

Mr. CARLIN. I want to ask you just how this executive committee is formed—this executive committee of the legislative committee.

Mr. LEWIS. I beg your pardon, sir, but there are two things that are linked in the question. I am chairman of the legislative committee, of the legislative reference committee, of the National Progressive Party. That committee has the duty merely of assisting Progressive Members of Congress or State legislators who ask their assistance. Now, there is another committee in your mind, evidently, sir, from your question, which is this: It is the committee which was appointed by the late Republican State Convention in Pennsylvania, known as the legislative and State committee of the State of Pennsylvania. That convention drew a platform and they did what no convention did before, but which several conventions have done since—they appointed a committee to draft such acts which they designated to carry out the pledges of the platform which they drew.

I happened to be a member of one of the subcommittees of that committee, which has nothing to do with the committee which has given advice to Mr. Murdock on these bills.

Mr. CARLIN. How is that committee organized?

Mr. LEWIS. That committee was appointed by the convention, the late Republican State convention, which went out of existence with the last legislature.

Mr. CARLIN. I mean, the committee of which you are chairman—how is that formed?

Mr. LEWIS. You mean the legislative conference committee?

Mr. CARLIN. Yes.

Mr. LEWIS. The members of that were appointed by the national committee of the National Progressive Party.

Mr. CARLIN. Of how many does it consist?

Mr. LEWIS. I think I am right in saying there are 11 members.

Mr. CARLIN. And you only advise members of the Progressive Party?

Mr. LEWIS. Yes. It is a committee confined to that duty. As an individual, sir, I am always willing to advise anybody on a matter which I know something about, but I have got to first know something about it. But as chairman of that committee we confine our labors to assisting members of our party.

Mr. CARLIN. At the present, as far as you know, is the legislation relating to trusts the only legislation you have in mind that is pending in Congress?

Mr. LEWIS. Pardon me, sir. There are 11 bills which have been put in on which we have given some advice; very little on some and more on others. Different members of our committee advise on different bills, but personally my own work has been to advise on these particular bills, perhaps more than on any others.

Mr. CARLIN. Of course, their service is perfectly patriotic?

Mr. LEWIS. Unquestionably patriotic, if you mean by that it is not remunerative. But I do not wish to be put in the position—I think, Mr. Chairman, I ought to say this, as Mr. Murdock is not here to-day, being in the West—that these bills are Mr. Murdock's bills. Our duty is not to draw these bills, but our duty is to give such advice and assistance as we may, and we aid the Progressive Party as a whole and the Progressive Members of Congress, and render them such assistance as possible whenever requested. We believe this is very serious legislation, and it is worth while to get all the expert assistance possible, and therefore these bills have been prepared by Mr. Murdock with every advice he could get; but they were begun away last spring, and there has been continuous labor on these bills for months, and we do believe very strongly, all of us, in that way of preparing bills.

Mr. CARLIN. Did you all have before you the Morgan bill when the Murdock bill was revised? Did your executive committee have before you the Morgan bill to which your attention has been called to-day?

Mr. LEWIS. No. Our advice was confined as to what should be put into these bills from our point of view and what research we could make into the matter.

Mr. CARLIN. Did you have before you the Morgan bill at that time?

Mr. LEWIS. Not personally. It might be other members of our committee had. I gave certain suggestions on the bill and other members certain other suggestions.

Mr. CARLIN. The reason I mention that to you is that Mr. Morgan or some of his friends think you all have stolen his thunder.

Mr. LEWIS. In so far as I am responsible for some suggestions in the bill, I was unconscious of theft. I was a kleptomaniac.

Mr. MORGAN. You understand, Professor, he has to have his joke.

Mr. LEWIS. I understand the joke.

Mr. DYER. There was a question asked you concerning this bill of Mr. Bartlett about these associations of agriculture and horticulture whether you had given that sufficient thought to answer the question as to whether they should be taken out of the operation of the Sherman Act along with the labor organizations.

Mr. LEWIS. Personally, I think that should at the present time be left to the determination of the commission with an appeal to the courts—the determination whether they are engaged in business. If they are not, that the jurisdiction of that commission should be confined to those who are engaged, who carry on a business. It should include all that carry on business, but not those associations which do not. Therefore, the question whether these associations which are now being formed, which are comparatively new in some of their aspects, particular industrial factors in a community, should be included or not is, frankly, something I do not think the Congress should decide. If they should simply decide to give to the commission control over corporations engaged in business between the States and define the word "corporations" to include any association engaged in business, and then first to the commission, with appeal to the courts, put the question up to it whether this particular agricultural association involved is or is not engaged in business. If you do not do that you will get into trouble, because the forms of these associations are, as I understand it, rapidly changing what they are doing. Whereas, if they were purely beneficial and informational to their members—they are now doing a certain amount of collective selling and not collective producing—if you try to solve all of these problems and say exactly what associations, instead of saying merely, in general language, any association that carries on business is subject to this act—if you tried to enumerate what kind of associations do or do not carry on business, you would do the same sort of thing which, in my opinion, is fatal to the three bills introduced by the chairman. With the best possible motives, he has tried to define the crime by specifying the ways it can be committed. You can not specify what carrying on business is by defining different kinds of organizations that carry on business. Do not draw that kind of a bill, or you will simply draw it for the benefit of lawyers.

Mr. CARLIN. This language is plain. I do not know whether it comes within your definition of carrying on business or not, but here is the language of the bill that is proposed, which means, transposed, that no person or persons may enter into any arrangement, agreement, or combination among themselves for the purpose of engaging in horticulture and agriculture with a view of enhancing the price of agricultural or horticultural products.

Mr. LEWIS. I would leave it all alone, sir; I would leave it all alone. I would simply say that your commission has power over

those who carry on business. Now, if this association actually comes before the commission, being cited by the commission, and the commission says it is carrying on business, let the actual facts of the case be examined by the commission, with an appeal from its conclusions to the courts.

Mr. DYER. How would you amend the Sherman law?

Mr. LEWIS. I think the only amendment that is arguable to the Sherman law is to make it read "That this act shall not apply to persons who are not engaged in carrying on business," but do not touch it as a definite thing.

Mr. CARLIN. We have to meet here, as legislators, propositions that are brought seriously before the committee by responsible citizens, and you would have to meet those same responsibilities if you were chairman of an advisory committee to a legislative body, either of a particular party or of all parties, and that is the reason I asked you whether a statute would meet with your approval which would permit combinations among agricultural and horticultural associations for the purpose of enhancing the price of their products.

Mr. LEWIS. Personally, sir, I do not think that I can answer that off-hand. I do not think I could agree to an act worded as that act is worded. All I can say is to repeat that if these associations do not carry on business, then they should not be restrained from combining.

Mr. DYER. Is it not carrying on business when they enter into an arrangement as to the prices of their products?

Mr. LEWIS. Again I would like to be excused from answering a question to which I had not given any thought. In other words, what is carrying on business in these associations does not depend upon that particular act of getting together and putting up the prices, but upon that act and a whole lot of other acts. In other words, carrying on business is a thing that you can not define any more than to say "carrying on business," and nothing else.

Mr. CARLIN. Now, this is not a hypothetical question I am putting to you, but if you are going to engage in the business of legislating or advising legislation, you have got to meet this question just as we meet it, in a spirit of fairness and frankness, and we are here dealing with this problem and you are here to give us information, and I am asking you for it.

Mr. LEWIS. Yes, sir.

Mr. CARLIN. Now, this is seriously proposed: That we shall permit a dozen or 500 farmers to form an association, and, whether carrying on business or carrying on anything else, to combine to raise the prices of their products, and I ask you the plain question, whether or not such a statute would meet with your approval?

Mr. LEWIS. Might I ask you whether it meets with yours?

Mr. CARLIN. Yes, sir; I think it does.

Mr. LEWIS. Might I ask you again whether you have had this question before you for some time or whether this is snap judgment on your part or the result of consideration?

Mr. CARLIN. This bill was introduced on the 7th day of April, 1913, and it has been before this committee ever since its introduction.

Mr. LEWIS. Yes. You have had that question before you for some time.

Mr. CARLIN. No; we have not. The committee has not been in session until recently, but the question has become acute now because of this proposed antitrust legislation.

Mr. LEWIS. I can not imagine how you could answer that question without consideration of all the facts bearing upon it.

Mr. CARLIN. Well, I have answered it.

Mr. LEWIS. Of course, after a careful consideration of the facts bearing upon it——

Mr. CARLIN (interposing). I have already answered it.

Mr. LEWIS. If you have answered it without careful consideration of the facts bearing upon it, and the reasons pro and con, if you have answered in that way you have a power of intuition such as I have not.

Mr. CARLIN. Then I will ask you to give this suggestion such consideration as you might think you would like to give it, and then answer my question.

Mr. LEWIS. I shall try to do it.

Mr. CARLIN. And then answer my question directly as I have answered yours.

Mr. LEWIS. Unquestionably, when I come to a conclusion you will have a direct answer, provided I have the opportunity.

Mr. CARLIN. Let us have your answer within the next two or three weeks.

Mr. LEWIS. I should be very glad to answer you if I can, but at the same time you must remember that my responsibility is not yours.

Mr. CARLIN. I am thoroughly familiar with my responsibilities.

Mr. LEWIS. When you ask me that question you simply ask me as one man asking a friendly question of another: "If you have an opportunity to look up this question, won't you try to look it up and make it a business of giving me an answer?" I can try, but I can not promise you here that within the next three weeks or within the next three months I shall have the adequate time to give to such a momentous question as this the consideration it deserves. I thank you very much for the hearing you have accorded me.

Mr. CARLIN. We are much obliged to you.

STATEMENT OF MR. DONALD R. RICHBERG, 109 EAST FIFTY-SIXTH STREET, NEW YORK CITY.

Mr. RICHBERG. Mr. Chairman, it was the intention of the three gentlemen presenting themselves to-day to endeavor to present a concrete constructive program and express certain opinions regarding the program before the committee. It was the intention that Dr. Lewis would outline the principles upon which trust regulation might be based, and then I was to discuss the mechanical means for carrying out those principles as proposed by these Murdock bills, and then Mr. Herbert Knox Smith would describe the method of precedure under the present laws and previous laws of the same kind. Now, as the hour is growing fairly late, I wish to ask the indulgence of the committee to be exceedingly brief in a narrative résumé of the theory outlined by Dr. Lewis, and I trust I may be permitted to make a rather short dogmatic statement in so doing.

Just to sum up the theory upon which we are trying to approach this legislation, and upon which it seems to me it should be approached, it is aparent that the crux of the matter of dealing with monopolies or unfair business is not to attack the method but to deal with the power, and therefore, our solution is, first, to get a commission with full power to gather all the facts, and then give it power to suppress unfair methods, and the only way to terminate unfair practices is by the creation of a proper commission with power sufficient to carry out its orders. Then, there is the question of handling monopoly. It seems to me as to that that the only method of handling it would be by commission, and the only method of dealing with monopoly is to attack not the theory or the method but the form; that is, some noncompetitive factor in the industry. As opposed to that theory, which we believe to be the sound theory, there seems to be a present consideration of what might be termed administration measures before this committee, regarding the continuation in a commission of the power which has remained heretofore in the law to prohibit certain illegal acts and to punish the individual violating the provisions of the prohibitory act.

Now, as distinguished from that theory and the program outlined in these bills, I shall ask leave to read a short succinct statement in order that I may be able to get the matter before the committee in concise form.

A government that proposed to destroy all big, strong men in order to protect little, weak men, would be ridiculed.

Yet our Government is seriously proposing to destroy all concentrations of business in order to prevent abuse of the resultant strength. Children hate the hot sun and the wet rain. Mature persons protect themselves from the heat and the wet while utilizing the sun and the rain. They do not pray that the sun and the rain shall be done away with. A mature government might utilize the analogy.

The evils of monopoly do not lie in the concentration of vast resources nor in handling of enormous business by one organization. The power of big business is its menace and the abuse of that power is its sin. That power lies in the ability to determine price policy. The admnistration bills deal with big business as with an inherently vicious thing, just as ancient law dealt with the criminal as a person essentially different from law-abiding persons. The mbdern criminologist recognizes that the criminal is merely ordinary flesh and mind perverted to bad uses. The monopolistic concern is large business perverted from public service to public exploitation.

The administration bills only attacking the methods and forms of monopoly provide for an inquisitorial body to get the facts, then prohibit indiscriminately unfair business practices and practices that may bring about unfairness and finally prescribe the punishment of the individuals engaging in either kind of practices.

The Progressive proposals exhibited in Congressman Murdock's "trust triplets" aim to distinguish between a vice and an abuse of power. Unfair trade practices may be to a certain extent defined and prohibited, as inherently vicious. But when the field of monopoly is reached the wrong to be prevented is abuse of power and the effort to prevent the mere development of business to the point where monopoly may be threatened is merely the destruction of strength in fear of the abuses of strength. It is the Progressive idea that busi-

ness should be allowed to grow, but that its responsibility to the Government and the power of the Government to enforce that responsibility should keep pace with that growth.

The power of the Government to cope with the power of concentrated wealth must be lodged in some instrument of administration. The judiciary is not equipped for the task, nor is it consistent with judicial functions. The legislature can only take cognizance of principles and measures for their expression. The power of the Government to develop its strength constantly to maintain the interest of all the people against the selfish interests of strong groups operating with large resources must therefore be lodged in an arm of the administration.

Assuming, therefore, the interstate trade commission as the embodied governmental power, it must be granted the authority to limit the power of any private enterprise within the field of active or potential competition. If a private organization challenges the authority of the Government, the commission must be empowered to maintain the supremacy of the public interest. If the "obligation of public service" is accepted as by common carriers, there is no monopolistic power—no ability to determine price policy.

But if a concern not under this obligation yet exercises monopolistic power the issue is plain—either the Government is to control private business or private business will control the Government. The third Murdock bill provides in this emergency that the Government may for a brief term of reorganization control the monopolistic concern through "supervisors." This assertion of control is analagous to a reformative imprisonment, whereby the individual who will not subordinate his profit making to the community interest may be deprived for a time of community freedom. The corporation is created as a business unit to relieve individuals of responsibility. When the corporation offends it is most appropriate and most effective to deal with it as a unit. The "personal guilt" of the individual is an outlet for escape from joint responsibility. The "personal guilt" of a corporation is a trap wherein to catch all the responsible indiviluals.

There is no monopolistic power if there is no price policy. I want to point out the difference between a monopoly in fact and the exercise of monopolistic power. A public-service corporation may apparently be a monopoly, but it is unable to exercise its monopolistic power because it is held within its limits by the courts.

Now, I wish to give you a very short narrative statement of the bills introduced by Congressman Murdock. First, there is a bill creating an interstate trade commission, which is substantially the same as the Clayton bill. I do not know what is the correct way to refer to them—as the Clayton bills or the administration bills.

The CHAIRMAN. They are merely tentative.

Mr. RICHBERG. Very well, I will refer to them as tentative bills. I understand the question to be discussed here is the question of the theory of control rather than of mere mechanism.

The CHAIRMAN. What are the numbers of the other bills?

Mr. RICHBERG. H. R. 9299.

The CHAIRMAN. What are the numbers of the other bills?

Mr. RICHBERG. H. R. 9300 and H. R. 9301. They were introduced at the same time and, as I understand it, the idea by which they were in-

troduced as three bills was in order to separate and distinguish the three subjects for consideration: First, the need for an interstate trade commission; second, the power in the commission to prohibit and prevent by administrative order unfair competition; third, the protection of commerce against monopolies. I think the second bill has been quite thoroughly covered by the questions that were asked of Dean Lewis. The definitions of unfair practices are purposely very broad in order to avoid the difficulties pointed out by Mr. Lewis of attempting to define a crime. When we reach the third bill I would like to break off this discussion just a moment to take up this issue. There are a great many persons who believe that publicity and criticism of unfair practices will terminate the so-called trust problem. But there is a better way. In other words, a monopoly is not built on unfair practices necessarily. There are certain fields wherein monopolies exist which are not necessarily built up on unfair practices and do not necessarily exercise monopolistic power. The question was asked here as to the distinction between a good trust and a bad trust.

I would like to say that I see no good in monopolistic organizations from a public standpoint. But I do see the difference between a large organization which does not possess monopolistic power and a large organization which does possess monopolistic power. The first I regard as an efficient means of business and the other I regard as a menace to the public. When we reach this field of monopoly we find certain so-called natural bases of monopoly; that is, certain bases on which a monopoly naturally will be builded, such as the control of natural resources, the control of terminals, the control of transportation facilities, or any other financial conditions inherent in the industry. In other words, the secret of a monopoly is found in a certain factor which sometimes destroys the possibility of competition.

Now, it is the intention of this third bill that when there is an alleged exercise of monopolistic power the commission shall examine into the facts and determine whether or not the monopoly is based on unfair business competition or on a natural basis of monopoly. The first question is easy, and the answer to that is the elimination of the practices. The second situation raises the problem with which it seems to me no antitrust legislation deals. As long as hands are kept off of the creation of large corporations you must prescribe the acts that shall not be done, prohibit them, and enforce that prohibition in the courts.

Then you must find the appropriate remedy and apply it. In considering the question of the control of monopolistic power, the crux of the question is not found in the smashing of the organization, because if it is an efficient organization it should be permitted to exist, but if it is an unfair and inefficient organization it will dig its own grave. But the interest of the public lies in attacking that force whereby competition is kept out of the field. That may be accomplished in many different ways, each arrived at by a consideration of the peculiar problem in each particular industry. For example, I have in mind the statement made by Mr. Smith that the Standard Oil Co.'s monopoly power is based on its pipe lines. In other words, the control of transportation facilities will be the crux

of the monopoly, and without which no monopoly can exist. It is the intention that this commission shall determine whether a corporation, either through its organization or through its conduct and management of its business, is exercising a power which, in the opinion of the commission, is monopolistic, and if it finds that such monopolistic power exists it shall prescribe the method by which the monopolistic power shall be terminated and shall issue appropriate orders and have power to enforce them. Where the monopolistic power is based on the control of a factor, it will be possible to separate the factor, as, for example, the illustration has been made of the use of the patent right, where a monopoly is based upon the control of the patent by an organization, and the suppression of that factor, namely, the control of the patent right, terminates the monopolistic power of the particular organization.

In the same way, where the control of natural resources is the basis of monopoly, the suppression of that portion of the organization which controls natural resources, throwing it open to all alike, would terminate the monopolistic power of the particular organization without altering the business efficiency of the process of distribution which may have been built up through the control of that resource.

That, in very brief, is the program. I would like to say one word in conclusion in regard to the efforts being made to get away from the thing which has been very strongly urged and emphasized before this committee, and that is the effort to get away from the misleading doctrine of personal guilt. There is no particular pleasure in relieving wrongdoers of the responsibility for their acts, but the history of prosecutions for monopolizing and restraining trade has shown that in the intricacies of corporate organizations it is practically impossible to reach the guilty parties, and the alleged doctrine of personal guilt results in practically making scapegoats of the underlings, if anyone can be attacked at all. The reason for that situation is not difficult to discover. The corporation is built up as a business unit. The law creates a corporation in order that the individuals composing it may act collectively as a unit, and when legislation is permitted to deal adequately with a corporation, it seems to me that we must deal with a corporation as a business unit. Otherwise we are immediately face to face with the difficult problem of untangling the various units forming the collective unit, separating them back into individual units, and then bringing them all together again into the meshes of the prohibitory laws that may affect them.

The effort to go back into the personal responsibility theory is not a progressive effort but a reactionary effort. Step by step the long and arduous fight has been made through the courts. Originally it was resisted in the courts, incorporations were held not to be able to commit a crime, but step by step those theories have been broken down, and you will find in some of the decisions of the courts that they have said that only by laying the liability on the corporations themselves can justice be done.

Mr. CARLIN. Do I understand you to be opposed to the punishment of the men who actually issue the orders?

Mr. RICHBERG. No; I am heartily in favor of it. I am not opposing the removal of the personal-guilt provisions in the Sherman

law, but I am desirous of seeing put on the statute books, in addition to the provisions already contained therein, a provision placing the responsibility for corporate wrongdoing upon the corporation as a business unit, because I think only in that way can preventive and reformative measures be worked out.

Mr. CARLIN. You would not punish the directors?

Mr. RICHBERG. I would punish them if I could reach them; but I say that there should be a provision for reaching the corporation itself, in order that there may be a demand that we have law-abiding corporations as well as law-abiding individuals.

Mr. MORGAN. I see in bill H. R. 9299, introduced by Mr. Murdock, that only corporations doing a gross annual business of $3,000,000 are placed under the jurisdiction of the commission.

Mr. RICHBERG. Yes.

Mr. MORGAN. You think it wise, then, to limit the jurisdiction of the commission to certain characters of corporations?

Mr. RICHBERG. The reason for that limitation, as I understand it, is largely for the benefit of a practicad operation of the law. In other words, if you create a commission of this size and give it unlimited jurisdiction it would be swamped with a multitude of details which would render it unable to perform the functions for which it was created.

Mr. MORGAN. As I understand it, we are entering a new field of exercising Federal jurisdiction over private business; that is, we are placing it under a commission. Now, do you not think it is wise for the Government to go only as far as the public interest demands it and public necessity requires it?

Mr. RICHBERG. Yes, sir.

Mr. MORGAN. In other words, the smaller businesses should not be controlled unless there is some public menace?

Mr. RICHBERG. Yes, sir. On the other hand, there may be a menace in a multitude of small businesses, some of which may be small monopolies.

Mr. MORGAN. I notice in H. R. 9300, introduced by Mr. Murdock, in section 3 you attempt to define unfair competition. Now, under paragraph H it says, "Any other business practices involving unfair or oppressive competition." Now, suppose you strike out all before paragraph H and leave it to the commission to construe the general declaration. In other words, under this bill the commission would decide what would be unfair competition.

Mr. RICHBERG. That would be theoretically, perhaps, more sound than the detailing of any of the practices.

Mr. MORGAN. Pardon me for asking you, but are you an attorney?

Mr. RICHBERG. Yes, sir.

Mr. MORGAN. Referring to section 4 of that bill, what authority is given the commission in regard to making rules and regulations to prohibit certain practices?

Mr. RICHBERG. As I understand it, the theory on which this is drawn, and would be justified, is that the law follows the more modern tendency of stating the broad principles of conduct and leaving the definition of the methods of exercise of power to the commission exactly as it has been left to the Interstate Commerce Commission and justified by the courts.

Mr. MORGAN. I do not think the Interstate Commerce Commission has the authority to make a rule. The bill, of course, declares unjust discrimination unlawful, and then they decide what is unlawful discrimination. But I do not understand that they can, by rule, make a certain specific thing unlawful. They could decide that a certain thing was unlawful because it was unjust?

Mr. RICHBERG. Yes.

Mr. MORGAN. But they could not make it unlawful by a rule?

Mr. RICHBERG. No, sir; I do not think this commission could. I think the intention is that these regulations are simply statements by the commission of its understanding or interpretation of unfair business practices and unfair competition, not that they can add to those which are accepted by the present law.

Mr. MORGAN. Then, if we declare by law unfair competition to be unlawful, that gives the commission the right to decide that a certain thing is unlawful. Could we not give them that power and leave it to the courts to decide whether what was declared unlawful was unlawful?

Mr. RICHBERG. That seems to be the principle of this legislation. Necessarily the courts are in the background of this legislation. The courts are not relieved of a particle of jurisdiction by the creation of this commission. They have jurisdiction under the Constitution. This commission's orders are not enforceable until a court has passed upon them. The commission might order a certain thing done or not to be done, but the order could not be enforced without the process of the court, and necessarily the matter must receive judicial consideration.

Mr. MORGAN. Are not there a good many cases in the States where commissions have been given powers that were formerly regarded as judicial powers and not considered as executive or administrative powers?

Mr. RICHBERG. Well, there is no doubt that that has been the case.

Mr. MORGAN. Are you the secretary of this legislative committee in which Mr. Lewis is interested?

Mr. RICHBERG. Yes, sir.

Mr. MORGAN. The bills that you have read, then, represent the legislative ideas of the Progressive Party?

Mr. RICHBERG. I understand so.

Mr. MORGAN. And Mr. Morgan has introduced a bill on the same subject?

Mr. RICHBERG. Yes.

Mr. MORGAN. Mr. Clayton has also introduced a bill?

Mr. RICHBERG. Yes.

Mr. MORGAN. Do you know the difference between your bill, Mr. Morgan's bill, and Mr. Clayton's bill?

Mr. RICHBERG. As a matter of fact, I read Mr. Morgan's bill with considerable care. I think it was introduced as early as last spring.

Mr. MORGAN. It was introduced two years ago; that is, the first bill.

Mr. RICHBERG. It was called to my attention by one of the Progressive Members here. As a matter of fact, if you will excuse the idea of stealing anyone else's thunder, I did not myself assist in the incorporation of any of the provisions of Mr. Morgan's bill, but it

seems that a good many of the provisions of his bill were drawn upon a sympathetic theory with my bill. Mr. Clayton's bill was very carefully considered also.

Mr. CARLIN. As to the Clayton bill, you have no specific suggestion to make as to how to improve that particular bill, except to take your bill instead of that bill?

Mr. RICHBERG. Well, I have certain very specific suggestions, if you care to hear them. I do not know that you care to go into the mechanism.

Mr. CARLIN. We will be glad to hear what you have to say.

Mr. RICHBERG. I think, for example, that the addition of the right to compel uniform and comparable methods of accounting is necessary to the proper investigations of an interstate trade commission.

Mr. CARLIN. That is Mr. Brandeis's idea.

Mr. RICHBERG. I think he has that idea; but it is not a new idea; it is an old idea. I do not know whether he is the parent of it or not. Another thing is that I believe the commission should have the power to take testimony by deposition and have special examiners, because if the commission is only to act as the commission provided for in the Clayton bill it seems to me that it will be swamped with work without being given additional arms with which to exercise its functions. I have a very definite opinion in that respect. I also think that the definition of a corporation in the second bill is entirely limited. Organizations with which we are dealing sometimes assumes a form known as a corporation, and very often many other forms. There is a form in Massachusetts which is particularly utilized there, and that is trusteeship. There are many other forms of organizations, all of which are practically corporations. I think the term is too limited in the Clayton bill.

Mr. CARLIN. The Clayton bill covers persons, firms, and corporations.

Mr. RICHBERG. Well, if I am in error I would be pleased to be corrected. The bill I have here reads, "That all corporations engaged in interstate commerce." Perhaps this was an earlier proof of the bill.

Mr. CARLIN. Which bill is that?

Mr. RICHBERG. H. R. 12120, page 4.

Mr. CARLIN. I think you will find that bill applies to persons, firms, partnerships, and corporations.

Mr. RICHBERG. I was under the impression that there was no definition of the word corporation in the bill. It seems to me that there should be. Now, I do not want to take up any more of your time unless you wish to ask me any further questions.

Mr. CARLIN. We are much obliged to you.

STATEMENT OF MR. HERBERT KNOX SMITH, LAWYER, HARTFORD, CONN.

Mr. SMITH. Mr. Chairman, I was formerly commissioner of corporations and also assistant commissioner, covering altogether a period of nine years. I shall be extremely brief, Mr. Chairman, as you have been very good to us, indeed. I simply want to discuss the general principle of the Clayton bills, so called. If I understand them correctly, they represent one well-defined, thoroughly

clean-cut line of policy in the regulation of corporations. The Murdock bills represent another line, and the two are totally different. In my personal opinion, the Clayton bills represent the wrong line. If I understand the Clayton bills properly, the essence of them is thoroughly contained in section 4 of the No. 2 committee print, which is, I think, properly referred to as the Clayton bill which defines the Sherman law.

Paragraph 4 sets out the following:

> 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.

In other words, to enter into any agreement on the part of any party engaged in interstate commerce which will in any way restrain competition between themselves. That goes much further than the present Sherman law. Two parties running stagecoaches across a State line if they were in partnership would violate the terms of that clause. In other words, the theory of the Clayton bill is this: The regulation of corporations by dissolution. It is the theory of the Sherman law carried a little further; the theory that if a corporation or combination has created evil or abuse the way to regulate and prevent the abuse is to take apart the corporation or combination and reduce it to a state of competition. The Murdock bill theory, or the Progressive theory, is the theory, on the contrary, that we must have a large degree of business concentration to carry on the business of the 90,000,000 people; that it must be allowed so far as it is economic, but it must be stopped when it reaches monopolistic power.

Mr. CARLIN. That is to be determined by a commission?

Mr. SMITH. Yes, sir. Personally my opinion is in favor of the latter. But I want to make clear the two very important and very divergent theories that are now before Congress. The theory of the Clayton bills fails, to my mind, in two great points. The first point I have already indicated. It seems to fail to recognize the modern business proposition that you have got to have concentrated power to carry on our business. The theory of the Clayton bills is that every man has got to compete with every other man, and that is going to carry the country back to the days of the blacksmith forge, the grist mill, and the cobbler's bench. The other bills, like the prohibition of holding companies—that bill has not been introduced, but I understand it is contemplated—the prohibition of interlocking directorates and the trade relations bill are along the same line; that is, interlocking directorates are prohibited in order to prevent the getting together of competitors, and the holding company is prohibited in order to prevent the getting together of two competing companies.

Mr. CARLIN. Do you think the commission ought to permit competitors to get together?

Mr. SMITH. My theory of the holding company is like my theory of rocks. A rock is a good thing or an evil thing according to how it is used. So a holding company is a good or an evil thing according to how it is used. It is simply a legal device for getting something together. Now, is that getting together a public benefit or a public detriment, net? It is the net problem. We have to get

together through a business sense in order to carry on the commerce of our 90,000,000 people, and when that getting together gets beyond the point of efficiency and economy and reaches the point of monopolistic control, then the commission says you must stop. The holding company per se is nothing at all. It is simply a means to carry out something. It can be good or evil. The same difficulty is experienced with restriction of competition. Competition may be either good or evil. Now, suppose we carry out the theory of dissolution and throw ourselves back to the time of the forge and the cobbler's bench. Where do you arrive? The trusts to-day are the product of that period. This bill would throw us back into the days of unbridled aggressive competition that was started a hundred years ago. That is the condition which has brought us to where we are to-day. That is the difficulty in my mind with the Clayton theory, that it proposes something that will throw us back into a condition where we will lose efficiency in business, where we will gain nothing because we will have to go through the same process again. Then as to the interlocking-directorate theory and the holding-company theory. They go simply to the legal form.

I was Commissioner of Corporations when they started the suit to dissolve the Standard Oil Co. under the Sherman law. What has happened? They dissolved that company after four years of litigation into 34 companies. The intent of the Sherman law was to restore competition, but if they had wanted to restore competition that is not the way to get at it. You do not get competition by dividing an oil corporation into a pipe line, a tank company, and a business office, because they can not compete. If you had wanted to break the monopolistic power of the Standard Oil Co., a commission expert would have told you that the secret of their power lay in their transportation advantages—earlier it was in railroad rebates and now it is in pipe lines. That is what their control of the market was based upon. To divide a company into its legal relations or component parts is no way to break the strength of its monopoly. As a matter of fact, it has the same strength as it had before. That came about through a process which is absolutely inevitable. That is the trouble with the Clayton theory. It attempts to throw us back to the conditions of industrial impotence and it does it by going at the legal form and not the economic facts. Now, the theory of the progressive bills, or the Murdock bills, is the contrary. It says, practically, "We propose to handle this by administrative process, not through the courts. We propose to take the actual factors of monopolistic power; that is, control of natural resources, control of transportation facilities, railroad rebates, etc., and, going on the expert advice of the commission, to put our finger on the real source of monopolistic power.

Mr. CREW. What change would you make?

Mr. SMITH. Well, take the Standard Oil Co. If the commission were sitting now or had been sitting at the time the dissolution was proposed, I think I could say that the first order would be to make the pipe lines of the Standard Oil system common carriers. That would have a most sweeping effect upon monopolies, more so than you could get in any other way.

Mr. MORGAN. Are not pipe lines common carriers?

Mr. SMITH. Well, the Interstate Commerce Commission said so six or seven years ago, but it is not enforced.

Mr. CAREW. You think that every monopoly depends upon its own circumstances?

Mr. SMITH. Yes, sir. Every monopoly has usually one name at the keystone of its arch. The steel business has its ore; the American Tobacco Co.'s power has hung largely on the brands they own—Bull Durham, for instance. Mr. Duke told me once that he did not know what the value of the Bull Durham was, but he thought it would be between $20,000,000 and $30,000,000. There is always some one great factor in every monopoly which you can put your finger on if you know what it is.

Mr. MORGAN. Take the International Harvester Co. I remember reading your report on that case.

Mr. SMITH. Well, I went out of office before we finished that report. It was before I had really considered that report. You see, the men under me get together all the facts and digest them, and after a long period of work they come up to me; but in this case they never got up to me, so that I have not clearly in my mind the factor of that monopoly, but a part of it was a very efficient distributing system. That company has some extremely valuable names, like Deering, McCormick, Champion, etc. You have no idea how strong those names are. Take a company like the Harvester company. They go to a retail dealer and say, "Unless you carry our full line you can not get any Champion, Deering, or McCormick machines," and that is an awful club over a man. I do not say that they have done that, but they could do it.

Mr. MORGAN. You remember that they controlled a very large percentage of all the harvester machines manufactured. I think it was 85 per cent.

Mr. SMITH. My impression is that it was less than that.

Mr. MORGAN. That would be a factor, would it not?

Mr. SMITH. Yes; but the question is, How do they get their power?

Mr. MORGAN. Well, they are a combination.

Mr. SMITH. Well, but with the present industry and genius of the people and a great fluid capital, you can not do much with it unless you have something to base it on.

Mr. MORGAN. Do you not think it would be a very great difficulty for anybody to organize a company that would compete with the International Harvester Co.?

Mr. SMITH. There are quite a number of them now, and they are quite successful; that is, some of them.

Mr. MORGAN. Is not that because those independents have followed the lines of the International?

Mr. SMITH. Well, not at the time I knew about them. The International probably molded the theory and some of the smaller companies tried to follow that theory, and some of them made a great deal of money. I know one of them did. But there is competition. If you once give a fair chance for competition, it is surprising how quickly it will come up.

Mr. MORGAN. We had a gentleman talking this morning about the products of petroleum, and he admitted that the Standard fixed the prices and they sold at Standard prices; and, as a matter of fact,

there was no competition at all, and the independent companies were a part of the Standard Co. in their acts.

Mr. SMITH. In the oil business there is only one company that you could call anything like strong, and that is the Pure Oil Co., which is supposed to be allied with the Standard now. The Standard knows all the time that there is potential competition. The Standard can not raise its prices, because the little fellows would lower their prices and undersell them.

Mr. MORGAN. Do you not think that in the course of a year or two the International Harvester Co., if they so desired, could drive every competitor out of business?

Mr. SMITH. I suppose they could if they went into a regular knock down and drag out fight, because they have their own oil supply and their own timber.

Mr. MCGILLICUDDY. Could not the United States Steel Corporation do the same thing, and drive out every competitor in six months, if it wanted to?

Mr. SMITH. My impression is that it could do it if it set its mind to; that is, until the Hill lease expires. It has been canceled, but it has not yet expired. Now, the United States Steel Corporation owns 75 per cent of the available lake ore in the country. I do not have to tell that to a member of the Stanley committee. Any man or corporation who controls 75 per cent of the available lake ore ought to be able to know what is going on in the steel industry.

Mr. VOLSTEAD. Is it not a fact that the United States Steel Corporation practically determines the price of steel?

Mr. SMITH. I do not know whether they do or not. Maybe some of these gentlemen from the Stanley committee can tell you. We really do not know what happened at the Gary dinners. Undoubtedly they did have a strong effect on the determination of the price of steel.

Mr. VOLSTEAD. I think some of the officers of the company admitted that they determined the price of steel. I will ask the gentleman, who was on the Stanley committee, if that is a fact?

Mr. MCGILLICUDDY. I would not want to say.

Mr. SMITH. Well, it may have been in this court investigation.

Mr. MORGAN. Did you ever try to ascertain how many corporations would come under this trade commission if the net annual income was limited to $5,000,000 or $3,000,000?

Mr. SMITH. Well, Senator Newlands drew a bill of that kind and we figured that it would cover somewhere between 550 and 600 corporations. I think $3,000,000 might bring in 1,000 corporations. I am very much in favor of starting something like that, because, in the first place, you will prevent the commission from being swamped with work, and, in the second place, you will get rid of a lot of little kickers in the country. Every little corporation in the country will make a kick and you will have pretty much all the work you can do, and the political annoyance will be pretty heavy.

Mr. MORGAN. I think the statistics in 1909 show that out of all the industrial concerns, 3,060 have an output exceeding $1,000,000.

Mr. SMITH. Well, call it 1,000 on a limitation of $6,000,000.

Mr. MORGAN. How many did you figure would be brought out under the Clayton bill with no limit?

Mr. SMITH. Well, the total number of corporations that paid the 1909 income tax was 288,000. I think it would be probably a safe guess that at least a third of those; well, you can cut out 15,000, because railroads and corporations like that would not come under this bill; but the Clayton bill would probably bring under this commission from 150,000 to 200,000 corporations. I guess 200,000 would be nearer to it.

Mr. MORGAN. The Clayton bill would bring under its supervision many thousand corporations that did not pay the income tax.

Mr. SMITH. Yes, sir.

Mr. MORGAN. In New York, for instance, practically every little corporation does business outside of New York.

Mr. SMITH. Yes, sir; that is the reason I raised that figure to 200,000.

Mr. CARLIN. Under your plan you would only bring in 250 corporations.

Mr. SMITH. Well, between 400 and 1.000. It is only a wild guess, anyway. If I could pick out to-day 500 corporations in this country I would guarantee to get in every one of interest to the public; that is, every corporation that has an effect upon the public.

Mr. MORGAN. Do you think a distinction ought to be made or that it should apply to all persons, all firms, and all corporations? In other words, would it not be better to give this commission jurisdiction only over larger companies?

Mr. SMITH. Well, I looked that up when Senator Newlands was drawing up his bill, and I figured that the number that would come under this commission would be from 500 to 1,000.

Mr. CAREW. Do you not think the Department of Justice as at present constituted ought to be able to deal with them?

Mr. SMITH. No, sir; I do not. The courts have said again and again that it is within the power of Congress to classify and say that legislation shall apply to railroads and not to other things, and to certain kinds of railroads. There is no constitutional wrong or impropriety in making classes as long as the distinction between the classes has a real relation to the corporation. If you classify all corporations at $5,000,000, that may include all corporations big enough to affect the public. You see, classification has a straight connection with regulation. But if you should say that only red-headed men should pay the income tax, of course, it would be unconstitutional, because it is not based on the income tax.

Mr. MORGAN. Or certain corporations in certain sections of the country?

Mr. SMITH. Yes, sir; that would be unconstitutional. I took a great part in trying to regulate corporations in the courts. The Standard Oil case was the finest illustration of how not to do it. The suit for the dissolution of the company was started in 1906. We took over 10,000 pages of testimony. We got the decree in 1910, four years later, and four years in the life of a business is too long a step. Business does not remain the same for four years at a time. The corporation was finally divided up into about 34 companies. They got a decision along legal lines which resulted in a farce, and yet the best possible work was done that could be done. It was the best that we could do with the instruments at hand. The court, the bench and bar,

through the long centuries, have all been worked out for the purpose of settling disputes between two private parties. Now, you can not turn it around and make them determine questions between great corporations and millions of people, questions involving the public welfare.

Mr. CAREW. Now, what would you have your commission do? Assume that the Standard Oil case was before your commission, assuming you had your commission, and you were the head of the commission, what would you do?

Mr. SMITH. Well, the first order I would make would be that the pipe lines should be considered common carriers and publish rates as such. They do not do that now, although the law requires them. Second, I would require that they should cease bribing employees of the railroads to give them information about competitors' shipments. Another thing would be to cease bribing employees of railroads to desert their duty. Another one would be to make them cease from getting railway preferences, if possible.

Mr. CAREW. I believe all those things are crimes.

Mr. SMITH. They are crimes, but it takes the deuce to go and prove them in a court of process.

Mr. CAREW. Do you think it would be easier to prove it before a commission? Do you think a commission is going to believe it quicker?

Mr. SMITH. Well, a commission is not bound hard and fast by the iron system of criminal law.

Mr. CARLIN. Your bill gives the right of appeal to the courts, and it gets back to the courts again.

Mr. SMITH. Pardon me. Mr. Carlin——

Mr. CAREW (interposing). Pardon me, sir. But you would have done that in the Tobacco case?

Mr. SMITH. Well, not the same way.

Mr. CAREW. Well, but something on the same principle.

Mr. SMITH. Yes, sir. The appeal to the court is simply on two grounds, just as the appeal from the Interstate Commerce Commission, first, whether the procedure of the commission is correct, and, second, whether the commission has the legal power to do what it did. The merits of the case can not be reviewed by the courts.

Mr. CAREW. You think in all of these cases it depends upon whether an injury has been done to the public?

Mr. SMITH. Yes, sir.

Mr. CAREW. And, of course, that is really the view taken by the Supreme Court when it put this word "unreasonable" into the statute?

Mr. SMITH. Yes, sir; but you do get such results from administrative action. In 1906 we got the Standard Oil report and we published it in June. We set forth the railroad rebates enjoyed by the Standard Oil Co., and it covered about three-quarters of the area of the United States. Inside of three months every one of the railroads canceled the rates that we had called unfair. Now, we tried the same thing in the courts and drew about a dozen indictments in 1907. We got thrown down in two out of four cases, and I do not think any of the rest of them have been tried yet, and that is eight years ago.

Mr. CAREW. If you subject 500 corporations to administrative action and leave all other corporations to judicial action, then you are not giving those 500 corporations the equal protection of the law.

Mr. SMITH. If the bill contains anything that does not give them the equal protection of the law, the courts will protect them.

Mr. CAREW. If you are going to leave it to the parties involved to carry the questions to the courts, some of them are not going to give you the credence that others would give to the courts——

Mr. SMITH (interposing). Now, that is a very good point.

Mr. CAREW. How are you going to give them the equal protection of the law——

Mr. SMITH (interposing). It would be very obvious that the court would give them the protection they asked for, if they asked for it.

Mr. CAREW. Of course, I am only blundering along; but the ultimate result is that you do get back to the courts?

Mr. SMITH. Yes; if a constitutional right is involved; otherwise the decision of the commission is final.

Mr. MORGAN. Are there not classes of decisions which hold that the statutory provision is that you can not take property without due process of law?

Mr. SMITH. Yes, sir.

Mr. MORGAN. Of course, the administrative commission might take property without due process of law, by reason of settling these controversies. As I understand it, the courts have been inclined in the last quarter of a century to hold that the provision with regard to taking property without due process of law has relation to a controversy between two individuals, but that on these public questions of the relation of a corporation to the public they have no such constitutional right in the courts.

Mr. SMITH. In other words, the courts have applied to the corporations the theory of property affected by the public trust.

Mr. CARLIN. Mr. Smith, you give your commission the power to determine that a corporation is not a bad corporation—to so declare—and give them a legal permit to remain in business?

Mr. SMITH. Not really that, Mr. Carlin, but to determine whether it is engaged in unfair practices, and, if it is, to prohibit those practices.

Mr. CARLIN. But your idea is that there should be no congressional definition of unfair practices?

Mr. SMITH. It is in the bill.

Mr. CAREW. That part that winds up by saying "unfair practices" is pure bunk; when you start out by saying that a thing is unfair, if it is unfair, you know between man and man that is not even respectable.

Mr. SMITH. I do not care to answer that sort of——

Mr. CAREW (interposing). I mean from a reasonable point of view. We are studying this thing hard and giving our best efforts to it, and when you come here with an attempt to assist us like that and say that a thing that is unfair is unfair, that is not assistance. I am almost willing to admit that it is beyond me.

Mr. SMITH. We have stated various forms of unfair practices here, and then we have put in a final form, general unfair practices. We stated that specifically because we felt that the power should be——

Mr. CARLIN (interposing). Mr. Smith, will you read that last definition? That clause, as I understand it, would leave it to the discretion of the commission?

Mr. SMITH. I think you are not quite fair in your statement, Mr. Carew. I may be entirely wrong in my view of the law, but it was worked out fairly without any intention of making buncombe of anything. We endeavored to enable Congress to lay down the general lines of unfair competition. I was not sure whether Congress had the power to lay down the principles of unfair competition, but it seemed to me best to define them as best I could and then put in the other possibility. I was not entirely clear as to what the constitutional rights were.

Mr. CARLIN. The point I was getting at, Mr. Smith, was whether, in the last analysis, if you did what you would have liked to have done you would not have created a commission for giving immunity baths?

Mr. SMITH. Oh, no, Mr. Carlin; we merely created a commission to determine unfair competition and not to give vaccinations.

Mr. CARLIN. Yes; but where they thought the practice was not unfair it amounts to an immunity bath.

Mr. SMITH. Well, no more than when the State's attorney does not prosecute the street railway for being in restraint of trade. That does not give the railroad company an immunity bath.

Mr. CARLIN. But you have a finding of this commission upon the complaint——

Mr. SMITH (interposing). Oh, you mean in the case of the commission?

Mr. CARLIN. Yes. It would amount to an immunity bath.

Mr. SMITH. Oh, no.

Mr. CARLIN. You would say that a certain corporation is guilty of unfair practice——

Mr. SMITH (interposing). You could not plead that in court.

Mr. CARLIN. Oh, but a court would not say that a man who went on and did business with the Government sanction——

Mr. SMITH (interposing). Oh, as far as the past goes, if this commission had investigated and found that a man had been guilty of unfair practices, he ought not to be immune.

Mr. CARLIN. You read the Cummins bill?

Mr. SMITH. I do not know.

Mr. CARLIN. I mean the commission bill introduced by Senator Cummins.

Mr. SMITH. I read so many of them, I do not know.

Mr. CARLIN. That had the immunity expression.

Mr. SMITH. I did not know that.

Mr. MORGAN. It could only refer to such practices as would appear to the commission unfair. I suppose there would have to be some kind of complaint made as to certain practices.

Mr. CARLIN. I want to know whether the effect of this commission, striking out your definitions and adopting your general definition, which you prefer——

Mr. SMITH (interposing). Oh, no; I do not know that I prefer it. I said I did not know at first what the constitutional rights were.

Mr. CARLIN. Now, giving them that power, whether you prefer it or not, supposing you had concluded that it was the best thing to do, do you not think that is an unwise thing to do for the purpose of determining whether they are good or bad?

Mr. SMITH. You mean good or bad competition?

Mr. CARLIN. Yes.

Mr. SMITH. We have got to determine that. That comes down to the very basis of it. If we can not tell whether competition is bad or good, we have got to either go back to the day of the blacksmith's forge and the cobbler's bench and have no concentration at all, or to have an absolute monopoly.

Mr. CARLIN. You mean unless you can determine what concentration is good or bad? That is the power you would give the commission?

Mr. SMITH. Why, certainly; we have got to. We have got to have some authority to establish it.

Mr. CAREW. The same defect is in paragraph E as in paragraph H, at the bottom of page 196, House bill 9300. It defines oppressive competition, and says oppression is oppression.

Mr. SMITH. The question is what is oppression?

Mr. CAREW. This says that oppression is oppression.

Mr. SMITH. What is the mater with that?

Mr. CAREW. You say, in effect, oppression is hereby defined to be oppression.

Mr. SMITH. Personally I do not see anything wrong with that.

Mr. CAREW. Is that a definition?

Mr. SMITH. It is, as near as you can get at it.

Mr. CAREW. Oppression is oppression?

Mr. SMITH. Oppression is monopoly.

Mr. CAREW. Who is to be the judge of it?

Mr. SMITH. The commission. I could point out a good many cases of that sort. Now, I am very much indebted to you, Mr. Chairman.

Mr. CARLIN. We are much obliged to you.

(Thereupon, the committee adjourned until to-morrow, Thursday, February 12, 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.	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 11.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Monday, February 9, 1914.

The committee this day met, Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. The committee will be in order. Mr. Ryan is here this morning, and desires to be heard on pending antitrust legislation.

STATEMENT OF MR. JOHN D. RYAN, OF BUTTE, MONT.

Mr. RYAN. If the committee please, I want to address myself first to the bill that is not numbered, a bill introduced by Mr. Clayton——

Mr. CARLIN (interposing). It is numbered 1 in the corner, is it not?

Mr. RYAN. Yes. No. 1, committee print. While there are a number of things about the bill that I would like to commend, I presume that you would rather, to save time, hear about the things to which I think there is some serious objection.

Mr. CARLIN. We would like to hear your commendations.

Mr. RYAN. I think, generally speaking, that the provisions in the bill making more definite the prevention of agreements, combinations.

or understandings in restraint of trade, as far as they apply to domestic trade, are in the interests of the whole country and in the interests of the large and small manufacturers, miners, and producers. I think, although perhaps it is pretty bold to say this to you, that the first provision in that bill, providing, in effect, that the price of any commodity shall be the same, taking rates of transportation into consideration, for every section and community is an unworkable provision, especially if it relates to foreign business. Nearly every producer and manufacturer of any article that is exported in any quantity——

Mr. CARLIN (interposing). That is not intended to relate to foreign business, and the committee will make it plain that it does not.

Mr. RYAN. I am very glad to hear that, but I just want to say a word if there is any question about it. Of course, if the committee understands that it does not apply to foreign business, most of my argument can be done away with. But, regarding foreign business, exporters must do business in every country in the world, in every kind of money, under every kind of rate of exchange, and under all kinds of freight rates, and, as I say, such a provision is absolutely and entirely unworkable.

Mr. CARLIN. How would your criticism apply if the bill is simply to relate to the United States?

Mr. RYAN. Simply this: Many producers are producing the same article in different sections throughout the country at different costs. Take our own business. We are refining and making copper ready for the market in Montana and we are making it in New Jersey. Frequently, when we make a sale of an amount, large or small, to a domestic manufacturer we do not know where we are going to deliver that copper from, whether it is to come from the Montana works or from the New Jersey works, because it all depends upon how business is in the West, whether the Montana plant is overloaded or how business is in the East, or whether we have——

Mr. CARLIN (interposing). It would be simple enough for you to quote a price to your customer which would apply to either factory and ship it from whichever factory you pleased?

Mr. RYAN. Yes; but we must meet the competition of the Michigan copper mines. We sell copper 1,500 miles from our own refineries and 500 miles from the Michigan refineries, and we have to meet that competition. On copper shipped from Montana we could not make a rate that would comply with this provision and at the same time meet competition in other sections. We would have to surrender the intermediate field to another producer who was nearer to that district, because it would be absolutely impossible for us to compete with him. However, when we get farther East he is on the same footing, practically, that we are, and——

Mr. CARLIN (interposing). How much competition have you?

Mr. RYAN. We produce in our mines, on the basis of last year's business, 13 per cent of the copper of the world and 19 per cent of the copper produced in the United States. That is the total production sold by our companies.

Now, I would like to say a word regarding your suggestion, Mr. Carlin, that it is not intended to regulate the price of exported products under this provision. It may be rather bold to say so, but I

think the law ought to go further than that. I think that sound, sensible economics will prove to anybody who looks them squarely in the face that we want to take off all restraint and absolutely all the ties, bonds, and fetters from American producers or manufacturers in their foreign trade. I say you should go so far as not only to permit, but to encourage, combinations, agreements, understandings, or anything else on business that is exclusively export business. This country has great natural resources; this country, of all the countries in the world, produces most in the way of natural resources; it sells more in the unmanufactured state than any country in the world and it furnishes the raw material for great manufacturing nations like England and France, and particularly Germany, in which to put labor and supply the markets of the world with manufactured articles. Now, everything that we sell in any quantity is sold to a combined buying power in the great European countries.

Mr. CARLIN. What is the difference in the cost of your selling abroad and at home?

Mr. RYAN. That does not amount to much; the difference in cost of selling is practically nothing.

Mr. CARLIN. The difference in the selling price is how much?

Mr. RYAN. I will get to that in a minute; the difference in the selling price is the point I am reaching. The general impression is that concerns dump their surplus stock in Europe; that on account of being protected by the tariff in this country they maintain their prices here and get lower prices in Europe. That may be true as to some concerns which have the benefit of the tariff, but, gentlemen, we are not protected by the tariff and have not had any protection for 16 or 17 years. We produce in this country 75 per cent of the copper of the world, and we sell 55 per cent of all we produce in an unmanufactured form to the rest of the world to manufacture and put in shape for the markets of the world. When we sell that copper in Europe—to Germany, England, and France—we have to sell it to combined buyers. Repeatedly and regularly the dealers or consumers of Europe have combined to force the American manufacturers of copper to unload, especially at times when business conditions were not good and when a surplus was accumulating. At those times they have almost named their own price, and the result has been that on a business of $850,000,000 in raw copper in 14 years, from 1901 to 1913, inclusive, $450,000,000 of it was done with foreign countries, mostly in Europe, at a sacrifice of half a cent a pound as against the price secured in the sale of the product to domestic manufacturers. I am speaking now of our own business.

Now, that was not because we took any advantage of business conditions; we simply had to do it; we were doing the best we could. When the concerns here had large quantities of copper to sell and the trade was dull the European buyers combined and forced the unloading of large quantities of copper, and the domestic manufacturers were not able to combine; they had to trade in competition with those foreign manufacturers who were able to combine, and the result was that over a period of 12 or 13 years they paid a half a cent a pound more for their copper and started with a handicap as against the manufacturers of the world in that line of business; they started with a handicap of at least $10,000,000 a year on account of their inability to buy as well as the European manufacturers.

Mr. CARLIN. What percentage of copper did you say was mined in this country?

Mr. RYAN. Seventy-five per cent of the copper of the world, and of that 75 per cent 55 per cent is sent to foreign countries for manufacturing purposes; that is, it is sent out in its raw state.

Mr. RYAN. Forty-five per cent of our own product and about 20 per cent of the world's product used in this country. That there is something radically wrong in this business I think you will all admit when I give you some figures from the Government's Bureau of Statistics, starting with 1896 and going up to and including 1910. The Government's statistics are correct, as I know from our own business and experience. Those statistics show that in 1896 the value of exported manufactures of copper—that is, copper in its manufactured form—from this country was $119,000 and that the value of raw copper exported was $27,820,000. In 1910, which is the last year for which we have any figures, the manufactured products of copper exported had a value of $5,132,000 and the exported raw copper had a value of $90,411,000. We are mining this natural product; this country is turning it out in its raw state, and because the manufacturers of the world are able to combine and have understandings and agreements and do all the things that domestic manufacturers are not permitted to do, they are able to buy this material to better advantage, and are able to do that even without any tariff, or anything else, to weigh in the balance. We are exporting the raw product that should be manufactured in this country and which would be manufactured in this country if the conditions of sale, exchange, and all that sort of thing were more favorable to the domestic manufacturers. Now, we are not manufacturers for export at all; we are only producers of the raw material.

Mr. CARLIN. Tell us just why that product is not manufactured here?

Mr. RYAN. Because the foreigner can buy it better and because he gets his labor to much better advantage; gets it at a lower cost. In this country we penalize the domestic manufacturer by permitting the foreign manufacturers to combine and buy the raw product to better advantage than he can buy it.

Mr. CARLIN. As a matter of fact, is not the copper manufacturer abroad all American?

Mr. RYAN. Not at all. There are no Americans in the copper manufacturing business abroad, and no American concern has a dollar, so far as I know, invested in the manufacturing of copper outside of the United States. I do not think there is an American manufacturer or an American concern engaged in the copper manufacturing business or with a single dollar invested outside of the United States.

Mr. CARLIN. What percentage of Americans are engaged in mining in this country? I do not mean in ownership, but in doing the actual mining.

Mr. RYAN. You mean the operatives?

Mr. CARLIN. Yes.

Mr. RYAN. I do not know; but speaking for our own mines in Montana, which are the largest copper mines in the world, we have 10,000 employees in the mines. We have 20,000 employees in

smelters, railroads, coal mines, lumber mills, and all that kind of thing, necessary to carry on our operations. But in the mines alone we have 10,000 employees. We keep a very careful record of every man's place of nativity and all that kind of thing, and last September when I looked at the records last I found that of the 10,000 men employed in our mines 82 per cent could read, write, and understand the English language.

Mr. CARLIN. How many of them are American-born citizens?

Mr. RYAN. I should say over 60 per cent. I think in our mines we have a large proportion of American citizens and American-born employees than perhaps in other mining sections, because we have always paid very high wages. We have in recent years had an eight-hour day and the conditions are, perhaps, better than they are in most mining countries. And then again we have since 1907 had a sliding scale of wages in effect in our mines, namely, that as the price of copper increases our wages increase. We have a division of profit arrangement with our men, and that arrangement has been running for the last seven years.

These matters, gentlemen, when you are considering these amendments to the Sherman act are very well worth your consideration. I am only speaking of the copper business, but there are many other lines of business. As I said, this country is the country of great natural resources. We are sending too much of our natural resources out of the country in the raw state; more of them should be manufactured here and would be if the right to do what is done in other countries were given to our domestic manufacturers.

Mr. MORGAN. Do you mean by that that you ought to have the right to make contracts; that is, that manufacturers ought to have the right to make contracts to buy?

Mr. RYAN. They ought to have the right to make contracts as far as they apply strictly to export business—to trade with an outsider. I can not conceive of any reason why this country should tie the hands of its manufacturers in any way in their trade with foreign countries.

Mr. MORGAN. In an article I was reading the statement was made that because of the reduction in the tariff on certain products, manufacturers here had gone abroad and combined with manufacturers there; that they had divided the trade and fixed up matters so that there would be no reduction and that we here would get no benefit.

Mr. RYAN. I presume that is so, but if domestic manufacturers combine with foreign manufacturers to fix up trade so there can be no reduction in prices to American consumers they ought to be put in jail. However, domestic manufacturers ought to have the right to combine amongst themselves on foreign business exclusively; that is, selling outside of this country. That is a thing which ought to be encouraged rather than penalized.

Mr. MCGILLICUDDY. You have said that a large percentage of the unmanufactured copper produced in this country is shipped abroad?

Mr. RYAN. The large percentage; yes.

Mr. MCGILLICUDDY. And that it is manufactured into the finished product there. Now, is there any considerable portion of the finished product returned to this country?

Mr. RYAN. Very little.

Mr. MCGILLICUDDY. Do you know about what percentage?

Mr. RYAN. Until now the finished product has always been prevented from returning by the tariff.

Mr. MCGILLICUDDY. So that none of it returned here in that state?

Mr. RYAN. Until now. Heretofore the tariff has been prohibitive and none of it returned in that state, and, of course, the change in the tariff is so recent that it is pretty difficult to tell what will be the effect, whether the foreign manufactured product will come back in manufactured form or not.

Now, take the attitude of Germany in comparison with our own in the matter of exporting its natural resources. You are more or less familiar with the potash resources of Germany; they are the greatest of the world. Germany supplies the world, practically speaking. Now, potash, as you all know, is required in the manufacture of fertilizers, and some of our fertilizer manufacturers went to Germany and made a contract to take the output of certain potash mines in Germany. The German Government, acting in connection with the potash syndicate, canceled those contracts. The Attorney General of the United States and the Department of State took a hand in it, but got no satisfaction from the Germans. The German Government says to the world, "We have these natural resources; they are for the Germans and we will make every other country pay for them." Now, as I have said, this is the country that has the greatest natural resources, and we ought to make every other country pay for them.

Mr. MORGAN. Do you know of any other mineral product where this same thing is done—where a large part of the product is sent abroad?

Mr. RYAN. Yes.

Mr. MORGAN. What else?

Mr. RYAN. Spelter. This country is now producing and gaining very rapidly in the production of spelter; it is a great producer of lead, and it is a great producer of silver. Of course, silver is in a somewhat different position. We made 14,000,000 ounces of silver and we sold nearly all of it in the London market. We can not protect ourselves against the foreign buyer of silver; we simply have to take the price he pays for it in the London market.

Mr. THOMAS. Do the copper operators sell all of their material abroad at a loss? Do they not make a profit out of it?

Mr. RYAN. Certainly, they do.

Mr. THOMAS. Then as I gather from your remarks you want the law so framed that these copper operators can combine and regulate the price in all foreign markets—is that it?

Mr. RYAN. I did not say that I wanted that. I have suggested that the law be framed so that the copper operators, as you call them, or the producers of copper in this country, can protect themselves against the combined buying power of European countries; that is all; not to raise the price or regulate the price, but to put themselves in the same position to trade from the selling side that the foreign buyer is in from the buying side.

I have talked longer on that point than I expected to talk, but I want to refer to the latter part of that paragraph, which provides:

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.

Now, gentlemen, I do not think a mine ought to be singled out. I understand that was the idea in framing this paragraph; but a mine sells its product just the same as any manufacturer sells his product; it finishes it up to a certain point; it has its brands; it cultivates its customers; it builds up its custom, and in times of scarcity of material it protects its customers; it carries stock for them and keeps them going; but under this provision anybody could come in at any time and ask to be supplied. For instance, an individual who had not done a dollar's worth of business with us for 10 years could come in under this provision and lay down a certified check in front of us and we would have to hand him our copper. Now, further than that, in the mining States the mining business is done in a small way in hundreds of little mines; hundreds of individuals and partnerships producing from little mines and selling to smelters. Under this language none of these little mines could make contracts for the exclusive sale of their ore, and if they could not make such contracts nobody would be bound to take the ore when they got it ready for the market. Now they can make their contracts and the smelters agree to take a carload a week, or a carload a day, or whatever it amounts to, and the miner can always have his market and the smelter is bound to take the ore under the contracts made with the miners. But under this provision a contract would not be of any use and a miner could not depend on having his product taken from him after he had produced it.

Mr. MORGAN. Before you leave that section I would like to suggest that you append to your remarks, in revising them, a provision in such language as you think would accomplish the purpose intended and yet in no way affect local interests.

Mr. RYAN. I would hesitate to do that. I am a plain, ordinary man of business, and have not the legal knowledge requisite to draw a provision such as would even cover my own views. I might call in some one who had that knowledge and work with him and do it.

Mr. MORGAN. Sometimes, you know, the idea of a merchant, manufacturer, or business man is important even to the lawyer who knows how to put ideas into legal form.

Mr. RYAN. Yes; I understand that, and I could do it in that way. I would be very glad to give my ideas to some one who could put them in such form as to be of use in comparing the original provisions of the bill and the suggested changes.

Mr. VOLSTEAD. I should judge, however, that you would run a pen through the whole section, would you not?

Mr. RYAN. No; I do not think so.

Mr. VOLSTEAD. What features of that section would you favor?

Mr. RYAN. Oh, that particular section?

Mr. VOLSTEAD. Yes.

Mr. RYAN. Yes; I think I would run my pen through all of it. I do not think it is practicable to make equal prices for a product that is sold in a large way throughout this country and all over the world.

Mr. MORGAN. What would you think of this proposition? Instead of having a provision like that, declare in some way that the prices shall be reasonable? What effect would that have?

Mr. RYAN. I would not want to feel that we had to submit to somebody's judgment who had never been in our line of business as to what was a reasonable price. For instance, you might say that copper at 15 cents a pound is a reasonable price because it costs some mines 10 cents and other mines 14 cents or nearly 15 cents. It might depend upon who sold it whether it was reasonable or not. One person might give consideration to the fact that in exhausting our mines we are exhausting our capital, because every pound we take out is so much taken out of our capital. Another person, as in the case of the income tax, would not give us credit for that; that is, for exhausting our capital in that way.

Mr. MORGAN. What percentage of the copper in this country does your company produce?

Mr. RYAN. Nineteen or twenty per cent.

Mr. MORGAN. And are there any larger producers than you are?

Mr. RYAN. No; we are the largest producers.

Mr. MORGAN. Are there a number of other companies that are large producers?

Mr. RYAN. Yes; there are four other concerns that produce another 40 per cent.

Mr. MORGAN. Then there is practically 60 per cent produced by five companies?

Mr. RYAN. Well, let us say groups; not exactly companies, but groups.

Mr. VOLSTEAD. What is the name of your company?

Mr. RYAN. The Amalgamated Copper Co.

Mr. MORGAN. Do you not think that those five companies have such control that they can practically dictate the prices?

Mr. RYAN. No; if they had such control that they could dictate the prices they would be subject to prosecution as the law stands to-day. Competition between large groups is very much more fierce than it is between small dealers in any article, because the large manufacturer or large producer, when trade is slow for a few days or a few weeks, accumulates so much stuff and ties up so much money, that he is very anxious to get to his market and get there ahead of the other fellow. There is more competition in this particular business than there is in the marketing of any other product that I know anything about on account of the fact that five or six interests or groups make and sell such a large proportion of the product.

Mr. MORGAN. You say you produce about 19 per cent. What is the total annual value of the output of your mines?

Mr. RYAN. Last year the total production of copper in this country was 1,200,000,000 pounds, and it was sold at an average of about 15 cents a pound. You can very easily figure that out.

Mr. CARLIN. What is the name of your company?

Mr. RYAN. The Amalgamated Copper Co.

Mr. CARLIN. How many companies has it taken to form that company?

Mr. RYAN. We have one company that produces all of the copper. We have a small interest, less than 10 per cent, in two other companies—one of them in Mexico, not operating in this country at all;

and one in Arizona, not producing at all, it has not commenced production as yet. But our production comes from the Anaconda mines, the Anaconda Copper Mining Co., and the Amalgamated Copper Co. owns 75 per cent of its stock. We produce approximately 250,000,000 pounds a year.

Mr. CARLIN. Where is your company chartered?

Mr. RYAN. The Amalgamated Copper Co. is chartered in New Jersey, and the operating company, the Anaconda Co., is chartered in Montana, the place where the mines are located.

Mr. CARLIN. Which is your company?

Mr. RYAN. The Amalgamated Copper Co.

Mr. CARLIN. What percentage of copper ore, as far as is known with certainty, does your company control in this country?

Mr. RYAN. We control, as I said, about 20 per cent of the output of this country.

Mr. CARLIN. What percentage of the mines do you control?

Mr. RYAN. That can not be determined. It is not like iron ore. Copper ore is not blocked out and measured so that we can say we have so many million tons, because the nature of copper-ore deposits in mines that we work is such that no one can see a great many years ahead. There is no way of arriving at even the approximate tonnage of copper that anybody owns or that our concern owns or that is owned in the whole country. From the total known copper resources of this country, as far as the developed tonnage in the mines is concerned, it would seem that copper in this country will be exhausted in 15 years. Now, I have not any idea that the country is not going to be a very large producer of copper at the end of 15 years and for many 15 years thereafter, but answering your question, Mr. Carlin, the total developed resources would be exhausted in 15 years.

Mr. THOMAS. You say the Amalgamated Copper Co. is chartered in New Mexico?

Mr. RYAN. No; in New Jersey.

Mr. CHANDLER. You said it was chartered in New Mexico.

Mr. RYAN. I meant New Jersey.

Mr. THOMAS. You have no copper mines in New Jersey?

Mr. RYAN. No.

Mr. THOMAS. Your mines are in Montana?

Mr. RYAN. Yes, sir.

Mr. THOMAS. Why did you not incorporate your company in Montana?

Mr. RYAN. The Anaconda Co., the producing company, operates in Montana, and that is the Montana corporation.

Mr. THOMAS. But why was not the Amalgamated Copper Co. incorporated in Montana instead of in New Jersey?

Mr. RYAN. There was no provision in the Montana laws at the time the Amalgamated Copper Co. was organized which permitted a corporation to hold the stock of other corporations, and the Amalgamated Co. was organized for that purpose—to hold the stock of other corporations.

Mr. THOMAS. How long has it been incorporated?

Mr. RYAN. It was incorporated in 1898 or 1899, I think.

Mr. CARLIN. How many corporations did it take over?

Mr. RYAN. Well, it took over five or six actual producing companies, but all in the same district, in the some locality, and in the same group.

Mr. CARLIN. And they were competitors at that time, were they not?

Mr. RYAN. Yes, sir; they were.

Mr. CARLIN. And they are not competitors now?

Mr. RYAN. They are not competitors now. The physical property of these companies is owned by the Anaconda Copper Mining Co. now—that is, the physical property—and the Amalgamated Copper Co. owns stock in the Anaconda Co.

Mr. MORGAN. How about the other copper companies—are they holding companies?

Mr. RYAN. Some of them; yes.

Mr. MORGAN. Would you say that a large number of them are corporations of that kind?

Mr. RYAN. No; I think not. However, I think the larger part of them are holding companies in a sense—that is, they hold the stocks of subsidiary companies—because it is a difficult thing to operate in different sections with one corporation. They all hold the stocks of subsidiary corporations that are engaged in producing different things—some of them in coal mining, some of them in railroads, and some of them in producing timber and one thing or another for their own needs.

Mr. CARLIN. For the information of the committee, just what was copper selling for per pound before the organization of this holding company?

Mr. RYAN. I do not know how far back, but the fluctuations of copper have not been much different since the organization of that company than before. The average price of copper for 20 years previous to the incorporation of the Amalgamated Copper Co., or, say, 15 years, was as high as it was during the 15 years since the company was organized. It has not affected the average price at all.

Mr. CARLIN. Now, as to the cost of production. What was the average cost of production?

Mr. RYAN. I do not think there has been any very great change in the average cost of production, because the output is constantly running to lower grade ores. To-day mines that were considered absolutely worthless, not worth talking about or to be considered on account of the low-grade ores they contained, are among the most profitable mines in the country. Such mines 10 years ago were not considered at all.

Mr. CARLIN. That is due to the improved processes of smelting?

Mr. RYAN. Yes, sir; largely. Mining used to be a small business, conducted by individuals and small corporations which did not have the capital that was necessary. Now, gentlemen, you all have mistaken ideas about the intentions of some of these companies. I can see that from your inquiries as to why this company was incorporated in New Jersey. These companies have to provide great amounts of capital. The first partnership that owned the Anaconda mines was incorporated in the form of a company, but it was practically a part-

nership, because it was owned by five men. They happened to be rich men, and they happened to be very rich men, but——

Mr. CARLIN (interposing). And the holding companies are controlled by about the same number of men, are they not?

Mr. RYAN. No. You gentlemen are confusing me a little; you are getting me a little tied up; but I will just answer by saying that the Amalgamated Copper Co. has an average holding of about 100 shares; in other words, it has about 15,000 shareholders, just about.

Mr. CARLIN. But where is the control?

Mr. RYAN. The control is in the public; there are no 5 men controlling, and no 50 men, outside of stocks held in brokerage houses. A few individuals do not control it.

Mr. THOMAS. Are there any copper companies operating in Montana except the Amalgamated Co.?

Mr. RYAN. Oh, yes.

Mr. THOMAS. Any independent companies?

Mr. RYAN. Yes, sir.

Mr. THOMAS. How many?

Mr. RYAN. I should say eight or nine.

Mr. THOMAS. What is the amount of their product as compared with the product of the Amalgamated Co.?

Mr. RYAN. I should say about 10 per cent of the Amalgamated Co.'s product.

Mr. THOMAS. So that the Amalgamated Co. owns all the copper in Montana except about 10 per cent?

Mr. RYAN. Oh, no; however, it is mining about 90 per cent of the copper that is mined in Montana, 85 per cent or 90 per cent.

Mr. THOMAS. How many holding companies did the Amalgamated Co. acquire after it was incorporated in New Jersey?

Mr. RYAN. It did not acquire any holding companies; it acquired the stocks of operating companies.

Mr. THOMAS. How many?

Mr. RYAN. Five or six.

Mr. THOMAS. They were competitors, were they not?

Mr. RYAN. Yes, sir; to some extent.

Mr. THOMAS. And you say the laws of Montana did not allow you to take over such companies?

Mr. RYAN. The laws of Montana did not permit the holding of stocks of other corporations.

Mr. THOMAS. And for that reason you were incorporated in New Jersey, so that you could acquire these companies and stifle competition?

Mr. RYAN. No.

Mr. THOMAS. They were competitors, were they not?

Mr. RYAN. We acquired these companies, developed the mines, and marketed their product in a systematic and decent kind of a way.

Mr. THOMAS. Were they not developing their mines and marketing the product?

Mr. RYAN. Not all of them were developing in the way they should be developed. As a matter of fact, I was just going to say that the people who owned the Anaconda Co., and who sold it to the Amal-

gamated Co., had put into the ground and expended $10,000,000 before they took out one dollar in dividends; they got that property up to the point where they wanted to reimburse themselves and where the development of the property required even more money than that. They had to go to the public, and in going to the public the Amalgamated Co. was made necessary and the public's money was then put into this business, and it has been a profitable business, but not too profitable. The Amalgamated Co. has earned about 5 per cent on its capital stock, which was sold at par. The Amalgamated Co. has earned about 5 per cent on its stock since 1898.

Mr. THOMAS. What is that stock worth?

Mr. RYAN. The last figures I saw made it worth about 76.

Mr. CARLIN. What percentage of copper in this country is found outside of Montana?

Mr. RYAN. Montana is the second State. As a copper-producing State Montana is second and Michigan is third. Copper is produced in New Mexico, California, Idaho, and in almost every one of the Western States, and there is considerable copper produced in Tennessee. Copper is generally distributed over all the mineral area of the United States. It is produced in a dozen other countries of the world, and the copper produced here is sold in competition with the copper from all over the world. We are paying our miners a minimum wage in Montana of $3.50 for an eight-hour day and selling in competition with copper mined by natives in Africa who work for 30 cents a day.

Mr. THOMAS. Where are the mines in Tennessee?

Mr. RYAN. At Ducktown. Now, this country imports copper in ore and matte, in an unfinished state, for the purpose of refining, and does not manufacture more than 5 per cent of what it exports, in spite of the fact that without doubt the manufacture of copper in the United States is up to date and as far advanced as it is in any country in the world. But the market handicaps of the American producer has kept him out of the markets of the world and will keep him out just as long as you gentlemen do not give him the right to do what producers in other countries of the world are encouraged to do.

Mr. CARLIN. What handicaps do you refer to?

Mr. RYAN. The American has to buy the raw material, and, of course, has to pay higher wages. That is to be expected and we hope it will continue. He has to buy his raw material and can not combine in the selling of his product in foreign countries.

Mr. CARLIN. But he has combined. Your company has combined.

Mr. RYAN. What is that?

Mr. CARLIN. Your company has combined.

Mr. RYAN. I know; but any company that is doing 12 or 13 per cent of the business of the world, and 20 per cent of the business that is done here where 40 per cent more is done by four or five other companies, has not combined in a way that will help.

Mr. CARLIN. You think it would be helpful if we would permit you to combine all of the copper mines in this country into one holding company?

Mr. RYAN. I would not suggest that at all, but what I would say is this: It would be very helpful if you would permit me and permit every other man in the copper business to have understandings, agreements, or anything else as against the foreign buyers of copper.

Mr. CARLIN. I think there is a great deal of force in your suggestion, and I was trying to get at what sort of combination you would want to form, in order to enable you to do that.

Mr. RYAN. I would simply follow out the bill here which prevents any agreement or any understanding or anything of that kind. Here it is in the bill:

> Fourth. To make any agrement, 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 would simply modify that by saying, "*Provided, however*, That this does not apply to products that are being exported exclusively." That is all.

Mr. CARLIN. I think there is a great deal of force in your suggestion.

Mr. RYAN. That is all. If you gentleman around here owned all of anything in the United States, whether it was iron, copper, wheat, or anything else, and each of you had to use and did use some of it—I am saying you gentlemen, because you represent the United States—and you had to export three-fourths of it and got your money from outsiders for it, it would be good business for you to agree that you would compete among yourselves for what you needed for yourselves, but that when you traded with an outsider you would let Mr. Carlin, or Mr. Floyd, or Mr. Clayton, or somebody else do the business, because the outsider would be trading with you as they do with us. I have seen copper producers in this country, a dozen of them, in the most bitter competition at times, especially when business was depressed, and where stock had accumulated to the point that they were borrowing money to carry on their business—I have seen them confronted by practically one buyer represented the buying power of Europe, and they were forced, of course, to take the price offered.

Mr. MORGAN. As I understand it, your idea is that every producer should be allowed to combine in order to compete with the producers abroad who do combine?

Mr. RYAN. With the buyers abroad who do combine; not the producers abroad but the buyers. I would not permit any combining on the part of the domestic producers with the foreign producers. If you caught me in any arrangement with any producer of copper in New Mexico, Arizona, or any other State on domestic business then I would expect to get what was coming to me. What I do say is that you ought to allow the American producer, the American manufacturer, to combine in such a way as to help him sell his goods at the best price he can to foreigners.

Mr. MORGAN. That is based on the ground that it is necessary, because of the fact that combinations are made abroad?

Mr. RYAN. It is not only necessary on that ground, but it is desirable from the point of view that it is the best possible thing for a company in this country to get every dollar it can get in selling its goods in the markets of the world outside of this country.

I am afraid I am getting tiresome, gentlemen, but I would like to say a word with respect to holding companies. Such a bill has

not been introduced as yet, but the footnote says a bill affecting holding companies will be introduced. When the holding company bill comes before you gentlemen I would like you to have in mind the necessity for doing business in separate States and in foreign countries, whether it is a mining corporation or a manufacturing corporation, or any other corporation. For instance, if we want to own a mine in Mexico or a mine in any foreign country we can not own it there with our own corporation. In the first place, we can not take our American corporation and domicile it in any of the foreign countries, and if we could the foreign country would not permit us to do it because in most cases they will not permit the ownership of minerals except by domestic concerns or individuals who are citizens of those countries.

Mr. CARLIN. I do not see how any prohibitory definition could be drawn concerning holding companies that would not include your company.

Mr. RYAN. I am not asking for any protection for my company in any general regulation as to holding companies, but what I say relates to every company that holds the stocks of companies that are not competitors.

Mr. CARLIN. Now, that is the point. You are holding the stocks of companies that were competitors.

Mr. RYAN. Yes; they were competitors, but to a small extent, the same as you might say that 8 or 9 grocers in the city of Washington out of probably 80 or 90 are competitors, but we did not stifle any competition; we did not buy up anybody's product. It is just as free and unrestricted in the markets of the world as it ever was.

Mr. CARLIN. Does your company own mines in other States than Montana?

Mr. RYAN. We own about 10 per cent in a mine in Arizona that has never produced copper; it is just reaching a stage where it will commence to produce. Then we own about 10 per cent of a mine in Mexico.

Mr. CARLIN. What is going on in Mexico?

Mr. RYAN. You certainly would not suggest that we be prevented from holding stocks in a company in Mexico or any foreign country, even though it were a competitor of ours in business.

Mr. CARLIN. Is your Mxeican mine now being operated?

Mr. RYAN. Yes.

Mr. CARLIN. It has not been affected by the disturbances down there?

Mr. RYAN. Well, to some extent. It has not shut down; it is operated to some extent, but not fully. It is in a portion of the country controlled by the constitutionalists, so called. We have been running to some extent and have never had any actual riots or anything of that kind. That is due to the fact that the mines are located very near the border; they are only about 30 miles from the Arizona line, and they are pretty well protected and cared for.

There is another thing about holding companies that I would like you to have in mind, and that is the necessity for selling the products of American producers in other countries through selling organizations. There must be selling organizations, and the business can not be done otherwise. For instance, if we should take our com-

pany and domicile it in England, Germany, or any other country, we would be subjected to all kinds of taxes and all kinds of trouble that you do not want to subject us to, or it would bring about the other alternative, that of compelling us to sell outright to somebody who would act as a middleman or speculator, and if that were done it would mean the taking of profits that belong to our shareholders and belong to the public interested in our properties generally. If the provision against holding companies should go to the length of prohibiting the holding of stock in selling organizations abroad I would be very much inclined, knowing as much about the business as I do, to sever my official connection with my companies and become a middleman. I think that would be the fattest kind of a job I know anything about.

Mr. CARLIN. What are the general industrial conditions in Montana now?

Mr. RYAN. Senator Myers will testify that Montana has never been in better condition. Montana has been prosperous. The mines have been in operation and they have been paying good wages; labor has been well employed; agricultural conditions are good, and we are one section of the country that has not felt any marked change in employment or in trade.

Mr. CARLIN. The Democratic administration, then, has not proven a hardship in Montana?

Mr. RYAN. Not at all. We have a Democratic administration in Montana and we have gotten accustomed to that for a long time, although it is a very close State. It has not hurt business affairs in Montana.

Senator MYERS. That does not hurt Mr. Ryan at all, because he is a Democrat himself.

Mr. RYAN. Gentlemen, you have been very good to me and, as I say, I have been rather tiresome. However, there is one other thing to which I want to call your attention. In the last bill, No. 3 of the committee print, on the first page, is a provision regarding interlocking directors. It says:

> 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, etc.

Now, I do not know of any mines, outside of coal mines, that sell any supplies to railroads, except in a——

Mr. CARLIN (interposing). Take your trade. What percentage of your products would the railroads consume?

Mr. RYAN. I do not know; but a very small portion. Of course, we sell wire for telegraph lines and telephone lines, and the copper that goes into the brass that is used by railroads. But railroads are not our big customers. The utilities companies and the electric companies are our big customers. Copper is the most generally distributed product that you can imagine. You can look around and see it everywhere; it is in every door knob, in every hinge, and everywhere.

Mr. CARLIN. Has the automobile increased the demand for your product?

Mr. RYAN. Very largely. It is estimated that 40 pounds of copper goes into every automobile that is manufactured, although some have very much more than that and some less. But it is estimated that an average of 40 pounds goes into every automobile manufactured. The automobile business has helped us materially, although the development of the electrical business has built up the copper business.

As I said to you before, one concern, one partnership, spent $40,000,000 in the development of its properties before it took anything out in dividends, and when that concern started to develop its mines in Montana there was no known treatment of the ore. When the first ore was taken out of these mines it was actually sent to Swansea, in Wales, for treatment. In spite of that fact, the industry has been built up by the investment of this large capital in Montana, and to-day it employs 20,000 people. They are among the best-paid, the best-clad, the best-fed, and the happiest people in the United States. Now, have that in mind when you are considering——

Mr. MORGAN (interposing). What is the capital of that concern?

Mr. RYAN. $155,000,000.

Mr. PETERSON. You spoke about subsidiary companies. Does your holding company hold the stock of those subsidiary companies?

Mr. RYAN. It owns 75 per cent of the stock of the producing company. Now, further answering Mr. Carlin's question, I will say that of the companies that were taken in and combined into the Anaconda Co., the Amalgamated Co. owned about 99 per cent of the stock of all but one. These companies were not companies competing in the markets of the world, and these companies were not taken and put together in order to stifle competition, as Senator Myers can tell you. I am referring to him often because he lives in the State and he knows our condition. He always has lived there. These properties were owned more or less individually; men of large means developed them, and the ownership was simply transferred from these groups of individuals to a very much larger group of the public, the management, of course, being concentrated.

There is one thing in section 4 of the second bill to which I want to call attention. In line 10, after the word "corporation," I suggest inserting a comma. An innocent director, an innocent employee, or an innocent agent of the corporation would be incurring the penalty if——

Mr. FLOYD (interposing). Will you give that again, please?

Mr. RYAN. In bill No. 2, page 3, line 10, where it provides, "directors, officers, and agents of such corporation authorizing," I would suggest that a comma after the word "corporation" would be necessary in order to save an innocent director, employee, or officer of the corporation from getting into trouble.

I think the interlocking directors' bill as it is drafted here is pretty radical. I think it would destroy the usefulness of a great many men in a great many concerns. I will say that in my own case I am a director of a railroad, the Chicago, Milwaukee & St. Paul Railway Co.; I am a director of a national bank in New York, and of a trust company. I do not think the national bank that I am a director of or the trust company that I am a director of ever had any business with the Milwaukee Railroad Co., but——

Mr. CARLIN (interposing). You very seldom have any business with the bank.

Mr. RYAN. Do I?

Mr. CARLIN. Do you attend the meetings of the board of directors?

Mr. RYAN. I attend them very regularly. I rarely miss a meeting of the board.

Mr. CARLIN. Are you living in Montana?

Mr. RYAN. I spend what time I can in Montana. Montana is my residence.

Mr. CARLIN. The complaint against this directors' bill has been made that it does not mean anything and that it is not drastic, but instead that it opens the way for dummy directors.

Mr. RYAN. That is my feeling about it. If the bill is enacted as it stands, the bank boards and other important boards of the country would be filled largely with dummy directors.

Mr. CARLIN. Do you not think that a very large percentage of the directors now are dummies, in a practical sense?

Mr. RYAN. Oh, I think not. I think since the insurance investigation in New York a few years ago the personnel of the boards of directors has improved wonderfully. There is more real directing done by boards of directors than there used to be, and I think very generally that men are taking seriously their duties as directors of corporations. I find very much more serious interest in the affairs of corporations generally than there used to be. Gentlemen, I hope you will have in mind, when you come to the final consideration of this bill, what I said here, although it might not strike you favorably at first, as to the desirability of giving producers and manufacturers and merchants of this country a free hand in dealings with the rest of the world. Tie them down all you please, so far as the domestic trade is concerned. I do not think any man or combination of men should be allowed to regulate the prices of commodities in domestic trade. That is a dangerous thing to do. Men are greedy; they are born that way, most of them, and they might take advantage of it. But it does not make any difference whether they are greedy or not; it does not make any difference, except for the benefit of the country, what they do in combination in the business with the outsider.

Mr. CARLIN. Are you a director in the Montana company?

Mr. RYAN. Yes, sir.

Mr. CARLIN. Where do they hold their board meetings?

Mr. RYAN. They hold their board meetings in New York. I am a director and not a president.

Mr. CARLIN. Are you a director in the holding company, the New Jersey company?

Mr. RYAN. Oh, yes; I am president of that company.

Mr. CARLIN. Where do they hold their board meetings?

Mr. RYAN. In New York. I am president of that company. I am very much obliged to you, gentlemen.

Mr. CARLIN. The committee is obliged to you, sir.

Mr. RYAN. If there is anything else that you should feel like asking me at any time, I will be very glad to come down here again, if you will let me know; I will be glad to answer any questions by letter, if they will help you any.

Mr. CARLIN. The committee has been very much interested in your statement.

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 12.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Thursday, February 12, 1914.

The committee this day met, Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. Mr. Cole, will you give your full name and address and occupation?

STATEMENT OF MR. ARTHUR W. COLE, SALES MANAGER M. J. WHITTALL CARPET MILLS, WORCESTER, MASS.

Mr. COLE. Mr. Chairman and gentlemen of the committee—I hope I may conscientiously and sincerely say friends—your chairman accepted my proposition to come down and appear before you so promptly that he really took away my breath and I have had only about two or three hours in which to collect the points that I wished to bring before you, and while that might not seem much to you gentlemen in public life, it is considerable to a layman. When I am off duty I am a farmer, and if you gentlemen will just excuse me I will put this before you in a sort of a farmer's way. I think I can give it to you much more quickly, and when I get through, if you want to use the hammer a little bit, I think perhaps you can draw out the points you wish to draw out.

I take it for granted that the objective of this committee is the framing of a law or laws which will insure justice to all, whether rich or poor, producer or consumer; in fine, an equal law for all citizens without distinction.

Before I go further there I may say that I intend to address myself particularly to the part of uniform retail prices.

I wish, first, to place before you as briefly as possible the position of the producer as regards the prices at which his product is sold to the consumer, and later to consider the consumer's side of the subject if there remain any points where their interests have not been shown to be identical.

When I mentioned the word "producer" I do not want you gentlemen to conjure up an individual who simply takes in all the profits there are in the business. In our individual case it means pratically 2,000 men, all dependent, from the lowest to the highest, on the success of the business, and just as worthy of the consideration of you gentlemen as if they were engaged solely in consumption.

I have the honor to represent a firm which has for a long time past sold its products direct to the retail dealer at a uniform price to all. It has been our policy to place the small dealer on an equal plane with his big competitor. We have gone even further; we have suggested to these same retail dealers that they pursue the same policy with the consumer. We have never fixed a price in the sense of an agreement. We have endeavored to keep in touch with the cost of doing business in our particular lines, and on the basis of the information thus obtained we have from time to time made up a retail price list which we have submitted to our customers, suggesting it as being fair to all concerned, and have expressed a hope that they would see their way clear to adopt it.

We have never exercised any coercion. Whenever we have failed to get support we have simply withdrawn and allowed some other manufacturer of similar fabrics to take our place. Our sales have generally exceeded our production.

I think I can explain my position on the uniform price question easily and quickly if you will allow me to introduce a little of the inside history of my firm.

Mr. M. J. Whittall, its founder and still its dominant factor, came to this country comparatively a poor man many years ago. He was skilled in all branches of his business. His ambition soon led him to start in business on his own account. Step by step he has risen from the very bottom, gaining not only a nation-wide reputation for his fabrics but the trust, the respect, and even the affection of his competitors, whom I think I do no injustice in saying freely accord to him the head of his profession.

Along with his success have come problems. When he was making his way to the top his goods were dumped into the retail stocks and sold along with others for just ordinary goods. When his skill in building fabrics, coloring, and designing lifted him from the ranks, and consumers began to demand his goods, his troubles began.

You might think this an ideal condition; all that he then had to do was to build more mills to meet the demand. Unfortunately such a conclusion overlooks the fact that retail dealers are in business to make money. This is nothing to their discredit. With them it is a question of make or go bankrupt. The moment any article of com-

merce becomes well known and a demand for it is created that moment it becomes a shining mark for the confirmed price cutter, and the moment the price cutter gets busy the reputable merchant is either forced to drop the article or restrict its sale as much as possible. Let this condition obtain over a wide area, and it will readily be seen that the ruin of the manufacturer or the cutting of his quality to meet the new situation is absolutely certain.

Now, I ask you, gentlemen, in all fairness, whether such an ending is a just reward for a lifetime of endeavor to reach the ideal? Who and what is profited? The attempt of a few notorious price cutters to pose as public benefactors is too ridiculous to merit your slightest consideration. What it costs to do business is well known within a narrow margin. When, therefore, a firm offers an article at a price which affords a profit below what it costs to do business, it is at once evident that it is not offered in the usual course of business, but with an object to accomplish something which may not be evident except to those on the inside.

Too frequently in the past it has simply meant the wiping out of some single line of business by the big department store.

The first question, gentlemen, is, then, whether the producer is justified in protecting the labor of his lifetime by demanding that his wares shall be sold at legitimate retail price?

The second question is, Does the consumer profit by price cutting?

Let us see what happens to an article that the cutter gets after.

If he were sincere in his claims of philanthropy he would continue to push the sale of the article, but, on the contrary, we know that as soon as other dealers throw the article out in disgust he also throws it aside as a child would a sucked orange. Then what happens? The consumer is either unable to get the article at all or, as so often happens, the manufacturer is forced to cheapen the article to meet the price which the public has been taught by the long continued cut price advertising to consider a fair price for same.

Now, I want to say a word as to the effect of the uniform price on the cost to the consumer. I eat Kellogg's toasted corn flakes for my breakfast every morning at home, and I never woke up to how badly I was being robbed until I saw it in a magazine. Then I looked around and I found I could buy a bigger package of apparently the same thing, with a picture of the Father of my Country on it as a guarantee that nothing could be better. But I am still eating Kellogg's, although I have made up my mind that if my own business gets bad I am going to profit by that magazine tip and go into corn flakes before my 99,000,000 fellow citizens wake up to the profit there is in it.

It is just the same in my business. There are more than a dozen firms making the same class of goods, so it is optional with both the dealer and consumer which they use, but it seems to be just like the corn flakes.

I had a fellow blow into my office from Texas some months ago. Goodness knows they are wise on monopoly down in that country! He said, "I have listened season after season to traveling men tell about their goods being as good as Whittall's, or the next best thing to Whittall's, or 'We copied it from Whittall's,' until I made up my mind to go North and see the real article." We didn't coerce him. In fact, we did not even go after him, but we felt it would cost too

much to get the business. He can go back to selling the "just as good" any time he wants to, and no doubt his competitors are seeing to it that the consumer has the same chance.

I firmly believe that a man's life efforts in building up a business is in effect property; that he is justified in protecting himself from those who would destroy its value by insisting that his product shall not be sold at prices which will not afford a living wage to those who handle it.

The tendencies of the times are to eliminate the ruthless features of competition in business. It is generally agreed that a business must afford a sufficient margin of profit to pay the workers a living wage and protect those who may be injured. Anything, therefore, that tends to make such a policy difficult or impossible is contrary to this spirit. The consumer has no right to profit by the misfortunes of the producer, and least of all as a hoggish retailer.

The big department stores some years ago put the bulk of the small single-line or carpet stores out of business. They did it partly because they were able to do business at that period of their career cheaper than the single-line store and partly because with a hundred and one other departments paying a profit they could conduct one department at a loss long enough to throttle the single-line handler of the same merchandise.

To-day, with the old-time merchant in our line out of the way, the competition in idle show amongst themselves compels them, as a rule, to ask a greater percentage of profit than the specialty merchant formerly required, and the consumer is footing the bills. They still, however, retain their power to down any manufacturer or any single-line merchant who has the courage to start in again, if they are free to procure the goods and name their own price on same.

There have never been any large amalgamations in the carpet trade. If one is desired, the first step is to deny a manufacturer the right to protect himself from such tactics.

Now, gentlemen, if you will let me digress for just about two minutes, there is one side issue which I would like to have you consider if you do not feel it irrelevant.

We have never had a strike in our mill. Mr. Whitall said to his men some years ago, "Boys, I am ready to pay you as much as anyone in the business, and perhaps a little more; but I can't pay much more and compete. When anything goes wrong, don't fetch anybody from the outside, but come up yourselves and talk it over," and they do. When a local organization made wall flowers of our help, because they could not get all the grime from under their finger nails, he built them a clubhouse. They go to and from their work, and their windows look out amid shrubbery and driveways as fine as surrounds the owner's own home. All these things cost money, and I suppose the consumer foots part of the bill, and are they not worth having? Are not these things and the care of the sick and their injured in accord with the spirit of the day?

Would you advocate their abandonment and the swapping of our English-Scotch help for near Asiatics that we might lower our price sufficiently to make that the sole object for purchasing our goods?

All that I have said on this subject has been better and more concisely set forth by Mr. Louis D. Brandeis, whose position on monopoly is too well known to leave him open to suspicion of selfish

interest. His article, which we thought well enough of to reprint in our trade journal, I beg to leave with you for your consideration. Also another article by Mr. Lee Galloway, professor of commerce and industry in the New York University.

Gentlemen, what I have said, and these articles which I herewith hand you, comprise my idea on this subject; and while you may feel there is a great deal of chaff in what I have said, I think you will—if you will think it over—find considerable meat.

(The articles here submitted by Mr. Cole are as follows:)

THE HIGH COST OF PRICE CUTTING.

[By Lee Galloway, Professor of Commerce and Industry, New York University, in Everybody's Magazine. Advertisement paid for by M. J. Whittall.]

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 merchandising.

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 merchandising. Smith hadn't though 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.

[The Rug Trade Review, May 15, 1913.]

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, soups, 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 guaranty 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 consumer 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 consumers 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 Carpet Trade Review, Sept. 15, 1913.]

BRANDEIS ATTACKS PRICE CUTTING.

A number of leading magazines have published an article by Louis D. Brandeis on the subject of price cutting, in which that well-known opponent of monopoly expresses himself as follows:

The American people are wisely determined to restrict the existence and operation of private monopolies. The recent efforts that have been made to limit the right of a manufacturer to maintain the price at which his article should be sold to the consumer have been inspired by a motive that is good—the desire for free competition—but they have been misdirected. If successful they will result in the very thing that they seek to curb—monopoly.

Price maintenance—the trade policy by which an individual manufacturer of a trade-marked article insures that article reaching all consumers at the same price—instead of being part of the trust movement is one of the strongest forces of the progressive movement which favors individual enterprise.

THE ARTICLE WITH INDIVIDUALITY.

There is no justification in fixing the retail price of an article without individuality. Such articles do not carry the guarantee of value that identifies them with the reputation of the man who made them. But the independent manufacturer of an article that bears his name or trade-mark says in effect: "That which I create, in which I embody my experience, to which I give my reputation, is my own 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 may confidently rely upon receiving when he purchases my article in the original package. It is essential that consumers should have confidence in the fairness of my price as well as in the quality of my product. To be able to buy such an article with those qualities is quite as much of value to the purchaser as it is of value to the maker to find customers for it."

THE DISTINCTION DRAWN.

There is no improper restraint of trade when an independent manufacturer in a competitive business settles the price at which the article he makes shall be sold to the consumer. There is dangerous restraint of trade when prices are fixed on a common article of trade by a monopoly or combination of manufacturers.

The independent manufacturer may not arbitrarily establish the price at which his article is to be sold to the consumer. If he would succeed he must adjust it to active and potential competition and various other influences that are beyond his control. There is no danger of profits being too large as long as the field of competition is kept open, as long as the incentive to effort is preserved, and the opportunity of individual development is kept untrammeled. And in any branch of trade in which such competitive conditions exist we may safely allow a manufacturer to maintain the price at which his article may be sold to the consumer.

PRICE MAINTENANCE ENCOURAGES COMPETITION.

Competition is encouraged, not suppressed, by permitting each of a dozen manufacturers of safety razors or breakfast foods to maintain the price at which his article is to be sold to the consumer.

By permitting price maintenance each maker is enabled to pursue his business under conditions deemed by him most favorable for the widest distribution of his product at a fair price. He may open up a new sphere of merchandising which would have been impossible without price protection. The whole world can be drawn into the field. Every dealer, every small stationer, every small druggist, every small hardware man can be made a purveyor of the article, and it becomes available to the public in the shortest time and the easiest manner.

Price cutting of the one-priced trade-marked article is frequently used as a puller-in to tempt customers who may buy other goods of unfamiliar value at high prices. It tends to eliminate the small dealer who is a necessary and convenient factor for the widest distribution, and ultimately, by discrediting the sale of the article at a fair price, it ruins the market for it.

ABOLISH MONOPOLY BUT NOT PRICE MAINTENANCE.

Our efforts, therefore, should be directed not to abolishing price maintenance by the individual competitive manufacturer, but to abolishing monopoly, the source of real oppression in fixed prices. The resolution adopted by the National Federation of Retail Merchants at its annual convention draws clearly the distinction pointed out above. The resolution declared that the fixing of retail prices in and of itself is an aid to competition, among other reasons, because it prevents the extension of the trust and chain stores into fields not now occupied by them. But the resolution also expresses the united voice of the retailers against monopoly and against those combinations to restrain trade against which the Sherman law is specifically directed.

Manufacturers and retailers are getting this distinction clearly in their minds, and it must soon be generally recognized by the public. What is needed is clear thinking and effective educational work which will make the distinction clear

to the whole people. Only in this way can there be preserved to the independent manufacturer his most potent weapon against monopoly—the privilege of making public and making permanent the price at which his product may be sold in every State in the Union.

Mr. COLE. If anyone has any questions to ask, I will be pleased to answer them.

Mr. WEBB. What article have you a patent on?

Mr. COLE. Upon no article; our raw material is free. The only copyright we have is on our brains.

Mr. WEBB. You have no trade-mark?

Mr. COLE. We have no trade-mark, except that which has been made by the keeping of our name before the public.

Mr. WEBB. What point is it that you desire to make?

Mr. COLE. The idea that a manufacturer or producer of any sort shall be able to protect himself and name a price on his goods; that he shall not be compelled to sit idly by and let people name a price on his goods which will, in effect, drive him out of business.

Mr. WEBB. You mean that everybody ought to have that right, whether protected by a patent or not—every manufacturer?

Mr. COLE. I do not see why he should not. I can conceive from what has been said here to-day that you may feel that a patent right gave a man an undue monopoly, but it is entirely outside of the point I am arguing. Personally, as a citizen of this country I have no objection to affording any man who has blessed his country with a patent the privilege of getting all he possibly can out of it. I can readily see that if he was deprived of this right he might be deprived of the entire advantage of his patent, because it would be possible to drive a patented article or a good many patented articles out of the market just as easily as one that was not patented.

Mr. MORGAN. You think that you not only should have the right to fix the price at which you sell to retailers, but that you should have the right to have some kind of an understanding about the price the retailer shall sell your goods for.

Mr. COLE. I do; I do not believe that a retailer who is selfishly inclined should have it in his power to drive a man who is honestly conducting his business out of business and ruin him.

Mr. MORGAN. Then, do you think you would have a right to refuse to sell goods to a merchant whom you knew was going to sell under the price you thought your goods ought to sell at?

Mr. COLE. I do.

Mr. MORGAN. And that you would have a right to refuse to sell goods to him any longer.

Mr. COLE. I do.

Mr. MORGAN. Or selling other goods—you manufacture but one line, carpets?

Mr. COLE. That is all; that is what makes us peculiarly susceptible to the attacks of anybody who wishes to injure us.

Mr. MORGAN. How large a capital have you—it is a corporation?

Mr. COLE. No; practically an individual business.

Mr. MORGAN. Of course, the rights you have you would be willing to share with every other manufacturer?

Mr. COLE. Most certainly I would, except I do not think that anybody who has a monopoly of material should be allowed to monopo-

lize the whole business, but I think there are so few instances of that sort that I think it is a negligible quantity.

Mr. NELSON. You would let every manufacturer in this country have the same right of fixing prices down to the consumer?

Mr. COLE. I would.

Mr. NELSON. What do you think about the matter of fixing prices to the consumer in that case where every man fixed his own price?

Mr. COLE. I do not think it would have any effect whatever. I think competition would take care of it.

Mr. NELSON. Where will there be any competition if every manufacturer fixes prices?

Mr. COLE. You would have competition in restraint of trade if the manufacturers agreed among themselves. I do not believe in letting manufacturers get together and make prices for that one article throughout their industry. I do not see why the individual should not be allowed to pursue his own course and let competition take care of the rest. You can not get a retail price on an article much in advance of what a similar article could be bought for.

Mr. NELSON. Would you have a commission pass upon the maximum price in order to save the consumer from any oppressive price?

Mr. COLE. I would not; I would let competition pass upon it.

Mr. WEBB. Well, sir, we are very much obliged to you.

The CHAIRMAN. Mr. Chamberlain, we will be glad to hear from you, and you may proceed in your own way.

STATEMENT OF MR. LAWRENCE CHAMBERLAIN, REPRESENTING THE INVESTMENT BANKERS' ASSOCIATION OF AMERICA, 141 BROADWAY, NEW YORK CITY.

Mr. CHAMBERLAIN. Mr. Chairman, I represent in an unofficial sort of a way the investment of bankers of the country.

I come before you not so much in either opposition or support of the present measures or present trust bills as to place before you the conditions of our industry, so that you may see the relations of these measures to the industry; but I can at the same time present to you our feeling regarding these bills and ask of you one or two questions to show the effect that these bills may have on our industry.

I think it is a splendid relationship that obtains when one can be so hospitably received as I have been and made to feel that the various business interests of the country are welcome to present their thoughts on these legislative matters.

The investment bankers of the country, of course, obtain all the capital for the enlargement of American enterprise that is not obtained through the raising of funds locally by local promoters and local capitalists. Therefore it is fair to say that whatever restricts their operations restricts their ability to obtain capital and is a hinderance, whether necessary or otherwise, to the business of perhaps a hundred thousand of our most important corporations.

I should like to speak a word about the trade-commission bill, although it is not before this committee, but it has a bearing on the thoughts that follow.

I understand that it is the purpose of the present Congress to establish a trade commission, with what amounts to inquisitorial powers over our business, as well as over a great many other busi-

nesses. Bonds and stocks, I am told by my friends the lawyers, are coming more and more to be considered and treated under legislative decisions as articles of interstate commerce, not necessarily, perhaps, commodities, but subject to any rules and regulations that deal with articles of interstate commerce. If, therefore, members of our guild, as individuals or as corporations, wish to unite, join hands in any shape, wish to sell out their business and retire at old age, or in any other respect join hands with the result that in any particular there may be a restraint of trade, whether unreasonable or reasonable, we are subject to the penalties of these bills.

For a number of years we have been suffering from what are called "strike suits." Perhaps some of you know more about that than I do; but it is only recently that we have felt that in our business—suits of professional blackmail, relating to some immaterial point, usually in the purchase or sale of securities or in the development of financial and material resources of the country, resulting in the purchase and sale of securities. It would inevitably follow, we believe, from the wording of these bills as they now stand that the activities of those who instigate these suits would be increased, and of any others which had an ulterior motive, so that they might harass our business and claim monetary or other capital as the result of their activities. If anyone chose for any purpose whatsoever to sue us in equity, I believe that the wording of these bills would make the investigation of the trade commission and its findings matter of public record. In other words, since we are dealing in articles of interstate commerce, there is nothing in the present bills which would impede anyone, no matter how irresponsible or with whatever motive, from obtaining access to our books and our records, of whatever nature. If I am wrong in this matter, I should like to be corrected. As regards particularly the Sherman law definitions, still, which I understand enlarge materially the scope of the Sherman law, I believe that under the wording of that law, as it has appeared in the papers—I have not obtained until this morning a copy of the actual text of the laws—but I think that the papers were correct.

It would be impossible for two or three banking houses to join hands for the purchase of a block of securities in the usual manner, agreeing that one of them might bid a certain price for the bonds and, of course, by implication, that the others would not bid, putting the prices of the work of bidding entirely in the hands of the syndicate manager and agreeing that if the syndicate is successful in obtaining the bonds that they should be sold by the different members at a fixed, definite price, if such syndicate and operation would be possible under these bills.

In New York State we have recently sold $51,000,000 of State bonds. These bonds were obtained by a syndicate that bid very much in excess for the bonds what could have been obtained by the State for them if they had not been sold to this syndicate. The illustration is a perfectly common one—I merely mention it because of the currency that the sale obtained at the time in the papers. Such sales are going on with respect to the sale of municipal bonds throughout the country every week in the year, and to the extent, perhaps, of $1,500,000,000 a year. These communities in many instances, perhaps in most instances, would not be able to obtain the price of their

securities that they do obtain if Congress passed any law that prevented groups of houses from combining to purchase securities.

This is not favoring the strong at the expense of the weak; it is doing quite the contrary. It permits the weaker banking houses to combine in competition against the strong. The number of houses that can buy an issue of bonds amounting to $5,000,000 or $10,000,000, to say nothing of $50,000,000, is relatively limited. The number of houses that combine in groups of two or three to compete for bids for an issue of bonds for $5,000,000 or $10,000,000 is very numerous. I presume that there are 500 houses—as a guess—that can combine to purchase the issue of municipal, corporation, or of public utility bonds in the manner that I have spoken of when the amount of the bonds issued and sold is $1,000,000.

Mr. McCoy. Mr. Chamberlain, before you go any further, can you point to any decision of any court which has held that the buying and selling of stocks and securities, even of interstate corporations, is in itself a transaction in interstate commerce; or, to go further, that the shipment of the evidences of indebtedness of a corporation from one State to another creates interstate commerce—from this point of view, I mean?

Mr. CHAMBERLAIN. From this point of view, I understand that the recent decision of the Michigan Supreme Court in the so-called case of the "Michigan blue-sky" bill, tends to confirm the statement I have made, that securities are articles of interstate commerce; and my good friend Reed, who was speaking this morning, verified that. I asked him if that was not the case. He was one of the counsel in behalf of certain organizations that prosecuted that case.

Mr. McCoy. Do you mean that that held that the paper upon which evidence of indebtedness appears is an article of interstate commerce?

Mr. CHAMBERLAIN. Yes.

Mr. McCoy. That might be so; but, for the purposes of the Sherman Act, has any court ever held that the buying and selling or the combining to buy and sell stocks and bonds of interstate corporations is a transaction in interstate commerce?

Mr. CHAMBERLAIN. I do not believe so, Mr. McCoy; but I am not a lawyer at all, I am just merely a bond man—a seller of securities—and I can not tell you whether that has been the case or not; but I have been told that the provisions of these bills would probably have that effect on our business, or that that might be so construed. I have been told that by prominent corporation attorneys in New York. It is usually stated at the same time that probably that is not the intent of the bill as it is framed; but I merely wish to call your attention to what we think would be a very grave error in legislation if it did obtain.

Mr. WEBB. Can you put your finger on the section of any of these three tentative bills that would prohibit three or four or five small banks combining to purchase the municipal bonds of another State?

Mr. CHAMBERLAIN. I think so; in the definitions bill, at the beginning of that bill, as I have it in the newspapers, which I happen to be familiar with [reading]:

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--

That is the Sherman Act of 1890 and in the acts supplementary thereto, which, I presume, refers to these acts that are now proposed 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, etc., to create or carry out restrictions in trade or to acquire a monopoly in any interstate trade, business, or commerce.

Mr. WEBB. You do not object to that—that does not cover your case, that first subsection?

Mr. CHAMBERLAIN. Take the second, then, for instance.

Mr. VOLSTEAD. I presume it might, if the banks were in different States.

Mr. WEBB. That is not monopoly in interstate trade.

Mr. VOLSTEAD. If the banks bidding were in different States, I presume it might.

Mr. WEBB. That is just the point; if they buy for the purpose of creating restriction in trade, buying municipal bonds in one State, that is not creating restriction of trade.

Mr. VOLSTEAD. If they agreed to bid at a certain figure or agreed not to bid at all?

Mr. WEBB. That is not the point he makes. His point is that three small banks want to buy a million dollars of municipal bonds; they agree to buy them together, and go down to another State and buy them. I do not think that would offend against this first subsection.

Mr. McCOY. When New York sold its bonds, about which you speak, the other day, those were for new roads?

Mr. CHAMBERLAIN. Yes.

Mr. McCOY. Suppose it would have been for the purpose of putting up a water plant. Suppose some municipality had offered its bonds for sale in order to get money to put up a water plant. There is not the remotest connection in that transaction with interstate commerce, unless you can say that the people who combined to buy those bonds are in the business of selling stocks and bonds in different States, and thereby have sent the evidence of the indebtedness from one State into another; but I may not be right about it, but I have a notion that you can find somewhere in the Supreme Court decisions a statement to the effect that what is sold is the promise to pay and not the piece of paper which contains the promise. They held that up in New York in regard to the inheritance tax. A man in New Jersey dies and he owns the stocks and bonds of the New York corporation. One of them is taxed for inheritance purposes and the other is not. Now, why? That is simply because one is evidence to pay or an interest in something or other, but as pieces of paper they are not worth anything.

Mr. VOLSTEAD. Some courts might hold that a bond itself is an article of commerce.

Mr. McCOY. The paper; yes.

Mr. VOLSTEAD. No; a bond carries with it certain rights, and it might hold it was an instrument of commerce itself. Of course, the proposition that you advance, I presume, rests upon the theory that personal property is where the person lives?

Mr. McCOY. No; because, if I own a certificate of stock in New Jersey of a New York corporation and I die in New Jersey, that owner-

ship is taxed in that stock in New York. Why? Because it represents an interest in the New York corporation. But take the case of a bond. The owner of a bond loses it. Now, he can collect on that bond—at least, he can collect all that was evidenced by the bond, if he gives some sort of security.

Mr. WEBB. That makes the question of bonds very much analogous to the insurance policy, and the Supreme Court has held that the insurance contracts are not interstate commerce. They did go far enough in the lottery decisions to say that the card on which the lottery operated was interstate commerce, but they filed a very vigorous dissenting opinion in the case.

Mr. McCOY. I think that case has left it somewhat in doubt as to whether the insurance business may not be interstate business.

Mr. WEBB. It is not now.

Mr. McCOY. It is not according to last decision, but I think the question may be an open one.

Mr. WEBB. But I do not see how your business can be affected by these sections in the bill.

Mr. CHAMBERLAIN. I merely have to fall back on my lawyer friends, who tell me that bonds and stocks are tending more and more by judicial decisions—citing the "Michigan Blue Sky" case—to be considered articles of interstate commerce, and that the conduct therein of the sellers of the security is interstate dealing, and that they are subject to the regulations that anyone else who deals in interstate commodities is subject.

Mr. WEBB. I have read the decision in an Alabama case, where a cotton factor in Alabama telegraphed to some branch office in Chicago to purchase or sell some cotton, and the Supreme Court held that was not interstate commerce; that is my recollection.

Mr. VOLSTEAD. Supposing this situation should develop: That all the banks should combine, not only in New York, but in all the other States, that are engaged in the purchase of a certain class of bonds, and that they should agree to fix a price on those bonds and not buy them except at a certain figure or refuse to buy them at all, because they wanted to boycott somebody, perhaps. Do you not think that it might be subject to the Sherman Antitrust Act?

Mr. WEBB. Oh, that might be a combination in restraint of trade.

Mr. CHAMBERLAIN. Assuming that it is an open question, it has served my purpose in this connection if I have brought it to your attention that in framing this law as it may ultimately be passed, you will duly consider our situation. That is all the point there is to these preliminary remarks.

Just one more illustration in point: The Sherman law definitions bill prohibits those two or more individuals or concerns dealing in interstate commerce or participating in any way, directly or indirectly, to prevent free competition among themselves. On that score we are not permitted, it seems to me, if I am correct in assuming I am doing an interstate business—and almost every bond house in the country does business in more than one State, both by letter or solicitation—to bid for bonds and let the municipality or corporation obtain the benefit of the higher price of larger competition; and, furthermore, limiting or reducing the product or increasing the price, which is known as a means of increasing the price. Suppose a given group of bond houses bid together on an issue of railroad or other

bonds and, as happened this last month, the whole level of security prices advances in the stocks 10 per cent—perhaps that is too high; in the case of bonds, 3 or 4 per cent—under this law would not the bond houses that started to sell these municipal or other bonds at a given price be compelled to maintain that price, in spite of the fact that their price was no longer the natural competitive level of prices for the given security at the given time; would it not be a violation of all economic principle to compel them to maintain that price?

Mr. CARLIN. Would price maintenance be susceptible of that construction?

Mr. CHAMBERLAIN. In answer to that I should like to suggest this: That the price at which a given group of men or banking houses will bid for a given issue will depend largely on their ability to control the market until the time that their bonds or stocks are floated. It must inevitably be so. If they can not agree among themselves that no one of them shall sell below a given price until all the bonds are sold it means they must bid less for the bonds in the first place.

Mr. CARLIN. Assuming that would be included in that definition; that they would not be permitted to enter into a combination for the purpose of doing things which are forbidden by the statute.

Mr. CHAMBERLAIN. Do I understand you that, according as the bill is now worded and assuming we were doing interstate business, we would still be permitted to be competitive and agree upon a price which a group would bid for an issue of bonds?

Mr. CARLIN. I think you would not be.

Mr. CHAMBERLAIN. You think we would not be—that is just the point.

Mr. DANFORTH. That is the point he is addressing himself to. Give us illustrations where that would work to the benefit of the debtor.

Mr. CHAMBERLAIN. I mentioned the case of the New York sale recently, in which the successful bidder bought $51,000,000 worth of bonds. There is not any banking house in the country that has the capital and the facilities to bid $51,000,000 of bonds on its own feet. These bonds were sold to this group of concerns, as my recollection serves me, at $5 a bond more, or, in other words, one-half cent more than the State of New York could have obtained for those bonds if it had not been possible for that group of buyers to combine and with their united capital and resources to bid for that issue. And I went on to say—if you were out of the room—that that situation is not extraordinary at all; it is occurring all the time, not only for municipal bonds, of course, but for all other kinds throughout the country.

Mr. FLOYD. When you buy those bonds what do you do with them?

Mr. CHAMBERLAIN. Assuming a syndicate has bought the bonds, then there are a number of ways in which it is customary to allot the bonds among the members of the syndicate. Each one in the syndicate has already agreed to be responsible financially and otherwise for a given proportion of this bond issue, and then each one of them sells to its own customers, but they all agree on a given price. There would be no point in having a syndicate at all if they did not agree.

Mr. FLOYD. That is the point I wanted to bring out—that you sell to the general public?

Mr. CHAMBERLAIN. Yes.

Mr. FLOYD. At an advance price, and the syndicate that buys fixes the price at which they sell to the public.

Mr. CHAMBERLAIN. That is true. We try to sell at an advance, and in the long run we must sell at an advance in order to do business. If the inference is that the public, therefore, must pay more for the bonds, I remind you of my previous argument—that by being permitted under present laws to combine in a syndicate bid there is more real competition, especially for the larger issues, than if there were no syndicate bidding at all, because there are more bids that will go in there.

Mr. CARLIN. Speaking offhand, I do not think that is in the bill; I do not think that would be included.

Mr. CHAMBERLAIN. That is an open matter, and I think I have covered the case sufficiently for you to consider it at your leisure.

I wish to speak of the relation of the interlocking directorates to our interests, because that is exceedingly important. It seems to me that the interlocking directorates' bill should be, as far as we are concerned, framed with an eye to the effect on the average business in the average town throughout the country. As that bill reads at present, I know a town, we will say, of 50,000 or 100,000 inhabitants, and there may be a dozen men in that town of 50,000 who are properly qualified by business experience, financial success, and otherwise to sit on the boards of the principal coporations of the town—street railway, banking, power company, electric lighting, and so on. I know that this bill does not apply, provided these companies do not go outside of the State in one form or another, but there, again, I am informed that a large proportion of the corporations are vitally affected, even though they do a small business and although you would think that smaller corporations do not operate outside of the State. Take, for instance, one of your street railways which has a line running from here to Arlington. It would be doing an interstate business, and no man who is a director of a national bank, no matter where it is, could be a director in that railway; but, furthermore, if that power company supplying that street railway with power, should the railway run down to the banks of the Potomac and there meet a railway which took passengers across to the Virginia side—two separate corporations—nevertheless there is a probability that the fact the power was furnished in one State and the corporation in the other would constitute interstate business. If the railway ran down the bank of the Potomac and there transferred onto the line between the District of Columbia and Virginia and sold tickets anywhere in the city to a point beyond, making a regular custom of it, that would constitute interstate business, and a man who is a director in this street railway here could not be a director in a bank in Oklahoma.

The fiduciary relationship of an investment banker with his customers is an exceedingly important matter. The ethics of our profession, I think, are growing very much finer year by year. We are realizing the responsibilities that we shoulder when we advise a customer to purchase securities of us. I am now speaking, of course, for all of the investment bankers of the country, taking by and

large, as you find them, from the Atlantic to the Pacific. When we buy an issue of bonds the member of the firm that buys the bonds ordinarily wishes to go on the board of the company whose securities he has purchased, if for no other reason, simply because he feels that he is under obligation to his clients, to whom he has recommended these bonds, to use the best available corporate means of knowing all the time what is going on in a broad and general way in that corporation. This is nothing new; this is no new situation. It began, I presume, originally with the intrustment of European capital to our bankers; the English, the Dutch, and the French undoubtedly required the bankers before and after the Civil War to enter the boards of the railways and other corporations in which they intrusted their money; and that same principle applies and would apply—does apply—in the case of a thoroughly domestic situation. A large proportion of the investments of the country is in the Northeast, as the most densely settled section, and it is equally true that a large proportion of the meritorious industries of the country requiring development is in the West and the South, far removed from the capital. The middle man or "go-between" is the investment banker. The investment banker is solicited by the promoter in the West or the South to reach into the East and get the capital that is there. The eastern investor is in no position, under the ordinary circumstances of investment, to look after his interests. Who should he naturally look to but the man from whom he bought securities and whose very success in business first and last is going to be dependent on his ability to sell securities that do not "go wrong"? It is as true of the strong as of the little banker, and you have illustrations every day of what happens to the small banker or big banker that has a lot of securities "go wrong."

For those reasons I think we should be extremely careful to put the investment banker in the position of not being able to look after his clients' interests by permitting him to sit on the board. As I said before, since the investment banker naturally obtains stocks for the corporations of a middle size, and a large proportion of these in one sense or another have consented to do business outside of the State, this law as it is now framed would prevent the investment banker from being represented on more than a limited number of boards. If we shall assume 100,000 as the number of corporations that require his capital or the capital that he obtains, and if we assume, for the sake of argument, that there are just about 4 per cent, or 4,000 bankers, of one sort or another that are capable of buying these bonds, it must inevitably mean there that we allow a banker to be on more than one board of corporations doing an interstate-commerce business or that we compel him to neglect his fiduciary duty.

Mr. WEBB. Are most of your investment banks national banks?

Mr. CHAMBERLAIN. "Investment bankers" is rather an unfortunate term that has come to be applied to dealers in bonds. Investment bankers do sell preferred stocks and sometimes even common stocks, but that is a very small proportion of investment bankers. The typical national bank confines itself to mortgage bonds or very high debenture bonds.

Mr. MCCOY. Most of them are not incorporated?

Mr. CHAMBERLAIN. They are becoming more and more so. I should hesitate to say just to what extent. Three years ago—most of them are not incorporated now; but take it in New York, the situation with which I am most familiar, the tendency there is to incorporate.

It seems to me to broaden out the argument a bit, because it concerns us so directly—this matter of interlocking directorates—that, as has been intimated before this morning, you are getting after what we are seeking in preventing interlocking directorates. The practice of "dummy" directors, which everyone must deprecate, is growing, I presume, all the time, and I do not see but that the tendency must inevitably be, if the law as worded in these bills goes into effect, that the tendency will grow and grow. As long as a man has interests in two concerns I doubt very much, and my lawyer advisers tell me that in their opinion it would be extremely difficult to prevent them from directly or indirectly controlling their interests, and I do not see why it is not proper that we should control their interests. If we do not permit them to do it directly by being members of two boards, then they delegate their power to some one who is less competent, and a man is going to keep his interests in major concerns, those which are most important; that goes without saying. If that is the case, what happens to the smaller concerns? They get the benefit, if there is any subtraction of such supervision, and the benefit of less supervision and less advice. Advice usually—perhaps I am speaking without sufficient knowledge, but I think it may be said that advice of an employee who merely goes through a routine operation when the directors hold their meetings—in other words, the proceedings of directors' meetings become nothing but "librettos," to use an expression that is common in the street now, when it is necessary, because of one law or another, for a man to delegate his authority to some one else in the matter of directors. Since the tendency must inevitably be to lay the responsibility on the director, if you have delegated directors who are not financially responsible nor in any other way nearly as responsible as the true director, who is invisible but stands behind the chair, it seems to me you are defeating another object of your bill.

Mr. MCCOY. Do you agree with Mr. Reed, of New York?

Mr. CHAMBERLAIN. In what connection, Mr. McCoy?

Mr. MCCOY. Along the lines of his general statement?

Mr. CHAMBERLAIN. I know Mr. Reed very well. I have not heard anything of his theories until I heard them here to-day, but I should say in general that I was in sympathy with Mr. Reed; yes; quite so; but I hesitate to say, not knowing more fully just exactly what he does advocate, which, of course, can not be gotten in one hearing.

In the matter, lastly, of interlocking banking directorates, this is a matter which does not concern the investment bankers as dealers in securities so much as it does concern those investment bankers that are also bankers of deposits, so to speak; that is, are truly bankers and receive deposits. There are large numbers of investment banks who are truly banks. It seems, I think, to the majority of these concerns that if a given bank has a financial interest in another bank by reason of having redeposited a large portion of its funds, or rather the funds of its own depositors, in the second bank, that it is entitled to be represented on the board of the second bank in the same fidu-

ciary relationship that the investment banker, as a dealer in securities is entitled to be represented on the board of the company whose securities he buys and resells to his own client.

Mr. McCoy. Do you refer to redeposits under the reserve features of the national bank act?

Mr. CHAMBERLAIN. I do not refer to those so particularly as I do to other banking situations, irrespective of the Federal reserve act. The Federal reserve act itself takes care of its own situation pretty thoroughly, if you know what I mean by that—it safeguards itself. As far as the national reserve bank is concerned, it is going to be safeguarded by the very size of the bank and by the supervision of the Federal Reserve Board and by the very excellent regulations under which that board acts.

Mr. McCoy. Why should one bank outside of those requirements want deposits from another bank?

Mr. CHAMBERLAIN. Because the banks in the country are not going to do business with the Federal banks or with the member banks. There are still State banks, trust companies, and there are still private bankers, some of them with millions of dollars of deposits, that want to continue to do business, we will say, with members banks or with State banks or with trust companies. I will give you a concrete illustration where your question does not apply. We will say a given private banker has deposits of $1,000,000, and a large part of the time a large proportion of these deposits are redeposited in a State bank or trust company.

You take concrete cases, without mentioning names; a number of bankers have come to me in the course of conversation at dinner or otherwise and said, "Look here, Chamberlain, why should I, who am a private banker and deposit in the X Y Z Bank, and therefore am sitting on that board and also sitting on the board of another bank 25 miles away or 50 miles away, where there is not any possible chance of competition, why should I be compelled to get off the board of these other two banks, simply because I am a private banker; or if not a private banker and were a director in a bank, why should I be compelled to do that in that situation? Why is it not sufficient, as long as there is no competition in the banks, that I be permitted to sit on the three boards? The fact I am on one board presupposes I have had banking experience and am better qualified."

Mr. McCoy. How can you say in any given instance that there is no competition?

Mr. CHAMBERLAIN. Personally, I can not say, and I am not in the position of attempting to submit regulations for the government of banking. I merely did suggest that if these laws, by not being sufficiently definite and limited, do prevent business men throughout the country and bankers in this latest illustration, from sitting on different boards where there is no competition, it restricts rather than enlarges our business freedom.

Mr. McCoy. Suppose, on the other hand, that there is not any competition, but that there is combination? To be concrete, take the situation that existed with reference to J. P. Morgan & Co. and some of the banks and trust companies in New York. The thing complained of there was not there was any competition, although that was complained of, but principally that there was combination which

gave them power over the credits, which they exercised to the disadvantage of the country at large.

Mr. CHAMBERLAIN. Not answering your question with reference to the specific illustration, because some of the houses interested may be members of our association, whom I officially represent, but merely on the general question, I certainly believe that the great majority of the investment bankers of the country would say, "We are willing to suffer to the extent that is necessary to accomplish the result you speak."

Mr. McCOY. Where are you going to draw the line?

Mr. CHAMBERLAIN. You see, I can not propose a law.

Mr. McCOY. On that point, that is exactly what we would like to have you do, because of your experience.

Mr. CHAMBERLAIN. Very good, if that is the case I should be very glad, Mr. McCoy, to send you a suggestive regulation to cover that case.

Mr. McCOY. Just for the sake of argument here now, if you can prepare a concrete bill, can you not say in a general way where you would draw the line so as to permit interlocking directorates in banks on one side of it and forbid it on the other?

Mr. CHAMBERLAIN. In a general way I could say, speaking for myself, and believing that I represent the sentiment of the large majority of the investment bankers of the country, that if combinations of banking capital can be restricted for the benefit of business only by preventing a duplication, preventing interlocking directorates, the line should be drawn in this way; that interlocking directorates between banks should not be permitted when there is a real competition for business between the banks in question. I am really begging the question, because I am not a lawyer, and I can not on my feet give you what you want; but I could very readily, I think, with the aid of my lawyer friends frame up a law or two that would cover the case for you, Mr. McCoy.

Mr. WEBB (presiding). You can have that privilege of extending your remarks if you desire.

Mr. CHAMBERLAIN. All right then, I will do so. I have nothing further to say.

Mr. WEBB. The committee will now adjourn until half-past 2 o'clock, gentlemen, when we will hear Mr. Rogers.

(Whereupon, at 1.50 p. m., the committee took a recess until 2.30 o'clock this afternoon.)

AFTER RECESS.

The committee reassembled pursuant to the taking of recess.

STATEMENT OF GUSTAVUS A. ROGERS, ESQ., OF NEW YORK, N. Y.

The CHAIRMAN. You may give your name and address and occupation, Mr. Rogers.

Mr. ROGERS. My name is Gustavus A. Rogers; my address is 160 Broadway, New York City; I am a lawyer.

Of course, I am appreciative of your permission in allowing me to appear before your committee to-day, and doubly so because I do not claim to be an expert in the matter of the Sherman antitrust law.

The CHAIRMAN. Whom do you represent, if anybody?

Mr. ROGERS. I will refer to that as I go along.

My reason for appearing before your committee is that I thought if I should recite to you some of the difficulties that my firm encountered as counsel for a concern in New York City which had been previously interfered with by the trust, so called, which is now being prosecuted under the Sherman Antitrust Act by the United States Government in an equity suit, in the eastern district of Pennsylvania, that the experience that my client had might give you a practical idea of some of the existing difficulties, and indicating strongly the necessity for adopting the provisions recommended or presented in the bills of Judge Clayton, supplemented, possibly, by several suggstions that I will make to you.

The suit that I refer to is the suit of the United States Government against the Motion Picture Patents Co. and other defendants, generally the defendants in the suit are known as the Motion Picture Trust.

I think that the presentation of the situation and a recital of the circumstances under which that combination was effected, and its operations, will probably be as illustrative as anything else I could say to you of what is required in the way of an antimonopoly act. I think it is as illuminating as any case that will be called to your attention throughout your deliberations. I think I say that advisedly, because in this instance you not only have the presence of a combination of firms and corporations engaged in dealing in an important commodity, but you have the question presented of a combination of competing or correlated or interrelated or dependent patents into one holding company. You have a combination of manufacturers who, at the time of the creation of this combination, manufactured possibly 95 per cent of the entire commodity, and you have an organization created by this combination, by the manufacturers, as a selling agency for the combined output of all these manufacturers, and you have present a situation which shows that this combination, within a period of a few months after its organization, drove out of business, by means to which I shall call your attention presently, every one of the customers who had dealt with the manufacturers with the exception of my client, and how he was able to stay in business I shall show you in a few moments. They not only drove these customers out of business, but turned over to this sole selling agency company all the business in that particular industry.

I am respectfully suggesting a number of recommendations which I have put before you, perhaps in crude form, and I shall ask the permission of the chairman and the other distinguished members of the committee to later file, if I may, a printed argument in support of these recommendations which I make at this time. This afternoon I shall content myself with a brief statement, which I am about to make.

The organization of this so-called Motion Picture Trust found its justification, if it had any at all, in the fact that there were outstanding a number of patents the validity of some of which was challenged, and I think I will show you that the principal patents on which they had relied had been declared invalid by the court before the combination was formed; and despite that fact this so-called

invalid patent was one of the chief forces—if not the main force—relied upon to effect that combination.

Mr. CARLIN. What was the name of that patent?

Mr. ROGERS. It is the so-called Edison patent on motion-picture films.

Now, to the average mind, and to one who reads about motion pictures and motion-picture theaters, there is some illusion. And at the outset I should like to impress upon the members of the committee that it is necessary for us to remember that this is a very important industry, not only because it is the means of amusing the Nation—and I use that term advisely, I think, because statistics show that possibly a majority of the people of the United States go for their amusement and recreation to the motion-picture theaters, but because it is being increasingly used for scientific, educational, and other similar purposes.

When I say that a misapprehension has been created in the average mind in regard to motion-picture theaters, what I mean is this: When you talk about a motion-picture theater one conjures up in his mind some small place, tucked off in a street or avenue, occupying possibly 25 feet frontage by less than 100 feet in depth, and a place that apparently looks shabby or gaudy.

But we to-day have arrived at the point in the building of motion-picture theaters when, in some of the larger cities in the Union, there are theaters that have been constructed at a cost of a million and a quarter dollars and over.

I know personally of the construction of one theater in New York City on which a million and a half dollars was expended for the ground and the cost of the building, which accommodates approximately 3,500 people, the building occupying a square block of land in the city of New York.

The motion-picture film is used not only for amusement purposes; it is largely used for scientific purposes, and it is being increasingly so used, and it is also used for philanthropic purposes and for educational purposes. I predict to-day that it will be a part of the curriculum in our schools and colleges in the next five years; that the subjects which are capable of being transmitted and taught by motion pictures will be so handled.

I could talk to you a good deal longer about the importance of the strips of motion-picture films, so called, but I will not take up your time unnecessarily on that subject, except to add that an investigation will develop the fact that during the course of some of the matters of which I now speak, when the United States Government, in one of its departments, had occasion to require and use some motion-picture films, it was impossible for the Government to get the use of those films without the permission of the trust, and only under certain conditions and interlocking restrictions which the trust had put upon the use of that film by individuals. The same rule was applied to the Government that was applied to the individual, the same rule of which I now complain.

The history of this combination——

Mr. VOLSTEAD (interposing). Can the film itself be copyrighted?

Mr. ROGERS. Yes; the subject can be copyrighted—the play. I think there is a recent decision in New York, which has only been handed down within the last day or two, which is to the effect that

the author of a dramatic representation of any kind may get a copyright for its use as a book or a play, and also a copyright for its use as a scenario for use in motion pictures. Motion picture stories are subject to copyright.

The history of this combination of which I was speaking a few moments ago is somewhat on this order. I do not want to burden you with this matter, except as it is important to demonstrate how quickly a combination can do something that is utterly impossible for an individual ever to accomplish in a lifetime.

Up to the spring of 1908 the industry was absolutely open and without restriction. The motion-picture films were made and manufactured and sold as unpatented articles. The dealer in the film—perhaps I ought to interpose here and speak for a moment about the film itself. The film itself which is commercially used is a celluloid film strip, consisting of a reel of approximately 1,000 feet in length. These different positives are printed from the negative taken with the camera; they are duplicate prints, in analogy representing positive photographs made from the negatives.

These reels of films were sold in the market. Anybody who wanted to purchase them would go to the manufacturer, make his bargain with him, and buy his film and do as he pleased with it. He might sell it or lease it for exhibition purposes. He could export it and do as he wanted with it. The projecting machine by which this film was projected on the screen was, prior to the spring of 1908, sold as an unpatented article, and there were thousands of them sold—several thousands, in any event.

In the spring of 1908 the Edison Co. at that time had already been defeated in the courts on a patent which was known as the Edison film patent, and under which Edison claimed that he was the inventor of motion pictures and consequently entitled, under his patent, to dominate the entire art. He had been defeated in that claim by the United States Circuit Court of Appeals for the Southern District of New York, and there was no mistake about the decision of that court. It declared his claim absolutely invalid in that respect.

Taking that patent which had been declared——

Mr. VOLSTEAD (interposing). Was it declared invalid on the ground that he had not made the invention?

Mr. ROGERS. Absolutely. The court said he was not the inventor. If you are interested, I think I can give you some of the language of that decision, but it was clearly to the effect that he was not the inventor.

And that same decision has been followed in the District of Columbia in the court of appeals. In December, 1911, the court of appeals in this District also held that patent to be invalid, and said in no unmistakable language that Edison was not the inventor.

Mr. CARLIN. Has the court ever said who was the inventor?

Mr. ROGERS. It said that motion pictures were known probably for 30 years before Edison ever thought of them, because motion pictures are only an evolution of what you and I as boys played with and used as the magic lantern. Motion pictures are simply an evolution of that. But let me proceed with my story. Using this patent, the invalidity of which has been declared, as a basis, there was gathered into a group a lot of manufacturers who became so-called Edison licensees, and for a little time they had a warfare with another group who refused to come in under this invalid

patent—contesting with the so-called combination on what they claimed were patents that they had on parts of the projecting machine—and so these two camps had a warfare between themselves.

Finally, in the fall of 1908, both of these factions got together, and when they got together every practical patent which affected any part of the motion-picture art was put into one holding company, known as the Motion Picture Patents Co., including this invalid patent; and when they got all these patents into one holding company they then banded together the 10 manufacturers—the 10 American manufacturers, the only American manufacturers of motion-picture films—and they were constituted a group known as the "Licensed Manufacturers." These "Licensed Manufacturers," in turn, the most powerful of which at that time were the Edison Co. and the Biograph Co., each had equal representation on the board of directors of the holding company of the patents; every act of the Motion Picture Patents Co., the holder of all these patents, was dictated and dominated by these manufacturers, and so in some of the corporations conducted as manufacturing companies you find common directors with those that were in the patent company. The Edison Co. has two directors in the patents holding company. Those two directors were also officers of the Edison Co.

The CHAIRMAN. How many directors were there in that company?

Mr. ROGERS. There were four in the Motion Picture Patents Co. The Biograph Co. had two directors in the Patents Company. Both of those directors were also officers of the Biograph Co., and the Biograph Co. and the Edison Co. were, at that time, two of the largest manufacturers of motion-picture film in the world.

After this combination was effected, they then called together the representatives of approximately 150 concerns throughout the United States who were the customers of these manufacturers, and they said, "Gentlemen, the time has come when we must have new arrangements. Hereafter you can deal with this film projecting machine and the cameras only as patented articles, and you can not buy a single foot of this film any longer. You can only lease it from the manufacturer, and you have got to agree to return it within seven months from the day you get it."

The prices that were fixed were at least equal to, and in some instances greater than the prices at which they had previously sold the films outright.

They presented for the signature of these men who were gathered there from all parts of the Nation, an instrument, a copy of which I shall present to the committee, in which the most rigid interlocking restrictions were inserted that man's mind was ever capable of drafting. I may say here that by reason of my experience and that of my client with this particular institution, I have made the recommendation or suggestion that no lawyer be excused on the ground of privileged from testifying either before the courts in an action instituted by the Attorney General or in any inquiry to be conducted by the Interstate Trade Commission, on the ground that he has a privilege status. I think the mind that conceived an instrument of that kind and devised it ought not to conceal his identity. I think we ought to know who it was.

Some of the more stringent provisions of that agreement I would like to call to your attention, and I think it would be of some assistance to you in your deliberations.

In the first place, it was provided that the customer of the manufacturer, whom I shall hereafter designate as being the rental companies—these rental companies could not deal with anybody except with the licensed manufacturers. Since these manufacturers at that time were making 95 per cent of the output, the chance of any competing manufacturers getting a market was very small. Further than that, the rental company, in leasing that film to the exhibitor, no matter what the character of the exhibition might be, could not permit that film to be used, excepting upon the express condition that the film of no other concern in the world be used or shown at that particular place. In other words, this film was known as a licensed film, and by the agreement it was provided that the film of no independent manufacturer could be shown at a place where this licensed film was shown. I might say also that they did not stop with mere language. They not only made the provision in the agreement, but they enforced it, for if some European film got into the market, or an independent manufacturer got his head above water and tried to get his film on the market, if that film was shown in a place where the output of the trust was shown, the license of the rental company to do business was immediately forfeited, and the exhibitor was also put out of business.

Now, to return to the agreement they proposed to the rental company. I have shown you some of the provisions. There were others equally important, but I shall not dwell on them at this time.

Mr. CARLIN. You know we have a provision in bill No. 1 which would prevent that character of a contract?

Mr. ROGERS. I said in regard to that, I think Judge Clayton's bill might be amended—if you will notice my second recommendation.

Mr. CARLIN. Do these numbers refer to our bills or to your recommendations?

Mr. ROGERS. Take, if you please, paragraph 2 of my recommendations.

Mr. CARLIN. You refer to tentative bill No. 1?

Mr. ROGERS. Yes.

The courts seem to draw a distinction between agreements affecting the sale of patented articles and those that are unpatented, and my idea in making the suggestion that I have made in my second recommendation was that upon the face of the bill—any doubt as to whether patented or copyrighted articles are covered by this statute should not exist.

Mr. CARLIN. Have you read paragraph 2 of section 1 of bill No. 2?

Mr. ROGERS. You mean the paragraph in which the words "any commodity" are used?

Mr. CARLIN. Yes.

Mr. ROGERS. I did read that. My feeling about that situation is that the courts might construe that section and might say that Congress used the term "any commodity," but Congress must also have had in mind patents, and it probably refers to any commodity which was not the subject of patent or copyright.

Mr. CARLIN. The word "article" is used there.

Mr. ROGERS. That reads, "to limit or reduce the production or increase the price of merchandise or of any commodity."

Mr. CARLIN. I am talking about the section below that.

Mr. ROGERS. You mean the third section, which reads, "to prevent competition in manufacturing, making, transporting, selling, or purchasing of merchandise, produce, or any commodity."

Mr. CARLIN. You are reading the different subdivisions of section 1.

Mr. ROGERS. Section 2, at the bottom of the page, reads:

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.

Mr. CARLIN. That refers back to the four subdivisions of section 1.

Mr. ROGERS. It may be that that language is sufficiently comprehensive to cover the situation, but, really, I prefer, if my suggestion is worth anything, that on the face of the statute it be made absolutely clear that the inhibitions and prohibitions therein contained are intended to cover patented as well as unpatented articles.

Mr. CARLIN. Now, then, take section 10 in bill 1, and tell me if you insert the word "lease" whether that would not meet your contention?

Mr. ROGERS. Possibly it might; but you know that the courts have been very jealous to protect the rights of patentees under a so-called license agreement, and, of course, you have in mind the Dick mimeograph case; but whether that case is still the law, in view of the decision in the subsequent case—the Sanatogen case—I am not prepared to say.

But I do say that possibly under the Dick case, if not under some others to which I could refer, the courts might hold that Congress did not intend, in using this language, to include patented articles.

Mr. CARLIN. Take the decision in the Strauss case, just rendered last month.

Mr. ROGERS. You mean the copyright case?

Mr. CARLIN. Yes; the copyright case. There the courts have gone to the extent you are contending for.

Mr. ROGERS. As I understand that case, the court held it would be unlawful for persons to combine and to oppressively prevent a competitor from engaging in the sale of copyrighted or uncopyrighted books because he did not live up to certain rules and regulations which were promulgated.

Mr. CARLIN. It provided that such a contract was in violation of the statute; that is what the court held.

Mr. ROGERS. Oh, yes; because of the Sherman Act. The situation I present is a little different from a copyright case. It may be that a situation of the kind would be presented in the future for determination by a court. The owner of a patent has certain rights. He may make a lease to an individual, firm, or corporation to deal in his patented article, and he may put any restriction upon it that he wishes to. I assume it might be perfectly legal for a man who had a patent on a printing press, if the Dick case is still the law, to say to a man that "if you use my printing press, you can not use on that press any except a particular type and paper of my selection."

Mr. WEBB. Do you know of any combinations with that sort of contract?

Mr. ROGERS. I do not; I do not think it ought to be the law. I agree with Chief Justice White in his dissenting opinion, that the

Dick case should be held strictly to the peculiar facts presented in that case, and not used as a precedent. However, there is a lot of room for the adgument of hair-splitting lawyers, and such lawyers might succeed in convincing a court that the law should be interpreted as it appears upon the statute books, and that in the absence of Congress using distinguishing words of inhibition against patents and copyrights that probably Congress did not intend to include copyrighted or patented articles. Of course, it would be the safest way, in any event, to include it.

Mr. FLOYD. Your contention is that they ought to be included the same as the others?

Mr. ROGERS. Absolutely, Mr. Floyd. I do not think we ought to have any sentimental objections to it.

Of course, we all know that the argument in favor of permitting the patentee to have the broadest rights under his patent is that it encourages inventive genius and is a stimulus to the creation of new and useful articles. But I think we also know, as practical men, that in very few instances is the inventor the direct beneficiary of the creation of his own brain, and that if he has anything really worth while, it gets into the hands of some very powerful corporation or firm or individual who really makes practically all the profit there is in it.

Mr. WEBB. Do you think there has been any change by subsequent decisions?

Mr. ROGERS. I think a close reading of the Sanatogen case, as reported in 229 United States—that was the case in which it was attempted to regulate the resale price of this article known as Sanatogen—and the United States Supreme Court held that the price at which an article could be retailed was not within the patentee's rights.

In other words, he could not fix the resale price of it; and even in that case you will find a very broad statement that the rights of a patentee are very complete, and you will find also the decisions—of course, I know you are familiar with them and I am quite sure they will be repeatedly called to your attention—in all the decisions you will find that the courts are attempting to jealously guard the rights of the patentees, and that it is done upon the principle that Congress intended that the patentee should have the broadest rights to the end that he should enjoy the fruits of his patent. Although really it is his patent only up to the time that he subscribes his name to the application.

I think I have already said that in this agreement put before the men when they gathered together there were a number of very arbitrary restrictive clauses.

I might add, too, that one thing that probably should be absolutely mentioned is that in this agreement there was a requirement that this film should be returned at the end of seven months. With a piece of ingenuity that was rare in its impudence, although it was successful at that time, it was carefully planned out that these men who had for years been dealing in these articles which they had bought outright would prefer to return what they had on hand and which they owned outright, because they were a little older, in preference to returning new films delivered to them, and so the manufacturers ultimately succeeded in getting possession of nearly every piece of film in the United States which these men owned outright, and the only film which they had when the time came to destroy

them was the film which the trust owned under this new agreement, which was only a lease.

You can see if they were permitted to retain possession of the film they had on hand which they owned outright that if the trust attempted to put them out of business by failure to supply their commodity, they would have had at least the older film, which they owned outright.

When that agreement was put before these men who were gathered in that convention, of course, they protested, and they were given the other alternative of either taking the agreement as it stood or going out of business entirely, because if they failed to sign the agreement it was made clear to them that they would not get any film.

Mr. CARLIN. Does not the contract call now for the return of the film in less than three months and provide that they can only buy it in one place?

Mr. ROGERS. That is the rental contract. You probably have in mind the agreement by which the rental company leases the film to an exhibitor for one day, or for some other stated short period, and at the end of that day or whatever the period may be, he must return the film.

Mr. CARLIN. Or at the end of the week?

Mr. ROGERS. Yes: or biweekly. I am talking now about the relation between the manufacturer and the man to whom he sells. The exhibitors never have, and probably never will, deal directly with the manufacturer. The character of this business is such that it required the intervention of the middleman, which is the rental company.

Mr. CARLIN. How many rental companies are there?

Mr. ROGERS. There is a larger number to-day.

Mr. CARLIN. But they do not compete in regard to their territory, do they?

Mr. ROGERS. That will come later in my story. I think you are quite correct in your statement.

There are three companies to-day where there was formerly one—I mean three large combinations of manufacturers—each one having its own rental-company arrangement, and, naturally, they have some understanding as to their territorial operations as a means of conducting their business.

Mr. CARLIN. Let me see if I can get at this correctly. As I understand you, the rental companies all rent or lease from the parent company, or holding company, which is a combination of manufacturers?

Mr. ROGERS. Yes, sir.

Mr. CARLIN. Does the holding company, by contract with the rental company, restrict them, too, in their territorial operations?

Mr. ROGERS. If that question were addressed to the past I could easily answer it. That is true as to the past.

Since the Government suit was instituted there have been some changes in this business. But when the company was first formed a branch was licensed for the city of New York. That branch could operate only in the city of New York. If another rental agency or company was licensed in Chicago, it could only operate in Chicago, and if they wanted to open a branch business they had to get a

specific license to go elsewhere and operate. Of course, they restricted territorial operations.

The field is somewhat different to-day from what it was in the early days, and it is because of the Government suit that there has been the cause of a change.

So I am addressing myself to the situation as it was.

Mr. NELSON. What is the status of the suit at this time?

Mr. ROGERS. The Government has completed its testimony, and the defense has offered testimony, and has been directed by the court, pursuant to an arrangement with counsel, to complete the taking of testimony by the 1st of April.

Mr. NELSON. What court?

Mr. ROGERS. In the eastern district of Pennsylvania.

I was reciting the conditions as they existed in December, 1908, when the combination was first formed. These men were given the alternative of either taking the license agreement as it was drawn or going out of business entirely, because they could not get a supply of films anywhere else.

After some protest and considerable reluctance they finally concluded that they had no alternative except to sign the agreements, and the agreements were signed.

But, instead of permitting the business to be done by the entire 150 companies, that number was arbitrarily reduced to 100.

Mr. NELSON. There were 100 rental companies?

Mr. ROGERS. One hundred rental companies. Having gotten the field in that shape, the manufacturers then, within a very short time thereafter, about a year later, organized their own company, known as the General Film Co., and the avowed purpose of that company was to go into the rental business, and it was incorporated as a paper corporation, and the first thing that company did was to begin a campaign, immediately after its creation, to drive out of business every one of these hundred companies then in existence, and they succeeded, because in November, 1911, every one of these rental companies had been driven out of business with the exception of my client, and my client to-day is the only one—my client is known as the Greater New York Film Record Co.—it is the only company in the United States, and when you say the United States you mean practically in the entire world, as I shall demonstrate—that gets the output of any of these 10 manufacturers, excepting their own selling company, the General Film Co.

Mr. CARLIN. How do you accomplish that?

Mr. ROGERS. You mean how do they succeed in that business?

Mr. CARLIN. Yes.

Mr. ROGERS. When I give you the recital of how we accomplish that I think I will not only get your sympathy, but I think I will point the way so that the performance can not be repeated.

Let me recite to you how they tried to put us out of business, because I think that will be more interesting.

Mr. CARLIN. They gave a preferential contract to their own holding company?

Mr. ROGERS. Absolutely. The manner in which they drove out these other companies was in this way. The General Film Co. had 10 directors. Its common stock was divided equally among 10 manufacturers, and the profits of the company were to be divided among

the 10 manufacturers and in the first year after they were organized, the first year of their existence, I think they divided $1,400,000 in profits among the 10 manufacturers.

This is the way they drove those men out. By way of illustration, say, you were in the rental business, and you had a license from this holding company, the Motion Picture Patents Co. Say you leave your place of business one night, the owner of a business that was earning, as the sworn testimony in the record of this case shows, $50,000 or $60,000 a year. You were in a happy, contented frame of mind, feeling that you had a profitable business and you and your family were protected from poverty. The next morning you found a letter reading something like this:

SIR: Please take notice that under the last paragraph of the license agreement we hereby terminate that agreement, and on and after this date you will get no further supply of film from the manufacturers.

Immediately upon the receipt of that telegram or letter you are practically put out of business and pauperized.

Mr. CARLIN. That is the natural consequence of the formation of their own rental company?

Mr. ROGERS. Absolutely, sir. That is one illustration.

That letter was sent to a man they feared not. Here and there was a man whom they thought was very influential financially or socially or in some other way, and so he had to be handled in a different way. That man would get a gentle intimation that he ought to sell his business. He would get an intimation that he ought to sell out to their rental company, the General Film Co. It was also intimated that if he did not sell out peacefully, he might find that later when he wanted to sell he would not have an opportunity of doing so, and he was given to understond that if he did not sell out he would lose his license agreement.

Say this man would sell. What would he get? They would give him an agreement by which they would pay him, in deferred payments, extending over a period of five years, about 90 per cent of the purchase price. Of course, that might be called stage money. Of the remaining amount they would give him a small percentage of the preferred stock in this company, which, of course, cost the manufacturers nothing. That was also stage money, and they would give him a very little cash, probably not over 2 per cent of the purchase price.

This corporation which had divided $1,400,000 in profits in the first year of its existence, and had paid 12 per cent on its common stock, which was owned wholly by the manufacturers, and 7 per cent on the preferred stock, was formed, operated, and controlled by the investment of $100,000, $10,000 being contributed by each manufacturer. Of course, there was a huge profit in that, because if your place was earning you $60,000 a year, and they bought your place for $60,000 and agreed to pay you back in five years, you were getting $12,000 a year out of the $60,000 you had formerly earned, and they were getting the other $48,000.

With the market in that condition, when September, 1911, arrived, my client, who was the most influential and the most powerful of all these rental companies, was its only remaining competitor. Accordingly, it was a thorn in their side, because with my client out of the way, they could have raised their prices, and they could have gone

further. Having control of the manufacturing and the leasing of the film, they could go one step further and take in all of the moving-picture theaters, and say, "Here, if you want our film now, you can only get it by giving our rental company 75 per cent of the profits of your business." There was at that time no other supply.

Of course, there is to-day an independent supply which is getting impetus and getting encouragement from the Government suit. But up to the point of time I am telling you about, no Government suit had been instituted, no action had been taken by the governmental agency, and so far as I can now recall, no action had ever been tried in a private suit.

Mr. CARLIN. When was the Government first appealed to?

Mr. ROGERS. In our suit, and at our instance.

The CHAIRMAN. When was that?

Mr. ROGERS. In December, 1911. The suit was begun in August, 1912.

With my client left as the only competitor, he was sent for, and I will recite now the sworn testimony taken from the records of several courts.

My client was told that this was his time to sell. I think they offered him $100,000 in this so-called stage money, to sell out a business which was earning $75,000 a year. The very man with whom he had the conversation occupied this position. He was the president of the General Film Co., the rental company of the trust, and he was the president of the Biograph Co., the most important manufacturer of motion-picture film. He was also the treasurer of the Motion Picture Patents Co., the company that held all the patents. So first he turned and facing him said, "I am now talking to you as the president of the General Film Co., and I would like you to sell out." My client said, "No." Then this man turned to him as the representative of the holding company of the patents and intimated that if he did not sell out, his license was going to be canceled, and then he turned to him as a manufacturer and said, "If this company cancels your license, we will not deliver any more film to you, and you will be out of business anyway, and you might as well sell out."

I am going to show you the power that one company had over the other. My client said of course he did not want to sell out. They said, "Very well." He said on parting, "Possibly I will find between now and the next few weeks because I did not want to sell I will find my license has been canceled." And the other man said, "Oh, no. When I was talking to you, I was merely talking to you as an officer of a rental company. I did not pretend to speak for the patents holding company at all." My client went home. Before he went home the assistant to the president of this company breathed in his ear that he was, after all, only a little splinter on the edge of a big wheel, and when the wheel began turning this little splinter would soon be crushed out and ground to earth, if he did not submit.

With that remark ringing in his ears, my client naturally hesitated as to what his course should be, and while he was hesitating, one day he received a notice of the kind to which I referred before, to the effect that on and after a certain day his license would be canceled, and he would get no further supply of film. He thereupon interviewed some of the men and tried to get his license reinstated. He wanted to know what he had done to cause them to cancel his license,

but he got no explanation, except the continuous advice that he had better sell out.

Well, they had got him to the point, perhaps, where he might have submitted, and when he evinced a possible willingness to sell out, by a mere telephone message, the cancellation of that license was withdrawn. He took the papers submitted to him for his signature, and after giving the matter some further reflection, concluded that he would not sell out. On the same day he sent back his message he would not sell out, by return mail came a new letter canceling his license, thereby demonstrating with absolute clearness that the situation was that if he was not willing to sell, they would cancel his license and he would have to go out of business.

Now I come to what is the most important part of my mission here to-day. I will illustrate the difficulties we had in getting relief from the courts and show why I so strongly advocate some of the provisions in your bill.

Mr. CARLIN. What is the difference between the contract you have as rental agents and the contract that the holding company makes with their own rental agents?

Mr. ROGERS. In our contract there was no specific provision by the manufacturers that they would continue to give us a supply of films. In other words, there was not, as they claim, a contractual obligation to supply us with the film for any definite period.

The manufacturers in their agreement with their own rental companies provided that they would give their output to the General Film Co. for a stated period.

Mr. CARLIN. You have a contract with them now and are doing business?

Mr. ROGERS. They say we have no contract.

Mr. CARLIN. You are still in business?

Mr. ROGERS. Yes.

Mr. CARLIN. Is the rate at which you get your film the same as they charge to their own rental company?

Mr. ROGERS. They are obliged to give us the film at the same price as they are giving it to their own rental company.

Mr. NELSON. Did they do that before this Government suit?

Mr. ROGERS. They did, under a preliminary injunction which we obtained, but which has since been vacated. When we found ourselves in that situation, we went to the State supreme court and there we instituted an action by which we sought to compel them to refrain from cancellation of this license agreement and to compel the manufacturers to deal with us, because after this cancellation came the threat in writing from one or more of the manufacturers that by reason of the cancellation they would no longer supply us with film.

We went to the State court and sought there to restrain the cancellation of this license agreement and also to compel the manufacturers to continue selling a supply of film to us. When we got to the State court, they took the position that, since these were so-called patented articles and we had signed a license agreement which on its face was terminable at the pleasure of the holding company which owned the patents, they had a legal right to cancel this license agreement without cause, for cause, or for no cause at all.

Mr. VOLSTEAD. Assume that you had not signed that, would the court have issued an order compelling them to deal with you?

Mr. ROGERS. I was coming to that. Of course not. The position taken by the Federal court is that no man can be compelled against his will to do business with another and that he has the right to choose his customers. I do not agree with that authority.

The great vice and one of the basic evils of our industrial and business conditions to-day is that favoritism is practiced to the extent of monopoly, and monopoly, after all, is another term for favoritism. That is my point.

It is because the law permits the corporation or individual, such individuals or firms, to favor other corporations or individuals that we have the condition of which we complain to-day. There would be no incentive to a man to engage in a combination, there would be no incentive for a man to have a sole selling agency, unless that resulted in a profit to him that he could not otherwise earn, and we claim that a profit of that kind is not a legitimate and not a fair one.

Mr. VOLSTEAD. Do you think we can pass an act that would compel anybody to deal with everybody?

Mr. ROGERS. I had not given that subject much thought until I glanced through some of the questions submitted to Mr. Levy. I would like to call your attention to my recommendations upon this subject. I recommend that you incorporate this section in your bill:

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 results thereof would give the selling agency the control of one-third or more of the entire supply manufactured or sold in the United States.

That, I think, is within the power of Congress and it may govern the situation.

Of course, the State supreme court held that they had the legal right to terminate this agreement at will. Of course, we claimed in addition to the legal contention we offered that the phraseology was capable of the construction we contended for, that we had on the faith of that agreement given up and returned $100,000 worth of property which we had owned outright and had given away as a consideration for getting that agreement, and that, because they had taken away property, they were estopped from taking the contract away from us.

The court did not subscribe to that view. So the preliminary injunction restraining the cancellation of this license and compelling the manufacturers to deal with us was vacated when the appellate division, which is a court of appeal in our State, to which you go on an adverse decision of the supreme court—when our appellate division in May, 1912, affirmed that order, the first company to stop making the supply of film was the Biograph Co.

Then we went into the Federal court—there was a diversity of citizenship—and Judge Hand, the United States judge for the district, continued the preliminary injunction which Judge Hough had granted to us.

Judge Hand was met at the outset with the defense of the combination that in the absence of contractual relations and the contractual obligations, which the State court found we had not, and be-

cause the State court had found they had a legal right to terminate that agreement, that we were without any standing in court to ask the court to compel this combination, against their will, to deal with us and give us their commodities. Of course, the point was also raised, which I suppose is indisputable, that under the Sherman Act we could have no relief, because an individual was entitled to no equitable relief.

Mr. CARLIN. You are, under the bill as we have drawn it.

Mr. ROGERS. I notice that. If a provision of that kind is not in that act we might as well write the Sherman Act out of the books. It is all right to say the Government gives you relief under the treble-damage clause in the act, but it does not give you any relief, because there are very few men who are put out of business who can afford to conduct a litigation which would be as expensive as one of that kind.

Mr. CARLIN. You approve that provision in the bill?

Mr. ROGERS. The provision that an individual may have equitable relief?

Mr. CARLIN. Yes.

Mr. ROGERS. I go a step further. In order to clarify the situation I would have that language read that the courts are empowered to issue mandatory injunctions compelling persons complained of to maintain trade relations with others, where the charge is made that the purpose of the refusal to maintain those trade relations is to get rid of a competitor and to further a monopoly, and that whether there are contractual relations or not, that duty ought to be imposed by law.

Mr. CARLIN. The real trouble with your business was in the combination and formation of the rental company. The General Film Co.? If that company could have been prevented you would have had the right to an equitable injunction. When that was done you would not have had any trouble at all.

Mr. ROGERS. There would have been some trouble, but the combination would not have put the hundred and odd companies out of business.

Mr. CARLIN. They would have been saved. Then the manufacturers would have been seeking for customers, and when their own self-made customer had been stopped they would have been compelled by the business effect to have done business with the gentlemen who had previously done business with them?

Mr. ROGERS. Generally that is the way, but here they do not need to seek their business, because they have a monopoly of the business. Whenever an independent manufacturer attempted to manufacture any film, they would begin litigation immediately against this so-called independent competitor, and by the force of their old patents keep him so busy in the courts that even if he could get any business and get any of his commodity into the channels of trade, it would be so expensive that he could not live very long.

Mr. CARLIN. That is the manufacturing end of it?

Mr. ROGERS. Yes.

Mr. CARLIN. But the rental is another end?

Mr. ROGERS. If we had the right to equitable relief in the first instance to prevent the operation of the so-called General Film Co., the rental side of this business would have been at a pretty satisfac-

tory stage, and they could not have controlled the rental end of the business.

Mr. McCoy. What did Judge Hand decide?

Mr. Rogers. I will give you Judge Hand's decision in full in my printed argument.

Mr. McCoy. Has anybody ever contended that on the basis of multiplicity of suits the plaintiff can go into an equity court under the Sherman law because it gives the right to sue under the section providing a suit as the remedy?

Mr. Rogers. I do not know that the question has been raised in just that way. In the State courts I did bring up a point in regard to the multiplicity of actions that would arise for another reason. Inasmuch as they have the title to the various films which my client had, it was claimed that if they succeeded in terminating the contractual relations existing between them, that since they made claim to the title, they might institute replevin suits to recover the various pieces of film, and therefore we would be entitled to relief in a court at equity, and the court taking cognizance of the whole situation could afford such relief as it thought proper.

What the court did say is novel. Judge Hough granted the preliminary injunction, and Judge Hand continued it pendente lite. Judge Hand, in the injunction which he granted, provided that they were to give us the film at the same price and in the same quantities as they gave to their own company. In other words, that they were to maintain the same trade relations with us as they had theretofore, and that they were not to discriminate in favor of their own rental company.

Of course, we are obliged to give a bond or pay for the goods in cash.

An appeal was taken, and in this connection I desire to make another recommendation: Under the statute the appellant or defeated party was entitled to take an appeal from this order granting an injunction pendente lite, although if we had been defeated we would not have been entitled to an appeal.

They took an appeal to the circuit court of appeals and the circuit court of appeals reversed the order of Judge Hand, and the sole ground upon which the order was reversed that whatever relief we might have been entitled to, we were not entitled to the relief that the manufacturers be compelled to deliver the film to us.

I can read you that part of the decision.

Mr. Carlin. Suppose you give it to the reporter so that it may go into the record.

Mr. Webb. Are those cases in the Federal Reporter?

Mr. Rogers. This particular decision is in the Two hundred and third Federal Reporter, page 39.

Mr. Webb. Where is Judge Hand's opinion to be found?

Mr. Rogers. I can not find that it has been reported anywhere.

Mr. Floyd. You started to read the grounds upon which this was reversed. I would like to have you make a brief statement in regard to that.

Mr. Rogers. This is what the court said in that decision:

Where, in a suit for conspiracy between defendants to injure complainant's business, it did not appear that defendant B company had any contract by which it was bound to furnish complainant with moving picture films for any

period of time, complainant was not entitled to a preliminary mandatory injunction restraining the B company from refusing to deliver films of its own manufacture as complainant might from time to time order. (Greater New York Film Rental Co. v. Biograph Co. et al., 203 Fed. Reporter, 39.)

Mr. McCoy. Is that a unanimous decision?

Mr. Rogers. Yes; by a unanimous court. Judge Lacombe read the opinion.

Mr. Webb. It seems to me you have to get after that evil by an amendment to the patent laws, providing that any one who refuses to sell to the public a patented article would forfeit the patent.

Mr. Rogers. I do not know whether this comes within the province of this committee, but you will notice that in my recent recommendation I recommend that this section be added:

No license agreement based upon letters patent shall be effective unless the form thereof be approved by the interstate trade commission, which shall have the power to direct what provisions thereof should be eliminated and what provisions shall be inserted.

Mr. Volstead. Do you mean the patent?

Mr. Rogers. Any license agreement based on the patent. I think that is within the power of the interstate trade commission. I do not think it would offend any provision of the Constitution. We found ourselves in the condition of the courts declaring they were powerless to help us. We had in the meantime complained to the Department of Justice, and the Department of Justice was considering the institution of an action under the Sherman Act.

In the recital of the history of this transaction I had come to the month of February, 1913. You see we were permitted to go on and continue under these preliminary injunctions from December, 1911, to February, 1913.

Now, in the meantime, in August, 1912, the Government filed this bill in equity in the eastern district of Pennsylvania. I desire to make a suggestion at this time, if I may make a suggestion of that kind, and that is that this committee invite, if it is within its function, Mr. Edwin P. Grosvenor, the Assistant Attorney General, who has this matter in charge, to come here and discuss it with you. I am quite sure he would be willing to express his views to this committee. I think he is still with the department, but whether or not because of that he is in a position to discuss it with you, I am not sure.

The Chairman. He has written to the chairman saying he would be willing to come, but this committee has not given any special invitation to anybody to come. We would be very glad to have him and hear what he has to say, if he desires to appear before us.

Mr. Rogers. My only reason in making the suggestion is that we have a situation that is so unique and comprehensive that I think if you master this situation you get the whole field fully covered. I mean the whole field of operation and the prohibitions and inhibitions required.

Now, taking up my story again, we then went to the Attorney General. We said, "Here is our situation. The courts having declared they are powerless to help us, if we are put out of business, there is not only the fact that we are put out, but when they put us out, and during the two or three years which it will take to have the suit determined, what is going to become of the exhibitor and the

large theaters that some of my clients are interested in, and those in which one or more of the stockholders of this rental company are interested in?"

Now comes the suggestion that I make, and the reason for it, that the Attorney General be invested with discretionary power to secure a preliminary injunction to protect a private person, either as preliminary to, or as incidental to, an action to be instituted under the antimonopoly act.

The CHAIRMAN. Is the Attorney General not invested with discretion under the Sherman antitrust law as to whether he shall proceed in any case of a violation of that law? Has he not that discretion now?

Mr. ROGERS. I am very glad you asked that question, Judge.

I think it has been the policy of every Attorney General—I do not wish to speak for the present Attorney General, for I think possibly it is not the policy in that office to-day—that the department would not apply for a remedy to assist a private person, and that unless an injunction was necessary in order to protect the public, or the people at large, the application would not be made.

Mr. CARLIN. What is the use of giving the Attorney General discretionary power to do that when we give the individual the right to do it himself?

Mr. ROGERS. I say in my recommendation that I suggest that either in addition to or in lieu of the proposed provision, and the reason I make the proposed suggestion is that probably, in the last analysis, it may point the way out. I understand it has already been suggested to your committee.

The CHAIRMAN. Is not this the case now? You say invest the Attorney General with discretion where the rights of an individual are invaded and not so much a public right. How can it be possible, in any given case of the sort you mention, where you furnish amusement, that the individual proprietor of the show can be injured and his business destroyed—how can it be possible that that can be done without involving the rights of the public? The public has a right to entertainment.

Mr. ROGERS. I am inclined to agree with you; but I imagine that the policy of the department has been heretofore that it would not interfere in a case of the kind I have suggested, and, if that is so, I think I am supported in my statement by the fact that, I think, you will find, ever since 1890, there have been very few cases under the Sherman Act where the Attorney General has at any stage of the proceedings procured or applied for a preliminary injunction.

Another reason for the reticence on the part of the Attorney General to apply for a preliminary injunction is that it is very unsatisfactory to try a case on affidavits, and, of course, it is very unsatisfactory to go into court and have the judge decline to grant a preliminary injunction on the facts as there disclosed, and the resulting moral effect that it would have upon the trial justice who hears the case finally.

Mr. CARLIN. The objection to that would be that you would be using the legal department of the Government for the benefit of private litigants.

Mr. ROGERS. Another reason is that——

The CHAIRMAN. Of course, the matter must be of sufficient magnitude to lift itself out of the mere realm of private rights; it must involve some public right.

Mr. NELSON. It must be predicated upon some real trust or monopoly.

Mr. ROGERS. In our situation, the suggestion I make is that, in order to relieve the Department of Justice and the Attorney General from any criticism that might be charged against his for going into court in behalf of private litigants, that where it finds it necessary to do so, that the act shall plainly provide that he shall have discretion to do that, and no one can then say he has used his official position for the benefit of any private litigant. And to-day I think the Department of Justice—of course, I can only give you my impression, and my impressions are founded on pure guesswork—I think the Department of Justice is not inclined to apply for a preliminary injunction in a case of that kind. It is only very rarely that they will do that. I think, if you will go through the books from 1890 to date, you will find that seldom, if ever, has the Department of Justice applied for a preliminary injunction.

Mr. NELSON. Why would not the provision as to treble damages solve the case and give you relief?

Mr. ROGERS. It is like offering a starving man a loaf of bread two days after he is dead. It is all right to say to the people who have been put out of business, "Oh, you come into court and you present your case, and you will get treble damages." It is a very expensive proposition. I think it is going to cost the Government, for instance, something like a quarter of a million dollars in this case against the Moving-Picture Trust. There has been taken already over 4,000 printed pages of testimony. People from all over the country have testified, and, you see, there are still several months of testimony to be taken in the case. What private litigant could afford to pay for that? He has not only got to establish that they did violate the act, but he has got to show that, as a result of that they did, he has been damaged.

Mr. CARLIN. This bill meets both of those conditions. We first give the individual the right to bring his own suit in equity, either for a permanent or a preliminary injunction. The bill then gives him the right, after the Government has brought suit and gotten a decree, to use that Government decree in his own suit; and so we are trying to meet both of those conditions.

Mr. VOLSTEAD. If you should try to make use of any judgment that might be rendered in this suit, it would raise the question as to whether or not that act could apply, because that action had not been tried with reference to this proposed act and they had not been put on notice to protect themselves in this suit.

Mr. ROGERS. I have anticipated that question, and I understand that some constitutional objection has been suggested by Mr. Untermyer to this provision in the act.

Mr. VOLSTEAD. Still, that might not be an objection.

Mr. ROGERS. I think it could be very easily overcome. I am disinclined to agree with Mr. Untermyer that the act proposed is unconstitutional.

The CHAIRMAN. Why is it not constitutional?

Mr. ROGERS. I understand that Mr. Untermyer has advanced the idea that it is unconstitutional because you declare that while it is binding on the parties defending the Government suit, there is no correlative provision that it is likewise binding on the persons who might be affected thereby. In other words, that although you bind the trust, and it may be used as conclusive evidence against the trust by a private person, the act does not also provide that it is res adjudicata as against the private person and in favor of the combination if the combination is successful.

The CHAIRMAN. Do you contend it is not due process of law?

Mr. ROGERS. I understand he claims it is unconstitutional. We could use the words "presumptive evidence" and provide that any findings of any court that there was a violation under this act it should be presumptive evidence and put the burden on the defense in the treble damage action of going forward with evidence to show that the court has erred in the first instance.

I am rather inclined to the view that it is constitutional as drawn.

Mr. VOLSTEAD. Do you think it would be constitutional as to any suits started or tried before this law went into effect?

Mr. ROGERS. I think it is. There is no inhibition under the Constitution against any retroactive legislation unless it affects vested rights. Of course there is an inhibition against ex post facto laws, but my understanding is that that relates to purely criminal statutes.

Of course I do not want to imagine a case, but if this act as drawn provided that it should be res adjudicata in a criminal proceedings as to something that was not a crime at the time this act was passed, I suppose it would be unconstitutional, because it was ex post facto.

Mr. VOLSTEAD. I am not expressing any opinion one way or the other, but it occurs to me that this point might be raised. Say, for instance, there is a suit brought by the Government. The relief sought by the Government may not be of very large consequence, yet the relief that might be sought by other parties might be of considerable consequence.

Now, in the trial of that suit the trust might neglect to put in a defense and practically pay no attention to it. Then after judgment had been entered we put a statute on the books saying that shall be enforced in another suit which never was contemplated at the time the judgment was entered.

Mr. CARLIN. This statute does not go that far. It says they must have a cause of action at the time.

Mr. ROGERS. I would prefer not to answer that question at this time, because I have not given that matter a sufficient amount of study and thought.

Mr. CARLIN. They would not have a cause of action if the suit had been determined?

Mr. ROGERS. I think that is so.

Now, to continue with the story which I was telling you. Finding ourselves in that position we appealed to the Attorney General, and I think, to the credit of the Attorney General and his assistant, Mr. Grosvenor, it might be said that they did induce these men to go on

and continue to supply the film, pointing out to these men that if they did not go on and continue to supply the film they were increasing their monopoly and that some other action by the department might be called for.

After a number of conferences and after considerable discussion these men finally concluded to follow the suggestion of the Department of Justice.

Mr. CARLIN. Are you in business to-day?

Mr. ROGERS. Yes; but on sufferance.

In other words, the Department of Justice, a[illegible]ugh unwilling to go into court and ask for an injunction to protect [illegible] and the situation generally, yet, by suggestion, found a practical solution, and from that day to this, in commercial pursuits and in legal gatherings, the Attorney General has been unmercifully criticized because it is said he used his office for the purpose of protecting a private litigant. After all what he did was this: To give the exhibitor two avenues of supply for the same goods. Now, my reason for the recommendation——

Mr. CARLIN. He may have saved them a great sum in damages.

Mr. ROGERS. Possibly. I am coming to the question of damages, and one of the reasons why I am so strongly advocating the injunction provision is that whatever arguments may be used to this committee against it—and I know you will hear a great deal against it; it has probably already been suggested that a provision of this kind in the act might lead to blackmail, there is a complete answer to these arguments.

In the first place, the people who make that suggestion—I think you will find it coming either from men who are interested individually or who are the legal representatives of large powerful corporations—are losing sight of the fact or do not want to see that there is nothing in this legislation as proposed which makes it compulsory on the court to issue the injunction. It merely confers jurisdiction upon the court in a particular case to issue the injunction.

To-day the court meets you in this way: The courts say you want an injunction to compel the maintenance of trade relations; we can not do that. You want an injunction, so that you shall be kept in business; we can not do that. You say you will have no way of proving your damages under the treble-damage provision of the statute. We are sorry for you, but we have not the jurisdiction.

Now, if the judiciary can be trusted with its broad power of injunction in matters affecting life and property, and can use that power of injunction in Government cases, as it did in the Debs case, why can not the judiciary be given the confidence of Congress, and why can not Congress believe that it will not abuse this privilege?

But in order to make it effective, I have another recommendation. Under the statute as it exists, and as I read it, the right of appeal exists where there is an affirmative act by the court. If the court grants a preliminary injunction, you may appeal from that order to the circuit court of appeals, but if a judge denies your motion for an injunction there, you have no right of appeal.

Mr. MCCOY. Is the reason why you can not appeal because the action involves the exercise of discretion?

Mr. ROGERS. The theory is that you can bring it——

Mr. CARLIN (interposing). The theory is that you must wait until the cause is finally decided.

Mr. McCOY. An injunction pendente lite does not settle it. It just holds you where you are.

Mr. ROGERS. Yes; but see how far the courts go when they deny you the injunction. Take Judge Lacomb's comment. Our injunction only maintained the status.

Mr. CARLIN. The court in that case settled the principle involved.

Mr. ROGERS. Yes; but it went further and said the injunction can not be sustained merely on the ground that its continuance until a final hearing will injure the defendant less than its dissolution will injure the plaintiff.

Mr. CARLIN. It is, in effect, a final decree. It seems to me you could appeal from that. If the lower court had refused a preliminary injunction, I think you would have had a right to appeal.

Mr. ROGERS. Not under the statute.

I say, if you want to encourage the Department of Justice to go into court and maintain the status while the proceeding is before the court, giving the right of appeal in cases where the injunction is refused——

Mr. CARLIN. Had the lower court taken the view that the appellate court did in your case and disposed of the proposition upon its merits by saying that you had no right of recovery, they would have been able to enter a final decree, and from that you would have had an appeal.

Mr. ROGERS. I think what you have in mind is this: The statute now provides that the circuit court of appeals, under the powers of the circuit court of appeals—I am not clear whether it is by statute or not—where the circuit court of appeals has before it an appeal in equity, and where the appeal is taken from a preliminary order granting an injunction pendente lite, the circuit court of appeals has the power to scan the bill, and if it reverses the order granting the preliminary injunction, it may also dismiss the bill.

In our case they scanned the bill, and the point was raised in the brief that we did not state a cause of action in equity. After scanning the bill they did not dismiss it, but reversed the preliminary injunction on the ground that it could not be sustained merely because a status would be preserved, but said we could not have a right of recovery in the action that the perliminary injunction gave us, and since it could not be made final, it could not issue temporarily.

Mr. CARLIN. The rule is that where the decision upon a preliminary injunction disposes of the question involved, then that is in effect a final order and you have the right of appeal.

Mr. NELSON. You have had a great deal of experience with a trust. This tentative bill No. 1, in section 13, would have given you, had it been in force, injunctive relief only. Would it not have helped you if you could have brought suit for the dissolution of that trust? This section only gives you injunctive relief.

Mr. ROGERS. Well, I think I could answer that by saying that I think at common law we would have a right that would be analagous to the institution of a suit for dissolution. At common law you can restrain a conspiracy as such. In other words, there is no doubt that we could go into a court of law or equity and base our

action upon the theory that these men were engaged in a conspiracy; if we could do that, we could have relief to restrain that conspiracy. But even if we could restrain them from carrying out this conspiracy, that is where we would have to stop. That would be negative relief. We could not get affirmative relief.

It has been said that after all the Sherman Act is only declaratory of common-law principles. At common law conspiracies that were combinations in restraint of trade were subject to the jurisdiction of the courts. I would rather be opposed to giving a private party the right to institute an action under the act. It has been said that if you let the injunction provision remain as it is somebody will start an injunction suit collusively in order to help the trust.

Mr. CARLIN. Mr. Untermeyer suggested to this committee that we ought to give the individual the right to sue for dissolution and to interplead the Government in that suit. The committee had not thought to up to this time. This does not give the individual the right to sue for dissolution.

Mr. ROGERS. Naturally, no.

Mr. NELSON. I want to ask you in regard to that case. Would not the larger remedy have been more helpful if you had had a right to press on for dissolution? Would that not have terrified the trust and caused the trust to give up the fight?

Mr. ROGERS. I agree with you, if an individual had that right, it would be a tremendous power in his hands, but whether or not it should be given individuals is a matter of policy with which I do not agree.

Mr. NELSON. What do you fear in the way of a collusive suit?

Mr. ROGERS. I could imagine a trust might have such a suit brought for dissolution. That is what I was going to talk about. They could bring a suit before the Department of Justice, which is a very busy institution, was ready to act, and in a case of that kind they could take as much testimony as they thought necessary and let the court find on that testimony.

Mr. NELSON. There might be an insufficiency of evidence presented and a mistrial might result.

Mr. ROGERS. Yes; there might be a failure to properly present the case to the court.

The CHAIRMAN. Not exactly a mistrial, but because the complainant did not establish the fact that it was a trust.

Mr. CARLIN. And for the further reason that it is impossible for the individual to establish what the Government can, because of the great expense involved.

Mr. ROGERS. And also because of the reluctance of the individual to testify.

Mr. NELSON. What good would be the injunctive relief alone?

Mr. ROGERS. Take our case as we presented it. Judge Bijour said his sympathies were with the complainants, but he lacked the power.

Mr. NELSON. You were strong, but the ordinary corporation might not be powerful enough to prove it to be a trust.

Mr. ROGERS. The answer to that is this—that I think your question is the most powerful argument in favor of the injunction provision being inserted in that bill, because if the man can not resist the operations of the trust to-day without this relief, how much less would he be in a position in the future to combat it unless you shall give him that remedy?

Mr. NELSON. I wanted to find out the extent of the remedy.

Mr. ROGERS. I think if you adopt the suggestion I made, if you make it the duty of the Attorney General to exercise his discretion as to whether he shall go into court to apply for a preliminary injunction to aid a private person in a proper suit, and put that as an additional provision, then you cover the situation. Of course, there might be some criticism if the discretion is not exercised wisely; but if he does not exercise the discretion at all, that is another matter.

Mr. CARLIN. There is another objection you have not seemed to meet. The Government, if applying for a preliminary injunction for an individual, would have to give bond. No preliminary injunction ought to be granted in a case of this kind unless there is opportunity given for relief if the injunction has been improperly granted. If we were to adopt that suggestion and were to allow the Government to bring a suit to protect an individual, we would have the Government giving bonds, and to be liable on the bond if it were forfeited.

Mr. ROGERS. You have given the Department of Justice the power to spend $500,000 to prosecute the trusts.

Mr. CARLIN. That is for the public good. That is not for the benefit of any particular litigant. In such case he does not ask for a preliminary injunction, but he is asking for permanent relief.

Mr. ROGERS. Yes, sir.

Mr. CARLIN. If we carried that out to its practical conclusion, we would have to provide for a bond to be given somewhere.

Mr. MCCOY. The individual should be required to give it.

Mr. ROGERS. That would be one solution, but I think Judge Clayton suggested a theoretical solution in saying that in nearly every instance where you would have the Attorney General go into court the fact would be that he would not be going in to protect private interests only, but also to protect the public interest.

Mr. MCCOY. But you are giving him the discretion and practically compelling him to do it—to apply for a preliminary injunction—and you yourself would not advocate the granting of a preliminary injunction against an operating concern unless there were some bond given by somebody?

Mr. ROGERS. I will tell you what the answer to that is. I think I can adopt Judge Hand's language in answer to that when he said: "What harm will come from granting a preliminary injunction compelling these manufacturers to go on and maintain their trade relations with the complainant during the pendency of the suit? If the manufacturer is right, it will only affect him for a little while, under his absolute monopoly of the whole thing; but if the manufacturer is wrong, then great wrong would be done if you refused to grant a preliminary injunction."

I would say this: That if the Attorney General went into court and was only right in 6 cases out of 12, even if he were obliged to give bond, that bond would only cover the profits that might be made by this complainant during the pendency of the public suit.

Mr. CARLIN. I am trying to get the practical effect of the preliminary injunction. Take your own case. You were required to give bonds?

Mr. ROGERS. Yes.

Mr. CARLIN. When the preliminary decree was entered you were required to give bond. Suppose this company turned out not to be

a combination in restraint of trade, and had made a lawful contract to sell its entire output to the film company, and the court, by a preliminary injunction without bond had required them to take away from that company a portion of its output and sell it to you, they would have had to answer to the film company for their failure to comply with their contract, assuming that the contract was lawful.

Mr. ROGERS. That might or might not be true generally. I will assume it is true generally.

Mr. WEBB. Not if their failure to carry out the contract was on account of the court order.

Mr. CARLIN. If A has a lawful contract with B to take the output of his factory, and the court—assuming that they have the right to cancel your contract—and the court prevented them from canceling the contract, in effect prevented them from carrying out the contract with B, had you failed in your suit, and B had suffered a loss by his failure to receive the output of that factory, he would be entitled to damages somewhere. That is the position the Government would be in when it undertook to ask for a preliminary injunction at the instance of a private litigant.

Mr. ROGERS. The Attorney General is not going to get a preliminary injunction from the court unless he comes into court and establishes the fact that he has a real cause of action.

Mr. CARLIN. But it frequently turns out that a preliminary injunction is not made final, and it so turned out in your case.

Mr. ROGERS. Yes; but I imagine that a very close examination of the cases in the books will disclose the fact that in a vast majority of the cases where injunctions are granted you will find that the final judgment is in favor of the person by whom the injunction was secured.

Mr. CARLIN. A court frequently issues an ex parte injunction on the showing made by the bill.

Mr. ROGERS. What you probably have in mind is the rule that where the issuing of the injunction will do less harm to the defendant than a failure to issue it will do to the plaintiff, the injunction will be issued. I think that answers that proposition.

Mr. CARLIN. Your idea is that the Government ought to start the machinery in motion at the request of any individual who might seem to have a private right of action against a corporation?

Mr. ROGERS. I say in a particular case.

Mr. CARLIN. Every man thinks that his case is a particular case.

Mr. ROGERS. That is where the discretion of the Attorney General comes in.

Mr. CARLIN. That does not relieve the criticism he would be subject to?

Mr. ROGERS. No; he would be subjected to criticism, but I feel sure the Attorney General would exercise that discretion wisely, and that such a provision would very materially help the situation.

Mr. CARLIN. Had the proposed statute been a law at the time your trouble began, you would have had ample relief? Take your own case.

Mr. ROGERS. I do not think that is so. I will make this prediction, that the present Attorney General, whether you amend the act or not, during his term of office, will be in court applying for prelimi-

nary injunctions many more times than any other Attorney General we have had during the past 20 years. I think the public conscience has been awakened.

Mr. CARLIN. I have often wondered why, with the flagrant violations of the statute, preliminary injunctions have not been asked for.

Mr. ROGERS. I say you have got to accomplish that by first giving the discretionary right; and, secondly, you have got to protect the Attorney General in the respect that you should make a decision denying the preliminary injunction to him appealable.

Mr. MCCOY. You mean to the Supreme Court?

Mr. ROGERS. Yes; either to the circuit court of appeals or to the Supreme Court. He applies to the district court. If the district court judge denies the application, and in his opinion states that on the facts or the law no case has been shown, then there should be an appeal, either to the circuit court of appeals or to the Supreme Court.

Mr. FLOYD. In the particular case you have been discussing, the case of your company, I can easily see that where your object was simply to continue the trade relations that had existed theretofore, and the court had ordered them to sell to you at the same price at which they had sold the output of their company, no great harm could come. But this is a general statute and would allow people alleging injury in another form to bring injunction suits also.

Suppose, on the contrary, some unlawful combination was trying to drive out competition and destroy the business of their competitors by selling commodities at ruinous competitive rates, and they should seek to bring a preliminary injunction to stop them from doing that, and suppose, at the end of the suit, they should fail to sustain the charge, ought not the private corporation to pay some damages?

Mr. ROGERS. Yes.

Mr. FLOYD. I think there would be danger in allowing the Attorney General to maintain a private suit without bond.

Mr. ROGERS. That is true, but the answer to it is this, that when you adopt a method of going after wrongdoers and when you pursue one class vigorously you can pursue the other class just as vigorously. If anybody should take an improper advantage of any provision of the law, which was intended for beneficient purposes, and use it for evil purposes, they can be reached by the criminal law and mulcted in damages under the civil law.

Mr. FLOYD. But the man alleges, we will say, that they are doing wrong and he induces the Attorney General of the United States to institute a preliminary injunction against them without bond, but at the end of the controversy the court holds that he has not established the fact that they are wrongdoers; that they had a perfect right to do what they were doing; that instead of being guilty of unlawful acts, they were stimulating legitimate competition. Do you not think that they ought to pay for damages in that case, if that corporation had been enjoined from doing the thing that the court has held is not improper?

Mr. ROGERS. I agree with you in spirit that that should be so, but I think it would be cumbersome to draw such an act.

Mr. FLOYD. There is no trouble about it at all, if you require a bond to be given to cover whatever damage may result.

Mr. ROGERS. The objection you will find to it is this, that the combination will come in and fix their damages so high as to make it almost impossible for the complainant to furnish the kind of bond that the Attorney General might be asked for.

Mr. MCCOY. What kind of bond do you have to give?

Mr. ROGERS. In the State court the bond is fixed by statute. We give a bond of $250, and they have a right to increase it. Judge Hough fixed the bond at $5,000. Judge Hand, I think, fixed the bond also at $5,000, but they did not require much of a bond there because we were obliged to pay cash.

I can not imagine that you would have a large class of cases in which the court would be induced to give a preliminary injunction where the circumstances would not call for it.

Mr. NELSON. The Attorney General and the court would have to pass upon it.

Mr. ROGERS. Yes. The Attorney General is a quasi judicial officer, especially trained with special knowledge, and if a case were presented to him, it is not to be presumed that he would apply for a preliminary injunction unless he were satisfied that the circumstances warranted the application.

Mr. CARLIN. The court would not grant an ex parte injunction; if that is applied for the bond would have to be given.

Mr. ROGERS. There is no provision to-day for a bond under the Sherman Act.

Mr. CARLIN. That is in the discretion of the court, and general equity practice requires a bond. The court has the power to require a bond to be given. The statute has not taken that power away from the court.

Mr. ROGERS. If they do not have it directly, they would have it indirectly, because they would say we would deny the Attorney General's motion, but if the Government is disposed to give the bond, we would take a different attitude.

Mr. CARLIN. It is in the hands of the court now.

Mr. ROGERS. I rather imagine that where the Attorney General was coming into court to ask for a preminary injunction the danger of the Government being mulcted in damages, if the bond was required, is rather remote.

Mr. CARLIN. The office of the Attorney General would be crowded every day in the week with applications of private litigants urging him to bring private suits.

Mr. ROGERS. It costs the Government something to try suits under the treble-damage act now.

It is not all one-sided. It is true, the Department of Justice would be applied to with great frequency to use its powers, but, after all, it costs something to try suits under the treble-damage provision, and the only reason why the courts are not kept busier than they are is because you have made it prohibitive, or rather the law has made it so.

Mr. CARLIN. It is the duty of the court to try controversies between private individuals, but up to this time it has not been the duty of the Attorney General's office to determine the rights of private individuals. You would have him sitting as a continuous court.

Mr. ROGERS. My suggestion is not that the Attorney General would come in at the instance of every applicant nor that it would be

obligatory upon him at the instance of every litigant who feels that he has a case, but that in a proper case the Attorney General shall have the discretion as to whether or not he shall apply to the court. As to what would be a proper case, you would give the Attorney General the same discretion he has to-day.

Mr. CARLIN. I think you have made this perfectly plain, but perhaps I have not made myself plain. The Attorney General would have to give audiences to private individuals in order to exercise that discretion. My point is that we would not have time to do anything else.

Mr. ROGERS. The answer to that is this. The Attorney General to-day is continually being appealed to to institute actions under the Sherman Act. I know from my experience with his office that it is kept pretty busy listening to complaints.

I think the Attorney General ought not to apply for a preliminary injunction unless he intends thereafter to file a bill under the act. If he is going to do the work, does it make any difference whether he exercises his energies in the preparation of the papers for an injunction coincident with the bill in equity?

Mr. NELSON. The amount of the work would be limited, of course, by the number of trusts in existence.

Mr. ROGERS. Yes.

Mr. CARLIN. It would be limited only by the number of private litigants in existence.

Mr. NELSON. They would only come because they were confronted with a monopoly.

Mr. CARLIN. No; a good many of them would come with a private grievance.

Take your case. So far as its legal application was concerned in the beginning, it was a perfectly private matter, as to whether your trade relations were established or not.

Mr. ROGERS. It was more than that.

Mr. CARLIN. On the other hand, so far as trusts are concerned, it was a public matter, and the Attorney General proceeded along those lines. In less than six months he brought suit.

Mr. ROGERS. From December to August.

Mr. CARLIN. You would have had him bring your suit first for preliminary injunction and then begin on the investigation, which took six months, and then bring a suit for dissolution. The fundamental objection is that there has to be time for investigation. The suit ought not to be brought upon a mere complaint, and the evidence must be procured, and if you are going to put upon the Attorney General the burden of bringing your suit, he has the burden of securing the evidence.

Mr. ROGERS. I do not want to appear to be unduly persistent, and I hope I have the quality of knowing that I ought to submit when the argument is against me, but I still insist that if the Attorney General is given the discretionary power to come into court and ask for a preliminary injunction he will do so only after full and fair investigation.

Mr. CARLIN. If he had taken time for investigation, and that time was the six months he did take, you would have been out of business six months before you were.

Mr. ROGERS. But you understand the great difficulty——

Mr. CARLIN (interposing). Injunctive relief presupposes the idea that something immediate is necessary to be done.

Mr. ROGERS. Yes; but the real difficulty in our case was this—it would not take so long in the average case, and it will not take so long again in a case of this kind; the real difficulty here was the hesitancy on the part of the Attorney General to go into court to litigate a question concerning patent rights, in view of the decisions up to that time, and also because this was a unique situation. The legal mind that worked out this scheme ought to be identified.

Mr. CARLIN. You ought to know him.

Mr. ROGERS. Yes; and I am not using this as an humorous illustration. I am very serious about it. I think there ought to be a provision in this act that attorneys shall be competent witnesses, when a suit is brought by the Attorney General under the act, or when there is an inquiry to be instituted by the Commission. I think this committee will find a place for itself in the history of the Nation and in the history of the world if it can work out a practical solution making it compulsory upon the attorney who was engaged in perfecting the so-called trusts—making it obligatory and compulsory upon him to testify.

Mr. CARLIN. And disclose his confidential relations?

Mr. ROGERS. What harm is there in that? You provide for the constitutional guarantees to the witness in other cases, and you can do the same thing in this case.

Mr. CARLIN. Would you apply the rule to attorneys in all cases? Take even so strong a case as murder, where the public would have as deep an interest as it would have in moving pictures?

Mr. ROGERS. It has been a mooted question as to whether or not an attorney ought to suppress the information he receives from his client when his client says he was guilty. I think the people are waiting now for the lawyers to demonstrate that they are equal to the situation and to the emergency, and I think the lawyers ought to be the leaders in this movement. I think it has been justly said that lawyers are the last persons to see the changing economic conditions, and the fact is pointed out that the medical profession is marching on with progress, while the lawyer stands still and does not go forward. I think, for instance, the attorneys for the harvester company ought not to have any objection to saying, "We advised that the harvester company should do such and such things." If the things they advised to be done were proper and honest and legal, there ought to be no objection to that. But when Mr. Jones, or Mr. Brown, or Mr. Smith, can walk into the law office of some man specially trained to show those men how they can combine for the purpose of getting a monopoly, that man is not worthy the name of a lawyer, and that man ought not to be allowed to hide behind his privilege and say, "I am not the man who was behind the scheme."

Mr. MCCOY. Do they not receive punishment for that crime when they get into courts and are knocked out as illegal combinations, and the lawyer loses his reputation?

Mr. CARLIN. Every fellow who has consulted his lawyer might say, "I did this because my lawyer told me to do it." And the lawyer might deny it until he was black in the face. The defense would always be that he did it because his lawyer told him to do it.

Mr. ROGERS. There are some rascals, who, when they get in a corner, will blame it on the lawyer, and try to explain their liability in that way. But that is the exception.

I suggest this provision, so that when a lawyer is called into court, or there is being an investigation conducted by the court or by the interstate trade commission, and he is asked if he prepared this agreement, he shall be compelled to say whether he did or not, and he shall be compelled to say what the circumstances were, in order to determine whether or not the agreement is legal. I have not the slightest doubt that if the lawyers could not take advantage of the plea of privilege that it would not take the courts two weeks to discover whether or not the defendants being investigated are a trust or not, because the circumstances under which the agreement was made tell the story.

Mr. CARLIN. He would say, possibly, "I decline to answer," upon the theory that he might bring a conviction upon himself.

Mr. ROGERS. You provide against that by saying that his testimony might not be used for the purpose of convicting him.

I say if you throw the constitutional guarantees around the situation there can be no objection to it. There is no more reason why a lawyer should not disclose the situation than that the client should not disclose it. By some of the provisions here you compel the client to come before the commission and disclose what took place. You would get the real story from the lawyer, where you might not get it from the client. My proposition is that when you are investigating a matter in which there are papers that tell the story, the lawyer should be compelled under oath to tell the story.

The CHAIRMAN. Do you wish the committee to understand from what you have said that you approve the tentative bills now pending?

Mr. ROGERS. I do, sir; absolutely.

Mr. CARLIN. You think they would accomplish great good?

Mr. ROGERS. Absolutely.

Mr. CARLIN. Do you approve of all of the provisions in all the bills?

Mr. ROGERS. I am talking of Judge Clayton's bills. Of course I have read Congressman Lenroot's bill.

Mr. CARLIN. My question had reference to the tentative bills.

Mr. ROGERS. Yes; I approve them thoroughly, with this addition: I think the patent situation might be inquired into, and when you come to do that you will find a very curious situation that will have to be covered.

The difficulty with our patent law to-day is that—we have nine circuits in the United States, and it has been said that a patent is like a cat with nine lives—you can try out the question of the validity of the patent in all nine circuits, and even if the invalidity has been established in one circuit, you can still harass a man with that patent.

Mr. MCCOY. You can go into another circuit, and with your showing of the first decision, if it has been in your favor, you can get an injunction pendente lite.

Mr. ROGERS. In this particular case the Circuit Court of Appeals for the Southern District of New York had declared this patent invalid in 1901. The trust then selected a little, insignificant fellow, the Chicago Film Exchange, who could not resist them because he

did not have money enough, and they instituted a suit against him in the District of Columbia on the same patent. It was tried and the judge granted an injunction, holding that the patent was valid, an appeal was taken to the Court of Appeals of the District of Columbia, when the decision of the lower court was reversed.

Then this same holding company went down into New Jersey, and there is a suit pending there now on the same patent, in which they are seeking to establish the validity of that patent. Of course the vice with a patent is that it can be used as a greater instrumentality to carry out monopoly and combination than an ordinary document or paper, because a patent has the Government behind it.

I think you will cover the commercial field so completely that you will probably find that everybody who seeks to get around the act will try to get it on some patent situation.

They tried that in the Bathtub Trust case. In that case they tried to make the patent the basis of the combination. The court said, "No; you can not use this patent for that purpose because, while it is true there are patent rights here, this patent was only on a tool used as an instrument for enameling the ware, and consequently you can not claim you are entitled to a patentee's rights." If you gentlemen do not fix the patentee's status now, you will have to go over it some other time.

Mr. McCoy. What do you think of section 4, in bill No. 3, on page 15?

Mr. Rogers. Really I had hoped I would not be asked that question, because I do not feel qualified to answer the question. That is a provision about interlocking directorates.

Mr. McCoy. No; it is the section that creates a presumption on certain things existing, and then because those things exist that the person is guilty.

Mr. Rogers. Of course that is one of the provisions Mr. Untermyer criticized as being unconstitutional. I prefer not to express an opinion upon it at this time.

Mr. McCoy. You do not express your approval?

Mr. Rogers. It may be that it is inadvisedly drawn, but I do not claim to be an expert on that matter, and I would rather not express an opinion at this time. Of course there is a great vice in having common directors in a great many cases, but whether it ought to go as far as that provision goes I do not know.

Mr. Nelson. Referring to the trust with which you have been dealing, are there any of these other combinations back of it? Are there any of the men in the Standard Oil or Tobacco Co. behind it?

Mr. Rogers. I believe that has not been charged; I do not know whether it is so or not.

Mr. Carlin. You do not know of your own knowledge?

Mr. Rogers. I do not.

I do know this, and I think it is but fair to say it, that since the Government has instituted this suit there have come into the field two sets of large, independent manufacturers, who are supported financially and have resources other than their initial investments. In other words, the trust now has some competition.

Mr. McCoy. Is that the Mutual?

Mr. Rogers. The Mutual and the Universal.

Mr. Nelson. Do you know who is back of it?

Mr. ROGERS. It is rumored that the Mutual is financially supported by people in Wisconsin.

Mr. NELSON. In Wisconsin? That is my State.

Mr. ROGERS. My remark may have been unfortunate; I did not intend it so.

I only want to take another moment or two to show you the evil of precedent and example, now that I have referred to the two independent companies. I rather imagine that the situation there is practically the same as it is in the other. The Universal and the Mutual recognize their own selling agents and you can not get their commodity except you get it from these selling agents. The Universal has its own selling agents and you can not get their commodity unless you get it from their selling agents.

Mr. VOLSTEAD. Do you not think it would be a good idea to give serious consideration to the proposition of compelling them to sell to any person of the same class in the same territory?

Mr. ROGERS. My suggestion on that is that where two or more persons combined—and this is a serious difficulty—if Mr. Jones is in the business of manufacturing hats of a certain kind and he wants to appoint Mr. Smith his agent to sell those hats, I think it would be difficult to convince the court that it would be within the power of the court to say he can not do that. But if Jones and Brown are both manufacturing a certain kind of hat and they both appoint Mr. Williams their selling agent and the result of their combined operations is that in that way Mr. Williams gets, perhaps, 35 per cent of the entire output of the hats——

Mr. CARLIN. Gets a monopoly?

Mr. ROGERS. I do not go as far as that. I suppose a monopoly might mean 51 per cent.

Mr. CARLIN. It might be less. The Steel Trust only has 46 per cent.

Mr. ROGERS. I suggested a third. If the effect of the appointment of the common selling agent is to give him 35 per cent, or about one-third of all the hats manufactured in the United States, it should be unlawful.

Mr. VOLSTEAD. Take your case. Do you not suppose a court would sustain a law that would say a presumption might be raised by facts such as show that they did intend to injure you?

Mr. ROGERS. I think the courts would sustain any statute which declares that a given state of facts raise a presumption.

Mr. WEBB. I think when a man abuses a patent he ought to be put in the same class as the corporation which misuses its charter. I think a man should be punished who attempts to use his patent for purposes other than the Government intended. I think our jurisdiction over that is perfectly clear.

Mr. ROGERS. I think the great question we are going to be confronted with in the coming years is how far you can go in creating sole selling agencies. It seems the courts now take the view that it is within the power of a man to appoint a sole selling agent, and nobody can take the power from him. Whether Congress can do it or not I am not prepared to say with any degree of certainty, but my opinion is it is within the power of Congress to say that no two or more persons shall combine and appoint a sole selling agent where

the tendency would be to create the sort of monopoly suggested by Congressman Carlin.

Mr. McCoy. The court would always take that into consideration as one of the circumstances which would indicate whether or not there had been restraint of trade.

Mr. Rogers. I think so. Up to now the courts have not been induced to hold that the appointment of a sole selling agent was an act or series of acts in violation of the Sherman Act or of the common law in regard to conspiracy.

Mr. McCoy. Not that by itself, and with nothing else?

Mr. Rogers. Of course, you see that I suggest that a presumption should be created following the language of the section in Judge Clayton's bill.

The Chairman. The committee thanks you, Mr. Rogers, for your expression of your views on this subject.

(Thereupon, at 5.15 o'clock 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.
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 13.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Friday, February 13, 1914.

The committee this day met, Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. Mr. Towne, the committee will be glad to hear from you. Give your name and address and occupation.

STATEMENT OF HENRY R. TOWNE, PRESIDENT YALE & TOWNE MANUFACTURING CO., NO. 9, EAST FORTIETH STREET, NEW YORK CITY.

Mr. TOWNE. My name is Henry R. Towne; my business address is: President of the Yale & Towne Manufacturing Co., No. 9 East Fortieth Street, New York. I appear here as a representative and on behalf of the Merchants' Association of New York, the largest and most influential business organization in that great city, of which I have had the honor of being president more than five years, until I resigned last year.

Mr. VOLSTEAD. Is that a wholesale or a retail association?

Mr. TOWNE. It is neither; it is an association of business organizations and firms of all kinds, professional, banking, business, manufacturing, commercial, and transportation interests. Nearly all the

larger and a great many of the small business organizations having offices or headquarters in New York are members of our association. It is somewhat of a chamber of commerce in that sense. Our membership is now 3,500 concerns and firms, and so on.

These bills, affecting, as they will if enacted into law, every business interest in the country and of every kind, the subject is one which appeals peculiarly to this organization, the Merchants' Association of New York. Therefore, as a special committee has been appointed to study the subject on behalf of the association of which I have the honor of being the chairman, and a great many of our members have participated in the discussions thus far and will still more likely as the matter proceeds. I would like to say, Mr. Chairman and gentlemen, therefore, that I appear here not as an attorney; I am not pleading the cause of my own business in the least, nor of any group of interests, but speaking on behalf of a commercial organization which is representative of every interest practically—industry and commerce. Speaking in that broad sense, I shall try, in what I have to say—and I know it is the wish of my colleagues—to be helpful and constructive, but it is unavoidable that in discussing these tentative bills we shall not also be critical and in the position of objecting to some of their provisions.

The CHAIRMAN. That is exactly what the committee wants you to be, critical.

Mr. TOWNE. Mr. Chairman, it is easy to be critical, especially if proposed measures seem to hurt interests that we are familiar with or interested in, but it is much more difficult to be constructive, and that, I think, it is what you would like to have also; and where I feel prepared to offer constructive suggestions I shall be glad to do it, but the subject is very complex, very large, and a very difficult one, and the putting into words—words so precise as they need to be in legislation—to accomplish what is clearly desirable and just to avoid doing the other things that are not desirable, that is the function of the legislator, and I do not claim any skill in that direction.

Mr. Chairman, we are somewhat perplexed by another phase of this matter that we have had before us—four of the so-called "five brothers," of which we find one is at present in charge of the Committee on Interstate and Foreign Commerce and the other three in charge of this Committee on the Judiciary. And yet the more we study the subjects embraced in these four bills the more evident it becomes to us that most if not all of their features should be consolidated into a single bill. I had the honor yesterday morning of appearing for two hours before the Interstate Commerce Committee and devoted all but the last 15 minutes to discussing the bill proposed to create a trade commission, which I understand was introduced by the chairman of this committee and which, in our judgment, is admirable in its purpose and admirable in most of its provisions as it stands. We criticized some of the provisions and pointed out what we thought ought to be done to amend them, and with such amendments we believe that that bill would be the most useful and constructive measure that Congress had in its power to pass at this time; but very briefly, in the last few minutes of my address there, we urged that the provisions of these bills which are divided should be consolidated with

that, or that with these, and our reasons for that view will become apparent as I discussed each of these three bills which are before this committee.

No. 1, as numbered in your series, is the trade relation bill. We think the purpose of that bill is excellent and would be helpful in a great many ways, but we wished to point out in the section which is numbered 9, although it is the first of the bill, because it is continuing a previous act, that it provides that it shall be deemed an attempt to monopolize for any person, with the purpose or intent to injure thereby or to destroy a competitor, whether of such purchaser or of the seller to discriminate in price between different purchasers of commodities, provided that this shall not prevent discrimination on account of differences on account of grade or quality, which, of course, goes without saying, and that two or more persons shall not be prevented from selecting their own customers, but this shall not authorize the operator of a mine, and so on.

Mr. Chairman, speaking on behalf of our association, which embraces the merchants and manufacturers in almost every line of production, and speaking from nearly 50 years experience as a manufacturer myself, I want to point out that a bill which would make it illegal for a manufacturer or for a merchant to regulate, at his discretion and judgment, the prices at which he sells his merchandise to different customers would work a hardship and injustice in infinite ways, and would be an attempt to terminate what has been the usage of commerce from time immemorial.

A manufacturer, in the first place, sells his product to various classes of distributors; some manufacturers sell direct to the consumer—the man or corporation which builds locomotives, for example, as a rule used no middle man or agent between him and the consumer, the railroad companies.

Other manufacturers making a product like machine tools, which are sold sometimes to the consumer and sometimes to a middle man—the machinery-supply house—and by the latter to the consumer, while in still other industries in which the product is small and of more general consumption—take my own product, now, for example—builders' hardware and locks and allied products—that is sold to the jobber or wholesaler in part and by him or direct by us to the retailer in part, and by the latter or by us to the consumer in part. There you get a complication of relations and interests which necessarily imply an almost infinite number of shadings of quotations and prices, shadings which are based upon long experience upon the varying relations between the buyer and the seller and which necessarily are determined by the seller. Having in view all of these complex conditions, a mandatory act which forbids all grading of prices would be destructive in all of these respects.

Mr. VOLSTEAD. This act does not prevent grading of prices so far as quality and quantity are concerned.

Mr. TOWNE. As to quality you will permit——

Mr. VOLSTEAD. And quantity.

Mr. TOWNE. You may permit it as to quantity, but that law as it stands, if I may point it out, would preclude me, for example, in a community where, we will say, there are two possible customers of my product, from discriminating between those two.

Let us point out what that means. It happens in my case, and it is true of a good many others, that the product is highly specialized. In order to prevent——

The CHAIRMAN. What is that product?

Mr. TOWNE. We make—and one of our leading products bears a name that is probably familiar to most of you—the "Yale" locks, which are made in great variety and of various types and for all kinds of uses, and also bank locks and builders' hardware of every kind used in this building. The products of my plant were used all through in the trim of these doors and windows; also the locks and hardware used in the cabinet and trunk trades. We also make hoisting machinery—electric hoists, chain blocks—which is a large and varied product sold through nine different channels of distribution and different trades, each of them having its own peculiarities, its own usages, and differing widely from the others.

To come back to this case, if a little community in which there are only two possible distributors for my product—local dealers—the product, I say, is a specialized one which requires what is called "missionary" work to make the commodity known to the public and to enable the public to appreciate why some of the things that we make, although more costly than substitutes, are worth the difference and are the most economical for the public to buy. No dealer can afford to devote the time and effort that this implies without some hope of reward. If I say to one of these dealers, "I want you to go to work and open a market here for my line of products," he is interested and says, "Yes; I am ready to do that. What protection will I have if I am successful? Can I control your products in this particular market under reasonable conditions?" "Oh, no; you can not do that. I must sell to your neighbor just exactly as I do to you." "What inducement have I, then?" "That is your affair. I want you to do this for me, if you will." The man says, "Under those conditions"—and I know this from country-wide experience—"this proposition does not interest me; I do not care to do anything about it." I go to the other man and make him the same proposition, and he makes me the same reply, with the result that I get no customer at all, and that community loses what I conceive in my own case would be the benefit of the opportunity to purchase a better product than they have been in the habit of getting or that they know about. Even if there were no requirement of this kind, of the ability to furnish some adequate——

Mr. CARLIN. Right there, I would like to ask you a question. You say these other two merchants are both your customers?

Mr. TOWNE. Both what?

Mr. CARLIN. Are both your customers, and you give an illustration——

Mr. TOWNE. They are neither my customer. I am trying to get one for a customer.

Mr. CARLIN. Suppose both of them became your customers—you succeed in getting them both. Your proposition is that you ought to be allowed to give an inside price to one and an outside price to the other?

Mr. TOWNE. Yes.

Mr. CARLIN. In the last analysis, the fellow who was buying from you at the outside price would find himself out of business because he could not compete with the man who had the secret rebate?

Mr. TOWNE. There is no secret rebate—it is an open quotation.

Mr. CARLIN. You do not let the competitor know—for instance, you do not let A know what B is paying you for the goods?

Mr. TOWNE. There is no secret about these quotations.

Mr. CARLIN. Where you have two customers in one town and you sell one lower than the other?

Mr. TOWNE. We frankly tell the second man we charge him a higher price than the other, because the other man has more to furnish; the service is indispensable in that little market, and the other man can not compete alone.

Mr. NELSON. What is the nature of that service, specifically—that he puts out circulars or literature?

Mr. TOWNE. In the first place, he invests a little capital in buying some of the goods.

Mr. NELSON. The other man might do that too.

Mr. TOWNE. The other man might do it. My point is, unless you make it the object for one to do it by giving him assurance that the fruits of his work and expenditure will accrue to him and not his competitor, he says, "I will not do it."

Let me give you a better illustration of how this things works. Many years ago there was invented a process for treating cast iron and steel to prevent them from rusting—the rustless process. It was known by the names of its two inventors, Beller and Bouff, and is commonly known all over this country and throughout the Anglo-Saxon world as the Beller and Bouff process. It was patented. The patents have expired many years ago. The patents for this country were controlled by the firm of Cooper Hewitt Co., of New York, known everywhere as an old, strong, and honorable house. They had succeeded in getting it introduced for rust work—the coating of pipes and heavy architectural ironwork, and so on. I saw the opportunity of applying that to delicate and decorative work such as knobs and escutcheons and things that go into interior architectural work.

I proposed to take it up. They offered to give me a license under their patents, but without any control. I said, "It is going to take some years of effort and a large expenditure to bring this new product and new finish before the architects of the United States, and to convince them of its value and to induce them to use it and to advise their clients to pay for it. We can not afford to do this unless you will give us some protection, a monopoly of it, in our particular field of builders' hardware." "No; we can not give any exclusive license." I said, "Oh well, gentlemen, we will let the matter drop," and we did—gave it up. They came to me volutarily about a year or two years later, nobody having pushed it in the meantime, and renewed the proposition that we should take it up. Again I made the reply that "we can not afford to do it; it would be squandering the money of the corporation that I am responsible for, unless we can be protected and have some return for the expenditure.' Again they declined to give me an exclusive license for our line of products, and the matter again dropped. About a year later—that is, nearly three years from the initiation of these negotiations, the process having remained absolutely dead and inert for this purpose in this country, they came to me and surrendered. Perhaps that is not the right word to use—in other words, they said to me, "Mr. Towne, we have endeavored in vain to induce other people to take this thing up, and

every one has made the same reply, that they are not willing to do it unless they have protection; in other words, that we have got to give it into the exclusive control of some one concern, in this particular field of its application, and that being the case, we prefer your concern to any others; we are ready now to negotiate with you for an exclusive right." The license was given. We built the necessary furnace and apparatus, and we introduced that product widely all over this country, and ultimately in Europe and elsewhere. The patent expired after a few years, our competitors are free to use the process, and everyone adopted it and utilized our experience and the market which we had created for it, and the public was correspondingly benefited. There is an illustration, gentlemen, of the inevitable result of trying to put on a dead level of equality everybody concerned and then expecting any one of them to do any initiative work in opening up new markets.

Mr. NELSON. As I understand you, it finally found its way to a leval equality and to a competitive basis?

Mr. TOWNE. Absolutely.

Mr. NELSON. How is the public affected as between the price when you had a monopoly and the price that it now pays, where it has open competition for the same article?

Mr. TOWNE. There has been hardly any difference. The public pays substantially the same now as it did then, because we were wise enough not to put an extravagant price on the material controlled by this process, and thereby curtail and prevent its introduction.

Mr. NELSON. How has it affected your business? Has it reduced your business since competition has come into the field?

Mr. TOWNE. That question can not be answered categorically. We have had competition in this particular project which we did not have before, but the growth of the company and the steady growth of our business has more than offset that, so that our business is larger now than it was then, very much.

Mr. NELSON. But the competition has not hurt you, then?

Mr. TOWNE. In this particular article?

Mr. NELSON. Yes.

Mr. TOWNE. It has hurt us in the sense that we do not any longer do all of that kind of work that the country requires. Many others now are doing it as well as we.

Mr. MCGILLICUDDY. In the matter you referred to, you say these prices have not been raised at all?

Mr. TOWNE. They have not been raised, but lowered at intervals since that date, but because of other conditions, the price now——

Mr. MCGILLICUDDY. But at the time that you had a monopoly of that particular thing you had the power to raise the prices, if it had not been for your generosity not to do it?

Mr. TOWNE. There is no element of generosity in it.

Mr. MCGILLICUDDY. You did not see fit to do it for some reason or other, but you had the power?

Mr. TOWNE. We used business common sense, because we did not think it was the best policy.

Mr. MCGILLICUDDY. You did not think it was advisable to do it?

Mr. TOWNE. No.

Mr. MCGILLICUDDY. But you had the power to do it, if you wanted to?

Mr. TOWNE. Absolutely, just as we have the power to say we will not sell that article to you or anybody else in the United States.

Mr. NELSON. So that the only limit of price was what you thought the public would reasonably pay?

Mr. TOWNE. There are a good many substitutes for this.

Mr. NELSON. Equally good?

Mr. TOWNE. Equally effective, but not equally attractive. We said, unless we put this before the public at a fair and attractive price, the thing will not go. We would rather have a large business at a moderate price than trivial business at a fancy profit. That is a matter of business judgment.

Mr. NELSON. But you operated under the maximum; but would not the average man operate accordingly and charge what he thought the traffic would bear in that case?

Mr. TOWNE. Undoubtedly. That is the general principle in all business of all kinds. Every seller the world over, from the time commerce began, has charged a profit as large as the traffic would bear.

Mr. NELSON. It is human nature?

Mr. TOWNE. It is human nature, and it is good sense. If you have a house to sell, you do not take a quixotic view of it and say, "It is worth $10,000, and here is a man who will give me $10,000, but I am going to sell that house for $9,000."

Mr. NELSON. Do you not think, looking at it from the standpoint of the consumer, that the consumer is more apt to get a reasonable price where there is real competition than he is where there is a monopoly?

Mr. TOWNE. Undoubtedly. But may I ask, in return, is it the purpose of a law of this kind to regard only the consumer?

Mr. NELSON. No, sir.

Mr. TOWNE. And not the producer?

Mr. NELSON. We want to take into consideration everybody who is interested in business.

Mr. TOWNE. That is what we understand.

Mr. NELSON. Either as dealer or seller.

Mr. TOWNE. That is what we understand—what I am trying to bring clearly before the committee.

Mr. FLOYD. I desire to ask you a question in connection with it: While you had a monopoly on this particular commodity, though you did not raise the price, is it not a fact that you restricted the use of it very greatly—it has been more extensively used after the patent expired, has it not?

Mr. TOWNE. We sought to bring as large use as we could under our control.

Mr. FLOYD. I understand that—under your control. What I am asking you is whether, after the patent expired and competitors sprang up all over the country, selling the same article, while the price was not reduced materially, the use of it was widely extended?

Mr. TOWNE. Yes.

Mr. FLOYD. Do you not think there is an evil to the public, regardless of the price, where a concern gets a monopoly on the useful article and limits its consumption by arbitrary rules that it fixes by exercising a monopoly over it?

Mr. TOWNE. Is there any good, speaking in a broad sense of the word, that is not accompanied by some possible evil?

Mr. FLOYD. I do not know of any.

Mr. TOWNE. I do not know of any. I think the most striking illustration, in answer to your query, is that of the United States Patent Office. There is a function of our Government intended and at liberty to create a monopoly, and it has created millions of monopolies in the many years of its existence, and is doing it to-day, and yet is there any man here, or any sane man in the country, who would argue that the effect of the operations of the patent law and Patent Office in this country has not been enormously to the public good? Now, why? Because it has given a monopoly for a temporary period, constituting an inducement for men to do things otherwise from lack of stimulus or reward they would have left undone.

Mr. CARLIN. A monopoly in production does not necessarily mean that there shall follow a monopoly in distribution?

Mr. TOWNE. Pardon me, there, but it does to a large extent—it may not theoretically, but it does in the hard school of practice.

I will go back to my simile of these two merchants in the little town and illlustrate some other things. My first point is that unless we are permitted to offer an inducement of reward to one or the other of those two merchants, we can enlist neither in our behalf. If he absolutely needs our product, he will buy it. If he is a grocer he has got to buy flour from somebody and tea and coffee and sugar from somebody else, but here is a case where he does not need to buy from us at all.

Mr. CARLIN. If we carried your argument then to its last analysis, no good thing would ever be marketed unless a monopoly were permitted.

Mr. TOWNE. No; I do not say that; that would be very sweeping and very unfair. A good thing will always find a market in time, but to broaden that market, to reach out to all the little rivulets of commerce, you have got to utilize the existing machinery of commerce, consisting in this case of the local merchants, and those local merchants, as a rule, are men of small capital, and of still smaller imagination on the average. I say this with no disparagement; it is a recognition of differences in men, but unless you can give to men so situated some strong inducement to take up novelties, to be agents in the broadening of their market, in the education of their people to the value of new things, they will leave them alone. That is the experience of manufacturers the world over, and in every line of product and distribution.

But, let me go a step further. We have these two merchants. Admit that the interested are willing and would like to sell both of them, but we manufacturers and merchants do not make sales indiscriminately to strangers until we know whether the goods that we deliver to them will be paid for. The first step in the entering of an order in the well organized business administration office is to refer the office to the credit bureau or credit department or credit man, in order that he may see whether that presumptive customer is good for what he wants to purchase. Our investigation shows that as to merchant A that he is an excellent credit; he is doing a nice little business there; his reputation at the bank is good and he pays his bills promptly, while on the contrary merchant B is in trouble.

He has a house which is under heavy mortgage, and a threat of foreclosure; is very slow in his payments and the bank is not willing to give him any credit, and the credit man says to us, "If you make the sale to that man I will not guarantee your ability to collect the account. You will probably make a loss." What are we to do under those circumstances? Are we to be compelled to sell A and B at any price, and if we make a sale to A, as we desire to do, because he is an honest and able merchant who can pay his bills, does that carry with it the obligation that we shall sell to B, whom we know to be doubtful credit and business character?

Mr. VOLSTEAD. Suppose he offered cash?

Mr. TOWNE. The shaky bankrupt is not apt to do that very often.

Mr. VOLSTEAD. No law, I presume, would compel a man to sell a bankrupt.

Mr. TOWNE. If he offered cash, we would give him all he wanted in exchange, but that is not the course of business, practically.

Mr. CARLIN. I was going to say to you, Mr. Towne, that we are being urged here to give the power to this trade commission to fix the price for which you sell all your products, even down to the consumer.

Mr. TOWNE. I will not take the time of the committee arguing in the negative of that proposition, because I simply know you will never do it.

Mr. CARLIN. Do you favor such a proposition?

Mr. TOWNE. It is like asking me if I favor a proposition that you should enact a law that water should run up hill. I think I had not better take the time of the committee in discussing that.

Mr. CARLIN. Strange as it may seem to you, that question has not been broached here with levity but with seriousness.

Mr. TOWNE. I know it——

Mr. CARLIN. By some of the biggest manufacturers in the country and some of the largest retail associations in the country.

Mr. TOWNE. That the trade commission was to fix the price at which the product shall be sold?

Mr. MCGILLICUDDY. No.

Mr. CARLIN. Fix the price at which it shall be sold by the manufacturer to the wholesaler, and fix the price at which it shall be sold by the wholesaler to the retailer, and fix the price at which the retailer shall sell it to the consumer; that is the proposition.

Mr. TOWNE. Regardless of what it cost the manufacturer to make it?

Mr. CARLIN. Oh, no: they want the Government to take those elements into consideration and fix the price.

Mr. MCCOY. Is not this what has been suggested, Mr. Carlin—that they shall publish the prices at which they will sell to the wholesaler and the retailer, not that they shall necessarily——

Mr. CARLIN. They have gone to the point of requesting this committee all the way down the line to give the trade commission the price-fixing power.

Mr. TOWNE. Who?

Mr. MCCOY. I do not understand that anybody has done that. Some people have appeared here who want to have the power to fix the reselling price, but these retail associations, like the plumbers

and grocers and others, said they wanted publicity of prices just as the railroad companies have to give publicity of rates.

Mr. FLOYD. Others have come in and insisted that the trade commission be given the price-fixing power.

Mr. CARLIN. There is not any question about that, and that is Mr. Brandies's theory, as I understand it. The Retail Druggists Association asked us to give power to this commission to fix the retail price of certain articles which they deal in.

Mr. McCOY. Perhaps I am mistaken, but I understood them to say that they wanted to give the manufacturer the power to fix the retail price.

Mr. CARLIN. That is exactly what they wanted.

Mr. MORGAN. Mr. Towne, I understand you are opposed to the manufacturer selling an article to a retailer under condition that he will sell the article at a certain price. In other words, a good many merchants——

Mr. TOWNE. I understand your question, sir. That is the question of control of resale prices, which I have not touched upon at all, and these gentlemen have been discussing that. It is foreign to my argument entirely.

Mr. MORGAN. Are you in favor of that?

Mr. TOWNE. I would rather not say at the present time. I want to confine myself to those three bills, and after I get through with them I shall be glad to talk about other matters, but that is not germane to those bills. The bills do not cover——

Mr. MORGAN. I thought you said you were opposed to price fixing.

Mr. FLOYD. Opposed to letting a trade commission fix the prices.

Mr. TOWNE. I have no reference to the commission controlling resale prices.

Mr. MORGAN. You had reference to the Government control of prices?

Mr. TOWNE. Yes.

Mr. MCGILLICUDDY. Mr. Towne, the case that you cited of the man with a poor credit and the other man with the good credit, that provision would not come under that. If you refused to sell the man with poor credit, it would not be for the purpose of injuring or destroying him. You would be refusing him on the very good ground that he could not pay.

Mr. TOWNE. That is correct.

Mr. MCGILLICUDDY. In the tribunal that tried the final case you would have a perfect defense if prosecuted.

Mr. TOWNE. I do not want to be prosecuted on an issue of that kind. I do not want merchant A to be able to hale me into court under the charge that I am discriminating against him and about to injure his business or trying to ruin him because I will not make him the same price that I do to merchant B.

Mr. MCGILLICUDDY. He would have no object in citing you into court where he would be sure to be defeated.

Mr. TOWNE. People are haled into court without any apparent reason.

Mr. MCGILLICUDDY. Sometimes. Of course no law would be made by which you would avoid all that.

Mr. TOWNE. I think this law could be made so as to avoid all that.

Mr. NELSON. There is a question I have asked several times. I do not think Mr. Towne has quite made it clear to me. I can see how

the manufacturer may want to have their special man in a field, but by what right is one merchant to be favored and the other discriminated against?

Mr. TOWNE. The question seems to me—if you will pardon me, I do not mean the slightest disrespect—about as pertinent as it would be to say that a young chap has been flirting with two girls, and finally selected one for his wife, and the other asked, "Why did you not choose me?"

Mr. NELSON. That assumes, however, that there are no rights except the right of the producer?

Mr. TOWNE. I do not say that at all. I say the seller——

Mr. NELSON. You say that the retailer in this country has no rights with reference to the manufacturer or producer, and that he can absolutely choose as to whether he will "flirt with one and marry the other"?

Mr. TOWNE. I do, most unqualifiedly, or to go back here—are you a lawyer?

Mr. NELSON. I pretend to be.

Mr. TOWNE. Suppose a client retains you in a certain case, as actually happened in a case in my knowledge. The party on the other side also goes to you and says, "I want to retain you in my case." Would you accept his fee?

Mr. NELSON. That is a matter of my professional conduct. Would you put a manufacturer of articles in the same class with a lawyer as to his advice to clients?

Mr. TOWNE. Absolutely. I claim equal honor and equal respect with you, Mr. Lawyer.

Mr. NELSON. I just wanted to get your view, that is all.

Mr. TOWNE. As a manufacturer I take off my hat to no other profession or vocation or industry, manufacture, or commerce.

Mr. NELSON. To sell your product to whomsoever you will and to refuse to sell it to anybody else?

Mr. TOWNE. Just as you have a right to sell your services; that is my point.

Mr. NELSON. Then the Oil Trust has a perfect right to go anywhere and say, "I will sell oil to this man, and I will not sell it to that dealer"; and they have a perfect right to do that under your theory?

Mr. TOWNE. In a broad sense; yes.

Mr. NELSON. And the Tobacco Trust could do the same?

Mr. TOWNE. In a broad sense; yes.

Mr. NELSON. You wish to buy tobacco and you can not, because I can "flirt" with whomsoever I like?

Mr. TOWNE. No; I now get the point of your inquiry——

Mr. NELSON. "Marry" whom you please?

Mr. TOWNE. And I will answer that presently.

Mr. NELSON. I wanted to see where your ethics lead, that is all.

Mr. TOWNE. My ethics are the same as yours on that point, that there should be no discrimination which is by intent and result destructive of the moral and legal rights of other people. Whenever you get onto that ground I am with you that there should be legislation to prevent it.

Mr. NELSON. Let us take a very plain case—take the Oil Trust. It is a monopoly. Do you maintain it has a right to go into the city

of Washington and say, "Mr. Merchant A, we will sell to you, but we will not sell to you, Mr. Merchant B"; and that no one has anything to say about that—yes or no?

Mr. TOWNE. On a broad hypothetical case, as you put it, I would say no; but under the actual conditions of commerce, I would say yes; you can not deal with questions of this kind, gentlemen, on such easy and simple lines as these questions imply. The subject is infinitely complex, and you have got to take all of the factors into account before you can determine or before you can fairly answer questions of that kind.

Mr. NELSON. I would like before you conclude to have you discuss that, because I would like to see what results you arrive at.

Mr. TOWNE. I will take your case and deal with it. Suppose mineral oil were a new discovery, and that back in the old days of camphene and the other things that went with it, and that a prejudice existed against it, and nobody would use mineral oil, and that the Standard Oil Co., if you please, was just beginning and trying to sell its product, and it could not get anybody to sell to in the city of Washington, but it finally enlisted one man, whose faith was not so utterly shaky but that he was willing to venture a little time and money in the effort to make the thing go, but he said, "I can not afford to do that if you turn around, in case of my success, and give the benefit to anybody else who wants to sell it here." This proposed law would bar the manufacturer out; it would prevent the consummation of an agreement of that kind, and the public of this locality would have gone without its oil for an indefinite time, whereas my argument is that under conditions of that kind it is not only reasonable but highly expedient on grounds of public policy that somebody shall be compensated for doing work which is useful, not merely to the manufacturer or merchant concerned, but useful to the community in the long run.

Mr. NELSON. Suppose that you had the permission to start that, where would you change your ethics?

Mr. TOWNE. As conditions changed, just as we have done for all these years past; we have done things of this kind temporarily.

Mr. NELSON. Could you suggest some point where a business that has been introduced by being given some favor should be deprived of that privilege?

Mr. TOWNE. No one could frame a law or rule of that kind that would apply to all business. I could easily frame a rule that would apply to a familiar case. And there is your legal difficulty, and that is what we are trying to accomplish by giving you illustrations of the local difficulties and illustrations of the actual conditions and those which exist and have existed from time immemorial in commercial transactions.

Mr. FLOYD. Mr. Towne, you have been discussing section 9, I understand, of this first bill?

Mr. TOWNE. Yes.

Mr. FLOYD. The purpose that we had in mind in proposing that section, and the evil to be reached, or what we considered the evil to be reached, was a specific one; that is, where a powerful manufacturer, in order to drive out and injure or destroy a competitor, would reduce his profit in a community so as to utterly destroy the independent concern.

Mr. TOWNE. And that, I think, ought to be prevented, and can be.

Mr. FLOYD. You noticed the language used, "to injure or destroy competitors." He could do all those things, provided it was not done for the purpose of ravaging or destroying a competitor. In some statutes a different phraseology is used. In the statutes of some States it is provided that a person who shall sell below the cost of production for the purpose of injuring or destroying any person should be prohibited. Would you regard that as a better way of reaching the evil than in this section?

Mr. TOWNE. I wish I could see any such straight and short path to the end they seek by such enactments, but it is not possible. Now, let me point out just the two things that your last statement suggests: In the first place you make no distinction between an act tending to injure and an act tending to destroy a competitor. If I am in business in the same locality as you, and we are both selling the same things, we are competitors. Every time I make a sale I am injuring your business; every time you make a sale you are injuring my business.

Mr. FLOYD. Can you not distinguish, however, between ordinary competition for trade and a deliberate act on the part of the corporation to destroy a competitor, to wipe him out of existence?

Mr. TOWNE. I hardly favor such enactment that would make it illegal and punishable for any corporation by intent and deliberation to seek to destroy a competitor or rival.

Mr. FLOYD. You would leave out the word "injure"? Do you think that would reach it?

Mr. TOWNE. I would, unless it were clearly qualified; but to say that you should not injure a competitor in any sense implies you can not do any business.

Mr. FLOYD. I can see the difficulty. The tendency would be to cut out competition altogether?

Mr. TOWNE. Yes.

Mr. FLOYD. Because incidentally it might be injury for the purpose of taking any amount of his business away from him; but the evil that we are striking at is where a corporation or concern, deliberately and for the purpose of destroying and putting out of business competition, sells in such a manner as to utterly destroy a competitor. We feel that in the interest of business that a man ought to be protected against such operations.

Mr. TOWNE. So do we.

Mr. FLOYD. And if you have any suggestions to make as to what the phraseology should be that would reach that without disturbing legitimate business, we should be glad to have it. Our whole object is to stimulate proper competition.

Mr. TOWNE. Let me say, Mr. Chairman and gentlemen, we are practically sure that the purpose of this committee and the purpose of this Congress under this administration is not to injure business, but to help it. We know that, and we are here—the organization which I have the honor to represent—it has been their desire to help you do these things, and if I appear to be critical it is simply from my desire to point out what seems to us to be the objections to the bill as it has thus far been framed and to thereby help you to modify it. If it shall be the pleasure of the committee, after hearing me to the end, to have our association submit some tentative modification

of some of these sections or of the whole bill, I think we should be willing and glad to attempt to do what that implies, but we realize the difficulty of constructive work and that it is a great deal easier for me to stand here and criticize what you have done than it is for me to tell you how to do better, if I were capable of that.

Let me point out another difficulty that is involved in this same direction. The bill, as it stands, would deprive the seller of the ability to protect himself against a disloyal agent.

I go back to my previous simile, the little town and the two dealers and the manufacturer who has tried to get his product introduced there, but has not succeeded, and he enlists one of these men, finally, to the point of inducing him to do it, by giving him a preferential price he makes him, in effect, his agent in that locality. I have argued on that point.

Take the other case of the man, the dealer, who says: "I want your agency; give me the control of it in this locality and I will do the missionary work of introducing your product and make it known. I will make a market for you." And the manufacturer in that good faith gives him that trust and agrees that he will not sell at the equal terms to any local competitor; and thereupon the agent, in bad faith, while nominally representing that manufacturer, turns around and takes up the goods of his competitor, who offers a more attractive proposition, in price or otherwise, and tries to push those goods into the market and to substitute them for those of the house that he is nominally acting as agent for. It is a dishonorable relationship, but it happened; and yet this measure would apparently deprive the manufacturer of protection in a case of disloyalty of that kind. Would it not be better, gentlemen, to enact not a bill of this kind, but to leave free play to the action of the forces of business and commerce in all these matters, as they have been from time immemorial, except as to specific conditions, which I conceive it is feasible to set forth in such a bill, and to impose penalties for violation of these normal laws and under those exceptional conditions, but do not try to modify the fundamental laws?

Mr. CARLIN. Take this practical problem, which is one of the things the committee is trying to reach: Mr. A, who is manufacturing a certain line of goods, says to the merchant, "We will only sell you our goods upon the condition that you do not put into your store our competitor's goods"——

Mr. TOWNE. Yes.

Mr. CARLIN. Or goods which in themselves are competitive, and thereby he prevents a retailer from distributing in accordance with his own judgment and binds him to a hard and fast rule under the penalty that if he does sell his competitors' goods he can not get any more of his goods. What do you say about a practice of that sort?

Mr. TOWNE. I think that the implied evil or implied condition which you make there might operate to keep a certain individual from getting these goods is a far lesser evil than would result inevitably from the operation of the law as you conceive it, by shutting those goods completely out of the market, because it is nobody's interest to introduce them, and the manufacturer is barred out of that market. He is injured and the community is injured now, because it has no opportunity to become familiar with and to purchase,

if it wants to, a better article than the one which it has been accustomed to. Everybody is injured there excepting your one——

Mr. CARLIN. You are assuming the article is always a better one. It might or might not be a better one; it might simply be better advertised.

Mr. TOWNE. That might be true; but it might be an article which the ultimate buyer in that community would desire to have, and he can only get it through his dealer.

Mr. CARLIN. Can he not buy it through his dealer if the dealer is allowed to sell both articles—the one he is protected in and his competitor's? The customer, in the last analysis, has the choice of taking either he desires.

Mr. TOWNE. And then what assurance have either of the two manufacturing concerns that he is going to be loyally and fairly represented in that market?

Mr. CARLIN. Assume that the retailer is going to sell the goods under those circumstances that the public wants, that they ask for.

Mr. TOWNE. Each manufacturer would like to have the dealer present his goods fairly and preferably, and to have the dealer induce the customer, if possible, to purchase that article rather than anything else.

Mr. CARLIN. Take the case where there were only two merchants in a town. Two hatters, we will say, and one is required to make an exclusive contract with Knox and the other is required to make an exclusive contract with Mr. Stetson. What earthly chance has the wearer of the hat to get anything but those two hats in his town? He has got to wear the one or the other or go bareheaded.

Mr. FITZHENRY. What chance has other manufacturers in that market? Where would Dunlop's come in; and that is the condition that doubtless exists?

Mr. CARLIN. It does; but, above it all, "Jones, who pays the freight," either has to wear one of those hats or go bareheaded.

Mr. TOWNE. No; because your hypothetical case, Mr. Carlin, does not coincide with the actual facts. It is correct, undoubtedly, that so far as concerns those makers whom you have named, or one or two others that we are all familiar with—makers of high-grade hats, who charge three or four or five dollars retail for the product—but those manufacturers make no objection whatever to a local dealer in a small town handling another line of inferior-quality hats, which sell at 50 cents or $1 or $2. They know there is a market for both.

Mr. CARLIN. But the inferior-quality men demand the same character of contract?

Mr. TOWNE. Yes.

Mr. CARLIN. He says, "I am selling the inferior article. I can not sell any other inferior article that competes with me, or I will sell you no more goods," and he binds him up the same way that the other fellow does, and these are actual existing conditions, and not hypothetical, as it exists all over the country, and the consequence is the community is restricted in its opportunity to purchase by just whatever restrictions happen to be made by these contractual relations between the manufacturers and dealers.

Mr. TOWNE. Yes. In place of that, you would substitute restriction of ambition and energy and interest on the part of manufacturers, each to develop his own line and make it more attractive than others?

Mr. CARLIN. You misunderstood what we had in mind. Our idea was not to interfere with the retail dealer in puting on his shelves stock for the benefit of the community, the wares of just as many people as he desires to sell or just as few.

Mr. TOWNE. Do you think the honest manufacturer is entitled to some consideration, as well as the dear public?

Mr. CARLIN. I do; but I also think the "dear people" are entitled to some consideration.

Mr. TOWNE. I do thoroughly; but I want to see both taken care of.

Mr. CARLIN. So do I, but I want to reach the point of justice to both, and meet existing conditions, which is, as you say, a complex subject.

Mr. TOWNE. There is the difficulty; and you are not going to reach it by any easy path.

Mr. MORGAN. Mr. Towne, what corporation is it that you are president of?

Mr. TOWNE. The Yale & Towne Manufacturing Co.

Mr. MORGAN. How large is its capital?

Mr. TOWNE. Now or when I started?

Mr. MORGAN. Now.

Mr. TOWNE. We have now in our Stamford works something over 4,000 employees, and our total employees, everywhere in the world, is nearly 5,000.

Mr. MORGAN. What is the capital on which you are doing business, the amount?

Mr. TOWNE. The nominal capital is about $4,500,000.

Mr. MORGAN. What is the total annual output, gross?

Mr. TOWNE. It is in the neighborhood of $6,000,000.

Mr. MORGAN. Do you think that corporations of the size that you represent——

Mr. TOWNE. Pardon me—my own corporation, and therefore my own business experience, because I happen to be the founder of the business, began with a shop in which we employed less than 300 hands, and had only a few thousand dollars capital and of business; and I have passed in my 45 years of business experience successively through the stages from that little one-horse affair up to a modern business that we are conducting now, so I have a somewhat corresponding range of experience.

Mr. MCCOY. How many different articles do you produce?

Mr. TOWNE. Something over 100,000. It is a very diversified and complex business.

Mr. MORGAN. As I understand it, Mr. Towne, you think that you should have the right, for the purpose of introducing your goods, to make a certain man in a certain town your exclusive agent or to give a certain man a special lower price than you would others?

Mr. TOWNE. We do.

Mr. MORGAN. And I presume that that is the custom of practically all manufacturers, as a rule. Do you think that has enabled you or similar corporations to establish a monopoly, or is that just one method you have of conducting your business, or is it something that you use to establish monopoly in trade?

Mr. TOWNE. A monopoly is a very agreeable thing to own and control, I imagine. I can not speak from experience, but the prac-

tices you refer to, and which are not singular to my concern, but are common to that industry and many other industries, in no way result in monopoly. They are simply the agencies which human experience has developed as those which are effective, as, in many cases, the ones which are only feasible. Under modern conditions of production and distribution to bring the product of a plant like ours before the communities all over this country, and in all other parts of the world as well, we have got to make it to somebody's interest to become our responsive agent and representative and to devote himself loyally to our interests, or he would not serve us at all.

Mr. MORGAN. And your idea is this, that if this bill prevented you from doing that that it would result in restricting and limiting and holding the business enterprise of the Nation back?

Mr. TOWNE. In some ways I do. I think the purpose of this bill is all right. I am not criticizing that; I am only pointing out the many difficulties in framing a bill to accomplish what this seeks, without running into other difficulties and evils which might be worse and in some respects the bill as it stands would act in serious restraint of trade; it would be contrary to the spirit of what you are trying to do, I think; but finally, as to this bill, may I suggest——

Mr. MCCOY. One question. You say that you are the manufacturer of some hundred thousand varieties of things. Would you consider that a business producing so many articles is to be treated on the same basis as the Standard Oil Co., which produces practically only one article, whose main business is only one article?

Mr. TOWNE. I think all businesses ought to be treated on the same basis as to matters fundamental, matters of principle, but in the application of that principle to individual industries and individual cases I think there has got to be a great deal of flexibility, in order to do justice and to effect the purpose and intent of your proposed bill.

And, Mr. Chairman and gentlemen, let me make the final point as to this bill, that it seems to us—and I beg to remind the committee that I am representing the merchants and not the merchants manufacturing; I have just used this experience——

Mr. NELSON. Let me ask a question, in order to get it in the record, so we will know what the business world wants: When you advocate this right to give exclusive representation and preferential price to retailers and to exclude others, do you mean to say that is the view of the business association you represent in New York?

Mr. TOWNE. As far as we are justified in speaking for it, we believe it is; we know it would be of value.

Mr. NELSON. Have you passed any resolution, or anything like that, authorizing you to say that is the view of the merchants' association?

Mr. TOWNE. Not to say it unqualifiedly.

Mr. NELSON. That is your own view here?

Mr. TOWNE. No; I was speaking as the chairman of a very competent committee appointed by the association to deal with these subjects, which has given them most careful consideration and studied these bills; and which has had the benefit of consultation with the president and other officers of the association and has the indorsements of these recommendations, so that we could feel that we are speaking with practical assurance that we voice what would be the

sentiment of the whole association when that shall be ascertained. We did not have time to do otherwise.

In conclusion, as to this bill, we want to say this, that no matter how carefully laws may be framed their true intent is never ascertainable except by the action of the courts—by a tribunal of some kind. There is no more striking example, of course, of that than the Sherman Act of 1890, and no matter what you may do here in framing a law of this kind its application and interpretation will never be defined until it is adjudicated, until cases which are on the border line and where your language fails to apply clearly and directly. Such cases inevitably have got to be taken into court and adjudicated.

Why would it not be better to anticipate that inevitable time and, while defining in your bill the broad principles which shall prevail, to vest the decision—as a court of first instance or as a sort of grand jury, if you please—in the proposed interstate trade commission, and to say that these slightly divergent practices which arise in all the complex machinery of commerce and distribution, which may have been decided finally by a competent tribunal to be on this side, not on that side, of the arbitrary line which the law attempts to define; that those debatable cases will not involve the expense and infinite delay of procedure through the Federal courts before they can be passed upon—a procedure which is not definite and final until you get through the district to the circuit court, the court of appeals, and the Supreme Court, and in which you have got 27, I believe, judicial districts in this country, each of them liable to deal with this same aspect, and giving you 27 different varieties of decisions concerning it, with no unity of practice, with no opportunity for the judges to become experts in these technical subjects. Why not, instead of all that, vest the primary decision of these matters in the interstate trade commission. Give them jurisdiction——

Mr. NELSON. On that point may I just ask a question? Do you think a commission of 10 or 12 men would have the time to pass upon every practice of every business in the United States?

Mr. TOWNE. I think they can do it just as surely as the Interstate Commerce Commission has dealt with the vast problems and the infinitely numerous problems of the traffic question.

Mr. NELSON. Would you have more than one commission?

Mr. TOWNE. I would not at the beginning; I would start with a commission. I think the bill introduced, as I understand by your chairman, and which I discussed yesterday before the other Committee on Interstate and Foreign Commerce, has admirable features in it, which we think could be amended; but that, in the main, its purposes are right, namely, to create a commission of five members in that case; in short, coordinated in its powers and duties with the Interstate Commerce Commission, but dealing with trade questions where the other deals with public-utility questions. We believe that that would do more to solve this vast flood of problems, many of them small but of importance, each to the parties directly concerned. In that sense, more than anything else Congress can do, it would be the finest piece of constructive legislation that remains to be done, with the tariff out of the way and the currency problem out of the way. I wish to make this point in that connection, gentlemen, that where the so-called trusts—big corporations of $10,000,-

000 and upward, if you please, to make an arbitrary dividing line—are concerned in these matters, but are subject already by State or national law to a large degree of publicity, which we have no objection to being increased to any reasonable extent, the publication of their financial reports annually, if you put all of them together on one side of the scale, either in volume of business done, in the line of capital employed, or number of employees engaged, and in the other scale you put the smaller industries and the smaller commerce, the scale will tip, 10 to 1, in the latter direction. The big concerns are not the chief questions of interest in these problems. It is the small men of business and small men in manufacturing, the multitude of whom is vastly greater than the other in all of these respects, and those are the people who ought to be considered primarily; and the danger is that in drafting bills that may be all right and justified and unobjectionable as applied to large businesses, you are going to do something that will be destructive to the small man.

Mr. NELSON. You advocate then, a dividing line at $10,000,000 or $5,000,000?

Mr. TOWNE. I would, theoretically, but it is not practicable. There is no place that you can draw a line and say, if to-day I am doing a business within that line I have certain exemptions and privileges, and if I pass over that line to-morrow I am subject to penalties, that would be too artificial and impossible. The line that would be right in one class of industry would be utterly absurd in another.

Mr. FITZHENRY. In that first objection you make to section 9, where you spoke of conceiving a new use for this particular product for preventing rust of iron, and for which you asked the exclusive right to manufacture and distribute, did you, in the arrangement that you finally made with those parties, get any right except such right as way incident to the patent itself?

Mr. TOWNE. None whatever.

Mr. FITZHENRY. So there is nothing in this law, unless we amend the patent laws, that would interfere with what you did?

Mr. TOWNE. Not in the least. We merely used the illustration to show how impossible it is in many matters to secure the interest of the distributer in the manufacturer who is developing a new and useful invention or product or opening up a new market to an old product, unless you give that person an inducement of some kind.

Mr. FITZHENRY. In that case, Mr. Towne, with the use of the right incident to the patent itself, you made an investment and created a demand for these goods and did distribute them?

Mr. TOWNE. Yes.

Mr. FITZHENRY. And finally, when the patent ran out, it was a matter that anybody engaged in that line of business could take up?

Mr. TOWNE. And they did take it up very promptly, because we demonstrated the value of it.

Mr. FITZHENRY. And in order to interfere with just such a right as you described, we would have to amend the patent laws and this section 9 would not interfere?

Mr. TOWNE. Oh, not at all. I am not referring to the patent practice; I only used that as an illustration of where you have got to enlist human interest to do things or else many of them will not be done.

Mr. FITZHENRY. The other objection that you make is that you think the manufacturer ought to have the right to appoint an exclusive sales agent at a particular place?

Mr. TOWNE. I do.

Mr. FITZHENRY. And he ought to have the right to give him such advantages as the manufacturer deems necessary in the prosecution of his business.

Mr. TOWNE. On broad principles, I do.

Mr. FITZHENRY. That is your judgment?

Mr. TOWNE. It is.

Mr. FITZHENRY. And those, substantially, are your objections to section 9 of the tentative bill, are they not?

Mr. TOWNE. A part of my objections; but I say in return, that whatever my right, as I regard it, may be applied in a manner which will be unjust to other interests, and that your law may very properly endeavor to guard against that under conditions where it is liable to arise; but I submit, again, as to that, that the application of such a rule varies so infinitely with all these infinite complications, conditions in the different industries and trades and channels of commerce, that you can not, no matter if you labor for a year, attempt to define all of them in arbitrary language, and that you have got to have a tribunal, and the best tribunal for that purpose would be the proposed trade commission.

Mr. FITZHENRY. Mr. Towne, this language is all written and designed for the purpose of protecting the public against an effort on the part of one manufacturer to destroy another. Do you consider that it would apply to a manufacturer endeavoring to protect himself in the legitimate introduction of his product?

Mr. TOWNE. I do, as the law stands; but I would see no objection to saying that the law fits any of these practices when such a result is to injure or destroy.

Mr. FITZHENRY. Your concern is a concern of $4,500,000 capital, and you say you manufacture in the neighborhood of a hundred thousand different articles?

Mr. TOWNE. It is a business of vast detail.

Mr. FITZHENRY. What percentage of those 100,000 articles are covered by patents?

Mr. TOWNE. Practically none. The foundation patents that we had expired many years ago, and while we probably have to-day, I imagine, 100 patents in force, none of them relates to anything that is controlling.

Mr. FITZHENRY. So that the present integrity of your business is due to fair treatment and not to any patent rights?

Mr. TOWNE. Absolutely. Again, the final paragraph of this bill, section 13, provides that all courts shall have jurisdiction to give injunctive relief. We strongly urge the consideration of referring all matters of that kind, in the first instance, to the trade commission.

Mr. VOLSTEAD. Let me suggest it to you: Might not the intervention of a trade commission delay instead of expedite the examination of matters, because the final decision would have to be made by the courts anyway?

Mr. TOWNE. I appreciate your point, but our answer is that ninety-nine out of every hundred of these minor cases would be disposed of by the trade commission without any necessity of reference to or

appeal to the Federal courts, and it would greatly clear up the work of the courts and, above all, would constitute a commission of which the five men would speedily become business experts, just as the Interstate Commerce Commissioners have become traffic experts, better qualified than any judge possibly can be who has not had that training and experience, and who is dealing with a multiplicity of issues that are foreign to these questions.

Coming to your No. 2 bill, giving further definitions of the Sherman law, with all respect and sympathy for the purpose sought there, we venture to express our strong conviction that your bill would work in exactly the opposite direction. Instead of clarifying the situation it would complicate it. The Sherman law is as clear as a brief expression of its intent. No man doubts the intent of the Sherman law in principle. The doubt that has arisen under the Sherman law is its application in specific cases, and that doubt is generally one that arises inevitably under every law that human ingenuity can frame. That is what the courts are for, to interpret the meaning of the law in its application to individual cases.

We have been 23 years in building a body of decisions, very slowly and laboriously, which have partly clarified the intent of the Sherman law as applied to individual types of cases. The enactment of a bill like this would obliterate that record of the 23 years and put us back again where we were in 1890, to start all over again and laboriously reconstructing the judicial interpretation of the meaning of the law, but in the place of having one single clear-cut sentence, as in the Sherman Act to interpret and apply, courts would, in place of that, have four additional phrases or sentences in the act to interpret and to apply to each and every litigated case, and the whole situation would be vastly worse than it is at the present time, and we urge with all possible emphasis that a bill of that kind while right in intent would defeat its own purpose, and it had far better be withdrawn. Let the Sherman Act stand. Its intent is fine; we all respect it, and business is trying to obey it. In order to obey it in its infinite number of applications to business in all its varieties, it has got to be interpreted; it is being interpreted by the courts. Do not throw away all that has been accomplished in that matter and start over again from the point where we were 23 years ago and under a more difficult law to construe than that one.

But we ask this committee to give due consideration to incorporating with these measures a bill such as has already been introduced by Mr. Levy on the 22d of last month, which, in effect, is an application of the Canadian act, modified to conform to our conditions here. We have given great study for more than two years to that Canadian act in its framing and in its operation, and the more we study it the more we seem to admire.

Mr. NELSON. You speak in the plural, "we." Do you mean yourself or the association you represent?

Mr. TOWNE. The association; and we have caused in the last Congress a bill to be introduced that embodied our views, but I frankly say that this bill of Mr. Levy's is better than ours. I have it in my pocket. You are doubtless familiar with it. If a piece of legislation of that kind could be adopted by us—and as our jurisprudence is based on that of England, there seems every reason to believe that as Canada has adopted this law, and its constitutionality has

not been questioned, that it is possible for us to do something of the same kind. If such a piece of legal governmental machinery could be adopted, and the exercise of the functions of that controlled by this trade commission, you would thereby create a clearing house, gentlemen, which would within a few months take out of the debatable field the greater part of these minor questions, which, while not spectacular and not touching big trade trusts or combinations are one of the heaviest handicaps resting on small business to-day, and one of the potent causes which is retarding the recovery of business activity.

Give us a tribunal to which we can go which will deal promptly with these things, and which as to the multitude of minor questions, which are on the border line between the thing which is permitted and the thing which is forbidden—we all want to keep absolutely within the law and yet wish not to needlessly handicap ourselves by abstaining from doing things that are useful and helpful under the mistaken belief that they are forbidden—that we can go to and get decisions in these matters which will clear these cases, and combining that with these other features and the proposed interstate trade commission you are going to do more to free business from the trammels which would embarrass it at present, and to set it on the path to prosperity again, than anything that can be done by process of legislation.

Mr. VOLSTEAD. Have you given any consideration to the Williams bill or any other measure with reference to holding companies?

Mr. TOWNE. I am coming next to that. I have said all that is needed as to the Sherman law definitions bill, excepting one thing, section 4, which makes clear the thing that guilt is personal in the case of actions by corporations in violation of law. We have nothing to say but approval of that. If there is any doubt in the present law, clear it up.

As to the rest of that bill, for the reasons I have endeavored to express, we hope it will not be pressed.

The third of the bills before this committee is the one relating to interlocking directorates, and there, we are in unqualified sympathy with the purpose sought to stop and remedy an evil which we all recognize as existed and does still, but in this case, again, in correcting that evil the essential thing is not to do a harm in other directions greater than the evil that is cured, and especially not to impose restraint on trade and on business operations which in themselves are harmless or beneficial, in order to attempt to prevent the doing of other things which are unquestionably bad. There should be a distinct improvement in this case, and we believe in this case it is perfectly feasible to do it.

The act provides that no person shall at the same time be an officer and director of two corporations which are in any way engaged in competitive business. Let us see how that will work out in cases that exist by the score, by hundreds, by thousands. I will take as an illustration an actual case, that I happen to be conversant with, of a manufacturing corporation which many years ago began to develop an export trade in its products. That is a thing that is desirable for the interests of our community. We want a broader and bigger market as an outlet for our surplus manufactures. We

shipped abroad last year $1,500,000,000 of our products, the greater part of which was manufactured products.

A particular corporation some 10 years ago found out it was called on in England, and a little later in Germany, to make reports to the Governments of those two countries, which should disclose its entire operations. The capital employed, the profits or losses realized, the amount of sales, and so on, and then should pay taxes, based on these statistics. That implied we would disclose all of our private affairs in this corporation, in which I happened to be a director, and in these foreign States; but worse than that would be subject to these impossible taxes, and that we should have to withdraw from the market. Thereupon, the subsidiary corporation was organized under the laws of the State of New York, and with a name identified with that of a parent company, and not interlocking directors, but absolutely the same directors, and the whole thing was done openly and publicly, and that subsidiary conducted the European business for some years. Then it was found that the laws of England had been somewhat changed or that they had not been correctly understood, and that returns in England required to be so different from those in Germany as to make a further subdivision desirable, and another subsidiary was formed, one continuing the British business and the other taking over the business in continental Europe; and still later this same corporation found that in order to develop its business in Canada and to escape the Canadian tariff it was expedient to establish a plant in that country, and in order to conduct that business and obey the requirements of law there it would be economy to organize another subsidiary. Those three subsidiaries are all existing to-day, and the directors are substantially identical in all of them. The names of the parent and the three subsidiaries are so identified that nobody could mistake the fact that they are connected, and, as a matter of fact, the whole stock of the subsidiaries belongs to the parent company. There is a useful process, absolutely harmless to anyone, absolutely necessary to enable this corporation to continue and extend its business in foreign markets; and yet the bill would prohibit a process of that kind. Surely that is not the intent of the committee, and surely a bill could be so framed as to permit of operations of that sort.

Mr. NELSON. Mr. Towne, may I inquire, supposing that that company was in part operating in restraint of trade or attempting to monopolize, merely prohibiting interlocking directorates from acting would be merely handicapping the corporation, would it not, if the stock remains in the same ownership as before? Would they not simply put in other men who would take the directions from those who owned the stock?

Mr. TOWNE. If the law was so framed as to make it merely a personal matter, it would be evaded by putting in dummy directors, and you would have accomplished nothing; if the law is so framed as to be effective in forbidding any control between corporations of that kind, it would be destructive of cases, such as I have spoken of, and there are many of them in such subsidiary corporations as are formed for the legitimate purpose of promoting the conduct and development of our national industries.

Mr. NELSON. As a practical question, from the point of a practical business man, will prohibiting common directorates get at the root of any evil?

Mr. TOWNE. This bill?

Mr. NELSON. Yes; this bill.

Mr. TOWNE. The interlocking directors' bill?

Mr. NELSON. That in itself, without changing the ownership of stock or prohibiting the ownership of stock, will not really reach anything outside the sy.. ,tom of the evil.

Mr. TOWNE. I gravely doubt it; I think you are attacking the symptom of it and not the disease.

Mr. FLOYD. Would you favor going further and striking out the stock?

Mr. TOWNE. That is a very serious question. We are not prepared yet to answer either yes or no definitely. We recognize the evil that this bill is aimed at, and it is a real evil. There are undoubtedly cases where there is interlocking control which is prejudicial to public interest and had better be prevented, but in attempting to do that, the bill, as it stands, would do an immense amount of harm, and would fail to accomplish what it aims to accomplish, because it would be so easy to evade it. The thing that you are asking here is not the individual presence of the same man at two different boards, but it is the power that that man represents, whether it belongs or is vested in him or somebody else who employs him as a mouthpiece.

Mr. FLOYD. The unity of control?

Mr. TOWNE. The unity of control; and yet, gentlemen, there is great difficulty and great danger in attempting to prevent abuses of that kind that you may unintentionally prevent many things that are beneficial and helpful. You take the case of a small community where there are two or three or four, and as time passes, a few more little industries, which are only possible by the getting together of local capital, and with, therefore, properly implied putting them into corporated form. Then, though they may have only $10,000 capital, belonging to men of small means, but a great many of them, ; id if those little concerns prosper, as many of them do—and they are a very important, very useful factor in our national growth; and if a year or so later a similar concern is started in that same locality, these same men inevitably are going to be thrown into it or invited into it, and their cooperation in it may be esential to making the thing succeed, because in these small communities, as a rule, there are only a few men qualified by natural gifts and experience to do these things, to act as leaders for those who are less competent and these men are a vital asset to that community, and it should be utilized for its full benefit, and the more of these local industries there are the better, if these men are more competent, as they usually are, then the only others who would be available, so long as that "interlocking" as it has come to be called, is not effective or utilized for the purpose of restricting competition.

Mr. MCCOY. What would you think if this legislation were aimed at that sort of interlocking in potential competing companies; would any harm be done? In other words, in the suppositious case that you are referring to now, those were the same individuals in a given community who were directors or stockholders in potentially competing companies or merely noncompeting companies?

Mr. TOWNE. I get your point, and I have cases in mind that represent it. It is hard to say whether or not two businesses are fairly

competitive. There are a great many, especially in some localities, because there is a tendency of industry to localize and to concentrate. There is a tendency for business to get together in that way, which is wholesome and should not be legislated against without due reason. For example, in the town of Danbury, Conn., every shop there almost is a hatter's shop; in Lynn, Mass., every one is a shoe shop.

Mr. McCoy. Mr. Towne, if you will permit me right there, in answering a question which Mr. Nelson asked you, you illustrated with a case involving lawyers. It is well recognized by the legal text writers—founded away back in the Bible, I suppose—that a man should not try to "serve two masters," and therefore a lawyer will not permit himself to be retained on both sides of a case, not that in a given instance he could not successfully and honestly represent both interests, but he does not allow himself to take that risk. Is not that exactly the situation where the same set of men are eiher in control of the stock or in control of the board of directors of potentially competing companies, that no man ought ever to put himself in a position where, by any possibility, he is endeavoring to "serve two masters"?

Mr. Towne. I will agree to that last proposition, but I think it does not fit properly to the case I have supposed.

Mr. McCoy. Let us take two hatters.

Mr. Towne. Two hatters in Danbury or two shoe plants in Lynn. One is already in existence, successful, and has got a man, we will say, 60 years of age, at its head, who has built up his business and prospered, and yet the concern needs no additional men at the top. His son, who has been trained in the business and who has accumulated a little capital, proposes to start another shoe shop under corporate form, and he has friends enough of his own and his father's to get the requisite capital together, and they organize a corporation. They want the father to serve as one of their directors so that his long experience and good judgment may be useful to this young enterprise getting on its feet. The two concerns are competitive only in the same sense that a grower in San Francisco and another in New Orleans are competitors. They are both selling sugar and tea.

Mr. McCoy. You are eliminating my proposition.

Mr. Towne. These two concerns, although their shops are side by side in the streets of Lynn, are selling their shoes to the distributing points anywhere and everywhere all over the United States.

Mr. McCoy. But they do come in competition with each other?

Mr. Towne. They may never touch in competition; you can never tell what constitutes competition. Would you say they are in competition also with a hundred of their neighbors in that same town?

Mr. McCoy. When you come to the matter of common directorship, the father in this particular instance, we will assume, does not own all the stock in the company in which he is interested, and that company has some stockholders who are not also stockholders in the one which is organized by the son. Immediately, you put the father, if he is a director in both companies, where he is at the risk of not being a real director; he is representing two different sets of stockholders.

Mr. TOWNE. My dear sir, that hypothetical case presupposes that every business man is naturally a rascal and inclined to be crooked.

Mr. McCOY. No.

Mr. TOWNE. I know you did not intend that, but the interest still lies there.

Mr. McCOY. That is where I want to differ from you; it does not assume that at all. It assumes the possibility that some man may not do the thing fairly. I am not very familiar with the Bible, but, as I recollect it, it is laid down in the New Testament that a man can not serve "two masters," and therefore in the legal profession it is considered thoroughly unethical for a man to endeavor to represent two conflicting interests. That does not assume that lawyers are rascals; but assumes that some of them may be, and therefore none of them ought to put himself in the position of having his actions questioned.

Mr. TOWNE. I will agree with you that the same man should not be put in a position of trust in respect to two conflicting interests, but in my hypothetical case I assume that there is no conflict of interest at all, and that you are barring the young concern from the benefit of the old man's experience and good judgment in helping it to organize.

Mr. McCOY. Just let me go back to a further thing that you said. You stated here a few minutes ago in criticising the word "injuring" in one of these sections that any man who sought to get another man's market or another man's customer was thereby injuring him. Therefore, if you should assume two corporations are competing, you necessarily put the common director in the place where he is at the risk of injuring one set of stockholders for the benefit of the other set.

Mr. TOWNE. There is my answer to that and the answer of our committee: There is the danger, not probably but possibly, that you imply; but, on the other hand, in order to prevent the injury in that improbable and hypothetical case, do not do injury to a vast number of actual cases, but seek to find some path which will cover both.

Mr. McCOY. But, what is the path?

Mr. TOWNE. The path is simply this, short and straight. Define the things that are forbidden in broad language. Your law has got to be interpreted by some tribunal anyhow to fit the individual case. Make the interstate trade commission that tribunal as to questions of this kind, with the right of appeal to the Federal courts, of course, where the case is serious or is disputed. Then, you have cleared all these debatable cases.

Mr. NELSON. What would be the line——

Mr. TOWNE. We will go back to the shoe case. I am supposing these two stores doing business are practically noncompetitive, one reaching out to the far west and the other to the south, and their customers never overlapping.

Mr. McCOY. You are taking my supposition out of it, then.

Mr. TOWNE. No. Suppose this was the case, and this act was questioned and submitted to the tribunal, and the tribunal discovering no competition there, said there was no objection to that dual sitting on your two boards of directors. Suppose your view of it was the correct view, and the two factories were distributing their

goods over a common territory and therefore were overlapping and interlapping; then the tribunal would say, "No; you are two businesses, which, while not already competitive, surely will become so," and there should not only be a separation of the directors, but you have got to apply your law every time by the facts in the individual case, and you have got to have a tribunal to do that; and if you constitute a wise and sound tribunal, give it broad discretion and lay down rules that are clear and so broad as to correspond in its character to the clear definition of the Sherman Act as to what is intended, but leave the application of that principle to the interpretation of that tribunal.

Mr. McCoy. Has not the court now power under the Sherman Act to do that very thing?

Mr. Towne. If so, this bill would be superfluous. But, here, again, Mr. Chairman and gentlemen, it seems to us you have the opportunity to do a splendid piece of constructive and helpful work—I mean that Congress has; I am not sufficiently versed in the distribution of duties among your committees to speak otherwise—that this Congress has the opportunity to do a splendid piece of constructive work by creating a tribunal and trade commission which will have jurisdiction of all these questions in their primary stage, a kind of grand jury, as it were, to determine whether the case presented does or does not imply violation of the law sufficient to take it into the Federal courts, just as the grand jury——

The Chairman. Then, Mr. Towne——

Mr. Towne. Determine whether I should or should not go to the petit jury and into court, because a tribunal of that kind I predict in a year or two will accomplish astonishing results and the clearing will be effected in that way.

The Chairman. You think all the antitrust legislation necessary is a trade commission?

Mr. Towne. No, Mr. Chairman. Let me put it rather this way: We think that either one of these bills aims at useful results, that something which each of them embodies is expedient and desirable, but we believe that all four of these bills will be best consolidated into a single bill, and that each of these things prohibited should be defined in brief, clear language, similar to that employed in the Sherman Act of 1890, and that the application of the principle thereby laid down should be vested primarily in this trade commission, and then you will have consolidated all practices in these intimately related matters into a single channel and into a tribunal where, in a short time, experience will be built up which will enable them to deal with them rapidly and intelligently.

The Chairman. Have you concluded, Mr. Towne?

Mr. Towne. Just a word, and I am through.

In section 2 you forbid the same persons serving on two directorates. Why not make a man who is already on one board simply ineligible on another board, and thereby automatically prevent his serving? And, again, you say that the fact of his serving on two boards shall be appropriate evidence that no competition exists. Would not the word "presumptive" be more expedient?

That is all I have to say. I thank the committee for its patience in giving me such a long hearing.

STATEMENT OF V. J. FARLEY, PUBLISHER THE RETAIL TOBACCONIST, 1931 BROADWAY, NEW YORK CITY.

Mr. FARLEY. My name is Vincent J. Farley. I am the publisher of a tobacco-trade publication which has a circulation throughout the United States largely, and I am entirely among what you may term the "independents." We have organized associations in Brooklyn, New York, and New Jersey, but principally in New York, and cooperating with the western association we have almost been entirely interested in the tobacco end of the trust question.

I have some matter here which I will run over very hurriedly, and wish to say that I am very sincere about all this, however, and if my inexperience leads me to some statements with which you disagree I would be very glad to correct the same.

The Sherman antitrust law is an honest and fair enactment.

It has not been enforced. Officers of the National Government, who failed to enforce it, were influenced by opposition of big business combinations.

What hope for this country if the intelligent, the educated, and largely the Christian men are to be the big lawbreakers—the lawbreakers whose "yes" or "no" means more in the retard of progress and spread of poverty than a thousand acts of criminality by uneducated, primitive lawbreakers.

When an uneducated element commits crime there is hope; when the intelligent and educated, the men who should be examples to the rest, show glaring unfairness, how can we lead the masses to believe in the value of human character?

Difficult is it for a country to lead the poor and uneducated up to higher and better things. Sad, indeed, is the condition when the crimes that have the most extensive and far-sweeping effect are committed by the men at the top—the men who know better. Our newspapers, which should be the center of education, right living, and right thinking, have followed the trend of modern-day business and two of their number allege criminal monopolistic combination by the others.

What is unfair and wrong under the Sherman antitrust law was unfair and wrong before that law. What will become illegal under these amendments was manifestly wrong before the amendments.

The public press answers as the official organ of this committee. We read that the committee offers to all, from poor independent up to the head of a multimillionaire corporation, a fair hearing with no impugnment of motive. Each day I have watched the press for reports reading: "Mr. ———, of the Standard Oil Co., said ———; Mr. ———, of the sugar combination, said ———; Mr. ———, of the tobacco combination, said ———." I am interested to know whether the above have been heard or are to be heard.

This regulation of business is most important. It must be done by some one at some time. The names I have read of persons appearing before this committee do not suggest that the great combinations are interested in what so obviously affects them. If Mr. John Rockefeller, Mr. Thomas F. Ryan, Mr. J. Pierpont Morgan, jr., are not already represented, I would respectively suggest a cordial invitation be extended for a free and frank discussion of these amendments with the committee.

As to the amendments: A bill to create an interstate trade commission, to define its powers and duties, and for other purposes. In regard to that trade-commission bill, I want to say that the independents have small faith in commissions. Commissions start out to control, but are controlled. The idea is all right; criticism is of the enforcement of the idea. We believe in our President; so we believe that men of character will make up the commission. The idea will not be misrepresented. So real independents are in favor of the trade-commission bill. At the worst it is a step forward.

With regard to the publicity provision, the publicity that may be given combinations if the records of the trade commission are made public worries a great many. The newspapers and magazines of the country with rare exceptions never have exposed the big combinations, which are nearly all advertisers. It is folly to assume that they ever will. And if there be a wrong, why should not the public know it. Big combinations belong to private individuals no more; they belong to the stockholding or the product-consuming public. If the Government gives certificates of good character to big combinations must not the Government go further and provide the publicity required for good conduct? The Government incurs a liability when it licenses big business. In return for the license big business must make some concessions. The Government has allowed the big combinations to keep stolen wealth; to pillage with a certificate of character and a license to pillage. Publicity must accompany the licensing of monopolies.

If a housewife of Washington Heights, N. Y., leaves her home and walks north, entering the grocery store, and buys a pound of sugar she will buy of the American Sugar Co.; should she walk south, and likewise purchase a pound of sugar, she will buy of the American Sugar Co. The American Sugar Co., as one of the sugar combinations, is a quasi-public corporation. Why, then, should not this much-objected-to provision of section 4 not apply to it? Is not the housewife entitled to know the facts? She must buy of this company; there is no alternative. This being true, publicity is demanded.

If a housewife of Flatbush, Brooklyn, leaves her home, walks east, and enters the first store she meets, and buys a package of oyster crackers, she will make her purchase of the National Biscuit Co. Should she leave her home and walk west, and likewise purchase the same article, she will make her purchase of the National Biscuit Co. In the olden days she could have bought a pound of loose crackers—enough for a family; now she can buy them in only one way, and that is in a fancy box at a standard price. Is not, then, the National Biscuit Co. a quasi-public corporation? Is not this housewife entitled to know about the company which compels her to buy their goods whether she wants them or not? Had she her choice of half a dozen companies from which to buy her crackers the case would be greatly different.

The publicity provision of the trade-commission bill will work no injustice to corporations. No one has been able to make us cry in describing the hardships big business has had to undergo, and we have withstood even tearful descriptions of widows and orphans and the more fearful ogre of "disturbed business."

A few specific examples of impoverished monopolies stricken down by the cruelty of newspapers and magazines carrying their business advertisements would be edifying. "Executives," said one speaker before the committee, "might also make public some things in response to public clamor."

The present agitation for better laws is for the sole purpose of relieving the public, not big business. The gigantic trusts have been squatting on the people, despite the latter's agonized cries to "Get off." And here we find men weeping over the embarrassment of the trusts. Possibly at some date, in some future time, the trusts may move, and then the people—the ferocious, wild, untamed people—might ask the trusts why they had been sitting on them.

Some one has suggested that the trade commission might well imitate the Bureau of Corporations. That body can not be imitated; its pure essence of innocuous desuetude is not imitatable. Under the administration of the late Republican Party this Bureau of Corporations was run as a side show to the big circus—the Department of Justice. "The Bureau of Corporations shall cease to exist"—these words of the interstate trade commission bill are like music from heaven.

During the dissolution of the Tobacco Trust in New York information on trade-marks, etc., was needed. Mr. Brandeis has made the interesting statement that important material reached New York City when the conference was over. The Bureau of Corporations has always been regarded as a joke by independents in the tobacco field.

The word "corporation" in section 9 of the trade-commission bill should be changed to the word "complainant." However, the bill as it reads suffices. For instance, the New York Sun—a corporation—surely will have the right to complain of the Associated Press—another corporation—and, in fact, it has recently done so. "Complainant," however, will include all classes.

Protest has been made of the investigation by a Government agency without an affidavit of wrongdoing, and the threat made to resist such governmental action by injunction. This inquisitorial power is in effect now in regard to banks, and such power has been sanctioned as to the books of railroad corporations.

Large monopolies recently paid lawyers large retainers to guide them in regard to doing business within the law. Are these bills and this agitation for specific laws to resolve into a trade commission that will act as legal retainer for the monopolies and save them employing lawyers? I hope not.

Now, in regard to an act to protect trade and commerce against unlawful restraints and monopolies. From the independent standpoint this is an excellent bill. There are important suggestions for improvement.

In section 9 is a provision permitting a seller to select his own customers. This opens the door to monopolistic acts. Independents of New York now complain that big manufacturing tobacco concerns sell exclusively to the Metropolitan Tobacco Co. The Metropolitan Tobacco Co. is in itself a monopoly and combination, and does the distributing of tobacco products in New York City. The Metropolitan, by virtue of having the sole agency for nationally advertised products in big demand, can say to an independent dealer, "Buy all

of me, or I will not sell you the highly advertised product." The pressure of public opinion has brought a few of the big combinations to a half-hearted consent to sell to all who paid cash, but here in this bill we find a certificate of character for a very suspicious "colored" gentleman.

Splendid, indeed, is the provision of section 12, rendering conclusive against a trust every judgment in favor of the Government, adjudging that the corporation had violated the act so that every person injured could sue and have the advantage of that judgment without having to prove the illegality.

We here can name a few independents that recovered damages from the big monopolies. When the monopolies got through with the average independent in the tobacco trade, the latter was content to accept a salesman's job with the victor. Of the thousands of independents scattered to the four winds of heaven by the big combinations in the tobacco field, there is a record of but two that recovered so-called "damages." In one case the damages secured only paid the creditors and left the penniless manufacturer to seek a job with the trust. When it takes the Government more than seven years to get a final decision in a trust suit, where is the independent so foolhardy as to sue?

One John Locker, of Brooklyn, sued the so-called Tobacco Trust. After the case had strung along for nine years, long enough to bankrupt a small man, a decision was handed down which practically stated that Locker could not recover damages that amounted to anything, because he had not been ruined. In other words, a jobber who succeeded in surviving the trust monopolistic attacks had no cause of action; a ruined jobber, with a salesman's job and money just enough to pay rent, could sue and recover.

If a court of special sessions convicts a man of being a thief, can not others use it? Should exception be made of a monopoly because it has stolen millions? Are we to have "ordinary man's justice" and "millionaire's justice"? Disregarding the Government's findings would be like rejecting all civilization's progress, in order that the present generation might rediscover for itself.

That section 12 of this bill is needed is shown by the history of the Tobacco Trust. It cost the Government several hundred thousand dollars to prosecute the Tobacco Trust. It took seven years. You must agree that no independent complainant could spend the money. You must agree that a victim of monopoly oppression suffered enough hardship in having to wait seven years for a verdict in the United States suit without having his damage rights taken away by the statute of limitations. And certainly he should have the benefit of the Government's decision. If a decision is rendered favorable to the trust, the trust gets a tacit certificate of good character; so if the decision is adverse, the private party should profit by having the evidence as a basis for his action.

Secion 13 of this bill on the face of it grants injunctive relief to the independent, but then takes it away in the provision for a bond.

Suppose a small East Side cigarette manufacturer declares that one of the big cigarette combinations is ruining him. If precedent teaches us anything, the manufacturer will be dead and buried before there is an adjudication in the regular routine of legal procedure. If

a bond is asked for, how can a man who is being ruined provide a bond, and, moreover, how can he give a bond that will in any way recompense a big combination?

I would suggest that injunctive proceedings be in charge of the trade commission and be granted in the judgment of such commission. Surely such commission is better able to judge the reasonableness of such demand than a court of law. This amendment might be called the "ambulance service" of the Sherman antitrust law.

In section 9, I object to the words "quantity of." It permits a manufacturer to discriminate in price without limitation or restriction, as between the buyer who makes a small purchase and the buyer who makes a large purchase. This opens wide a door for illegal and unfair discrimination. Here is an example: A manufacturer of a produce nationally advertised, in great demand, allows a lower price to a jobbing firm buying a hundred thousand dollars' worth at a time. That jobbing firm will sell to the retail trade at a lower price than the competing and less-favored jobbers can buy wholesale. As a result you have a monopoly in the jobbing business.

This provision should be amended.

There should be a minimum factory shipping price, estimated from a universal system and taking into account transportation. Suppose, now, for instance, there is an independent and a so-called combination factory in Lima, Ohio. If an independent firm finds it convenient to make shipment of 100 pounds of tobacco and pay the freight or f. o. b. from Lima, why should not the big combination do it? There is a universal factory shipment quantity in every business.

A big grocers' association recently complained that there should be a standard price for carload lots of groceries. A half car might be a broken lot and sold at various prices, but a whole car should be as cheap as two carload lots. The grocers' association rightfully demanded that one carload be the same price to all and that one such amount be at a like rate.

Manufacturers may make their own terms, but once made, let it be the same for all. If the discount is 10 per cent on factory shipments, let it be 10 per cent for all. There may be a minimum shipping amount; to this all independents will agree. That is very important. For instance, in New York City we had at one time 200 jobbers. We have two left, and the two that are left are doing a business that amounts to nothing at all. Why did the 200 jobbers disappear? They disappeared because the manufacturing company discriminated and appointed the Metropolitan as the sole distributor. The Metropolitan, as the sole distributor of their widely advertised products, went into the field and undersold them, and all of them disappeared.

Mr. NELSON. Who are back of the Metropolitan?

Mr. FARLEY. That is a long story. The Metropolitan was organized with the approval of Mr. Duke some years ago—over nine years ago.

Mr. NELSON. Let me make just a brief inquiry.

Mr. FARLEY. Well, the corporation now——

Mr. NELSON. Was the Metropolitan back of that?

Mr. FARLEY. It was supposed to be.

Mr. NELSON. Do you know, as an independent, what it was?

Mr. FARLEY. We say it was, but it is very hard to say. For instance, I do not know all of the stockholders in the Metropolitan. I know some; I know the Messrs. Bendheim. We have the records of the United States Government suit and the suit against the Metropolitan, which is also in the courts. It was stated that Bendheim visited Duke. Duke subsidized this distributing company with $5,000 a month at the time they were driving out the independents. They gave them $5,000 a month then and they did it.

With respect to injunctive measures, Mr. Chairman, suppose an independent manufacturer is injured by a monopoly. Under the procedure being discussed the trade commission will investigate. Inside of a year the data will be on hand. Then the Department of Justice prosecutes. It took over seven years in the tobacco cases; so we will, in view of modern methods, estimate two years. All this time what will happen to the complainant?

The wounded business is the same as a wounded man. Suppose that all of those investigations, appeals, decisions, appeals to higher courts, etc., were gone through with when a man cuts an artery. The man, of course, would die. Business arteries severed by the big combinations have allowed the lifeblood of business to flow away while judges and lawyers have haggled away over complex questions of law.

The amendment in section 13 providing for the injunctive features provides for quick relief. Independent business wants an ambulance service. The independents are in favor of this. I wanted to refer to the effect of jail sentences. The independents want the section 3 of the tentative bill amended so as to provide a mandatory jail sentence for offenders. The courts, in the few instances where they have fined offenders, have made themselves ridiculous by the smallness of their fines; and I want to impress upon you very much that the independents are in favor of these mandatory jail sentences. Strike out "in the discretion of the court" from the penalty clause and add a clause making imprisonment mandatory.

I want to say, also, that independents would like to have the section defining "monopoly," also "a tendency toward monopoly," defined. What is a tendency toward monopoly? We have "monopoly" defined, but we have not "what is monopoly" defined. We believe that in some cases we could prove our damages much easier, and, anyway, it should be defined.

In regard to some suggestions about price cutting, the insertion of a provision against price cutting in the Sherman antitrust bill is useless. In handling the price-cutting or unfair-competition end of the corporation business, you can not prevent the same by one specific prohibition any more than you can stop an eel wiggling with one finger. A broad, sweeping enactment is necessary—one that will cover any number of small evasions.

For instance, a monopoly may offend not alone in price cutting but in price raising. It may use rebate coupons; and, again, the price for a standard article may remain the same, but the seller may award an accompanying present. If he sells a plug of tobacco for 10 cents, he may throw in a pipe valued at 5 cents.

Regarding interlocking directorates, we are much in favor of prohibiting certain persons from being or becoming directors, officers employees of national banks, or of certain corporations.

Section 4 should be amended by lessening the time for the correction of the interlocking-directorship evil. This idea of removing into the future all of the time steps from common welfare is getting tiresome. Six months from the time of the passage of the act is enough time.

It has been objected that the prohibition of interlocking directors is unconstitutional, inasmuch as the same person may be a director of two national corporation competitors without the separate boards of each having knowledge of such dual capacity of that person, and so each corporation would be criminally liable, including all individuals.

No law can be designed to make corporations perfect by patent. Surely some duty of scrutiny of its members is devolved on corporations. We do not excuse the professional receiver of stolen goods for his ignorance of the origin of property. Shall we place no responsibility upon the professional corporation promoter?

The prohibition against a bank director being a railroad director is commendable. Running railroads was once a business in itself. To-day it is a question of high finance. It is the banks and frenzied finance which have made widespread a national demand for public ownership of railroads. Banks are the focus points of embryonic tobacco and other business monopolies. I know of one recent trust that was organized in Wall Street long before factories, fields of growing tobacco, and shipping business was considered. Strike out this prohibition and you weaken your bill.

If you amend the interlocking-directorate bill to prohibit interlocking directors of banks that are in the same city or are potential competitors, you open the door to applications of the "rule of reason" to a commission. Our epitomized complaint of the Sherman antitrust law during the past administration was that it allowed the Department of Justice to use its judgment in settling mooted questions.

For heaven's sake, permit us to have something definite, if it is only a crumb. Let us know where we stand. That, I understand, is the purpose of these amendments to the Sherman antitrust law. Unless the "five brothers" accomplish this, they have failed in their purpose.

Interlocking control of corporations must also be attacked by specific injunction against stock ownership, dummy directors, voting trusts, and other such devices.

"Passing the brick" is a highly descriptive expression of the streets. That is what many want to do when they urge that so many important questions of procedure and interpretation should be left to the trades commission. Why not settle on some specific prohibitions at these conferences? If monopolistic holding companies are evil, specify their prohibition and open no door for compromise. No technicalities should surround a private person's right to sue. Protection of much-persecuted monopolies from independents is getting too old and stagy to be swallowed. When some one points out a millionaire corporation that has been driven out of business by independents, my pity may be freely extended.

With independents disappearing so rapidly that one can not be collected for the Eden Musee, let alone exhibited at a hearing like this, I can not sympathize with tearful statements that if rights be

given private individuals to sue many will abuse the privilege and blackmail.

This committee has been told that an interlocking directorate might be legal, as between a railroad and a bank. How about the present New Haven investigation? Was not a large share of the trouble there laid to the intimate relation between a bank and the railroad? Were there not interlocking directors? To be sure, a bank does not compete in actual carrying of passengers, but in this case the bank was the railroad.

Gentlemen, while the Judiciary Committee is sitting in Washington, many newspapers are making a great hullabaloo in opposing and criticizing these Wilson trust bills, as will be seen by the following [reading]:

George W. Wickersham, who did as much as anyone else to bring President Taft's administration to an unhappy close, emerges from the obscurity of the "land of ex" to criticize President Wilson's message to Congress on the subject of "Business legislation."

Has he no sense of humor? He pompously declares, in a recent issue of the New York Sun, that the "honorable surrender" of big business was due to his "four strenuous years" of activity, and he cites the dissolution of the Tobacco and Standard Oil Trusts as "accomplishments."

It was these "accomplishments" that made us the laughing stock of nations.

Our friend Wickersham's efforts, which he still thinks worthy to boast of, might be compared to the productive pruning of trees—the monopolies grew and flourished fourfold under the "strenuous" Wickersham policy. Big business never had any real quarrel with Wickersham.

WHO WAS JAILED?

Decisions! Why, the past autocrat of the Department of Justice can quote them by the newspaper column; but suppose one interrupts with foolish and irrelevant questions like these:

1. Name a few of the multimillionaire promoters of the more well-known monopolies who went to jail.

2. Name a few monopolies who were forced to relinquish what the United States Supreme Court said they had stolen.

3. Name an appreciable body of independents who were satisfied with the Wickersham "strenuosity."

"Mock assaults" describes those heroic adventures Mr. Wickersham so modestly recites in his interview in the press.

However, we ought to be grateful to Mr. Wickersham. We are convinced that nothing had been done, when along comes the fearless prosecutor of a past administration to declare: "Huh! I tamed the trusts so they would eat out of my hand; Wilson is going to 'needless and unnecessary' pains."

Apparently Mr. Wickersham thinks that we may not regard him as a "fierce trust buster" of "four strenuous years," and so he enumerates the cases. The Tobacco and the Standard Oil combinations head the list.

NOW "COMBINATIONS."

Mr. Wickersham was always careful about hurting the "sensitive" natures of the trusts, and even now how carefully he selects his words—they are "combinations."

I would gladly pay a fee to watch the face of the much probed, investigated, and penniless John D. Rockefeller as the latter reads this paragraph of Mr. Wickersham's cry from the grave:

"One who, during four strenuous years, was called upon to direct the enforcement of the Sherman antitrust law may be pardoned if he points to the accomplishments of that period as the probable reason for this spirit of surrender referred to by the President."

Yes; it's funny. Funny as a crutch.

I wouldn't seek to rob Mr. Wickersham of one milligram of halo, but suppose we take the case of an independent manufacturer who waited from the

passage of the Sherman antitrust law in 1890 until 1912 (20 years) for justice. Could you hand him this "spirit of surrender" in lieu of restoration of stolen money, arrests of offenders, or real bona fide dissolutions?

How ordinary and commonplace are these fellows who keep repeating that they want their money back, a chance to do business or to put someone in jail. Why can't they be content with laws, decisions, appeals, spirit of surrender, etc.?

One of the greatest monopolies was "dissolved" at the Federal post-office building in New York City. Mr. Wickersham came here and for days was closeted in secret sessions with the Federal judges and the monopoly's lawyers.

DECLINED AID.

The writer, escorted by a committee of tobacco independents, waited on Mr. Wickersham at the Bar Association and read a written demand that "interlocking stock ownership be barred in the dissolution."

Mr. Wickersham refused to do this, and he turned down the rest of the 13 practical and sensible requests of the committee.

Even at this late day an investigation might be made as to why, when criminal monopolies are brought before a court for dissolution secret sessions are so necessary. If the selfsame lawyers, who schemed the law breaking, may sit in council with the Attorney General and the court and suggest how dissolutions may be "delicately" accomplished, why can't the public have a look-in?

Our Don Quixote of jurisprudence in his interview says: "But the most unfortunate suggestion is that the results of 25 years' construction of the antitrust law by the courts should be thrown away * * *."

Attorney General James C. McReynolds, when merely a deputy under Mr. Wickersham, said that Mr. Wickersham's famous "dissolution" of the Tobacco Trust should be "thrown on the scrap heap." And President Wilson might well be pardoned now for consigning those famous "results" to the same dump.

But dear experience has taught us the folly of trying to argue with Mr. Wickersham.

I am not against big business, but I would criticize the nauseating hypocrisy of some big business. We once had a simile, "a beggar whines." Now we say, "a corporation snivels." Multimillionaire corporations declared that they must not be attacked because "the widow and orphans would suffer." In the Tobacco Trust fight, half-starved retailers and independents fought multimillionaire corporations, yet the latter must whine and hide behind fictitious widow and orphans' skirts. The New York Sun of Thursday, February 5, opposing these bills, seems to be as solicitous as Senator Root about "my people." It marvels that more business men are not at the hearings. Various corporations affected are well represented. The tobacco independents, if represented, must be by a roll of the dead.

We had 200 independent tobacco jobbers in New York City. The other night we called a meeting to appoint a committee to indorse these tentative Wilson trust bills. The only two jobbers that are left of the former 200 were there and they will come to Washington. Yet big newspapers jibe that those other 198 are not here. Must they come carrying their business tombstones with them?

None need worry about the corporations, and if they get the complaining independents to Washington the newspapers must start an expense fund.

The anvil chorus of criticism from the press has as a sidelight the interesting inconsistency of the New York Sun. This paper has complained to the Department of Justice that it is injured by the Associated Press "monopoly." On one page it seeks protection of the Sherman antitrust law; on another page it opposes the administration's tentative bills for more effectual operation. It is a case of whose ox is gored.

Time was when our newspapers of the conservatives would ignore the fact that there were trusts. How edifying the cry of "monopoly" by one newspaper and its suit for damages. A New York paper says: "Hundreds of business men are ready to go to Washington and oppose these bills," and they print interviews with many. Why should not a number of business men be found who would oppose these bills? No one accused the impoverished independents of reaping the benefits of monopoly. If anyone is to oppose the bills it is not the starving independents. It must be, then, the business men who resent any curtailment of their financial ideas.

Interlocking directorates were never noticeable for their multiplicity among independents or workingmen. When merchant association bodies, influenced by interlocking directorate men, oppose regulation such as is proposed, is the opposition other than natural? Most wealthy men obey laws against monopoly when passed, but they are not angels; who expects them to assist in passing a law to regulate themselves? Mellen never told about the New Haven until he was deposed and Carnegie was dumb as the Sphinx about protection until he retired.

The passage of those amendments are necessary because of the succeeding puzzle decisions of the United States Supreme Court.

The Knight case, the first case under the Sherman antitrust law, seemed to show that manufacturing was not commerce and that the decision thus drew the teeth from the law as regards industrial corporations. The court later reversed itself in a series of cases, one of which was the Northern Securities case. Here it decided that the antitrust law forbid all combinations restrictive of trade or competition. This seemed to be the idea in the Trans-Missouri Freight Association, the Joint Traffic Association, and other cases. Then came Judge LaCombe with his decision that the merger of two rival express companies doing business across the State line was illegal, and at last followed the famous "rule of reason" in the Standard Oil and tobacco cases. In this famous "rule of reason" it was set forth that the dominant purpose of the promoters controlled the judgment as to the right or wrong of the corporation. The United States Steel Co. and the International Harvester Co. are still to be acted upon by the court. When the Supreme Court can go floundering like this, surely some one needs to specify something.

I will close now with a few words here in regard to the results of the Sherman antitrust law. After all this lofty talk about putting violators in jail, a few men of average means jobbing kosher chickens have been given prison sentences in New York. The press has seized upon this as a wonderful argument of the efficiency of the laws extant. They declare, "Why new law or amendments, in view of such a marvelous happening?" If the kosher chicken men had a few millions and advertised we would still be waiting for an example. There was an arrest, less than a year ago, of several Yiddish grocers on the upper East Side for combining in restraint of trade. Some farmers in the South were also examples.

Shades of Rockefeller and James B. Duke! Did we go to all of this expense for a few Yiddish grocers of New York's upper East Side and some jobbers of kosher chickens? If this law reaches the poor man and puts him in jail, where he belongs, surely it is worth an editorial of approval in the subsidized press. Why amend such a

law? Many corporations, by illegal operation, have injured independent business men of the country; otherwise the Sherman antitrust law and the present amendments would be unnecessary. It is difficult for corporations to understand that the Government is legislating now to give the independent a square deal. Big business need not hold out its hand for me. Remarks have been made before this committee that the committee might, by its bills, injure the business men of the country. These proceedings are for the purpose of giving the business man relief. The only destruction of business I ever saw was by the illegal monopolies.

Every newspaper in the land carries reports of this committee's work. A business man that is not alive enough to read the newspapers or talk with some one who does would be of little use in appearing before this committee. Assertions that business men would be here in droves if they understood what is being discussed is nonsense.

A few years ago a number of independents were fighting the Tobacco Trust as a monopoly. The last administration engineered a so-called dissolution that was hailed as a great fiasco. Yet the Government had given the trust a certificate of character, saying to the independents, "The trust is a trust no longer." A newspaper that formerly called the Tobacco Trust a "trust" now must say "combination," or stand liable for damages. Does not, then, the Government owe some duty to independents if it is to issue certificates of character to monopolies? Specific laws must be passed or amendments to the Sherman antitrust law to provide for specific performance and punishment for failure to so perform.

The Government is compromising with railroads and industrial corporations.

The Democratic platform said [reading]:

> We condemn the action of the Republican administration in compromising with the Standard Oil Co. and the Tobacco Trust and its failure to invoke the criminal provisions of the antitrust law against the officers of those corporations after the court had declared that from the undisputed facts in the record they had violated the criminal provisions of the law.

Something to be explained here. One of the reasons why the Republican Party was retired was because it had compromised with several of the famous trusts.

Under a new administration it was presumed that one of the following courses would be taken: Put them in jail, take away their stolen loot, or break up their illegal combine. In ordinary criminal practice a lawyer or court is not allowed to compromise with criminal offenders. Heavy penalties are provided for those who do. The State does not compromise with excise or other law violators.

These Wilson trust bills should be passed. Independents of the United States indorse them. The bills are a few well-placed nails in the hitting end of the Sherman antitrust law club—a club, by the way, which has never been used. Independents get real angry when they hear this senseless talk as to what has been done to the trusts.

Fallacious dissertations on theoretical results fill many volumes. If there ever was a famous or infamous mirage, so far as results are concerned, it was that enactment of 1890. Of results we complain, not of the law itself.

Were it not for visions of so many independent business tombstones and wrecked lives, what a delightful farce comedy this antitrust question would be. Uncle Sam in 1890 manufactured its big stick in the Sherman antitrust law. Trust promoters raised a great disturbance. The outcry did not subside until it was discovered that Uncle Sam did not intend to use it. This was fine. Now Uncle Sam is hammering a few spikes in the end of the club. Nobody is hit, and in all probability no one will be hit, yet the driving of those nails rasps on the fine sensibilities of the many monopoly promoters. Why should Uncle Sam inflict additional theoretical cruelty?

Mr. CAREW. What do you know about the United Cigar Stores?

Mr. FARLEY. The United Cigar Stores were organized to handle the retail end of trust products. The result has been the driving out of the business the independents, in many instances.

Mr. NELSON. Just one question. Do you represent all the independents in the tobacco bubsiness?

Mr. FARLEY. Three and a half years ago I organized a paper in behalf of the independents, to support and represent the independents, and at the same time I organized the independents in New York City. With that initial starting I organized the Independent Retail Tobacco Dealers' Association of New York, and then I also organized, following that plan of organization, one in Brooklyn and one in New Jersey; and then I also cooperated with the secretary of the western association of Oregon, Washington, and three other States there, and he has organized them.

Mr. NELSON. Do you know the present status of the American Tobacco Co., whether or not they are still operating together as they did?

Mr. FARLEY. Well, the only answer to that is to ask what independent concerns now are trying to compete with them, or have come into existence to compete with them.

Mr. NELSON. What is the answer to that?

Mr. FARLEY. There are none.

Mr. NELSON. So far as pertains to any change in prices or contracts, there has nothing resulted from the dissolution of the trust?

Mr. FARLEY. Nothing has resulted, except conditions are worse.

Mr. NELSON. Worse?

Mr. FARLEY. Worse.

Mr. NELSON. How?

Mr. FARLEY. I am not only in the tobacco business, but as a publisher of a paper I read all the papers and am supposed to know in a general way from reading what is going on. I only know of one practical cigarette company in all of the United States that is independent. I only recall one or two others in all of the United States; so, there is the answer.

Mr. FITZHENRY. Is not that due to the fact that the Tobacco Trust completely annihilated all of its competitors?

Mr. FARLEY. They did.

Mr. FITZHENRY. There was not anybody left?

Mr. FARLEY. There was nobody left to speak of.

Mr. FITZHENRY. And nobody can succeed since then——

Mr. FARLEY. We have one jobber—Locher. Nine years ago when the monopoly went after him and drove the other 199 out, and Locher still litigating for justice. The case is still before the court in New York, and then they talk about going to the courts for justice. They

would have a fine time at that. Locher has been nine years waiting for justice. Over in Newark I know one little fellow, a jobber, and one of the high promoters of the trusts sent a colored man over there to buy a pack of cigarettes. You would not believe they would do a thing like that, but it is in the United States record against the Tobacco Trust—sent over there and caught him selling, and he had to stop, and he was finally ruined. Imagine that little fellow waiting all these years for the dissolution proceedings of the United States Government's suit and waiting and waiting. That fellow has died and probably his wife is dead by this time—10 or 12 years ago.

Mr. NELSON. Do you know anything as to any arrangement with the tobacco company or Tobacco Trust in the buying of tobacco from producers and farmers—whether there is any real competition?

Mr. FARLEY. At the time Mr. Wickersham came to New Jersey to take charge of the dissolution of the Tobacco Trust I waited on Mr. Wickersham with a committee of 13 independents—plain, ordinary business men. We stayed here two or three nights, and we drew off 13 very plain, ordinary requests which would help us in our business. We saw Mr. Wickersham at the investigation, and he absolutely ignored us. One of the things we asked him is in line with your question. We said, "Mr. Wickersham, you are a lawyer, not a tobacco man; is it not a peculiar thing that the lawyers of the Tobacco Trust, the men who have been guiding the Tobacco Trust through all of this illegality, are allowed to stay with the judges and with the Department of Justice in secret session? These men know the tobacco business; you do not know the tobacco business. We ask for representation, and we ask that in the allotment of such brands, in the separation of the Tobacco Trust into the constituent parts, not to give one factory or plant the certain brands, like the Burley tobacco, in order to place all the Burley tobacco business in the hands of one of these constituent parts, but put it in one and then another," and we said to him, "If you have not the information as to the brands, the divisions and the uses of this tobacco, that you get it from the Bureau of Corporations"; and I understand, although I do not make this as a positive statement, that that was the data from the Bureau of Corporations which I referred to earlier here, which "never arrived." In any event, Mr. Wickersham refused our request.

Mr. MCGILLICUDDY. What do you mean by the judges and the tobacco men "sitting in secret"—just what do you mean?

Mr. FARLEY. I am an independent, and I organized an independent association. I am interested in the welfare of my tobacco paper; I am interested in the welfare of the independent retailers, and I go down there——

Mr. MCGILLICUDDY. Where did they sit together?

Mr. FARLEY. In the Federal Building.

Mr. MCGILLICUDDY. The judges of the court?

Mr. FARLEY. Yes. The judges of the court that were considering the case. When they got ready to dissolve the Tobacco Trust they called in the lawyers who represented the Tobacco Trust, they called in the Attorney General as representing the people, and they sat there for days discussing it, and I went to the building in behalf of my people, and I found it was a secret session. I could not be heard, they said.

The only remedy we had was to go to Attorney General Wickersham and ask that when he went inside that he would do those things for us.

Mr. NELSON. You have not answered my question. From your knowledge are you able to answer this: My people in my district who raise tobacco, are they selling only to the American Tobacco Trust, or are there independents in the field that would compete for that tobacco?

Mr. FARLEY. We understand now there is some competition, but we claim, however, that the trust factors, by using a certain grade of tobacco for a certain thing, are the only purchasers. For instance, suppose I am an independent, and I go down into your district to buy. The big buyer is the man who used all of that, if it is thousands or hundreds of thousands of pounds. How can I compete with him? But if those trade-marks or the different trade brands were distributed, then there would be competition down in your district.

Mr. FITZHENRY. Then, according to your idea, the entire dissolution of the Tobacco Trust is a failure?

Mr. FARLEY. A farce. I am paying to-day—this is outside of tobacco—19 cents a gallon to the Standard Oil Co. The Standard Oil Co. was dissolved, but every time I take out my little Ford car I pay 19 cents a gallon for gasoline, which was thrown away a few years ago. They dissolved the Standard Oil Co. into its constituent parts, yet I understand the stock is now selling at $1,200 a share, and I think they are cutting melons every three or six months. The dissolution of the Tobacco Trust is equivalent to the dissolution of the Standard Oil Co. I think one is as ridiculous as the other, and I think it is generally agreed all over the world that the Department of Justice simply was made a laughing stock in the dissolution of the Tobacco Trust.

Mr. FITZHENRY. They have not common directors; therefore, how can they get together?

Mr. FARLEY. They have common stockholders.

The CHAIRMAN. How would you remedy that?

Mr. FARLEY. My contention is this: For instance, Mr. Ryan is a financier who held a large volume of stock, Ligett & Myers, and Duke is also a large stockholder in the American Tobacco Co. We asked the Attorney General in our 13 demands that this community of stockholding be done away with in the dissolution, but he did not catch that.

The CHAIRMAN. How would you do away with it?

Mr. FARLEY. I do not know whether you agree with me or not.

The CHAIRMAN. I want your ideas.

Mr. FARLEY. We have new conditions now. It is hard for some of the business men, I suppose—some of the very wealthy men, corporation owners, who appear before your committee—to understand you are sitting here because of new conditions, and I believe that this community of stockholding in these corporations should be broken up; that it should be prohibited, or there will be an outcry against it.

Mr. VOLSTEAD. Did not the Supreme Court in that Northern Securities Co. case practically hold that that was the only legal way

of distributing—by giving each man a proportionate share in the various parts in which the corporation was subdivided?

Mr. FARLEY. In regard to that I can only say that those decisions—I have often heard of them—I have never studied them individually, because they have always been referred to before me as the "puzzle" decisions, and it seems from the way the courts have certainly handled the tobacco cases that the results are absurdities.

Mr. VOLSTEAD. I do not dispute that.

Mr. FARLEY. Then, to go back to the decisions they have made in other cases, and they discover that decision in the Securities case.

Mr. VOLSTEAD. I think the Supreme Court made a mistake, with all due respect to the Supreme Court.

Mr. FARLEY. I thank the committee.

The CHAIRMAN. The committee will now stand in recess until 2.30.

(Whereupon, at 1.15 o'clock p. m., the committee took a recess until 2.30 o'clock this afternoon.)

AFTER RECESS.

The CHAIRMAN. The next gentleman in order is Mr. Kellogg, and we will be glad to hear from you now, Mr. Kellogg.

STATEMENT OF MR. W. K. KELLOGG, OF BATTLE CREEK, MICH., MANUFACTURER OF FOODS.

Mr. KELLOGG. Mr. Chairman and gentlemen of the committee, I am not a public speaker. I have a story to tell. It will only take a few moments, and if I could add anything to what I have to say by your asking questions when I have finished my short story, I shall be glad to have you do so.

The matter in which I am specially interested is one of the uniform price. The company which I represent was organized about eight years ago. At that time I had had no previous experience in this kind of business. I had been engaged with my brother, Dr. Kellogg, in another enterprise which did not call for any knowledge pertaining to the mercantile business in any way whatever. We started to make a product called toasted corn flakes. This product, I learned, had been introduced into Philadelphia, at a price that was not uniform, by our representative there. Shortly after this came to my knowledge, within a few months at least after learning of the situation, I went to Philadelphia and arranged to have a uniform price on toasted corn flakes in Philadelphia. There was a large number of stores in Philadelphia known as the chain stores, a combination of retailers, to whom we were selling the product at one price, although they were retailers, and to another group of retailers we were selling at still another price—a higher price. I looked over the situation and it seemed to me it was absolutely wrong; it was not right. There was a gentleman on this side of the street to whom I was selling the goods at $2.80 and another man on the other side to whom I was selling at $2.50.

The CHAIRMAN. $2.50 for how much?

Mr. KELLOGG. For a case of 36 packages, which retailed at 10 cents each. We cut off in one day in Philadelphia some twelve hundred of the leading and best stores in Philadelphia because we could not sell for the price at which we had been selling them, at the jobbing price.

We knew we would lose business; that it would be detrimental to our interests from a manufacturer's point of view; but I thought it was not right to do what we had been doing. From that time until this time we have been trying to make our price uniform all over. We select the jobber and through him distribute our goods. We sell to jobbers only. We have one price to jobbers. A jobber can purchase our goods in one case lots as cheaply as he can in carloads. We believe it is wrong and not correct and not right to sell to one jobber at $2.50 and to another jobber at $2.40 a case of 36 packages simply because the one buys in a larger quantity.

We believe also in maintaining the retail price and having a uniform price on our goods as well. We endeavor to give our customers full value for what we charge them. When we began our business, we had a package which sold at 15 cents, a small package. Shortly, within a very few months or within a very short time after we began business, by improved methods we were able to increase that size nearly 50 per cent. and a short time later, within a year, we were forced by competition to still further increase, and we were able to do it by improved methods. We were obliged to give, and did give, half as much again—50 per cent more than what we had been giving in quantity. So we have, since we began business and since we began to endeavor to maintain a uniform price on our goods, we have succeeded in giving a consumer 50 per cent more goods for 50 per cent less money. And, now, we consider it is no hardship to any one to pay, we will say, 10 cents for a package of our product, for the reason if he does not want our kind there are many others that can be had at less money.

We have had in all, in competition in our corn-flake business, 107 different varieties of toasted corn flakes. There are not that many on the market to-day, but there are quite a large number, and competition is very brisk. It seems to me if we could have a uniform price on commodities, that it would be to the interest of the manufacturer, the jobber, the retail merchant, and the consumer. We do not want our product sold for more than 10 cents; we publish the price on the package. We also publish a guaranty on the package as to the quality of the goods. We guarantee them all the way through. For instance, it has occurred many times in our experience that a jobber or wholesale man has had some of the goods injured by fire or smoke. He gets his full amount from the insurance companies, and the goods may be sold for salvage, but we think it is necessary to our interests always to protect those goods by buying them up regardless of what they cost. We can not afford to have our name go out on a package of goods which we know are not right, that have been smoked or injured by water.

We have recently endeavored to give the public a still better product than ever before. We are installing at the present time a machine for wrapping the package, so that it will be absolutely sanitary, in a sealed container, paraffin sealed, so that it could be dipped in water without securing any moisture.

I think I have nothing more to say, unless the committee has some questions to ask. I believe I have told my story. I am for a uniform price on commodities. I believe in it thoroughly.

The CHAIRMAN. We are very much obliged to you, Mr. Kellogg. We will hear next from Dr. Van Hise.

STATEMENT OF DR. CHARLES R. VAN HISE, PRESIDENT OF THE UNIVERSITY OF WISCONSIN, MADISON, WIS.

Mr. VAN HISE. Mr. Chairman and gentlemen, I appreciate the burden that is put upon the committee in hearing numerous large organizations which must come before this committee, and I shall be as brief as possible in my general statement, with the hope that if I have not made clear the ideas which I wish to express questions may be asked. Of the proposed bills which are before this committee, I shall only speak in regard to one, because they are so complicated it seems to me perhaps I could be of more help, if I can be of any help to the committee, by confining what I may say to a single bill rather than scattering over the whole field. Therefore what I shall say will be applied to No. 2 of these committee bills, tentative print, and if you will pardon me I will have to make certain general remarks in order to get a background upon which to apply the principles which it seems to me should obtain regard to this bill.

For my own part it seems to me there are certain things in the bill on which there is a very general agreement, and which scarcely need to be discussed. At least if there are any differences in regard to those points I am not aware of them. I suppose there is no one at the present time who would advocate the retention of private monopoly in business in this country, and therefore nothing should be done which in any way might limit or alter the effect of the Sherman Act in preventing monopoly. I am not going to argue it, but simply take it as one of the premises on which I shall start.

The second point on which I believe there is a general agreement is that unfair practices should be prohibited, unfair practices of all kinds. Under the common law unfair practices have never been allowed, and under statute law the Sherman act has been very effective in preventing unfair practices along certain lines in the past, and is likely to become, it seems to me, more effective in the future.

Now, the third point on which I believe we would all agree is that nothing should be done that would prohibit or stand in the way of free and open competition.

As to those three fundamental points I could not say a word against the committee taking every possible precaution to guard any infringement upon the privileges of the people with regard to monopoly, the rigid enforcement of prohibition of unfair practices, and the maintaining of a situation in which there shall be competition.

And, now, with those premises it seems to me certain conclusions have been drawn which do not follow. In the great majority of the discussions upon this question of the trusts there is no distinction or little distinction (indeed, usually there is no distinction) between magnitude and monopoly. Monopoly, of course, has a well-defined meaning in law which you know better than I, and, of course, as the term is used in the Sherman Act and as used in law and as it comes into the law courts, the word "monopoly" should be applied to businesses which belong to the legal definition of that term. And yet I think you will all agree that the discussions which have taken place in the press, in the magazines, and on the platform have, for the most part, made no attempt to distinguish between "magnitude" and "monopoly." There are many businesses of great magnitude

which are not monopolies. The use of the terms "trusts" and "magnitude" and "monopoly" as if they were synonomous terms is likely to lead to confusion on the subject.

If I can only assume that a trust is a monopoly and a large business is a monopoly, then it is quite easy to agree with public opinion that those things should be restrained or interfered with or destroyed, because it is assumed it is a monopoly. Yet, I venture to say, gentlemen, there are comparatively few organizations which now exist—I am not talking of public utilities now and will not touch that subject except as it relates itself to this subject—there are few public utilities which exist at the present time which are not, for the most part, monopolies. Still there are some places in which monopoly does occur, or is occurring in things which sometimes have been operated as private service and sometimes as a public service even. For instance, in the case of water powers. When they come under the public-service commission, of course, they come under public-service laws, but there are water powers which are owned exclusively by private parties, and if it becomes a monopoly it should be controlled. Therefore, I do not assert there are no businesses in private hands not monopolies, but I do assert in any case it should be shown it is a monopoly before the principles of monopoly should be applied to it.

Another thing which has a very close relation to this question is another assumption. It has been assumed in all the discussions, or in the greater part of the discussions, that this cooperation, these difficulties with which we are dealing, are confined to a relatively few organizations; if we could only find the means by which we could hit this organization or that organization or association, the existence of which we believe is contrary to the public welfare, we think the problem would be solved. I do not think it would. And I say as a consequence of the discussion of the public it is assumed it can be dissolved. I do not apply that, of course, to this committee or anyone who has given the subject serious consideration, but that is the attitude of the public in a very large measure. Now, I wish to insist upon the opinion that this kind of cooperation which controls the market is not exceptional, but is a general phenomena in this country. It does not make any difference whether you take two ice men or three anthracite men in the same country town, as Congressman Nelson knows, or whether you take the great organizations of New York, Chicago, and Philadelphia, there is perfect cooperation to control the market; and the thing we have to deal with is a much larger problem than that of magnitude. We have the problem of the control of the market by large numbers of organizations, from the little organizations at the country cross roads to the great industrial organizations.

Now, it has been proposed sometimes, on the theory that only the big things need to be hit, to use the idea, that if you only divide up some of these great big organizations so that no one shall have more than 50 per cent, 30 per cent, 10 per cent, or some other per cent our difficulty will be solved. But I wish to say it makes no difference whether you divide them up so that there are 10 with 10 per cent, 20 with 5 per cent, 50 with 2 per cent, or 100 with 1 per cent the situation would not be changed. Our former Attorney General said of the tendency for competition, that the tendency for com-

petition is so strong that if we can only break these organizations up into very small units competition will be restored; that the tendency for competition is too great for them. Now, that might have been true in the past century, and especially it might have been true before transportation developed on a vast scale; but in this twentieth century, so great is the tendency toward cooperation with us, that we cooperate with one another along the lines of education, along the lines of social service, and along every possible line. We think this is a period of social responsibility and a period of cooperation, and we believe in the doctrine everywhere else as a desirable thing. But in that principle of cooperation we draw a dead line and say that that universal cooperation, which we believe elsewhere in this twentieth century is a desirable thing, shall not be applied in business. We say it shall not be applied in business, and yet we might just as well say it should not snow to-day, or that the Atlantic Ocean tide should not rise up in the Potomac River; but it will do so despite anything we might say. So that this great tendency for cooperation is held by everybody everywhere, and I have yet to be able to find a business in this country, large or small, in which any man with whom I have talked confidentially claimed cooperation did not exist, and I have met them on the trains and in my travels about the country studying this problem for some several years and writing a book of some magnitude upon the subject, and I have made it my purpose to ascertain the facts.

I have never yet found a man who talked to me as one individual to another—confidentially, not to be used—who said that there was not cooperation in his business. I talked yesterday to the Chamber of Commerce of the United States, and a number of men have spoken to me since that time about my address and the points involved in it, and not to all of them, but if I had a chance to do so, I put the question: "Now, I do not know what your line of business is, but did I misstate the business in my address that cooperation does exist in your business?" and not one of them has intimated it did not exist.

Why, we know it. It does not make any difference as to whether it is three grocers selling sugar or whether it is a hundred cranberry growers, separated in three different States—Wisconsin, New Jersey, and Massachusetts—or whether it is the citrus fruit growers of California, or what it is, there is cooperation. Now, in my State they raise the cranberries grown in the territory on small patches or half an acre, or 2 or 3 or 5 acres—small patches—and the same is true of Massachusetts and in New Jersey. Now, you would say that is divided up fine enough so that there can not be cooperation, wouldn't you? If there is this irresistible tendency for competition it certainly ought to be applied there. Yes, more than 30 per cent of the entire output of the cranberries of those three States is sold through one selling agency in Hudson Street, New York.

Now, if I were permitted, I could give illustration after illustration of that, but I only give that one illustration as illustrating the practice. It is useless to think we shall solve this problem by subdivision.

The CHAIRMAN. Doctor, why is it that one concern should handle such a large part of the entire cranberry output?

Mr. VAN HISE. That raises another question as to whether that particular cooperation is detrimental or beneficial. That raises another question.

The CHAIRMAN. There must be a reason.

Mr. VAN HISE. I will give the reason, but that particular cooperation, as almost all the cooperations which have begun from farmers, are more beneficial than otherwise. Now, I will tell you how. It used to be the case before the cranberry combination had been produced—or the Cranberry Trust, because it is just as rigid a trust as the Steel, or Iron, or Tobacco Trust—it used to be the case that the farmer would sell his products—some of them—very low and get rid of it at current prices. Others of them would hold back and would not sell until later, believing the price would be raised, but they did not know. One year the crop would be sold out at very low prices and a shortage of the crop would result by the middle of the winter, or by January, and another year the cranberries would have to be sent to the dump. What they do now is this: They get together and make a very careful estimate; every man who raises cranberries in these three associations reports his acreage and his probable output for that year, and the estimate then goes into the central agency, which has complete information regarding the output of the cranberries which will be put out that year. Cranberries are not an article which can be sold at an exorbitant price, and so this association seeks to regulate the situation through the price so that one-half of the crop will be sold before Thanksgiving, and then they raise the price a trifle each month so that they will have enough cranberries to sell at the last of the season, and none of this crop is disposed of at too low a price and substantially none of it goes on the dump; the growers are benefited, the public is benefited, and it is a beneficient case of combination.

Exactly the same situation obtains with the citrous-fruit growers of southern California. We know perfectly well that before the formation of the association of citrous-fruit growers of southern California they were bankrupt one year and the next year they were prosperous. Then came a shortage of oranges and the prices went up and down, up and down, and the industry was never a continuously prosperous industry until this citrous-fruit growers' association was formed. They not only do that, but they do more than that thing—they grade their fruit. It all goes into a central packing agency and must be handled just so. Each particular orange must be picked in just such a way and must be wrapped in just such a way, and they go into a central agency and are absolutely marked and graded so that not only a person knows he is going to get a standard, but he has to pay for it a standard price. There can be little question that the public, as well as the producer, is benefited by reason of cooperation along the lines of those things which are perishable, which could not be kept, which must be sold, which should be standardized, but which should be sold at such a reasonable price as to last throughout the term of the normal market.

Therefore I say these cases illustrate there is beneficial cooperation as well as detrimental cooperation.

Now, as to this growth of cooperation at the present time among the farmers. Up there in Wisconsin we have started at our university

to teach cooperation. We are not teaching these citizens to violate the law, but we are teaching them economics and not law, and we believe we are teaching production in economics, and we believe these principles to be sound economics and sound principles, and if the law is not that way that is not our lookout. We are not demonstrating our economics to conform with the law in this matter. The law that stands in the way of beneficent cooperation of this kind should be modified so as to permit that useful and beneficial cooperation. Now, this rising tide, this pressure, has come upon us so that we have increased our force in the department of economics very materially, and there are always farmers in 15 or 20 communities that want instruction along this line; and in this way the cooperation among farmers is increasing in Wisconsin, Nebraska, California, and in many of the States of the South, and in a few years it will sweep over the entire country and we shall have cooperation among the farmers along all lines in the handling of their products. They have now, in the handling of eggs, an association similar to that for the handling of cranberries in Wisconsin and the citrous-fruit growers of southern California, and under the circumstances it is questionable whether it will be quite so popular a political position to attack cooperation among the farmers. Even their cooperative enterprises will be interfered with.

Now, this I wish to point out, that what we have is this irrestible general tendency to cooperate, this universal tendency, and it exists in every business everywhere in the United States and we all know it. Then, any solution of this problem which depends upon the theory that a few big organizations are to be struck, or any solution which depends upon the idea that if we can only sever them, I believe is an erroneous conclusion. We have got to get a better solution than that.

If it is in order to illustrate in regard to the Sherman Act itself and how it has worked out, the early decisions under the Sherman Act said it did not make any difference whether it was cooperation or not, all contracts and combinations in restraint of trade were forbidden and everybody thought so when it was passed that that was the intent. And the Supreme Court thought so, for in their earlier decisions they said in cases which came before them that the words "reasonable" or "unreasonable" were not pertinent and had no bearing upon the question, so that the whole consideration with regard to reasonable things or unreasonable things in those earlier cooperations was excluded from consideration by the court. That was 23 years ago when this period of cooperation came on and came on and came on and swept over the country and everybody was in it, and then the Supreme Court saw—I say they saw; I do not know what they did inside, but I know what they did outside, and it looked as if they saw—this cooperation along some lines was legitimate and reasonable, and they legislated—I do not care whether you use the word "legislated" or "interpreted," but at any rate they decided—that the question of reasonable or unreasonable, which they had said before was not relevant, was relevant, and that only those combinations in restraint of trade which were unreasonable were intended to be under the ban of the act, although they have not gone quite so far as that in regard to contracts in restraint of trade. The most of their decisions at the present time, and, indeed,

relatively early, were pretty severe in prohibiting contracts in restraint of trade, but they have become very liberal in permitting combinations in restraint of trade provided they come within the limit of reason—the rule of reason. Now, then, that is the situation of the Sherman law.

What was the situation before the Sherman law was passed? Why, we had most rigid laws in this country against all combinations and contracts in restraint of trade in colonial days. And the same was true in England. And then this same irresistable tendency came along and the common-law decisions became a little more free in this country until all contracts and combinations in restraint of trade were permissible which were reasonable, and practically most combinations for a division of output, a division of territory, and even uniform prices, provided they were reasonable, provided they were not indefinite in time and unlimited in area under some of the laws, were held to be reasonable, and some contracts in restraint of trade were held to be reasonable in all parts of the United States except Arizona and New Mexico, those two Territories evidently being put in simply to prevent the ban of the law by becoming universal. Exactly the same thing happened in England, and in England, in 1844, Parliament decided that all these restraints and difficulties were disadvantageous to them and Parliament wiped out the whole slate, repealed the whole thing, and permitted freedom of trade in England, meaning freedom to combine as well as freedom to compete. That is what freedom of trade means, freedom to combine as well as freedom to compete; provided always there was not monopoly, and provided always they were not immoral, the contracts were not immoral—that is, not unfair practices—and provided they were not contrary to public policy.

Now, we have then in the Sherman Act just turned back the situation, you see, to that condition which prevailed in colonial days in this country and in the middle ages in England, and then the courts, by common-law decisions, by these decisions of which I have spoken, started on the second cycle of development to make by common-law decision the same situation of development, permitting reasonable combinations and contracts in restraint of trade. And now it is proposed, or it is proposed by some, after the courts have gotten along thus far in their cycle of development, to turn back again and start a third cycle of development by common-law decision by making amendments to the Sherman Act which will prohibit absolutely all contracts and all combinations in restraint of trade.

Now, this brings me, as you will readily see, to this bill—and you might think my conclusion was that I should be opposed to this bill No. 2 of these laws. But, strangely enough, I am not opposed to it with a modification of a single clause which will meet this new large situation. We must be careful not to allow limitation on production or the price of merchandise, or any of those things, if that will be detrimental to the welfare of the people of this country; we must not allow monopoly, we must not have unfair competition so as to eliminate competitors through juggling the prices and all those things which have been done, and we can not have contracts in any kind of a combinational program which are detrimental to the public welfare. So, therefore, I suggest for your consideration, gentlemen, to meet this situation a single modification. I can not suggest at this

moment the language of the modification, but I suggest that you modify this language in this first paragraph, that you leave these numbers 1, 2, 3, and 4, those paragraphs of your bill No. 2, just as they are or make them more rigid if you care to and make your first clause in the proposed bill read "the practices enumerated below are all prohibited so far as they are detrimental to the public welfare or hereafter become inimicable to the public welfare"; and make the presumption, if you like, that any combination or contract is inimicable or detrimental to the public welfare, and put the question up to the interstate trade commission—upon which subject I talked to one of the other committees this morning—put up to them the question of any proposed contract or combination.

As far as these farmers and cranberry growers are concerned, they are all under the ban of the Sherman Act. There is no question but if the Attorney General brings that group of citrus growers, or the cranberry growers, or any of these selling agencies before the courts, they will as certainly be destroyed as the Standard Oil or Tobacco Trusts; and it is an unfortunate situation and an immoral situation, because certainly everywhere in this country, as I have said, that is the case with the producers in 999 cases out of 1,000, and that is the situation we have in this country. It is not the case of the sporadic violation of the law, but it is the case of the universal violation of the law by business everywhere. Edmund Burke said a century ago: "I know of no way to draw up an indictment against the whole people," and if the Sherman law was enforced to the letter under the interpretation of the court as it now exists, an indictment would have to be drawn against an entire people. Therefore I suggest for your serious consideration that the public will be wholly protected, absolutely protected, in this way.

Do you wish to prohibit combination which is not detrimental to the public welfare? Do you wish to put all lines of business in a class by itself and set aside this irresistible tendency to competition? Do you wish to prohibit cooperation so people shall not be able to cooperate anywhere in business, even if it is a benefit to the public welfare? Or do you wish to prohibit, absolutely prohibit, all kinds of combinations and contracts which are detrimental to the public welfare? It is my supposition, gentleman, that it is the purpose of this bill to do that. If it is the purpose of this bill to do that, then it seems to me that the language ought to be perfectly clear in that respect. I sympathize, I agree absolutely with what I understand to be the purpose of the bill, but it seems to me that the purpose of the bill has not been clearly conveyed, and perhaps there has not been this large fact, this general cooperation has not been fully taken into account and given due consideration.

Now, what would happen if this modification were made? Here are A, B, and C. They wish to combine or cooperate in some line of business. The can not do so under the Sherman Act as it now is. They go ahead and do that without permission and they are under the ban of the Sherman Act. It has come up here for amendment. How can they cooperate? They would like to cooperate, and the presumption is against their cooperation. They come before your Interstate Trades Commission, which you are proposing to create, and lay their cards right out on the table and say, "Gentlemen, we wish to do so and so, and we believe what we wish to do is not a

detriment to the public welfare. We believe what we are proposing to do is legitimate, and we ask your approval of it." Then, under these rules of law, laid down by the Congress, these rules laid down by the courts, the commission finds the fact that it would not be detrimental to the public welfare, and then this trades commission may permit that cooperation, and that cooperation would be free from attack so long as the order of the commission exists or so long as the Attorney General did not differ with the commission and carry the case into the courts.

What sort of a situation will that create? Why, it will permit all this legitimate cooperation of the farms, which we have got to permit. I feel pretty sure of that. I know the situation among the farmers. We have an agricultural college in our State, and I know how they feel and I know what they are going to do, and I know this wide-spread, irresistable desire upon their part to cooperate to improve their prices and discuss the prices to the consumer and selling their goods directly from one to the other. We had an exhibit at the University of Wisconsin just the other day, showing the farmers how to cooperate and bring their eggs into a certain place and sell them there through the parcels post directly to the consumer and showed them the kind of package that should be used, the size of the package, and showed them how cooperation among the farmers in a given district would assure them of getting a better price for everything he has—a higher and better price. And they are going to do it; whatever law is passed, they are going to do it.

There is no Attorney General in the United States, or any 10 attorney generals, or any 10 courts, or any 10 times the courts that exists in all the United States that can try out in a hundred years the violations of this law that will take place in one year—not large violations, but there will be a universal violation of the law because of this irresistable tendency to cooperate. You should say, "Gentlemen, we are going to allow cooperation along these lines in a way that is not detrimental to the public welfare," and you therefore allow this cooperation among the farmers because it is legitimate cooperation. You did exactly the same thing with regard to the labor organizations and the labor organizations found themselves under the ban of the Sherman Act, and, as you know, many cases have been in court and it has been one of the difficulties of Congress, because, as I understand this matter, in two sundry civil bills, one vetoed by President Taft and the other signed with the disapproval expressed by President Wilson, have been passed which exempted the use of $300,000 to prosecute the farms and labor organizations. Now, gentlemen, I submit to you that that was a wrong way to right a right conclusion. It is not right, it is not fair; it is immoral to take one group or two groups of industries and exempt them by indirection from the operation of the Sherman Act, and to leave another class of business under its ban. It is not fair; it is not right; it is not reasonable; it is not defensible, and I doubt if the Members of Congress, if they had fully appreciated what was involved in it would have made the exemption. And it is unnecessary, wholly unnecessary, because you can make your rules just as rigid as you please by that simple qualification, and wherever the farms need to cooperate and should legitimately cooperate they may. Wherever labor organizations wish to cooperate, if they cooperate for legitimate purposes, they

may, and also manufacturers and business men if they have legitimate lines of cooperation in which they enter, they may.

Now, another great advantage which will come from this, in which I am profoundly interested, as a man deeply interested in the welfare of the Nation, is the question of conservation. At the present time the bituminous coal operators could produce 200,000,000 tons more coal per year than the markets demand. They can not cooperate in limiting the output or the division of territory or in regard to the prices, and what happens? Why, there is a destructive competition in the worst form going on. Fifty per cent of the coal remains in the ground, because the richest seams only are mined, and very wastefully, and the smaller seams are neglected and left in such a condition they can not be reached in the future. Why, gentlemen, it took the building of the world to make our banks of coal. We are in just the same position in regard to them that a man would be who had a deposit in a bank upon which he could draw throughout his natural life but which he could not increase one dollar. The banks of coal in the earth have got to last throughout the life of this world. If we wantonly waste and recklessly skim the cream, succeeding generations will have a heavy score against us. And that is the situation that now exists. There is a ruthless competition because limitation of output, division of territory, and maintenance of prices in all respects are prohibited by the Sherman Act as now interpreted. But suppose this clause was put in that combinations and contracts not contrary or detrimental to the public welfare could exist, and the bituminous coal dealers of Illinois go before your trades commission and say: "Gentlemen, we wish to cooperate in this way. Chicago and other markets which are tributary to us demand this year 50,000,000 tons of coal. Now, we wish to divide that 50,000,000 tons of coal among us in such and such a percentage, and we are willing, if you let us do that, to agree we will mine cleanly and safely and under sanitary conditions. We will agree to do that." And you can bind them by contract to do it, and they then shall supply the market in that way, because they will be interested, because it prolongs the life of their properties. If they can only do it and keep their heads above water, and they will do it, and it will be an immeasurable benefit to future generations.

Now, gentlemen, it was because of my deep study and long study of conservation which led me to write a book upon that subject, which led me to consider this subject. That is the road I traveled when I began to study the laws with relation to contracts in restraint of trade, because I saw how seriously our natural resources—and by that I mean mineral and timber resources—are suffering under existing conditions, conditions which compel wasteful exploitation, to the loss of our children and our children's children. Now, we ought not to permit that. A generation which allows, and not only allows but which compels, that is certainly not worthy of the high regard of future generations. The Japanese worship their ancestors, it is said, and it is also said that that fact involves the necessity that a man shall so live that he shall be worthy to be worshipped. It seems to me it is a simple thing to consider our children and our children's children so that we shall not destroy, diminish, or impair their heritage—not to meet our legitimate needs, but to meet those, and with wanton destruction, of a large and equal amount which was wholly

unnecessary. And yet, without competing in that sense, how can those men cooperate in that way to protect the future?

Therefore, sympathizing profoundly, deeply, with what I understand to be the purpose of this bill, believing profoundly that any unfair practice should be prohibited, that monopoly should not exist, I ask you to consider most seriously whether you do not meet this broad situation by making this simple qualification—these practices are prevented, inhibited, when found detrimental to the public welfare by the interstate trades commission, and making the presumption that any contract or combination in restraint of trade is detrimental until a man who wishes to establish that this contract or combination is beneficial has made his case before the impartial representatives of the public—the interstate trades commission.

Now, those, gentlemen, are the principles which I wish to present to you. I can multiply with illustrations, but the fundamental points are covered in what I have said, and I shall be glad, if you care to do so, to try to answer such questions as you wish to ask in any way related to the subject.

I thank you for your consideration.

Mr. NELSON. I understand, Doctor, that what you want is to destroy the evil of monopolies, but conserve all of the good there is in cooperation?

Mr. VAN HISE. Precisely.

Mr. NELSON. And you think the best way to do that is to prohibit monopoly in restraint of trade or otherwise when it affects the public welfare, but not to so word the law that it prevents cooperative practices on the part of farmers and laboring men especially?

Mr. VAN HISE. Yes.

Mr. NELSON. And would you, then, also have——

Mr. VAN HISE. I would not mention any group or classes, but simply in a broad way. Do we wish to prohibit any kind of cooperation except the kind of cooperation which is detrimental to the public welfare? Do you wish, gentlemen, to prohibit proper cooperation that is not detrimental to the public welfare?

Mr. VOLSTEAD. Doctor, supposing we would authorize cooperation directly, except such as might be injurious to the public welfare, would not each man be his own judge as to whether it was detrimental?

Mr. VAN HISE. If he were allowed to be his own judge, we would be just where we were before; but what I am proposing is, if he wants to get a bill of clean health, he must put his case before a commission representing the public.

Mr. VOLSTEAD. But, then, would we not have to have about 5,000 commissions instead of one?

Mr. VAN HISE. In regard to that, I tried to clearly separate the discussion before the other committee and this committee in regard to the powers of the commission. Make their powers extend only to those businesses which are so large as to be vested with a public interest, or which, by cooperation, control the markets and that limits the scope of the trades commission. As I said to the other body this morning we ought to proceed carefully and cautiously in the powers which we give to them; we ought to assign to them only a possible task, rather than an impossible task, and we can only do

that by defining their task, limiting it. And if we could limit the task which they had to do to that of only considering those cases in which the business is so large as to be vested with a public interest and thereby really becomes a public utility, or they are engaged in those lines of business by which, through cooperation, the market is controlled, as has been unquestionable in regard to steel, then a possible task would be before the commission, and the great lines of business which we wish to continue along the old, free, competitive lines and do not wish to cooperate, would not be hampered or touched or restricted in any way.

I have no doubt that there will have to be State trade commissions to handle the problems of the different States before this is worked out, just exactly as there are State public utilities commissions to handle the public utility questions of the different States. For instance, there would be no concern of the public trades commission with the two ice men or the three coal men in Wisconsin.

Mr. VOLSTEAD. Have you given any consideration to this question whether we could delegate to the commission the power to determine these questions?

Mr. VAN HISE. In regard to that, that is a question which has been before our courts in Wisconsin and it has been decided there, and, if I can judge of the views of Mr. Justice Holmes and a number of others—I have gone through these opinions very carefully——

Mr. VOLSTEAD. Can you give a citation to any of them?

Mr. VAN HISE. I can not at this minute. I have in my book on "Concentration and Control" a summary of the important citations. but my citations on those particular cases I should have to look up. If you will permit me, when this material is given me to revise I shall be glad to put in at this place citations covering that.

Mr. VOLSTEAD. No doubt the committee would be glad to have that.

Mr. VAN HISE. In regard to the summaries of the more important cases which have occurred under the Sherman Act, the decisions until two years ago in those cases, except those cases which have happened within two years or until a few years ago, are found in the work entitled "Concentration and Control," by the MacMillan Co., pages 174 to 192.

Now, a thing that has relation to this is the situation in other countries. We are the only country of the great nations that has followed these particular lines of history in this matter. England went through one cycle and stopped. Germany at the present time has the situation which I described, but to an extent favorable to the corporations to which I could not go. Contracts and combinations in restraint of trade in Germany are enforced by the courts, provided they are not monopolies, are not unfair, and are not contrary to the public policy. I have read the cases in the German courts. Almost every week you will see cases of unfair discrimination, cases of unfair practices, where it has been charged that there is discrimination or another has entered into a contract which is unfair, and there will be a suit brought to dissolve that contract. Germany is working right along that line, and this is simply one of the numerous explanations why Germany has extended her commerce around the world as no other nation in the past 20 years. She has been in the position of permitting those contracts, and there is no question but what the condition of the workingman has improved, and the education of the

workingman has improved in Germany during that same 20 years much more than in the previous 20 years of the history of that nation.

Mr. VOLSTEAD. Do you know whether those suits are brought by the German Government?

Mr. VAN HISE. They are not brought by the Government, but very frequently the complaint is by some one left out of the contract or combination. Now, I am not advocating, or going so far as that, because I think they go too far in protecting these combinations, and I could not agree with them; but what I am proposing to you, I wish to point out, is more moderate and is actually in practice in the great competing commercial nations—Germany and England.

Mr. VOLSTEAD. What you really advocate is restraining unfair competition and unfair practices of cooperation?

Mr. VAN HISE. Yes; and more than that. You see, there are three things: There are monopolies, there are contracts in restraint of trade, and combinations in restraint of trade. I want to prohibit absolutely monopoly and all unfair practices, but allow cooperation in contracts and combinations in restraint of trade so far as they are not detrimental to the public welfare.

Mr. VOLSTEAD. Now, taking a combination like the Standard Oil Co.?

Mr. VAN HISE. That was a monopoly, and the American Tobacco Co. was a monopoly. Unless the committee wish to go into the matter, I do not care to take up the question of monopolies. Although I think it would be difficult to prove, I have right here on these slips of paper the prices of the Standard Oil products and the prices of meat products, and the prices of tobacco products before the dissolution of the corporations and at the present time, and I have the index figures of prices elsewhere, and as I look at these figures, I can not find out where the public has come in yet.

The CHAIRMAN. Those figures you have in your hand, what do they show?

Mr. VAN HISE. In my opinion, they show this: In regard to meat, of course, the Beef Trust was very adroit. They did not merge in one great big company, but they had the beef companies, and then, they had the National Packing Co. in which each one of them—all of them—had an interest, and, then, the National Packing Co. decided on the prices they were going to pay and the prices they were going to sell for, and all the rest of them made the same prices and the same conditions of purchase, and so through that adroit combination of the National Packing Co. they had a complete monopoly. Now, that monopoly was broken up and meat, since the dissolution of that trust, has risen in price and more rapidly than the index figures for the average products of the United States.

The CHAIRMAN. Now, to what is that attributable?

Mr. VAN HISE. That is not a case. You will have to take a number of cases to prove a principle. In fairness, it ought to be said, in the case of meat, there are other factors which enter except that one. There is unquestionably the factor of the demand for meat going beyond the supply, with the increasing cost of the grain and, in consequence of that, higher prices for the farmers, so that it is not a simple case; but I say, so far as the prices are concerned, no one can prove the public has been benefited.

The CHAIRMAN. Has there not been a general tendency of higher prices in everything—not only in meat?

Mr. VAN HISE. Yes; as I say, I have the index of figures. I did not compare the prices of one commodity, but all prices of all commodities.

The CHAIRMAN. Do your figures show that meat has unduly increased in price over other commodities?

Mr. VAN HISE. Now, I would not say so. I do not know.

Mr. MCGILLICUDDY. Where are those figures taken from?

Mr. VAN HISE. These are taken from Bradstreets, most of them. I had Bradstreets and the bulletin issued by the Department of Commerce of the United States.

The CHAIRMAN. You taken almost any commodity; the trend of prices has been steadily upward in the last few years.

Mr. VAN HISE. Yes. But, as I say, Mr. Chairman, I do not make my comparisons with the prices at that time; I make my comparisons of the percentage of increase of the average prices of articles with the percentage of increase of this particular article, and for this particular article this percentage of price has been increased more rapidly than the average of prices has increased.

In another case, that of oil. Now, oil is a case where we have a manufactured article. But, take machinery oil and kerosene and gasoline all together, and the prices of those have risen more rapidly than the average price of manufactured articles.

Mr. VOLSTEAD. But it is not true there has been an enormous increase in the consumption of those articles?

Mr. VAN HISE. But there have been new fields opened up quite as fast.

Mr. VOLSTEAD. Have they been opened up in proportion to the increase of consumption?

Mr. VAN HISE. Oh, yes. The great field of Indiana, the field in Oklahoma, the Kansas field, the Louisiana field, and the California fields have been opened up, so it is perfectly easy not only to produce all the oil the country needs and all that is required for export, but the excess in California is used in locomotives and for sprinkling the roads.

Mr. VOLSTEAD. What is used there, I suppose, is not gasoline and oil?

Mr. VAN HISE. No. That is why I say, gentlemen, you will have to take a large number of these articles to get a fair cost, because there are always special factors in one case. And so I have gone over, Mr. Nelson, very carefully the lists of the cases—all the lists of cases—under the Sherman antitrust law, those lists and the supplemental lists, and I took up every case in which there has been an order of dissolution which has been in force a sufficient length of time to get the facts, and I had an advanced technological student go through the documents and get at every one of them he could, and it is by averaging the number I got these results. And, I say, I can not find, taking the average of all these figures, for every case, so far as the figures are available, that the public has been benefited in decreased prices by the dissolution of any of these corporations.

Mr. VOLSTEAD. Do you find they have been dissolved?

Mr. VAN HISE. That I do not know. But what happened, whatever the Sherman Act does to them, has been done, and what it did do to them has not produced any benefit to me or to the consumer.

Mr. VOLSTEAD. That has been true, perhaps, in some instances, it has permitted competitors to get along a little better.

Mr. VAN HISE. That may be possible. It may be that the Standard Oil Co. and the other independent oil companies are dividing up the swag in a different proportion than what they did before, but that does not help me; but so far as the point I want to put before you, I am not interested so much in how the big fellows are divided up as to what 90,000,000 people get; and until it can be shown the 90,000,000 people get lower prices the dissolution of the organizations has not been proved of advantage.

Mr. VOLSTEAD. Suppose it does not change the price, but it does give to other people an opportunity to enter that same field, would it not be worth a good deal to the public?

Mr. VAN HISE. I said, as you know, I was not standing for monopoly, I was standing for free competition; and I say I am in favor of the dissolution of monopolies, and that is one of my fundamental premises, you will remember, because I do not stand for private monopoly any more than a very much more distinguished personage, the President of the United States.

I thank you for your consideration.

The CHAIRMAN. The committee is very much obliged to you, Doctor.

We will now hear from Mr. David.

STATEMENT OF MR. OTTO DAVID, OF NEW YORK CITY.

Mr. DAVID. Mr. Chairman and gentlemen, I represent a trade, the building trade, which has in the last few years suffered enormously, mostly from crookedness in monetary losses. But it is not our trade alone; other trades, all other persons, have suffered through more or less crooked failures. Attempts on the part of trade associations, etc., have always been to protect their credits, but they have always been frightened more or less by the district attorneys. In short, I might recommend as an amendment, about the following words—I am not a lawyer, gentlemen, but I am glad I know English—that associations formed or agreements by individuals, corporations, or by associations with each other for the purpose of protecting credit shall not be considered as in restraint of trade.

It should be held that credit associations may have a right to issue their reports as to the moral risk attached to doing business by the corporations or individuals, by reason of the previous transactions of the officers or directors or the principals of individual concerns. And this holds good not only as to building corporations or builders in general, but also in regard to other persons. Credit-information bureaus formerly issued weekly failure and judgment sheets valuable to credit men. This has been discontinued. Why? There was a trade paper of New York, a building-trades paper, that formerly published a full list of all judgments, etc. Now, that has been discontinued, and I also ask why? They evidently got into trouble by giving valuable information. Bankruptcy laws give the crooks a

vast opportunity of passing their assets into safe hands and clearing out their liabilities.

Credit is not something that we are entitled to by law; and therefore laws should not interfere when associations guard their members against giving credit to parties who are not entitled to it. There can be no restraint of trade so far as credit granting is concerned, and the laws could not prevent credit givers from cooperating with each other. Time and actual information are essential in the granting of credit to the deserving, the credit taken by the undeserving limits to such an extent the credit which should be granted to good parties and good payers must eventually pay the debts of the crooks. Secretary of Commerce Redfield last night at the dinner of the Chamber of Commerce asked the interests if they recognized the right of labor to form unions or incorporate themselves into bodies to treat with corporations or employers. Let the employers first protect their property against legalized crookedness and you can rest assured they will do the utmost toward looking after the welfare of the employees. Do not handicap by law and through the imprisonment of men the credit organizations in guarding their credit, in guarding their property.

I ask you gentlemen to consider in that Sherman antitrust law very well if these, our demands, could not well be taken care of. We do not want any monopolies or price regulations. All we want is the protection of our credit.

It is pretty well known to some of you gentlemen about the bad habits in the building business and other kinds of trades about the manipulations of loan men. They practically, for instance, get buildings to-day for nothing. We have put up their buildings practically for nothing. We have absolutely no protection. If we want to protect ourselves, if those men, the credit loan man, wants to go ahead and put up another building, and we should ever dare to try to stop him, under the present law we simply will be hauled before the district attorney, and then what happens?

The CHAIRMAN. That is under the State law, isn't it? You are complaining about the evils under your State law?

Mr. DAVID. Gentlemen, I am not only speaking to you of the evils of this particular business, but it is in every line so. There is interstate commerce in it, and there are wholesalers in New York, Chicago, and all over——

The CHAIRMAN. You must understand that anything that comes under the jurisdiction of the local authorities, or State authorities, I might say in New York, we have nothing to do with at all.

Mr. DAVID. Correct, Mr. Chairman; but the situation might arise in case the Congress offers us this possibility—there might be crimes among the people that are not only intrastate in New York and other States, but there might be associations in the States which are formed and operate outside.

The CHAIRMAN. As I understand it, you want some protection for your local organization which prosecutes entirely a local business in the State of New York?

Mr. DAVID. No; not within the State of New York altogether, but they are over in Jersey, and New York is doing business to-day in Michigan, and New York is doing business in all the United States. And, on the other haid, in New York if we shall try to

protect ourselves, somebody might come in from the outside, but if we can protect ourselves in the different States, if we can form combinations in the different States, in their respective trades, in their respective manufactures, then we will have a full protection, and then, in my opinion, it is a matter of the Sherman antitrust law to handle that.

Mr. VOLSTEAD. Is there any prohibition now against giving information as to the solvency of parties?

Mr. DAVID. Excuse me, I did not catch the question.

Mr. VOLSTEAD. I say, is there any prohibition now against the giving of information to one another as to the fact whether there is a judgment against a person or he does not pay his bills?

Mr. DAVID. There is more or less in the form that information is submitted.

Mr. VOLSTEAD. Dunn and Bradstreet, I suppose, give that information right along to almost anybody who will subscribe?

Mr. DAVID. Yes; but these informations are not protections for claims, for instance. These informations are not protections; they are not protections to collect old debts. They will not help in collecting old debts. There are merchants all over the United States day they form the C B A Co., and they have fooled their creditors out day they form the C B A Co. and they have fooled their creditors out of their money.

Mr. VOLSTEAD. Do you want a repeal of the bankruptcy law? Is that what you are seeking?

Mr. DAVID. No; absolutely not. The laws as they stand now are essential, but they are misused.

Mr. VOLSTEAD. Do you want an amendment to that, or what is it?

Mr. DAVID. No; not an amendment. I want to ask for consideration in the Sherman antitrust law of credit associations, or, as I said here, in a few words, all associations formed or agreements made by individual corporations or by association with each other for the purpose of protecting credit, will not be considered in restraint of trade.

Mr. MORGAN. Your idea is, that you ought to be allowed to form combinations between yourselves and others and have it understood that if a man has made a failure and has a judgment against him, he won't be trusted by any in your associations. Is that it?

The CHAIRMAN. In other words, to have a black list?

Mr. DAVID. Not exactly. I would not call it a black list; I would call it an open accusation. This man has committed acts which are unfair, and I refer exactly to the previous speaker, and I am pretty well acquainted with the laws of Germany, and the crooked methods and so-called unfair practices.

Mr. NELSON. Is there any case to which you could cite us, in which such a practice as you desire is prohibited under the Sherman law? Have you ever gone into any court on anything of that kind?

Mr. DAVID. I know the accusations in New York State. Gentlemen, I want to tell you I have considered very much before bringing this up if I should go before the State legislatures or I should come before your committee. I came for this reason before your committee, that in case different associations in the States, protective associations in the States, should be formed, there is still a possibility, if they should be permitted by the State laws, that outsiders

may come in from other States and simply fool us out of our money. There might be agreements between unions and employers to protect themselves against these crooks. We can not under the present laws. It is almost impossible to prosecute these people for their acts. We can not prosecute them for bankruptcy; we can not prosecute them for their shaky loan transactions and building operations, etc. I considered for quite a while if I should go before the State legislature or before your committee. If the Sherman antitrust law would have such a provision, then the individual States could go ahead and make their own laws, formed after the Federal law.

Mr. FLOYD. If I understand you, by that language, you can form credit associations, the purpose of which would be to protect the members of that associations from dealings with persons who were unworthy of credit——

Mr. DAVID. Exactly.

Mr. FLOYD (continuing). Whom you denominate as crooks, or men who have defrauded people in other transactions?

Mr. DAVID. Exactly.

Mr. FLOYD. Now, if I understand, after you had your association, the only way you could enforce that advantage of membership in the association would be to communicate this information among the different members of the association and when they got that information they would refuse to deal with the people. Is not that your only protection?

Mr. DAVID. Exactly; that is a certain protection.

Mr. FLOYD. And, then, if it was a matter involving interstate commerce, I can see very readily how you might be under the ban of the Sherman law.

Mr. DAVID. Gentlemen, I am not speaking only of this trade, but I am speaking of the commercial trades all over the United States. Chicago does business with New York and New York does business with the other States.

Mr. FLOYD. It is the Buck Stove & Range case exactly.

Mr. DANFORTH. You spoke of a trade paper that has gone out of business.

Mr. DAVID. No, sir; it has not gone out of business.

Mr. DANFORTH. I thought you said they had. I thought you said they published certain information which they stopped?

The CHAIRMAN. There are court records which they have a right to publish.

Mr. DAVID. But their information——

Mr. DANFORTH. What did they stop or thought they were obliged to stop publishing?

Mr. DAVID. They stopped the transfer notices, etc., in the combined form you know.

Mr. DANFORTH. What do you mean by "combined form"?

Mr. DAVID. Transfer notices, judgments, and all these things, by giving a pretty good picture of certain people. But why they stopped we do not know the reasons for it.

Mr. DANFORTH. All these things are published in the daily papers in New York and other places?

Mr. DAVID. A very few things are really published every day.

Mr. DANFORTH. You want them tabulated under the individual names?

Mr. DAVID. Exactly.

Mr. DANFORTH. Judgments and chattel mortgages?

Mr. DAVID. Yes. And all these things stopped very suddenly and a business man has not the time to go through all these papers, and many of these things are only published, for instance, in the law journals, and we have not got our own attorneys watching like watchdogs all the time and many of those things escape our attention.

Mr. DANFORTH. You can get all this information from Dun or Bradstreet or any other similar agency?

Mr. DAVID. Such sheets as have been issued by them heretofore have been stopped, too.

Mr. DANFORTH. You mean they do not publish the special inquiry sheets?

Mr. DAVID. No; specially compiled sheets giving, as I call it, a photograph of certain people.

Mr. DANFORTH. If you are a subscriber to one of the agencies of Dun or Bradstreet and sent in a special inquiry, they would give you a reply giving you such information?

Mr. DAVID. Oh, yes. They would give information about some individual, but they do not give me any information about all the different people I might do business with. They give me certain information and, then, if something happens, say, in a few weeks or a few months or years, you will get an additional information sheet about something you might probably know all about.

Mr. DANFORTH. But if you are about to do business with some person it is not enough for your purposes to be forewarned by such a sheet from the agency to look that particular individual up?

Mr. DAVID. The sheets do not really give us—it is not sufficient, you know.

Mr. DANFORTH. I do not mean the daily sheets. You say they have discontinued that.

Mr. DAVID. Yes.

Mr. DANFORTH. I refer to the confidential replies.

Mr. DAVID. Gentlemen, I do not refer so much to that warning as I refer to making crooks pay their debts if they want to embark in that business again, in that same line.

Mr. DANFORTH. If you can discover a scheme to make people pay their debts, you will be able to do more than anyone else has ever done.

Mr. DAVID. If you will give your assistance by passing such an amendment, we will show you how we can do that.

Mr. MORGAN. Your scheme is to bring that about by publishing the information in your own way and is a sort of "posting" of information as to the unreliability, is not that it?

Mr. DAVID. Gentlemen, under present conditions, if anybody asks me to-day, "Mr. David, come in and we will form an association; we do not want to furnish this man material; we do not want to do any business with him, let us get together," I may say, "No; hands off; I do not want to go to prison." But if you give us a handle in the shape of the passage of an amendment to the Sherman law, we will cooperate, gentlemen, I can assure you.

Mr. MCGILLICUDDY. You belong to an association of builders?

Mr. DAVID. I belong to an association of builders, but I come here absolutely of my own free will. I just spoke to one or two members of the association and said, "I am going down to Washington before this Judiciary Committee closes its hearings." And if you want to hear any more about my ideas there are more people who are able to express my thoughts than I myself and I gladly will have representatives, not alone of the building trades, but I will have hundreds of other representatives of other associations to tell you about it. I have spoken to a number of merchants in different trades.

Mr. FLOYD. You all agree to the same proposition you have submitted here?

Mr. DAVID. Yes. We can cooperate if we have just such a thing. We do not want anything dishonest; we only want honesty. We do not want any fixed prices, or anything like that. We only want to give the honest business man the preference before the crooked one.

The CHAIRMAN. Don't you think you can do that under the law now?

Mr. DAVID. No; we can not.

Mr. FLOYD. Why?

Mr. DAVID. If we combine to-day to form an association in which we all agree to furnish information—if we do that, then we will be right away prosecuted by the attorneys, and, under certain circumstances, by the United States district attorney if it is interstate commerce.

Mr. NELSON. Did you ever think of the other side of that proposition, that if you were given power to combine and directly blacklist men who did not comply with your requirements, that it might be a considerable injury to the public?

Mr. DAVID. Gentlemen, there can be added, after the thing has been submitted to a court of arbitration that would decide if the claim of an individual against a certain concern was justified, as we have on the other side, as we have in Germany—so-called merchants' courts. Not every case over there is tried in a court, you know; some things are taken out of court and long litigation is prevented.

The CHAIRMAN. The committee thanks you very much, Mr. David, four your attendance and for your views.

(Thereupon, at 4.30 o'clock p. m., the committee adjourned until to-morrow, Saturday, February 14, 1914, at 11 o'clock a. m.)

TRUST LEGISLATION.

SERIAL 7, PART 14.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Tuesday, February 10, 1914.

The committee this day met, Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. Mr. Childs, please give your name and address to the reporter.

STATEMENT OF MR. WILLIAM H. CHILDS, PRESIDENT AMERICAN COAL PRODUCTS CO., 17 BATTERY PLACE, NEW YORK.

Mr. CHILDS. William Hamlin Childs; 17 Battery Place, New York City.

I am here simply as an individual, representing no interests of any kind; and, as an individual and business man I am entirely in sympathy with the general spirit of the proposed legislation. I am president of a middle-sized corporation, and have had some 20 years' experience in that line. What I mean by "middle-sized corporation" is not one of the great organizations and neither one of the small organizations, but an organization having a capital of $15,000,000, and whose business is entirely a commercial business, scattered all over the United States.

The idea of my coming to Washington was largely because I saw in the papers that it was the desire of the committees to discuss with the business men their views of proposed legislation, and because I believed that it was the duty of business men to come on such an invitation. I think one reason, too, why I am here instead of, perhaps, 999 out of 1,000, is because I have, perhaps, a little less modesty and a little quicker insight into the possibilities of this situation, from the fact that I have been closer in touch with it, because I have been asked to give it some study. The average business man does not understand the situation; he has gotten what information he has received through the newspapers, and, unfortunately, he does not always believe the newspapers. Besides that, he does not know what is meant by the bills from what is said about them in the newspapers.

I have asked for the direct information from your committee, have seen all of the bills, have studied all of the bills, and have formulated individual ideas as to what can be done to correct the abuses of the small percentage of business men who have been denominated as "predatory rich"; and I want to say this, as a business man, that there is as large percentage of the business men of this country that are honest and are interested in the solution of these problems—all the problems before these committees and the other committees of Congress—as is the percentage of any other class of men in this country. The honest business man composes much the larger percentage of business men, and he is disturbed at being classed with the small percentage of business men, the abuses by whom ought to be corrected; and there is no class of men in the country who are more anxious to correct those abuses than the honest business man. He has suffered more than anybody else. Because there have been such abuses the honest business man has been hampered in his business relations, whereas if a small percentage of the business men had not abused those laws he would be unhampered, and he is now ready, in my judgment, to cooperate in the same spirit that you are to correct those abuses; and, in correcting those abuses, he is anxious that the honest things that he is doing shall not be called "dishonest" and should be made legal. This has been our actual experience. In our corporation there frequently have come up questions as to procedure in business. It appeared to me that those things were perfectly proper and perfectly legal, from an honest man's standpoint. I have taken those matters to my attorneys, and said: "Is there anything in here that is at all illegal or against the wishes of the Government?" And he has looked them over carefully and said to me: "I see absolutely nothing in there that can be criticized, Mr. Childs; but I tell you frankly that I do not know how the Government will look at it."

I said, "How can I find out how the Government will look at this, before I do it?" He said, "There is no way. The best you can do is to go ahead and do it, and if it is illegal you will get into jail." That is no exaggeration. I have had that said to me a half a dozen times within the last two years—projects which we thought and he thought, and I believe you would have thought, were perfectly proper things to do; and it is that situation that the business man wants to be relieved from.

Mr. NELSON. You tell us that there has been instances of that condition; will you knidly specify some one thing upon which you were so advised——

Mr. CHILDS. Yes.

Mr. NELSON. Which might be illegal.

Mr. CHILDS. Well, for instance, we have a small corporation in Duluth, of which we own the majority of the stock. The minority interest is desirous of selling out to us, so we can own all of the stock. They are not competing with us at all, but they are a producing company, and the question comes up, can we buy and hold all the stock of this company, and our attorney said "I do not know—laws are being considered that will prevent you holding the stock of any subsidiary company."

In this particular case our corporation, with the assistance of the minority holders, organized the corporation, started the business, and have always controlled it. It is simply a question of buying the minority interest in our own business operating in a field where there is now and always will be the greatest competition. It seems clear to a business man that there should be nothing unlawful about this and, indeed, our attorney is of the same opinion. Yet there is abroad so much fear of the possible criticism of the Federal officials, so much doubt as to the effect of proposed legislation that we hesitate.

Mr. NELSON. Laws are being considered?

Mr. CHILDS. Now being considered, yes; in this pending legislation. But you mean in the past year?

Mr. NELSON. Yes.

Mr. CHILDS. Why, I do not know that I can give specific instances, but I remember bringing problems of contracts and things of that kind to my attorney's attention to which he made the exact return to me which I have stated.

Mr. NELSON. That it might be a violation or restraint of trade?

Mr. CHILDS. It might have been. He did not think it was, I did not think it was, but there was absolutely no way for me to find out whether it would be construed as such restraint of trade.

Mr. NELSON. Was that confusion caused by the decisions of the Supreme Court?

Mr. CHILDS. Partially, as well as all the uncertainty as to facts which have not been judicially considered at all, or which have not been acted upon, and concerning which we can get no opinion.

For instance, I will give you a direct illustration of it now. The question came up in our corporation, in the case I have just mentioned involving the minority interest, we applied to the Department of Justice for guidance as to whether this would be permitted. The decision was that no opinion would be expressed.

Mr. CAREW. What was that case?

Mr. CHILDS. The Duluth case.

Mr. DANFORTH. What sort of business does your corporation engage in?

Mr. CHILDS. Our corporation engages in the coal-tar business. It is a business which has grown from nothing. We have been developers of an entirely new business in this country. The coal tar originally produced by the gas companies was thrown away.

Mr. CAREW. Both of these instances, where you were in doubt as to whether you could legally do these things, were instances where you were about to acquire another business in the same line?

Mr. CHILDS. Yes, sir.

Mr. CAREW. And the only reason you say they were not competitors was because of the distance between them, one of them being in New York and the other being in Duluth. Can you recall any other instance where you had a doubt as to the legality of your action, of the character of the thing such as you have indicated, where you were about to acquire a similar business or have all these doubts arisen from the fact that you were about to enlarge?

Mr. CHILDS. Oh, no; they have not all arisen from that. I do not think I could quote specific instances. Those particular items were small items. We have no desire to acquire large interests. We have no desire to become any larger corporation in our line than we are now. In fact, we are doing a less percentage of the business all the time.

I think this will come out more clearly if you will allow me to take this up in detail, and ask me questions as I go along. May I do this, Judge—may I discuss this matter regardless of whether the matter is pending before this committee or before the Committee on Interstate and Foreign Commerce? They so intertwine that it is very difficult for me to discuss this matter regardless of whether it is before this committee or the other, but merely as a business proposition. It is not in my mind as to which bills are before each committee.

The CHAIRMAN. The trade commission is not before this committee.

Mr. CHILDS. You would prefer I should not refer to that?

The CHAIRMAN. Oh, do as you please.

Mr. CHILDS. It is rather impossible for me not to do it, as they are so intertwined. Our thought is that a law formulating an interstate trade commission could be of great advantage to the business interests of this country, and I will take up the two bills—one of Mr. Levy, the other of Judge Clayton. We suggest that they be combined in some form. The bill of Mr. Levy, which follows the Canadian act, has some very good features in it. Our thought is that the main features of that should be combined with Judge Clayton's bill, and that, as far as complaints are concerned, where it says that the complaints of six persons shall first be investigated as to whether the complaint is of any value or not—whether there is anything in it—and then that a hearing shall be had upon that matter; those things are very useful. Our suggestion is that instead, as the Canadians do, of going to a court for those things for a preliminary investgation, that that same procedure be taken before an interstate trade commission; that this be the body to hear complaints and to decide as to whether any investigation should be made after hearing the complaints, but always providing that after complaint has been made and the commission have heard the complaint, which should be in writing and duly verified, and in its judgment an answer should be given, that then the offending corporation should be allowed to answer before a further investigation goes ahead, as frequently a great many matters can be entirely cleared up by conferences, and a great deal of legal difficulty be avoided by simply a statement of the actual facts in the case.

In the Clayton bill, so called, the section that arouses most consideration and most trouble is section 4, that the information so obtained shall be public records and the commission shall from time to time make public such information in such form and to such extent as it may deem necessary. What I suggest in the place of that is that all records of investigations remain secret, unless a violation of law is found, and then only such publicity as comes from court proceedings. And I will give you an illustration of what I mean by that. A complaint was made against our corporation a year and a half ago by a competitor. As soon as we heard indirectly that an investigation was in progress by the Department of Justice we telegraphed the Department of Justice, asking them to come to our office, telling them we would give them entire access to everything we had in the subjects they were investigating. About a week later they came to our office, and the representative of the department who was making the investigation took the matter up with me, and I said: "Now, there is one question I want to ask you, first, if we open everything we have to you, give you access to absolutely everything, will these investigations be published or will it be where our competitors can get a hold of it, or, instead of that, will it be secret and only for your purposes?" He gave the entire assurance that all of those investigations and reports should be secret; and immediately upon that assurance from him verbally we opened all of our business affairs to him, and nothing, as far as I know, has ever become public to our disadvantage. The Government treated us with the utmost consideration, and I am glad to testify here, as perhaps some corporations would not be willing to testify, that the Government has treated us with entire justice and fairness. We opened everything; discussed everything with them. I came down to the Department of Justice myself and discussed the matter, and we reached an amicable settlement to our personal satisfaction and to the entire satisfaction of the department. We had no legal proceedings any more than a bill and an agreed decree that settled the matter.

Mr. NELSON. What was the decree of the court? I did not hear you.

Mr. CHILDS. With respect to the method of operating, there was a decree in equity that if we did certain things, that ended the matter. For instance, they found little complaint as to our general method of doing business or that we were guilty of any unfair competition. They found we had certain subsidiary companies, which they questioned as to whether they should be dissolved. That will come out a little later, but I will explain it now in regard to that, so that it may be brought out here. We had eight subsidiary companies. Four of them were not doing an active business, and we agreed immediately to dissolve them. The other four were doing an active business. They had built up a considerable business and had a valuable good will. They suggested that we dissolve those, also. I took this to the department, and I said, "Gentlemen, that is entirely impracticable and is unfair to us and the stockholders for this reason, that these subsidiary companies have for years been doing business under these particular names. They are trade-mark names, and the name of the corporation is of great value—the good will. We understand that the heart of your object is to prevent the deception of the public. Now, if we dissolve these corporations and give up the names it is

perfectly possible that a competitor can form a corporation with those identical names and steal our good will, which we lose. Now, we suggest, instead of doing that, that you should allow us to put upon our letterheads and billheads and our advertising matter of these subsidiary companies a definite, clear statement, that they are departments of the other company, so there can be absolutely no deception of the public." They granted that condition, and we have been ever since acting in that way. It cleared the thing up that they objected to.

In section 9——

Mr. NELSON. Beg your pardon. Do you not wish to be interrupted now?

Mr. CHILDS. I do not care; it makes no difference to me.

Mr. NELSON. You had a number of sibsidiary corporations which they thought were in restraint of trade?

Mr. CHILDS. Not at all.

Mr. NELSON. What was the department after?

Mr. CHILDS. They were after just what I suggested—preventing a deception of the public.

Mr. NELSON. Under what statute?

Mr. CHILDS. I do not know about the statute, sir. I do not know under what they acted or why they acted.

Mr. NELSON. You are familiar with the Sherman law?

Mr. CHILDS. Yes, sir.

Mr. NELSON. What section of the Sherman antitrust law did they act under?

Mr. CHILDS. I presume they thought there might be a monopoly and a restraint of trade—potential restraint of trade—not that we would actually do it, but that it was possible by deceiving the public that these companies which were selling some of our own goods might deceive the public if they were independent and would be competitors—that they were seeming competitors.

Mr. DYER. Complaint was made by competitors of yours, who started investigation by the Government?

Mr. CHILDS. Yes, sir. I do not know if it was a complaint as to that particular feature of our corporation, but the original complaint was made——

Mr. NELSON. And the agreement you made with the Department of Justice was that you might go on with the subsidiary companies?

Mr. CHILDS. Yes, sir; making it openly public that they were our subsidiary companies, because there would have been such a loss of good will to us by doing away with the names. That was absolutely all there was to it, retaining the trade-mark names.

Section 9 states:

> That the commission shall, at any time, upon the request of the Attorney General, or any corporation affected, investigate any corporation subject to the provisions of this act.

Now, that is covered in the Levy bill. The point we want to bring out there is—we are not objecting to that in any way—but that provision should be made in some way that a corporation desiring an investigation of its own affairs should be provided for. It is very possible and very probable that in the complexities of the business situation now—I am sure that it would be with my corporation—that we would be glad to spread out before a trade com-

mission our business and say: "Gentlemen, this is the way we are doing business. Is there any objection to our doing it that way? It is uncertain in our own minds, and we do not see any objection."

Mr. NELSON. If there should be something covered up there, something that the commission would not understand, an approval of that would be construed by you as a business man to have what effect?

Mr. CHILDS. What we suggested is that an approval by the commission of certain methods of doing business should relieve that corporation of fines or imprisonment until it was stopped by the commission, or until it was investigated and found it was wrong to do it, putting us in a temporary position to do business under their sanction, not interfering with the Sherman Antitrust Act or the jurisdiction or powers of the courts or of any executive department.

Mr. NELSON. You want to have the commission rule upon something before you do it?

Mr. CHILDS. Before we do it instead of after we do it. I will tell you what I mean by that. There are continually matters coming up to me which are simply business propositions, and a subordinate may say, "Now, Mr. Childs, is this a proper thing to do under the terms of the act?" All of our heads of departments are awake to the situation. I look all through it, and say, in my judgment, "Yes." I refer it to our attorney, and he says it is a perfectly proper thing to do, and we go ahead and do it. The advantage to the corporation is that we are not prevented from doing the things that are legal for fear that they are illegal. That is one of the great troubles with corporations to-day, they are not free to do the legal things, because they do not know they are legal.

Mr. NELSON. Will not this be inviting them to prepare plans that will come so near violating the law, or will they not put it the other way—will not the corporations constantly be finding how near they can come to the violation of the law, and then have the commission rule upon that?

Mr. CHILDS. I am talking for the man who wants to obey the law.

Mr. NELSON. And I am asking you a simple, practical question.

Mr. CHILDS. I do not know. I presume there are corporations which will come just as near to doing it as they can. The ordinary average business man is honest; he wants to do the thing for the public welfare as well as for his own welfare, and he does not want to get just as close to the precipice as he can and stay there; he wants to be well within the law.

Mr. DYER. He wants to know if he can go on and do business and will not be put in jail?

Mr. CHILDS. Exactly.

Mr. CAREW. Do many instances of that come up, where a man is in doubt as to whether a certain procedure is illegal?

Mr. CHILDS. Oh, yes, sir.

Mr. CAREW. Mr. Nelson a moment ago asked you to specify something, and you specified one or two instances.

Mr. CHILDS. If I had time——

Mr. CAREW. That would be a great help to me if you could specify a number of instances where you say you were in doubt and you were on debatable ground; that would certainly help me, and it might be

of a little assistance to these other gentlemen. I would like to find out where the doubt and the haze and the debatable ground is.

Mr. CHILDS. I think I can give you specific instances if you will allow me to write you or the committee about that, because that for the moment would not come to my mind; but I know that is the position I have been in during the last two or three years—things coming to me that were debatable as to whether they could be done, and others that were doubtful. When possible, I have come to Washington and tried to find out here.

I might give you another illustration here of the difficulty in extending business or acquiring properties. Of course there are almost daily questions in our general offices pertaining to the effect of particular contracts, whether this or that provision can be construed as any restraint of anyone's trade, or whether it affects unfair competition in any sense.

These matters are passed on and settled by our attorney every day, and generally I feel that he gives the law the best of it on doubtful points. But recently a proposition came to our company from a competitor in a large eastern city, who had a small but old business in one line, where the most valuable asset was the good will and trade-mark. The owner was getting old. The city had extended a thoroughfare and condemned the whole of the property upon which his plant was built. He would secure ample damages for his plant, but did not want to rebuild. He could secure nothing from the city for his going business. It was of value to him, and he wanted to sell it and retire. It would have a value to our company and probably to none other, yet we couldn't buy, and because of that the owner could not sell, because our attorney told us it was wholly unsafe to buy out any competing business. That old man's property goes in the discard unless he reinvests his entire capital in a new plant. Technically the attorney was probably right, but to us business men it does not seem wholly right, and we would like to see a body authorized to pass on facts and conditions that in fair judgment would lift the case out of the hard and fast rules of law.

Mr. NELSON. You do not agree with what President Taft said in his Chicago speech, that every honest business man knew well enough whether he was violating the Sherman law or not?

Mr. CHILDS. I do not agree with him.

Mr. CAREW. You agree that his conscience pricks him and he gets into doubt and consults the department?

Mr. CHILDS. No; I do not agree with that at all. The business man on the average is not trying to come so close to the thing that his conscience pricks him; he wants to know so that his conscience will be entirely free all the time.

In the holding-company proposition, which affects all corporations, there is no bill that I know of that has been presented—well, there is a bill, H. R. 12123, by Mr. Stanley. In the first place it would make necessary the reformation of all the corporations in the country, because there is not probably a corporation that has these things in its charter. I do not know how you are going to possibly oblige the corporations of the country to take out new charters with these provisions in them.

Mr. DANFORTH. What is the number of that bill you are talking about?

Mr. CHILDS. H. R. 12123, dated January 22, 1914, introduced by Mr. Stanley, in which it provides that every corporation doing interstate business shall have in its charter certain definite things. It is beyond my comprehension how that could be possible. That is also before the other Committee on Interstate and Foreign Commerce, but this would regulate corporations entirely by reincorporating them. I do not see how it is possible to do it, unless you passed a Federal incorporation act.

This is a suggestion: I am entirely in favor of a provision that holding companies should be prohibited from holding stocks of competing companies, unless such ownership is made clear to be in the public welfare by the trade commission, giving the trade commission the power to say as to whether that is for the public welfare or not. What I mean by that is in the subsidiary-company proposition, which comes in, as I have already stated. We have a number of subsidiary companies, and almost every corporation in the country has a number of subsidiary companies for different purposes.

In the first place, you are obliged to have subsidiary companies. We are obliged to have a subsidiary company in the State of Pennsylvania, in order to hold any real estate at all. There are other laws in other States which oblige corporations to incorporate separately in those States. There is nothing at all improper in all that stock being held by the main holding company. It can not be done in any other way, as I see it.

Mr. VOLSTEAD. Do you mean to say that the Pennsylvania law prevents a corporation from holding real estate at all?

Mr. CHILDS. A foreign corporation. No foreign corporation can hold real estate in the State of Pennsylvania, but they have a separate corporation for that particular purpose.

Then, also covering the other points already brought out, there should be no objection to a holding company holding the stock of a corporation in New York and the stock of a corporation in Chicago, for those corporations could not possibly compete. I can not see why they should not do it, and there is a great advantage in doing it. I know of one concern that has subsidiary companies all over the United States, locally, of which they hold 51 per cent. The idea of it is that they go into a local community, and for the development of their business they enlist the local capitalists. They know the business. They furnish 51 per cent of the capital, and that is a perfectly legitimate proposition, perfectly above board, and that is where the publicity of the ownership would cure all objections. I do not know whether they make it public or not. I do not know enough about that corporation to know whether they do or not. I know that is their method of doing business. So, there could not be any deception of the public, and there ought not to be any objection to it. It does not do any harm to anybody, and those local companies do not compete; possibly such companies might compete if you drew a line long enough. Any concern in Chicago might compete with a concern in New York. How are you going to determine as to whether they compete or not; and whether it is possible for them to compete? They do not naturally compete; it is not economic; but how are you going to differentiate when you say two competing companies' stock shall not be held by a holding company? Now, what

we suggest is that that question shall be decided by the trade commission in the interest of public welfare. If they do actually compete, in the judgment of the interstate trade commission, do away with them. They ought not to be allowed to do that. I thoroughly agree with that idea.

Mr. FLOYD. As I understand you, Mr. Childs, you agree that holding companies that hold the stock of competing corporations for the purpose of destroying competition are an evil?

Mr. CHILDS. Absolutely; I thoroughly agree with that; there is no question about it; that is a fact. It ought to be left to a trade commission to find out—investigate it. If it is a fact, they ought to be prevented, because it is a great evil.

Another bill is in regard to interlocking directorates. I am in entire sympathy with that proposition. I think there have been great evils from interlocking directorates of competing companies. We suggest this: The bill which has that in it is the so-called Clayton bill,, tentative bill No. 3, section 4, which has aroused so much discussion amongst business men, is very drastic. In may judgment it is not only impracticable but it is unfair—I do not mean it is intended to be unfair, but I mean as a practical result it would be unfair. We simply suggest this, or I do—please make it that I suggest this, because I represent no one but myself. In the place of that I suggest that no person shall be eligible as a director in two competing companies except as approved by the trade commission as not against public welfare, and provide the proper penalties for the violation of that decree.

Mr. DYER. Mr. Childs, according to your theory, then, no one could be a director in a corporation or competing corporations until they had first submitted the matter to this trade commission?

Mr. CHILDS. Exactly. They should pass upon whether that was a proper thing to do or not, if they are competing corporations. Of course, there are any number of corporations not competing which this bill does not affect at all, if it is confined to competing corporations, which is where the injustice comes. Then, if they are competing corporations, let that matter be referred to the trade commission and let them say whether it is against public policy or not. In this very case of subsidiary companies they are obliged to have interlocking directorates; that is, you ought to have interlocking directorates. I believe thoroughly in the duties of a director. A director's duty, in my judgment, is to know what his corporation is doing and to understand the business of his corporation and to be able to direct; and he ought to be obliged to assume the responsibility of directing or pay the penalty. You should not provide for the increase in "dummy" directors. I think they are a great evil. If the law is such that the people in forming a corporation must have "dummy" directors in order to avoid the law, then they ought not to be in those corporations.

Mr. CAREW. What do you mean—that they should not be allowed to own the stock?

Mr. CHILDS. No; I do not go so far as that. I do not know just how you are going to cover that point in the ownership of stock.

Mr NELSON. Let me ask you a practical question, sir. What evils could be prevented by prohibiting interlocking directorates if you permit stock ownership to be used; in other words, what do you accomplish by prohibiting the form if you leave the fact remain—the

ownership of stock? As a business man, what will we accomplish by prohibiting interlocking directorates——

Mr. CHILDS. I think it is very doubtful.

Mr. NELSON. If anything?

Mr. CHILDS. I think the suggestion of a law making the directors ineligible to act as directors in two competing companies will accomplish a certain amount of good; it will not accomplish the whole of it.

Mr. NELSON. Would it not only lead to a little change of representation?

Mr. CHILDS. I think that it certainly would.

Mr. NELSON. And they would receive instructions from the stockholders just the same, would they not?

Mr. CHILDS. Yes, sir. Yes; that was my idea, that that should be decided by the trade commission as to whether they were proceeding properly.

Mr. CAREW. You think they could have a preprimary? [Laughter.]

Mr. CHILDS. Personally, I am in just that position—I am talking very frankly; I think you want me to talk so.

Mr. DYER. The trade commission would have a big job if they followed that out?

Mr. CHILDS. The trade commission would have a pretty big job if they followed that out in that respect.

Mr. CAREW. That work is substantially done by the Department of Justice and the courts, except that the Department of Justice doesn't decide anything.

Mr. CHILDS. I think that is correct.

Mr. CAREW. You think if we had more judges and more lawyers we would not need the trade commission? [Laughter.]

Mr. CHILDS. If you want an honest man's opinion in the matter, I think we have enough lawyers. What the business man wants, in general, is to be able to get along without the necessity of so many lawyers. I do not want to injure any of your business. I would like to have some authority to which we can go personally. Now, for instance, if this was a trade commission, I would like to come down here and present the plan of our corporation and say, "This is so and so; we want to do it. Do you see any objection?"

Mr. DYER. That would deprive the lawyers of a good many fees.

Mr. CHILDS. I am not here advocating that for that reason. [Laughter.] Lawyers are very desirable men a great many times.

Mr. DUPRÉ. They are necessary evils?

Mr. CHILDS. I would answer with grave doubt as to how much is going to be accomplished by any law forbidding interlocking directorates.

Mr. NELSON. What do you think of going further and preventing ownership of stock in competing companies?

Mr. CHILDS. I have given that matter no study. I do not know how it can be worked out. I think it is the most difficult question you have before you. Even that does not cover it.

Mr. CAREW. If you forbid that, they will hold stock in their wives' names.

Mr. CHILDS. It is an easy matter to hold stock in somebody else's name. I own a majority interest in a small corporation, not a com-

peting corporation in any business with me at all. The stock is in my name, but I have relatives who have charge of the business, and I am not a director and am not an officer, and yet I control that business just the same as if I was. I do not control the detail of the business, but no policy is put forward relative to which I am not consulted. They are obliged to do that, because I am the owner of the business.

Mr. NELSON. Would not the interstate trade commission have power to go through a business and ascertain whether there was really an assignment of stock to avoid the law?

Mr. CHILDS. Suppose stock stands in my wife's name, and I have nothing to do with it on the face of the thing; how are they going to prove that I do have anything to do with it?

Mr. CAREW. You are going to come down and tell them all about it, and ask their advice.

Mr. CHILDS. I should; that is just what I want to do. I do not want to do anything I can not put before the trade commission. I am no different from a thousand other business men. We do not want to do a thing underhanded; we want to do it over and above board and to be respected for it.

The Stanley bill, H. R. 12123, also has this clause:

That no corporation, association, or partnership, including the business of a holding company, but excluding, if so provided, the business of banking, insurance, education, or administering of estates or executing testamentary trusts, shall be or act as or for a stockholder or member thereof, or receive or hold any such stock, right, interest, or trust therein.

I think, gentlemen, that under those bills all the farmers' organizations of the country will go out of existence, if not also all the labor unions. Surely they are just as much in restraint of trade as any business proposition that has ever been put out.

Mr. DANFORTH. What section is that?

Mr. CHILDS. Section 5, the Stanley bill, the second clause. I think that is a very difficult proposition. I do not know how it can be covered.

The next and the last thing is the Clayton bill, tentative bill, sections 1 and 2, which brings up the price question, and also that other bill H. R. 12123. There is another bill that has been presented that does not have the clause that is in this bill of Judge Clayton's. The clause I refer to is "with the purpose or intent to thereby injure or destroy a competitor." There is one bill before Congress that has left that out. If that is left out, it would make a revolution in business in the United States. You would have the bulk of the business men in the United States doing business in violation of law, because it is utterly impossible to carry out this price clause practically. If, however, it has that clause which is also in the "Seven sisters," of New Jersey, it simply results this way: Ever since that law has been in existence in New Jersey corporations have viewed it from the standpoint that the object of that bill was to prevent only the lowering of prices, cutting of prices, when it was done designedly to injure a competitor. As a matter of fact that is very rare, and whenever it is done it would be very hard to prove. We go out into the State of New Jersey, having a factory at Jersey City, and sell goods at Trenton. We may sell goods at Trenton at a less price or at the

same price as we do at Jersey City, absorbing the freight. Our salesman reports that the customer can buy goods at such and such prices. We instruct him to meet the competition. Are we doing that to drive out a competitor? And who is going to judge? Every sale you make is to take trade away from a competitor. It may not drive him out of business or anything of that kind, but it is to take it away from him, for that is the gist of trade, the competition which the Government wants and which is legitimate. You can never have it both ways. As to this price clause, I think probably it is more difficult to work out than anything you have, and frankly I should say it is an impossible proposition.

Mr. NELSON. What bill is that?

Mr. CHILDS. I am talking now about the tentative bill, section 9.

Mr. FLOYD. Section 9 of the tentative bill. Let me ask you this question, Mr. Childs: In a number of States laws have been passed differently worded. In some of the States they provide if the competitor sells below the cost of production for the purpose and intent of destroying competition that he should be guilty. What would you think of that kind of a proposition?

Mr. CHILDS. Personally I have no objection to any law providing that if goods are sold below cost or if sold at any price if it is done for the purpose of driving out competition; there is not any objection to that at all if it is worded that way.

Mr. FLOYD. You understand, now, the particular evil that all of those statutes aim at—some 19 of them in the different States that have been passed differently worded and that New Jersey statute—is to prevent one concern from sitting down in a community and underselling a competitor for the purpose of destroying and driving him out of business.

Mr. CHILDS. That is entirely covered by the Sherman antitrust act, is it not? We have been told repeatedly we might not do it. We have not asked to do it, but they have said, "Are you doing it for that purpose? If so, you are guilty under the present law."

Mr. FLOYD. You claim that the present law is so indefinite and uncertain that business men do not understand just what their rights are, and we thought we would prepare a specific statute that would put you on notice that when you did that particular think you would be violating the law.

Mr. CHILDS. I do not think any business man of any moment in this country does not know now that he can not do that thing; that he does it at his peril.

Mr. NELSON. On that point, Mr. Childs——

Mr. FLOYD. Let me finish. You recognize that would be an evil that ought to be prohibited?

Mr. CHILDS. Absolutely; it ought to be cured, because it is a dangerous thing.

Mr. DYER. Do you mean selling below cost?

Mr. FLOYD. For the sake of destroying a competitor?

Mr. CHILDS. For the sake of destroying a competitor. I certainly think that is an evil. I really do not think it is a practical evil, to any great extent. I think it has been in the past. I do not believe that the corporations to-day are doing that thing to any extent whatever.

Mr. DYER. But it is a fact that they do oftentimes, because of seasons being bad, have left over quantities of goods that they do sell below actual cost?

Mr. CHILDS. Sure; they are obliged to.

Mr. DYER. I have a case of a merchant here, where a lady bought a coat for $16 some three months ago. Now comes along another lady and buys one for $7, exactly the same pattern.

Mr. CHILDS. Exactly.

Mr. DYER. But they are not doing that, and it would not be fair to say that that merchant is doing that, for the purpose of driving somebody out of business, but to get rid of a stock of goods that would be unseasonable.

Mr. CHILDS. How are you going to find out for what purpose it is done?

Mr. DYER. What did you say?

Mr. CHILDS. How are you going to find out for what purpose it is done? I do not see how it is possible to find out whether it was done for the sake of selling those goods or whether it was done for the purpose of driving a competitor out of business.

Mr. CAREW. Do you not think that, if you have a law like that, that you will enable any competitor to make an assault on his rival and that you will thereby increase the amount of debatable ground and twilight zone around this bill?

Mr. CHILDS. There is no question that the more bills of this character you have the more twilight zones you will create, and you are going to have more litigation around these new bills than heretofore.

Mr. NELSON. You have complained, as to the Sherman law, that you, as a business man, are in doubt as to when a thing is in violation of it or not.

Mr. CHILDS. I am not in doubt as to that point at all.

Mr. NELSON. As to the Sherman law?

Mr. CHILDS. As to the point of driving a man out of business.

Mr. NELSON. Generally, as to the Sherman law?

Mr. CHILDS. Generally, as to the Sherman law.

Mr. NELSON. You have read the La Follette bill?

Mr. CHILDS. No.

Mr. NELSON. Would you like to have specified the practices that have been so injurious in the past and justly prohibit them? Would that help you, as a business man, to know whether you were violating the law or not?

Mr. CHILDS. If they were not so general that there were great variations in them; for instance, if it were provided that it was against the law to sell goods below cost for the purpose of driving a competitor out of business, yes, absolutely; that is all right, so far as that goes, up to that point. If you make it that, I shall not sell goods below cost; no; that is very bad. People are obliged to sell goods below cost frequently to get rid of them, and that is nobody's business. Besides, you will never know what the costs are. No two concerns have costs exactly alike and made up in the same way.

Mr. CHILDS. Yes; I say similar things to that; I should say it might clarify matters a little. If those were the definite things it may not be unfair.

Mr. NELSON. A specific practice to be forbidden.

Mr. CHILDS. A specific practice to be forbidden under the head of "unfair."

Mr. NELSON. Then you favor that if it could be made definite?

Mr. CHILDS. I do.

Mr. CAREW. You said you had a list of instances you could send?

Mr. CHILDS. I said I could prepare cases where we have been in doubt, but that has nothing to do with this question at all. I would be very glad to say, in my judgment, what specific things were or were not in this specific class. I think it is practical to say that was the interpretation of the Sherman Act—to sell goods at a low price and cut price for the sake of driving a competitor out of business was illegal. That is perfectly definite, and I understand that to be the law now.

Mr. CAREW. Another question. You are a business man and you have followed the trend of legislation and also the judicial decisions, have you not?

Mr. CHILDS. I have tried to; yes, sir.

Mr. CAREW. What effect would it have upon the business mind from your standpoint, this interpretation of the Supreme Court that the words "reasonable restraint of trade" should be put into the statute?

Mr. CHILDS. Very favorably.

Mr. CAREW. In what way? That it made it more definite or indefinite?

Mr. CHILDS. It prevented hardship.

Mr. CAREW. Prevented hardship?

Mr. CHILDS. Yes; it allowed things that were perfectly proper to be done.

Mr. CAREW. For instance, could you name some of the things you have in mind?

Mr. CHILDS. Well, there are so many variations of the interpretation of the restraint of trade. What is restraint of trade? This very thing of selling goods at a low price is restraint of trade. It might be perfectly proper for a man to sell his goods at a low price without it being an improper thing to do and without it being against the public welfare.

Mr. CAREW. Your conception was that it would vastly open——

Mr. CHILDS. A proper field of business.

Mr. CAREW. The field of business?

Mr. CHILDS. Yes, sir.

Mr. CAREW. So that they could do many things that they feared they could not do before?

Mr. CHILDS. Exactly. We have thought, with perfect reason and right, not that it opened a field for things that were improper, but I would have it all covered by the trade commission, and let them say what is reasonable and what is unreasonable; that is, what is for the public welfare.

Another point in this very thing: This law, as we understand it, proposes to enact only in regard to corporations. Suppose a corporation was acting under this clause of Judge Clayton's, where a thing is done for the purpose of driving out competition. That takes care of itself: there is no objection to that: but any bill that does not have

that qualifying clause in it would be utterly incapable of carrying out. There is no possible way in which a man or corporation could keep from selling goods at one price at his factory and at a different price than the price made at the factory, plus the freight to another point—utterly impossible. The fact of it is that most corporation's prices are seldom alike. The conditions are entirely different all around. One carload might be sold where there was a chance to get a good price legitimately and where the buyer was perfectly willing to pay; the other might be sold in sharp competition at a less price; and then this point would arise, if such a provision were carried out, that corporations would have to sell under that price clause; it would lead to monopoly absolutely. For example, our corporation would at once establish perhaps a hundred depots over the United States, and have a circle around every manufacturing point which the competitor located at some other point can not reach on account of freight. I do not believe that that price clause ought to be pushed by your committee at all. I think the prices are entirely taken care of by competition. I draw the line on monopoly. If the corporation is a monopoly, then under the Sherman Antitrust Act it ought to be dissolved.

Mr. NELSON. What would you consider to be a corporation monopoly?

Mr. CHILDS. One that had actual control of the entire business, and with the power to injure, limit, or restrict competition.

Mr. NELSON. Fifty-one per cent?

Mr. CHILDS. No, sir; that has nothing to do with it: 50 or 60 or 70 per cent is not a monopoly unless they have such a grasp of the business as to absolutely control the price.

Mr. NELSON. Such a monopoly would be unfair?

Mr. CHILDS. I could not say. I do not believe any percentage will apply. The independent competitor makes the prices for the large corporation always and has an advantage to make the prices. It sells a little under the large corporation and makes a price.

Mr. NELSON. Could you not give me some more definite idea of your conception of a monopoly from a business point of view?

Mr. CHILDS. I should say that if a concern had it in its power to make all the goods suitable for a certain purpose, that would be a monopoly.

Mr. NELSON. All the goods?

Mr. CHILDS. I mean suitable for that purpose.

Mr. CAREW. Do you think the Standard Oil Co. is a monopoly?

Mr. CHILDS. Please do not ask me about that. I do not know enough about their business, sir, to answer that. That is an honest statement; I do not know enough about the situation.

Mr. CAREW. You know they had some rivals, do you not?

Mr. CHILDS. I judge so from the newspapers. I know nothing about that business. I know nothing about the details of the Standard Oil business at all.

Mr. NELSON. You say the independents fix the price for the monopoly.

Mr. CHILDS. Not for the monopoly.

Mr. NELSON. For the large concern?

Mr. CHILDS. Yes; for the large concerns.

Mr. NELSON. Your competitor might fix the price for the independents so that the independents might not dare cut below the price fixed by the larger corporations, like the Steel Trust?

Mr. CHILDS. The steel business is entirely out of my line. I do not know how that operates. My opinion is that if the Steel Corporation sold a large proportion of the product—I do not know how much, 45 or 50 per cent—it is a great stabilizer of business.

Mr. NELSON. Why do you say that the small fellow could fix the price for the big man?

Mr. CHILDS. There is no business that I know of that the competitor is not enabled to sell largely and increase his output and largely increase his sales by selling below the large producer, and all he has got to do is to sell his goods at a cut price; in fact, that is just what they do.

Mr. MORGAN. Can not a large concern manufacture cheaper than a small one?

Mr. CHILDS. In a great many cases; yes, sir.

Mr. MORGAN. The natural consequence would be, then, that they could sell at a price so that the small concern could not fix the price?

Mr. CHILDS. If they wanted to drive the other concern out of business, but they are in the business to make money, and they are going to sell at the highest price they can.

Mr. NELSON. Is this your conception, that the big fellow only puts his price down sufficiently to prevent the independent from coming in?

Mr. CHILDS. Well, no. It prevents the independent from taking all or a large share of the business. A manufacturer wants to maintain a certain volume of business suited to his capital. He is perfectly content for other people to have their share of the business. If he is attacked by independents and they are taking his business away from him and driving him out of business he has got just as much right of redress as the independent. He has got to retaliate by dropping his price, and that is how competition controls the price.

Mr. CAREW. How much competition is there in your business?

Mr. CHILDS. A very large amount of competition, and I would just like at this point to make a statement. I used this argument before the Department of Justice, and I think it is a side light that is interesting. The statement was made that we controlled a certain percentage of a certain raw product. We contended to the department that we did not control that percentage of that raw product. We showed exactly what we bought; showed our contracts and that they were running out at different times, and that consequently we had no control of the raw product, which is true. We have lost quite a lot of the raw product that we have had. This is the argument we make, that a concern owns or has contracts for the raw material, say asphalt, of a certain character—Trinidad asphalt—and has contracts for the larger proportion of Trinidad asphalt. That concern controls mainly the use of that Trinidad asphalt for a certain line of goods, say roofing. When that man comes to the consumer, instead of controlling everything he has perhaps 10 per cent of the trade, because there are so many other articles that can take its place. There are 50 different things used for roofing. We might have a large percentage of a particular kind of roofing, and another concern might

have a large percentage of another particular kind of roofing, but you are not obliged to buy our kind. His may be just as good, and you have a choice. That is where the consumer is taken care of, and that is what the Government is interested in—protecting the consumer.

Another thing connected with this is the selling proposition; that came out in the discussion sometime ago, that the cost of selling has not been given proper consideration by people who have been discussing this subject. If it were possible to make a price at one point which would simply cover the difference in freight, that would be one thing, but the selling cost varies tremendously with the article. In the selling cost comes all the money spent for advertising; that is selling cost; that would add a large item to cost, salesman, the establishment of depots, all that sort of thing comes in, and there are no two concerns that are alike. It is a part of the exigencies of business, a part of the game of business to do those things as cheaply as you can and as efficiently as you can, for out of that comes your profit.

If this law applying to corporations for price maintenance should not apply to partnerships, a partnership would get all the business. For instance, you take the State of New Jersey for illustration. If that qualifying clause was not in there, that goods should not be sold at a less price at a distant than at the shipping point, except providing for the purpose of driving out competition, if that was not in there, simply a regulation that they should not be sold at different prices in different localities, the corporation would be entirely at their mercy. You would do away with corporation business anywhere if that law was in effect, absolutely.

Mr. DANFORTH. This section 9 of the tentative bill No. 1, to which I think you are now calling attention, refers to any person. It does not say any corporation—it says "any person," which presumably would cover the corporations. Top line, page 2, it says "any person," not any corporation.

Mr. CHILDS. Yes.

Mr. DANFORTH. Which would cover the individual, the partnership, and the corporation.

Mr. CHILDS. This bill of Judge Clayton's, I see no objection to it in that form, except I think it is entirely unnecessary; I do not think it amounts to anything.

Mr. FLOYD. There is another bill which leaves out the purpose or intent to injure competition.

Mr. CHILDS. My only thought with respect to Judge Clayton's bill is that as long as that is in there—which should be in there—it is entirely covered by the Sherman Antitrust Act, and you are putting in something that does not accomplish anything.

Mr. CAREW. I want to clear up in my mind, Mr. Childs, the point that you raised about the sale of goods away from the point of shipment. Let us assume, for argument's sake, that you have a factory situated in New York; you are selling your goods at a certain price at that factory?

Mr. CHILDS. Yes, sir.

Mr. CAREW. You propose to sell goods in Harrisburg, where a competitor of yours is located. I understand under your reading of this provision that you have got to sell those goods at the price at the

point of shipment, plus the cost of freight. Well, if you have to do that, will you not give the man in Harrisburg a monopoly?

Mr. CHILDS. Absolutely

Mr. CAREW. And then, the only thing you can do to compete with him is to put a factory right alongside of him?

Mr. CHILDS. Exactly. This is the reading of the bill:

That nothing herein contained shall prevent discrimination in prices 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.

Mr. CAREW. And then every big man throughout the country will put a big plant down alongside all the little fellows and make competition more keen and injure him in the end.

Mr. CHILDS. There could not possibly be a better thing for my corporation or any other corporation. It is directly the opposite of what you want to do, gentlemen. Eventually, I do not know, but I think, eventually this legislation will probably lead to some form of Federal license, for the reason that the business man of to-day is so hampered by these different State laws. There has been a case in some Western States where a cooperative association of farmers have had a business and sold lumber in a specified territory. A lumber dealer from a distant point came in there and sold lumber below the price fixed by this association. They sued the lumber dealer for selling below their price, and he had to pay a certain amount of damages. That is the opposite of competition; exactly the way it would work out.

The only possible way to cure that for the business man is to have some general law which will cover practices that are improper and will allow him to do it without multitudinous trouble in different States. I presume that point is not up for discussion, but I simply express it as my opinion.

In closing I just want to say a word, if I may, why business men are not down here. I have heard a number of statements made since I have been in Washington of disappointment that the business men have not come to Washington. The reason for it, I think, is that the average business man gets his information as to what is going on in Washington from the newspapers. He has been gradually coming to the conclusion that what the newspapers publish may or may not be true. At any rate, that it is not definite information as to what you gentlemen propose to do. I have been in a more fortunate position, because I have had the time to study these things, and have sent for the bills, and have given some time to their consideration, and I think I am one business man out of a hundred who are interested, and I believe that if proper publicity is given to these measures that you will have any number of business men down here from all over the country to take substantially the position that I take, and I would beg you, for the interest of the country, to hold these hearings open for a week or two longer, in order to give them an opportunity to come down and express their views. If that is done, I would be very much surprised if you gentlemen do not have a large number of men expressing practically the same views I have expressed upon these bills.

I am greatly obliged to you, gentlemen.

Mr. DANFORTH. Mr. Childs, before you close, I want to ask if you have examined the committee print of the tentative bill No. 2? I think you have not addressed yourself to that at all. That is what they call the "definitions bill." You spoke of definitions in some other bill, but I think not in regard to this.

Mr. CHILDS. I have it here, Mr. Danforth.

Mr. DANFORTH. Take, for instance, the fourth paragraph of the first section.

Mr. CHILDS. Yes.

Mr. DANFORTH. If you have looked over that bill——

Mr. CHILDS. I have. What I should object to in that clause is its indefiniteness as to what is a free and unrestricted competition. There are a good many cases where it might be for public welfare that manufacturers should consult together as to the amount of production which they might put out, as to the market, and I would be in favor of having all of that matter handed over to a trade commission to decide what was and what was not for public welfare. I know of organizations in this country that I understand have been held not to be in violation of the Sherman Act by the Department of Justice which, in their judgment, do not restrain trade, and I think they ought to be under a trade commission.

Mr. DANFORTH. Some criticism has been directed to this fourth paragraph of section 1 by some of the gentlemen whom we have heard to the effect that it will catch the small ones and the big ones slip through.

Mr. CHILDS. I think that a good many of the smaller merchants do arrive at understandings with each other as to what are proper prices without any agreement. There is a great difference between knowing what the prices of a competitor are and arriving at agreements to maintain that price. Our theory of this has been that any information given to a competitor was perfectly legitimate and sound so long as there was no agreement to maintain any price for a moment. The result of that is this—and I think it is absolutely legitimate and is for public welfare—it is the difference between a buyer's and a seller's market. It does away with the deception of the seller by the buyer, which is now the bane of the manufacturers. If we sell a lot of goods, or attempt to sell a lot of goods, and the buyer tells us that he can buy those goods at a certain price somewhere else, much below our price, if it is true we would like to know it. It will affect our action when we quote; if it is not true we also would like to know that, and as long as it does not restrict competition in any way, does not restrict us from making any price, it ought to be perfectly proper for manufacturers to receive that knowledge. The question is, under this clause, whether they could do it or not; whether it would be interpreted to mean that it would be in some measure restraint of trade.

Mr. NELSON. You advocate the power to be given to the interstate trade commission to pass upon practices?

Mr. CHILDS. Yes, sir.

Mr. NELSON. Good or bad practices?

Mr. CHILDS. Exactly.

Mr. NELSON. Would you prefer to let them pass upon good or bad combinations and trusts?

Mr. CHILDS. Upon their practices?

Mr. NELSON. Their practices.

Mr. CHILDS. Which would lead to the——

Mr. NELSON. Which would lead to the decision as to whether a combination was good or bad?

Mr. CHILDS. Yes, sir.

Mr. NELSON. You favor that?

Mr. CHILDS. I do.

Mr. NELSON. Do you not think that politics might sway the commission greatly in the heat of a campaign along those lines?

Mr. CHILDS. I think we are getting above politics in our business; I think we are rising to a plane——

Mr. NELSON. In your business, but how about in the Government?

Mr. CHILDS. I have no criticism of the Government.

Mr. NELSON. Do you think we are getting out of politics in the Government?

Mr. CHILDS. I have no criticism to make, sir, of anybody in that position.

Mr. MORGAN. I will ask you if you have examined H. R. 1890, introduced by myself, which you find on page 85 of this volume of bills relating to the trust question?

Mr. CHILDS. I have not read that, Mr. Morgan.

Mr. MORGAN. If you have not read it I will not ask you some questions I had intended to ask you in regard to it.

Mr. CHILDS. I will be very glad to read it and give you my personal opinion in regard to it after I have read it.

Mr. MORGAN. Are you going to be before this committee again?

Mr. CHILDS. Not that I know of.

The CHAIRMAN. I understand he is going to be before the Committee on Interstate and Foreign Commerce, where you bill is, Mr. Morgan.

Mr. MORGAN. The bill is pending before the other committee.

Mr. CHILDS. This bill?

Mr. MORGAN. Yes; I will give you a copy of the bill.

Mr. CHILDS. I will be very glad to submit my opinion in regard to it.

Mr. MORGAN. I would like to have you discuss it before the other committee, if you will.

Mr. CHILDS. All right; I will be very glad to do that.

The CHAIRMAN. The committee is very much obliged to you, Mr. Childs, for having appeared before it and giving your views in regard to this subject.

Mr. CHILDS. I am very glad to have been given the opportunity to discuss these subjects with you, Mr. Chairman, and I am sure if the business men of the country understood the attitude of this committee a great many more of them would come before the committee and express their views in regard to the various bills which are now pending before you.

(At 1.05 p. m. the committee took a recess to 2 p. 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 G. 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 15.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Thursday, February 12, 1914.

The committee this day met, Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. The committee will be in order. Mr. Robert R. Reed, of New York, is here and desires to give the committee the benefit of his views on bills that are pending before the committee.

STATEMENT OF ROBERT R. REED, ESQ., OF NEW YORK CITY.

Mr. REED. Mr. Chairman and members of the committee, my connection with this subject is simply this: In 1909 I proposed as a trust solution a Federal law prescribing conditions upon which corporations might engage in interstate commerce. This proposal was made in the Atlantic Monthly of January, 1909, and restated in an article in Pearson's Magazine for January, 1910, both of these articles being printed in the hearings of the Senate Committee on Interstate Commerce. That proposition was based on a view that was not new at that time, but which is much more generally recognized now. It is a view that has been asserted time and time again, and, I think, has never been disputed; but it is a view that has been

ignored very largely in trust discussions. That view is that the American trust grows out of the corporation and out of the corporation alone; that it grows out of the extension of the corporation to commercial and industrial business without requiring adequate safeguards against monopoly, without primarily so safeguarding an industrial or trade corporation that it must always remain an independent business unit. I believe that if that were done—and it could be done and has been done in times past—there would be no trusts in the United States.

There are practically no trusts in England, which creates its own corporations and looks after them, in the first instance. We all know what the corporation situation has been in this country. By reason somewhat of our dual system of Government, though unnecessarily so, we have had 48 States more or less competing, and several of those States competing actively in the sale of corporate charters, corporate rights, and special privileges, not for the benefit for their own citizens at all, but competing in the sale of corporate privileges to be used by citizens of other States, giving them powers which their own States would not give them and, incidentally, enabling them to harness the commerce of the United States. We have seemed to be helpless before that situation, and, as a matter of fact, I think we have been ignorant of it until the last few years. I have restated this whole matter in an article in the Atlantic Monthly of February, 1914.

Let us suppose, for an instant, that corporations formed by Brazil or France come into the United States with unsafe powers, blanket charters. Whose duty would it be to protect the commerce of the Nation against such corporations? Would it be the duty of the individual States or the duty of Congress. Now, by the action of events, entirely unforeseen, we have had the States create these corporations, and they have created them in such a way and with such powers that they have been able to harness the commerce of the Nation. There is no question of the constitutional power of Congress—it has not been disputed since it was proposed five years ago—to exclude by restrictive law from engaging in interstate commerce unsafe corporations, industrial and trading corporations, whose organization was such as to enable the men connected with them to combine into one giant monopoly the commerce of the whole country. I have said that this proposition is not disputed. The highest authorities of the country that have considered it have recognized it, although the proposition, as I said, has been largely ignored.

At the annual convention of the American Bar Association in August, 1911, Judge Edgar H. Farrar, of New Orleans, the president of that association, and one of the most able and brilliant men in the United States, delivered an adrress on this very subject. It is the most notable address that has been delivered on the subject. He discussed the genesis and growth of monopoly in this country and he laid it to the corporation and the corporation alone. The president of the American Bar Association spoke in that way to the members of that association, the bar of the country, and that proposition has never been disputed.

Ex-Attorney General Wickersham, a man of scholarly attainments and scholarly mind, a student of this subject and in his official position familiar with it by experience, laid down the same proposition as

long ago as February, 1910. He said that our modern monopolies grew from corporate grants just as surely as monopoly in England came from royal grants, and he instanced the holding companies. At that time some of us who were fighting for the Williams bill criticized Mr. Wickersham for still talking about Federal incorporation, and also for talking of regulation of prices. Mr. Wickersham took up the matter with Senator Williams and came to the conclusion—and in public addresses so stated—that while he still favored Federal incorporation if any restrictive method was to be adopted the John Sharp Williams bill was the most intelligently conceived and practically the only effective remedy in that direction, and that proposition he has announced time and time again.

Mr. VOLSTEAD. Is that the bill that is now before the committee?

Mr. REED. No; I will discuss the bills before the committee more in detail later on.

Mr. VOLSTEAD. I mean the John Sharp Williams bill. Do you know whether that is before the committee?

Mr. REED. I think that the bill is not before the committee, but Mr. Stanley's bill and Mr. McGillicuddy's bill, which are based on this proposal, are before this committee.

Mr. VOLSTEAD. There is a bill before the committee which was introduced by Senator Williams.

Mr. REED. It has been introduced in the Senate. It was originally introduced in April, 1911, and it was reintroduced in 1912.

Mr. VOLSTEAD. Could you give us some idea of what is in it?

Mr. REED. I have a copy of Senator Williams's bill here.

Mr. DANFORTH. Does the Stanley bill follow the Williams bill?

Mr. REED. Yes; it follows and amplifies, and in some respects, I think, improves upon the Williams bill, as does also the bill introduced by Mr. McGillicuddy.

The CHAIRMAN. Mr. McGillicuddy has also introduced a bill.

Mr. DUPRÉ. On page 251, volume 2, Bills and Resolutions Relating to Trusts, is a bill prescribing the conditions under which corporations may engage in interstate commerce.

Mr. MCGILLICUDDY. I think the bill he refers to is on page 241 of that volume, H. R. 11167.

The CHAIRMAN. What is that bill?

Mr. MCGILLICUDDY. My bill should be the next one to it because they were introduced at the same time.

The CHAIRMAN. They are House bills——

Mr. MCGILLICUDDY (interposing). 11167 and 11168.

The CHAIRMAN. Are both of them House bills?

Mr. MCGILLICUDDY. Yes. I think the bill appearing on page 241 is the bill you refer to.

Mr. REED. That is the bill; yes, sir.

Mr. DANFORTH. Is that the same as the Williams bill?

Mr. REED. No; but it is based on the same principle.

Mr. DANFORTH. On page 459 of the volume of bills you have before you is the Williams bill, Senate 1138, which is a bill to prescribe the conditions under which corporations may engage in interstate commerce and to provide penalties for otherwise engaging in the same.

Mr. REED. That sounds like the original bill. That is a new bill that was introduced, I believe, at the last session.

Mr. DANFORTH. You do not know whether it is the same bill or not?

Mr. REED. In reading it I can see that the language seems the same right straight through, but I could not, without a critical study of it, say whether it was the same in every respect. It seems, however, to be the same as the Williams bill, which was introduced in 1912. I will be glad to discuss this bill, but I want to call the committee's attention to one or two more matters in connection with the history of the subject. I want particularly to call your attention to the fact that Judge Farrar tells us, in the address which I have mentioned, that as early as 1688 the people of Massachusetts protested against the chartering of a trading corporation with power to open mines in New England, and that one objection to the charter was that it would tend to create a monopoly and enhance prices.

In those early days companies, such as the East India Co., were formed for the recognized purpose of effective monopoly, but, of course, that is not the express or avowed purpose of our present-day commercial and trading corporations. A corporation engaged in the railroad or public utility business is created and used very largely for the purpose of asserting State control over such businesses, and if you analyze this thing you will find we are going along lines that will bring us to the proposition that we must regulate commercial and trading businesses because they also are incorporated and have become corporate monopolies.

Mr. FITZHENRY. You say they are very largely used for the purpose of asserting State control.

Mr. REED. Yes; for bringing them under State control; for instance, banks. In the early part of the last century the State of New York, for the purpose of bringing the banks under State control, prohibited private banking and required incorporation of banks, and it was upheld upon the basis that it was intended to subject them to State control. The case was that of the People *v.* Utica Insurance Co. (15 Johns., N. Y., 358). Finally, the popular prejudice or instinct against the extension of corporate privilege to ordinary business was overcome; and I say "fortunately overcome," because, of course, we know that a corporate enterprise has tremendous advantages; but we also know it is capable of tremendous abuses. It is also capable of being safeguarded against those abuses. The ordinary business corporation, when it was first created, was surrounded with adequate safeguards.

Finally these safeguards, one by one, were dropped, and unheralded and undesired came the great evil instinctively feared in the first instance—giant monopolies effected as an established institution under the lax corporation laws of the States. When the Sugar Trust of New York and the Standard Oil of Ohio were declared illegal by the courts back in the early eighties, they went to the Legislature of New Jersey and got a sovereign grant to do, under the authority of statute, just what the courts had said they could not do at common law. They formed the holding company. Now, I want to quote Judge Farrar, "Great aggregations of capital have been formed, which have seized upon specific industries and driven everybody else out of them. They stand like armed colossuses astride the gateways of commerce and destroy every entrant who presumes to compete with them. They have no legal grant of monopoly, but

monopoly comes to them by virtue of their size, organization, and strength just as surely as monopoly went to the East India Co. by royal grant," and he shows by citations of facts and State laws that this "size, organization, and strength" are grants of the States and effectual grants of monopoly. "The most vicious of all the (statutory) provisions," he says, "is that authorizing one corporation to hold and vote stock in another. This provision is the mother of the holding company and the trust. It provides a method for combining under one management and control corporations from one end of the country to the other."

Do not understand me to be asking for the absolute destruction of holding companies. They also may be safeguarded against monopoly.

The CHAIRMAN. Mr. Reed, suppose you prohibited one corporation from owning stock in another and allowed the stockholders to be the same in both corporations. How would that cure the difficulty?

Mr. REED. It would not, Mr. Chairman. We all know that. The trusts have very largely been created through holding companies that restrain trade. Now, it may be that by the destruction of the holding companies the difficulty may be overcome, although I think it can be reached in other ways. It is best, and it is most clearly constitutional, to compel a corporation to make itself a safe instrument of commerce before it goes into interstate commerce, and for that purpose it should write into its charter provisions adequate to protect it as an independent business unit. The great majority of business corporations in the country would welcome requirements to protect them from competitive interests coming in, and by hook or by crook getting control of their business. I might cite one specific instance of the fact that it is the corporate powers, the corporate facilities, and the unsafeguarded corporate organizations which have created our modern monopoly rather than unfair competition.

The Tennessee Coal & Iron Co. was a competitor of the Steel Trust, and the controlling interest in that company, represented by stock, got into a position, due to a financial and not to a commercial crisis, where it was at the mercy of its adversary. There was a temporary advantage which the circumstances permitted them to weld into a permanent corporate right. That is a proposition which I will come to later on in connection with these bills, although I might as well state it now. Monopoly is an institution, not an accident. It never has been and never will be in this country or in any other country created by unfair competition. It will not be prevented by punishing unfair competition. Unfair competition causes temporary advantages which may often destroy a single competitor, but it does not create a monopoly unless those temporary advantages can be welded into a permanent institution by the facilities of the corporation.

In order to make this matter more plain, I want to ask you to consider two legal facts. The first is that the United States Supreme Court has said that a corporation is assumed to be created for the benefit of the public, and the McGillicuddy and Stanley bills, like the Williams bill, are based on the proposition that it must be created for the benefit of the public before it can be admitted to engage in interstate commerce.

The CHAIRMAN. The Williams bill contemplates that all corporations engaged in interstate commerce shall take out a new charter or re-form their present charters so as to meet the provisions of that bill?

Mr. REED. They must do that, of course; but time is permitted for them to do it.

The CHAIRMAN. If the Federal Government is to prescribe by charter the conditions under which a corporation shall engage in interstate commerce, why not have the Federal Government issue Federal charters?

Mr. REED. There is all the difference in the world there. In the one case the Federal Government acts restrictively to protect the individual against the abuse of governmental powers by the State, and in the other case the Federal Government creates a special privilege which it can not or will not freely withdraw. In the first case Congress remains free at any time to protect the individual absolutely by restriction, but in the second case, when it itself creates a corporation and makes a mistake, it has estopped itself from correcting it.

The CHAIRMAN. Oh, no; it could put a limitation in the charter.

Mr. REED. Yes; it could do that.

Mr. CARLIN. It could reserve the right to amend the charter.

Mr. REED. I fully appreciate that, and I might even say that as a last resort I would welcome Federal incorporation if that seemed necessary. But that is not the Democratic remedy. The Democratic remedy is equally efficient and more democratic and more clearly constitutional.

I ask you to come back with me to the proposition that if a corporation was created under the laws of Brazil, or of France, with unsafe corporate powers the Congress has the power to exclude it from this country, and not the individual States, and Congress has the same power to exclude unsafe corporations created by any one of the States. If it has not that power, then the commerce of the Nation would be subject to the abuses of the worst corporate powers that could be granted by the worst of the 48 States.

My view is clearly this, that where the business of a corporation is confined entirely to carrying articles back and forth in interstate commerce that Congress has the power to regulate that business, but that where a corporation's business is primarily that of manufacturing or producing, and, as a necessary part of that, selling, it is engaged in commerce as an instrument, as a means, to its general business.

The CHAIRMAN. You think Congress has the power to prescribe the terms and conditions of State charters for corporations engaged in interstate commerce, but Congress has not the power to charter the corporation itself to do that same business?

Mr. REED. That is——

The CHAIRMAN (interposing). Is that your position?

Mr. REED. Yes; that is my position. You ask me whether I had any doubts about it, and I say I have; I consider it an open proposition. However, I have no doubt that the restrictive law is the democratic law and the more clearly constitutional law. You are going a long step further when you adopt Federal incorporation, and I

should not think there would be any chance of its being adopted by this Congress.

The CHAIRMAN. Well, I think not, but I wanted to get your view.

Mr. REED. My view is that it is doubtful, much more doubtful than the restrictive proposition. In fact, there is no doubt about the restrictive proposition; it has never been publicly disputed. I will quote you something specific on that. Judge Farrar, in his address in August, 1911, said this:

Congress can drive out of interstate and foreign commerce all corporations with fictitious or watered stock, all corporations whose capital stock is so great as to constitute them practical monopolies or suspects of being such, all holding companies, and all companies whose stocks are owned by holding companies or by other corporations.

That is on the authority of one of the ablest lawyers in the country, who has given a great deal of thought to this subject. I have one other authority on it, which I know is a strong one, and that is the Democratic platform of 1912. I may say in connection with that, that whatever may be said of other platform planks, that this platform plank stated the position of the party on the paramount issue of the last election. There can be no question of the fact that it was distributed throughout the country, read to the voters on the hustings, that it met their approval, and that the position of the different parties on this paramount issue materially affected the result of the election in the Nation at large and in the different congressional districts.

A private monopoly is indefensible and intolerable. We demand the enactment of such additional legislation as may be necessary to make it impossible for a private monopoly to exist in the United States. We favor the declaration by law of the conditions upon which corporations shall be permitted to engage in interstate trade, including, among others——

The CHAIRMAN. The Williams bill, the one that you advocate, enumerates those conditions, does it not?

Mr. REED. It does, sir; as do also the McGillicuddy and Stanley bills, to which I have referred.

The CHAIRMAN. Will you give the committee the benefit of what those conditions are?

Mr. REED. I shall, sir, immediately; but I just want to finish this reading:

Including, among others, the prevention of holding companies, of interlocking directors, of stock watering, of discrimination in price, and the control by any one corporation of so large a proportion of any industry as to make it a menace to competitive conditions.

And that is the platform. The Williams bill from which I read, introduced April 17, 1913, is based specifically, in terms, on this proposition, and is confined to commercial and trading companies:

That no corporation shall engage in commerce between the States or Territories or in the District of Columbia by the purchase, sale, or consignment of any article of commerce, or otherwise, directly or indirectly—

First. Unless it is authorized under laws with a charter that—

(*a*) State the business in which it is authorized to engage and the properties it is authorized to acquire.

(*b*) Provide that it shall have only such powers as are incidental to such business, and shall not have any power to hold the stock of any other corporation or association, to do any act or thing in restraint of trade, or to do anything outside of the State of its incorporation which it is not permitted to do therein.

(c) Provide that all its stockholders shall have an equal right to vote according to the number of shares held by them, respectively, at all meetings and for all directors, subject to any general limitation on the number of votes that may be cast by a single stockholder.

(d) Provide that no other corporation, association, or partnership shall have any vote or voice, directly or indirectly, in its affairs, and that no person representing, directly or indirectly, any competing business as owner, stockholder, officer, employee, or agent thereof, or otherwise, shall have any such vote or voice, directly or indirectly, in its affairs or be eligible as a director or officer thereof.

And that one paragraph is the meat, I think, of the whole proposition, compelling the corporation to be an independent business unit.

(e) Provide that its capital stock shall be fully paid or payable, and permit it to be paid in property or services only when the value of such property or services has been determined according to the fact, upon competent and specific proof, under oath, filed in a designated public office.

(f) Limit its surplus at any time to 50 per cent of its outstanding capital stock, and its indebtedness at any time to not more than its outstanding capital stock and surplus.

Mr. CARLIN. What is the reason for that provision?

Mr. REED. One reason for that provision is in connection with a suggested limitation, which is not in this particular bill, of the total capital stock so that its surplus and its bonded debt should always bear a definite relation to its capital stock, and, independently of that, to prevent the corporation from engaging in business with $100,000,000 worth of bonds and $10,000,000 worth of stock, the stock being required to be fully paid. There are corporations in the business world that are kept afloat as long as it is desired by those in control to keep them afloat, although they are insolvent in their inception and so remain. That is a specific corporate abuse, and this provision goes more to correct the corporate abuse than it does to the intercorporate control. I personally lay stress primarily on those provisions that prevent intercorporate control and which compel the corporation to be an independent business unit. I continue:

(g) Provide that such corporation shall by an amendment of its charter be subject to and comply with and, if necessary, shall accept any requirement that may be made by the State of its incorporation and with any requirement that may be imposed by Congress as a condition of its right to engage in interstate commerce.

Those are charter requirements.

Second. Unless it is conducted and managed in conformity with the said provisions and limitations and is organized under the laws of the State, Territory, or District in which its executive offices are located and its directors' meetings are regularly held.

That latter provision I do not think could be put into effect immediately, although it is based on a sound principle.

Mr. CARLIN. That is a provision of the New Jersey statutes now with reference to State charters?

Mr. REED. What provision is that?

Mr. CARLIN. That they must hold their directors' meetings where the principal office is located.

Mr. REED. Yes; and the various States require that now, and some States have never departed from it.

Mr. CARLIN. And the principal office is——

Mr. REED (interposing). Usually the principal office of about 100 other corporations.

Mr. CARLIN. Yes.

Mr. REED. The next is the third section, and in connection with it I shall have something to say about limiting the rights of individuals engaged in commerce later on. I want to call your attention to the fact that this section is based on the proposition that a corporation, as such, may be required by Congress to conduct itself on a higher plane than Congress may have a right to require of an individual.

Third. If it, directly or indirectly, of itself, or in connection with others, destroys or seeks unfairly to stifle fair competition in any part of the United States in the manufacture, production, mining, purchase, sale, or transportation of any articles of commerce not the subject of any patent, copyright, or trademark held by it, either by making or effecting exclusive contracts, rights, or privileges relating thereto, by restricting its customers or other persons with regard to price, territory, or otherwise, in freely buying, selling, or transporting any such article by securing the monopoly or control of raw material or sources of supply or of any business connected therewith by temporarily or locally reducing prices with intent to stifle competition by accepting rebates, or by any other act, device, or course of business that is unfair and tends to secure an unfair advantage and unreasonably and unfairly to destroy competition.

Mr. FLOYD. Why do you except patents from that provision, the worst form of monopoly and the greatest source of monopoly we have in the country?

Mr. REED. A patent primarily, Mr. Floyd, is based upon the intent to give a monopoly.

Mr. FLOYD. I beg your pardon, it is intended to give an individual the exclusive right to manufacture it, but when he comes to sell it in competition with the world or with other customers it carries with it no such right.

Mr. REED. There has, of course, been a change in the court decisions in the last few years.

Mr. FLOYD. I know that. In our State we prohibit corporations handling patents from unfair competition the same as we do anybody else, and it seems to me that ought to be especially prohibited on account of the fact that they are given an advantage by having the control of the article in the first instance.

Mr. REED. In view of the fact that that monopoly is granted for a limited number of years and for the express purpose of encouraging patents——

Mr. FLOYD (interposing). Do you mean that by reason of that fact they should be allowed to indulge in unfair competition?

Mr. REED. Not at all. The section I have read prohibits other things that are probably lawful under the patent laws. I would go slowly in dealing with it, because it is a separate subject, and I do not want to include it in this matter. That is the sole reason why that was put in here.

Mr. FLOYD. We have heard a great many arguments along that line, that because the Government has given them an additional privilege we should give them still greater privileges, one privilege being that they should be allowed to fix the retail price to the consumer, basing their request for that privilege on the fact that they are given a monopoly in the first instance.

Mr. REED. I am rather inclined to agree with your view of it, but I think that in dealing with the general subject we will get further and accomplish more results if we put this exception in here and

consider patents under the patent laws, where they should be considered.

Mr. FLOYD. When you except patents you except one of the greatest sources of monopoly in this country.

Mr. REED. It is a source of monopoly that must be dealt with under the patent laws.

Mr. FLOYD. Patents are a greater source of monopoly than any other branch of business.

Mr. REED. Yes; they are a source of monopoly; but that monopoly should be dealt with under the patent laws, and those laws should define just the extent of monopoly that is intended to be given.

Mr. FLOYD. The patent laws are very plain. They give a man the exclusive right to manufacture and sell his product; but when he has sold it or when he sells it in interstate commerce those laws do not give him the right to discriminate and give him no higher right to do anything more than any other individual can do in the selling of products. I think he should be compelled to sell his product under the same rules and regulations that other individuals must observe in selling commodities in interstate commerce.

Mr. REED. I am inclined to agree with you absolutely. Of course, you must bear in mind that the exception here does not relate to unfairness alone, but to all these conditions below.

Mr. VOLSTEAD. You have included trade-marked goods, too, and, of course, there is no special reason that I know of for that.

Mr. REED. I would be perfectly willing to cut that out as far as this discussion goes. I knew there were a great many who felt differently about it, because at that time, I believe, the United States Circuit Court of Appeals, in a western case, had upheld a very extreme assertion of patent rights to control prices; but since that time that has been practically reversed in the United States Supreme Court. However, regardless of that, I would think it well to keep that subject out of this law.

Mr. WEBB. This section practically authorizes that sort of thing.

Mr. REED. No; I want to call attention to this fact, that it simply deals restrictively with all articles of commerce not subject to a patent.

Mr. WEBB. By indirection, then, or negatively, it authorizes that sort of thing.

Mr. REED. Then let me suggest that we cut it out altogether and deal with that subject under the patent laws.

Mr. WEBB. There is great opposition to the right of the owner of a patented article to fix the retail price down to the consumer, yet it seems to me this section authorizes that particular thing.

Mr. REED. It is not intended to, but you must not lose sight of the fact that you have got to give a certain monopoly to patents in order to encourage patents.

Mr. WEBB. Most of us agree that a patentee has the right to sell his article to whom he pleases and for whatever price he pleases, but he has no right to go still further and settle the price at which the man to whom he sells shall sell the article.

Mr. REED. I think the courts practically sustain that view.

Mr. FLOYD. I go further than that. Because he has a patent and is given a higher privilege than other men does not entitle him to do anything that is unfair, and when it comes to unfair practices

and discriminations, I think he ought not to be given any advantage over any other competitor.

Mr. REED. Absolutely not.

Mr. FLOYD. But your provision excepts him from the operation of this law.

Mr. REED. Of this section, which deals with restrictions generally, including that of unfair competition, as I say, I think that is a matter that should be taken up under the patent laws. This section, however, should, perhaps, be revised to meet that view. Now, those are the conditions of the Williams bill. They are very largely the same in Mr. Stanley's bill and Mr. McGillicuddy's bill, as well as in Judge Smith's bill, which is pending before the Interstate Commerce Committee. As I said before, this whole bill is limited, practically, to commercial and industrial corporations, and contains provisions which provide for heavy fines and for imprisonment where the violation is with the intent of creating a monopoly.

Mr. FLOYD. Right in that connection, will you permit a question?

Mr. REED. Yes.

Mr. FLOYD. If I understand your bill, it not only excludes patents, but only includes industrial corporations?

Mr. REED. Industrial and commercial corporations.

Mr. FLOYD. You do not include banks at all?

Mr. REED. I do not. I think it is a pretty large subject and that you had better deal with one branch at a time. I think a great many of these provisions should be applied to banks, but Congress can apply them through the national banking laws just in the same way it can apply them by other laws to railroads.

Mr. FLOYD. But can we not prohibit wrongs in them? Why can we not proceed along those lines? We attempt by indirection to control the corporate power of the State——

Mr. REED (interposing). We are not controlling the power of the State any more than we are controlling the corporate power of corporations of Brazil and France that have unsafe charters.

Mr. FLOYD. Why not have a bill prohibiting interlocking directorates of banks and commercial and industrial corporations without undertaking to control the internal affairs of the organization of corporations within a State? In other words, why should we, by indirection, seek to do what we have not the power to do or are unwilling to do directly?

Mr. REED. It is largely a lawyer's question.

Mr. FLOYD. Let me state the point a little further. If we have power under the Constitution to enact a Federal incorporation law, why not do that? If we have not that power, then why seek by indirection to compel the organization of a corporation within a State in a certain manner—that is, if we have not the power to compel it to do it directly and exclude it from interstate commerce? Then it may be that the legislature of the State in which it is operating will not permit it to organize according to the manner prescribed by Congress.

Mr. REED. You are not proceeding by indirection at all. You are meeting the corporation with monopoly powers at the State line. You are proceeding directly to protect the commerce of the country and saying what conditions a corporation must conform to if it is to engage in that commerce.

Mr. FLOYD. Let me give you an illustration. You understand that the creation of the corporation laws of a State is not directly within the power of the corporations, but is within the power of the legislatures of the States.

Mr. REED. Absolutely yes; in the first instance.

Mr. FLOYD. Now, we have 48 States. Suppose that some of the States, some few of the States comply with the requirements of this law by immediately amending the laws of the State in such manner that incorporations can put these several provisions in their charters which you have described, but suppose 38 of the States refuse to pass such laws. Do you not exclude the corporations in the 38 States from doing business in interstate commerce? Would not that be the effect of that legislation?

Mr. REED. One effect of your argument would be that Congress confesses it is helpless to meet the situation, and——

Mr. FLOYD (interposing). I want you to answer my direct question. We will suppose that this bill is enacted into law and that 10 States so modify their corporation laws that the corporations within those 10 States can comply with these provisions of the Federal law and they do comply with them, but that 38 of the States refuse to modify their laws so as to enable their corporations to comply with the provisions of this act. Would it not mean that you exclude the corporations incorporated under the laws of those States from interstate commerce?

Mr. REED. If such a thing were possible it would, but such a thing is not possible.

Mr. FLOYD. It certainly is possible.

Mr. REED. I beg your pardon. In the first place, corporations are organized to-day in the State where it is most profitable for them to organize, and under the laws of most of those States where they are now organized they may amend their own charters, so as to write into these charters the conditions to which I am referring.

Mr. FLOYD. Then, let me ask you this: Suppose a few States, or 10 States, refuse to amend their laws so that the corporations of those 10 States could comply with these regulations. You would then exclude them from interstate commerce when, by the authority of their States, it would be impossible for them to comply, would you?

Mr. REED. If a State wishes its corporations to engage in interstate commerce, it would necessarily conform to the laws which Congress has passed and which prescribed the conditions under which its corporations could do that.

Mr. FLOYD. In other words, you are seeking by congressional action to compel a State to do something whether it wants to do something or not in order to protect its corporations?

Mr. REED. I am not compelling it to do anything with respect to its own internal affairs, but with respect to the corporation which it licenses to engage in interstate commerce.

Mr. MCCOY. Is not the effort to prevent interlocking directorates an indirect way of amending a State charter along the lines of Mr. Floyd's argument?

Mr. REED. The Williams bill may seem an indirect way of amending a State charter, but it is a direct way of destroying monopoly.

Mr. MCCOY. The argument that Mr. Floyd applies to the wide regulation of charters in that way would apply also to the prohibition of

interlocking directorates. In other words, it is an indirect way of reaching State corporations.

Mr. CARLIN. Not at all; this does not require the State to do anything.

Mr. MCCOY. But if the State law, like the law of New Jersey, permits, under its charters, the interlocking of directors, and if Congress legislates and says that such corporations shall not engage in interstate commerce, then you are regulating the charter-granting power of the State of New Jersey.

Mr. FLOYD. I do not agree with that at all, and I would like to answer Mr. McCoy's proposition.

Mr. REED. I will answer all at once. The only provision in this program of legislation that has now been put before the country that comes within any distance whatever of the party platform or deals with corporations as the real cause of monopoly is the fourth section of the third bill, which provides that after two years, if two corporations happen to have a common director, that shall be conclusive evidence of the fact—which may notoriously not exist—that they are acting in restraint of trade. That provision would be ruinous to any corporation that did not amend its charter to prevent that thing from happening. If a corporation, A B, should elect John Doe a director, and without any authority from it whatever he became a director in another company the next day, the first company would be guilty of a crime, and the only way to protect itself against that statute is to write into its charter that John Doe, after he becomes a director of a second or third corporation, will cease to be its director.

Mr. FLOYD. But you do not understand the intent of the provision. The penalty is against the director.

Mr. REED. I understand the English language.

Mr. FLOYD. The penalty is directed against the man who accepts two directorships and is not against the corporation.

Mr. REED. I do not know just what would happen here, but I do know what has happened to several corporations that have violated the Sherman Act.

Mr. CARLIN. You have misunderstood the provision.

Mr. REED. I beg your pardon. I have read it, and I believe I understand it correctly.

Mr. CARLIN. I think it makes the directors personally liable to the exclusion of the corporations.

Mr. REED. And is it your intention to leave to the discretion of the prosecuting officer whom he shall prosecute?

Mr. CARLIN. It makes the individual guilty. We say that that shall be conclusive evidence that there is cooperation between them.

Mr. REED. It provides that the "elimination of competition thus conclusively presumed shall constitute a combination between the said corporations in restraint of interstate or foreign commerce."

Mr. MCCOY. And that is a crime under the act?

Mr. REED. Yes.

Mr. CARLIN. But you must take into consideration the acts of both; you must take the individual and the corporation.

Mr. REED. And then you have made the corporation guilty of a crime that it has not committed.

Mr. CARLIN. But each corporation knows its own directors and——

Mr. REED (interposing). He is its director when he is elected, but the next day he may become a director of another corporation, and how can the first corporation prevent that?

Mr. CARLIN. Very easily, in my opinion. In the first place, I do not think any man would invite a penalty upon himself by allowing himself to be elected a director in another corporation.

Mr. REED. He will invite any penalty that he is paid to invite.

Mr. CARLIN. Do you mean to say he will invite the penalty of going to the penitentiary?

Mr. REED. He will take chances on it if he wants to do it and is paid to take the chance.

Mr. CARLIN. I do not think he would if he faced 10 years in the penitentiary.

Mr. MCCOY. He could take a chance under that provision, because probably his lawyer would advise him it is was thoroughly unconstitutional, would he not?

Mr. REED. Yes, sir; he might.

Mr. CARLIN. I will perfectly agree with you that a man could take those chances if he wanted to.

Mr. REED. Then you are assuming that the corporation will not commit a crime on the view that some one else should not commit it. You are taking the most unconstitutional method, I think.

Mr. CARLIN. We do not think so.

Mr. REED. I think it is very clear in its intent.

Mr. CARLIN. Why is it unconstitutional?

Mr. REED. Because you make a corporation guilty of a crime for something it has no connection with whatever. It is not a new proposition. It was in Senator Cummins's bill, and I think he corrected it himself. It was pointed out to him that the first corporation could not control its director after he was elected. Now, if you will simply prohibit a man from becoming a director in two corporations, and, if that is constitutional you may accomplish the result. Now, that brings up the question that I want to discuss——

Mr. NELSON (interposing). Your idea is that when a man is elected a director of a corporation and then is elected a director of another corporation, one becomes guilty?

Mr. REED. The first becomes guilty.

Mr. NELSON. Of an act not its own?

Mr. REED. Absolutely; it is conclusively presumed to be a combination in restraint of trade, and I would call your attention to the fact that you are conclusively presuming something that may be notoriously the opposite. I do not think you can conclusively presume something that is notoriously the opposite.

Now, I do not want to take any more time in discussing that proposition, but by this legislation you are attempting to assert a right or jurisdiction over persons engaged in interstate commerce, and simply because they are engaged in interstate commerce you tell them they shall not do something that may be entirely outside of interstate commerce. That is the way these bills are drawn.

Mr. CARLIN. That is the way the Sherman law is drawn, is it not?

Mr. REED. No; the Sherman law says they shall not create a restraint of trade in interstate commerce.

Mr. CARLIN. That they shall not combine, and that there shall not be a combination in the form of a trust.

Mr. REED. Yes; in interstate trade. I want to advance this to your view, that you are attempting, by this legislation, to say to a corporation engaged in interstate commerce not that you shall not engage in interstate trade unless you correct your organization and alter your unsafe charter rights among yourselves, but you can do those things and you can do that. Your stockholders and directors can do this, and by reason of your being engaged in interstate commerce, we can control your corporate and intercorporate rights. Now, I doubt whether that can be done in this way, but if it can be done then you can do this: You can provide that a corporation engaged in interstate commerce shall transfer no stocks on its books unless such transfer is accompanied by a certificate or proof that the transferee is not a representative of any competitive interest. When you have done that, if it is constitutional, you have accomplished that which is attempted by the Williams bill in what I believe to be the more effective and plainly constitutional method. If you can constitutionally say what shall be done and what shall not be done by any person or corporation engaged in interstate commerce, then you should say that no such corporation shall transfer any stock to any person except upon proof that that person is not a representative of a competitive interest. Then you have——

Mr. CARLIN (interposing). We think Congress can say what acts shall constitute a combination in restraint of trade and what shall constitute an attempt to monopolize trade. We think we can legislate along those lines by defining and specifying what acts shall constitute those particular offenses. Now, that is the theory upon which——

Mr. REED (interposing). I have no doubt you can, but you can not prohibit a man engaged in interstate commerce from committing, for instance, adultery.

Mr. MCCOY. Mr. Spelling contends that the sort of thing you attempt to cover into your bill is not interstate commerce. The sort of thing you are aiming at, as I understand, is a certain fact which is no part of interstate commerce. Interstate commerce is a transaction which involves traffic or the carrying of passengers or whatever you please——

Mr. REED (interposing). It includes absolutely purchase and sale under the decision of the Supreme Court.

Mr. MCCOY. Well, the purchase and sale.

The CHAIRMAN. Intercourse, too.

Mr. REED. Yes, sir.

Mr. MCCOY. He says those other things are facts entirely independent of interstate commerce, and, therefore, that Congress has no power to legislate with reference to those facts.

Mr. REED. There are no other facts, I believe, in the McGillicuddy and Stanley bills. The prohibition is against the purchase and sale of commodities.

Mr. CARLIN. Take the pure-food act and take the Webb bill. You will find that Congress has absolutely provided for certain prohibitions.

Mr. REED. Yes; it can absolutely do that, of course.

Mr. CARLIN. And it has done it?

Mr. REED. Yes.

Mr. CARLIN. Now, having the power to prohibit, of course it unquestionably has the power to regulate, because that is exactly in line with the Constitution, and having that power it has the right to define what shall be considered proper regulations for commerce, and therefore it can say: If you combine to do a certain thing we will consider it a restraint of commerce and we will consider it a combination in the form of a trust or we can consider it an attempt to monopolize. We can define it to be any of those things, and those are the three things that the Sherman Act deals with.

Mr. REED. As these bills are drawn they forbid "any person in interstate or foreign commerce to discriminate in price between different purchasers of commodities," although the discrimination itself may be an intrastate sale. I have heard lawyers contend that that is unconstitutional, but I do not know just how the court would construe it. They would probably hold that it related only to interstate transactions, which would deprive the bill of much of its intended force.

Of course, this "trade-relations" act is taken from the Kansas trust act of 1897, and it has been in existence in a great many States for a good many years. Whether or not it adds anything to the Sherman Act is a question. I do not think it adds an iota to it. Certainly the Sherman law prohibits any interstate offense such as those specified in the second bill.

I want, however, to suggest one thing by way of amendment to these specific bills. If you undertake to prohibit practices which create a monopoly, you should prohibit specifically combinations of competing companies with intent to destroy competition by the use of corporate means, including the acquisition of stock of competing companies. I think there has been an inadvertence in section 11 which it is proposed to add to the Sherman Act. That section provides:

> That nothing contained in section 9 or section 10 hereof shall be taken or held to limit or in any way curtail the meaning and effect of the provisions of section 2 of this act.

Now, if it is the intention of anyone to allow sections 9 and 10 to curtail the effect of sections 1 and 3 of the original act I think it would be very much contrary to the popular will.

Mr. CARLIN. There is no such intention.

Mr. REED. I would also urge upon the committee language something like this:

> That nothing in this act shall be construed in any way to make legal what would otherwise be illegal in the original act of July 2, 1890.

I do not think you can make that too strong.

As I look at all this legislation it proceeds on the assumption that you can not attack combinations directly, but that you have got to prohibit unfair competition. It proceeds on the view which, I think, underlies this program, whether you recognize or know it or not, the view shared by many capitalists, monopolists, philanthropists, university presidents, and some lawyers of all parties, all of them seeking to uplift the public, the view that combination is a beneficent thing, that monopoly plus philanthropy makes for the happiness of mankind. Not one of those men, whether they be called Democrats, Republicans, or Progressives, believes in the great doctrine of human

freedom; they do not believe in preventing combinations, but they believe in making combinations good. These bills are fraught with peril to the individuals and to the States. They recognize the trusts and seek to make them and all the people of the country good by statute instead of proceeding directly by adequate laws to destroy the trusts and leave business and the individual free.

Mr. NELSON. What is your belief?

Mr. REED. I believe you can prevent monopoly completely.

Mr. NELSON. You are for the competitive system rather than making monopoly good?

Mr. REED. Yes; you can not maintain a republic on any other system.

Mr. NELSON. You are against the trade commission?

Mr. REED. Yes. There is no reason for it. It accomplishes nothing which could not be accomplished by the Bureau of Corporations. It simply increases the centralization of power at Washington and divides the responsibility.

Mr. CARLIN. While that act is not before this committee, it does accomplish a great deal that can not be accomplished by the Bureau of Corporations.

Mr. REED. Well, I meant by an amendment to the law applicable to the Bureau of Corporations, providing for whatever you wanted to accomplish. Its vital evil, it seems to me, is that it increases the centralization of power at Washington. I believe the Sherman law should be enforced throughout this broad land by district attorneys, courts, and juries, and that every restraint of trade should be met where it arises in the first instance. This legislation is based on the supposition that a monopoly must be national before you pay any attention to it. If these bills were adopted it is inconceivable that they could be enforced, except in special instances selected by the executive officer or board. You have got to enforce such laws locally or not at all—that is, laws dealing not with a more or less widespread condition, a national monopoly, but with specific acts of individuals in the everyday relations of life.

Mr. CARLIN (interposing). Of course you are familiar with the fact that the three political parties are now committed to a trade commission?

Mr. REED. Well, I do not know who has committed the Democratic Party to it.

Mr. CARLIN. The Progressive Party, through the Murdock bill, drawn and approved by its executive committee, which committee appeared here yesterday; the Republican Party, through the Morgan bill——

Mr. NELSON (interposing). Well, I want to say that is not correct. What Mr. Morgan stands for I do not believe every Republican stands for.

Mr. MORGAN. Is it not a fact that the Republican platform of 1912 declared for an administrative commission?

Mr. CARLIN. One minute, Mr. Nelson. I am not responsible for the statement made by Mr. Morgan, but he stated here that that was the idea of the Republican platform.

Mr. MORGAN. I wish to say that I quoted the Republican platform.

Mr. CARLIN. That is what I had in mind. I have no desire to commit the Republican Party to Mr. Morgan's bill, but was just quoting

his statement. And the Democratic Party seems to be pledged, through the recent message of its leader, Mr. Wilson. Now, that is the condition. We have passed beyond the stage of theorizing and we are going to have a trade-commission bill representing the ideas of some one of these parties, although I do not know what the result will be. As long as we have got to have that commission, it may be just as well to get it clear. It may be true, as you say, that it is susceptible of the criticisms you make—that is, of the centralization of power in Washington—but I want to say that none of these bills meets the desire for power as asked by representative associations from all over the country.

Mr. REED. If the committee please, I am as loyal to the administration as anyone, but I do not concede that the President's message can commit the Democratic Party to any program which is plainly opposed to its party platform. He ceases to be the Democratic leader for the purpose of this legislation in so far as he departs from that platform, and I call attention to the fact that he has only recently announced that view himself; he has announced that he only feels justified in suggesting those things which have been embodied as promises to the people at an election. The only party that embodied in its promises the proposition of a trade commission such as is now proposed, the only party that embodied the proposition of more definitions of the Sherman law in order to give the business man more certainty, the only party that promised those things was the Republican Party, and the only people who adopted it were the people of Utah and Vermont. The Democratic voters of this country adopted a radically different policy. That is clear beyond the point of argument. It is, I believe, a fact that the trade commission proposal was urged upon the party leaders at Baltimore and rejected. They did not wish to appeal to the electorate on that proposition.

Mr. CARLIN. We have considered these matters in committee in a perfectly nonpartisan way, and I only referred to party matters to show how, from a political standpoint, all of the great political parties seem to be of the same opinion in that direction. I did not have any idea of speaking for the Republican Party. I took Mr. Morgan's statement as true that it was in the platform, although I had never read it and do not recall its being there.

Mr. NELSON. I want to qualify what I said. I spoke more directly about Mr. Morgan's whole bill, because it involves price fixing, and all that, which I certainly would not say is the view of the Republican Party.

Mr. CARLIN. I did not refer to anybody's particular plan as embodied in a bill, except the Progressive Party's bill. That seems to be their bill, because their executive and legislative committee appeared here yesterday and stated they were appointed by the Progressive Party in convention or by the national committee of the Progressive Party; that they had instigated this bill and given it their approval, and so far as their party goes this particular bill does present their views, at least the executive committee so stated yesterday.

Mr. MORGAN. Of course, I do not pretend to speak for the Republican Party, as far as my bill is concerned, but I would like to read what the Republican Party did say exactly.

Mr. VOLSTEAD. What year was it?
Mr. MORGAN. In 1912.

The Republican Party favors the enactment of legislation supplementary to the existing antitrust act, which will define as criminal offenses those specific acts that uniformly mark attempts to restrain and to monopolize trade, to the end that those who honestly intend to obey the law may have a guide for their action and that those who aim to violate the law may the more surely be punished.

In the enforcement and administration of Federal laws governing interstate commerce, and enterprises impressed with a public use engaged therein, there is much that may be committed to a Federal trade commission, thus placing in the hands of an administrative board many of the functions now necessarily exercised by the courts. This will promote promptness in the administration of the law and avoid delays and technicalities incident to court procedure.

Mr. NELSON. I had in mind the Morgan bill as representing the Republican Party.

Mr. CARLIN. My statement was that the Republican Party favored a trade commission and that we had before us the Morgan bill and we have before us, incidentally, the Murdock bill. I simply wanted to bring Mr. Reed's attention to the fact that we were no longer theorizing; that all three parties seemed now committed to some form of trade commission bill.

Mr. REED. The Republican platform contains that specific proposal, but the people who elected the Democratic Party to office have not committed that party to that proposition; they committed it to the opposite proposition, and you can not avoid that fact. If the ineffective policy represented by these bills is to be fastened upon the majority it means simply this: That you have surrendered to the trusts in the hour of victory, to the same trusts that you were elected to destroy. Now, having said that, I want also to say that the President's message does lay the basis for effective legislation, but that legislation has not yet been taken up, and much that I have said relates to it, particularly my suggestion that in order to prevent holding companies and individuals from controlling competing companies you should first require, within a certain time, that the charters of all companies must provide that no stock shall be transferred except upon the books of the corporation and that there be proof that the transferee is not a representative of any competitive interest. This specific proposal, which I deem quite important, is new in the form in which I have just stated it. It can be carried out by a charter requirement, or if you prefer the other method, the more doubtful method, I think, of attempting to prescribe what corporations shall do simply because they are in interstate commerce, then prohibit industrial and commercial corporations engaged in interstate commerce from transferring stock or allowing it to be voted, except upon proof that the transferee or person voting it is not a representative of competitive interests, and that practically takes care of the whole proposition. If the transfer or voting of such stock to or by a competitive interest can be said to affect interstate commerce, then I can see no reason why Congress may not prohibit it directly. It would go a long way toward destroying monopoly to do it. I shall put this specific proposal in the form of a very short bill and ask leave to insert it in the record.

Mr. FITZHENRY. Is not the effect of that to prohibit corporations from engaging in interstate commerce except upon being licensed by

the Federal Government upon terms satisfactory to the Federal Government?

Mr. REED. Absolutely not at all, sir. A restrictive and uniform law speaks for itself and needs no license. When the Congress issues a license it creates a privilege, and when your trade commission passes upon a proposition and finds it legal it creates a privilege.

Mr. NELSON. And avoids penalties?

Mr. REED. Yes; it may avoid penalties. It creates a privilege when we get that far with the trade commission, and if we adopt it I think we will get that far. But I realize that unless the Democratic Party performs its duty now and destroys monopoly you have got to come to that proposition, but I do not think the Democratic Party will fail in its duty. I think Congress is just as capable as any trade commission of determining conditions under which corporations may be engaged in interstate commerce.

Mr. MCCOY. Does not the Williams bill provide that Congress shall have power to make further requirements, so that there is no estoppel? If anything should occur later on that needs correction, Congress can create further restrictions.

Mr. REED. Yes; and that is absolutely essential. And, gentlemen, when I say Democrats I mean Republicans, too, because until within the last few years all Republicans have followed the fundamental principles of Democracy, and many of them did it very effectively at the last election. You can not reach this proposition unless you reach it on the basis of democracy; unless you exercise what is the essentially democratic function of the Federal Government, the protection of the individual against the abuses of the powers of government by the States, the preservation of the freedom of interstate commerce, and the freedom of individuals engaged in or dependent on interstate commerce. That is the essentially democratic function of the Federal Government.

Mr. FITZHENRY. There is not any question about it, but what is the practical way to do it.

Mr. REED. The basis of this whole proposition is that the corporation's charter is itself a law.

Mr. FITZHENRY. It is the law.

Mr. REED. It is the law of its being. The Supreme Court of the United States has said that every act it does depends upon that. It is the only law that can control it; on the other hand, it is a law that is capable of being used to evade other laws. A corporation is chartered under these special privileges created by the State and in spite of all the machinery that can be resorted in the Federal law can be effectively evaded. All you have to do is to make it a safe instrument of commerce in the first instance. The difference between the present corporation and the one we should have is the difference between a wild animal and a tame one. You can require it to be a safe instrument of commerce before it engages in commerce.

Mr. FITZHENRY. If it complies with all these things you specify, then we say it can engage in interstate commerce?

Mr. REED. That it can not engage in interstate commerce unless it does comply; and if it attempts to do something you gentlemen did not foresee you can make further restrictions; but as soon as you begin creating corporations and licensing corporations and passing upon the validity of corporations by trade commissions, telling them

they can do this and do that, and they have been already created with that privilege, you are practically estopped.

Mr. FITZHENRY. You do not think we are legally estopped?

Mr. REED. Not necessarily legally estopped, but practically.

Mr. MCCOY. In the Tobacco case it was said they must be very careful to avoid doing damage to innocent stockholders.

Mr. REED. I wish I had here Senator Edmunds's article which appeared in the North American Review on this very subject and is printed with the hearings of the Senate Interstate Commerce Committee. He did not feel as squeamish about enforcing the law and sending violators to jail as our administrative officers have been and as our administrative officers are. He did not fear the interruption of the great prosperity of the country or anything like that. He said there could be no disaster to the country from the destruction of corporate monopolies which were harnessing its commerce.

Mr. MCCOY. I think you are a little unfair toward the administrative officers, because in the Wire Trust——

Mr. REED. I referred to the attempt to prosecute great monopolists.

Mr. MCCOY. The district attorney up in New York in that case of the Wire Trust pleaded with Judge Archibald to make the offenses of the individuals criminal.

Mr. REED. I would not unfairly criticize the administrative officers, but I do say this: That for reasons which have seemed necessary, the administration has been more severe in its prosecution of the lesser offenders than it has of the greater.

Mr. MCCOY. What do you think of a jury which will find corporations criminally guilty and find not guilty the moving spirits in the corporations?

Mr. REED. I think that juries are very apt to feel that way. When they see that the law had not been enforced, they believe that this justified the view of the individual that what he did was legal. In fact, I have seen some combinations, and I know that men have been unwillingly dragged into combinations on false statements that the Department of Justice had said it was all right.

Mr. FLOYD. Under your plan would you prevent the Standard Oil Co., the United States Steel Corporation, or the Sugar Refining Co. from going into New Jersey and remodeling their corporations according to the requirements of the bill which you propose, and exercising all the powers of the monopolies which they now exercise, because your proposition involves a reorganization of the charters of these corporations? What would prevent the biggest monopolies in the country from going right into New Jersey, putting all of their properties under one charter head, prescribing all the things you prescribe, and then to exercice their whole powers as heretofore?

Mr. REED. As one corporation?

Mr. FLOYD. As one corporation. What would prevent that under your plan?

Mr. REED. The suggestion has been made as a part of this plan, and I personally have figured it, that going back, as we must go back, to the original perception of a corporation, which was created with limited capital, that Congress has the information and it has the power to say what is a safe amount of capital to be used by corporations engaged in particular industries; but Judge Smith's bill, in the

other House committee, plans to make $500,000,000 the outside limit of corporate capital. Its capital may not exceed $500,000,000 unless by special act of Congress, subject to any other limitation that Congress may impose upon corporations engaged in any particular industries. But even apart from that, you have ample power to compel the disruption of existing companies; but were it otherwise, when you once get them into one corporation you have got them where you want them—where the law and their competitors can deal with them—a very different situation from that of 5 to 50 corporate entities, nominal competitors, actually subject to a central control, dominating the industry of the country. The actual competitor itself is a corporation, and they can, if necessary, go behind its back and get control of it as a corporation. It is thrown into its adversaries' power; a thing that has happened time and time again in this country, and created more trusts than all the unfair competition that ever existed.

Mr. FLOYD. But you have not answered my question. What would prevent——

Mr. REED. The limitation of capital would prevent it absolutely. Of course, the other terms of the bill would prevent them from going ahead as they are now; as far as the Standard Oil Co. is concerned, it could not combine; it has been disrupted.

Mr. FLOYD. Instead of making a new law authorizing them to be combined——

Mr. REED. I am not authorizing them to be combined.

Mr. FLOYD. Congress did.

Mr. REED. This proposed new law is not authorizing them to be combined.

Mr. FLOYD. It authorizes them to recharter.

Mr. REED. It does not authorize them to recharter. It excludes them from commerce unless they comply with the conditions imposed; it does not authorize anything.

Mr. NELSON. You do not contemplate repealing the Sherman law?

Mr. REED. Absolutely not.

Mr. NELSON. But the effect would be restrictions; it would be negative entirely and not affirmative.

Mr. REED. It would be negative absolutely.

Mr. NELSON. You mean engage in interstate commerce, and that would not authorize any other powers at all.

Mr. REED. The Standard Oil Co. is one striking instance of how this law would operate. There is not a single interlocking directorate in the Standard Oil Co., but practically every director in all of the subsidiary companies is a stockholder in all the rest. That is what prohibiting interlocking directorates would accomplish—using dummy directors leaves it still in one corporate control, just where it was, but if, under this proposed law, the prohibition was against the holding and transferring of stock by competitive interests, the whole Standard Oil system would fall by the necessity of getting their eggs into one basket in order to exercise any control at all.

Mr. NELSON. You have read these bills that are pending?

Mr. REED. Yes; I have.

Mr. NELSON. In the Standard Oil Co., as I understand it, the ownership of the stock is in the same parties who owned it before the dissolution?

Mr. REED. Practically, I believe.

Mr. NELSON. And yet there are 28 different corporations, ostensibly?

Mr. REED. Yes.

Mr. NELSON. Are there any of these bills now pending that would tend directly to break up that mutual ownership of stock in the hands of a few?

Mr. REED. Not the scratch of a pen.

Mr. MORGAN. Mr. Reed, did I understand you to say that you think we ought to limit the amount of capital of corporations?

Mr. REED. I say that is absolutely in the power of Congress.

The CHAIRMAN. Do you think it is good policy, a practical proposition, that Congress should do that?

Mr. REED. I think it is; it should make it large enough, in the first instance, not to be unfair.

The CHAIRMAN. What limit would you place there?

Mr. REED. I think that the limit that is placed in the act I mentioned as $200,000,000 on the capital stock, with a provision that its surplus shall not exceed 50 per cent, and that its debts shall not exceed its capital and surplus, giving it a total possible operating capital of $500,000,000, is a small enough maximum limit to be applied generally to any corporation engaged in any industry or trade business in the United States. But more than that, I believe Congress can and probably should impose a smaller limit upon many industries, just as the State originally limited the capital of a corporation with a view to the particular industry in which it was to engage, with a view, that is, of preventing it from monopolizing that industry.

Mr. MORGAN. I understand you believe we should enact such laws as would destroy private monopoly?

Mr. REED. Absolutely.

Mr. MORGAN. While we all understand pretty well what the word "monopoly" means, I understand in the Murdock bills they use the words "substantial monopoly." I would like to know what your conception is when you say "destroying all monopolies." What do you regard as monopoly in an industrial corporation? For instance, do you regard the Steel Corporation as a monopoly?

Mr. REED. I regard it as a corporation which dominates the industry to a dangerous degree.

Mr. MORGAN. Then you did not mean that it is an absolute monopoly, but that it has such a control over a particular business that it can, through that arbitrary power, control prices, that is the real thing?

Mr. REED. That is the real thing.

Mr. MORGAN. How do you think we could ascertain, as a practical proposition, just when a corporation has such power? What percentage must there be in order that it can control prices? How would we ascertain that?

Mr. REED. The view that I am proceeding on does not call for the ascertainment of that as to particular corporations; it calls for exercise of judgment on the part of Congress, just as though it were creating a corporation in the first instance, with the public point of view that originally existed in the creation of corporations, and in that judgment would say what it thought the maximum safe capital was for industrial and trading corporations, both as to all industries and as to each industry.

Mr. MORGAN. Then, if an individual had a business with $100,000,000 of capital, you would not object to that amount of capital in the hands of an individual?

Mr. REED. I see no possible danger in that in this country to-day, nor in any country at any time, so long as the door of trade is open and conditions competitive. As I said in answering a question, monopoly is an institution created by the Government, and never existed otherwise, and that is an axiom in political economy; an institution grounded to-day in the corporate laws of the States; that is a proposition that has been stated time and time again within the last five years.

Mr. MORGAN. Your objection to the trade commission is that it concentrates Federal power over the business of the country and interferes with the business freedom?

Mr. REED. Yes. This whole policy interferes with business freedom; it allows the corporations to exist as monopolies, and tries to make them good in the hope that monopolies will die in their youth, but I am afraid it would be the competitor, who is in fact young, who would obey the law and die.

Mr. WEBB. You think that everything in combination in any part of interstate trade should be declared illegal and punishable, unless the defendant showed affirmatively that such restraint was not injurious to the public nor to a competitor and was reasonable?

Mr. REED. I am one of those who think there has been a great misconception of the rulings under the Sherman law. The thing speaks for itself. The Supreme Court has never held to be legal any combination or restraint of trade that anybody wants to declare illegal. When it does that it will be time for Congress to legislate to make illegal what is held to be legal by the Supreme Court under the Sherman Act. Then it will be time to consider amending the Sherman Act to reach that particular thing.

Mr. WEBB. The Supreme Court has not had a chance to anybody except when the Attorney General brings it before them.

Mr. REED. It has extended the law much farther than we dreamed of a few years ago, and the elasticity of the law is its chief value.

The CHAIRMAN. Do you remember how many cases involving the Sherman antitrust law have been before the Supreme Court in which the Government's contention was upheld in each case?

Mr. REED. I have never made a list of them.

The CHAIRMAN. That it was in violation of the Sherman antitrust law?

The CHAIRMAN. I thought perhaps you knew how many there were.

Mr. REED. I think these books here contain a list of them, but in the last few years, certainly, the Supreme Court has in case after case given to the Sherman law the broadest possible effect to reach every form of known or provable evil that had the effect of actual restraint of trade or of fair competition, and I do not think for that reason it would help much. I am not opposing that any more than I am some of the provisions of these bills, except that I think you are wasting time and deceiving the people while the monopolies grow stronger and stronger. I think you gentlemen, if you ever go home, know, as I know, that the monopoly is actually existing in every town in every part of the country, and the people are suffering—the grocer,

the butcher, and the clothier all tell us that the trusts are controlling prices.

Mr. WEBB. Has not the Supreme Court declared that illegal?

Mr. REED. If properly prosecuted. We should get rid of the corporate organization by which particular men control various businesses. We should open up the situation where we can deal with them, and it is to-day the corporate situation that prevents dealing with them. That is absolutely true.

Mr. WEBB. Will not that continue even though that which you suggest is done?

Mr. REED. It will not continue if the provisions are made sufficiently drastic to right that particular thing. You are not restricting anybody's freedom, but you are restricting the acts or abuse of Government and protecting the people against the act of the Government.

Mr. WEBB. Did you draw this bill?

Mr. REED. I drew it subject to Senator Williams's approval.

Mr. FLOYD. Mr. Reed, you stated that you were not in favor of any legislation relating to individuals, as I understand it. Do you not think it necessary? Let me suggest a case. Suppose an individual owns the controlling stock of 40 corporations. He is not a director in any of them, but he directs the affairs of all of them. Can you reach that situation?

Mr. REED. Absolutely; reach it through the corporation.

Mr. FLOYD. Here is the individual owner, who has got the stock of 40 corporations; he owns it all, or owns a majority of it, which is the same as owning it all, as far as corporate control is concerned. These various corporations do not own the stock of each other, yet this one individual owns the controlling interest in the 40 corporations, and none of these corporations own the stock of those corporations, but the individual by virtue of being an absolute controller of stick directs, through his directors and the officers of these corporations, control of them all.

Mr. REED. I wish you would legislate to prevent that situation; that is the basis of just exactly what I want you to do.

Mr. FLOYD. Your proposition is that a corporation shall not own the stock of another corporation?

Mr. REED. Absolutely. I have required that no representative of competitive interests, no stockholder in a controlling corporation shall have any vote or voice, and you can go further and say that no competitive stockholder shall have any stock. There has been a lot said about the injustice in prohibiting a man owning stock of two corporations. It may not be necessary to prohibit that, but personally I see no injustice in it. The individual has become the owner and is thereby sharing in the corporate privilege, and he is operating as an individual member of the corporation. When you restrict his ownership of the stock in a corporation, you are not restricting his freedom at all, but his right to share in a corporate grant. You can deal with him through the corporation itself—exclude the 40 corporations from commerce, if they are so controlled, unless safeguared against such control, but if you refuse to do that you might specifically prohibit the individual from doing the very thing you speak of—from owning and controlling those 40 corporations; and if you will not do it in the right way, I will be glad if the Supreme

Court would uphold the other way. But I doubt whether you can do that. It is not so clear anyhow. In several drafts of this Williams bill we come to provisions dealing with the individual, and we have always referred to him as a member of the corporation. He shall not do those things as a member of the corporation; and that is exactly what he does as stockholder of a corporation. By that means you can catch him. I will go as far as is necessary with you on that, but when I spoke of legislating as to individuals generally I meant, first, it is not so clearly constitutional to do it in that way; second, these present bills deal only with individuals and not practically with corporations at all.

Mr. McCoy. The President threw out a suggestion along the line of your argument, did he not?

Mr. Reed. He did in the latter part of his message.

Mr. McCoy. That is fundamental; that underlies this whole proposition absolutely?

Mr. Reed. Absolutely.

Mr. McCoy. We have got to reach the issue of stock or we do not get anywhere?

Mr. Reed. Absolutely.

Mr. McCoy. It is an endless chase after people who are more subtle than to permit the machinery of Congress to catch up with them.

Mr. Reed. You have got to reach the ownership of the corporation so as to make it a business unit. The State has forgotten to protect itself in that. That is a thing that the average corporation itself would wish in the first instance. They want all the corporate advantages which are proper and right, but they do want to protect their individual business entity, and they do not want some stockholder to put up his stock at the bank for a loan and come around next week and find the whole corporation has gone over to the other side. That is just what happens time after time. It took place in this New Haven situation.

Mr. McCoy. How would you provide against that?

Mr. Reed. By excluding corporations from commerce that are not safeguarded against it. That is the fundamental, underlying thing, and really when you reach that you reach the holding company, for the holding company is only the instrument for reaching a number of people.

Mr. Webb. Suppose a man is holding a lot of stock in the name of his daughter or son or of his wife or some other member of his family?

Mr. Reed. I think this is broad enough to reach all of it, and let it be a matter of proof. And I call attention to the fact that if you have those things in the corporate charters your stockholders will enforce it nine times out of ten. If you act this way, you will destroy monopoly at its source and you have not got one-hundredth of the work that you now have. I doubt if you would have much need even for the Bureau of Corporations.

Monopoly destroys itself if you do away with its corporate evils.

Mr. McCoy. I know of a case now where the same man holds the majority of stock in a big corporation which controls 75 per cent of a very necessary business, and we can not reach that condition in any way, shape, or manner except through stock ownership.

Mr. REED. Absolutely, you can not; and on that point, I do not want to be extremely drastic in the drafting of a bill of this kind, but I call attention to a possible danger that may some day have to be reached: That the ownership of stock certificates indorsed in blank, in my safe-deposit vault, gives me control of the corporation, although I may never be known in that control, and there may be the most active competition between the different corporations that I control in this way—competition in getting business, competition in efficiency, competition in everything makes money for me; but as soon as one of them tries to reduce prices, that stock comes out of my safe and is transferred to the name of another man. I am still not known in the transaction, but those men go out of office, and that corporation is whipped into line. The mere ownership of corporate stock indorsed in blank, held in other names, would give the extremely wealthy man or group of men control of any industry in this country, when they think it is necessary to do it in that way.

Mr. McCOY. Here is a situation, Mr. Reed: I know of an instance in which stock was held by a certain person for a certain other person. The person for whom it is held always gets the proxy of the person who holds it. He has not the slightest interest in it in the world, and would just as soon get rid of it, but that is the way it is held, so that the proxy controls the whole situation.

Mr. REED. Your provision should go to the voting of the stock on proxy, held directly or indirectly in competitive interests, and we do that in most cases. Your stockholders will enforce the law itself, just as the Waters-Pierce interests tried to drive the Standard Oil Co. out of the Waters-Pierce Co. They wanted to protect themselves against the competitive interests; they wanted to be independent. If you go back that way and correct the original mistakes, and see that the control in commercial corporations of this country is safeguarded in their charter, that the law of their being is safe, that they are domesticated beasts of burden, you will solve the trust question; and it is just as much your duty to do that against the corporations of New Jersey as it would be against the corporations of Brazil or France; the power is the same and the necessity is the same, unless you are going to lay down the theoretical possibilities of interfering with State rights, unless you are going to allow the situation that has been created to permanently tie your hands and surrender the country to the permanent institution of monopoly, to be regulated in time or in time turn it over to national socialism.

Mr. McCOY. State rights are interfered with just as much in practice, though not to the same degree, as I look at it, by forbidding interlocking directorates of interstate corporations. Is not that so?

Mr. REED. Absolutely so.

Mr. McCOY. So, if you are going to abandon the principle of State rights, in that instance, logically there is no reason why you should not go the limit. It is only a question whether practically you want to go the limit. The question is, how far shall you go?

Mr. REED. I have always been a Democrat, and I have always felt—and I think the leaders of the Democracy have always felt that State rights was a means not an end—a means to the preservation of the liberty of the individual.

Mr. McCoy. An obligation on the other side?

Mr. Reed. A means for the preservation of the liberty of the individual.

Mr. McCoy. But, having the right, it is an obligation?

Mr. Reed. Yes, it is; and when a State is interfering with the liberties of the individual, when it is licensing and giving its sovereign grant to corporations, enabling them to monopolize the commerce of the country, there is no more supreme duty resting on the Congress than to protect the individual against those monopolies and against the abuse of the powers of the State government. This is essentially democratic and it is, I believe, essential to the preservation of democracy in this country.

I thank you, gentlemen, for your kind consideration.

(The bill heretofore referred to by Mr. Reed follows:)

Proposed Federal bill to prevent industrial combinations by intercorporate control.—Every industrial corporation should be made an independent business unit.

[Words italicized may be omitted and words in parentheses inserted.]

1. That no industrial or commercial corporation *engaged* (shall engage) in interstate or foreign commerce *shall* after one year from the passage of this act (if it shall) permit the transfer of any stock, unless such transfer shall be accompanied by a statement signed by the transferee stating that he does not represent any undisclosed owner of said stock or any competitive interest, either as a director, officer, employee, agent, or stockholder of any competitive corporation, or as the owner of or a partner in any competitive business, or otherwise, directly or indirectly.

2. That no such corporation shall (engage in interstate or foreign commerce) after two years from the passage of this act (if it shall) permit the voting of any stock, by proxy or otherwise, unless a statement shall be signed by the holder thereof stating that he does not represent any undisclosed owner of said stock or any competitive interest, either as a director, officer, employee, agent, or stockholder of any competitive corporation, or as the owner of or a partner in any competitive business, or otherwise, directly or indirectly, nor, if such stock is voted by proxy, unless a similar statement shall also be signed by such proxy.

3. That any person who shall attempt to transfer or vote any stock, in violation of the foregoing sections of this act, or sign any statement required thereby which shall be false, shall, upon conviction thereof, be subject to a fine not exceeding $1,000, or, if such act be done or if such false statement be made with intent to exercise or to conceal a control of one or more corporations for the purpose or with the effect of preventing free competition, to a fine not exceeding twice the par value of any such stock and to imprisonment not exceeding five years.

(The article appearing in the Atlantic Monthly, 1909, follows:)

AMERICAN DEMOCRACY AND CORPORATE REFORM.

[By Robert R. Reed, Atlantic Monthly, January, 1909.]

The so-called corporate evils are the great problem of to-day. We know how great this problem is, how great the evils are, but few realize how far-reaching in effect may be the solution that is now pressing upon us. The corporation has become popularly, if not properly, the embodiment of modern industrial wickedness. To reform it every kind of panacea has been offered, running from the destruction of the corporation itself to the destruction of American individualism and democracy by a form of recognized corporate socialism. The destruction of the corporation is, however, making much progress; it is not a real danger nor a real possibility. The destruction of individual freedom and opportunity, of the fundamental principles of American life and government, is both threatened and imminent. How threatened may be read in the reports

of any industrial monopoly; how imminent may be seen in the widespread demand for Government recognition and regulation of these monopolies. Great as are the corporate evils themselves, they are not so great, nor so imminent, as the spirit of opportunism, of disguised socialism, leading the political leaders of to-day and demanding the abandonment forever of the simple independence of the individual; to increase his industrial dependence and make it political and permanent. This result is to be accomplished and socialism established, if at all, not directly, as a wise and voluntary measure, but indirectly, through the subversive nature of a corporation and as a last escape from the irresponsible oligarchy of corporate wealth. The corporation has subverted law and honesty between individuals; it can and will, if unrestrained, subvert the basic ideal of American Government, the happiness and welfare of unborn generations of the American people.

To recognize and license the far-flung corporate monopolies that rule the business of the country, and to increase and centralize the powers of Government to regulate them, means the beginning of the end of those sound principles of Government which are our special heritage as a people, the principles on which the American colonies were founded, their independence as States established, and their union as a nation made possible and permanent; the principles by which we became and have remained a great and free people. These principles are not merely popular government; they rest below, and rise above, the political right of suffrage. They were, and are, solely the liberty and equality of the individual. In our own experience as a people, and in the words of Rousseau in his Contrat Social, they are the practical ideal of progress: "Liberty, because individual dependence is so much force taken from the body of the State; equality, because liberty can not exist without it."

Under the title "Democracy," in the Encyclopedia Americana, it is said: "The principles of democracy are forcibly and clearly stated in the American Declaration of Independence, in the words of Thomas Jefferson, who has been called 'the Apostle of Democracy': 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.' * * * The distinctive features of the modern democracy are the widest personal freedom, by which man has the liberty and responsibility of shaping his own career; equality before the law; and political power in the form of universal suffrage exercised through the representative system."

The theory of Rousseau, the ideal of Jefferson, is the practical necessity of to-day. It has proved and established itself in America without much aid from theory and ideal. It was recognized by Edmund Burke that, in their rapid strides toward prosperity and commercial success, "the Colonies owe little or nothing to any care of ours; that they are not squeezed into this happy form by the constraints of watchful and suspicious government, but that, through a wise and salutary neglect, a generous nature has been suffered to take her own way to perfection * * *. I pardon something to the spirit of liberty." By this neglect, by the very fact that they had been enabled to throw off the inherited dependence on government, the Colonies realized, as no other people ever had or could, the full power and glory of the individual. A new ideal was applied, an ideal not of rule, but of freedom, and a new power was found in that ideal, a power greater than any government had ever known, greater than any government can ever know. They recognized that, in the words of Winthrop, the first colonial governor of Massachusetts, the civil liberty of the individual is "the proper end and object of authority. Whatever crosseth this is not authority, but a distemper thereof."

The Revolution was a successful effort to secure that liberty against government. The next and crowning effort was to secure that liberty by government, a design accomplished in the Federal Union, which, as expressed by Washington in his Farewell Address, 'is a main pillar in the edifice of your real independence; the support of your tranquility at home; your peace abroad; of your safety; of that very liberty which you so highly prize." This design has been developed and perfected in the Federal Constitution. In the remarkable document by which the Union and the force of all stand pledged to guarantee the liberty of each, by which the Federal Government, itself a government of delegated and limited powers, is vested with the supreme function of protecting the inalienable rights of the individual against the reserved sovereignty of the States. This function rests primarily with the Federal courts. Its initial

purpose was extended and completed, with almost superhuman excellence, by the words of the fourteenth amendment, adopted in the passion and turmoil of the reconstruction period: "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The principle of democracy exists to-day perfected as a supreme written law by the preservation of the States themselves and by the Federal guarantee of the rights of life, liberty, and property, and of a republican form of government within the States. It exists in the separation and distribution of the powers of government; in the reservation to the States, as self-governing sovereignties, of general legislative power; in the effective distribution of that power where it can do the least harm to the individual, where it can have the greatest opportunity for good in meeting the needs and least opportunity for harm in testing the theories of widely differing communities. It exists preeminently in the happy fact that it is secured beyond the power of an impulse to destroy it, beyond the power of opportunism, of government of the day, by the day, and for the day, to impair the foundations of a constitutional democracy. The greatest powers of the Nation are not legislative or executive, but judicial, the power of the supreme law interpreted and enforced by the Federal courts, to declare void, to prevent and restrain, the legislative or executive acts that seek to violate its provisions.

Such is and has been the design of our Federal Union to secure the liberty of the individual; a design so perfect in its conception, so happy in its effects, and so permanent in its nature that we can not but acclaim it as an act of Providence, an inspiration, and a result beyond the conception of the great minds that have wrought it. Its practical benefits have been manifold and widespread. To what shall we attribute them? To the ever-blundering but necessary government, or to the spirit and fact of liberty that has been secured against the powers of government to destroy it? Our greatness to-day is the greatness of a people who have been made great by the practical enjoyment of democracy, by the greatness of the liberty, of the incentive, and of the energy of the individual.

Our Revolution, according to Gladstone, "was a vindication of liberties inherited and possessed." Our history is a vindication of the value of those liberties possessed and enjoyed. These liberties it is, of course, our duty and desire to maintain. We must first understand them. We must keep clearly before our minds the principle of individual rights, of freedom from unnecessary government, of free and equal opportunity and equal right. We must not confuse this idea with the idea of popular political power, with the natural desire at times to increase that power to reform abuses, with the misleading ideal of to-day that the greater the government the greater are the people whose votes control it. The "rule of the majority" justifies itself as a principle of revolution. As a principle of government it is merely the right of the majority to act within established limits, to control the machinery of a government that is or should be, as ours is, a government of limited powers designed to secure and not to diminish, the freedom and equality of the individual.

Popular rule, the rule of the majority, is a necessary incident; not, as we are too apt to suppose, the whole gospel and synonym of democracy. Democracy is the practical, valuable, and essential thing; and each problem must be met and solved within its limitations. We must not be deceived. We must not be led by degrees of corporate subversion into a kind of government or state of society where the individual ceases to be its dominant factor; where he ceases to enjoy the fullest freedom and opportunity compatible with the equal freedom and opportunity of all; where his "inalienable rights" are in fact destroyed and, in a sense, exchanged for the empty bauble of equal suffrage in a top-heavy socialistic experiment. Mr. Justice Brewer is quoted in a very recent speech as follows: "There are certain individual rights—the right to life, liberty, and the pursuit of happiness—and they are rights which belong to every individual in this broad land. There is no crowned head in this country who can say, 'I am the State.' The only thing we have to fear is that majorities will get together and, for business, commercial, or industrial reasons, will crush off the independence of the individual. Nothing appeals to me more strongly as calling for the combined action of all true Americans than to preserve these inalienable rights."

The "rights" of democracy are "inalienable," because they are inherent in man as man; their enjoyment may be disturbed, but the title, the right, is inalienable. Civil liberty is the right retained by each man as a member of society, the liberty that each can enjoy without infringing upon the liberty of

others, and includes the right to the protection of that liberty by the force of all—a right not possessed in the natural state—and an equal right in the civil benefits of law and common effort flowing from his assent to the social contract. A government is democratic in form when the political right of suffrage protects the civil right of liberty. It is democratic in substance if the individual is protected in the enjoyment of the fullest liberty compatible with the equal liberty and equal protection of all. It ceases to be democratic in substance or in fact when a despot, an oligarchy, or a majority, takes from the individual a substantial portion of his civil liberty, when they force him against his will to part with his independence, with his right to labor for himself alone, to aspire to and realize his own ideals and ambitions of life, character, and power. That right is not alienable. It is not in any event surrendered voluntarily by all. Its surrender is not inherent in the social contract; it can not be assumed.

Consequently, society at large, whether acting by a despot, an oligarchy, or a majority, can never acquire the right, though it may exercise the power, to establish any degree of paternalism, socialism, or communism, as such, within a State. The blessings of the earth are intended for all, the ownership of land should, it may be argued, be in common, but the abilities and efforts of one can not be justly given to another without his consent. The just incentive of toil, the sacred title of production, the blessed virtue of charity, are the property of individual effort, the keystone of progress, character, and happiness. Democracy is the one principle inherent in and essential to every just government. "That people is best governed that is least governed" is its active principle. It is as much opposed to the unrestrained rule of the majority to socialism, to bureaucratic paternalism, to the unnecessary increase of governmental powers, to the impairment of individual freedom and opportunity, as it is to despotism, the unrestrained rule of one over all.

What is the danger to-day? We have been led to believe in the responsibility of government for the creation and distribution of wealth. We have enjoyed great prosperity; and now, generally speaking, we see its great accumulated wealth in the hands of a few whose methods we have investigated and found dishonest, yet who are in the main unpunished and unpunishable by existing laws. The demagogue is the popular answer. The demand of the hour is for more law and more power to punish and destroy. The demagogue's conception of government is of the absolute power to punish and destroy. Fortunately, there is too much strength in our institutions and too much conservatism in our people to permit this popular feeling to overturn directly and immediately all the principles and safeguards of democracy. But the tone and the tendency are destructive. They seek to increase the bureaucratic powers of government and to centralize those powers where they can be used most effectively and destructively; to make popular power supreme, individual rights subordinate; to destroy the corporate monopoly of to-day; to destroy the safeguards and in time the rights of the individual. Democracy's limitations on government protect only the essential rights. The forces of real reform that beat mistakenly against them will in time find the line of least resistance. They will remedy the abuses without destroying the safeguards of society. It is the problem of doing this that now and always confronts us. Those who contribute to its solution will be remembered and revered as statesmen. Those who oppose it with temporary success will not be entirely forgotten.

The increase of Federal power, the centralization of government, above all, the regulation and supervision by government of corporate monopoly, the popular preaching of the day, is radically opposed to the principle of democracy. Is there no other way to reform existing evils? The first step in any reform is to understand the evil, and our first step to-day should be to understand the corporation. We can no longer leave the exclusive knowledge of its evils to the much-abused corporation lawyer, the exclusive use of this knowledge to the corrupt influences that too often employ him. One further suggestion, I think, is pertinent. Before increasing the powers of government, before departing forever from the principles of individual freedom from government, a due regard for that principle and a due regard for reason and precedent suggest the inquiry whether, by any chance, the evils to be reformed are caused, in whole or in part, by a prior departure from that principle, by some unwise or unnecessary act of government, impairing the freedom, the supremacy, or the equality of the individual. The answer to this inquiry is immediate.

What is a corporation, that it so seriously threatens the welfare of the individual? It is first, last, and all the time an act of government; it is a privilege

and a license to one or more persons or to an aggregate of wealth controlled by one or more persons, known or unknown, to be for certain purposes and in certain respects a separate person, a "legal fiction," and as such to be and do things that the individual can not be and do. It is an advantage to the incorporated individual, a disadvantage to the unincorporated individual; a resulting situation whose only perfect equality lies in incorporating each individual in each relation of life.

This fact was plainly recognized when, in their inception, corporations were created only for public or quasi-public purposes, with innumerable safeguards to protect the State and the people against the abuse of the powers granted for the public good. Their development from this early stage was very gradual. Their power for good was recognized, but their power for evil was not at first overlooked. Corporations for private purposes and for profit were chartered by special laws, but with great precaution and ample restrictions against abuse. With legislative corruption and carelessness these special laws became in time blanket charters, special privileges capable of great abuse. The proper demand for reform and for equality resulted in general corporation laws containing at first many safeguards and limitations. The difficulty has been that the legislative and public minds have never fully grasped the real dangers and possibilities of the corporation. The mistaken demand of general business interests, and in many cases the corrupt influence of special interests, have finally in very recent years made these general laws practically a blanket power of incorporation, an authority to any one to make a "legal entity" of any kind, a law for himself and for those who deal with him. The modern corporation is essentially a modern act of government, a modern extension of a power of government, proper in its inception, but so unwisely deprived of its initial safeguards that it has become in effect a charter of corruptive lawlessness, a license, so to speak, of irresponsible business methods, of wildcat promotion, of fraud on coowners and creditors, of public corruption, of monopoly, and of subversion of established principles of law and equity.

Individual capacity for wrong is something we must always contend with and restrain, but the blanket powers of the modern corporation give to that capacity a scope and facility of fraud, of immoral profit and unpunished crime, that could not exist between individuals, that need not exist if intelligent limitations and safeguards existed to prevent the abuse of corporate powers. It has created one evil and one danger that is perhaps peculiar to the facility it affords to secret combination, to the efficiency and corrupt profit it bestows on irresponsible and secret control of wealth. This is the evil and danger of monopoly, of far-reaching aggregations of capital, greater in wealth and power than the "dummy" States that create them. These monopolies control a large part of the business of the country; they place a whole people under a tribute that is neither just nor voluntary. They move with secrecy and corruption through all the channels of trade and government. They influence and in a measure control government, and give sense as well as humor to "Mr. Dooley's" suggestion that our Federal Government should be incorporated under the laws of New Jersey, so that it may have power to deal with them. They threaten a day when, but for an escape to socialism, the vote of the share and of wealth shall be dominant, the vote of the man and of principle subservient; when the control of wealth and of government shall be entrenched by corporate entities and fictions in one man—the possible heritage of an imbecile son of an unscrupulous father.

This is an outline, not in all respects of existing conditions, but of the existing possibilities of existing laws; of the extent to which the power of government has been extended in the creation of irresponsible corporations, in creating and making possible the many evils that have resulted from such corporations.

These evil possibilities have in large part been realized. Every lawyer knows that the temptations and immoralities of corporate promotion and management are frequent; that so-called corporate efficiency is often attained at the expense of business integrity. Men, little and big, who would not think of taking a dishonest dollar directly, take them indirectly with a soothed conscience through the medium of a corporation. The control of a corporation gives to the man who controls it the power to deal with himself as an individual and fix his own profit; it enables him in innumerable ways to benefit himself at the expense of minority stockholders and creditors. With all the details and all the fictions of corporate management under his control, he can violate with impunity ordinary principles of honesty, can commit with impunity what in any other form would be crimes. This favors irresponsible promotion. The enthusiasm of Smith in

a new enterprise becomes a corporation, half of whose stock is issued to him for a possibility costing nothing, and corruptly divided with Jones because he is a friend of Robinson, who has the money and the gullibility to buy the remaining stock at par. This money is spent in salary and experiments. The venture fails. Robinson loses, and the creditors are defrauded by a false appearance of wealth.

Again, Jones has a small business worth $4,000 a year. It becomes "Jones & Co." The directors—his stenographer and office boy—vote him a salary of $5,000. A few years later he pays up his back salary, and in a very little over the four months' bankruptcy period the creditors are informed that the business is unsuccessful and the company insolvent.

A and B form a mining company, issue, say, $100,000 "preferred stock" to themselves for an option, and sell $10,000,000 common stock at attractive prices, to pay for the property and its development. They provide in the charter that the "preferred stock" shall elect all or a majority of the directors, creating what in any other form would be a legal trust. The business is successful, but its profits are absorbed by A and B in exorbitant salaries, graft contracts, etc. They may be called to account where the theft can be proved, but they can not, on existing legal precedents, be dislodged from control.

The corporate charter, the home-made law, can not be destroyed or the corporation dissolved until our courts of equity are bold enough to break through the corporate fiction, recognize the trust created by it, and destroy or reform as they would do in any other case. These are a few of the everyday evils that are overshadowed in the public mind by the wholesale frauds of the great corporations.

The Equitable Life Assurance Society, owned by the holders of policies worth $400,000,000, who are it legal members, was, and for all intents and purposes is supposed to be to-day, controlled by a $100,000 stock ownership with exclusive voting power. The holders of this stock diverted millions of the trust funds committed to their care, and there was no legal precedent for canceling the violated trust.

The New York City Railway Co., a small existing corporation, was acquired by men in control of the Metropolitan Street Railroad. The lines of the latter company were leased to the New York City Railway Co. at a rental equal to 7 per cent on the Metropolitan stock, an amount in excess of its earning power. The stock of both companies was then transferred to the Metropolitan Securities Co., which received the rental as stockholder of the Metropolitan and creditor of the New York City Railway Co., and would receive any possible excess as stockholder of the latter company, which, practically insolvent in its inception, operates the road for the real benefit of its self-created creditor, the Securities Co. It incurs all the liabilities of operation, and at the proper time lays down on its general liabilities, including several millions in just claims of passengers injured, and the widows and orphans of those killed in the operation of the road, for the real benefit of the Securities Co., which was able to take more than all the earnings and to avoid the liabilities.

Another notorious instance is the company formed in 1899 to effect the "trust" declared illegal by the courts in 1892. In this corporation, or system of corporations, perhaps more than in any other, the ingenuity of man has striven successfully to defeat the ends of public policy and private justice, and to commit crimes in morals without responsibility in law; all through an ingenious chain of corporate entities, "legal fictions," acting in different States in secret and different ways, for the common end of monopoly, industrial oppression, and immoral profit.

It is impossible to enumerate the frequent public wrongs committed with the aid and under the shield of corporate ingenuity. Public franchises obtained by fraud are represented by corporate stock conveniently distributed between the corrupted and corrupter of the public trust. The bonds are issued for construction, underwritten at 80, the cost of construction, and sold to the public at par. The bonds and stock at par, in the hands of innocent holders, become a recognized property right, to uphold exorbitant rates and defend inadequate service. It is a striking fact that this franchise itself is an act of government; too frequently granted for nothing, without due limitations and without preserving the right of individuals to the equal use, at equal cost, of the public highways; without defending the public against the iniquitous rebate. Large corporations and small are periodically reorganized and bled by every conceivable form of "high finance," the men in control fixing their own price for the use of their time, credit, and names. The corporation, the greatest apparent means for the wide distribution of industrial profits, and the wide control of

industrial management, is actually, through stock-market manipulation and "high finance," the greatest actual means for the accumulation of these profits and the vesting of this control in the hands of a relatively few individuals.

No one who has read the recent magazine story of the "Vanderbilt Millions" can avoid the conclusion that the full and fair reward of the financial genius who consolidated the many connecting links of the New York Central Railroad, the millions that resulted from the increased value and earning power of the road, was unfairly increased and multiplied ten times over by the fraudulent stock jobbery, watered capital, and legislative corruption that have made his name, like several others, a by-word for immoral financial success. It is easy to blame these men for what they have done, what many others would have done if they could, playing the game as they found it; easy also to clamor for prison cells to punish acts which the public mind had not conceived or stamped as criminal when they were done. It is much harder and much more to the point to study the evils themselves, to understand them first, and then to remedy or punish them by intelligent statutory enactments.

The evils that have existed, and still exist, are manifold. They are not, however, the universal rule of corporate management. Corporate powers may be, and are in many instances, honestly and conscientiously used. The point is that they may be, and often are, dishonestly used with legal impunity; that the corporation as it exists to-day is a charter of irresponsibility; that it enables the insiders to bid successful defiance to courts, minority stockholders, creditors, and the general public; that government, too much government, the unrestrained delegation of the powers of government, have made these evils possible, and that it is time to know these things, and to act with knowledge in their correction. Using this knowledge, we must see that the first step in their correction lies, not in inventing new activities of government to regulate the abuse of powers that should never have been granted, but rather in revoking, curtailing, and limiting those powers, and in preventing their further grant.

We have come to think that corporation laws can not be too liberal, that the corporation as such is one of the "inalienable rights." We must return to the original conception of a corporation as a special privilege that must be carefully limited and made subservient to the common good. If, and so far as, it proves disastrous to society, to the individual, its existence or its powers, the corporate powers of the persons controlling it can and should be destroyed. The true remedy lies in remedial and penal laws; laws that are self-operating, limiting the formation and powers of corporations and their officers and majority stockholders; laws of corporate management, enforceable in the courts at the suit of the Government or of individuals; laws that clearly define and adequately punish and remedy the wrongs incident to corporate relations. The remedy is less government, and not more government; restriction, and not extension, of its abused powers.

But how are these remedies to be applied? By which Government, State or Federal? By State laws, of course, and the need of them is great and immediate. But what can Texas and Massachusetts say to the "octopus" of New Jersey that rules the oil industry of the country? They have the legal power to keep it out of their territory, but they are practically powerless to protect their citizens from its national monopoly. The question has become and is now unavoidably national, largely because it is universal, but largely also because tariff laws shut in our markets and interstate free trade opens them, making the country an industrial world by itself, the natural prey of the "tariff-fed monopolies." The tariff incidentally is an act of government. The evil is also national and Federal, because of the comity that tends to admit the corporation of one State to do business in another, and because of the rights of such corporations as "persons" under the Federal Constitution. It is distinctly appropriate to Federal remedy, because it is an evil that one State inflicts upon another, an evil also of interstate commerce in its truest sense, and within the power of Congress to deal with it. Congress, if it has this power, is not a party to the State "contract" of incorporation; that "contract" can not be pleaded to limit the power of Congress, as it might be in some cases to limit the power of a State. The problem must be met in some part by Federal legislation. The essential thing is that this legislation be in harmony with the constitutional principle of delegated Federal powers, and that it also be in harmony with the larger inherent principle of democracy itself; that it be, if anything, a limitation rather than an extension of the powers of government over the individual. Can this be?

What we want as a people are safe and sane corporation laws, each in his own State, and we want to protect our own States against the licensed corporate

wrongs of a sister State, as well as against a similar possible license by the Federal Government. If we can do this, our sister States can work out their own salvation, and neither our mistakes nor theirs alone will threaten the entire Nation. If any State wishes to bestow a blanket power to create irresponsible corporations within its own borders, it is a local question that must be met and answered with a view to local conditions. The more settled States should not wish it. If they do not wish it for themselves, it is the height of impudence and bad faith for them to license such enterprises, as some of them do, expressly to do business in other States. Within her own borders the powers of a State should not be improperly restricted by Federal legislation; she also, in a sense, is an individual in the sisterhood of States, and has a right and a mission to work out her own salvation. She should not, however, exercise her powers to injure the individuals or public policy of other States. To prevent this, to prevent the irresponsible corporate monopoly arising from it, a Federal law is both necessary and proper.

This does not necessarily mean either a Federal license or Federal regulation for interstate corporations; it does not mean an extension of Federal Government, although it may mean an exercise of the restrictive power of the Federal Congress. Federal Government is not necessary if the Federal power can be used to attack directly and logically the real evil, the abused power of one State to license an irresponsible corporation to do business in other States. The simplest course is sometimes so simple and so direct that in our confusion or timidity in an important matter we try to walk around it. The remedial Federal law should be a simple and effective attack on the actual abuse; it should be, so far as possible, self-operating; an effective prohibitory law, stating in detail the conditions of incorporation, management, and governing laws necessary to enable a corporation to depart from the State of its birth to engage in interstate commerce, prescribing adequate penalties and making void and unenforceable by a corporation any contract made in violation of its provisions.

Such a law would be partly self-operating and completely enforceable in the courts; it would do away with the necessity of a Federal license or Federal commissions, with their endless increase and centralization of power, expense, patronage, and corruption. Without violating State sovereignty, it would be a limitation on the power of the States to injure one another; it would not be an increase of the powers of the Federal Government. Radical in precedent, it would be correct in principle—in some respects analogous to the 10 per cent tax imposed in 1866 on State bank notes to reform the national evil then arising from reckless State legislation. Instead of extending the Federal power as a bureaucratic invader of the rights of the individual it would extend it as a shield to defend these rights; it would be less government and not more government.

The practical effect of such a law, properly and constitutionally framed, would necessarily be immediate and tremendous. It would cause, without directly compelling, the immediate amendment of its nonresident corporation statutes by every "corporation State"; the radical reform, if not reincorporation, of every interstate corporation. It would become a national standard for all corporation laws. It would make men who to-day seem greater than their surroundings, who "live in the higher world of railroads and finance," recognize the real source of the power they have abused, the fact that the people who have given can also take away, that the "interstate commerce" clause of the Constitution is a reserved power of the whole people, greater than an interstate monopoly created by one State. Above all, if we can meet these evils in State and Nation by limiting rather than extending the powers and bureaucratic activities of government, by legislative and judicial rather than executive remedies, by preserving rather than by impairing the rights and safeguards of the individual, we shall have made a step backward from the dangers that confront us; a long step forward in the path of permanent reform and "triumphant democracy."

(The article appearing in Pearsons, 1910, follows:)

THE PRACTICAL WAY TO "REGULATE TRUSTS."

[By Robert R. Reed, Pearson's Magazine, January, 1910.]

It is impossible to overestimate the importance of the "trust" problem and the question of corporate reform. It is a problem the solution of which must make or mar the state of society in which we live. It presents the one para-

mount issue before the American people; and the time has come when it should be met and solved—not behind the closed doors of a secretive administration, but in the open forum of popular discussion. Its solution should appeal to the intelligence and meet the wishes of the people, and it should have the will of the people behind it. Does the reader of this magazine wish to see every business in the country permanently owned by a trust, each trust owned or controlled by one or a few persons, or the inheritance of a family permanently established in wealth and in the power of increasing it? If not, I shall ask him to follow me in a brief outline of the growth of monopoly, in a summary of facts known only to those lawyers whose business or interest it has been to study them, facts which the public are not supposed to know. I shall endeavor to show him that monopoly has been created, and can only be created, by the aid of government; that it exists only by reason of existing State laws; that it is clearly, irrefutably, within the power of Congress and of the President to destroy it. I shall show him also that these facts have for 20 years been ignored by the interests controlling legislation, Federal prosecution, and popular discussion of the subject, and are now ignored by the interests working more or less openly for the perpetuation of monopoly under a beneficent, undefined program of Federal regulation. This program is based upon the false assumption that "prohibition has failed" and is impracticable, when as a matter of fact the prohibition of the Sherman antitrust law has not been enforced, and the courts have persistently, but vainly, upheld the principle of prohibition in every case that has been presented to them.

In the beginning of things, so to speak, the English nation grew out of feudalism into democracy—imperfect democracy, but one in which the rights of the individual became the basis of English civilization, establishing "the widest personal freedom, by which each man has the liberty and responsibility of shaping his own career." (Encyclopædia Americana, title "Democracy.") Monopoly destroys democracy. It recreates feudalism in the dependence of the people on its industrial barons. By the law of judicial decisions, known as the "unwritten" or "common law" of England, monopoly of any kind was unlawful. This law became the common law of the American States. The Federal Government received, under the Constitution, the right to regulate commerce between the States, and in 1890 the Sherman antitrust act was enacted, making a monopoly or, in fact, any restraint of such commerce illegal. Any form of combination, by ordinary act or contract, was thus within the prohibition of the written and the unwritten law. They were frequently set aside by the courts. How could these laws be evaded? Let us see.

In the beginning of things, also, the corporation was a creature of the State, created for public purposes. As stated by Mr. Justice Brown, of the United States Supreme Court, in a recent case: "It is presumed to be incorporated for the benefit of the public." Extended to business purposes, it was still held subservient to the general welfare. Its powers were jealously granted and cautiously safeguarded to protect the public. Legislative indifference or corruption, however, led in time to the granting of special charters that were too broad and irresponsible. There was a general demand for general laws, and the day of special charters ended. The same tendencies, however, soon operated to procure the enactment of general laws in many cases worse than the old special charters. They in effect to-day allow each combination to draw its own charter.

Now how was the law against monopoly evaded? Take one very prominent instance. The original Standard Oil Trust, under which the holders of stock in competing corporations attempted to trustee their stock under one control, was destroyed by the Ohio courts, as the Sugar Trust had been destroyed by the New York courts. The State of New Jersey—note carefully the source and nature of the act—by its sovereign act, though under a general law, created the artificial person known as the Standard Oil Co. of New Jersey. It gave to this person an unlimited power of capitalization, the power to buy any property at any price payable in its corporate stock. It gave it power in this way to acquire the stock of any company and of competing companies, and to hold them as a person presumably safe from the courts of the State and nation. Acting under this power, it became the instrument and personification of monopoly. It also acquired the power to act secretly and elastically, to tempt with secret and immoral profits, to destroy with secret and immoral means, its business rivals. But this was not the only act of government necessary to its power and great success. The States of Pennsylvania and New York had also created artificial persons, the Pennsylvania and New York Central Railroads, and they had given them irresponsible powers, including the power to establish, main-

tain, and operate for private profit great highways of commerce, without protecting their citizens in their natural equality of right in the use of such highways; their political right to equal treatment in the charges and facilities of a State-created monopoly of transportation. These great corporate creatures of the State, the railroads and the oil company, using the irresponsible powers given them by the States, acting—it is claimed—within these powers, gave and received rebates, the purpose and effect of which was to destroy the competitors of the Oil Trust and establish its monopoly of the business. This monopoly was created by the act and aid of the State governments—and could not have been created without them. The 20 or 30 monopolies existing in as many businesses to-day have each of them been similarly created by the act and aid of State government.

These evils are not the evils of the individual, of the unwritten law, of democracy; but the evils of government, created by act of government. Yet monopoly is now spoken of as the "inevitable tendency to combination" and "industrial economy." College professors and newspapers are found to advocate its blessings and efficiency. It is in fact only the inevitable danger of all governments, which has always been persistently opposed by honest and far-sighted leaders. "Economy of production" is economy to the people, only when it means lower prices, higher efficiency, better living; and this we have only when competition is preserved, competition in prices and in the "economies." Monopoly and combinations, as we know it to-day, are the acts of government, procured by the indifference or corruption of public officers, while the public have been persistently misled as to its source and as to the means of preventing it. Without the State charters of unlimited combination, the "inevitable tendency" would accomplish nothing. A complete enforcement of the Federal law would have rendered it ineffectual. It is, in fact, only the "inevitable tendency" of wealth to corrupt government. Compel the repeal of these State laws, enforce and extend the Federal law, do away with this corruption, and monopoly can not exist.

In a recent editorial on the very illuminating "Sugar Trust" situation the New York Sun says: "It may be accepted as axiomatic that no trust or corporation can attain the character of a monopoly in this country except it be by criminal collusion on the part of the Government." And the Sun knows.

What were Congress and the Federal Executive doing all this time while these State-created monopolies were extending their power over the commerce of the Nation? The answer is written large in the noise of industrial commissions, congressional debates, and campaign orations. It is written large in the silence of the statute books, the laxity and inefficiency of executive prosecutions. Locally and nationally we are one people. The able constitutional and "corporation lawyers" in the public service have generally been devoting their abilities to other questions. When out of that service, they have generally been active in the employ of the monopoly interests. In 1894, in the Knight case, the Sherman Act of 1890 was held not to warrant an action against the Sugar Trust to set aside an acquired ownership in stock of formerly competing manufacturers. This decision was limited to the form of action brought and to the language of the Sherman Act. It laid down the rational proposition that manufacture was not a part of commerce, so that Congress and the Executive would have to base their attacks on acts of commerce and combinations in restraint of it. It clearly invited some more direct attack on the act of combining through corporate means in restraint of commerce, both by further suits under the Sherman Act, and by an amendment of that act, or by a new law. It invited a suit against the Trust itself as one complete conspiracy in restraint of trade. No such suit was brought. The act was not amended, nor any new law enacted, and monopoly continued to grow. After eight years in 1902, when a notoriously flagrant attempt was made by the use of a holding company to combine two great competing railroads, this combination was attacked and destroyed in the celebrated Northern Securities suit. Its decision pointed clearly and strongly the line of attack against industrial combinations, the destruction of monopoly by prohibition, by driving it from the commerce of the Nation. For six more years this line of attack was not pursued. Monopoly prospered under a continued torrent of oratorical abuse, and side by side with it has grown the present demand for Federal regulation, the still academic demand for Federal incorporation, either or both of which monopoly itself seems to welcome and seek as a harbor of refuge from the real remedies of prohibition and destruction, the path to which is open, while the Supreme Court holds the light and points the way.

Finally, when monopoly was established, and 18 years after the Sherman law was enacted, in the decision of the Tobacco Trust case, on November 7, 1908, the Circuit Court for the Southern District of New York, by three judges to one, flatly decided that the combination of two or more competitors by the monopoly device of a holding company is a violation of the Sherman Act of 1890. The language and great importance of this decision have been ignored by the press generally and by the financial and administration press particularly, as an examination of the papers and leading news magazines for the fall of 1908 will show. This case has since been held dormant on appeal to the Supreme Court, and the decree restraining the several constituent companies of the trust from "further directly or indirectly engaging in interstate or foreign trade and commerce" (164 Fed. Rep., 700, 1024), has been stayed pending such appeal. The decision below agrees with the former decisions of the Supreme Court. If it is correct, monopoly has grown under the authorization of State laws, in violation of the Sherman Act, and because of its nonenforcement. Only two other similar suits appear to have been brought, one against the Standard Oil Co., now awaiting decision,[1] and one against the Powder Trust, not yet tried. All the monopolies continue to exist in violation of law.

Turning from this phase of the matter to the direct question of the policy of Federal regulation, we find it expressed and summarized presumably in the last report of the Bureau of Corporations under the last administration. In this report we read: "Prohibition has failed. The aim of new legislation must be to regulate rather than prohibit combination. * * * The control by the Federal Government should be broadened into a general constructive system based on tested principles of supervision, publicity, and cooperation." This apparently is the program of the new administration, based on the proposition that "prohibition has failed," though every lawyer in that administration must realize that prohibition has never been really tried; that every monopoly in the country has been created and grown in violation of the Sherman Act, with the aid and acquiescence of Government, and that no amendment or new law has been attempted making its prohibition more effective against them. This program of "supervision, publicity, and cooperation" is without promise or sign of definite remedy, unless it leads to and includes socialism, with a period of transition in which monopoly is to be rendered tolerable(?) by Federal regulation. But regulation of what, we do not know; unless it reaches prices, wages, and stock manipulation it can not touch even the most apparent evils of monopoly, nor prevent the amassing of fortunes, great enough and corrupt enough to hold their control against all attacks. We do know that Federal regulation has the approval of men like Judge Gary, of the Steel Trust, and that the industrial stock market has been rising in anticipation of a prolonged period of non competitive prices in the necessities of commerce and of life. It has the support of the Republican organization, of leaders whose alliance with monopoly interests is nowadays taken for granted, of leaders also whose deep-rooted desire to increase and centralize the powers of government is peculiarly favored by the assumed necessity of regulating monopoly, of creating a "centralized Federal control of the business of the country" (quoting Judge Parker).

There is another part to the extreme Federalist program that has not been made conspicuous in the recent campaign of education and delusion. It is Federal incorporation. The powers of Congress in respect to corporations engaged in commerce were summarized as follows by James R. Garfield in his report of December, 1904, as Commissioner of Corporations, the first two propositions being in fact disputed by many able lawyers:

"It may be considered as established that Congress may:

"(1) Create corporations as a means of regulating interstate commerce.

"(2) Give to such corporations the power to engage in interstate and foreign commerce.

"(3) Prohibit any other corporation or individual from engaging in the same.

"(4) As a condition precedent to the grant of any such corporate power, lay any restriction it chooses upon the organization, conduct, or management of such corporation."

Had the mind of the distinguished commissioner of corporations not been centered on the extension of Federal power, the last paragraph above quoted would have suggested to him something less radical, more American and more effective, than the plan of Federal incorporation. Federal incorporation, like the Federal

[1] Decided Nov. 20, in favor of the Government. This decree also restrains constituent companies from engaging in interstate commerce.

license proposed by Mr. Bryan, involves a radical and unnecessary extension of the executive powers of the Federal Government, powers that once granted will continue to increase until they effectively control the business of the country. Each of these propositions is of doubtful constitutionality, of more than doubtful wisdom and popularity. The Federal power to create or license corporations can in law only exist upon the assumption that it is necessary to the power of regulating commerce. And of course it is not necessary if commerce can be completely regulated without it, if everything that could be accomplished under the disputed power can be accomplished under existing powers as to which there is no dispute. The power to regulate commerce does not include the power to regulate all business dependent on commerce. Again, Congress can not limit or impair any of its own constitutional powers, and an irrevocable charter, license, or power given to any corporation would limit pro tanto the power to regulate commerce. Congress has not licensed, and should not license, any corporation, combination, or monopoly. It is and should remain free to prohibit and exclude.

The power to prohibit, as to which there is no doubt, is sufficient. Instead of creating corporations with the exclusive power of engaging in interstate commerce, and laying "any restriction it chooses upon the organization, conduct, or management of such corporation," as suggested by Mr. Garfield—a doubtful and dangerous proposition—Congress can, without Federal incorporation, without doubt, and without danger by a general law "lay any restriction it chooses upon the organization, conduct, management" of any State-created corporation as a condition of its right to engage in interstate commerce. In other words, and this is the plain prohibiton that speaks from the page of every important court decision on the subject, Congress can prohibit with effective penalties any State corporation from engaging in interstate commerce unless it conforms to certain prescribed conditions of "organization, conduct, or management." These conditions can and should reach and eliminate every corporate power or act that unreasonably restrains commerce or tends to the creation of a monopoly. It can and should go further and establish a standard of corporate charters, a standard of honesty, uniformity, and equality in the corporate privileges and immunities enjoyed by individuals engaged in commerce between the States. A prohibitive and punitive law of this character is the logical remedy for existing conditions. It would drive the monopoly corporation back to the State from which it comes and compel it, by an amendment of its internal laws or of the State laws governing it, or both, to acquire a restrictive charter, restricting its powers of evil, destroying its power of monopoly. It has been said that this power is too great, that it is a popular power capable of abust at the hands of an aroused populace. One answer to this is that the populace is not now aroused, but might be later.

Just how far we should go in limiting the powers of corporations is a question for public discussion and solution. We should preserve natural conditions, competition, and freedom, as opposed to special privileges, trusts, government regulation, and dependence of the individual on monopoly or on government. All corporations which constitute or belong to combinations exercising an unreasonable restraint of trade should be directly excluded as a matter of course, and the penalties should be prohibitive. A step at a time is pretty good policy in introducing a new remedy; but by way of illustration a few instances of possible limitations of corporate powers may be useful. One thing stands out above every other—capitalization, unlimited in amount and unlimited in the purposes to which it may be applied, is a power that no State or Government should grant or permit to a business combination. It is a power that renders such a combination a proper subject of exclusion by Congress from interstate commerce. Judicial control of large capitalization should be made essential. So also as to the power to water stock or bonds, the power to hold stock in other corporations, the power to engage in more than one business. All corporations having such powers should and could be excluded from interstate commerce by a direct prohibitive and punitive Federal act. So as to every evil that directly or indirectly affects or endangers commerce and the corporate means used in commerce. It can be effectively met by requiring its elimination as a condition of the right of a corporation to engage in such commerce, and punishing severely both the corporation and its offending members for every act of commerce done by it without such right.

There is no doubt that a law along these lines can be made effective and constitutional. It would not involve any extension or centralization of government power, but would in fact be a prohibitive act limiting the abuses of gov-

ernment by the States. It would mean less government, not more government; democracy instead of socialism.

A word as to the effect of such a law on business and capital. It would be much less radical in its effect upon existing corporations and more efficient in operation than the unenforced Sherman Act. It is logical and constructive. It would bring order out of chaos, and establish industrial opportunity for all on an equal basis. A successful attack on monopoly would not drive capital out of the country, as has been so daringly threatened. It would drive it, rather, to find protection in independent investments, unhindered and unafraid either of monopoly or of Federal control. Nine hundred and ninety-nine out of a thousand of us are in a competitive business, that of offering our services, our labor, our goods, or our capital in competition with others and to the highest bidder, and we can not do business to advantage unless all men with whom we deal are kept on the same basis. Monopoly inevitably draws to itself the surplus wealth of production, of speculation, or of investment. It has the advantage of every move, the trick card of every hand. It inevitably corrupts government and dominates the world in which it moves. From this evil we must be delivered; and a law radical enough to be effective, and intelligent enough to be efficient, is absolutely essential. All men and all parties should strive to enact and enforce such a law.

(The article appearing in the Atlantic Monthly, 1914, follows:)

AMERICAN DEMOCRACY AND CORPORATE REFORM—THE DEMOCRATIC ANTITRUST PLANK.

[By Robert R. Reed.]

To the Atlantic for January, 1909, I contributed a paper bearing this same title. "American Democracy" was then used, and is still used, in its broader sense. The trend of events has made the trust remedy then advanced the declared policy of the party now in power, but the principle on which that remedy rests is the common heritage of all who believe in democracy itself. That principle demands the solution of the trust problem without destroying the fabric of our institutions. It demands the prevention of monopoly, not its regulation. This proposal, made in 1909, I shall call the Williams bill proposal, because it has become identified with the Senate bill introduced by John S. Williams, of Mississippi, who from its inception has been its most effective advocate.

Senator Williams wrote me early in 1909 that this proposal furnished the key to the trust situation, and asked me to draft the bill which he later introduced. Later he wrote, "You have the right sow by the ear; hold on to her," but his has been the grip that held, and the credit, if there be any credit, for its present position and promise of accomplishment is chiefly his.

The proposal itself has been so fully established that there are now a number of pending bills based upon it introduced by leaders of the different parties and factions; it is apparently accepted without question as both constitutional and practicable. It calls in its simplest terms for a Federal law excluding from interstate-commerce corporations which fail to comply with such conditions as Congress finds and declares necessary to preserve the freedom of that commerce from corporate monopoly, "an effective prohibitory law stating in detail the conditions of incorporation, management, and governing laws necessary to enable a corporation to engage in interstate commerce." It is based on a fact which is now undisputed, that monopoly is created by government and can not exist without its aid, and that our modern monopolies have been created by the State grants of corporate powers necessary to their existence. This view was strongly stated by ex-Attorney General Wickersham in his notable address of February 22, 1910, in which he said that the resulting condition is strongly analogous to that which arose in the reign of Elizabeth by the express grant of royal monopolies.

The most complete and conclusive statement of the genesis and growth of monopoly under the grant of the State corporation laws is that made at the 1911 convention of the American Bar Association by its president, Hon. Edgar H. Farrar, of New Orleans. Judge Farrar particularly condemned the holding company and the unlimited capitalization allowed modern corporations, and said, "Monopoly comes to them by virtue of their size, organization, and strength, just as surely as monopoly went to the East India Co. by royal grant," adding that "Congress can drive out of interstate and foreign commerce all corporations with fictitious or watered stock, all corporations whose capital

stock is so great as to constitute them practical monopolies or suspects of being such, all holding companies, and all companies whose stocks are owned by holding companies or by other corporations."

This remedy had been proposed in 1909 and was at the time Judge Farrar spoke embodied in the Williams bill introduced in the Senate April 20, 1911, covering the specific items mentioned.

In September, 1909, the New York World called this proposal to the attention of the so-called Saratoga conference, which was deliberating on the future policies of the Democratic Party, and urged upon it the importance of presenting a definite policy on the trust question. The platform adopted was negative on this question, and this omission was criticized by the Outlook in an editorial, in which it said, "As soon as the Democratic Party takes a stand on one side or the other of the giant struggle over the whole industrial problem that is paramount in this country, it will become vitalized, but until it does that it is negligible."

Between 1909 and 1912 the entire aspect of the trust question changed. The banner of national socialism was raised at Ossawatomie, and the Democratic Party seemed still to be unable to meet the issue squarely on one side or the other. But with the Supreme Court decisions in the Standard Oil and Tobacco Trust cases the situation altered. Monopoly was attacked and defeated. Its origin and its methods became more clearly defined, and in particular the fact of its creation by and dependence upon corporate devices became more clear to the general public. The Williams bill proposal was justified by the events which followed it and gradually acquired strong individual support and public recognition. The Attorney General of the United States, who in court and forum had contributed so largely to this result, publicly stated on March 30, 1912, that the Williams bill was "the most practicable and indeed, I think, the only clearly thought-out and intelligently conceived legislation in that direction"—in the direction, that is, of prevention of monopoly by restrictive laws. The Democratic Party in July, 1912, nominated Woodrow Wilson for President, and, on the initiative of Senator Williams, made its appeal to the voters with the following antitrust plank, embodying the proposal which had been ignored by the Saratoga conference:

"A private monopoly is indefensible and intolerable. We therefore favor the rigorous enforcement of the criminal as well as the civil law against trusts and trust officials and demand the enactment of such additional legislation as may be necessary to make it impossible for a private monopoly to exist in the United States. We favor the declaration by law of the conditions upon which corporations shall be permitted to engage in interstate trade, including, among others, the prevention of holding companies, of interlocking directors, of stock watering, of discrimination in price, and the control by any one corporation of so large a proportion of any industry as to make it a menace to competitive conditions."

The Outlook prediction was fulfilled. Democracy was vitalized when for the first time in any party platform the restriction of corporate evils was declared to be the specific remedy for destroying private monopoly. The average voter, I believe, grasps quite clearly the plain general meaning of this remedy. He has, wisely or unwisely, an inherited antipathy to corporate privileges, and whoever discusses the subject with him will find ready recognition of the fact that monopoly is the outgrowth of corporate privilege and can be destroyed by its limitation. He is surprised not at the declaration but at the failure to apply it long ago. He knows that "a private monopoly is indefensible and intolerable." In the words of a member of the English Long Parliament, quoted by Judge Farrar, he has found them "a nest of wasps—a swarm of vermin which have overcrept the land. Like the frogs of Egypt, they have gotten possession of our dwellings, and we have scarce a room free from them. They sup in our cup; they dip in our dish; they sit by our fire. We find them in the dye vat, washbowl, and powdering tub. They share with the butler in his box. They will not bate us a pin. We may not buy our clothes without their brokerage. These are the leeches that have sucked the Commonwealth so hard that it is almost hectical."

It is the purpose of this article to emphasize the need and meaning of the platform remedy, in connection with the situation now existing, and with the effort now being made to dispense with this remedy or to subvert it to the perpetuation of monopoly; also to make plain the fact that the platform pledge calls for certain definite things, the effect of which will be as complete as the party promise "to make it impossible for a monopoly to exist in the United States."

The first platform pledge is for "the rigorous enforcement of the criminal as well as the civil law against trusts and trust officials." It was, perhaps, expected that the enforcement of the law would be more "rigorous" and effective under Mr. McReynolds than under Mr. Wickersham, and the Union Pacific dissolution is cited as evidence that this has been the case. In justice to the subject, it must be said that the difference is largely one of form. In the Standard Oil case the common-stock ownership was not disturbed, and so long as it continues the "trust" remains. The Southern Pacific stock certificates allotted to Union Pacific stockholders were not allowed to be physically converted into actual stock by a Union Pacific stockholder, but their exchange for actual stock by such a stockholder, by sale and purchase on the stock exchange, was not restrained by the decree, and was accomplished at a cost of 25 cents a share brokerage. The common control has apparently been retained; if it was worth retaining, it could not be destroyed by such a measure. I cite this simply to emphasize the futility of the "rigorous enforcement" of the present law against corporate monopoly. It has not been and will not be destroyed in this way, nor, I believe, by "the trusts eating out of the hands of the Attorney General," to quote the current characterization of a process that originated with the last administration and has some of the features of an "immunity bath" for its fortunate victims.

The evil is an underlying one and requires an underlying remedy; such was Mr. Wickersham's conclusion after four years of actual experience, and it is not apt to be ignored by his successor. If monopoly is destroyed to-day, it will be reestablished to-morrow, for the means by which it was created remains, and can not well be controlled by judicial decree or by adjustments similar to those of the Standard Oil and Union Pacific cases. The acceptance of such adjustments as a permanent solution of the problem involves a surrender, not by the trusts but by the Democratic Party—a surrender in the face of an assured victory.

The platform recognizes this fact and demands "the enactment of such additional legislation as may be necessary to make it impossible for a private monopoly to exist in the United States." Monopoly is destructible and will be destroyed. In these bold words the Baltimore convention met the issue raised at Ossawatomie. Monopoly to-day is on the defensive. Its cause and the way to its removal are known to the electorate and to the active leaders of Congress who were members of the convention that adopted this declaration.

The platform pledge is strong and it is specific, but it is susceptible of subversion, and efforts have been and will be made to subvert it so as to effect the perpetuation of monopoly. It calls for certain definite, substantially unmistakable provisions of law, for a "declaration by law" of certain "conditions" which must be met.

The Williams bill proposal, embodying these conditions, had been thrashed out in the Senate Committee on Interstate Commerce, and was known to all Members of Congress at Baltimore who had followed the subject. It is embodied in the platform. The "trade commission" proposal and various proposals to amend the Sherman Act so as in effect to permit a "reasonable restraint of trade" by "good trusts" were also well known—if anything, more widely known than the Williams bill. They are not embodied in the platform. The danger of the subversion of this remedy is serious. It is evidenced by the report of the Senate Committee on Interstate Commerce, presented on February 20, 1913. Its only specific recommendation for legislation embodied the Williams bill proposal in the following words: "Third, that it is desirable to impose upon corporations now or hereafter organized under State law and engaged in or proposing to engage in such commerce further conditions and regulations affecting both their organization and the conduct of their business."

The Senator who wrote the report, referring to "10 out of 20 manufacturing establishments heretofore in competition" desiring to consolidate, said: "There ought to be a way in which the men in such a venture could submit their plan to the Government and an inquiry made as to the legality of such a transaction, and if the Government was of the opinion that competitive conditions would not be substantially impaired there should be an approval, and in so far as the lawfulness of the exact thing is concerned, there should be a decision, and if favorable to the proposal there should be an end of that particular controversy for all time."

A more apt statement of the program for the creation of monopoly under a Federal bureaucracy could not well be made. It subverts the whole proposal adopted by the committee, and instead of "conditions for the destruction of monopoly," suggests "regulations" under which it may be perpetuated "for

all time." Woe betide the American Republic if combinations of industry can, by Executive approval, make "an end of that particular controversy for all time." The proposal, if adopted, would be a new and greater mother of trusts. From its womb would spring, for the first time in our history, full-grown national monopolies, vested "for all time" with the sovereign grant of the United States. There have been and will be many similar efforts to secure an Executive discretion in the "regulation of combinations," issuing cards of admission or orders of exclusion directed to particular corporations. They will be presented with great ability as authoritative embodiments of the platform plank in several forms and from many sources. They can have but one certain result. Mr. Wickersham said in July, 1911, on the subject of Federal regulation: "It has been openly advocated quite recently by representatives of some of the largest combinations of capital, probably as a means of salvation and to preserve, under Government supervision, great organizations whose continued existence is menaced by the recent interpretation of the Sherman Antitrust Act."

To "preserve" them—this is the crux of the whole subject—on the borderland of monopoly and as near to its accomplishment and rich rewards as the Executive for the time being may permit.

When the mind contemplates, in the light of history and with a knowledge of men, the vast meaning of this picture, it is small wonder that our Executives no less than our "captains of industry," have at times inclined to favor a power so full of possibilities. Its possibilities are different for different men. It appeals to the beneficent autocrat, with the idea of compelling industrial peace and justice through the land, a dream fit for a Marcus Aurelius. It appeals to political ambition, with its possibilities of a great political autocracy controlling the destinies of the Nation. Last, but not least, it appeals to the man of large affairs, the business autocrat and monopolist, with its promise of salvation to existing combinations and of future growth. It means but one thing certainly, and that is monopoly under the possible restraint of Government. The sanction it will enjoy, but the restraint will not be felt. The thing is practically impossible in any Government that is free and expects to remain free. It is useless to speculate on a matter of such absolute certainty.

Ours is a republican form of Government. The only problem of "regulated monopoly" under it is to outwit, mislead, or corrupt the ever-changing powers that be, all the big brains and money, cunning and greed of the country working toward a common end, with nothing to check them but a handful of men, big and little, each holding a political office at a small salary until a better office or a better salary is offered him, and hoping for something worth while when he returns to unofficial life. Where are the presidential secretaries and bureaucrats of yesterday? The question is a fair one, and the answer tells the story of bureaucratic efficiency under a republic, of regulated monopoly in a democracy. The head of the Steel Trust is the most pronounced advocate of such a system, a system of the "good trusts," of great industrial combinations riveting the chains of commerce with Executive permits, growing imperceptibly, but "for all time," and irresistibly, to the complete dominance of industry.

Fortunately the party elected to power is pledged to the destruction of monopoly, not by regulation, but by the enactment of specific legislation which by the terms of the declaration excludes the idea and possibility of "regulated combination." Fortunately, also, there is one man in the United States who has kept his mind open on this question, not perhaps individually, but as President, nor has he expressed any other view but that the causes of monopoly are known, and we must act with that knowledge to destroy and prevent them. Correcting a popular impression to the contrary, he has very recently said with much emphasis, "I conceive that to be part of the whole process of Government, that I shall be spokesman for somebody, not for myself. I have to confine myself to those things which have been embodied as promises to the people at an election. That is the strict rule I have set for myself."

The recent report of the Secretary of Commerce, which covered the field of possible legislation, contained no suggestion of Federal regulation. Its specific recommendation of "legislation looking to fundamental charter provisions for every corporation doing interstate business" states the proposal and details of the Williams bill; it is the only recommendation that has not been adversely criticized by the press.

"Les hommes sont impuissants pour assurer l'avenir; les institutions seules fixent les destinées des nations." (Men are powerless to assure the future; institutions alone fix the destinies of nations.) These were the remarkable

words of Napoleon, the most powerful man of modern history. We are at the threshold of an era, the beginning and the end of which will, I believe, bear the luster of the name of Woodrow Wilson; but it is an era remarkable, not for the man, but for the institutions which he is upbuilding and reestablishing upon their original foundations, to bear the shocks of succeeding ages. In that work and that way lies undying fame. The other way, a Wilson or a Bryan disturbing the fabric of our institutions would soon surrender to a Debs the work and the fame of institutions yet untried.

A restored democracy triumphant over the monopoly-ruled paternalism from which we have suffered is the mission of the party now in power. The Executive will not dictate the laws, nor will he ask or receive the power to enforce them "with discretion." Monopoly will be destroyed, but not by the officers or employees of a Federal bureau, matching their knowledge and their wits against the trained specialists of our great trusts. The unfortunate episode of the Tennessee Coal and Iron acquisition should be sufficient as an experiment in so one-sided a program.

The "additional legislation" specifically demanded by the party platform is "a declaration by law of the conditions" necessary to the prevention of specific corporate evils. Congress is competent to exercise its prerogative of legislation, and the subject is one that can be completely covered by a remedial law. A "declaration by law" is a political platform in itself. It disposes at once of all plans for the administrative control of business. It accords with our established principle of Government and requires a "Government of law and not of men."

The things to be "declared by law" are "the conditions upon which corporations may engage in interstate trade." The program of legislation is declared and does not admit of generalities. It recognizes the fact that monopoly is an act of government, and that the problem is not to prevent its growth by natural laws, for such growth is impossible, but to prevent its creation by special privileges by which alone it has its inception and fruition.

In the last five years no one, lawyer or layman, has questioned this proposition, nor can it be questioned. Those who oppose it privately have publicly ignored it and will continue to do so. Nor has anyone ever explained just how, without the special privileges and facilities conferred by these State statutes, our modern trusts could have been created or how, without them, they can now exist. Individuals might attempt to combine by private agreement, but such agreements never have been and never will be upheld or enforced, and without the aid of Government in enforcing them they are worthless. They were uniformly held illegal at the common law, and the original Standard Oil and Sugar Trusts were destroyed by the courts of Ohio and New York, respectively, and then went to and obtained from New Jersey the statutory power to do what the courts had held illegal. Without this statutory power they could not have been created.

The Williams bill proposal is directed against the licensing of monopoly, as an un-American and sovereign abuse of governmental power, not against any proper function of the State. It is directed to the protection of commerce, to the preservation of the individual engaged in or dependent on commerce, against special privilege. It is based on the democratic function of the Federal Government; it demands a restrictive uniform law, and involves no vestige of grant or privilege, of executive discretion or administrative control. It removes the evil at the source, and leaves commerce and the individual free as they were before the inception of privilege and monopoly.

From one point of view, it may be said that, disregarding monopoly and competition, regulated or unregulated, and every other question affecting restraint of trade, except the undisputed fact that there are certain recognized corporate evils affecting commerce which can be corrected by Federal law, it should be possible for all to unite in correcting these evils, pending their agreement or disagreement on other questions. No one can very well oppose such a law, except the few who are bold enough to demand that these corporate devices should be retained for the benefit of monopoly. Open opposition is impossible, but the trouble comes, and will come, from the attempts made, and to be made, to graft upon this simple measure one or another of the various remedies desired by different interests. Correct these specific "character-enacted" evils first, simplify the problem by reducing monopoly to its own "inevitable evolution," and we shall, I believe, be in a position clearly to understand and deal with "economic combinations" and "unfair competition."

The proposed remedy does not demand, as some have thought, the immediate change of all the corporation laws of the States, but the amendment by the

corporations themselves of their own charters under those laws, and, where necessary, their reorganization, so that they may become safe instruments of commerce. The State laws will be amended when their unsafe grants have becomes valueless.

The general proposal needs, I believe, little further explanation. It is not Federal incorporation, although it may be taken as the Democratic alternative for that remedy, and is neither so drastic nor so revolutionary in principle. It may have the effect, by restrictive provisions, of standardizing the essentials in State corporation charters. By requiring restrictive safeguards in the organization of corporations, Congress can accomplish everything that the creating State should accomplish, and yet remain entirely free to require further safeguards as they may be needed. The power asserted is one of complete control over the charter, organization, and conduct of corporations engaged in interstate trade; a control, however, to be exercised restrictively by a general law, without any element of license or regulation, beyond requiring such publicity as may be necessary to insure compliance with the law.

The remedy no longer lies with the States, for any one of the 48 may perpetuate the evil; and, indeed, if they should all unite to-day to destroy it by amending their laws, we might awake to-morrow to find yesterday's monopolies chartered by some South American Republic. Congress alone can protect the commerce of the Nation against this particular danger; acting for all the States and all the people, it can exclude from that commerce every corporation that is not by the law of its own being a safe and proper business agency.

What must be the prescribed conditions? The several items enumerated are, like the program itself, specific and admit of little substantial variance in the legislation necessary to put them into complete effect. The first condition required is one to effect "the prevention of holding companies." At this suggestion the Democratic Member of Congress wants to consult the 1913 amendments of the New Jersey corporation law, though President Wilson has denied that these amendments forecast in any way his idea of a Federal law. His meaning is plain, when one reads in section 40 as amended, that "any corporation formed under this act may purchase property, real and personal, and the stock of any corporation necessary for its business * * *: *Provided further*, That the property purchased or the property owned by the corporation whose stock is purchased shall be cognate in character and use to the property used or contemplated to be used by the purchasing corporation in the direct conduct of its own proper business." This amendment, the best that could be obtained with the conditions existing under the New Jersey laws, plainly furnishes no light on the problem of eliminating the holding company. On the controry, it furnishes an instance of the charter-power under which the holding company exists; and a company with this power, as Senator Williams expresses it, is a "potential monopoly." According to Judge Farrar, "The most vicious of all the provisions in the statutes above enumerated is that authorizing one corporation to own and vote stock in another. This provision is the mother of the holding company and the trust. It provides a method for combining under one management and control corporations from one end of the Nation to the other."

Mr. Wickersham, who speaks with the authority of experience, is convinced that "Probably no one thing has done more to facilitate restraint of trade and the growth of monopoly than the departure from the early rule of law that one corporation can not own stock in another." The holding company, according to President Taft's message of January 7, 1910, has been the "effective agency in the creation of the great trusts and monopolies."

What are the corporate conditions necessary for "the prevention of holding companies"? Mr. Wickersham has said that if Congress should exclude them from commerce, "the axe would indeed be laid at the root of the trust evil." Judge Farrar would also exclude—and it is essential to exclude—"all companies whose stocks are owned or controlled by holding companies." It is a simple matter to exclude holding companies, though Congress has waited a long time to do it; but it is not so simple to exclude companies controlled by holding companies. The corporation can not prevent the holding company from acquiring its stock; the latter may remain in its own State and control the commerce of the Nation. Prof. John Bates Clark, in his recent edition of "Control of trusts," suggests a remedy when he says that "the incentive for forming such companies would be removed if it were enacted that the shares of industrial companies owned by holding companies should have no

voting power." This, however, must be enacted by the State or by the corporation itself as a part of its charter; and as to existing companies it would have to have the assent of the stockholders whose right to vote is to be destroyed. This right is binding upon the State and corporation which are parties to it. It is not binding upon Congress.

Conceding, as we may, that Congress can not change the State-made grant, it can exclude from commerce any corporation that holds this grant in a form inimical to the freedom of commerce. It can exclude every corporation in which any other corporation has the right to vote, and can in effect compel the surrender of that right by any person or holding company engaging in commerce as a member of the corporation, or compel the reorganization of the corporation under a new charter denying such right (a reorganization in some cases under State laws, instead of in all cases such as would be required by Federal incorporation).

In every effort to deal effectively with the problem, we are brought back to the basic proposition that, in the words of Chief Justice Marshall, a corporation "may be correctly said to be precisely what the incorporating act has made it—to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes." And Chief Justice Waite has added that "every corporation necessarily carries its charter wherever it goes, for that is the law of its existence." In a very real sense, the charter is the only law that it can not ignore or evade, but it is also a law by the aid of which, if so designed, it can successfully evade other laws. There can be no permanent solution of the matter that does not reform the charter and make the corporation a safe instrument of commerce. Mr. Justice Brown has said that "the corporation is presumed to be incorporated for the benefit of the public"; and the Baltimore platform has declared that it must be so incorporated if it is to engage in interstate trade.

This is the theory of the Williams bill, and I agree with Senator Williams that it is the only theory on which the proposal of 1909 can be made completely effective; and the only way in which monopoly, dependent for its existence on corporate devices, can be completely destroyed and prevented. It is the method indicated in the recent report of Secretary Redfield, urging "fundamental charter provisions" to be required of all interstate corporations.

The holding company is prevented by Senator Williams's bill, first, by requiring that the corporation shall not have the power to acquire or hold the stock of other corporations; second, by requiring a provision in its charter that no other corporation shall have any vote or voice, directly or indirectly, in its affairs. This may be supplemented, if necessary, by imposing the penalty of forfeiture on any member of the corporation who prevents it from amending its charter to conform to the law. It will, I believe, be sufficient for Congress to declare the law; its conditions will be met. The extent to which it is possible to go with charter restrictions is instanced by the following unwise provision in the charter of a Panama steamship corporation organized in New Jersey in 1911: "The power of any stockholder or director to vote on any question shall cease upon notice from the Postmaster General of the United States that such a stockholder or director represents a competitive railway interest."

The second condition required is one to effect "the prevention of interlocking directors." Here, also, the efficient remedy seems to be plain and unmistakable. It would be unjust to do as one bill introduced by a very able Senator attempted to do—exclude a corporation from commerce if one of its directors happens to become a director of a competing company. He may do this after his election. The corporation can not control him, and its life or death is in his hands. The corporation can be protected only by a charter provision against such an event. Senator Williams has, I believe, laid the ax at the root of the tree by requiring a charter provision declaring any director in a competing corporation ineligible as a director, extending this provision also to include any person representing any competing interest. I quote again from the charter of the existing New Jersey corporation to which I have referred: "No person shall be eligible as a director who shall be a director in or an officer or agent of any corporation or association engaged in any competitive transportation business by rail."

The Williams bill requires the charter to declare any person representing a competitive interest, including a director in a competing corporation, to be ineligible as a director. Such a charter provision is self-operating. The attempted election of an ineligible director is a nullity and the office remains vacant. The charter is safeguarded, and the corporation is a safe instrument of business.

The same method adapts itself to the third requirement, that of a condition preventing watered stock. It is unjust to provide, as one important Senate bill did provide, that a corporation should be excluded from commerce if it issued capital stock with a par value exceeding "by more than 10 per cent" the "value of the property received therefor." Under this provision an honest business error in the valuation of the property would exclude a corporation from commerce and effect its ruin. What is needed, and all that is needed, is to nullify the dangerous sanction that has been supposed to be given under some State laws, to issue stock at any valuation declared by the directors. Senator Williams, in the bill revised with his sanction and introduced in the lower House by Hon. William R. Smith, of Texas, has entirely nullified the permissive statutory power by requiring that all stock shall be fully paid or payable, and permitting it to be paid in property only when its value has been determined on oath filed in a public office to be not less than the par value of the stock, or, in the case of stock authorized to be issued without par value, to be not less than $5 per share. This condition applies after the passage of the law, but is required to be inserted in the charter within a limited time. It would completely nullify the permissive power offered under the State laws.

The fourth condition required by the Baltimore platform deals with "management" rather than "incorporation" or "governing laws." It must prevent "discrimination in prices." The Williams bill excludes any corporation which destroys competition by any unfair methods, including "temporarily or locally reducing prices." One of the New Jersey "seven sisters" meets quite specifically the language of the platform. It declares it a misdemeanor "to discriminate [in prices] between different persons * * * or sections * * * of the State * * * after making due allowance for the difference, if any, in the grade, quality, or quantity, and in the actual cost of transportation * * * if the effect or intent thereof is to establish or maintain a virtual monopoly, hindering competition or restriction of trade" [sic]. This provision, applied to "different persons and sections of the United States," adapts itself admirably to the platform requirement. It is not possible to discuss here the various statutes relative to unfair competition, or the various similar conditions that might be contained in the Federal law, but I wish to express the thought that the State in creating a corporation, and Congress in admitting it to interstate commerce "for the benefit of the public," may well require of it the highest standard of business ethics, even as to matters with respect to which the same standard might not so justly be required as a restriction of the liberty of the individual.

The last condition demanded in the platform is one to effect "the prevention of control by any one corporation of so large a proportion of any industry as to make it a menace to competitive conditions." This is perhaps the one item in the platform declaration which is not entirely specific. It may be met by a general condition in the language quoted, excluding a corporation from commerce if it acquires a dominance of any industry. It may, and perhaps should, be met by a provision limiting the capital to be employed in a particular industry. Limitation of capital was originally, and in theory is still, the rule in the creation of corporations. But to-day the limit is fixed by the corporation charter adopted by it under a general law, and not by a special charter granted by the legislature.

There is, of course, no question of the power of Congress to limit the capital of corporations engaged in interstate trade. Judge Smith's revision of the Williams bill asserts this power with striking efficiency. It excludes a corporation from interstate trade if its authorized capital "exceeds $200,000,000, unless a larger capitalization shall be permitted by special act of Congress, subject also to any lower limitation of capital which Congress may at any time prescribe for corporations engaged in any particular industry."

Let us summarize the conditions demanded by the platform. First, the only conditions which can be imposed on corporations engaged in interstate trade to prevent holding companies are (1) a condition that the corporation itself shall not be a holding company; that is, that it shall not have the charter power to hold stocks of other companies; (2) a condition that its stock shall not be held by any holding company, which can only be effected by requiring a charter prohibition against such holding, and may be met in part by a charter prohibition against the voting of any stock so held. Second, the only condition that will prevent interlocking directors is one that the corporation shall not have as a director a person who is a director in any competing company, and that can justly be effected only by requiring a charter pro-

vision declaring any such person ineligible as a director. Third, the only condition that will prevent watered stock is one that requires the stock to be fully paid or payable upon an actual valuation, and the most effective ultimate condition for this purpose is to make this a charter requirement; the charter law is the only one that is incapable of evasion. Fourth, the only condition that can be imposed by a "declaration by law" which will prevent discrimination in prices is one similar to that contained in the New Jersey amendment approved by Gov. Wilson. And, fifth, the most effective, if not the only condition to prevent the control of an industry by one corporation, is one that limits the capitalization of corporations engaged in particular industries.

These are the only conditions specifically required by the platform. They are the chief conditions necessary to the prevention of monopoly. Had they prevailed in the past, monopoly would not now exist. Would their requirement now destroy existing monopolies? For instance, what effect would they have on the common-stock control of the "dissolved" Standard Oil and Tobacco Trusts? Is it possible to meet the recent taunt of Senator Gallinger made on December 3, 1913, following the reading of the President's message, when he is quoted as saying that attempts to suppress private monopoly would "be about as successful as the Standard Oil suit, which has resulted in no change of ownership, no reduction of prices or of profits." The Democratic Party and individual Members of Congress will wish to go before the country in a situation different from that which confronted the last administration. They must present a fait accompli according with the letter and spirit of the antitrust declaration.

As an aid to the solution of this question of common-stock ownership, let us go back again to the origin of the corporation, and bear in mind the basic fact that "it is presumed to be incorporated for the benefit of the public." The State in creating a corporation should, and Congress when admitting it to commerce can, write at the head of every charter and into its every provision the words, "Salus populi suprema lex." The State creates a corporation on the assumption and with the intent that it shall be an independent business unit. The State has a plain right so to condition its organization as to safeguard this intent. The incorporators themselves, in the first instance, would be apt to desire such safeguards. The "buying-in" privilege peculiar to a corporation is a special privilege which does not exist with respect to a partnership. The State in granting this privilege should protect itself and the incorporators against the facility which it presents for the acquisition of control by competitive or monopoly interests. The simplest and most workable condition for this purpose is the requirement of a charter provision similar to that of the Williams bill, that no person representing or holding stock in a competing company should be eligible as a director or have "any vote or voice in its affairs." If such a provision were inserted in the charters of the various Standard Oil corporations it would not take very long to obtain competitive conditions between them. The several interests would separate themselves very quickly to secure the control of separate corporations. The Waters-Pierce interests have pointed the way toward such action.

It has been suggested that Congress might prohibit the voting of stock by a holder in a competing company, if done with intent to prevent competition. Even if such a law were constitutional, its enforcement would be extremely difficult and partial. The burden of proof would be upon the Government, or possibly the contending stockholder seeking to establish the intent. In the absence of any strong contest, the actual control would continue as it is. Here, as elsewhere, the problem can be rightly solved and permanently solved only by going to the root of the evil, requiring the corporation to be safeguarded by its charter law against control by competing interests. It is a safeguard which the State should require in the first instance, which experience and present conditions show to be necessary, and which Congress can require as a part of the conditions it now aims to impose on corporate organization.

The "interlocking" of corporate interests is the real evil. It can be made impossible only by charter safeguards which shall effectively prevent ownership of stock by a competitive interest. Short of this there are three degrees of prevention, if I may so express it. The first is the prevention of interlocking directors by the charter provision above mentioned. This is, I believe, of little practical value in cases like that of the dissolved Oil Trust, where each director remains a stockholder in all the constituent companies. Competition between companies so officered is impossible. The second degree, which would seem to be much more effective, is to require a charter provision that

no person representing a competitive interest, as director, stockholder, or otherwise, shall be eligible as director. The third and much more effective charter provision is that no such person shall be entitled to vote as a stockholder. The fourth and completely effective provision is that first suggested, that no such person shall acquire or hold any stock or any interest therein, directly or indirectly, placing a heavy penalty on its secret ownership with intent to exercise control. This should and could be required of a new corporation created by a State if it is to be made proof against acquisition by competitive interests. Whether the Federal law should go so far as to require so drastic a condition as to either existing or future corporations is an open question. The power is there, and if it any time its exercise seems necessary it should be used.

We can not meet this problem if we surrender in advance to the view that the State grants have by a process of estoppel become binding upon Congress, or that the rights acquired under them are too complex to be dealt with by an effective law. We should, I believe, prescribe conditions, to take effect at once, that will disintegrate and batter down the corporate walls of existing monopoly; but we must also prescribe conditions, to take effect within one, two, or three years, that will reach the creating power and prevent for all time the use of the corporate charter, whether granted by a State or by a foreign government, as a means of circumventing the Sherman Act or of monopolizing the Nation's commerce.

Any bill that is drawn will have to be carefully guarded as to its effect on existing corporations, first, to compel without evasion the complete disintegration within a reasonable time of all existing monopolies; second, to allow reasonable leeway for the amendment of charters of other corporations with a view to ultimate complete uniformity in the substantial safeguards to be required. With respect to holding companies, it may be said that though they owe their origin to the demand for monopoly powers, they have acquired some incidental legitimate uses which it may be possible not to destroy. I do not mean by this that they should be permitted as an institution, and prohibited only when used "with intent to create a monopoly," a provision that would throw us back on the existing law, but that the prohibition asserted and expressed might be accompanied by an exception, in effect permitting one corporation to operate, under subsidiary charters, separate branches of one business, treating it in other respects as a single corporation and not permitting it to hold less than 90 per cent of its subsidiaries' stock or to combine competing properties.

The adjustment of this far-reaching corporate reform to the actual business conditions of the country will not, I believe, be as difficult or drastic as one might at first suppose. It is directed primarily to requiring an amendment of the charters of corporations organized under the so-called liberal State laws. This can be done by each corporation for itself under the broad power given it to make or amend its own governing law. Reorganization will be necessary in some cases, but, as every corporation lawyer knows, reorganization is not a destructive or necessarily burdensome measure; it is readily effected for a business advantage or profit. Amendments of State laws will naturally follow, and a large amount of leeway can safely be given by the law to corporations already organized under conservative State laws. Permanent exceptions, however, need not, and I believe should not, be allowed as to existing corporations; and the ultimate aim should be to subject all corporations engaged in interstate commerce to a uniform standard of organization fully prescribed by a general Federal law. The result should be to give Congress the same complete power to protect the commerce of the Nation from corporate evils that any independent sovereignty has over corporations doing business within its territory, whether created by itself or by a foreign power.

The remedy proposed, says Senator Williams, "is the right one—efficient, sufficient, operating in the open and by force of prescribed law." Fully understood, it justifies rather than condemns the genius of our form of government. The power to grant corporate privileges remains in the State, subject always to the restrictive power of the General Government, a power that can be asserted not to create special privilege but only to protect the liberty of the individual against it. This, I take it, is the supremely democratic function of the Federal Government, the bulwark of our individual liberties, protecting the liberty of each by the force of all, against any special privilege created by the State governments.

First Tentative Draft.

PROPOSED PROVISIONS TO BE INSERTED IN FEDERAL LAW AMENDING OR SUPPLEMENTING SHERMAN ACT.

1. If a combination is formed or exists which substantially restricts the freedom of competition in any trade or industry, and if prices are artificially and unreasonably advanced, reduced, or maintained by such combination to the loss or injury of persons buying from or selling to such combination or any of its members, then such facts shall be sufficient, with evidence of the surrounding circumstances, to support a decision or verdict that such combination was formed or exists in restraint of trade.

2. If a substantial part of the stock of two or more corporations the business of which constitutes a substantial part of any trade or industry are held by the same persons or by persons acting in unison with each other, such fact shall be sufficient, with evidence of the surrounding circumstances, to support the conclusion that a combination exists in such person or between such persons with respect to the business carried on by such corporations.

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. SPRIGHT, *Clerk.*

TRUST LEGISLATION.

SERIAL 7, PART 16.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Monday, February 16, 1914.

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

The CHAIRMAN. The committee will be in order. We have invited Mr. Brandeis to be with us this morning. He is here, and we will be very pleased to hear from him.

STATEMENT OF MR. LOUIS D. BRANDEIS, BOSTON, MASS.

Mr. BRANDEIS. Mr. Chairman and gentlemen, at the outset I want to state that the recommendations of the President in regard to the proposed legislation in regard to so-called trusts, big business, have my unqualified approval, and I approve also the purposes indicated in the several bills prepared tentatively by this committee. Whatever I have to say by way of suggestion is wholly with the view to perfecting these bills, and I avail myself of the very hospitable invitation which the committee has extended to all citizens to aid in carrying out the broad purposes set forth by the President. My suggestions are partly matters of phraseology and partly they involve more important modifications of some of the provisions which have

been prepared by the committee. Some are substitutes for those provisions; and I also want to make certain suggestions by way of additions to the bills. All, however, with a view to carrying out their obvious and declared purposes.

With your permission I will address myself first to what appears in section 12 of the first bill, introduced by Judge Clayton, and appearing on page 5 of the compilation entitled "Bills and Resolutions Relating to Trusts, No. 2." That provision was obviously deemed by the President to embody a rule of great importance because it is practically the only suggestion, specific and definite in its nature, which the President has called to the attention of Congress. It is the provision by which, when the questions have been litigated between the Government and defendants, the decree or judgment rendered shall inure to the benefit of all who have been injured or affected by the acts declared and found to have been unlawful.

The importance of that provision is obvious when we recall the history of the prosecutions which have taken place, notably the proceedings against the Standard Oil Co. and the Tobacco Trust. In those cases the Supreme Court of the United States, upon a review of a very comprehensive record, found unanimously that beyond question acts had been committed in their nature not only illegal but obviously immoral, and that the combinations in each case had been effected in large part through the crushing of rivals, and yet at the end of these long proceedings in the court, following proceedings before the Bureau of Corporations, and a decree was finally entered in each case declaring that there should be a segregation, nothing whatever happened which could in any way redress the wrongs suffered by those who had been crushed; who had been, many of them, the heroes who had made it possible for the Government successfully to conduct its proceedings to a final decree.

That situation presented what almost amounted to a scandal in the administration of justice. Instead of the decree operating injuriously to the defendant it was followed by no consequences, so far as the long period of illegal and wrongful acts were concerned. Upon looking into that situation it became perfectly obvious why that was the result. It was because none of those who had been injured could, under the then existing law, recover for the injury that had been done them by these illegal acts except through the institution of new proceedings, and they would not, in any way, have benefited from the decrees which had been entered except so far as the facts there developed might make it easier to present evidence to a court. This further fact was presented, that as these proceedings had covered a long period of time, even if the parties were alive and could proceed against the offending corporations, such proceedings would be barred by the statute of limitations, and the result, therefore, was that these great signal proceedings against the trusts were, so far as those who had been previously injured were concerned, of no effect in redressing any existing grievance.

Now, the President saw that situation. He had occasion, during the campaign, to comment upon that situation, and it impressed him, as it had many others, not only as showing the inadequacy of the machinery of the antitrust law, but as throwing discredit upon the whole judicial system, and, therefore, that it was absolutely neces-

sary to correct that situation. And with a view to correcting it your committee has carefully provided that a final decree or judgment entered in a Government proceeding shall be an estoppel of which others may have the benefit of proceedings subsequently brought to redress grievances arising from the same set of facts.

Now, I understand from the press that that provision has been challenged as being unconstitutional, and that the ground of that claim of unconstitutionality is that the provisions of your bill do not provide for a mutuality of estoppel; that it is an infringement of some of the fundamental rights guaranteed by the Constitution, and particularly the fourteenth amendment. Now, I conceive that that contention rests upon a failure to recognize both what the rule of estoppel is and what its effect is when applied to a particular case. The rule of mutuality in estoppel, which is ordinarily applied, is not any rule of fundamental right, and it is not a mere matter of judicial procedure.

In one respect it involves a fundamental right, namely, the right to be heard, the right to have a hearing, and a full judicial hearing, but there is no rule whatsoever that where a litigant has had his day in court, where there has been a full opportunity for a legal hearing, that the person who has been heard can not be bound unless some other person who has not been heard is also bound. Now, that is the situation here. This provision undertakes to declare that when the Government has undertaken this proceeding, in which every defendant has had the fullest opportunity to be heard, that as the Government has brought this proceeding, not only on its own behalf but on behalf of all persons who may be interested and who care to connect themselves with the proceeding, that when that decree is entered they may have the benefit of it. Take a perfectly simple instance, which greatly resembles it. Suppose one stockholder brings a proceeding in equity against a corporation, a minority stockholder, alleging what he must allege under equity rules, that he sues not only on behalf of himself but on behalf of all other persons similarly situated who desire to participate in the proceeding. He must begin his bill in that way; otherwise it would be demurrable. And if he proceeds in that way, at any time during the conduct of that case, in the discretion of the court, any other persons similarly interested may intervene, and, having intervened, may get the full benefit of that proceeding. And one of the benefits may be obtaining redress for some particular grievance which he has suffered.

If he intervenes, if he undertakes to avail himself of that procedure, of course, he is bound by the decree, because he has become a party to the proceeding; but if he does not choose to do so he is not bound; it is wholly optional with him. The defendant in no instance can complain, because he has had a full opportunity to be heard; he has been heard, he has introduced his evidence; and when that situation has been disposed of he has had his day in court, and the judgment may inure to the benefit of any other person who may be interested. When, however, some other stockholder has not cared to proceed in that case he is not bound by that decision.

Now, the cases in which that rule is applied, or in which that same principle is applied, are very numerous. Mutuality of estoppel is enforced in every case where it is essential that a person whose interests are to be affected shall have the right to be heard, but it is

not enforced to the extent of saying that although a man has had the right to be heard, and has been heard, that the judgment entered against him may not serve as an estoppel against him in favor of some other person. The cases which have been decided on that point, as I say, are very numerous. One of the most frequently cited of the cases is the Portland Gold Mining Co. *v.* Stratton's Independence (158 Fed. Rep., 63), in which the decision was rendered by Judge Van Devanter, then on the circuit and now justice of the Supreme Court. He says this:

> Thus it is settled by repeated decisions that the general rule that one may not have the benefit of a judgment as an estoppel unless he would have been bound by it had it been the other way is subject to recognized exceptions, one of which is that in actions of tort, such as trespass, if the defendant's responsibility is necessarily dependent upon the culpability of another who was the immediate actor and who, in an action against him by the same plaintiff for the same act, has been adjudged not culpable, the defendant may have the benefit of that judgment as an estoppel even though he would not have been bound by it had it been the other way. And we think it could not well be otherwise, for when the plaintiff has litigated directly with the immediate actor the claim that he was culpable, and, upon the full opportunity thus afforded for its legal investigation, the claim has been adjudged against the plaintiff, there is manifest propriety, and no injustice, in holding that he is thereby concluded from making it the basis of a right of recovery from another who is not otherwise responsible. To such a case the maxim, "Interest reipublicae ut sit finis litium," may well be applied.

Judge Van Devanter then cites about a dozen cases in support of that proposition, and which do support it.

In another case, one of the cases referred to, Spencer *v.* Dearth (43 Vt., 98), where this same doctrine of mutuality of estoppel was invoked against holding a judgment effective as against one who was not a party to the suit, and would not have been affected by it had it been the other way, Judge Wilson said:

> It is said that estoppels should be mutual, but it is shown by the authorities above cited that the rule of strict mutuality of parties is not universal. The rule is technicality and it should not be applied where it can not stand upon sound reason.

I will not detain you gentlemen with the citation or reference specifically to the other authorities, but I feel sure that when you examine them you will find that the suggestion which has been made that this provision is unconstitutional is entirely unfounded; that it is a suggestion which rests upon a misapprehension. In your wisdom as a legislative body you can decide whether or not this doctrine of mutuality should be applied, and it is only as a question of legal policy that you have any occasion to consider it, and when it comes before you as a question of legal policy, as it does, can there be any real difficulty in your reaching a decision? Here is a complete, full trial; the defendant, in resisting the Government, undoubtedly will have adduced all the evidence and all the arguments which possibly could be adduced to establish innocence; and if, in the opinion of the court of last resort, the defendants have failed to establish that innocence, can there be any question about the adjudication entered, which may ordinarily, in an equity suit, declare, through injunction and otherwise, a cessation of the wrongful acts, and, as an incident to that, that each and every person may have an opportunity to then seek redress for the injury which has been suffered? Now, so much for the constitutionality of the provision which you have proposed as section 12, supplementary to the Sherman law.

In the phraseology of that section I venture to suggest a slight change in the interest of clarity and of brevity. It is to strike out from line 17 what follows the word "nations," all of line 18 and line 19, and the word "monopolize" in line 20, substituting for it the following: "such judgment or decree." Then strike out the words "judgment or decree" in lines 20 and 21 and substitute the word "it," so that it would read "such judgment or decree shall, to the full etxent to which it would constitute in any other proceeding an estoppel as between the Government and such defendant," inserting the word "defendant" instead of "person." That is, of course, a slight change in phraseology which, I think, will make it somewhat clearer than it is. In addition to that change and with a view to carrying out the purposes which your committee has in mind, I suggest that there be given specifically the right to intervene. It seems to me that it will aid greatly in granting to the individuals who have been injured redress for their grievances and protection against threatened injury. If they have the right, subject always to the control of a court of equity, to intervene in the proceedings and to seek redress from the tribunal which has the cause before it and which is familiar with the facts, I think it will be of great advantage.

Mr. CARLIN. You mean you will allow C and any number of others to intervene?

Mr. BRANDEIS. Yes.

Mr. CARLIN. If you should allow C to intervene, and so on down the line, you would have the court trying a dozen different causes of action at one time.

Mr. BRANDEIS. But the court does that in very many equity suits, a suit which involves a receivership or a suit which involves dealing with large properties, and the court does it almost of necessity. Now, the ability to deal effectively with such a case depends upon the detailed knowledge of the facts. It seems to me that where there have been inadequate decisions or erroneous decisions it has largely been because the courts have not been sufficiently familiar with the facts, and to get real relief an injured party must be able to come before a tribunal which is capable, through the knowledge it has acquired, of dealing with all phases of the situation, because it is in equity that those cases are brought for the purpose of stopping wrongful acts committed or alleged wrongful acts committed by defendants or to break up combinations. Now, what those acts are, what the circumstances are, all of the details of that situation, the court is or becomes familiar with, although it may be incidental, as it is in an ordinary railroad foreclosure procedure or an ordinary receivership matter.

Mr. CARLIN. What I was driving at is this: A defendant has the right to know, when he is brought into court, just what the complaint against him is. Now, you bring him into court on the complaint of A, and he answers or demurs, and afterwards, according to your idea, you would allow 100, more or less, petitions to be filed involving new subject matters and perhaps new causes of action. Now, that might be all right as to the petitioners, but the defendant ought to have some rights.

Mr. BRANDEIS. He has all the rights there are. I will submit, in the first place, that when he is brought into court the A which you refer to is the Government.

Mr. CARLIN. Not under this section.

Mr. BRANDEIS. Yes.

Mr. CARLIN. That section provides for an individual having the right to intervene.

Mr. BRANDEIS. Perhaps I have not made myself clear, because the right of individuals that I speak of is the right of intervention in Government suits. Perhaps I had better read the the paragraph which I have in mind.

Mr. CARLIN. You were discussing section 13, which has reference to suits of individuals using the Government's decree, of course. Now, I understood you to mean that where an individual had brought suit under that provision and was taking the benefit of the Government's decree, that you would allow all other individuals to intervene. But if you have reference to the Government's suit, that is another thing.

Mr. BRANDEIS. I did not make myself clear, and I beg your pardon and the committee's pardon. So far as section 12 was concerned, I meant merely to devote myself to the single question that the decree in the Government's suit should inure to the benefit of anybody who desired. That left the question open as to what the proceeding should be in which one might take the benefit of it. It might be an entirely independent suit, an action for damages, or a right to proceed in equity as conferred by another section. I desire to urge that there be given specifically the right to intervene in the Government's equity suits just as a man now has the right to intervene in an equity suit for the foreclosure of a railroad mortgage or in an equity suit for the appointment of a receiver for any particular corporation.

Mr. CARLIN. Your suggestion, of course, would be by way of amendment to the Sherman Act and not this section?

Mr. BRANDEIS. Precisely; it is really an additional section, and I bring it in now, because it would affect a subsequent part of this section—that part dealing with the statutes of limitations. Now, on that point I suggest the following:

That in any suit begun by or on behalf of the United States in which a judgment or decree interlocutory or final has been entered that the defendants, or any of them, have been guilty of conduct prohibited by section 1, section 2, or section 3 of this act, if it shall appear to the court by intervening petition of any other person that such person claims to have been injured by such conduct, such person shall be admitted as a party to the suit to establish such injury, if any, and the damages resulting therefrom, and such person may have judgment and execution therefor or any other relief to the same extent as if an independent suit had been brought under section 7 of this act. In the course of such proceeding the court may grant orders of attachment or may appoint a receiver or may take such other proceedings conformable to the usual practices in equity as to insure the satisfaction of any claim so presented and the protection of the petitioners' rights. Nothing done under this section shall be permitted to delay the final disposition of said principal proceeding in all other respects, and nothing contained in this section shall be taken to abridge the right of any person to bring an independent suit, as provided under section 7 of said act; but if any person proceeds both by intervening petition and by independent suit, the court may order an election.

Mr. DUPRÉ. Are you reading from the printed bill?

Mr. BRANDEIS. Yes; that section appears in the Ivanroot bill and in the La Follette bill. I think it appears in the Stanley bill and was in the Oldfield bill.

Mr. FITZHENRY. From what page were you reading?

Mr. BRANDEIS. I was reading from page 497, of volume 2, Bills and Resolutions Relating to Trusts, and it there appears as section 14.

Mr. CARLIN. It has been suggested to the committee that we ought to change this and turn it around; that where an individual brings a suit under section 13 that we permit him to include the Government in the suit. What do you think of that suggestion?

Mr. BRANDEIS. I should strongly oppose that provision, and I think the objections to it are obvious. In this connection I desire to suggest some change in the phraseology of the balance of section 12, which relates to the statutes of limitations, and that change is practically embodied in section 15, following the one I was reading, which is as follows:

That such intervening petition or an original suit for the same cause under section 7 of this act shall not be barred by lapse of time if begun within three years after final decree or judgment entered in a suit brought by or on behalf of the United States establishing such violation by the defendant or defendants of section 1, section 2, or section 3: *Provided*, That the claim on which such intervening petition or original suit is founded was not already barred at the time of the passage of this act.

Mr. CARLIN. What were you reading?

Mr. BRANDEIS. From page 498, of volume 2, Bills and Resolutions Relating to Trusts, the section following the section I just read. It seems to me very important that every person should be relieved from the necessity of attempting to enforce his own claim until the Government should have successfully conducted its case. The Government is proceeding on behalf of all not only to stop a wrongful combination in the future but to enable others to obtain redress. Now, until the Government has obtained a decree to the effect that that act is wrongful there ought to be no action by anyone, but after the Government has obtained that decree there ought to be given a reasonable time within which to get together the facts.

Mr. CARLIN. Even as to those who have intervened?

Mr. BRANDEIS. Yes; even as to those who have intervened. Those who have intervened, of course, have complied with this provision; they have brought their proceedings within the time, and the whole case is before the court; the record is there, everything is there. It is just like giving time, in an ordinary foreclosure suit, to the bondholders and all other persons interested to come in and prove their claims, or giving time in an ordinary dissolution and winding up suit to those who have claims to come in and prove their claims. It is merely giving ample opportunity for the doing of those things. There may be a question as to what that time should be, three years or two years, but it ought to be a time which would enable those who have been injured unreasonably to know all about these matters and have an opportunity to get together all of their facts and come in to prove their damages.

Mr. FLOYD. Right in that connection, you suggest that section 15 be added.

Mr. BRANDEIS. Well, it is a substitute.

Mr. FLOYD. If section 15 were substituted it would only apply to those who intervene? It refers to the interveners.

Mr. BRANDEIS. It refers to an intervening petition in the original suit. I merely brought it in now because the provision which you have in your bill deals only with the original suit.

Mr. FLOYD. I see. What would you suggest about the provision as drafted in the tentative bill providing that those who had a cause of action at the time of the institution of the Government suit should

have the statutes of limitations suspended as to them during the pendency of the suit? Do you think section 15 would have the same effect?

Mr. BRANDEIS. Section 15 would have the effect that nobody would be barred who had not been barred at the time the Government began its suit. It would give an opportunity to anybody to take advantage of the suit, not only those who had claims when the Government brought its suit, but those whose claims accrued while the Government was pressing the suit.

Mr. FLOYD. It would only bar those who were barred at the time the Government instituted its suit?

Mr. BRANDEIS. Yes; those whose suits were barred. Now, in very many cases the Government brings its proceeding because certain persons called it to the attention of the Government, and while the Government is in controversy over the subject and litigation is proceeding, no citizen ought to be called upon to do anything except to await a decree. Then he ought to have the opportunity to come in and get some redress for the wrongs found to have been committed.

Mr. GRAHAM. Would not that last suggestion conflict somewhat with your prior suggestion of intervention?

Mr. BRANDEIS. No. In the first place, I referred to specific intervention, and the intervention I referred to was intervention after the decree had been entered; and in the second place, intervention was not compulsory; it was to be optional. It was merely to be allowed for the purpose of aiding the individual. As a matter of fact, it has been and always must be an extremely difficult thing for anyone to get redress; it certainly has been practically impossible for anyone to get redress up to the present time. It might prove very difficult for an individual to conduct certain litigation. It might prove burdensome for some one to conduct litigation by intervention; that is, some one living in California interested in a suit in New York City. Under those circumstances the litigation could only be pursued where the defendant could be served.

Any other course would be an injustice to the defendant and would not facilitate the proceedings, so far as the plaintiff was concerned. Therefore, it would seem to me wise to provide in the law for specific intervention in each suit.

Mr. GRAHAM. To my mind the analogy between the railroad proceeding and this proceeding does not appear to hold. In this proceeding there is a wrong inflicted which the Government is proceeding to redress. Now, it seems to me, that is a separate and distinct proceeding. In the case of the private suitor, he is seeking damages for a wrong that has been done to him personally, to his property or to his business. The analogy would appear to be more like a case where a man is pursued for a crime, say, assault and battery. You would not allow a person to intervene in a Government suit brought for the purpose of trying the question of damages arising from that wrongful act. It seems to me that you confuse the issues and allow a multiplicity of issues, which the law frowns upon.

Mr. BRANDEIS. Let me see whether I can make my position more clear. In any claim which the Government has against defendants alleged to have violated the Sherman law there are three questions which would arise—three main questions. One is whether the defendants have been guilty of a combination in restraint of trade or an

attempt to establish a monopoly. The second question is whether by that combination or attempt they have injured the plaintiff, and the third question is, if they have been guilty of a wrong and have injured the plaintiff, what are the damages which the plaintiff has suffered.

Mr. GRAHAM. That is right.

Mr. BRANDEIS. Now, in that question the one point as to which there is difficulty of establishing the facts, and on which the proceeding was so voluminous in the Standard Oil case as to fill 24 printed volumes, is the question as to whether or not there is an illegal combination. In that issue, which is the only issue which the court will have acted upon in finding its final decree in favor of the Government, there is great need that an individual seeking redress shall be aided by being relieved from the necessity of proving that and hence the preparation of section 12. Now, that being out of the way there remain these two questions——

Mr. GRAHAM (interposing). Let me ask you a question right there. Do you not accomplish what you seek to accomplish by making that decree an estoppel against the defendant?

Mr. BRANDEIS. I accomplish that part of it, but that is not all.

Mr. GRAHAM. And then you leave a clear and definite issue to be settled in a subsequent suit. Did that monopoly or combination affect the person who is suing, and what damage did he suffer?

Mr. BRANDEIS. No. I think there are two or three answers to that. Because of the difficulties involved, the issues are not perfectly clear and definite. Every intervening petition will present an entirely separate issue between the plaintiff and defendants. However, each case is to be taken up in that court because that court is able, from a general knowledge, to deal with it, and also because——

Mr. GRAHAM (interposing). It is really a distribution of assets.

Mr. BRANDEIS. No; it is not really a distribution of assets. But it would be of very great advantage to have the issue come before a court that is familiar with all the circumstances. Take this question, the question as to whether a petitioner has been injured. Take the tobacco suit, the question whether an individual man, a little tobacco dealer down in Alabama, Oklahoma, or any other place, has been injured by the Tobacco Trust. It is not merely a question whether you have an illegal trust, but it is a question which takes in all of the circumstances, the methods of doing business, etc. All of that would be of the greatest advantage to the court in determining whether this individual man has been injured or has not been injured. It releases the plaintiff from all the necessities of proving it, but that does not settle the question.

This court has got to be aided, as far as it can be aided, in dealing intelligently with that situation, and aided by the great background of knowledge which comes from that situation; the court needs all of those things in facilitating a decision. But more than that, in this case we may be dealing not only with the question of redress for past grievances, but the restraining of future grievances, and the court may have to deal with the situation of securing payment in satisfaction of the claim. Now, on all those matters this court can decide. There is no possibility, to my mind, of confusion, because the record on this intervening petition is an entirely separate and distinct record from anything else. But we have one situation which

can only be adequately, economically, and efficiently dealt with, in many instances, in the court; that is——

Mr. CARLIN (interposing). When would there be a final decree in a suit in which you allowed intervention?

Mr. BRANDEIS. Which final decree? The final decree for the Government?

Mr. CARLIN. Yes. It seems to me that your provision ought certainly to provide that when the Government's decree is entered the right of appeal shall apply, so as to overcome the statutes of limitations. As you know, it is necessary to have a final decree sometime and somewhere.

Mr. BRANDEIS. We would have a final decree. Take the Tobacco case. The final decree in the Government's suit was when the circuit court entered its decree.

Mr. CARLIN. I am asking when there would be a final decree if your suggestion were followed that 100 intervening petitions be allowed? The suit would have to be determined under all known rules of equity.

Mr. BRANDEIS. The final decree——

Mr. CARLIN (interposing). There must be an end to the suit sometime, but it would not be final until all matters have been disposed of, unless you provided specifically for it.

Mr. BRANDEIS. I think it would be final, so far as the Government's end is concerned, when the final decree was entered. For instance, a case goes to the Supreme Court, and when the Supreme Court sends down its mandate ordering a decree affirming the judgment below that, I take it, would be the final decree.

Mr. CARLIN. The question is how to get it there. I am just talking this over with you, because if we are going to rig it up we want to rig it up in a practical way.

Mr. BRANDEIS. I have supposed that that language was clear, but if it is not clear we ought to make it so.

Mr. FLOYD. Now, going back to the question of limitation. We studied those provisions very carefully, both in the La Follette bill and in the Lenroot bill, and we ran onto this difficulty: If you should give every litigant who had a cause of action that was not barred by the statute of limitations at the institution of the Government's suit, three years after the final termination of the suit, the effect of it would be to give certain litigants a longer period of limitation than others. For instance, a man who had a cause of action which originated three years and eleven months previous to the institution of the Government's suit would have a period in which he would have a legal right to bring his suit of six years, or five years and eleven months, and the only way we could fix a uniform period of limitation, barring the period that was suspended during the pendency of the suit, was to fix the provision as it is fixed in the bill.

Mr. BRANDEIS. I do not see that any very great hardship would be done by allowing him a little longer. Of course, the whole point of the statutes of limitations is the question of convenience. It is merely a question——

Mr. FLOYD (interposing). I know; but is it not sounder principle to have a uniform period of limitation than——

Mr. BRANDEIS (interposing). I would have no objection to the uniformity of the period after final decree has been entered, and I did not mean to say three years is necessarily the right one. A shorter period might be better.

Mr. FLOYD. You can see that if a party had the right to bring a suit two years and eleven months previous to the institution of the Government's suit that that would give him a superior right over other litigants.

Mr. BRANDEIS. That might be so, but you take the record of the last 23 years. You might practically say that section 7 has been a dead letter. The instances where anybody has obtained rights are so few, although the instances where men have been injured are so numerous, that section 7 has been practically a dead letter. This right to bring a proceeding before the Government has taken over and carried the burden of enforcing the law is a perfectly barren right; it is a mere paper right, and whether that person has had three years and eleven months of five years and eleven months it seems to me is an entirely immaterial proposition, because it is of no practical value. The only thing that is of value is that after the Government has entered its decree the man shall have a reasonable time within which to bring suit. I think three years is not too long a time. I think the period ought to be ample enough to enable a man to turn around and get himself into a position to get redress.

Mr. MORGAN. What do you understand to be the object and purpose of section 12? Has that ever been discussed? That, is it merely to give individuals the right of redress which they do not now have in a practical way or do you understand that it is to help prevent combinations or help prevent violations of the Sherman antitrust law? In other words, is it to help individuals to have a right of action whereby they can get redress or is it to prevent monopoly?

Mr. BRANDEIS. It is both, and I will tell you why.

Mr. MORGAN. What is the primary purpose of it? That is what I am after.

Mr. BRANDEIS. In the first place, so far as the individual goes, as I stated before, section 7 of the Sherman Act is practically of no value whatever, because the burden can not be borne by an individual. If you give an individual the benefit of such a decree his ability to sue is so facilitated that you can reasonably rely upon his seeking and obtaining redress for that injury as well as for ordinary injuries that occur to him through other breaches of the law. Consequently, you make it possible for him to get redress. At the same time, in making it possible for the injured party to get redress, you are supplying one of the greatest deterrents that there is against the violation of the law. In nearly every instance, the individuals who have been injured, the competitors who have been crushed, are members of the community who have caused the Department of Justice to act and who have set at work the machinery of justice in these cases.

Now, if you give to individuals the expeditious means of securing relief when a wrong has been perpetrated, you have provided the greatest possible deterrent to the perpetration of that wrong, and for this reason: If the question were merely a question, in the case of corporations, of recovering an amount of damages, the corporation would go ahead and say, "We will take our chances." But the law

has wisely provided that not only may the plaintiff recover damages but that he may recover triple damages for the injury he has suffered and reasonable counsel fees. There you have something which, in the case of many violations of the law, would present a real deterrent. I have very little faith myself in the deterrent effect of a criminal penalty, because jurors will not convict. The necessity of proving beyond a reasonable doubt presents such difficulties, as well as the fact that the people who are doing these things are doing them in the excess of zeal of business in many cases, that it is difficult to secure a conviction; but I think, on the other hand, that if anyone knew that in conducting his business in such a way as to get the advantages which come from combination and destroying competitors a day of accounting was sure to come and there was a possibility of the payment of triple damages for the wrongs done to these competitors, there would be the greatest hesitation before a man took such chances. The point is this, that all of these defendants have said: "We will take chances; we can not lose; there is not anything that can happen to us by which we are going to lose. We are going to take a chance. If we win, we will go on. If we fight our case hard and lose, we will have extended the period of time during which we could enjoy these illegal profits." And that is exactly what took place in the tobacco case and exactly what took place in the Standard Oil case, and it is, I submit, exactly what is taking place in the shoe machinery case.

Mr. CARLIN. Let me call your attention to the fact that there is now pending, I understand, in Louisiana against one defendant something like 500 suits. Now, if the Government had brought——

The CHAIRMAN (interposing). Against the Sugar Trust.

Mr. CARLIN. Yes; individual suits. Suppose the Government had preceded those suits with its own suit and those 500 different people had intervened by 500 different petitions, how may appeals would you allow? How would you arrange for appeals under those circumstances? Where you have 500 different causes of action growing out of 500 different circumstances or 500 different acts at 500 different times, affecting each individual differently, it seems to me that you have got to have some provision for an appeal.

Mr. BRANDEIS. It may be that we ought to make some provision, and I know perfectly well what I would do. My only thought is whether it would be done.

Mr. CARLIN. What would you do?

Mr. BRANDEIS. I should have an appeal from the main decision.

Mr. CARLIN. You would segregate that?

Mr. BRANDEIS. Yes, sir; absolutely. In regard to the individual cases, it seems to me that each one may properly stand upon its own bottom.

Mr. CARLIN. Would you not have to suspend a decision in the individual cases until the final decision in the main case was rendered, because that is the decision from which the individuals would expect to get benefit.

Mr. BRANDEIS. Of course, a court of equity could suspend a decision if it was necessary and proper in the conduct of the case. Those questions come up nearly all the time and could be easily disposed of. The court would not allow a man to get damages until it was known whether the defendant was guilty. I think that is perfectly clear. No court would think of doing that.

Mr. CARLIN. That is, you would have to wait until you had settled on the decree?

Mr. BRANDEIS. Yes; and there probably never would be any individual cases brought until the decree had been settled upon.

Mr. CARLIN. You will consider that the provision which you have just read would give the right of intervention?

Mr. BRANDEIS. Yes; and I would not limit it in any way, because the circuit court can always take care of itself. There may be cases where it would be proper to intervene at a much earlier time, but whether that be so or not can be left to the decision of court. All questions of advancing the proceedings from time to time are left to the discretion of courts of equity. I do not think we need to deal with the details of that. What we should do is merely to give the power which does not now exist. I think that if there is any question—and the very fact that you raise it shows there is a question—as to the exact operations of these provisions they ought to be made entirely clear.

Mr. WEBB. A moment ago you spoke about the importance of the court knowing all the facts brought out in the Government's suit in order to mete out justice in private suits?

Mr. BRANDEIS. Yes.

Mr. WEBB. Would you make the evidence taken in the Government suit evidence also in the personal suits?

Mr. BRANDEIS. You have the benefit of the decree and I think you should have that also. We have a somewhat similar situation before the Interstate Commerce Commission in dealing with questions there. The interstate commerce act provides that where a rate is declared to be unreasonable that there shall, under certain circumstances, be reparation. Now, the commission decides on the question of reparation after the question of the reasonableness of the rate has been disposed of. That is not nearly as strong a case as the one we are advocating, but it is somewhat analogous. I do not believe they have experienced any great difficulty in dealing with that case.

Mr. WEBB. Do you think that any of the sections of the three bills would give that right to the personal plaintiff?

Mr. BRANDEIS. The right of intervention?

Mr. WEBB. No; to use evidence taken in the Government suit as evidence in a private suit?

Mr. BRANDEIS. I should want to consider that carefully. That precise question had not occurred to me and I have not given it any attention.

Mr. CARLIN. A great many suggestions have been made to us with reference to these two sections, 12 and 13. Now, section 13 is one which gives the individual the right to injunctive relief. It has been suggested to us that we ought to give the individual the right to file a bill in equity for the dissolution of one of these combinations, the same right which the Government now has and which it is its duty to perform. What do you think of that suggestion?

Mr. BRANDEIS. I think that is not a sound one. It seems to me that the right to change the status, which is the right of dissolution, is a right which ought to be exercised only by the Government, although the right for full redress for grievances and protection against future wrongs is a right which every individual ought to enjoy.

Now, all of this procedure ought to be made so as to facilitate, so far as possible, the enforcement of the law in aid, on the one hand, of the Government, and in aid, on the other hand, of the individual. But that fundamental principle is correct, that the Government ought to have the right, and the sole right, to determine whether the circumstances are such as to call for a dissolution of an alleged trust.

Mr. CARLIN. The same party made these suggestions to the committee, as I recall, with reference to those two sections: First, that an individual should have the right to include the Government in a suit brought for injunctive relief under section 13; second, that he should have the right to apply for the dissolution of a combination; and, third, that when the Government was interested in the suit that the court should assess the costs and counsel fees of the Government against the defendant. What do you think of those three suggestions?

Mr. BRANDEIS. I do not think well of any of them. It seems to me that if those suggestions were adopted that any citizen, instead of the Department of Justice, would be charged with the administration of the law; and so far as the last proposition is concerned, fixing compensation, we should be adopting an entirely new principle of law; that the Government could get compensation from the defeated party which, I think, would be new. As I say, I do not think well of any of them.

Mr. CARLIN. Do you approve of section 13 of the bill?

Mr. BRANDEIS. Is that the section giving an individual the right to injunctive relief?

Mr. CARLIN. Yes.

Mr. BRANDEIS. I do. It seems to me that it is all in line with the things that I have been endeavoring to discuss.

Mr. GRAHAM. That applies only to threatened injury, as I understand.

Mr. BRANDEIS. Yes. I myself feel that the authority of the court should go further, and there are some other provisions that I want to refer to. I think that when this proceeding has been brought by the Government, which is for the protection of the whole people, that anybody who believes himself to be aggrieved by the thing that has been done ought to have an opportunity to come before the court and ask for protection. It may be that the action is against the Oil Trust or the Tobacco Trust or any other trust, the claim being that they are being crushed out of existence, and while the court is carefully going into those facts these individuals say, "Here is our situation; you know about it. Give us protection." But what that protection should be I would not let them say, but I would give the right of injunction to anyone, so as to make the act really effective and the ability of the court to deal, upon interlocutory application, with such a condition. That may be the most important way of effectually enforcing the law.

Mr. GRAHAM. But they would not get the relief desired upon the interlocutory application.

Mr. BRANDEIS. Courts are always giving relief upon interlocutory applications.

Mr. GRAHAM. But this provision is for the purpose of granting injunctive relief at the end of the hearing.

Mr. BRANDEIS. That is the purpose of every suit that you bring for injunction. I see nothing in the act whatever which changes the ordinary powers of a court of equity to grant relief to the plaintiff, namely, the Government, and which, according to the recognized rules of equity, it could not grant. I think we should recognize that there is somebody else, some individual, who may need protection, and the very recognition of the fact that he may need protection would probably be most effective. It is the existence of the remedy which would be the greatest deterrent.

Mr. GRAHAM. How far is this an invasion of the constitutional right of trial by jury?

Mr. BRANDEIS. I do not think it is an invasion at all, and that it is subject to the same general rules which are applicable in a receivership proceeding, a bankruptcy proceeding, or any of these other proceedings. When issues are raised on an individual claim the court, under certain circumstances, should grant the request that the issues go to a jury. And under other circumstances it will not be found necessary to send the issues to a jury. In these ordinary cases the rules of a court of equity should be applied. Here there is nothing denied.

Mr. GRAHAM. I appreciate that.

Mr. BRANDEIS. If the Government brings a suit it brings it like a stockholder's suit, for itself and for the benefit of all who may come in, and then you have the ordinary situation which you have in foreclosure and receivership suits. In any of these actions every man who has a claim can come in and establish his claim under certain circumstances. There may be a need for a trial by jury, and if so the particular issue would be referred to a jury. But I should not in any way interfere with whatever the rules of the court are in that respect. Now, there are two——

Mr. VOLSTEAD (interposing). Before you leave that, let me call your attention to the last part of section 12, that part referring to the suspension of the statutes of limitations. Is it not true that under the provision as written a suit which originated during the pendency of the action would not be covered by this——

Mr. BRANDEIS (interposing). By the statute?

Mr. VOLSTEAD. By this provision.

Mr. BRANDEIS. It could be barred, whereas the suit that existed at the time it began would not be barred.

Mr. VOLSTEAD. That is how it seemed to me.

Mr. BRANDEIS. Now, Mr. Chairman, there are several other provisions relating merely to the matter of remedy, which appear in the Stanley and the Oldfield bills, and also in the Lenroot and the La Follette bills, in whole or in part, which seem to be important to be considered.

Mr. CARLIN. Section 12 in the tentative bill No. 1 was taken from the Lenroot bill, except so far as that part relating to the statute of limitations is concerned.

Mr. BRANDEIS. Yes; that is what I just answered.

Mr. CARLIN. Yes. I mean our section 12 of tentative bill No. 1 was taken from the Lenroot bill bodily, with the exception of the part which refers to the statute of limitations.

Mr. BRANDEIS. So I understood.

Mr. CARLIN. There was in the Lenroot bill a different rule with reference to the application of the statute of limitations from the rule which we put into this section of tentative bill No. 1.

Mr. BRANDEIS. Now, there is one provision which appears in those bills in regard to the powers of the court. I happen to have before me section 17, on page 500 of this committee print of bills and resolutions, which sets forth certain powers that a court shall have, and I shall read that section, with the permission of the committee:

SEC. 17. That whenever in any proceeding under section 4 of this act any combination has been adjudged illegal under section 1 and section 2 of said act the court before which such proceedings are pending shall have jurisdiction—

(a) To partition any property owned under any contract or by any combination mentioned in section 1 and section 2 of this act in severalty among the owners thereof, or groups of owners thereof, and if the owners include one or more corporations among the several stockholders thereof, or among groups of the several stockholders thereof, all in proportion to their respective interests.

(b) If sales of such property are necessary or proper, either to pay debts or encumbrances thereon or to re-create conditions in harmony with the law, to sell such property as a whole or in parcels; and the court may forbid the said owners, and if the said owners include one or more corporations, the stockholders thereof, from purchasing at such sales, and may prescribe the conditions on which any purchase may be made by any person whatsoever.

(c) To make such restraining orders or prohibitions as may be necessary and proper to re-create conditions in harmony with the law, including prohibitions of any acts, conduct, methods, or devices which are enumerated herein as indicating unreasonable restraint.

(d) To declare void, as against the defendants, or any of them, any contract entered into as a part of the combination found to be in restraint of trade.

The relief granted in this section shall be in addition to, and not exclusive of, other relief permitted by this act or otherwise by law.

Mr. CARLIN. Mr. Brandeis, which of those supposed powers does the court not already possess?

Mr. BRANDEIS. In my opinion the court possesses, and has possessed, all those powers, but the very learned circuit judges of New York who passed on the Tobacco case, in which I happened to be counsel for some of the defendants, were of opinion, apparently, that they did not possess those powers, and the very eminent counsel for the tobacco companies asserted most strongly that the court did not possess some or all of those powers.

As a matter of fact, there was much discussion of the actual and almost the revolutionary character of the remedies which it was proposed that this court should exercise in carrying out the decree of the Supreme Court.

Unfortunately, we did not have an appeal as we should have had, from the decision of the circuit court judges. Because we did not have it, and because of the action there, and the fact that the judges were very eminent and were located in what is, perhaps, officially, the most important circuit of the United States, it seemed important to make it desirable to set forth clearly the existence of these powers. If the court has the power, then no harm is done. If any judge should be in doubt now as to whether he has the power or not, that doubt will be removed, and it is one of the great purposes which the President and all of us have been desirous of accomplishing, in the removal of uncertainties in the law, and it has seemed to me it would be of great educational value at least to set forth these provisions distinctly in the law.

Mr. McCOY. Do you think Congress can create any new equity?

Mr. BRANDEIS. I think Congress can clearly define equitable powers. I do not think we have got to stand by the equitable powers which existed at the time of the adoption of the Constitution of the United States.

Mr. McCOY. Would you look upon things that are suggested to be done here, in what you have just read, as pertaining to procedure?

Mr. BRANDEIS. I think so. It is merely endeavoring to make clear the legal machinery. This only has reference to legal machinery, and everything I have said had reference to that. I think that is a matter which is most appropriately before this committee. I think these questions are not questions of substantive law. They are all questions of how to make our administration of law a more efficient machine. That is all this is.

Mr. CARLIN. Personally, I think every one of these provisions is simply a rewriting of the law as it is. I am surprised to know that any court had any other view. But as to section 18, I am particularly anxious to have your view in regard to that.

Mr. BRANDEIS. May I, before going to that, refer to one other matter in connection with section 16?

I wanted to take up another provision which I believe to be also an important matter of machinery, and which I believe to be the most important one. It appears in section 16 on page 499 of Bills and Resolutions, and it is also in the Oldfield and the Lenroot bills. It says:

SEC. 16. That whenever after the institution of proceedings under section 4 of this act it shall appear to the court in preliminary hearing that there is reason to believe, upon final hearing the court shall find, that any combination was entered into, existed, or exists, which was or is in any respect or to any extent in restraint of trade, and that as a result thereof the defendants, or any of them, have the control of supplying the market with any machine, tool, or other article, whether raw material or manufactured, reasonably required in the manufacture or production of any other article or for general consumption and use, and that no adequate opportunity exists to immediately obtain a substitute therefor of equal utility, the court shall have power to make such order by injunction or otherwise, as it may deem necessary, as will secure to purchasers or users of such article full opportunity to secure and use the same upon payment of a reasonable compensation, to be fixed by the court in such order, until some other adequate substitute can be provided: *Provided, however*, That in so far as at the time of the application for such order such machine, tool, or article is being supplied to any person under any contract, the amount of compensation therefor to be paid him under said order shall be that actually payable under the terms of such contract, unless and until such contract is found or declared to be void or expires.

Mr. CARLIN. Ought that not to be read in connection with section 18? It seems to me they relate to the same subject.

Mr. BRANDEIS. Section 18 deals with the patent.

Mr. CARLIN. Does not section 16 have that application?

Mr. BRANDEIS. Section 16 has an application absolutely independent of the patent, and that is the case I want to put to you.

The CHAIRMAN. You are striking at the matter of having a tying clause in the contract, as we had in the shoe-machinery case?

Mr. BRANDEIS. The tying clause was intimately connected with this, but it is by no means essential.

This is the situation: This particular provision was suggested by a set of facts resulting from the shoe-machinery situation, but by no means peculiar to it. It may exist in many other cases.

This is the situation of the shoe-machinery suit, as I view it: The United Shoe Machinery Co. has acquired a control of the industry, which is, of course, particularly important for this reason. It owns the machines with which shoe manufacturers generally manufacture their shoes, and they are holding them on lease. The probability is, if the Attorney General is right in his contention—and I think it is a fact—that those leases will be held to be invalid. But whether they are invalid or not, those leases, in very considerable part, contain a clause by which they can be terminated at the option of the corporation, at 30 days' notice, in Massachusetts.

Consequently, every shoe manufacturer—there are only a few exceptions in the country—practically all the shoe manufacturers are to-day manufacturing shoes under a condition where this corporation is able to say to any of them, certainly if the leases are not valid—they can say to any one of them, "Return these leases to us, and we will furnish you no further parts for the machines you have; you can not get any more machines from us." It is absolutely in the power of the corporation to say to any individual concern, subject, as I say, to that provision in the lease, that they will not let them have the machines any more, and will not give them the parts which will allow the machines to work properly.

Now, the situation of dependence on this corporation, in which the manufacturers are to-day, is not due to the existence of patents. Many of these machines, perhaps all of them, are patented, but these manufacturers could do business with other machines—machines that embody inventions on which the patents have long since expired and which, as many manufacturers believe, are quite as good, and perhaps in some respects superior, because simpler than these machines on which they are paying royalties.

But the situation is a perfectly practical one. No other machines are in existence and they can not be brought into existence quickly. Manufacturers of machinery will not manufacture them because they have not any market, and they have not any market because these shoe manufacturers do not dare buy the machines. They do not dare buy the machines because there is this tying clause in the contracts, and the other powers I speak of would enable the corporation at any time to pull back the machine.

There are about 100,000 machines out among all the various manufacturers in the country, which forms the basis for shoe manufacturing in the United States, and whether one or practically all the manufacturers continue in the business, it is in the hands of practically one corporation, not by virtue of a patent, although a patent monopoly had an important historical bearing on the situation.

Mr. McCoy. Why not by virtue of a patent monopoly? If it is true that it is not by virtue of a patent monopoly, then there must be manufacturers in the country who could manufacture all the machines which all the shoe manufacturers would want.

Mr. Brandeis. Yes; but nobody will go to the expense of manufacturing the machines unless he has somebody to use them, and none of these people who have the United Shoe Machinery Co.'s machines in their business are willing to run the risk of taking another machine in, because they may lose the machines they already have.

Mr. McCoy. But if they are not able to tie up the shoe manufacturers in that way, they appear to have them tied by the use of their patented machinery, even though some other manufacturer of shoe

machinery could manage to manufacture all the kinds of insignificant unpatented machines which would permit the shoe manufacturers to go ahead. They might not be able to introduce these machines at the time, and, tempted by the great profits which the large Shoe Machinery Trust is making, some manufacturers could make up a whole set of machines, sufficient to supply one factory, and go ahead.

Mr. BRANDEIS. Anybody could do it practically, but there is nobody in this country who wants to try it.

One gentleman did try it. His name was Plant. He spent some $3,000,000 in getting a start, and that is all he got.

Mr. COX. He could not furnish all the machines that any one shoe manufacturer would want to have?

Mr. BRANDEIS. Quite the contrary.

Mr. WEBB. He could not furnish the patented welter, which is very important?

Mr. BRANDEIS. He had a welter which is very important, and, as a matter of fact, the patent has now expired on that.

Mr. McCOY. Why could he not furnish an efficient welter?

Mr. BRANDEIS. He can.

Mr. McCOY. Why did the manufacturers not take them?

Mr. BRANDEIS. I will tell you why.

Mr. McCOY. He was rich enough to go ahead with this proposition?

Mr. BRANDEIS. He was not. He spent $3,000,000 on it, and he was in a position where he owed $2,000,000 and he could not renew his notes, and he had to sell out to the United Shoe Machinery Co. What he had done was to develop this machinery, and in complete answer to the suggestion that he could not give the thing he ought to give, you have the fact that he did run his business with that, and his 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. He tried it. Others have tried it. The fact is that nobody is making the machines. If you had some five or ten million dollars and you wanted to go in and spend your money, you would make them, but I doubt whether you would make much money out of it, because the United Shoe Machinery Co., when they got ready, would begin cutting prices, when they found that you were getting to be a very hot competitor.

Mr. McCOY. The United Shoe Machinery Co. is supposed to make large profits?

Mr. BRANDEIS. It does; oh, yes.

Mr. McCOY. Therefore your contention is that with this enormous profit they are making—and I know it is enormous—there is capital and enterprise in this country which could be invested, but which will not be invested to secure such large profits?

Mr. BRANDEIS. I should say there was plenty of capital and enterprise, and also sufficient prudence to induce those gentlemen not to enter into it, and I should feel that anybody who entered into this manufacturing business on a large scale while this suit is pending, before we had gotten the determination on this question in regard to the tying clause, and in regard to the dissolution of this trust,

was doing something that was hazardous, not if these men came together and did certain experimental work involving some hundreds of thousand of dollars that might be well expended. What one needs is not preliminary work merely.

It is an actual fact that when this decree is entered that big corporation is in a position within 30 days, in Massachusetts, assuming the lease to be valid, to pull out every one of those machines.

Mr. McCoy. The reason I ask these questions is this: We got the notion when we had this shoe machinery matter up in this committee a couple of years ago that at least one or two or more patented machines were necessary in order to make the power of the Shoe Machinery Trust what it seems to be.

Mr. BRANDEIS. There is not a single one necessary. There are certain patented machines which do the hundreds of operations in the making of a shoe better than you could do it by some other machine or by hand, but there is not an independent machine. The situation I am pointing out is not a legal situation, it is a purely practical situation.

This is the trouble: You will have to have a supply, altogether, of thousands of machines. It will cost not only a great deal of money to supply them, but it will necessarily cost also a great deal of time to make the machinery.

Take, for instance, one shoe machinery company, the Plant shoe machinery manufacturing business. There are working there some 3,000 men, making those machines for quite a long time, and occupying a large part of the spare machinery manufacturing capacity of at least one of the Massachusetts machinery concerns outside of the United Shoe Machinery Co. That is a purely practical question.

If you had your decree to-day declaring a dissolution the United Shoe Machinery Co. would be protected for years in its situation, simply because there was not anything to take its place, in the first place.

There ought to be two possibilities while this suit is pending, or immediately upon its conclusion. In the first place, if the court should find that the Attorney General is right in his contention and that this is an illegal trust, there ought to be a power in the court—in view of the fact that there has been a clean sweep of all the shoe machinery, and a man can not go on with the business unless he takes his machines from this source—there ought to be a power in the court to say, "You must let men have the machines; but not only that, but let the man have the necessary parts which will be needed next week, or the week after next, in order that the machine may properly run. You must let these men have these things until there shall be an opportunity for them to supply themselves with machinery elsewhere," and that is purely a practical matter.

Otherwise there is a power of discriminating against men who have been active in bringing this matter to the attention of the Government and in bringing about the decree.

There is great danger also, even if they are not discriminating against them by refusing to give them that machinery, that they are making demands upon them to pay extortionate amounts, and in some other way you may be able to conserve the existing situation.

That is one thing. Until you have the machines there can be no liberation from the existing situation, and you can not have the machines for years after the decree has been rendered.

Mr. DUPRÉ. What stage has the Government suit now reached?

Mr. BRANDEIS. They have been putting in the rebuttal testimony. I do not know whether they have finished that or not. I have not followed it very closely of late. I have been in Washington for some time, and I have only read in the papers what has appeared to be the rebuttal testimony.

Mr. MCGILLICUDDY. How long since this suit was started?

Mr. BRANDEIS. I think it was started two years ago last August or September, nearly three years ago, I think.

That is only one difficulty, the difficulty of getting machines. The other difficulty is the difficulty of training men to use the machines.

This shoe machine is different from a great deal of the ordinary textile machinery. It is in many respects a machine tool in itself. That is, it is worked by an individual, and the character of the output depends upon the skill of the individual. You may take two men on the same machine, and the result in making the shoe will depend upon the individual skill in the use of the machine.

Now, if you had a complete set of machinery ready to put in factory A, which had been theretofore using machines of the United Co., making fine shoes—$5, $4, or $3 shoes—expert shoe workers could not work those machines and produce good results without some training; they would have to be gradually taught and worked in. In any factory, as a matter of fact, if they were going to change over from machines made by the United Shoe Machinery Co. to other machines, machines made by some other concern, they would do it gradually. They would have to do it gradually or else they would spoil their product. They would put one man on a stitcher, another man on a welter, and then, having gradually taught that man, they would put in another man, and the first man would teach the second man, and in the course of two or three years they would make a complete change.

In very coarse work, that would not be necessary. You might be able to do that more quickly, but you would not ruin your trade. But in the better class of work, you would simply ruin your trade, if you undertook to make the change rapidly.

Mr. CARLIN. Let me ask this question. Do you know of any other combination that would be affected by section 16, except the Shoe Machinery Trust?

Mr. BRANDIES. I could not speak positively, but I should think there might well be others. It undertakes to deal with a situation which might be quite a common situation.

Mr. CARLIN. It was drawn with particular reference to the Shoe Machinery Trust.

Mr. BRANDIES. It was suggested by a situation, just as the other things were suggested by a situation in the Tobacco case.

All these difficulties of machinery in the application of the law suggest themselves by reason of facts.

Mr. CARLIN. But you are particularly familiar with all the facts that relate to the question, or you seem to be, and I asked you whether you know of any other corporation which would be affected?

Mr. BRANDIES. I deny most specifically that I am familiar with all the cases. I have known something about the Tobacco case.

Mr. CARLIN. I think you are as well informed on this matter as any man I know of.

Mr. BRANDIES. I thank you, sir.

Mr. VOLSTEAD. What about the Film Trust?

Mr. BRANDIES. I am not familiar with that, but I could well imagine there might be exactly that situation there. Certainly there was such a situation with regard to the Aluminum Trust. You would have had a perfect situation there. I do not remember what the tariff was, but if we had a prohibitive tariff on aluminum, and you had to get the aluminum in the United States, you could not go on with your business unless you got it from that one company.

Mr. CARLIN. I wonder whether that would affect the Moving-Picture Trust? I was wondering whether the operation of that combination would be affected by this section.

Mr. BRANDIES. I should have very little doubt but what you would find a situation more or less resembling it in a number of other cases. But you have got to have two elements in order to effect this result. In the first place you have got to have a trust which has practically acquired control of the whole country. Of course, in a great many of these cases that is not so; not even in the case of the Standard Oil Trust, because you have the opportunity of getting oil from a lot of independent producers. And you have an opportunity of getting tobacco from a lot of independents. But with the lesser trusts, there are undoubtedly instances where the manufacturers of all the machinery of a particular kind have united, but even that would not be a strong case. The reason why this case is so strong and appealing is that not only does this concern have control of all the shoe machinery of this kind, but the further fact that all this machinery is not owned by the people who use it, but is only leased. You have a case where the power of monopoly is carried to the highest degree.

Mr. CARLIN. That is exactly the case with the Moving-Picture Trust.

Mr. BRANDEIS. I think it might be. I am not familiar with the details. I think if you go into the question of machinery—I mean in the cases of the lesser trusts, which have not attracted so much attention—I should expect you to find a very similar situation, and it might conceivably exist in the case of trusts dealing in certain raw materials or semifinished materials, except for the fact that some of the goods are imported. But, as I say, I do not happen to know the details of the lesser trusts, to any extent, yet I should expect you to find quite a number of those instances, resembling this, and calling for the exercise of that power.

I feel, in regard to that power which is there suggested, precisely as I should feel in regard to some of the other powers in section 17, about which you asked me, Mr. Carlin. I think that a chancellor administering the powers of a court of equity ought not to have any very great difficulty in granting that relief, independently of a provision of law, but it is a novel thing. It would take a man, perhaps, who is willing to take a step forward in the law which the others are not willing to, and it seemed to me that Congress ought in its

endeavor to make the machinery effective point out this, as it should point out the other powers, as one that could be exercised, always leaving in the discretion of the court of equity the question of whether or not it will exercise it. It is merely a matter of machinery, and as a matter of machinery it is practically merely one of education. We think it is a matter of existing machinery which has not been invoked by the court.

Mr. WEBB. Some of us got the impression a year or two ago that the United Shoe Machinery Co. had about 60 or 70 machines to-day, one-fourth of which were patented, and in order to allow the manufacturers the use of the patented article, they compelled them to lease also the other machines that were not patented or upon which the patents were expired. That was our impression.

Mr. BRANDEIS. That is not the correct impression. I think, as a matter of fact, you would find this. Of course, machinery to which—this is not all the machinery used in the manufacture of shoes, but it is a very important part, particularly for manufacturing what is called the bottom of the shoe.

This company has, however, what they call two departments, one being a department in which it leased machines, and the other the department which is known as the general department, in which it leased and also sold machines. That is, the latter class, in which they leased or sold machines, was a mere auxiliary, and its use was really to aid its main department or to weaken its possible competitors in the main department.

Now, probably every machine in this main department where it leased the machines is in some respects covered by a patent, and those patents may not all be valid; and very many of those patents, so far as they are valid, are in regard to unessential detail matters that had been put in from time to time, sometimes improving machines and sometimes while improving them at the same time making them a good deal more complicated and more expensive to use, in the wearing out of the parts, and therefore from some standpoints less desirable. Then, there are certain machines on which the patents are clearly in existence and which are important patents.

But nobody has to have in his conduct of his shoe machinery business any machine of all that they have, of which they have control of that particular kind of machine by patent. That is, you may have any number of lasters; they could have a lasters which is better or worse than some other laster, but anybody could get a lasting machine which would do his work.

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. While the United Shoe Machinery Co. has some patented machines on existing patents which are valuable as patented machines, it is not essential to the conduct of the business. That is, there is some other machine which will do the same work, perhaps not as well, or in many instances it could be done by hand.

There are, in the manufacture of shoes, many operations which are still done by hand in spite of the great advance. In the making of a particular shoe, there may be a hundred or sometimes more

than a hundred operations, and one or more of those could be done by hand.

Mr. WEBB. Do you think the United Shoe Machinery Co. could exist in its present line of operations if all the patents should suddenly expire?

Mr. BRANDEIS. I think so, yes. Of course the patent is an added benefit. It gives them a constant weapon. If somebody begins to manufacture a new machine, he is in danger of having a patent suit brought against him, and that is not a light matter. The patent has advantages for militant purposes, particularly.

But the situation to-day is not a situation which is dependent upon a patent, although patents have had a historical bearing upon its coming into existence.

Mr. WEBB. The only way a manufacturer can get the United Shoe Machinery Co.'s patented machinery is to take its unpatented machinery?

Mr. BRANDEIS. The machinery on which there is not any patent at all would probably be found in their general department.

Mr. WEBB. We were told that in order to use the United Shoe Machinery Co.'s patented machinery you had to lease their non-patented machinery, and even buy their tacks.

Mr. BRANDEIS. That does not state the whole situation.

Mr. WEBB. Perhaps, but that was our impression, I think.

Mr. BRANDEIS. You do have for all these machines—for instance, the tacks used in nailing and soling, and all that sort of thing, have to be bought from the United Co. That is the way they have of paying the royalty. That would be a shoe in which you use tacks, pay 10 or 20 cents for the tacks, which would ordinarily sell in the market for a fourth of that amount, and the extra amount would represent the royalty on the machine.

There is no objection at all, I think, to the proposition of leasing the machines. Anybody ought to have the right to lease or sell a machine as he pleases.

Mr. WEBB. I think the Supreme Court has thoroughly established that fact.

Mr. BRANDEIS. I mean, as a matter of economic policy, it is entirely proper, and there are many things the United Shoe Machinery Co. has done through a system of leasing, in enabling a small manufacturer to go ahead with small capital, because he would not have to pay as much as if he had to buy the machines outright.

The objection is not to the leasing; the objection is to the circumstances under which it exists. I am not speaking now of any of the advantages or disadvantages or the illegalities in the tying clauses. All I want to do now is to see what will be the situation of the country if the Attorney General's contentions are sustained and this trust declared to be illegal and the tying clauses are declared to be illegal.

Mr. WEBB. Do you not think the trust will lease or sell its machines in order to make a profit?

Mr. BRANDEIS. After that time?

Mr. WEBB. Yes.

Mr. BRANDEIS. Yes; but it might very well conclude that it might make more profit in some other way. Suppose the trust were to conclude that it would engage in the business of manufacturing shoes.

It is engaged in that indirectly in this one Plant Shoe Machinery Co. It has been many times suggested that they were going to use the machinery in the manufacture of shoes.

Mr. CARLIN. How are you going to bring about competition? That is the point.

Mr. BRANDEIS. I will tell you how you can do that. With the aid of this provision I think there would be no difficulty in doing that. This is the situation. It may be years before that case is finally decided. It has not yet been decided below, and it will go to the Supreme Court of the United States. This is a provision that ought to be enacted at once in order to bring about the competition you ask for, Mr. Carlin. If you pass this provision and the court acting upon it issues an order that the United Shoe Machinery Co. shall continue to allow these existing shoe manufacturers to use these machines which they have and that the United Shoe Machinery Co. shall supply them with parts on the terms of the existing contracts and leases, then any one of these shoe manufacturers may turn to the John Smith Co., manufacturers of machinery, or to the Boylston Shoe Machinery Co., or any other company, and say, "We will take from you next month or next year as soon as you can give to us two welters and two stitchers and two nailers and two lasters and two sluggers, and we will put them in our factory, and when we get them worked in we will put in some more, and then some more, and then some more, and we will continue to buy them, as the case may be. We will gradually equip our factory with these, but we can not do anything in that line now. We can not make any agreement with you and could not take a single step, because if we put a machine in there to-day we will be liable to lose our whole business, but if the court will protect us and say we can keep the machines we have and we can get the parts we are willing to go ahead and put in other machines," and in that way gradually you will build up competition, and by the time you get to the end of this litigation you will have in existence another shoe machinery company, which is practically doing as was suggested—building up trade.

Mr. CARLIN. Has any application been made in the pending suit for such relief as is suggested in this section?

Mr. BRANDEIS. No.

Mr. CARLIN. A court has never had an opportunity to say whether it would grant that relief or not?

Mr. BRANDEIS. Never.

Mr. CARLIN. Do you think the court could grant that relief under the Sherman antitrust law as it stands at present?

Mr. BRANDEIS. My own judgment is that a progressive, courageous court would exercise that power, but no court has exercised any such power, and I should be very much afraid that a court would not exercise that power unless it had the education which Congress would give it by such a provision as I have pointed out. Of course, it would then do it, or not as it pleased, because it is in the discretion of the court, but there would be removed absolutely the question as to whether the power existed. You would have such an order, under which you could not get a final decision until the matter had gone to the Supreme Court.

Mr. FLOYD. It seems to me this is the identical question presented the other day by the film case.

As I understood it, the company that manufactured and sold the films had driven out all competition except one concern, and it refused to furnish them the film which it had agreed to furnish under their contract, and, as I remember, it was the statement of counsel who appeared before the committee that the independent company had brought suit in the New York courts to enjo'n the other concern from interfering, and the courts held against them, and they then took the matter to the Attorney General in order to try to get the Attorney General to interfere, and he said he could not do that, but he would try to get an agreement out of the parties to furnish the films during the pendency of the suits, and the Attorney General got them to enter into an agreement, and, as I remember it, counsel stated that they were still receiving the films under the original contract, but the Attorney General did not use any legal but only persuasive means to bring about this result.

Mr. CARLIN. This was the case, as it was detailed.

The holding company was composed of the nine manufacturers who manufactured films in this country. They had formed a combination, so far as the manufacturers of the article were concerned.

In their first method of distribution they had a hundred selling agents all over the country. Then they decided that the business was so profitable that they would organize what they called a rental company of their own; that is to say, it was composed of the same stockholders as were represented in the holding company. Then they made an exclusive lease with this one rental company to furnish them the output of their own factory and they drove out of business the fellows who had been in the rental business and had been distributing to the exhibitors, except one man with whom they previously had a contract to rent certain films.

He applied to the court for injunctive relief, compelling them to do business with him, not for the dissolution of the combination, and he set up the fact that he had been previously doing business with this company as a rental agent and now they refused to do business with him, and were doing business with their own rental company. The court held that there was no law under which a person could be compelled to deal with somebody with whom he did not want to deal.

They then applied to the Attorney General for relief through dissolution proceedings under the Sherman law. Then the Attorney General, according to counsel who appeared here, suggested to the rental company that it might be well for them to continue their rental arrangement with this particular company until this suit was determined, and they did so, and there it stands. The whole system of operation of the business was first to combine those who did the manufacturing and then to organize their own rental company and to use those two corporations for controlling everything except the actual exhibiting apparatus.

Mr. BRANDEIS. It produced just the result you might expect.

Mr. FLOYD. You would have that exact parallel if the United Shoe Machinery Co. should go into the business of manufacturing shoes in addition to manufacturing machinery.

Mr. BRANDEIS. You would have, to a slight extent.

Mr. FLOYD. I mean, if they went into the shoe manufacturing business exclusively.

Mr. VOLSTEAD. Allow me to make a suggestion along that line. The Associated Press is an organization organized to run along very much the same lines. Of course, they do not rent anything, but they operate largely along the same lines. They exclude from their service absolutely any newspaper which may obtain news from any other organization of any kind, in very much the same way as the United States Machinery Co. refuses to sell to anyone who buys a machine from anyone else.

Mr. CARLIN. This provision applies, in section 16, to any "machine, tool, or article" which "is being supplied to any person under any contract, the amount of compensation therefor to be paid him under said order shall be that actually paid under the terms of such contract, unless and until such contract is found or declared to be void or expires." That seemed to apply to those articles, whether a raw material for general consumption and use or not, and it appeared to the committee that that met the motion picture situation.

Mr. BRANDEIS. It seems to, exactly. I think you are producing a situation——

Mr. CARLIN (interposing). The profits there are way beyond anything that they expect or contemplate in the shoe machinery business, I suppose. It turned out that these nine manufacturers in America supplied the world with these things, and it further turned out that they had no valid patent for any one or a part of any one of these devices.

Mr. BRANDEIS. That is very interesting and very instructive, I think. I think you will find that that situation, in a lesser degree, would develop in many different branches. Of course, it might present itself in the form of some raw or semiraw material which was an important element in the manufacture of any important article. Our attention has been directed so much to some of the large trusts, I think we have not given very much attention to the smaller ones.

Mr. CARLIN. This moving picture combination is a tremendous one. It entertains the whole world with its films, and its profits are something enormous.

Mr. BRANDEIS. That is very instructive.

Mr. MCCOY. You think that compelling a man to continue to do business is a power which a court of equity now has?

Mr. BRANDEIS. I think this is the situation: This court has power to do things under the Sherman Act. It has power to confiscate property.

Mr. MCCOY. I would like to get away from the Sherman Act.

Mr. BRANDEIS. I will tell you what the analogy is. Here is a situation which is created, or appears to have been created illegally. Now, if it has been created illegally, it is like a nuisance. The court has power over such a thing by direct mandatory injunction, to compel a defendant to abate a nuisance.

I think, analogous to that power is the power to meet this situation. If a court has power—of course it could interfere in some cases ultimately through a receiver. It could now, as an alternative, say, we are going to take charge of that situation, and a court of equity orders a receiver to take charge of the business. That is a kind of thing a court would not do except in very extreme cases. If the corporation were a great successful corporation, a court would

hesitate before appointing a receiver and possibly affecting an entire community by so doing.

On the other hand, if that were the only way to do it, they could do it, but it is not likely that they would take such extreme measures.

It seems to me when you have the situation that by a number of acts creating a monopoly one concern has acquired power over a whole industry, as a part of the preventive relief in the situation the courageous chancellor would have no doubt that equity must meet the situation where conditions show it was merely a matter of intervention on the part of the chancellor to find some way of meeting the situation, but, I think, you would find a very large proportion of the judges would shrink from being the first one to do it.

Then, I think, you have this other situation which we are constantly dealing with, in which the courts, inferentially, are doing the same thing which the Supreme Court did in the case of Munn *v.* Illinois, in which the grain elevators were affected to the public use. They have gone from one thing to another, and in the earlier cases, when the facts were such that a community was, really in respect of any necessary business, in the hands of a relatively few people, the court always recognized that the business was affected to the public use.

I should have very little doubt if the matter came up before the Supreme Court of the United States, with its broad view of the situation, that the court would say that this power exists and would exercise it.

Mr. McCoy. There would not be so much difficulty with it in regard to compelling the United Shoe Machinery Co. to permit the lessees to continue in the use of the machines under lease, but I should think they would consider more especially that part of the lease which would go to the compelling of the United Shoe Machinery Co. to make the parts.

Mr. Brandeis. I think what the court would do would be to issue an injunction compelling them to allow their continued use, and that if this company manufactures parts, that it would, under the terms of the paper lease, continue to furnish them. I do not think any court would ever be called upon, and I do not think it ought to be asked, as a matter of prudence, to compel them to continue to manufacture for the purpose of doing it. I think they ought to compel the manufacturer, there ought to be a mandatory injunction which would order the manufacturer to refrain from refusing to furnish parts, as provided in the lease.

Mr. Carlin. We are trying to help the consumer and the small business man.

Mr. Brandeis. Absolutely; I know that.

Mr. Carlin. And the question is how to bring about competition.

Mr. Brandeis. I think there is no difficulty whatever in bringing about competition. I think you will have the most extensive competition in shoe machinery the moment this field is open.

In our New England country, and it is true in all the shoe-machinery centers in this country—you will find it in St. Louis and Pittsburgh and Chicago and Milwaukee and St. Paul, and now in the South also, in the Craddock concern, and down in Georgia—you will

find where the large manufacturing business is coming up and these men are inventing things, and you will find, the moment the shoe-machinery business is opened again, if a man feels he can take his new machine and make a deal with a man who will advance that machine, you will find the invention in that field blossom out almost overnight.

I think there is not the slightest difficulty in the shoe-machinery business. You have this situation: You have a hundred different operations, and in some cases more than that; and for every one of them practically a different machine exists: and if a man can make one machine and be sure he has a chance of getting that machine in use without having to have the immense capital required for the whole system, you will find competition keener.

Mr. CARLIN. We are constantly met with this suggestion in the preparation of these statutes, and that is that the present law gives ample relief, and will accomplish all that the proposed new legislation would accomplish, and it is further suggested that we are complicating the situation.

Mr. BRANDEIS. "By their fruits ye shall know them." Take this particular situation: Fifteen years ago you had competition in shoe machinery and shoe machines were being invented to be put on the market all the time. To-day you have this situation.

Mr. CARLIN. Is that due to lack of legislation or is it due to lack of enforcement of the present laws?

Mr. BRANDEIS. I believe it is due to both. In the first place, all I have said has had to do with the machinery of the law. I have not undertaken to provide a single new prohibition. There are some things I will want to suggest to you later, but the things I am speaking about are simply these: The Sherman law lays down a rule of action which declares an economic proposition, which I believe to be economically sound. What it has lacked has not been in that direction. Its inability to obtain results has been partly due to the lack of desire on the part of those in control of the Government, and perhaps of the whole community, to enforce its provisions; but even where you undertake to enforce those provisions you find the legal machinery inadequate. It is a question of making more perfect our machinery, recognizing the Sherman law as the law for human action.

Mr. CARLIN. I was calling your attention to the Sherman law, which a good many people contend has application to all these subjects, and is an elastic statute, and certain criticisms which have been made by manufacturers here, in which they were more particularly speaking with reference to definitions of prohibitions.

Mr. BRANDEIS. I want to go into that question of how far those criticisms are valid.

Mr. CARLIN. I say that is a comprehensive subject, and all these things relate to the one subject, and that is the best way to bring about competition and fair trade among men.

Mr. BRANDEIS. There are two problems: One is a question of substantive law, as to what we ought to do. Many of the provisions that you deal with——

The CHAIRMAN. And the other is the question of administrative law?

Mr. BRANDEIS. Yes; a question of administrative law or the adjective administration of the law. One is the question of procedure and the other is a question of substantive law.

Mr. CARLIN. Have you read the definition in bill No. 2?

Mr. BRANDEIS. Yes; I have a good deal I would like to say on that portion of the subject.

Mr. CARLIN. As to the general idea, now, without regard to specific definitions, what is your general idea as to the best policy to pursue along that line as to whether we should go on and attempt to cover the area with definitions or leave the Sherman law in its present shape, without definitions, but simply take up matters of procedure?

Mr. BRANDEIS. I think there is something to be said in favor of the definitions, and I want to say something in connection with certain criticisms that have been made upon the administration's policy. I want to simply go further and draw attention that all these things we have been talking about to-day are all matters of legal procedure, but there are a few other matters I would like to talk about and one of them is section 18.

Mr. NELSON. I notice from what you have said that you are going to cover the question I was about to ask you. I would like to know this: We concede that there is corporate evils in this country and now we are trying to revitalize the Sherman law. It has practically failed, as you know from the tobacco cases and from the Standard Oil case. There is something wrong.

You have read these five bills. Do you believe that when we enact these bills into law we thereby will have dissolved trusts and monopolies in this country?

Mr. BRANDEIS. I know of no law that is automatic in its effect.

Mr. NELSON. I mean so far as we are concerned—the National Legislature—when we have enacted these five bills you believe then that if the Department of Justice does its duty that the trusts will be promptly dissolved?

Mr. BRANDEIS. I think there are three duties that will have to be performed, Mr. Nelson. First is the duty of perfecting the legislation itself.

Mr. NELSON. On that point——

Mr. BRANDEIS (interposing). On that, if you will permit me, I want to go into that later, if I may.

Mr. NELSON. The point I was getting at was this: Have we the things in here that will accomplish that, and if we have not, what things ought we to put in?

Mr. BRANDEIS. I want to take that up later, if I may. I want now, with your permission and the permission of the committee, to draw a very clear line between those things which are purely matters of legal procedure and certain other things which are matters of substantive law, definitions which may or may not be substantive law, but which may be an interpretation of the law. I think the distinction is important to bear in mind.

On this question I have been talking about to-day, and one or two others involved in it, anybody who has a thorough belief that the Sherman law is the best possible expression of the law which could be made, all those persons ought still to be in entire accord with

the desire to improve the legal machinery, because it in no way changes the provisions of the Sherman law; it merely says, "Here are ways of making the Sherman law more effective, just as if you passed laws to make the law in regard to replevin more effective, or any other thing of that kind. It deals with questions on which men should be able to agree. It is not intended to do with the broad questions on which men may reasonably differ as to whether the wisest thing to do with the Sherman law as to its prohibitions and rules is or is not to leave it in its present form. Those are questions entirely separate and apart.

Mr. CARLIN. That is the thing confronting us, a question of legislative policy.

Mr. BRANDEIS. I think so. Now, speaking of the policy in regard to this matter of definitions to which you have called attention. Whether it is the best policy to leave the first section as they are or not, in either event it is our duty as lawyers and simply as lawyers, in our professional capacity, not as statesmen dealing with the big policy of trusts and monopolies, we ought to see that the legal machinery is apt and efficient, and all these things I have been talking about are strictly technical questions.

Mr. CARLIN. But the difficulty is to get lawyers to agree.

Mr. BRANDEIS. Absolutely. They are more likely to agree because they are always reasonable.

Mr. CARLIN. But there is one class of lawyers who insist that we are making what is now an elastic statute a rigid one, by attempting to put in there other definitions.

Mr. BRANDIES. Mr. Carlin, I do not think any of those eminent gentlemen could have been speaking to the legal machinery. I think they all had their minds on the substantive provisions of the law. They could not have had their minds on a question of this nature, which we have been discussing this morning, in regard to the matter of legal procedure.

Mr. CARLIN. Oh, no; they discussed that in connection with the other.

Mr. BRANDEIS. I do not think they could have had their attention specifically directed to it, because they might or might not agree that the definitions that are proposed to be enacted into that law are good definitions. They never could doubt but what it was desirable to make the legal machinery efficient.

Mr. CARLIN. But the difficulty is about the method of improvement.

Mr. BRANDEIS. Yes; I think that question has always been a difficult one, and of course men may differ. I do not believe, from what I have read in the public press—I gain the impression that their minds were on the other point, on the question of the application of the Sherman law as a matter of substantive law to the problems as they arise in business, and that they did not have their attention specifically drawn to the difference, as the chairman has drawn attention to it, as between administrative law and substantive law.

The CHAIRMAN. We will now take a recess until 2 o'clock.

(Thereupon at 1.05 o'clock p. m., the committee took a recess until 2 o'clock p. m.)

AFTER RECESS.

The committee reconvened.

STATEMENT OF MR. LOUIS D. BRANDEIS—Continued.

Mr. BRANDEIS. Mr. Chairman, there are a few other provisions all in the line of improving the machinery and effectiveness of the law that I want to discuss briefly. One is that section which appears on page 502, section 21——

Mr. FLOYD (interposing). Now, Mr. Brandeis, if you will pardon me, you mentioned section 18 when you were interrupted.

Mr. BRANDEIS. Well, I was going to come back to that later a little more appropriately.

Mr. FLOYD. Very well. I wanted to hear you on section 18.

Mr. BRANDEIS. All right, I will take that up later. Section 21, on pages 502 and 503, volume 2, Bills and Resolutions, reads as follows:

That whenever a suit has been instituted under section 4 of this act any person who shall be injured or is threatened with injury in his business or property by any other person by reason of anything forbidden or declared to be unlawful by this act, and any State of the United States, may at any time intervene in said suit to protect his interests, or, if the intervenor be a State, the interests of the citizens of such State, and may, after final decree in said case, petition said court for protection or redress in case of any violation of said decree, and the court shall have power to take such action as may be appropriate in the premises.

This is the section which, it seems to me, would be apt as an expression of the right to intervene which I was discussing this morning; that is, the intervention prior to a decree. The special reference there to the State was made by reason of the action of the circuit judges in New York in the Tobacco case, when the States of North Carolina, Virginia, and Wisconsin, as I recall it, undertook to enter appearance by their attorneys general to represent the interests of their States. It was urged that they had no right to be heard and that they had no interest like private citizens to protect. It was a matter of courtesy and without being allowed to intervene they were allowed to be heard. But it seems to me obvious, as was shown in that case, that a State may have, as in that case all three States had, a very important interest to be protected.

Mr. WEBB. You would insert this section 21, on page 502, Bills and Resolutions, immediately at the end of section 12 of the bill we were discussing this morning?

Mr. BRANDEIS. Yes; I think it might aid an easy reading of it to break it up into sections. It would follow section 12 of the bill which has been referred to. Then as another and entirely different matter, but also bearing upon the questions which have been put as to making the law effective and to a certain extent self-enforcing, I suggest section 20.

Mr. FLOYD. Before you leave section 21. That seems to contemplate intervening for the sole purpose of protecting their interests, or, if the intervener be a State, the interests of the citizens of the State, and after the disposition of the case it seems to contemplate the trial of the rights.

Mr. BRANDEIS. Well, there were two provisions for intervention. The one I read and discussed this morning is the intervention after

a final decree has declared a trust to be an illegal trust, and then the parties intervene for the sole purpose of getting relief by way of damages for the injury which they have suffered. This is an intervention of a broader character which may come up by way of seeking preventive relief and applies to the earlier stages of the proceedings. It might have been possible, of course, to consolidate these two provisions into one, but it seemed to me that as a matter of clearness it would be better to keep them separate.

Mr. FLOYD. But it seems to contemplate the litigation of the person's right who intervenes after the final decree in the case.

Mr. BRANDEIS. Yes; that is, the final decree of the main case. That might end it, but yet there might be left over considerable questions that ought to be thoroughly worked out as they would be in an ordinary receivership or dissolution proceeding.

Mr. FLOYD. That was all I wanted to know on that point.

Mr. BRANDEIS. Now, another provision, bearing also upon the remedy merely, is what appears on page 502, volume 2, Bills and Resolutions, as section 20:

> That it shall be a complete defense to any suit arising out of any contract, or for the infringement of any patent, that the plaintiff, or the real party in interest, at the time of the making of such contract, or of its alleged breach, or at the time of the alleged infringement, or at the time of the beginning of said suit, was engaged in carrying on business in any manner or to any extent in violation of the provisions of this act.

Now, see what that situation deals with. Take, for instance, the Standard Oil or the Tobacco or the General Film Co., or any other company, and assume it to be engaged in an illegal conduct of its business in violation of the Sherman law. It goes into court and it has all the legal processes, and the defendant is unable to set up in that case that the concern is illegal; it sues on the infringement of a patent which it is using illegally, and it may get complete redress and the court may be aiding it in the illegal conduct of the business because the defendant can not set up the fact that that contract was made, that patent was used, in the course of an illegal business. Now, it seems wholly unreasonable to me. It seems to me that if an illegal trust is conducting its business the court ought not to lend the aid of its processes to the enforcement of that illegality, because it is a part of that illegal plan. It is an incident of the illegal existence. Of course the defendant might have a very serious burden to establish it in an ordinary case, but you might have some cases; for instance, you might have a case under the existing law where the Supreme Court of the United States had declared this trust to be illegal and had issued its final decree; and yet, under the law as at present administered, although there was that decree, the contract which had been entered into, the patent which had been held as a part of the business of that trust, illegally declared, could be enforced. It seems to me that one of the aids to the enforcement of the law would be to enable a defendant sued on such a contract or upon a patent so held, to set up the illegality of the proceedings. That is purely a matter of procedure.

Mr. VOLSTEAD. And enforcement of the general law.

Mr. BRANDEIS. Why?

Mr. VOLSTEAD. The courts might be afraid of holding a concern in violation of the antitrust law in fear of absolute bankruptcy. Sup-

pose a concern has a lot of contracts outstanding for goods sold, and the parties who had bought them and had not paid for them would get the benefit, and you would absolutely ruin the concern.

Mr. BRANDEIS. That is true wherever you set up the illegality as a defense to the contract.

Mr. VOLSTEAD. Of course, in some instances it is perfectly fair, but in other instances it might be pretty drastic.

Mr. BRANDEIS. But the plaintiff has the burden of proof, and it is a very severe burden at that.

Mr. VOLSTEAD. But, of course, if there is practically conclusive evidence of illegality and a judgment is secured, as a result of that, practically all claims that this trust might have would be wiped out.

Mr. BRANDEIS. Well, there is practically to-day a position almost of irony in the law, that here we go on with the greatest solemnity and declare a corporation illegal. It has conducted its business year in and year out within the law, and then at the end of a long proceeding we declare it illegal and say, "Do not do it again." Now, if it be, or if it should happen, that there had been some handicap upon that corporation as the result of its illegal conduct of its business; that it had contracts which the court would not lend its aid to enforce, or if it had patents which the court would not lend its aid to enforce because it was engaged in illegal business, it seems to me that would far more comport with the dignity of the law.

Mr. VOLSTEAD. But, is not this true, Mr. Brandeis, that a great many of those contracts might be very innocent and have no relation to the illegal business complained of? Would not this be broad enough to practically wipe them out? Now, wherever it is relieved of its illegal restraint of trade, and as a result of that a contract was entered into or depended upon an illegal act, of course, I think it would be perfectly proper——

Mr. BRANDEIS (interposing). That is true, but we are undertaking here pretty ineffectually to punish—we put in all sorts of threats which are merely threats—they do not amount to anything—to punish people with fines and imprisonment, when the fine is inconsiderable, and if it is large it is set aside and the imprisonment does not occur. We have got an idea that we ought to use the deterrent power of the court to prevent people from taking all the chances of breaking the law, and if they do it it does not do any harm. Now, if we want to put teeth into this law let us do it in a way that will amount to something. Do not let us write some penalties and imprisonments into it that will not be enforced, but let us point to people that if they do business in a way where they go to the border line of illegality they are going to run some risks of loss as well as a mighty good chance of gain.

Mr. VOLSTEAD. We had a man here who said he was engaged in the production of 100,000 different articles.

Mr. BRANDEIS. Yes.

Mr. VOLSTEAD. Now, as to a great many he might be perfectly innocent. As to some particular article he might have a monopoly; as to that particular article he might be operating in restraint of trade. Suppose that the court should finally find that as to some particular article he was in violation of the Sherman antitrust law, would it be fair that as to any and all other articles he would lose all that he

might have coming to him on contracts? Is not that putting it pretty broad?

Mr. BRANDEIS. Well, I do not know whether that section would cover it. If that is a case that you want to provide against I would suggest a slight modification of the law to fit that case.

But, take the case of the Standard Oil Co. or the Tobacco Co., which have been found to be violating the law by the decree of the courts. Do you think it would be a very great hardship to say that those people who had made all sorts of contracts and perhaps held patents in connection with that concern would not be aided by the courts to enforce them? Or would it not be better to use the machinery of the law to enforce them? The law might not punish you, might not put you in jail, might not impose any legal penalty on you, but the law says that if you are in that category we will not lend you aid. All I suggest is that if we are serious in an attempt to enforce the Sherman law, do not write down certain things and make provision on the one hand to enforce them and on the other hand give all the aid possible to enable a man to make profit, so that he will not care what happens later on. I fear that that is one of the inconsistencies of this law.

Now, there is another inconsistency that falls in this line, although from a different standpoint. That is the suggestion embodied in section 22, of the La Follette bill, at page 503.

Mr. VOLSTEAD. Before you get to that, let me suggest to you this: Would not there be a serious doubt as to the constitutionality of a law of this kind?

Mr. BRANDEIS. I think there is no doubt about it.

Mr. VOLSTEAD. Where you punish them for some innocent act not connected with the antitrust law?

Mr. BRANDEIS. Absolutely no question about it. It is a very great question and it has been decided differently by various courts, although the general rule is that where a person is engaged in an illegal occupation the court shall not be prevented from enforcing his contracts. It was very seriously argued in one or two cases that the existence of such a combination ought to be a defense. The court held that under its procedure it was not a defense. This is purely a matter of procedure. It seems to me that if we want to aid in making this Sherman law self-executory——

Mr. VOLSTEAD (interposing). But suppose the Standard Oil Co. had rented a building in this city at a reasonable figure, probably not connected at all with their oil business, and this law had been in force when the decree was entered. Do you suppose that law would have absolved me from the obligation to pay for the building or would it have been unconstitutional?

Mr. BRANDEIS. Clearly not. I think the court can not declare that persons conducting business illegally shall not recover. I think it is perfectly within the power of the court to say that a man engaged in an illegal calling shall not recover for his business.

Mr. VOLSTEAD. That would make him an outlaw.

Mr. WEBB. A man can not recover the price of a quart of blockade whiskey.

Mr. BRANDEIS. No, sir.

Mr. WEBB. In this connection, let me call you attention to this fact: The Legislature of Illinois had a provision very much like this sec-

tion 20, and a sewer-pipe company in a certain case sued the defendant in Illinois, and he set up the fact that this sewer-pipe company was a trust and the only way the Supreme Court got around supporting the plaintiff was that it declared the whole antitrust law was void because it exempted farmers.

Mr. BRANDEIS. Well, take this situation, which is a very common one in the States. The law, in some States, says that no foreign corporation that has not filed its papers and has not complied with certain provisions of the act shall have the right to recover in any State, and that all the courts of the State are barred to a corporation which has been guilty of an infraction of the law. Now, you will find many provisions of one kind or another in the law. It simply says, "We deny our solemn legal processes to one who is engaged in these illegal practices." Now, it seems to me that that comports with the dignity of the law. We are in this position in regard to the Sherman law: Men come all the time and tell you of the uncertainty of the law and that they have done these things believing that they had a right to do them, that lawyers had advised them that they had a right to do them.

Now, what is the situation? There are very few questions, as we know, on which lawyers, particularly when they have clients, can not honestly differ. You put some facts up to a man and he may not be able to say definitely that it is an illegal situation. He may think it is, but he has a reasonable doubt. Just as in any number of cases that are put up to us in examining titles, dozens of questions come up and a man who has a reasonable doubt, what does he do? Pretty much every time he has a reasonable doubt he decides against doing the thing. His decision is always to resolve the doubt against doing it. You take the situation in regard to the Sherman law. Every doubt that has arisen in a man's mind has been resolved in favor of not doing the thing, because there is no harm in guessing wrong. If you do guess wrong you give your client the benefit of a combination that would have otherwise been illegal. There is nothing to be lost. Now, it seems to me that if we want to make this law an effective law we ought to see to it as a matter of machinery that men should be deterred from doing the thing which they have a doubt about doing or that they would do as men do in other walks of life.

Mr. WEBB. Section 6 of the Sherman law provides for confiscation.

Mr. BRANDEIS. Yes; but that is of a character which is never enforced. This is the kind of a thing which might be self-executory. Now, I said that there was another provision which was somewhat similar in its character although differing very much in other respects, and that is section 22, which appears on page 503, and reads as follows:

That whenever in any suit under section 4 of this act it shall be alleged that the defendants, or any of them, have entered into a combination which was or is in restraint of trade, no department or official of the United States shall, unless and until such allegations shall be found on final decree to be unfounded, enter into any contract with any such defendant for the purchase or supply of any article, nor purchase from any such defendant or any other person any article manufactured by any such defendant or any subsidiary or controlled company, association, or firm, except so far as required so to do by some existing contract, unless—

First. The article so manufactured is reasonably necessary for the purposes of the Government and no adequate opportunity exists to substitute another article of equal utility at a reasonable price; and

Second. The officer so authorized to make contracts or purchases of that nature shall, after full investigation and before such contract or purchase is made, have certified in writing to the facts set forth in the preceding paragraph, and have filed with or mailed to the Department of Justice and the Commissioner of Corporations copies of such certificate.

Now, the purpose of that section is this: It appeared to me to be entirely unseemly that the Department of Justice should be engaged in prosecuting as a trust a certain combination, and that the War Department or the Navy Department or some other department should be doing all it could in the way of giving business to that particular organization. Certainly the Department of Justice ought not to act, and it does not act, except upon the very extended investigations showing reasonable cause for its action. If it, having investigated the subject, has made an investigation and has determined that the Government should prosecute that combination as illegal, no other department of the Government ought unnecessarily to interfere with the action of the Department of Justice by promoting the profits of that institution.

Now, of course, it is a question of policy, but it is also a question of machinery. It is a question of discouraging, in some outside way, breaches of trust. Take the situation in the Tobacco case. Year in and year out, while the Department of Justice was prosecuting the Tobacco Trust as a result of its investigation, aided as it was by the investigation of the bureau, with what propriety could the Navy or the Army undertake to patronize those whom the department was pursuing? Of course, if it is necessary the Government can do it. If it is necessary because you can not get it elsewhere, or because others will not deal fairly with the Government, under this provision the official would file his certificate, which would be ample to justify it. It seems to me that there ought to be a respectful consideration by the other departments of the action of the Department of Justice.

Mr. FLOYD. Now, going back to another one of these provisions, Mr. Brandeis. Suppose that suit is instituted alleging that one of these corporations is unlawfully doing business, and the War Department or Navy Department should make a contract with it for the purchase of supplies and file the statement as required, and we also enact this other provision referred to which prohibits the corporation from enforcing a contract when it is adjudged to be unlawful, would not you put the Government in an attitude of repudiating its own contract?

Mr. BRANDEIS. I would not put anybody in the position of repudiating his own contract.

Mr. FLOYD. You put the company in an attitude where it could not enforce the claim against the Government.

Mr. BRANDEIS. Well, no company could enforce a claim against the Government without the Government's consent. It is wholly a matter of the Government's will.

Mr. CARLIN. The Government has already provided machinery for that purpose.

Mr. BRANDEIS. It has provided the Court of Claims, but the action of the Court of Claims is not final.

Mr. CARLIN. But when they have decided a case they enter judgment as a matter of course.

Mr. BRANDEIS. Well, when the Government makes a contract nobody expects that the Government will not perform it.

Mr. FLOYD. If section 20 was enacted would not it apply to the Government contracts as well as any other contracts?

Mr. BRANDEIS. I think so.

Mr. FLOYD. That is, if nobody representing the Government should insist——

Mr. BRANDEIS (interposing). But nobody has got to insist upon a defense of illegality any more than on the defense of the statute of limitations or the statute of frauds or the defense of infancy. There are any quantity of cases where persons could avail themselves of those defenses, but they do not do it.

Mr. FLOYD. I only wanted to call your attention to the matter to show that if we adopted section 20 at the end of this last provision you would put the Government in the position of making a contract which could not be enforced against the Government.

Mr. BRANDEIS. The Government can do that with any contract because it is sovereign. What I have endeavored to accomplish in both of those provisions is this: It is to help overcome these various anomalous positions in which we are to-day in regard to the Sherman law, and have been for the last 23 or 24 years, where a man did not stand to lose anything by taking the law into his own hands or resolving doubts into his own favor and making the combination. It seems that we ought to arrange our legislation so that there would be a risk in doing these things, so that a man, in respect to the Sherman law as in respect to a great many other things, would keep away from the danger line. The question was once put to me, "Would you advise a man safely under the Sherman law?" I said, "It depends altogether upon what you mean by safely. If you point to a great precipice and ask me, 'Now near can I go to the edge of that precipice without falling over?' I would have to answer, 'No, sir; I can not, for you may go near to that precipice and there may be a loose stone or a protruding root that you may stumble and go over,' but if you ask me, 'How near can I go to that precipice and be safe?' I could tell you that, 'If you keep on this side of a certain line you will be absolutely safe, but in between here and there it is very dangerous and you had better not go there.'" Now, under the Sherman law as it exists to-day, men have been going near the danger line because apparently there was no danger to it. There was absolutely all the time a chance of sure winning. There was no chance of losing at all, because nothing happened except the declaration when a final decree came, "Do not do it again." That is all that happened. Now, it seems to me that what we should do in perfecting this machinery and in devising this machinery is to make it so that men should have something to lose if they take the risks and are actually found afterwards to be in the wrong.

Mr. GRAHAM. What penalty is imposed on the man, and what is he to lose under section 20?

Mr. BRANDEIS. He has as much to lose as any man who sets up a defense. He is allowed to set up any defense he likes. Suppose he sets up a defense in an ordinary suit that the contract is illegal, and he loses. He has lost his defense, or if he sets up any other affirmative defense he simply loses his defense.

Mr. GRAHAM. Then, it seems to me, that is inviting just such defenses to be set up.

Mr. BRANDEIS. It is a pretty heavy burden.

Mr. GRAHAM. Take this section 21, and suppose the Department of Justice instituted a suit against a corporation, and it turns out that that suit is ill founded, and in the meantime the Government has denied the making of contracts to that corporation through its various departments and deprived them of a measure of business. What redress is there for that corporation?

Mr. BRANDEIS. What redress is there for it if the Government brings a suit that is wrongful?

Mr. GRAHAM. I believe in clothing the Government with full power to enforce the law and make it as severe and penalizing as possible, but I do not believe in clothing the Government with power to put into the hands of Tom, Dick, and Harry the right to enforce litigation.

Mr. BRANDEIS. Here are two provisions; one says that when the Government has undertaken to proceed it can not say, "Do" with one hand, and with the other hand say "Don't." We have got to have confidence that the Department of Justice, which is commissioned to look into matters that the War Department or the Navy Department are not commissioned to look into, shall not be working at cross purposes with them or with any other department of the Government. That has reference to section 22 that I have referred to. As I say, the purpose of both of them is merely to lend some additional deterrent to overcome the tendency of resolving the doubt in favor of doing.

Mr. GRAHAM. It looks to me like inflicting the penalty before there has been any adjudication of responsibility or guilt.

Mr. BRANDEIS. There is a penalty every time the Government brings suit. That is a pretty serious thing.

Mr. GRAHAM. That is not an answer to the proposition where you take the business away when you clothe individuals with the right to institute these proceedings.

Mr. BRANDEIS. An individual has no right to institute these proceedings.

Mr. GRAHAM. He interposes a defense that brings about a trial of the issues.

Mr. BRANDEIS. He has the right to set up the facts, and if he is beaten he is beaten on them the same as if he sets up any other facts. He can set up a thousand other defenses if he likes.

Mr. GRAHAM. I only wanted to call attention to that fact.

Mr. BRANDEIS. Well, I did not mean to say that there is not an argument on that side. I think the point that you make is extremely well taken. But I think we have got to make up our minds. Everybody talks about the Sherman law and says it is all absurd. You say it is absurd because the trusts have flourished all these years. To my mind it does not show that at all. We have not made the machinery, we have not been whole hearted in the way we ought to have gone about it. If we want the Sherman law, and apparently all the people of the United States do want it, let us be honest with ourselves and make the machinery that will produce the results. If we do not want that thing, do not let us have the law at all.

It seems to me that the whole law, not only the Sherman law, but the whole system of jurisprudence, the whole system of courts is brought into disrepute when we have any law that is prominently ineffective. The Sherman law is ineffective.

Mr. MORGAN. As I understand it, the object of these sections that you are discussing is in reality to give an additional penalty for violations of this law.

Mr. BRANDEIS. As a discourager.

Mr. MORGAN. That is the great object of all deterrent laws.

Mr. BRANDEIS. Yes.

Mr. MORGAN. If that was the proposition could we not accomplish that much more simply by adding larger penalties?

Mr. BRANDEIS. No.

Mr. MORGAN. Like confiscation.

Mr. BRANDEIS. You have confiscation and it does not work, for a very simple reason.

Mr. MORGAN. You say, and we all concede, that the Sherman law has not been effective in its results.

Mr. BRANDEIS. Yes.

Mr. MORGAN. Do you not think that a large part of that comes from the fact that the Department of Justice has not had the time or equipment to bring suit in all these cases? Is not that a part of the trouble?

Mr. BRANDEIS. That is one-third of the trouble. I do not believe it is more than that.

Mr. MORGAN. Do you not think that whatever additional laws we make, that the multiplying of statutes will simply multiply that work and you would make it more ineffective because the courts can not handle them?

Mr. BRANDEIS. I do not think so. If you are dealing with machinery, what you want to do would be to have the tools or the machines adequate to do your work. You would insist upon the proper tools if you were a good workman. You would have half a dozen tools instead of trying to do all the work with one tool.

Mr. MORGAN. Well, that is all right, but you talk about machinery for administering the law. Does not that more particularly apply to courts, commissions, or some administrative bodies? Now, when you are making additional statutes and piling them on top of each other, are you not putting more work on the machinery that we now have?

Mr. BRANDEIS. I do not think so. I think as to these last two sections that is applicable. That statement is applicable, because that refers to the attitude or policy of the Government. It is not true of section 20 or the earlier sections we discussed.

Mr. MORGAN. Now, take the sections in reference to machinery.

Mr. BRANDEIS. That is power in the court, for that is all it is, if it finds that a monopoly exists and the person can not supply this otherwise, to compel the department to continue to supply until other supplies can be found.

Mr. MORGAN. As I understand, and as you understand, of course, the question of a trade commission is not before this committee.

Mr. BRANDEIS. Yes.

Mr. MORGAN. But the other committee, the Interstate and Foreign Commerce Committee, has that matter under consideration. Are

you advocating these propositions with the idea that the commission will be created?

Mr. BRANDEIS. Well, what I am advocating here I should advocate whether or not a commission will be created, but I hope the commission will be created.

Mr. MORGAN. What do you think about the proposition of whether a commission, or even the Attorney General, if we saw fit to give him the power, could advise business men whether or not a certain proposition would be in violation of the law before they enter upon it?

Mr. BRANDEIS. I do not think it would be safe at this time to give such power either to a commission or to the Attorney General.

Mr. MORGAN. Do you not think that business men generally, if there were such a body created that had such power, that almost without exception the great business men of the country would be glad to comply with that Federal authority and not undertake to do anything which they had been advised was illegal?

Mr. BRANDEIS. I think that it is very probable that in most instances they would not do the thing which they were advised they could not do, but I think it is possible also that in the present state of the law you would get a great many decisions—I mean in the present state of knowledge of trust decisions—which would be unsafe, and you would get some decisions probably authorizing things to be done that would not be authorized if the matter had been fully investigated. In other words, it seems to me that if you should have a commission, and I believe you should have a commission, that the work of the commission should be strictly limited to the beginning, as the President states, to the ascertainment of facts and the getting of information and to the making of that information public, so far as it is of public interest. That is all the power that we can safely commit to a commission to-day, the machinery for getting data, and that machinery of itself will be of the greatest aid to the public.

Mr. MORGAN. Do you not think it would be better, if that is all the commission is to do, to organize a committee under the Attorney General?

Mr. BRANDEIS. No; that ought to be entirely distinct. I do not believe that when we have created the proper machinery for the law, and the proper machinery for getting at facts, that the occupation of the Attorney General in dealing with trust questions is going to be very difficult. It seems to me a mistake to deal with this trust problem from the standpoint of crime. What we ought to do is to create conditions so that men will not be disposed to break the law.

Mr. MORGAN. Now, just another question that I want information on. I think you spoke about the proceeding against the United Shoe Machinery Co., which controls the machinery, which has been going on about three years. Where is that suit now?

Mr. BRANDEIS. In the circuit court of the district of Massachusetts.

Mr. MORGAN. That court will probably render a decision within a few months?

Mr. BRANDEIS. No; not within a few months.

Mr. MORGAN. Well, within about a year?

Mr. BRANDEIS. I do not suppose anyone can tell when. I am not entirely familiar with the situation, but my impression is that the evidence has not been closed.

Mr. MORGAN. Well, it will probably take one or two or three years before the Supreme Court of the United States passes on that question.

Mr. BRANDEIS. I should not be surprised.

Mr. MORGAN. Then, there are five or six years in that case before final determination and any suit which the Attorney General brings against similar corporations may take just as long a time.

Mr. CARLIN. The Standard Oil Co. case only occupied four years from beginning to conclusion.

Mr. MORGAN. Well, is it not a fact that the great trouble is in the delay in bringing those things to an issue. That they go on and on, and that is why the Sherman antitrust law, as I think, has been a failure—and a great many other people think the same way—that the courts are too slow, too crowded, too overburdened, and that we are altogether court ridden, and the people are powerless to help them. Now, I want to know how those additional statutes will change that part of it. Will the courts get through any quicker?

Mr. BRANDEIS. Let me answer that question the best I may.

Mr. MORGAN. That is what I want.

Mr. BRANDEIS. It seems to me when we look at the past that we ought to look at it for the purpose of ascertaining why the trust law has not been effective heretofore. There are, as I conceive it, three reasons: The first reason is that in a long period—in the earlier period of this law—there was no desire to enforce it; that is, there was no desire on the part of the administration and there was no desire on the part of the people to have it enforced.

Mr. MORGAN. Do you mean that as a criticism upon the administration?

Mr. BRANDEIS. I state it merely as a historical fact. I think it is undoubtedly true as a historical fact. There was at one time a question on the part of the Attorney General, as I recall it, as to the constitutionality of the act itself.

Mr. DANFORTH. Who was that; Mr. Olney?

Mr. BRANDEIS. I think so. But at all events, the law was not enforced, because there was not a serious purpose to enforce it. In the second place, there was not a serious desire to enforce it, probably because it was not generally recognized what were the evils of monopoly. People were misled by the apparent blessings of monopolies. Also there had been a decision in the Knight case which restricted the law.

Mr. CARLIN. Do you not regard the Knight case as overruled?

Mr. BRANDEIS. Yes; but for a long time it stood as a deterrent for many from bringing proceedings, as a justification for many to do things that are now illegal. Now, first, you have had the attitude of the Attornay General, the public, and the courts. Now, second, it has seemed to me that we did not know what the law meant, not only that it was limited as the Knight case limited it, but we did not know further than that. We thought it was rather the question of the way of doing the thing rather than the doing of it, and one device or another was created for doing the thing, and we were dealing with technicalities, which made the people believe that the thing was ineffective.

Then there was the third and the very important situation to which I have referred, which was that the machinery itself was

defective, and nothing could be more marked in that respect than the results we have in the Standard Oil and Tobacco cases. Both of those cases arose and were treated in the usual way and it almost resulted in a judicial scandal. The courts, however, were not responsible for that, but there was a grotesque result from a case that involved not only legal but moral delinquency. I say that as lawyers who are charged not only with the duty of advancing the Sherman law, but that of advancing our profession, we should see to it that a law that is probably the most conspicuous of all the laws on our books should be effectually enforced, and that in the interests of law and order, aside from the question of trusts and monopolies, we ought to make the machinery of this law work as effectively and as promptly as it is possible for us to devise it.

Mr. MORGAN. And by machinery you mean additional statutes?

Mr. BRANDEIS. I mean by machinery perfecting the remedies and, where it is necessary to protect the remedies by statute instead of by rule of court, I would amend it by statute and, if the situation is one of doubt, I would, in the exercise of the power which Congress has, instruct the courts as to what their powers may be, because you must remember that you gentlemen here are studying hard this question of the trust law. You are giving time and attention to this question. The courts have it, and it is one of many questions which come before the courts. You will be specialists in the law, so far as it deals with trusts and monopolies and the Sherman law. They are not experts or specialists on this subject, and you ought to do what you can to make the machinery such as it may be an example to the country of how efficient legal machinery may be when the mind of man is directed to it.

The CHAIRMAN. Mr. Brandeis, would it interfere with the order of your oral remarks if I invite your attention to tentative bill No. 3 now before the committee, involving the question of interlocking directorates? Perhaps you can take it up and criticize it.

Mr. BRANDEIS. Very well. And then I shall return to this patent matter later.

The CHAIRMAN. It is found at page 14 of the pages numbered in Roman numerals, volume 2, Bills and Resolutions.

Mr. BRANDEIS. I thoroughly approve, Mr. Chairman, of the general proposition that we should prohibit the practice which has been broadly discussed or spoken of as that of interlocking directorates. I conceive in that practice under that term there are included two entirely reasonably distinct propositions. One is strictly the question of interlocking directorates between two or more concerns engaged in a similar business. So far as we are dealing with that subject, we are dealing wholly with something which is cognate to the Sherman law, the law of trusts. If we have two competing concerns and they have a common director or some other common interest, financial interest, we are practically, in many cases—though it is not in all cases—preventing that which we were supposed to have, namely, competition, and that interlocking of these two competitors may be of such a character as really to restrain trade; I mean seriously, injuriously, unreasonably restrain trade. That may happen. There we are dealing with a subject which is akin to the Sherman law, and the interlocking directorate is merely one of the instruments by which restraint is exercised.

There is another class of cases which do not specially deal with the realm of the Sherman law directly, but which are of the greatest importance in dealing with this broad subject, and that is where a person is a director in two corporations, not competing corporations, but two corporations which deal with one another. We have a railroad which makes a contract, on the one hand, with the banks from whom it borrows money—falling in line with the President's suggestion in his message—and, on the other hand, which buys its equipment from another corporation, and the same person is a director in the three corporations. Obviously there we do not directly come at all upon the realm of the Sherman law. There is not any suppression of competition visible anywhere. But we are getting there into a field which can more properly be likened to entering upon the field of the Money Trust. That is, we are getting into a field of the extension of power of one individual or a few individuals over many fields, and we are giving men, the men who are engaged in that position, an extraordinary power, a privilege which may ultimately grow so large in its consequences as to embarrass business generally. Why? Because this banker who lends the money to the railroad, this banker who buys the securities from the railroad, acquires power. He is on the railroad and may fix the price, or help fix the price, at which those securities are sold to him as a banker. This banker is on the national bank, he being also a director on that, and may get the money from the national bank with which he buys these bonds from the railroad.

Mr. CARLIN. He is buying and selling to himself?

Mr. BRANDEIS. Yes; he is buying and selling to himself on all hands. He is selling the bonds to himself, he is borrowing money from himself in the bank, lending money to himself in the bank, selling those bonds to the insurance company of which he is also a director, and then, in the capacity of the railroad holding this money ultimately, he is using that money to buy from the equipment company of which he is also a director; and so you may go on until the end of time, always in another and still another and still another case; and yet at no point in that chain which we are setting out there, would you find that there is a direct suppression of competition between competitors. What you are doing is to build up an immense financial force by reason of combining together all these kinds of business, transportation and finance and equipment and manufacturing and insurance, and they are all bound together.

Mr. NELSON. Generally that tends to restrain trade, does it not, in that field?

Mr. BRANDEIS. In its ultimate result it tends to restrain trade, and is more important because it is more fundamental than the things at which the Sherman law directly is aimed.

Mr. CARLIN. I direct your attention to section 1 of tentative bill No. 3, which is intended to relate to directors of railroads; that is to say, it prohibits the directors of certain companies being directors of any railroad or other public-service corporation which engages in interstate commerce, and it has no reference to any other corporation. What is your view of that section?

Mr. BRANDEIS. I should say in regard to that section, while its intent and purpose was most sound, that, as drawn, it seems to me on the one hand it goes too far and on the other hand it does not go

far enough. It goes too far in this, that in order to prevent the same man who is a director in a railroad from borrowing money from the bank in which he also is a director, and from buying equipment or supplies from the company in which he is also a director, it says outright that no man shall be a director in concerns of both of those kinds. I think a man might be a director in the Pennsylvania Railroad and there could be no possible objection to his being a director in a bank of which the Pennsylvania Railroad Co. does not borrow money, or his being a director in the equipment company of which the Pennsylvania Co. does not buy equipment. The wrong comes in when he is on both sides of the transaction, and, as it so often happens, in the middle also. That is where the wrong comes in. It is not inconsistent to be a director of a railroad and a director of a bank and a director of the steel corporation. These things are perfectly consistent and may be perfectly honorable and conducive to the best interests of the community; but it is when men are endeavoring to serve two masters or to serve themselves by being in a position of being the servant of two masters that the evil comes. Therefore, I say that this section as it stands is too broad, because it prohibits a great many operations which are innocent in themselves and which may be extremely beneficial to the community, and that we ought not to carry any prohibition so far as it affects business, further than the necessities of the case require.

What we are undertaking to do is to liberate business, and the whole purpose of the present proposition is to liberate this business, and we ought to remove restraints, not make them. We do not make any restraints, but we are to remove restraints. Therefore it would be wise, in respect to that section, in what it undertakes to do, to limit it, not to the prohibition of directorates, but to the prohibition in these various occupations there, and any others—the dealing of a railroad company with a steel corporation or an equipment company that has the same director, or the dealing of the railroad company with a bank which has the same director.

Mr. CARLIN. You think we ought to apply it to all persons who sell supplies to the railroad?

Mr. BRANDEIS. I want to go further. I say in that respect it goes so far, but in another respect it does not go far enough.

This principle we speak of here is a principle that ought by no means to be limited to railroads, but ought to apply to all classes of relations to industrials as well as railroads.

Mr. CARLIN. We attempted to do that by section 4 of the bill. Section 1 deals with the railroads, section 2 with the banks, and section 4 with industrials.

Mr. BRANDEIS. I think, Mr. Carlin, that as you have section 4 there your clause is limited to a linking together of two industrial corporations who are competitors; that is, questions which are, as I said, originally and strictly within the realm of the Sherman law proper.

But the proposition to which I am addressing myself now is not the proposition of prohibiting the directorates but the proposition of prohibiting dealings. Take an industrial concern, Mr. Carlin; take the Steel Corporation itself and the power which the Steel Corporation exercises. It is a fact that the same man who is a director of the Steel Corporation is a director in this string of banks and trust companies and insurance companies, on the one hand, and that he is

a director in the telephone and telegraph compnies, and that he is a director in a large number of other concerns that create that huge power which makes really effective the restraints upon trade. That may be made just as well through the connecting link of industrial corporations as it may be made through a connecting link of a railroad, and the preservation of that practice which gives men the privilege of the inside track—because that is what it is; the binding together of all these corporations of various kinds—is giving them a privilege which makes them so powerful that all business is subject to that privilege. That is what the Money Trust means. That privilege which comes from men dealing with themselves is a privilege in which the railroad is only an incident, though a very important one; the industrial is an incident, the insurance company is an incident, and the bank is an incident. That principle of prohibiting the men from making contracts with themselves is a principle which ought to be universal in its application. It is not strictly a question of interlocking directorates.

Mr. CARLIN. The reason, perhaps, for separating the subject matter and dealing with the same principle all the way through may have been one of juridiction. There is no question that Congress has the right to deal with railroads that are interested in interstate commerce and to limit the directors. There can be no question that we have the same right with reference to national banks, which are the creatures of Congress. When you come to the industrials, certainly you can not go any further than those which are engaged in interstate commerce.

Mr. BRANDEIS. Absolutely.

Mr. CARLIN. Therefore, you will see that the subdivision perhaps is such as was made necessary for jurisdictional reasons.

Mr. BRANDEIS. For jurisdictional reasons, therefore, it would seem to me desirable to limit it in this way: Provide that no corporation shall engage in interstate commerce unless it complies with certain definite provisions, and these provisions are the ones eliminating such particular transactions as I have spoken of. You keep wholly within your jurisdiction when you limit to corporations engaged in interstate commerce, and when you have limited the corporations engaged in interstate commerce, you have covered all the field practically that it is important to cover, because there is not a large corporation, there is not a powerful corporation—I mean industrial or railroad—that is not engaged in interstate commerce. So far as it deals with any other corporations that you want to deal with, the powers of Congress are ample to extend to those, because you can resort, as you have resorted in many other instances, to the taxing power; and there are other powers also as well as taxing power. Congress, in the oleomargarine law and in the phosphorus-match law and in the law prohibiting State banks from issuing bills, has undertaken, by virtue of the tax law, to control the operations. So you have, aside from any question which may arise under the post-office law, the interstate-commerce provision which would cover practically all that you need to cover—unless it be in certain instances in connection with banks—and you have the taxing power which can clearly enable you to do whatever it is wise to do; and we come back, therefore, to the question of what is it wise to do?

The CHAIRMAN. Mr. Brandeis, I want to direct your attention to section 2. You have discussed railroads, and this section 2 relates entirely to banks.

Mr. BRANDEIS. Yes.

The CHAIRMAN. It has been brought to the attention of the committee that there are small trust companies in connection with banks in the smaller communities. This provision would prevent there being one director in the bank who was also one director in the trust company, and it is said these people are in no wise engaged in anything in restraint of trade, and it would interfere with a perfectly legitimate business if this section were enacted into law without amendment. I would like to have your views about it.

Mr. BRANDEIS. I am very glad indeed, Mr. Chairman, that you have called my attention to that provision. Let me state with some fullness my view on that question.

The vice, as an economic and moral proposition of being on both sides of the contract, when you are in a position of trust, I think exists no matter what the size of the corporation may be nor what its class. I think, in the interests of general morality and in the interests of the minority stockholders, it would be highly desirable that no director should be put in such a position. But when we come to deal with the question which you have particularly in mind, the question of restraints of trade, of money trust power, and of great commercial power, we can look at it in a different way.

All classes of corporations—that is, all kinds of corporations—ought to be subject to a law which enforces that fundamental principle that no man should serve two masters. But when it comes to the question of the restraints of trade it is obvious, as the question put by the chairman has just indicated, that there are many corporations which, as bearing on that particular subject, are altogether too small to be of effect. It would be perfectly consistent for Congress to say, "We are going to make a prohibition of such dual relations and conflicting relations impossible so far as they deal, in the first place, with public-service corporations, railroads, and other public-service corporations; that is, ones in which the public generally is interested; and in the second place, in respect to all corporations which are of a size sufficiently great to make them important." We could therefore say we will, for instance, enact this rule for all corporations having either capital or resources of, say, $5,000,000 or over, or $2,500,000 or over, or $1,000,000 or over. We will not apply it to a corporation, say, other than banks, which have resources less than that and we will not apply it to banks which have resources of less than $500,000, not because the same principle, as a principle of business morals, is not applicable, but because we are dealing here primarily with a question of restraint of trade and the exercise of a great commercial and financial power, and when we come to deal with these smaller corporations, although we must recognize that to a certain extent they may contribute to this power, balancing the advantages and disadvantages of that legislation, we could eliminate from the operation of the law those corporations which, by reason of their capitalization and resources, are too small to be dangerous to the general financial and commercial fabric.

Mr. MORGAN. Do you not think that would be really wise in this legislation?

Mr. BRANDEIS. Do I think it would be wise?

Mr. MORGAN. Yes; is that your view?

Mr. BRANDEIS. I think it certainly would be wise to do it at the start; that is, I mean in a law which is to go into effect at an early date. I have had a question whether it would not be desirable in framing the law to make it apply at first to the larger or the quite large corporations—I mean after a lapse of a limited time, as suggested by the President—and then make it applicable a little later to a second class, somewhat more comprehensive, and at a still later date to take in still others, because I believe the fundamental principle is absolutely sound, and I believe that this apprehension to which the chairman has called attention so clearly is one that to a large extent is unfounded; but it exists, and I think it should be restrained.

Mr. MORGAN. Do you think we would have the constitutional right to so classify them?

Mr. BRANDEIS. I have no question but you have that right. I think it is perfectly clear that that right exists, and I think it would be wise to classify them.

Mr. MORGAN. Could you give in a few words why you think it would be constitutional?

Mr. BRANDEIS. In the first place, the Supreme Court has decided in a large number of cases that any classification which is not arbitrary and discriminatory—and by that I mean the decisions have practically said, in which you can not read an intention to discriminate against certain persons, to use the law against certain persons—that that classification will be upheld by the court not to be arbitrary.

The CHAIRMAN. Going back to section 2 of this tentative bill No. 3, what banks and trust companies, if any, would you exempt from the operation of this section 2?

Mr. BRANDEIS. I think, Mr. Chairman, the law ought to be so drawn as to exempt, say, any bank—that is, in the first instance, making the law that is to become operative, say, a year hence or two years hence——

The CHAIRMAN (interposing). The section makes the law operative two years from the date of approval.

Mr. BRANDEIS. Let us take it at two years, then. Under that law I should exempt any bank or trust company which had a capital of, say, less than $500,000 and resources of less than $2,500,000. Those, I think, you might exempt.

Mr. PETERSON. Would you not base it on capital and surplus?

Mr. BRANDEIS. I think not. I think there ought to be a double limit. That is, if you base it on merely the capital and surplus, you may have a bank which has, through its deposits, tremendous power. There are such instances, and they could be easily excluded. I think we ought to have a double limitation—one of capital and surplus.

The CHAIRMAN. Surplus is a part of the capital?

Mr. BRANDEIS. Surplus is always a part of the capital. The one limitation should be on capital, and the other on resources, which would include deposits. I think if a bank has very large deposits, regardless of what its capital is, it may be a source of danger in this connection. The main danger in all these things is not the capital

so much as the resources. Other people's money is far more important than the money of the people who own the bank. I think you should put in that limitation.

Mr. CARLIN. Here is what I understand the section to be, that they are rather excluding from the directorship of one bank an individual who is a director of another bank.

Mr. BRANDEIS. Yes.

Mr. CARLIN. If we come to the exemption we have to deal with the individual still and say whether or not he shall be a director in two banks or three banks, or whether he shall be a director in a national bank at the same time that he is a director in a State bank. We have this difficulty: A number of State banks—small institutions—have directors who are also directors in national banks which are large institutions. If you exclude those directors from being directors of the national banks, would you not cripple the situation?

Mr. BRANDEIS. I think, Mr. Carlin, if you want to make that law effective you have got to exclude certain things. When you come at all to the bank which is within your classification—say within $500,000, or whatever it may be, or $100,000—I think, you have got to exclude the right to be a director in any other bank, State or Federal, which is a competitive bank. I would not admit a right to be in any other State bank any more than in any other national bank.

The CHAIRMAN. Let me give you a case that was brought to the attention of the committee the other day: Over here in the State of Maryland the president, who was also one of the directors, of a national bank of $25,000 capital is also a director in a savings institution in the same town, and the savings institution had assets of $1,200,000. He protested quite vigorously against this proposition denying him the right to be a director in both of those concerns. He said they were in nowise antagonistic and that he had been serving in the capacity of both of them for a long time; that they were not engaged in exploiting any scheme; they were simply conducting, in the one case, a savings institution for the benefit of their patrons and nobody else, and, in the other, the national bank, simply doing no more than a legitimate banking business.

Mr. BRANDEIS. When you came to that particular case, I think, under the classification which I propose, he would be eliminated because his bank would not be of the class which would come within the limitation.

The CHAIRMAN. By reason of its lack of capital?

Mr. BRANDEIS. Yes; by reason of its lack of capital.

Mr. CARLIN. The case is that of a savings institution where they have no stock at all.

Mr. BRANDEIS. The other institution may be of a class which is of a different kind.

I want to make myself a little more clear on that. There is no difference in the way business is conducted between a national bank and a State bank, as the term is ordinarily used, and a State trust—I mean a trust company like those in New York, where the trust company does the same sort of thing that the national bank does.

Mr. CARLIN. Those are all banks of discount?

Mr. BRANDEIS. They are all banks of discount, and they are banks of deposit in the ordinary sense, where money is deposited and drawn out on checks without notice. Those are banks which are

of the one class. When you come to a savings institution I presume the Maryland savings banks are similar in that respect to those of New York and Massachusetts.

Mr. CARLIN. The case in point was in a town of 40 population. There was a national bank with $150,000 deposits and $25,000 capital, and a savings bank with over $1,000,000 of deposits, and the same men were directors in both institutions.

Mr. BRANDEIS. Those do not come within the rule I am contending for.

The CHAIRMAN. I understand that.

Mr. BRANDEIS. They are not banks in the ordinary sense.

The CHAIRMAN. I suppose it is an ordinary trust company?

Mr. BRANDEIS. No; it is not an ordinary trust company; and if it were of a size coming within the classification I suggested, I think the man ought to be obliged to make his selection as to whether he would be on one or the other; and I have great confidence that all of our communities contain men who are properly to be intrusted with the management of these concerns—a great many more men than are now on boards of directors who can be properly intrusted with the management of these concerns.

The CHAIRMAN. The criticism has ben offered in this connection that even if it were enacted into a law you would prohibit a man from being a director in two or more banking institutions, but that it would in no wise prohibit what they term a "dummy" director.

Mr. BRANDEIS. I think the law should be strengthened in respect to that.

The CHAIRMAN. How would you do that?

Mr. BRANDEIS. I think it should be expressed so that the dummy director—that is, the representative of a director—would be excluded. As a matter of fact, I think that in order to create complete separation, you have got to go perhaps even further than that. It is a matter of expression of detail, and I should be very glad to submit to the committee some details in phraseology with a view to covering that point.

I think the first question, and the question which we have to consider throughout this whole subject of interlocking directorates. is, on the one hand, not to make this prohibition so sweeping as to interfere with the proper conduct of business; and, on the other hand, where we do apply the restraint, to apply it so effectually that it really accomplishes the purposes; and therefore I should prohibit the holding of the dual relations of a director in two institutions, while applying it to all kinds of corporations, banks, and industrials and railroads, and public-service corporations of all kinds. I should apply it there only to those institutions which were competitive. On the other hand, when it comes to the interlocking of relations between all the various classes, I should undertake not to prevent the holding of directorships, but to prevent those who do have common directors from making contracts with one another.

Mr. FITZHENRY. I would like to ask this question right there: Do you think Congress has the power to legislate, say, in this way, that in all cases hereafter arising in the courts of the United States, in which there shall be called into question any contract between two corporations having common directors, the directors of both

corporations shall be considered to be trustees of an express trust. Have we the power to legislate in that way?

Mr. BRANDEIS. I should think not. I have not considered it exactly in that form, but I should think that is beyond your power. I think you have to limit your powers to acknowledged jurisdictional rights, namely, the right to legislate on the ground of there being an instrument of interstate commerce or one of the other recognized powers.

Mr. FITZHENRY. Suppose you make it apply only to corporations engaged in interstate commerce?

Mr. BRANDEIS. I should still think that legislation in that form would be in danger of being held unconstitutional. I think the result can be accomplished, but I think we would have to do it in another way.

Mr. FITZHENRY. You think Congress can not create a new equitable right?

Mr. BRANDEIS. It might create a new way of enforcing an equitable right, but wholly aside from the question of equity, there is great doubt as to what rights Congress can create as rights in the ordinary field. I would not base it upon the ground that this happens to be an equitable right as distinguished from another kind of right.

Mr. FITZHENRY. What I am getting at is this: Of course the decisions have held that if a director does not vote on the contract which he is making with his company, he is at perfect liberty to make the contract with the company. You say that if he, in that instance, shall be treated as the trustee of an express trust, and you do create a new equity, do you not, because in order to have a transaction like that stand, it would have to be disclosed to all the directors of the company and ratified in advance?

Mr. BRANDEIS. The objection that I should have to that method of expressing it, or the hesitation that I have in answering your question, is more largely because I should not feel that we ought to limit or seem to place it on the ground of a limitation of the powers of Congress over equitable rights as distinguished from rights generally. I do not think the circumstance that it is an equity, as you have expressed it, that we are creating rather than a legal right, has any importance whatever.

Mr. FITZHENRY. It would be a right enforceable in equity?

Mr. BRANDEIS. It would be a right which happens to be enforceable in equity if you happen to express it that way.

Mr. FITZHENRY. Can Congress create such a right?

Mr. BRANDEIS. I have no doubt Congress can, under certain circumstances, do it. I can not see why Congress can not create rights enforceable in equity just as it can create rights enforceable at law. I do not believe there is any difference in that respect.

Mr. FITZHENRY. Do you think we could enact such a law successfully?

Mr. BRANDEIS. Do you mean create a right enforceable at law or in equity, as the case might be?

Mr. FITZHENRY. Could we enact such a law as I have suggested and have it stand the test of the courts?

Mr. BRANDEIS. I have a doubt as to that particular way of stating it. I would not undertake to speak authoritatively on it because I have never given that special matter consideration.

Mr. FITZHENRY. It would give some relief.

Mr. BRANDEIS. It would. But it seems to me that matter could be reached probably in another way, and perhaps very effectively in another way.

My idea would be to accomplish the result which is sought to be accomplished in this third bill by a bill in a somewhat different form, reading, say, like this:

SECTION 1. That from and after July 1, 1916, no corporation having a capital or resources of $1,000,000 or more shall transact any commerce among the States or with foreign nations except upon compliance with the following requirements:

(A) It shall not have among its directors or officers any person who is a director or officer or who holds an interest as a stockholder or otherwise in another corporation which is engaged in competition with it, directly or indirectly, through stock ownership or otherwise, unless one of such corporations shall lawfully control the other through ownership of a majority of the shares of its capital stock.

That undertakes, so far as that part of it goes, to say, dealing with these larger corporations, that a corporation shall not engage in interstate commerce if it has on its board a director who is also in a similar position on the board of another corporation which does not control as a lawful subsidiary. Of course, this particular bill does not undertake to deal with the broader subject of holding companies, which ought to be treated in an entirely different way, but assuming that a New Jersey corporation is legitimately able and entitled to have a subsidiary sales company in Ohio and entitled to hold that other corporation's stock there would be no objection to the same man being a director on both. But if it did not hold that other stock, then you would have a director in two competing companies and under the law they could not engage in interstate commerce. And there you would have what would appear to be a clearly constitutional provision because it is limited to corporations engaged in interstate commerce and it would exclude this dual relationship in these competitive corporations.

Mr. CHANDLER. What effect would that have had on the final decree in the Standard Oil and tobacco cases? Would that have prevented the present holding of the common stock?

Mr. BRANDEIS. Standing alone, it would prevent any man from being a director or officer of those companies who was an officer of or held stock in the other company. That is, it would have accomplished the exact thing which Mr. McReynolds, as special assistant, wanted to accomplish in that case.

Mr. CHANDLER. It would not affect the mutual ownership of stock in each of those companies?

Mr. BRANDEIS. No; it would not affect the mutual ownership of stock, but it would have prevented the man who held stock in both companies from being an officer or director in either company.

Mr. CHANDLER. Was that not prevented by the decree itself?

Mr. BRANDEIS. No. A man could be a director in one and hold stock in the other.

Mr. DANFORTH. What do you say about preventing one from holding stock in two competing corporations?

Mr. BRANDEIS. I think a general law of that kind would be going too far. There are a great many men who hold stock who are of no significance in a corporation. You may take the ordinary investor who buys stock in 100 different corporations and who has no voice in any one of them, as an instance.

Mr. DANFORTH. How would you limit it—by name or amount?

Mr. BRANDEIS. You would have to limit it by the percentage, I am inclined to think.

Mr. NELSON. How would you suggest a law controlling the matter of ownership of stock in competitive companies that would have prevented just what happened with the Standard Oil and Tobacco cases?

Mr. BRANDEIS. I have endeavored in one of these provisions, relating to machinery, to reach that situation by pointing out to the court that that was the kind of thing to do. What we contended for in that case, and what Mr. McReynolds when he was special assistant contended for, and what I contended for in that case, was that the court in dividing up the tobacco company should refuse to allow anybody who held stock in one of those three important segments to hold stock in either of the others.

Mr. NELSON. Do you think the court now has that power to prevent it?

Mr. BRANDEIS. Yes; I think the court now has the power to prevent that. The Supreme Court of the United States has done something very similar to the exercising of that power in the Union Pacific case. There is no question about having that power, because it is a matter of partition. You can partition in various ways. When these corporations were brought together they were valued and put together. I think when a court is hearing a partition suit it can have the corporations treated in exactly the same way as in the case of a man who dies possessed of half a dozen parcels of real estate, and when you have a partition in his family you give one son one piece and another son another piece, and another son still another piece, and you value all those pieces and even them up by money.

Mr. NELSON. What did the court of appeals or the Attorney General hold with reference to that?

Mr. BRANDEIS. A different Attorney General expressed very grave doubt about that power and refused to bring the question up to the Supreme Court of the United States; but Mr. McReynolds at that time was very particular as to the existence of that power. He had no opportunity of carrying out his views in the Tobacco case, and when it came to the Union Pacific case, he insisted upon a provision of that nature, which resulted in the ultimate decree that was rendered in the Union Pacific case, by which the Southern Pacific stock could be sold only to those who were not holders of the Union Pacific stock. I mean the principle we contended for there and which the machinery for which is set out in that provision was adopted in the Tobacco case. It was contended in that case most strongly, by Mr. Choate and all the counsel for the Tobacco Co., that the Supreme Court held a different view, and quoted passages from the Harriman case and other cases in passing on the Standard Oil case, indicating that was the view of the Supreme Court. It seemed to me the contention was absolutely unfounded, but it satisfied the circuit judges, so they denied us the relief.

Mr. PETERSON. Was this last case approved by the Supreme Court?

Mr. BRANDEIS. Yes.

Mr. PETERSON. Holding it might be partitioned?

Mr. BRANDEIS. Yes; and I do not see how there could be a serious question of it. If you can partition ordinary real estate on valuing it, why in the world could you not partition stock in a corporation by valuing the relative lots there, and saying, "We will give to stockholders A to M the stock in company No. 1, and to the next stockholders M to T the stock in corporation No. 2," etc. It seems to me it was a perfectly clear proposition if the court wanted to do it. Counsel for the Tobacco Co. thought it was not so, and the court believed them; at all events, they did not do it. Attorney General Wickersham refused to appeal the case to the Supreme Court.

Mr. NELSON. What do you gain by preventing common directorships if you leave common ownership of stock in the hands of a few men?

Mr. BRANDEIS. I think you gain a great deal.

Mr. NELSON. What, for instance?

Mr. BRANDEIS. You gain a great deal even if you had dummies. Why was it that a few men exercised this power? Why was it, in the case of the New Haven, for instance, that all reason and all argument against the mismanagement of the New Haven directors fell on deaf ears? It was the magic of a few names—J. P. Morgan, William Rockefeller, and names like that—that carried the weight and the confidence of the community and the stockholders in their consummate wisdom, if not in their virtue. There they were. Those names meant a great deal, but they carried huge power with them, because people were willing to follow them. That is one thing. If you went no further than that as a practical matter, if you prevent the same men, with acknowledged power and ability, from holding positions in a large number of corporations, you will have taken away that great support which comes from reverence for their power and recognition of it.

There is, however, another thing. The reason why most men want to be on boards of directors, aside from the certain reputation for power that goes with it——

Mr. PETERSON (interposing). Would not this be true? Men like Morgan and Rockefeller would dislike very much to have their names connected with things that were improper, and if they could have dummies do it, might they not go a great deal further than they would if they were doing it in their own individual names?

Mr. BRANDEIS. I do not think so at all, and I do not believe, as a matter of fact, that these men are trying to do things that are improper. I think the improper things are far more largely the result than the cause—the result of our system. I do not believe these men enter upon this proposition with the intention of wronging other people; but they do.

Mr. NELSON. But they entered for the purpose of getting excess profits?

Mr. BRANDEIS. They entered for the purpose of getting profits which probably seem to us extraordinary, but not to them extraordinary. I believe you will find that those men believed, a very large portion of them, that they were doing the right thing, when they were doing the wrong thing; that they were men who believed that

they could serve two masters, and who believed that although they were getting a large profit, they were giving an immensely greater profit than other men could give. I do not believe, as to a number of men who are in these boards, that any large percentage of them either went in with a wicked intent or did the things that we most complain of with a wicked intent. You will find exceptions to it, but taking it as a whole, those men are not wicked in intent at all, but they have been led by practices which are distinctly objectionable, which are based on fundamental wrong ethics, to do things which are unsocial and injurious to public weal.

Mr. NELSON. In the Standard Oil we now have 28 corporations, but a mutual ownership of stock?

Mr. BRANDEIS. Yes.

Mr. NELSON. And they are not common directors, but the evil perists just the same?

Mr. BRANDEIS. The evil does persist, and I think the great evil that was done there was to have the decree in the from in which it was. I should most strongly have contended, and, in fact, in arguing the Tobacco case did contend, that there was a dissolution which did not dissolve.

Mr. NELSON. You think the Supreme Court has the power to order the dissolution of stock ownership, but that the mere matter of preventing common directors will not accomplish the dissolution?

Mr. BRANDEIS. It will not. If you ask me in one of these things whether it will accomplish the complete result, I have to tell you no. No one of them will accomplish the whole thing, but each and every one of these provisions are merely tools to aid in accomplishing a thing, and one of the things which would be a very great aid is the abolition of interlocking directorates, because not only is that the great name that attaches to it, but there is the knowledge of association and personal influence which comes. Take this question of Mr. Morgan on the board of directors of every corporation. It was testified, and it has been stated by people who knew what was going on in board councils, that if Mr. Morgan said something, that ended it; that there was no discussion; it was not merely a question of Mr. Morgan's power, in the sense that he could do the thing, but it was his influence, based largely upon a profound and, in my opinion, an exaggerated respect for the correctness of his judgment; but the fact Mr. Morgan said something ended it. If he had had a dummy on that board, nobody would have paid any such attention to the dummy.

Mr. DANFORTH. Not if the dummy said that Mr. Morgan suggested it would be a wise course?

Mr. BRANDEIS. In the first place, even that statement would not have carried with it any weight, because they would have known that Mr. Morgan was not there and could not have participated in the transaction.

Mr. NELSON. But if Mr. Morgan owned the stock, and the dummy said that he had talked to Mr. Morgan, and that Mr. Morgan said thus and so——

Mr. BRANDEIS. He would not do it in the first place; and in the second place he could say it. In the first place, Mr. Morgan did not own very much stock. His influence in hardly any corporation was the result of ownership of stock. It was his control and influence.

If a single individual gives a lot of thought to a certain matter and works it all out, knowing what is going to come up in advance, I could imagine a case where a dummy would be just as effective as the individual. But that is not the way things happen in life. These things are not all set up. These things are all worked out. There is not a deep-laid plan that is going on with Mr. Morgan in his 40 corporations, or Mr. Rockefeller in his 50 corporations, all worked out and all arranged in advance. These things are coming up from time to time, and it is a question of what the general effect is. Mr. Morgan is on there frequently at inconvenience to himself. Mr. Morgan or the others are there because of the power their personal presence has, the information they get from the discussion, which is a very large part of the power and of the emoluments that come from holding the position of director. They are there, and they know what is going on because they are there. They hear it and they see it, and they go into the books and they notice one thing and another. There is nobody except a most carefully planned and devised representative who could ever utilize such knowledge, and no representative could carry the power and influence which a big man does himself carry.

Mr. NELSON. If I understand your point, it is this: That a man who is the owner of stock in large blocks, unless he is on these directorates, would not understand the business sufficiently to give the orders. Is that it?

Mr. BRANDEIS. That is quite right.

Mr. NELSON. It must leave some discretion or a large discretion to the directors who are there?

Mr. BRANDEIS. A very large discretion. Of course, if you get a controlling interest, or if you get a very large interest in those corporations, you may have a control through that interest just as you would control possible power through a directorship.

Mr. NELSON. Take the question of fixing prices. Let us say the Standard Oil directs the one company to fix a certain price, and the order is given to the others to follow that price. Could not they in that way have uniform action all over the country, even though there were different directors?

Mr. BRANDEIS. Oh, yes; I think that could be perfectly accomplished. The effect of that ought to be reached in some way.

Mr. FLOYD. Coming back to your proposition that you suggested for interlocking directorates, would you substitute something for that provision, or would you embrace in the terms of that provision both railroad corporations and industrial corporations?

Mr. BRANDEIS. All corporations engaged in interstate commerce.

Mr. FLOYD. That would not necessarily include banks?

Mr. BRANDEIS. There is a question left in regard to banks as to how far they are engaged in interstate commerce; I mean there is a certain question, I think, that has been raised in that respect. It is very difficult for me to say how that is.

Mr. FLOYD. We have absolute power to deal with national banks or banks created under Federal authority. Do you not think it would be wise to deal with the question of interlocking directorates of banks directly?

Mr. BRANDEIS. I think it would be valuable to do that directly, but I should not limit to national banks.

Mr. FLOYD. I understand.

Mr. BRANDEIS. I think if you do limit to national banks you will leave the way open for all the difficulties, and you will find that we do not accomplish our result.

Mr. FLOYD. I understand that. You would base it on the limitation of capital and resources?

Mr. BRANDEIS. I would extend it to banks, whether State or national.

Mr. CARLIN. You have read all three of the bills, Nos. 1, 2, and 3 of the Clayton bills, and No. 4, known as the trade-commission bill. I observe by the paper that you have been discussing that trade-commission bill before the Commerce Committee. Let me ask you first as to the constitutionality of all these bills which Mr. Clayton has introduced. Have you found any constitutional objections to any of them?

Mr. BRANDEIS. In the first place, as to the trade-commission bill, I should feel very clear that the trade commission, dealing as it does with corporations engaged in interstate commerce, is absolutely constitutional.

The CHAIRMAN. So you do not agree with those who say the bill is unconstitutional?

Mr. BRANDEIS. I have not heard the arguments. I should be glad to know on what ground they claim it is unconstitutional.

Mr. DANFORTH. It was reported that Mr. Stephens said so.

Mr PETERSON. It was reported that he objected to it on the ground that it covered both State and interstate commerce.

Mr. BRANDEIS. It certainly purported to or, at least, I assume that it did purport to deal only with instrumentalities of interstate commerce. If it does that, it is constitutional, and I think we certainly need not go any further than that, because those are the only questions that interest us.

Mr. PETERSON. It was suggested that a corporation might be engaged largely in State commerce?

Mr. BRANDEIS. The fact that they deal largely in State commerce would not affect the bill, provided they deal in interstate commerce at all. It is hardly conceivable that any corporation that deals in commerce at all would not deal in some degree in interstate commerce.

Mr. PETERSON. I am not expressing any opinion myself. I am merely stating what I understand was said by others.

Mr. CARLIN. That disposes of your view with reference to the constitutionality of the trade commission. What have you to say as to the constitutionality of Clayton tentative bill No. 1?

Mr. BRANDEIS. May I ask what objection has been raised to the constitutionality of it, if any?

Mr. CARLIN. There has been general discussions along technical lies entirely with reference to No. 1.

Mr. BRANDEIS. I think very clearly this is constitutional. I have considered that most carefully.

Mr. DANFORTH. I would suggest this, without expressing an opinion on the proposition: Suppose that two of the parties were in a suit now pending when this becomes a law, would their judgment be binding upon third parties as evidence?

Mr. BRANDEIS. I think so. I think that would be true.

Mr. DANFORTH. It occurred to me that some question might be raised for this reason: Some corporation attacked by the Government might not care to make any particular defense if it would not be binding upon the corporation as against third parties, but allow the Government to take judgment; while on the other hand, if it knew that as a matter of fact it might be used for that purpose, it would resist the Government's suit very much more vigorously.

Mr. BRANDEIS. I think that raises the precise limitation which I had in mind. Take the ordinary case of making a procedure binding, like acts limiting the statute of limitations and things of that sort. I think the court has held in a number of cases that what is necessary is that there should be a reasonable interval.

Mr. PETERSON. Would not this be the question that they naturally would raise, that the corporation attacked did not really have to stay in court because it was believed that this was the result of a judgment or decree that might be entered?

Mr. BRANDEIS. Nobody could make any claim as to surprise. This legislation has been before the country for at least two years, and there is always the possibility that this may be the effect.

Mr. PETERSON. Is it not true, however, that the courts might permit additional testimony?

Mr. BRANDEIS. Perfectly.

Mr. PETERSON. If this section became a law, the courts would probably exclude testimony which otherwise they would be willing to hear?

Mr. BRANDEIS. I do not see how they could do that. The issue must be the same. I do not think there could be any exclusion. The only issue would be the issue of whether there is a combination in restraint of trade or attempted monopoly.

Mr. CARLIN. They raised the question of the constitutionality of section 4 of Clayton bill No. 3, which provides that where two or more corporations have a common directorate, that fact shall be conclusive evidence that there is no competition. What is your view on that?

Mr. BRANDEIS. I think that is an arguable question. I do not feel sure about that. I should think that is not clear, whether the mere existence would be conclusive evidence that there was no real competition. I do not feel certain one way or another on that.

Mr. CARLIN. Complaint has been made that all these measures are looking toward the theory of dissolution and prevention of ultimate competition by virtue of that idea, and they offer as a supplement or in lieu thereof the economic proposition that if this is a failure, we should adopt the regulation and give to the interstate trade commission discretionary power to determine what is fair trade between man and man. They claim this would be the only remedy against this evil.

Mr. BRANDEIS. I have a great deal to say on that subject. I did not know whether you would have the patience to hear it to-day, as I see it is now half past 4, and there some other things I want to say in regard to the specific provisions of the bill. If it will be agreeable to you, I shall be glad to come at some later time at your convenience.

The CHAIRMAN. I suggest you exercise your own option about that.

Mr. BRANDEIS. If I may communicate with you, Mr. Chairman, about some later date that will be agreeable to you, I should deem it a pleasure to come and discuss that question with you.

Mr. CARLIN. Just briefly, what is your idea?

Mr. BRANDIES. I feel very clearly on this question that it would be extremely unwise to vest in the trade commission any such power, at the present time at least. It seems to me that would be very unwise, and might, instead of resulting as these gentlemen suppose in a just settlement, create very grave difficulties. At some future time, when we know a great deal more than we do to-day and the trade commission has developed that knowledge, we can trust it gradually with greater power.

Mr. DANFORTH. Do I understand you to say that you think dummy directors should be prevented?

Mr. BRANDEIS. I think they could be perfectly prevented.

Mr. DANFORTH. Have you taken the pains to prepare any provision to cover that?

Mr. BRANDEIS. I should be glad to submit some suggestion about that. I do not think there is anything that can be prevented absolutely. All we can do is to approximate results, but I think we can do something along those lines.

(After informal discussion.)

The CHAIRMAN. Mr. Brandies, we shall be glad to hear you on Wednesday, February 25, unless, as you have suggested, you are required to appear before the Interstate Commerce Commission on that day.

The committee will now stand adjourned until half past 10 o'clock to-morrow morning.

(Thereupon, at 4.30 o'clock p. m., the committee adjourned until to-morrow, Tuesday, February 17, 1914, at 10.30 o'clock p. m.)

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. McGILLICUDY, 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. SPIGHT, *Clerk.*

TRUST LEGISLATION.

SERIAL 7, PART 17.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Tuesday, February 17, 1914.

The committee this day met, Hon. Henry D. Clayton (chairman), presiding.

The CHAIRMAN. The committee will hear this morning first from Mr. Dushkind, whom, I believe, represents independent tobacconists.

Mr. DUSHKIND. Mr. Chairman, I would like the committee first to hear Mr. Hunter, who represents the independent retail tobacconists of Manhattan.

STATEMENT OF HENRY H. HUNTER, ESQ., OF NEW YORK, N. Y.

The CHAIRMAN. You will please give your name and address and occupation to the reporter.

Mr. HUNTER. My name is Henry H. Hunter, and I live in New York City. I appear before your committee this morning as the attorney representing the independent retail tobacconists of Manhattan.

The CHAIRMAN. Before you proceed, Mr. Hunter, I want to say that a great number of gentlemen are here this morning waiting to be heard. They are tobacconists and dealers in cigars. There are a number of other gentlemen here who desire to give their views on

the pending bills, and I have conferred with some of your associates, and I believe you gentlemen who are given an opportunity to be heard on behalf of the tobacconists and dealers in cigars can get through in an hour and a half.

Mr. HUNTER. My impression is that we can do that, sir.

The CHAIRMAN. With that limitation you may now proceed.

Mr. HUNTER. Mr. Chairman and gentlemen of the committee, I appear before your committee as the attorney of the independent retail tobacconists of Manhattan.

The independent retail tobacconists constitute an association of independent tobacco dealers, and those engaged in the trade together with those dependent upon them, such as clerks and manufacturers, and number in the metropolitan district about 40,000, and in the United States they number about 800,000.

The retailers of Manhattan have headquarters in New York, and they have a president of the association, a secretary and treasurer, and they hold meetings twice a month for the benefit of the trade.

They are interested in the pending measures before your committee because they affect them so vitally.

For years past they have been contending in the courts with the so-called trust against monopolistic practices and have been trying to restore competitive conditions in the retail trade.

I shall define for you what an independent is. He is a dealer not connected with any combination but has his own private store and has his personality as an asset in his trade and is a voter in the district in which he lives, and his neighbors' interests are his own in public affairs for the welfare of the community. In contrast to him is the chain-store system, which is usually a corporation, and the stores are but agencies of this corporation, having nothing in common with the neighborhood, but to barter and exchange therein for money, employing people who have no permanency in the neighborhood nor interest but to sell goods for their corporation.

For the welfare of the State we independents have always maintained that the live individual with his private store and competitive customs has always counted more than the agency of a corporation, which does not enter into the political life of the community. It is an artificial person.

I think I have set before you as briefly as possible who we are. Now, as to the bills.

I wish to say that the retailers are opposed to an industrial commission to hear trade grievances. Past experience with such tribunals has been unsatisfactory. We have known of such commissions with the attorneys of the opponents constituting the commission, and what chance is there for an honest finding then?

We do not say that an honest commission could not be constituted, but we do say that it makes a body of men that experience has taught us do not carry out what the public expects of them. We have heard of one legislature creating a commission and the next legislature abolishing it, and the only results were bills of expense to the innocent taxpayer.

We have concluded that the experiment of commissions is too costly and hazardous for us to experiment with.

We believe that the Department of Justice can handle these cases better than any commission could. If that department could be

enlarged to produce better results, why there should be a way to enlarge it and let the Sherman law remain as it is without change to be enforced by the Department of Justice.

It has taken years to define the Sherman law. If you should change it, from the history of the past, none of us would be alive by the time it would be defined in the future, for it has taken about 20 years to interpret it already, and it would be better for this generation to leave it alone.

We are not in favor of any change from the method of complaint under the Sherman Act.

We find that to file a complaint directed to the Attorney General, that the same receives immediate response, and that if the Attorney General undertakes an investigation, that the expense falls upon the Government; the Government has the sinews to proceed with. I have never seen the individual yet, who as a private complainant, had money enough to carry on a private suit for a disintegration of an illegal combine of such proportions as the Tobacco Trust or Oil Trust; he would be bankrupt on the first appeal.

The Government is the only complainant that can carry his complaint to a trial in such large matters.

We believe in leaving the present way of bringing an action as it is, but we have no objection to allowing a private suitor, if he wants to, to attempt such prosecution; but we want the Government to fall back on in case of necessity.

In the case of suing out an injunction, we believe that a substantial bond should be given to cover costs in this litigation. We also believe that the sentence imposed upon any lawbreaker, under these bills, should be left to the discretion of the court. However, we are in favor of jail penalties to break up the promoting of illegal combinations.

In conclusion, Mr. Chairman, I would like to say that the Department of Justice, under its present efficient management is giving great satisfaction to the tobacco trade, and we would not desire to have any interference in the way of legislation with that excellent department. It is being conducted very efficiently, so far as we are concerned at the present time, in its investigations and is giving us full satisfaction.

I do not believe that I can enlighten the committee on the other lines in relation to the pending bills, aside from what I have said, and I would like now to introduce to the committee Mr. Charles Dushkind, who has been a practicing lawyer in New York City for many years, and who is familiar with this line of work, and who is much more familiar with the legislative end of this work than I am.

Mr. NELSON. What do you mean by saying that the present Department of Justice is being conducted in a way so helpful to you independents?

Mr. HUNTER. I mean by that, that they are conducting an investigation at the present time in the metropolitan district, through the assistants of the Department of Justice, and taking evidence in regard to conditions as to the monopolistic situation there.

Mr. NELSON. That is, so far the activities of the Department of of Justice are purely of investigatory character. No steps have been taken in the courts to relieve the situation?

Mr. HUNTER. Not to my knowledge; but I understand that is the purpose of the investigation.

Mr. WEBB. You do not recommend any new legislation at all?

Mr. HUNTER. I am not in favor of changing the Sherman Act in any way, unless it is that it be made so that penalties will be enforced instead of fines being levied, particularly in cases where they form illegal combinations. I think if they would impose jail penalties it would be more effective in the enforcement of the Sherman law. Take the situation under the Donnelly Act in the State of New York, where corporations appear in court and they are fined, and after their fine is paid they go right on and commit the same offense over again. If there was a jail sentence I think that would stop that practice.

Mr. GRAHAM. Your protest is against the formation of an interstate trade commission?

Mr. HUNTER. The retailers are not in favor of the formation of a trade commission.

Mr. GRAHAM. I only want to undestand your position.

Mr. HUNTER. From our past experience we are led to take that stand. Our experience in New York has taught us that we have never received very many favors from a commission.

Mr. NELSON. Would you object to a commission which merely had the power to investigate and find out what these big combinations which you allege are illegal are doing to destroy competition in your section?

Mr. HUNTER. It seems to me the Department of Justice does that a good deal more efficiently at the present time.

Take the situation as it is in the metropoditan district. We are having an investigation there now. The Department of Justice has headquarters there; they are taking testimony verey rapidly. If you had a commission there making that investigation the matter would drag along, in all probability, for weeks and weeks. That investigation is being conducted now by the representatives of the Department of Justice—men who are trained in that particular kind of work.

The CHAIRMAN. We will be pleased to listen to Mr. Dushkind now.

STATEMENT OF CHARLES DUSHKIND, ESQ., REPRESENTING THE INDEPENDENT TOCACCONISTS' ASSOCIATION, OF NEW YORK CITY.

The CHAIRMAN. Mr. Dushkind, the committee does not desire to control the line of your remarks at all, but I do desire to call your attention to the fact that we have some tentative bills pending before us. Have you examined those bills?

Mr. DUSHKIND. I shall dwell on the matter contained in those bills.

The CHAIRMAN. We will be pleased to hear you.

Mr. DUSHKIND. Mr. Chairman and gentlemen of the committee, on behalf of my client, the Independent Tabocconists' Association, of New York, I will take the liberty of submitting a few remarks to you in regard to the pending legislation.

In the first instance, I desire to say that we are opposed to any legislation that may, in any way, attempt to define the present mean-

ing of the Sherman antitrust law, or that may in any way regulate the conduct of these big corporations.

We believe that the Sherman law is now sufficiently defined to enable the captains of our industries to know what is right and what is wrong under the law, and we further believe that the evil the people are now suffering from by the existence of trusts and monopolies is not due to the insufficiency or inadequacy of the Sherman law, but it is due rather to the early interpretations of the statute, which the Supreme Court has since practically reversed, and to the lack of enforcement of the law.

More than 20 years elapsed before the Sherman law was finally and fully defined by the Supreme Court in the Standard Oil and in the Tobacco cases. Until these decisions were handed down the attitude of the courts toward these big enterprises in construing the statute in a way that the big industrial corporations could hardly be reached by Federal authority is the main cause that brought about the development of these gigantic monopolies, and we respectfully contend that any attempts to define the Sherman law or to provide fixed rules or regulations for the conduct of big corporations will result in other litigations that may take another 15 or 20 years for final determination, and in the meantime the operation of the very same law that has taken 20 years or so to be defined by the courts is likely to be suspended and in the meantime trusts and monopolies will continue to grow and become bigger, and then, after reaching final adjudications as to the new amendments and new definitions, it may be found necessary to enact some additional amendments and again we may have a long waiting period for the interpretation of the new amendments.

The Sherman law as it now stands prohibits in the very broadest terms contracts, combinations, and conspiracies in restraint of trade, also monopolization and attempts to monopolize. We have seen that from the narrow construction placed upon that act in 1895 in the Knight case, where it was held that the Sugar Trust could not be reached by that statute, the courts have broadened their interpretations from time to time as conditions have changed and as public policy required, so that now we find the Sherman law effective not only in every big industrial enterprise, but even in the case of a local association of small jobbers for self-protection from destructive competition like the California Tile case, as well as in the case of local labor unions, who, by means of strikes, are preventing their employer from manufacturing his products intended for transportation to other States, like the Danbury Hat case, the Sherman law was found to be equally effective.

There has been a general cry about the "rule of reason" that has been applied by the Supreme Court in the Standard Oil and the American Tobacco cases, but no thinking man can escape the conclusion that it was this very "rule of reason" that has put life into the statute.

It was under the "rule of reason" that the statute was held to apply to combinations in mutual restraint of trade, as well as to combinations in extraneous restraint of trade.

It was by the "rule of reason" that the labor unions were held to be subject to the provisions of the act.

It was by applying the "rule of reason" that the provisions of the Sherman Act were applied to many of the acts of the Tobacco Trust that according to the letter of the law were not unlawful; and

It is by the "rule of reason" that the Sherman law has now been so construed that the intents and purposes of the act can not be avoided by disguise or subterfuge.

The Sherman law, as it now stands, is not only adequate enough to destroy existing trusts and combinations, but by means of the injunctive and seizure provisions found in the act, if applied at the proper time, the Government can check and stop the building or formation of such monopolies or combinations. Had the Sherman law been rigidly enforced from its very beginning, and had the injunctive and seizure provisions been applied at the proper time, we would have had none of the big monopolies that control our industries now, and so it is not the fault of the statute that our main industries are now in the hands of trusts, but it is the failure to enforce the law that the present conditions are due to.

We are therefore opposed to any legislation that might tend to limit or define the scope of the present law. Such legislation would only create new uncertainties, for I venture to say that no definition can be framed that would be broad enough to cover the wide and almost unlimited scope of the Sherman law as now construed under the "rule of reason," nor can such definition be close enough that the trust lawyers would not be able to ride through it with a big touring car.

We therefore respectfully submit that the Sherman law as it now stands should not be meddled with. We do, however, ask for additional legislation that will make the enforcement of that statute more certain and that will give those injured by reason of a violation of that law more adequate relief and that will provide more severe penalties or forfeitures in case of such violations.

And in this connection we must say that a provision that will make it comparatively simple for individuals to recover a full measure of damages for any injuries sustained by them as a result of a violation of the antitrust act would, it seems to us, subject the unlawful combinations and monopolies to greater danger than any penalty that the Government may inflict upon them. The present remedy of treble damages is not only inadequate, but it is practically unenforcible and beyond the reach of litigants with moderate or no means, as we shall hereafter point out.

If the Congress should, however, determine to amend or supplement the Sherman law according to the general outline of the bills now pending, we desire to submit for your consideration our views in regard to the proposed legislation.

We are heartily in favor of the proposed provision prohibiting discrimination in prices as between purchasers of the same article or commodity, but such prohibition must be absolute, for to permit such discrimination in regard to differences in quality or quantity or to permit the vendor to select his own customers would practically nullify or destroy the good of that prohibition.

Experience has shown that price discrimination and the refusal to sell to certain parties were the most effective weapons used by the big corporations in destroying competition.

Every article or commodity before it reaches the consumer from the manufacturer must go through two channels of distribution; that is, through the wholesaler and through the retailer. No manufacturer can reach the consumer without the medium of the jobber and the retailer.

Deprive a manufacturer of any commodity of the medium or agencies for the distribution of his products and you make it impossible for him to reach the consumer. This is particularly true in regard to articles that are purchased by consumers in small quantities for their daily wants. Thus, if the wholesalers in a given territory should be precluded from handling the products of a certain manufacturer, that manufacturer would be unable to reach the retail trade for the small quantities that the great multitude of little retailers buy from their jobbers from day to day can not be shipped or delivered by the manufacturer especially from a distant point and if the retail trade should be induced by some means not to handle his goods he would be unable to reach the consumer.

The California Tile case, as well as the Standard Bath Tub case, are good illustrations of how a big manufacturing corporation controlling a substantial part of a certain industry can combine certain jobbers in given territories, either in the form of membership organizations or otherwise, and by giving them special allowances, concessions, or rebates, which those not belonging to the combination can not obtain, they not only succeed in destroying or undermining the business of the jobbers without the combination, but by this means they obtain control over the agencies by or through which such products must reach the consumer, and in that fashion they leave their competing manufacturers either without any medium of distribution altogether or thus being in a position to limit, restrict, and direct the distribution of their competitor's goods they practically place such competitors at their mercy. It is absolutely essential, therefore, not only for the protection of jobbers and retailers, but in order that every manufacturer shall have an equal opportunity and a fair chance for the distribution of his goods, first among the retail trade and then among the consumers, that every possibility of manufacturers obtaining control over the jobbers or retailers shall be removed.

The statute should therefore preclude every possibility for manufacturers giving special or undue advantages either by reduced prices, rebates, concessions, or other allowances to one jobber or combination of jobbers or one retail dealer or combination of retail dealers that they would not give to other jobbers or retailers in the same territory. The question of quantity should not form a justification for such discrimination, for manifestly if a manufacturer should intend to make a special deal with a particular jobber or retailer or with a particular group of jobbers or retailers he would find no difficulty in arranging the prices as to quantities in such a way so as to preclude the smaller dealers from getting the same advantage.

The CHAIRMAN. Then you would not allow any lowering of the price of cigars in carload lots over the rate paid for one box of cigars?

Mr. DUSHKIND. Yes; we do in this respect. What we propose is this, that if the purchaser is a jobber he shall be entitled to the jobber's price if he buys a factory shipment. If he is a retailer he

shall pay the retailer's price. It makes no difference if you have a hundred jobbers in a town or one jobber who buys a larger quantity and another jobber who buys a smaller quantity. The one who buys the smaller quantity should pay more.

The CHAIRMAN. Suppose a man wanted to buy 10 boxes of cigars; is he a jobber? What is a jobber? Suppose he wanted to sell them by the box instead of by the single cigar?

Mr. DUSHKIND. We propose here that the man who buys a factory shipment—of course, we can not ask a manufacturer to investigate whether a purchaser is going to sell at wholesale or retail, but we propose that the present classification of jobbers and shippers, as they are divided in every industry, and also the difference between shippers and retailers that you find in every industry, shall be maintained, and the price shall be fixed to all jobbers alike, no matter how much he buys, and that another price shall be fixed for all retailers alike, and having a statute in that respect and applying the rule of reason and taking into consideration that each trade has its own definition as to what constitutes a jobber and what constitutes a retailer in that particular trade, there will be no difficulty in enforcing a law like that.

Mr. DUPRÉ. Do you take any interest in the consumer?

Mr. DUSHKIND. That is what I am talking about. We certainly do. But the consumer who buys a 10-cent article for a cent less is not benefited very much to that extent, and he is hurting the community generally by accepting that reduction in price, which is used as a means of destroying the independent dealers. I would rather, as a consumer, pay a cent more for a package of cigarettes or tobacco and allow my neighbors to exist in business.

All jobbers buying what we call factory shipments—and in almost every line a factory shipment is well defined—should obtain their goods upon the same terms, and all those classified as retailers shall in like manner obtain their goods upon the same terms, and so even the discrimination as to quality should be omitted from the statute, as that exception would permit manufacturers and jobbers to enter into different special deals.

The CHAIRMAN. The manufacturer, in your opinion, should be compelled to sell a thousand boxes of cigars at the same rate at which he sells a hundred boxes?

Mr. DUSHKIND. Absolutely; if both buyers are jobbers, there should be no distinction between the big jobber who buys a thousand boxes of cigar and the small jobber who can only buy a hundred boxes. He should have the same chance.

The CHAIRMAN. What about the man who wants to buy only 10 boxes?

Mr. DUSHKIND. If he is a jobber and if 10 boxes is a factory shipment; we can not require the manufacturer to sell less than a factory shipment.

The CHAIRMAN. The jobber is the man between the manufacturer and the retail merchant?

Mr. DUSHKIND. That is right.

Mr. MCCOY. How would you make that apply where the article was, for instance, a machine tool which might cost four or five thousand dollars, and where one article is a factory shipment?

Mr. DUSHKIND. That is true. I would say this, that this proposed law should apply to proprietary articles, to trade-marked goods, to those articles a dealer must have, without which he can not carry on his business. No one is compelled to buy that machine; there may be other machines. Unless it is an article of general use that people must have, and that the dealers must have, and without which neither a jobber nor a retailer can exist, that the manufacturer shall be obliged to sell it to the retailers and jobbers at the same price. The man who buys only 10 boxes of cigars, and if he is a jobber and is so recognized in the trade—in every trade people know what the terms jobber and retailer mean—if he is a jobber he should be entitled to get his 10 boxes of cigars at the same price that the other jobbers get theirs, even though the other jobbers might buy a thousand boxes.

The CHAIRMAN. Then the jobber wants special legislation at the hands of this committee for his benefit?

Mr. DUSHKIND. It is not for his benefit, Mr. Chairman. It is for the benefit of the manufacturer, because, as I have said——

The CHAIRMAN (interposing). Where does the consumer come in?

Mr. DUSHKIND. The consumer may, of course, have to pay a little bit more for his goods, but in fact he would not.

What difference would it make whether there is one monopoly of the jobbing business in a town or whether there were a hundred jobbers in existence in that town. It makes no difference to the consumer; he will pay the same price.

The difference is this: A manufacturer can not reach the consumer without having the jobber, and the big corporations who own a substantial part of a particular industry, by obtaining control of the jobbing trade, by creating a monopoly of the jobbing trade in a particular territory, are in a position to preclude all other manufacturers from reaching the consumers in that particular territory with their goods.

Mr. NELSON. Why not let the manufacturer sell direct to the retailer instead of selling his goods through a jobber?

Mr. DUSHKIND. That is impossible. Take a tobacco store, and you will find on the shelves of that store two or three hundred different brands. If the proprietor of that store is doing $50 worth of business a day, or $300 worth of business a week, and is quite a substantial dealer, that amount of business may represent the products of a hundred manufacturers. So that he may use two or three dollars worth or six dollars worth of goods from one particular manufacturer a week. He does not buy in factory shipments, and the manufacturer from Richmond, Va., for instance, can not ship a little retailer in the city of New York 50 cents worth of goods every week. On the other hand, a jobber who handles all these manufacturers' goods and who who goes around with his horse and wagon and has a variety of brands of all manufacturers, and comes to the retail dealer twice a week, may sell the retailer those small amounts, because he handles the products of 10 or 20 or 30 manufacturers.

So that if there is one concern or combination of manufacturers which controls the jobbing industry, either by special associations or rebates, or in some other way, they have it within their power to keep the manufacturer in Richmond, Va., out of that territory, unless the manufacturer should ship a small shipment to every retailer in

that territory every week—ship two or three dollars worth of goods—and that is practically impossible.

Now, a situation like that exists in New York to-day, absolutely so. It was the case in New York about 10 years ago that there were 200 jobbers there, each one having his own trade, and if a manufacturer came to New York and wanted to introduce a new article he had 200 agencies through which he could distribute his article among the retail trade.

The trust made out of 200 jobbers, one jobber who covered the entire metropolitan district. Eighty per cent of the profit of that jobbing house comes from the products of the Tobacco Trust. You can readily see that when a manufacturer comes from Louisville, Ky., with a new brand of goods, that that jobbing concern, which is making perhaps a million dollars a year from the products of one concern, is not going to handle the goods of the Louisville manufacturer.

Mr. DUPRÉ. Did you not say that it made no difference whether there was one jobber or a great many in one city?

Mr. DUSHKIND. I said it made no difference, as far as the consumer is concerned, as far as the price to him is concerned. In that respect it makes no difference.

Mr. MCCOY. What has been the effect on prices in New York by the wiping out of these 200 jobbers and the substituting of one jobber in their place? I mean what has been the effect on the prices to the consumer.

Mr. DUSHKIND. None whatever.

Mr. MCCOY. Has the price gone up?

Mr. DUSHKIND. No; not to the consumer. The prices, as far as the consumers are concerned, do not vary at all, except in so far as the conditions change from time to time in regard to the revenue tax and other matters of that sort.

Mr. MCCOY. Then, what harm has been done so far as the consumer is concerned?

Mr. DUSHKIND. None; so far as the consumer is concerned?

The CHAIRMAN. The harm has been done to the middleman.

Mr. DUSHKIND. And also to the independent manufacturers, who are unable to get into that territory to market their goods.

Mr. NELSON. When there was only one firm of jobbers where did the independent retailers get their cigars?

Mr. DUSHKIND. They got them all from one jobbing concern.

Mr. NELSON. Then that jobber would have the trust goods as well as the independent manufacturers' goods?

Mr. DUSHKIND. He does handle some independent goods, those which he is compelled to handle; he does not handle any new goods, and he does not help the independent manufacturer in disposing of the old goods.

Mr. FLOYD. Did I understand you to say that you object to that provision relative to the quality of the goods?

Mr. DUSHKIND. Of course, there must be a distinction between quality and quantity. There is no question about that; but I object to that provision being inserted in the statute. I should say if you will say in the statute that there shall be no discrimination as between one dealer in one class and another dealer in the same class, it is perfectly understood that when a man is buying a 10-cent cigar

he will have to pay more than he will have to pay for a 5-cent cigar. And having that qualification in the statute, may lead to certain secret deals and give people a chance, and give an excuse, particularly when it comes to trade-marked goods and proprietary articles. When you say there shall be no discrimination as regards the price, you have covered the purpose; that is, the price in the same territory.

It seems to us that the situation would be fully covered if it would simply prohibit discrimination between dealers or purchasers of the same class within the same territory. Manufacturers or producers should be permitted to differentiate in different States or sections or Territories, but there should be no discrimination in one and the same section or territory as between the different purchasers who may be classified either as wholesalers and retailers, etc. And it seems to us that the provisions contained in the Stanley bill (H. R. 5676), introduced on May 29, 1913, in section 13, is much stronger and broader and more appropriate to meet the needs of the situation than the one contained in the Clayton bill, excepting in so far as the Stanley bill permits the appointment of sole agents. That feature is strongly objectionable for the very same reasons that we have already stated, for the appointment of one jobber or a combination of jobbers as sole agents by a manufacturer controlling a substantial part of a given commodity can easily put the other jobbers out of business, and by this means obtain control of the avenues of distribution of the article and exclude competing manufacturers from the particular territory.

Sole agents should be permitted, but only on condition that such sole agent shall simply stand in place of the manufacturer in dealing with jobbers and retailers; in other words, he should not be made the sole jobber or the sole distributer in the territory, but he should simply act as agent for the manufacturer in dealing with such jobbers or distributers. It is one thing for a manufacturer to appoint a concern to act as his agent, to deal with his customers, to make deliveries and carry the accounts for a given compensation, but it is quite another thing for a manufacturer controlling a substantial part of a commodity to sell it to or through one jobber called a sole agent and preclude all other jobbers from handling the goods or to deprive them of their jobbers' profits or jobbers' discounts.

In the one case the jobbers would still remain jobbers; the sole agent would simply obtain a compensation for making deliveries and carrying the accounts for the manufacturer; in the other case the jobbers would be put out of business; the sole agent would remain the only jobber, and being under the control of his principal he would, of course, give as little, if any, attention to competing goods as circumstances will permit. Exclusive agencies must not be confused with excluding agencies; that is, agencies to exclude competition.

It may be considered somewhat harsh to deprive manufacturers of the right to select their own customers or to sell to all purchasers of a certain class at the same price and upon the same terms, but in the first place if the "rule of reason" should be applied, as it undoubtedly will be, to the supplemental acts as it has been applied to the present act, there is no probability that small manufacturers will be harassed or interfered with in the management of their busi-

ness; and, on the other hand, the big corporations who are either monopolies or who have monopolistic tendencies should be required to submit to certain regulations and restrictions as a matter of public policy; and, in the second place, this prohibition should be made to apply only to corporations of a certain size or to corporations controlling a certain amount of business.

We certainly approve of the provisions in the Clayton bill permitting a party who is or is threatened to be injured by a violation of the Sherman law to apply for injunctive relief and suspending the statute of limitation during the pendency of a suit brought by the Government against offenders, and that a decree against a trust in the Government suit may be used as evidence in a private suit for treble damages, but we respectfully submit that these provisions are entirely inadequate and insufficient, and moreover they would be ineffective without making some changes in regard to the practice and procedure in the Federal courts.

Mr. WEBB. Would it be competent for Congress to provide that testimony produced in the Government suit should be competent in a suit instituted by a private party?

Mr. DUSHKIND. No; but I think it would be competent to provide that the decree should be presumptive evidence. I doubt whether the testimony could be used.

Mr. WEBB. Mr. Brandeis, on yesterday, told us that he thought that would be very important.

Mr. DUSHKIND. Perhaps it would. I would not care to question a thing of that kind which Mr. Brandeis might say, although I am inclined to believe that while you can use the decree as res adjudicata, I doubt very much whether you could read the depositions into the case.

Mr. WEBB. I do not see any difference between using the decree as evidence and using the evidence itself upon which the decree is founded.

Mr. DUSHKIND. I am not at all prepared to decide that question.

Mr. GRAHAM. There are two stages in every such case. The first is to establish a monopoly or combination, and the other is to prove the specific damages. Consequently, the decree would furnish proof of the first, and confine the trial to what is really the gist of the suit, to the question of what could be recovered. I should think it would be a dangerous proposition to carry the evidence where the parties had not the right to cross-examine, where the issue is in a suit for damages, to make that evidence, without a chance to have the living witness there and make that evidence in the other case.

Mr. WEBB. I was not asking the witness as to the policy, but as to the power.

Mr. GRAHAM. That was the thought in my mind when he was speaking about it.

Mr. DUSHKIND. The better way, it seems to me, would be, not only in regard to this industrial situation but otherwise, to define it in our Federal practice and procedure. That has been entirely overlooked by Congress and should be looked after, at any rate irrespective of this situation, because there is no way under our present methods, particularly since the Supreme Court has promulgated its new rules of equity practice, its new rules in equity suits, whereby even equity suits must be tried in open court, whereas formerly you

could try them by taking depositions before an examiner and then go on for the final hearings; whereas now you have to try your case in open court.

Mr. GRAHAM. Do you mean to say that under the seventh section of the Sherman law you can not take depositions of witnesses?

Mr. DUSHKIND. You can not.

Mr. GRAHAM. Oh, yes; you can.

Mr. DUSHKIND. You can take deposition of witnesses providing they reside beyond the hundred-mile limit, or if they are about to depart from a State or from the country under section 861 of the Revised Statutes, but that does not give you the right to examine your adverse party, or to examine the officers of the defendant corporation or their books. You may examine witnesses if they reside beyond the hundred-mile limit, more than a hundred miles from the place of trial, or if they are about to depart from the country, or something like that. That is the only circumstance under which you can take the depositions of witnesses. Of course, you can also take them by consent.

Mr. McCOY. Is there any practice anywhere which gives the plaintiff or either party the right, without a special showing, to go into all the books and papers of his adversary?

Mr. DUSHKIND. There is in almost every State in the Union. In almost every State in the Union that practice has been adopted, either by code or otherwise.

Mr. McCOY. You have to make a special showing?

Mr. DUSHKIND. You are not allowed to go on a fishing expedition. When you show what particular books you want to examine and what you desire to prove by these books, and what particular person or persons you desire to question, and what you intend to prove by such person or persons, and that the evidence you desire is material and relevant to the issue in the case, naturally the court will grant you that order. So, on the other hand, the adverse party may come into court and ask that the order be vacated on the ground of disputed statements made by the other side, and then the court will pass upon the question as to whether or not the order shall be issued.

Mr. McCOY. You have got to show in such application that you are not merely seeking to get your adversary's evidence, but that such course is essential to get your evidence.

Mr. DUSHKIND. That is it. The rule is that you must show you want the evidence for the purpose of proving your case and not for the purpose of learning what the other side is going to show.

Mr. McCOY. And that practically you have no other source of information——

Mr. DUSHKIND. And that you have no other source of information, and that the information which you desire is under the control of the defendant.

In the first place, as we have already stated, an effective statute whereby those who are injured in their business or property by trusts or combinations might obtain both equitable relief as well as a full measure of damages would be feared by the trusts more than any penalty that the Government might provide for such violations. But under the present system it is almost an impossibility for anyone, save those with unlimited means, to obtain such relief or to avail himself of the benefit of that statute. The extraordinary difficulties

that a plaintiff in such case must encounter to prove the existence of the trust or the combination are such that only the Government or corporations with unlimited means can overcome. Moreover, under our present system of Federal practice and Federal procedure there is no way by which a plaintiff in such a suit can obtain the necessary evidence so as to prepare for trial. Cases of that character can be established only by the books and records of the defendant corporations or by the testimony of their officers and unless such books or records can be examined or the testimony of such officers taken before trial, no plaintiff can expect to be able to prove his case at the trial. In most of the States provisions are found in their codes or statutes regulating the practice or procedure for discovery or for the examination of adverse parties before trial. Singular as it may be there is no such a provision in the Federal statutes, except in certain cases as hereinafter pointed out, and there is no way by which a plaintiff in such suit either to enjoin the defendants or in an action at law for damages can obtain either discovery or the testimony of the defendants before trial.

We have, however, in our Federal statutes, section 724, which was apparently intended to permit discovery of books, etc., before trial, but the United States Supreme Court has held, in the case of Carpenter *v.* Winn (221 U. S., 533), that:

> A court of law is not empowered to compel one party to an action to produce books or papers in advance of the trial for his adversary's examination and inspection by the provisions of section 724.

And so it has been held that even a bill for discovery in an equity suit can not be maintained in aid of a suit for treble damages under the Sherman law, because such suits involve a forfeiture or a penalty and would also subject the defendant to a criminal prosecution, and therefore equity will not grant discovery in such cases. Judge Coxe, of the United States Circuit Court of Appeals, Second Circuit, has refused to grant me an order for the production of the American Tobacco Co.'s books, even at the trial, under section 724, on the ground that the suit involves a forfeiture or a penalty and would subject the defendants to criminal prosecution.

We also have in the Revised Statutes, sections 861, et seq., which provide for the taking of depositions, etc.; but these sections do not provide for the taking of depositions of adverse parties before trial, and in the case of Hanks Dental Association *v.* Internal Tooth Crown Co. (194 U. S., 303) the Supreme Court has decided that the depositions of an adverse party before trial can not be taken, and that even the practice of the State providing for such examinations of adverse parties before trial can not be applied in suits pending in the Federal court.

So that there is no method by which a plaintiff in a treble damage suit can obtain the necessary evidence to prepare for the trial of his case, and even in an equity suit for injunctive relief where, under the former rules of the Supreme Court, it was possible to try the case by taking the depositions before examiners, etc., that practice has been done away with by the new rules of the Supreme Court requiring that such cases or suits be tried in open court. We respectfully urge, therefore, that to render the provisions relating to private litigants effective it is absolutely essential that some provision be made for the

examination of such defendants and their records and books before trial.

We respectfully recommend, therefore, that the provisions of the New York Code of Civil Procedure, sections 803 to and including 809, relating to discovery, and sections 870 to and including 886, relating to examinations before trial, or some similar provisions, be enacted.

And we also suggest that no suit under the Sherman law shall be barred by any statute of limitations, except as against parties against whom the Government shall have obtained a final decree, and as against such parties the statute shall first begin to run at the time of the entry of such decree.

Combinations and conspiricies in restraint of trade are necessarily continuous. Furthermore, experience has shown that their manipulations are so complicated and their methods so varying that it sometimes takes many years before the ordinary merchant can discover the identity of those who have undermined him. We know, for instance, that one of their methods is to send some little subsidiary company into a territory to destroy competition without disclosing the identity of the parent company. In the meantime, the statute of limitation in force in that particular State is running. Furthermore, there is no Federal statute of limitation, and the time within which such suits can be brought vary in the different States. We think that under such circumstances there should be no limitation as to the time to bring such suit, except after an adjudication in a suit brought by the Government.

Again, we must say that the strongest possible provisions should be made in regard to such treble damage suits, so as to render it within the reach of everyone injured by such combinations or trusts to bring suit and to recover damages.

We are strongly opposed to the appointment of a commission to deal with the trust situation. We firmly believe that the appointment of such commission would only divide responsibility and would perhaps provide a convenient dormitory where all complaints against the big trusts might be put to sleep. We fail to see why the Bureau of Corporations and the Investigation Bureau connected with the Department of Justice can not perform the very functions that are to be performed by the commission according to the proposed legislation. If the commission is to have no powers beyond making investigations, then the commission is surely not needed, for this is the character of work that has been performed by the two departments mentioned with unquestionable skill and ability, and at an expense to the Government amounting to much less than what the administration of such commission would cost. Surely the record of Attorney General McReynolds, both while acting as Assistant to the Attorney General and since he became the head of the Department of Justice, shows that he is not in need of any commission to advise him in dealing with the trust situation. Moreover, the people can not but look with suspicion upon the creation of such commission, that such commission, although without powers to regulate, etc., will turn out to be but the first step toward the adoption of a policy to regulate private monopoly, instead of destroying it—a policy that the people have repudiated on more than one occasion and that the President himself has strongly condemned. If we are to have monop-

olies under proper regulation by a commission, let us repeal the Sherman law and create such commission with ample powers to supervise and regulate their conduct. But the people will not stand for monopoly, whether regulated or not, and we think that the creation of such commission will only lead to amended legislation from time to time, always adding to their powers and functions, until we will find all our industries controlled by private monopolies regulated and supervised by a commission. We would suggest that Congress provide sufficient appropriations for the Bureau of Corporations and the Department of Justice, and there will be no need for a commission. The Sherman law will be properly and rigidly enforced, and we are confident indeed that in due time the present administration will restore to the people the industrial freedom that has been taken away from them.

But while we are opposed to the bill creating such commission and while we earnestly hope that the bill will fail to pass, we nevertheless take the liberty of suggesting the enactment of certain provisions in case Congress should determine to pass such bill.

We think that the jurisdiction of such commission should be confined only to the big corporations, to be classified either according to the amount of their capitalization or the amount of their annual business. For without any limitation every little corporation would be subject to the jurisdiction of the commission. It would probably happen that thousands of these small corporations who have not the means to employ the able legal talent that the trusts usually employ to guide them and advise them would be prosecuted for violating the Sherman law, and of course some pains would be taken to advertise and herald such prosecutions throughout the country in order that the people might see how rigidly the Government is prosecuting violators of the antitrust laws, while the big corporations, the real monopolies, through the guidance of their able lawyers would probably succeed in being let severely alone.

Moreover nothing would suit the big business interests better than to have their little competitors investigated, harassed, and annoyed from time to time and their business secrets made public by the commission, so that these big corporations might obtain the information as to the strength or weakness of their competitors and as to the character and extent of their business, and they will thus obtain through the Government the very information that they had heretofore been compelled to procure through all sorts of unlawful methods. Surely no good can be accomplished by such a state of affairs. Nor would it be fair or reasonable to subject every little corporation engaged in interstate commerce to such investigations, etc. The purpose of this bill, as well as of all other pending antitrust legislation, is to protect the people in their industrial freedom and to suppress and destroy monopolies and combinations in restraint of trade, but it is not the purpose of the Government to supervise the management of all businesses of whatsoever size or character they may be and that are as far from being trusts or monopolies or combinations in restraint of trade as the North Pole is from the South Pole. Why, then, shall this commission be given jurisdiction over all corporations?

The CHAIRMAN. May I interrupt you there to say that this committee is not considering the bill in regard to the Interstate Trade Commission, and therefore the argument you make against the

trade commission might be made before the committee having that bill under consideration.

Mr. DUSHKIND. I fully realize that. I have here certain suggestions which we propose, and we do not know whether they should be embodied in one bill or the other bill, and I am coming now to the various suggestions which we think might be enacted either in one bill or the other, and that is the reason I have dwelt on this subject.

Furthermore, if we are to have a commission, we believe that the commission should have certain powers beyond making investigations. The commission should have power, for instance, to grant summary relief upon proper complaints by prohibiting and stopping trade abuses, business oppression, and all unfair business methods whereby the big corporation may attempt to destroy the little fellows. The commission should have the power to act in such cases in a summary way, and if there be any cause for litigation, let the evil be stopped first and let the litigation follow. Such power would necessarily involve the regulation of prices. The commission need not necessarily fix or regulate prices at which commodities are to be sold. But when one of those big corporations shall come into a territory and sell an article that cost 20 cents to produce for 10 cents in order to destroy its competitors the commission should have the power to order them not to sell the article below a given price.

We submit that it is of greater importance to fix and determine the prices below which certain articles or commodities shall not be sold than it is to fix the prices above which they shall not be sold, because experience has shown that even with the existence of trusts and monopolies there is no danger about paying excessive prices for commodities. The big companies fully realize that the charging of excessive prices would create new competitors and develop new opposition. Moreover, by reason of their extraordinary wealth and machinery and the perfect organizations that they maintain, they are able to produce commodities at a much lower price than their competitors, but the danger lies in selling commodities at too low a price for the purpose of destroying their competitors. We have seen instances which are elaborately referred to by the Supreme Court in its decisions in the trust cases where the trusts have gone into territories and have sold their products at almost "give-away" prices in order to get the business and destroy competition, for they can readily stand losses amounting to millions of dollars by selling goods far below cost or giving away various presents, coupons, concessions, rebates, and allowances from time to time which their small competitors can not meet, and as a result of which they build up their monopolies. Such practice is by no means a benefit to the consumer, as it is only a temporary advantage, which is insignificant as far as the consumer is concerned, but he soon suffers the disadvantage which by far outweighs the temporary advantage that he gains by the trust driving the small man out of business, and then advancing the prices on the commodity to what it should be or as it may see fit. We say, therefore, that abuses of this character should be summarily stopped and dealt with by the commission. The people should not be required to await the result of a 10-year litiga-

tion to obtain relief. The trade abuses should be stopped at once and in a summary way, and litigations may follow thereafter.

We believe also that, subject to proper regulation by the commission, it should be made lawful for manufacturers of proprietary articles to fix and maintain the prices at which their products shall be sold by both the wholesale man and the retail man, and that contracts in that respect shall be enforcible in the courts. This recommendation may seem to be strange, coming as it does from so-called independent dealers who are suffering at the hands of combinations in restraint of trade, but we can see a marked distinction between fair-trade agreements that restrict competition and agreements to restrain trade, while it is true that every restraint of trade restricts competition, but every restriction of competition does not necessarily restrain trade. Fair trade agreements to prevent ruinous competition among jobbers and retailers by the manufacturer fixing uniform prices at which his products should be sold would neither constitute a combination in restraint of trade nor would it even restrict competition; on the other hand it would protect the small dealers against extermination by their powerful competitors, and it would at the same time also protect the consumer against being fooled into buying some unidentified and unknown articles for exorbitant prices by offering some of the well-known and well-advertised brands at cut-throat prices.

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 on the leader, they succeed in selling them something that repays them several times the amount that they lost on the leader.

Moreover, in view of the present tendency to establish chain stores in almost every line, which stores are controlled by unlimited wealth, the small dealers should be protected against the chain stores underselling leading brands in order to ruin them. By making it lawful for manufacturers of trade-mark goods to fix and maintain the prices at which their goods should be sold this evil will be readily abated.

We have submitted our views for your consideration, and we hope that any legislation that Congress may enact in regard to this matter will result in restoring to the people their industrial liberty and their right to engage in any lawful calling that they may see fit.

Mr. McCoy. Will you allow me to ask you a question right there?

Mr. Dushkind. Surely.

Mr. McCoy. If I understood you at the outset of your remarks, you did not want us to change either a letter or a line of the Sherman Act. I will ask you if the Supreme Court of the United States has not recently held that under the Sherman Act that kind of a transaction is unlawful?

Mr. Dushkind. The Supreme Court has held, I think, that the agreements in regard to fixing prices are against public policy and in restraint of trade and in violation of the Sherman law, and also against public policy irrespective of the Sherman law; that is true, and I do not know that the jobbers want to have that legalized. The jobbers do want a special act legalizing and authorizing the manufacturers of trade-marked and proprietary articles to fix the price at which their articles shall be sold.

Mr. FLOYD. Upon what principle of justice do you make any such demand as that? Do you not think the people of this country ought to be free to use their own property and dispose of it as they see fit?

Mr. DUSHKIND. Absolutely so.

Mr. FLOYD. A retail dealer buys a certain commodity, and he pays for it. It becomes his property as absolutely as his house or his horse, and yet you insist upon the right of the manufacturer to control the price at which that individual shall sell that commodity, if it is a proprietary article, to the consumer?

Mr. DUSHKIND. That is so.

Mr. FLOYD. Why?

Mr. DUSHKIND. Because, as I claim, the manufacturer who owns a trade-mark that may be worth hundreds of thousands of dollars or millions of dollars should be protected, and should have a right to protect his trade-mark from destruction.

In the second place, as I am pointing out here, it is for this reason: We have in our industries certain particular leading brands that are well known throughout the country, and it is by means of underselling or cutting the price upon those leading brands that the chain-store people, the big corporations who own the chain stores, are able to drive the small competitor out of business, because no store can exist without having these brands. It must have those trade-marked goods.

It acts in both ways. It sometimes destroys the value of a trade-mark, and it also enables the big chain stores in other instances to drive the small dealer out of business.

Mr. FLOYD. Now, if I understand you, you are in favor of giving this special privilege to men who have trade-marks, and I presume also to those who have patents?

Mr. DUSHKIND. Of course, necessarily.

Mr. FLOYD. They are given a kind of special advantage by the law already.

Mr. DUSHKIND. They are given a patent.

Mr. FLOYD. And you would give them another special privilege because they have that advantage over other dealers?

Mr. DUSHKIND. No; I am giving them the special privilege because the advertised goods, the trade-marked goods, the standard brands that have a national reputation are used as means of destroying the small merchant and the small dealer.

Mr. FLOYD. Why do you not apply your principles generally? We are making laws, and they ought to be uniform. Why not say that the man who grows potatoes and corn shall have the right to fix the price at which he sells it to the middleman and that he shall also have the right to fix the price at which the retailer shall sell those goods to the consumer?

Mr. DUSHKIND. Because public policy and public interest do not require that, but it is required in the other case because the retailer, if he does not buy of the jobber, if he does not buy from one producer, he can buy from another producer, and he does not have to meet the same conditions as the people in the other cases do.

If you take an advertised hat or a pair of shoes, take a hat like the Stetson hat or the Douglas shoe, without them the retailer can not exist. You can not say to the dealer if you do not want my goods you do not have to buy them, because he must have these

goods, and the same thing will apply to the various brands of cigars and tobacco and cigarettes handled in these various cigar stores.

Anybody can see that these big concerns are determined to drive these little retail dealers out of the market or out of business. They take these very old brands, the very brands that the dealer must have in order to keep his store open, and they undersell him, in that manner driving him out of the market. But when you take an article that is not advertised or has no particular trade-mark or trade name it is a different thing. For instance, you take an overcoat or a tie. If you do not like a certain manufacturer's goods you can buy another manufacturer's goods. If a particular store handles clothing of a particular manufacturer and is selling the clothing at a price that is not satisfactory to you, you can buy clothing from another manufacturer.

Mr. FLOYD. Let me ask you this question direct. You complain about the big chain stores getting the advantage by competition. Now, is not your real purpose this: That you want to have the privilege of fixing the retail price in order that you may drive the chain stores out of business, as well as every other competitor, and exercise an absolute monopoly over that commodity? Is not that the real purpose?

Mr. DUSHKIND. How can we ever drive chain stores out of business? How can the chain stores be affected at all, especially if the chain stores are compelled to sell articles at the same price I am selling them? The manufacturer should be given the right to say that this is a 5-cent article and that this is a 10-cent article, and that he wants this article sold for 5 cents and that article sold for 10 cents, if it is a trade-marked article, a proprietary article of such a character that the dealer must have it in order to keep in business. How can the chain stores be in any way affected if I am compelled to sell an article for the same price at which it is sold in that store?

Mr. NELSON. Suppose the chain store could be eliminated? Would there be any reason for fixing the prices down to the consumer?

Mr. DUSHKIND. There would still be two other reasons.

Mr. NELSON. What other reasons?

Mr. DUSHKIND. One reason would be—which, of course, is not a public reason; I would not say it is a reason that would at all concern public policy or public interest, but one reason is that a manufacturer who owns a proprietary article should be in a position to protect it against destruction by giving it away or using it as a leader in some way or other. And another reason would be that while we are opposed to any kind of restraint of trade we are not at all opposed, but on the contrary, we favor a fair trade agreement or fair trade arrangement between small people whereby they can obtain a living profit upon their goods and protect themselves against destructive competition. We must distinguish between combinations in restraint of trade and that particular thing. In other words, we draw a distinction between a fair trade arrangement to restrict competition and an arrangement to restrain trade. In the one case the small dealers would come in and agree to sell a certain article at a certain price in order to protect themselves against ruinous competition. They are selling independent of one another; each one is competing with the other; they are still separate entities,

there is no restraint of trade there. But a combination in restraint of trade is an entirely different proposition.

Mr. DUPRÉ. Are you a member of the American Fair Trade League?

Mr. DUSHKIND. I never heard of that league until this morning, sir.

Mr. MORGAN. I would like to ask you a question, bearing on the right of a manufacturer of an article to control the retail price. Is it not a fact that a manufacturer who manufactures an article, some patented article or some article controlled by trade-mark, builds up that particular trade as his own, and when he sells that article to a retailer has he not a natural right—that is, if we are to allow freedom of contract—to fix the conditions upon which he makes the sale? In other words, when he sells it to a retailer he does not sell it absolutely, but he sells it under certain conditions.

Mr. DUSHKIND. That is right.

Mr. MORGAN. Now, it is suggested by the gentleman from Arkansas, Mr. Floyd, that when a man bought this property it became his, but it is not only a conditional sale? He buys it under certain conditions, and is that in conflict with the freedom of contract or with any public policy?

Mr. DUSHKIND. No; except that the Supreme Court has held that such contracts are against public policy.

Mr. MORGAN. Do you not think that if a farmer or gardener should develop a certain kind of lettuce, a certain kind of potatoes, or a certain kind of strawberries that he should have the right to go into the city and say, "I will sell you these things at so much a quart or so much a bushel on the condition that you sell them at a certain price?"

Mr. DUSHKIND. That would seem to be his natural right, but according to the decisions handed down recently by the courts that would probably be construed as a restraint of trade.

Mr. McCOY. Would you couple with the right to fix the resale price a condition that the price fixed should be reasonable?

Mr. DUSHKIND. There is no objection to that at all, except, as I have pointed out, that is entirely unnecessary, because competition will regulate that itself. There is no danger at all about paying excessive prices even with the existence of trusts or monopolies; they know they can not charge an excessive price which would create new competitors, but the danger lies in underselling—the bigger man underselling the smaller man and underselling him to such an extent as to drive him out of business.

The CHAIRMAN. The next gentleman that the committee has agreed to hear is Mr. Ehrlich.

STATEMENT OF MR. NICHOLAS EHRLICH, OF BROOKLYN, N. Y.

Mr. EHRLICH. Mr. Chairman and gentlemen, our able attorney, Mr. Dushkind, and our loyal attorney, Judge Hunter, have dealt with the subject which concerns us, the middle men, and they are the men I am representing. They were talking about the subject as a whole but did not go into the details. Some of you may never have gone to a little store to buy a cigar and thus have not been in a position to see how they live and how they are existing. But here

is some evidence which may lead you gentlemen to think that the small man ought to be protected and ought to have the right to live. Here is some evidence——

The CHAIRMAN (interposing). What is the evidence that you refer to?

Mr. EHRLICH. I refer to evidence of the cut prices in the chain stores. Here is a cigarette, a cigarette which was sold for the last four or five years for 10 cents—10 for 10 cents and 20 for 20 cents. Now they are sold for 20 cents with a subway ticket thrown in.

Mr. WEBB. What is the name of the cigarette, the Owl?

Mr. EHRLICH. No; the Own. Here is the subway ticket right in here [indicating], which cuts it down from 20 cents to 15 cents. Now, the American Tobacco Co. gives flags like these [indicating] with a 10-cent package of cigarettes and smaller ones with 5-cent packages. Do you think it is possible for a small man in the trade to give anything like that? No; it is not possible, and that is the way they put the small man out of business.

Mr. WEBB. Who manufactures that cigarette?

Mr. EHRLICH. The Schultes Chain Stores.

Mr. NELSON. Is that the Tobacco Trust?

Mr. EHRLICH. I can not say that, but as far as we know they are supported by the American Tobacco Co. and have always been financed by the American Tobacco Co.

Mr. WEBB. The ownership of the stock is practically the same——

Mr. EHRLICH (interposing). The same as the United Cigar Stores Co. Now, here is some evidence [indicating]. I tried to go through a few stores the day before I left New York. I went into the Schultes store, and I bought some things. Here is the bill for them: February 12, 1914, 2 Hoyos, at 20 cents, 40 cents; 2 packages of Helmar, at 8 cents, 16 cents; and 1 package of Adams gum, 3 cents, making a total of 59 cents. The slip is marked "paid" and is signed by the clerk. Here is a bill for three packages or Turkish trophies, at 10 cents a package, and cigars, 20 cents, with 8 certificates. This bill is receipted by the chief clerk of store No. 805, in New York City. The certificates amount to 8 cents in cash or 16 cents in goods.

The CHAIRMAN. How would you prevent all that? If it is right to prevent these packages that you refer to, how would you do it and for what reason would you do it?

Mr. EHRLICH. First of all, I want to convince you that we ought to prevent it, and then you are to find a way to prevent it, because you have more brains than I have. I have to work everyday, and you gentlemen know how to do it. All I have to do is to convince you that it is necessary to do it. I have a bill here from the Metropolitan Tobacco Co. for 500 Helmars, at $3.80, which makes 7.6 cents at wholesale, and they sell them at 8 cents retail. Considering rent, considering matches, and considering our labor, we would lose if we sold them at such a price. Here is evidence showing what we pay for them at wholesale and how much they sell them at retail. For gum we pay 55, 60, 50, 55, and 50, and yet they sell sum for 3 cents a package. Here is an advertisement of the Riker & Hegeman Drug Stores, advertising Perfectos for 18 cents, and we pay over 16 cents for Perfectos. If we are able to convince you that this is wrong, then you ought to right the wrong, but how to do it is up to you gentlemen and lawyers.

If you will permit me to do so, I will read a little brief which I have prepared, and I will try to go through it as quickly as possible. On October 31 and November 6, 1913, respectively, we sent two letters, with documentary inclosures, to President Wilson regarding the Tobacco Trust. In them we have explained the close relationship, by interlocking directorates and other ways, between the American Tobacco Co., the United Cigar Stores Co., Riker-Hegeman Drug Stores Co., Liggett Drug Stores Co., etc. We have shown by data the restraint of trade, the injury to small business, and the cut-throat competition used as a method to eliminate the small middleman from the tobacco market. In part we said:

If the annihilation of the small retail dealer was being brought about in a fair way, whereby the people at large could get some benefit, we would not be justified in complaining. In truth and in fact, we are being exterminated, violently driven out of business, by a few dozen commercial pirates.

The Department of Justice, to which our letters were referred by the President for reply, said in part, that the present Attorney General has always considered that the court decree to dissolve the Tobacco Trust was inadequate; that our views will be further considered in connection with any new legislation upon the subject which may be proposed to Congress. The antitrust bills now in your hands were carefully prepared for the purpose of helping the independent manufacturers, jobbers, and retailers to maintain their business, to uphold fair and sane competition for the benefit of consumers, to break the power of monopoly in business and interstate commerce in this country. However, objections were made to the form in which these bills were framed.

The CHAIRMAN. What bills are you referring to as having been proposed?

Mr. EHRLICH. The antitrust bills proposed by the administration to protect the small man in order that he may remain in business. It is not a question now between the consumer and the manufacturer, but it is a question between the people and monopoly. If it goes on as it is going on now, monopoly will be in every line of business, and as soon as monopoly controls the people will be the losers. The people only get small prices because we are still in business, because we are competing with them. If we should all quit business they would raise their prices and at the same time reduce the quality in all lines of business.

The CHAIRMAN. You are still able to compete? Notwithstanding all their practices you are still in business and able to compete with the Tobacco Trust, are you?

Mr. EHRLICH. If you will permit me, I will show you how we are able to compete. I am going on to give you a little view of the condition of the business. It seems strange that the consultation of the Judiciary Committee and the subcommittee with proper authorities regarding these bills, covering days, weeks, and perhaps months, could find no fault with them, while big business found them all out in a few days; moreover, it is remarkable that all objections found are in favor of big business against the small middleman.

The first objection made was to the amendment to the Sherman law, that it would render conclusive against a trust every judgment in favor of the Government, adjudging that the corporation had violated the act so that every person injured could sue, and

have the advantage of that judgment without having to prove the illegality. This would open wide the door to recovery by every injured tradesman, who is now prevented from suing through the inability to give this proof and its prohibitory expense. If this objection made by big business shall be considered and sustained, we might as well wipe the Sherman law off the statute books. The history of the Tobacco Trust in this country has proven time and again that any individual, financially small or big, who started a lawsuit against the members of the Tobacco Trust, an action which usually lasted more than a decade, eventually lost his money and his business and ruined himself and his family forever. The cemetery of the independent tobacconists is as large as the country. You will find victims of the Tobacco Trust in every large city in the Union. Big business usually hires the best lawyers in the land to defend itself in the courts. Now, I ask this honorable committee what chance has a poor tradesman in a lawsuit against big business? It is only just and right that the Government should assist the injured small business man to recover the damage caused by a monopolistic corporation.

Any honest citizen who has read the reports of the Commissioner of Corporations and the Attorney General on the tobacco industry for the past 15 years must come to one conclusion, namely, that one dozen men in the tobacco industry have violently oppressed and driven out of business manufacturers, jobbers, and dealers by the thousands. It has been proven by the authorities that they have violated laws of State and Nation. They built up an enormous monopolistic combination from which this country is suffering and will suffer for years to come unless sharp and clear antitrust bills are enacted immediately. Big business is trying to change these bills and modify them to suit itself. What will be the result? Prosperity for a small minority; ruin and poverty for the small manufacturer, jobber, and dealer. Will the country benefit by it? Positively not. The concentration of production in a few hands will reduce the number of laborers and thus will increase the army of unemployed; the centralization of distribution will deprive thousands of small business men from their livelihood, who will also be lined up with the unemployed. Look at the condition of the people in this country that big business has brought about. Fanciful luxuries for multimillionaires on one hand, poverty, misery, ignorance, and suffering for the masses on the other; 75,000 unemployed in Philadelphia; 300,000 unemployed in New York; over 6,000,000 unemployed in the country; strikes and battles between big capital and labor is an everyday occurrence.

Mr. NELSON. How do you account for that condition now?

Mr. EHRLICH. That is just one result.

Mr. NELSON. That is the effect of the trusts that have been developed since this administration came into power.

Mr. EHRLICH. Not at all, sir. The present administration is trying to enforce some bills against them and, therefore, they are trying to create panics.

Mr. NELSON. Where do you get these figures?

Mr. EHRLICH. From newspapers, magazines, and other authorities, wherever I can get them. Some of them are from professors of colleges. Under the régime of big business the cost of living went

up 65 per cent for all the people and wages went up 20 per cent for skilled workers only, who number only about 10 per cent. Prosperous big business is driving out the mothers from their homes and the children from their schools into the shops, mills, and factories to support themselves. We have about 17,000,000 men and women unmarried because they are unable to provide for families. The trusts of vice and crime are only the result of the existing other trusts. Look up the reports of the Commissioner of Labor and of the New York State Factory Investigation Commission for 1912, and you will find that the Tobacco Trust factories employ children at 30 cents a day.

The independent manufacturers, although we have only a few of them, pay 30 cents for packing a thousand cigarettes, while the trust pays 2 cents a thousand, because it employs girls. That is a statement made by a manufacturer in New York. The small business man, who serves this country with the best in him, who spends and invests all he makes in this country, who gives material for the best institutions in the country, who is an honor and a credit to every city wherein he lives, who produces the best brains for professions and business, whose children are filling up all the educational institutions in the Union, this important middle-class business man who is the backbone of the Nation's democracy and liberty, will have to vanish unless antitrust bills are passed by the Sixty-third Congress.

The bill prohibiting the fixing of prices is mischievous in principle, said a representative of big business. Instead of stimulating competition and freeing business, he said it would destroy competition. It would enable every local manufacturer and dealer to undersell an interstate corporation in a locality and drive it out of that locality unless the corporation was willing to reduce its price all over the country. This argument is unjust and unfair. Big business believes in fixing prices. We do not. We have seen how the Oil Trust was built up by fixing prices—selling oil in one city at 8 cents a gallon, freezing out the local dealers and manufacturers, and at the same time in other cities charging for the same oil 18 cents a gallon.

Fixing prices means price cutting and price cutting was and is the most dangerous weapon in the hands of big business. Price cutting has driven out of business 1,252 cigar manufacturers in 1912; price cutting has closed the doors of 716 cigar manufacturers in 1913; price cutting of the United Cigar Stores Co. in New York alone has reduced 10,000 cigar dealers to a minimum, the most of them ruined, and many of them having committed suicide; price cutting has ruined the Siegel-Cooper store, which ruined at the same time 15,000 poor depositors; price cutting ruins 95 out of each 100 small business men who attempt to run a small business independently. Price cutting forces the cigar dealers to sell all imported cigars at cost price and cigarettes with a small margin above cost. Price cutting is the most poisonous weapon in the hands of monopoly to fight the independent business man. Big business is against prohibiting the fixing of prices, which means absolutely to cut prices in one place and raise them in another. In other words, it means big business will reduce the price in one locality to starve out the local manufacturer and dealer and raise the price in another locality where the independent dealer and manufacturer has already been starved out. Price cutting kills reasonable and sane competition, thus it makes big business supreme in industry, and after they get through with the independent

competitors they reduce the quality and raise the price on their products and the helpless consumer has to pay for it all.

Mr. VOLSTEAD. I should judge from what you say that we have no trouble with the high cost of living at present, the trouble being that the cost is too little.

Mr. EHRLICH. Well, that is a logical question, but I am speaking from the standpoint of the tobacco man, and certainly it is remarkable that although we have an Oil Trust the price of oil went up; we have a Sugar Trust and the price went up; we have an Egg Trust and a Beef Trust, and the price went up; and in the tobacco business we have a trust, but the price is going down. Why? Because we have small men, still enthusiastic, holding on to their own.

The CHAIRMAN. So that the Tobacco Trust, instead of putting up the price of tobacco and cigars, has actually decreased the price of tobacco, and the consumer is now buying tobacco and cigars from the trust at a lower price than before the Tobacco Trust got control of the tobacco market. Do I understand you to say that?

Mr. EHRLICH. I mean to say that the prices are down, but the consumer gets lower quality for a smaller price than in the stores of the independents. The United Cigar Stores have existed for the last 10 years but they do not get the discriminating smoker because they do not give quality; they are trying to sell low quality for a high price.

Mr. PETERSON. Can you buy the same brands of cigars and tobacco there that you buy elsewhere?

Mr. EHRLICH. No, sir; they have their own controlled brands, and they are always pushing their own controlled brands, which only an expert can know how much they are made for and how much they cost. The independent is always pushing his own goods. Two-for-a-quarter cigars cost between $9 and $10 a hundred, 9 and 10 cents apiece. The United Cigar Stores sell Porto Rico cigars for 9 cents apiece, which the producer could sell for 6 cents apiece. The United Cigar Stores sell their own controlled brand, and although the consumer could demand an independent brand and get it most of the time he could not get it because they are not pushing the independent brands. It is very seldom the United Cigar Stores carry independent brands. Now, I want to answer the question of the chairman about the United Cigar Stores. It is true that the United Cigar Stores sell goods at a lower price, but as long as we are in the business we have independent manufacturers, independent leaf men, who are helping us. We are trying to make as little as possible to keep from going out of business, because for a man to go out of business after he has been in business for 25 years means absolute ruin. When he sells his brand there will be nothing left of everything that he has worked for.

The representative of big business meets the big men of big business and surely knows what they wish and what is better for them. We come from the masses. We meet the small men every day, and therefore we know what they want and can say that we express their thoughts. If the gentlemen in Congress wish to retain their seats in the House at the next election they will have to listen to the voice of the people, not of big business. New York's last election may serve as a good example. Take, for instance, our tobacco industry. A few magnates control the production and direct the distribution

of the business. About half a dozen corporations control the production of cigarettes, tobacco, snuff, and plug tobacco. Mr. Whelan controls over a thousand cigar stores—a $30,000,000 concern. He also organized the Tobacco Products Co., a $50,000,000 concern; and by legal advice of Mr. Utermyer he absorbed the Riker-Hegeman Drug Stores Co.; and before long Mr. Whelan will control the medical profession and nurse the American people on its sick bed. Suppose Mr. Whelan, yachting in Europe, would give an order by wireless telegraphy to the Riker-Hegeman Drug Stores to sell below cost goods which are sold by independent competitors in its neighborhood, to reduce the quality and double the price on articles not well known to the public, in order to pay 7 per cent dividends on the watered stock in 1914. Can you stop him from doing it under the present laws? Therefore we claim we must have new and better laws to protect the people.

Just imagin one man living in Europe and spending there American money, from three to four thousand dollars a day. He gives an order, and the American people foolishly and helplessly accept the order. The conditions which exist in the tobacco business to-day will prevail in the drug business three years later, and will be general in the confectionery and delicatessen business five years later. Three or four men, while recklessly spending American millions in the European gambling resorts, will control and direct the production and distribution of commodities essential to the American people. Poltical democracy will become a farce and the American people will become economically enslaved to the Whelans of big business.

Prof. James, of Yale University, says that the average man develops only 30 per cent of his efficiency. The United Cigar Stores Co. has developed a system by which it makes its men give up the last drop of their energy and vitality for the benefit of the company. Do its clerks get any better rewards than any other average clerk? By no means. The independent cigar dealer accepting a position with the United Cigar Stores Co. after he has been driven out of business by it becomes the object of miserable exploitation by the same company. For example, I will copy the text of a contract forced upon each employee upon the 2d of January, 1914. Here it is:

I hereby accept employment with the United Cigar Stores Co. and agree to perform such duties as may from time to time be assigned to me, and do also agree that my compensation is to be determined from time to time by the superintendent or sales manager of the store in which I may be employed, subject to the approval of the employment department. My employment is by the day only, and may be terminted at any time without cause or notice, and is subject to all rules and regulations adopted by the company from time to time, which I agree to be bound by and comply with.

This contract shows clearly and plainly what the small business man may expect from the Whelans of big business after they are driven out of their independent business. The New York charities have stated that a family must have $21 a week to buy urgent necessities of life. However, the average United Cigar Stores clerk receives from $14 to $16 a week.

It is up to Congress now to check the growth of monopoly, otherwise we may expect that in 1916 Government monopoly of the tobacco industry and public ownership of many utilities will be a

serious political issue. Monopoly prevents the exercise of individualism and hence hastens the adoption of public ownership. We would rather have Government monopoly than trust monopoly. Monopoly must be under strict social control. We must understand our task and prepare for it. With our united efforts we shall achieve it.

At Detroit, Mich., September 18, 1911, President Taft said:

> We did get along with competition; we can get along with it. We did get along without monopoly; we can get along without it, and business men of the country must square themselves to that necessity. Either that, or we must proceed to state socialism, and vest the Government with power to run every business.

We warn our Representatives in Congress not to suppress so easily the public sentiment. The American people will not slave for the trust magnates. We shall rather labor and toil for the Government than slave and starve for the trusts. If all the tobacco factories are destined to be consoldiated into one grand establishment, wherefore should not that establishment belong to the people and be run for the benefit of all of us? The United States, which can manage an Army and a Navy, can settle international conflicts in politics, can run the Post Office Department, the Panama Canal—this United States I am sure will be able to run the tobacco business of this country for the benefit of all. If the trust can buy the best brains of the country to run its business why can not the Government do the same?

The merger of the United Cigar Stores Co. was conducted under the direction of Mr. Samuel Untermyer. Mr. Whelan was very much disturbed by the Government investigation into this merger, but he has been continually advised by his counsel that no law will be violated in any way by him in that matter, and he felt certain that any investigation which might be contemplated or made would disclose nothing unlawful or improper. This is an extract of a statement made by Mr. Whelan himself.

We have no complaint to make concerning the fact that Mr. Untermyer has been engaged as legal adviser to Mr. Whelan. What we would like to make clear is that Mr. Untermyer can not represent the interests of the independent American business men. No man can serve God and mammon at the same time. Mr. Whelan's interest is diametrically opposed to the American spirit, American fairness, and American liberty. If Mr. Untermyer serves the interests of Mr. Whelan's big business, he is naturally opposed to the interests of the independent business man. The United States Government can get along all right without his advice. He might better save his legal advice for the big corporations.

We have great confidence in the sound judgment and reasoning of the honest and good citizens who represent our great Nation in Congress; and that in spite of the objections of Mr. Samuel Untermyer the five antitrust bills of the administration will be passed and made law, with a few little changes for the benefit of the American independent business men.

(Thereupon the committee adjourned to 10.30 a. m., Wednesday, February 18, 1914.)

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.
L. C. DYER, Missouri.
GEORGE S. GRAHAM, Pennsylvania.
WALTER M. CHANDLER, New York.

J. J. SPEIGHT, *Clerk.*

TRUST LEGISLATION.

SERIAL 7, PART 18.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Wednesday, February 18, 1914.

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

The CHAIRMAN. It was agreed that the committee would hear Mrs. Christine Frederick this morning. She represents the Housewives' League, and desires to be heard on the antitrust bills pending before the committee. We will be glad to hear from you at this time, Mrs. Frederick.

STATEMENT OF MRS. CHRISTINE FREDERICK, OF NEW YORK, REPRESENTING THE HOUSEWIVES' LEAGUE, CONSULTING HOUSEHOLD EDITOR LADIES' HOME JOURNAL, NEW YORK SUN, AND PHILADELPHIA PUBLIC LEDGER.

Mrs. FREDERICK. Gentlemen of the committee, permit me to say that I am not acquainted with legal procedure, and I am not here this morning in the interest of any one group of organizations, but I am trying to bring before you points which appeal to me as a woman and as a consumer, from my experience in various women's organizations and as the purchasing agent for an extensive family.

When I was in my teens I remember that my mother used a certain soap exclusively for toilet purposes. It was aromatically scented and made a delightful lather. I recall this soap affectionately, and when I began to have a home of my own I started inquiries for this soap at various dealers. "Why do you no longer carry this soap?" I asked my corner druggist. "Oh, there's been no sale for some time," he replied. "Why, it was a very good and unusual soap," I replied. I know at one time it was used by a great many particular families.

I decided to ask another dealer. "Don't you still carry that soap?" I asked. "No; nor for some time." "What is the matter?" I asked. "Oh, there was no profit in it; the dealers got to selling it at any kind of a price, and as there is no living in that kind of a game I dropped it altogether."

My quest of a cake of soap set me thinking. I tried to see a bit further than my market basket and pocketbook. I knew at one time there was a standard, widely distributed article in extensive use. I knew that somehow or other I couldn't get it when I wanted it. What was the reason?

I began to see that I, as a consumer, should have some say about the kind of goods I wanted to continue to purchase. I saw that it was extremely important that I should understand the manufacturer's method of distribution, his prices, and the retailer's method of selling goods. I saw that it was still more important that I understand these methods in order to properly fulfill my job as the purchasing agent for my family.

My object as a consumer—and that is the object of every consumer—is to get the greatest value for my money with least expenditure of time and effort. In order to do this I have found it essential that I standardize my purchases. The time of the housewife is valuable to-day, and she can not afford to lose time in repeated analysis of the same article. For instance, it is quite a problem to decide whether I should use gluten, whole wheat, Graham, roller process, or what kind of flour in my home, and what brand is best suited to my purse. I have to make the same analysis of other foods, of underwear, shoes, and, in fact, every article of clothing, food, and furnishings. I have found that it was wasteful of time and expensive in money to repeat such an analysis of an article as to size, quantity, quality, and price every time I go to the store to buy. I must do this unless I stick to a brand. I lose money when I have no standards in underwear, shoes, etc.

My object, then, as a consumer is to find always dependable articles as to quality and price which suit my particular needs. The more widely distributed such goods are, and more quick and easy it is for me to purchase them, the more simplified are my problems of buying for my family. Dependable goods at the same unvarying quality and price mean that with little effort I can order such and such articles, and know that they will always be the same. If brands are always changing and disappearing, and if quality and prices are not dependable, then I have to study my goods all over again each time of purchase, which is wasteful of time, entirely unsatisfactory, and inefficient.

Now, then, with this conception of my condition and needs as a consumer, how does the matter of uniformly maintained price appear to me? I have considered the subject from various angles—pure food,

purchasing efficiency, and economic value—and as a woman consumer I favor it.

First, I wish to emphasize that experience has taught me that the manufacturer's mark offers me my maximum guaranty as a consumer. The trade-mark is that sign by which I can standardize my purchases. After my long analyses of flour, of shoes, of any other article, I find one article, one brand, that meets my needs as to quality and price. It is distinguished by a trade-mark, a means of identity, so that I can instantly and without effort and without deception ask for and receive that standard of quality and price. The manufacturer's trade-mark assures me five vital things which nothing else could do so straightforwardly and logically:

(1) Quality, (2) manufacturer's name, (3) price, (4) size and weight, (5) place of manufacture.

The trade-mark of an article of proved standard price and standard quality is my protection and convenience, because it is some sort of a guaranty by the manufacturer that he will continue these definite standards of quality and price at any time and any place. My hope as a consumer, speaking for women consumers generally, is that there will be much more trade-marked merchandise. When there is a trade-marked merchandise of a standard quality and price, I will have more opportunity to test the genuineness of so-called "bargains." There are those who tell me that trade-marked goods are often inferior to unnamed goods. I admit that they sometimes are, but the fact itself that they are trade-marked enables me to recognize them—or refuse to buy them. The trade-mark identifies both quality and lack of quality—value or lack of value for the set price.

For instance, there is a trade-marked, well-known brand of women's hosiery which I have found undesirable. I will not buy them again. The trade-mark and the set price may be a guide against inferiority as well as for excellence, but at all events it fixes responsibility either way, and it establishes a standard of price which gives me a permanent universal factor upon which to base my calculations.

There is nothing more certain in my experience as a buying consumer than that every instance of cut price on standard articles is simply a lure to draw me into the store. It is too obvious that the stores want to show how clever they are, and how they are perfectly willing to lose money for the sake of the publicity they would receive—publicity with a purpose—that purpose being to indirectly get more people in contact with their questionable bargains of unknown merchandise than would naturally be attracted by the store's own reputation. In other words, when I see a cut-price article I know it is a bait or lure to induce me to enter the store. For example, when a dealer offers me three cans of Campbell's tomato soup for a quarter I know at once that it is simply a bait to lure or induce me to enter the store not only to buy the three cans of Campbell's tomato soup, but other untrade-marked and unstandardized articles which that store sells. I have yet to find a single instance where the cutting of the price on a standard trade-marked article has not been used as a bait or lure to induce me to go into the store to buy unstandardized goods on which the dealers have so much more profit. They realize the need of other reputations than their own to draw a crowd.

The chief practitioners in the cut-price game are the large department stores and the chain-store establishments, I find. How many

times I have seen those alluring signs—3 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. I have purposely entered such stores, ordered the "special" of Campbell's soups, and then been feverishly asked, "No coffee or tea to-day, madam? Something in extracts or baking powder?" and have found the dealer greatly disappointed, even impolite, because he could sell me nothing more.

It is one of the biggest points of convenience to me as a consumer that every little corner store carries my standard brands. In other words, I have figured it out as a practical household buyer that it is my need as a consumer that good standard articles have a wide and universal distribution. My quest of the cake of soap proved beyond question that as soon as one of two dealers in a neighborhood try to get the advantage of each other in cutting prices on standard articles, the end is always that one or both of them stops selling the articles altogether.

A certain old-time soap is generally sold at 12 and 19 cents a cake, instead of 25. The sale of this soap has largely been taken away from the small dealer and concentrated in the hands of the large drug and department stores. The small dealers could not afford to carry it—and I can no longer get it at my average corner store. Where am I benefited by such low-finance stunts as this?

Right here I want to ask whether it is a right and sincere selling policy of either dealer or manufacturer to mark plainly on an article "25 cents" and then sell it universally for 12 and 19 cents. I am here as a consumer, and hold no brief for either dealer or manufacturer; but equal criticism for both. I think it is a hypocritical and unsound plan to mark goods at prices at which they are never expected to sell. I think it belongs to the realm of business immorality, and I wish I could compel every manufacturer to mark every package at its price, and let me take it or leave it at that price, and not have it offered to me at all kinds of prices—never the price originally marked on the wrapper.

I am strongly opposed to taking good articles away from the small dealer and concentrating them in cut-price, down-town, and department and drug stores. I repeat that the small dealer has a large place in the economics of the consumer's life. I would like to hear from anyone who understands this serious subject of prices who could successively deny the hurtful effect of the cut price on the small dealer. The small dealer is an every-day necessity, and he has got to get a living wage out of his work in supplying me with necessities. Staples like bread, sugar, tea, thread, elastic, tape, pins, buttons, etc., must be bought every day. To whom can we turn for instant service, for considerate and personal service, but to the small dealer around the corner to whom our trade means a great deal?

I have not time to give the various possible instances of the folly of the attitude of hundreds of women who spend half a day, 6,000 calories of energy, and 10 cents in car fare to run down town to take advantage of a cut price—such as a 25-cent toothbrush selling for 19 cents. Here is economic waste for you.

It is known that 40 per cent of the goods which the average grocer sells are staple, daily-necessity goods on which there is little or no profit. A study of the cost of doing business in retail stores of all lines is found to average 23 per cent. The only chance of the small dealer making any profit under such conditions is either to charge exorbitantly for such things as tea, coffee, etc., or to make rapid turn over on easy and rapidly selling goods. That is what the trade-marked articles do for him. I learn that he can have 52 turn-overs a year on Uneeda biscuit, while on unmarked, unknown other goods it might be only two or more turn-overs. Because he does not have to convince the consumer, he does not have to urge me to buy trade-marked goods whose quality and price I have already tested and accepted.

For this reason it is deadly to the small dealer, whom I need so much, to take away by cut prices his easy-selling rapid-turnover trade in standard articles. As far as I can learn the cost of doing business to the department store is about 30 per cent, or much higher than the small dealer. It is easy to see, therefore, why the department stores go pirating around, anxious to cut prices on standard merchandise, and hound trade-marked reputations in order to bring grist to their expensive mills. They want to get all the trade that means a living profit to my small corner dealer, and leave him all the no-profit daily-necessity trade.

I have heard it said on excellent authority that from 90 to 98 per cent of retailers in all lines favor price maintenance. I have noticed, too, as a consumer, that these price-cutting stores never fail to pick the best known and most widely advertised articles on which to cut prices; thus acknowledging on the one hand what they deny on the other—they acknowledge the practical value in dollars and cents of the reputation for standard quality and price; they deny on the other hand that advertising to the public is anything but an expense. In other words, they let the sincere manufacturer spend money to tell me his standard and his ideals at a set price and quality, and then when he has done this they publicly assault him and try to rob him, as well as me as a consumer, of the benefits of this standardized fixed quality and price, which are so valuable to me.

I notice that they delight only to assault a price that is fixed, which proves to me that they are cutting price only when they are convinced that the cut will cause a sensation. If there were no trade-marked 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. I, too, used to weep tears at the noble attitude of "social service" claimed by these price cutters with but a single thought—that of supposedly reducing my cost of living. But why limit these untold benefits to one special sale—to one occassion? If it benefits me to buy three cans of Campbell's soup for 25 cents at a cut price at a special Monday bargain, why not permit me to buy three cans for 25 cents every day in the week. Furthermore, if this price is an economic one, with a fair margin to both dealer and maker, why isn't it available at every store in the land regularly? And if the maker has set the price too high, why doesn't a competitor set a lower one and take his trade? As a matter of fact, this is what does happen,

even with a patented article, oftentimes. I don't believe any manufacturer can charge exorbitant prices—if he has not a real monopoly—and stay in business successfully.

One of the arguments against the set price which has been put up to me is that it permits prices to be exorbitant. But they forget that if any manufacturer sets too high a price on an article, even if universally necessary in modern life, I do not pay that price. I have yet to find that as a consumer I have to pay exorbitant prices for anything, except for articles which are scarce or controlled by unfair monopoly. I am always able to find plenty of other articles made by other manufacturers, which the natural laws of trade have put on the market at a lower price; but usually I prefer the higher grade at the higher price. If it is a patented article priced exorbitantly, of which there is only one make, I usually find that it is not a very necessary commodity to my life anyhow; and if it is necessary, then there are sure to be other articles of that class under other patents at lower prices that will do.

Besides, I am quite sure that it is a most unwise thing for any manufacturer to place an exorbitant price on an article. It affords an enormous temptation for people to pirate or imitate what he has got and cut his prices. From my observation, the wise manufacturer, even with a patent right, puts only a fair profit on his merchandise, because it must be better business in every way to do a large volume of business at a small profit than to do a small business at a high profit. His good will is protected better from price competition and imitation and his profit is kept more before the minds of the people when he sells a great volume. An instance of the self-regulation of prices—a case where the proprietors of a patented article tried to ask an exorbitant price—comes to mind in the case of a familiar vacuum washer put on the market in the past few years. This device, which was only a simple tin cone, was first sold at $3.50, which was a great overcharge, and which resulted in fat fees to agents over the country on a questionable endless-chain plan. But this excess charge did not last long. A similar washer appeared on the market in about six weeks and sold for $2. Then one was sold for $1.50. The last I heard of it the price for the original washer had been reduced to the level of competitors' prices. I instance this as an example of how an overpriced article is almost bound, by competition, to reach a fair level. If the article had really been worth $3.50, with service guaranty and high standards, the price would still be $3.50.

I believe, therefore, that a maintained price on a patented article only rarely results in an excessive price, and it usually suffers the consequences. The consumer does not stand for it long. The law of competition, I believe, is absolutely certain to get in its work under any circumstances. Just as soon as an exorbitantly priced article becomes really popular and necessary to comfort and living, the price is invariably mercilessly cut by some one seeking to make a sensation, and it is also ingeniously and effectively imitated. It has been interesting to me to see merchandise come and go, and time after time I have seen a line of goods that sold at all kinds of prices, and therefore was generally undependable in quality, get steadied and dignified in service and quality by setting up firm price standards.

When I first began my experience as a consumer, I thought that the best way to do my family marketing was to ask the dealer his price and then Jew him down. That, I am told, was the attitude of all consumers in this country 50 years ago. This condition existed because at that time all dealers and merchants overpriced their articles, and the shrewd buyer was the only one who could get the best trade or bargain, after hours of talk and discussion. That method is still extant in some European countries, and almost all Asiatic countries, where I myself have been first asked $2 a yard for cloth and finally secured it at 50 cents. But John Wanamaker and Marshall Field saw the fallacy of these methods as affecting more important lines of merchandise. The reason why to-day 99 per cent of all merchandise is no longer sold after these Asiatic methods is because common sense has demonstrated that the one-price plan is more honest and more efficient for all concerned.

Now, I am convinced that exactly these same benefits to me as a consumer of one price on retailer's goods also comes to me from one price on manufacturer's goods sold through retailers. What is common sense for dealers is common sense for me, and also common sense for manufacturers. Both I and manufacturers and 98 per cent of dealers know it is far better to set an honest, fair-profit price, and sell at that price uniformly to all. It is a principle of honesty and fair dealing which I am astonished to find disputed.

The only people who I can see are interested to prevent maintained prices are the small 2 per cent of retail stores, which woundn't be interested at all if the 98 per cent wasn't for it—for then they wouldn't see any sensation value.

Some people believe, when two dealers across the street "compete" to see who can sell Campbell's soup at lowest price, that this is honest, sound "competition," the kind that we would all like to see more of. But I have come to see that in reality this is unfair competition, such as Germany has a definite law against. It is not competition based on natural principles, but it is fictitious competition used as a bait. In other words, they are not trying to sell me my soup more cheaply as a straight-forward, regular principle, based on costs, but they are trying to wave a lure in front of me, costing them actual loss, to serve as a means to get me to buy other goods on which they make exorbitant profit. In my opinion, it is just as fictitious competition for dealers to cut prices below cost to get sensational value as it is for the Standard Oil Co. to sell below cost to undersell and drive out a competitor. It is history that when the Standard Oil Co. cut prices and succeeded in driving out a competitor, the prices went up higher than before. Real, honest competition would have been to see who could sell oil at the lowest margin of profit, year in and year out—not for a day, a week, or a month. We can't be short-sighted as purchasers—we must learn to look out for next year as well as to-day, and that is why we women are studying business subjects. Instead of letting the Standard Oil Co. sell us so cheaply we should have refused to take the bait and thought of next year.

Fair competition in all kinds of merchandise is based on the same two factors: First, that of lowest price for quality, and, second, that of permanency and dependability. Like other consumers, I made the first mistake, but my experience with a cake of soap, and many other articles, has convinced me differently.

When I hear claims that price cutting is "social service," to enable the consumer to buy for less money, I know only too well from experience that the real object is to have me notice the so-called $30 suit, which is marked down to $13.98. It is only to get me into the store to look at the suit and buy other things which are not offered as attractive bargains for that day. Price cutting is to such people only a question of which reputation to assault and how much they can afford to lose to get me into the store at all. They have figured out laws of averages showing that merely my presence in the store is worth a definite sum in cash, in anticipation of what else I may be induced to buy, what other lure I may fall for. I know such people figure that it is worth a definite sum to have me enter the store; they can afford to lose that sum in order to get me into the store.

I want to propose one final test of the so-called social service, the talcum powder, supposed to be sold at 25 cents, being sold for 12 cents. The real test of this wonderful price-cutting philanthropy toward the consumer would be if all merchandise in the store was sold at the same per cent of profit or less at which the cut-price, trade-marked goods are sold. If the selling of a standard article at a lower price is a good thing, why not sell all the other merchandise in the store at the same low profit? But because the cut-price stores are very far away from such a Utopia I am bound, as a consumer, to line myself up with those who believe in sincerity and stability; who believe in merchandise standing on its own merits and its price as represented; who believe in merchandise of a uniform quality at a uniform price. I believe it is to the best advantage of all of us that all lures based on subtle and hidden motives be abandoned. I believe that everyone concerned in any business transaction, from manufacturer to myself, should deal frankly and openly, without tricks and shiftiness, at a fair advantage to all, including the laborer at the mill or the factory.

The laborers are often kept working at miserable wages and uncertain work by manufacturers, who make irresponsible merchandise which does not bear their name, for cut-price stores to impudently offer as "just as good" as the goods of manufacturers who treat their employees well and who are willing to stand back of their goods. Very often private brands of goods are made under the most disgraceful factory conditions and the most insanitary conditions that we have to deal with in the line of pure food. That is not so with manufacturers of standard products, manufacturers who are willing to guarantee their products and put their names on the products so that the people may know where the factories are located. Where an article is made and does not bear the name of the manufacturer it is impossible to tell the conditions under which it was manufactured, and if the name of the manufacturer does not appear, how can I tell whether the bottle of catsup I buy is made of skins, refuse, or what not, or made under conditions that are in conflict with the child-labor laws, which we are all seeking to enforce. When a manufacturer of a standard product puts his name on the product I am able to go to his factory, if I have the time, the ascertain the conditions under which that standard product is made.

Briefly, then, gentlemen, my position as a consumer and as consulting household editor of the Ladies Home Journal, the New York

Sun, and the Philadelphia Public Ledger is this: I make a plea for a general law against unfair competition, so that we can be mutually rid of that body of men who live on the reputation and labor of others, but who do not given honest service themselves. I believe competition will work out the salvation of business quickly if real competition is given a chance by having Uncle Sam umpire the game fairly.

In making any laws about business I hope you will remember the desires of the consumer: First, the fullest and frankest knowledge about every article the consumer buys; second, the ability to send a child or servant to buy any article without fear of overcharge or that the price or quality or guaranty may be different. In other words, permission to manufacturers to protect their prices for my benefit; and third, that I be able to find such standard goods for sale at every convenient corner; that every encouragement be given manufacturers to reach national sale and large volume, that prices may decrease and service increase to me as a consumer, thus reducing that very terrible bugbear, the high cost of living.

I thank you.

The CHAIRMAN. The committee is very much obliged to you for your most interesting and instructive talk. Mr. Abraham Erlanger is the next speaker.

STATEMENT OF MR. ABRAHAM ERLANGER, 65 WORTH STREET, NEW YORK.

Mr. ERLANGER. Mr. Chairman and gentlemen, I come before you as the president of the B. V. D. Co., makers of summer underwear. I can talk with knowledge regarding the underwear trade, having been in business for over 40 years, and in the underwear business for more than 30 years. My argument will touch chiefly on the unwholesome effects of price cutting on branded and well-known goods, which if of high quality and wide publicity offer a convenient means to the price cutter to dispose of the rest of his goods at abnormal profit. Or, rather, more often at more than an ordinary profit.

My grievance is not that my company has been injured. While it is distasteful and expensive to be forced continually to maintain the dignity of our trade-mark, I am influenced chiefly by the wish to protect all fair-minded retailers against the tactics of cutthroat competitors. I shall attempt to show further that the one price to all is directly in the interests of the consumer, and that the temporary and doubtful benefits resulting to the consumer from alleged bargains are a poor recompense for the frauds that almost invariably accompany such sales.

First, I want to clear away any possible impression that the uniform retail price which I advocate tends, in any way, toward monopoly. This impression is superficial, illogical, and thoroughly refutable. There never has been a monopoly in the woven underwear market and never can be. It is a physical impossibility. I can not illustrate this better than by stating that my company has created, at least, 75 active competitors, as I have noted in the Dockham directory, covering my trade, and there can be no possible doubt that the actual number exceeds this very greatly, owing to the facility

with which a man of practically no capital can enter the woven-cloth underwear business. It is utterly impossible to compute the number of brands now on the market. These goods are all made on sewing machines, therefore anybody can very readily enter this business.

Please bear in mind, gentlemen, that I base whatever claim I make for consideration upon the quality of the B. V. D. underwear. The predecessors of the B. V. D. Co., which is the firm of Erlanger Bros., of which I am a member, first commercialized the idea of making summer underwear in knee drawers and coat-cut undershirts. Our original idea was deemed most radical, and met with wide derision in the trade, mixed with pity for us, the pioneers. When our goods were first produced by Erlanger Bros., much missionary work was required and it was necessary to donate garments—we could not sell them—to sympathetic friends to convince them of the value, comfort, and general advantages of this undergarment. Some of my closer friends in trade commiserated with me in private and assured me that I was heading for bankruptcy and the lunatic asylum. I could give you some stories, but I do not think you want them now. But the idea proceeded, and to-day we have many competitors. We sell goods through wholesale distributors only. The most popular numbers retail at 50 cents in separate garments and $1 in union or combination suits.

These prices are the popular prices for summer underwear of merit. In fact, this is the universal price for most of the underwear consumed in this country. For our goods, that is the popular number, the retailer pays 33⅓ cents per garment. From the information that is generally received it costs approximately 25 per cent of the sale to run his business. If he sells a 50-cent article for 40 cents, from which is deducted this 25 per cent for business expenses, he receives 30 cents for goods that cost 33⅓ cents. In other words, he has lost 3⅓ cents on this sale, and he must add this 3⅓ cents to his normal profit on other goods. And for each degree of lower price the consumer must pay an extra tax above the normal on unknown goods which he has no means of appraising at their real value. This method of doing business is a public menace. This offers an unfair advantage to the merchant of large capital who has various unidentified items in his stock, to retrieve the loss suffered on the well-known article. The smaller merchant, on the other hand, in order to succeed, needs the merchandise that can be sold with the least trouble and the quickest turnover. Hence his desire is to operate in well-known goods of merit. When the prices on these articles of merit are cut by a competitor the small merchant, who is not in the same position, on account of his meager stock of general merchandise, to retrieve his losses on unknown goods, is placed at a disadvantage, and when thus forced to cut the price, suffers an absolute loss. So far as the consumer is concerned—and his is the interest to be safeguarded—he is in constant peril from this pernicious practice of price cutting on popular goods. He is much safer where the competition is one of merit and not of cut prices, for the lowering of a price of a popular article by cut-throat methods tempts dealers, who otherwise would trade fairly, to sell as few as possible of the popular goods at a cut price, and serve an inferior article, frequently at a price greater than its real worth.

I want to show that the true competition is a competition between the articles of various manufacturers, based on their respective qualities, and not competition in prices between different dealers in the same article. The latter competition is false and destructive and tends to utterly demoralize commerce.

Mr. THOMAS. Are you in favor of fixing prices Do you want some method or law by which the prices will be fixed?

Mr. ERLANGER. On well-known goods, yes, sir.

Mr. THOMAS. Whom would you have to fix the prices?

Mr. ERLANGER. Well, I should——

Mr. THOMAS (interposing). The manufacturer of the goods?

Mr. ERLANGER. Yes, sir.

Mr. THOMAS. Where do you reckon the consumer would come in if the manufacturers were allowed to fix the prices of these goods and if the public were compelled to buy at the prices they fixed?

Mr. ERLANGER. I can only speak of my own business. I can say this, that if our prices were too high we would soon lose our business. I suppose there are 1,000 articles of that kind on the market to-day, and the public, in that instance, is taken care of. You see, this is not an article where there are only three or four people engaged in manufacturing it. Every man with a sewing machine can enter it.

Mr. THOMAS. If we had a law which permitted manufacturers to fix prices, what would keep some large manufacturers from manufacturing articles and fixing excessive prices?

Mr. ERLANGER. That is their privilege. If their articles are good enough people will take them. Time will test that. It is always an experiment, anyway. Under present conditions ono article wins and another does not, no matter what the price may be.

Mr. THOMAS. Then the consumer would have to pay the price fixed by the manufacturers and would have to depend upon those prices?

Mr. ERLANGER. It would seem so, but a manufacturer would have to make his prices right or he could not stay in business.

Mr. WEBB. You would only apply this right to fix the resale price to patented or copyrighted articles?

Mr. ERLANGER. No; the principle is broader and should apply to trade-marked goods—goods that have been identified by their trade name; and they have got to prove their merit to the public.

Mr. WEBB. Would you not apply it to other articles when they have a standard reputation?

Mr. ERLANGER. I can only tell you what we do and you can draw your own applications. I think the trade-mark proprietor should have the right to name the retail price at which goods sold under his reputation should be offered to the public.

Mr. THOMAS (interposing). Any one could trade-mark his goods, could he not?

Mr. ERLANGER. Certainly he could; but if the people do not want his article it will come to an end. Even if he were allowed to fix a price and the people did not want his article it would come to an end. If his goods are no good or prices too high nobody will take them.

Mr. THOMAS. And he would finally drop out?

Mr. ERLANGER. Yes, sir.

Mr. PETERSON. Who is it you are afraid will cut the price? What class of dealers?

Mr. ERLANGER. Well, if you will give me time, I will show you, because I have quite a number of illustrations of that sort.

Mr. PETERSON. Give us the class of dealers you mean.

Mr. ERLANGER. Well, there are clippings from the newspapers, and they will speak for themselves.

Mr. THOMAS. In other words, you want a law to keep people from cutting prices?

Mr. ERLANGER. On advertised goods, because I know the effect of it is that if it is done the consumer is hurt, because well-known goods, to some degree, are either displaced or the consumer is overcharged, or something else. As a matter of fact, business is simply arithmetic; every dealer must make his living and he can not do so unless he gets a profit. That is my view.

Mr. MCCOY. Is not the foundation of your objection this: That the people who are selling your goods at a cut price are practically stealing your advertising?

Mr. ERLANGER. Well, they are. They are using it to sell their own goods, but we are, of course, able to get along.

Mr. MCCOY. If you did not advertise your goods so extensively, then these cut-price people would not undertake to advertise your goods at a cut price?

Mr. ERLANGER. I think they would not.

Mr. MCCOY. Because otherwise, if you had not advertised them, they could advertise your goods at a cut price and nobody would come to buy them?

Mr. ERLANGER. They would not be popular.

Mr. MCCOY. But it is because you have spent all your money in advertising that the mere mention of your B. V. D. goods attracts people's attention right away, and if one of the big stores advertises your goods at 40 cents instead of 50 cents everybody knows that he is getting a standard quality of goods at a cut price, and that is because you have advertised the goods and given them that information.

Mr. ERLANGER. And have kept the merit and quality up and improved the quality.

Mr. FLOYD. If that be true, you want the consumer, the general public, to pay for your advertising?

Mr. ERLANGER. That is not correct; they would not pay it.

Mr. MCCOY. Advertising is part of the legitimate expenses of a business, is it not?

Mr. ERLANGER. Yes, sir.

Mr. THOMAS. Do you have a fixed price for your goods now?

Mr. ERLANGER. We sell them to jobbers, but we have not fixed the price in the sense that you mean. We have no law which permits us to do that.

Mr. THOMAS Can you not fix the price yourselves now? Do you have one price for your goods? Do you sell them to everybody alike?

Mr. ERLANGER. Yes, sir. We do not sell to retailers; we sell to jobbers.

Mr. THOMAS. You sell those goods at a certain price?

Mr. ERLANGER. Yes, sir.

Mr. THOMAS. And when a man buys your goods and pays you what you ask for them, they then belong to him, do they not?

Mr. ERLANGER. I think he buys those goods because there is value in that trade-mark and because he can sell those goods much more readily than if he should buy unknown things.

Mr. THOMAS. He even buys your trade-mark and pays for it, and then has he not the right to do with his goods anything he wishes?

Mr. ERLANGER. That is for every man to decide for himself, and if he wishes to sell at a cut price it would seem that I could not do anything. But they should remember that they are handling goods of merit and which we have improved. We have never raised the price at any time, although we have always improved our goods.

Mr. McCOY. If you were permitted by law to sell your goods under a contract by which the purchaser agreed to resell them at a certain price, then it would not be true to say that he absolutely owned those goods, but that he had a qualified title in them, and that is all you could say; that is, he took them with the understanding that he could not sell them except as provided in the agreement.

Mr. ERLANGER. I think under such laws that would be true, but you gentlemen are wiser than I am.

Mr. McCOY. He would then have no absolute title; he would have a qualified title.

Mr. ERLANGER. He would have a title by which he could not do any injury; but if he sells those goods for less he does us injury and injures the small dealer and the consumer, and I think he does injure them more than he does us.

Mr. THOMAS. If I am not mistaken, the Supreme Court has decided the reverse of that.

Mr. ERLANGER. Well, we have to obey the laws, whatever they may be.

Mr. FLOYD. I want to ask you this question. It involves a greater principle, a principle of individual liberty, as I understand it. I am a retail merchant, and if I buy your goods and pay you your contract price for the title to that property, it becomes my property. Then, what right have you to say at what price I shall sell those goods?

Mr. ERLANGER. I am only telling you what I know about in our business, and if you will allow me to show you what havoc has been wrought then you can determine these things for yourselves.

Mr. FLOYD. Let me give you an example which came under my observation. Previous to the decision of the Supreme Court the very system that you have defended was in force for 10 or 15 years in practically all of the leading lines of business of this country, was it not?

Mr. ERLANGER. Yes, sir.

Mr. FLOYD. A jeweler in my district was talking to me about that system, and he told me that the watch manufacturers not only fixed the price to the jobbers but fixed the price to him and fixed the price at which the retailers should sell the watches at retail to their customers, and that the penalty imposed upon the retailer if he refused to sell them at that particular price was that he could not purchase another watch in the United States from any company. He showed

me the price list fixing the trade price and the retail price, and then at the bottom of it was this statement:

We will pay a premium or a reward of $10 to any person who will give us reliable information as to any of our customers who have been guilty of cutting prices.

Now, he said to me, "Let me illustrate what kind of a condition that puts me in. I am here in a small town; I have paid my own money for these goods; they are absolutely mine, and there are no strings on them. If they would furnish me these goods as an agent I would be perfectly willing to let them fix the price, but they do not do that"——

Mr. ERLANGER (interposing). Do not do what?

Mr. FLOYD. Do not furnish him these goods as their agent; do not allow him to sell them on commission. He said, "They do not do that; they make me pay cash for them." He said, "Now, if I want to close out this stock of goods for the purpose of going to some larger town, and decide that I want to give the customers who have patronized me for years the benefit of reduced prices by putting those goods up and selling them at auction to the highest bidder, and do so, I can not buy another watch in the United States." Do you indorse a system that leads to such consequences as that?

Mr. ERLANGER. Well, that is a peculiar case. Naturally, they should have given that man some relief.

Mr. FLOYD. Let me give you another example which came under my observation, not as to cutting prices, but as to raising prices. In my old home town of Bentonville, Ark., there was a firm of merchants—Terry Dry Goods Co.—which for a long time had sold spool cotton thread at 5 cents a spool. An order was made by some representative of some association, which controlled the price of spool cotton thread, that the merchants of that town should raise the price 1 cent a spool; that is, to raise the price to 6 cents per spool. All complied without protest except this one firm, and they protested. Thereupon the representative of that association, whatever it was that controlled the price of spool cotton thread, sent an agent to that town to try to reason with those merchants. They were still refractory, and he returned. Then a notice was served upon that firm that unless they raised the price of spool cotton thread to 6 cents a spool that no more spool cotton thread would be shipped to the Terry Dry Goods Co. They answered, and in reply stated that they bought their goods for cash, owned them, and would sell them at 5 cents or 3 cents a spool, or would give them away, as they saw proper; that they had never bought a spool of thread from the person who was writing them; that they bought their entire output from Hoffman & Co., a wholesale house in the town of Bentonville. Thereupon Hoffman & Co. got notice that if they sold any more spool cotton thread to the Terry Dry Goods Co. that no more spool cotton thread would be shipped to them as wholesalers. Do you indorse any such business methods as that?

Mr. ERLANGER. I can not speak for any other line of individuals; I can only tell you the troubles in our own trade.

Mr. PETERSON. Does not your argument here to-day lead inevitably to the same result as that Judge Floyd has indicated?

Mr. ERLANGER. No; in the cases mentioned by Judge Floyd the parties had a monopoly. If those people did anything that is entirely harmful to the people some way must be found to handle them.

Mr. PETERSON. If you had the power that you are asking here would you not do the same thing?

Mr. ERLANGER. No; we have over 75 competitors. We have never raised the price; that is all I can say, and yet we have continuously improved our goods.

Mr. THOMAS. Do you sell goods to all merchants in a town; that is, to every merchant, or do you sell to one merchant in a town?

Mr. ERLANGER. We sell to jobbers. We have not that in our hands at all.

Mr. McCOY. Would you see any objection, assuming that a law were passed permitting the fixing of prices, to having a clause in it providing that permission should be given only in case the goods were sold at a reasonable price?

Mr. ERLANGER. Well, if you will permit me to do so, I will show you a case here where a cut of 1 cent created havoc all over the country.

Mr. McCOY. Well, the point is right here. A great many people seem to be afraid that if it were made legal to fix the retail price the manufacturers would fix an unreasonable price and thereby get an advantage which they ought not to have. Now, suppose a bill were enacted permitting them to fix the retail price; could there be any objection to having a condition inserted in that bill, namely, that the price fixed must be a reasonable price?

Mr. THOMAS. Who would be the judge as to the reasonableness of it?

Mr. McCOY. Let us put it the other way. Would you claim, if you were advocating such a law, that the manufacturer would have the right to fix an unreasonable price?

Mr. ERLANGER. No.

Mr. McCOY. Then would there be any objection to having a clause in the bill that the price fixed must be reasonable?

Mr. ERLANGER. I could not see anything wrong about that, if you can determine what the price should be.

Mr. WEBB. What would you think of a proposition to create a commission whose duty it would be to fix on all patented, trade-marked, and copyrighted articles, the price at which the manufacturer shall sell the article to the jobber, the price at which the jobber shall sell to the retailer, and the price at which the retailer shall sell to the consumer?

Mr. ERLANGER. How would that affect the manufacturer if the price to the jobber was such that he could not afford to run his business? However, such a plan would be almost impossible in our line, because I know there are many brands of our kind of goods on the market, and different people make different goods in different ways.

Mr. WEBB. I understand there are different brands, and each brand has its particular trade-mark.

Mr. ERLANGER. Yes, sir.

Mr. WEBB. You see the trouble with a good many members of the committee is in reference to your right, in the first instance, to fix the price at which you shall sell it and the price at which it shall be sold all down the line. What would you think of a permanent commission created by Congress whose duty it would be to take into consideration the cost of producing these articles, all the overhead charges and profits, and fix your price to the jobber, and so on down the line?

Mr. ERLANGER. I would have to investigate that to see whether we could live under it. You see under all conditions we would have to be fair to all men.

Mr. WEBB. The trouble is—at least, that is the opinion of some members of the committee—that the manufacturers are supposed to have the big end of the stick. That is the way it looks to some of the committee.

Mr. ERLANGER. If you will give me the opportunity, I will show you what our situation is.

Mr. WEBB. My question was, What would you think of having a trade commission to fix your price?

Mr. ERLANGER. Let me make clear to you the fact that we are manufacturing largely an article which is sold at 50 cents and have unlimited competition.

Mr. WEBB. What does it cost you to manufacture a suit of B. V. D. underwear?

Mr. ERLANGER. I do not want to answer that. I do not think that is a fair question.

Mr. THOMAS. What would you say to the proposition of having the consumer to fix your price?

Mr. ERLANGER. After all the consumer does fix the prices. He decides whether he will pay a certain price or not.

Mr. FITZHENRY. Don't you think that a person advocating the doctrine that you are advocating ought to distinguish between necessaries of life—that is, things that are needed and desired by everybody regardless of trade-mark or anything else and articles which are advertised by the manufacturer? For instance, you have started in with a certain line of underwear and you advertise it; you have a trade-mark for it and you advertise it for the retail dealer. You do that because you have a trade-mark. The retail dealer does not have to advertise your goods because you advertise them before he gets them. Now, as I understand it, your claim is that inasmuch as you have gone to the expense of advertising these goods originally you have an interest in the final retail price. Is that your position?

Mr. ERLANGER. Not in the merchandise of anybody else, but in our merchandise, because our trade name is used by the retailer to sell the goods.

Mr. FITZHENRY. Is it your position that when you manufacture the goods you not only put the fabric in the goods and incur the manufacturing cost, but that you also put a certain investment in the goods in the way of advertising which benefits the retail merchant who is going to use them? In other words, you do the advertising and, to that extent, you think that you have an interest in the final retail price at which the goods are sold?

Mr. ERLANGER. We put the quality and the merit in the goods. If you will let me tell my story——

Mr. FITZHENRY (interposing). Is that the reason you claim this right to fix the retail price? Do you claim that right because you advertise the goods you sell, make a market for them, so to speak, or make a demand for them? Do you claim that because you advertised the goods and made a market for them originally—that is, before the goods left your factory—you have a proprietary interest in the final retail price? That is your position, is it not?

Mr. ERLANGER. Yes, sir; but not merely because we advertised them. The main reason is that our reputation as the manufacturers is the basis of every retail sale.

Mr. FITZHENRY. Then you do not want to mix that proposition up with the proposition of permitting farmers to fix the price of flour, do you?

Mr. ERLANGER. I do not know anything about that.

Mr. FITZHENRY. You do not want the farmer who raises the hogs to fix the price of pork, do you? That is a different proposition, is it not?

Mr. GRAHAM. I would like for you to make clear this proposition: You are not here advocating a monopoly that controls an article in the whole country and can deprive a would-be purchaser of the right of buying it, are you? Your plea, as I understand it, relates to a man who by his honesty and integrity has made a good article and has built up what he believes to be a right which the law recognizes; that is, a right in the article that he makes. Now, I apprehend from what you started to say that you feared when you fixed your price that some man, in order to get the benefit of the reputation of your goods and trade-mark, would cut the price on them, regardless of profit, and in that way would demoralize your dealings with the rest of your trade. Therefore, as I understand it, you want protection, so far as you can get it, to enable you to say, "This price is a fair, reasonable, and proper price; I have made these goods; I have built up this reputation, and I do not wish to have anybody to take my article and cut the price on it so as to demoralize my trade and destroy the confidence of the people with whom I am doing business."

Mr. ERLANGER. It certainly demoralizes business.

Mr. GRAHAM. That is your position, is it not?

Mr. ERLANGER. Our position is that when the price on these goods is cut the dealer who cuts the price is simply using our trade-mark goods as a vehicle to build up a trade in some other goods. You will understand that we are strong, not only on account of our trade-mark but in the quality of our goods.

Mr. THOMAS. You sell your goods exclusively to jobbers, do you not?

Mr. ERLANGER. Yes, sir.

Mr. THOMAS. You have an article you sell to jobbers which is retailed, as I understand it, at 50 cents?

Mr. ERLANGER. Yes, sir.

Mr. THOMAS. Suppose the jobber who had bought your goods and paid you in cash the price you asked for your goods had in turn sold the goods to a retail merchant, and that retail merchant should then sell your 50-cent article for 30 cents and you found that out, would you let him have any more goods?

Mr. ERLANGER. We do not deal with the retailers.

Mr. THOMAS. Would you allow the jobber to have any more goods if he did that?

Mr. ERLANGER. We have got to do it; that is what we are struggling under now. The jobber buys goods from us and then sells the goods to the retailer, and the retailer in many cases is cutting the price.

Mr. WEBB. Have you been selling to the jobbers all along?

Mr. ERLANGER. Yes, sir; always.

Mr. WEBB. That has been your custom all along, to sell to the jobbers?

Mr. ERLANGER. We have a patent union suit. Formerly we fixed the price and asked the retailer to uphold the price, but when that was declared to be unenforceable, the arrangement fell.

Mr. THOMAS. I will ask you about a private matter, and you can answer my question if you desire. What are your profits on that article during a year?

Mr. ERLANGER. I decline to tell that to anybody, unless compelled to do so.

Mr. THOMAS. Do you earn or make a good profit on your sales?

Mr. ERLANGER. I think we make a good profit—I will be frank with you.

Mr. THOMAS. If you make a good profit, what are you complaining about?

Mr. ERLANGER. I have been interrupted in my statement of that.

Mr. MORGAN. What is the capital of your company?

Mr. ERLANGER. The capital is $400,000 paid in.

Mr. MORGAN. How many men do you employ?

Mr. ERLANGER. Between 2,000 and 2,200 employees.

Mr. WEBB. How do you buy your raw material?

Mr. ERLANGER. We buy our material from cotton mills under conditions of strength, careful selection, etc., that we name. The conditions we impose are such as to give us positive surety that at all times the best methods are employed in the manufacture. We are building a mill in North Carolina, and in doing that we have but one purpose in view, and that is to get a better grade, if it can be done. We expect to pay the full wages of the State.

Mr. WEBB. In what part of the State is your mill to be located?

Mr. ERLANGER. At Lexington.

Mr. WEBB. Are there more mills than one manufacturing these goods?

Mr. ERLANGER. Yes, sir; there are plenty of mills making this kind of cloth.

Mr. WEBB. Would you permit these mills to fix the price to you? Would you be willing to permit the manufacturers of the raw material to fix the price at which you should buy their goods?

Mr. GRAHAM. As I understand it, he nominates a certain quality or grade of goods that the mill shall furnish. It is not simply the manufacture of the cotton mill, but it is manufactured in accordance with his instructions.

Mr. WEBB. I thought that if price-fixing in one case was a good thing it would be a good thing in another case.

Mr. ERLANGER. We must take our own medicine that way. Every time we buy from mills we must pay their price or go elsewhere.

Mr. FLOYD. The man who has a patent or trade-mark has a special privilege under the law already over other dealers, and now you are asking for special legislation in favor of a class which already enjoys special privileges. A good many advocates of this principle have been before this committee and have insisted that it ought to be limited to patented and trade-mark articles and not extended to other articles.

Mr. ERLANGER. Unless an article has a trade-mark and has popularity, I do not see any occasion to name the price.

Mr. FLOYD. I do not suppose anybody on this committee or anywhere else questions the right of a manufacturer to price his own commodities to the jobbers, and I do not suppose anybody would insist that he should be required to do anything but fix a uniform price. There is nobody here or elsewhere that I know of who questions the right of the jobber to fix the price at which he sells to the retail trade, but some of us seriously question the right, not only the legal right—because he has no such right under the law—but the moral right of a man when he has parted with the title to his goods and accepted the other man's money to dictate to that man at what price the goods shall be sold.

Mr. ERLANGER. You say that you all concede the right of the manufacturer to fix the price to the party he deals with directly, so that if he deals directly with consumers he can fix the price lawfully. There is no difference in having this function performed by the jobber and retailer where the manufacturer chooses to do business that way instead of direct, no matter how speciously the argument is presented. If you will permit me, I can give you the history of this trade and can show you circumstances that have occurred. They are in print, and I can show them to you, to illustrate the need of standard prices for standard goods.

Mr. McCOY. The manufacturer does not dictate the price at which the goods shall be sold after parting with the title, but before he parts with the title. He makes the title which he conveys a qualified title, just as a man may convey real estate with certain restrictions which, if named in the deed and recorded, could not be violated by the grantee when he conveys to somebody else.

Mr. ERLANGER. It is a condition of sale.

Mr. FLOYD. If you have any such contracts of sale with you, I would be glad if you would insert one of them in the hearings.

Mr. ERLANGER. I will send you one.

Mr. WEBB. You may proceed in your own way, Mr. Erlanger.

Mr. ERLANGER. My remarks will probably take only 20 minutes of your time, but I have also 8 or 10 letters with me that would give you some insight into this matter.

The CHAIRMAN. You might put them in the record as a part of your remarks.

Mr. ERLANGER. I do not want to mention the names of the parties.

Mr. WEBB. Then, edit the letters as you want them to appear in the record.

Mr. ERLANGER. There is in some quarters a superficial impression that dealers generally are satisfied with cutthroat competition. This is utterly false. Price cutting is a disease; you can trace it at its beginning and follow it in its path across the country just as accu-

rately as you can trace a storm. I have taken the trouble to map out one particular epidemic, and shall present it to you very briefly to illustrate my point. I have correspondence and newspaper clippings with me here, but I shall avoid mentioning names unless you specifically ask for them. On May 9, 1913, a Massachusetts retailer wrote us, complaining of the action of a competitor in cutting the price of our 50-cent product 1 cent. He said, "We shall always object where price cutting on an advertised article at an advertised price is started. While the small reduction here made is immaterial to us, yet a cut of 15 cents means that the goods lie still on our counters untouched. This we know from the experience of past years." This party was a good prophet; he foresaw what was going to happen in the wake of that 1-cent cut. Soon thereafter we had a telegram from a large dealer in Boston complaining of a 13-cent cut on the same article on the part of a competitor. He added, significantly, "Have met price." This dealer did not want to cut, but felt that he had to do so to compete. On the same day we had another telegram from another Boston dealer complaining of the action of both of these houses in selling our 50-cent goods at 37 cents. In other words, one dealer in Boston, by starting the cutting, precipitated a warfare which injured them all, as well as hurting their neighboring dealers, and which, it is safe to assume, did the public no good, inasmuch as they made up their profit on other goods. The strife went further, and before it finished extended largely through New England. I have computed that one of the dealers, in a single day in this strife, in selling 3,600 of these 50-cent garments at 27 cents each and 1,200 of the dollar garments for 55 cents, lost $780, recognizing 25 per cent as his expense. This statement is supported by their advertisement, which means these quantities sold at these prices. I have it with me. Do you want to see it?

Mr. WEBB. You might insert it in the record.

Mr. ERLANGER. In the course of this feud another party advertised these 50-cent goods for 35 cents or 3 for $1, stating they were sold at that price because 1,000 men's spring suits were delayed in the making. What connection the sale of B. V. D. garments could have with an accident in the field of men's suits we have never been able to discern. When the foregoing advertisement was announced, on the same day, the opposite neighbor of this firm telegraphed to us, "Firm (naming firm in question) opposite us has large sign in window, B. V. D., 35 cents; union suits 70 cents." The cutting condition aforesaid precipitated a further cutting by another dealer, who sold 100 dozen of these goods at a loss of $35, recognizing their cost of doing business as 25 per cent. In their excitement in carrying on their fight they wrote to us, "Sell us 1,000 dozen of these goods at $1.75 per dozen." (The right price for them is $4.12½). This would have been lowering our price to retailers $2.37½ per dozen. We have never been able to determine just what line of reasoning these people followed in asking us to carry on their end of a cut-price war—to donate over $2,000 and injure our trade-mark and every retailer. The evidences for the foregoing narratives I have in my possession and you can see them.

Mr. WEBB. Did you state the wholesale price to the jobber?

Mr. ERLANGER. No, sir. The price that these retail parties paid for them was $4.12½.

Mr. WEBB. What is the price to the jobber?

Mr. ERLANGER. The jobber's price is $3.40.

Evidences in my possession show that retailers generally detest this manner of doing business as cordially as we do and that they would welcome a condition of price uniformly on popular goods that would enable them to deal squarely with the public without the fireworks of abnormal "bargain" sales. We have many price-cutting cases in our files that I have with me and which, if you care to take up the time with them, can be brought to your notice. Price cutting on popular goods very frequently leads men to commit improper and, sometimes, fraudulant practices. I have in mind the case of a Syracuse firm who got so badly into the price-cutting habit that it became necessary to resort to deceit and actual misrepresentation to keep themselves free from losses when advertising their bargains. This firm on June 12, 1912, in the Syracuse Herald advertised "Men's B. V. D. style union suits" and sold other makes—not B. V. D. We wrote them complaining and have their reply of June 18, 1912. On August 13, 1912, they advertised "White nainsook, same as B. V. D. underwear." These were also other makes—not B. V. D. We called their attention to this again and in reply received their letter of August 16, 1912, and again accepted their explanation. I would like to read their letters into the record. On July 18, 1912, that firm wrote us as follows:

We are in receipt of letter from your legal department, under date of the 17th inst., regarding the advertisement of "Men's B. V. D. style union suits" in the Syracuse Herald of June 12. Upon investigation we find that this was an oversight on the part of the manager of our men's-furnishing-goods department in giving copy to our advertising manager, and he relizes that it should not have occurred. We wish to apologize for this error as we have no desire to infringe upon your rights in any way and assure you that it will not occur again.

Their second letter, dated August 16, 1912, after we found fault with what they did, reads as follows:

In reply to your letter of the 3d, regard our having advertised B. V. D. underwear, would say I was entirely unaware of the fact that I could not use the letters B. V. D. until now that you fully explain the matter, as it is your trade-mark. I assure you it will not occur again, and we will refrain from using the term B. V. D. in any of our underwear advertisements.

On May 16, 1913, there appeared in the Syracuse Post-Standard an advertisement of that firm reading: "Extra! Men's B. V. D. union suits, 69 cents. On sale Saturday only."

On the same day we had occasion to believe that those goods were not right, and, after taking the matter up with the firm in question through our attorneys that day by wire, the firm wrote to us on May 19, 1913, as quoted below. In that case in the morning they advertised the goods as clean, but those goods were fire soiled, and the advertisement was corrected the same night because we complained. On the evening of May 13, after our attorneys had taken the matter up with them, they repeated practically the same advertisement in the Syracuse Herald, stating, however, that the goods were water soaked, soiled in transit, that they had them relaundered, and stating further "You will find them in almost perfect condition." Their letter of May 19, 1913, reads as follows:

Will you please tell us how we can dispose of the B. V. D. suits which you take exception to our selling at a cut price? These garments were bought

from an auction house in your city, and when we received them they were packed in with work shirts, underwear, and other goods, and were soaking wet and the colors from the other merchandise had run into them so that they were more or less streaked with red and other colors. We sent them to the laundry and had them relaundered. Some came out perfect, but others are more or less stained, and no man would pay $1 for a stained garment.

We are willing to do whatever you wish us to in this matter, but would like to have you advise us how we can unload our purchase, as we have some 1,400 of these garments. If it would be agreeable to you, we would run an ad on B. V. D. regular goods at $1 and these soiled garments at 69 cents, but, of course, only with your approval and at our expense.

I have before me several instances of sensational advertising on our goods in the State of Washington, cases in which the dealers necessarily suffered considerable immediate loss and recouped them through overcharging on unbranded merchandise. I have an impression that it was this condition in that particular State that was largely responsible for the recent decision of the Washington Supreme Court, which ruled that price cutting on popular goods was wrong, injurious to the product itself, and—most important of all—constituted a hardship on the public at large. The decision said very significantly, "It is a fallacy to assume that the price cutter pockets the loss. The public makes it up on other purchases."

Mr. WEBB. You refer to the standard brands of flour—the Flour case?

Mr. ERLANGER. Yes, sir; the State of Washington case. It is surprising to note to what extremes these price cutters on popular goods will go in presenting their claims to public attention. I have before me an advertisement of one dealer who mentions his sale of our 50-cent garments at 35 cents (three for $1), and adds, "Never known to be sold at this price before." That was a Jersey dealer. This is a ridiculous and laughable imposition on the credulity of the public, and is merely a type of a great many more. I have before me advertisements featuring our 50-cent garment at 19 cents.

Mr. THOMAS. Did the Jersey dealer who sold those goods for 35 cents make a profit on them?

Mr. ERLANGER. Certainly not. They cost him 33¼ cents, and he had to pay his freight and the other expenses of running his business. He lost heavily on this item, and must have made up on other goods in some way.

Mr. WEBB. What did they cost the dealer, $4.12 or $4.75?

Mr. ERLANGER. $4.12½: and if they positively pay cash to their jobber they get 3 per cent off, which makes about $4 net; but if they use time it is about $4.04.

So as not to take too much of your valuable time, I can illustrate the ill effects of price cutting in various forms; and if you desire, I am in a position to show you where the advertising illicitly has been done—an hour at a time, a day at a time, on special days, on periods of 3 days, on periods of 4 days, on periods of from 10 to 15 days, and on continuous periods—and if it is your wish, two or three or more of each of these peculiar methods of advertising can be shown to you. I have them with me. I know dealers that sell their goods right along and lose 25 per cent on them. Now, it takes a magician to do business like that, and the small dealer must suffer.

Mr. VOLSTEAD. I have known people to do that in my town on sugar.

Mr. ERLANGER. Yes; I suppose that is so. In practically every case this cutting of popular-priced goods is nothing better than a cloak to hide excessive charges on unknown merchandise. The idea underlying the bargain sale is the desire to assume a mask of respectability through the use of goods that are known and command respect.

Mr. THOMAS. If you had no bargain sales what would the ladies do, do you reckon?

Mr. ERLANGER. I do not know; I am an old "bach." I give my family the money and let them do as they see fit, but I warn them against bargains.

Mrs. FREDERICK. They would be better off.

Mr. ERLANGER. Price cutting on popular goods leads to substitution and unfair advertising, and I wish now to show you a few instances where the consumer has been imposed upon. I have some illustrations here and have plenty at home. I also have the statements that were made when those garments were sold. In every one of those instances the public has been cheated.

The habit of advertising unknown goods as "B. V. D. Style," like "B. V. D.," "the same as B. V. D.," "imitation B. V. D.," and the like, is a favorite method of exploiting a reputable trade-mark for the purpose of selling inferior goods. Is that right?

Mr. THOMAS. I think so.

Mr. ERLANGER. I have tried to make it clear that the dealer who ruthlessly cuts the uniform price of a standardized product is injuring the people. Since the inception of this business we have never raised a price or lowered a quality, but under every circumstance have steadily improved the quality. The retail price is the same now as it always has been. We at all times literally guarantee satisfaction to the consumer. If a man sends in a garment that is at all imperfect—because we are all human and those things will happen—we refund his money or send him another garment, but there are not many such cases during the year.

Mr. McCOY. Do you make those goods in your own factory?

Mr. ERLANGER. Yes, sir; we do.

Mr. McCOY. What are the conditions under which they are made?

Mr. ERLANGER. I think they stand as high as any other factory in that kind of business.

Mr. McCOY. Where is the factory?

Mr. ERLANGER. Baltimore.

Mr. THOMAS. What is the average price you pay your employees?

Mr. ERLANGER. That I do not know.

Mr. PETERSON. Do they work on piecework?

Mr. ERLANGER. I think the work is divided. I am not in that branch of the business.

Mr. THOMAS. How many hours a day do they work?

Mr. ERLANGER. They comply strictly with the laws of the State, and that is all I know. I could not say whether they work less or not, because I do not know. However, I know we never break the laws. We treat these people as well as we can, and we try out, as they come out, every device that will improve the service or will make it easier for our workers. And we do not charge any of it to the hands. We have a lunch room there, one floor that we could

use in manufacturing. I think it is about 60 feet wide by 175 feet deep. Anyhow, it accommodates 700 people at once, and they go in there and get the best food at actual cost. I will read the menu to you. You can get a regular lunch for 10 cents, which is made up of coffee, tea, cocoa, or milk, bread and butter, roast beef, white potatoes, and pie. Then there are extras; bread, 1 cent; toast, 1 cent; butter, 1 cent; coffee, cocoa, tea, or milk, 2 cents; sandwiches, ham, tongue, corned beef, or cheese, 3 cents; egg, roast beef, chicken, or oyster, 5 cents; soup, 3 cents; and so on.

Mr. McCoy. Do you ever buy any cut-price soups?

Mr. Erlanger. No.

Mr. Beall. What does the restaurant just across the street think about your selling pies at that price?

Mr. Erlanger. I can not tell you about that. However, I spoke to one of our men the other day and he said that he was well satisfied; that he could get a lunch in our place much cheaper than he could on the outside.

Mr. Beall. But you are price cutters on pies?

Mr. Erlanger. Not at all. We sell them at cost to the people in our employ; we do not sell to anybody else.

Mr. Peterson. They would have to go outside to get their lunches if you did not sell to them?

Mr. Erlanger. Yes; that is so. However, it is voluntary on their part; they can go outside if they wish to do so.

Mr. Thomas. You did not answer my question as to how many hours a day your people labor. You answered by saying that you complied with the laws of the State, but I do not know what the laws of the State are.

Mr. Erlanger. I will find that out so you will get it straight. I do not actually know.

Mr. Thomas. I am asking that for information.

Mr. Erlanger. Yes, sir; and you are entitled to it. I refer you to the Maryland statutes.

Mr. Beall. Are any of these goods made under what is usually called the sweat-shop system?

Mr. Erlanger. No, sir; no penitentiary or reformatory goods, and nothing except goods made in shops of our own.

Mr. Thomas. Do you employ child labor in your factory?

Mr. Erlanger. No; not what I understand you to mean by child labor, which is defined in State statutes. You can put those questions and I will find them out for you. I do not get over there very often.

Mr. Thomas. But I thought you had been connected with the business for 30 or 40 years.

Mr. Erlanger. Only in the sale of these goods. However, I will get any special facts for you if you want them.

Mr. Thomas. I can not wait 40 years for this information.

Mr. Erlanger. I know. But those things change from time to time. We are not what you call philanthropists, but we treat everybody right and treat them as well as anybody else.

Mr. Thomas. Well, that is all that is required or ought to be required.

Mr. Erlanger. We do that.

Mr. McCoy. These employees could cooperate and run their own restaurant, could they not?

Mr. Erlanger. Yes; or they could go out.

Mr. McCoy. You are doing it for them at these low prices merely as a cooperative plan?

Mr. Erlanger. Yes. I have told you just how it operates. We do it because there are lots of people who prefer not to go out, and it is cheaper for them.

Mr. Peterson. And you prefer not to have them go out, do you not?

Mr. Erlanger. They do go out, but I know they are better off in there and prefer it. That saves them money and works for efficiency.

I want it distinctly understood that my talk to you is not an appeal for help for our own company; we have the virility to survive any conditions that may arise. Our present plea is for the fair dealer, especially the smaller one who is now carrying on his legitimate business against almost overwhelming odds, and for the consumer's welfare. The kind of competition that I advocate—now you will get my platform—is the competition that refrains from despoiling trade-marks; that does not resort to unfair advertising and that does not sell popular goods at cut-throat prices, and I trust you will recommend the enactment of measures to bring these things about, the benefits of which are apparent now, but will be still greater in days to come. The views that I have expressed are well set forth in bill H. R. 13305, introduced by the Hon. Raymond B. Stevens, of New Hampshire.

Gentlemen, I thank you.

(Thereupon 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.	L. 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 19.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Thursday, February 19, 1914.

The committee this day met, Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. The committee will be in order. Mr. Boyd Fisher is with us this morning, and the committee will take very great pleasure in hearing from him at this time.

STATEMENT OF MR. BOYD FISHER, OF NEW YORK CITY.

Mr. FISHER. Mr. Chairman, let me state at the beginning that my relation to this question is as manager of the Efficiency Society, an organization composed of about 1,000 business men in 11 countries and 37 States of this Union. We are interested in the principal questions that are brought up in these bills from the point of view of how they shall promote efficient conduct of manufacture and general business. I hope that nothing Mr. Knobloch or I shall say will appear to be from the point of view of some special interest, but rather be criticisms directed to the end of helping to carry out what the committee has in mind in these measures. I take it that you have in mind certain general principles which you propose to carry out to affect the

business of the country, to improve the business methods, and that the language of these bills, as herein contained, is an effort to carry out those principles with the smallest number of exceptions and with the smallest amount of irritation, and that you especially welcome criticism designed to point out where this language can be effective. Mr. Knobloch, who is manager of the Northway Motors Co., of Detroit, which will perhaps be affected, not necessarily adversely, by some of the provisions of this act, I am sure, will be able to take the larger point of view, namely, the point of view of efficiency, how these measures can be effective or efficient, and how they, in turn, can help make business and manufacture more efficient and effective.

If I may be permitted, I will myself offer a few criticisms as to the way the language of these bills might affect the thing they are driving at.

The CHAIRMAN. We will be very glad to have your criticisms.

Mr. FISHER. It is, perhaps, good parliamentary procedure to begin with those things of which I personally happen to approve and of which the members of the society to whom I have been talking since this committee was so good as to assign us a hearing approve. That carries me at once into sections 12 and 13.

The CHAIRMAN. Of which bill?

Mr. FISHER. The first bill, 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." It is a supplement to the Sherman Act. The effective phrases read:

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.

I am not a lawyer, but I am informed by competent lawyers that this will have the admirable effect of reducing the cost of litigation; that where the Government has spent, we will say, a million dollars trying the facts of an alleged restraint of trade, and has established those facts, a private litigant suing for damages against a monopoly is not put to the additional expense of again proving those facts, but merely has to prove the damages. It seems to me—and, as I say, I am informed by lawyers whose judgment is worth taking—that this language is effective for that purpose, and that the purpose itself is admirable. This serves the double purpose of reducing the machinery of litigation, the delay of litigation, and reducing the cost. The same favorable criticism should be made of the second part of section 12 in that measure, which reads:

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.

That seems to me to be very clearly drafted for the purpose of mitigating the abuses which have arisen under the statute of limitations. It gets rid of another kind of twilight zone, and I think that even combinations in restraint of trade can offer nothing to oppose this effectively.

I will next refer to the provision in section 13 of that first act, which reads in its effective phrasing:

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.

At the present time I understand a private party can not sue for injunction against a combination in restraint of trade; he can sue for damages, but can not pray for an injunction. This extends to private parties the right, which now the Government only has, of causing a cessation of the restrictive acts pending a trial. And again I am merely quoting advisers in stating that that seems to be a measure for facilitating the enforcement of the antitrust law; that it seems to be a just measure and one which will, perhaps, bring into court a little earlier some violations of the antitrust law than they would be brought into court if they had to wait for Government injunction.

Now, on the other hand, it has seemed that section 9 of this act contains provisions which are admirable in intent, but which are likely to be unfortunate in effect. For instance, if I may pick out the phrasing:

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.

It seems to me that it is entirely possible for a manufacturer or a seller to attempt to injure a competitor and still be within proper business rights. If I may cite a specific example, we will say that the Hart, Schaffner & Marx Co., of Chicago, large clothing manufacturers, agreed with Wallach Bros., clothing salespeople in New York, to sell the Hart, Schaffner & Marx clothing exclusively, and in compensation therefor to give a special price to Wallach Bros., because it is such a large corporation that, quite apart from the quantity of goods which would permit of a reduction in price, the advertising value of Wallach Bros. making that an exclusive sale, is worth a further discrimination in price. Now, by any common reading of the phrasing of this act that would be an attempt to injure competitors. Competition is, at the basis, an attempt to get the better of, injure, or rise superior to competitors.

Mr. FLOYD. If you will carefully notice that provision you will find it is intended to prevent discrimination for the purpose of destroying competitors. There is nothing to hinder a manufac-

turing concern, if it will lower its price all over the country, from putting every competitor out of business.

Mr. FISHER. Yes.

Mr. FLOYD. But we have another provision that expressly prohibits—I do not recall the section—the exact thing which you say is desirable. That prohibits one concern from making a contract with a customer on the condition that he will not handle other goods.

Mr. FISHER. Yes, sir; that is section 10. I think that, perhaps, will prove to be unfortunate in many of its effects, and I think, furthermore, that it will be ineffectual and that it will be unenforceable.

Mr. FLOYD. The evidence before us—and very strong evidence—is to the effect that those are two of the most effective means practiced by great corporations of this country in attaining monopoly. Now, if we can not reach these evils in this way, what are your suggestions as to how we could reach them, the object being to protect the people of the United States against unjust monopolies.

Mr. FISHER. Let me say that I am in hearty accord with that purpose, and it is very easy for me to be in accord with it, because I am simply a salaried employee of an association where some of the interests represented are against monopoly and some are for it. So that I have no bias in the matter. I am heartily in accord with that purpose. You may have in mind the Standard Oil Co.'s discrimination in prices in different localities, which not only injured competitors, not only put them out of business, but thereby injured the common weal. It seems to me it would be a very good principle to lay down that no specific act prosecuted in ordinary competition can be regarded as either good or bad per se; that it is only when it is a part of a campaign, or a series of acts which are effectual and which injure the common weal, that we can consider such a series of acts a restraint of trade which should be punishable by fine and imprisonment. I consider that the discrimination in prices which is practiced by numerous—well, I may say, perhaps, the majority—of the businesses of the country, is not in itself and is not always something which is intended to be harmful. That if we attempt to define each individual act which might be used as a means, and have been used as a means, of destroying competition, that we shall have woven a seine which will drag in many whom we do not wish to catch. I feel that too particular phrasing and too particular definition of methods of destructive campaigns is going to be unfortunate; that it is much better to leave a large discretionary power with the courts to consider all the facts attendant on a given circumstance, and to make the special point of attack injury to the common weal rather than injury to competitors, because if we are going to preserve the competitive system we must not give too much consideration to the injury of specific competitors but the injury of the common weal.

President Wilson said he was not against big business but that he was against the trusts. Now, wherever big business succeeds by superior methods, by efficiencies, by economies, it destroys, in part, some competition, and it may be to the common weal that that competition be destroyed. The keynote should be injury to the common weal.

Wherever the Eastman Kodak Co.—which is another case prominently in mind—has effectually destroyed competition and not re-

duced prices as rapidly as competition would have reduced them, and has forced the people to take inferior goods, the common weal has been injured even more than competitors.

I feel that my criticism about the discrimination in prices, which I have just applied to this measure, holds as against section 10 to which you have referred, the one preventing exclusive agencies.

Mr. FLOYD. We have testimony before the committee on that second proposition.

Mr. FISHER. With regard to exclusive agencies?

Mr. FLOYD. Yes; exclusive agencies. We have testimony which, I think, very clearly illustrates the necessity, in the public interest, of prohibiting that kind of a transaction. It was in regard to the motion-picture business.

Mr. FISHER. Yes; I have had experience in that business.

Mr. FLOYD. It was shown that there were 150 companies under agreement with the Edison——

Mr. FISHER (interposing). The General Film Co.

Mr. FLOYD. The Edison License Co., I think it was; that they reduced the 150 to 100 and ran along about a year, with enormous profits to each one of the 100 concerns. At the end of the year this general manufacturing company established a company of its own to sell films and excluded all the others from business by notifying them it would no longer supply them, and one company has been in litigation with them since 1909. Do you not think that such a system is injurious to the public; that we should prohibit such a system and require dealers to deal fairly with the public without discrimination?

Mr. FISHER. You have touched me on a point that comes very near my own experience. At one time I was managing three educational motion-picture theaters, and the difficulty in getting educational films was greatly complicated by the fact that I could deal with either the General Film Co., which had, I believe, some 18 companies in it, and no more, or with the Motion Picture Sales Co., which had about 20 companies in it, and it was very difficult to get enough educational films from either one or the other to make up a program; whereas if I had been able to deal with both I would have been able to make up exclusive programs of educational films. I heartily agree that the Motion Picture Trust is a distinctively evil and wicked combination in restraint of trade, and I feel that the courts should long since have dissolved it; but I do not feel that that dissolution should have come upon the technical point of exclusive agencies, but on the whole character of their business—their methods and the effect of their methods. I feel that this provision, which might be used as a means of prosecuting that trust, is not necessarily the only means that should be used, and that if this provision were effectively enacted it would cause great injury to other lines of business which do not have the evil effect of that Motion Picture Trust.

Mr. FLOYD. In addition to the general public, do you not think the law ought to give some protection to the individual concern that is being put out of business by wrongful manipulations of a powerful corporation? Do you think it is wise policy to allow some gigantic concern, because it can furnish more of the things that are needed in any particular line of industry, to utterly destroy competitors, de-

stroy their property rights, and put them out of business in order to get exclusive control in that line of industry?

Mr. FISHER. No.

Mr. FLOYD. Do you not think when they do that the general public will be seriously injured?

Mr. FISHER. I do; but I think the proof should come from that direction and not from specific injuries to individuals.

I want to make just one more point, because I feel I am infringing upon Mr. Knobloch's and Mr. Lucking's time.

Mr. BEALL. Before you pass from that, you have criticized section 10. What would you substitute in its place? How would you change it in order to attain the thing you have in mind?

Mr. FISHER. Let me say, with some modesty, that the difficulty of getting hold of these bills prevented a thorough discussion with the members of the society on whose judgment I rely, and has prevented even as thorough reading and reflection on these measures as I should like. But my present feeling is that section ought to be abolished.

Mr. BEALL. You would strike out that section entirely?

Mr. Fisher. Absolutely, because I feel it can not be so phrased that it would not stop some legitimate and necessary practices of business. For instance, the automobile business is managed almost wholly through exclusive agencies, and it is very necessary. Part of the prosperity of the automobile business, which has grown up so rapidly in the last few years, and which is responsible for many prosperous industrial sections, even if extravagance in automobiles has had deleterious effects elsewhere, is due to that, and I feel this would injure, perhaps for years, automobile selling; that is, to abolish exclusive agencies. Now, just one more criticism on this point. I feel that this provision, as drafted, is unenforceable. It might be enforceable, but almost any company might get around it. I criticize it for what it is after, and then I criticize it further by saying you would not get what it is after.

Mr. BEALL. Why?

Mr. FISHER. Well, say we are selling kodaks to a firm in Stamford, Conn. We are allowed under the provisions of section 9 to establish sole agencies in Stamford, but not to make them exclusive. I constitute some man in Stamford the only agent I have there, but I can not, under the provisions of section 10, say that he shall sell no other kodak, but the very fact that I have constituted him my sole agent gives him an advantage in the sale of my cameras. If he is handling other companies' cameras, I can say to him, along about the middle of the year, "You are not selling as many Eastman kodaks as I think a sole agency warrants. I think it is probably due to the fact that you are giving a little bit too much attention to the wares of other companies. If your sales do not materially increase, I shall have to constitute another man my sole agent." Now, without any understanding, without any agreement, without anything approaching blackmailing, I can compel that man either to act as my exclusive agent or else take my sole agency elsewhere; that is, to one who will be my exclusive agent. I feel that any company sell-

ing under any present plan can get around the difficulty in that way by reason of the provision establishing sole agencies under section 9.

Mr. BEALL. You would strike out section 10 entirely?

Mr. FISHER. Yes, sir.

The CHAIRMAN. But suppose a man is in fact the purchaser of your goods and owns his goods? You call him your sole agent, but suppose he bought the goods and owns them; how, after that, would you take away from him the right to buy your goods?

Mr. FISHER. Under the provisions of section 9, which I think, is a wholesome section, by the way, I could not stop his selling those goods that he had already bought under any terms he wished to, but I could refuse to sell him any more, and I could warn him I should do so, and by that warning effect an immediate change of policy. I feel, gentlemen, that you are aiming to reach the monopolies that are injuring the public or injuring competitors and thereby injuring the public; that you have picked out specific means by which certain large corporations have injured the public and are attempting to penalize those means rather than giving the courts larger discretionary powers to reach the trust or combination itself.

Mr. MORGAN. What do you think about this proposition? Suppose we declared against all unjust and unfair discriminations to the public or to competitors and then allowed the courts or a commission to determine those questions—that is, whether this practice or that practice, as the case may be, is an unjust discrimination or unfair competition?

Mr. FISHER. I think that is much better. I think that at the present time we are in doubt as to just what are the things which distinguish a monopoly; we are in doubt as to just what are the things which constitute combinations in restraint in trade; that we are in the transition stage; we are not even sure that as a whole the program of the competitive system is the best thing; we are not wholly sure that we want to have regulated competition; we are not wholly sure of that, and, as a matter of fact, there is a large section of the people, of which I am not one, that voted at the last election in favor of regulating monopolies. It seems to me that it would be much better not to try to crystalize imperfect thinking; not to put into the form of law, or into the form of a specific crystalized statute, our present attitude, and, perhaps, our prejudices, toward practices in industries which public opinion might fully approve or further condemn in another year or in another six months as the result of some distinguishing case. We have based all of our reasoning upon a few cases prosecuted in the main by Mr. McReynolds and Mr. Wickersham, with one or two, perhaps, by Mr. Bonaparte. But there is a great number of cases not being brought under the law, but which might be brought under the law under the terms of this proposed provision, and which we may find should not have been brought under the antitrust law.

I would now like to yield my place to Mr. Alvin F. Knobloch, the manager of the Northway Motors Co., of Detroit, who is a member of the Efficiency Society.

The CHAIRMAN. The committee would be glad to hear from you, Mr. Knobloch.

STATEMENT OF MR. ALVIN F. KNOBLOCH, MANAGER OF THE NORTHWAY MOTORS CO., OF DETROIT, MICH., AND MEMBER OF THE EFFICIENCY SOCIETY.

Mr. KNOBLOCH. Mr. Chairman and gentlemen, I come not as an eloquent speaker, but as a plain business man. I come not to speak as my worthy associate has on the bills specifically. The fact is that I have not had a chance to see the bills until this morning, although as a member delegated to attend the chamber of commerce convention, which met here last week, I tried hard to get hold of the bills, as did other members, but we were unable to do so. This morning I have just seen the outside of some of them. So I am even more unfortunate than my associate. I come to you to speak on the subject of a principle, or a set of principles, that vitally affect or that should vitally affect all legislation that concerns business interests in the country. We noticed Mr. Redfield's remark the other day through the press that heretofore business men had come to ask for legislation from a purely personal standpoint, hoping thereby to gain personally, and he suggested, and, in fact, demanded, and properly so, that the business man that comes before you to discuss these matters should come not primarily from local and ulterior purposes, but should come in the interest of the American people as a whole. Being related as we are to the so-called efficiency society, I come before you this morning, not to speak on behalf of any specific enterprise of interest, or I might speak on this automobile subject, in which I am somewhat interested——

The CHAIRMAN (interposing). The committee will be glad to hear from you as to what antitrust legislation you think ought to be enacted.

Mr. KNOBLOCH. I want to confine myself, if the chairman will permit me, to the announcing and emphasizing of a principle that I failed to hear either from the Government's representatives at the chamber of commerce meeting or from the business men who spoke. There is in this country at the present time an awakening on the subject of efficiency which touches the heart of every business man in this country. It is a flame that is setting a new light to business men in this country. Too long have the American people, especially the American business interests, concentrated their attention on extensive operations, the growing to larger proportions, the covering of greater areas, and thus they have neglected the intensive side or failed to give attention to the principle that develops efficiency in the localized industries. Every wide-awake business man to-day is asking this question, "What can I do to make my own business more efficient?"

Mr. DYER. Will you point out to us now, if you do not intend to do so later on, how the question of efficiency in business is going to benefit us here in the enactment of legislation affecting the whole people in their relation to trusts?

Mr. KNOBLOCH. Yes, sir. Now, I am not sure of the bills that are specifically before this committee, or the so-called "five brothers" bills, or five or six or ten—I am not sure what the number is—but they do affect the industries of the country on the subject of efficiency tremendously. There are conditions under which interlocking direc-

torates create higher efficiency than when such interlocking directorates are indiscriminately eliminated. There is without question a large place for legislation which eliminates interlocking directorates which tend to inefficiency in the operation of our industrial institutions and in our commercial relations, but there are relations where interlocking directorates make largely for the efficiency of the local institution. Without question, the holding companies have in many instances resulted in restraint of trade and unfair competition, but I know of specific instance where the holding company's relation has made possible the existence of institutions, and has augured for the efficiency of those smaller institutions that would not have been possible without this relation. Therefore, we can not help but recognize, if you please, that all legislation which touches the subject of business relations should largely recognize the possible opportunities for efficiency that may result. I have seen in my own experience and in my own business the results of the restraint of trade operations by interlocking directorates. I have as distinctly recognized the reverse, and the thing that we are trying to emphasize this morning is this, that interlocking directorates, where they are tending to the efficiency of an institution or concern, should not be eliminated but controlled, and that the relation of holding companies should be handled in the same manner.

I do not know that this proposed intersate trade commission comes directly before this committee, but permit me to say that what the business interests of this country need most is not another policeman, though some do, but what we do need is a commission that is properly authorized, properly instructed, and properly limited, which will, first, adopt as its slogan the making more efficient the American industrial institutions and will sustain a relation that does not primarily take the position of the policeman who is constantly watching for bad tricks that may develop in the local institution, but, on a larger plane, watching the relations of institution with institution and preventing unfair methods of competition and restraint of trade, and giving the business man to understand that as long as he does the thing right, legally and fairly, the Government stands back of him to assist him in his work. I take as an illustration the relation of the Agricultural Department of our Government to the farmer. Precisely that relation is what the business interests are ready for in their relationship to the Government. None of your bills that are being contemplated to-day has any such constructive purpose. The farmer to-day is beginning to look toward the Agricultural Department of our country as a constructive force in his business, and, while it is true that our average farm is only 20 per cent as efficient as the realized maximum, or 40 per cent as efficient as the average that is realizable, you will notice that the industries, the manufacturing industries of this country, are only 50 per cent as efficient as the realized maximum. Now, what does that mean? It means that the business man by this constructive relationship to the Government can make his local institution more efficient by cooperation through an interstate trade commission. The Government should stand in the same relationship to him as the Agricultural Department stands to the agricultural interests of this country. I am confident that every business man in this country would welcome assistance and

association of that kind. I do not know that these principles of efficiency have at all entered into your contemplation of legislation on the subject. Waste, or preventable waste, in our industrial and commercial institutions of this country runs into the hundreds of millions of dollars. The automobile industry has wasted a larger sum of money through preventable waste than it has realized in tangible profits. We are not meeting competition from foreign countries in this specific article. For instance, America is importing 70 per cent of its ball bearings, which are made in Germany. Now, that is absolutely wrong, but why does that condition exist? The reason is that the American industries are so inefficient on that article that we are unable to meet the competition of Germany.

Mr. DYER. What do you mean by saying they are inefficient?

Mr. KNOBLOCH. Not able to produce the quality or the price.

Mr. DYER. Why are they not able to do that?

Mr. KNOBLOCH. Because the American manufacturer has not applied himself constructively to the subject of efficiency.

Mr. CAREW. Whose fault is that?

Mr. KNOBLOCH. I am pleading, if you please, for the relation of the Government constructively to the commercial interests of this country in order that it may point out these things that are necessary. I am coming to this point, if you please: The laboring man of this country is more directly affected and the consumer is more directly affected by giving attention to this subject of efficiency than anybody else. Let me cite this instance, if you please: Last year, under a limited application of the principles of efficiency, we distributed to about 1,500 men $120,000 in cash over and above their average wage; so that the average wage, which was 27 cents per hour, was brought up to 35 or 36 cents per hour. At the same time we were able to reduce the price on that product to the consumer of our article. Now, I am pleading for the working man, for the public, and for the manufacturer, by urging that legislation on the subject of business come forth from this committee, or from this session of Congress, if you please, that will prevent waste in the relation of capital to labor and of labor to capital. For instance, to-day we have a committee in the State of Michigan, which is my own State, to correct certain wastes in the copper country. The copper country has suffered a tremendous waste because of the lack of efficient management in the copper regions. We need legislation that will prevent these wastes rather than to correct them.

Mr. DYER. Do any of these bills pending before this committee upon the question that we are now considering cure the evils to which you are addressing yourself?

Mr. KNOBLOCH. If you will permit me, I will say that there is a tendency in these bills to bring about the indiscriminate elimination of holding companies and interlocking directorates, and an improper construction of the interstate trade commission which would prevent the most successful operation of our industries, and while I am not pleading specifically in criticism of any of these bills, I am urging the consideration of the principles of efficiency in the matter of legislation which concerns business.

Mr. DYER. Have you read these bills sufficiently to enable you to point out what you complain of and what you approve of?

Mr. KNOBLOCH. As I said in the beginning, if you will permit me, we were not able to get hold of the bills, and I did not see them until this morning.

Mr. FLOYD. Did you apply to the clerk of this committee for copies of the bills?

Mr. KNOBLOCH. I applied through the chamber of commerce and through our own Congressman.

Mr. CAREW. There must have been a little lack of efficiency there.

Mr. MORGAN. As I understand it, your position is this: You think these restrictions that are put upon business concerns by these provisions would in effect make the concerns less efficient as a result?

Mr. KNOBLOCH. They are liable to, if you please, if the method of indiscriminate elimination of interlocking directorates and holding companies were applied. I believe, if you please, that the subject of the efficiency of the institutions and concerns should always be considered. I am not necessarily referring to the $50,000 or $5,000,000 corporations, or larger ones, but more especially to the smaller institutions.

Mr. CAREW. In other words, you think there are good interlocking directorates and bad interlocking directorates?

Mr. KNOBLOCH. Yes, sir.

Mr. VOLSTEAD. Can you suggest a general rule by which you can distinguish the good interlocking directorates from the bad interlocking directorates? Can you suggest a rule of that kind that could be expressed in some legal form?

Mr. KNOBLOCH. The present information on that subject, as brought out in the chambers of commerce, indicate that there is serious danger in taking certain experiences with interlocking directorates and legislating with that one, two, or a dozen specific instances in mind. Legislating from that viewpoint will do serious harm to many constructive and helpful relations brought about through interlocking directorates.

Mr. MORGAN. Can you give us some illustration from your own knowledge where such directorates would be beneficial?

Mr. KNOBLOCH. I have in mind a certain director who as a director has knowledge in the east of the machinery business and of operating very efficiently plants or groups of plants, and because of his relations to the General Motors Co. and his ability to bring into the General Motors Co. these principles and experiences of successful operation specifically and having them applied, the result is that many of the departments have been brought up 50 per cent in their efficiency; they are paying the workingmen a higher rate of wages and producing goods at a lower cost, and are able to furnish them to the consumer at a lower cost. That, to my mind, is a very pronounced instance of a successful interlocking directorate.

Mr. FLOYD. It seems to me that we have got to leave to business some things to do for itself, and the efficiency of its operation and management it seems to me is peculiarly within its province. Do you have any suggestions to make as to how we can legislate to make the inefficient man more efficient? If so, we would like for you to enlighten us on that subject.

Mr. KNOBLOCH. I mean this, not that it is your province to tell the inefficient how to become more efficient necessarily; that is our

end of the work, but I am urging you not to legislate so as to make it impossible to become most inefficient, as, for illustration, by the indiscriminate elimination of interlocking directorates or the relation of holding companies to smaller companies that must have, in order to succeed, the assistance of the larger relation.

Mr. FLOYD. Referring to the interlocking directorate proposition, let me suggest that it has been argued here that in managing big business concerns there are one or two men connected with them who can take care of all the different kinds of business involved. Now, if one man, we will say, is a director in 50 different concerns, no matter how competent he is, do you think he can perform the duties devolving upon him in such a relation as efficiently as 50 men could perform them?

Mr. KNOBLOCH. I think I could answer that question more effectively if it were 5 directorates rather than 50.

Mr. FLOYD. But we have had men before this committee—not at this session but at previous sessions—who have told us that they were directors in 50 different companies, and they were men of standing in the business world.

Mr. KNOBLOCH. There is a danger there of having the entire control, perhaps, in one man, and that would not augur efficiency in the institutions.

Mr. FLOYD. That is what I understood——

Mr. KNOBLOCH (interposing). I have tried to cover that point, that is, where the interlocking directorate brings about inefficiency in the local institution, then the interstate trade commission should look to the elimination of such an interlocking directorate, but where it stands for the efficiency of the institution it should not be disturbed. I am not arguing that a man who stands in that relation to 50 different concerns makes for the efficiency of those concerns, because I fear there would be somthing else back of it.

Mr. FLOYD. I can conceive of only one purpose, and that would be to enforce a uniform policy in all of the concerns.

Mr. MCCOY. Are you not looking for something like omnipotence or omniscience in a trade commission when you suggest that it is possible for a body of men in Washington or anywhere else to supervise the question of interlocking directorates in its relation to efficiency? How would it be humanly possible to do that?

Mr. KNOBLOCH. I would not permit the trade commission to determine the matter, but to present the result of their investigations to the proper authorities to enforce the law.

Mr. CAREW. What law?

Mr. KNOBLOCH. The law that you will carefully frame on the subject of interlocking directorates.

Mr. CAREW. We have courts, district attorneys, hundreds of judges, the Attorney General and his assistants, and, in fact, the whole Department of Justice now waiting to enforce the law.

Mr. KNOBLOCH. Is it not true that the law would thereby make a man a criminal when he stands in the relation of an interlocking director?

Mr. CAREW. No, sir; never. We can not make any man a criminal unless he is a criminal in his heart.

Mr. KNOBLOCH. That is the point; it is the intent, rather.

Mr. CAREW. No man ever violated the Sherman law who did not know that he was doing it.

Mr. McCOY. I want to ask you a question on the matter of ball bearings, to which you have referred: How would a trade commission deal with that concrete situation that you have in mind there?

Mr. KNOBLOCH. An instance of that sort of aid is afforded by the Agricultural Department. In specific instances investigations have been conducted in this country and in other countries and the results of them put at the disposal of the farmers of this country, and the information thus given has materially assisted them.

Mr. McCOY. Of course, that has nothing to do with anything that we have in contemplation in these bills.

Mr. KNOBLOCH. That is what I said; I do not know whether the matter of an interstate trade commission comes before this committee or not.

Mr. CAREW. Why do not business men deal with that subject themselves?

Mr. KNOBLOCH. We are endeavoring to do that through the Efficiency Society, but I am pleading, if you please, that no legislation comes forth by your permission that will prevent men from doing that thing, so that we may operate most successfully in competition both for our own market and the markets of the world with any other country; that we may know that the relation of the Government to business is helpful, and that the Government's attitude is thoroughly constructive.

Mr. McCOY. On the question of interlocking directorates, what is the attitude of German legislation toward that question, or do you know?

Mr. KNOBLOCH. It exists under the Government's jurisdiction to a tremendous extent.

Mr. McCOY. Do they pass on the question of whether or not a man shall be a director in two or more corporations?

Mr. KNOBLOCH. I am not sure that they do; I do not know that they assume to decide that, but they do assume to decide whether that relation is in restraint of trade or hurts the general walfare of the German people.

Mr. McCOY. Have you any translated copy of the German laws on that subject that you could put in the record?

Mr. KNOBLOCH. I have not. I am not familiar with them.

Mr. McCOY. Do you know where they can be obtained?

Mr. KNOBLOCH. I can not tell you, but I know from my own contact with the German people—and, if you will permit me, I will say that I am a German by birth—as I was saying, I am satisfied from my actual contact with the German people that that is true. My father was a manufacturer when he came to this country, and, I may say, that it is not my fault that I was not born here. It is a fact that to-day the German industries are making greater strides, because they feel back of them a settled Government policy that will assist them in realizing the greatest possible success.

Mr. McCOY. Is it not also a fact that the German Government and German business men are conducting a policy over there which is founded on the perhaps not admitted assumption but still on the assumption that people can tax themselves wealthy? In other words,

do they not make subsidies of all kinds and do all sorts of things which somebody is paying for over there, presumably the taxpayers?

For instance, is it not a fact that if there is a seaport here, a mine nearby, and another mine a little farther off, that they will so adjust rates as to make it just as easy for the mine farthest away from the seaport to ship as the one nearby and, consequently, is not that giving somebody an advantage over somebody else which nature did not give him, and does not that result in somebody's paying to give this man farther away an advantage?

Mr. KNOBLOCH. I am not familiar enough with the German system to answer that in relation to mines. My experience has been with the German manufacturers.

Mr. McCOY. I will take the manufacturing industry. Is not that the sort of thing which they are doing in Germany in regard to manufacturing, and if they are doing it who is paying for the advantage which one man gets, not by nature but by some law?

Mr. KNOBLOCH. I will answer that, if you will permit me to do so, by relating the experience I recently had with the Germans on the subject of ball-bearings. All of the manufacturers of Germany came together and agreed among themselves on the price, and came to this country with a specific discount. We are compelled to pay a uniform price to the various manufacturers of ball-bearings, and that with the recognition of the German Government.

Mr. McCOY. How would you meet that in this country by anything that we could do in these bills?

Mr. KNOBLOCH. There is danger in the restraint of trade within our own borders in legislating to permit the existence of conditions in trade along that line. I will grant that; but I want to bear home this one point: Let our legislation be constructive, having in view the higher efficiency of our own local institutions.

Mr. McCOY. The trouble with your suggestion is that while on principle it may be perfectly proper, we have got to legislate; we have got to get down, with pen and paper, and meet the situation. What we need are concrete suggestions as to how to do it.

Mr. VOLSTEAD. Would not this meet the situation: To appoint some experts, send them to Europe to study the situation there, and then send them among our various manufacturers for the purpose of giving them suggestions?

Mr. McCOY. The Department of Commerce is doing exactly that to-day.

The CHAIRMAN. Does not that address itself more to commercial organizations than it does to a legislative body or a legislative committee? We are trying to frame statutes supplementary to the Sherman antitrust law. It is claimed that the Sherman antitrust law has not been effective always in the matter of breaking up monopolies and preventing unlawful restraints of trade. Now, what we want to do is to frame an act or acts supplementary to that legislation, to make our antitrust laws more effective. That is what this committee is trying to do.

Mr. KNOBLOCH. Pardon me, if I say that among some business men that I have met there is a feeling that there is danger of legislation that does not relate constructively to business, but destructively to business.

The CHAIRMAN. The President's message was referred to this committee, and it contains several very definite propositions. He said, in the course of his address to Congress, which this committee now has, and in response to which this committee is trying to frame legislation:

It waits [that is, business] 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.

We are trying to meet that suggestion here, and we would be very glad to have you give us your views as to how far we should go and just how we should frame legislation preventing interlocking directorates. One of the tentative bills before the committee undertakes to do that. You will also remember that the President in his message, to which I have referred, advanced other propositions.

Again, he says:

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.

One of these bills undertakes to deal with that subject. And then, again, he says:

Every act of business is done at the command or upon the initiative of some ascertainable person or group of persons. These should be held individually responsible and the punishment should fall upon them, not upon the business organization of which they make illegal use.

Again, I call your attention to this:

Enterprises in these modern days of great individual fortunes are oftentimes interlocked, not by being under the control of the same directors but by the fact that the greater part of their corporate stock is owned by a single person or group of persons who are in some way intimately related in interest. We are agreed, I take it, that holding companies should be prohibited, but what of the controlling private ownership of individuals or actually cooperative groups of individuals?

Now, this message was referred to this committee, and these tentative bills before the committee have undertaken to respond to those suggestions. One of these bills undertakes to respond to the President's suggestion that the individual be accorded a larger right in the matter of proceeding under the antitrust law than he is now accorded, and so on. So we have taken up these suggestions. If you will examine these bills and try to formulate suggestions into legislative expression, the committee would appreciate them. That is what the committee has invited the business men here to give us information upon. I think your most excellent talk largely relates to what the Department of Commerce or the Consular Service would deal with, and to other questions, and not the specific legislative propositions that we have before us.

Mr. KNOBLOCH. May I ask this question, for information? If the present interlocking directorates bill were passed does it not indiscriminately eliminate interlocking directorates?

The CHAIRMAN. That is what we want to hear from you. We want your criticisms of the bills.

Mr. KNOBLOCH. If it does then there is great danger of many of our institutions losing in efficiency. If the present bill contemplates——

The CHAIRMAN (interposing). Then you would have no legislation prohibiting interlocking directorates?

Mr. KNOBLOCH. I would not say that. I think the thing that should be done is to eliminate interlocking directors where interlocking directors interfere with the efficiency and the common welfare of the American people.

The CHAIRMAN. Suppose I were to write that down—that is, just adopt your language? How would that read?

Mr. KNOBLOCH. It would not be wise. But just permit me to say, Mr. Chairman, if you please, that the message I am trying to bring to you is to keep in mind that there is a destructive feature in the passage of the present bill and some of us are going to suffer from it tremendously if it is carried out just as it stands.

The CHAIRMAN. Granted that that is so; we do not want you to suffer, but we want to do the proper and wise thing. What should we do by way of amending this interlocking directorates bill that we have before us?

Mr. KNOBLOCH. The chairman of the board of directors of the Westinghouse Co. wisely stated that the interests of this country would be conserved in business relations if this antitrust legislation were taken up carefully in piecemeal and not the whole subject, as now contemplated, covered at once, but that careful consideration and investigation be given it.

Mr. CARLIN. Which paragraph of the interlocking directorates bill do you complain of?

Mr. KNOBLOCH. I stated earlier in my talk that I had not had the privilege of reading them because I was unable to secure them, although I had endeavored to do so. The chairman of the board of directors of the Westinghouse Co. also pointed out the fact that wise legislation along this line is desired by every fair business man in the country. We are anxious that it shall be done, but we ask that the matter be given plenty of time for consideration and not hastily passed. That is our message. I thank you.

The CHAIRMAN. Mr. Knobloch, the committee will be very glad to give you an opportunity, after you have examined these bills, to send the committee any further criticism of these bills or any suggestions which you think may be important. Any arguments at all that you may have in criticism of them the committee will be very glad to have.

Mr. KNOBLOCH. May I ask this question? What length of time may I have?

The CHAIRMAN. The committee could not tell you about that, but we hope you will do it as soon as possible.

The committee will next hear from Mr. Lucking.

STATEMENT OF ALFRED LUCKING, ESQ., OF DETROIT, MICH., REPRESENTING THE FORD MOTOR CO.

Mr. LUCKING. Mr. Chairman and gentlemen, I understand that you would like such remarks as are made to be addressed to some specific topic, and speaking for the Ford Motor Co., of Detroit, manufacturer of a line of automobiles, we advocate an affirmative declaration in the law of the right of the individual manufacturer to stipulate with his dealers as to the resale price of his product, provided, always, that there be no monopoly of the class of goods in question, no combination of manufacturers, and free and open competition. As to the form of declaration, that is comparatively unimportant, and we are willing to comply with any reasonable rules in that behalf, as illustrated by the Stevens bill, which is now pending before the Committee on Interstate and Foreign Commerce. But our individual opinion is that the law should simply provide, as for illustration by way of proviso at the end of section 1, bill No. 2, committee print, as follows:

Provided, It shall not be unlawful nor held to be a violation hereof for an individual manufacturer or producer or owner of an article to stipulate with his jobbers or retailers, or both, to resell such article only at a price fixed by such manufacturer, producer, or owner: *Provided*, This shall not be held to legalize any combination of manufacturers, producers, or owners to fix prices or restrain trade.

Mr. CARLIN. I call your attention to the fact that that is exactly what the Supreme Court has recently said is unlawful.

Mr. LUCKING. That it has recently said what?

Mr. CARLIN. That what you ask for is unlawful—that having been decided in the Strauss case.

Mr. LUCKING. It is on account of the recent decision of the Supreme Court—a divided court—that we ask to have restored the common law upon that subject and the common practice for centuries.

Mr. CARLIN. May I ask how it would affect your business if we do not restore the common-law rule?

Mr. LUCKING. As far as the Ford Motor Co. itself is concerned, and as it is conducting business this year, it will not affect it, but as it was conducting business up until the last of those decisions and until the 1st of last October, it was an offense at common law by judicial construction and also contrary to the Sherman law. We now——

Mr. CARLIN (interposing). My question was: How would it affect your business?

Mr. LUCKING. We would go back to the practice which existed before that time. If you will allow me to follow this outline, which is very brief and which will not take 10 minutes, I will then be glad to answer any questions that you may wish to ask. The Ford Co. may, we think, come with good grace to Congress on this subject because it is well known that for many years this company, when it was much smaller and weaker than it is to-day, fought single-handed and alone at great expense against an attempted monopoly of the automobile business, rejected all offers of combination and peaceful profit, and won a great and lasting victory for open competition in that business, and that as a result of that fight and of the

company's constant and persistent progress toward mechanical improvement and the giving of better value to the purchaser and its annual reductions in prices the whole country has benefited in lower prices and better values.

Feeling well assured that you have been already surfeited with the general arguments favorable to our side of this controversy, I shall confine myself largely to the automobile man's point of view. There are special and peculiar reasons in the automobile business for the fixing and maintaining of retail prices, which we will try to explain; and we hope to be pardoned, in discussing so broad a principle, for referring to the concrete example of the Ford Co. That company until last October marketed its product through independent dealers, and it is to its experience prior to that date to which reference is made. It now markets through agents. The large companies can do that, but the small ones can not. In the first place, let it be understood that there is fierce competition in the automobile business. Every maker meets competitors on every hand by the dozen. The public is not suffering from any combination or monopoly. From the beginning of its business Ford cars have been sold at a uniform price to everybody alike, and the Ford Co. has done all that it could to prevent certain favored ones among the public from getting the advantage over others in the matter of reduced prices. I might say that under the strict construction of that rule one of the early stockholders, who undertook to favor a friend, was compelled to pay the difference out of his own pocket. The owners have striven to treat all of their customers alike and to give the best value for the money. It has been its policy not only to treat the public alike, but to treat the dealers fairly and equally, and not allow them to cut into each other's territory or to get advantage by selling surreptitiously to price cutters, who would ship into the territory of other dealers at somewhat reduced prices, thus injuring the business of the dealers.

The Ford Co. recognized early the fact that in order to build up a successful business it would be necessary to establish a system by which each purchaser or user of a Ford automobile should receive prompt and loyal service; that is, that his car should be kept in good condition, in order that he might have first-class service and uninterrupted service. The relation between the Ford Motor Co. and its product is not completed when it has received the price paid by the dealer. This relation continues on during the entire life of the machine sold, and the success of that machine is regarded as of vital consequence to the company.

The company's business has been built up to its present proportions by maintaining an organization consisting of dealers in every part of the country, I think about 6,000—who were under contract obligations not only to maintain a garage and a stock of parts for quick repairs, but also to show purchasers how to use and handle and conserve the car, instructing them how to run it, and following and watching every car, remedying defects, and making it please and satisfy the customer. None of these things is done by the cut-price cutthroat, who has no interest in the car or in the business. When by his tricky practices he succeeds in taking customers away from the regular dealer, the Ford Co. loses its best dealers and salesmen and the car loses its reputation. The purchasers have troubles with the

car which could be easily and simply corrected by any person having knowledge, but there is nobody in the vicinity to instruct them. Hence follow dissatisfied customers, loss of the best advertisers (satisfied customers), loss of reputation, loss of sales, and loss of business.

It would be a brutal injustice, after a dealer has established a garage at a large expense, bought and paid for a demonstrating car, and worked up customers, spending weeks and months of his time and considerable sums of money, to allow some outsider who has succeeded by some trickery in getting hold of some cars, to step in and undersell by 5 or 10 per cent the regular dealer and take his customers away. Of course, the outsider can afford to cut the price somewhat, when the other man has stood all the expenses connected with working up the sale. After making such sale the outsider has no further interest in the car or the purchaser. He does not instruct the buyer how to use it, or stand ready to remedy slight troubles or defects, or keep the car in good running order, or to do any of the hundred and one things which the regular dealer is glad to do in order to sustain the reputation of the car and build up his own business. If it be told from mouth to mouth that Smith paid $550 for his Ford car while Jones bought the same car about the same time for $500, it is a serious blow to the Ford cars and to the Ford business. It instantly causes the article and the dealer and the manufacturer to fall into disrepute. There is absolutely no danger of extortion under the one-price plan, because if the price is unreasonably high competitors will take the business. The intense competition on the automobile business is well known to everybody. The Ford Co. knows that it can not attain permanent success without it treats the public all alike, meaning thereby not the jobbers but the consumers. Hence it stipulates to retain such control of the article as will facilitate equal treatment of buyers and a fair return for dealers, without whose friendly activities the company can not succeed. As a result of these efforts the company has been enabled to reduce the prices practically each year on its cars, and to improve the quality of the same. The following is a statement of the prices year by year on the different models which it is now making and selling:

Model T.

Model.	Date.	List.
Touring	October, 1908	[1] $850
	October, 1909	[2] 950
	October, 1910	[3] 780
	[illegible]	[illegible]
	October, 1912	[3] 600
	August, 1913	[3] 550
Town	January, 1909	[1] 1,000
	October, 1909	[1] 1,200
	October, 1910	[1] 1,200
	October, 1911	[3] 900
	October, 1912	[3] 800
	August, 1913	[3] 750
Torpedo runabout	October, 1910	[3] 725
	October, 1911	[3] 590
	October, 1912	[3] 525
	August, 1913	[3] 500

[1] Unequipped. [2] Fully equipped. [3] Equipped.

One price to all has not only been the company's motto, but we consider it the only truly moral and honest method of doing business. It is the fairest to the public in general and particularly to the por man and the man without a pull. If one man gets advantage it is bound to come out of others, out of those least able to bear it. This system is regarded by the company as vitally necessary to the successful operation of its business. This is true, not because the company fears to meet competition—this it has always had to do—but it is true because it is for the best interests of the Ford Co. and the maintenance of its business and for the best interests of the public, meaning the users of Ford cars.

The CHAIRMAN. While you were reducing the price of the cars the profits of the company were increasing every year, were they not?

Mr. LUCKING. Magnificently; yes, sir; owing to the tremendous output.

The CHAIRMAN. And all that was accomplished without any special legislation of the kind you are now asking for?

Mr. LUCKING. True enough, but under circumstances which have recently been declared to be illegal and which we wish to have restored and which I claim is a matter of common law. I do not say it is an undebatable question, by any means, because the Supreme Court practically divided, and I notice you gentlemen are divided.

Mr. LLOYD. We are trying to pass general legislation for all the people, and suppose we should apply the same principle to meat, bread, and potatoes, do you not think that would start a revolution in this country?

Mr. LUCKING. No, sir; not at all. The amendment I propose is broad enough to include everything and every person who chooses to come under it.

Mr. CARLIN. Have you read section 9 of the Clayton tentative bill No. 1?

Mr. LUCKING. I have.

Mr. CARLIN. If you have you will find that the principle you are claiming is only restricted to a very limited extent; that is to say, there is no effort in that paragraph to compel you to select any customer that you do not desire.

Mr. LUCKING. That is true.

Mr. CARLIN. That leaves open the present law, that a man has a right to select his own customers, but requires him to do what you have been doing, to sell everywhere at the same price. Now, if you are already doing that, I can not see what objection you would have to leaving that in the law; that is, to compel you to do it.

Mr. LUCKING. I have not formulated any objection to that particular section, but I have to subdivision 4 of the first section, which apparently confirms the recent decisions of the Supreme Court of the United States.

Mr. CARLIN. Section 9 of the Clayton tentative bill, No. 1, plainly writes into the law the very practice under which you claim to have had you greatest success.

Mr. LUCKING. Well, I would not say that.

Mr. CARLIN. It gives you the right to select your customers; it does not take away that right, but leaves that right as it is. However, it provides that you shall sell in different sections of the country at the same price, plus transportation.

Mr. LUCKING. Absolutely.

Mr. CARLIN. That has been your practice. You do not sell a machine in Virginia at $550. You sell it at $550, plus transportation?

Mr. LUCKING. Yes, sir.

Mr. CARLIN. And that is exactly what this statute provides.

Mr. LUCKING. I have no objection to that section; that section is all right.

The CHAIRMAN. All the advertisements read "f. o. b., Detroit."

Mr. LUCKING. Yes, sir.

The CHAIRMAN. $550?

Mr. LUCKING. That is right.

Mr. MORGAN. What you want to do is to control the price at which the retailer sells?

Mr. LUCKING. Yes, sir.

Mr. CARLIN. The statute as it is now drawn, you say, meets with your approval?

Mr. LUCKING. That section which you asked me about, sir.

Mr. CARLIN. That would not interfere with your present plan of operations?

Mr. LUCKING. I have no objection to that section. I think there is nothing in that section you refer to that we object to.

Mr. CARLIN. Now, as I understand it, you want an additional right. You want the right to contract with your jobber that he shall not sell to the retailer at any price except the price you name?

Mr. LUCKING. Absolutely.

Mr. CARLIN. And that practice we prohibit.

Mr. LUCKING. That has been prohibited apparently. That has been construed to be unlawful by the Supreme Court, but by a divided court, and section 2 of the bill is the one upon which we ask this proviso.

Mr. FLOYD. Don't you think that when a man is the absolute owner of a piece of property he ought to have the right to do what he pleases with it?

Mr. LUCKING. Unquestionably.

Mr. FLOYD. Now, a man purchases one of your automobiles; if he is a retailer, he pays you full consideration for it, and you have no legal right, under the decision of the Supreme Court, to control his price. Now, what moral right have you to control the retail price on that automobile?

Mr. LUCKING. None whatever, unless he agrees to it. If we sell him a qualified title to the car for our good, and, as we conceive it, to his own good, is there any reason why he should not conform to that contract?

Mr. FLOYD. I think it is one of the greatest instrumentalities of monopoly in the whole system of monopoly.

Mr. LUCKING. There may be a great many people who think that way, and undoubtedly five judges out of nine of the Supreme Court thought that way. The former Attorney General felt that way, but I doubt if the present one does.

Mr. CARLIN. I call your attention to section 10 of the Clayton bill, which is bill No. 1. That section provides for the liberation of the retail dealer from the contract that you are asking for. It also prohibits you from allowing special rebates, or having what you term in big business "inside transactions." Now, do you have them?

Mr. LUCKING. I think one or the other of us misunderstands the section. I do not understand that section to say that I can not contract with a dealer that he will not handle some other car.

Mr. CARLIN. But you can not give him a rebate under that section.

Mr. LUCKING. No, sir; it does not say anything about rebates.

Mr. CARLIN. I think it is in that section. The language is: "To make a sale of goods, wares, or merchandise, or fix the price charged therefor or discount from or rebate upon such price, on the condition or understanding that the purchaser thereof shall not deal in the goods, wares, or merchandise of a competitor or competitors of the seller." Now, how does that affect your present practices? Are you doing that now?

Mr. LUCKING. Our contract does not directly provide that he shall not handle any other class of goods. We make them or agents. It happens that I drew that contract, and I ought to remember it, but I do not. I say to you that the people who manufacture should have the right to stipulate with the dealer that he shall not handle competitive goods. I think so; I think that is an important common right, and I think it is a terrible pass that we have come to in this country to prohibit it.

Mr. CARLIN. If your business should fail, then the retail dealer would be out of business.

Mr. LUCKING. The contract only runs for a year, and it is terminable at pleasure. It has always been terminable at pleasure.

Mr. CARLIN. It is terminable provided he sells the goods of your competitor. If he does that, you terminate it at once. That is the object of that provision in your contract. If your concern were not so prosperous, but, on the other hand, were on a sliding scale, going down, you would force the retail dealer in automobles to go out of business when you did?

Mr. LUCKING. Not to go out of business; he would have to go out of our business.

Mr. CARLIN. But he could not go into any other until you had failed.

Mr. LUCKING. I am interested in another corporation; I am a director in another corporation which is a pharmaceutical manufacturing house. Now, take that company as an illustration of this principle: Here is the Rexall Co. with a line of goods and a line of stores, the business reaching into every community, many of the stores being owned by the company. Now, in order to secure enthusiastic work on the part of stores that it does not own in pushing its goods on the market, is it not a matter of common right that we should be permitted to go into a city or village and say to some druggist, "We want you to push our line of goods, and if you will do so we will give you our line of goods; we will select our customers, and if you will push our goods, you shall handle them, but we stipulate with you that you shall not handle any competitive line of goods." Now, it seems to me that you are interfering with a matter of the commonest right that has existed for time out of mind. It is a practice that is not injurious except where there is a monopoly, and every word I say is based upon the idea that there is no monopoly, but full competition in every case.

Mr. CARLIN. There is nothing proposed in the Clayton bill—and I am referring to bill No. 1—that prohibits you from doing any-

thing you say you want to do except that it prohibits you from contracting with that man that he shall not sell anybody else's goods in that same line. That is the only difference between what you want and what is proposed here. We give you the right to select your customers. We do not disturb that right. We give you the right to make such business arrangements with that customer as you please, but we deny to you the right to say to that man that he shall not sell anybody else's wares.

Mr. LUCKING. I question the policy, the expediency, or the wisdom of any such legislation. I did not intend to discuss these bills generally.

Mr. CARLIN. Of course, you will not understand from what I have said that we give you the right to fix the retail price of your article, because we do not do that, but we give you the right to select your customers, or we do not deny you that right. We give you the right to fix the price on your goods up to the point of sale to your customers.

Mr. LUCKING. Provided we fix our own price——

Mr. CARLIN. But the bill proposes to say that you shall not contract with that man to prevent him from selling somebody else's goods.

Mr. LUCKING. And I think that is an interference with one of the commonest rights in the world.

Mr. MITCHELL. Does the Rexall Co. permit these drug stores that sell their goods to buy goods from other competing companies?

Mr. LUCKING. I am not sure of that.

Mr. MITCHELL. I think that is so. I assume that they often own their own stores.

Mr. LUCKING. Yes, sir; the Rexall Co. has stores in every State in the United States. There are Rexall stores in nearly every community in this country.

Mr. FLOYD. Let us go back to the question of foodstuffs. We can do without automobiles and well people can do without drug stores, but we can not do without meat and bread; we can not do without certain necessities of life. We know that the meat product of this country is controlled by large combinations and corporations, especially in the western part of the country, where I live. The packing houses in Chicago, Kansas City, and St. Joseph control that business. Now, suppose we gave them the right to say that if a merchant handles their product he shall not handle the product of any other concern. Do you think that would be for the benefit of the American people? Would it not result in absolute monopoly? Would they not drive out all competition?

Mr. LUCKING. I see your point of view perfectly. In the first place, in our town they establish their own branches and sell their own products. In the next place, I apprehend that those institutions, from the language of your description, are monopolies, and therefore they are prohibited by the general terms of the antitrust statute and also by the very terms of the proviso which I include. I include in my proviso the stipulation that there shall be no monopoly, but full competition.

Mr. FLOYD. Let me ask you this further question: What do you think about the possibility of preventing monopolies in this country,

unless we destroy the instrumentalities through which monopolies are created?

Mr. LUCKING. Of course, that question is very general, but I want to say to you that I have always been a very ardent opponent of monopoly. You can not make any of your provisions that will hit real monopolies too drastic for my purposes, but to say that a private individual manufacturer, where there is all kinds of competition against him, should not have the right to build up his business in his own way, according to any means that he choose to select which are not in themselves inherently wrong or immoral, I say, is bad policy.

Mr. FLOYD. I agree with you on two of your propositions. I agree that the manufacturer ought to have a perfect right to fix the price to the man he sells his commodities to, whether high or low, and I think that the jobber who buys the commodities and pays for them ought to have the same right to sell to other parties at his own price, and I believe that the system of uniform prices from that standpoint is a good one; but I deny the right of a man when he has sold a commodity to an individual or retail dealer and accepted his money for it and has passed the title to him to put any strings on it for the future. I think that is denying one of the fundamental rights of every citizen—that is, the right of property.

Mr. LUCKING. With your permission, now, I will touch on that subject in a moment. I want to bring your attention for a little while to the automobile business. In the automobile business the thing of prime importance to the purchaser is continuous, reliable service. This and this alone will satisfy the customer, and therefore this service is absolutely essential to the maintenance of a successful and enlarging business. No method of providing this is known except by contract requirements of the dealer, and in order to get it he must be protected in his territory, and a reasonable return must be secured to him. Now, let me urge briefly a few thoughts of a general nature, and then I will come to the matter you have been talking about.

Freedom to build up one's business in his own way—freedom to contract with dealers that his articles shall be sold at a certain price, deemed by him of vital consequence in the upbuilding of his business—is of very high importance. Freedom to contract is one of the great rights of competent persons not lightly to be set aside. If it is necessary to set it aside in order to protect the public against substantial injury, I agree it is all right. The safety of the public is the supreme law.

If there is no monopoly, but full and free competition in the line of goods in question, any restrictions are superfluous and unpardonable. There is absolutely no substantial ground for interfering with freedom of contract in such case or with the natural course of trade. We submit there is no public good to be served by compelling competition among dealers in the same article produced by one manufacturer where there is unlimited competition in the same line. Any ground for condemnation of the individual manufacturer in such a case for maintaining a uniform price must be purely technical. It can not be substantial. Such a rule may do infinite harm and injustice to manufacturers without working any important good to the public.

Where there is abundant competition too high prices are self-corrected. There is an automatic remedy. You don't need artificial legislative or judicial restriction. There is no possible excuse for governmental rules forbidding the free play of competitive forces. What is the free play of competitive forces? It is to let every man build up his business in his own way. Our way is to establish absolutely one price to everybody. If another manufacturer prefers to let his dealers make all prices to all men, let him do it.

If a man has labored and produced an article, it is self-evident under our social system and under our Constitution that he has the inalienable right to fix the price at which he will part with it. He also has the unalienable right to build up a business in the making and selling of those articles.

This absolute right to keep the article or to fix his sale price and to sell it in his own way and part with the title at his own pleasure is secured in our constitutions and is not denied; but the right to agree with the vendee, the dealer, as to the resale price is denied by some.

But the manufacturer, if strong enough and big enough, may accomplish the very same thing by selling only to the consumer and not to or through dealers. If he retains the title until a sale to the consumer and sells only through agents, there is no way to prevent his fixing one uniform price to all persons.

This being so, why prevent him from using the ordinary channels of commerce; the wholesaler and retailer? The big and powerful manufacturers may sell at fixed prices to the public by chain stores, by consignees, by agents, by salaried men. Why penalize the small manufacturers?

These restrictions only serve to compel the manufacturer to deal directly with the public at the same fixed prices, cutting out and wiping out large numbers of independent dealers and turning them into dependents and subservient agents and mere salesmen. This is bad public policy.

There is another fundamental reason against such restriction on so-called resale prices. As a matter of basic truth, it is not a resale at all. The sale to a dealer is only a technical sale, a step toward a completed sale.

From the standpoint of a business, of a growing, permanent business, the sale to a dealer is only part of a process of sale. Without the sales to the consumers the sales to dealers stop short; business dies almost instantly.

Mr. CARLIN. Do you make any discriminations among your dealers in the matter of commissions; that is to say, do you sell to one at a lower price than to another by allowing a different commission to one than to another?

Mr. LUCKING. No, sir.

Mr. CARLIN. You do not allow any difference on account of quantity sold?

Mr. LUCKING. There is a bonus at the end of the year if they have sold a certain quantity or a certain percentage.

The CHAIRMAN. You spoke of destroying the right to fix the resale price on your machines; by that, do you mean to say that you want the right to fix the resale minimum price? In other words, do you make any complaint against your agent, as you call him, if he sells

at a price greater than your minimum price? For instance, if he should sell your $550 machine to a third person for $600 would you regard that as a breach of your contract with him?

Mr. LUCKING. It would be absolutely, and we have never in all our 400,000 sales had occasion to meet a case like that. The contract requires them to sell the machines at a certain price.

Mr. CARLIN. Is that the output of your company up to this time—400,000 machines?

Mr. LUCKING. Yes, sir; that is the total.

The CHAIRMAN. Are you quite sure that some of your agents do not get more than $550 for your machines?

Mr. LUCKING. I believe so; and I can not go beyond that. I do not think so. The sale prices of the Ford are as well known to the buying public as they can possibly be, and I do not believe an agent would ask more. Some of them have in some cases attempted surreptitiously to cut prices, but as soon as it is found out their heads are taken straight off.

The CHAIRMAN. What profit does a selling agent get?

Mr. LUCKING. Fifteen per cent, and that is a very moderate profit for his trouble and expense.

Mr. CARLIN. And he gets a bonus at the end of the year?

Mr. LUCKING. If he sells a sufficient quantity. They get a bonus of 1 per cent when they have sold a certain quantity and an additional 1 per cent when they have sold a certain other additional quantity.

The CHAIRMAN. When a machine is shipped to the man you call your agent is not a draft attached to the bill of lading requiring him to pay 85 per cent of the $550 to be paid on that $550 machine?

Mr. LUCKING. Yes, sir. It is either done that way or by a direct remittance in advance.

The CHAIRMAN. He must pay for that machine the price you charge him for it before he gets it?

Mr. LUCKING. Yes, sir; before he has absolute control over it.

The CHAIRMAN. And now although the agent has paid for the machine and it is his, and he has the right to dispose of it, you want to limit that right by saying that the agent shall not dispose of it for less than $550?

Mr. LUCKING. Yes, sir; we do, because we want to sell some more cars.

The CHAIRMAN. You want an act of Congress giving you that right?

Mr. LUCKING. An act restoring an ancient right which has always been upheld.

Mr. CAREW. What authority have you for that proposition?

Mr. LUCKING. It was a commonly recognized right and practice throughout the country, and it was never questioned until recently.

Mr. CAREW. Regarded as a restriction on ownership——

Mr. LUCKING (interposing). If I sell an article and contract that it shall be sold at a certain price, until the recent decision of the Supreme Court there were no authorities——

Mr. CAREW (interposing). I refer you to a law book by Prof. Gray, of Harvard University, on the subject of Restraints on Alienation. If you will examine that book, I think you will find plenty

of authority to the effect that such a proposition was contrary to the common law in England.

Mr. LUCKING. As to personal property?

Mr. CAREW. Yes, sir.

Mr. MCCOY. I think you are wrong on your legal proposition.

Mr. CAREW. I think you would find the decisions of the English courts decidedly against that proposition.

Mr. LUCKING. I have not been able to find any such decision. I have asked Mr. Williams, who has collated the English decisions on restraints in trade, about it, and he has not found any such authority.

Mr. CAREW. I suggest that you get Mr. Gray's book. Mr. McCoy says that he was taught that principle of law in the Harvard Law School many years ago.

Mr. LUCKING. I can give you authorities to show that you can sell goods under qualified conditions that must be observed.

The following cases establish that such contracts restraining resales except at certain fixed prices were and are valid at common law, this being held in England and in this country:

Elliman *v.* Carrington, 2 Ch. Div., 275.
Fisher Flouring Mills Co. *v.* Swanson, Supreme Court, Washington, Opinion, Dec. 13, 1913.
Walsh *v.* Dwight, 58 N. Y. S., 91
Grogan *v.* Chaffee (Cal.), 105 Pac., 745.
Commonwealth *v.* Grinstead, 111 Ky., 203.
Nat. Phonograph *v.* Edison, 1 Ch. Div., 335

Mr. PETERSON. You can accomplish this thing, and are now accomplishing it by your system of agencies, are you not?

Mr. LUCKING. Certainly.

Mr. PETERSON. Why is that not satisfactory?

Mr. LUCKING. I will tell you: The other system is better so far as the manufacturer is concerned. The small manufacturers can not do it, because there is always a certain responsibility for agents that you do not have for independent dealers.

Mr. PETERSON. You want to make the dealer or middle man pay you in full for your machines——

Mr. LUCKING (interposing). What you call paying in full we do not consider so for this reason: When a man purchases an article from me and enters into an agreement which will enable me to sell other cars, that is just as valuable a part of the consideration as the money he gives me. It is just as valid, I think, and it is very important.

Mr. CARLIN. We are being asked by another school of thought to write into the law a provision to compel you to sell to every responsible person who offers to buy. How would you like that provision?

Mr. LUCKING. I would not like it at all, and I understand that that has not met the approval of the thoughtful minds of the committee.

Mr. CAREW. You would not sell to every responsible person to-day who is willing to buy?

Mr. LUCKING. From the factory—we can not. We do not do that; we give the agent exclusive rights in his territory. That is the only way to do business. We are talking here along this line, that when I sell one car that is all there is to it. Now, that is a very small

thing. We want to build up a business, and this is the approved method of manufacturers for ages.

Mr. CARLIN. You have in your business made a reduction of prices to the consumer, but you did not make any reduction in 1914, did you?

Mr. LUCKING. This is now 1914, and the reduction was made on August 1. The reduction was made on the 1st of last August.

Mr. CARLIN. To $550?

Mr. LUCKING. Yes, sir; that reduction was made on the 1st day of August.

Mr. CARLIN. I am a user of the Ford car, and bought one in September.

Mr. LUCKING. The reduction was made on the 1st of August, 1913. The price was reduced on the $600 car.

Mr. CARLIN. But you have made no reduction for 1914, have you?

Mr. LUCKING. The year 1914 lasts with us until the 1st of October, and I do not know what the plans are. I would not know that any more than any gentleman at this table. Now, I was just discussing this fact, and I am about through so far as I am concerned; that is, that the first sale really is not anything to the dealer. I was saying when I was interrupted that from the standpoint of a business—of a growing permanent business—the sale to a dealer is only part of a process of sale. Without the sales to the consumers the sales to dealers stop short; business dies almost instantly. In the large sense, in the real sense, in the philosophy of business, the first sale of the article is made only when the article is sold to the consumer. It is simply technical to say that the article has entered the wide domain of commerce when it is sold to the dealer. It is only a passing on through a medium to reach the real buyer. In the narrow restricted sense, when applied to one particular article, it may be true; but in the large sense, from the viewpoint of building up a business in the article, it is not true at all.

Mr. CARLIN. What is the capital of your company?

Mr. LUCKING. $2,000,000.

Mr. CARLIN. What were the profits of the company last year?

Mr. LUCKING. There was a public statement made by Mr. Ford about that, otherwise I would not tell you, unless compelled to do so, without his permission. The profits amounted to $25,000,000. That was a profit of about $125 per car.

Mr. CARLIN. The annual profit was 1,200 per cent on the capital?

Mr. LUCKING. Yes, sir; and originally the capital was only $100,000. Then it was made $2,000,000 out of the earnings of 20 years of labor by Mr. Ford trying to get started. There is nothing in the history of the Ford Co. that does not meet with the approval of those who know about it. President Wilson in his magazine article stated that he had no objection to big business if it is doing its work honestly, and no citizen in Detroit who knows the history of Mr. Ford and what he has done regards him enviously. Every user of automobiles in this country is indebted to him to-day for lowering the prices. The price of that car was reduced to $550, that being a reduction of $50, and then $10,000,000 is being given in gratuities or additions to the wages of the 20,000 employees of the concern. Now, the only way that they can hope to keep on making large sums

is, of course, by enormous sales and constant economies in the manufacturing end of it.

Now, the manufacturer who has built a reputation for an article by honesty, efficiency, and advertising, by good workmanship and good value, and by putting his name and guaranty back of it, should as a matter of common justice be permitted to name the price to the user.

Now, this comes right to the proposition which Judge Clayton mentioned a few moments ago. It is utterly false reasoning to say that he has no further interest in the article after the technical first sale to the dealer. Over and above the right reserved to him by his contract the resale is based upon his reputation, his name, and the reputation if his article, and, more than that, it is vital to his future business in ways too well known and too obvious to require pointing out here. One price to all, in our opinion, is the only moral and honest way to do business. One fixed and well-known price to all is bound to result in good values to the purchasers, for otherwise competitors will take the business. Now, on that subject, four years ago the price of this Ford car that I mentioned was $950; it is now $550. How many Ford cars of that type do you suppose would be sold in these days at $950, with the magnificent productions that are being put out at that price? In other words, the competition among manufacturers is such that to live at all a manufacturer has got to keep his price right down.

Mr. VOLSTEAD. Is it not a fact that nearly all the automobile companies are making good money?

Mr. LUCKING. No. In Detroit they have been falling by the wayside. Millions have been invested and lost there. I do not know how many failures there were last year, but there were many. A great many of them are just hanging on by the skin of their teeth.

Mr. CARLIN. One of the principal objections to section 9 of bill No. 1 has been that we do require that the articles be sold in every community at the same price, and yet you seem to think that is good business.

Mr. LUCKING. I think it is the only honest business principle. I have read the remarks of Mr. Bennett, of New York, and I can see where, in cases of that kind, where they make only a few sales and have profits large enough so that they can scale prices and have got to compete on each particular sale—printing presses, I think, in that case—that perhaps there ought to be some margin allowed. I doubt the wisdom of very much legislation so long as you hit monopoly good and hard; that is all. That would be my guiding star in all this legislation, and to leave competition free, as far as possible, so long as there was open competition. And if the Ford Co. has gotten so big that there is no competition, it will be met under the Sherman Antitrust Act. But that is not so. We are meeting competitors everywhere. Two of the stockholders of the Ford Co. have withdrawn—they have not sold their stock—from the board of directors, and they are preparing to put a great car upon the market, and they have unlimited means back of them.

Mr. CARLIN. In competition with the Ford?

Mr. LUCKING. Nobody knows positively yet at what price they are going to put the car out or what it is going to be, but that is the general newspaper talk. Differing and varied prices to the public

for the same article multiply fraud, dishonesty, and cheating, and those suffer the most who are most innocent and least able to bear it. In the one-price system the strong and the shrewd can get no advantage over the weak. You can send your children to buy with confidence and they will not be cheated.

And, in fact, the buying public are all children. Not one in a hundred is expert and able to judge. The dealer has all the advantage. The one-price system is essentially honest. Monopoly only should be condemned and wiped out.

Now I am about through, gentlemen, and am willing to stop any time you say the word. We do not ask any special privileges. We do not ask Congress to fix any prices; we do not ask Congress for any commission to fix prices; we do not ask that anybody be compelled to fix his prices, but that everybody be given permission to fix prices to the consumer of his manufactured article if he chooses, provided there is no monopoly and loss of competition. It will regulate itself just as it has in the past in the automobile business. Every automobile in the past has had a fixed price, but there are all kinds of competition in the business, and a constant, steady lowering of prices.

Mr. McCoy. Does the Ford Co. spend much in advertising?

Mr. Lucking. I notice that they carry advertisements right along. I am not directly associated with the company. I am simply their counsel in important matters and never thought to ask about that. However, I see various journals carrying their advertisements right along. The contracts do require that they shall advertise, put up signs, and advertise freely, but they consider their best advertisement satisfied customers. This morning I met the first dissatisfied customer of a Ford car that I ever saw, one of the most prominent men of Detroit. I am not a booster for the Ford car at all; I never drove one myself, although I have been in them a great deal. We do ask the restoration of what seems to us to be a matter of common right, to make a contract as you like so long as you are not monopolizing anything; that everybody be treated alike; that there be liberty of contract; and that we be allowed to build up our business in our own way.

The Chairman. You want the right, then, to make a contract in restraint of trade? So long as it does not reach the point of becoming a monopoly you want to be allowed to restrain trade?

Mr. Lucking. Yes. I think the only immoral thing about restraint of trade is where it tends to monopoly.

Mr. McCoy. You do not contend that resale price fixing does restrain trade?

Mr. Lucking. Oh, well, in a technical sense, Mr. McCoy, it does. In a technical sense it restrains trade. It restrains a man from selling at any price he chooses, and technically it does.

Mr. McCoy. But the ultimate result is to increase trade?

Mr. Lucking. Unquestionably.

Mr. McCoy. And the ultimate result is what we are seeking to——

Mr. Lucking (interposing). Unquestionably, and you want great results.

Mr. Carlin. Let us work that out just a moment in its effect upon the consumer. You have a profit of about $200 to a car before it

reaches the consumer; you have $125 to the manufacturer, and you have 15 per cent plus to the agent.

Mr. LUCKING. We have not this year, Mr. Carlin. According to the figures I gave you it starts in at $75 a car; it was $125, but we knocked off $50 because of the increased wages of the workmen.

Mr. CARLIN. What is the profit to the manufacturer and retailer before a car reaches the consumer?

Mr. LUCKING. As it started in at the beginning of the year, with no additional economies, and all that?

Mr. CARLIN. Yes.

Mr. LUCKING. It is not profit, mark you, but I know what you are asking about. One hundred dollars, I should say; but, mark you, the dealer must pay all the expenses of his demonstrator, must count in his time, the cost of maintaining a garage, working up his customers, and innumerable other expenses.

The CHAIRMAN. But that is a part of the business of selling?

Mr. LUCKING. Yes, sir.

The CHAIRMAN. The cost of the machine is what?

Mr. LUCKING. Well, I have told you that on last year's business the profit to the manufacturer was $125 a car, about. But of course this great question can not be settled by the example of one case. There are a lot of automobile companies that are losing money right along. The Lozier Co., which put in a million dollars a short time ago——

The CHAIRMAN (interposing). I know that we can not settle legislation by any one fact, but we want all the information we can gather on the subject.

Mr. LUCKING. I notice the argument that is put forth that the dealer should have the privilege of doing as he pleases with his own. Now, that is true, in a general way, if it is sold to him unqualifiedly; if it is not sold to him in that way, but sold to him under certain conditions, he should observe those conditions unless there is something inherently wrong or immoral in the contract. Another thing, gentlemen, is this: I have said to you already that the big manufacturers may reach it by selling direct to the consumer, whereas the small manufacturer ought to be permitted to go through the ordinary channels of commerce, the wholesaler and the retailer, and be allowed to build up a business in that way. No man can build up a business except through substantially wise methods of doing business.

And my final word is gentlemen, that so long as there is competition in any business and people get free and complete competition, there is no danger of a man putting his price too high to the public; there is no danger whatever, because others will get the business if he should do that, and no manufacturer is going to fix his price any higher than he safely can to build up that business.

I shall be very glad to answer any questions; otherwise I am through.

Mr. BEALL. Before that decision came out last fall, or in the earty part of the winter——

Mr. LUCKING (interposing). The Sanatogen case—last June, I think.

Mr. BEALL. Yes. Was that practice of the manufacturer fixing the price at which the retailer should sell to his customer usual, or did it exist in relation to trade-marked articles, patented articles, and machinery like automobiles? Was it a matter of general practice——

Mr. LUCKING (interposing). It never was.

Mr. BEALL (continuing). In regard to the necessaries of life, to which Mr. Floyd referred?

Mr. LUCKING. Not at all; because there is no object in it. It has not been done except in much-advertised goods and very much desired goods. There are many other arguments connected with this general subject that could be opened up, namely, that price cutters use these well-advertised goods simply to build up their business; they cut prices in order to use the goods as leaders to draw people in to sell goods to them. That is their principal object.

I had a case for the Ford Motor Co. in Ohio last year. It has been argued, and Judge Harmon was on the other side of that case. It was a case in which a concern known as the Union Motor Sales Co., of Dayton, Ohio, had been advertising that it could and would sell Ford cars at 10 per cent off. The judge, in finding them guilty of contempt of court for violating his injunction, found, as a matter of fact, that their chief business was to use the advertisement that they could sell a Ford car at 10 per cent off to sell memberships in their concern at $10 apiece. That was their object, and that was the holding from the bench. I do not say it is always so in every line of business, but very generally, wherever you see serious price cutting of a standard article, such as breakfast foods, for instance, the object is, where they undertake to sell below cost and all that kind of thing, to get people to come so they may sell other articles to them and make up the difference. Now, what earthly sense, gentlemen, is there in allowing liberty of contract on the part of dealers who handle, we will say, Kellogg's Toasted Corn Flakes, to sell packages at a certain price—what sense is there in it when there are hundreds of breakfast foods and we may always go back to oatmeal?

Mr. MCCOY. Do you remember what Dr. Woods Hutchinson had to say about breakfast foods? He said you might eat them if you wanted to but always eat your breakfast afterwards.

Mr. LUCKING. Yes; that is witty, of course. But it is just the same with every other article you can name where there is plenty of competition. I thank you very much, gentlemen.

Mr. DANFORTH. You think your suggested proviso to the fourth paragraph of section 1 of the second bill would cover the ground?

Mr. LUCKING. I think it is sufficient to do so; yes, sir.

Mr. DANFORTH. Not only in your case but in every case?

Mr. LUCKING. Yes, sir; in every case. If it is thought wise by a committee of Congress to require a dealer to file his prices, as is contemplated in the Stevens bill, which is pending before the other committee, and to require that a fee be paid to the Bureau of Corporations, or wherever that price list is to be deposited, and to make it public, that is all right. There is no objection to that at all, although personally I think you should not interfere with a man in building up his business in his own way. If there is any sign of a monopoly hit it as hard as you can, but do not hit others.

Mr. VOLSTEAD. Suppose that provision were inserted? Is it not true that everybody would claim not to be a monopoly, and, consequently, until you had practically convicted all these corporations of being a monopoly it would be nullified, so that you might as well leave that whole thing out?

Mr. LUCKING. I would not think so. In the automobile business there has always been competition, resulting in the constant lowering of prices in all lines of automobiles, and it is so in every other line of business where there is plenty of competition. It is only where there is a combination of manufacturers that there ought to be any interference at all.

Mr. VOLSTEAD. Suppose the Tobacco Trust, as it is called, the Standard Oil Co., and other trusts——

Mr. LUCKING (interposing). How does the Standard Oil Co. operate? It operates through agents entirely. It has been decreed to be a monopoly, but I think the Government's dealing with it has been ineffective. I say you can not make any instrumentality of attacking a real monopoly too strong to suit my purposes and I am sure you can not for the gentlemen I represent here. There was an attempted combination of the automobile business for several years under what was known as the Selden patents, but the Ford people refused to join it and fought it for years. The Ford Co. spent a great deal of money in fighting it, and it resulted in absolutely free and open competition in that business. I do not think what I have suggested would help to maintain or make a monopoly. All we do is to say to a man who enters into a contract to sell at a certain price that he shall do so and to confine himself within his own territory.

Mr. VOLSTEAD. It may be a good thing, but I am afraid the farmers would be bitter if all their farming machinery should be sold on that kind of a plan.

Mr. LUCKING. It is claimed there is a great trust in harvesting machinery.

Mr. VOLSTEAD. It is contended, on the other hand, that there is not. Suppose the people had to buy farming machinery——

Mr. LUCKING (interposing). Is there competition in the same plow among farmers?

Mr. VOLSTEAD. Well, I do not know.

Mr. LUCKING. I do not think there is. That is all there is to it, that the individual manufacturer should fix the price of his article in order that he may build up his business.

Mr. VOLSTEAD. Of course, the claim is that the Harvester Trust, so called, only controls a relatively small part of the total output of all farming machinery, but if you should permit those manufacturers to fix the prices, do you not think this Congress would be very vigorously criticized?

Mr. LUCKING. I do not think so, if it is made perfectly clear that it is an individual manufacturer and that the article is open to free competition.

Mr. VOLSTEAD. I think there is a great deal of merit in the contention that there ought to be some way——

Mr. LUCKING (interposing). You take a new man in the automobile business, or any other business. He can not build up a business un-

less he can fix the retail price of his article in competition with the people who are already established. He can not do it.

Mr. CARLIN. If we strike out section 10 and leave section 9 it would help you a great deal?

Mr. LUCKING. Of what bill?

Mr. CARLIN. Of the Clayton tentative bill No. 1.

Mr. LUCKING. If you strike out section 10 and leave section 9, did you say?

Mr. CARLIN. Yes.

Mr. LUCKING. I have not the slightest objection to section 9. I do think that section 10 is wrong in principle, but it will not hurt the way we are doing business now.

Mr. FLOYD. It does not strike your case at all?

Mr. LUCKING. Not at all. Mr. Couzens, the treasurer of this company, said to me some months ago, "As far as we are converned, we can go on and do business as we are, but believing that the principle is right we want you to do everything you can to help establish the correct principle."

Mr. MCCOY. As between fixing a hard and fast rule in a statute, on the one hand, and leaving the matter open to be decided by a trade commission from time to time as questions arise, which would be your choice?

Mr. LUCKING. I am constitutionally opposed to bureaus, inspectors, and commissions unless they are necessary.

Mr. MCCOY. I am assuming that you have got to make a choice personally, as a matter of opinion, between the two methods.

Mr. LUCKING. Preferably, I would desire some such provision as I have suggested, open and free competition; second to that, the Stevens bill, and, third, a commission with power to act upon it.

Mr. MCCOY. In other words, you do object to having these hard-and-fast definitions embedded in a law so that they have no flexibility?

Mr. LUCKING. I must ask you to challenge my attention to some particular one that you have in mind.

Mr. MCCOY. Let us assume that the statute should provide that there be no resale price fixing; suppose that should be one of the provisions of this bill.

Mr. LUCKING. I see. Well, of course, I would prefer that you leave it to a commission.

Mr. MCCOY. Then, as to all these other tentative definitions, which affect other phases of the question, you have a similar condition, and——

Mr. LUCKING (interposing). I would not want, Mr. McCoy, to hastily say, considering everything together, that a commission should be appointed. I came here on this one idea and have not given thorough consideration to any other propositions. I think we are running to bureaus, commissions, and Government officials prying into people's business too much in this country. I am speaking now in the most general fashion, but I do not believe in it. I happen to have been up against some of the bureaus of the Government since I was a Member of Congress, and I know the tremendous power of the United States Government when it sets its face against a

particular practice or a manufacturer or business man, and when that power is committed to inspectors and to subordinates, you can not get the ears of the superiors very well. It is tremendous machinery and engineering that you are going against. I do not believe in hampering business too much. I do believe absolutely in the Sherman law. I would not like to see it curtailed in any way. I would like to see the central point that of hitting monopoly as such, and when you have accomplished that you have done everything, and you will then leave the American people to go ahead in accomplishing greater things.

Mr. McCoy. You would have us hit at monopolistic tendencies?

Mr. Lucking. Yes. Of course you can not wipe out all monopolies. We have laws against murder, but murders are committed every day. We have our laws and we should let our Attorney General and our prosecuting officers go forward and do all they can. Some may say, as they like to say, that the Sherman Act has been futile and that it is disregarded every day. That is not true. There are conspicuous examples of those who have disregarded that statute; that is unquestionably true; but I say that the business men of this country are accommodating themselves to that statute every day. It has not been four months since I was taken into consultation by the manufacturer of an article which was manufactured under patents. That article is sold all over the world and the manufacturer wanted to know if he could buy out other corporations which had other patents and whether they could combine their forces. I said: "It is very doubtful, under the Bathtub decision, whether you can possibly accomplish it," and I advised him not to do it.

I know in other directions that they are fearful of the law and are attempting to accommodate themselves to it, and that if prosecutors would simply make examples of a few of them, examples of a few of the great malefactors of this country, there would be mighty little in the way of combinations or monopolies as such. Do not think for a minute that that law is not very effective in this country; it may not be wholly so, but neither is the law against stealing nor the law against murder. There are always violations, but we must keep on fighting to reach a higher standard.

Mr. Volstead. Do you know the number of the Stevens bill to which you refer?

Mr. Lucking. I have a copy of it here.

Mr. Volstead. Will you give me the number of it, because he has introduced two bills?

Mr. McCoy. Is that also the so-called Williams bill, Senator Williams's bill?

Mr. Lucking. I do not know that it has been introduced in the Senate. It is H. R. 13305, introduced on the 12th of February, 1914. I understand this bill has the approval of Mr. Brandeis, who is, I suppose, the most well-known opponent of real monopoly that we have in this country. I understand he expects to be heard before your committee.

The Chairman. I thank you. Mr. Miller desires to be heard at this time.

STATEMENT OF MR. CHARLES F. MILLER, PRESIDENT OF THE HAMILTON WATCH CO., LANCASTER, PA.

Mr. MILLER. Mr. Chairman and gentlemen, I represent a company whose product contributes a large part towards the safety of travel on steam railroads. I mention this because we manufacture what is known as the raliroad timekeeper of America. It was started some 20 years ago and after it was found to be effective a number of railroads, especially the western railroads, where they had but one track, adopted these watches, or these timekeepers, as I will term them, to time their trains.

If you will permit me I will be as brief as possible. In speaking on this subject I have very little to say in addition to what Mr. Lusking has just said. However, there are one or two things about which I disagree with him, and I think you will all agree with me on them. I do not only represent the Hamilton Watch Co., but I represent 23,000 retail jewelers in the United States who have dependent on them about 85,000 employees—watchmakers, and other employees—to say nothing of their families. These jewelers at their meetings during the past five years have all voted, or nearly all, to support a fixed-price policy; not only voted for it, but plainly stated that it was the only legitimate method of merchandizing. As many have put it, where a reasonable profit ends there swindling begins.

Our belief is this: If the dealers do not get a fair profit out of our article the consumer is the loser, because the dealer who cuts the price can not give the service that we require every owner of a watch to have. Consequently there is a loss all along the line from the consumer to the dealer to the manufacturer. Now, I am going to ask you to listen to a statement about this business and about why I regard it as important that we be protected. Our business was established in 1873 and after three reorganizations finally in 1894 we perfected machinery for the making of parts of watches to one five-thousandth parts of an inch, realizing the deep responsibility of having our watches so dependably accurate that they could be used with safety on the railroads for timing the runs of passenger trains, as we all agree that to an engineer a few seconds means a matter of life and death, not only to himself, and the destruction of property, but to the hundreds of passengers that he is carrying daily. Now, as to our machinery, I will say that our machinery makes all of our watch parts interchangeable. We can take 10 or 100 or 1,000 of our watches of the same size and take them apart, mix up the parts, and put them in a pile, and a watchmaker or repairer can make as many watches out of those mixed parts. That is what we claim and that is what we guarantee absolutely. I mention this because it makes it safer for anyone to buy an American watch than a watch of Swiss make, and these parts are supplied by all dealers whom we have appointed our agents. That is a protection to the consumer. These Swiss watches are not always made with interchangeable machinery, and therefore our system introduced an element of safety to the consumer who buys the watch.

Now, as to question of price cutting. It has been said that the fixing of prices may admit of the setting of prices too high, so that they would be a burden on the public, but this is surely taken care

of by competition. Theoretically, that first statement is true, but it is also true that competition will surely take care of that situation. Just as soon as the dealer undertakes to extract an unreasonable profit out of the consumer for an article, whether it is a watch, suit of clothes, or anything else, it is only a question of time when he will not enjoy the confidence of the manufacturer or anyone else. It has been contended that after an article has been sold the manufacturer no longer has any right to fix the price upon it. Now, in the first place, we feel that there really is no sale until the article is in the hands of the consumer, because the retailer and jobber are merely distributing agents, and the manufacturer depends for his success upon the good will of the consumer, and to obtain this good will the consumer must be properly cared for, not only now but for years to come. In that connection, let me say, gentlemen, that the Hamilton Watch Co., that I represent, takes care of the people who have Hamilton watches, whether they are 1, 2, 5, or 15 years old, and if there is anything found about them that is defective or anything that can be improved upon, it is done free of charge. The plan of distribution through the channels I have just mentioned is certainly the cheapest method known to the jewelry trade. In the second place, the manufacturer is interested beyond his original province, because the permanent success of his business depends upon future sales, which will be lost if price cutting is permitted. In other words, the success of any manufacturer, and it seems particularly so in our line, depends on satisfying the people. That is true because they do not buy a watch every day or every week or as often as they buy a suit of clothes, but usually a watch is bought and handed down by the the father to the son, and it is generally a matter of 20, 30, or 40 years, or even longer.

They have proved their running qualities now, because we have been timing trains for 18 or 19 years. In the third place, the service or the guaranty that a manufacturer must give in order to be successful causes him to have a lifelong interest in the article, and therefore he should have some control over it after the first change of title. We contend that the fixing of the price also prevents the dealer from overcharging. That is the case where a disreputable dealer might sell a second-hand watch or a foreign watch without a price on it, and ask any price for it, representing it to be such or such a watch. Now, the Supreme Court has recently interpreted the Sherman Act in such a way that it is impossible for us to continue our business without a violation of that law. That is true, because our next greatest asset is the good will of 23,000 jewelers that we have established in the past 20 years by providing for them a reasonable profit, and it is our experience that more than 95 per cent of those jewelers are sincere in their dealings with the trade. It is our experience that they are sincere and do take care of the trade properly. As proof of this statement, I have with me a handful of letters, perhaps fifty out of a thousand or more, that I have received, not recently, but running back as far as 1905. I will be glad to leave these letters with you or I can file with you a brief of what they contain. These letters are from all parts of the country, and they complain of their competitors and neighbors who have a little money invested and begin to cut prices. All the letters plainly state that unless we can stop the price cutting by their competitors they will no longer handle

our goods. It is our opinion that the manufacturer of a branded article who is not in any way, directly or indirectly, connected with any other similar concern should have the right to set the price of his article to the consumer and depend solely upon the reasonableness of his price and the merit of his article for the sale of the same.

We feel that we are, therefore, justified fully in asking that the Sherman Act be amended so as to legalize this method of merchandising, always providing that under no circumstances should they be permitted to be connected with any other concern of a similar nature. At this point I will have to disagree with Mr. Lucking, because I believe there should not be any quantity price permitted under any consideration, and we have never permitted it. We have always sold at one price. I ask you to keep in mind the fact that we have but one price to jobber, retailer, and consumer, and have no quantity or special discount of any nature. The largest dealer who buys 100 or 500 watches pays exactly the same as the man who buys 1 or 5 watches. We strongly recommend that there shall be no quantity prices or special discounts or allowances of any nature. We sell to the jobbers at one price, and we require them to sell to the retail dealer at one price, so as to give every person fair and equal treatment. Back of that, we stand by our guarantee of service. If everything is not exactly as we represent, we want the watch back, because we regard that as our best advertisement. Our best advertisement is a satisfied customer. In that connection, I might say that we maintain a very extensive repair department and it is our constant purpose to take care of the watches we sell, because we can not have anybody to say that his watch is not as it was represented. We have a living interest in our goods. It was not until two years ago that we started to advertising at all. Our business was built up without advertising, and we are advertising now only as a matter of business insurance.

Mr. McCoy. What, in your opinion, is the effect of fixing the resale prices or having the right to do so, upon the existence of small dealers in the small places throughout the country? What effect does it have upon the continuous business of the small dealer?

Mr. Miller. It is the healthiest thing we can do for him. If you prevent quantity discounts, if I understand your question correctly, it will introduce an element of safety all along the line.

Mr. McCoy. The complaint has been made here before the committee that some of these so-called chain systems of stores and also mail-order houses are cutting badly into the business of the small dealer in the small community.

Mr. Miller. That is true.

Mr. McCoy. Now, is it your contention that the right to fix the resale price on standard articles will be a protection to the small dealer in the small community and permit him to keep alive?

Mr. Miller. Absolutely so. That has been our policy from the beginning. We have been offered orders for thousands of watches from large dealers——

Mr. McCoy (interposing). Even assuming that you do make a different price for different quantities, nevertheless, if you can control the resale price the little dealer would not be affected by the fact that you sold at wholesale prices in large quantities, provided the man who

buys the large quantities can not go into that community and take advantage of his better price by selling the goods at a lower price.

Mr. MILLER. That is an incentive for them to cut the price.

Mr. MCCOY. But if you have the right to prevent it, so that he can not indulge his inclination?

Mr. MILLER. Yes, sir; of course that is true. The question of transportation, as you know, does not enter into it, because there is no such thing as a carload of watches. Watches are sent by express or parcel post, and I am very certain that one price to all is the only sure and safe way in which to handle this business.

Mr. MITCHELL. Is that the way you do it now—by lease?

Mr. MILLER. No, sir.

Mr. MITCHELL. By contract?

Mr. MILLER. Yes, sir. We have a very simple contract, which does not bind them to sell our watches exclusively, but they can sell anybody else's watch. However, if they sell our watch, they must absolutely carry out their promise to take good care of it, see that it is properly adjusted, and if anything gets out of order that they can not fix themselves, they are required to send it to the factory and have it fixed. We have about 1,000,000 watches out, and maintain an expensive repair and adjustment department—a department that cost us last year nearly $15,000. Many of the watches that are sent to us come from negligent people who do not handle them right, and in many cases the watches were in poor cases. We do not manufacture watchcases, but simply the movements, and the movements are put in any kind of case. If the case is a poor one, dirt and dust will get in the movements, causing it to become sluggish and lose time. That is particularly true where the watches are used on railroads, where there is so much dirt and dust to get in the works.

Mr. MITCHELL. Is there much difference in the prices of these standard movements? Is there much difference between the price of the movements you manufacture and the Waltham and Elgin movements?

Mr. MILLER. No, sir; they are all about the same. They all aim to have about the same adjustments from three to five positions and the same temperature adjustment. They are, practically speaking, about the same.

Mr. MITCHELL. And the price is about the same?

Mr. MILLER. As near as I can tell. Without having the list, I should say ours are lower in a number of grades.

Mr. MITCHELL. Do you export many watches?

Mr. MILLER. No, sir. We send some few to Canada and occasionally a few go to the Philippines. We also sell a few in Mexico, but not many.

Mr. MITCHELL. How do the prices compare there with the prices you charge jobbers and retailers here?

Mr. MILLER. We charge the same price; there is no difference in the price at all. You will understand that we manufacture only a small number of watches. We have never been able, by reason of the high standard we set, to make more than 350 watches a day, while there are manufacturers in this country that make as high as 3,500 watches per day. There is one manufacturer who makes 3,000 watches a day and another 3,500. The Ingersoll concern makes 13,000 watches a

day. I do not mean that they make them, but they have them made for them.

Mr. McCoy. When you were testifying as to the export price and stated that it was the same as the domestic price, were you referring to your own company or to all the others?

Mr. Miller. Only my own; I do not know about the others. There is no combination of watch companies, and absolutely no agreements as to prices on any watch or watch material, or of one concern with another concern, in any shape or form. We have a small business at Lancaster where we employ 735 people, and we pay the highest wages in that section of the country. Besides, we do many other things to assist our people. We aid them in every way we can.

Mr. Mitchell. I understood you to testify that the price fixed for your standard movements by your company and the price of the Waltham and Elgin movements were practically the same.

Mr. Miller. That is true as far as we know. Our prices were set 20 years ago and never changed. For instance, a 21-jewel watch will sell for $30 or $40 or $50, owing to the quality of the case. Many of them sell cases, but we only sell the movements in railroad watches and comparatively few cases, but our most popular watches are lower in price than similar grades of other makes, and much cheaper than Swiss makes of same grade.

Mr. Mitchell. How has the tariff affected your business?

Mr. Miller. Of course, the tariff has affected us somewhat. It has increased the duties on jewels and diamonds, and they have been lowered somewhat on watches. We do not export many watches, but they are bringing in more Swiss watches from year to year. Of course, that makes it some harder for us. Then, labor is increasing in cost. Our labor has shown a very marked increase; and, besides, we have voluntarily within the last 2 years given our people an advance of 11 per cent, and have done a good many other things for them; but during the past 10 years we have improved our watch in many ways and added to its durability, but never increased the price.

Mr. Floyd. We will now hear from Mr. Charles L. Miller.

STATEMENT OF CHARLES L. MILLER, ESQ., COUNSEL FOR THE HAMILTON WATCH CO., LANCASTER, PA., AND MEMBER OF THE LEGAL COMMITTEE OF THE AMERICAN FAIR TRADE LEAGUE.

Mr. C. L. Miller. Mr. Chairman, I would just like to answer a question put by Mr. McCoy, asking how the retail jewelers felt on the question of the chain stores. I have brought with me perhaps 50 or 60 letters from the different jewelers in regard to this matter. Many of those jewelers have complained in regard to this very proposition, and you will find that most of these letters—which I will be glad to leave with you, and also the various papers and advertisements which are attached to them—these letters complain of the mail-order houses advertising and offering to sell the Hamilton watches for a lower price than the standard price. If you allow us to fix a selling price on our watches the mail-order houses will have no advantage over the other dealers. These letters show that these various firms believe in the principle that the manufacturer should sell at one price to all dealers and jobbers. We only sell to jobbers. We

sell to 100 jobbers in this country, and they all get the same price from us, no matter how many watches they buy. We believe if the manufacturers are compelled to sell to the mail-order houses at the same price at which they sell to the other dealers, the mail-order houses being retailers, they will have no advantage over the other dealers. We believe that the competition of the mail-order houses is doing great harm to the retail dealers and we believe that this method—one price to all, all along the line—will very largely cure that harm.

Now, in reply to the questions of the chairman in regard to our position as to the restraint of trade, I would like to call your attention to the fact that a restraint of trade is not illegal as such. It was in the early decisions said that it was the reasonableness or the unreasonableness of the restraint that made it legal or illegal; and that is what the Supreme Court of the United States decided in the Standard Oil and Tobacco cases, and there was also a similar decision recently announced in the highest court of England in the case of Nordenfelt *v.* Maxim Nordenfelt & Co., 1904 App. Cas., 565.

There is one other question I would like to take up. I believe Judge Floyd asked Mr. Lucking something along this line, that if we allowed price maintenance would it not tend to build up monopoly But I want to tell you that the great monopolies have been built up, largely, by price cutting. The monopoly will undersell the dealer in a certain territory, and they will drive other dealers out of business.

You may be familiar with the methods pursued in the case of the packers; you may know how the packers in some one locality would get control of the meat business by underselling the local butcher and driving him out of business, and then their prices go up. It is to protect the small dealer against that sort of price that we ask the privilege of maintaining prices.

Mr. FLOYD. That is one of the methods.

Mr. C. L. MILLER. That is one. I mean to say that price cutting has been used for that purpose.

Mr. FLOYD. Some of us think there is another method of doing that, and a method equally effective in building up a monopoly.

Mr. C. L. MILLER. As I take it——

Mr. FLOYD (interposing). Let me give you an illustration along that very line. I was talking not long ago with a friend of mine in my district who is a jeweler, and he told me he bought his suppiy of watches from a jobber and paid for them, and that the people who sold him the watches exacted of him a contract to the effect that he should not sell them except at a fixed, uniform price.

Mr. C. L. MILLER. If I may interrupt you, I would like to say that I am familiar with that case, and if you will allow me I will answer to that now.

Mr. FLOYD. I would like to ask you a little further about that. This jeweler told me that he was given the price list—and I saw it—these concerns were offering a reward of $10 for anyone who would inform them in regard to any customer of theirs who had been guilty of cutting prices. Have you any such regulation in your business?

Mr. C. L. MILLER. We have never had such a regulation. In fact, we do not have to offer a reward for that sort of thing, because the

very moment there is any price cutting we get an immediate notice from other dealers that some certain dealer is cutting the price.

Mr. FLOYD. He said that the policy was this, that if he sold those watches at any other price than the set price they would not sell him any more watches.

Mr. C. L. MILLER. That is true.

Mr. FLOYD. He said there was an understanding between the different manufacturers of watches in the United States and he could not buy another watch in the United States if he was reported to the manufacturers as doing such a thing as I have indicated.

Mr. C. L. MILLER. That is absolutely untrue. We do not have any agreement; we do not have an undesirable list in connection with any other company; and we have no way whatever of knowing what dealer can not buy an Elgin or Waltham watch.

Mr. FLOYD. If a dealer in Elgin watches should cut prices and the Elgin Co. should notify your company that this dealer was a price cutter would you deal with him?

Mr. C. L. MILLER. They never have done that, and we would deal with him. I will ask my father to correct me if I am wrong. We will sell to a dealer provided he does not cut prices on our watches. We would pay no attention to complaints from any other companies.

Mr. FLOYD. There is a general impression that the watch business is one of the most complete trusts in the country. I have understood that. You say your company does not belong to it?

Mr. C. L. MILLER. No; and further than that, I believe that the Elgin and Waltham Cos. do not belong to such an organization.

Mr. FLOYD. Do you undertake to say that the Elgin and Waltham Cos. are not in the combination.

Mr. C. L. MILLER. I can not tell what arrangements they have, except from frequent communications we have had from Mr. Fitch, and judging from that and from what I have seen in the trade, there seems to be the keenest kind of competition.

Mr. FLOYD. You mean in selling watches at the same fixed price?

Mr. C. L. MILLER. In selling watches to the jobbing trade. We also have what we call missionaries, who go around among the retailers, but who do not sell the retailer, but who talk up our product, and there seems to be the keenest kind of competition between the seven concerns who manufacture the highe. grades of watches. There is no combination whatever.

The suit which the Government instituted against the Keystone Watch Case Co., which also controlled the Howard Co., was simply against that company and had no connection whatever with the Elgin, the Hamilton, the Illinois, or the Waltham, or several other companies I might name. There was no evidence whatever produced by the Government to show any such situation. If there had been any such combination as you suggest, sir, the Government certainly would have introduced evidence in regard to it.

Mr. FLOYD. Let me ask you a further question. If I correctly understand your position, you think the manufacturer ought to have the right to fix the price at which he sells to the jobber?

Mr. C. L. MILLER. Yes, sir.

Mr. FLOYD. So do I. Do you think the jobber ought to have the same right as the manufacturer to fix the price, if he buys your goods—to fix the price at which they shall be sold to the customer?

Mr. C. L. MILLER. No; and for this reason: The interest of the manufacturer does not cease in the watch when the first change of title takes place.

As has been well said, the jobber and the retailer are simply distributing agents of the manufacturer. I quite concede that there is a transfer of title, and that the question of restraints on alienation may come in. Practically, however, there is no actual sale until the watch gets into the hands of the consumer; and while it is in the hands of the consumer the manufacturer has a living interest in that watch, and he ought to be able to say who shall give the service, and he ought to be able to require the jeweler to give the service, and the jeweler will not give the service unless he has gotten a reasonable profit out of that particular watch. That is why I think the retailer should be compelled to sell the watch at a price which will give him a vital interest in that watch.

Mr. FLOYD. Suppose, for instance, a man is engaged in the business of breeding fine horses. Would you apply the same principle there and say that he should be allowed to fix the price at which the farmer makes the resale of those horses?

Mr. C. L. MILLER. If the farmer is a dealer, I would say that; but if the farmer uses the article for a time, I certainly would not. We do not say that after a man has carried our watch in his pocket, after he has carried the watch for any length of time, we do not attempt to control the resale price.

Mr. FLOYD. Your principle, I concede, is an advantage to the manufacturer, and it may be an advantage to the jobber and an advantage to the retailer, but the difficulty with those who insist upon this principle is that they lose sight entirely, it seems to me, of the consuming public. I venture the prediction, although I do not think it is at all likely, that if you would enact that provision into the law, that there would be a demand in this country for a higher authority than the manufacturer to fix the price—that is, a demand for the Government through some constituted agency to fix the price all the way down the line, in the interest of the general public. How would you like that?

Mr. C. L. MILLER. As I understand it, there is that demand at present, and the Socialist Party is largely based on that demand, but I believe that the large mass of the thinking people of the country are not ready to come to that. They realize the difficulty of any commission fixing the price of the hundreds of thousands of articles that are manufactured in this country.

Mr. CAREW. Do you not think if the public becomes aware of those advantages that they will get the idea that it will be a very good thing to have such a thing all around, and that if that comes about we will have a commission to fix all those prices?

Mr. C. L. MILLER. I think they will get the idea that it would be a good thing——

Mr. CAREW (interposing). Do you not think the commission will fix your prices and fix them a little bit low; that the pressure on the commission to fix prices low will be stronger than your pressure to fix them high?

Mr. C. L. MILLER. If the country ever becomes committed to the socialistic principle we will have that.

Mr. CAREW. Do you not think you are helping it along?

Mr. C. L. MILLER. No; I do not think we are.

Mr. FLOYD. That is the point I am making—that you are insisting upon a principle which will drive the country to socialism in the end. You will destroy freedom of contract by insisting that the manufacturer shall have the right to fix and control the price all the way down to the ultimate consumer. There are, comparatively speaking, only a few manufacturers, and there are thousands of ultimate consumers.

It seems to me you are advocating a principle that will be utterly destructive not only of your own business, but of the general business interests of this country and of all our institutions as now constituted.

Mr. C. L. MILLER. When you speak of the public you seem to lose sight of the fact that the manufacturer does not stand alone. The manufacturer, as you will easily recognize, is an employer of labor, and the interests of all his employees are bound up in his own success. When you think of this matter of fixing prices you must remember that in fixing the price, which will tend to the success of the manufacturer, you must also consider the interest and welfare of the employees of the manufacturer. And, carrying that argument further, not only must you consider the retailer but also the interests of the employees of the retailer—and all these employees, the great army of laborers, are the greater part of the whole purchasing public.

Mr. MCCOY. In answering the questions asked you as to whether socialism is not essentially monopolistic you are not contending for this sort of thing in any business which savors of monopoly?

Mr. C. L. MILLER. We certainly do not.

Mr. MCCOY. But in such businesses as permit of the freest competition, and therefore the two things do not run along the same lines.

Mr. FLOYD. I agree that socialism is monopolistic, and the socialist's idea is that the Standard Oil Co. is all right and the United States Steel Corporation is all right, but that the ownership is wrong, that the Government ought to own and control both of them, and I think that in insisting on the special privileges for the manufacturers you are fostering a sentiment in this country that is growing rapidly in favor of a purely socialistic system.

Mr. C. L. MILLER. It does not seem so to me, because I believe it is a benefit to the consumer and to the employer and also the employee.

Mr. FLOYD. He would insist, and with some reason, it seems to me, that the manufacturer is not the person to fix the price; that the Government is the party who should fix the price.

Mr. CAREW. You are an interested party, and you want to cut your own loaf.

Mr. C. L. MILLER. If we fix our prices, high competition will make us lower them.

Mr. CAREW. But you will have these secret understandings.

Mr. C. L. MILLER. I strongly deny that there is any such thing as secret understandings among watchmakers.

Mr. CAREW. I said you will have them—not that you have them now.

Mr. C. L. MILLER. It is the contention of Mr. Brandeis, who has made a study of that question, that by allowing price maintenance you will stop monopoly, and by allowing this price cutting you will

compel the manufacturers of the country to get together for their own protection. I suppose Mr. Brandeis will, if he has not already, present that view to you.

I did not intend to go into that, because he will speak to you about it much better and more clearly than I can talk about it. I simply suggest that as an answer to the question which has been put to me.

There is one phase of his subject that I have not heard spoken of to-day: To differentiate between price fixing by a combination and price maintenance by one manufacturer in a competitive field, price maintenance on his own article, without any agreement, secret or otherwise, with other manufacturers in that particular line.

It seems to me that the people have very often used the term "fixing price" when they are thinking of the price fixed by a monopoly. It is the very essence of this bill, as I understand it, that the right to fix prices shall only be given to people who are absolutely in no combination and have no connection, secret or otherwise, with the other manufacturers of the same or similar article, and it is our suggestion, further, that this will foster competition, because it will produce real competition, competition in quality and price, rather than the cutthroat competition of the retail trade.

The competition that we need in this country is the competition between manufacturers as to their prices and in their quality, and not cutthroat competition of the retail trade which has in the past to a certain extent at least, been one of the elements which has built up trusts.

I could cite instances where, by this cutthroat competition, the article has been killed. Is that fair to a man who has put the best years of his life in a business and built up an enviable reputation in his particular line; is it fair to have that man robbed of his efforts? Perhaps you will say in the public benefit it is, and I quite agree with you, that if you will show that the consumer has benefited, that that will be true.

But the price cutters are not philanthropists; they are stealing another man's good name, and they are trading on his trade-mark. They are robbers, and they are not sharing their booty with the public. I could give you numerous instances which prove that absolutely. I can cite to you the instance of Mr. Keene, who says that he will discharge a man if he sells more than one of his "leaders" in one day.

Mr. FLOYD. You say that when a man buys an article, and it becomes his own just as absolutely as his horse or his house, that if he sells it at a lower price than you would fix at which he should sell it, that he is a thief, and that he is stealing from you?

Mr. C. L. MILLER. If he has used it for a while he is not.

Mr. FLOYD. Whether he uses it or not?

Mr. C. L. MILLER. I say he is a thief if he is doing what the men who have been cutting prices have been doing. I do not say that is the case with the legitimate dealer. It is the case with a man who has advertised a known article at a cut price as a decoy, and then has substituted something else, I say he is a thief.

Mr. FLOYD. He is not doing anything except what you are doing in the exercise of your business. You are manufacturing goods, and you fix the price at which you sell them; but I say the man who

buys your product and pays his money for it obtains a title to that property, and he ought to have the same right you have, to sell it for whatever he wishes, or give it away if he desires to do so.

Mr. C. L. MILLER. All rights in our day are dependent on equal rights in others.

Mr. FLOYD. It seems to me there are certain people who think they belong to the manufacturer.

Mr. C. L. MILLER. No; they do not. The retail trade is interested in this thing, and that is a large element.

Mr. FLOYD. Yes; and that is what is astonishing to me, practically very few manufacturers have been here. But the retailers have been here advocating a policy that is in the interests of the manufacturer primarily. That is one of the astonishing things with which we are confronted.

Mr. C. L. MILLER. If you will allow me to introduce this letter, which I have here from one of the largest jobbers on the Pacific coast, explaining how the retailers feel on this subject——

Mr. FLOYD. Certainly; you may put in anything you desire.

(The letter referred to is as follows:)

SEATTLE, WASH., *February 6, 1914.*

Mr. CHARLES F. MILLER,
President Hamilton Watch Co., Lancaster, Pa.

DEAR SIR: It will no doubt be of interest to you to hear from me in reference to the troubles we have had in Portland and Seattle, full reports of which have been given you from time to time recently, all of which refer to certain dealers there cutting the established prices of Hamilton watches, thereby causing decided protest on the part of the dealers in both of these cities, who both wrote and wired us advising that unless steps were taken by your company to protect the established prices on their movements, thereby insuring them a legitimate profit on their sales, that they would find it necessary to discontinue handling the line.

Due to this, at considerable inconvenience and expense to ourselves, we sent our Mr. Brennan there, and in the hopes of having him satisfy the customers we learned that they had all decided that unless the cutting of prices would stop that they would no longer handle Hamilton watches. The position they took is about the same as that taken in the other cities. No firm who has the interest of its customers at heart and who means to give the service required can possibly do so and cut the prices on your watches. Therefore they have decided that if Burnett Bros. continue to cut prices they simply will not handle the goods any longer, and there will be no use in my trying to sell your watches in that section, because the dealers simply will not handle them.

While I am on this subject you might as well understand my experience in Los Angeles, where recently Feagans & Co. started a sale for the purpose of raising money. Immediately the jewelry trade in Los Angeles advised us of this fact and desired to know what steps you would take to protect your line from being sold at less than the established price. We immediately had our Mr. Marshall call on Feagans & Co., who gave us the assurance that the price on your line would be maintained, and through this fact we were able to satisfy the balance of the trade there, that they could go ahead selling the line at the established price, with the feeling that they would be protected.

A short time before this a department store by the name of Hamburger & Co. secured your line for the purpose of offering it at less than the established prices, thinking that the great reputation of the watch would help them to increase the sales in their jewelry department, especially if the price was sacrificed. We had some difficulty in getting these people to understand our policy, but finally secured from the manager his agreement that they would not handle the line unless they could see their way clear to sell it at the regular price.

I feel that if the price is not maintained that the trade will stop handling your watch, a business on which it has taken me 16 years to build up; and it has been our experience that through the policy of protection in the way of price we have been able to build up a trade among the dealers who value their

reputation of fair and honorable dealings with the trade. These dealers claim and show figures to prove it that a legitimate profit must be obtained on every article they sell, in order that they may get a return in keeping with the expense of doing business, including what is only considered a reasonable profit. Almost the entire legitimate jewelry trade on the Pacific coast, through their State associations, have indorsed the established price on merchandise and welcome a line where a price is established, and they wish to buy it with the assurance that the price will be maintained and that the factory making the goods will see to it that they are only sold to those firms who will sell at the established prices.

There are in Los Angeles 52 dealers, in Portland 20, and in Seattle 18, and this entire trade has been affected by this price cutting above referred to on Hamilton watches.

It is now 16 years since I have been earnestly at work developing the business over the entire Pacific coast. The only thing that we have is our reputation of one price to all—no matter what quantities are bought—and fair and honorable dealings, and we regret more than we can tell you that if something is not done to stop these few dealers from cutting the prices all of my efforts will be lost, and I might as well seek some other line upon which the dealers, as well as the consumers, can get protection.

There is one thing that I did not mention, and that is this: That very often the people who cut the prices on the goods have only a few of them and make a big advertisement out of them, and even sometimes they buy second-hand goods, in order to destroy the business of their competitors. It is my experience that not more than 3 per cent at the most are what we would call unprincipled dealers.

I would like some kind of a guaranty from you as to what you are going to do in the future.

BUBB W. FREER.

Mr. C. L. MILLER. That states exactly how the retailers feel, and the retailers feel the necessity of this, because if in a community a single dealer will advertise Hamilton watches at, say, 10 per cent below the regular price, or anything like that, such advertisement will lower the standard of that article in the eyes of the purchasing public. When a consumer asks the legitimate dealer, for instance, for a box of Kellogg's Corn Flakes, after some other man has advertised to sell them at a cut price, the consumer will say to the legitimate dealer when he charges him 10 cents, you are fleecing me. But when the goods are sold at cut prices there is no profit in them, and no man can continue in business at a loss.

Mr. CAREW. Then this price cutting stops business?

Mr. C. L. MILLER. No; it simply means that Jones will be out of that article.

Mr. CAREW. That Jones is out of that article?

Mr. C. L. MILLER. It means that Jones has stopped selling that article at 10 cents.

Mr. CAREW. Then it stops business?

Mr. C. L. MILLER. Yes; because the other fellows can not sell that stuff any longer. It stops the sale of those corn flakes in that particular town.

Mr. FLOYD. Is not the reason that Jones is out of the particular article because the manufacturer finds out that the price is cut, and the manufacturer, therefore, would not sell him any more?

Mr. C. L. MILLER. No; it is because Jones has only a few of those articles. He can not make a profit out of it. The retailer has got to make a profit, and if the price has been fixed by all the retail trade

in any article one man can not continue in business and sell it below that standard price.

Mr. FLOYD. Let me ask you a practical question that has been in my mind every time an advocate of this principle comes here. The advocates of this principle complain of the big mail-order houses and of their price-cutting practices. Now, if you control your price to the jobber and of the people they sell to, how do these mail-order houses get these particular commodities that they use in competition with the other dealers? Do they not get them from the same concern?

Mr. C. L. MILLER. May I answer that?

Mr. FLOYD. Yes; I would like to know how they do it.

Mr. C. L. MILLER. We have traced a great many Hamilton watches into the hands of Sears, Roebuck Co. and Montgomery Ward & Co., and in several instances we found that they were second watches which had gone through the hands of pawnbrokers.

When we send out a Hamilton watch—we have a record of the number of every Hamilton watch which goes to a jobber. We also ask the jobbers to keep records of sales to retailers. The retailer is also asked to keep the records of the numbers of the watches he sells. So that if we ask a retailer what he did with a certain watch we either know that he sold it to a mail-order house or sold it to a legitimate consumer, and then, perhaps, the legitimate consumed pawned it, and, finally, Sears, Roebuck & Co. or Montgomery Ward & Co. bought it at second hand. I have a letter here from a jeweler who sold these secondhand watches, but whose advertisements say they are first hand. That is a case where the public is fleeced, and fleeced mightily. They get a secondhand article, which can not give them the service. I would like to insert in the record the letter which I refer to, and also our letter to which this was a reply. I would also like to put into the record the advertisement of this particular dealer.

Mr. FLOYD. If there is no objection, those letters and that advertisement may be inserted.

(The letters and advertisement referred to are as follows:)

OCTOBER 14, 1913.

DEAR SIR: We have before us your recent advertisement in which you state that you would put on sale on Saturday, October 11, Hamilton 21-jewel, 5-position adjusted watches for $20.

We can not help but feel that there must be some error in this, or else the Hamilton watches which you offer are not new; and if so, you should so state in the advertisement.

We feel that it is for the best interest of not only ourselves but also of the jobber, retailer, and consumer that our established prices shall be maintained. It is necessary that you should receive a reasonable profit, as we feel that our responsibility only commences after a Hamilton watch has been purchased by your customers.

If you do not sell at figures rendering you a reasonable profit you have no living interest in our goods. We know that we, on our part, have the right to sell to whomsoever we please, and have decided to continue in the future, as we have in the past, to confine ourselves to our customers who are of the same opinion on this question, and who of their own motion are thus willing to work in harmony with us.

We would be pleased to hear from you regarding this matter by return mail, and thanking you in advance, beg to remain,

Very truly, yours,

HAMILTON WATCH CO.

[Reply.]

OCTOBER 16, 1913.

HAMILTON WATCH CO., *Lancaster, Pa.*

GENTLEMEN: In regard to the Hamilton 18 size, 21 jewel, in nickel case with nickel chain, will say those watches were bought from pawnbrokers, fitted in filled cases. I bought them low and sold them at a cut price. They were in first-class condition and looked like new, but, as I understand it, not covered by standard price agreement.

[Advertisement.]

WATCHES.

I shall put on sale for Saturday, October 11, only, your choice of Waltham, Elgin, Hamilton, and Seth Thomas watches, 21 jewels, adjusted to 5 positions. The above are of the finest railroad watches fitted in good business cases, with chain, for only $20.

I will on this day sell a few Waltham and Elgin watches, not fully adjusted, cased, for $5.

Watches above mentioned are the finest makes in the world and fully guaranteed.

* * * * * * *

Mr. CAREW. Did you prosecute him?

Mr. C. L. MILLER. We did not. We have never sold anybody but jobbers. We do not sell to department stores or mail-order houses.

Mr. FLOYD. I would like to ask you a question in connection with that. I am very much obliged to you for that information, because I wanted to know how it was. Your theory and your information indicate that those watches are principally secondhand watches.

Mr. C. L. MILLER. They are very often secondhand watches.

Mr. FLOYD. If that be true, in what way and in what manner would the granting you the privilege you are asking, namely, allowing you to fix the resale price, to set a uniform price—how would that prevent that particular thing?

Mr. C. L. MILLER. In this way. If Sears, Roebuck & Co. or Montgomery Ward & Co. had put in their catalogues the Hamilton Watch or the Elgin watch at the regular price people would not send to Chicago to get an article which they could get in their own town, in their local store, at the same price.

Mr. FLOYD. The point I make, Mr. Miller, is this. You say that Sears, Roebuck & Co. and Montgomery Ward & Co. and these big department stores get their supplies from pawnbrokers, and get secondhand watches?

Mr. C. L. MILLER. Yes.

Mr. FLOYD. If that be true, how would the fact that you are given the right which you had been exercising for the last 10 or 15 years, or, at least, up to the time when the Supreme Court of the United States held that it was illegal to fix a resale price—how could that in any way relieve you from that situation? Would they not still buy the secondhand watches, and advertise them cheaper, and sell them cheaper?

Mr. C. L. MILLER. Our contention is that they should not be allowed to advertise them below the price which is fixed. We contend that we should be allowed——

Mr. FLOYD. If a man gets possession of a secondhand watch, you say that he could not advertise and sell it for less than the regular price of a new watch?

Mr. C. L. MILLER. If he will call it second hand. You, for instance, as a purchaser, are being fleeced by being led to buy anything as new which is really second hand, no matter what it is, and in the case of a watch it is very, very difficult to tell whether it is new or second hand.

Mr. FLOYD. Nobody will dispute that principle.

Mr. C. L. MILLER. I do not think there is any dispute about it.

Mr. FLOYD. The point I make is this: What remedy would you have against that kind of thing if you had the privilege you claim you ought to have?

Mr. C. L. MILLER. If that man will advertise them as secondhand watches he will not make the sale; if he tries to sell new watches at the maintained price he will not get the sale, because people will deal with the man in their own town, who is close by. If he advertises them as firsthand and they are secondhand watches, we can prosecute him for false advertising.

Mr. FLOYD. But he gathers them from pawnbrokers?

Mr. C. L. MILLER. If he advertises them as second hand we have no objection, if he wants to sell them even as low as a dollar. If you are willing to take a secondhand watch, we do not care what price he gets for it. What we want is that the new watches that are advertised as new watches shall be sold at a regular price.

Mr. VOLSTEAD. What do you know about the manner in which these concerns get other articles?

Mr. C. L. MILLER. They get other articles largely on quantity price. The reason they can not do that with Hamilton watches is that we would not sell them directly to those people, and consequently they could not get a quantity price from us. Our company is as much opposed to a quantity price as we are in favor of price maintenance.

That is the way the mail-order house has been able to do business. A mail-order house will buy, in some instances, three-quarters of the supply of a manufacturer, and they will get the goods at a carload or a trainload price.

Mr. FLOYD. In how many places in the United States are watches manufactured?

Mr. C. L. MILLER. In nine places; that is, the higher class of watches—the seven-jewel watch, and from that on up.

Mr. FLOYD. Those nine watch-manufacturing concerns supply jewelers throughout the United States, and you have insisted here that competition will regulate the price. What more objection is there, from your point of view, to allowing the big department stores throughout the country to sell them than there is to allow manufacturers to sell them throughout the country? What is the difference in principle between those two conditions?

Mr. C. L. MILLER. We have no objection to the department store selling them, if they will sell at a price that does not do an injustice to the dealer.

Now, in regard to the difference between the mail-order house and the independent dealer, which you referred to a few minutes ago, and between the manufacturer and the consuming public, there are hundreds and even thousands of retail dealers in this country—I mean in all lines. Those people have got to make a living, and those people can not do it in competition against some of the prac-

tices of the mail-order houses. We admit if you cut out quantity price and make it illegal, then, in a large measure, you will have solved the mail-order house problem.

Mr. GRAHAM. You would allow a man acquiring second-hand articles or second-hand watches to be controlled by other methods? You do not ask for any legislation affecting that branch of it; that would have to be taken care of under a charge of fraud or false advertising?

Mr. C. L. MILLER. Yes. I think there is no trouble about that.

Mr. GRAHAM. You want to protect the specialized article which you have made up and for which you have made a reputation, and you desire that your business and your property in that article shall not be destroyed by somebody taking your article and selling it at a cut price, whether it is below cost or not, either for an advertising effect or for some other result which they seek to obtain? You want to be secure against the invasion of what you have spent your life in building up, so that it will not be destroyed by price cutting?

Mr. C. L. MILLER. That is expressing it in a great deal better way than I could hope to do. The fact is, we do not want the business of the retail dealers to be killed. It is a known fact that if one dealer in any commodity in a town will cut the price on it that other dealers can not handle it, because they either have to come down to his level or else they go out of business, because they can not cut it to his level and make a living profit out of it. We have all seen the distress which price cutting has caused.

When we fixed the price of Hamilton watches—which has never been raised—we did it after consulting with the jobbers and retailers. We consulted with most of the jobbers and with hundreds and hundreds of retailers, and we asked them what was a fair profit on a high-grade article of jewelry. They told us; they gave us various figures, and we set a fair price to meet the demands of those people. It was not a case of our coming in and asking a very high price, nor coming in and asking a price that would not give either of these men a living interest in the article.

Mr. MITCHELL. How long ago was that price fixed?

Mr. C. L. MILLER. In 1893.

Mr. MITCHELL. It has never been changed?

Mr. C. L. MILLER. It has never been changed, except in the case of one grade.

May I emphasize again what I have said before, that we have never sold our watches except at one price to all jobbers. We have sold directly to no retailer.

There is a large department store in Philadelphia and New York whose manager has been begging us to sell them our watches direct, and they have offered even to put up a bond of almost any amount to guarantee that they will maintain our price if we would sell our watches to them. But we do not want our watches to get into any trade but the jewelry trade, because the service element comes in.

In many articles there is what we call service. You know what service means in the case of automobiles. You know that the business in the high-priced automobiles has been built up largely on the fact that the manufacturing companies maintain service stations at various points at tremendous cost, and those service stations are a

tremendous boon to the owners of the cars. So it is in the case of many other products.

In a watch or an automobile that service can not be given directly by the manufacturer. It would be absolutely impracticable for you to send your car back to the factory at Detroit when something happens to it. You have to go to your local dealer in the case of the automobile. So it is in the case of the watch. It is possible for you to send articles to the factories through the mails, but in the case of an article like a watch, sending it through the mail is very dangerous. But even if you could send a watch through the mail without endangering it, you would, nearly always, prefer to go to your local dealer whom you know and with whom you have dealt for a long time, and who will let you have what is known as a "lender" which you can carry until your watch has been fixed. That man, that dealer, in your home town, under our appointment as our agent, is bound to keep an interest in that watch, and he does keep an interest in it as long as it is in the hands of the purchaser. But he can not and will not do that unless he has a fair profit.

I say there may be a reasonable difference between ordinary articles and articles in which there is a life-long service required. That is particularly the case with a thing like a watch, where the jeweler must be in a position to enable him to give the service you want as the carrier of a watch.

Mr. MITCHELL. What is the capital of your company?

Mr. C. L. MILLER. $2,000,000.

Mr. MITCHELL. What dividends did you pay last year?

Mr. C. L. MILLER. Fifteen per cent.

Mr. MITCHELL. Do you remember how the dividend has run since 1893?

Mr. C. L. MILLER. Since 1893, when the company was reorganized, the first dividend was paid in 1900, a dividend of 5 per cent, and since that time it has increased. Let me say in that connection——

Mr. MICHELL. Are the employees in your factory organized?

Mr. C. L. MILLER. No; they are not. They have a beneficial society to which the company contributes half and to which the employees contribute half, which helps the employees in case of sickness or death.

May I say further in connection with the capital of the company that prior to 1893 there were three failures of the company, and that all that capital is really in there now in the form of old machinery and patents, so that that dividend of 15 per cent, when spread over all these years, would not mean that the company had made 15 per cent really, but, when scattered through all those years, it would amount to a dividend of about 5 per cent.

Mr. MITCHELL. Do you know whether any of the other companies which manufacture watches have fixed a standard price for the movements?

Mr. C. L. MILLER. I understand that the Waltham company has a maintained price on their high-priced watches. They have not been quite as successful in that because they also make a cheap movement. Our cheapest movement sells for $12.25 at retail. They make a watch which you can buy in a case as low as $5. On the cheaper watches they have not a maintained price, but they have on the higher grades of watches.

Mr. MITCHELL. That is the only line in which you are competing with them?

Mr. C. L. MILLER. In the higher grade watches?

Mr. MITCHELL. Yes; in the higher grade watches?

Mr. C. L. MILLER. Yes.

Mr. MITCHELL. How much of a variation in price on the higher grade movements is there between the movements manufactured by your company and the movements manufactured by the other companies?

Mr. C. L. MILLER. I do not know. I know the Waltham people have recently been advertising a $250 watch.

Mr. C. F. MILLER. When I said the prices were substantially the same, that is true to a large extent; but it is also true that the Keystone people have what is known as the "Howard," and that is what I think you have in mind when you speak of the Watch Trust. I wish to say a word about that.

They, the Howard Co., were the ones who recently came in and set a price on complete watches within the last six or seven years; but there is no arrangement between our company and any other company as to the fixing of prices or as to the value of the case. In other words, we are sharp competitors. I know the presidents of all the other companies, barring one, and while we correspond, but never on question of prices of our product, we are sharp competitors.

Answering the judge's remark about the Watch Trust, I wish to say with absolute certainty that there is no Watch Trust. What was known as the Watch Trust grew out of a proposed combination, including the Keystone, the Elgin, and Waltham Cos. about six years ago. At that time we were asked to join them, but we stood alone, and we stand alone to-day, and we defy anybody to say that we have any connection with them in any form whatsoever; but, on the contrary, our watches are sold lower than theirs. We have been asked a number of times by a most important friend of the Waltham Co. whether we would not stop making our No. 9–40. He said, "You can not make them for that money." He said, "If you will stop making them, we will stop making our No. 8–45." We said, "No; we are making a living profit on our No. 9–40, and we are giving the best article we know how to give for that price."

The Keystone Watch Case Co., which is in litigation now, also owns the Howard watch: and the New York Standard watch, which is made in Jersey City, is what was known as the Keystone Watch Trust some years ago; and one of the officials wanted to make a combination of these concerns, but nothing was ever done. We do not make any cases; we simply make the movements and buy a few cases, and supply those cases with the movements which we make, but we do not do that in very many instances. Is that clear to you now?

Mr. FLOYD. Yes; so far as I am concerned.

Mr. MCCOY. You said a while ago that the manner of service in the case of such articles as watches is quite an important proposition, and you said that the matter of service is also an important proposition in the case of automobiles. Is it not equally so that the question of service comes in in the case of a retail grocer or a retail butcher? In other words, taking my own case; I live in East Orange, N. J. If I patronize a New York butcher or a New York grocer, that New

York butcher or New York grocer is not particularly interested in me, and in that case what I would complain about in the matter of service is that I can not get service from the New York butcher or grocer as I can get it when I am dealing with my own local man. For instance, if I get from my local grocer a couple of quarts of strawberries that turn out to be in bad shape, I telephone him, and he has to take them back and send me others. I immediately get that service, which I would not get if I were dealing with a man in New York City. So the service question is intimately connected with local retail business?

Mr. C. L. MILLER. Exactly; and not only in the matter of watches, as I tried to point out, but it is intimately connected with the matter of the clothes you wear. If one of you gentlemen buys a suit at a ready-made house, and the buttons come off or a seam rips, you will take those clothes back to your clothing dealer, and you will require the clothing dealer to make good on that suit. It is also the same way in the case of a pair of shoes. So this question of service is a very common thing, not only in the watch trade, in the matter of mechanical devices, but in everything we buy.

In the Keystone Watch Case Co.'s case which the Government brought against that concern there was this testimony, and to my mind it should be put in the record here

A certain notorious price cutter swore that he would not handle Howard watches because he would not ask his customers to pay 50 per cent profit. The attorneys for the Keystone Watch Case Co. subpœnaed him to bring in his cost sheets. The next day he came in with his cost sheets on the particular line of goods which he had been pushing, instead of this particular line of Howard watches. The goods which he was pushing were unknown goods; and now note what those sheets showed. They showed that on the goods he was substituting he was making a profit of 115 per cent. If the committee desires it, I can get a copy of that testimony to insert in the record.

That is a startling fact. It would not be so startling if it was only a single instance. But that is common.

About three months ago I went into the store of a retail haberdasher in my own town, and I said to this man, "Would you be good enough to show me your cost prices on Manhattan shirts, and half a dozen other well-known articles you gentlemen are wearing to-day; and will you also show me the cost price of the goods you sell under the name of Smith & Jones?" He showed me his cost sheets, and I found that his profits on those goods which were not widely known were nearly double his profits on those articles which I first mentioned. It is much easier for a dealer to sell articles which are nationally advertised. He spends less for clerk hire, because it does not take any of the time of the clerk to "talk up" articles which are well known and which are so frequently called for. And he does not have to substitute something which is "just as good." That shows that the national advertising of goods of that kind, which leads to large scale production, reduces the cost of production, and also reduces the cost of distribution, and the public gains by it. The public gains by this well-known and well-advertised name, and the merit which stands back of it. When you go into a store to buy a Manhattan shirt, you know you will get service, and good

service from the retailer, because the manufacturer will stand back of his product.

The consuming public is interested in this question of price maintenance. On an article on which there is not any price maintenance there is a great deal more profit to the retail dealer than on the known articles.

Mr. McCoy. Is there not another fundamental proposition involved in this whole thing, and that is that it is economical itself to suppose that the community at large is benefited by the sale of goods under a reasonable price?

Mr. C. L. Miller. That is so. It may be said that if a man buys a Hamilton watch at a cut price, does he not benefit? Of course he does. But, as I have tried to point out, the retailer can not continue to sell them below a reasonable profit, therefore the great mass of the people will not benefit. Is it worth the cost to all the other retail dealers in this country to have one or two articles cut in price and two or three people benefited, when at the same time the whole trade is injured by the transaction and the article bound to be deteriorated in quality?

Mr. Volstead. Let me suggest this to you: Does it not result, in a large measure, from the fact that a firm dealing in a large line, such as Sears, Roebuck & Co., or Montgomery Ward & Co., or the big department or chain stores—they are actually selling their whole line at considerably less because they have a great many economies which the small storekeeper does not have, and is there not a tendency toward eliminating a great many of these people that make for the high cost of living?

Mr. C. L. Miller. No; and for this reason: It is a known fact that the cost of doing business to the big department stores is considerably higher than the cost to the smaller stores.

Mr. Volstead. Let me tell you something right there. I had a conversation with a merchant in my town a couple of years ago. He was complaining very bitterly of the situation. He took one of the Sears, Roebuck catalogues and showed it to me. He said to me, "There is practically not a thing in my store that they are not advertising at figures less than I can buy them for at wholesale." He was perfectly frank with me. He was complaining of the situation. There is not any question in my mind that those people are selling, as a general rule, at a considerably less price than the local store. I do not believe you can convince the public that that is not true, and that is the one thing that is going on now, the destruction in a large measure of the small stores. How are we going to stop it? By legislation? Or are we going to allow the economic development to go on, with the consequent result of eliminating a great many of those stores? I think it is a very grave problem which we have before us.

Mr. C. L. Miller. I do not think our president would favor any legislation which was aimed at any one class, whether it was the mail-order house, the chain store, or anything else. Let me say to you that the reason that the mail-order house has been able to undersell these stores is because they have a favorable price. We ask that that be stopped, and we think it is very important that it shall be stopped. We think it is a very important matter for the small retailer.

Mr. VOLSTEAD. That is a different problem from the question of fixing price.

Mr. C. L. MILLER. It seems to me that the two questions are absolutely bound up together.

Mr. VOLSTEAD. There is no doubt in my mind that in many places there are two stores where there ought to be only one, and that does not help to reduce the high cost of living. I realize that it is an awfully hard and cruel proposition to say to a man, "Get thee out." But we are confronted with that thing. You take the situation and view it from any angle, and there is no doubt in my mind that these fellows are getting squeezed. What we are going to do to solve the difficulty is a very hard problem.

Mr. C. L. MILLER. I think if you do not stop this you will have a greater monopoly in retailing. You know these mail-order houses do not buy things by the dozen. They buy them by the carload or by the trainload. They own many big factories, and they can make, in many instances, their own prices and can sell those goods at a much less price.

Mr. VOLSTEAD. Let me give you one illustration along this line. A short time ago Sears, Roebuck & Co. went to a concern in Iowa for the purpose of getting some manure spreaders. The agent of Sears, Roebuck & Co. said to the manufacturer, "I want you to give me a price just as low as you can make it." They gave a price lower than the price at which they had been in the habit of selling to the trade. When that article went into the catalogue of Sears, Roebuck & Co., it was listed for just exactly the same figure at which they had purchased it. The question was, how did they make their money?

They did not handle those goods at all. When an order was sent to Sears, Roebuck & Co. for one of those manure spreaders, they sent the order on from their office to the factory. But they got the money, because Sears, Roebuck & Co. sell for cash, and the money was deposited in some bank in Chicago, I have been told. They draw interest on their deposits. They settle with the manufacturing company in Iowa a month or two later, and all the profit they got out of that transaction was the interest on the money which they had in the bank, and, of course, it helped otherwise to stimulate their trade in that community. What did they have in it? Absolutely nothing but a contract, and the total expense was the expense for the stamps. How can you beat anything of that kind?

Mr. C. F. MILLER. That is the extreme limit, and do you not foster a monopoly there?

Mr. VOLSTEAD. I do not deny that. It is going on all the time. I know how they do it in reference to buckets. They take the output of a certain factory. They do not put a dollar in that factory; they do not have a dollar in the shape of stock. They send the order for buckets from their establishment to the factory, and, getting the cash at all times, they take no chances on losing anything. There is no question, I think, so far as the expense is concerned, that it is considerably less than that of the retail dealer, and I do not believe anybody could ever convince me that they can not do business at a profit and undersell every retail dealer in the country.

Mr. C. F. MILLER. Nobody will dispute that. You are right in regard to that particular article. Of course, that is a big machine, and it is not profitable for them to move that around. But would

that hold good with a watch, and would that not really, in the end, put everyone of these dealers in the United States in the poorhouse?

Mr. VOLSTEAD. I am not disputing that fact, but I am giving you the situation we are confronted with, and I think that is the real situation. I think that is the greatest problem we have before us, and the question is, how are you going to deal with it?

Mr. C. F. MILLER. By putting a large penalty on quantity price; would that not avoid it?

Mr. VOLSTEAD. That may be a matter for consideration.

Mr. C. F. MILLER. If every person is treated as we have treated our people for the last 20 years, there is no question about it at all. This whole thing would be settled in five minutes.

Mr. C. L. MILLER. May I suggest, that after a mail-order house has driven out all the retail dealers, they are going to stop all underselling; they are going to raise the price.

Mr. VOLSTEAD. The same thing occurred when the department stores started. I remember very distinctly when the department store was started in Minneapolis and St. Paul. The local merchants complained very bitterly because they insisted they would be driven out of business, and I think that is true in a great many other cities. You will find the department squeezing out the general merchant. They do not squeeze out the grocery store, because he is serving a local situation.

Mr. C. F. MILLER. Is there not a way of taxing them on the number of departments they have?

Mr. VOLSTEAD. I understand they do that in some foreign countries, but I do not imagine that we are likely to do it here. I suppose there might be some question as to our right to do it, because it is a local enterprise.

Mr. C. F. MILLER. We have given this matter much serious thought for many years. We can not see anything except to treat everybody alike and let everybody live. We have to let the success of the manufacturer depend on the merits of his goods and the honorable treatment he is bound to give the people who deal with him.

Mr. VOLSTEAD. I do not see how your price-fixing plan will solve the real difficulty that is underlying the whole situation. It might do something toward keeping the retailer in business. As long as the retailer can obtain goods in the way he is doing now, probably because he manufactures a great deal of the stuff himself, it is going to be very hard to prevent what is going on now and the crushing out of a great many of the small stores.

Mr. C. L. MILLER. Would not price maintenance and the prevention of quantity prices fix it? I am speaking now of the standard articles. Sears, Roebuck & Co. and the other big mail-order houses get a tremendous advantage in the matter of quantity prices, and it is a tremendous injustice to the small people, the people who are trying to make a living.

Mr. FLOYD. In my opinion, the very thing you gentlemen are insisting upon, the practice which you carried on until the late decision of the Supreme Court of the United States on the subject, is the very thing that has brought about the condition that has made possible this very competition, the only competition that the people have. You put your goods in the store of the local merchant and establish a fixed price, and if he is an honorable man he is going to

keep that agreement. You tie his hands absolutely, and the people know you have fixed that price. They know that the local merchant has no control over the price, and with the spirit of independence which the people of this country have, they take advantage of the very thing you complain of and they make possible the very condition against which you complain. I think the very system you advocate has made it possible.

Another thing, in driving out small concerns, I think it works in this way: The manufacturer fixes a uniform price throughout the United States. Any man who knows anything at all knows that in different communities the cost of handling a certain kind of business varies, and when you allow a man to fix, arbitrarily, the profit to be made, everyone just alike, and give a dealer no latitude, the result is that if the expense of conducting his business in the local community makes it so that his business does not bring him in any profits he goes out of business.

Mr. C. L. MILLER. I will try to answer that. Yesterday I had the privilege of dining with a man who is a large jobber on the Pacific coast. I asked him whether it was necessary to interpose any other qualification on the Stevens bill besides the difference in the cost of transportation. I said it would cost him more to merchandise his goods, because he had to have salesmen who had to travel thousands of miles and therefore it cost him more to merchandise his goods than it does the people in the East. He said he thought they could take care of themselves; he said he could sell five or six lines of goods where the jobber in the East would sell only one line. And the retailer can carry some goods that are manufactured close to him and will therefore have an advantage over the man in the East, who has to pay a heavier freight. He said he did not think there was any necessity for any further differentiation than in the matter of transportation.

Mr. FLOYD. That is the jobber's proposition. I am talking about the retailer. A manufacturer in New Jersey or New York or somewhere else in the East, we will say, fixes a uniform price throughout the United States. The point I am making is that when all the lines of industry have that same arbitrary arrangement which you formerly had for 10 or 15 years before the recent Supreme Court decision and which was not confined to manufacturers of watches, so that the man who is in local business has no margin; if he is an honest man and wants to carry out his contract he has no margin except that fixed in the resale agreement. You absolutely tie him and you make him a victim of a competitor in every instance, and that stimulates the mail-order houses. On the other hand, you fix his margin of profit below the cost of running his business in that community, and he has to quit.

Mr. VOLSTEAD. Let me call your attention to another thing.

A few weeks ago we had a meeting of the Minnesota delegation. We had one of the large wholesale grocers at St. Paul, in fact, the president of the largest wholesale grocery establishment there. He was complaining very bitterly of the fixing of prices. He said that a few years before that over 100,000 bushels of oats had been shipped from his town to Michigan, to be made into oat meal, or something of that sort. He said those oats came back to him in packages with a probable profit of a thousand per cent, more or less, and he said

they are sold in St. Paul at the same price at which they are sold on the Pacific coast, because the price is fixed. He said that is an outrage and an injustice on t' e people close to the factory and close to the place where the raw material is produced. He said that the fact that those people, so close to the place of production, had to pay the same as the people a thousand miles away was an injustice, to the people living close to the place of production.

Mr. C. L. MILLER. It seems to me the answer to that is that we can not have a different price on every article in every place where it is sold.

Mr. VOLSTEAD. Of course you have that if you fix it, but if you do not fix it, competition will fix it, so that it will meet the local situation somewhat.

Mr. C. L. MILLER. The whole effect of the production of that particular article in that locality would be the difference in freight between the Pacific coast and Minnesota.

Mr. VOLSTEAD. Perhaps that is so, but there is another thing which this gentleman complained of in connection with the same thing. He said the article ought to have been manufactured there, but this arrangement prevents it from being manufactured where the raw material is produced. That was his idea.

Mr. C. L. MILLER. Very often freight rates take care of that very thing. Take, for instance, the case of Ivory soap. The Ivory soap people have opened factories at different places to meet the rates, and, in time, I suppose other things of that kind will have to be managed in the same way. I do not think we need to bother much about that question.

Mr. VOLSTEAD. I think the fixing of the price makes possible all this very unnatural situation of producing an article in an out of the way place and supplying the whole country, in that way, while if the price were not fixed and the competition would force you to build factories in other places, but if you can have an arbitrary price fixed high enough to take care of everything everywhere, of course, there would not be any object, particularly, in having your factories at the places where it would be the most economical in the matter of production and distribution.

Mr. C. L. MILLER. In that connection, I would say that the competition that you seem to look to is the competition between retailers. It is our position that the real competition which benefits the country is the competition between the manufacturers in the quality of the goods and in the price. It is this competition between the manufacturers, which emphasizes also the fact that we do not ask for price maintenance except where there is free competition in the manufacture of the goods.

Take, for instance, the case of breakfast foods. In the articles in which there has been price maintenance, there is tremendous competition. If I remember correctly, there are 103 active competitors of Kellogg's in that line of goods.

The CHAIRMAN. You mean in the manufacture of breakfast foods?

Mr. C. L. MILLER. Yes; the competitors of the Toasted Corn Flakes. That did not include Shredded Wheat, nor a great many other things of a similar nature, but only the actual competitors in their line.

The CHAIRMAN. Do you know what the composition of the Toasted Corn Flakes is?

Mr. C. L. MILLER. I do not know exactly. I have understood that it was largely corn toasted.

The CHAIRMAN. Corn or wheat?

Mr. C. L. MILLER. I mean wheat.

In conclusion, gentlemen, I would say that all we ask is that the distributing agent be compelled to treat all parties alike, just the same as we treat all of the distributing agents alike in our business; that is to say, that the jobber be compelled to sell to all retailers at the same price, and that all retailers be compelled to sell to the public—to the consumers—at the same price, just as we see that all jobbers and all the retailers get the same prices. We ask that in order to enable the little man to become a big man. We ask that so that the big man will not have any unfair advantage over the little man in the matter of price. The little man is undoubtedly ambitious to become a big man. I believe that the greatest help you can give the little man in order to enable him to become a big man is by allowing the manufacturer to fix a reasonable profit, and this retail competition will take care of itself in the competition in service and salesmanship, and other things.

Mr. FLOYD. If you are correct in your theory, why was it that when business was being carried on in that way, before the recent decision of the Supreme Court, for 8 or 10 years prior to that time, the big man grew bigger and the small man grew smaller?

Mr. C. L. MILLER. In the retail line he grew bigger through quantity price largely.

Mr. CAREW. Would you accept a bill which would authorize the manufacturer to fix a price, and to fix it so that he would get 10 per cent of it?

Mr. C. L. MILLER. I do not quite understand what you mean.

Mr. CAREW. I mean allow him to fix the price which would not give him more than 10 per cent profit?

Mr. C. L. MILLER. I think the profits must depend on the risks in the business.

Mr. CAREW. What profit would you say was a fair profit?

Mr. C. L. MILLER. In our business?

Mr. CAREW. Yes.

Mr. C. L. MILLER. As I answered a question along that line at the beginning, we are now making 15 per cent, but if you spread that over the entire period of our existence it gives us less than 5 per cent.

Mr. CAREW. Take it, for instance, for a year; would you say 10 per cent?

Mr. C. L. MILLER. You mean considering the years in which there has been no profit?

Mr. CAREW. Let us forget the past.

Mr. C. L. MILLER. I do not think that is fair.

Mr. CAREW. Suppose we pass a law to the effect that hereafter you should be allowed to fix your price, but in no case would you be allowed to fix a price any greater than would give you more than 10 per cent profit?

Mr. C. L. MILLER. Our business is open to the vicissitudes of new invention. If a new kind of watch manufacturing machinery comes

out to-morrow, all the capital which we have invested there in machinery is largely junk. Against that hazard we should have a correspondingly higher profit. Furthermore, I do not believe that that suggestion, with all due deference, is practical, because no business can start to-day and make 10 per cent profit during the first year.

Mr. CAREW. You are not in favor of that?

Mr. C. L. MILLER. I am not.

Mr. MITCHELL. You contend that the whole question is a question of competition among the manufacturers?

Mr. C. L. MILLER. Yes, sir.

Mr. MITCHELL. And there are seven manufacturers of watches in this country?

Mr. C. L. MILLER. There are nine manufacturers of high-grade watches.

Mr. MITCHELL. And there is practically a uniformity of price for all standard movements?

Mr. C. F. MILLER. I do not believe that is a fact. I do not believe that I properly understood your question before. Our prices are really lower than some of them. Some of the younger companies have a higher price than ours, and our prices, while set 20 years ago, have never been raised.

Mr. MITCHELL. You claim there is real competition?

Mr. C. L. MILLER. Absolutely so.

Mr. CAREW. Do you think that seven is a sufficient number of watch manufacturers?

Mr. C. L. MILLER. I do not know that there is anything to prevent a new watch coming in?

Mr. CAREW. You think there are a sufficient number in existence now?

Mr. C. L. MILLER. I feel that there is very severe competition now. Twenty-one years were passed in the development of machinery for the manufacture of the interchangeable watch. All watch factories have gone through that.

In conclusion I desire to say that all we ask is that we be let alone. We do not ask any legal penalty on the price cutter. We simply ask the right to select our customers. I understand that is provided for on the second page of the bill drawn by the chairman of the committee—the first bill. We ask that we be not penalized for having violated the Sherman law when we refuse to sell to somebody who has injured our business and who has injured the trade and the consuming public.

I thank you very much, Mr. Chairman, for the privilege of appearing before you.

Mr. FLOYD. We are very much obliged to you for the statement which you have made.

Mr. C. L. MILLER. I assure you, Mr. Chairman, it has been a privilege for us to have discussed this matter with you. We would like to have the privilege of filing a brief with the committee at a later date.

Mr. FLOYD. That privilege will be given to you.

(Thereupon, at 2.40 o'clock, the committee adjourned until to-morrow, Friday, February 20, 1914, at 10.30 a. m.)

The following are a few of the many resolutions passed by retail jewelers' associations indorsing price maintenance, referred to by Mr. Miller in his statement. Not a single retail nor wholesale association has sounded a discordant note on this question:

RESOLUTIONS ADVOCATING AND INDORSING THE FIXED SELLING-PRICE SYSTEM PASSED BY CONVENTIONS OF RETAIL JEWELERS IN 1913.

NATIONAL RETAIL JEWELERS' ASSOCIATION.

We again renew our allegiance to the principle of a fixed selling price, believing that it protects the consumer in that it insures to him quality, a fair living profit to the retailer, and protection to the manufacturer from unscrupulous and dishonest competition. As the wage earner is by God and nature entitled to a fair living wage, so are the retailer, jobber, and manufacturer entitled to a fair living profit, and they should not be exposed to commercial sharks who subsist and profit by the death of others. Keenly regretting recent decisions bearing unfavorably upon the question of a fixed selling price: Be it

Resolved, That this matter be, and is hereby, referred to our national officers, to be by them considered as to proper action next to be taken.

NORTH CAROLINA RETAIL JEWELERS' ASSOCIATION.

Whereas the jewelers are in favor of uniform prices on watches: Therefore, be it

Resolved, That we heartily recommend the efforts of the Waltham Watch Co. and the Hamilton Watch Co., as per their letters of recent date, saying that they will protect retail prices as far as the law permits and to continue their efforts to put their goods only into the hands of the jeweler and show our faith in their policy by giving them our cooperation and support.

COLORADO RETAIL JEWELERS' ASSOCIATION.

Resolved, That we go on record as emphatically opposed to any legislation that will eliminate a fixed selling price.

Resolved, That we ask all manufacturers of our lines of merchandise to compel jobbers to maintain equal fixed prices and sell to legitimate jewelers only.

Resolved, That we go on record as in favor of upholding and maintaining the restricted prices on all lines of our merchandise.

PENNSYLVANIA RETAIL JEWELERS' ASSOCIATION.

Resolved, That we go on record that we are emphatically opposed to any legislation that will eliminate a fixed selling price.

Resolved, That we ask all manufacturers of our lines of merchandise to compel jobbers to maintain equal fixed prices and sell to legitimate jewelers only.

MISSOURI RETAIL JEWELERS' ASSOCIATION.

Resolved, That we ask our Representatives and Senators from this State to vote against House bill No. 23417 and Senate bill No. 6273, which, when passed, would change the United States patent laws and eliminate a fixed selling price.

Resolved, That we go on record that we are emphatically opposed to any legislation that will eliminate a fixed selling price.

EXCERPTS FROM LETTERS RECEIVED BY THE HAMILTON WATCH CO. FROM RETAIL JEWELERS, SHOWING THE EFFECT OF PRICE CUTTING ON THEIR BUSINESS, AND INDIRECTLY ON OUR BUSINESS.

(These are typical of hundreds of similar letters referred to by Mr. C. L. Miller.)

ANAMOSA, IOWA, *November 22, 1905.*

You know when these goods are cut that it is only a limited time until you are compelled to cut the quality, and that to maintain the price means to maintain quality.

S. A. MCCROSKEY.

FARMINGTON, ILL., *March 21, 1906.*

I have not only lost sales on the Hamilton watch, but lost a good customer. It is also impossible to sell any article and guarantee same when it is catalogued by the mail-order houses, who only use them as leaders, and are not responsible for them after they leave their hands.

PERRY M. SLAUTER.

BELLFLOWER, MO., *November 8, 1905.*

I am carrying a few Hamiltons in stock, but if I have to sell them at those figures I shall cut them out entirely.

J. H. KEADLE.

RANDOLPH, N. Y., *May 7, 1906.*

Just a few days ago a runner from a watchcase company had an argument with me about Hamiltons, and he told me he met a peddler in Corry, Pa., selling Hamiltons at greatly reduced prices and that he was cutting the life right out of the business.

This may be erroneous, however, but the fact remains secure that what I am saying about mail-order houses I can prove to you without any question of doubt.

The only thing the jeweler can do in the future is to blacklist every manufacturer of watches in America and sell as many of the better grades of Swiss and English goods as possible and let Sears, Roebuck, Montgomery Ward & Co., the Cash Buyers' Union, etc., sell all of the balance. This is the only protection the legitimate jewelers will ever have, and if it becomes possible to kill you fellows off in that way I shall rejoice to see the time come, if I live and hold my business.

That will be the only feasible way that we can expect to have our rights sustained, and I shall glory in the time when it comes.

F. LARKIN, Jr.

DEER RIVER, MINN., *February 4, 1914.*

Inclosed find cutting from John M. Smith, of Chicago, a mail-order house. I thought you sold to the jewelry trade only. I am handling your watches, but if you are going to let the mail-order house advertise cut prices on them I will discontinue to carry them in stock.

L. C. RANDALL.

KEOKUK, IOWA, *November 9, 1908.*

I have 36 Hamilton movements in stock, and believe in your watches, but what am I to do the coming year against such competition?

JULES RENAUD'S SON.

NILES, MICH., *January 26, 1906.*

I have been pushing Hamilton watches because they were not handled by mail-order concerns. Of course, I realize that as an individual dealer I am of no consequence to you, yet I can not help but add my protest to that of every retail jeweler in the country. For my part, I shall stick to the people who protect the retailer and market their product through legitimate channels.

GUY M. LA PIERRE.

PRINCETON, IND., *September 20, 1905.*

We can not compete with such prices, and, of course, under such conditions, can not afford to handle your movements.

J. W. HANSEN.

WEYERS CAVE, VA., *November 11, 1908.*

Please return this inclosed page to me as I am going to take the matter up with the Hampden Co. also. I cut out the Elgin and Waltham Cos. long ago

on account of the mail-order evil, and surely thought in the Hamilton I had a watch they would never be able to get into their catalogue. Please let me hear from you.

JNO. W. EVANS.

PHILADELPHIA, PA., *August 2, 1906.*

What advantage is it to me to push Hamilton watches if those people can cut them like that? I would simply lose my customers as it would look as if I was charging exorbitant prices. There is something rotten about this which I would like to have explained.

JOHN A. KINSLER.

OZARK, ALA., *July 25, 1906.*

I have built up quite a little trade and demand for them, but am frank to confess if I can not be protected in the selling price I will cease to handle them. Will you please explain?

R. E. HOLMAN.

DURHAM, N. C., *October 9, 1905.*

As for our part, gentlemen, we wish to say that these people are not only cutting the life out of your watch, so far as price is concerned, but they are evidently buying the watch cheaper than we are, and we will thank you to thoroughly investigate this and let us know, if it is possible, what jobber these people are buying your goods from, as we will ever in the future regard him as little better than a thief; and, again, we wish to know your position in the matter, and if it is out of your power to control Messrs. Montgomery Ward & Co., we will be compelled to cut your watch from our list, as we have done the Elgin and Waltham.

JONES & FRASIER, INC.

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.	L. 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 20

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

The committee this day met, Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. Gentlemen of the committee, Mr. Untermyer is here this morning and will give us his views on the pending trust legislation, or on the bills relating to trust legislation, or on some of the bills.

Mr. Untermyer, suppose you direct your remarks very largely to the three tentative bills which we have in the committee print.

STATEMENT OF SAMUEL UNTERMYER, ESQ., OF NEW YORK, N. Y.

Mr. UNTERMYER. I would like to have it made plain, Mr. Chairman, that I am not here in the rôle of a witness, nor am I appearing here of my own accord, but at the request of the committee, in order to give whatever suggestions I may be able to present to the committee in regard to this legislation.

The CHAIRMAN. That is understood. The subcommittee which had under consideration these three tentative bills that I speak of requested Mr. Untermyer to come here to-day, just as the committee has done and as the chairman of the committee has done in other

cases, requesting gentlemen from various parts of the country—bankers, lawyers, merchants, and others—to come before us and give us their views as to further antitrust legislation.

Mr. UNTERMYER. Mr. Chairman, in my view of this legislation it will not be possible to separate the trades commission bill in some of its aspects from the bills that are before this committee.

To that extent, and to that extent only, will I point out here briefly the additional powers which should be given that commission to cover certain phases of interlocking control, holding companies, and voting trusts. I realize the delicacy of your situation with respect to the other committee and your anxiety to avoid the appearance of conflict, but the subjects are so closely related that they should be dealt with as one body of legislation if you hope to evolve a satisfactory solution.

Dealing now first with the question of interlocking directors, the bill is, in my judgment, far too drastic and sweeping in some respects to be workable, while in its essentials it does not reach the vitals of the evils at which it aims.

It prevents any one person from being a director in more than one bank or trust company, no matter how far apart they may be in location or business relations. A man could not be a director in one bank in New York and one in Philadelphia or Chicago.

There seems to me no rhyme or reason in this sweeping prohibition. It is mischievous and can only lead to the substitution of the dummy director for the interlocking director.

The root of the evil to be reached lies in interlocking control of actual or potential competitors. That control is not now always evidenced by common or interlocking directors. That is only one manifestation of the evil. If eliminated, as now proposed, the evil would continue. Interlocking stock holdings and other forms of indirect domination are more important. The bill does not seek to reach them. I do not mean by this that interlocking control through identity of directors should not be prevented. What I mean is that it is only one of the many manifestations of control.

I have not prepared any formal statement or argument, and I would like, with your permission, now to go over the interlocking directorate bill informally with you in a colloquial way and submit such suggestions as occur to me. That is bill No. 3 of the committee print.

I suppose the committee has carefully considered the length of time that ought to elapse before this legislation is put into operation, but it has seemed to me that two years for that purpose is unnecessarily long, and that within that time the evils may accentuate and accumulate. One year would appear to be quite sufficient so far as the directorate control is concerned.

When you come to the seventh line on the first page of the bill, I suggest that you put in after the word "locomotives" the word "supplies," and on the same line, after the word "railroads," the word "equipment," and then when you refer to mining or selling coal I should imagine that mining and selling iron would be quite as important as mining or selling coal, in connection with a directorship in a railroad. In other words, it is quite as logical and important that railroads that transport iron shall be free from the producer

or the people who control the iron mines, as those who sell the coal. That is possibly true, also, as to other industries.

Mr. FITZHENRY. Where would you put the word "supplies?"

Mr. UNTERMYER. On line seven, after the word "locomotives."

Mr. FITZHENRY. After the word "locomotives" and before the word "or?"

Mr. UNTERMYER. After the word locomotives.

Mr. MCGILLICUDDY. The word supplies would come after the word "or."

Mr. UNTERMYER. After the word "locomotives," "railroad cars, locomotives or supplies or railroad equipment, railroad ties or structural steel." The business of making iron and steel railroad ties is almost as important as that of making rails.

Then on the eighth line I suggest striking out the words "or the conduct of a bank or trust company." It seems to me 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, although I realize that there are weighty arguments against that view and that many who have studied the subject differ from me.

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. I can quite see why, and I think it is a very wise provision, a man who engages in the manufacture or sale of equipment should be ineligible as a railroad director, but why a bank director should not be eligible as a railroad director, so long as there is no conflicting interest, and so long as they do not deal with one another, I do not see. The end sought to be attained, of 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. This danger could be largely averted if, as I hope and anticipate, these new laws shall result in reducing the number of directors in our great corporations, paying them substantial salaries and exacting rigid responsibility, absolute loyalty, and real service from them, as is done in other countries.

The idea of a bank or industrial company having 30 or 40 directors, as is the case now in some of our corporations, is ridiculous, and vicious in its results. It destroys all sense of responsibility. They are merely lending their names without apparent pay. They advertise a degree of supervision that does not exist. The business is done by the executive committee.

The board is a mere device for registering the acts of the executive committee, and the public is misled. In return, these men who thus lend their names secure illicit advantages from their connection with the company.

In England directors receive salaries and sometimes a share in the profits over a given sum. In Germany they also receive salaries and more frequently a substantial share of the profits. But in all Euro-

pean countries they are held to a rigid accountability. A man who would try to make a profit out of his company or speculate in its securities would be removed and disgraced. With us that sort of thing has been the rule rather than the exception. It is well within the fact to say that most of our great corporations have been shamefully exploited by their officers and directors in one way or another, and many of them in numerous ways. We have tolerated a degree of dishonesty that accounts for many ill-gotten fortunes, and have thought none the worse of their possessors.

Mr. DYER. Would you limit the number of banks in which a man may be a director?

Mr. UNTERMYER. I am coming to that.

Mr. FLOYD. What is your suggestion of an amendment after the word "coal"?

Mr. UNTERMYER. Selling iron or coal. I should say copper was almost as important, too.

Mr. MCCOY. Might not the word "supplies" be a little too broad? Why not say "railroad supplies"?

Mr. UNTERMYER. That should be "railroad supplies."

Mr. FITZHENRY. It is used in that connection there.

Mr. UNTERMYER. I think, with Mr. McCoy, that it is a little broad; "selling railroad ties, locomotives, or supplies."

Mr. MCCOY. I suggest "railroad supplies."

Mr. MCGILLICUDDY. You have the word there now; that qualifies all three of those words.

Mr. UNTERMYER. I went over this bill last night hurriedly. The phraseology is not quite as I would like to have it, and with your permission I will make it a little more exact later on.

At the end of section 1 I suggest this amendment: "No person who is an officer, director, or employee of any railroad or any other public-service corporation that is engaged in interstate commerce shall be an officer or director of any competing or potentially competitive railroad or public-service corporation, nor shall any such person be an officer, director, or employee of any other railroad or public-service corporation, as stockholder or otherwise, without the express authorization of the Interstate Commerce Commission, which is hereby authorized to examine into all such applications and to grant or deny the same in its discretion as in its judgment the public interest may require."

You see, you have not anywhere in this bill reached the crux of this evil. The evil here more largely rests in a common-stock holding than it does in a common directorship in the railroads. Some of the great capitalists of this country make it a rule not to go on boards of directors, but they control the railroad and the selection of the directors much more effectively than if they were on the board. If you are going to strike at the interlocking of interests and the interlocking of control in competing companies you can not reach the root of that control without reaching the stockholders, and for that reason I suggest that whereas section 1 does not allow a man to be a director of a railroad who is a director of any supply company, I do not think that prevents him from owning the supply company and being a director in the railroad. He can own the whole thing and still be a director in a railroad, or he can own the railroad and be a director in the supply company, or he may control both and dictate their boards and be a director in neither.

It was proven before the Pujo committee that no director in the United States Steel Co. has ever been named since its organization without the approval of Mr. Morgan. It was unnecessary for him to be a director. If this bill is enacted in its present form that domination may continue. So, too, it appeared that he and his partner, Mr. Baker, named and names every director in the Southern Railway and in various other railroads and banks through voting trusts that this bill does not attempt to reach. Thus J. P. Morgan & Co. might under this bill name every director both of the steel company and of various great systems of railway with which they deal, thus excluding all competition and still not offend against the bill, provided they personally keep off the boards, which they could well afford to do.

You can not make a hard and fast rule on that subject. You have got to lodge the power somewhere to investigate and to determine when the interests are conflicting in that respect. You can make a hard and fast rule that a man shall not be a director in two potentially competing railroad companies, or in a railroad company and a supply company, but that gets you next to nowhere. You can not draw the line as to when he is disqualified from being a director in or otherwise in control of a railroad company because he has an interest in a supply company as a stockholder. It might be only a trifling interest or it might be a large interest. Those are questions that must have wide discretion and elasticity and that must be determined through some executive body which can inquire into that subject and learn all the facts bearing upon the nature and extent of the interests. If the control is maintained through dummy directors, there must be machinery for determining that fact and of correcting the situation.

Mr. VOLSTEAD. Would not we have to lay down some rules by which this executive body would be governed?

Mr. UNTERMYER. The rules I would lay down would be these. I would lay down a hard-and-fast rule that a man can not be a director in two potentially competing railroad companies or other interstate institutions. I would lay down a hard-and-fast rule that he can not be a director in a railroad company and in a supply company. As to whether or not he can be a stockholder in two competing railroads, or a stockholder in a supply company and a director in a railroad company, or a controlling stockholder in one bank and a director in a competing bank, those are questions that depend upon the nature and extent of the interests and upon other circumstances as to which there ought to be some executive body to determine the question of the interest and its extent, otherwise you would paralyze business without reaching the evil. You can not say that a man who has 10 shares of stock in one bank shall not be a director in another bank in the same city. Such legislation would lead to the wanton and ill-considered throwing over of vast amounts of bank stocks in this country, with nobody to buy them, or still more likely to their being held under cover. Nor can you say that a man can not be a director in one railroad board because he has stock in another railroad not competing, providing it does not amount to anything like an influential holding. A commission can determine that in each case, but no fixed rule could do aught but create untold injury and confusion.

Mr. NELSON. You would limit the ownership if it would be a practical control, would you not?

Mr. UNTERMYER. Oh, yes; but of course it is never actual control in the large institutions in the sense of being anything like a majority or a near majority nor is it necessary that it should be in order to constitute actual and complete control. In a great railroad, if a man's directors are already in possession, 10 per cent is practical control. There is not in my opinion any single interest that controls a railroad, in America, with the exception of Mr. Hill and one or two others, that has 5 per cent of the stock, but they are almost as firmly entrenched as if they had it all. Experience has demonstrated that you can not dislodge them, even where gross mismanagement is proven.

The main reason is found in what I have christened as stockholder inertia in various addresses I have made on the subject. Another reason lies in the fact that many of our great railroad and industrial corporations are dominated by "banking" control that is sufficiently powerful to secure the proxies, especially from the brokers who are carrying stocks for their customers whilst the other holders are too unmindful of their interests to vote. Still another factor is found in the timidity of men to head a movement in hostility to the great interests and the fear that every such effort will be cried down as "blackmail" by these interests and the subservient financial press that depends upon their patronage. The ramifications and the ability to "reach" people who might otherwise raise their voices are so many that it has become apparent that where stockholders are widely scattered the corporation is at the mercy of those in control and that the State must exercise supervision.

Cumulative voting, which would secure minority representation, would do much to mitigate the evil, but there must also be severe restrictions put upon the power of directors to deal with their corporations besides wide publicity and Government supervision. When the corporation can no longer be safely exploited the incentive for the sort of control from which we are suffering will disappear.

Mr. NELSON. Would you leave it to the commission to determine when there was an injury to the public?

Mr. UNTERMYER. To determine when such holdings would be permitted, when a man may own stock in competing banks in the same city; it would depend upon a variety of considerations; it would depend upon the atmosphere and the determination of the commission, whether he is potentially in competing institutions.

But there should be a hard-and-fast rule as to directors in potentially competing institutions, which can be made hard and fast, and your bill makes a hard-and-fast rule; it prevents a man from being a director in more than one bank and trust company anywhere on earth. I should limit that hard-and-fast rule to potentially competing institutions and leave the rest to the commission, and there the power to prohibit should be broadened so as to include all conflicting interests that may represent control or substantial influence.

Mr. FITZHENRY. In this tentative alteration or amendment which you suggested, you suggest that we strike out "any bank or trust company" in lines 8 and 9.

Mr. UNTERMYER. Yes.

Mr. FITZHENRY. Would it not be wise, in your judgment, to have some prohibition in this statute against a director of a railroad company being a director in a bank or trust company that was dealing

in the securities of the railroad, because that is the way railroads are controlled, is it not?

Mr. UNTERMYER. No; railroads are not controlled by banks, in our State, to any great extent. That is not the case. Our national banks are not allowed to hold railroad stocks. Our State banks and trust companies are permitted, much to my regret. I hope this will be stopped.

Mr. FITZHENRY. I understand that.

Mr. UNTERMYER. And our State banks do not, to any great extent, hold such stocks, but our trust companies do, to a considerable extent at times. I do not see what relation there is between a bank director being a railroad director, in the essence of the thing.

Mr. FITZHENRY. Except where the bank or trust company is the fiscal agent of the railroad company?

Mr. UNTERMYER. Yes. That is an unmitigated and inexcusable evil that should be stopped. One of the recommendations of the Pujo report, which I am going to try to get into the form of legislation, is aimed to prevent fiscal agencies. They have been a curse to the country, and their prevention is one of the 27 recommendations of the Pujo report. The prohibition of interlocking control, holding companies among competitors, and voting trusts are among the others. I direct your especial attention to the report and to the maps and diagrams you will find attached in connection with your study of interlocking control and holding companies and voting trusts. We devoted months to the subject, and I believe the committee's recommendations, if followed, will solve your problems.

Mr. FITZHENRY. You think that provision would make it unnecessary to have any prohibition of that character in the bill?

Mr. UNTERMYER. I do. What I am afraid of is that this prohibition of any man who is a railroad director being a bank director will simply take away from the community all the available men we have and put nothing but dummies in their places. There is no reason for it. You are likely to substitute the dummy director for the interlocking director.

You can formulate no bill that will avoid this danger. Hence I urge that besides preventing absolutely certain obvious forms of interlocking and inconsistent control in the way I have already indicated you impose upon the trade commission the power and responsibility of investigating and preventing all the other forms under which may be hidden the sort of control that it is the purpose of Congress to prevent. In no other way can you meet the difficulty. You will be more likely to accentuate it.

Mr. MCGILLICUDDY. Have you drawn up anything expressing just what power you would give to the commission and what limitations you would put upon it?

Mr. UNTERMYER. None as yet entirely satisfactory to myself. I have some noted here which I jotted down last night. I have been before the Senate Committee on Banking and Currency for the past two days, at its request, explaining the stock-exchange bill and have not had an opportunity to dissect this plan thoroughly and in a manner satisfactory to myself. But if it is desired that I should do so, I would be glad to put what I have here jotted down in better form hereafter for the use of the committee. I want to make clear to the committee what the reasoning is on which these changes are based,

and I would like the members of the committee to interrupt at any stage and ask questions, because I think that the colloquial form of discussion is the only useful and instructive form.

Mr. TAGGART. What did you say with reference to a director of a bank and a director of a trust company?

Mr. UNTERMYER. I have not come to that yet.

Mr. TAGGART. You have referred to——

Mr. UNTERMYER (interposing). I have referred generally to the fact that a man should not be prevented from being a director in banks that are not actual or potential competitors; that is, in banks which are not located in the same city and do not appeal to the same clientele.

Mr. TAGGART. Take a bank and trust company in the same city.

Mr. UNTERMEYER. I have a proposed amendment on that subject. The Pujo report deals very fully with that. We presented a bill on that subject. It is one of the provisions embodied in one of the two bills attached to the report of the Pujo committee. It is to the effect that a man may be a director in one bank and in not exceeding one trust company in cities of not more than 100,000 inhabitants. That was put in because the members of the committee found that in their localities nearly every one of them had a bank that was allowed to do certain business and could not do other business and that a trust company had been formed by those interested in the bank to work with that bank to do the business the bank could not do. So I made the suggestion that in cities of 100,000 inhabitants or less, where it is not easy to get the right men for directors, one man may be a director in one bank and in not exceeding one trust company dealing with that bank.

Mr. McCOY. What about mutual savings banks?

Mr. UNTERMYER. They are differently constituted and regulated in different States. In your State and in mine they are not conducted for profit. A savings bank is like a charitable organization, somewhat. There is no stock and there are no profits, but I do not think that a savings bank director ought to be a director in a national bank.

Mr. McCOY. I was talking yesterday with a director of a savings bank in Newark, N. J., who is also a director of other banks, and referring to his savings bank he said that such a prohibition would remove all but one of the directors from the savings bank, or else they would have to get out of the national bank system, and he said they have hard work to get people to serve as directors at all; that they are under a severe penalty for any misdoing, or any breaking the law of the State, and it would take them all out.

Mr. UNTERMYER It is with the greatest difficulty that we can get them in our State and they only act from a sense of public duty. The men who are directors in a national bank with us are not, largely, directors in savings banks. Directors in some of the savings banks are very powerful; they control large sums of money. The directors direct the use of that money; they have deposits in national banks.

Mr. McCOY. Why would not that be analogous to the situation where a railroad director was also a director in a national bank. In other words, if there is no objection to that, why should there be any objection in the case of the savings bank, because the savings bank may put its money into these various national banks?

Mr. UNTERMYER. The savings bank is an investment corporation. Its securities consist to some extent of bonds. In our city some of the national banks have become promoting agencies. They are promoters, underwriters and issuing houses, and they underwrite, issue, and buy and distribute large amounts of securities. If you have a body of national bank directors who are also savings bank directors, you would have the same difficulty in regard to the question of investments. They would naturally want to deal with the investments that their banks had to sell. And the same thing would apply to the large life insurance companies. I think there is a grave question as to whether a director in a great life insurance company should be a director in a bank. You have failed to cover that feature. I think you should do so.

Mr. MCCOY. I know of a case in which if you should forbid the directors in a national bank being directors in a savings bank, the only director who could remain would be a man who is not a director in a national bank, but who is very powerful in a very powerful trust company, and so you see if you have gotten rid of these national bank directors from the board of the savings bank you would have left a man who is more powerful than any one of them in a more powerful trust company than a bank.

Mr. UNTERMYER. You can not safely base your legislation on isolated instances; you have got to look at the broad principles involved and what your law is intended to prevent. You can not afford to take the temporary inconveniences too seriously into account. Most of them can be overcome by a substantial reduction in the number of directors in each institution. In that way there will be found enough responsible men to go around, with the vast advantage that each director will have an undivided interest in his own institution, which is as it should be. Then, and not until then, will you secure the restoration of real competition.

Mr. MCCOY. With regard to our savings banks in New York and New Jersey, they are purely, theoretically at any rate, charitable institutions, so far as the services of the directors are concerned.

Mr. UNTERMYER. So are the national banks in that regard. at least upon the surface. The directors are presumably working without compensation.

Mr. MCCOY. Yes; but they are looking out for their own private interests, whereas, theoretically at least, in a savings bank they are looking out for somebody else's interest.

Mr. UNTERMEYER. I confess that is a subject that is debatable, as to whether you should prevent a savings bank director from being a director in a national bank.

Mr. TAGGART. Would it not be desirable, if you are going to arbitrarily limit the size of the city to 100,000, not to limit the right of a man to be a director in one bank and one trust company?

Mr. UNTERMYER. Unless you have a rigid limit in that respect you are going to perpetuate the present trouble. The reason for drawing the line is because of the difficulty in getting the right man in a small community. That difficulty does not apply to the same extent in a large community. I would like to see the rule extended to the great cities.

Mr. TAGGART. Would that not lead to all manner of embarrassment and uncertainty in our growing western cities that have now 95,000 people and next year will have a population of 100,000?

Mr. UNTERMYER. It is a question of principle. Are you going to have the prohibition unlimited; and if not, where are you going to draw the line? The same arbitrary situation is true of a town of the population of 250,000, if you put a limit there. If there is to be a limit, you must put it somewhere, and it will always be an arbitrary limit.

Mr. TAGGART. Would you be willing to limit the right of a man to be a director in one bank and one trust company and no more anywhere?

Mr. UNTERMYER. I think that you will be weakening the measure you have in mind and the purpose to be accomplished. Large trust companies and banks in the same community ought to be active competitors. There ought to be a rigid line drawn there to accomplish that result.

Mr. TAGGART. A national bank could not do a full and complete business without acting in connection with a trust company, as you said.

Mr. UNTERMYER. A national bank could do all the business that, in my judgment, a trust company ought to be permitted to do. They are now doing many things in open violation of law and in disregard of safety. Our State laws permit trust companies to do things which national banks are wisely prohibited from doing, and which I hope that trust companies will be prohibited from doing before long.

Mr. FITZHENRY. Have you prepared any alterations or amendments to section 2?

Mr. DANFORTH. Will you read the suggested addition to section 1?

Mr. UNTERMYER. I propose to add the following: "No person who is an officer, director, or employee, or who alone or in conjunction with others owns or controls upward of 10 per cent of the stock of any railroad or other public-service corporation that is engaged in interstate commerce, shall be an officer, director, or employee of any competing or potentially competitive railroad or public-service corporation, or the owner, or holder, alone or in conjunction with others, of upward of 10 per cent of the stock thereof nor shall any such person be an officer, director, or employee of any other railroad or public-service corporation, or the owner or holder or otherwise control, alone or in conjunction with others, upward of 10 per cent of the stock thereof, without the express authorization of the Interstate Trade Commission, which is hereby empowered to examine into all such applications and to grant or deny the same in its discretion, as in its judgment the public interest in stock shall be deemed to own or control the same within the meaning of this section, whether or not the same is registered or held in his name."

Mr. CARLIN. You would apply competition there, too?

Mr. UNTERMYER. No, I would not. I would absolutely prohibit men being directors or large stockholders. As to noncompeting railroads, a man could not under this provision be a director or a large stockholder without the express authorization of the Interstate Commerce Commission, which is empowered to examine such applications and to grant or deny the same in its discretion, as the public interests may require.

Mr. DANFORTH. Then you give the Interstate Commerce Commission the privilege of saying who shall buy stock in any railroad corporation?

Mr. UNTERMYER. No, not who shall buy stock, except to an amount that threatens to be practical control.

Mr. DANFORTH. I gathered that from what you have read.

Mr. UNTERMYER. I should say to an extent not exceeding 10 per cent of the capital, without the permission of the Interstate Trade Commission.

Mr. DANFORTH. Take it to that limit and carry it to that conclusion, you would say that no man may buy more than 10 per cent of the stock of any corporation, provided he owns a like amount in some other class of trade or business which permits him to do so.

Mr. UNTERMYER. If it is a potential competitor.

Mr. DANFORTH. You would add that to the suggestion?

Mr. UNTERMYER. I say that because a man is really working or presumed to be working two inconsistent investment investments.

Mr. DANFORTH. Would not the trade commission be kept pretty busy in deciding who might and who might not buy stock?

Mr. UNTERMYER. I do not think they would be if my suggestion were adopted, that only corporations shall come under the jurisdiction of the trade commission which have a capital or a business exceeding a certain amount. As the bill now stands it would drag in all of the small businesses of the country engaged in interstate trade. It will embarrass small business as it ought not to embarrass it. My suggestion is that every corporation with a capital of, say, two million or gross assets of over two or three million, or a gross business of over two or three million—whatever limit you want to put on it, and that is purely arbitrary—every such corporation which wants to engage in interstate commerce shall apply for a license to the commission, and the commission shall then license those companies without thereby certifying to their legality.

The license shall simply be given to indicate that the corporation is one over which the commission assumes jurisdiction, leaving the great mass of small corporations that do interstate business, and with which the public is not concerned because of their size, entirely out of the jurisdiction of the commission, and freeing them from any of the embarrassments of Federal control.

Mr. DANFORTH. When the small corporation becomes sufficiently large, it would be put under the jurisdiction of the trade commission?

Mr. UNTERMYER. Yes; whenever its size was such as, in the judgment of Congress under the limitation thus fixed, would lead to the conclusion that the public had a substantial interest, it would come under the jurisdiction of the trade commission. This would exclude three-fourths or perhaps four-fifths of the interstate businesses from the jurisdiction of the trade commission and leave it a workable body with a reasonable number of corporations subject to its jurisdiction.

Mr. DANFORTH. Then a logical conclusion to be drawn from your outline of your plan is this: For instance, if I had sufficient money I could get control of the stock of several of the smaller corporations, but as long as I kept them below the limit, if the volume of business was below the limit fixed by the commission for licensing under the trade commission, I would swing clear of the entire proposition, and

I would be able to compete against the larger corporations as long as I kept the business down.

Mr. UNTERMYER. I do not think the bill would permit anything of that kind, because I suppose it would provide that where the same ownership of the same class of business controls more than one company, although separated into different entities, it should be regarded as one company engaged in interstate commerce. Therefore if I, for instance, controlled half a dozen different companies of the same character I would be guity of a misdemeanor if I engaged in interstate commerce without applying for a Federal license.

Mr. DANFORTH. Suppose I had, for instance, Judge McGillicuddy hold a part of the stock and it does not appear on the surface that we are the same person; that is the same difficulty.

Mr. UNTERMYER. That would be a reason for the existence of this power lodged with the commission, which would give it the right to inquire into such matters.

Mr. DANFORTH. But it will not have the right, as I understand the proposition, unless a corporation was up to the licensing limit, whatever that limit might be.

Mr. UNTERMYER. It will always have the right to inquire whether a corporation should have taken out a license, and whether it is operating in violation of the law. The fact that it may not be licensed would not interfere with the right of the commission to inquire whether it ought to have a license.

Mr. DANFORTH. Then you would put the entire control of all interstate corporate business in the hands of that trade commission whether the corporations are up to the licensing limit, whatever it may be, or whether the corporations are below that. In other words, if you thought those two smaller corporations, for instance, were working together, then you would prevent Judge McGillicuddy and myself from buying stock in those two corporations, because the trade commission might say we were working together?

Mr. UNTERMYER. I do not think I should put it as broadly as that.

Mr. DANFORTH. Is not that the conclusion to be drawn?

Mr. UNTERMYER. No; it is not.

Mr. DANFORTH. How are you going to avoid that conclusion?

Mr. UNTERMYER. In this way: I should give the commission power to investigate and determine whether it had jurisdiction over a corporation. If the commission found that it had jurisdiction, then it would take jurisdiction over that corporation; but if it found that it did not have jurisdiction, it would not take it. That does not keep that company under the control of the commission. It simply gives the commission the right and power to inquire whether its jurisdiction is being evaded, and there would still be under the control of the commission only those corporations which were within its jurisdiction.

Mr. DANFORTH. It seems to me you are going to make a pretty busy commission, because, while you place the licensing limit on those that have one or two million dollars' worth of business, or whatever the limit may be, you still leave within their jurisdiction the business of the smaller corporations, and the commission will necessarily be inquiring as to whether one stockholder is working in collusion with another stockholder or is buying into one small corporation so that it may work in cooperation with another corporation.

Mr. UNTERMYER. This is an attempt to limit its power.

Mr. DANFORTH. As to the licensing limit; yes.

Mr. UNTERMYER. No; it is an attempt to limit its jurisdiction and not to extend it. The purpose of this suggestion is to limit it so that in the regulation of corporations the jurisdiction of the commission will apply only to those whose business is over the limit which has been set, but the commission would have the power to determine whether it had jurisdiction. That is all. It can find out whether these smaller corporations are under one ownership. If it finds out that they are not, that settles it. If they are, they are proceeded against if they do not take out a license and do interstate business in violation of the law.

That provision very much circumscribes the jurisdiction of the trade commission over the jurisdiction as at present provided.

It is analogous to the power that is constantly being exercised by courts. They are called upon to determine in the first instance whether they have jurisdiction over the parties or the subject matter. If they decide that they have not, the parties are dismissed. If they determine that they have, they proceed to decide the merits of the controversy. Power to the trade commission to determine whether it has jurisdiction does not involve power to regulate or control the corporation unless the claim to jurisdiction is established.

Mr. DANFORTH. You still leave with the commission power to dictate—would you leave with the commission power to dictate as to which corporations a man might become a stockholder in?

Mr. UNTERMYER. No. But as to what extent his ownership in a competing company that is subject to the jurisdiction of the commission may be permitted. If you do not do that you might as well make this bill a blank piece of paper, because if a man can own the controlling stock in one company and control the directors in a competing company, whether by being a director or dominating stockholder, what good is your bill? He may be a director in neither and control both of them far more effectively than if he were a director in both. He may name all the directors.

Mr. DANFORTH. I presume you have some scheme that will prevent a man from doing that under cover? A man may be a dummy stockholder as well as a dummy director?

Mr. UNTERMYER. Certainly. Therein, and in stock control rather than in interlocking directors, lie your real problems. That is the purpose of the commission, to lodge somewhere the power to ascertain the facts, so as to prevent dummy stockholders and dummy directors. You will never get anywhere with this legislation unless you have some method of investigation.

Mr. VOLSTEAD. May I ask if you have given any consideration to the suggestion that the stock of corporations engaged in interstate commerce, the transfer of the stock of such corporations, shall be registered in some fashion?

Mr. UNTERMYER. There is a bill here, I believe, providing for the registration in the name of the true owner.

Mr. VOLSTEAD. Yes.

Mr. UNTERMYER. Many of the State laws under which corporations are organized require that now. You could have a provision requiring a stockholder to take oath at the time he votes that he is the beneficial

owner of the stock, but that would very much impede corporation management, to make every man who voted his stock, directly or by proxy, accompany it with a sworn statement.

Mr. TAGGART. The income-tax law would reveal a good deal of that.

Mr. UNTERMYER. That is a large question.

Mr. TAGGART. Is there any doubt in your mind about the soundness of a statute which regulates what anybody can purchase?

Mr. UNTERMYER. Yes; I think there would be very serious doubt about such a statute in regard to the securities of a corporation engaged in interstate commerce.

Mr. TAGGART. If you wish to sell and I wish to purchase, can you say how much I shall purchase?

Mr. MCGILLICUDDY. It does not undertake to say that. It says if you do certain things you can not engage in interstate commerce.

Mr. TAGGART. That is the way it would be regulated. If you were permitted to engage in interstate commerce, in that case you would be violating a provision of the law.

Mr. UNTERMYER. I suppose Congress has the right to prescribe conditions under which a corporation may engage in interstate commerce, and one of those conditions would be that no corporation shall so engage that is controlled by the same people who control a potential competitor.

Mr. MORGAN. You spoke about the limit to be placed on the business of the corporation; that is, the amount of stock and the amount of business, and you spoke about that limit being subject to the control of the Interstate Trade Commission. What is your idea as to what that limit should be?

Mr. UNTERMYER. No; I do not think the Interstate Trade Commission should have any discretion as to that. The bill should fix that.

Mr. MORGAN. I understand that; but what is your idea as to what the bill should provide; what limit should be provided for in the bill?

Mr. UNTERMYER. That is purely arbitrary. I should say, perhaps, a corporation with not more than $2,000,000 of capital.

Mr. MORGAN. Would you take into consideration their gross receipts?

Mr. UNTERMYER. Oh, yes; I would have the law provide that a corporation should take out a license if its business or capital amounted to, say, one or two million dollars; you might say if it had a capital of a million dollars or three million dollars of annual business, or three million dollars of assets. You might require any one or all of those conditions to be fulfilled in order that the corporation may secure a license.

Mr. MORGAN. Suppose you make it $5,000,000. Can you give us an idea as to how many corporations could come under the jurisdiction of the trade commission?

Mr. UNTERMYER. No; I can not. I have heard it said that it would not include over 200 corporations, but I think that limit would be too high. Any limit based on capital alone would be a mistake. If either its capital or business or assets equal a given amount it should be subjected to Federal jurisdiction.

Mr. MORGAN. Then suppose you make it two million?

Mr. UNTERMYER. I have no data on that here.

Mr. MORGAN. Is there any way in which members of the committee may ascertain that; is there any way in which that knowledge or information could be secured?

Mr. UNTERMYER. I imagine it ought to be in the Bureau of Corporations. I do not know. I have never sought to secure it. I do not think it would be an unwieldy thing if you do it that way, but I believe the bill is unwieldy in its present form; utterly unworkable. The whole business of the country should not be brought under Federal regulation. It is needlessly oppressive.

Mr. MORGAN. The basis on which you exclude the smaller corporations, is that done on the ground that the evil arises from the great corporations and not from the small ones?

Mr. UNTERMYER. Yes; on the ground that the country has not the same interest in the small corporation for the reason that it is not likely to reach the proportions of a monopoly or to operate in restraint of trade or be able to do so. And it is based on the further very important ground that you do not want to embarrass business. This idea of scooping in every small concern in the country which sells goods over the border seems monstrous.

Mr. MORGAN. You believe, in so far as possible, there ought to be freedom of contract and that this interference should only be from public necessity?

Mr. UNTERMYER. Yes; only where Congress believes that the public is vitally interested in the operation of those companies.

Mr. GORMAN. But these larger——

Mr. UNTERMYER (interposing). I mean the general public of the country, not the local public in the local community.

Mr. TAGGART. Will you state the exact end to be reached by this legislation?

Mr. UNTERMYER. We have rather drifted into a discussion on the trade commission bill, instead of discussing these bills, and my intention was not to discuss that bill here except on the two points relating to interlocking directorates and interlocking control and holding companies, because that is where the bills plainly encroach upon the field of one another.

My suggestion was that certain forms of interlocking control and of holding companies, which I will come to hereafter, should be vested in the interstate trade commission, and that there should be certain rigid rules as to interlocking directorates and holding companies, but that as those rules can not effectively cover the whole field, that there should be a zone of discretion beyond those rules lodged in some executive body.

Mr. CARLIN. How far ought we to go as to holding companies?

Mr. UNTERMYER. I will come to that later, if you will indulge me.

We now come to the second section of the bill. On page 2, at line 5, I would put in, after the word "employee" "or beneficially interested as stockholder or otherwise, except as permitted by section 4 hereof."

Mr. CARLIN. What is that exact language?

Mr. UNTERMYER. I will give you the exact phraseology later.

In other words, it provides that after two years no person shall, at the same time, be a director or other officer or be beneficially interested as a stockholder or otherwise, except as permitted by section 4.

The same section on the same page, at line 17, I would suggest be amended so that it shall read that a man shall not be eligible who is an officer of another bank which is a competitor of the first bank. This bill now does not allow a man to be a director in more than one bank.

Mr. CARLIN. You would make that conform to section 4?

Mr. UNTERMYER. I would make it so that a man could be an officer in as many banks and trust companies as he chooses, so long as they were not potential competitors and in the same community.

Mr. CARLIN. That is what we do with industrials, in section 4.

Mr. UNTERMYER. Not entirely; I do not so understand it.

The following is an amendment that I propose to section 4:

That no person shall own or be beneficially interested as stockholder or otherwise, except as herein provided, in two or more Federal reserve banks, national banks or banking associations, or other banks or trust companies which are members of any reserve banks and are operating under the aforesaid act, that are located in the same city or town, or that are actual or potential competitors; nor shall any person exercise, alone or by arrangement or understanding with others, control over any two or more such banks, banking associations, or trust companies, either through stockholdings, dummy directors, or otherwise: *Provided, however*, That a stockholder in one of such banks, banking associations, or trust companies may own or be beneficially interested to the extent of not exceeding 10 per cent of the stock in one or more other of such banks, banking associations, or trust companies.

Then I propose to add a new section, section 5, to read as follows:

No person owning or beneficially interested in any shares of stock of banks, banking association, or trust company subject to the provisions of the aforesaid act shall enter into any voting trust or other agreement or arrangement for the transfer of the voting power on such stock to trustees: *Provided, however*, That such owner or person beneficially interested may grant proxies to vote upon such stock which shall be valid for not more than six months from the granting thereof.

I will explain the reason for this provision against voting trusts.

It was found in the Pujo investigation that the stockholders of the two greatest trust companies in the United States, located in New York City, the Guaranty Trust Co. and the Bankers Trust Co., having resources together of between four and five hundred million dollars, had turned over their stock to voting trustees, and that the majority of the voting trustees were members or close associates of the firm of J. P. Morgan & Co., two of the three voting trustees being Mr. Morgan and Mr. Baker.

In other words, that while the public supposed that the imposing list of stockholders of those concerns represented the control of those banks, every director was in fact a mere dummy, selected under a voting trust by those three voting trustees. They controlled. Those two voting trusts have now been abandoned, following the disclosures of the Pujo investigation. It certainly ought not to be possible to have anything in the nature of bank stocks tied up in a voting trust, because it is of the very essence of the stability of the corporation that the stockholders shall exercise their power of voting upon their stock.

Mr. CARLIN. Do you think that criticism applies to banks?

Mr. UNTERMYER. They were two banks. They were trust companies, but of course what would apply to one kind of bank would be equally applicable to another. From that moment voting trusts in financial institutions became very unpopular, and these gentlemen were finally impelled by the force of public opinion which condemned

this device and were compelled to disband them. One expired and was not renewed, and the other was abandoned before the date of its expiration. They had been in existence, one of them, since 1903.

Mr. CARLIN. I understood your criticism at the beginning was that we ought not to prevent bank officers from being directors in railroads.

Mr. UNTERMYER. No.

Mr. CARLIN. And yet the same firm you have just named, the members of whom were members of the voting trust of the two banks you referred to, has the voting trust for a number of railroads; for instance, the Southern Railroad.

Mr. UNTERMYER. Yes; that is true. That is all very sharply criticized in the Pujo committee's report.

Mr. CARLIN. Your position is that we ought not to affect banks in this way, and yet you know that Morgan & Co. hold the voting trust for the Southern Railroad.

Mr. UNTERMYER. I am speaking of the voting trust for banks. I am also opposed to permitting voting trusts for railroads except with the permission of the Interstate Commerce Commission, but in this case you assume that the stockholders controlled the bank and the railroad.

Mr. CARLIN. But the voting trust happens to be the financial end of the proposition.

Mr. UNTERMYER. I would do away with voting trusts, except as I have stated. There are occasions when it has proven to be a protection to a weak road being oppressed and controlled by a powerful clique with ulterior purposes during the period of rehabilitation following reorganization. I would permit the commission to permit this protection when it was thought wise. That is what this section is intended to do. If you do away with voting trusts generally, what reason is there for a man who is a railroad director not being a director in a bank?

Mr. CARLIN. You are trying to protect them in the directorship, but as to whether we should go any further, that is another question?

Mr. UNTERMYER. Does it not strike you that the voting trust is the most aggravated form of control?

Mr. MCCOY. That is the essence of control.

Mr. UNTERMYER. That is the essence of control. In the report of the Pujo committee you will find a list of railroads which had come under the control of Morgan & Co. through reorganization and voting trusts. In this country railroad reorganization and voting trusts have put, I should say, 100,000 miles of road under the control of a few men. That is the reason the Pujo committee's report recommended certain reforms in railroad reorganizations.

Mr. TAGGART. What would you think of requiring railroads to deposit directly in banks that are under the control——

Mr. UNTERMYER. That question, I assume, is not before this committee; but that is another recommendation of the Pujo committee's report, to prevent railroads from having fiscal agents and from depositing their moneys with private bankers. It is a great abuse, and I can not understand why these gentlemen persist in it. These bankers keep no reserves, make no statements, are subject to no supervision. They are simply defying public opinion and the rights of stockholders.

The directors who are permitting that sort of thing should be removed. If the hundreds of thousands of stockholders whom they are falsely assuming to represent knew the facts, they would soon be brought to account. But there is no way to find out. All we know is that Morgan's held $168,000,000 at one time in that way.

Mr. FLOYD. Have you any further suggestions with regard to section 2?

Mr. UNTERMYER. Yes; I have.

In lines 14 and 15, which read, "and a private banker and a clerk who is a director in any State bank or trust company," the word "officer" should be inserted before the word "director," and I should also add "or beneficially interested as a stockholder or otherwise, except as permitted by section 4, in any State bank or trust company now operating under the provisions of said act shall not be eligible as officer or director," instead of "director," "shall not be eligible to be an officer or director in any bank or banking association or trust company that is located in the same city, town, or village, or that is an actual or potential competitor of said bank or trust company of which such private banker, stock or bond broker is an officer or director."

If a man holds stock in violation of these provisions, controlling competing corporations, the act would paralyze his voting power upon the stock so held.

Mr. CARLIN. How do you expect to reach a voting trust in a trust company? That does not seem exactly clear to me.

Mr. UNTERMYER. All you could do would be to provide that no man would be eligible as a director in a bank operating under the Federal reserve act who was a director acting under a voting trust.

Mr. CARLIN. We accomplish that now by driving him out whether it is a voting trust or not.

Mr. UNTERMYER. If you attempt to drive them out entirely, it is a different matter. You can not reach a man who is a director in one trust company under a voting trust and nowhere else.

Mr. CARLIN. That is what I want your idea about. He would now be prevented from being a director in a national bank at all. Now, then, whether it would be a voting trust or not, he is prohibited from being a director. I was wondering whether you had any other idea as to how we could reach the trust company.

Mr. UNTERMYER. I do not see how you are going to reach a man who is a director in one such trust company that is a voting trust and in nothing else. My suggestion had reference to the possibility that you would not allow a man to be a director in a bank and a trust company in a certain community. If you are going to leave that prohibition as broad as it now is, it covers the situation.

Mr. FITZHENRY. You had a limitation, using the limitation of 100,000 population, that you would apply in regard to banks and trust companies, did you not?

Mr. UNTERMYER. Yes; where a man was a director. That is a mere arbitrary limitation.

Mr. FITZHENRY. There ought to be some limitation of that kind, and you would recommend 100,000?

Mr. UNTERMYER. Yes; I think so.

Mr. FITZHENRY. For instance, in the State of Illinois every national bank has its trust company and savings bank. It has to do

that in order to meet the demands of its customers, and it is simply the national bank going into the State banking business for the purpose of performing its own functions.

Mr. UNTERMYER. That is not to the same extent true in New York State, because the national banks and trust companies do practically the same general class of business, in large measure.

I do not believe it will do much harm if you take off the limit entirely and allow a man to be a director in one bank and one trust company. I think that is what you will come to.

Mr. CARLIN. If you do that, why not let him be a director in two?

Mr. UNTERMYER. It is only a question of how far you can conduct business with these limitations.

Mr. CARLIN. It would not be much more hurtful with a limitation of two than of one.

Mr. UNTERMYER. Certainly. It would be more hurtful to be in one trust company and one bank than to be only in one bank. I concede that. I am looking at it from the broad point of view of obstructing business as little as can be avoided. Here you have a vast country of different States and different laws. A trust company in one State is an entirety different thing from a trust company in another State. In some States the trust companies do a large savings bank business, and in other States they do a big business in farm mortgages.

Mr. CARLIN. Let me take up your suggestion in regard to dummies. Take a national bank. A director in a national bank has to own at least 10 shares of stock in that bank.

Mr. UNTERMYER. He ought to be made to hold a great deal more.

Mr. CARLIN. Let us see. Take the State banks. The Fifth Avenue Bank of New York is a State bank. Each share is worth $4,000, or so the president of that bank testified here a few days ago. A gentleman who owned 10 shares of that stock would be considered rich in my country. Certainly he would have a potential interest in that bank.

Mr. UNTERMYER. You could say a man must have so many shares of a value of so much.

Mr. CARLIN. We do that now; the law requires him to have 10 shares. It depends on the value of each share as to the value of his whole stock.

Mr. MCCOY. I do not see how it depends on the value of the shares, because the percentage of the individual ownership to the total value is the same, no matter what may be the valuation of the stock.

Mr. UNTERMYER. Whether a man can be a director does not depend on whether his stock is worth a thousand dollars or forty thousand dollars.

Mr. CARLIN. I was trying to show how you would not have dummies acting in the banks of that sort.

Mr. UNTERMYER. You would where the stock is only worth a hundred dollars.

Therefore, I say you should say a man must have an interest equal to so much money.

Mr. CARLIN. How much?

Mr. UNTERMYER. It depends on the proportion. Suppose you said he should have an interest of at least $1,000, but it should not

be less than 1 per cent of the capital of the bank. Take that by way of illustration.

Mr. McCoy. Does not that come to my point, Mr. Untermyer?

Mr. Untermyer. That means that in the small communities $1,000 would be 1 per cent and more, while in a great institution with a capital and surplus of $100,000,000, a thousand dollars would amount to nothing at all. One per cent would be a million dollars.

Mr. Carlin. I think you are having the same difficulty that is in my mind as to just how to regulate by an arbitrary rule the potential interest in all banks.

Mr. Untermyer. I think you can figure that out, Mr. Carlin. I would not require a man to have a million dollars in order to be a director in any bank, but I would say he should have not less than 1 per cent up to a given interest. For instance, he should own 10 shares, or an amount not less than 1 per cent, provided he need not own over a $10,000 or $20,000 interest. It is a matter of phraseology. In order to get substantial interests in the directorships——

Mr. Carlin (interposing). I think that is reached by the present law; the national banking law reaches that sufficiently.

Mr. Untermyer. I do not think so. Do you think, for instance, that 10 shares in the City Bank reaches that?

Mr. Carlin. This Government has thought so for a good many years.

Mr. Untermyer. They have thought a good many things for a good many years, but they have been changing their views.

Mr. Carlin. They have not changed their views on that yet.

Mr. Untermyer. They have not started to revise the national banking law yet, and when they do they will make a great many changes. They have just about begun. Every attempt to do that at this session was rightly believed to be an obstacle to the passage of the currency bill, and those who, like myself, had these suggestions postponed them in their desire to do nothing to obstruct the currency bill.

The national-bank bill attached to the Pujo committee's report makes a great many recommendations and changes in national banks. Section 4 of that bill——

Mr. Carlin (interposing). Let me direct your attention to this. Section 4 of our bill is intended to only include industrials. The criticism has been made that perhaps it does include transportation companies. Would that be your view of it?

Mr. Untermyer. Yes; I think so, as it reads at present, because you are dealing with banks and railroads in other sections of the bill, and here you are dealing generally with corporations.

Mr. FitzHenry. Regardless of the business?

Mr. Untermyer. Yes; I think so. Does it not strike you that way?

Mr. Floyd. It was not intended that way.

Mr. Taggart. Would you say a bank was engaged in interstate and foreign commerce?

Mr. Untermyer. No.

Mr. Floyd. We did not intend that this should include transportation companies.

Mr. Untermyer. That is a very trifling detail. I want to call your attention to the last part, from line 6, section 4, of bill No. 3, on through the rest of the paragraph. Is there not very grave doubt of the con-

stitutionality of that provision? Here is an act perfectly lawful now. A man may now be a director in two competing corporations provided they are not acting in restraint of trade, and this makes the man who continues in that position guilty of a criminal offense.

In the first place, it conclusively presumes him guilty, the mere fact that he is a director——

Mr. McCoy. That clearly would not do in criminal law.

Mr. Untermyer. This is a criminal statute.

Mr. McCoy. It says he is a criminal before the jury says so.

Mr. Untermyer. Have you considered the question of the constitutionality of the provisions of section 4, bill No. 3, from line 6 on?

Mr. Floyd. It says, in line 10, "conclusively presumed shall constitute a combination between the said corporations in restraint of interstate trade or foreign commerce." That is the view, that such an arrangement constitutes a combination under the Sherman Act, and that is conclusive proof.

Mr. Untermyer. That makes a man liable, criminally.

Mr. Floyd. In regard to the first part of your proposition, in all statutes, where you take new criminal statutes, you make unlawful things that have not been unlawful heretofore. Of course, it could have no retroactive effect. It would not apply to previous transactions, but every time you declare by law that some act is criminal that was not theretofore criminal you do that very thing.

Mr. Untermyer. See what the effect is.

Mr. Carlin. I do not think there is any constitutional question involved.

Mr. Untermyer. I do.

Mr. Carlin. We are just defining something there and including within the meaning of the Sherman law another condition.

Mr. Untermyer. Let us see. I have, let us say, a controlling interest in two competing corporations, and I have a right to have them to-day, we will assume. I protect my interests by being a director, and I have a right to be a director. If I continue to have those interests, and to guard them, I am a criminal.

Mr. Carlin. No, you are not; we give you two years to get rid of them.

Mr. Untermyer. I can not get rid of those interests, all of them, under the protection of the law.

Mr. Carlin. You can eliminate yourself from the board of directors.

Mr. Untermyer. That is a more evidence of my ownership. I am compelled to part with the attributes of ownership, and one of the attributes of ownership is to be a director; in other words, I must either surrender that——

Mr. Floyd (interposing). The same principle would apply to the bank director.

Mr. Untermyer. No; because that does not make him out a criminal.

Mr. Floyd. If he violated the statute he would be a criminal.

Mr. McCoy. Is not this the objection, Mr. Untermyer? It says that if such a condition exists.

Mr. Untermyer. Then as to the second proposition. Can you conclusively presume the existence of a crime without giving a man the right of trial?

Mr. FLOYD. I want to hear you on that later, but I want to pursue the other inquiry a little further, Mr. Untermyer. You say the right of ownership means the right of control, and, if I understand you, you have not objected at all to the provision where we prohibit the director in one national bank from being a director in another national bank?

Mr. MCCOY. But we do not make that a crime?

Mr. FLOYD. Yes; we do. Let me pursue the proposition a little further. Suppose we assume a law, then, that absolutely prohibits a director in one national bank from being a director in any other national bank. You say the ownership implies the right of control. Suppose this same individual, now, that is at present a director in two national banks, owns a controlling interest in those two national banks, and we make it a crime to be a director in the two after a certain time. I think the same principle applies.

Mr. UNTERMYER. I think not.

Mr. FLOYD. Why not?

Mr. UNTERMYER. The national banks were created by Congress, which reserves the right at any time to amend the charter, and he took his charter rights and his property rights subject to that act of Congress. These railroad and industrial companies are State corporations; they have their charters under the laws of the different States, and you do not assume to change them and can not change them.

Mr. CARLIN. Mr. Untermyer, to bring that to the last analysis. What you mean to say is you doubt whether Congress has a right to legislate with reference to industrials?

Mr. UNTERMYER. I say only Congress has not the right to change their charters. It has the right to change national-bank charters.

Mr. CARLIN. What would you do with the right of cumulative voting? If the ownership carries with it the right of control, your plan to prohibit cumulative voting fails.

Mr. UNTERMYER. No, I think you have a right to determine the conditions on which the corporation shall engage in interstate commerce.

Mr. MCCOY. But is not this the point you raise, Mr. Untermyer, about the conclusiveness of the presumption to be drawn from a given set of facts?

Mr. UNTERMYER. That is the second provision. I do not want to be understood as venturing a positive opinion at this time because my manner seems to be very positive. All I meant to say was, as I said at the outset, in looking this bill over without examining it very closely, it looked to me as though there were constitutional questions involved. I did not want to be understood as venturing any positive opinion. I will look into the question and, if you so desire, will send the committee a formal opinion to be embodied in the record here.

Mr. CARLIN. There have been a great many changes in the construction of the Constitution.

Mr. UNTERMYER. You mean judicial legislation as to the meaning of the Constitution?

Mr. CARLIN. Yes, we are finding an elastic Constitution.

Mr. FLOYD. I will say in drafting that provision we were not unmindful of the constitutional limitations upon our power, and we

drafted it in that peculiar way, because in that manner we thought we would probably avoid those difficulties.

Mr. UNTERMYER. Oh, the provision if constitutional is a mighty fine proposition, and I admire the ingenuity of it very much. Section 4, I think, is the most ingenuous of the body of laws you have put out, if you can accomplish the purpose in that way. It is a short cut and most effective.

Mr. TAGGART. Is not the sole question in section 4 whether it can be made penal to be a director in two corporations doing an interstate business?

Mr. CARLIN. Mr. Untermyer, now that you are engaged in the art of destruction——

Mr. UNTERMYER. I thought I was engaged in the business of construction? That is my sole purpose.

Mr. CARLIN. Then I would like to ask you to tell us now how you would construct that section?

Mr. UNTERMYER. I would like to have you explain your preamble to that question?

Mr. CARLIN. You have raised a constitutional question.

Mr. UNTERMYER. I stated that upon a superficial reading of it, the constitutional question sticks out, and Mr. Floyd said you had that in mind.

Mr. CARLIN. Admitting it does stick out, how would you change it to meet your own objections?

Mr. UNTERMYER. I think that is a fair question, but that you ought to give me a little time to consider it. I do not think a man is justified in embarking upon a system of criticism when he has nothing to put in its place. If I can not suggest a way to overcome the objection I shall withdraw the criticism.

Mr. CARLIN. I wish you would consider it in that light

Mr. UNTERMYER. Certainly.

Mr. FLOYD. In order that the committee may understand our view of it, I want to explain what I understand. The conclusive presumption is that such an arrangement constitutes an unlawful combination in restraint of trade under the Sherman law. That is why it is conclusively presumed.

Mr. UNTERMYER. But wouldn't you do away with all due process of law that way?

Mr. FLOYD. That is what is conclusively presumed. Now, after we have declared that to be a conclusive presumption of law, if a corporation is engaged in interstate commerce with these common directors, and that is conclusive proof he is engaged in an illegal and unlawful combination under the Sherman law, then, if in the face of the statute he becomes a director in two or more of them, it is the act of becoming a director in two or more such companies that becomes a criminal act in the face of the statute.

Mr. UNTERMYER. I understand.

Mr. FLOYD. And we give him two years in which to get out.

Mr. UNTERMYER. Yes; but just see how broad you have made it—"If such corporations shall have been theretofore, or are, or shall have been by virtue of their business and location of operation, natural competitors."

Mr. CARLIN. Of course, that is simply a rule of evidence.

Mr. UNTERMYER. Mind you, if it will go through, I think it is the most effective thing that has been suggested in all the history of this legislation.

Mr. CARLIN. I am right glad to know that you think that.

Mr. UNTERMYER. I think I said so before.

Mr. McCOY. Will you notice this provision, though. It does not simply provide that that state of facts shall create a conclusive presumption, but it is based upon another presumable conclusive thing, namely, that under certain circumstances, there is no real competition.

Mr. UNTERMYER. Yes.

Mr. McCOY. It says here, in line 4, section 4, bill No. 3, "The fact of such common director or directors shall be conclusive evidence that there exists no real competition between such corporations." And then it follows up a conclusive presumption with another conclusive presumption and there may, as a matter of fact, have been competition all the while. So you first presume there is no competition; then you presume that therefore he is violating the act.

Mr. UNTERMYER. That is one of the reasons why I say it is a question that involves serious consideration from a constitutional point of view.

Mr. CARLIN. Have you in mind the Union Bridge case?

Mr. UNTERMYER. No; I do not remember that case—what was that?

Mr. CARLIN. In the Union Bridge case that is where Congress required a bridge to be elevated in order to free commerce.

Mr. UNTERMYER. Where is that reported?

Mr. CARLIN. In one of the United States reports; I do not just remember which one, now. But it was contended that as the bridge was already there, it was a taking of property without due process of law; but the court held that was not the case.

Mr. UNTERMYER. Yes, I think you would escape under the civil end of it, but I think when you get to a question of conclusively presuming that to be a crime, you reach another proposition.

Mr. McCOY. As you may have presumed something to exist which a jury may have found did not exist?

Mr. UNTERMYER. Do not understand me as expressing any fixed opinion. I would like to consider the question further and will furnish a matured opinion by which I will be willing to stand.

Mr. CARLIN. No; I understand.

Mr. FLOYD. The presumption is that those corporations shall be conclusively presumed to be constituting a combination in restraint of trade—"in restraint of interstate or foreign commerce under the provisions of and subject to all the remedies," etc. Now, my position is that if a man is director in two or more corporations so engaged in interstate commerce, after the passage of this act he is put upon notice that he can not be a director in two or more of those corporations; and if he undertakes, two years after the adoption of that act, to become a director in two or more of them, it is the act of becoming a director that constitutes the offense.

Mr. UNTERMYER. Just as if you should say a man who becomes a director in those two companies by that act alone is a criminal. I suppose you have a right to do it, but what you say is this—you do not say he is a criminal by that act, but you say it is conclusive evidence that there is no competition between those companies. Sup-

pose he is indicted under this act. He wants to come into court and to show that there is the most bitter competition; that there are 21 directors in each company, and all the other 20 are different directors from those in the other company; that he is the only director that is a director in both companies, and they are cutthroat competitors. The statute steps in and says no.

Mr. McCOY. He may be the only common stockholder, too?

Mr. UNTERMYER. Yes. The statute says, "No; you can not do that; you are guilty; there is no competition."

Mr. CARLIN. It is just what we are trying to do.

Mr. UNTERMYER. It is a pretty good way of stopping this evil, if you can do it—the best way I have yet seen suggested. But can you do it?

Mr. CARLIN. We would be glad to hear you further upon that.

Mr. UNTERMYER. I would be glad to consider the matter, gentlemen, and if I get a chance to send you a brief on it. But I think that I have said pretty much all I have to say on the question of these interlocking directors.

Mr. FLOYD. Now, we would like to hear you on the holding proposition.

Mr. UNTERMYER. I would like to say a word before discussing the holding company, if I may, on this bill that adds sections 9, 10, 11, 12, and 13 to the Sherman law.

Mr. FLOYD. No. 1.

Mr. UNTERMYER. In section 12, line 20, in which you very wisely provide that a final judgment in a suit by the Government declaring a corporation unlawful is evidence of the illegality of it in other proceedings, that is both criminal and civil, is it not?

Mr. FLOYD. In regard to that query, I want to suggest that while this provision makes this evidence, it makes a decree in a civil and a criminal case conclusive evidence of the facts contained in the decree; that decree is only to be used, as I understand it, under the terms of the provision, in civil cases brought by other parties against the corporation.

Mr. UNTERMYER. Is it?

Mr. FLOYD. That is the way I understand it

Mr. UNTERMYER. I do not so understand it.

Mr. FLOYD. The facts are conclusive as to the same issues of law in favor of any party in another proceeding brought under proceedings involving the Sherman Act.

Mr. UNTERMYER. Yes; but that would be in any indictment by the Government against a director?

Mr. FLOYD. Oh, no.

Mr. UNTERMYER. Yes; it would. That is a proceeding.

Mr. CARLIN. Mr. Untermyer, does not this occur to you, that we would have an undoubted right to simply create a presumption there, allowing the right of rebuttal?

Mr. UNTERMYER. Yes; certainly, because the only question is whether you give a man due process of law. There is a fundamental difference between making a state of facts presumptive and conclusive evidence.

Mr. CARLIN. That would have been a mere change of evidence. Now, we have merely gone a step further and say we will create the presumption, and the presumption is conclusive.

Mr. UNTERMYER. That raises the constitutional question. I agree you could have made it prima facie or presumptive.

There is the further consideration that whilst the judgment is conclusive against the corporation and in favor of the Government and of all injured parties who are not bound by it, it is not even evidence in favor of the corporation against such injured parties in suits they might bring, if the judgment in the Government suit is in favor of the corporation. That comes perilously near to offending against the right to due process of law. It is, of course, denying the equal protection of the laws, but that provision, as I recall it, applies only to the States.

Mr. FLOYD. To answer your proposition, we are talking about suits brought by the Government in the first instance.

Mr. UNTERMYER. Civil or criminal?

Mr. FLOYD. Yes.

Mr. UNTERMYER. That is right.

Mr. FLOYD. Now we come to line 25 and say "of any other party." That means other than the Government, because you are speaking of the Government in the first instance. "Any other party" excludes the Government.

Mr. UNTERMYER. I think not.

Mr. FLOYD. We so construe the language. At least, that is what we intended. Now, we say in suits brought by the Government, civil or criminal, in which a judgment is obtained, that the decree so obtained may be used by any other party as 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 or involving the provisions of this act, which we intended to add no right under section 7 of the Sherman Act to recover damages, but under a new proceeding to bring an injunctive suit.

Mr. UNTERMYER. Yes, I understand. If you will make that reciprocal you remove the objection but I don't think you can make the judgment conclusive in favor of the other parties and not against them. It is at least doubtful.

Mr. FLOYD. And I think under the language of the statute "any other party" would exclude "the" party, as the Government is the party mentioned in the first instance.

Mr. UNTERMYER. That is a question, Mr. Floyd, and that is the reason I am calling your attention to it.

Mr. FLOYD. Yes, I am glad you did and would like to have you think further on that.

Mr. UNTERMYER. I will do so and advise you later. There is something else I wanted to call to your attention there. In lines 20, 21, and 22, don't you think it would be better if you struck out the words "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"? Does not that really limit you? Does not that limit the binding force of the estoppel as a judgment?

Mr. CARLIN. Yes; I think it does, and I think it ought to. In other words, the decree ought not to be taken for any matter that was not in litigation; and if it went that far and no further, of course it would be an estoppel.

Mr. UNTERMYER. Let us see. I have this query: Would this make a judgment against the corporation on an indictment an estoppel in a civil suit by an individual?

Mr. CARLIN. I think this deals entirely with the civil phase of the situation.

Mr. UNTERMYER. It speaks of civil or criminal.

Mr. CARLIN. But where we speak of estoppel, I think that applies to a civil proceeding.

Mr. UNTERMYER. This refers to civil and criminal.

Mr. FLOYD. But the word "estoppel" would relate only to a civil proceeding.

Mr. UNTERMYER. Why would it? Is not there such a thing as estoppel in the criminal law?

Mr. FLOYD. As I understand the purpose of this—of course different questions arise in the drafting of it, but the purpose of it was where the Government had instituted a suit to dissolve a corporation and had obtained a judgment or decree declaring that the affairs and the operations of that corporation were unlawful, to enable any person who had been damaged by this corporation to use this judgment to establish those unlawful acts.

Mr. UNTERMYER. I heartily indorse the purpose and have long contended for such a rule. But suppose it is a judgment in a criminal proceeding?

Mr. FLOYD. Whether criminal or merely unlawful in some other way.

Mr. UNTERMYER. You intend, do you not, that the judgment in a criminal proceeding by the Government shall be an estoppel in favor of any party who sues that corporation in a civil suit, and it is right it should be so?

Mr. FLOYD. Yes; it says civil or criminal.

Mr. UNTERMYER. Now, then, you have added these words "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," and my point is that by including those words you would not allow a judgment in a criminal proceeding in favor of the Government against a corporation to constitute an estoppel in a subsequent civil suit by a private individual against that corporation?

Mr. FLOYD. I see your point.

Mr. UNTERMYER. And with those words in, it would not be—and you want it to be—available to any private party when the Government has gotten a judgment against the corporation in a criminal suit; and that ought to be available to any private party.

Mr. FLOYD. By using the words "civil or criminal" in the first instance ——

Mr. UNTERMYER. No; I think it would be all right if you struck out those parts to which I have referred.

Mr. FLOYD. And you think those words possibly would eliminate a criminal proceeding?

Mr. UNTERMYER. Don't you think so?

Mr. FLOYD. It might be it would.

Mr. UNTERMYER. If you leave those words out I think you accomplish what you want.

Mr. McCoy. On that question of estoppel, the suggestion was made the other day that the provision might prevent a great many of these settlements which are being made—the so-called consent decrees.

Mr. Untermyer. I have another prepared section on that, Mr. McCoy, and will come to that now. Section 13 ——

Mr. Floyd. If I understand you, Mr. Untermyer, except as to your criticisms as to the phraseology, which is a mere matter of detail, you think the substance of that provision is wise?

Mr. Untermyer. I think it is wise and fine and necessary—absolutely necessary—that private individuals shall be able to avail themselves of those judgments against the corporation, and I think and have often asserted that a provision such as section 13 is very necessary; that private individuals should be able to begin suit on their own initiative, because the Government can not and does not pretend to cover more than a fraction of the violations. But I think it is very unwise in its present shape, because it places a premium on blackmail, and I have some suggestions in that connection which I would like to present.

Mr. Floyd. You approve of the purpose, but criticize the wording?

Mr. Untermyer. No; I say that when a private individual is allowed to begin a suit to dissolve a corporation, or an injunctive suit, the same kind of a suit the Government may begin, the Government should be made a party to such action and that the Government should be able to take control of that suit at any time, and it should not be possible to settle, dismiss, or discontinue such suit without the Government's consent. In other words, the corporations should not be subject to a succession of strikers.

Mr. Floyd. We did not intend by section 13 to give the individual the same power to bring a suit to dissolve the corporation that the Government has.

Mr. Untermyer. He ought to have it.

Mr. Floyd. We discussed that very thoroughly among ourselves, and we decided he should not have.

Mr. Untermyer. I can not see why not.

Mr. Floyd. This provision 13 was intended to give an individual that was being injured by one of these unlawful combinations or corporations, who had a right under section 7 of the act to recover threefold damages in case he was injured——

Mr. Untermyer. I understand.

Mr. Floyd (continuing). The right to enjoin them from doing these things to his business, and, in their general operation, to enjoin them under section 13 of this act, in so far as their unlawful operations affected him individually.

Mr. Untermyer. But the very existence of the combination may be the only and vital thing that affects them. That is, the fact that that unlawful combination is doing business—that is, this bringing all of their competition together and, after eliminating competition among themselves, then to go in competition with him, and which is a violation—in that instance that is the violation that affects him. It may not do any overt act at all, and generally does not, but it is the fact that it exists in violation of law that injures him. In nearly all the private suits for damages that have been brought that has been the gravamen of the claim. I have been concerned in some of them. There is no reason why a private individual should not be able to

stop that sort of a violation. The very existence of the combination is the violation and the sole occasion of the injury. Damages are rarely provable. The Attorney General, in the very nature of things, can not cover the field. He never has done so, and never will. It takes sometimes years to get action, and frequently you can not get action at all, because the accumulation of business in the department is too great. I have in mind cases with which I have been identified, like the Motion Pictures Patents Co.—that is the combination of the moving-picture concerns. It took a long time, not by reason of any neglect on the part of the Department of Justice, but because they are overwhelmed. It also happens at times that the Government demands more proof than it should ask before acting.

Now, what harm can come from allowing an individual to begin that sort of a suit, provided he makes the Government a party, and provided the Government has a right at any time to take control of it; and provided that if the Government does not take the control, it shall not be bound by the judgment, so that there can not be any collusive arrangement between the individual and the corporation to get a judgment?

Individuals and corporations are subject to unfounded litigation, if you please, on every other conceivable subject. Why, pray, is the individual to be barred here from seeking to dissolve the unlawful combination if that appears to be the only remedy that will be of any avail to him?

Therefore, I have suggested broadening section 13, in line 18, by making it read "shall be entitled to sue for and have injunctive and other equitable relief, including an action for the dissolution of the corporation and for a receiver thereof."

And in line 20, after the word "as"—

As such injunctive and other equitable relief against threatened conduct——

Mr. FLOYD. Where is that other amendment?

Mr. UNTERMYER. Line 22, after the word "as," the word "such," and after the word "injunctive" to add the words "and other equitable."

And, on the next page, line 1, take out the word "an" and add the words "a temporary," so that it will read "for a temporary injunction." Surely, he ought not to give any bond for a permanent injunction; because that is the decree of the court, even though it is reversed afterwards. He ought to be required, if he gets a temporary injunction, to give an undertaking; but he ought not, on a final judgment, if it is appealed from, because that is the action of the court; it is not the action of the party. Is not that true?

Mr. DANFORTH. Does it not really amount to a temporary injunction in connection with line 3 where it speaks of "a preliminary injunction"?

Mr. UNTERMYER. No, they are two different things, with us at least. In out State the practice may be a little different. We sometimes get a restraining order without notice, and we call that an injunction in connection with our application for an injunction pendente lite, which is known as a temporary injunction pending trial.

Mr. MCCOY. Mr. Untermyer, would not the whole thing be cleared up if instead of using those different phrases which we use in different States, we would say "an injunction pendente lite"?

Mr. UNTERMYER. What I mean is that the plaintiff ought to give a bond or an injunction pendente lite, or on a preliminary injunction, but not on a final injunction.

Mr. FLOYD. It was not intended to be on a final judgment.

Mr. DANFORTH. It was not intended to be on a final judgment, as Mr. Floyd says.

Mr. UNTERMYER. But do you think the section covers that intention?

Mr. DANFORTH. No; I do not.

Mr. CARLIN. What section are you discussing now, Mr. Untermyer?

Mr. UNTERMYER. We are discussing section of bill No. 1, and I took the position, as I took with you the other day, that a private individual ought to have a right to begin a suit to dissolve a corporation.

Mr. CARLIN. You think he ought to have a right to implead the Government?

Mr. UNTERMYER. Yes. In this connection I want to suggest adding two further sections to be known as sections 14 and 15, as follows:

SEC. 14. *Provided, however*, That the United States shall be a necessary party defendant to any such action and shall receive due notice of all proceedings therein and that no such action or proceeding shall be settled, dismissed, or discontinued without its consent, and that it may at any time, upon its application, assume the control and prosecution thereof; but nothing herein contained shall limit or affect the rights and remedies secured to any such injured party under section 7 thereof: *And provided further*, That no judgment rendered in any action instituted under this section shall bind the United States or affect is independent rights of action unless it shall have assumed the prosecution of such action in place of the original plaintiff and that fact shall be affirmatively found by the court.

Mr. CARLIN. You do not give it an opportunity to get out of that suit, though?

Mr. UNTERMYER. What?

Mr. CARLIN. Why not give the United States the right, after it is impleaded, to get out of that suit? You get them in to carry the suit along, and you compel them to remain a party.

Mr. UNTERMYER. But not to be bound by the judgment.

Mr. CARLIN. But why not give them the right to escape from that suit?

Mr. UNTERMYER. Because this fellow may then go and settle with the defendant, or he might go on and get a collusive judgment.

Mr. CARLIN. That is not the point. Under your provision, after the United States has once impleaded, there is no way for it to be eliminated from that suit.

Mr. UNTERMYER. Yes.

Mr. CARLIN. Now, the United States ought to have the right to retire from that suit if it cared to do so.

Mr. UNTERMYER. I do not see any objection to that.

Mr. CARLIN. But you do not provide for it.

Mr. UNTERMYER. No; I do not provide for it, but I think that is a good suggestion, and I think it might be amended in that respect. Of course, its continuing will not hurt it because it will not be bound by the judgment; but it ought to have the right to retire.

Mr. FITZHENRY. Why would it not be proper that suits of this nature should be commenced in the name of the United States by

the aggrieved party, and let the matter be a suit between the relator and the defendant until such time as the United States takes charge of it, and then for the United States to be bound by it.

Mr. UNTERMYER. That is practically the same thing.

Mr. FLOYD. It would be except for this possible difference, Mr. Untermyer: If the United States was unwilling to institute the suit the man could not proceed, and that is the case now.

Mr. FITZHENRY. I think the United States ought to have the right to control it and say whether the name of the United States shall be used. If it is private grievance between this litigant and the defendant he ought to be able to prosecute it to the fullest extent so far as it affects his rights.

Mr. UNTERMYER. But in case the amendment is made as I suggest, the United States is an intervening party and may come into court and say, "I do not believe this suit is brought in good faith and I do not think there is any ground for it;" and can practically bring about any result it pleases.

Mr. MCCOY. What is the provision in New York? Isn't it that the Attorney General must be notified, and then he keeps getting notices of all proceedings?

Mr. UNTERMYER. No; in New York any private individual can bring a suit in the interest of the State except in certain cases. There the Attorney General must sue, or authorize the suit in his name.

Mr. MCCOY. But I mean when a private individual, a stockholder, we will say, sues to dissolve a corporation or asks for that relief, he has to give notice, as I recollect, to the Attorney General?

Mr. UNTERMYER. Yes.

Mr. MCCOY. Now, the Attorney General may come in, or may not, but he is entitled to notice of all stages of the proceedings; and, without necessarily becoming a party, he has notice of everything, and whenever he thinks the State's interests require, he can step in.

Mr. UNTERMYER. It is rather complicated with us. It is only certain classes of suits that affect private interests, but whenever the public interest is affected, then suit has to be brought on the relation of the Attorney General and the individual has to get permission to bring it and use his name. It is not very satisfactory.

Mr. FLOYD. This is the point I made, that we intended to give by this provision an individual a right, independent of the Attorney General or anybody else, if he felt he was aggrieved, to proceed against a corporation. To make him merely a relator, it seems to me, you are in the same condition as now—the Attorney General has got to bring the suit, and you are in the same condition as you are now.

Mr. UNTERMYER. Oh, yes; I do not think that would do at all. The point is here, that the very relief that the man needs nine times out of ten is the dissolution of the corporation, because, as I say, it may not be doing any specific act of illegality, but its very existence, in violation of law, is the thing that is injuring him; and therefore he ought to have the right to begin the suit.

Mr. CARLIN. You approve of this section as far as we have gone, but think it ought to have gone further?

Mr. UNTERMYER. Yes; I approve of it as far as you have gone, and I approve very heartily of the suggestion that has been made that the United States ought to have the right to get out.

Now, I suggest a further section in that connection, section 15, to read as follows:

SEC. 15. In any suit or proceeding, civil or criminal, brought or prosecuted by the United States, under any of the provisions of this act, in which judgment shall be rendered in favor of the United States, the court rendering such judgment shall award to the United States against the defeated party or parties, or one or more of them, and in such proportions as it shall determine, a sum or sums which in the judgment of the court is or are sufficient to cover all the costs, counsel fees, and disbursements of the action, and which shall constitute a complete indemnity to the United States for all its charges, outlays, and expenditures for special counsel and otherwise, in connection with such suit or proceeding.

In other words, the mere court costs as now taxed are no indemnity to the Government. It costs it, sometimes, a hundred or two hundred thousand dollars, perhaps, as is likely in the Steel case. If it wins the Government should get that back from the corporation. That is the English system as applied to all litigation. In England the court fixes an amount which is an indemnity to the successful party. It does not penalize the successful party, as we do in our country; I think that is the only just principle and that it would relieve a good deal of the burden on the Government, in these cases, if the court were to fix and be able to fix, in its judgment, a sum that would amount to an indemnity to the Government.

Mr. CARLIN. You of course mean by "counsel" the counsel in the case. You would not allow the Attorney General himself a fee?

Mr. UNTERMYER. These important cases are conducted, as you know, mainly by special counsel.

Mr. CARLIN. That is the purpose of your bill; you would not allow a salaried officer a fee?

Mr. UNTERMYER. I would in this way. I would allow the indemnity to go into the Treasury of the United States for the purpose of recouping the Government against what the Department of Justice has cost the Government in that litigation. As things stand now, the outlaw corporations are costing vast sums to this Government which it is not able to get back. If there had been such a rule it would have made a difference of many hundreds of thousands of dollars to the Government in the Standard Oil, Tobacco, Northern Securities, and Southern Pacific cases. The present procedure is most unjust.

Mr. MCGILLICUDDY. Would there be any additional costs on account of officials?

Mr. UNTERMYER. Yes; I think there would. There has been appropriation after appropriation by Congress for this kind of litigation. They have to keep a vast staff of men which the ordinary business of the department would not require, and it is very expensive for the Government in continuing their investigations and enforcing that law. Why should not the court be able to say, "In our opinion, in this case the Department of Justice has been put to an expense which we assess at $25,000, and that is about, we think, a fair indemnity"; and that comes back to the Government.

Mr. CARLIN. Now, Mr. Untermyer, let me ask you a question: Referring now to bill No. 1, I understand that this bill has your approval, but you think it would be a better bill if we were to add the two sections which you propose?

Mr. UNTERMYER. I do not want at this time to take exactly that position. I simply make these suggestions.

Mr. CARLIN. I am trying to get the idea as to whether you approve of the bill as far as it goes?

Mr. UNTERMYER. You remember we discussed a few provisions under section 9 the other day?

Mr. CARLIN. Yes.

Mr. UNTERMYER. And since you asked me, I have not felt that that was very effective in its present form, and my suggestion was that in lines 4 and 5 you strike out the words "with the purpose or intent to thereby injure or destroy a competitor."

Mr. CARLIN. You mean page 2, bill No. 1?

Mr. UNTERMYER. Page 2, lines 4 and 5, beginning with "the purpose or intent to thereby injure or destroy a competitor," and that provision to the effect "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," so that the section will read this way:

that nothing herein contained shall authorize the owner or operator of any property 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.

If you will pardon my burdening you again with my views on this subject, I will say that I do not believe in the principle or economics of section 9. I do not believe in the uniform price principle or theory, except possibly as applied to patented articles or when you get to cost or below cost; I think it is going to be unworkable and dangerous to business in that it is likely to destroy the ability of interstate corportations to compete with intrastate corporations. If an intrastate corporation wants to build up a business within a State, and starts to cut the prices of an interstate corporation, this does not allow the latter to cut the price in that locality without cutting it everywhere. That is unjust. It is destroying instead of stimulating competition.

Mr. CARLIN. You are aware of the fact of the difficulties we have here. There is another school of thought led by Mr. Brandeis, that thinks they ought to be allowed to fix the price all the way down the line.

Mr. UNTERMYER. Mr. Brandeis and I have discussed that and do not agree on that particular proposition. We do agree on a great many other subjects, and I have a very high regard for Mr. Brandeis and his views, but there are a few subjects on which we have agreed to disagree. I think it is all right to prevent them from cutting below cost; but this is a point where they can not meet the competition without breaking their prices everywhere, and it does seem to be a rather unworkable proposition that the power of the interstate corporation should be crippled in that way.

Mr. FLOYD. I will state, Mr. Untermyer, in my State, Arkansas, that is exactly the provision of the law.

Mr. UNTERMYER. You have not many vast interstate corporations there?

Mr. FLOYD. No; but I mean the provision is it shall be unlawful for a corporation with intent to destroy competition to sell below cost of production.

Mr. UNTERMYER. I fully agree to that. When you get to that point, competition is injurious. Cutthroat competition is very different from wholesome competition. You have here the intent to injure competition. The use of the words "intend to injure or destroy competition" to my mind would make it pretty difficult to get a conviction anyway.

Mr. FLOYD. If I understand you, instead of wording it in that way, if we should substitute "to sell below cost," it would meet it?

Mr. UNTERMYER. I think some such change would meet my economic views on that subject. That is one phase of it. On the other hand, if you want the provision as it stands to be effective—my contention is it is not effective as it stands for the purpose you have in mind with which, mind you, I do not sympathize. In the first place, you say that "they may select their own customers," and again that "they may discriminate in price between sellers because of the quantity of the sales." If you give the seller the right to select his own customers, that, to my mind destroys the whole effect of the section. If you left that out, and provided that no corporation engaged in selling the product should refuse arbitrarily to sell to a responsible person, why is not that all to which it is entitled?

Mr. CARLIN. We had yesterday, Mr. Untermyer, before us representatives of four different classes of associations—the officers of the Retail Druggists' Association, the officers of the Retail and Wholesale Grocers' Association, the officers of a great retail lumber association, and, indeed, the ex-officials of the Retail Lumber Association. All of them agreed that it is an essential element of business to allow a man to select his own customer. They said if they could not do that, they would go out of business, and they agreed with this provision in all its details, with the exception that each one of them think that they ought to have a little distinction made as to their particular business. The retail druggists thought they ought to have a right of generally fixing the prices of patented and copyrighted articles which they sold.

Mr. UNTERMYER. Yes; I know the argument.

Mr. CARLIN. And then the Retail Grocers' and Plumbers' Associations think they ought to have a right to publish a white list. They do not publish a black list, but they publish a white list. And so on.

Mr. UNTERMYER. Why is not a man sufficiently allowed to select his own customers when he can refuse to sell to any person who is not responsible?

Mr. CARLIN. There are other questions in trade besides the mere question of financial responsibility. A man ought not to be allowed to deal with a man he does not want to deal with. His moral character may not suit him. And, really, there are some men of little financial responsibility whose credit is much better than men of greater responsibility.

Mr. UNTERMYER. I know, but you are just continuing the existing evil if you allow a man to select his own customers. That means he can refuse to sell to anybody.

Mr. CARLIN. Oh, does it, now?

Mr. UNTERMYER. If you leave me the right to refuse to sell to any irresponsible person or for any other good cause——

Mr. CARLIN. "Any other good cause" would cover it; but, after all, you make me the judge of the cause.

Mr. McCOY. How far do you think we can go into a man's moral character in these matters when he comes along with a legal tender of $100 to buy whatever a man is selling in interstate commerce?

Mr. UNTERMYER. I think that, broadly speaking, a man who is in interstate commerce ought to be obliged to sell to anybody who is responsible. Of course, that leaves the discretion to him.

Mr. VOLSTEAD. And who will pay the price?

Mr. UNTERMYER. Yes.

Mr. McCOY. That is the only responsibility that ought to be called for is it not—that he is responsible for the money?

Mr. UNTERMYER. I think I would go a little further. For instance, he may be a firebug or he may be a man whom a merchant does not want to deal with at all for good reasons. But if the seller has the unrestricted right to select his own customers without assigning any reason, that means an absolute continuance of the present conditions. It seems to me it makes the entire provision meaningless; there is nothing left of the section. It would enable a merchant with a valuable brand to exclude every dealer who buys elsewhere.

If you retain that expression in the bill you will be legalizing in statute form one of the worst abuses of the day. Under it the American Tobacco Co. could destroy every retail dealer who bought elsewhere by refusing him its brands on the ground that it had the right to choose its customers. The concluding paragraph accentuates the unwisdom of the earlier provision. I fail to see why every merchant in interstate commerce should not be prohibited from arbitrarily refusing to sell to a responsible customer for cash.

Mr. CARLIN. Suppose you strike that out. Would you have it remain in the condition as there?

Mr. UNTERMYER. As it is?

Mr. CARLIN. Yes.

Mr. UNTERMYER. I do not think that it ought to remain as it is. I think a man in interstate commerce ought to be required——

Mr. CARLIN. This paragraph is drawn upon the theory it will make compulsory customers except in the case of products of the mines.

Mr. UNTERMYER. There is nothing in that distinction about mines. I know it is on the fanciful theory of the right of all to nature's resources on paying the price.

Mr. CARLIN. Should we go to the extent you think we ought to go?

Mr. UNTERMYER. Yes. That is on the theory that is a product of the earth.

Mr. FLOYD. You think it ought to apply to all?

Mr. UNTERMYER. I think it ought to apply to all business. A man should not arbitrarily refuse, without cause, to sell a given customer.

Mr. FLOYD. Of course, if a man did not have the money and wanted credit, he would always be in the discretional class.

Mr. UNTERMYER. Certainly. You need never extend credit to a man, but the man who comes with the money should be allowed to purchase. There is no other way of preventing the unjust discrimination from which we have suffered.

Mr. FLOYD. In the case of the man who comes along with the money, then, the dealer would not have that right.

Mr. UNTERMYER. Yes; he ought not to have that right. For instance, I might want to go into the retail cigar business in Washington, and I can not go into that business unless I handle certain well-known brands of cigarettes and cigars, which might be controlled by the American Tobacco Co. If I had the right to buy those brands, I could buy independent and other brands and go into the business; but if the American Tobacco Co. has the right to select its own customers they can keep me out of business, because I can not do business without these established brands.

Mr. CARLIN. Take the Huyler Candy Co. as an illustration.

Mr. UNTERMYER. Yes.

Mr. MCCOY. They do not sell to other people, do they?

Mr. CARLIN. Oh, yes. They would have to do that if we do what you suggest now. Mr. Huyler manufactures candy, and if he has to sell his candy to every responsible person who desires to purchase it, he would lose control of his business entirely.

Mr. UNTERMYER. Why?

Mr. CARLIN. Because a fellow would say I want to go into the candy business and you have a fine brand of candy, and I can not sell candy unless you sell me your candy.

Mr. UNTERMYER. Why shouldn't he sell him his candy, unless he establishes his own agencies and says I want to sell my own product and I will not sell to anybody. That is not arbitrarily refusing. The point is, he shall not arbitrarily refuse to sell his candy as against one dealer in favor of another.

Mr. VOLSTEAD. To give you an illustration up home: No lumber yard can start in the town without the permission of the other lumber yards in that section. They have a provision so that if a new yard attempts to start up, he could not get his lumber. We have an illustration right in my own town: A man is trying to start a lumber yard, and he has got to go to the Pacific coast for his lumber, because he can not get any lumber in the locality.

Mr. CARLIN. We have a right to stop a collusive contract.

Mr. UNTERMYER. It is not a collusive contract; that is simply applying the principle of this bill of permitting the manufacturer to select his own customers. If you are going to allow that provision to remain, I do not think you are going to give any relief.

Mr. VOLSTEAD. You think that last provision might be amended and made practicable.

Mr. UNTERMYER. Yes; it might be amended and made practicable It might be practicable, anyhow, but not according to my views.

Mr. CARLIN. Suppose you submit a suggested amendment to that section?

Mr. UNTERMYER. I will do so. Now, gentlemen, I have nothing of any consequence to say about the definitions bill, except section 4, which I think is a very valuable provision.

The bill is not, in my judgment, sufficiently comprehensive in its enumeration of the classes of enterprises within its scope to cover all cases that should be included. Let us assume, for the sake of the argument that the Associated Press is a monopoly or that it will absorb competitors and secure a monopoly in the gathering and distribution of news. There is no class of industry more clearly im-

pressed with a public use. Its facilities should be open to all who are willing to pay. Anyone should be able to start a newspaper and get the news. They use the mails and telegraph, and they should be made to furnish their facilities impartially. Yet we know that is precisely what the Associated Press refuses to do and that in certain cities, including New York, it is impossible to start a paper, because the service can not be secured. This bill should be so framed as to leave no room for doubt as to the inclusion of industries such as this, that are impressed with a public trust and of other businesses, such as the vaudeville circuit of theaters and the moving-picture shows, which are said to be in a combination. There is some doubt as to whether the present phraseology covers any of these cases. I am submitting amendments to cover that point.

Mr. McCOY. Mr. Untermyer, I would like to ask you one thing on that fourth section. Reading the paragraph entitled "Fourth," in connection with the rest of it, is it your opinion that that would prevent two men who had been in similar businesses forming a partnership?

Mr. UNTERMYER. Which section do you mean?

Mr. McCOY. I will read what I have in mind.

Mr. UNTERMYER. Yes.

Mr. McCOY. Taking the bill, beginning with the words "Every contract shall be deemed to include any agreement"——

Mr. UNTERMYER. Combination or agreement?

Mr. McCOY. I am just taking it "agreement." Well, make it "combination or agreement" between persons?

Mr. UNTERMYER. Yes.

Mr. McCOY. "For the following purposes."

Mr. FLOYD. But it does not say that—two or more.

Mr. UNTERMYER. Why should it not be just as unlawful for individuals or partnerships to get together in violation of the statutes as for the corporations?

Mr. McCOY. If it is in violation of the statute, yes; but I mean to make any agreement by which they directly or indirectly undertake to prevent a free and unrestricted competition among themselves. Now, suppose two men in the same town——

Mr. UNTERMYER. Which section is that?

Mr. McCOY. That is the fourth section, the twentieth line, bill No. 2. Suppose two men in the same town are engaged in the hat business—in the retail hat business—and they do engage in interstate commerce, and they make up their minds that they would like to be partners. Now, that does restrict competition between themselves. They cease to compete, but they may have absolutely no intention to monopolize the trade in hats. They may have a capital of only $10,000. Suppose they were manufacturers of hats—small individual manufacturers of hats—and they make a partnership agreement?

Mr. UNTERMYER. Yes.

Mr. McCOY. The literal reading of that would prevent their doing it.

Mr. UNTERMYER. Don't you think this has to be read in connection with the balance of the bill, and that is that it must amount to a restraint of trade?

Mr. McCOY. That does restrain competition.

Mr. UNTERMYER. But every restriction of competition does not reach the dignity of a restraint of trade.

Mr. McCoy. But this says if they make a contract which does in any degree restrict competition among themselves. That is just my point. Surely they do restrain competition among themselves, because they become partners. That may not amount, as you say, to a restraint of trade under the act, but it does literally restrain competition and make them violators of the law.

Mr. UNTERMYER. I think that would be a too literal construction.

Mr. FLOYD. I think, to make that clear, that it would not be a literal construction of the law if you read it in connection with lines 1 and 2, on page 2, bill No. 2—let me read it and see if you put that construction on it: "Any combination or agreement between corporations, firms, or persons, or any two or more of them engaged in trade or business * * * to make any agreement, enter into any arrangement," and so forth.

The first applies to distinct persons. That is, if anyone had a store here, in one part of the town and another in another part, the two being engaged in the same line of business, and entered into an agreement whereby they were going to eliminate competition—they are not partners there; they are distinct persons conducting an independent business. If you read lines 1 and 2 in connection with what follows, I think it is clear that it means distinct corporations, distinct firms, and distinct individuals in the same line of business and not acting as partners.

Mr. UNTERMYER. A selling arrangement may be a form of partnership.

Mr. CARLIN. The agreement takes them out of competition with each other.

Mr. UNTERMYER. If any individuals or firms enter into any arrangement by which they are preventing unrestricted competition among themselves, they are guilty under the act. Now, if two business men enter into an arrangement to go into partnership, why is not that an arrangement?

Mr. CARLIN. Why should not they do that?

Mr. UNTERMYER. Ought not they to have the right to go into partnership?

Mr. CARLIN. Yes; but you should not be able to restrict trade by partnership.

Mr. McCOY. It does not say so; it says "restrain competition." It does not say "restraint of trade."

Mr. FITZHENRY. They must be engaged in interstate commerce.

Mr. McCOY. Absolutely. A man down in my district, a hat manufacturer, acting as an individual, and another individual there have a hat factory. They are in interstate commerce and they want to go into partnership. They do go into partnership, and make an agreement for that purpose, in writing. Thereby, when they carry out such an agreement, they restrict competition among themselves.

Mr. CARLIN. That is the law in your State now?

Mr. UNTERMYER. Oh, yes; but those New Jersey statutes have not been construed yet. With all due respect, we do not think very seriously of those statutes.

Mr. CARLIN. I want to ask you, Mr. Untermyer, whether you do not think we had better leave out, page 2, line 21, the words "or transportation," because, having referred the subject of transportation to the Interstate Commerce Commission for regulation, it seems

to me perhaps we had better omit dealing with the subject of transportation from these definitions.

Mr. UNTERMYER. I think that might be the conclusion.

Mr. CARLIN. That is the idea. You see, we have relegated the railroad companies to the commission, with all powers to regulate and control.

Mr. UNTERMYER. But this is an agreement between industrial corporations in respect to transportation.

Mr. CARLIN. If you confine it to that, I think it is all right.

Mr. UNTERMYER. That is the spirit of the whole act.

Mr. CARLIN. That is our intention, of course.

Mr. UNTERMYER. I think it is all right as it stands.

Mr. McCOY. Mr. Untermyer, would you care to express an opinion as to whether or not it is necessary or desirable to define in this way, or whether, on the other hand, the Sherman Act is not now so interpreted as to include these very things which are defined here, and that there may be danger by definitions in some way of excluding something that is now included?

Mr. UNTERMYER. I should rather not express a definite opinion on that at the moment, because I have not given it a great deal of thought. I have read this bill with that idea in mind and my impression is that this bill is exceedingly drastic, although there are features of it that I consider essential. I do not agree that this bill will unsettle the law as now construed. If language means anything it can not have that effect. I think some such bill as this is necessary. But in its present form the bill is likely to prevent many lawful classes of cooperation that do not rise to the dignity, as I have said, of constituting a restraint of trade. Every man who is in business of course restricts competition in some way. He competes, and the larger he grows the more he restricts the competition of others and the more business he takes to himself.

Mr. McCOY. I would like to ask you this question, if you care to express an opinion upon it: Reading the Sherman Act in connection with its title, do you think it was intended that only restraints of trade that were unlawful were intended to be covered into the act, and that the purpose of the act was to largely make a criminal statute?

Mr. UNTERMYER. No, I do not. I take an entirely different view of it. I think it was intended to enlarge the common law rule, and not simply to codify it.

Mr. McCOY. With all due respect, then, to the opinions in the Tobacco and Standard Oil cases——

Mr. UNTERMYER. I do not think the court went to that length, Mr. McCoy.

Mr. McCOY. For what purpose did they make mention of the fact that the title of the act did read in a certain way, and then go on to discuss all this common law and English law of restraints of trade?

Mr. UNTERMYER. I think that all of this talk that we have heard so much about, this play of words upon the subject of reasonable and unreasonable, is largely due to a misconception of the meaning of the court, which is obscure, and I think misleading. The act was never intended, to my mind, to apply to any restrictions of competition that did not restrain trade. It was only intended to affect restraints of trade, and I have always seen a very wide distinction between the

great mass of restrictions of competition that did not reach the dignity of restraints of trade, and those restrictions of competition that amounted to restraints of trade. There are many restrictions of competition that are reasonable. For instance, I buy out a man's business. He is in the same line of business. I am one of 200 competitors in that business. I have a raft of competitors, and I prefer to enlarge my business by buying him out. If I want to get the good will of his business, he agrees with me not to go into business in that locality. That is simply an agreement to assure to me the good will I am buying, and if he could not make such an agreement with me the good will would not have any value. Now, that is a restriction of competition, but I have 199 more competitors there and my purpose was not to restrict competition, but was to get that good will to add to my good will. In order that I should get it, he had to agree not to go into business. That is not a restriction of competition, that restrains trade, and yet it does not restrict competition.

Mr. NELSON. When you spoke of this discussion being misleading you mean that it was obiter dicta?

Mr. UNTERMYER. I do not think the court discusses it from that point of view. I referred largely to the irresponsible discussion in the public press by writers who are not lawyers and by some lawyers who are ill-informed, and elsewhere. I do not mean, of course, to refer disrespectfully to the opinion of the court. I think the opinion has been somewhat misunderstood. It was attempted to be corrected later on, you know, in one of the subsequent decisions. I mean, the opinion in the Standard Oil case on that subject was explained in the opinion in the Tobacco case because of that misapprehension of the language of the court. What I mean now is that the court never intended to say there were reasonable and unreasonable restraints of trade. I think they intended to say there were reasonable restrictions of competition and there were unreasonable restrictions of competition that amounted to restraints of trade because they were unreasonable restrictions.

Mr. McCOY. Didn't they say in substance, this, too: That, taking the title of the act, and because it was feared there was no common law in the United States that might cover it, they would consider this as being a codification practically of the common law against unlawful restraints of trade and, finding that one restraint, namely, of the kind where a man sells out his business, was reasonable, therefore the legislature intended that only things that were unreasonable should be forbidden? And didn't they then go to work, and, in the case of the Standard Oil Co., referring exactly to that kind of a contract between Mr. Rockefeller and others who were individuals, and who had sold out their business—didn't they refer to just that sort of a thing and say it was one of the elements to be taken into consideration in holding that the statute had been violated?

Mr. UNTERMYER. There was so much said in that case, Mr. McCoy, that it seems to be an unprofitable discussion to try to determine what was or was not said. Does it help us any here?

Mr. McCOY. If we admit that they simply held in those cases what was actually decided on the facts, I agree; but if we are to be governed not by the actual decision on the facts, but by the opinions, then it does open up that whole range of discussion whether they are

subsequently going to decide upon reasonable and unreasonable restraints.

Mr. CARLIN. Mr. Untermyer, as I understand you upon the opinion of the Supreme Court, you do not see any necessity for legislation which would change the rule as to reasonable and unreasonable restraints?

Mr. UNTERMYER. No, I do not—not in that respect. I hope that will be left where it stands. It is perfectly plain.

Mr. CARLIN. In other words, you approve of that opinion as it is?

Mr. UNTERMYER. Yes; I think it gives us measurable protection.

Mr. CARLIN. Now, with reference to holding companies.

Mr. UNTERMYER. On the question of holding companies I wish I had time to say all I have in mind. It is a fundamental question of regulation, I think, that no corporation should have the right to hold the stock of any actual or potentially competing corporation. I think that far we ought to go by rigid regulation. If one corporation can lawfully acquire the actual legal title to the physical property of another company and take it unto itself as a part of its physical property, very well. There can be no objection to that course. But it was never the idea of corporate law that any corporation should be managed by another corporation instead of being managed by itself and in its own interest alone, or that any one company should be run in the interest of some other company because of the mere fact that one company is a holding company for another. It means, I think, generally that there is some outstanding interest, minority interests except in a few instances—except, I should say, in railroad corporations where they have to have a charter in each State. And there, where it is a connecting line, I suppose a holding company would have to be allowed.

Mr. CARLIN. In other words, your idea is we ought to prohibit the holding companies holding the stock of competing companies and stop there?

Mr. UNTERMYER. No; I would not stop there; certainly not. I would stop there with the rigid prohibition, but when it comes to other holding companies that are not of actually or potentially competing companies then I should put that subject into the hands of the interstate commission to determine in each case when the circumstances of the particular case renders it wise or expedient that one company shall hold the stock of another. I would allow no corporation to hold the stock of any other corporation where they were actual or potential competitors. And I would continue and extend the prohibition to noncompetitive corporations unless the commission can be satisfied that the case is an exceptional one in which a useful purpose is to be served that can not be otherwise accomplished. Let us take an illustration: A large interstate stock corporation wants to develop a foreign business, we will say, in Germany. It has to take in German interests so as to get local representation, and it takes the control of the stock in that company, but it can not push the interests and that foreign trade without German allies. It is in the interest of our country that that sort of enterprise should be permitted.

Mr. CARLIN. We had before us some gentlemen representing a Texas oil company.

Mr. UNTERMYER. Yes; I knew about the organization and business of that company very intimately.

Mr. CARLIN. Their statement was that under the laws of Texas one company is chartered to produce oil. That is its business. But for the purpose of selling oil they had to charter another company.

Mr. UNTERMYER. Why?

Mr. CARLIN. Because it seems as if the State did not allow the two to be done by one company.

Mr. UNTERMYER. Is that correct?

Mr. CARLIN. That is their statement here.

Mr. UNTERMYER. I do not understand it so from my experience in oil companies in Texas and Oklahoma.

Mr. CARLIN. And then they stated they wanted to get a little pipe line, and they went to Oklahoma, and in order to acquire the right of condemnation they had to take out a third charter, and so it went on until they found themselves with four or five different companies, all relating, though, to one subject—namely, the production, transportation, and sale of oil.

Mr. UNTERMYER. Yes; but they had bought competing oil companies.

Mr. CARLIN. And finally they went to New Jersey and secured a charter there in which they put the stocks of all of those companies in in order to finance them, and of course there is a holding company pure and simple. But it is not, according to their contention, and not according to much opinion, such a holding company as ought to be prohibited by law.

Mr. UNTERMYER. My answer to that is that in so far as that company owns the stocks of different competing producing companies, which I believe it does, it ought not to have the right to hold them. If the Texas company can lawfully acquire the title to those competing companies, very well; then it should own the physical properties instead of the stocks of the constituent companies. But if it can not acquire the title to those competing companies lawfully it ought not to be permitted to own the properties by indirection through the stock of the competing companies. In so far as the Texas company has to take out a charter for a pipe line, which it probably has to do, it should be permitted to hold that stock. That, to my mind, is the province of the interstate trade commission, and that is the reason I say Congress, in my opinion, should rigidly prohibit the holding of stocks of competing companies, and there should be relegated to this commission the duty of determining when a corporation should be permitted to hold the stocks of other companies that are non-competitive, but related to its business.

Mr. CARLIN. Of course, you would carry with the exercise of that discretionary power, immunity?

Mr. UNTERMYER. If the commission has given that permission that would constitute immunity for that particular transaction, but if the acquisition of the constituent property is lawful there is no occasion for immunity.

Mr. CARLIN. Yes.

Mr. UNTERMYER. Now, take another class of cases that are very much more frequent. There is a large amount of, we will say, gas securities scattered through this country that are held in this way:

A corporation is organized as a holding company to buy gas stocks in different cities and it issues its own stock against the holding of these gas stocks. They are not competitive companies; they have local franchises and are a favorite form of investment for the small investor, because he in that way divides his risks—he averages his risks between a great number of companies. One may turn out badly and another well. In the same way, with his means, a small investor can not safely go into a single mining company, but when a development company is formed, or a holding company or exploration company, as we call it, to exploit and develop mines, that company acquires different mines, and issues its stock against them. By purchasing this stock the small investor in mining stock has avoided a great deal of the risks of mining because his risks have been averaged. Now, I undertake to say that any commission, looking at the facts in these cases, would authorize a holding of stocks in that way.

Mr. CARLIN. There is a case where the location really eliminates the idea of competition.

Mr. UNTERMYER. It might and might not, dependent on the circumstances of each particular case. You can not lay down any general rule. If, for instance, you were to permit generally holding companies for mines on the broad theory that location renders competition impossible, you might sanction the building up of the most objectionable form of monopoly in a product of the mines that should be the last thing to be controlled. Under such a general permission a development company could acquire control of the copper output of the company and control the prices. Nothing would be easier. The Amalgamated Copper Co. already owns a selling company, through which it controls a substantial part of the copper output. I am trying to show the necessity for avoiding any cast-iron rule that would permit holding companies even in enterprises that are supposedly noncompetitive and for leaving that entire subject in the hands of a commission.

Mr. CARLIN. For instance, a gas company in Baltimore would not be a competitor of a gas company in New York.

Mr. UNTERMYER. It might not. In the case of a mining company, it would not eliminate the idea of competition, because one holding company might, as I have illustrated, hold all of the copper mines of the country. The commission would not permit that. But it might permit a holding company that would control an oil mine here, a gold mine there, and another mine at some place else, and therefore I say you can not lay down a rigid rule——

Mr. CARLIN. If I gather your idea, you would apply the idea to competing companies and make a rigid rule?

Mr. UNTERMYER. Yes; as to all potentially competing companies, but I should not stop there. I would not allow any holding company of any kind without the consent of the commission. That is my suggestion on that subject.

Now, on page 2, of bill No. 2, where you speak of limiting or reducing the production or increasing the price of merchandise or of any commodity, don't you think that ought to be "to fix, limit, reduce or increase the production"? You say "to limit or reduce the price" and of course fixing the price and holding it there is about the same thing. A combination to fix the price, even though it neither increases or diminishes it, is quite as objectionable.

Mr. FLOYD. You say "to fix, limit, or reduce?"

Mr. UNTERMEYER. "To fix, limit or reduce the production or increase or fix the price of merchandise or of any commodity or subject of transmission or industry." That provision, as it now reads, would only make it unlawful to increase the price. There is another suggestion of phraseology there, and that is that you define "merchandise or any commodity." I should say "or other subject of interstate industry or transmission."

Mr. CARLIN. What clause does that refer to?

Mr. UNTERMYER. The second paragraph there.

Mr. CARLIN. You say after the word "commodity" to add what?

Mr. UNTERMYER. "Or other subjects of interstate industry or transmission." News is a subject of transmission, and yet it can not be called either merchandise or a commodity. What would you do, for instance, under a combination of all the circuses of the country? They are neither merchandise nor commodity, but they can be the subject of a trust; and if you put the word "industry" after the word "business" it would cover that.

Mr. CARLIN. We had not taken circuses into consideration.

Mr. UNTERMYER. But what I mean is that "merchandise or commodity" does not cover all the subjects of interstate industry.

The CHAIRMAN. Theaters, too—there might be a theatrical trust.

Mr. UNTERMYER. There is sometimes said to be, but I know nothing about any such trust. Still it might readily happen and your definition would not embrace it.

There is still another and, to my mind, a controlling reason for absolutely preventing holding companies of actual or potential competitors and for forbidding all forms of holding companies that are noncompetitive unless permitted by the trade commission. It is because experience has demonstrated that they furnish the incentive for and are frequently accompanied by the intolerable oppression of minority stockholders.

That is one of the greatest evils of present-day corporate management due to the toleration of the holding company. It is the rule, rather than the exception. I might say that it is almost the invariable accompaniment of the holding company.

It was never the intention to permit one company to manage, dominate, or control another company. The invasion of this method of government has been gradual and is due to the laxity of State laws that from time to time under the pressure of great financial interests enlarged the powers of corporations in competition between the States so as to induce them to come within its jurisdiction.

The idea that one corporation should control the policy and business of another against the protest of an outstanding minority is abhorrent to one's sense of justice, as is also the exclusion of the minority from all representation. If the power to permit holding companies that are noncompetitive is lodged with a trade commission, its allowance in any particular case can be made and doubtless would be conditioned upon the allowance of minority representation through cumulative voting and at times upon affording the same treatment to the minority as is received by the majority. There is no more important subject within the domain of corporate reform, for it is a crying evil. You may have bought your holdings in an independently conducted company and wake up some fine day to find yourself a victim-

ized minority holder, with the majority holdings in the grip of a corporation with purposes quite alien to the best interests of your company and with no redress. That should be no longer possible. It can be corrected by allowing the trade commission to prescribe the terms on which a holding by one company of stock in another, otherwise unobjectionable, may be permitted.

All this can be covered by a bill which I will endeavor to outline and submit to you regulating the conditions on which interstate corporations may hold stocks of other companies.

(Thereupon, at 1.40 o'clock p. m., the committee adjourned until Monday, February 9, 1914, at 10.30 o'clock a. m.)

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Friday, February 20, 1914.

The committee this day met, Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. The committee will be in order. Mr. Hunt, of Connecticut, is here. He desires to talk to us this morning and will give his views on the subject of interlocking directorates. As I understand, he represents a number of savings banks or savings institutions. We will be very glad to hear from him.

STATEMENT OF MR. EDWIN S. HUNT, OF WATERBURY, CONN.

Mr. HUNT. Mr. Chairman and members of the committee, I am treasurer of the Waterbury Savings Bank, of Waterbury, Conn., and president of the Savings Bank Association of the State of Connecticut. I come here to-day at the request of the executive committee of the Savings Bank Association of Connecticut. There are 84 mutual savings banks in Connecticut, of which 64 are members of our association. We have deposits in those savings banks amounting to $307,000,000, and there are 606,000 depositors, which is, I believe, somewhat over half the population of the State. I represent 90 per cent, at least, of those savings banks. I do not doubt I speak the sentiments of them all.

The tentative bill that is before your committee, relating to interlocking directorates, provides that "a person who is a director in any State bank or trust company, not operating under the provisions of the said act," that is 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." That is, any person who is a director in one of our savings banks can not at the same time be a director in one of the Federal reserve banks or one of the institutions that is a member of the Federal reserve bank. The effect of that on our banks would be to deprive the Connecticut savings banks of half or three-quarters of their present directors.

Now, the proposition that I come before you on to-day does not apply to the merits of the bill in general but it is to ask you to except mutual savings banks from the provisions of this act. Mutual savings banks are a creation of the East. They exist in all the New England States and in the State of New York, but I understand that there are very few mutual savings banks outside of those States.

You will pardon me, therefore, if I go into a little explanation as to the nature of the mutual savings banks. They were started in Boston about 100 years ago. They are institutions that have no capital stock. The whole theory of them is to create an institution for the encouragement of thrift and the protection and safeguarding of the people's savings. The mode of our organization is this: We have a body of what are called incorporators. Under our statutes our banks have 20 incorporators. That body has power to fill vacancies and it is, therefore, a continuing body.

Now, the sole duty of that body is to elect the directors of the mutual savings banks and the directors have the management of the banks. That is, these incorporators would correspond to stockholders in an ordinary corporation, but they have no interest and no concern in the management of the bank except in the choice of the directors, the directors having the actual management of the bank. All the profits of the bank belong to the depositors. Under our laws a director can not receive any pay for his services; a director can not borrow from a bank; a director can not obtain a commission for procuring a loan from a bank; and a director can not sell securities to a bank. The whole theory of our statutes is that a director shall have no financial interest in the bank and that it shall be impossible for him to make any profit out of his connection with the bank. The courts have called them quasi-charitable institutions. They are charitable and philanthropic to the extent that they are formed in the interest of the general public and not for the people who organize them. Of course, they are not charitable in this respect, that they do not call on the community to be supported.

The CHAIRMAN. It is not an eleemosynary institution?

Mr. HUNT. They are self-supporting entirely. I have heard people say, to whom I have described those banks, that they did not believe it possible that these directors were not connected with these banks because of the money they get out of it in some way or other. I can assure you, from my experience, that it is a fact that in the State of Connecticut, and I believe in New England generally and New York, the savings banks' directors do not make anything from their connection with the banks.

The CHAIRMAN. Suppose that it is a good thing to exempt them from the operation of this proposed law forbidding interlocking directorates. What is your proposition as to how we should do that?

Mr. HUNT. Well, Mr. Paton, who will speak to you later, has a tentative draft of a bill, in which he has the following provision:

Provided, That nothing herein contained shall make ineligible the trustee of a mutual savings bank, not having capital stock, to become an officer or director or employee of a Federal reserve bank or other bank or trust company member thereof.

That would be a proviso inserted in the act to exempt mutual savings banks. In the bank with which I am connected there are two directors who are directors of one national bank, two others who are directors of another national bank, and two more who are directors of a trust company in the town. I am one of them, and I would naturally give up my connection with the national bank, if I had to, in order to keep my connection with the savings bank, because that is the way I make my living. The other five directors, who are directors of national banks, would naturally give up their connection

with the savings bank because their financial interest lies with the national bank. The result would be——

Mr. DYER (interposing). As I understand, the officers make nothing out of the savings banks?

Mr. HUNT. The directors. Of course the officers do. I am the managing officer of the bank and I get a salary.

Mr. DYER. The managing officers get salaries, but the directors do not?

Mr. HUNT. That is right. Of course, the only persons who are making a living out of the bank are the employees—persons who are employed all the time in the bank.

Mr. PETERSON. What are the business relations between your company and the national banks of which these gentlemen are directors?

Mr. HUNT. Of course, we carry deposits in the national banks; we carry deposits in two national banks, but we do not happen to have a deposit in the trust company. Our investments are regulated by law. We are permitted to invest in certain things.

Mr. PETERSON. Then the directors of your company and the directors of the national banks do business with themselves?

Mr. HUNT. It might be called so to that extent. We have to carry a deposit somewhere.

Mr. BEALL. I understood you to say that your mutual savings bank keeps deposits with two national banks?

Mr. HUNT. The one I am working with happens to do so.

Mr. BEALL. Does it happen that the deposits which are kept in national banks are kept in banks of which gentlemen are directors who are also directors of the savings bank?

Mr. HUNT. Let me go into a little further explanation about the investments which savings banks in Connecticut are allowed to make. I do not think it is so in all the New England States, but under the laws of Connecticut we can invest a sum not exceeding $100,000, and not exceeding 30 per cent of the capital of any national bank, in the stock of that national bank. One of our best investments has been the stock of national banks, and the stock in national banks is very generally held by savings banks throughout the State—that is, stock in local national banks will be pretty generally held by savings banks and pretty well scattered throughout the State. Our savings bank owns a certain amount of stock in two national banks, and those are the banks in which we keep deposits, because we are interested in their prosperity. If there is any additional income to gained we want it gained by the institution in which we hold stock and are financially interested. That is the reason why these two national banks carry the deposits of our savings bank rather than the other banking institutions of the town.

Mr. BEALL. Are these the two national banks whose directors are also directors in your savings bank?

Mr. HUNT. We have two directors in those national banks; they are on our board. For instance, I am a director of the Citizens' National Bank, and we own stock of that bank, and we think it desirable that our stock holdings should be represented on that board, and one other man in the Citizens' National Bank is also a director of the savings bank. We also hold stock in the Waterbury National Bank, and there are two men on our board who are directors of that

bank. We have two men who are directors of the Colonial Trust Co., but we do not happen to own any stock in that company, and we carry no deposits in that company.

Mr. DANFORTH. Aside from your holdings of the national-bank stock, your investments are confined to accredited bonds and real estate loans?

Mr. HUNT. Our largest investments are real estate loans.

Mr. DANFORTH. Are they not confined to real estate loans?

Mr. HUNT. We are allowed to lend 10 per cent of our deposits on collateral, and where there is no other bank in a town we are permitted to lend 10 per cent of our deposits on two-name paper.

Mr. DANFORTH. That is not true of the other New England savings banks?

Mr. HUNT. I do not think it is true of Massachusetts or New York.

Mr. DANFORTH. I know it is not true in New York.

Mr. HUNT. There are quite a number of country banks where there is no other bank in the town, and that provision was really made to enable them to make loans on notes. As a matter of fact, we lend small amounts. We have seven millions on deposit; three and a half millions are invested in real estate loans and two and a half millions, in round numbers, invested in railroad and municipal bonds; then there is about $500,000 in collateral loans and two or three hundred thousand dollars in two-name paper. We have, I think, $145,000 invested in bank stock.

Mr. PETERSON. Ostensibly, then, your company and the national banks which have the same directors are competitors?

Mr. HUNT. Well, as a matter of fact, they are not.

Mr. PETERSON. Ostensibly they appear to be?

Mr. HUNT. Ten per cent is a fairly small proportion of the deposits of a bank; they are limited to 10 per cent that they can invest in notes and it is only to that extent that they could be said to be competitors.

Mr. PETERSON. As a matter of fact, a national bank does loan on real estate security in an indirect way, does it not, and therefore comes into competition with your company?

Mr. HUNT. I should hardly think they can be said to loan on real estate.

Mr. PETERSON. Do you not know that it is the custom of a national bank to make a loan to a dummy and then have it indorsed to the bank? That is carried on generally, is it not?

Mr. HUNT. I do not think that is the practice. They do take real estate where they have to secure themselves, but they are mighty reluctant to take it, from my experience, and they do not want to enter into any scheme, knowingly, that will bring them any real estate, if they can help it. That is the way they feel about it.

Mr. FLOYD. You say that a considerable portion of your assets are invested in municipal and railroad bonds?

Mr. HUNT. Yes, sir.

Mr. FLOYD. How do you acquire these investments? Through what medium, through your bank?

Mr. HUNT. Oh, no; we buy them from the various houses that deal in securities of that kind.

Mr. FLOYD. Do you put any such deals through your national banks?

Mr. HUNT. No; the national banks do not deal in that kind of thing at all. In Connecticut we buy these securities from bond salesmen who represent houses in Hartford, Boston, and New York; once in a while from Cleveland, or somewhere else. It happens that we buy the securities we want from the men who have them to sell. It is not usually a local man or local concern. Our laws are quite strict on just what we can buy. For instance, we can invest in the bonds of no city that has more than 7 per cent of debt—that is, a debt of more than 7 per cent of its assessed valuation. That bars a good many cities. We can invest in the bonds of no city that has less than 20,000 population. The whole thing is aimed at safety. Our national banks do not deal in bonds. I do not know of any bank in Connecticut that does.

Now, the injury that this act would do to our banks is this: We could not get the proper class of men to be directors of our banks if this law should take effect. We have got to have men of financial experience, and even in a town like Waterbury the number of men is limited. We have got to have men of high standing in the community—not only men who are good, but who are known to be good men and have a wide reputation in the community. If you bar out all men, if you make all the men who are directors in the various banks of a town ineligible for directors of savings banks, there are not enough left to supply our needs. The result would be that our banks could not be so well managed. In addition to that, the result will be that we shall not have the confidence of the community to the extent that we do now. As you know, the confidence of the community is a great essential for a savings bank. We have in our bank 12,000 depositors of all degrees of ignorance and inexperience. It is a very easy thing to get up a run on a savings bank, even the best of them, as you all know, and if you wipe out from our board of directors five or six of the men of the best standing in the community and put in their places, perhaps, good men, but men who have not the standing and have not the reputation and have not the financial experience, it seems to me it will be a hazardous thing.

I come from a city of about 85,000 inhabitants, and in towns of three, four, five, or six thousand inhabitants, where there is one national bank and one savings bank, they absolutely have not the material that is suitable for making directors of a savings bank. It would work worse with them than it would with us, and in connection with that I want to read a letter that I received from Mr. Charles H. Coit, treasurer of the Litchfield Savings Society, of Litchfield, Conn., that being a town of about the size I spoke of, three or four thousand inhabitants:

I, personally, and this savings bank and town, are all much interested in the proposed bill at Washington relating to interlocking directors. I think the conditions here are a good illustration of what prevails in many of the smaller towns of the New England and Middle States.

In an experience of nearly 40 years, during all of which time I have been very familiar with the affairs and management of both the national bank and the savings bank here, I do not recall any instance of any abuse, or of any result of restriction of credit, due to interlocking directors. As a matter of fact, the national bank here lost by death, during the past year, a director of long service. In trying to fill his place it seemed to us impossible or impracticable to find any person suitable except one of our savings bank directors, and, as the State law which limits the number to three prevented us from electing the director in question, we were compelled to elect as director a man whose chief interests and residence are in a neighboring city.

Aside from any personal feeling I am convinced that the close relations and intimate knowledge of the affairs of both banks, which comes from interlocking directors, and in our case the same men as chief officers, has worked in every way to the advantage of both banks, and also to the public at large.

So far as granting credit goes, especially to the farmers, it seems to me, as a banker of long experience and a close observer of farming conditions here, that it would not be possible and safe to arrange any method to increase the farmer's ability to get credit. The savings bank loans him on mortgage at 5 per cent interest, and the national bank discounts his notes at 6 per cent to the cattle man, the grain man, the merchant, and others, and frequently to the farmer himself, without other security than his personal financial responsibility and standing.

I beg to repeat that I think it would be a serious hardship and disadvantage to the safety, efficiency and helpfulness of our mutual savings banks, and our commercial banks as well, in this State, to prohibit any interlocking directors.

You see it is the theory of our State law that no savings bank shall control a national bank, and, on the other hand, that no national bank shall control a savings bank. I could get letters from practically every savings bank in the State, but I read that to you simply as a sample of the way the savings bank people of Connecticut feel about it. I have a few more letters, but I will not trouble you by reading them. I do not desire to prolong this too much, but if there are any questions I shall be very glad to answer them.

Mr. DYER. What effect, in your judgment, as an experienced banker and director in national banks as well as savings banks, would there be if one of these national banks got into trouble and had a run upon it? What effect would that have upon a savings bank where its directors were upon both boards? Would that have any bad effect upon a savings bank?

Mr. HUNT. I doubt it. Of course, runs are not very common on national banks, as they do not have, as a rule, savings departments. The people who have checking accounts usually do not start a run unless there is some extremely good reason for it, whereas in a savings bank, where we have Italians, and all nationalities, and all degrees of ignorance, a run can be started from no cause whatsoever. It may happen any day to any bank no matter how good it is. I do not think that the public mind would connect the two banks even if there were a run on a national bank.

Mr. DYER. Do you recall the conditions in this city a short while ago with reference to the United States Trust Co.?

Mr. HUNT. I saw a little in the papers about it.

Mr. DYER. And the probable effect it would have had if action had not been taken quickly, upon some of the national banks?

Mr. HUNT. I am not familiar with the details of the occurrence.

Mr. FLOYD. What do you think of the proposition of prohibiting directors of one national bank from being directors in another national bank?

Mr. HUNT. On that general proposition, speaking for Connecticut, I do not think that there is any abuse of any kind that will be avoided by that prohibition. On the other hand, I do not know that it will be a great hardship to the banks of Connecticut, the national banks of Connecticut, even if that should become the law, because interlocking directorates among the discount banks are not very common in Connecticut.

Mr. FLOYD. If there was no abuse, of course, it would not prevent any harm.

Mr. HUNT. No. I do not think there is any abuse or any harm in the State of Connecticut.

Mr. FLOYD. It would not affect you one way or the other if you do not have the system.

Mr. HUNT. There are a few directors of national banks who would have to resign from the board of directors of one bank, but I do not think the number is very great in the State. I am very sure there is no abuse to be corrected by that means which exists in the State of Connecticut.

Mr. VOLSTEAD. How about trust companies and national banks having the same directors?

Mr. HUNT. The same proposition is true. Trust companies are practically banks of discount, and there is but one man, I think, in our town, who is a director in a trust company and in a national bank. He is the only man I call to mind in the town who is a director in the two institutions.

Mr. DANFORTH. Under your State laws can trust companies discount paper?

Mr. HUNT. They conduct a regular banking business.

Mr. DANFORTH. They buy the paper?

Mr. HUNT. They discount it for their customers. The Colonial Trust Co. has the largest deposits of any institution in our town and expects to take care of its depositors just the same as a national bank does. It is precisely the same institution except that it is a State institution and has the trust-department feature added.

On the general proposition of the bill, while I have not gone into it at all, it is my general feeling, so far as the State of Connecticut is concerned, that the bill has no special end to accomplish.

I thank you, gentlemen.

(Mr. Hunt submitted the following resolution:)

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 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, owing to the fact that said persons are also directors of national and other banks which 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 of the requisite financial experience and standing in their respective communities: Now, therefore,

Resolved, That said H. R. 11322 be amended so as to exclude said mutual savings banks having no capital stock from the operation of said act.

STATEMENT OF MR. THOMAS B. PATON, GENERAL COUNSEL OF THE AMERICAN BANKERS' ASSOCIATION.

Mr. PATON. Mr. Chairman and gentlemen, the American Bankers' Association is composed of over 14,000 banks throughout the country. I want to say a word to disabuse any impression you may have that the bulk of the membership represented in the American Bankers' Association is centered in New York or any other big city. They

are in the minority, the control of the American Bankers' Association being through an executive council of some 80 men, a large proportion of whom come from the country banks. The present president of the association is a country banker. The chief activities of the association, as an association, are in protecting its members against crime, bank burglary, robberies, forgeries, and also in the promotion of laws in the different States which will make banking transactions safer and an endeavor to procure uniformity of law relating to commercial paper, etc. With that preliminary statement, I want to say a few words about the bills now before your committee. However, whatever I may say must be subject to correction. In a way, I am representing the legislative committee of the association, but what I say can only be taken as merely suggestive at this stage and not binding on the association. They might want to present something different in the future, because I have not had the time or opportunity to get the settled views on this subject of the legislative committee, which is the authoritative body.

I want to say just a few words, by way of suggestion, in regard to the modification of section 2 of the bill before the committee——

The CHAIRMAN (interposing). Which bill?

Mr. PATON. Tentative bill No. 3, I think it is. It is the bill which relates to the subject about which Mr. Hunt has just spoken. I received a letter from Mr. E. L. Robinson, vice president of the Eutaw Savings Bank, of Baltimore. The mutual savings banks are in Maryland as well as in New England. In his letter he says:

> Our directorate, which is in character a board of trustees similar to those directing the New York, Massachusetts, and Connecticut mutual savings banks, consists of 25 men of high standing in this community—successful in their several lines of business—but nearly all are connected with other financial institutions in this city; this very fact makes them useful to us, as we need men with just this sort of experience to help us in a wise selection of investments and real estate loans. None of our directors has an "ax to grind," and their direction of our affairs is largely a philanthropic service.

Mr. HUNT. That is true about all our banks.

Mr. PATON. In regard to section 2 of this bill, its purport, in general, is to prohibit an officer or director, either of a Federal reserve bank or of a member bank, from being an officer or director of any other member bank or any other financial institution. In the first place, looking at that provision strictly and referring the directors of the Federal reserve banks, it would seem that a portion of it would conflict with the Federal reserve act, which has recently been passed by Congress, after full consideration, and which, of course, there would be no intent to amend in that respect. The Federal reserve act, section 4, provides for nine directors of a Federal reserve bank and divides them into three classes, A, B, and C. No director of class C shall be an officer, director, employee, or stockholder of any bank; class C directors are appointed by the Federal Reserve Board. No director of class B shall be an officer, director, or employee of any bank. The plain intention there is that they may be stockholders. Class B shall consist of three members, who at the time of their election shall be actively engaged in their district in commerce, agriculture, or some other industrial pursuit. The act is silent with regard to class A directors; that is, there is no prohibition against their being officers or directors. It provides that class A directors shall consist of three

members, who shall be chosen by and be representatives of the stock holding banks. Naturally, the class A directors of a Federal reserve bank, chosen by and representative of the stock holding banks, would be officers or directors of those banks, and it is evidently the intent of the Federal reserve act that they should be. Therefore, such of the provisions of section 2 of the Clayton bill, as would prohibit a person from being a director of a Federal reserve bank or any other bank, would be contrary to the intent of the Federal reserve act as passed. I am simply pointing that out.

Now, another general suggestion which I would like to make runs along the line of the advisability of eliminating section 2 in its entirety and leaving that for subsequent enactment as part of the Federal reserve act when that system goes into operation and any necessity for regulation appears. I have written a few lines on this subject, and probably I can read them better than I can speak them. My suggestion is the enactment of a general provision which would give discretionary power to the Federal Reserve Board when, in any future case, this Federal reserve act is in operation and they find any abuse by reason of an officer of a member bank being in control of another bank, to give them the discretionary power to control and remove the officer.

The CHAIRMAN. Why could not the subject be dealt with in a broad way by a statute amending the Sherman antitrust law and without restricting it to the more amendment of the Federal reserve act?

Mr. PATON. My only thought is that banking being a separate subject and being regulated by the Federal reserve act it would be more germane to the subject to have any regulation of banks come under that act. Banking is different from other industries to which the antitrust law applies.

The CHAIRMAN. You know what has brought about the demand for this legislation?

Mr. PATON. It has been this Pujo investigation, where they found certain concentration of control in New York.

The CHAIRMAN. They found, it was said, banks exploiting railroads, industrial enterprises, and various other things. Now, what we want to do is to bring in some legislation that will prevent that; but you would not do anything?

Mr. PATON. I beg your pardon, sir; I did not mean to suggest that at all. I meant to suggest the possibility of postponing this and enacting a law which would place this within the power of the Federal Reserve Board; that is, where evils were shown to exist. The legislation proposed in section 2 is broad and sweeping; it applies all over the country. It will hurt 99 men in their business relations where there is no abuse, where it will catch 1 where there is an abuse. Why should it not be regulated by a board that has the power to remove a director or officer if the facts and experience justify it?

The CHAIRMAN. Then you do not want any legislation at this time?

Mr. PATON. I simply throw that out as a general suggestion.

Mr. MCCOY. I suggested that to the president of a bank in my district (Newark, N. J.), Mr. Van Dusen. Perhaps you know him.

Mr. PATON. I am very well acquainted with him.

Mr. McCoy. And he wrote me that he thought the Federal Reserve Board was already burdened with sufficient work to make it undesirable to leave the power in its hands to regulate. His notion was that the bill ought to be so amended as to make this prohibition apply to banks of a certain amount of capital stock. And, by the way, I am the unfortunate individual who introduced an interlocking directorates bill as applied to banks, and I want to say now that I intended to except from the scope of that bill mutual savings banks, but by inadvertence I did not put it in. I think it ought to be in there.

Mr. Paton. There are differences of opinion on this subject among bankers, and I can not give a concrete expression for the American Bankers' Association as a whole. I have simply come here and am trying, in an informal way, to offer certain suggestions for your consideration. Now, if it is not thought desirable to leave that to the Federal Reserve Board and some legislation, as provided by section 2, is thought necessary, then I have prepared a draft of a suggested amendment or substitute for that section which, I think, would be more fair than the section is as at present drawn.

The Chairman. You have that draft?

Mr. Paton. I have that here, and it will not take more than five minutes to go over it.

The Chairman. I wish you would read it.

Mr. Paton. That section as at present drawn applies to everybody; it is not limited as to liability; it is not limited as to amount, but it applies to everybody. A man in New York or a man in any other town could not be a director in a bank in another State, and it seems to me entirely too sweeping. I would call your attention to the report of the Pujo committee after making this investigation. They suggested a bill to amend the national banking act, and section 11 of that bill is not nearly as sweeping as section 2 of the present tentative bill. Section 11 of that bill provides:

> No officer or director of a national bank shall be an officer or director of any other bank or of any trust company or other financial or other corporation or institution, whether organized under State or Federal law, that is authorized to receive moneys on deposit or that is engaged in the business of loaning money on collateral or in buying and selling securities except as in this section provided; and no person shall be an officer or director of any national bank who is a private banker or a member of a firm or partnership of bankers that is engaged in the business of receiving deposits: *Provided*, That such bank, trust company, financial institution, banker, or firm of bankers is located at or engaged in business at or in the same city, town, or village as that in which such national bank is located or engaged in business: *Provided further*, That a director of a national bank or a partner of such director may be an officer or director of not more than one trust company organized by the laws of the State in which such national bank is engaged in business and doing business at the same place.

Under that suggested provision it would only limit this holding officer in two banks to the same town or city.

Mr. Floyd. Would not that system permit the great banks in New York to have common directorates in banks all over the country and absolutely leave their control undisturbed?

Mr. Paton. My amendment does not go as far as that in that respect.

Mr. Floyd. I am talking about the amendment you have just been reading. Would it not do that?

Mr. Paton. It would, unless it was restricted. I have an amendment here which I think will cover that.

Mr. FLOYD. We would be glad to hear it, because we have studied the other one very carefully.

Mr. PATON. This must be subject to correction, as those I represent may not all agree to it. It is simply a suggested substitute for section 2:

No person shall at the same time be an officer, director, or employee in two or more Federal reserve banks.

That is the same provision as in section 2.

Nor in two or more banks or trust companies located in the same city or town which are members of any Federal reserve bank where the aggregate paid-in capital and surplus of all of such members if apportioned among each would exceed $1,000,000 for each member.

That would prevent an officer or director of a member bank from holding office in another large bank. The only abuse as yet shown by the facts developed by the Pujo committee has been in the concentration of vast amounts of money, but there has been no such abuse shown in the cases of smaller concerns.

Nor shall any private banker employing in his business a capital exceeding $1,000,000——

The CHAIRMAN. Would you not say resources, rather than capital and surplus?

Mr. PATON. Then the limit would have to be a good deal larger, it seems to me.

Mr. MCCOY. Are not the deposits of a bank liabilities?

Mr. PATON The deposits of a bank are liabilities.

Mr. PATON. The deposits of a bank and the capital and surplus constitute the funds that can be loaned and invested. On the other hand, there is a liability on the part of the bank for those deposits. They are not resources in every sense; they are really liabilities.

Mr. MCCOY. Deposits are converted into resources by loans.

Mr. WEBB. Mr. Brandeis stated that deposits were resources.

The CHAIRMAN. You will find that in Mr. Brandeis's statement.

Mr. PATON. (Reading:)

Nor any officer or director of any bank or trust company not a member of a Federal reserve bank whose paid-in capital and surplus exceeds $1,000,000 be an officer or director of any Federal reserve bank or member bank located in the same city or town: *Provided*, That nothing herein contained shall make ineligible the trustee of a mutual savings bank, not having capital stock, to become an officer or director or employee of a Federal reserve bank or other bank or trust company member thereof: *And provided further*, That when the business of a trust company which has a paid-in capital and surplus exceeding $1,000,000, whether member or nonmember of a Federal reserve bank, is of a character which does not substantially compete with the business of a member bank in the same town or city, nothing herein contained shall make ineligible a person who is an officer, director, or trustee of such trust company from also being an officer or director of any such member bank or of any Federal reserve bank which may be located in such city.

The thought of that last proviso is that where there is no competition there is no reason why a man who is a director in a member bank should not also be a member in a trust company.

Mr. FLOYD. It developed, as I remember, in the Pujo investigation that a group of about five big financial concerns in New York, dominated by one whose capital far exceeded the others, had interlocking directorates extending through 85 concerns in different towns and States. Now, when you use the phrase "not in the same city," do you not make it possible to have that condition continued? It

would seem to me that after you had passed your law you would fail to prohibit the very people it is intended to reach from concentrating control in big banks.

Mr. PATON. I admit that this draft would not cover a case where there is control in one city of a bank or trust company in another, but it does not seem to me that such a condition has been shown. There was no institution specified in that Pujo investigation——

Mr. FLOYD (interposing). Did you ever see the chart of those banking institutions made under the supervision of the Pujo Committee or Mr. Untermyer?

Mr. PATON. Yes; I have seen it.

Mr. FLOYD. Did it not connect those banks in that way, not in the same city, necessarily, but cities throughout the country?

Mr. PATON. I will admit that I am not thoroughly familiar with that; I have seen it, but it is not clearly in my mind now. However, I do not understand that it was shown that officers or directors in a bank in New York, for example, where the evil was shown to exist, were also officers and directors in control of a bank in Chicago and other cities.

Mr. MCCOY. Was it not shown in that report that there was that kind of connection between Boston banks and New York banks; that some of the directors of banks and trust companies in New York, or in Boston, at any rate, were directors of banks and trust companies in New York?

Mr. PATON. My impression is not sufficiently clear to say about that. I know it was shown that there was a community of interest; that certain concerns in Boston were interested with concerns in New York, competing with one another in the loaning and investing of money. This draft does not cover that, but it can be very readily added; that is, to make ineligible an officer of a bank in one city from being an officer or director in any other city whose capital was exceeding a certain limit.

Mr. MCCOY. Do you see any serious objection to leaving the regulation of the entire matter to the Federal Reserve Board?

Mr. PATON. That seems to me the best solution of it, and that is what I suggested in the first instance.

To summarize what I have already said, my first thought was that nothing would be done which met the objection of the committee. My thought there was that inasmuch as Congress had already enacted a tariff law, and an income-tax law, and a Federal reserve bank act, that is doing pretty well. Why not let those acts stand and see what the people think of them before attempting any new, revolutionary legislation which may not find favor with the people of the country?

The second thought was that if there was to be legislation it would be more appropriately done by a provision giving the Federal Reserve Board the supervision and power to remove any officer or director from a member bank who abused his position by exercising a too great control in other banks. The Federal Reserve Board is now given broad powers. They are given power to examine into the affairs of all the member banks, and so far as the Federal reserve banks and member banks are concerned, they have the power to find out what is going on in the bank.

They are also given the power to suspend or remove any officer or director in any Federal reserve bank who is guilty of an offense which

warrants his removal. It stops there, as far as the removal of officers and directors goes. Why would it not be practicable and probably the best thing to suggest an amendment of that act itself, which would increase the power of the Federal Reserve Board to remove the officers and directors of member banks on certain stated conditions?

Mr. CARLIN. I want to call your attention to the fact that that is just what Congress refused to do. Amendments to that effect were offered to that section and were not accepted.

Mr. PATON. You think that would be impracticable to suggest?

The CHAIRMAN. The position was taken that there ought to be a comprehensive law prohibiting interlocking directors generally.

Mr. PATON. My thought is that this legislation is more properly banking legislation than antitrust legislation. The railroads are supervised by the Interstate Commerce Commission. You are going to have a board of supervision for the trusts in general, and there is also a board created to supervise the banks. It seems to me you ought to guard against conflicting jurisdiction in these cases and that this particular matter ought to come within the supervising powers of the banking commission.

Mr. MCCOY. There would be no legislative difficulty in passing an act on that particular matter in connection with these so-called antitrust bills. To whatever extent we legislate now on that subject it will be an amendment of the Federal reserve bank act, to be taken notice of by the Federal Reserve Board, if we give them jurisdiction, so that it would not make any difference whether it is under the jurisdiction of this committee or the Committee on Banking and Currency.

Mr. PATON. That brings me to a suggested amendment to section 2, which I have already read in detail, and in regard to which I would like to read a portion of a letter which I received to-day from the president of the Alabama Bankers' Association. I sent him a copy of this draft and asked him to reply to me here. I have just received a letter in which he says:

> In thinking of affairs in Alabama I find standing out more prominently as being affected by the bill introduced two conditions of sufficient importance, and should not be interfered with, in my opinion. And what is true in Alabama I think is generally so throughout the United States. The liberties of a national bank being somewhat prescribed, to take care of legitimate business in agricultural districts as well as other sections in making longer loans than commercial banks can do, in loaning on real estate and the real development of many departments of business, and also in allowing interest and stimulating people to save, those interested and managing commercial banks have found it expedient to organize savings banks and some to organize trust companies, and it will be readily seen these supplement each other and often prove a great blessing in the communities in which they are located.
>
> I find again in certain centers men with capital and brains engaged in the banking business have gone into smaller communities and joined forces with the small capital to be raised in those communities, have organized country banks which have proven great developers, and therefore are very helpful.
>
> Now, leaving the interest of the investors out of the question, I think it would prove very hurtful indeed to the communities in which these savings banks and trust companies are located, or in these rural communities mentioned, if the law should close up or otherwise destroy these classes of banking. I am confident it is not their desire to do this.

That is simply on the general proposition, that it would be unjust to prevent an officer or director of the small bank to hold office or an interest in another bank in the same locality.

There was one suggestion made that this bill did not cover, and that was by Mr. Floyd, who said, as I remember it, that it did not

prevent the controllers of great capital in a great city like New York from controlling the smaller banks. If there is an evil there, it seems to me that could be amended by an added proviso to the bill, and amendments drafted and presented, which would provide that in a city of a million or more population an officer or director in a bank in that city should not have control of a bank in a smaller place, without interfering all over the country with the established relations which now exist, and where no such abuses are found.

Mr. McCoy. You say control; do you mean literal control or stock ownership, or an interlocking directorate?

Mr. Paton. I mean the directorate.

Mr. McCoy. The directorate?

Mr. Paton. Yes.

Mr. McCoy. Now, take the situation in the place where I live. I live in a commuting section. Thousands of people go from the part of the country where I live into New York City every day. A great many of them are directors in New York banks, and they are also directors in our local banks.

Mr. Paton. In that case, there is no abuse by the New York bank officer of any condition in the New Jersey locality.

Mr. McCoy. Is it your suggestion that the man should not be a director in two banks, each of which was in a city of a million, or that if he were a director in a bank in a city of 1,000,000 population, he could not be a director in another bank, no matter how small the city might be?

Mr. Paton. My idea was the former suggestion of yours.

Mr. McCoy. That is, he would be forbidden to be a director in two banks, each of which was in one of these large cities?

Mr. Paton. Yes. I do not think you will find any abuse in the matter of abuse in the smaller places.

Another thought which I might add is this: It is often a great benefit to two banks to have one man as an officer or director in each of those banks, especially when the matter of loaning money is considered. For instance, a man may have borrowed up to his limit from one bank, and then he may go to another bank to borrow some more. If there is no director in the second bank who knows of the condition of affairs, it is very probable that this man may succeed in securing an over loan.

Mr. McCoy. That would be a minor objection, I mean as compared with some of the admitted evils.

Have you considered the proposition of providing for cumulative voting on bank stock?

Mr. Paton. No; I have not. I have simply confined my thought as to this particular banker.

Mr. McCoy. It has been suggested that there should be permitted cumulative voting on bank stock. Can you, offhand, see any objection to that?

Mr. Paton. You mean to prohibit it?

Mr. McCoy. No; to permit it.

Mr. Paton. I am not a practical banker. I would prefer to have Mr. Hunt answer that.

Mr. Hunt. I should not think there would be any serious objection to that. It simply means that here is a man who has a substantial

stock interest. If he votes it all for one man he can get his stock interest——

Mr. McCoy. Be given a minority representation on the board?

Mr. Hunt. Be given a minority representation on the board, and it would not enable him to control the bank or to control the board. I should not think it was seriously objectionable.

Mr. McCoy. Do you see any objection to it?

Mr. Hunt. Not on the face of it; no, sir.

As a matter of fact, my experience is that banks are usually very willing that the substantial stockholders be represented. Therefore, it does not make it necessary for him to have the power of cumulative voting in order to get representation, because he usually is allowed representation.

Mr. McCoy. Is it your experience in Connecticut difficult to get men to go on the boards as bank directors?

Mr. Hunt. To get the kind of man you would like to have is not always easy.

Mr. McCoy. Meaning thereby the man of business experience?

Mr. Hunt. Meaning thereby a man of business experience and standing, a man who will help to bring business to the bank owing to his standing in the community. Men of his kind are not easy to find. So it is ra her difficult than otherwise to get the kind of man you would like to have.

STATEMENT OF MR. THOMAS C. SPELLING, ATTORNEY AT LAW, NEW YORK CITY.

Mr. Spelling. Mr. Chairman and gentlemen: I have been witness to the fact that a variety of views have been presented here, and I avail myself of your courtesy. I appear before the committee to say a few words in favor of the legislative proposition of Hon. A. O. Stanley. I wish that the eloquent, logical, and patriotic statement that he made at the opening of these hearings could be read by every citizen, at least by every intelligent citizen, of this country. Nevertheless, I would not be satisfied with the bill supported by him exactly in its present form. His amendment goes to the second section and inserts in that the words "in any degree." I would insert in the first and third sections these words——

Mr. Webb (interposing). What Stanley bill do you speak of?

Mr. Spelling. The bill that Mr. Stanley advocated before the committee about two weeks ago when, I think, you were not here, Mr. Webb.

Mr. Danforth. What is the number?

Mr. Spelling. I do not know the number. It is in the hearings. It provides that the words "in any degree" shall be inserted in the second section of the antitrust act, and it contains another section providing that the jury in damage cases can consider whether the constraint or monopolization was undue or unreasonable. I would not be satisfied to have that at all because—disposing of it right now—it recognizes the presence of, and as part of the antitrust act, the words interpolated by the Supreme Court, and I think there are better and other ample measures of damage. I think that might have the effect of excluding any other measure of damages, and I do not think

it is any measure of damages at all. Now, then, what I would do would be to insert in the first section which reads, "Every contract, combination in form of trust or otherwise, or conspiracy in restraint of trade or commerce," etc., after the word "conspiracy" and before the word "in" the words "to any extent or in any degree." And I would make the corresponding change in the third section, which I think is merely an amplification of the first.

Mr. DANFORTH. Mr. Spelling, is that the bill you are talking about [handing Mr. Spelling a bill]?

Mr. SPELLING. Yes; that is it. It is H. R. 11757. Now, there is a question as to whether the word "direct" ought not to be inserted between the words "in" and "restraint." I think it might be a wise precaution to insert that word, because, notwithstanding that the Supreme Court decisions without a break have limited the application of this act to direct restraints and excluded indirect restraints, it might, as I say, be a wise precaution to exclude any doubt as to the retention of the word "direct" as a part of the law, and to also make that amendment. The first sentence of the first and third sections as thus amended would then read: "Every contract, combination in the form of trust or otherwise, or conspiracy, to any extent or in any degree indirect restraint," etc.

Now, gentlemen, when the Supreme Court decided these cases it was almost the universal view in Congress, and in the minds of the legal profession outside Congress, that the court had decided erroneously. Not only that, but the opinion prevailed that the decision was vastly prejudicial to the public interest.

Mr. CHANDLER. How did you determine it was the almost universal view of the lawyers in and out of Congress that the decision of the court was erroneous?

Mr. SPELLING. I judged from expressions.

Mr. CHANDLER. Where? In the press?

Mr. SPELLING. Yes; and in congressional circles. But that is a matter of opinion. You and I may differ upon that.

Mr. CHANDLER. I just wanted to know upon what you based your calculation.

Mr. SPELLING. Even if it were simply a small minority that held that opinion, it would not be material. Of course, I am liable to be mistaken, but I do not think it would be material if a very large majority thought the other way. Now, gentlemen, that was the prevailing opinion, and I will go further——

The CHAIRMAN (interposing). It is your opinion that that was the prevailing opinion?

Mr. SPELLING. Yes.

The CHAIRMAN. Some other lawyers have been before the committee and expressed the contrary opinion.

Mr. SPELLING. Yes: I am aware of that, and they seem to have come before the committee for no other purpose than to express that opinion.

Mr. CHANDLER. How do you know that?

Mr. SPELLING. I judged by the hearings. I heard some of them and read their statements. Now, I can only express, gentlemen, my own opinions, my own views, my own convictions, and I claim the right to express them no matter what the opinions and convictions of others may be. We can not be governed by other people's opinions

in matters of law and conscience. And if they are so unpalatable that the committee does not want to hear them, of course, I will subside. But I would like to continue on this line a few minutes.

The question has been discussed here as to what the Democratic platform contains. I think I know, from my individual experience and observations, that the plank declared the purpose of the Democratic party to be to make the Sherman Act more certain and to remove undertainty, and that it was the desire to eliminate the words "undue and unreasonable." I might say that I was on the ground and heard the views of the committee. I know what arguments were presented to the committee on platform. Aside from all that, you take the words in the platform:

> We regret that the Sherman antitrust law has received a judicial construction depriving it of much of its efficacy, and we favor the enactment of legislation which will restore to the statute the strength of which it has been deprived by such interpretation.

Nothing more should be required than to read that platform declaration. The clamor and pressure for legislation at this time is due to the alleged or actual uncertainty in regard to the state of the law. I think I am safe in saying that the uncertainty which is now complained of originated and exists largely because of those decisions. I do not know any better way to do a thing than to do it directly; I do not know of any shorter route between two points than a straight line. If supplementary legislation is enacted, it must necessarily amend the Sherman antitrust law. An act of Congress either changes the law or it changes nothing; if it changes the law it changes the Sherman Antitrust Act; if it does not change anything at all, then, of course, there is no need of enacting it. I believe, and I think I have the right to believe, that such was the intention at the insertion of that plank in the platform.

Here are a few extracts from a report of the Senate Committee on Interstate Commerce, made in February, 1913, through Senator Cummins, and I think it speaks the best thought of the Republican Party. That is merely a matter of opinion, so that I need not be taken to task on that. He says:

> In order to look at the subject in the light of illustration, it is suggested that there will presently come before the courts the combination centered in the United States Steel Corporation. In the end, nine justices of the Supreme Court will be asked to say whether the restraint of trade brought about through this combination is a due or an undue restraint, and the answer which each justice makes to that question will depend upon his individual opinion as an economist or sociologist, the conclusion of the court being in substance an act of legislation, passed by the judicial branch of the Government to fit a particular case.
>
> * * * * * *
>
> The committee has full confidence in the integrity, intelligence, and patriotism of the Supreme Court of the United States, but it is unwilling to repose in that court or any other court the vast and undefined power which it must exercise in the administration of the statute under the rule which it has promulgated. It substitutes the court in the place of Congress, for whenever the rule is invoked the court does not administer the law, but makes the law. If it continues in force, the Federal courts will, so far as restraint of trade is concerned, make a common law for the United States, just as the English courts have made a common law for England.
>
> The people of this country will not permit the courts to declare a policy for them with respect to this subject. If we do not promptly exercise our legislative power, the courts will suffer immeasurable injury in the loss of that respect and confidence so essential to their usefulness. It is inconceivable that in a country governed by a written constitution and statute law the courts can be permitted to test each restraint of trade by the economic standards which the individual members of the court may

happen to approve. If we do not speedily prescribe, in so far as we can, a legislative rule by which to measure the forms of contract and combination in restraint of trade with which we are familiar or which we can anticipate, we cease to be a government of law and become a government of men, and, moreover, of a very few men, and they appointed by the President.

It may be that the Supreme Court will be so enlightened and so alert that its opinion respecting what is due and what is undue restraint of trade will be in harmony with an awakened public conscience and a disinterested public judgment, but to fashion our conduct upon that hypothesis is to repudiate the fundamental principles of representative government.

I submit that Congress at least has the right to examine for itself and come to a conclusion as to the soundness or unsoundness of judicial opinions. And I say that for this reason, that if the decision of the court is wrong at all the court usurped legislative functions. It departs from the rule which has been recognized for over a century and in many decisions, that questions of policy are for Congress, while questions of administering the laws only are for the courts.

Now, for a court to declare a new policy and apply that new policy to the cases as they come before it is to legislate. And I can say what I would do if I had the legislative power in my hands. I would examine this question and see whether I believed the coordinate branch of the Government had abandoned its proper function and had promulgated decrees which, though having the forms of judgments, were, in fact, acts of legislation. I would consider it not only my right and comporting with my dignity, but also my duty, to eliminate the wrong decision, correct the wrong, and insert in lieu of such decree a declaration of the legislative policy.

First, the court, basing its conclusion on common-law doctrines, is in error, because at the common law the rule of reasonableness was never applied if the act condemned by the law was indictable.

This idea that the Supreme Court merely embodied in the statute the common law is itself erroneous. It is an erroneous conception of what the common law is.

The antitrust act penalizes alike the entering into contracts and combinations in restraint of trade. It seems a palpable contradiction in terms to speak of that as a contract which in the same sentence is declared to be illegal. According to the common law, though they are called contracts, they are, when restrictive of trade, really combinations. Now, all combinations in restraint of trade were indictable at common law, as they are under the Sherman Act, and the question of reasonableness does not enter at all. The reason is that a thing can not be punished as a crime if its quality as such or as an innocent act must be determined by such a mere matter of opinion as reasonableness or unreasonableness.

The first sentence of the antitrust act would mean just the same if it omitted the words, "contract," "trust," and "conspiracy." An illegal contract is a combination, and a conspiracy is as much a mere form of combination as is a trust agreement. Only reference to the law dictionaries is needed to show this. For instance, Bouvier's Law Dictionary defines combination as "A union of men to violate the law," and a conspiracy as "A combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means." No part of the opinion in the Tobacco Company case is clearer than that in which is stated, as

already quoted, the illegal character of the restrictive arrangement; that is, that it was a combination. So that the antitrust act would have been just as comprehensive if it merely declared, "Every combination in restraint," etc. And the court, in effect, placed the word "undue" or "unreasonable" before the word "combination" in its illegal and criminal sense, and held that before there could be either civil redress or punishment, the Government must prove an "undue" or "unreasonable" crime.

Now, let us glance at the form of language and arrangement of the words at the beginning of section 1 of the Sherman Act, bearing in mind what has been said of the identity of meaning of combination and conspiracy. "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade," etc., "is hereby declared to be illegal." Could the legislature, using these words in this relation, have possibly intended that the word "unreasonable" should be interpolated by construction before the word "restraint," with reference to the word "contracts," and not also with reference to the words "combination" and "conspiracy"? Again, if the common law governs, and the adjective "every" applies in the same sense to each of the three nouns, then, why should it be required that a contract appear to be unreasonable in order to enjoin or penalize it, unless an unreasonable element be essential in cases of combinations and conspiracies? But at the common law, as has already been shown, combinations and conspiracies in restraint of trade were indictable, and, of course, illegal, without any question as to the degree or extent of the restraint.

The confusion of thought has no doubt arisen from the fact that if at the common law a restrictive arrangement came before the court in a civil action it was called a contract. If the same arrangement came before the court in a criminal case, as might and often did occur, it was called a combination or conspiracy. So that where the arrangement was really restrictive, in illegal sense, the terms "contract" and "combination" might be interchangeably used to describe it.

The Supreme Court has not merely substituted what is supposed to be the common-law rule, meaning one thing, for what Congress enacted of a different meaning, but by applying the doctrine of reasonableness to combinations or conspiracies it establishes a rule found neither in the statute nor in the common law.

Second. Common-law rules and distinctions can not be properly resorted to by the courts for the purpose of interpreting the laws passed by Congress. For more than a hundred years it had been the established view, expressed in many decisions, that the public policy of the United States was in the care and keeping of Congress, and that our courts are not at liberty, as are the courts of England, to invoke and apply that unstable and indefinable thing, found outside all written laws, and known as public policy. If this new power is retained and exercised, the purpose and effect of almost any statute of a general nature are liable to be changed to meet a judicial view of what the public interest, or policy, demanded at the hands of Congress, though not expressed. And even though Congress may by the most explicit terms declare a certain act to be a criminal offense, a court may find outside the terms of the statute a public policy, borrowed

from the common law and used as a touchstone or test in determining how far, or if at all, the expressed will of Congress shall prevail.

Nothing had been so well settled and generally accepted as that the common law was no part of Federal jurisprudence, and that its principles were of merely persuasive or argumentative force. Now, if a rule of public policy peculiar to the common law, and nowhere else to be found, can be set up to change the meaning and settled construction of a statute, is there any rule or principle that may not be employed to the same end?

And what was the nature of this abstraction which, as a result of the recent decisions, is hereafter to abide with the courts and not be intrusted to Congress? In Davies *v.* Davies (36 Ch. Div., 359) it was said that "public policy is a variable quantity; that it must vary, and does vary, with the habits, capacities, and opportunities of the public." In Richardson *v.* Mellish (2 Bing., 229) that "it is a very unruly horse, and when once you get astride it you never know where it will carry you." And in Woodruff *v.* Berry (40 Ark., 251) that "we are aware that courts tread upon thin ice when they annul contracts because they contravene, or are supposed to contravene, considerations of public policy." There is much of the same import in Hilton *v.* Eckersley (6 El. & Bl. 47) and in other cases.

What Congress intended to say, and what it meant to say, according to this view of the court, was not that "Every contract, combination," etc., "in restraint," etc., but "Every contract, combination in the form of trust or otherwise, or conspiracy, in unreasonable (or undue) restraint," etc. Can we believe that a Congress of scholars, lawyers, and statesmen said the one thing and meant the other, so very different in meaning? If Congress had meant merely to rest upon the common-law prohibition, why didn't it merely prescribe the penalty and the civil remedy and stop there?

Third. Persons (corporations being included in the term as used in the act) obviously occupy no stronger relation to the power of Congress to regulate interstate commerce than the individual States; and it has been frequently held that a State can not directly interfere with interstate commerce to any extent whatever.

There are many decisions, and I cite one, Shelby *v.* The Taxing District of Memphis, in 120 United States. It was insisted that this tax——

The CHAIRMAN (interposing). That case was Robbins *v.* The Shelby Taxing District.

Mr. SPELLING. Yes; that is right.

The CHAIRMAN. Robbins was a traveling salesman who was charged with violating the local tax law there.

Mr. SPELLING. Yes; it was insisted that it was only a slight tax, only a slight inconvenience; but the Supreme Court said we lay that all aside, because by the Constitution the States and municipalities can not interfere with interstate commerce at all; and, applying it to that particular case, it was immaterial that the tax was light and the inconvenience inconsiderable, because the constitutional prohibition was all inclusive, could not be limited, and interstate commerce can not be taxed at all.

Here we have, for instance, a contract, so called, or a combination in restraint of trade. Does that not regulate interstate commerce? Is it not, pro tanto, a regulation? Certainly. Here is a combination formed to control the interstate commerce in oil or in tobacco or in

anything else. If we can restrain interstate commerce, that is, pro tanto, regulation, because that is what regulation means? That means that a private individual or a private corporation can make a rule for interstate commerce just like the municipality at Memphis made a rule in that particular locality. I believe it was an ordinance passed by State authority, by the authority of a State statute, and that held the State statute void.

That principle that I have just announced is expressed in the Addyston Pipe Co. case. That decision is to this effect: That to allow that individuals and corporations could make contracts or create entities or combinations or by any means reasonably restrain interstate commerce would be to concede them the right to regulate it. And it was on that principle that Congress had the power to forbid all restraints and monopolizations and attempts to monopolize interstate commerce.

Long prior to the antitrust act the courts were constantly applying the rule or principle of noninterference with the freedom of commerce to State interferences, a rule such as that applied by Congress to private restraints when it passed the antitrust act. And by parity of reasoning the rule adopted by Congress, like that drawn from the Constitution and applied by the courts, was not qualified by any common-law doctrine and which admitted of no modification or exception. The similarity of the rule of exclusiveness where State legislation is involved and the rule that should apply in cases arising under the antitrust act was mentioned by the court in Hopkins *v.* United States and in Addyston Pipe Co. *v.* United States. According to this rule to admit that a State or city might reasonably or in some small way tax interstate commerce, the extent to be determined by the courts, would, of course, be absurd. But is it any less absurd to admit or assert that corporations and individuals might "reasonably" restrain it, and thereby regulate interstate commerce, the meaning of the qualifying term to be fixed by the courts? The power of a State to reasonably tax interstate commerce would be the power to reasonably regulate it, and the same would be true of a power to reasonably restrain it if such power could be extracted by construction from the antitrust act. It seems very clear that when Congress came to express its will with reference to these interferences by private parties it spoke in the same sense and with the same comprehensive scope as had characterized the decisions of the courts in dealing with similar conditions.

The CHAIRMAN. There has just been a call of the House and the members of the committee desire to answer the roll call, so we will stand in recess until 2 o'clock this afternoon.

(Thereupon, at 12.05 o'clock p. m., the committee took a recess until 2 o'clock p. m.)

AFTER RECESS.

The committee reassembled pursuant to the taking of recess.

STATEMENT OF THOMAS C. SPELLING—Continued.

The CHAIRMAN. You may continue, Mr. Spelling.

Mr. SPELLING. I think, Mr. Chairman, I was discussing the third reason. If I can go on in my own way I will not take very long to close.

The fourth reason is this: The common law and its doctrines could have no application to the legislative branch of the Government, created long after the formative period of the common law had ended; still less could it apply to a subject matter, here interstate commerce, which came into existence as a part of the new system inaugurated by the adoption of the Constitution.

There never was any such thing in England or known to the common-law system as interstate commerce, nor was there anything resembling it. Interstate commerce pertains to all the States, not one or any number otherwise than in a capacity and relation as members of the union of States. A transaction beginning in New York and ending in Jersey City is not merely a New York-New Jersey matter, but concerns every State and every citizen in every State. It is essentially national. If interstate commerce could be localized, if it could belong or pertain to any number of States or persons less than the whole, then it would not be subject to the regulative power of Congress, each of whose enactments extend throughout the length and breadth of the Nation, and to all its people.

Now, in England, that is to say, under the régime of the common law, as already explained, the doctrine of reasonableness was essentially local, besides being limited to contracts as already defined. Under no circumstances could one preclude himself or be precluded, generally, from following his avocation or carrying on business in the whole kingdom. Such an agreement was not only void on its face, but could not be made good. And since the subject of interstate commerce has scope coextensive with the whole country, and is incapable of being localized, it must follow that any restrictive contract having that for its subject matter, and without reference to degree of restraint, is void. As to combinations and conspiracies, if indeed they be distinguishable from contracts for present purposes, there are additional reasons, as already shown.

There is a fifth reason, which, though covered by the foregoing, may be stated separately for greater perspicuity. Whatever may be said of mere restraints, all monopolies and attempts to monopolize were illegal at common law. So in the second section, Congress considered it unnecessary to say "every monopoly is illegal." But when the first section was written, it appears to have been the very purpose to remove all uncertainty and get as far as possible from the technical distinctions of the common law. Otherwise the first sentence of the first section might just as well have been omitted.

Now, I just want to call your attention to another phase of the matter. The Supreme Court overlooked the fact that it was dealing with a combination in those cases, because the common-law doctrine of reasonableness applied to a combination in which term is included conspiracies and contracts in restraint of trade; that is, when the Supreme Court held in the Standard Oil and Tobacco Trust cases that the words "undue" or "unreasonable" qualified the facts in those cases, it held that, in order to have that effect under the Sherman Antitrust Act, it must be an unreasonable and undue combination. This rule of reasonableness or unreasonableness did not apply to monopolies nor to attempts to create a monopoly, although restraint is an element of each attempt to monopolize. But although that is sometimes alone sufficient, it is usually attended with other evil acts and practices.

I want to briefly call your attention to another matter. Certain lawyers before this committee, and certain gentlemen who have appeared before this committee, and who have expressed their views elsewhere, have confounded the "rule of reason" with this doctrine of reasonableness and unreasonableness.

Now, in regard to the rule of reason, it is no more nor less than a process of reasoning in the construction of a statute. That is necessary in the case of all statutes. That is necessary even in other matters which must be passed upon by the judiciary. There is not a court in this country, from the Supreme Court of the United States down to the most inconsiderable municipal court, but must exercise reason, and that is the "rule of reason," or the process of reasoning.

But it has been said here by Mr. Levy and Mr. Low that the Supreme Court of the United States merely declared this "rule of reason," and Mr. Levy went on to say just what I have been saying, that it is absolutely necessary for courts to reason and weigh the matter judicially when they are considering the statutes. Nobody can deny that, nor has ever attempted to deny it. But he was treating the rule of reason and doctrine of "undue" or "unreasonable" in the two decisions as identical.

Another thought is this, that the Supreme Court of the United States not only confounded the rule of reason with the doctrine of reasonableness, but both with the principle laid down and established in the courts that the act only applies to direct restraints. The question of whether a restraint is direct or indirect is a question of fact that might be passed on by a jury. The question of whether a restraint would be reasonable or unreasonable in any particular case, I will say, without being dogmatic on the matter is a mixed question of law and fact, and the court must first pass on it. For instance, a case is presented, and the defendant moves for judgment on the evidence or demurs. Then it is a question of law But if the defendant should go to trial and the case is submitted on evidence, so that the court has to instruct a jury; then the court must instruct the jury to apply the facts to the law, the court giving the law. It then becomes a mixed question of law and fact.

Now, that the court did so view those matters may account for what I think is an error in the decision, and I will read a short extract from the opinion in the Standard Oil case. This is a part of what the Chief Justice said:

> If the criterion by which it is to be determined in all cases, whether every contract, combination, etc., is a restraint of trade within the intendment of the law, is the direct or indirect effect of the acts involved, then of course the rule of reason becomes the guide, and the construction which we have given the statute, instead of being refuted by the cases relied upon, is by those cases demonstrated to be correct.

That is what I would call a non sequitur. It is a case of confusing things that have no essential or legal connection, and confusing them in the same paragraph.

The court then continues to argue that it necessarily follows from the fact that a resort to reason to distinguish between direct and indirect restraint is necessary, the question of reasonableness is ever present, and his language expressly brings combinations and conspiracies under the rule along with restrictive contracts.

It was called to the attention of the committee by Mr. Stanley that there was a general agitation in 1908, at the session that closed in the

summer of 1908. There was a stupendous movement on foot, which crystallized in the form of a bill introduced by Mr. Hepburn, of Iowa, to amend the Sherman antitrust law excepting railroads and labor organizations, and legalizing certain trade agreements. That movement had its inception in the National Civic Federation, which had a so-called trust conference in the city of Chicago in the month of October preceding. Most people supposed, and I did, too, that it would be an antitrust conference, but without saying more about that meeting and that discussion, it eventuated in this bill being introduced and in Mr. Low and others, including certain lawyers in New York, drafting the Hepburn bill, and getting it introduced and having a hearing before the committee. The balance of the history has been stated by Mr. Stanley, and is not very material at this time. But I wish to call your attention to the fact that the complaint then was that the Sherman law was too drastic. There was not any complaint that it was uncertain, except that large numbers of people were in fear because they could not do business lest they be prosecuted and not because they did not know they were violating the law. And it was said by those gentlemen before this committee at that time, and also said at this trust conference to which I have just referred, and said also in many editorials throughout the country and in numbers of after-dinner speeches by everybody who was taking a particular interest in that matter, that three-fourths of the business of the country was being done in violation of the law. That was the condition they wanted relief from.

Now, the Supreme Court has made these rulings, and the same people are satisfied with regard to legislation, and they do not want any change made at all. And yet most of them admit and some of them assert, that the great trouble in this country is the doubt and uncertainty as to what the law means, and some of the same individuals who say that protest against any amendment to the Sherman Act. Mr. Untermyer said to this committee the other day, that as construed by the Supreme Court the act is "absolute perfection." Whether the committee should agree with me or disagree on the proposition as to the proper method of amendment, I am free and frank to say that there ought to be legislation to remove the uncertainty. In short, I differ from those persons who protest against all the bills before the committee and all other bills.

As Mr. Brandeis was accorded time for a full expression of his views, and took liberal advantage of the time given him, it may be worth while to briefly quote from his statement and comment thereon. If he had any objection to making judgments in Government proceedings, "civil or criminal," conclusive between private litigants, he did not state it. And yet, against such legislation, I see insurmountable objections.

1. The burden of proof is on the Government throughout as to facts, and the defendant can not be forestalled herein.

2. The defendant is entitled to be confronted by the witnesses and he might, if necessary, fall back on a third reason that in a jury trial the jurors should have before them the original facts and not be forestalled by a mere conclusion of law, because that is what a judgment is. But judgments, when admissible in evidence at all, are never alone admitted in evidence, but the whole record. The last objection would hold good in civil cases. The judgment of a court

in any case is a mere conclusion of law, a legal proposition based on the facts of a particular case.

This idea of creating presumptions is what I would call a new fad in legislation. It seems to be an ingenious device to do by indirection what one is forbidden by the Constitution to do directly. There is normal use to be made of such legislation. It is convenient in cases where there is a logical and natural sequence and connection. But unless such substantial and logical connection is found, the legislation is unconstitutional. At the hearings we find the following question and answer:

Mr. CARLIN. If you should allow C to intervene, and so on down the line, you would have the court trying a dozen different causes of action at one time.

Mr. BRANDEIS. But the court does that in very many equity suits, a suit which involves a receivership or a suit which involves dealing with large properties, and the court does it almost of necessity (p. 641).

This is a far-fetched analogy. The right of intervention in equity is limited to persons having interests identical with that of the plaintiff. The Government represents the community of general interest of the whole United States. It can not represent a private interest, there being no possible community of interest with anyone having a special interest. And the same constitutional objections would lie against concluding the defendant by an intervention as to giving the judgment for the Government conclusive or presumptive force and effect against him.

Herein the rights of corporations are the same as the rights of individuals.

Constitutional guaranties may impose great inconveniences, but courts can not be and are not influenced by such inconveniences. Something was said of this in Hale *v.* Henkel (201 U. S., 1).

Mr. Brandeis attempted to meet the constitutional objections without referring to them. He said:

Now, I understand from the press that that provision has been challenged as being unconstitutional, and that the ground of that claim of unconstitutionality is that the provisions of your bill do not provide for a mutuality of estoppel; that it is an infringement of some of the fundamental rights guaranteed by the Constitution, and particularly the fourteenth amendment. Now, I conceive that that contention rests upon a failure to recognize both what the rule of estoppel is and what its effect is when applied to a particular case. The rule of mutuality in estoppel, which is ordinarily applied, is not any rule of fundamental right, and it is not a mere matter of judicial procedure. (Hearings, p. 639.)

Thus he entirely sidesteps the constitutional objections and discusses a point which he admits is not fundamental.

Judging from this and what he says on other proposals, he evidently thinks that by mere linguistic jugglery constitutional safeguards can be evaded by mere forms of speech. Then he attempts to compare the Government to a stockholder in equity for the benefit of himself and other stockholders. But there is no analogy whatever. The interests of the stockholders are identical, but the Government has no common interest whatever with any private citizen, least of all with one who has a private grievance. Moreover, the relation of the parties must be such that only one final decree need be entered and such a decree here would be impossible in the very nature of things.

Is this a mere matter of procedure? The due process of law to which a party is entitled is not awarded him if parties, pleadings, and

evidence are so jumbled and intermingled that an intelligent conclusion is impracticable. In other words, a fair trial is one according to due course of law, whether the case be civil or criminal, and whether the procedure be legal or equitable.

He then goes on to argue the question of mutuality or estoppel, as if that were the only matter to be considered.

But I call your attention to the fact that this all begs the question. Before you come to the question of mutuality of estoppel, you must consider the right of trial by jury and the due-process clause. And yet he deplores the state of misconception on this subject in other minds than his own.

He likens the proceeding of intervention here proposed to a receivership case. Says these suits are in equity. But the Government suit is purely legal, in which an equitable remedy is borrowed and only the prohibitory form of it. But why intervene in the Government suit? If the Government gets an injunction the wrong stops anyhow. It would confuse and totally disorganize our judicial system. He would have cases conducted like a town meeting.

Then he likens it to foreclosure proceeding. But these claims under the antitrust law are for torts. Did anybody ever hear before of a claim for unliquidated damages in a foreclosure proceeding?

The folly of the whole proposition of intervention, and for that matter of res adjudicata appears on page 645 of the hearings:

Mr. GRAHAM (interposing). Let me ask you a question right there. Do you not accomplish what you seek to accomplish by making that decree an estoppel against the defendant?

Mr. BRANDEIS. I accomplish that part of it, but that is not all.

Mr. GRAHAM. And then you leave a clear and definite issue to be settled in a subsequent suit. Did that monopoly or combination affect the person who is suing and what damage did he suffer?

Mr. BRANDEIS. No. I think there are two or three answers to that. Because of the difficulties involved, the issues are not perfectly clear and definite. Every intervening petition will present an entirely separate issue between the plaintiff and defendants. However, each case is to be taken up in that court because that court is able, from a general knowledge, to deal with it, and also because——

Mr. GRAHAM (interposing). It is really a distribution of assets.

Mr. BRANDEIS. No; it is not really a distribution of assets. But it would be of very great advantage to have the issue come before a court that is familiar with all the circumstances.

He displays his—I will call it lack of preparation, at page 646.

Mr. CARLIN (interposing). When would there be a final decree in a suit in which you allowed intervention?

Mr. BRANDEIS. Which final decree? The final decree for the Government?

Mr. CARLIN. Yes. It seems to me that your provision ought certainly to provide that when the Government's decree is entered the right of appeal shall apply, so as to overcome the statute of limitations. As you know, it is necessary to have a final decree sometime and somewhere.

Mr. BRANDEIS. We would have a final decree. Take the Tobacco case. The final decree in the Government's suit was when the circuit court entered its decree.

Mr. CARLIN. I am asking when there would be a final decree if your suggestion were followed that 100 intervening petitions be allowed? The suit would have to be determined under all known rules of equity.

Mr. BRANDEIS. The final decree——

Mr. CARLIN (interposing). There must be an end to the suit sometime, but it would not be final until all matters have been disposed of, unless you provided specifically for it.

Mr. BRANDEIS. I think it would be final, so far as the Government's end is concerned, when the final decree was entered. For instance, a case goes to the Supreme Court, and when the Supreme Court sends down its mandate ordering a decree affirming the judgment below that, I take it, would be a final decree.

Now, bear in mind that there can be only one final decree in an equity case. Here the statute of limitations would tie up affairs of a great corporation 8 or 10 years, destroying its credit at the inception.

Then he seems to be at sea on the question of appealing.

Mr. CARLIN. What would you do?

Mr. BRANDEIS. I should have an appeal from the main decision.

Mr. CARLIN. You would segregate that?

Mr. BRANDEIS. Yes, sir; absolutely. In regard to the individual cases, it seems to me that each one may properly stand upon its own bottom.

Mr. CARLIN. Would you not have to suspend a decision in the individual cases until the final decision in the main case was rendered, because that is the decision from which the individuals would expect to get benefit?

Mr. BRANDEIS. Of course, a court of equity could suspend a decision if it was necessary and proper in the conduct of the case. Those questions come up nearly all the time and could be easily disposed of. The court would not allow a man to get damages until it was known whether the defendant was guilty. I think that is perfectly clear. No court would think of doing that.

Mr. CARLIN. That is, you would have to wait until you had settled on the decree?

Mr. BRANDEIS. Yes; and there probably never would be any individual cases brought until the decree had been settled upon (pp. 648, 649).

And he is just as much at sea on the question of "dissolution."

Mr. CARLIN. A great many suggestions have been made to us with reference to these two sections, 12 and 13. Now, section 13 is one which gives the individual the right to injunctive relief. It has been suggested to us that we ought to give the individual the right to file a bill in equity for the dissolution of one of these combinations, the same right which the Government now has and which it is its duty to perform. What do you think of that suggestion?

Mr. BRANDEIS. I think that is not a sound one. It seems to me that the right to change the status, which is the right of dissolution, is a right which ought to be exercised only by the Government, although the right for full redress for grievances and protection against future wrongs is a right which every individual ought to enjoy.

When brought by a direct question to the matter of constitutional trial by jury, he says:

Mr. GRAHAM. How far is this an invasion of the constitutional right of trial by jury?

Mr. BRANDEIS. I do not think it is an invasion at all, and that it is subject to the same general rules which are applicable in a receivership proceeding, a bankruptcy proceeding, or any of these other proceedings. When issues are raised on an individual claim the court, under certain circumstances, should grant the request that the issues go to a jury. And under other circumstances it will not be found necessary to send the issues to a jury. In these ordinary cases the rules of a court of equity should be applied. Here there is nothing denied. (P. 651.)

Here we see conspicuously the absurd theory that one can be deprived of a jury trial by merely changing forms of procedure.

Then he attempts to extricate himself thus:

If the Government brings a suit it brings it like a stockholder's suit, for itself and for the benefit of all who may come in, and then you have the ordinary situation which you have in foreclosure and receivership suits. In any of these actions every man who has a claim can come in and establish his claim under certain circumstances. There may be a need for a trial by jury, and if so the particular issue would be referred to a jury. But I should not in any way interfere with whatever the rules of the court are in that respect. Now, there are two. (P. 651.)

Comment seems unnecessary.

We now come to the disposal of the matter after, by these devices, the parties have been stripped of their rights to due process of law and have reached the last ditch. By the provisions of sections 16,17 and 18 of the Lenroot bill, which Mr. Brandeis has been advocating the past two years, the courts are empowered and directed to appoint receivers, partition properties, and compel patentees and others to grant licenses.

It is unnecessary to discuss the matter. It is well known to lawyers that receiverships and partition suits come under one of the great heads of equitable jurisdiction and are of a preservative character. They can never be used for destructive purposes. Equitable principles are here involved; not merely forms of procedure. And, of course, equitable jurisdiction vested in the courts by the Constitution can neither be enlarged nor diminished.

The great principle constantly overlooked is that while Congress can give remedies and prescribe procedure there must be due regard for constitutional limitations. Besides, while the courts do possess all the powers described in these sections in proper cases, yet if resorted to otherwise than according to the usages and established practice of courts of equity the effect would be a denial of due process of law, given force and effect in spite of all mere forms.

Other provisions urged by Mr. Brandeis attempt to empower courts of equity to compel patentees and others to grant licenses. In addition to the fact that no equitable principle countenances it it would violate the terms of contracts and be a taking of property for private use.

When at length pressed by members of the committee, Mr. Brandeis advances an idea which is exceedingly novel. He says:

Mr. McCoy. You think that compelling a man to continue to do business is a power which a court of equity now has?

Mr. Brandeis. I think this is the situation: This court has power to do things under the Sherman Act. It has power to confiscate property.

Mr. McCoy. I would like to get away from the Sherman Act.

Mr. Brandeis. I will tell you what the analogy is: Here is a situation which is created, or appears to have been created, illegally. Now, it is has been created illegally; it is like a nuisance. The court has power over such a thing by direct mandatory injunction to compel a defendant to abate a nuisance (p. 663).

It is probably the first time that a lawyer seriously advanced the theory that it was a nuisance and abatable by arbitrary mandate of a court for a person or corporation to soberly and industriously apply a useful art, even though it happened to be profitable. As to confiscating property, that has heretofore been considered exclusively a war power, exercised only in cases of necessity, provision being made for prompt payment upon the cessation of hostilities.

He proposes in another section of the Lenroot bill to confiscate a plaintiff's right to protect his property in a patent against infringement if a defendant shows that the plaintiff was, at any time or to any extent, engaged in carrying on business in violation of the anti-trust act. A member of the committee asked if he was sure of the constitutionality of such a statute, and Brandeis answered, "Absolutely no question about it."

I think the Constitution says something about bills of attainder and outlawry, and prohibits their being passed. And even if a man has been convicted of crime and consigned to prison, he can not be despoiled of his property without due process of law. Here it is pro-

posed to do it collaterally, even before conviction, indictment, or arraignment. And yet Mr. Brandeis is ready to stake his professional reputation upon its constitutionality without reservation. I deem it unnecessary to do more than call it to the attention of the committee. He offers a very ingenious argument, which I deem it unnecessary to notice, and cites illustrations which are utterly irrelevant and pointless.

I had other matters to discuss, but out of forebearance for the committee, I am willing to close at this point.

Mr. VOLSTEAD. You commented on the last provision of the Stanley bill, I believe, section 3, in reference to evidence in regard to restraint of trade?

Mr. SPELLING. Yes. I think I made some remark about that.

Mr. VOLSTEAD. I did not quite catch it. I did not have the bill, and I did not understand the comment which you made.

Mr. SPELLING. I do not see how the degree of monopolization can be made a measure of damages. If it is only a mild restraint or small monopolization, of course the jury will consider that. The jury must also consider the extent of the injury, and perhaps the motives. There is ample in the law as to fixed standards for measuring damages, and reasonableness is not one of the standards. It might have the effect of excluding other standards, if it were left just as it is.

My more serious objection is this. I would object to anything that would give congressional recognition to the propriety to having the words, "undue," or "unreasonable," in the antitrust act, thus sanctioning the decisions and crystalizing the views of the court in the statute.

I will say that I think, in a general way, that the thing the public complains of in this country can not be to any great extent remedied by any legislation which is confined to the power of Congress under the interstate-commerce clause. I think the possession of enormous capital is itself a centralizing and monopolizing force which will, in general, have its way in industry and commerce, no matter how stringent the legislation under the interstate-commerce clause to prevent it might be.

The biggest business in this country can obey any antitrust laws that can be enacted, and still, with the powerful organizing force and tremendous momentum of millions and thousands and hundreds of millions of dollars, dominate the situation.

Just as to what legislation there should be to meet that situation I will not undertake to say. I may have some views on the question, but it would not be relevant to the bills now pending before this committee.

Mr. VOLSTEAD. You would substitute the Stanley bill for the Clayton tentative bill No. 2, would you?

Mr. SPELLING. No; I never said I would substitute it at all. That is merely one item of legislation that I would stand for. Whether that would supersede or obviate these tentative bills is another question. I am not discussing those other bills. I have not discussed them.

There are some matters of new legislation in the tentative bills—additional legislation—not supplementary or aimed at any of the provisions of the existing statute at all. For instance, the matter of allowing private parties who are injured by restraints and monopolizations to bring suits and to make judgments recovered in Govern-

ment suits admissible in evidence and conclusive, and the bill relating to interlocking directorates; that is all new legislation. I would not say that the one I last mentioned was entirely new, because the most important phase of it is already covered by the Sherman Antitrust Act.

The CHAIRMAN. We are very much obliged to you for the expression of your views, Mr. Spelling.

STATEMENT OF MR. JAMES H. McGILL, OF VALPARAISO, IND.

The CHAIRMAN. I believe Mr. McGill, of Indiana, now desires to address the committee.

Mr. McGILL. I thank you, Mr. Chairman, for the opportunity you have given me of addressing you. I want to talk from the other side of the question—from the side of the consumer—as I see it and have seen it in my business life.

I believe that this fourth section in tentative bill No. 1, as I understand it, is strengthening the Supreme Court decision, to make it impossible for the manufacturer of an article to set a price at which that article shall be sold to the consumer.

I will speak in favor of that, and in reply, so far as I can, to those who have taken the other side of the question.

One of the chief arguments used is that these manufacturers have spent their money building up the reputation of a trade-marked article and establishing the reputation of a trade name, and that if you allow the price to be cut, that that reputation will be taken away from them and rendered valueless.

It is true that they have built up that reputation, but I fail to know, of my own personal knowledge, where the expense of building it up was not paid for by the consumer ultimately. It has been my experience that the profit paid for building up this kind of business, and does it as it goes along, and I do not think they have the same right to continue that one would have who had made an investment in the ordinary sense of that term.

I believe, and it has been my experience, that fixing of the price to the consumer by the manufacturer tends to monopoly and tends to keep the fellow who comes after us out, and to make it possible to charge a high price for that particular commodity. You might take the case where a trade-marked article is sold below the regular price at a department store, and their argument is that the department store is cutting the price and is using the advertising of the manager, and appropriate advertising for the purpose of luring people into his store so that he may sell them something else that they do not want. The same reasoning, it seems to me—it seems to me this is an admission that people can be sold things they do not want, and it is due to the power of suggestion.

I have studied advertising a little, as I use it in my business, and the principle of it is to produce a desire, to make men want to buy. The expression "he sells advertising" is a common trade expression. A man may advertise something which it is claimed is just as good as some staple article on the market. It does not have the full value of the thing it superseded.

I do not think you have ever obtained anything better than the oatmeal as an article of food, and yet by the power of suggestion they sell many dollars worth of a substitute for it. Of course we could

hardly ask Congress to legislate along the line of protecting the individual, and I merely mention this in rebuttal, so to speak, for the claim which has been made that the other fellow is luring them into the store in order to sell them something, and they want you to protect the public against themselves by keeping them out of the store.

My experience has been—my own experience has not been along what you might call household necessities—it has been along the line of articles more in the way of smaller use, which is marketed through wholesale establishments who, in turn, sell to the retailer; but it is not in a line of trade where the difference between the wholesaler and retailer would be clearly defined, as in the case of groceries.

My own experience is that the man with these other articles, if he expects to sell them, they must carry what, to me, seems to be an exorbitant profit, so that the manufacturer may pay for the advertising in order to arouse the desire for the goods, and all the different parties, from the wholesaler to the retailer, and then to the consumer must all make a big profit. It seems to me, in my study of this matter if you stop up the growing trade in any way, artificially, you will make it easier to build up and to dam up the stream and make a monopoly or a trust. In these articles, with which I am familiar, I know men who bring out a good device that goes into this particular trade. It is a good device, and you can show it to the user and he will say, "Yes, that is all right; but unless they can guarantee to control the price, it is a pretty difficult thing to get the jobbers to boost it and help it along." Some one else will make something that will answer the purpose that is well known, and with which people are familiar, and they say, "Why bother about this? Here we have an article which will answer the same purpose, and the trade likes it, and it is good enough, and we are protected all the way through."

That comes from the fact, I think, which is true in nearly all businesses, that we have these associations and they meet at certain stated intervals, and all these men become personally acquainted; given men become acquainted with given men in certain territory, and they talk cooperation. We used to talk combination, but we had to quit that.

Now, we talk about cooperation. The manufacturer and the distributer meet and spend a few days together several times a year, and they talk about cooperation, and they are cooperating against the consumer in most cases.

I believe anyone who is fair will have to admit that you will probably find examples that where an injury in equity might be done to some one who is now doing business, I think, in the long run, that both those causes will prove to be a splendid thing, and should be maintained, for the preventing of the fixing of a resale price by the manufacturer for the consumer.

Mr. DANFORTH. What do you deal in?

Mr. MCGILL. In electrical material.

Mr. DANFORTH. Electrical fixtures?

Mr. MCGILL. Yes; to some extent. I am engaged in the manufacturing business. It is a comparatively small business, and I deal in small items. One manufacturer will manufacture a line of fixtures, practically everything along that line, but I sell different articles, such articles which, if they were sold in the drug-store trade,

would be called proprietary articles. They are similar to razors, which you find in the drug stores.

Mr. McCoy. What are your relations with the big electric companies?

Mr. McGill. You mean with the electric power companies?

Mr. McCoy. No; the General Eelectric Co., and the companies of that sort?

Mr. McGill. I have no dealings, particularly, with the General Electric Co. I am on terms of very friendly relations with their men. The Western Electric Co. is my largest customer.

Mr. McCoy. There is a suspicion that the electric companies rather control the people who are making electrical devices of any kind. For instance, if I invented something that might be a very good thing, as I understand it, I could not get it on the market unless I came to terms with one of those big companies?

Mr. McGill. That is wrong.

Mr. McCoy. Is it not a fact that that happens?

Mr. McGill. It never happened to me. I have never been a member, even in the old days when they had a combination.

Mr. McCoy. Let us suppose that it were legal to fix the resale price. Would not the power which a man might have under the law to fix the resale price of some electrical device cut right into the practice which the electrical companies are said to have adopted along the line which I have just suggested?

Mr. McGill. I do not know that I just exactly understand your question.

Mr. McCoy. Well, I do not know what the fact is. I know only what I have heard. As I understand it, from what I have heard, if I invent something that can be used in connection with something which the General Electric Co. manufactures, sells, and controls——

Mr. McGill (interposing). I see.

Mr. McCoy. As I understand it, it is said that some of the companies will not permit the thing which I have invented to be used in connection with any article which they are selling. They will simply shut it out. I know of a case where that has been done. The only object in that is that they shall get some share of what that thing sells for. If that thing can be sold under the law at a fixed resale price, would not that fact cut into the arrangement which these companies are said to force on anybody who does such a thing?

Mr. McGill. I hardly think so. The General Electric Co. has so many ramifications. It is such a tremendous thing in the electrical business. But I have never had any dealings, particularly, with the General Electric Co. I sell a little stuff to them occasionally. When some of my best stuff is asked for they will send me an order, but that does not happen very often. The General Electric Co. is not engaged in the general jobbing business, as the General Electric Co. There is no question, however, about their being interested in and controlling some jobbing houses.

Mr. McCoy. They are in the jobbing business, if rumor can be believed. In other words, they control not only the things which they manufacture under patents themselves, but they control the field of every man who may have an electrical device, and they are able to say whether that device shall be put into a building where their stuff goes. This is what is said.

Now, if it is the fact that they are in the jobbing business—and I believe it is—if you permit a man to fix a resale price for something which they might want to use, you thereby take away from them their power for the control and use of this article.

Mr. McGILL. I understand. I am not going to dispute the fact that you might, but from my knowledge of the business I do not believe that you would help as much as it would hurt in other ways. They do not control a big enough percentage of the jobbing output. Of course, their policy is changing from year to year, and I do not know where they are going to stop, unless there is some way of curbing tremendous aggregations of capital. Unless you can control those tremendous aggregations of capital it is going to be hard for the next generation to do what some of us have done—that is, to obtain a measure of independence in the business world. I have been in this business since I was a boy.

Mr. FLOYD. In other words, you think if there is not something done to curb them, they will finally monopolize the entire business; I mean the big concerns will monopolize the entire business of the country and prevent the development of new business and independent manufacturers?

Mr. McGILL. I actually believe that, after a good deal of study. I do not want to be thought an alarmist, but I am looking at this thing from the consumer's standpoint——

Mr. McCOY. Let us see how your belief will stand the test. The complaint is made that the mail-order houses and the so-called chain stores are driving out the little man in business throughout the country, particularly in the very small towns.

Their only power to do so, I assume, is gained because they can sell cheaper, otherwise they would not get the business. Now, these people who want to fix the price say that if they have that right to to fix the price, then the chain-store people can not drive out the little man, who may want to carry a few Ingersoll watches or some kodaks, or some few of the thousand other articles which have heretofore been sold at a fixed price. If they have not that right then the mail-order houses are going to drive them out of business, and why would there not be a monopoly of the retail business by large capital?

Mr. McGILL. I think if the source of supply is open to the coming generation, if it is not restricted in one way or another, and if a man has an equal right to the source of supply, the man with small capital has certain advantages over the man with big capital—that is, the big fellow, according to my view—if the field is open can not monopolize the young fellow. It is a principle of nature that youth will be served, if the avenues of trade are open. A big aggregation of capital alone will not stifle competition, because you have to have high-class men to take care of that business, and I think you will come to the point where the big unit is not especially efficient.

Mr. McCOY. Then your point of view, if I understand you, is not that large aggregations of capital are dangerous, but that the practices in which those large aggregations of capital are engaged are dangerous?

Mr. McGILL. That is it, exactly.

Mr. McCoy. And that they do not necessarily result from the possession of a large amount of capital?

Mr. McGill. I do not believe it; not according to my political economy.

Mr. McCoy. You say you are afraid of big business?

Mr. McGill. I am afraid of big business the way big business is conducted.

Mr. McCoy. It is not due, then, to the mere fact that they possess a large amount of capital?

Mr. McGill. Oh, no. If there were what you might call free trade, I would not be afraid of it.

Mr. McCoy. Do you believe at all in uniformity of price made at the same stage in the process of distribution? That is, for instance, the Hamilton Watch Co. was represented here yesterday and their representative testified that they sold five watches to a jobber at the same price per watch that they would sell a hundred watches to him.

Mr. McGill. I can answer that. I worked out a scheme in my own business. I give a small jobbers' discount and grade it according to the quantity the jobber buys, but I do not make the maximum quantity so large to the jobber that it will not be of any assistance. I make a graduated price, according to the quantity used by the jobber but I place a penalty against the small order and the fellow who does not buy my stuff in wholesale quantities.

Mr. McCoy. If it remains possible for people to buy on the basis of wholesale quantities, how are you going to prevent the mail-order houses from monopolizing the retail business?

Mr. McGill. If a mail-order house can give value received, and they do not enjoy any advantage that any other man can not enjoy, it looks as if they had a right to exist.

Mr. McCoy. Then you would not object to a monopoly in the shape of a mail-order business?

Mr. McGill. I do not believe it would be a monopoly.

Mr. McCoy. Assume that there is no unfair practice indulged in.

Mr. McGill. My theory is this, that there will not be any monopoly if there is not any restraint of trade. I believe the restraint of trade—I have been convinced that you can figure out the laws that will do away with the restraint of trade. I am just egotistical enough to believe that with a fair start no one will be monopolized. I do not think the mail-order houses can monopolize the business of the country unless they have some advantage that some other dealer has not go in starting a mail-order house. The mail-order houses were all started in a small way. It seems to me if you get away from that principle you are running into Socialism very fast.

Mr. McCoy. Let us take that on the fixed price proposition. If, in a given line of business there is no monopoly, say, in the business of watch manufacturing there is no monopoly of watchmaking and of watch selling as a whole, what danger is there to anybody?

Mr. McGill. There is this danger, that if the manufacturer has enough capital to do enough business to make it profitable for the wholesaler and retailer—if he can fix a higher price and then gain, by the power of advertising the confidence of a sufficient number of people, and make them believe that he has made a more desirable watch for them to buy, he does not have to say it is a better one. You can picture it in the mind of a man that he wants that watch.

Mr. McCoy. But you do not object to the practice of advertising?

Mr. McGill. Not unless you have that fixed price. The manufacturer builds up that picture in the minds of the public, then he goes to the wholesaler and says, "Here is my watch and it will not cost you any more than this other watch, and I am going to fix a price to the retailer that will give you 15 per cent more than yo are getting on any other watch, and you must fix it to the retailer so that he will sell to the consumer in order to get 25 per cent more for that watch than for any other watch. I am going to put all my mo ıey back of it, and I am going to make it a success." He will get these fellows together, and we will send a good man out, who knows how to make the salesmen his personal friends. They will go out to the retail trade and start that thing going, and pretty soon the whole organization will be working for that watch.

Mr. McCoy. Well, has the other fellow gone to sleep for a while?

Mr. McGill. The man who can not carry on such a big campaign is at a disadvantage.

Mr. Peterson. Back of him is the price fixing.

Mr. McGill. Certainly.

Mr. McCoy. The only people whom I have heard asking for permission to fix the price, the resale price, are the people who are advertising. In other words, is it not true that the man who wants to fix the price on a watch, for instance, will be able to do so to the disadvantage of somebody who can not advertise, and according to your argument, the other man has to advertise in order to make price fixing good for anything. In other words, you have as much competition as ever before.

Mr. Ford's representative was here the other day, and I am sure he made as complete a picture of a successfully run concern on the fixed price basis as anybody could ask for, resulting in enormous reduction in prices on account of competition.

Mr. McGill. Did he claim it would reduce the price of his car to the consumer?

Mr. McCoy. It has been reduced. He gave us the schedules of his figures.

Mr. McGill. Reduced from 1911?

Mr. McCoy. Surely.

Mr. McGill. Did he advocate it as a principle?

Mr. Volstead. He made $25,000,000 on $2,000,000.

Mr. McCoy. He said that within two years the price of the car has been reduced from $925 to $550.

Mr. Peterson. I thought he said four years.

Mr. McCoy. Well, call it six if you please. In that time he had cut it down from $925 to $550.

Mr. Volstead. Did he not particularly say that up to the present time they had been sold by agents, but that now he was changing his policy?

Mr. McCoy. Now they are selling the car by agents. This is also something which he said, and I would like to have your views on it. He said when a man sells an automobile, and the representative of the Hamilton Watch Co. said that when a man sells a watch, the reputation of the business is behind the watch and the automobile, and that company is able to afford a profit to the man who finally

sells the car to the consumer, because they can fix the price. They can fix it in the case of the automobile so that that man can keep a garage and keep all the duplicate parts, and any user of the Ford machine can go to that place and get the parts that belong to his machine, and the company stands back of it.

He said if anybody can buy these cars and sell them for any price they would cut the price to 10 per cent advance on what they cost. But they could not maintain anything in the way of a repair ship.

Mr. McGILL. Of course, the Ford automobile company is a tremendous concern; you would not expect me to discuss the Ford automobile business?

Mr. PETERSON. Is there not this difference? The automobile is something that requires special skill to handle. It is the exception. We are speaking about a general rule, not an exception.

Mr. McCOY. Mr. Peterson, take for instance, the kodak cameras.

Mr. PETERSON. They are not a monopoly.

Mr. McCOY. You can not buy films anywhere except under their system, films for their cameras. You can name dozens of different things in that class.

Mr. PETERSON. Is it your contention that the Kodak people would not furnish films for the kodaks if you stopped the price maintenance on the kodaks?

Mr. McCOY. I have not any doubt that would be the result. I can go to any drug store in New York City and I can pick up a kodak film for 20 cents. Suppose, the cut-rate store, paying 10 cents for those films, were selling them for 10 cents. They would immediately drive the other man out of business, and if I want a film under those circumstances, I might have to travel 100 blocks to this particular place to buy the film.

Mr. McGILL. Why does that not hold good in the sugar industry? Why is it there is no price maintenance in sugar?

Mr. McCOY. There is on certain brands.

Mr. McGILL. To be sure, there is on the little cubes, which cost two or three times what they are worth.

Mr. McCOY. That may be.

Mr. McGILL. But why is there not such a price maintenance on the ordinary sugar?

Mr. McCOY. I believe that in my house there is purchased a certain brand of flour. It may be that I am paying 50 cents a barrel more than I would have to pay for other flour, but I know what I am getting, whereas if one of these cut-rate stores instead of maintaining the price at, say, $7, sells it for $5.50, there are a hundred stores which may have to quit selling it because they have not such a large variety of other things which they can also sell, and on which they can make a big profit.

Mr. McGILL. I think that question of price maintenance in relation to the so-called advertised article goes a long way into this question of the high cost of living. These are just my views.

I have just come to this conclusion by observation and by what I have seen in my short business life of the change in business. When I went into the electric business 25 years ago it was a small business comparatively. There was no price maintenance whatever. We were secretive. The first big house I worked for did not want its

salesmen to associate with the salesmen of the other houses, and there was a great rivalry between the men representing these houses.

I have lived to see this condition obtain in that business, and I think it is true in every other large business. Three or four times a year the jobbers, at considerable expense, meet in some very good place, it may be Hot Springs or in Niagara Falls, where it is pleasant, and they talk over the situation. I have never been a member of that association, and never attended any of those closed meetings, but I understand the leading jobbers who go to those meetings get up and tell those other jobbers, their competitors, how much it costs them for an order, what percentage is gross, what their gross percentage was on last year's business, and that these big jobbers use these ways to compete with their competitors. As far as I know I guess it is lawful, but the result is that the price stays up to the consumer.

This cooperation is a fine thing. You make exorbitant profits on the amount of business done, and you tempt a lot of capital into the business which otherwise would not go into it, and the consumer pays for it.

Mr. McCoy. He pays for it when the capital is tempted to come in and make competition?

Mr. McGill. He pays for the high price of this article. Let me take up the article of sockets. There are five or six different leading socket manufacturers in the United States.

A few years ago there was a very energetic young man who secured sufficient capital—he had to have a lot of capital—and he went into the socket manufacturing business. He was a personal friend of nearly all the distributors. All of them, almost without exception, said, "We want to bring out another socket in order to meet the demands of our trade. Now, we have several thousand dollars invested in duplicate stocks."

This young man knew the business, and he had some ideas about it, and he wanted to go into it. He sent his salesmen to the contractor. The price was all the same and there was no question about the quality.

Through his ability to sell goods he got orders at the same price for the same thing, then he took those to the jobbers and forced them to carry along his line of sockets. I maintain that the customer has to pay for that profit, and I have examined the Canadian market. Just across the border on the same article I find that where there is the keenest competition, no attempt at the fixing of the resale price, where the volume of the business is very much more, and in a country where they import a considerable part of the sockets and pay duty thereon, the price of sockets is about 20 per cent less to the consumer. Those are the things that come under my observation.

Mr. McCoy. Is there any price fixing on the sockets?

Mr. McGill. Absolutely.

Mr. McCoy. On the resale price?

Mr. McGill. Yes.

Mr. McCoy. Fixed by the manufacturer?

Mr. McGill. Fixed by the manufacturer.

Mr. McCoy. In each instance?

Mr. McGill. That was under the old law; you can not fix it now, after the recent decisions of the Supreme Court.

Mr. McCoy. Now that they can not fix it, has there been any effect on the price?

Mr. McGill. A little, but not much.

Mr. McCoy. Is not the standard price due to the fact that the people you spoke of have got together and fixed the price?

Mr. McGill. They can not fix the price, by law, but they are all good friends.

Mr. Floyd. Is it not a fact that they have heretofore fixed the prices right along, and that without any further agreement, they continue to carry out the old understanding?

Mr. Volstead. If you fixed the resale price between the manufacturers, the manufacturers can fix what the original selling price shall be, and does it not resolve itself back to this, that you can fix a resale price if you fix the wholesale price?

Mr. McGill. That may be.

Mr. Volstead. So that this proposition practically permits these people to agree among themselves as to what the resale price is going to be?

Mr. McCoy. We have not seen any evidence of it here beyond what the witness has just stated.

Mr. McGill. I had these views in regard to this matter and I happened to talk about it with my neighbor and friend, Mr. Peterson, and after hearing me talk about it, he suggested that I might come here and submit the views to the committee.

Mr. Floyd. There are a great many people who agree with you, myself among the number.

Mr. McGill. The public is unprotected in matters of this kind. They do not appear in court.

Mr. McCoy. What would you say to making it impossible to advertise any goods that enter into interstate commerce?

Mr. McGill. I have not any opinion on that.

Mr. McCoy. Advertising is not for the benefit of the consumer, but for the man who has the stuff to sell.

Mr. McGill. That is the case, I think.

Mr. Volstead. I would like very much to have introduced into this record the cost to the consuming public of advertising. I remember some years ago Mr. Cannon—I think he was Speaker at that time—made an inquiry of the Census Bureau in regard to that, and I know that the figures were staggering.

Mr. McGill. I can not give you direct testimony on that, but I know it is very expensive.

The trouble with this advertising proposition is that they are selling you advertising on the same principle that the cutthroat people sell the poor woman, according to some of the testimony you have had here, something she does not want, because they are in the store to sell to her.

I will simply close by saying that, so far as my experience goes, I would not allow the manufacturer to fix the resale price. Not only do I believe it is wrong in practice, but it seems to me every man has a right to his own.

Mr. McCoy. With all due respect to you, I think your logic there is bad, because it starts with a wrong premise.

If I buy a piece of real estate from a man, and in the deed there is a condition that that shall not be used for 20 years for the sale of

liquor, the law will enforce that. Why? Because I have not title, but I have got a qualified title. And in morals, as between man and man, if I buy that chair and agree that I will not sell it for less than $10, I have no title to that chair except the title he has given me, namely, a title governed by a condition subsequent, and morally, I have no right to sell that chair for less than the price at which I said I would sell it.

Mr. McGILL. Of course, this is leading now into by-paths, and my logic may be wrong; but your illustration of the real estate and the chair seems to me to cover the case. I am one of those who doubt very much the morale of the man who owns something that God makes, for his own exclusive use.

Mr. PETERSON. In other words, you are a single taxer?

Mr. McGILL. I am a single taxer; yes.

Mr. McCOY. Without going into the question of single tax, let me say this: You start off with the assumption that the man had the absolute title to one of those things which he had agreed not to sell except for a certain purpose. He has not; and in connection with the real estate the law will enforce that agreement without any question, because it is good morals; and in connection with the personal property, there is no reason why they should not enforce it—and I am getting into the single-tax question now. The man has a monopoly of that article, and it is a necessity.

Mr. McGILL. Unless it is a case of good morals again; and I believe it is good morals to prevent monopoly, and I believe the fixing of these prices is an aid to monopoly.

Mr. McCOY. You believe that in regard to the real estate just the same?

Mr. McGILL. Yes.

Mr. FLOYD. I want to answer Mr. McCoy's suggestion by saying that his premise is correct provided the contract does not relate to an illegal transaction. The Supreme Court has held that transaction is illegal.

Mr. McCOY. No; we can make that thing legal which the Supreme Court has said is illegal, and then enforce it.

Mr. VOLSTEAD. Let me suggest this—I do not know that I have any opinion on this one way or the other, however—but suppose you should sell a piece of real estate and put in your deed a provision that it must be sold at not less than a certain fixed figure; would the courts approve that sort of contracting? The suggestion you make, Mr. McCoy, of course, is based upon an entirely different theory.

Mr. McCOY. My notion in regard to real estate—and I speak subject to all kinds of correction that anybody wishes to make—is that if two or three people were engaged in a real estate speculation and they between themselves divided up the land and each made an agreement with the others that he would not sell his land at less than a certain price, we will say, within a certain period, say within five years, that either the law enforce it specifically, or would give damages to the man who considered that his rights had been violated. I have not studied real property law for a long while, and I would not want to say that I am absolutely correct in that statement.

Mr. FLOYD. It would hold the contract void because it is against public policy.

Mr. VOLSTEAD. If it is a perpetual one, I think that is right, because it would be a restraint on trade. Of course, if it were for a limited period, it might possibly be good if you could show it was upon a consideration such as you suggest.

Mr. McCOY. In connection with an article like a watch, the same question of public policy would not be involved, because a man could not carry a watch for five years, or does not, in the ordinary course of events; because if he has to carry it five years, he does not deal in watches.

Mr. FLOYD. In regard to the matter of personal property, delivery of possession carries with it absolute title, as a rule.

Mr. McCOY. Oh, no. I might deliver my hat to you and say nothing, but it does not carry title to you.

Mr. FLOYD. If it is sold, the general rule is that possession carries absolute title.

Mr. McGILL. I think, as to the tending toward the fixing of prices, if this principle obtains, it is my belief that these trade associations will multiply indefinitely wherein there is no conspiracy, as we usually understand the term; but that "get-together" principle, "and let us all do well," this "let-us-all-get-ours" talk, will tend to make the customer pay more than he otherwise would.

(Thereupon, at 3.40 o'clock p. m., the committee adjourned until half past 10 o'clock to-morrow, Saturday, February 21, 1914.)

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Saturday, February 21, 1914.

The committee this day met, Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. The committee will be in order. The clerk will call the roll. A quorum is present.

Gentlemen, there is a bill that Mr. Danforth wants to report to the full committee from his subcommittee, but before we receive that report I want to say to the committee that we had two gentlemen down to be heard to-day by the committee on the pending antitrust bills, but neither one of them is here; and again, before we go into the matter that Mr. Danforth desires to present to the committee, I will ask the clerk to read the following telegram which I received last night:

PALM BEACH, FLA., *February 20, 1914.*

Hon. HENRY D. CLAYTON,
Chairman Committee on Judiciary, House of Representatives, Washington, D. C.

My attention is just called to report in Wednesday's issue of New York Times and Sun of hearing before your committee at which Nicholas Ehrlich, of Brooklyn, commented on my supposed professional connection with the United Cigar Stores Co. as bearing on my competency to advise unselfishly with respect to pending antitrust bills. He is reported to have made following statement: "The merger of United Cigar Stores Co. was conducted under the direction of Samuel Untermyer." Article also contains following statement: "According to Mr. Ehrlich the United Cigar Stores Co. is a monopoly perfected as such by Mr. Untermyer." Mr. Ehrlich does not know what he is talking about; he is grossly misinformed. There would be nothing inconsistent with my known views on trust legislation in my having given the company professional advice nor should I have hesitated to do so if asked. It is difficult to

understand how individuals or corporations would know whether they are acting within the law without such advice. There is something grotesque in the all too prevalent idea that lawyers who advise corporations are thereby robbed of their independence or disqualified to use their special knowledge as citizens in public interest in endeavoring to correct unlawful corporate aggressions. They are above all others best equipped for the task. It so happens, however, in this particular case that I have at no time had professional relations with the company of any kind; was not concerned in its organization; know nothing of any merger; and that I have never until within the past six months had any professional relations with Mr. Whelan or any of his associates or had any acquaintance with them.

My only such connection with Mr. Whelan or his associates was to advise him individually as to the legality of a very recent transaction that had no relation to the organization or affairs of the United Cigar Stores Co. It related entirely to a purchase by Mr. Whelan individually and for his own account of stock in Riker Hegeman Drug Stores, which I then advised to be, as it is beyond question, free from legal objection. Mr. Ehrlich implies that United Cigar Stores is an unlawful combination. The United States Supreme Court has held to the contrary in a Government suit against the American Tobacco Co., with which I had, however, no concern nor did I have anything to do with or know anything about the organization or affairs of the United Cigar Stores Co. or any of its subsequent dealings. Here again Mr. Ehrlich has permitted himself to be misled. The Supreme Court decided that the American Tobacco Co. holding of United Cigar Stores stock was unlawful. The stock was distributed and ever since my recent connection with Mr. Whelan the companies have, as I understand, been in active and uncompromising competition. I am not its counsel and have no personal knowledge of its affairs. In view of Mr. Ehrlich's reported statement I will ask you to have this telegram read into the record and to give it such publicity as, in your judgment, will offset the publication of the utterly erroneous and unfounded statements of Mr. Ehrlich. I do not regard it as necessary for me at this time to defend myself against the charge of being in sympathy with corporate oppression and monopoly, but I want the record on this transaction to be accurate.

SAMUEL UNTERMYER.

Mr. CARLIN. I move that the request be complied with and that the telegram be inserted in the record.

(The motion was agreed to.)

The CHAIRMAN. As I said, the other two gentlemen who had requested to be heard to-day are not present. The committee will, therefore, adjourn the hearings for the day and will consider the bill that Mr. Danforth desires to report from his subcommittee to the full committee.

(After some time spent in discussion the committee adjourned to meet at 10 o'clock a. m. Tuesday, February 24, 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.
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 21.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Tuesday, February 24, 1914.

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

The CHAIRMAN. We have with us this morning Mr. John T. Manson, of New Haven, Conn., who desires to be heard on some of the pending antitrust bills. We will be glad to hear from you at this time, Mr. Manson.

STATEMENT OF MR. JOHN T. MANSON, PRESIDENT OF THE YALE NATIONAL BANK, NEW HAVEN, CONN.

Mr. MANSON. Mr. Chairman and gentlemen of the committee, in a short time and in a very few words I wish to lay before you a situation in New Haven, Conn., that I believe is no different than exists in many cities and towns throughout the country, especially away from the large commercial centers, and to point out the damage that would result if the interlocking directorate bill, as proposed, becomes a law.

New Haven has a population of approximately 140,000. It has 15 banking institutions, three of them mutual savings banks, under State laws, with deposits of about $35,000,000. These mutual

savings banks pay 4 per cent interest; they do not accept more than $1,000 from any one depositor in any one year, thus confining their business, in the main, to the small saver.

The deposits are used to make loans on real estate; to purchase bonds approved by our State laws and loans secured by collateral. They do not figure in commercial operations at all outside of collateral loans.

The commercial banks and trust companies, of which there are seven National and five State, had at the time of the comptroller's last call for bank statements, on January 13, 1914, capital and surplus, $9,640,000; deposits, a little over $19,000,000; loans and discounts, $17,155,000; and cash and reserve, $5,577,732.

New Haven has a considerable number of manufactories, a few wholesale jobbing houses that supply the country that can be easily reached, besides the retail establishments usual to any community, all of which depend upon the local banking institutions for their requirements.

Sometimes some of the banks have to borrow to take care of the needs of their customers and rarely have funds not in use locally that they have to invest in so-called note-broker's paper.

I am stating these facts that the committee may see New Haven is not a large commercial center, not as large as we wish it were, and that we do not have resources available for engaging in such operations as the drafters of the bill evidently had in mind, even if there had been the disposition, which I am confident there has not been.

If the bill as it now reads is made a law, it will hurt every bank in New Haven except one recently organized under State law, because not one of these banks but has directors who are either trustees in some mutual savings bank or on the board of one of our trust companies.

I am very much interested in the welfare of our city and its institutions, but I am especially concerned as to how the proposed legislation will affect the Yale National Bank.

The Union & New Haven Trust Co., our strongest and best trust company, has a board of 18 members, and two of these men are directors in State banks, and 12 of them are directors in national banks, two of these last being presidents of national banks. One of the directors in this trust company is a director in our bank and is our counsel.

I say to you frankly that it will be a serious thing for us if we have to part with his services. I can not put this too strongly. He is placed in a very embarrassing position and he hopes he will not have to face the question of deciding which bank he will stay with; and I am the more concerned because he was a director in the company before he was with us, and came to our bank as director and counsel at my solicitation.

We have one director who is also a director in a national bank in a small city up the State; one who is a director in a national bank in New Haven, and four who are trustees in mutual savings banks. I am a vice president in one of these mutual savings banks myself.

Several of our national banks have directors who are on the boards of banks in other cities and towns in the State, and the president of another trust company is a director in a national bank.

In our State, and I think we are no different in that respect than in the country generally, the banking growth has been mainly in State-chartered institutions, and when the time comes that a director

must choose which bank he will give up, I fear it will be the national, for the reason that under State law there has been room for wider, freer operation, and the feeling has been that under national law the duties of directors are more exacting.

It goes without saying that you gentlemen of the committee desire to do everything in your power to strengthen and not weaken the national banks, and I submit that compelling us to give up directors who bring to us exceedingly valuable business and advice would tend to weaken us.

A directorate made up of men of good standing in a community, who are known to be conservative and successful themselves, is a valuable asset to any bank, and a bank properly conducted is an asset to any place.

I wish to repeat that the situation in New Haven is no different than exists in hundreds of other localities, and that not only no good but positive harm can come from placing such restrictions as this law proposes upon legitimate business efforts.

May I be presumed to offer a suggestion? If we look at the situation in another way and assume that all the commercial banks and trust companies in New Haven should combine forming one institution, it would have a total capital, surplus, and deposits of $28,640,000.

Even this aggregation of capital, large as it is, would make but a small institution in these days of big business compared with many single banks in large cities.

We suggest that we have no condition in New Haven that would require anything like that. We have no situation such as there was recently in New Jersey, where one man was interested in establishing a chain of banks in which there could be no control in one local place.

I would like to suggest, therefore, first, that a person be specifically permitted to be a director in two national banks, and that being a director in one State bank or trust company will not bar him from being a director in one national bank. And further, that under certain conditions one may be a director in more than two national banks, provided the Comptroller of the Currency is satisfied upon due investigation that there is no intent to restrict credit or in any way restrain or obstruct trade. In other words, let the law very clearly define the evils to be corrected or prevented and allow the proper official discretion in its application.

Second, that the law state the size of a bank in which a person may not be a director if he is to be on two boards.

I suggest, third, that the law state the size of a city in which a person may not hold more than one bank directorship.

In each case a person should not be barred from serving on the board of a mutual savings bank, because in this class of banks, investments are prescribed by law, and they are therefore not subject to the evils which this law is proposed to correct.

Gentlemen, it is a really serious situation which we have in prospect in New Haven, and I hope there will be some way found of relieving us of the embarrassment of having to depend for some of our directors upon persons who have not had any experience in banking.

I thank you very much for giving me this opportunity of expressing my views in regard to this particular matter.

The CHAIRMAN. Will you be kind enough to tell us whether or not you have studied the bill before the committee on this subject, and if you have, how you would amend that bill; that is, if you would have any legislation at all on the subject of interlocking directorates?

Mr. MANSON. I have read the bill two or three time, Mr. Chairman, and I would make this suggestion, that a person be specifically permitted to be a director in two national banks, and that being a director in one state bank or trust company shall not bar him from being a director in one national bank.

Mr. VOLSTEAD. That would allow him to be a director in three banks in the same town?

Mr. MANSON. If you consider a mutual savings bank; yes, sir.

Mr. VOLSTEAD. And did you not say a trust company?

Mr. MANSON. From being a director in one State bank or a trust company.

Mr. VOLSTEAD. And also in two national banks.

Mr. MANSON. I meant in one national bank and besides that; that being a director in one State bank or trust company shall not bar him from being a director in one national bank.

The CHAIRMAN. So that the fact of his being a director in one national bank should not bar him from being a director in a trust company or State bank?

Mr. MANSON. Yes, sir. For example, this trust company I have in mind in New Haven, if all the directors in this trust company should remain in their national banking connection, it would almost break up the trust company, because of the 18 directors in that company; 14 of them are directors in banks, and that bank was started more particularly to get the trust business, and they compete with us now in the matter of commercial business. Their deposits are almost larger than those of any national bank in the city of New Haven.

Mr. VOLSTEAD. The trust company was organized under the State law?

Mr. MANSON. Yes, sir.

The CHAIRMAN. You would not say anything in the proposed legislation about the size of the banking institution?

Mr. MANSON. Well, yes; if you choose to do that, I would make this further suggestion, that you state the size of a bank in which one person may not be a director, if he is to be on two boards.

The CHAIRMAN. What would you suggest as to the size?

Mr. MANSON. I have not gone into that. Let me give you this picture. Take the situation in the large commercial centers. There are many banks which have assets of upward of $50,000,000, and if you combine all the banks in New Haven they would have assets of less than $30,000,000. I am using the local situation to illustrate what I mean. So that a single institution in a large city would be more powerful than all the banks in New Haven combined.

Mr. FLOYD. As a business man and a banker, do you think the system of interlocking directors in these great financial institutions that control enormous sums of money gives them any control over the smaller concerns, over the policy of the smaller concerns in which they have interlocking directors?

Mr. MANSON. No, sir; I have never come in contact with that at all. I think that is not the first thing that would indicate that.

In New Haven—I can only speak in regard to local conditions—in New Haven I doubt if there is a bit of money control in our banks in New Haven. So far as I know, I doubt if there is a dollar's worth of stock held by men in the larger cities, the banking interests in the larger cities, in any of our local institutions.

Mr. FLOYD. Are there any of the banks in New Haven whose directors are on the boards of any of the great financial institutions in New York?

Mr. MANSON. No, sir, except one. There is one young man in New Haven who happens to be, at the present time, president of one of the banks there who is on the board of one of the New York banks, but it is one of the smaller banks in New York; I do not know the name of it at the moment. This young man is Mr. Victor Tyler, the president of the National New Haven Bank, whose name appears in this little pamphlet here giving the statements of the New Haven bank and trust companies with their officers and directors; but he is only temporarily president of that bank. That is the only one I know about.

Mr. FLOYD. From your experience and your associations with these concerns you would not be able to speak authoritatively as to what control they may be able to exercise over institutions in which they have interlocking directors?

Mr. MANSON. No, sir; I can not answer that because I have not had any experience in that direction.

Mr. DYER. Are any of the directors of the banks in New Haven directors in any of the large life insurance companies or mutual life insurance companies?

Mr. MANSON. I happen to be one myself. I am a director in the Equitable Life Assurance Society in New York. I would be very glad to answer any questions which that statement may prompt.

Mr. DYER. You do not see any objections to a director of a bank being also a director in a life insurance company, or of an organization controlling great capital?

Mr. MANSON. I do not see it, sir; no. In my particular case I was chosen as a Connecticut director after the unpleasantness some years ago, and I try to be faithful in my attendance there. I have never seen anything there that would show that there was anything looking toward control. The local account of the Equitable Life Assurance Society is in our bank.

Mr. NELSON. How large a sum do they keep in your bank?

Mr. MANSON. From $15,000 to $30,000.

Mr. NELSON. Is it the policy of the life insurance companies to deposit sums of money in that way in various banks throughout the country, to keep the money there?

Mr. MANSON. That is only their local funds. We have a State office on the Equitable Company in New Haven, and the collections which are made in the State are deposited in our bank, and then drawn by the New York office as they need the money there.

Mr. NELSON. You handle nothing but local funds?

Mr. MANSON. That is all. It is just as a convenience.

Mr. WEBB. How would it affect your State to limit the application of this interlocking directorate section to banks whose assets and deposits exceed, say, $3,000,000?

Mr. MANSON. In our particular case that would just about throw us out. We are just a trifle under $3,000,000 now. Sometimes we are just a trifle under and sometimes we are a trifle over. I should say that would be a very much smaller sum than ought to be thought of.

Mr. WEBB. I simply made that suggestion to get your idea in regard to the matter.

Mr. MANSON. Irrespective of our own situation it would seem to me that a bank with only $3,000,000 of assets and deposits is very small.

There is not as much cooperation among the banks in New Haven as there really ought to be. I think that is probably the general situation throughout the country. There are times when it would be much better if there was the feeling that we were cooperating more and we knew more about the credits which each bank had on. You can see if one man borrowing, say, in my bank is secret about it, and the competition is such that that man goes to another bank and borrows money, I may know nothing about it, and unless we can get definite information of that kind, and have cooperation among the banks, the lack of it is a dangerous thing, and it is really necessary that there shall be cooperation in the banking business.

Mr. DYER. Do you not think it would be better to leave this question to the Federal Reserve Board than to have passed a binding law upon the subject?

Mr. MANSON. I should feel that that would be wise, without any specific restriction in connection with it. I certainly think it would be wise, in comparison with what is proposed. You take a small community such as New Haven is, and I think that a large number of men are already drafted into the banking business there.

I will tell you of the laughable incident in regard to that. I know of a man who served as a director of a national bank for less than a year. He found that he did not and could not give the time to it that he felt that he ought to, that in order to be a conscientious director and discharge his duties faithfully and conscientiously he ought to have more time to give to it, and so he resigned, and actually returned the fees that had been given to him during the time he had served as a director in that bank. It is not easy to get a good man for a director in a bank.

There was a time when it was looked on as a decided honor to be a director in a bank, but I can cite you to the instance of a new man whom we took on our board last year who did not think it was a great honor to be a director of a bank. I think most banks under our new national laws, or under the rules laid down by the recent comptrollers, are finding that his position is sometimes very onerous.

We always tell our directors that we expect them to be faithful in their attendance, and we place before them the records of the bank in such a way that a director in our national bank, if he chooses to keep his matter at home, can have as complete a history of the bank as if he was in the bank office right along. He has a printed list of all our loans every time we meet, and a statement of the bank at the same time. We make no large loans and take no new large accounts without having our directors pass upon them.

Mr. VOLSTEAD. How often do your directors meet?

Mr. MANSON. Twice a week. I think you will find that that is true in most of the smaller cities. We do not have an executive committee. Our full board always meets and passes upon these matters.

Mr. PETERSON. Along this particular line, I want to call the attention of the committee to a letter which I received this morning from the president of the First National Bank of Hammond, Ind. In this letter he says:

> There may be some injury done the people in large money centers by reason of the interlocking directors of banks and other financial institutions, but any interference with the plan so far as it affects smaller cities where most every national bank bank has some trust company or State institution in which the same officers serve both, will work an injury to the community.
>
> The passage of the law will result in forcing Mr. Bolman, Mr. Meyn and myself to turn our stock over to our wives or children or some friend, and can not accomplish any real change. In this county, Gary and this city will alone be affected. I would thank you very much, if consistent, for any service you may render against the passage of the bill, and for an expression from you as to the chance of passage and the chance of modification in the event it must go through, for it seems that you have got in the habit when you start a thing down there of going through with it.
>
> A. M. TURNER.

I know this man as president of the First National Bank of Hammond, Ind. They have a trust company organized in connection with that bank, and the stock of the trust company belongs to the same men who hold the stock of the national bank. As this man says, it would result in their having probably to reorganize and they might be required to liquidate their trust company, in which event it would be a great injury to the men who own the stock, and put the trust company out of business, and that business that belongs to the trust company would be scattered to the other banks in the city. In order to avoid that they would just simply reorganize, or else turn over their stocks to dummies, and go on in the same way.

Mr. DYER. What would you say if, instead of saying two or more Federal reserve banks, national banks, banking associations, etc., we should say three or more Federal reserve banks, national banks, and banking associations, so that a man could be a director in two? Do you think that would be satisfactory to the banking interests of the country?

Mr. MANSON. Yes; I think so.

Mr. DYER. You think it is necessary, do you?

Mr. MANSON. I really do; yes, sir.

I think there is one very fundamental principle that needs to be thought about, that we Americans have made our progress not because we have been restricted, and I think when you come to put too much restriction on you will destroy the initiation which has been such a factor in the progress of our country.

While there has been, no doubt, some harm done in certain localities because of some of the larger aggregations of wealth—I would not want to dip into that because I know nothing about it—but from what we read we can assume that has been so. I think there has been great gain to our country from the very working of the genius of the American people, and I think it would be very harmful to have a restriction thrust upon us that would be onerous.

But there is a limit in these times beyond which we may not go. As I understand it, you should exempt mutual savings banks from the

operation of this act. I do not know whether it is true in every State or not, but mutual savings banks are what the term implies; they have no capital stock and the deposits are made mostly by the poorer people. All of us who serve as directors serve without a cent of recompense. I have spent many days in going about the city looking after real estate, and all the remuneration I have received has been an automobile ride or a carriage ride. I have never received during my term of service as trustee one cent of remuneration other than about $5 or $10 for examining the bank. By law, we are not permitted to accept anything for our services.

I think if the law, as it stands now, I mean he proposed law, would bar out all from serving as directors in savings banks, I think I am safe in saying it would take 90 per cent of the trustees or directors of the savings banks of New Haven off the boards, men who would elect to stay with the national banks. I think that would be a crime against the people who place their money in the savings banks, because these men give their time and are glad to do it, and they go over the proposed investments very carefully, and the banks are governed by the trustees. So that in any case I think the savings banks ought to be exempted from any consideration in this proposed legislation.

Mr. PETERSON. Suppose the limit were placed at $5,000,000?

Mr. MANSON. I think that would be low, and for this reason. If you restrict it to $5,000,000, what harm could there come from a large aggregation, say, of $10,000,000 or $15,000,000 of money in savings banks over the country, in comparison with one large bank in a community that would have $25,000,000 capital, if you please, and assets of $50,000,000 or $200,000,000? There are plenty of banks with assets of $50,000,000, and several with assets of $100,000,000, and one with assets of $200,000,000. The burden there would be on the smaller banks if you restrict them there.

Mr. NELSON. Where would you draw a line? You are connected with a large insurance company. Where do you see a possible danger? Where would you draw a line?

Mr. MANSON. I really do not see any danger. I should say it should be from $15,000,000 to $20,000,000, but I really do not see any danger. The danger that the committee is after, of course, is largely in the large cities—it is altogether in the large cities. The small towns really have use for all the money they have in them. They have very little money to invest in any schemes or anything that would look like control of any large business. We now and then do invest in note-broker's paper, but there never has been the slightest thing in New Haven that would have even the slightest suspicion of looking toward the control of anything. I submit that anything that seems to get at something that restricts an alleged evil is not the thing which should be imposed upon us.

The CHAIRMAN. We are very much obliged to you, Mr. Manson, for discussing this matter with us and giving us your views.

Mr. MANSON. I am much obliged to you, Mr. Chairman, for giving me the opportunity to express my views to the committee.

The CHAIRMAN. The next gentleman who desires to give his views on the pending antitrust legislation is Mr. Henry E. Kirstein, of Rochester, N. Y. We will be glad to hear you at this time, Mr. Kirstein.

STATEMENT OF MR. HENRY E. KIRSTEIN, REPRESENTING E. KIRSTEIN SONS CO., ROCHESTER, N. Y.

Mr. KIRSTEIN. Mr. Chairman and gentlemen of the committee, I regret to say that I have not had any experience in addressing a committee such as this, and I hope you will pardon any inaccuracies of speech which may crop out during the course of my remarks.

In appearing before this committee, I do so with a view of stating our experience regarding price standardization.

Prior to the decision of the Supreme Court in the Sanatogen case, we did a substantial, increasing business, as the dealer preferred to buy a line of goods that he knew could not be sold to anyone at a lower price than he sold them at, and was not obliged to meet the ruinous cut-price competition of the department store in his locality. It placed us in a position to do everything we could to make our goods the best that could be made, irrespective of any other cut-price goods on the market, for the dealer felt that he could afford to buy our goods and pay us a fair price for them, as he could in turn get a fair price for them.

There are a large number of small dealers whom the manufacturer must compel to get a price, as they have not the business ability of the larger merchants to make a charge for their services and feel that the larger dealer will take their business away from them.

The ultimate consumers' best interests are served by a restricted price, for the manufacturer has no incentive to cut the quality of material or workmanship, as he is assured of a profit that will protect him.

Some of you gentlemen may think that the optometrist who buys an article at the price he does and resells it at $2.50 is making a large profit. The fact of the matter is, however, that very few dealers in our line of business are making what any of us would call a good living, for the cost of a pair of glasses covers all his compensation for subsequent adjustments, which, of course, takes up a man's time and a large organization to do the work. Then, too, optometry is a profession, and a man must spend a great deal of time and energy in learning the scientific and mechanical end of it and must have ability.

It is most natural for the public to have confidence in an article that has been advertised and for which a demand had been created, and especially now that the magazines guarantee to make good to the public the statements made by an advertiser. This really gives the public a triple guaranty of the article they buy.

If it is known that an article is sold all over the country at the same price, the consumer feels that he is getting a square deal and has more confidence in that line of goods than in an unknown line with an unknown guaranty of quality. The present condition does not encourage us to advertise very extensively. We feel, however, that the better known an article is, as is proved by the advertisements which I have here and which I will present to the committee, if you desire to see them, the greater the incentive for the dry goods store and other price cutters seems to be to cut our prices.

I would like to say that there are 10,000 or 15,000 dealers in optical goods in this country, and I believe you will find it to be true that they will not average $3,000 a year; that is, that their business will not give them an average of return above that.

Mr. NELSON. What is your specialty?

Mr. KIRSTEIN. We make the Shur-on glasses.

Mr. NELSON. Are you competing with any chain-store establishments?

Mr. KIRSTEIN. I want to give you some facts. I do not know whether all of you gentlemen are familiar with our article, but our article is a very well-known article. There used to be a time when we could say something to the man who sold our article at a cut price.

The CHAIRMAN. I did not catch what your article is.

Mr. KIRSTEIN. Our article is the Shur-on glasses.

That name stands for the product of our company. We have spent hundreds of thousands of dollars advertising it; we have spent in advertising more than anybody else in that line of business. The decision of the court in the Sanatogen case takes away all our liberties, so that we can not stop the dealer from cutting the price. I have here a number of advertisements. Here is one of Berg Bros. in Philadelphia, which says that they sell the genuine $3 Shur-on gold-filled mounting for $1.98. And then I have some others here.

Mr. NELSON. What do those things show?

Mr. KIRSTEIN. They go to show that these big department stores and dry goods stores are selling our goods at a low-cut price, so that our regular, small dealers refuse to buy our goods any more.

The CHAIRMAN. Is it a patented device?

Mr. KIRSTEIN. Yes, sir.

The CHAIRMAN. You own the patent, do you?

Mr. KIRSTEIN. No; we pay royalties on it. We are not objecting either way to that.

Here is an advertisement of a department store in Philadelphia which is selling our goods at cut prices, and here is another one of a store in Hartford, Conn. In Hartford the dealers have taken away our business because we could not say a word to these big houses. If you will make inquiries you will find that this article is the best known of its kind, under a trade-mark, the best known there is in the country in the optical business, and that is why they use it.

Mr. BEALL. Do you sell to the jobber?

Mr. KIRSTEIN. We sell to the jobber and the retailer.

Mr. BEALL. Before the recent Supreme Court decision, what was the price which you fixed on your article?

Mr. KIRSTEIN. $3 and $5.

Mr. BEALL. The dealers were not permitted to sell a certain grade for less than $3 and a certain other grade for less than $5?

Mr. KIRSTEIN. The gold was put at $5.

Mr. BEALL. What did you sell it for to the retailer?

Mr. KIRSTEIN. We sold those goods to the retailer for $12.50, less 10 per cent, and 6 for cash.

Mr. BEALL. $12.50 a dozen?

Mr. KIRSTEIN. Yes; and we had another line that sold for $9. The other one we sold for $1.75.

Mr. BEALL. You mean $1.75 each?

Mr. KIRSTEIN. Less 10 per cent.

Mr. BEALL. That was the price for a single glass?

Mr. KIRSTEIN. Yes; per single glass.

I will answer what I think you have in mind. You probably think there is an enormous profit; but you must remember that the man

who serves you with that pair of glasses has to have his place of business on Pennsylvania Avenue or F Street, and he has a limited demand for our product; but he has to be in a convenient place for you, and he is not assured of a profit after he has received your money. That is why he has to have what looks like a big profit, because when you come in again to this merchant, to this man who handles our goods, and if he is a big, broad-minded man he will adjust those glasses up again for you and he will put them in shape, and when you ask him what it will cost he will say that he will not charge you for it. He gives you also, in most cases, another case, if you want it, because he is afraid of his competitor.

Mr. FLOYD. You can not say anything to the dealers who cut your prices now. What did you say to them and what did you do to them before the United States Supreme Court held in its recent decision that you could not regulate the prices?

Mr. KIRSTEIN. Under the right of infringement, we had a tag which was put on as a part of the contract. They went so far as to try to prove that they were selling our goods at $1.98. Berg, of Philadelphia, printed our tag and used it on our $3 article that they were selling for $1.98.

Mr. CAREW. How could they afford to sell it at that price?

Mr. KIRSTEIN. They do not really sell it to you. They switch you over to something else.

Mr. FLOYD. My question was, what did you do to them? Suppose a dealer wanted to sell your glasses at a lower price, what did you say to that dealer, in case he violated the agreement you had with him and sold them below the set price?

Mr. KIRSTEIN. We notified them, and in a good many cases we talked to them and showed them that we were within our rights in making them stop. Almost invariably we had not any further trouble along that line.

Mr. FLOYD. I think that is correct, but suppose the dealer absolutely refused to stop and said he would sell them as he pleased, what you would do? What would you do then?

Mr. KIRSTEIN. We have never been obliged to go that far. We have sued him. We had a policy that was either some good or no good, and we tried to follow that policy, because we did not want the public to lose confidence in the trade.

Mr. FLOYD. Did you, in a case of that kind, refuse to sell them any more goods?

Mr. KIRSTEIN. We could not do that, because we were selling through the jobber. I believe the best way to carry on that business is along the lines of good will.

Mr. FLOYD. You did that simply because the manufacturer had the same control over you?

Mr. KIRSTEIN. We are the manufacturers of this patent.

Mr. NELSON. You are the sole licensees of this product?

Mr. KIRSTEIN. We are the manufacturers.

Mr. CAREW. Before the United States Supreme Court handed down its recent decision, you used to go around and try to pursuade these people not to do that?

Mr. KIRSTEIN. Yes, sir.

Mr. CAREW. Have you tried to do that since the decision was rendered?

Mr. KIRSTEIN. We talk to them, but what is the use? You only lose the confidence of a man. He says—he says you are a darn fool. I am glad you asked me that question.

Mr. CAREW. You have stopped using the system of going around pursuading them not to do that?

Mr. KIRSTEIN. No; we have our salesmen, and they go around and they say, "Here, you might as well make some money," and we do have some success in the State of New Jersey. I mean to say where we have written to a man in the State of New Jersey.

Mr. CAREW. Why is that not a sufficient remedy for this evil? Why do you want to come to Congress and have us pass a national statute?

Mr. KIRSTEIN. Because it will protect us without making us try to do it in the States.

Mr. CAREW. I was not asking you about that. I say why do you not keep up the practice you had before?

Mr. KIRSTEIN. Because New Jersey has a law which does protect you against cut prices. A man does not dare to advertise a price below the regular price. If we have a standardized price and advertise in the trade papers and magazines, which we do, he has no right to sell that below that price.

Mr. NELSON. Suppose you had fixed the price at $15 instead of $5?

Mr. KIRSTEIN. That is at my hazard; then I might lose business.

Mr. NELSON. Why?

Mr. KIRSTEIN. Because the other man could afford to put his good quality at the price I was charging and sell it at a lower price.

Mr. NELSON. Suppose he knew you were getting $15, and he put his at $12?

Mr. KIRSTEIN. Which do you mean?

Mr. NELSON. I mean this: What protection is it to the consumer if you put it at $15, as you say, because of the hazard in the business, because some rival may say, "I will sell it at a lower price?" Suppose he knows you are getting $15, and he makes his $14; would that be bad for the consumer?

Mr. KIRSTEIN. But the average manufacturer knows one thing—I am in favor of the standardization of prices by trade-mark; I am not talking about patents. Did you understand which way my opinion was?

Mr. NELSON. I was trying to draw it out.

Mr. KIRSTEIN. I am in favor of a trade-mark which gives every other man the same opportunity as myself to make as good an article as I make, and therefore I must be careful that my prices are not any higher than I can afford to charge and make a good article, and I want to protect and increase my business.

Mr. NELSON. You seem to be only thinking of your side. Suppose we think also of the consumer. What protection would the consumer have against the exorbitant prices?

Mr. KIRSTEIN. He does not have to buy my article.

Mr. NELSON. Where would he get an article of that kind?

Mr. KIRSTEIN. We make the smallest bulk of the goods that are made in that line.

Mr. WEBB. Are your eyeglasses trade-marked or patented?

Mr. KIRSTEIN. Ours?

Mr. WEBB. Yes.

Mr. KIRSTEIN. Both.

Mr. NELSON. Where would there be any competition with you?

Mr. KIRSTEIN. It would be the same as it is now. There are a great many other people who are selling goods as cheap or cheaper than we are, but they are not making them as good. The quality is not as good as ours. The public, in the long run, are not getting as good an article.

Mr. NELSON. Would you want a commission to say to them that the price shall not be too high?

Mr. KIRSTEIN. I do not care. All I ask for is the privilege of having a standardized price. I want the privilege of saying that no man shall sell my article below my price everywhere. I am willing to compete in the markets with the other good products, but I do not want a department store to break the confidence of all the dealers of the United States and fool the public, so that the public will not know what they are getting, and thus have the business broken up. And when they do it, it is always just a flash in the pan.

Mr. NELSON. You are in favor of other people who manufacture similar goods also fixing the price to the jobber and to the consumer?

Mr. KIRSTEIN. Sure. All I ask of you gentlemen is to give the manufacturers of this country the privilege of creating confidence, so that when you go into a store to buy a certain line of goods, no matter where you may be, whether you are in Maine or Texas or California, you know that you can get the goods at the same price wherever you may be, and that the quality of those goods will be the same in one place as in another.

Mr. THOMAS. As I understand you, you want the privilege of fixing the price of your goods and of compelling the retailers who buy your goods——

Mr. KIRSTEIN (interposing). And jobbers.

Mr. THOMAS (continuing). To sell those goods at the price you fix?

Mr. KIRSTEIN. Yes. When I do that, you must always remember one thing, that there is another manufacturer who does not have to put a trade-mark on his goods and who can sell them at any price he wants to.

Mr. THOMAS. You do not have to put a trade-mark on yours?

Mr. KIRSTEIN. No; but on the other hand, there is another condition you do not want to forget, that in the case of an advertised article, as for instance the Shur-on glass, when you buy that advertised article and you say you saw the advertisement, for instance, in the American Magazine, you have another come-back besides the come-back at the house of Kirstein. If we do not make good on the representations we have made in our advertisement, that advertisement will not appear again in that magazine. You do not get that from the dealer at all. When the goods which you may buy from a dealer are not what they are represented to be, the dealer will simply shrug his shoulders and say, "That is the best we can do." But you do not have such a situation as that in the case of an advertised article in a reputable magazine. I think there has been a good deal said——

Mr. THOMAS (interposing). I have seen some of the biggest fakes in the world more extensively advertised than anything else.

Mr. KIRSTEIN. If the article advertised did not make good, you will find that when it is advertised in a standard magazine, and there

is any complaint against it that it does not make good, the advertisement will not appear again.

The CHAIRMAN. You speak of a standard eye-glass?

Mr. KIRSTEIN. Not a standard eye-glass; we simply want the right to standardize our prices.

The CHAIRMAN. What do you mean by that?

Mr. KIRSTEIN. So that you could go even to San Francisco——

The CHAIRMAN. You want the right to fix the price; that is what you mean?

Mr. KIRSTEIN. If you like to put it that way.

The CHAIRMAN. That is what it is. You say you want your goods sold at a fixed price throughout the United States, wherever they may be sold. You want them sold at the same price everywhere, and you want a law to authorize you to fix the price, and you want to enforce that price?

Mr. KIRSTEIN. That is a thing I would like to answer. The little dealer does not realize the cost of running a business. He does all his own work and he does not know how to figure his costs.

Mr. THOMAS. What would you say to giving the farmer who raises hogs the right to fix the price of pork chops?

Mr. KIRSTEIN. I do not have to buy his pork chops. There is another fellow somewhere else from whom I can buy pork chops. I am not asking for a monopoly, but I want to be allowed to initiate my own policy in the handling of my product, so that I can always make my goods of a good quality, so that my goods will always be attractive to the public, and so that the public will buy the Shur-on glass, and not some other glass. And I also want to protect the retail dealer, so that the public will not lose confidence in the retail dealer, and the goods would be handled, and will not buy a cheaper glass, rather than buy my known product.

Mr. WEBB. Which do you depend on more for the sale of your article, advertising or quality?

Mr. KIRSTEIN. You have got to have quality in order to make good on your advertising. We have spent almost a fortune on advertising and on building up a reputation for our goods, and now we are made the goat.

Mr. WEBB. The public has paid for the advertising.

Mr. KIRSTEIN. No, sir; up to the time our business increased from $150,000 to $500,000——

Mr. WEBB (interposing). The public pays for the advertising.

Mr. KIRSTEIN. You do not believe that, do you?

Mr. WEBB. I am sure the manufacturer does not pay for it.

Mr. KIRSTEIN. We have to have the output in order to make our cost.

Mr. WEBB. The man who buys the glasses has to pay for the advertising of those glasses.

Mr. KIRSTEIN. He pays as much to-day for the glass which is not advertised as he does for the glass which is advertised.

Mr. WEBB. I thought you said they were sold at a cheaper price?

Mr. KIRSTEIN. The department stores sell at a cheaper price, some of them, but most of them sell at the same price that we do, because they use us for a standard.

Mr. WEBB. Do you sell your glasses for the same price in New Jersey and in Washington?

Mr. KIRSTEIN. Yes, sir; that is what we want to do.

Mr. NELSON. You say they use yours as a standard. Do they find out what your price is and then establish another price?

Mr. KIRSTEIN. They sell them at the same price.

Mr. NELSON. In the event you got what you wanted in the way of legislation, would they not sell them at the same price?

Mr. KIRSTEIN. No; because we would want it to be low enough so that we would be the leading house in that line.

Mr. NELSON. You would want it high enough to give the retailers a profit?

Mr. KIRSTEIN. Yes.

Mr. NELSON. They would fix the price at about the same?

Mr. KIRSTEIN. We would have the market.

Mr. NELSON. Your rivals——

Mr. KIRSTEIN (interposing). You must have quality back of the advertising, because the man with the handle to his name is the man who makes good. For instance, you know an Earl & Wilson collar; you know what those collars are. If you buy an unknown collar, or anything else that is unknown, you have no confidence in it.

Mr. NELSON. I want to get you to this point. Your rivals use you as a standard and fix their prices the same as yours?

Mr. KIRSTEIN. In some cases.

Mr. NELSON. Would they not do that if you were given, by law, the privilege of fixing the prices of the standard? Would they not then advertise your prices as standard prices?

Mr. KIRSTEIN. Some might and some might not. All men do not care for quality.

Mr. NELSON. Let us suppose that would happen, that you would fix a price that would be profitable to the retailer, and your rivals would follow the same price. What protection would there be to the consumers and the users of your glasses against the temptation to make that price excessively high?

Mr. KIRSTEIN. Human nature.

Mr. NELSON. How?

Mr. KIRSTEIN. For instance, there are a lot of people in this world who always want to sell something cheaper than the other fellow.

Mr. NELSON. Where would he be able to get it, when you had a standard price?

Mr. KIRSTEIN. For instance, Berg & Co. could sell the Shur-on glass at any price they see fit. I have not any objection to their doing that, but I do not want them to kill my business. They will kill my business or the business of any other manufacturer when they do that with an article which the public knows about. Why do they not take their own article and say they will sell that article cheaper than anything else? They do not do that. They take our standard goods and say that they have a cheaper price on them.

Mr. NELSON. The point I do not see clearly is where the consumer is going to get any competition if you have a regular fixed price and your rivals use your price as a standard.

Why is it not sufficient for you that you have a patented article? Why will not that privilege which you already have give you opportunity to get your goods out at a profit?

Mr. KIRSTEIN. Because they break the confidence which is behind me and the dealer.

Mr. NELSON. That is, by false methods?

Mr. KIRSTEIN. That is what I ask protection against; to stop the false methods.

Mr. WEBB. You can quit selling the jobber who sells to the retailer who breaks the price?

Mr. KIRSTEIN. Yes.

Mr. WEBB. That is the remedy you have.

Mr. KIRSTEIN. No, it is not. If he kills our business we might as well shut up our factory. In a great many small lines where you have to distribute quickly, and where every little druggist or small dealer does not carry an enormous stock of goods, he must buy through the jobber. You know there are a great many lines in which the jobber is the pivotal point. That is a case in which you have to pay a lot of money for distribution.

Mr. WEBB. What do you charge the jobber for the $5 glass?

Mr. KIRSTEIN. For the $5 glass we give the jobber 25 and 2.

Mr. WEBB. I wanted to know just the money value; what you charge him.

Mr. KIRSTEIN. We charge him $10.50.

Mr. WEBB. For the $5 glasses?

Mr. KIRSTEIN. Oh, no; $21; I beg your pardon.

Mr. WEBB. You have a glass which you sell to the public for $5.

Mr. KIRSTEIN. That is the one we sell the jobber for $21.

Mr. WEBB. What does the jobber pay you for that glass?

Mr. KIRSTEIN. Approximately $15, net.

Mr. WEBB. What do you mean by $15 net?

Mr. KIRSTEIN. $15 per dozen.

Mr. WEBB. Then what does the jobber sell that dozen to the retailer for?

Mr. KIRSTEIN. He sells that to the retailer, in a single pair, for $1.90.

Mr. WEBB. But by the dozen?

Mr. KIRSTEIN. That man does not buy a dozen in his business.

Mr. WEBB. The retailer does not buy a single pair from the jobber, does he?

Mr. KIRSTEIN. That is the point I am trying to bring home to you, that the jobber is a necessary factor, and is getting to be more so every day in relation to small business.

Mr. WEBB. As I understand it, the glass for which the jobber pays $1.25 is sold to the public for $5.

Mr. KIRSTEIN. That is in this way——

Mr. WEBB (interposing). Is that not correct?

Mr. KIRSTEIN. The retailer comes in there.

Mr. WEBB. The public pays $5 for a glass which the manufacturer sells to the jobber for $1.25?

Mr. KIRSTEIN. Just link up two things when you have that in your mind. The retailer has no assured profit, even after he has your money.

Mr. WEBB. Why not?

Mr. KIRSTEIN. Because you will go back to that man again and have your glasses adjusted, and he will true them up for you and keep them in shape for you, and do a lot of little things like that, for which he gets no compensation. That is so in a great many cases.

Mr. WEBB. Will you object to telling us what this $1.25 glass costs you to manufacture?

Mr. KIRSTEIN. No; that glass costs us—when you figure all the selling costs, we make about $1.50 on a dozen glasses.

Mr. CAREW. Do you sell the glasses or just the frames?

Mr. KIRSTEIN. I am speaking of the frames.

Mr. WEBB. That is the little nose piece?

Mr. KIRSTEIN. Yes; the nose piece on the frames. I am talking of the nose piece now.

Mr. FLOYD. You are a manufacturer?

Mr. KIRSTEIN. Yes.

Mr. FLOYD. You want the right to fix the price at which you sell the jobber?

Mr. KIRSTEIN. Under a trade-mark.

Mr. FLOYD. Yes; under a trade-mark. You want to be given, by law, the right to fix your price; you would not be willing to have somebody else fix your price?

Mr. KIRSTEIN. I am willing to leave it to a commission.

Mr. CAREW. How long do you think the public will stand for paying $5 for a frame which you sell to the jobber for $1.25?

Mr. KIRSTEIN. You do not have to buy that; you can buy the article of another manufacturer who will sell his article for anything he likes.

Suppose you paid $8 for your glasses and you read in the Washington Post that another man will sell you those same glasses for $4 How do you feel about it?

Mr. CAREW. I would feel very sorry that I was not in Washington before I bought the $8 glasses.

Mr. KIRSTEIN. That would be your real feeling. You would find you would not be getting the real service.

Mr. CAREW. You said the same frames.

Mr. KIRSTEIN. Yes; but there is more than merely the glass that goes with our line as well as many other lines. There is the service that goes with that.

Mr. CAREW. Do you believe that any interstate trade commission would ever allow you to set a price of $5 to the consumer for a glass which cost you $2 or less?

Mr. KIRSTEIN. Yes; because I can prove that the net profit is not as great as you think.

Mr. CAREW. I do not know anything about that. You said the retailer paid $2 for it and sold it for $5. Do you believe that any interstate trade commission would allow that glass to be sold at a $3 profit?

Mr. KIRSTEIN. It costs the retailer more than $2.

Mr. CAREW. How much? Does it cost him $4.90?

Mr. KIRSTEIN. No; but it would probably cost him—to my mind, he does not make over a dollar. I will ask Mr. Etz, who is a local dealer who handles our goods, whether that is right.

Mr. ETZ. We pay for Mr. Kirstein's mountings about $2, but the $2 does not represent the whole cost of the mounting, because after a man has bought the mounting we will give him a case. Then he will come in later with the frame bent, and we will straighten that frame for him. Then he will come in a little later and the case will be worn out, and we will give him a new case.

Furthermore, I am responsible to that man for his glasses. I may have to put in new lenses.

The CHAIRMAN. Suppose he never comes back and you never have to straighten the frames, or do anything for him; where does the service come in in a case like that?

Mr. ETZ. It comes in in this way: When that man first came to me he came because he had confidence in me; he had confidence enough in me to trust me with his eyes. It has taken me years of study to get myself in a position where I can give him that service.

The CHAIRMAN. Ought not you to charge him for that service instead of tacking it onto the price of the glasses?

Mr. ETZ. That is being done now in some States where they have competent laws. In the District of Columbia we have no such laws as that. If I should charge him for my services in that regard and my competitors would not charge him, I would soon be out of business. I sell a large number of mountings for which I charge $5, and on which, although I only pay about $2 for them, I have lost money, on account of the service which I have to render.

Mr. FLOYD. As the law does not hold up the price, your idea is that your competitor will lower the price, and that therefore you will be put out of business?

Mr. ETZ. That is it exactly.

Mr. BEALL. How long has your business been disturbed as a result of this Supreme Court decision?

Mr. KIRSTEIN. About six months, I think.

Mr. BEALL. How does the volume of your business during that time compare with the volume of your business during the same time last year?

Mr. KIRSTEIN. Last year we did not make any money.

I am trying to bring out the fact that our prices were reduced, showing that our competitors took advantage of this condition in more ways than one.

I do not want to appear to be antagonistic, but from what I have read most of you gentlemen seem to feel that the next thing to do is to reduce the manufacturer's profit to as low a figure as you can.

We are a little concern. We have only about 300 people employed in our factory. Those people are a part of the public. We are only a small manufacturing concern. But if we are crowded down we will have to make a cheaper article in order to meet competition. Our trade-mark will be hurt, and the wages of our workmen will be affected.

That all comes back to one thing, as I see it, and that is price fixing for trade-marked goods, and every man does it at his own hazard.

Human nature and the aggressiveness of the American manufacturer will make him keep his prices down, because one thing is certainly a fact, and that is that the law of this country, this law which you are trying to pass, does not allow him to get into collusion with anybody else, and therefore if he makes a high price he does it at his own hazard. You have heard a great deal about that, and I do not know anything about it.

Mr. DANFORTH. I understood you to say that the New Jersey law in regard to the standardizing of prices was working satisfactorily?

Mr. KIRSTEIN. Yes, sir.

Mr. DANFORTH. How would it strike you to have a similar law enacted, covering the entire nation?

Mr. KIRSTEIN. That would be great.
Mr. DANFORTH. You would be satisfied with that?
Mr. KIRSTIEN. That would be fine.
Mr. DANFORTH. That would hold your prices up?
Mr. KIRSTEIN. Yes, sir.
Mr. DANFORTH. You object to the practices of the department stores who sell your goods at a price below which you can sell them for?
Mr. KIRSTEIN. Yes, sir; the department stores can afford to run one department at a loss.
Mr. DANFORTH. And under the existing status of affairs there is no way by which you can reach that?
Mr. KIRSTEIN. No, sir.
Mr. NELSON. If you can prevent false advertising, you would not care about standardizing the price?
Mr. KIRSTEIN. It is not false. It gets you in the store, and then he sells you something else. You go into the store and you say you are going to buy a pair of Shur-on glasses, but he is a better salesman than you are a buyer.
Mr. CAREW. He sells you a high hat?
Mr. KIRSTEIN. He tells you those are not what you want. In the hands of a good salesman we are all fools, gentlemen.
You will find that any manufacturer will tell you this same story, that we are up against this fraudulent condition. It goes further than the city you are in. I have a letter here from a man in Bristol who writes us about it. He says, "What are you going to do about it?" He says he will buy an eyeglass which has no name to it.
That is what we are up against, gentlemen, it is not the big man who has a big store and a big reputation, but it is the other 10,800 dealers whom we are thinking about. The big merchant whom you have confidence in does not care, but it is the bulk of the business which is done by the great number of smaller dealers which we have to consider.
Before the decision in the Sanatogen case we used to have a tag, like this one which I have here.
Mr. DANFORTH. Read what it says on the tag.
Mr. KIRSTEIN. It is simply a license.
Mr. DANFORTH. Read the language on that tag.
Mr. KIRSTEIN. This tag says:

NOTICE.—This bridge is an essential part of our Handy Shur-on eyeglass mounting, which is covered by United States letters patent owned and controlled by us and cannot be used or sold excepting when it is sold to the public at a price not less than three dollars ($3.00), in addition to the standard price of the lenses of the optician selling same, without discount, rebate or bonus, and with this tag attached. Any sale or use in violation of these conditions and any erasure from or removal of the tag, is a violation of the license and renders the parties concerned in such transaction liable to suit for injunction and damages for infringement of patent. A purchase is an acceptance of these conditions. Pat. Nov. 26, '97; May 4, '09; Sept. 13, '10. E. Kirstein Sons Co., Rochester, N. Y.

We do not try to make any prohibitive price. We allow any optician to sell his lenses at his regular price added to the price of our Shur-on glass. We only wanted to insure the dealer a profit on our product in order to make it attractive to him to handle our product.
Mr. NELSON. I was just trying to get your idea. The thing I was thinking of was this, that your competitors who have not trade-

marked goods have their rights, and you should not have special rights unless there is merit in your goods, and the consumers have certain rights.

Mr. KIRSTEIN. I am willing to compete with them. But if I have built up a business by a trade-mark I think I should have protection for my good will in the business. It is the little man who cuts the price, as well as the big man.

Mr. CARLIN. Do you manufacture the reels from which the glasses are suspended?

Mr. KIRSTEIN. No, sir; we make spectacles and eyeglasses and mountings and parts.

Mr. CARLIN. Is this profit about which you have been talking the retailer's profit, in that he has to figure in the rent of his building and other expenses?

Mr. KIRSTEIN. That is why we have to figure on what would leave him a profit, and that is why he prefers to buy an article on which he is not strong enough to restrict the price himself as against his competitor. Do I make myself clear?

Mr. CARLIN. Yes; I think I understand you.

The CHAIRMAN. I understand you to say that you sell this nose device of a certain quality at $1.25 to the jobber?

Mr. KIRSTEIN. Yes, sir.

The CHAIRMAN. And then he sells it to the retailer at $2?

Mr. KIRSTEIN. Yes, sir.

The CHAIRMAN. And then the retailer sells it to the consumer or user for $5?

Mr. KIRSTEIN. Yes, sir. But he has to have a convenient place for you; he has to have a store on Pennsylvania Avenue or F Street, in order to make it convenient for you to deal with him.

The CHAIRMAN. Do you think the retailer ought to have a fixed price at $5?

Mr. KIRSTEIN. We make more than one kind. We make one for $2.50, and one for $4. We make a line of goods. When I say $2.50 or $4, I mean that that is the price to the retailer. There are different models.

Mr. CARLIN. How many manufacturers are there in this country who make the same line of goods which you make?

Mr. KIRSTEIN. There are about 20, and none of them is very rich.

Mr. CARLIN. What is the capital of your company?

Mr. KIRSTEIN. The capital of our company is $300,000, with $100,000 of preferred stock unused.

Mr. CARLIN. How many employees have you in your factory?

Mr. KIRSTEIN. We have 300 employees in our factory.

The CHAIRMAN. The committee is very much obliged to you, Mr. Kirstein, for having given us an expression of your views on this subject.

Mr. KIRSTEIN. I thank you very much, Mr. Chairman, for giving me the opportunity to express my views. I hope I have made myself clear.

The CHAIRMAN. There are no further witnesses to-day, and we will adjourn until to-morrow morning.

(Thereupon, at 11.55 o'clock a. m., the committee adjourned to meet to-morrow, Wednesday, February 25, 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.	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 22.

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Wednesday, February 25, 1914.

The committee this day met, Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. The committee will be in order. When Mr. Brandeis was formerly before the committee it was agreed that we would hear further from him to-day. That being the order, and Mr. Brandeis being present, the committee will be very glad to hear from him now.

STATEMENT OF MR. LOUIS D. BRANDEIS—Continued (Serial 7, Pt. 16).

Mr. BRANDEIS. Mr. Chairman and gentlemen, I was discussing, at the close of the hearing last week, the subject of interlocking directorates, and perhaps it may be profitable for me to state the lines on which, in my opinion, Congress can now wisely legislate on that subject. As I stated, the fundamental purpose of any legislation, dealing not only with the subject of interlocking directorates in the strict sense of that term, but in undertaking to prohibit the entering into contracts of men in corporate relations who have conflicting

interests, is this: That in our experience, during the last 20 years particularly, we have found that the existence of such intertwined relations have made possible the huge concentration of financial power. The interlocking of directorates applies, to a limited extent, only directly to the subject of the Sherman law, to the suppression of competition between competing concerns engaged in the same line of business, but it has indirectly a most effective relation to the whole subject of the suppression of competition and the suppression of liberty in business. The greater part of that power comes not from the interlocking of competitive businesses but from the interlocking of great businesses with other businesses in different lines, so that the same persons are connected with a railroad, a bank, an insurance company, an equipment company, and various manufacturing companies all down along the line.

The fundamental reason which underlies the objection to interlocking directorates on broad public grounds affords a basis for the limitation, at this time at least, of its application to corporations. So far as the principle that no man can serve two masters goes that is fundamental, and when a man undertakes to serve two corporations that are dealing with one another there is always the danger that the unethical relation may result in loss somewhere, loss to minority stockholders, and, in case of public-service corporations, in loss generally to the public through lessened efficiency or otherwise. But the greatest objection to this scheme of interlocking directorates is that by virtue of it it has become possible for a few men, like the firm of J. P. Morgan & Co., to acquire extraordinary power. They, the bankers, control the railroads, and controlling the railroads, they were able to control the issue and sale of securities. Being bankers, they bought those securities at a price which they had a part in fixing or could have a part in fixing. They sold those securities, as bankers, to insurance companies in which they were able to exercise some control as directors. They got the money with which to buy those securities from railroads through their control of the great banking institutions, and then, in their capacity of having control of the railroads, they utilized that money to purchase from great corporations, like the Steel Corporation, what the railroads needed; and in their capacity as controlling other corporations they bought from the Steel Corporation again, and so on until we had the endless chain.

Now, how far shall Congress go in prohibiting interlocking directorates in those conflicting relations to which I have called attention? It seems to me that in laying down rules for that legislation there should be a clear differentiation between banks and other corporations. The facts in regard to banks put them, in a sense, in a class alone. The whole financial power can be exercised very powerfully through an interlocking of banks, a connecting together of a large number of banking institutions, as ours are interlocked in Boston. Not only that, but the relation of a bank using not its own money, but the public's money, other people's money, is a relation that is peculiar and in that respect differing largely from conditions in any other concern. A bank is, in a proper sense, a trustee for the public—I mean a bank of deposit—because the greater part of the money which it is lending is not the money of its stockholders; it is the money of others, and the money in the bank is, to

a large extent, the currency of the realm, perhaps 90 or more per cent of all the business being done by bank checks or credit through the bank.

Now, to what banks shall this prohibition apply? It seems to me at the present time, when we are undertaking to deal with the evil commonly described as the Money Trust, that the legislation should be confined only to those banks in the larger communities, and that you may very properly classify the banks as those in cities with a population of at least 100,000, and direct your legislation, so far as banks are concerned, to those banks which are located or have a usual place of business in cities of 100,000 or more. It is in the banks in the great centers—New York, Boston, Chicago, Philadelphia, Baltimore, and St. Louis, cities of that character—that the greatest power has been exercised by a few men to control the industries of this country. True enough practices exist in many of the smaller cities which, in a way, may be to individuals quite as injurious as those that are practiced upon the community in general through the conflicting interests and interlocking relations of the bankers in the great cities. Looking at it from my point of view, from its effect upon the public as a whole, what is done in the smaller cities and in country towns is not of very great significance, and as this measure is a measure which works in itself some very radical changes in business habits, it seems to me that Congress ought to go slowly in the movement in this respect.

There are no classes of banks, it seems to me, that ought to be excepted. Properly all classes of banks which are banks of deposit, where men are utilizing the money of others which is subject to check or draft payable on demand, should be included, but we must very clearly draw a distinction between a bank of deposit and the ordinary savings bank where the money is not subject to check on demand. Circumstances are different. Deposits in a savings bank are deposits made for investment purposes; they are a part of an investment institution. The right to withdraw funds from a savings bank is almost universally limited by a requirement of notice. The money in a savings bank is not a part of the currency of the country, but the money in an ordinary bank of deposit is almost as much a part of the necessary instrumentalities of commerce as is the gold and silver itself or the bills which it represents. So that, whether a bank be a bank or a trust company, it ought to be subject to this limitation. The question is how you shall do it. Ought you to make any distinction between State banks and national banks? It seems to me that your first step ought to be to include in this legislation all banks which are members of the Federal reserve system, regardless of whether they are organized under the national-bank law or whether they are State banks and trust companies. Properly all State banks and trust companies which receive deposits, subject to check, ought also to be included within the limitations of cities over 100,000 population, to which I have referred. But there is present a certain difficulty in dealing with them.

Mr. GRAHAM. On what theory could Congress legislate in regard to State banks?

Mr. BRANDEIS. It could legislate, and there are three theories on which it can legislate. One possible theory is—although it has not yet been sustained by the Supreme Court—that banking is interstate

commerce. It seems to me that it is, but that has not yet been adjudicated by the court and whether it is or not we do not know. It could also legislate on that subject on the ground that it had legislated on the original subject of whether they should be allowed to issue bank bills through the exercise of the power of taxation.

Mr. VOLSTEAD. Do you remember the name of that case?

Mr. BRANDEIS. It was in Wallace, but I do not recall it exactly.

Mr. GRAHAM. It is an old case?

Mr. BRANDEIS. Yes.

Mr. GRAHAM. But, of course, that comes under a different constitutional provision?

Mr. BRANDEIS. Yes, sir.

Mr. GRAHAM. Because there they are issuing money.

Mr. BRANDEIS. Yes. But Congress has exercised the same power recently in two other respects. It exercised it in the oleomargarine case. Its purpose there was ostensibly to raise money by taxation. But, of course, its obvious purpose was to affect the manufacture of oleomargarine. And more recently it has exercised that power in the case of white-phosphorus matches. I do not think there would be any constitutional objection, but I think there could be at this time a question whether, as the whole subject is being introduced, it ought not to be introduced gradually; whether Congress should do it or not. I think there is a question of expediency to consider, but I do not think there can be any question of the constitutional right. There is, of course, one other ground on which, probably, the right would also exist, and that is through the control which Congress exercises over the mails. But I am inclined to think that——

Mr. GRAHAM (interposing). Does not that look like resorting to something indirectly which you can not do honestly and openly?

Mr. BRANDEIS. Congress has done it in the white-slave traffic, in the case of the white-phosphorus matches, in the case of oleomargarine, and did it originally in the case of the State banks. Wherever there is a need which justifies the exercise of that constitutional power it seems to me the precedents are ample for doing it.

Mr. GRAHAM. There does not seem to be any need for that; that is, any need to invade the power of the State to regulate its own corporations in matters pertaining to the State and which are confined within the State.

Mr. BRANDEIS. So far as they are confined in the State; but my own opinion is that the Supreme Court will ultimately hold, when the question is put up to them, that banking is interstate commerce.

Mr. GRAHAM. I think it will be a strain and a terrible stress put upon the law. This effort to legislate in such a way as to bring everything under interstate commerce, it seems to me, is a great mistake. I think we are going too far.

Mr. BRANDEIS. Perhaps I did not state that with full accuracy. A bank is as much an instrumentality of interstate commerce as a railroad is an instrumentality of interstate commerce.

Mr. GRAHAM. I can not see it in that light.

Mr. BRANDEIS. I doubt whether there is any bank, whether it be the smallest local institution, which is not being used as a means of conducting commerce between the States, and if we can exercise, as we have exercised in many ways, power over the instrumentalities of

commerce, over the telephone, the telegraph, and the railroads, and if we undertake to regulate it, even in such respects as passing our employers' liability acts, it certainly is merely a question of the relative importance, the urgency, the necessity, whether a condition exists or is likely to exist which calls upon the community to exercise its power in order to protect itself against evils which are grievous in their nature. I can feel no doubt in my own mind that the evils which we have suffered from the concentration of financial power would justify the exercise of any of these constitutional powers. But there is a question whether or not we need at this moment to do that. I should be disposed at the present time to confine that legislation, so far as banks are concerned, to the banks which are a part of the national reserve system, with the exceptions which I shall hereafter mention.

Now, so much for the subject matter of banks to which we should apply it, and that means the banks as to which you would say no person may be a director who is also a director of some other financial concern doing business in the same place. Now, what is a financial concern as I have used that term? I should say that term "financial concern" includes not only a bank which is a member of a national reserve system but any other bank.

Mr. VOLSTEAD. Would you include an insurance company?

Mr. BRANDEIS. And an insurance company also. It seems to me that both banks and insurance companies, which have a usual place of business in the same place, under whatever law they are organized, ought to be included in that prohibition.

Mr. DUPRÉ. May I ask what you mean by doing business in the same place?

Mr. BRANDEIS. Having a usual place of business in the same place.

Mr. DUPRÉ. Take the case of New York and Jersey City, for instance.

Mr. BRANDEIS. Well, I should not think New York and Jersey City were the same; I should think they were different places; but I think anything within the city of New York is the same place. It is perfectly conceivable that we might find it necessary, if there were attempts to evade the spirit of the law, to define that in such a way that it could not be evaded; but I do not believe that will be necessary. If once the intention of Congress is made manifest, I believe the attempts at evasion will be relatively few. But there will always be the broad power of amendment behind it. When you apply that principle to banks, then the next question is not merely as to where you will allow the interlocking of a common director, but what will be the extent of the prohibition against a bank doing business, either with a director or with a concern in which the same person is interested; that is, in which a director or other officer is interested. It seems to me that on that question the prohibition should be absolute. It seems to me perfectly clear that when you regard a bank as a public-service institution you take the position which alone will satisfy the needs of business. The money that is there is, in large part, the depositors' money. They must get that money; they must get the use of it; they must get the credit. It is the life blood of business.

Now, that money, of course, from the bank's standpoint, must either be loaned or withheld, according as whether the risk is good or

the rate is proper. You have got to vest in the bank absolute discretion as to whether or not they will lend to A or B or C. You can not control the exercise of that discretion, and you ought not to control it if it is honestly exercised. But the first requirement, or the fundamental requirement, of its exercise should be that it is exercised without fear or favor; that it is exercised without discrimination in the interest of those who come to borrow and who are entitled to credit. That is the only basis which justifies the existence of a bank of deposit. When you take the ordinary man who is lending his own money, he can lend it for any reason that he chooses; he can lend it to A because he prefers A, and he can refuse it to B because he does not like the color of B's hair. But when it comes to the performance of a public function, that ought to be exercised by a bank of deposit in precisely the way in which a railroad or gas company or electric-light company exercises its public function—that is, without discrimination and without undue preference. Of course, there is difficulty in determining whether there has been discrimination—a very grave difficulty in the case of banks—because the decision has got to be rested upon judgment—judgment whether the borrower is entitled to credit and also the lesser judgment as to whether, considering the risk, the rate of interest is proper.

But the existence of that difficulty does not prevent the necessity of applying the rule, and it only emphasizes more strongly the importance of insisting, in the case of a bank of deposit, that its money shall not be loaned by the bank to some one who has a private interest and, therefore, a conflicting interest. The prohibition should be, therefore, that a bank shall not lend its money or enter into contracts, ordinarily, with a director, an officer, an employee, or a corporation of concern in which any of those hold office or are financialy interested. And it ought to be so guarded, also, that a mere formality of whether you hold office or not——

Mr. NELSON (interposing). Would not that lead to many quitting the position of director in order that they might continue as stockholders, thereby wielding an influence and getting money for their concerns?

Mr. BRANDEIS. I think it would.

Mr. NELSON. Then how would you get rid of the evil you are aiming at?

Mr. BRANDEIS. In the first place, I do not believe that the number of people competent to sit on a board of directors is nearly as small as is sometimes assumed by great bankers. In the second place——

Mr. VOLSTEAD (interposing). If a director dies almost any man in the community is ready and willing to take his place?

Mr. BRANDEIS. That seems always to be the case, and when one man leaves there are frequently many applicants for that office, and most of the applicants are quite as worthy as he who filled the particular office of director.

Mr. DANFORTH. The objection to this entire bill has come from the small cities and not from the large cities at which you are aiming.

Mr. BRANDEIS. I think I have, by the limitation which I suggested of confining this to cities of 100,000 and more, removed that objection, so far as the small cities are concerned.

Mr. DANFORTH. Is not that too small a limitation to start with?

Mr. BRANDEIS. No.

Mr. DANFORTH. Have you found this evil, in your studies, to extend to small cities?

Mr. BRANDEIS. I think a city——

Mr. DANFORTH (interposing). One hundred thousand is a small city.

Mr. BRANDEIS. I did not take a city of 100,000 because it is a particularly small city. We have some such cities in Massachusetts. The city of Worcester—which happens to be at the moment a city having a little more than 100,000—was a pretty important city when it had less than 100,000; it had important banking institutions and capital. However, it seemed to me the reason was two-fold. When you are considering such legislation you have got to weigh the advantages and disadvantages. Now, while the evil may exist in a city of 100,000, it is not likely to exist; but, on the other hand——

Mr. DANFORTH (interposing). Do you know of any case where it does exist?

Mr. BRANDEIS. Yes.

Mr. DANFORTH. In small cities?

Mr. BRANDEIS. Yes; where it does exist or will soon exist. I think when you are closing a certain door you do not want to open too many other doors. This principle, that a man ought not to try to serve two masters, is a principle which ought to apply to every bank wherever it is situated. We do not apply it because it is not a proper principle in its application to small banks, but because, in view of the way that business has been done there are certain objections which are met and which some people think are very serious or might be very serious in making this change. However, in my opinion this law could be applied to a city of 50,000 or 20,000 and not work any hardship at all, and to a great many smaller cities in many cases. But it seems to me after all we must understand that in our legislation we can not do the whole thing at once, and we have to have regard for certain conditions. I believe it will be found, if a law should be passed containing a limitation applying to cities of 100,000, that there would be no difficulty whatever, and that these dangers—that people would not be able to get credit and that the banks would not be able to get directors—will vanish; that through the multiplicity of banks and connections there are plenty of means of getting on, and that it will be shown that many of these fears were unfounded. But I think that for the present, as we are undertaking to deal the most effective blows against financial concentration, it would be wiser to provide for a limitation of, say, 100,000 or under.

Mr. McCOY. Why not leave it to the Federal Reserve Board?

Mr. BRANDEIS. Because it seems to me that this is something that the Federal board has nothing to do with and ought not have anything to do with. The Federal Reserve Board is dealing not with the question of propriety in the management of corporations, but it is dealing with certain broad questions of credit and questions of the currency. This is a broad principle of action; we do not want to limit this; we do not want to give any discretion in regard to this.

Mr. McCOY. The alternative of not giving discretion is making a hard-and-fast line somewhere, and, as you suggest, a population of 100,000?

Mr. BRANDEIS. Yes.

Mr. McCoy. So you may have 101,000 to-day and may have 99,000 to-morrow in any city?

Mr. Brandeis. I would draw the law in such a way as to base the population upon the latest Federal census. Then the cities would come into the class if they grew beyond 100,000. Of course, it would be conceivable that you might give to the Reserve Board the power to fix the limit of population, but if you fix anything else except population as a measure you are going to impose some very grave problems upon the Federal Reserve Board, and it seems to me there is no occasion to impose those problems upon that board.

I think the objection to allowing these conflicting relations is fundamental and it is universal. It is merely a question of how far it is wise to go. Congress can determine that and it can determine it by a general rule. As you gentlemen have an opportunity to legislate from time to time, I think one might say with perfect calmness: "We will apply this rule to cities of over 100,000 to-day, and at the end of two years"—I think the law ought not to go into effect until, say, January 1, 1916—"the limit shall be lower"; two years later or four years later, whatever the time may be, the rule shall apply to cities of 50,000. To my mind that is simply saying this: Now, that we are introducing what is a new practice, although it rests upon a rule as old as any we know anything about, that no man shall serve two masters, we should apply it gradually, and the present tentative bill provides that the time when it shall take effect is to be postponed for two years. It seems to me that for that very reason we could make a limitation which excluded a large number of banks in the smaller cities. Certainly the same reasons do not apply to them, and it seems to me that if you take 100,000 as the limit you have certainly gone safely, so far as the innovation goes. We should have an opportunity of withholding the operation of that law, and Congress may, three or four years hence, after we know what the operation is, take a further step, if it seems desirable.

To my own mind, the educative effect of such an act of Congress will be very great, even in cities of 100,000.

Mr. Nelson. Right on that point, I have read with a great deal of interest your illuminating articles, and also followed the Pujo investigation, which showed that there is a money trust. Do you count on breaking that up by preventing interlocking directorates and leaving the ownership of the stock unaffected? You do not think that the prevention of interlocking directorates will result in breaking up this combination, do you?

Mr. Brandeis. Of course, the term "interlocking directorates" is a broad term; it includes a great deal. I stated a little while ago that it seemed to me the prohibition should extend to those cases where the director, officer, or employee was a director, officer, or employee in another company or in which they had a financial interest. The fact of having a financial interest as well as the fact of holding a position of trust should be a disqualification, and when you have applied that rule you have gone a very long way.

Mr. Nelson. Is not the evil in the financial world the fact that the big fellow gets an undue opportunity and has such power that the little fellow does not get enough for his actual needs?

Mr. Brandeis. I think there has been much of that.

Mr. Nelson. How would you prevent that?

Mr. BRANDEIS. I think when you have provided that a bank can not be administered for the benefit of those who are administering it, but must be administered for the benefit of other people, you have taken away, at least in very large part, the inducement of discrimination against the small man.

Mr. NELSON. Have you formulated in words the amendment that you propose to this bill and which you think will reach that point?

Mr. BRANDEIS. I have made some efforts in that direction and shall be glad, at a later time, to submit the details. It seemed to me that perhaps it would be most profitable now to discuss the broad principles which should underlie any amendment, because I think there may be many differences of opinion as to the exact phraseology which ought to be adopted.

Mr. MCCOY. The Federal Reserve Board has the right to remove certain members of certain classes of directors under the Federal reserve system, presumably for some misdoing. Would not the giving of power to control this power of interlocking directorates to the Federal Reserve Board be a further grant of power right along the same lines, so that if anybody complained to the Federal Reserve Board and could convince that board that in a certain bank there was discrimination shown in making loans, the board could say that it was due to the fact that a director on the board of that bank was controlling the loans for his own benefit or for the benefit of his friends to the discrimination of somebody else, and, therefore, say that he must stop that sort of thing or that the bank must stop it?

Mr. BRANDEIS. I think your suggestion is very interesting and ingenious, but I do not believe it would be wise to legislate on those lines, because, see what it means. You would have to undertake to establish what it is extremely difficult to establish—namely, the motive which has induced action in the exercise of a judgment on a very delicate matter. Whether you should grant credit or not to A is a matter as to which it would be very difficult to adduce evidence. It is not merely a question as to what a man's assets or liabilities are; it is a question of his character, of his prospects. It is a question, taking all things into consideration——

The CHAIRMAN (interposing). And the moral hazard?

Mr. BRANDEIS. Yes; the moral hazard is a very important element. You have got all those things to take into consideration, and a man may have the best judgment in the world and yet you could not establish by anything that looks like legal proof that he did the right thing; on the other hand, you could not establish, in another case, that he did the wrong thing. There could not be anything more delicate than the judgment that has to be exercised in determining whether there shall be credit or not. The thing to do, and the only way to secure a proper exercise of that judgment, is to put the man who exercises it—the bank officer and trustee—in precisely the position in which a judge is put, in which the head of a department of the Government is put, or in which the commissioner of a great commission is put. It is difficult to believe, for instance, that an Interstate Commerce Commissioner would be affected by the fact that he held certain shares of stock in a particular company; there is but one chance in a thousand that that would affect his judgment, but the law has determined in regard to those public positions, in regard to the position of a judge or the position of a man in the

Government service, that he must be in a position of absolute impartiality, and because of that the law says you must have no financial interest of any kind, however small, in the question that comes up for your decision. Now, if I am right in saying that the position of a bank of deposit is analogous and comparable to the position of public service anywhere, then we have only this single proposition, that in order to secure equality of treatment to the possible borrowers from that bank those men must be in a position where they can not conceivably have a financial interest in the matter of the loans—that is, no interest other than that which they naturally should have because of the positions they hold.

Of course, they will make mistakes, as judges make mistakes, as public officials make mistakes; but we ought to eliminate that possibility of error which comes from a financial interest. I think that when once that position is put before men and when Congress, in regard to the banks in the larger cities, says that is the rule by which they ought to be governed, you will find that the men in the smaller cities, at least a very large percentage of the men in the smaller cities, without compulsion of law will say, "We will not have any transactions with any men who can have a possible interest." As a matter of fact, some banks have already, since this question has been raised, and, perhaps, before this subject had come up for discussion, announced that rule and have taken considerable pride in it. I have had letters about that, and happen to have one from one of the banks in Boston—a letter from the president of one of our own banks. He said they had for some time laid down the rule that they would, under no circumstances, make a loan to any person who was an officer or director of the bank or of any concern in which he had any financial interest whatsoever. I believe that will become the generally recognized rule, and that the work of Congress in laying it down with respect to the larger cities will be of universal value as a means of operation.

Mr. NELSON. Do you know what the States are doing by way of legislation in regard to that subject?

Mr. BRANDEIS. I am not aware of that, Mr. Nelson.

Mr. NELSON. I think some of the States have prohibited it

Mr. BRANDEIS. They may have done so.

Mr. PATERSON The State of Indiana has a law which provides that no officer of a trust company shall borrow money from that trust company.

Mr. BRANDEIS. That is true in regard to quite a number of banks—that the bank may not lend to its own officers; but is it also true in Indiana that a bank may not lend to a corporation in which one of these directors may be an officer?

Mr. PETERSON. I do not think there is any limitation as to that.

Mr. BRANDEIS. That, of course, is the more important; and, as I said to Mr Nelson, I was not aware of any legislation of that sort.

Mr. PETERSON. I am not advised about that.

Mr. BRANDEIS. However, I think it is perfectly clear that there ought not to be the slightest question about it with regard to a director, officer, or trustee. We have the universal rule in equity that a trustee can not deal with himself. The matter has been tolerated partly because we tolerate a great many things until the evil grows

too great and partly because there has been this fiction that if a man does not vote on a thing in which he is interested he has not had any interest. But, of course, that is not true. The bank is entitled to his judgment as to whether or not certain action should be taken. He ought to vote. It may be that the facts he knows about in his own concern are such that he ought to vote that the bank should not lend it any money. The mere fact that he does not vote on the question is not the protection that the bank ought to have. Besides that, the influences of one director with his fellow directors, even if he does not vote, is so great that he might just as well vote.

Mr. CARLIN. How would that affect the present contemplated organization of our new banking system? Of course, we could apply that rule to banks over which we have jurisdiction, namely, national banks.

Mr. BRANDEIS. I suggested before you came in that it was my opinion that it should be applied not only to national banks but to all banks within the Federal reserve system, which would include others.

Mr. CARLIN. The question in my mind is not whether we should apply this rule to those that come into the national reserve system, but whether we want to keep a great many of the State institutions from joining the national reserve system, thereby crippling the organization.

Mr. VOLSTEAD. This Legal Tender case goes a great ways in holding that the National Government has the power to provide national currency and the power to regulate the means of securing that currency in any way it sees fit.

Mr. BRANDEIS. I do not believe there is any constitutional difficulty, as I stated before, and I venture to guess that when the Supreme Court has occasion to pass upon the question it will hold that a bank is an instrumentality of commerce which can be regulated, and that you could legislate concerning all banks, at least all those which are instrumentalities of commerce, and that would practically include every bank of deposit. Now, I think the Government has the taxing power, which you have exercised recently in the case of the phosphorus match in order to accomplish a purpose which you deemed to be of value, and which you exercised earlier in the oleomargarine cases. It seems to me it could be exercised to bring the banks and trust companies in.

Mr. CARLIN. That would involve a different character of legislation than that now contemplated.

Mr. BRANDEIS. It would involve some additional provisions, but I think the character of the legislation would not be really different.

Mr. CARLIN. I quite agree with the idea. I think it is a good one and a practical one, but the question is whether we ought to do anything that would interfere with the legislation which has gone ahead of us with reference to our new banking system and drive the State banks into independent operation.

Mr. BRANDEIS. If you feel there is real danger of that it can be clearly avoided by levying a tax, and there can certainly be no constitutional objection to your power to do it. There are other ways also; other constitutional powers which you can exercise, but that is the one which we naturally think of in connection with banks on account of the original State tax bank case.

Mr. DANFORTH. I would like to ask whether you have considered at all the basis of resources of banks rather than the population of the places in which the banks are located?

Mr. BRANDEIS. I did not consider that, and I was at one time ready to accept resources instead of location, but this situation occured to me, and to a certain extent it already exists: That there are many small banks which are closely related, which are interlocked, and I think that the interlocking of a large number of small banks is, in some ways, worse than a large bank.

Mr. DANFORTH. That is only in the very large cities.

Mr. BRANDEIS. Well, it is in cities that are not so terribly large—I mean cities not so much larger than 100,000. I think you would find that so in cities of 250,000 or 500,000.

Mr. DANFORTH. There is a great difference between 100,000 and 500,000 population.

Mr. BRANDEIS. Yes, sir.

Mr. DANFORTH. Especially if you consider the banking facilities of the cities.

Mr. BRANDEIS. Yes. But if you did that you would also have to have a limitation in regard to the cities. You certainly could not permit, in the cities of New York, Boston, Chicago, St. Louis, and probably Cleveland, the interlocking of innumerable small banks. I think you would simply open the door to the very evil you are trying to avoid.

Mr. DANFORTH. It does not seem to me you would cure the evil at all by applying it to places of a certain population, say 100,000. As an illustration, there would be nothing in the world to prevent your Boston bank interlocking with Worcester banks, or nothing to prevent them interlocking with the Framingham banks, which cities would come well within your poplation limitation.

Mr. BRANDEIS. They could.

Mr. DANFORTH. And they could do the business and lend to friendly corporations just as well and avoid that provision of the law.

Mr. BRANDEIS. It is perfectly possible that if people sit up nights trying to avoid a thing it could be done, but I think it perfectly clear they would not because, in the first place, you could not do your big transactions in that way.

Mr. DANFORTH. Why not as well through Framingham as through Worcester; that is, the big transactions? Of course, I do not mean the local transactions; you are not trying to reach them.

Mr. BRANDEIS. Of course, there is any quantity of legislation in this county that is based upon a classification of the size of cities. For instance, a city of 99,999 inhabitants ought to be subject to the same laws as a city of 101,000 inhabitants. But here is a direct answer. The moment it appears that the large Boston banks are practically conducting their great transactions through banks in cities of less than 100,000 population, or, as you said, Framingham, you would proceed to change the limit so as not to include Framingham and the other places. In other words, you would remove the limit which permitted the transactions to be carried on through the banks in Framingham and cities of that size. To my mind, however, the important thing is that having dealt with the flagrant cases, having set the example, having undertaken to lay down anew this rule which is so old, you will find that the business community acquiesces in it,

because it presents an argument which is really unanswerable. The mere statement of the proposition is practically conclusive as against almost anybody. A man argues for a little while, but will cease to do so when you put up to him the question: Can you fairly be allowed to deal with yourself, to be on both sides of a bargain and in the middle?

Mr. CARLIN. Let us take this thing from a practical standpoint. Theoretically you are correct——

Mr. BRANDEIS (interposing). I am trying to take it from a practical standpoint, Mr. Carlin.

Mr. CARLIN. Now, as to the wisdom of taxing the State banks, which is the only method you have suggested so far.

Mr. BRANDEIS. No. I can suggest another one, because if you include that in terms I venture the prophecy that the Supreme Court would sustain you. There is nothing to the contrary in the decisions of the Supreme Court.

Mr. CARLIN. After all, that is a prophecy.

Mr. BRANDEIS. Well, after all, everything is a prophecy, so far as the powers of Congress are concerned, until the Supreme Court has made a declaration.

Mr. CARLIN. Exactly; but the Supreme Court does not always do what we think it will do.

Mr. BRANDEIS. It generally does what it ought to do.

Mr. CARLIN. I agree with you about that. I agree with the idea that banks are instrumentalities of commerce, and I am inclined to think that the court might hold that. At the same time there appears to me to be this practical objection to adopting such doubtful legislation as that: That we ought to be certain about what we are doing in legislation of this sort; that we ought not to leave an uncertainty hanging over the business world, especially so important a part of our business as the banking business.

Mr. BRANDEIS. If you want to be absolutely certain, I can draft you two or three provisions invoking the taxing power, and you can——

Mr. CARLIN (interposing). When you come to the taxing power, I imagine you would have great difficulty in getting the gentlemen who represent the States in Congress to tax out of existence the banks of the States.

Mr. BRANDEIS. It would not be taxing them out of existence; it would be taxing them into a proper practice.

Mr. CARLIN. It would bring them into the national banking system.

Mr. BRANDEIS. No; I would simply say, in general terms, that the banks which did not observe these rules—the first rule against interlocking directorates and the second rule as against making contracts with people in interest—that the banks which did not adopt that as the rule——

Mr. NELSON (interposing). In other words, you would not tax the bank; you would tax a classification which would involve that practice and prevent it?

Mr. BRANDEIS. Yes; and which would induce every bank to record on its records the new law as a rule of guidance of itself. I think it would be relatively a simple thing to do. But I should say also, Mr. Carlin, that if you and the other gentlemen of the committee should agree with me in the prophecy as to what the Supreme Court

would do, that there could be no conceivable objection to your meeting on those lines. You did it when you passed your compensation act.

Mr. CARLIN. I think I agree with you about that. I believe the Supreme Court will eventually come to that conclusion, but it would be two years before it could possibly reach that conclusion, and during that time there would be a certain business uncertainty.

Mr. BRANDEIS. Will it be a business uncertainty? It is not business uncertainty; it is merely a question whether a State bank or certain State banks and trust companies will or will not conform to a practice which has been declared by Congress to be a proper practice, which is in accordance with the very old rule that no man shall serve two masters, and which has been adopted by some banks and trust companies. There is not anything that can disturb any business of any kind; it will merely say to them, "Gentlemen, this is what Congress has said. Are you going to challenge the power of Congress to do it?" I think there will be mighty few who would, because they know it is right.

Mr. CARLIN. The fact that a test case would be brought would leave that amount of uncertainty about the legislation?

Mr. BRANDEIS. You take up any and every volume of the decisions of the Supreme Court in the last 20 years, and the large part of all there is there relates to questions whether certain legislation, either of Congress or of the States, is or is not constitutional. There probably never was a single act passed about which a doubt as to its constitutionality was not raised. If you are going to shrink from legislation because of the fact that it has not already been decided upon you might as well abdicate a large part of the powers of legislation. You take yesterday's grist of decisions of the Supreme Court, and nearly every one of them deals with the question of constitutionality. I glanced through the list in one of the papers to-day and saw that in every instance but one the constitutionality of the act, be it State or Federal, was sustained.

Mr. CARLIN. Mr. Brandeis, as to the policy of Congress declaring that it has the right to regulate the States as instruments of commerce, suppose we were to introduce that as the policy and it was sustained; do you not see many dangers in that in interfering with State rights by the broad exercise of that power?

Mr. BRANDEIS. I do not think so; not as long as we have a Democratic administration.

Mr. CARLIN. I agree with you on that, but unfortunately we can not tell how long that will be.

Mr. DANFORTH. It seems as if State rights are forgotten under the present order of things.

Mr. CARLIN. If we are going to undertake to regulate State banks, and have the power to do it in one direction, I imagine that it would probably go much further than we are contemplating now, and it might render an act which is now popular unpopular from the standpoint of policy.

Mr. BRANDEIS. That is entirely true. I discussed a part of this provision before you came in, Mr. Carlin, and I suggested that we should include State banks, with a certain exception that I have not yet discussed but which I intend to discuss later on. I only suggested how easy it was to do it; that as an answer to your appre-

hension we might interfere with the Federal reserve system. But I do not believe in that apprehension.

Mr. CARLIN. I thought you were favoring the policy of us doing that?

Mr. BRANDEIS. No. I had stated before you came in that it should, as a matter of policy, include in this the members of the Federal reserve system, whether they be State or Federal institutions, with an exception which I had intended to discuss later.

Mr. CARLIN. If we limit it as you suggest we shall, do we not cripple the system?

Mr. BRANDEIS. I do not think you do. I am perfectly willing to run that risk, however. I do not believe there is a bank that ought to be in the system and a bank that ought to be considered—certainly not more than one in a hundred—which will refuse to adopt a rule of morals and good business which Congress has laid down and which is applicable generally to the financial institutions of this country. And if there are here and there people in certain places who will not follow that rule which has been adopted, let them do it, and Congress will pass a law taxing those banks into good practice. I have not any apprehension on that subject.

Mr. WEBB. Public sentiment would compel them to obey such a good, moral rule as this, and especially one which Congress lays down.

Mr. BRANDEIS. I think so, and I think what is needed is for you to lay down a rule in the conspicuous class of cases which we are speaking of. I am inclined to think that, although your act probably will not take effect until two years hence, in this respect I think you will find that the banks will not wait two years to adopt a rule that is so obviously demanded by good public policy. I think you will find all that is needed is to call it dramatically and clearly to their attention, because they can not argue against it?

Mr. CARLIN. If this is a great evil, and I believe it is, it occurs to me that it will cause more trouble to unscramble that egg than anything we are going to undertake to do just now, and if the evil is of sufficient size to demand the legislation, we are driving at the securities of the bank and requiring the bank to call loans which they have already made, and which were perfectly legal at the time they were made?

Mr. BRANDEIS. No; I think not.

Mr. CARLIN. That every loan of every corporation which is a borrower in the bank, in which an officer of the corporation is a director in the bank, would have to be called, and they would have to call all loans made to every officer and director that exists now, and I am not certain just how much of that the country could stand.

Mr. BRANDEIS. Under the terms of your own act you give them two years. You know, Mr. Carlin, from your own banking experience, that there is practically no ordinary bank of deposit in which the loans are not practically all either call loans or loans for four or six months, and that there are relatively few running into a year, and no loan, unless it is a forced loan, is a two-year loan, and I do not believe that there will be any calling.

Mr. CARLIN. I agree with you that it is a good thing.

Mr. BRANDEIS. Then let us do it.

Mr. CARLIN. Ipecac is sometimes a good thing, but you can give a patient an overdose. We have been operating on the patient quite severely.

Mr. BRANDEIS. I do not think you have. We have been nursing him.

Mr. CARLIN. We have been cutting out cancers.

Mr. BRANDEIS. Oh, no.

Mr. CARLIN. Now, if you are going to the bank and are going to say you must get rid of the loans you have made in that way, we have no idea as to just how much there is of that.

Mr. BRANDEIS. I do not think there is anything in that bill, or in the one I have mentioned, which says, "You must get rid of the loans." It says, "You shall not make any loans." That has reference to the future. I have not any doubt but what any bank to-day would be ashamed to have a loan more than two years old.

Mr. CARLIN. Of course, a national bank makes a loan for four months, and that is a limitation now. It is true we can not affect that particular loan, but you would affect a renewal there.

Mr. BRANDEIS. No; it would not, because you could renew a loan six times before the end of the two years and four months, although I think most banks would not like to have that loan renewed. They ought not to have it renewed six times.

If you put in that period, which your bill has very wisely inserted, and postpone the time when this shall take effect, it seems to me you have completely answered that objection, because you have given that time, and the community ought to know now that sometime within the present administration we are going to introduce a proper business practice in this respect and in the conspicuous cases. I think you can do it with perfect safety, and it will not disrupt business in any way.

Mr. NELSON. What effect do you think it would have on the political equilibrium?

Mr. BRANDEIS. I think it would be a very popular measure, because it would carry out the declared policy of curbing big business.

Mr. NELSON. It might be very dangerous from a political point of view.

Mr. BRANDEIS. I hardly think so. I said awhile ago that this would have to be applied to two classes, a separate category of banks and of other corporations.

Now, when it comes to the second class of corporations, it seems to me also that at the present time you ought to make a limitation.

Mr. WEBB. You are talking about section 4 of the tentative bill which we have here?

Mr. BRANDEIS. That is the interlocking directorate provision. I am discussing not only the interlocking provision, but I am talking about the making of contracts, in which some officer, director, or employee has a conflicting interest. That is something that directly corresponds to what I have been talking about in the case of banks.

Mr. GRAHAM. You have practically been discussing sections 1 and 2?

Mr. BRANDEIS. Yes; so far.

Now, when it comes to corporations, other than banks, the limitation I would suggest would not be in respect of the class of corporations at all. I think corporations of every class, whether they be a

mercantile or manufacturing company or any other company that engages in interstate commerce, ought to be included.

But, while I make the class universal, excepting only banks in the Federal reserve system, I should limit, at the present time, its application to corporations with capital and resources of $5,000,000 and over. The reasons which I have suggested in relation to banks apply in another way to this limitation. The great evils that have come have been through the interlocking of the larger concerns.

The CHAIRMAN. Under the head of resources, what would you put; what would you say the resources should be?

Mr. BRANDEIS. By resources I mean practically not merely the net capital, but the property which they have. The resources of the banks, for instance, consist of its capital, its surplus, and its deposits. The resources of a railroad would consist of all its property plus its surplus, when it has a surplus, and the same would be true in the case of any industrial concern.

It might have a capital of only a million dollars, like the old Standard Oil Co. of Indiana, which had a capital of a million dollars; and it might have net assets of $29,000,000, and it might have gross assets of $35,000,000.

Mr. NELSON. You might take the Equitable Life Assurance Society?

Mr. BRANDEIS. Yes; the Equitable Life Assurance Society, with a capital of $100,000 and assets of more than $400,000,000.

It is the power which is wielded through the property which the corporation manages which is the thing we are trying to arrive at.

The CHAIRMAN. Would you put down the deposits of the bank as a part of the resources, because the bank has a power of control over those deposits as long as they are deposits in the matter of loaning them?

Mr. BRANDEIS. Precisely.

Mr. DANFORTH. But the bank is liable to lose those deposits the very next day, by withdrawals.

Mr. BRANDEIS. Yes.

Mr. DANFORTH. If the bank is not satisfactorily conducted for the depositors, it will lose its deposits.

Mr. BRANDEIS. I understand; but there may be a bank which is satisfactorily conducted with reference to the depositors which is unsatisfactorily conducted with reference to the community, and it is the community interest which we are guarding in the case we are thinking of here.

But that limitation in the case of corporations would, it seems to me, bring within that limit only the conspicuous cases. I suggested a $5,000,000 limit in the case of corporations, including all classes of corporations, and limiting it in that way. Now, that limit would make this rule apply only to a very small percentage.

Mr. CARLIN. You mean that you are speaking of capital now?

Mr. BRANDEIS. I am speaking of the resources, and by resources I mean the assets which it administers.

Mr. CARLIN. What I would like to understand is whether in discussing this matter in reference to banks you are speaking of the deposits as it relates to the banks, and as it relates to industrial corporations you are speaking of the gross business?

Mr. BRANDEIS. I think that, in the case of banks, I should certainly think that the resources would include the deposits. In the case of corporations I think there is a very debatable question as to whether the limitation might not better be on the property administered or the business done. I should be inclined to think the property administered.

It was suggested, for instance, that there might be a difference at different times, that you would have some definite date, say, the 31st day of December, or whenever they make their returns. You would have to take a definite date for the purpose of classification.

Mr. CARLIN. That is what I mean; an industrial corporation might have a capital of $1,000,000 and do a business of $10,000,000?

Mr. BRANDEIS. Yes. I think the question is perfectly arguable, but I should be inclined to think that we would be reasonably protected if we took $5,000,000. A concern with resources of $5,000,000 might do $10,000,000 or $15,000,000 or $20,000,000 business and yet not be any very great danger.

Mr. CARLIN. I had in mind the testimony of Mr. Herbert Knox Smith, who was here the other day, who, I believe, is the only witness who has given us any direct information as to the number of corporations to be affected by different limitations. He was specific with reference to the Clayton bill creating a trade commission, rather than the other Clayton bills, and he said if we fix the limit at $5,00,000 we would only include 450 corporations, while if we left it without any limit we would have included over 50,000 corporations—that is, industrial corporations.

Mr. BRANDEIS. I think that figure is not correct, Mr. Carlin.

Mr. CARLIN. That is what I want to invite your attention to, because that is very important. His statement was, as I recall it, that if we had a limit of $5,000,000 that we would only control 450 corporations, and if we left it as it was now, without a limit, that would include 50,000 corporations.

Mr. BRANDEIS. I shall be able to give you——

Mr. MORGAN. I think you are mistaken about that last figure, Mr. Carlin. Even if it were 50,000, there is quite a difference between that and 450.

Mr. BRANDEIS. I shall be able to give you the exact figures in a short time, because, at my request, the Secretary of the Treasury was courteous enough to have the Commissioner of Internal Revenue make up for use a statement in regard to the various limits in regard to corporations. I shall be glad to furnish that to the committee as soon as I have it from the Commissioner of Internal Revenue.

Mr. CARLIN. That only deals with Mr. Smith's statement in regard to capitalization?

Mr. BRANDEIS. It is done on capitalization. I requested that it be made up from the corporation tax returns.

Mr. CARLIN. On $5,000,000, what would your figures show?

Mr. BRANDEIS. I think I have that. The total number of corporations in the United States on December 31, 1912, was 305,336. All of these——

Mr. CARLIN (interposing). How many of those were engaged in interstate commerce?

Mr. BRANDEIS. Practically all of them. Of that number only 1,610 have a capital of $5,000,000 and over. I happen to have that statement, because I used it in an article.

Mr. MORGAN. You referred to the capital; have you any figures in relation to the gross output?

Mr. BRANDEIS. I have not any in regard to that.

Mr. MORGAN. I have looked up that question. There are something like 268,000 manufacturing concerns reported in the last census, and there were 3,060 of those that had a gross output of over a million dollars. I figured out myself—there is another propostition; the census shows that there are about 500 manufacturing corporations which employ to exceed a thousand men, which gives some idea of the size, and I figured that there would be about 500 corporations that had a gross output of over $5,000,000.

Mr. CARLIN. If your figures are correct, Mr. Brandeis, the limitation is all right, because I think you would reach the evil if you reached 1,600 corporations, and I should think you would do it if you reached half that number. It is my recollection of Mr. Smith's statement that the figures he gave were different from those you have given.

Mr. BRANDEIS. I will be very glad to furnish the committee with a copy of the letter from the Commissioner of Internal Revenue to which I have referred, when I receive it.

Mr. CARLIN. I would like to read to you Mr. Smith's statement before this committee.

The CHAIRMAN. Will you incorporate the letter from the Commissioner of Internal Revenue in your remarks, Mr. Brandeis?

Mr. BRANDEIS. I shall be very glad to do that.

Mr. CARLIN. In Mr. Smith's answer to Mr. Morgan's question—this is Mr. Morgan's question:

"Did you ever try to ascertain how many corporations would come under this trade commission if the net annual income was limited to $5,000,000 or $3,000,000?"

Mr. MORGAN. That should have been gross output.

Mr. CARLIN. This is Mr. Smith's answer:

Well, Senator Newlands drew a bill of that kind and we figured that it would cover somewhere between 550 and 600 corporations. I think $3,000,000 might bring in 1,000 corporations. I am very much in favor of starting something like that, because, in the first place, you will prevent the commission from being swamped with work, and in the second place, you will get rid of a lot of little kickers in the country. Every little corporation in the country will make a kick, and you will have pretty much all the work you can do, and the political annoyance will be pretty heavy.

Mr. BRANDEIS. Senator Newlands made that same statement to me here some months ago when I was before the Senate Committee on Interstate Commerce.

Mr. CARLIN. He then went on further to say——

Mr. BRANDEIS (interposing). I think, Mr. Morgan, that that has to be limited further. Those figures which Senator Newlands was asking about and which he got from Commissioner Herbert Knox Smith in connection with his trade commission bill which he introduced several years, had reference to industrial corporations. These 1,610 that I have given you are those corporations which are not industrial corporations. Railroads are included, some of them, and banks

would be included, and you would get many corporations which are not in the figures that Mr. Smith gave.

Mr. CARLIN. I would like you to hear what Mr. Smith said further. He went on to say—

Well, the total number of corporations that paid the 1909 income tax was 283,000. I think it would probably be a safe guess that at least a third of these—well, you can cut out 15,000 because railroads and corporations like that would not come under this bill, but the Clayton bill would probably bring under this commission from 150,000 to 200,000 corporations. I guess 200,000 would be nearer to it.

Mr. CARLIN. Of course railroads would not be included in your suggestion?

Mr. BRANDEIS. Oh, yes, sir; they are.

Mr. CARLIN. As to limitations?

Mr. BRANDEIS. Oh, yes; everything is included except the banks within the national reserve system.

Mr. CARLIN. Then Mr. Morgan asked him this question:

The Clayton bill would bring under its supervision many thousand corporations that did not pay the income tax?

Mr. SMITH. Yes, sir.

Mr. MORGAN. In New York, for instance, practically every little corporation does business outside of New York?

Mr SMITH. Yes, sir; that is the reason I raised that figure to 200,000.

Mr. CARLIN. Under your plan you would only bring in 250 corporations?

Mr. SMITH. Well, between 400 and 1,000. It is only a wild guess anyway. If I could pick out to-day 500 corporations in this country I would guarantee to get in every one of interest to the public; that is, every corporation that has an effect upon the public.

Mr. BRANDEIS. What was his limitation?

Mr. CARLIN. $5,000,000.

Mr. BRANDEIS. Capital or business?

Mr. CARLIN. $5,000,000 capital.

Mr. MORGAN. Mr. Carlin, I beg your pardon; those questions were directed to the gross output.

Mr. CARLIN. I am talking about the answer to my question.

In answering it he said between 400 and 1,000; then he said, "It is only a wild guess, anyway." "If I could pick out to-day 500 corporations in the country, I would guarantee to get in every one of interest to the public; that is, every corporation that has an effect upon the public."

Mr. BRANDEIS. The figures I have mentioned are not those given by the Commissioner of Internal Revenue. He, at the request of the Secretary of the Treasury, has made for the first time a classification of all these corporations with reference to this point, and it was quite a considerable task.

Mr. MORGAN. Does that information cover simply capital, or does it also include output?

Mr. BRANDEIS. Capital.

Mr. MORGAN. I tried to get the information in relation to the output, but I could not get it.

Mr. BRANDEIS. I think——

Mr. MORGAN (interposing). But Mr. Smith is talking altogether about the output.

Mr. BRANDEIS. They could give you the figures in regard to the output at the office of the Commissioner of Internal Revenue, but it

would be a very great task to do it. It would mean going over the returns of over 300,000 corporations and taking them down. That would be a great deal more of a task than this was. This was a considerable task, but I thought, and so did the Secretary of the Treasury, that it would be of use to Congress.

Mr. MORGAN. As I understand it, Mr. Smith and you are proceeding upon two different propositions?

Mr. BRANDEIS. Absolutely.

Mr. MORGAN. Mr. Smith, I am sure, was not thinking about capital.

Mr. CARLIN. The figures in regard to the output would, of course, include more corporations than the figures in regard to capital, because the average corporation would have a greater output than capital.

Mr. BRANDEIS. I think that would be true of the average.

Mr. CARLIN. In other words, if we corral 1,600 of the big fellows that would about cover the case?

Mr. BRANDEIS. I think that would deal in a marked way with the evil of the concentration of financial power, and its effective and persuasive effect on the smaller corporations will be felt very soon, and I think long before the act goes into operation, because this act would go into operation at the end of two years. Instead of fixing the date two years from the passage of the act, I think it would be well to fix the date as December 31, 1915, so that we would have calendar years to deal with.

Mr. CARLIN. The only problem there is this, that if you have capital as a limitation, there are many corporations that could reduce their capital.

Mr. BRANDEIS. I would have it capital or resources; whichever is the larger, I think ought to be adopted. I think it would not be safe to take capital, because, as you say, they could reduce their capital.

Mr. MORGAN. What would you think about taking capital, resources, and output; that is, using those three things as a classification; do you think that would be practicable?

Mr. BRANDEIS. I think it would be; but I think it would add, perhaps, an unnecessary complexity. In most corporations, as has been stated by Mr. Carlin, I think the output would exceed the capital. There are some classes of corporations where it would not. I think you would find some paper and iron mills where the capital would exceed the annual output. But, as a rule, that would be true; and I think it would not be necessary to go to the more difficult question of output.

If you adopt that rule, then it becomes merely a question of the means of enforcing what you are going to adopt. It seems to be that a very important bit of machinery—of course, it is a question of the machinery for the enforcement of such a law as you may pass, the first thing in the way of machinery, it seems to me, is that you require from these corporations falling within that class a statement which will give the information as to whether or not they have directors which are declared to be interlocking within the provisions of the act; and in the second place, whether or not they have entered into contracts contrary to the provisions of the act; and that they file an annual statement, putting upon the corporation itself the burden of making a return upon such form as, in the case of the banks,

as the Comptroller of the Currency requires, and in the case of the other corporations, the forms which the trade commission would fix.

Mr. CARLIN. Have you the figures for $6,000,000 capital?

Mr. BRANDEIS. I have not Commissioner Osborn's letter here, but my impression is $5,000,000 is the largest limit I have asked for, but I will look for that letter and send you a copy of it.

Mr. CARLIN. The reason I mention is that because Mr. Smith has an estimate here as to $6,000,000, and he reduces his former figures about half with that addition of $1,000,000.

Mr. BRANDEIS. I think $5,000,000 is a figure which is as low as anybody ought to take, because there are so many corporations, as you have just indicated, which have adopted $5,000,000 as their limit of capitalization.

In addition to that provision in regard to the making of reports there ought to be a provision fixing a penal liability, both upon the director or officer and upon the bank or corporation itself. And, of course, there ought to be a provision providing for penal liability for failure to make a return.

Then there is the further question, which, it seems to me, is well worth your consideration, as to whether there ought to be granted in the bill, specifically, the authority on the part of the Comptroller of the Currency to bring proceedings to enjoin the continued conduct of the business, and similarly on the part of the trade commission, to bring such proceedings in the case of a violation of the act. That is merely completing the remedial provisions of the bill.

Now, Mr. Carlin, I was going to pass from the interlocking-directorate bill unless there are some further questions in regard to that.

The CHAIRMAN. A very distinguished business man said to me a few days ago that if we pass this bill we ought to change the title of the bill, and make the title "A bill to provide that there shall be dummy directors to manage most of the corporations of the country." I wish that you would deal with that matter and tell us how we would keep out dummy directors.

Mr. BRANDEIS. I would deal with them in two or three ways.

In the first place, the gentleman who used that phrase had undoubtedly in mind that the "director" in any legislation which he would recommend to Congress would be in the strict sense a director only, and that it would not include, perhaps, officers, and certainly employees, and certainly would not undertake to deal with financial interests.

As I have stated before, this rule in regard to conflicting interests, prohibiting transactions in which an officer or director has a conflicting financial interest, ought to extend to any financial interest, stock ownership or otherwise.

The CHAIRMAN. We undertake in this bill to prevent employees of corporations, or anybody having an interest in the corporation, being a director in any other corporation.

Mr. BRANDEIS. I think that is very wise.

The CHAIRMAN. We undertook in that way to prevent dummy directors.

Mr. BRANDEIS. I think that is correct, and I think there is, perhaps, only one other consideration which it would be desirable to add to that, and that is to include a partner, as was done in one of

the bills submitted by the Pujo committee, and to put in the word "representative." I think if you put in the words "representative" and "partner," and then also make it read so as to cover a prohibition of transactions in which any director, officer, or employee has a financial interest that you will practically cover all the cases which will arise. You can not expect to cover 100 per cent. There will always be some people who will be willing to take a great deal more trouble to evade the law than they can possibly get benefit out of evading the law, but that is a very negligible quantity in the community.

There is another question——

Mr. CARLIN. I had not intended to interrupt the chairman, but I want to call your attention to the penal provision of the Clayton bill. That is to be found in section 3 of the director's bill, tentative bill No. 3, and I will ask you if you do not think that meets the case. That section reads as follows:

> 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, in the discretion of the court.

In other words, you make each day a separate offense.

Mr. BRANDEIS. I think that is very wise. I have a little doubt as to the making of the term of imprisonment quite so long. I think the American is very loath to go to prison, even for a day, and perhaps a month would be quite a sufficient deterrent, but I think there ought to be an alternative.

The CHAIRMAN. It says not exceeding a year.

Mr. BRANDEIS. I think there is nothing so very important in that. I think the provision you have inserted there making each day an offense is a very wise provision.

On the dummy-director proposition, I think you could provide against a mere interposition of a dummy through the use of the word "representative" and through including all the cases where one has a financial interest. I think that by doing that you would practically eliminate the greater part of the cases which would arise. A man is not going to put a dummy director into an institution, as a rule, in which he has not some financial interest, and if he has a financial interest, although he has a dummy director in there, the transaction would be forbidden. I do not believe that the danger of dummy directorships, when you really analyze it, is substantial at all.

Mr. CARLIN. It would take an army of dummies to do the business.

Mr. BRANDEIS. That is exactly the situation. It would take an army of dummies, and you could not do the business. You have got to have a big name to conjure with. If Mr. Morgan had decided to put in dummies into the directorships of the New Haven Railroad, the people of Massachuetts would not have bowed down before him. It was the delusion that Mr. Morgan was really the responsible head that he was and that he was standing before the world as the manager of that property which induced the acquiescence of the people in the orgy of mismanagement that went on.

You have got to have the name of the man who is supposed to be powerful, and not only that, but he has to be there, as far as the matter of management is concerned.

Take one of the directors' meetings when Mr. Morgan was all potent in one of those meetings. It was because Mr. Morgan said it, it was because nobody was willing to say anything against him when he had spoken the word, which made him all powerful. He could not have sent any dummies in there to exercise the power which it was possible for him to exercise by his personal presence. When a man has to resort to a subterfuge he is so weak himself that his power would have been gone anyway. I do not think there is anything substantial in this suggestion about the dummy directors, because you are trying to do something, you are trying really to bring the man back into the right track.

Mr. VOLSTEAD. But suppose you had a holding company which was holding the stock?

Mr. BRANDEIS. You have got to cover that matter, and I understood this committee was engaged in the consideration of a bill, or was drafting a holding-company bill, which is to be dealt with later.

Mr. BRANDEIS. Are there any other questions, gentlemen, in regard to this interlocking question?

Mr. DANFORTH. You wave aside all possible danger from dummy directors in a very easy way, but we have a great many interlocking directors who are directors of two or more companies, and possibly when you get away from Mr. Morgan you take a big step down in the personal influence of the individual, so that you minimize the danger from the dummy director.

Mr. BRANDEIS. I consider the danger there extremely small for the reason I have stated. In case you include that provision, you will have, by the express provision of the statute, eliminated a natural class of dummies, namely, representatives. As soon as a man becomes a representative of one of these men he is, by express law, eliminated.

Mr. DANFORTH. By the use of the word "representative"?

Mr. BRANDEIS. Yes; it will be illegal. Of course you may break the law. That you may do in regard to any law, but the use of the word "representative" in the statute will cover a very large part of the dummies, if not all of them.

Mr. GRAHAM. What would you mean by a representative, in that sense?

Mr. BRANDEIS. I would mean a man put there by another man.

Mr. GRAHAM. Every director is put there by the stockholders. If the stockholders elected this man as a director, can he be classed as a representative, or a dummy, if he is a stockholder?

Mr. BRANDEIS. If he is put there as representing Mr. Morgan, for instance, then he would be a dummy.

Mr. GRAHAM. That is a metaphysical distinction that is not practical.

Mr. BRANDEIS. I think it is a perfectly practical distinction. If he is not representing Mr. Morgan, then it is a question of fact.

Mr. GRAHAM. Suppose he is a stockholder with a hundred shares of stock—owning a hundred shares of stock, a bona fide stockholder—and Mr. Morgan owns 500 shares of stock, and there are three or

four other stockholders. He can elect that man as a director in his place.

Mr. BRANDEIS. He can.

Mr. GRAHAM. Now, under the law, he is his representative. How can you use the term "representative" in order to give to it any distinctive meaning or differentiate it from the man who is a stockholder elected to the board?

Mr. BRANDEIS. I do not think that man would be Mr. Morgan's representative in the case you have put. I would say he had been elected by Mr. Morgan's vote, and many a man would be elected by somebody's vote, in part, who would not be a representative. But if Mr. Morgan, not being able to be a director in the New Haven road and also be a partner in his own concern which sells the New Haven securities, selects a particular person and puts him in there, in that sense he is Mr. Morgan's man and he does what Mr. Morgan tells him to do. That is the only case we can undertake to deal with.

Mr. DANFORTH. No one but the oracle of the Pujo committee can undertake to say that.

Mr. BRANDEIS. But if he is not that man——

Mr. DANFORTH. How are you going to prove that he is not that man?

Mr. BRANDEIS. How are you going to prove a burglary? In an ordinary case, if I had reasons to believe that a man was committing burglary or was falsifying books, although I do not know it, I might investigate——

Mr. DANFORTH (interposing). Who would you have investigate for the Government?

Mr. BRANDEIS. The Department of Justice.

Mr. DANFORTH. They are pretty busy now.

Mr. BRANDEIS. They will be less busy, I think, after we pass some laws.

Mr. DANFORTH. There are 300,000 of these corporations.

Mr. BRANDEIS. We do not assume that everybody is going to be a lawbreaker. If we assume that we might as well give up government.

Mr. GRAHAM. I think this legislation proceeds upon that basis.

Mr. BRANDEIS. Quite the contrary.

Mr. GRAHAM. Take this case: The language of this section, section 4 of bill No. 3, reads as follows:

> 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 operations, natural competitors, such elimination of competition thus conclusively presumed shall constitute a combination between said corporations in restraint of interstate or foreign commerce.

That that shall prove that they are guilty of maintaining a monopoly in violation of the Sherman Act.

I can understand very readily how a stockholder who has enough shares of stock to elect himself to a board of directors under the cumulative system might, for instance, have stock in a lumber company here and another there whose business might be competitive.

The purpose of electing himself to that board it to protect his interests which are vested in that corporation, not to create a monopoly, and he could very properly be serving on two or three boards.

Now, the vice in all this, as I see it, consists in the fact that we are singling out an instrument and legislating on that. We are trying to cure a symptom and not getting back to the disease itself. We are saying that a man shall not use a spade, because it may be taken by some other man and used to smite another man upon the head, and that therefore a man shall not use a spade for any necessary or useful purpose. Instead of declaring that this shall constitute larceny and leave it to the courts to determine when that stage is reached, we are simply declaring here in general language that all directors who shall attempt to represent their interests are violating the law.

It seems to me that the purpose of the legislation is to prevent monopolies and restraints of trade, and the language that we ought to use ought to be language that would be descriptive of what constitutes monopoly and restraint of trade, and not say that A constitutes a crime and that B constitutes a crime. Under this language the mere fact of a man honestly serving as a director in two or more corporations would make the corporations violators of the Sherman Act and subject to all its pains and penalties, both civil and criminal. Is not our trouble that we are legislating on instrumentalities instead of dealing with principles, and leaving it to the courts to settle the application of the law to the individual?

Mr. BRANDEIS. I think there are several answers, Mr. Graham, to at least part of your statement, although it has in it much that is true.

I should say we are dealing with incidents of the evil. We are dealing with one of the instruments which creates the evil, not the instrument that is created by it.

Mr. GRAHAM. An instrument that is used in accomplishing the evil?

Mr. BRANDEIS. It is used to accomplish it.

Mr. GRAHAM. But it is also used to accomplish a great many good things.

Mr. BRANEIS. I understand. In the first place, your particular question is dealing with a narrower subject than the one I have been discussing. I have been discussing mainly the question of conflicting relations.

Mr. GRAHAM. I am in entire harmony with you on that, but that can be covered without this specific language, which in all other relations would constitute men practically criminals without trial.

Mr. BRANDEIS. This particular question—you have agreed with what I have said in regard to the prohibition of conflict——

Mr. GRAHAM. I believe that your doctrine may be expressed in the old scriptural injunction, that no man can serve two masters successfully.

But when you come to limit the natural right of a man to control his property and represent himself in a corporation, and say that simply because in doing it he becomes a member of two boards ipso facto he is a criminal, then I dissent from such doctrine.

Mr. BRANDEIS. Let us come to this second question and see how far we can agree on that, Mr. Graham.

Let us take that question. You put a case of one man in three lumber corporation, being a stockholder in each and electing himself a director in each by virtue of the cumulative provisions in the laws of some States. Now, if those three corporations are not natural competitors, are not doing the same line of business in the same place, then they should not come at all within the provisions of any act which, I suppose, this committee would recommend. We consequently have the question limited to that case where this investor in three corporations which are competitors, which are natural competitors and which are doing the same kind of business in the same place.

Now, I ask you, adopting that principle of loyalty, of undivided loyalty which you accept, as the old scriptural injunction puts it, can this man, who is a director in these three corporations, be loyal to these corporations, loyal to those interests in each corporation, which are not similarly circumstanced with itself? In those three competitive corporations it is perfectly possible that you may have 25 per cent of the stockholders in these corporations who have no interest whatever in the other corporations, and who would feel that the men who are managing their corporations ought not to have any conflicting interests; that they ought not to be in a position to say "We will not trespass upon the ground of the other corporations."

Mr. GRAHAM. Your argument goes to the extent that a man ought not to be a stockholder in a competing corporation?

Mr. BRANDEIS. If he does not exercise any management that is a different thing. I think every careful man—if he does not undertake the responsibility, if he is a mere passenger, if he is not exercising his right of franchise, if he is not taking a part in the management, then he is a mere beneficiary, a mere dead beneficiary.

Mr. GRAHAM. The law in permitting cumulative voting for the election of directors gives him the right to appear either as a director elected in his own interest or to see that the men who are elected serve in that capacity; to see that his interests are protected, because, while technically the business of a number of corporations may be said, within the strict legal interpretation of that term, to be competitive, in practical effect they are not competitive. It runs along in the same line. They probably sell in the same market and are not competing. Unless that tends to create a monopoly in restraint of trade it is not against the law, even if they were to unite in a common policy and conduct all three corporations on common lines.

Mr. BRANDEIS. If it does tend to do that, you and I agree that he ought not to be a director in several corporations. If it does tend to create a monopoly you, of course, would not have any question about that. So that we come down to this question. Here is a man whom you say is elected to protect his interests. What does "his interests" mean? It is not to protect his interests, it is to protect his interests as a stockholder in company A——

Mr. GRAHAM. Certainly.

Mr. BRANDEIS. He is not to protect his interests; you do not let him make any contract himself which may be very much to his interest, and to his interest as a stockholder in company A, if he has any interest in company B, which may be greater or less than his

interest in company A; and if he has an interest in company C, and these three interests may conflict——

Mr. CARLIN. Let us take that illustration. Is this not a fact? Take the illustration of the man who has stock in three local companies that are natural competitors. Would it not be to his interest to see that companies No. 1 and No. 2 did not undersell in the market company No. 3, and thereby reduce his profits by making a low price; and would it not be to his interest to see that there was no competition at all?

Mr. BRANDEIS. It might be very much to his interest; it might or it might not be. Of course, it is perfectly conceivable in an individual case, that a man might hold the scales true, but that is an ideal case, because ordinarily he can not, with undivided loyalty, serve corporation A, provided corporations B and C are both competitors.

Mr. GRAHAM. Suppose those three corporations were consolidated and did not violate the theory of the Sherman law so as to create a monopoly, he would still be a director and be controlling the business of all three.

Mr. BRANDEIS. But he would have an undivided interest.

Mr. GRAHAM. The point I am getting at is a practical business point, not a legal point. Why should he not be permitted to hold control in those corporations in which, as Mr. Carlin says, his interest would be such that there would be no destructive warfare between them? Why not do it just as well in three organizations as to do it in one? There might be reasons why he could not have a consolidation, as, for instance, where they are operating under a lease, and the lease is unassignable, and yet the business interests of the men in those corporations would be practically one, and there would be no real competition, although by this method of legal interpretation they are all in the lumber business, and hence are competitors, and hence are within this prohibition, and hence they are criminals.

Mr. BRANDEIS. You have suggested a case——

Mr. GRAHAM. I have put a concrete case which was suggested to me last night.

Mr. BRANDEIS. You put a case which, I think, in most instances would be covered by a provision which I think is quite wise, if it is necessary to cover the point——

Mr. GRAHAM (interposing). Your suggestion of a limitation may possibly cover that.

Mr. BRANDEIS. That would undoubtedly cover the particular case you have had in mind.

Mr. GRAHAM. That might cover that particular case, but in a general application it might become obnoxious.

The CHAIRMAN. Take the case of a cotton mill down South, which has been referred to by Mr. Webb. A number of gentlemen organize one cotton mill in one town, and then over in another town they organize another one, and then in another town they organize still another cotton mill. In a sense it might be said that they are competitors, but really they are not competitors. It is really one business but different corporations.

Mr. BRANDEIS. Of course, as Mr. Graham has just called attention to, the $5,000,000 excludes those cases.

Mr. NELSON. If each lumber company had $5.000.000 of capital, and they were all operating together, there would be considerable chance for a possible disturbance of the public welfare.

Mr. CARLIN. I think there is an economic principle involved——

Mr. BRANDEIS. The fact that a man who is a director——

Mr. GRAHAM. When you attempt to fix arbitrary limits, you are getting on dangerous ground. It is a species of class legislation against which we ought always to frown, particularly so when men in one class are made criminals and men in another class are not.

Mr. BRANDEIS. He is not made a criminal unless he does an act——

Mr. GRAHAM (interposing). You say a man in a corporation with a capital of less than $5,000,000 may be an interlocking director and not be guilty, but when a man is a director in a corporation with more than $5,000,000 capital, under this law he violates the Sherman Act and may be subjected to all its pains and penalties. That is class legislation.

Mr. CARLIN. How would you reach the interlocking director?

Mr. GRAHAM. I do not think that, except in the case of companies which are instruments of the banks, and in the control of its currency, and in the case of all persons who are on two boards of corporations dealing with each other—those are general principles which we can establish and we can say those things ought not to be allowed.

Mr. CARLIN. Take the case of industrial corporations.

Mr. GRAHAM. I would express it in a general term. I think your Sherman Act covers it fully to-day, absolutely. I have seen in court the evidence of men being directors in two corporations put in as an item they have to show——

Mr. CARLIN (interposing). Merely as an item of evidence?

Mr. GRAHAM. Certainly; but in this legislation it is proposed to say that that is conclusive proof of a man's guilt.

Mr. CARLIN. The Sherman law does not cover the case of interlocking directors.

Mr. GRAHAM. It does to the extent that it is one of the elements. You will be better off by leaving the administration of that law to the administration of the principles—having them properly defined. They are now pretty well defined. Now, you have had decision after decision until the business world is beginning to know what the Sherman law means. If the Government says that these are interlocking directors, which constitute a monopoly in this particular line of business, what is to hinder the Attorney General from making an investigation?

There is the power of the Government to penetrate the secrets of any industrial concern, to make them say what their relations to each other are, and then by injunction or receivership break them up.

Now, then, if some individuals are hurt by it, you are making ample provision for them to get their day in court; and it seems to me the further we go into the matter of profits, and legislate on that, we are losing sight of the great principle of legislation, which is to legislate on subjects.

Mr. CARLIN. If I understand you, your answer to my question is that you would let the Sherman law remain as it is, so far as this subject is concerned?

Mr. GRAHAM. I am simply in a receptive mood. I was not here to follow the earlier discussions of this matter, and I am trying to see my way clear. This is a very difficult subject to handle. I am trying to see my way clear; to be guided by the great landmarks. It is always unsafe to get away from the great landmarks of legislation.

Mr. BRANDEIS. There is so much in which we agree on general principles that I want, perhaps, to be a little persistent in considering this particular provision.

Mr. GRAHAM. I am glad to hear anything you have to say, Mr. Brandeis. That is perfectly right.

Mr. BRANDEIS. In the first place, I think we ought, in attempting to frame legislation, not have so much thought of the power of Government in the matter of punishment as in regard to the method or means of preventing those evils.

These rules that I speak of, and which I have endeavored to lay down as general rules of action, have been recommended because it seems to me that they are just what you say—the broad landmarks of legislation, broad rules of human action, which men can not depart from except with considerable peril to the community, at least.

Now, if your objection to the section from which you have read is an objection to the particular method pursued by presuming one thing in a particular case, that is a point of view with which I have very great sympathy.

But the point right here that I want to go back to is whether this broad principle that you stand for, and on which we stand together—this principle of undivided loyalty—whether it does not prevent the doing of that thing in the very case that you put—of the three lumber companies—which you indicated at first might be admissible.

You have these three lumber companies, and one man is a director in the three companies. If those companies are absolutely independent in the sense that they do not cover the same field, if they are conceivably not conflicting and opposing in their interests with one another, the fundamental rule of substantive law which the committee has undertaken to meet in the bill they drew has no application. It is applicable only if those three concerns do have conceivably conflicting interests, namely, the interest of competing with one another in the same territory for the same business. It is only in that event that the rule will apply at all.

Mr. GRAHAM. Do you understand that it is the purpose of this legislation to prevent any combination of the atoms or the molecules of which business in any line is made up, because if that is so, there is no argument whatever that a man ought not to be a stockholder?

Mr. BRANDEIS. No; I am addressing myself to another proposition. I am undertaking to say, as you have indicated, whether this general rule on which we agree is not violated by the particular case you put, and I have difficulty in seeing how it is not violated, why it is not true that those three corporations do not come within the purview of this legislation, and if they do, and the three corporations do compete with one another, why the interests of corporation A are not conflicting with the interests of corporation B?

Mr. GRAHAM. Is that not rather sophistical? I do not say that offensively.

Mr. BRANDEIS. Of course, I know you do not.

Mr. GRAHAM. You are not meeting the real question involved. We start with the old statement that no man can serve two masters, but you forget in this argument you are putting to me that this has its limitations. A man may serve two masters, when you come to think about it. He may serve A in doing an errand there and he may serve B in doing an errand here. But you must add this, That where their duties conflict, then you can not serve two masters.

Mr. BRANDEIS. Yes.

Mr. GRAHAM. In the case I put there is nothing wrong per se; there is nothing wrong in the exercise of the natural rights of man, for you or me to be members of three corporations that are technically competing and yet we are conducting them along lines that preserve the best conditions for their business interests.

Mr. BRANDEIS. You beg the question when you say that they are being managed for the best interests of all concerned.

The law of human relations says, as well as the positive law, that a man who has a conflicting position ought not to decide——

Mr. GRAHAM (interposing). But do you not see they do not conflict under those circumstances?

Mr. BRANDEIS. They do not conflict because you do not allow them to, but you are injuring the stockholder in A by doing what you do in B.

Mr. GRAHAM. Not at all. They are all satisfied with it.

Mr. BRANDEIS. You do not know whether they are or not.

Mr. GRAHAM. They are until they complain.

Mr. BRANDEIS. The main question is not whether he is satisfied or not.

Mr. GRAHAM. You admit that monopoly has been declared an offense by legislation, because when business grew to a certain size it affected the community injuriously. There is no law that says a man shall not have a business here and a business there, and a group of them, and be in each one, all interrelated and having interlocking directors.

Mr. BRANDEIS. But this is not one business, because you have minority stockholders.

Mr. GRAHAM. But they are all agreed. The minority stockholder is not necessarily an enemy of the concern.

Mr. BRANDEIS. If you want to read into the law that if you have three corporations, each having the same stockholders in the same relations, and if the persons in that limited class of cases were all stockholders in the three corporations, and that the corporation is one that does not restrain trade, I think nobody would object to that law in limiting it; but I say you are assuming a case which does not exist one time in ten thousand.

Mr. GRAHAM. I can give you illustrations of hundreds of such enterprises run in different places.

Mr. BRANDEIS. Where the stockholders are the same?

Mr. GRAHAM. Substantially the same.

Mr. BRANDEIS. Oh, substantially the same; one bad oyster will spoil the soup.

Mr. GRAHAM. Those things—saying things like that do not prove anything.

Mr. CARLIN. The limitation suggested would reach the smaller concern; but take the economic principle involved, which is to prevent cooperation between business of the same kind, I think you will have to admit that there is greater opportunity for cooperation where the directors are interlocking than there is where they are not interlocking.

Mr. GRAHAM. Certainly; that is perfectly so; but cooperation is not forbidden except when it becomes monopolistic.

Mr. CARLIN. As soon as you permit a number of small concerns to cooperate where are you going to stop?

Mr. GRAHAM. Where are you going to draw the line? It is a pretty hard subject.

Mr. CARLIN. I think we were discussing the question of limitations.

Mr. BRANDEIS. I think that Mr. Graham and I are so well agreed on the fundamental principles which underlie the argument and the bill that if he undertook to draw a bill in reference to the particular practice which he refers to, I think it would prevent the difficulties of that situation.

Mr. GRAHAM. I do not see that there would be any difficulty about it. However, those are present thoughts.

Mr. BRANDEIS. It has been very instructive to me to have you present your views. I am very much obliged to you for them. There were a number of other questions that were asked in regard to the broader question, and as to my views on the definition bill, and other provisions, and if the committee has time I should be glad to take them up on some later day; but I have already trespassed so much on your time that I do not want to do that unless it meets with the wishes of your committee.

There were two provisions which I was asked to consider. One was the matter of appeal on the estoppel question, and then the provision referred to, I think, as section 18; and then there were other questions in regard to the definition bill which I shall have to postpone until another time, because I have an engagement this afternoon which will prevent me from taking them up to-day.

The CHAIRMAN. We will try to arrange another time for you to appear before the committee.

(Thereupon, at 1.10 o'clock p. m., the committee adjourned to meet to-morrow, Thursday, February 26, 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.	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 23.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Thursday, February 26, 1914.

The committee this day met, Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. It was arranged that Mr. Herbert Noble, of New York, would address the committee to-day on the bills pending before the committee.

We will be very glad to hear from you at this time, Mr. Noble.

STATEMENT OF HERBERT NOBLE, ESQ., OF NEW YORK, N. Y.

The CHAIRMAN. Mr. Noble, will you please give your full name and address, and state whom you represent.

Mr. NOBLE. My name is Herbert Noble; my address is 115 Broadway, New York City; I am a member of the New York bar. I am appearing before you to-day at the suggestion and request of the John A. Roebling Sons Co., of New Jersey.

Mr. CARLIN. What is their business?

Mr. NOBLE. They are manufacturers of wire rope, and they build bridges. They built, for example, the Brooklyn Bridge and the Williamsburg Bridge, in New York, and the Cincinnati Suspension Bridge, and other bridges of that character.

The bills that are before you, gentlemen, and that I have examined suggest certain proposed definitions as well as defining

various means and methods whereby business men may or may not conduct their business.

As I conceive it, the Sherman antitrust law was a great piece of redemial legislation. It was an attempt, and a successful attempt, on the part of Congress to adapt to our complicated Federal jurisdiction the method of procedure of the common law with respect to restraints of trade and attempts at monopoly.

The more recent decisions under that act, because they have dealt with such large factors in the country's business, have attracted widespread interest and widespread discussion, a discussion which has been participated in more particularly by laymen than by lawyers. And because of that fact and the large economic questions that were involved in some of those decisions, I believe a great deal of misconception has arisen as to the scope and effect of those decisions under the Sherman Antitrust Act.

The Sherman Act was, as I have stated, an enactment by the Federal Government of the common law with respect to restraints of trade. Restraints of trade which are harmful to the public interest have been the subject of judicial decisions in England and in this country for centuries, and the law relating to the subject is clearly understood by the courts and by lawyers, and much of the confusion, I think, is because it has been discussed by interested laymen who have not appreciated what restraints of trade, as defined by that law, were.

I think it may be briefly stated that the Sherman Act provides that every restraint of trade which harms the public interest is unlawful. There is no such thing as a reasonable restraint of trade which harms the public interest, and the recent decisions do not say that.

The Sherman law was intended by its framers, as the discussions in Congress disclose, as an enactment by the Congress which would make the common law relative to restraint of trade and attempts to monopolize applicable to our Federal jurisdiction. The recent decisions of the Supreme Court and of the other Federal courts have made it clear that the intention of the framers is now fully realized by the courts, and the results of those decisions have demonstrated that wherever the public interest is involved the courts are fully protecting it. No language could be plainer than that employed in the Sherman Act, that where the public interest is concerned the act of private individuals must give way to that interest.

Restraints of trade and attempts to monopolize which harm the public are clearly prohibited by the Sherman Act. The result which the law wishes to attain is the prevention of harm to the public interest, but the right of freedom of contract is quite as important to preserve as any other of our great rights, so long as that freedom of contract does not invade the public interest and do harm to the public.

The decisions of the Supreme Court and of the other Federal courts do not hold that restraints of trade or attempts to monopolize shall be reasonable or unreasonable. What they hold may be shortly stated as follows: That it matters not by what contracts, by what devices, by what conspiracies, by what combinations restraints of trade harmful to the public are brought about; they are all unlawful. The question of reasonable or unreasonable restraint is not applicable

when the restraint produced is harmful to the public. That is a contradiction in terms. Every restraint which is harmful to the public is unlawful. In the earlier decisions undoubtedly much confusion was created, for all restraints or partial restraints are not unlawful. Upon this I would like to read a part of the opinions in two of the cases in the Supreme Court, the first in the Hopkins case and the other in the case of the United States *v.* Joint Traffic Association. In the Hopkins case the court said: "To treat as condemned by the act all agreements under which as a result the cost of conducting an interstate commercial business may be increased would enlarge the application of the act far beyond the fair meaning of the language used. There must be some direct and immediate effect upon interstate commerce in order to come within the act."

In the Joint Traffic Association case the court said, in pointing out numerous so-called restraints which were not included within the meaning of the act:

> We might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade.
>
> We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer, or merchant of any additional farm, manufactory, or shop, or the withdrawal from business of any farmer, merchant, or manufacturer restrained commerce or trade within any legal definition of that term; and the sale of a good will of a business with an accompanying agreement not to engage in a similar business was instanced in the Trans-Missouri case as a contract not within the meaning of the act, and it was said that such a contract was collateral to the main contract of sale and was entered into for the purpose of enhancing the price at which the vendor sells his business.

The inhibited restraint of trade are those which are harmful to the public interest.

The growth of business is bound to take place. Any manfacturer may have to build an additional factory; any merchant may have to build another store; and if his business justifies such extensions he may bring them about through corporate forms, through partnerships, or through any other of the methods known to the law. He may buy out the factory of a competitor. By any of the well-known methods known to the law he may enlarge his business. He may buy out the business of a competitor, he may make a restrictive covenant collateral to the main contract for the purpose of enabling him to get in the good will and all the benefits growing from his purchase. Anything that means healthy growth of a man's business has always been permissible, and is not a restraint of trade, harmful to the public interest, although you may argue from it that there has been a restraint of competition, or even a restraint in fact, to some extent, of trade. There may be the making of many contracts which, under a given set of trade conditions, made for a given set of purposes, are perfectly lawful; whereas exactly the same combinations, the same partnerships, and the same contracts, if made under other trade conditions, and for different purposes would be unlawful. So an attempt to say that the making of all combinations, of all partnerships, or of all contracts which in any way restrict free and unlimited competition or which restrict trade is unlawful, is to extend the common-law doctrine in respect to restraints of trade

and attempts to monopolize, and to enlarge the meaning of the Sherman Act to such an extent as will make combinations, partnerships, contracts, and the normal and healthy growth of industry, which are utterly without harm to the public, unlawfu..

But the definition—and this is a question, gentlemen, of terminology—the definition of a restraint of trade is such a restraint as harms the public, as invades the public interest, and all those restraints of trade which invade the public interest are inhibited by the Sherman Act.

The decisions have gone to such an extent as to make it perfectly clear that no matter what the means, no matter what the methods, no matter what the devices and combinations or conspiracies that men may enter into the effect or result produced by those means may become unlawful if there is a restraint of trade harmful to the public interest. But if those very contracts and combinations do not produce a restraint of trade which is harmful to the public interest, they are innocent and may be protected.

I have said this much by way of introduction to indicate what I believe is the general opinion that the Sherman Act, as interpreted by the decisions of the Federal courts have made it perfectly clear now, that it is the common law which we meant to adopt, and the meaning of the common law is clear and clearly understood.

The difficulty in applying the law lies in the necessarily mixed question of law and fact which arises in every case. This necessarily involves judicial determination in each case. The court must determine whether or not, by the facts which are presented, by the devices, by the methods, by the means, you have brought about a result which is harmful to the public interest. If you have, you have violated the law, and if you have not, you have not violated the law.

As was said by one of the gentlemen who appeared before your committee, the courts must exercise "common sense" in dealing with the question. That is nothing more or less than saying that the courts must analyze the mixed question of fact and of law; and when those facts are understood in respect to the public interest, apply the law, condemn the acts if the public interest is harmed, and declare lawful the contracts and acts involved if the public interest is not concerned.

A thoughtful consideration of the recent decisions of the Supreme Court will show that they have not narrowed the meaning of the Sherman Act, but they have, on the contrary, brought within its scope, clearly, all arrangements, combinations, or devices which are harmful to the public interest, and that the contrary view, sometimes popularly expressed, is based upon a misconception of the true meaning of those decisions and their effect upon the act.

Mr. NELSON. What is the test of what is harmful to the public interest?

Mr. NOBLE. Of course, that is a mixed question. There are many cases where the courts have determined in particular instances. Take, for instance, the Northern Securities case. There the court held that was a combination between carriers serving the same public whereby they restrained the trade of the shippers; that thereby the carriers were able to divert or carry the freight of shippers according as the railroad companies might order, and not as the shipper might

wish. In other words, that was putting a dam, so to speak, in the channels of the trade of the shippers, and the court held because it restrained that trade the combination was unlawful.

Mr. NELSON. My question goes not to this clear case, but to the cases that are close to the border line. Would it not depend largely upon the individual economic views as to what would be a restraint of trade?

Mr. NOBLE. I do not think so. I do not mean to say that there is no mixed question in here, but the question of fact is this: If you get a set of facts which show that the trade, using that word in the broad sense, has been restrained and interfered with, then the question comes, Has the public been harmed? It is like cases indictable at common law. There the question always has been, Has the public interest been involved?

Undoubtedly no indictment would lie unless the public has been harmed, and that is a mixed question of law and of fact.

Now, as I see it, these bills, these suggestions that are before the committee—and I do not understand that they are intended to be more than a nucleus around which you gentlemen want to consider the entire topic—these bills contain so-called definitions. I will take up, if the committee will permit me, the various bills as they come along, and I think I can amplify that way best, and perhaps anticipate questions which may arise, and when I get through I shall be very glad to have an opportunity to answer any questions you may desire to ask me.

Now, take section 9 of bill No. 1. That bill proposes to add sections 9, 10, 11, 12, and 13 to the Sherman Act. This bill and bill No. 2 provide, among other things, for certain definitions. It may be properly observed, before taking up the details of the bills, that definitions enacted into law themselves require definition when it comes to applying those definitions to the facts in the case.

Under the terms of section 9 it is provided, "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 of communities, with the purpose or intent to thereby injure or destroy a competitor, either of such purchaser or of the seller." I will not take up the provisos just now.

The inhibition there, I suppose, is against different prices to different persons, either in the same or different communities. It seems to me that the first section says that a manufacturer must sell, f. o. b. his factory, at the same price to everybody, and that if he does not do it, and sells at different prices with the intent to injure or destroy his competitor, he is guilty of an attempt to monopolize. Gentlemen, that is legislation which does not go to the subject matter of the law, as I conceive it. That is an attempt to say you shall not pursue particular means or particular methods. For example, a merchant might be overstocked with goods. Take, for instance, the great merchant, John Wanamaker; he is sufficiently a public character to refer to him by name; he might be overstocked with goods, and a financial depression might come on. Some other great merchant might be similarly overstocked. This provision would forbid Mr. Wanamaker from unloading his goods, from selling them at dif-

ferent prices in different communities, in order to realize on his stock, because if he continues to do that it would have the effect of injuring his competitor across the street, and his acts in so doing would be evidence of his intentions. There is no way in which intention can be gathered except by considering the acts of a man and then drawing your conclusions from a series of acts.

If it should turn out that the means and the combinations employed produce results which are not harmful to the public interest, the bill which condemns those means will work harm and not good; and it is suggested that therein lies a fundamental difficulty in the proposed bills. It is a fallacy to attempt to prohibit the use of means whereby results may be brought about. For example, murder is prohibited; but murder may be brought about by many different kinds of means or methods, which same means or methods may be used for entirely innocent purposes and to produce good results. To prohibit those means or methods simply because a person may wrongfully use them to commit murder is clearly not in the public interest. Strychnine, opium, cyanide of potassium are all poisonous drugs and are frequently the means of saving life, but if given unduly will produce death. By these means murder may be committed.

The bill under consideration, to extend the simile, prohibits absolutely the use of strychnine, opium, or cyanide of potassium for fear that some one, by their lawful use, may produce trade death.

The Sherman Act as it stands to-day absolutely prohibits all those restraints of trade and attempts to monopolize which produce trade death or harm to the public, and it does not matter by what means, by what devices, or by what methods the result may be accomplished.

In every case where the courts are called upon to pass upon the contracts, combinations, etc., of business men, they must first examine the contracts and combinations, the acts of the parties under them, and come to a conclusion of fact as to whether, upon the application of common sense, they are wrongfully directed and harmful to the public, and then the law must be applied. With the facts determined the law is clear.

Now, let us take another instance. Suppose that A is a manufacturer who owns a factory in New Jersey, where the prices of coal, labor, and pig iron are high, and a factory in Missouri, where the prices of coal, labor, and pig iron are materially lower than in New Jersey. Must A sell everywhere at a fair profit upon his New Jersey cost price, or may he sell in such sections as he can reach by freight from New Jersey at a fair profit upon his New Jersey cost price, and in such regions as he can reach from Missouri by freight at a fair profit upon his Missouri cost price? Shall the public be deprived of the lower price which he can make upon his Missouri factory because of its favorable location? It seems to me clear that this would result if section 9 be enacted and he were to sell at his Missouri cost, plus a fair profit, for he would, of course, absorb all the trade in that region. Competitors located elsewhere, where the unit of cost is higher, would be utterly driven out. And for A to trade habitually, as indicated, from his Missouri factory with the result mentioned would be evidence of his intent or purpose to injure or destroy his competitor within the language of the act.

One effect of the enactment of section 9 would be clearly to deprive a manufacturing corporation, having various factories located

with respect to the trade in various communities, from the opportunity to sell at varying prices f. o. b. the various factories; for in any case where a factory capable of supplying the demand within a given freight radius was so favorably situated with respect to labor and raw materials as to be able to manufacture at a less unit of cost than any other factory which could supply goods within that freight radius, the factory supposed would, under this section, necessarily have to charge the same price as would be charged by the manufacturer's most expensive factory, for otherwise to charge a less price would be to destroy a competitor within that given radius. That is what the language of this section apparently means.

In this conception of the section its undoubted effect would be that the price for goods must be the same throughout the United States f. o. b. factory—grade, quality, and quantity being the same, allowing for no differences for commercial standing. Yet goods are sold upon certain standard discounts to men in good financial credit, but thousands of merchants are not able to get the same price because there is a risk involved in selling them at all. They can not pay cash, nor can the vendor rely upon their ability to pay upon the discount dates agreed upon. The practice is universal in such cases to charge a higher price for the risk involved. Such transactions as that would be absolutely prohibited by this act, and the merchant who through misfortune had become financially involved would be unable to get goods at all so as to work out of his difficulty.

Mr. CARLIN. Is your corporation a New Jersey corporation?

Mr. NOBLE. Yes, sir; organized many years ago.

Mr. CARLIN. This happens to be the New Jersey statute, practically.

Mr. NOBLE. I have observed its similarity to the recent bill in New Jersey, but there is a wide difference between what may be tried in a State and what may be practicable or wise for the United States.

Mr. WEBB. Do you not think the facts which you narrate would destroy the criminal intent necessary to be proven in a case of this sort, the intent to destroy a competitor?

Mr. NOBLE. No; I do not think so, because in the case supposed one man owns both factories. It is, however, not a hypothetical case. That is an actual case.

Under this act both factories must sell at the same price unless they put themselves in the position of being indicted for selling at different prices, for the effect therefrom would naturally be to drive out a competitor, and from the course of conduct an intention and purpose so to do might be found.

Mr. WEBB. If they sell at a different cost it is all right, provided it is not for the purpose of driving out a competitor?

Mr. NOBLE. There may be a good purpose——

Mr. WEBB (interposing). If iron can be produced cheaper in one locality than in another, then you think you ought to have the right to sell it cheaper in that locality?

Mr. NOBLE. I agree with that.

Mr. WEBB. And I think you would under the provisions of this act.

Mr. NOBLE. But you put yourself in a position where you are going to have a lawsuit to prove that. You are going to be subject to indictment. I do not think a definition really defines which keeps you in that uncertainty. That is the difficulty I meant to bring out.

Now, take another case. There is a large department store in Washington City which has grown from very small beginnings. Some years ago they erected a building anticipating being able to borrow money from time to time on their general credit, not only to carry on their business but for some of the needs of the building. Financial depression came on, and they were unable to make their payments. They went to their merchandise creditors, obtained an extension of time to meet their accounts, and arranged for the supply of further merchandise at prices sufficiently higher to safeguard the merchants in extending the credit. They worked out of their difficulty and are now a successful department store in Washington City. Transactions such as this have occurred and will occur all over the United States. If this section becomes a law, to extend credits of this kind would be impossible, for to make a difference in price which would injure or destroy a competitor, either of such merchant or of the seller, is inhibited. The mere making of a different price is prohibited, and the making of a higher price to a person in financial difficulties, if it turns out wrong, would lay the basis for a charge under the act.

Mr. CARLIN. This bill does not prohibit a man from selecting his own customers; we have not changed the law in regard to that.

Mr. NOBLE. But it does prohibit this. If the merchants who supply this department store are, by their contracts, destroying that concern, they would be open to a charge of a discrimination in price. That is the danger of it; yet, what was done was a fair, legitimate business thing to do.

Now, let us go a step further, gentlemen. The proviso says:

That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in grade, quality, or quantity of the commodity sold, or that makes only due allowance for the difference in the cost of transportation.

The object of this bill, as I conceive it, is to make the same price f. o. b. factory everywhere, adding the transportation; but this proviso expressly says that that is not what you mean. It says:

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 the difference in the cost of transportation.

In other words, a merchant in New York can sell to a merchant in New Jersey and allow him the cost of transportation, and he can sell at the same price to a merchant in Chicago and allow him transportation, and he can sell at the same price to a merchant in Denver and allow him transportation. Now, he has three prices instead of one, and he is doing it by law; and this is one of evils that has been pointed out in the public press, and it is one of the evils that the draftsman of this bill had in mind.

Mr. WEBB. Would this bill, in your opinion, permit a man to sell in wholesale lots cheaper than in small lots.

Mr. NOBLE. I suppose the word "quantity" would permit that.

Mr. FLOYD. I desire to suggest that you seem to entirely misconceive the purpose of the bill. You may have a correct perception of the effect of it. The real purpose of the bill is to prevent a well-known evil; when one concern goes into a local community to sell

goods at a lower price than its competitors, for the express purpose of destroying another concern and putting it out of business, and the idea of the draftsman was to prevent that condition unless the party who was doing that thing would lower his prices correspondingly everywhere else.

Mr. NOBLE. I am very glad to have that statement made, because is not this a fact and is it not a complete reply that the law as it stands to-day forbids the doing of the very thing you are talking about? The courts have time and time again in these decisions condemned that very practice. The law is, if I do an act for the purpose of injuring my competitor that is unlawful, I may be imprisoned or enjoined.

Mr. WEBB. They held that in the Standard Oil case.

Mr. NOBLE. They held that in the Standard Oil case, and indicated it thoroughly in the Tobacco case and in other cases.

Mr. CARLIN. That is not exactly what they held. Those facts were simply part of the proof. They were simply considered a link in the chain of evidence for the purpose of establishing the conviction.

Mr. NOBLE. It would be more exact to say that those were instances which showed unlawful combination.

Mr. CARLIN. In any case it was dependent upon initial circumstances of that sort?

Mr. NOBLE. I do not mean to say that. I meant to say that wherever acts are done which show the purpose of the other party to be unlawful, that in an appropriate case can be stopped.

Mr. MCCOY. Not if it is mere injury due to competition.

Mr. CAREW. You mean, Mr. Noble, injure the public?

Mr. NOBLE. Yes; that is the very point. This section attempts to define a means which may be perfectly right in one case, and the same means may be wrong in another case.

Mr. NELSON. Are you in favor of striking out this section or amending it?

Mr. NOBLE. I do not think the section is necessary. I think it leaves an uncertainty there, and it does not clarify the law.

If it is to stand, I will make certain suggestions as to amending it.

Mr. CARLIN. Your position is that the Sherman law is sufficient?

Mr. NOBLE. As to that section; yes, sir. The Sherman law, especially as it has been amplified in the recent decisions of the Supreme Court, is sufficient as to that section. I do not think the recent decisions have narrowed the Sherman law; I think they have broadened its application.

Mr. CARLIN. What do you mean by "broadened it"?

Mr. NOBLE. They have said it does not make any difference how you get at the result, even though the individual steps are, each one taken singly, legal, if you produce harm to the public you have done an unlawful act.

Mr. CARLIN. The cases you cited were suits brought for dissolution, and the circumstances were numerous and varied, and the illustration you give in regard to this statute was considered merely a link in the chain of evidence which would justify a court in determining that the concern was a combination in restraint of trade?

Mr. NOBLE. They reached that eventual result. But I do not think there is any difference between cumulative evidence and evidence sufficient to establish a fact. It is merely a question of cumulation.

If this section is to stand and be enacted, then, in my opinion, in line 9, on page 2, after the word "sold," the words should be inserted, "or the financial condition of the purchaser." Then, after the word "transportation," in line 10, the words "or factory cost of different plants or subsidiary companies owned or operated by the same person" should be inserted.

You have the cases of many companies which have subsidiary companies, and they, of course, should not be inhibited from selling at a particular cost.

Mr. NELSON. Take your second amendment, and think, if you please, of the Standard Oil Co. It would be in a position to do very effective and efficient manufacturing of its products, and it then could go out and compete with all other concerns that were not as strong as it with perfect success, because it is enabled to produce its product cheaper.

Mr. NOBLE. I suppose that the object which the draftsman of this bill had in view was to open opportunity to the man who wanted to take advantage of it. I presume that is your question.

Mr. NELSON. Yes.

Mr. NOBLE. I doubt very much whether you can preserve opportunity to the man so that he will always be able to take advantage of it.

Mr. NELSON. It seems to me, right there—the Standard Oil Co. is established in many places?

Mr. NOBLE. Yes.

Mr. NELSON. It might produce oil and its varied other products cheaper at one place than in another. Under your amendment, could it not use that establishment for cuttting prices in places, saying that it could produce those things much cheaper?

Mr. NOBLE. Not if it did it for that purpose, because that is against the law as it stands.

Mr. NELSON. But it could say, "We can do this, because we can afford it."

Mr. CARLIN. I would like you to point out, if you will, what provision of the Sherman law would make that particular act unlawful?

Mr. NOBLE. I conceive that the Sherman Act means this, that a merchant may lower the price of his goods to the public if it is for the purpose of advancing his own business.

Mr. CARLIN. In what provision of the Sherman law does that occur?

Mr. NOBLE. The Sherman law is a declaration of the common law, and therefore you go to the common law continually in order to find out what the common law was.

Mr. CARLIN. It is only a declaration of the common law in so far as it declares the common law, and no further. What declaration in the Sherman law would reach that condition?

Mr. NOBLE. The words "restraint of trade," "contract or conspiracy in restraint of trade." What happens is, if you restrain trade so as to destroy a competitor, and do it for that particular purpose, that is the restraint of trade which is referred to in the Sherman Act.

Mr. CAREW. That might not be injurious to the public.

Mr. NOBLE. In a given instance, under given circumstances, it might not.

Mr. CARLIN. Why did that apply to contracts and combinations in the form of a trust or otherwise? That provision of the Sherman law is attempting to reach a combination in the form of a trust for the purpose of dissolution, and the thing you are talking about is only one of the pieces of evidence which would justify a dissolution.

Mr. NOBLE. But let us take section 2—the second section—the Supreme Court in construing the two sections has said that the second section is supplemental to the first. That provides for the act of an individual. The instance which you give and the case Mr. Nelson referred to is an attempt to engross trade.

Mr. CARLIN. But a lack of uniform price would not necessarily be an attempt to engross trade.

Mr. NOBLE. It might or it might not be. That is why I object to this language, because it makes rigid that which is not capable of being made rigid, because it depends upon the facts and circumstances of the case.

Mr. MCCOY. You say the Sherman law is a declaration of the common law. The common law permitted a man to sell out his business and agree not to compete?

Mr. NOBLE. Yes, sir.

Mr. MCCOY. The Supreme Court in the Standard Oil case used as one of the bits of evidence to show the illegality of the combination the fact that certain individuals back in eighteen hundred and seventy-something-or-other had done exactly that thing.

Mr. NOBLE. Let us take a better illustration. Take the tobacco case, where the practice was found of buying out factory after factory and closing them. The Supreme Court said as an individual instance that was permissible, but when it was pursued for the purpose of engrossing trade that that is wrong. There is nothing to prevent a merchant from buying another out and making a restrictive covenant.

Mr. CARLIN. Do you know of any case brought by the Government to enjoin restraint of trade where it was simply based on discrimination in price?

Mr. NOBLE. You mean just involving that question?

Mr. CARLIN. Just as that particular statute involves it.

Mr. CAREW. There was no evidence in the case except what this forbids.

Mr. CARLIN. I ask you if you can point to a case.

Mr. NOBLE. Brought by the Government?

Mr. CARLIN. Yes; brought by the Government.

Mr. NOBLE. I think the Bathtub case involved that.

Mr. CARLIN. All these cases involved that.

Mr. NOBLE. I do not think of any case that involved just that narrow issue, but all these cases involved that in principle, so that I think the case which you suggest is really covered by these decisions.

Mr. NELSON. In order to get an evil of this kind you would have to dissolve the whole corporation?

Mr. NOBLE. Not at all. You can enjoin the doing of a particular act. You propose here in the proposed legislation to give to individuals the right to get out an injunction. That meets the evil.

Mr. NELSON. I am thinking about the present Sherman Act, without this condition.

Mr. NOBLE. Let us go a step further. I believe that under the present law, under the ordinary equity principles, you can get an injunction against the man who is doing you an irreparable injury. I do not believe the section proposed is necessary. I think it will be an enactment of the law as it stands.

Mr. CARLIN. This is a criminal statute we are discussing now. The injunctive relief is an entirely different remedy.

Mr. NOBLE. Mr. Nelson asked me a question as to whether or not you could get an injunction irrespective of the proposed statute, and I was replying to that.

Mr. FLOYD. In response to the suggestion I made you answered it by saying that the thing inhibited in this section is already provided for in the Sherman Act. Suppose that a concern proceeds, under the Sherman law as it now stands, to sell its commodities at reduced prices for the express purpose of putting a competitor out of business. And then suppose that that competitor should secure an indictment against that concern for that specific thing, and it was shown that they were selling that commodity at that particular point at grossly inadequate prices in comparison with what they were selling the commodity in other parts of the country and to other members of the trade. Do you think a criminal indictment could be sustained in that case under the law as it is now written?

Mr. NOBLE. Under the facts as you suggest them, I have no doubt about it.

Mr. CAREW. If it is injurious to the public?

Mr. NOBLE. Yes: if injurious to the public.

Mr. FLOYD. But it is not injurious to the public. It is beneficial to the public in that community to get the goods cheaper, but it puts that individual manufacturer out of business. This section is intended to prevent a wrong to an individual. If they were to lower their prices in that community you could never say that the people of that community, as a whole, were injured by the lowering of prices of things they bought.

Mr. NOBLE. The case you suppose suggests exactly what the second section of the Sherman law is expected to cover. That is exactly within the meaning of the second section.

Mr. FLOYD. Suppose that is not its object. Suppose the object is to help some other manufacturer not belonging to that particular concern, or through spite or some other motive to put this particular individual out of business?

Mr. NOBLE. I will answer that in this way, that wherever, in interstate trade, the purpose of the combination or the attempt to monopolize the business is primarily to restrain trade or to injure the trade of another, that is within the meaning of the second section of the act.

In that particular case which you supposed in the first instance, it seemed to me it came within that meaning. Of course, if it is for the purpose of advancing the business of the man who is doing it and undertaken for the legitimate purpose of advancing his trade another question is presented—that is one of the usual methods of advancing trade, the public would not be harmed.

Mr. CARLIN. Do you know of any indictment ever brought under the Sherman law for the cutting of the price in any community; I mean an indictment brought by the Government against anybody anywhere?

Mr. NOBLE. No; but I do not think that is an answer to the question, sir; because the several district attorneys have not done what the law permits them to do it does not follow that the law does not cover the point.

Mr. CARLIN. It is evident that the several district attorneys do not take the same view of the law that you do, because we are bound to presume that they have done their duty.

Mr. NOBLE. I do not think my suggestion includes the suggestion that they have not done their duty. It is a question of whether or not they have been moved to take action. Public officials rarely move except upon the complaints of private individuals.

Mr. CARLIN. I think the complaint against price cutting has been general throughout the United States.

Mr. NOBLE. You do not remove that by the language of that section, as I have tried to point out.

Mr. CARLIN. That is another question.

Mr. NOBLE. Yes; that is another question, but it is the question presented by this section.

Mr. CAREW. In discussing the remedy which you say is already there under the Sherman law, you would not want us to succeed in our avowed object; you are opposed to the accomplishment of that purpose, are you not?

Mr. NOBLE. Not at all; I am in favor of the enforcement of the Sherman Act.

Mr. CAREW. You are opposed to the accomplishment of the purpose of this section?

Mr. NOBLE. I think the section is designed to prevent the use of certain means and methods, and I think that is fundamentally wrong. I think legislation ought to go to the object, by whatever means——

Mr. NELSON (interposing). Is it not a fact that the Sherman law goes to the object, and this simply emphasizes one illegal practice?

Mr. NOBLE. The means you may prohibit may be used for a legitimate purpose, and I should say you can not and ought not to do that.

Mr. VOLSTEAD. Would it be for a legitimate purpose if it was for the purpose of destroying a competitor?

Mr. NOBLE. I do not think so. But now, passing to section 10, I suppose the object of that——

Mr. CAREW. If the word "sole" was put in there before the word "purpose"—"that the sole purpose or intent"; what do you think of that?

Mr. VOLSTEAD. He woud always prove he had some other intent besides that one.

Mr. CARLIN. He has the intention of profit, finally?

Mr. NOBLE. Now, passing to section 10, I would like to know whether or not it intends to deal with single transactions or a series of transactions. It says:

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 the goods, wares, or merchandise of a competitor or competitors of the seller.

Is it intended to deal with single transactions or series of transactions? If it is intended to deal with single transactions that is not clear.

The suggested language of this section seems ambiguous. Does it deal only with a single transaction? Does it deal with contracts for exclusive sales? Does it relate to contracts for future sales? Does it relate to exclusive agencies? Laterally, it appears to deal only with a consummated sale of goods, and a collateral agreement that in consideration of the price or discount in the particular transaction the purchaser will not deal thenceforth with the competitor of the seller. If it is intended to deal only with particular transactions, then to remove the ambiguity the section should contain a proviso something like this: "*Provided*, That nothing herein shall be held to prohibit contracts obligating the purchaser to buy exclusively from the seller, on terms agreed upon between them, all goods, wares, an merchandise required by the purchaser for his own use or in the business conducted by him or to prohibit sole-selling agencies."

Without such a proviso or without making it clear in some other way that it deals only with particular transactions, the section as it stands appears to make it apply to sales generally and not to particular transactions. If this latter is the intention, the proposed definition proposes a revolution in business methods and will destroy customs long established for the legitimate expansion of business.

Mr. CARLIN. It is intended to prevent exclusive contracts of sale, to prevent the manufacturer from limiting the business of the man who undertakes to distribute his wares, and thus preventing him from being a free merchant, so that he may sell the goods of a competitor if he desires to do so.

For instance, take this illustration. I do not know that they do it, but they probably do. The Knox hat people say, "We will sell you our hats to retail to the consumer, provided you will not sell the hats of any competitor." That section is intended to allow the retailer to sell the hats of a competitor by preventing the execution of any such contract.

Mr. NOBLE. Then, assuming that the language is sufficient to carry out that purpose, I would like to take one or two illustrations. Take the case of a mining company, to show where this would lead; take the case of a mining company which uses a great quantity of wire rope and explosives.

Mr. CARLIN. I would like to call your attention to the fact that there is a different provision relating to the products of the mines.

Mr. NOBLE. That is the proviso in section 9. I will cover that. This section would prohibit, for example, a mining company which is a large user of wire rope or dynamite or other explosives from making a contract to buy all its wire rope or explosives from a given manufacturer upon the condition which is usually made, that the seller shall always keep in stock at a point convenient to the mine enough wire rope or explosives to meet the company's needs. It would be unprofitable in the case of explosives or wire rope to keep a fresh stock on hand at a given mine or mines unless the seller

could have the mine or mines use his wares exclusively; yet not to keep fresh supplies on hand, with a man in charge on behalf of the seller, would seriously impair the work of the mine or mines and might be dangerous to life. Is it intended to enact such legislation? What public harm is there in permitting a manufacturer to make such a contract as that? Or, if you please, take the case of fashions.

Mr. CARLIN. I do not think this statute covers that.

Mr. NOBLE. It says you may not make an exclusive contract to buy all your goods from one man.

Mr. CARLIN. No; it does not. It simply says a man shall not require you to make an exclusive contract to sell his goods only.

Mr. NOBLE. If you reverse it, it does.

Mr. CARLIN. He can not give you a rebate for that purpose and shall not enter into that kind of a contract.

Mr. NOBLE. Do you mean the word "dealing" only refers to jobbers and not to consumers?

Mr. CARLIN. That statute has no reference to consumers. It is intended to apply to merchants generally. The purpose of that section is to prevent the evil of exclusive sales contracts. For instance, here is Mr. A, who is a retail merchant, and Mr. B says to him, "I am a manufacturer. I will permit you to sell the watches which I manufacture, provided you do not sell the watches of any other manufacturer." This statute is intended to prohibit that kind of a contract between those men and leave the merchant free to sell the watches of anybody he pleases and thus give the consumer an opportunity to choose between different watches.

Mr. NOBLE. Take, if you please, such articles as articles of fashion, where the individual taste of a man comes in—articles where the reputation of a manufacturer comes in.

Mr. CARLIN. That is true of the Knox hat and of the Ingersoll watch, and that is also true of the different makes of razors that are made, and it is true of all copyrighted and patented articles. But this section would strike down the exclusive contract, whether the article has a reputation or not.

Mr. NOBLE. Do you think it is wise to do some of the things you have mentioned? Now, take the case of articles of fashions which become unsalable when the fashions change, as they do every few months. Is it intended to prohibit a manufacturer from inducing a purchaser to buy and sell as much of the article while it is in fashion as by skillful salesmanship he can sell? And for that purpose to have on hand a supply surely adequate, and from making a contract whereby the manufacturer agrees to take off the purchaser's hands the unsold articles on condition that the purchaser buys and pushes the sale of these articles of fashion exclusively? The reputation of manufacturers for making excellent goods or goods suitable to the anticipated demands of trade, plays a large part in interstate trade—in all trade—and is one of the chief elements of business initiative. Certainly it should not be made unlawful for business men acquainted with the needs of business and of trade to make such contracts as they will, which advance and enlarge that trade? Would it be the intention to prevent the retail merchant from making a contract with the manufacturer to buy his goods exclusively and push them for sale upon the condition that the manufacturer would take

back off his hands anything unsold after the fashions had changed? It would have that effect, would it not?

Mr. CARLIN. I think it might if that were in the nature of a rebate. It prevents the exclusive contract whether it be in articles which are in fashion or in something out of fashion. The object of it is to take from the neck of the retail merchant the yoke which is put upon him now by an exclusive sales contract with the manufacturer and to liberate him, so that he may do business in as many different lines as he pleases.

Mr. NELSON. Why does a man dealing in fashions require an exclusive contract that he should push his goods alone?

Mr. NOBLE. Take an illustration of just that sort. There is not a very large profit in cases of that sort. The merchant himself could not make any money if he handled more than one line of goods.

Mr. NELSON. Then he would not handle them.

Mr. NOBLE. But you want to make it profitable to him to handle the goods?

Mr. NELSON. That does not stop you from making that kind of a contract.

Mr. NOBLE. At what price?

Mr. NELSON. No price. We do not stop you from saying you shall not also handle the goods of a competitor.

Mr. CAREW. We should do that irrespective of whether it is of public concern or not.

Mr. CARLIN. Of course, it proceeds upon the theory that the retail merchant is a part of the public.

Mr. NOBLE. On what authority does Congress concern itself as to the individual merchant in a State? I would like to get your point of view on that.

Mr. CARLIN. Because the individual merchant happens to be a citizen of a State and also a citizen of the United States, and the merchant has the same right of protection as anybody else. If you allow a system to be built up in your country which is going to destroy competition among retail merchants, and to prevent the merchant from doing business in his way and compel him to do it in your way, that system ought to be stopped.

Mr. NOBLE. Do you consider that as a part of the public welfare?

Mr. CARLIN. Yes; I do. Do you not think when the retail merchant enters into business that he is a part of the public, and his welfare is to be looked after as well as the welfare of the manufacturer? You are speaking from the standpoint of the manufacturer.

Mr. NOBLE. No; I do not intend to.

Mr. CARLIN. As I understand it, you are. You say this man ought not to be stopped from making such a contract which would enable him to take back the goods if a distributor fails to distribute them. What is intended in this section is the making of a contract with the man that he shall not have the right to sell his competitor's goods.

Mr. NOBLE. Let me ask you a question right there. Suppose, for example, cotton growers want to sell their cotton through a common agent and they make a contract with him that he shall not receive the cotton of any other men than these men named, such as A, B, C, D, and E?

Mr. CARLIN. Why should they have that right?

Mr. NOBLE. Why should they not have that right?

Mr. CARLIN. I ask you again, Why should they have that right?

Mr. CAPEW. Because they are American citizens.

Mr. CARLIN. You have not the right in the exercise of your liberty to destroy the liberty of anybody else.

Mr. FLOYD. You destroy individual liberty.

Mr. MORGAN. I would like to know whether this provision would prohibit the limitation of the sale of the product of a concern? It is said by Mr. Carlin that they want to protect the right of the retail merchant, and you offered a suggestion as to whether or not that is a matter of public policy. I would like to know whether there is any general complaint from the retail merchants, or is it not true that the average retail merchant is in favor of this process which you advocate, so that the only basis of this legislation can be to prevent monopoly and control in the interest of the public and not in the interest of the individual merchant?

Mr. NOBLE. As I conceive it, the object of the legislation should be the general protection of the country—legislation in the general interest of the country as distinguished from attempting to legislate in individual cases.

Mr. FLOYD. What about the consumer—what about the interests of the consumers? They constitute a very large body of the general public?

Mr. NOBLE. Yes.

Mr. FLOYD. All the advocates of this principle whom I have heard confine the benefits, as far as I can follow them, to the manufacturer, the jobber, and the retail merchant. None of them has convinced me that that would be of any benefit to the general consumer.

Mr. NOBLE. May I try to answer your question in connection with another one?

Mr. FLOYD. Before you get to that—and I will be glad to hear you on that—let me ask you this question.

Take the question of patents. Would not such a contract result in giving a concern which made it a complete monopoly in all rural communities where there was only one store, so far as the local trade is concerned? We have many country retail stores throughout the country. Would it not restrain, absolutely, the trade to that extent, giving the retail merchant an absolute monopoly in communities where there was only a single country store?

Mr. BEALL. You do not know of a single instance where a manufacturer would want to enforce that kind of a contract against a merchant in a place where there is just one store?

Mr. FLOYD. They did it in all the stores in my district before the recent Supreme Court decision. I have talked with numerous merchants who have told me that they were bound by such contracts.

Mr. NOBLE. Then you have answered your own question. Has not the Supreme Court held that way? That is not my proposition.

Mr. FLOYD. Yes; but in justification of my statement I will say that many witnesses have appeared before this committee and insisted strongly that we ought to modify the law and annul the effect of the Supreme Court decision, giving the manufacturers the right to control the retail price. That is my answer to that suggestion. I am willing to let it rest upon the Supreme Court decision, as far as that particular point is concerned. You are dealing with another question; I understand that.

Mr. NOBLE. I am not speaking to that point at all.

Mr. MORGAN. If you enact this section, would that not be completely changing the Supreme Court decision?

Mr. FLOYD. Oh, no; this deals with another phase.

Mr. NOBLE. Oh, I think this would be changing the decision, because the Supreme Court has held that you may have a common agent.

Mr. FLOYD. Not on that particular point, but on another point.

Mr. NOBLE. Yes; the Supreme Court has held that you may have a factor.

Mr. FLOYD. You are referring to one Supreme Court decision and I am referring to another.

Mr. NOBLE. But the two are not in conflict.

Mr. FLOYD. I understand that, because they are upon different points.

Mr. NOBLE. Yes. Let me go a step further here. Take the case of the cotton industry. Is it intended to prohibit manufacturers—take the case which is of great importance to the cotton industry—is it intended to prohibit manufacturers of cotton goods from contracting with a commission merchant or with a factor that he will take the entire product of one, two, three, or more of them and no others? If it is intended to prohibit this, the whole method of advances by factors would be destroyed, because the factor could not depend upon his supply of goods on the one hand, nor could the manufacturer depend upon his supply of cash for manufacturing purposes or upon his outlet, on the other hand. Yet the language of the act would apparently prohibit this.

He takes the goods, say, of five factories, and agrees not to take the goods of any other factories. He makes advances to the manufacturer to conduct his business. They make their advances over to the merchant. This section would forbid that, and yet that is one of the ordinary ways in which business is done. It would revolutionize that. Or, going back to the question of fashions for a moment, the point about that is this, that the public wants to get a particular thing. The manufacturer wants to maintain the reputation of his goods; the reputation of his goods is involved. He tries to meet the public taste; he wants to push his goods on the attention of the public, and therefore he makes a contract with a merchant and sells to the merchant these goods for a certain price upon the condition that the merchant will devote skillful salesmanship to the sale of these particular goods. That is salesmanship; that is not just simply handing out goods over a counter. When a customer comes in and will take any goods the fellow behind the counter may hand out to him, that is not salesmanship. Salesmanship consists in convincing a purchaser that this is the thing he wants.

Mr. PETERSON. When he is really selling him something he does not want?

Mr. NOBLE. If he does not want it, he does not have to buy it.

Mr. CAREW. In other words, Congress ought to save a man from himself?

Mr. NOBLE. The suggestion just made is that you might provide a retreat for people of that character.

Mr. PETERSON. He buys that because of the argument of the salesman?

Mr. NOBLE. If he does not want to buy it, but still does buy it, then that is his own affair.

Mr. PETERSON. If he is strong enough to resist that kind of salesmanship, he will not buy it.

Mr. NOBLE. It is in the interest of the trade that goods are manufactured and sold. It is a question of selling those goods.

Mr. PETERSON. The general public is involved, also.

Mr. NOBLE. The general public is very much a part of this whole business.

Mr. CAREW. Do you not think it would be a good thing to sell him something he does not want, so that he will be more careful the next time he goes in to buy?

Mr. MCCOY. What is the difference between one concern having an exclusive agent in Washington and another concern employing salesmen to travel throughout the country on condition that the salesmen shall represent that concern alone?

Mr. NOBLE. None in the world. The principle of this attempt to prevent exclusive agencies, and that is what it amounts to, is to attempt to say that business men shall not have any initiative; that they shall not attempt to push their own goods. You have got to have business initiative.

I want to come back to the subject I was previously discussing. The matter we are trying to protect and regulate, if you please, by this legislation is interstate trade; not to destroy and stifle it. Anything which prevents extension of interstate trade stifles it, and it is a serious thing for Congress to say that manufacturers shall not have initiative because of the use of methods that have been utilized ever since time began.

Mr. PETERSON. Let me suggest something right there.

Mr. NOBLE. If you will excuse me a moment, I speak just as much in the interest of the consumer as in the interest of the manufacturer, because the consumer is just as much interested in getting the goods as the manufacturer is in producing them and selling them, speaking from a public point of view.

Mr. PETERSON. Does not the driving of trade in one direction—toward one man—stifle the initiative of the other man who wants to get into the trade and compete with him?

Mr. NOBLE. Not at all; it encourages it.

Mr. PETERSON. Do you think that is a very good way to encourage him—to say that one man shall sell one line of goods and nothing else?

Mr. NOBLE. There is nothing in the custom which makes a man sell one line of goods and nothing else.

Mr. PETERSON. But you prevent him from doing it. I would prefer somebody else to get into the business.

Mr. NOBLE. A man on the next street corner can do it. Why? Why say that every man must deal in everything?

Mr. PETERSON. I do not say that; but give him an opportunity.

Mr. NOBLE. He has an opportunity. He need not make an exclusive contract if he does not want to.

Mr. PETERSON. Then he can not get those goods.

Mr. NOBLE. Then there are other goods which he can get.

Mr. PETERSON. He may have to depend upon that particular line of goods.

Mr. NOBLE. If he has that demand he will make money and serve the public by doing that. I think this section 10 is very important. Take this case: Suppose a factory in Georgia, desiring to buy coal in Tennessee, finds that by agreeing to buy the entire output of a mine coal can be obtained cheaper and accordingly gets a price conditioned upon a covenant that it will buy the entire output of the mine and that the coal operator will sell that factory exclusively all that it mines, wherein is the public harmed? The cheaper price of the coal is passed on to the public in a less cost of the goods, and yet this particular transaction appears to be prohibited by the language of section 10 and the last proviso of section 9.

Mr. FITZHENRY. Would this section prevent a wholesale grocer from contracting to buy the entire output of a factory?

Mr. NOBLE. Absolutely.

Mr. FITZHENRY. You think it would?

Mr. NOBLE. Yes, sir. It says so. It says "exclusive sale." You can not say it does not work both ways.

The CHAIRMAN. There has just been a call of the House, and the committee will take a recess until 1.30 o'clock.

(Thereupon, at 12.05 p. m., the committee took a recess until 1.30 o'clock p. m.)

AFTER RECESS.

The committee reassembled pursuant to the taking of recess.

The CHAIRMAN. We will be very glad to hear further from you at this time, Mr. Noble.

Mr. NOBLE. I wish to say a little more in regard to the provisions of section 10. The object of that section, as explained by Mr. Carlin, will go much further with the language used than without it. Take the case of the manufacturer, for instance, who wanted to buy his coal from a coal mine in Tennessee. He found that by making a covenant to buy the entire output of the mine he could get his coal at a price materially lower than otherwise. Section 10, as it stands, would prevent the making of that contract, because it says you can not make an exclusive contract.

Mr. VOLSTEAD. Is not this true: It could not apply to a case of that kind, because a person down there would not be selling the coal, but purchasing the coal.

Mr. NOBLE. Yes, but put it the other way around; and you have got to put it that way, because the miner could not make that kind of a contract, and the benefit of the cheaper price on the coal is passed on by that manufacturer, and the public is benefited.

Mr. VOLSTEAD. I hardly think the language warrants that construction. It says, "That the purchaser thereof shall not deal in the goods, wares, or merchandise of competitors of the seller." If he went up there and undertook to buy the whole output of the mine, how would this language apply?

Mr. NOBLE. Suppose we put it the other way. Suppose the owner of a mine went to a manufacturer and said, "On condition that you will buy my entire output, or being a manufacturer, that you will buy the entire output of my manufactured goods and deal exclusively in my goods, I will make you a price materially lower than the ordinary competitive price, and I will always sell you at a

price 2 per cent below the price offered by a competitor"; that is the case exactly, and that language would make such a contract unlawful.

What happens in the case of factors throughout the country? They make an agreement to handle the goods of a manufacturer or a group of manufacturers, and they covenant that they will not handle the goods of anyone else, and that the manufacturers shall not sell their goods to anyone else, and on that condition supply capital to the manufacturers of goods who, in turn, supply it to the growers. That is also the case with a good many farm products of the country which are sold through common agents. But this section would prevent that.

Mr. McCoy. What underlies that is this: Somebody has got to market the goods. If the manufacturer has to market them to a thousand individuals he has an added cost in his business, whereas if he markets them through one concern, that concern bears those costs, and the manufacturer can afford to sell a little bit cheaper because he saves something.

Mr. NOBLE. If the manufacturer did not do that, the additional cost would be passed along to the public, whereas, by the employment by the common agent, the goods are sold to the public at a cheaper price.

Now, if that section is to stand, certainly it ought to be amended by putting in a proviso, which might read something like this:

Provided, That nothing herein shall be held to prohibit contracts obligating the purchaser to buy exclusively from the seller, on terms agreed upon between them, all goods, wares, and merchandise required by the purchaser for his own use or in the business conducted by him or to prohibit sole selling agencies.

If you do not put such a provision as that in there you destroy the standard methods of doing business and revolutionize them.

Mr. VOLSTEAD. Suppose in the last line you should simply insert, after the word "thereof," on page 2, this language, "If a retail dealer of the class of goods purchased," so that it would read like this:

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 make a sale of goods, wares, or merchandise, or fix a price charged therefor or discount from or rebate upon such price, on condition or understanding that the purchaser thereof, if a retail dealer of the class of goods purchased, shall not deal in the goods, wares, or merchandise of a competitor or competitors of the seller.

That, of course, would confine it, I think, more to what it has been generally supposed this section was intended to cover.

Mr. NOBLE. It would have a tendency to do that. But would not that interpose a further difficulty?

Mr. VOLSTEAD. That is why I suggested it, so that you could suggest a difficulty.

Mr. NOBLE. That presents this difficulty: Under our Constitution freedom of contract is just as much one of the liberties guaranteed to us as freedom of life. The Supreme Court has so held. Why should the retail dealer be inhibited from making a contract which is for the benefit of his own trade?

The CHAIRMAN. But has not the Supreme Court, in several cases, recently said that the right of contract could be abridged?

Mr. NOBLE. I do not mean to suggest that you can not constitutionally abridge the right of contract where it involves the question of public interest, as where the health or welfare of a community is involved.

The CHAIRMAN. Take the cut prices of proprietary articles, drugs, and things of that kind, where the manufacturer or the producer of the article undertakes to stipulate that they shall be sold at a certain price by the retailer. The court has said that freedom of contract did not give the manufacturer the right to enforce that sort of contract.

Mr. NOBLE. No; because that was a restraint of trade harmful to the public interest. I think it is an exact case in point, Mr. Chairman. That is the case where the right of Congress comes in, but the decisions as they now stand meet the very point suggested by Mr. Volstead.

Now, passing on to the next topic, section 12, that provides for a new species of conclusive evidence on estoppel.

The first criticism I would make of it is that it is not fair. It is not mutual. If enacted, it should be so amended; and also amended so that decrees entered on consent, pleas of guilty and nolo contendere, may not be used as conclusive evidence of the same facts and conclusive evidence as to the same issues of law.

To illustrate, a party may not wish to contend with the Government, prefering to reorganize his business in accordance with what he may understand the law to be, and therefore to consent to a decree being taken against him and get the court to approve the form of reorganization which he adopts. Now, that is not a trial; that does not establish the facts set out in the pleading. This language is that upon the facts involved in the issues it shall be conclusive evidence. Of course, a consent decree does not establish the facts; it merely relieves the plaintiff of the necessity of proving his case. If you consent to a decree for the purpose of bringing about a reorganization agreeable to the court and consented to by the public authorities, by the Attorney General or the district attorney, it does not establish and should not establish the kind of facts which would constitute an estoppel as between the Government and such an individual. Further, take a criminal case. Many men may go in and plead guilty or nolo contendere. Suppose they plead guilty. They may do so upon some assurance from the district attorney, given under proper circumstances and considerations, that he will urge upon the court a mild sentence or a suspension of sentence. The personal considerations which lead such a party not to contend with the Government should not establish an estoppel against him in favor of a third party. Take a case of nolo contendre. A man may not be able to contend, although perfectly innocent, because a witness who has knowledge of all the facts may have died. We are all lawyers, and we are familiar with such situations as that, where a defendant can not get his proof. Under such circumstances the only thing to do is to make the best terms he can with the public authorities; but that should not establish an estoppel against him. The provisions should also be mutual. If you establish an estoppel in any case against a man you ought to establish an estoppel in his favor. If you are going to say decrees or judgments shall consti-

tute any form of estoppel it should constitute a similar estoppel where he wins. But there is another consideration which——

Mr. WEBB (interposing). This provision simply requires that the evidence and the law are made an estoppel. Now, in nolo contendere is any evidence usually submitted or any law argued or passed upon?

Mr. NOBLE. No; but the language here is that whenever a decree or judgment is entered it shall constitute conclusive evidence of the facts and of the law. Now, what are the facts? They are the things set out in the pleading or the indictment. If you consent to a decree, the issues that are presented are those set out in the petition or the bill of complaint, whatever we may call it; if it is in a criminal case, it is covered by the facts set out in the indictment. As to those facts this section says they shall be conclusive evidence.

Mr. MCCOY. This idea was suggested to me yesterday: That if this provision were to be allowed to stand the courts, realizing that in a large case there might be thousands of individuals to be injured in various ways, each one perhaps in a different way, and knowing what it meant to have a decree in estoppel against a defendant, might undertake to go more minutely into a finding as to what the defendant had been guilty of than if they proceeded as they do now without this right to use a judgment, and, consequently, there would be a greater chance, for instance, in an equity suit, for errors to creep into the proceedings because the findings of the court would be more minute and, therefore, be more chance of error. Do you think that is a sound objection?

Mr. NOBLE. Yes; I think that is a sound objection, because, as a matter of fact, as you, of course, know, under our Federal procedure an equity court may find generally. If the court attempts to find in particularity, then comes the question of review as to whether a particular finding is justified, and if a particular finding falls out, the whole case may be overturned.

Mr. MCCOY. The point was this—although I do not know that I made it clear—that the court, realizing the consequences of the enactment of such a provision in this law, might feel, in the interest of justice, constrained to be specific.

Mr. VOLSTEAD. Is that not true of any case brought on behalf of a large number of creditors? For instance, the case is brought by the plaintiff for his own benefit and for the benefit of other creditors that may come in, and it seems to me the same objection could be made.

Mr. MCCOY. No.

Mr. NOBLE. No; because under the theory of the law they are before the court, and they have got to come in before judgment; they must not come in afterwards.

Mr. VOLSTEAD. That is true, but in such a case there are certain facts which must be established by all the parties; each one that comes in must prove his claim.

Mr. MCCOY. He simply proves that he is a creditor, and that makes a well-defined issue.

Mr. VOLSTEAD. But you have got to prove many other circumstances before you can go into that suit. You take a suit for the purpose of securing title, where there is complication in the title. The parties come in and all they prove, except the one who has the

laboring oar in bringing the suit, will be their individual claims, but they rest upon the proof made by the original suitor; he will make proof as to a great many of the other facts that are necessary and which are for the benefit of all the other parties.

Mr. McCoy. The point that was made by the man who was talking to me about the matter was this: That a thousand people may claim to have been injured by an alleged illegal combination; the circumstances of the injury complained of may be the same as to most of the claimants, but that there may possibly be 100 of them who were not involved in the suit when the injunction was issued.

Mr. Volstead. Then, the judgment may have no bearing whatever on their cases, if they can not avail themselves of some of the facts established in the main suit as a part of their own evidence.

Mr. Noble. That goes to the fundamental question involved here, and that is, that the court in every instance has got to be the judge of the character of the evidence and its weight when submitted to it. Now, it is unconstitutional to legislate that a judgment or decree shall be "conclusive" evidence. That has been passed on by the Supreme Court in a case absolutely on all fours with this language. After the Civil War there was a statute passed giving the President power to grant pardons, but it contained a provision that if the person accepting a pardon did not protest in writing his innocence of having participated in the rebellion that it should be conclusively presumed from his accepting the pardon that he had participated, and that that should constitute conclusive evidence. In United States *v.* Klein the Supreme Court held that this contravened the Constitution as invading inadvertently the judicial power of the Government, saying:

> Can we do so [give effect to the act] without allowing that the legislature may prescribe rules of decision to the judicial department of the Government in cases pending before it?

The decision held that by the act—

> The court is forbidden to give the effect to evidence which in its own judgment such evidence should have.

In doing this the court said:

> We think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.

Now, that is just exactly what this language does.

Mr. Beall. Where is that reported?

Mr. Noble. Eightieth United States, page 128. I think that is the fundamental objection to the bill. The court must be left to give to such evidence as is presented to it the weight which in its judgment it should have, because otherwise you deprive it of being a court.

Gentlemen, I realize that I am taking a lot of time and I will pass along as quickly as I can. Turning to the second bill, tentative bill No. 2, committee print, that bill is a bill to include within the meaning of every contract, combination, etc.——

Mr. McCoy (interposing). Just a minute before you leave that particular objection. Would you say that that objection would be overcome by making the decree or judgment prima facie evidence?

Mr. Noble. No, sir. I would say all you could do would be to say it would be evidence, the court to determine what the character of it was.

Mr. McCoy. What would be the nature of the objection to the admission of it if offered?

Mr. Noble. That goes to the question of whether or not the particular point was involved in the issues. It may not be material. You could make it competent evidence, some evidence, if it is material, but it may not be material. You could not prescribe beforehand that the court must say that a thing is material which does not go to the issue before it.

Mr. McCoy. You would limit our power merely to saying that it may be admitted in evidence without further proof?

Mr. Noble. Yes.

Mr. McCoy. And that is as far as you think we can go?

Mr. Noble. If admissible under the rules of law, I mean under the ordinary rules of evidence. My words went further than I meant to go. What I meant was this: It may be offered and received in evidence.

Mr. McCoy. Without further proof?

Mr. Noble. Yes.

The Chairman. But we could not give it any probative force?

Mr. Noble. The probative force that it may have would be such as the court rules it has. The force and effect of it, in other words, must be left to the tribunal that passes upon its character.

Mr. Peterson. Have we not many statutes which provide that certain conditions shall be taken as prima facie evidence?

Mr. Noble. Yes. But take this case, sir. Suppose a man were to bring a suit for damages; are you going to deprive him of the right to trial by jury? And if you give character to the evidence you do deprive him of that right.

Mr. Peterson. I am not defending this on the ground that it should be conclusive evidence; I am speaking of the declaration mentioned awhile ago upon the question of this being prima facie evidence. I wanted to know whether you were quite sure you were right on that proposition.

Mr. Noble. Well, in answering that question I attributed to the words "prima facie" some probative character. I do not know that I have given sufficient deliberation to it to answer that question. If it does not go to the extent of characterizing its probative force, then, perhaps, I would modify what I said.

Mr. Volstead. It seems to me that if you can use it as evidence at all you might just as well say that it could be used as conclusive evidence. I do not see where you draw the distinction. I think there are many instances where a judgment has been practically conclusive evidence against third parties.

Mr. Noble. Yes.

Mr. Volstead. There is not any doubt about that proposition; it can not be impeached at all by third parties.

Mr. Noble. Collaterally.

Mr. Volstead. And here is a proceeding in which the United States Government, on behalf of all the people, on behalf of the people who have these claims, brings a suit. Now, the party against whom the suit is brought has ample notice of the fact that that is what it is seeking to establish, practically a determination in rem so far as all the others are concerned. It seems to me that if you can say it

is prima facie evidence you may as well say it is conclusive evidence, as we say in those rem suits. It is true that when you come to introduce that in evidence you no doubt will have to show it has some bearing upon the case. I concede that the findings of fact in the establishment of that judgment may have no bearing upon certain claims while upon others it may have a very material bearing. However, I am not able to see that this covers it so very clearly.

Mr. FLOYD. Do you not think there is a very wide distinction between declaring that the decree of a court in a suit brought by the Government against a corporation is conclusive evidence and declaring that the failure of an individual to comply with certain requirements of the statute is conclusive of the facts?

Mr. NOBLE. I think there is a wide distinction, and I think that that is one of the distinctions meant to be pointed out.

Mr. FLOYD. I had reference to the decision of the court in the case you referred to a moment ago where Congress had passed an act in regard to a pardon, and in which there was a provision that if the party did not file some kind of a statement within a certain time that he had not participated in the rebellion it should be conclusive evidence that he had participated.

Mr. NOBLE. Yes.

Mr. FLOYD. Do you not see a very marked distinction between Congress declaring that kind of evidence conclusive and declaring that the solemn adjudication of a court by judgment may be made conclusive evidence?

Mr. NOBLE. As between the Government and the party, of course, it would be conclusive evidence, but the issues which are involved in the third-party suit are not the same.

Mr. FLOYD. It is only conclusive evidence as to those issues that were determined in the Government's suit.

Mr. NOBLE. That is a question for judicial interpretation, as to whether or not it covers those circumstances; that is, whether the issues that arise are the same? That is your judicial question, as to whether it is conclusive evidence or not. Is not that true always in the trial of a case where the court instructs that anything is conclusive evidence or rules as a matter of law upon the question before him because there is no doubt left?

Mr. VOLSTEAD. I think it is true that, in many instances, this kind of presumption will add little when you come to try your suit, but to the extent that it establishes a fact in the suit of a private suitor it seems to me it might be introduced.

Mr. NOBLE. My suggestion is not that it should not; my suggestion is that you should not attempt to characterize its legal effect. That was my suggestion. I agree with you entirely; we are saying the same thing.

Now, gentlemen, passing to tentative bill No. 2, it is provided "That the words 'every contract,'" etc., "shall be deemed to include any combination or agreement between corporations, firms, or persons," etc., "for the following purposes."

This bill again deals with ways and means of committing a certain act, and in so far as it attempts to define, I think, there are various objections, which I will point out specifically. First of all, on page 2 of the bill, in line 1, the word "competitive" I submit should be put in after the word "between," so that it refers to competitive

corporations, because otherwise it may construe a case in which the parent company would——

Mr. McCoy (interposing). Would it not be better to say "potential competing companies"?

Mr. Noble. No; because——

Mr. Volstead (interposing). That would almost leave it as it is now.

Mr. Noble. I think it ought to be "competitive corporations."

Mr. McCoy. Two companies might be on the verge of getting to the point where they felt they would have to compete and rather than do that they might want to unite.

Mr. Noble. Yes.

Mr. McCoy. They may gradually be working toward the other in a territorial way; they have not been competitors but they say they are about to become competitors, and rather than be competitors they want to unite.

Mr. Noble. I do not know that you ought to forbid that in every instance; I do not think that ought to be forbidden except, perhaps, in some cases where it comes within the general purview of what we were discussing.

Mr. McCoy. I did not say it should be, but your wording would make it appear that the corporations are actually competing.

Mr. Noble. But if you attempt to define what the word "competitive" is you get into difficulties.

Mr. McCoy. If you put in that word you have got to include a definition of it.

Mr. Noble. Well, there may be something in that suggestion. That is one of the difficulties about attempting statutory definitions, it seems to me.

Now, gentlemen, taking paragraph marked "First. To create or carry out restrictions in trade or to acquire a monopoly in any interstate trade, business, or commerce," I would suggest that after the word "restrictions" there should be inserted the words "harmful to the public interest." It is not every restriction in trade that ought to be forbidden. Take the case of two competing stage lines serving a territory where the railroad is some distance from the village, neither one of them successful and neither one of them affording satisfactory service. If you did not put in the words "harmful to the public interest," or similar words, they could not go into partnership, although by having that privilege they might improve the service and give the public what it required.

Mr. McCoy. Do you make any distinction between restraints of trade and restraints of competition?

Mr. Noble. Oh, yes; there are many restraints of competition which do not amount to restraints of trade.

Mr. McCoy. Would not that be just one of the instances which you have given, of two competing companies, neither of them doing a successful business; they restrain competition by going into partnership but they may increase trade.

Mr. Noble. Yes; but the bill says "restrictions in trade." That is not restraint of trade; there may be a restriction which is not a restraint of trade. Restraint of trade has a definite meaning in the law; restrictions in trade constitute a new set of words and will probably have a much wider significance.

Mr. VOLSTEAD. Would not this introduce the very element that has been so much commented on in reference to this Standard Oil Co. case, where the Supreme Court injected the word "reasonable" into the statute, and would it not let down the bars a good deal if you put in such a phrase as that?

Mr. NOBLE. Harmful to the public interest.

Mr. VOLSTEAD. Have we ever had any definition of the words "harmful to the public interest"? Would the courts know how to construe those words?

Mr. NOBLE. They use the phrase; it has been in the law books for many many years. It was the whole basis of indictment in England before the Revolution, and it is well known in the law now. Now, take the case——

Mr. VOLSTEAD (interposing). Might you not as well say "To create or carry out reasonable restrictions"?

Mr. NOBLE. There is no doubt that there has been a certain amount of confusion between what the law is and the discussion of it in the public prints. Of course, there are loose expressions in the cases. We all know that the judges, in order to illustrate what they mean, sometimes use loose language; but the words, "Restraint of trade," "Harmful to the public interest," have been defined in the cases. Now, it is always a question of fact as well as a question of law in every case, and the court must determine it, or the court and jury, in every case, whether it does come within the meaning of harm to the public. Restriction in trade would have the effect of destroying or inhibiting all partnerships in interstate business. It is a contradiction in terms to say a reasonable restraint of trade is harmful to the public; that is a contradiction in words, and there can not be any such thing. If it is harmful it is not reasonable, and the Supreme Court did not say so. I guess you agree with me about that. The Supreme Court did not use the word "reasonable" in that sense at all; they used it in connection with the manner of construing the act—the manner of getting at its meaning.

Now, the language as used in this paragraph is too strict, too broad. It means a great deal more than the restraint of trade which is the policy of the law as declared in the Sherman Act. It would make impossible a case of this character: Take two grocery stores on opposite corners which serve people in the same neighborhood. Under this language they could not unite, because that would be a restriction in trade, although it might be that they had to unite; the person who owned one of the stores might die, and his family might want to dispose of the business to the man doing business on the other corner, but this would prevent, as the language now stands, such a disposition of the business.

Mr. MCCOY. In other words, you would apply it in the same sense you do the language forbidding the restraint of competition?

Mr. NOBLE. Yes; it would have a meaning something of that type; it might mean something of that sort.

Mr. MCCOY. And restraints of competition have always been legal—I mean some of them.

Mr. NOBLE. Yes.

Mr. MCCOY. Partnerships, for instance.

Mr. NOBLE. Yes; and things of that character. Now, to pass to paragraph marked, "Second. To limit or reduce the production or

increase the price of merchandise or of any commodity." Well now, gentlemen, if that is done for the purpose of injuring a competitor or restraining his trade, that is against the law as it stands to-day; and if it is not done for that purpose, it may be a perfectly legitimate and wise thing to accomplish. Take, for example, the case of a manufacturer whose business is growing; he has got either to build a new factory or buy one. Suppose he finds he can get another factory across the street or that by extending his own factory and moving the machinery from the other one into his factory he can operate more economically; but if he should do that, the combined factory might produce less than the two factories. There you have limited the production, and that is prohibited by the rigid words here used. Yet that is a perfectly legitimate thing.

Mr. FLOYD. This prohibits all agreements. It refers to agreements.

Mr. NOBLE. That would be done by an agreement. If he should agree to buy the factory from his competitor across the street, he would no doubt enter into an agreement that his competitor should not go into that line of business for, say, 10 years, which is the ordinary restrictive agreement made under such circumstances. Now, that would be made unlawful by this language. Yet that has been the custom and that has been allowed by law time out of mind. The Supreme Court has said that in individual cases of that sort that is perfectly legitimate, although if done as a policy for the purpose of injuring trade it might become harmful and might become unlawful.

Mr. FLOYD. Suppose instead of using the word "combination" we say "any contract or agreement between two or more persons"?

Mr. NOBLE. That would become exactly the same thing, because every sale is the result of an agreement and every lease is the result of an agreement. Now, the Supreme Court has in many cases held that such an arrangement is perfectly legitimate.

Mr. FLOYD. My construction of that language, if you substitute the word "contract" for the word "combination," is that it means simply this: That where two or more persons, firms, or corporations, acting as distinct entities, make an agreement for the purposes specified it should be unlawful.

Mr. NOBLE. But suppose they are acting as distinct entities——

Mr. FLOYD (interposing). For instance, my idea of the meaning or intent of that provision is that it relates to two men who are engaged in a similar line of business, say, the grocery business, and who enter into a secret contract or agreement in regard to the business; while they do not consolidate or become one concern, they carry out that agreement in order to accomplish some specific purpose.

Mr. NOBLE. Take the case that you have given; take the two corner grocery stores that we speak of. Suppose they make an agreement that they will have a joint delivery service and that they will only deliver within a given territory. That would come within the language of that act.

Mr. FLOYD. What provision?

Mr. NOBLE. To limit or reduce the production or increase the price of merchandise or of any commodity. To limit the production not only means to produce less, but to limit the distribution.

Mr. FLOYD. I do not think it has any reference to the delivery of any commodity, but has reference to the output.

Mr. NOBLE. Yes; but of course it relates to that when it gets into interstate trade; it does not relate only to that which stands on the factory floor, but to that which has entered into trade.

Mr. FLOYD. I do not think it would affect that kind of transaction. I have never so construed the language.

Mr. PETERSON. Your idea is that it would require delivery as a part of production?

Mr. NOBLE. Yes; necessarily so, to get it to the consumer.

Mr. FLOYD. The provision is "limit or reduce the production or increase the price of merchandise or of any commodity." I do not see how an agreement pertaining merely to the delivery of goods in a community or in interstate trade would reduce the production or necessarily increase the price. It might reduce the price by having joint delivery; that might be the effect of it. However, I would understand that this language would apply in its broad sense to two or more concerns engaged in manufacturing or producing commodities whenever they should enter into an agreement to reduce the output.

Mr. NOBLE. Very good. Then, if you do that, why not amend the section so as to make the point clear, if that is what the section is intended to mean, by saying in any manner harmful to the public interest. Then you clear away the ambiguity.

Mr. VOLSTEAD. I would like to know whether you have any cases that define what that means—harmful to the public interest.

Mr. NOBLE. I will cite them to you.

Mr. VOLSTEAD. I do not remember having run across that expression to any great extent. Of course, it has been used incidentally, but it has not been defined in such a way as enables me to know where the demarcation would be.

Mr. NOBLE. Of course, the line of demarcation is in the mixed question of law and fact, as we know. But I would be glad——

Mr. VOLSTEAD (interposing). Of course, restraints of trade have been defined from time to time by the courts, but I do not remember ever having seen any definition of that expression. It seems to me, unless there is some definite holding on the proposition, that we should inject an element of great uncertainty by using those words, and it seems to me that if we put those things in we would practically wipe out the Sherman Antitrust Act.

Mr. NOBLE. Oh, no. The Sherman Antitrust Act has been passed upon by the courts time and time again. The courts have pointed out those incidental restraints which do not harm the public interest. Now, the line of demarcation is, of course, that when they do harm the public interest, then they are inhibited.

Mr. MCCOY. Can you give an instance named by the Supreme Court where a restraint of trade—not a restraint of competition—was indicated not to be harmful to the public interest?

Mr. NOBLE. No, sir.

Mr. MCCOY. I understood you to say just now that the Supreme Court had pointed out certain instances of restraint of trade and said that they were not harmful to the public interest.

Mr. NOBLE. I misunderstood your question.

Mr. VOLSTEAD. Are there not a number of instances in which the Supreme Court has practically said they did not have anything to do with the question whether they were harmful to the public interest or not?

Mr. NOBLE. Some of the instances that the Supreme Court referred to in the case of Hopkins *v.* United States and again in the case of United States *v.* Joint Traffic Association——

Mr. MCCOY (interposing). Were those cases in relation to the restraint of trade or restraint of competition?

Mr. NOBLE. Now, you get to a question of terminology. They said they were not restraints of trade which were inhibited by the act; in other words, they were not restraints of trade which are harmful to the public interest. For example, the court said:

> To treat as condemned by the act all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased would enlarge the application of the act far beyond the fair meaning of the language used. There must be some direct and immediate effect upon interstate commerce in order to come within the act.

In other words, if the effect is incidental, not direct; if it is not immediate, it would not come within the meaning of the language "restraint of trade."

Mr. MCCOY. The effect of what kind of an act? That is what I want to bring out—whether it was an act in restraint of trade or an act in restraint of competition.

Mr. NOBLE. It may be that the line of demarcation you are indicating is that those things which are merely in restraint of competition and which do not amount to a restraint of trade are not harmful. Is that what you mean?

Mr. MCCOY. That is about it. In other words, I can not conceive of any restraint of trade being harmless. I think that every restraint of trade is harmful, and I think Congress, in passing the Sherman Act, meant to say so, but I think there are restraints of competition which are beneficial.

Mr. NOBLE. That may be a very good line of demarcation. It may be that that might describe it if the terminology were correctly used.

Mr. MCCOY. Mr. Stanley has proposed an amendment to the Sherman law relating to every contract which in any degree is a restraint of trade. In other words, he wants to make "every" mean just what "every" does mean when you look at the definition and read it.

Mr. NOBLE. You have done the same thing in paragraph 4 of this bill. Paragraph 4 of this bill says:

> 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.

Mr. MCCOY. That provides for "competition"?

Mr. NOBLE. Yes.

Mr. MCCOY. And if that fourth section had said, "to prevent a free and unrestricted trade," I should not have any objection to it.

Mr. NOBLE. If it had said "agreements to bring about restraint of trade" then it would not be objectionable.

Mr. McCoy. But as it stands to-day I can not imagine myself voting in favor of it.

Mr. Noble. No. It inhibits all of the things which I have just read from the Supreme Court decision, which are perfectly legitimate. And I have, of course, given only some few illustrations.

Mr. McCoy. And prevents the formation of partnerships. Mr. Untermyer has said, and I agree with him, that it would prevent the formation of a partnership.

Mr. Noble. Absolutely it would prevent a partnership, such as, I understand, any partnership engaged in interstate trade.

Mr. McCoy. Surely. Two hat manufacturers, for instance, working independently, might decide, for good reasons, that they would like to form a partnership; but this would prevent their doing so although trade might be increased instead of restrained.

Mr. Noble. Yes. As you gentlemen know, the marriage of families often results in the formation of partnerships in various lines of business, but this would prohibit that.

Now, what I have said about paragraphs 1 and 2 applies, of course, to paragraph 3, which is, "to prevent competition in manufacturing, making, transporting, selling, or purchasing merchandise, produce, or any commodity." What is desired there is an amendment so that it shall relate to restraints of trade, after the word "commodity."

Mr. Floyd. You say that paragraph 4 prevents partnerships. That provision is copied from the New Jersey statute. Do you contend that you can not lawfully form a partnership in New Jersey under the language of that statute?

Mr. Noble. I have not that language before me, and I would not want to answer that question without examining the language.

Mr. Floyd. My recollection is that it was copied from the New Jersey statute. I understand all follow the New Jersey statutes in the main. I do not construe it to affect partnerships, but, as I stated a moment ago, I understand it intends to prevent contracts for these purposes between two or more corporations, individuals, or concerns that are acting independently; that is, to prevent the making of agreements of that kind.

Mr. Noble. But that is what a partnership is.

Mr. Floyd. It becomes one concern when a partnership is formed.

Mr. Noble. So it may be a combination, because when one company buys out another company it becomes one concern.

Mr. Floyd. That is so if you use the word "combination" as it is written, but the word "combination" in that sense is not used in the New Jersey statute. It says "contract or agreement" in the New Jersey statute.

Mr. Noble. Well, I have read that act, but it has been some time ago.

Mr. Floyd. It says "contract or agreement," while in this tentative draft the word "combination" is used. If you leave the word "combination" in there it may be susceptible of that construction.

Mr. Webb. Here is the New Jersey statute to which you refer, I presume:

To make any agreement by which they directly or indirectly preclude a free and unrestricted competition among themselves, or any purchaser or consumer,

in the sale or transportation of any article or commodity, either by pooling, withholding from the market, or selling at a fixed price, or in any other manner by which the price might be affected.

Mr. NOBLE. Of course, that is quite different from this.

Mr. MCCOY. It is more drastic?

Mr. NOBLE. Yes.

Mr. VOLSTEAD. Do you know whether this New Jersey statute has ever been in the courts?

Mr. NOBLE. I am not familiar with any case containing it.

Mr. MCCOY. No; but a member of the Assembly of New Jersey introduced a resolution the other day for the purpose of ascertaining why the Attorney General had not undertaken to enforce those acts of the 1913 legislature.

Mr. CAREW. Mr. Volstead, you said you had a law in Minnesota similar to the one that was discussed here this morning?

Mr. VOLSTEAD. We have a law similar to section 9.

Mr. CAREW. Has that been enforced?

Mr. VOLSTEAD. Yes; it has been enforced against the Standard Oil Co. That has been in the United States Supreme Court and held constitutional.

Mr. CAREW. Has it been enforced otherwise?

Mr. VOLSTEAD. Oh, I do not suppose it has been enforced to any great extent. It has been on the statute books, but I have not paid much attention to it since I have been here.

Mr. NOBLE. Now, gentlemen, I think if those provisions are to stand they ought to be amended in the manner I have suggested.

Now, passing over to the penalties attached, and the language of section 5. I do not think it will be effective in any of these definitions; that is, I do not think it will accomplish the purpose that is meant. The courts will undoubtedly find on the part of Congress an evidence of congressional intent, congressional construction of its own laws, which will narrow the instances in which prosecutions may be had under the Sherman Act. I believe that is a grave objection to the legislation.

With respect to the penalties, gentlemen, I want to say one word. I think the Sherman Act has got, to use the vernacular, "teeth in it," and I doubt whether to attempt to increase the crimes would not do a grave injury to the business enterprise of the country. For a man to have hanging over his head the possibility of committing a crime in doing business in the way it has been done generation after generation is a matter of very doubtful wisdom. The producing classes of this country, the farmers and the manufacturers, are the bone and sinew which make our country grow. It is the pioneer that makes business grow. He tries new things, new methods of getting results; and to prescribe that certain methods, which have been open to business men from time immemorial and which are the world's custom, shall be unlawful, whether the result which they produce is harmful or no, would do a grave wrong. And, furthermore, it is unnecessary, because the Sherman Act, when applied, is effective. The decisions of the courts are clear, and it has been effective. The change in public view toward this kind of thing in the last few years is marvelous. Instead of having the country trying to evade the law, as it is charged, I think you gentlemen will

agree with me that the sentiment of the country is to obey the law. If you pass new laws which create difficulties, which are artificial, and which do not go to the result but which go merely to the means, you will produce a condition where men are thrown into doubt and, perhaps, evasion.

The language of the bill relating to holding companies have not been, so far as I know, drawn or determined upon; at least, I have not seen it.

Mr. MORGAN. I would like to ask you about the Sherman law. You have just stated that the tendency now is to obey the law. Do you mean by that that at the present time there are no prominent combinaions being formed, and that that tendency or drift of business has ceased?

Mr. NOBLE. I think the tendency distinctly is to follow the decisions of the courts with all sincerity.

Mr. MORGAN. But is it a fact that they are not now forming combinations as they did a few years ago?

Mr. NOBLE. Within my knowledge, that is not going on.

Mr. MORGAN. What proportion of the present business concerns—of course, this is merely a matter of opinion—will probably be dissolved under the Sherman Act in the next five years? What proportion of the business of the country is unlawful under the Sherman law?

Mr. NOBLE. I could not answer that question, sir.

Mr. VOLSTEAD. That is an economic rather than a legal question, is it not?

Mr. NOBLE. Yes.

Mr. MORGAN. Well, I do not know.

Mr. VOLSTEAD. That is, under the present law, I mean?

Mr. NOBLE. I think that a great deal of the discussion which has called things lawful or unlawful and called them combinations is because of a misconception of what the result has been and what the facts really are. Take, for example, the Northern Securities case. That was clearly an illustration that the result which was brought about was unlawful, although I suspect that almost any lawyer in this room would have held that every step was lawful. However, the result obtained was wrong and unlawful within the meaning of the Sherman Act.

Now, all holding companies, gentlemen—and that is what these combinations are characterized as being in many instances—are not bad. You gentlemen remember the case that Mr. Proctor brought to your attention—the Gulf Enterprise Oil Co. That was one illustration. Holding companies have financed lighting companies all over the country. For example, you take a group of villages having electric-light plants or gas plants and no one of them able financially to extend their operations or to secure the capital necessary to produce their gas or their electricity economically. Under those circumstances the method is and has been to buy up the stocks of the ones that are conveniently situated and turn those stocks into a holding company, and that holding company, because of its larger command of resources, is able to finance and get money enough, through the sale of its securities, to build a central plant or to enlarge one of the central plants and supply all the gas or electricity to the com-

munity at a better rate in price, better service, more current, and in every way more satisfactory to the public.

Mr. McCox. Why not buy out the companies, in a supposed case of that kind?

Mr. NOBLE. A good many of them have public franchises. You mean to buy them out and amalgamate them?

Mr. McCOY. Yes; to make one company instead of having holding companies.

Mr. NOBLE. A good many have public franchises, and it would be impossible to do that, as a matter of law, without the consent of the city, and that might not be possible to obtain.

Mr. McCOY. Then you immediately get into a question of public policy. Why should we leave the law so that corporations can do indirectly what they are not allowed to do directly?

Mr. NOBLE. Is that the question? That is not the question as I conceive it.

Mr. McCOY. Here are a lot of gas companies operating independently, and it may be a good thing for them to be taken into one company, and, perhaps, the best way would be the purchase by one company of all the companies and the elimination of the stock holdings separately. But you say they may have a public franchise and can not get the consent of the public officials. Now, the reason why they can not get it, we are bound to assume, is because it would be a bad public policy to give that consent.

Mr. NOBLE. Let me answer that question, if I may. The illustration I gave, of their being unable to get the consent of the city, is not the only illustration. There might be other excellent reasons. For example, they might not be able to buy all the stock; they might merely be able to get enough to hold a lease; they might not be able to purchase all of the stock and, as I say, might take a lease or might be able to get merely a contract. Now, all of those things would make it impossible to amalgamate them into one company, even though the public authorities were entirely willing. But you gentlemen must not assume that it is against public policy in a given locality if consent is not given, because we are all familiar with the difficulties of getting action through local boards. They are surrounded with difficulties which do not relate at all to questions of public policy.

Mr. MORGAN. Is it not a fact, in many cases, such as you have mentioned, that holding companies buy up a number of those public-utilities companies, and that that has been the very means resorted to by those companies in getting a larger capital than they deserve or should have, and in that way fleece the people and make big profits? Has that not been resorted to in those cases, and is not that what the people are grumbling about?

Mr. NOBLE. I think the people are now protected in that by the State public-service commissions.

Mr. MORGAN. Suppose a New Jersey company should buy a company in Ohio or West Virginia, you do not mean to say that the State of Ohio could control that New Jersey company, do you?

Mr. NOBLE. Did you say the New Jersey company was doing business in Ohio?

Mr. MORGAN. Yes.

Mr. NOBLE. Well, the New Jersey company could only come into the State of Ohio and do business on such terms as the State of Ohio provided.

Mr. MORGAN. I suppose that is true.

Mr. NOBLE. Now, gentlemen, I am not holding any brief for holding companies. Do not misunderstand me; that is not my point at all.

Mr. PETERSON. I would like to ask you a question in relation to these definitions. You say you would add to them "contrary to the public interest." Now, would not that tend to limit the Sherman Act, remembering that that was the very defense the Standard Oil Co. made in that case. They said, "We have not interfered with the public interest, but, on the contrary, we have promoted the public interest by making our production cheaper." If you added the words you suggest would not that limit the Sherman Act?

Mr. NOBLE. No, sir; in the case you mentioned the court held specifically that they had injured the public interest. There are many considerations——

Mr. PETERSON (interposing). But, mind you, at that time they contended that the clause which you ask to have put in should be read into the act.

Mr. NOBLE. I do not ask that that be read into the act, sir. I say that if you pass these proposed restrictions, which do not deal with restraint of trade but deal with restraints of competition, you are broadening the Sherman Act, you are extending it. Now, if I understand the bills correctly, the purpose is merely to give certain definitions to the law as it now stands, not to change the law.

Mr. PETERSON. That is our purpose.

Mr. NOBLE. If you do those things, my point is that you change the law, unless you make it clear that all you are attempting to do is to apply those things to restraints of trade.

Mr. PETERSON. You were suggesting amendments to these definitions.

Mr. NOBLE. So as to make them apply to restraint of trade.

Mr. PETERSON. When harmful to the public interest?

Mr. NOBLE. Yes; because you use the word "competition" and other words of that character. If you will confine it to the language of the Sherman Act you will find your definitions are not necessary, I submit.

Now, gentlemen, to go back to the question of holding companies. That is a question of means again, but what you want to get at is the result. If it can be proved that through a holding company, or any other device, you have restrained trade, of course, that falls. The Northern Securities case is the best illustration of it. But there are numerous cases where it seems to me, a holding company is necessary. I have in mind a firm which was established 60 or 70 years ago by the father of the present owners. It is one of the big enterprises in the United States. It undertakes great public contracts and carries them out. It is a great manufacturer.

Now, in order to do business in the various parts of the country and comply with local State laws they have organized subcompanies in many States; they hold the stock of those subcompanies so that in that sense they are a holding company. That is their method of transacting business. Your act when it is drawn should not provide

for companies having subcompanies. Take this same concern. It has invested money from time to time in the stocks and in the bonds of other companies, of railroad companies, of street-railway companies, of public utilities. Now, they will understake a contract which involves ten, fifteen, or twenty millions of dollars and they have got to have resources to undertake the contract; they must have their surplus invested, and they are a holding company of those securities. If you oblige them to distribute those securities and not hold those securities they can not undertake these big undertakings.

Mr. McCoy. Would you say a holding company existed when one corporation bought the stock of another, no matter what the extent of it was?

Mr. Noble. No. I do not know what you gentlemen are going to define as a holding company. I suppose what you are going to define as a holding company is one that is not an operating company. It seems to me a holding company is one which merely holds the stock of another company and does not operate.

Mr. Volstead. I presume that company could invest in bonds instead of stocks, could it not?

Mr. Noble. But stocks are much more readily saleable than bonds. If you have got to command large capital you can not always command it through the ownership of bonds. You might not be able to borrow as readily, and bonds are not saleable like stocks.

Mr. McCoy. Would you say a sufficient definition of a holding company would be one whose principal or actual business was the holding of stocks?

Mr. Noble. That is undoubtedly the common acceptation of the term "holding company." But it seems to me, gentlemen, you have got a broader question than that. I would go a step further. I presume what you want to do is to prevent the possible deception of the public by holding companies; that you desire to have known those with whom purchasers are doing business in order to clear up any possible deception in competition. It does not matter, if that be your object, whether the stocks, or a part of the stocks, be held by one company or be owned by individuals, so long as the public knows with whom the dealings are carried on. Suppose the case that I have given of this great manufacturing company, with its several subcompanies. Suppose that all those subcompanies are obliged to state that they are branches of the parent company; suppose operating companies, whose stocks are held by the holding company which does not operate, were obliged to publish on all their literature that goes to the public, "Our stock, or such a percentage of our stock, is held by 'X' holding company." The public is informed and the apparent competition no longer deceives anyone, and you know with whom you are dealing.

Mr. Volstead. Would not the suggestion be immediately made that that kind of a provision was unconstitutional?

Mr. Noble. That objection was met, I think, was it not, in the case where Congress required the newspapers and magazines to publish a list of their bondholders?

Mr. Volstead. Has that case been decided?

Mr. Noble. Yes; it was decided adversely to the newspapers, and the law was upheld. I do not know what your plan is, but you ought not to prevent a successful man from investing his money in the lines

of business he is acquainted with. Take, for example, a man who has grown up in the steel business. He is informed upon that industry and he ought not to be compelled to go and invest his capital in watchmaking or in the silk business; he knows nothing about those things. He ought to be allowed to invest it in the lines of business about which he is informed. If you legislate with respect to holding companies, it seems to me that the evil which you want to correct is the one which gives apparent competition through holding companies when the competition does not exist or exists only in a modified form.

Mr. VOLSTEAD. Is not this true, however, that these companies, by reason of this method of acquiring stock in other companies, become so large that they are, in many instances, monopolies? I am not suggesting that I am ready to get rid of the holding companies, but is not that true?

Mr. WEBB. His idea is that you could break them up under the Sherman law.

Mr. VOLSTEAD. I do not see any prospect of breaking them up just now.

Mr. NOBLE. It was done in the Standard Oil case and in the Tobacco case.

Mr. VOLSTEAD. They are practically monopolies now.

Mr. NOBLE. And in the Northern Securities case.

Mr. VOLSTEAD. That case did not affect the situation at all, although probably it did give us some valuable principles of law.

Mr. NOBLE. The decision is all right.

Mr. VOLSTEAD. Yes; the decision is all right, and that is about all we got out of it. The real combination was never attacked in that case; the real combination exists to-day and has existed ever since. It was valuable to this extent, that it gave us something new by way of principles of law which no doubt had a deterrent effect upon others in forming corporations of that kind, because I presume if no decision of that kind had been rendered we probably should have had practically all of our railroads combined in various holding companies.

Mr. NOBLE. I think that is met, Mr. Volstead, however, by the present provisions of the Sherman Act, and that it is merely a question of the enforcement of it.

Mr. VOLSTEAD. I do not see anything that will ever disturb conditions, regardless of anything suggested so far.

Mr. NOBLE. Take the Terminal case at St. Louis. That is one of the best illustrations that the courts are enforcing the law. There was a case where——

Mr. VOLSTEAD (interposing). That was a case of combination between various interests, but here is a proposed combination of manufacturers into one industry.

Mr. NOBLE. That was a holding company. In the Missouri Terminal case they were all held in one company.

Mr. VOLSTEAD. I know. But take a case where you combine practically everything into one industry. How are you going to break it up when you have combination without contract, because that is practically what it permits? When you allow one corporation to buy the stock of another corporation you have a combination without

contract and practically without any violation of the Sherman Anti-trust Act.

Mr. NOBLE. I will say to you that if companies were allowed to combine only where they pay for what they buy with money or maturing obligations it would be a sounder basis of economics. Furthermore, if the provisions of these bills, opening up rights to sue, became law, do you not further accomplish the end you have in view? Is not that the purpose of Senate bill 1036?

Mr. VOLSTEAD. Can you suggest some method by which we can prevent absolute monopolization in various lines by these holding companies?

Mr. NOBLE. I think the suggestion which I have just made is an answer to your question, sir. My view is that this would aid the growth of business normally and would retard and perhaps tend to prevent harmful combinations.

Mr. MORGAN. Would not that method, however, very often prevent combinations which would encourage and help trade?

Mr. NOBLE. That might be, but if properly safeguarded it should not prevent or retard sound economic expansion of business.

Mr. VOLSTEAD. The old English law forbade anything of that kind; it prohibited the English corporations from buying the stock of other corporations, and I do not know but that is still the English law. Of course, in this country there has grown up a contrary practice. The greed of some of our States to get money out of charters has resulted in those States giving them all the powers possible, and practically nullified the effect of the Sherman Anti-trust Act.

Mr. NOBLE. Now, I have a suggestion to make as to the bill prohibiting interlocking directorates. The first section simply prohibits certain classes of people from being directors and officers of public-service corporations. Now, why does not that merely build up dummy directorates? Why do you not fix responsibility by saying that everybody who has stock enough by a cumulative system of voting to be a director has got to be one? If it is desired to fix responsibility I would suggest that is the way to do it. But the way provided here will merely build up a system of dummy directors.

There is one further thing I would like to say in regard to the interstate trade commission bill. I think the true way to meet the difficulty which you gentlemen are trying to solve is to create a court, or a body with quasi judicial functions, to which public men, business men, may resort. The President in his message said that the business men "desire the advice, the definite guidance and information, which can be supplied by an administrative body, an interstate trade commission."

The best way to make that effective is by not having a commission that is merely ex parte—one which goes out to see what it can find. What would be effective would be a body that will be responsible, where all persons who want to be heard can be heard; where business men can go, present their matters, be heard, and get definite guidance and advice. I do not mean to take away from the courts any of their present jurisdiction or to take away any of the present activities of the Attorney General or the several district attorneys, but if you will extend, for example, the jurisdiction of the Court

of Customs Appeals or create another body where investigations can be had upon the request of the parties themselves, upon the request of the Attorney General, or upon the filing of duly verified petitions, and where both parties—the parties themselves and representatives of the Government—can be heard, you will create a body that will have the confidence of the public and one which will build up a system of rules and definitions based upon actual cases. If you have a court of that sort it will only be a matter of a year or two until the cloud which people talk about will be cleared away.

I do not propose a court which shall give immunity; that is not my point at all, but a body to which business men may go with their affairs, have them heard, and learn where they stand; where they can get definite guidance and advice; where they can come in of their own motion, and which body can also act of its own motion or as suggested. I do not propose that such a body shall oust the Attorney General or the courts. It seems to me that if you create a commission which is ex parte in its character it will not command public confidence. I respectfully submit to you that you should create a court which will proceed upon substantial and simple but, nevertheless, judicial lines. If you do that, such a commission will work out the definitions which you gentlemen are trying to formulate upon a safe basis, upon a basis resting upon actual facts, and the public uncertainty which the President refers to will cease, because the people will have the right to come in and get the definite guidance and advice which he refers to. This suggestion is more fully stated in the memorandum I am filing with the committee.

Gentlemen, I thank you.

(The memorandum submitted by Mr. Noble is as follows:)

To the Chairman and Members of the Judiciary Committee of the House of Representatives:

The proposed tentative bills before the committee on trust legislation suggest the making of certain definitions and other provisions supplemental to the Sherman Act.

That law is a great piece of remedial legislation, which has the support of public opinion and of the courts, and has had the advantage of judicial and administrative interpretation and of application to business affairs for nearly a quarter of a century.

The more recent decisions have dealt with such large interests, such great factors in our business enterprises, that they have excited the discussion as well as the wide interest of people generally, and those discussions have accordingly taken a wide range. Much of the discussion has been by interested laymen who have been in reality discussing what is essentially a question of law, requiring a scholarly appreciation of the common law relating to restraints of trade; and, accordingly, it is believed much misapprehension of the true scope of the Sherman Act has arisen in the public mind.

Restraints of trade, where the public interest is concerned, have been the subject of judicial decisions in England and in this country for centuries, and the law relating to the subject is clearly understood by the courts and by lawyers.

The Sherman law was intended by its framers, as the discussions in Congress disclose, as an enactment by the Congress which would make the common law relative to restraints of trade and attempts to monopolize applicable to our Federal jurisdiction. The recent decisions of the Supreme Court and of the other Federal courts have made it clear that the intention of the framers is now fully realized by the courts, and the results of those decisions have demonstrated that wherever the public interest is involved the courts are fully protecting it. No language could be plainer than that employed in the Sherman Act—that where the public interest is concerned the acts of private individuals must give way to that interest.

Restraints of trade and attempts to monopolize which harm the public are clearly prohibited by the Sherman Act. The result which the law wishes to attain is the prevention of harm to the public interest; but the right of freedom of contract is quite as important to preserve as any other of our great rights, so long as that freedom of contract does not invade the public interest and do harm to the public.

The decisions of the Supreme Court and of the other Federal courts do not hold that restraints of trade or attempts to monopolize can be reasonable or unreasonable. What they hold may be shortly stated: That it matters not by what contracts, by what devices, by what conspiracies, by what combinations, restraints of trade harmful to the public are brought about, they are all unlawful. The question of reasonable or unreasonable is not applicable to a discussion of whether the restraint produced, if harmful to the public, is reasonable. That is a contradiction in terms. Every restraint which is harmful to the public interest is unlawful.

The restraints of trade which are permissible as part of the freedom of contract are those which do not harm the public interest and which are reasonably designed to effect the object which the contracting parties seek to accomplish.

What constitutes such restraints of trade and attempts to monopolize as are inhibited by the Sherman Act is always a mixed question of fact and law. As was said by the Supreme Court in Hopkins *v.* United States (171 U. S., 578, p. 592):

"To treat as condemned by the act all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased would enlarge the application of the act far beyond the fair meaning of the language used. There must be some direct and immediate effect upon interstate commerce in order to come within the act."

And again in United States *v.* Joint Traffic Association (171 U. S., 505, at p. 567):

"* * * we might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade.

"We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer, or merchant of an additional farm, manufactory, or shop, or the withdrawal from business of any farmer, merchant, or manufacturer, restrained commerce or trade within any legal definition of that term; and the sale of a good will of a business with an accompanying agreement not to engage in a similar business was instanced in the trans-Missouri case as a contract not within the meaning of the act, and it was said that such a contract was collateral to the main contract of sale and was entered into for the purpose of enhancing the price at which the vendor sells his business."

The growth of business requires extensions. Any manufacturer may have to build new factories; any merchant may have to build new stores; and if his business justifies such extensions he may bring them about through corporate forms, through partnerships, or through any other of the methods known to the law. He may buy out the factory of a competitor. He may buy out the business of a competitor and take a restrictive covenant collateral to the main contract for the purpose of enabling him to get in the good will and all the benefits flowing from his purchase. There may be the making of many contracts which, under a given set of trade conditions and made for a given set of purposes, are perfectly lawful, whereas exactly the same combinations, the same partnerships, and the same contracts, if made under different trade conditions and for different purposes, would be unlawful. So an attempt to say that the making of all combinations, of all partnerships, or of all contracts which in any way restrict free and unlimited competition or which restrict trade is unlawful; is to extend the common-law doctrine in respect to restraints of trade and attempts to monopolize and to enlarge the meaning of the Sherman Act to such an extent as will make combinations, partnerships, contracts, and the normal and healthy growth of industry, which are utterly without harm to the public, unlawful.

The difficulty, as before stated, is in the necessarily mixed question of law and fact which arises in every case; and this necessarily involves judicial deter-

mination in each case. As was said by one of the gentlemen who appeared before the committee, the courts must exercise "common sense" in dealing with the question. That is nothing more or less than saying that the courts must analyze the mixed question of fact and of law, and, when those facts are understood in respect to the public interest, apply the law, condemn the acts if the public interest is harmed, and declare lawful the contracts and acts involved if the public interest is not concerned.

The object in making this preliminary statement is to indicate the belief that the recent decisions of the Supreme Court have broadened and not narrowed the meaning of the Sherman Act, have brought within its scope clearly all arrangements, combinations, or devices which are harmful to the public interest, and that the contrary view, sometimes popularly expressed, is based upon a misconception of the true meaning of those decisions and their effect upon the act.

TENTATIVE BILL NO. 1—COMMITTEE PRINT.

This bill proposes to add sections 9, 10, 11, 12, and 13 to the Sherman Act. This bill and bill No. 2 provide, among other things, for certain definitions. It may be properly observed, before taking up the details of the bills, that definitions enacted into law themselves require definition when it comes to applying those definitions to the facts in a case.

Furthermore, it is suggested by the bills to prohibit the use of certain means whereby a result may be brought about; and certain means, certain contracts, certain combinations, etc., are specifically condemned. If it should turn out that these means and these combinations produce results which are not harmful to the public interest, then the bills will work harm and not good; and it is suggested that therein lies a fundamental difficulty. It is a fallacy to attempt to prohibit the use of means whereby a result may be brought about. For example: Murder is prohibited, but murder may be brought about through many different kinds of means or methods, which means or methods may be used for entirely innocent purposes and to produce a good result. To prohibit those means or methods simply because a person may wrongfully use them to commit murder is clearly not in the public interest. Strychnine, opium, cyanide of potassium are all poisonous drugs and are frequently the means of saving life, but if given unduly will produce death. By these means murder may be committed.

The bills under consideration, to extend the simile, prohibit absolutely the use of strychnine, opium, or cyanide of potassium for fear that some one, by their wrongful use, may produce trade death.

The Sherman Act as it stands absolutely prohibits all those restraints of trade and attempts to monopolize which produce trade death or harm to the public, and it does not matter by what means, by what devices, or by what methods the result may be accomplished.

In every case where the courts are called upon to pass upon the contracts, combinations, etc., of business men, they must first examine the contracts, combinations, etc., the acts of the parties under them, and come to a conclusion of fact as to whether, upon the application of "common sense," they are wrongfully directed and harmful to the public, and then the law must be applied. With the facts determined the law is clear.

SECTION 9.—DISCRIMINATION IN PRICE.

"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 allowence 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."

Suppose A owns a factory in New Jersey, where the prices of coal, labor, and pig iron are high, and a factory in Missouri, where the prices of coal, labor, and pig iron are materially lower than in New Jersey. Must A sell everywhere at a fair profit upon his New Jersey cost price, or may he sell in such sections as he can reach by freight from New Jersey at a fair profit upon his New Jersey cost price, and for such regions as he can reach from Missouri by freight at a fair profit upon his Missouri cost price? Shall the public be deprived of the lower price which he can make upon his Missouri factory because of its favorable location? It seems clear that this would result if section 9 be enacted and he were to sell at his Missouri cost, plus a fair profit; for he would, of course, absorb all the trade in that region. Competitors located elsewhere, where the unit of cost is higher, would be utterly driven out. And for A to trade habitually, as indicated, from his Missouri factory with the result mentioned, would be evidence of intent or purpose to injure or destroy a competitor within the language of the act.

One effect of the enactment of section 9 would be clearly to deprive a manufacturing corporation, having various factories located with respect to the trade in various communities, of the opportunity to sell at varying prices f. o. b. the various factories; for in any case where a factory capable of supplying the demand within a given freight radius was so favorably situated in respect to labor and raw materials as to be able to manufacture at a less unit of cost than any other factory which could supply goods within that freight radius, the factory supposed would necessarily have to charge the same price as would be charged by the manufacturer's most expensive factory, for otherwise, to charge a less price, would be to destroy a competitor in that given radius.

In this construction of the section its undoubted effect would be that the price for goods must be the same throughout the United States f. o. b. factory—grade, quality, and quantity being the same. This allows for no differences for commercial standing. Goods are sold upon certain standard discounts to men in good financial credit, but thousands of merchants are not able to get the same price because there is a risk involved in selling them at all. They can not pay cash, nor can the vendor rely upon their ability to pay upon the discount dates agreed upon. The practice is universal in such cases to charge a higher price for the risk involved. Such transactions as that would be absolutely prohibited by this act, and the merchant who through misfortune had had his credit impaired would be unable to get goods at all so as to work out of his difficulty. To illustrate: A large department store in the city of Washington has grown from very small beginnings. Some years ago they erected a building, anticipating being able to borrow money from time to time upon their general credit—not only to carry on their business but for some of the needs of the building. Financial depression came on and they were unable to make their payments. They went to their merchandise creditors, obtained an extension of time to meet their accounts, and arranged for the supply of further merchandise at prices sufficiently higher to safeguard the merchants in extending the credit. They worked out of their difficulty and are now a successful department store in the city of Washington.

Transactions such as this have occurred and will occur all over the United States. If this section becomes law, to extend credits of this kind would be impossible, for to make a difference in price which would injure or destroy a competitor, either of such purchaser or of the seller, is inhibited. The mere making of a different price is prohibited, and the making of a higher price to a person in financial difficulties, if it turns out wrong, would lay the basis for a charge under the act.

The illustrations given might be multiplied, but it is suggested that they indicate clearly that this section should not be enacted for the reason that new difficulties will be introduced by the very words of the act, while the Sherman Act as it now stands, as applied by the decisions, makes clearly unlawful attempts to engross the business, and such attempts clearly include trading for the purpose or with the intent of destroying a competitor.

If, however, the section be enacted, it should be amended by the insertion of some such words as the following: After the word "sold," in line 9, page 2 of the proposed bill, the words "or the financial condition of the purchaser"; and after the word "transportation," in line 10, the words "or factory cost of different plants or subsidiary companies owned or operated by the same person."

But there seems another construction of the section which renders it ambiguous. The proviso is that—

"Nothing herein contained shall prevent discrimination in price * * * that makes only due allowance for difference in the cost of transportation."

Can a merchant discriminate in price by making an allowance for difference in cost of transportation? May he allow all the transportation, or only enough to get the business? For example: Can a manufacturer in New York sell his goods to a purchaser in New Jersey, at, say, $100 a gross, allow him the transportation, and to one purchaser in Chicago, at $100 a gross, and to another in Denver at $100 a gross, and allow to the purchaser in Chicago all the transportation and to the purchaser in Denver all the transportation? If so, his price to each of the three purchasers is different. Yet does not the language of the proviso sanction this very transaction, and is not this the very method used time and time again with the result of driving out a competitor in different localities?

SECTION 10.—CONDITIONS OF SALE.

"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 persons 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 the goods, wares, or merchandise of a competitor or competitors of the seller."

The suggested language of this section seems ambiguous. Does it deal only with a single transaction? Does it deal with contracts for exclusive sales? Does it relate to contracts for future sales? Does it relate to exclusive agencies? Literally, it appears to deal only with a consummated sale of goods, and a collateral agreement that in consideration of the price or discount in the particular transaction the purchaser will not deal thenceforth with the competitor of the seller. If it is intended to deal only with particular transactions, then to remove the ambiguity the section should contain a proviso something like this:

"Provided that nothing herein shall be held to prohibit contracts obligating the purchaser to buy exclusively from the seller on terms agreed upon between them all goods, wares, and merchandise required by the purchaser for his own use or in the business conducted by him, or to prohibit sole selling agencies."

Without such a proviso, or without making it clear in some other way that it deals only with particular transactions, the section as it stands appears to make it apply to sales generally and not to particular transactions. If this latter is the intention, the proposed definition produces a revolution in business methods and will destroy customs long established for the legitimate expansion of business.

It would prohibit, for example, a mining company, a large user of wire rope or dynamite, or other explosives, from making a contract to buy all its wire rope or explosives from a given manufacturer upon the condition which is usually made—that the seller shall always keep in stock, at a point convenient to the mine, enough wire rope or explosives to meet the company's needs. It would be unprofitable in the case of explosives or wire rope to keep a fresh stock on hand at a given mine or mines, unless the seller could have the mine or mines use his wares exclusively; yet not to keep fresh supplies on hand, with a man in charge on behalf of the seller, would seriously impair the work of the mine or mines, and might be dangerous to life. Is it intended to enact such legislation?

Or take the case of articles of fashion, which become unsalable when the fashions change—as they do every few months. Is it intended to prohibit a manufacturer from inducing a purchaser to buy and sell as much of the article while it is in fashion as by skillful salesmanship he can sell? And for that purpose to have on hand a supply surely adequate? And from making a contract whereby the manufacturer agrees to take off the purchaser's hands the unsold article at a price, on condition that the purchaser buys and pushes the sale of his articles of fashion exclusively?

The reputation of manufacturers for making excellent goods, or goods suitable to the anticipated demands of trade, plays a large part in interstate trade—in all trade—and is one of the chief elements of business initiative. Certainly it should not be made unlawful for business men acquainted with the needs of business and of trade to make such contracts as they will, which advance and enlarge that trade.

Is it intended to prohibit manufacturers of cotton goods from agreeing with a commission merchant that he will take the entire product of one, two, or three of them, and no others? If it is intended to prohibt this, the whole method of advances by factors would be destroyed, because the factor could not depend upon his supply of goods on the one hand nor could the manufacturer depend upon his supply of cash for manufacturing purposes or upon his outlet on the other hand; yet the language of the act would apparently prohibit this.

Or suppose the case of a consumer who, in his business, uses up the article purchased. Is it intended that he can not buy his goods at a cheaper price on condition that he will buy exclusively from the seller?

Suppose a factory in Georgia desiring to buy coal in Tennessee finds that by agreeing to buy the entire output of a mine coal can be obtained cheaper, and accordingly gets a price conditioned upon a covenant that it will buy the entire output of the mine, and that the coal operator will sell that factory exclusively all that it mines; wherein is the public harmed? The cheaper price of coal is passed on to the public in a less cost of the goods, and yet this particular transaction appears to be prohibited by the language of section 10 and the last proviso of section 9.

Or, again, suppose a jobber who buys manufactured articles as cheaply as possible, so as to meet competition, agrees to buy exclusively from some one factory and to order not less than a given amount within a given period, so as to get the benefit of a lower price or discount; is that to be forbidden?

SECTION 12.—ESTOPPEL IN FAVOR OF THIRD PARTIES.

"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."

This section, if enacted, should be amended so as to prevent the use as conclusive evidence of the same facts and conclusive evidence as to the same issues of law of decrees entered upon consent or judgments entered upon a plea of guilty or nolo contendere. A third party should not be benefited by what may be the private considerations actuating a defendant in consenting to a decree in favor of the Government. Many persons prefer to consent to a decree rather than fight the Government and, under the decree, bring about a certain reorganization meeting with the approval of the Department of Justice and the court. There mere submission to such a decree should not be taken as evidence of the facts alleged in the pleadings. Similarly, defendants plead guilty at times for personal reasons, as, for example, where they have not sufficient means to defend, or upon some assurance from the district attorney that he will urge the court not to inflict a severe punishment or will even urge the court to suspend sentence. A judgment entered under such circumstances does not, of course, represent such a trial as would establish, or tend to establish, conclusive evidence.

Similarly, defendants plead nolo contendere at times, where for many reasons they may not wish to oppose or to contest with the Government. It may be that they are not guilty, yet are unable to procure evidence of their innocence or evidence to show their lack of guilt, as, for example, where a witness who had entire knowledge of the innocence of the transaction complained of has died and a successful defense will be impossible. It would be manifestly unfair to have a judgment entered under such circumstances conclusive.

This section, if enacted, should be so amended as to provide that a decree rendered in favor of a defendant, or a verdict of not guilty given in favor of a defendant should be conclusive evidence of the same facts and be conclusive as to the same issues of law in favor of the party obtaining such a decree or such a judgment.

But it is suggested the provisions contained in this section, whereby it is declared that the issues of law and the issues of fact settled in a suit as between the Government and an individual, shall

"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 involved in the provisions of this act," would be in contravention of the Constitution.

In United States *v.* Klein (80 U. S., 128) the court was passing upon an act of Congress, which declared that a pardon given by the President and accepted in writing, without any express disclaimer of the fact of guilt contained in such acceptance,

"shall be taken and deemed * * * conclusive evidence that such person did take part in and give aid and comfort to the late rebellion * * *."

The court held that this contravened the Constitution as invading inadvertently the judicial power of the Government, saying:

"Can we do so (give effect to the act) without allowing that the legislature may prescribe rules of decision to the judicial department of the Government in cases pending before it? * * *"

The decision held that by the act:

"The court is forbidden to give the effect to evidence which in its own judgment such evidence should have. * * *"

In doing this the court said:

"We think that Congress has inadvertently passed the limit which separates the legislative from the judicial power."

The language in this act, it is submitted, comes within the exact purview of this decision, by attempting to make the decree or judgment mentioned "conclusive evidence." The court must be left, it is clear, to attach to anything which is made evidence the effect which it, in its judgment, thinks should be given to that evidence.

TENTATIVE BILL NO. 2. COMMITTEE PRINT.

The title of this bill proposes to include within the meaning of the language of the Sherman Act certain definite means of committing violations of that act.

It is submitted that this proposed bill should not be enacted into law, for the reasons above stated. In so far as it attempts to define it will, it is believed, introduce difficulties which do not now exist and will require many judicial interpretations, which will confuse the law and not clarify it; and in spite of the language contained in the proposed section 5, the courts will necessarily find in the exact language used by Congress and in the exact instances picked out by Congress evidence of congressional intention to confine and limit the application of the act. But if it is determined to enact legislation upon the lines indicated by this bill, then this bill should be amended, it is submitted, in numerous particulars.

One line 1, page 2, after the word "between," the word "competitive" should be inserted.

"First. To create or carry out restrictions in trade or to acquire a monopoly in any interstate trade, business, or commerce."

In paragraph 1, after the word "restrictions," the words "harmful to the public interest" should be inserted.

If this paragraph be not so amended it would forbid the creation of partnerships and all other forms of combination or cooperation, whether made for useful purposes to advance the trade and helpful to the public interest, or whether harmful to the public interest.

If the owners of two competing stage lines operating across the State line and serving the public of a village in one State a mile or more remote from

the railroad station in another State were to enter into partnership or one were to buy out the other, under the language as drafted this would be unlawful, and wholly irrespective of the facts and circumstances of the case, which might be that neither stage line was making expenses and that the public had very poor and insufficient service, while the combination or partnership might improve the service and eliminate the losses of the owners.

This section would also prevent the consolidation of two or more electric light companies or gas companies in villages in adjoining States which could be more efficiently served from a central plant at the same or less cost to the consumer.

The same would be true of two grocery stores on opposite corners in the city of Washington serving the public in Washington, Maryland, and Alexandria. It might well be that the business of these merchants was not profitable, yet under one management it might become profitable to the merchants themselves, resulting in the supplying of better goods at the same or less price to the public, for the two stores in combination might be able to operate at an overhead charge or charges for delivery of wares which would not be in excess, or greatly in excess, of the cost to each of them separately. Yet these same properties could not be sold one to the other in case of the death of one of the merchants or his inability to carry on his business.

"Second. To limit or reduce the production or increase the price of merchandise or of any commodity."

This paragraph should be eliminated, for it is unlawful now to limit or reduce the production or increase the price of merchandise by any combination or device harmful to the public interest, and the language here used would rigidly eliminate the question of the public interest.

The language as it now stands would prevent a manufacturer from buying a competing factory and dismantling it, removing to his own factory such machinery as he might need and desire to purchase, if his own factory, when thus remodeled, would not produce the same amount of merchandise as the two factories theretofore had been producing.

In single instances such a transaction as this is lawful and not against the public interest even when coupled with a restrictive covenant on the part of the seller not to engage in trade. Of course, if pursued as a policy, with the purpose of engrossing trade, it might become unlawful. But the language of this proposed paragraph is not needed to provide against such a contingency. The Sherman Act as it now stands is sufficient.

If the paragraph stands it should be amended by adding after the word "commodity" the words "in such manner as to be harmful to the public interest."

"Third. To prevent competition in manufacturing, making, transporting, selling, or purchasing of merchandise, produce, or any commodity."

This paragraph should be amended by striking out the words "prevent competition" and inserting in their place "restrain trade," and adding after the word "commodity," in line 16, "in a manner harmful to the public interest."

What has been said as to paragraphs first and second applies also to paragraph third.

"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 products, article, or commodity."

This paragraph would prevent the employment of a common agent.

The words "prevent a free and unrestricted competition" in lines 19 and 20, should be stricken out and the words "restraint of trade" inserted; and at the end of the paragraph, in line 22, there should be the words added "in a manner harmful to the public interest."

It should be observed with respect to this paragraph and the previous paragraphs, that this is an attempt to legislate against means and methods. That is not the object sought to be attained. The evil sought to be remedied is restraints of trade and attempts to monopolize, harmful to the public interest. To condemn means and methods is, it is submitted, not the way to bring about the object sought. The law as it stands is that no matter what the means or method, if the result is a restraint of trade which involves the public interest, it is unlawful.

We submit that it would be unwise to condemn means and methods which are perfectly innocent in themselves and which are employed to bring about useful

and innocent results, merely because they may be wrongfully used to bring about harmful results. Yet, in section 3, men who utilize these specific means and methods are made criminals though the means and methods are utilized for innocent and useful purposes, not harmful to the public interest.

It may be observed generally that the proposed legislation deals with the trade and commerce of the country which is produced by the bone and sinew, the wealth-producing class, of our citizens—a class surely entitled to the protection of the laws, and not to be selected as an example of wickedness. These men who have the courage and the foresight to build business are natural objects of the protection of Government, yet in numerous sections of the proposed legislation it is proposed that they be made criminals for using means and methods, which have heretofore been free in the commercial world, in the development of their business, and without regard to the effect of their conduct upon the public.

Legislation which penalizes the long-established and honest and honorable practices in business will destroy initiative, and the free and fair opportunity for all men, by industry, ingenuity, and application, to make their business grow and advance in the production of wealth, the employment of labor, and the supplying of useful articles of trade and commerce.

The Sherman Act as it stands to-day goes to the object to be attained, and the courts have said that it matters not by what means or methods the object is attained they can not make innocent that which results in something unlawful; and the penalties attached to the Sherman Act are complete and drastic.

SECTION 6.—HOLDING COMPANIES.

The language of this proposed paragraph has not been made public. The facts set forth by Messrs. Proctor & Batts, Serial 7, parts 3 and 4, make clear that all holding companies are not bad. Holding companies similar to that in the Northern Securities case have all been condemned. That is an illustration of where the court went to the object and result and ignored the means used, each one of which may, in itself, have been lawful.

Holding companies frequently finance public utilities corporations, as, for example, where there are a number of villages near to each other but in different States, a central power plant for the generation of electricity or the manufacture of gas might more economically and efficiently serve a group of villages than separate plants in each village, and be enabled to reduce the cost to the consumer. This is true in many parts of the United States. The smaller companies, by reason of the limited territory which they are enabled to serve, are unable to finance extensions and improvements in their plants. In such a case the financing corporation acquires the stock and other securities of these plants, and upon the strength of its own financial standing and securities procures the funds which make it possible to so concentrate the serving of the public that by the improvement of the most favorably located plant it is enabled not only to serve the same territory at the same or less cost, and more efficiently, but also to greatly extend the service into the surrounding villages and country.

Mr. Proctor has shown how this worked out in connection with the Gulf Oil Enterprise, and what is said in respect to that is true of many commercial enterprises.

There are numerous family concerns which are holding companies. I have in mind one of the large enterprises of the country, which was founded more than 60 years ago by the father of the present owners. It has grown to be one of the useful and great enterprises of the country. Owing to the laws of the different States the parent company has organized in many States subcompanies, all the stock of which the parent company holds. In some instances it has bought out other companies already established. In some States, in order to do business, it has had to organize local companies. This parent company, however, is a holding company. It is also an operating company. Certainly legislation should not be framed which would prohibit such a parent company from holding the stocks of its subcompanies.

This same company has from time to time, as an investment of its surplus, as a method of collecting debts, and as a means for keeping together its business resources, bought the stocks and securities of street railroads and other commercial enterprises. By having its surplus funds thus invested, it is strong financially and able to undertake the execution of contracts requiring the expenditure of large sums of money and the tying up of capital for protracted periods while the work is being completed. It is thus enabled to be an

active competitor in the obtaining of contracts and in the building up of large public undertakings. Of course, in the broad sense, this company is a holding company of such securities, though such securities are in reality an investment of its surplus, which surplus is necessary to enable it to make contracts for which it could not otherwise even compete. To require the distribution among the shareholders of the parent company of this surplus would be to rob the company of its ability to finance itself for large undertakings.

Legislation which would prevent a company engaged in interstate commerce from thus accumulating a surplus and investing it prudently would be a serious blow to American enterprises.

The successful man is learned in his own business and in those affairs which are cognate to it. If, for example, he has been brought up in the steel business and has made money in it, he is not likely to invest his surplus in the silk trade or in watchmaking, but in something in his own line of trade; and if the amount involved is large, why should he not have the ordinary right of looking after his investments, as a prudent man must, and if to accomplish that it is advisable for him to become a director in other companies, what harm is there? In these days of corporate activity it becames necessary to invest in the stock of corporations, and this may involve the prudent man in becoming a director in all corts of corporations, no one of which was organized as a holding company.

Holding companies which have financed the lawful combination of commercial enterprises, even where such holding companies do not operate, it is submitted, work no public harm.

Aside from the constitutional question of Congress prescribing what powers the States shall give to their corporate creatures, which we will not discuss, certainly the public interest only requires such legislation as may be necessary to prevent restraints of trade and attempts to monopolize, harmful to public interest, which may be brought about through holding companies.

If in addition Congress were to require that, upon all literature, bill heads, advertising matter, and brands of companies whose stocks are held by holding companies, that fact be published, together with the names of the companies thus affiliated through a holding company, there would cease to be any deception of the public as to apparent competition where, in fact, it does not exist or exists only in a modified form.

Tentative Bill No. 3—Committee Print.

This bill goes into an untried field where there are few, if any, landmarks to guide one's views.

Legislation which properly protects the public and gives freedom of opportunity to business enterprises is certainly wise. But does the proposed bill do anything more than disable individuals belonging to certain specified businesses or classes from employing means which may or may not be harmful to the public interest?

"Section 1. 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."

This section deals with railroads and other public service corporations and disqualifies the individuals included within the businesses or classes specified from acting as directors or other officers of any railroad or public service corporation.

It can readily be understood that there are cases where men in these businesses or classes have, in the pursuit of their own enterprises, got advantages not open to the general public. But will this section do anything more than bring about the election as directors and other officers of railroads and public service corporations of men who represent the men in the businesses and classes specified in the act?

If legislation upon these lines is to be framed, should not the effort be made to formulate what the evil is which it is desired to remedy, and then by appropriate language forbid such evil? The object to be attained by this section is not apparent. It is not substantive legislation. It deals merely with form.

"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.'"

What has been said about section 1 also applies to section 4.

The evil which sometimes exists as to corporations engaged in interstate trade is that denounced by the Sherman Act, namely, restraints of trade harmful to the public; and, it is submitted, that section 4 merely again prohibits something that may be, but not necessarily is, a means whereby an unlawful restraint of trade is produced.

If this section, however, be enacted, it should be amended so as not to cover common directors between a parent company and subsidiary companies; and it should not cover common directors in companies which have been consolidated through a holding company or by any method which still leaves in existence the component legal entities of the combination.

We take it that the evil aimed at is a concealed interest in the subsidiary or component companies; that is, giving the appearance of competition where no competition in fact exists, or where it exists only in a modified form, and so deceiving the public. Enforced publicity would be, it is submitted, a complete remedy for this evil, and publicity would be given if the law required, as above suggested, the relationship to be stated on the bills, letterheads, advertising matter, brands, and all printed matter by which the subsidiary or combined company or companies communicate with the public.

It is of course true that where a combination exists, either through a holding company or otherwise, it would be no less a combination because the various component companies do not have common directors; and if the combination is unlawful, providing for having different directors would tend to deceive the public; whereas if the combination is a fact, and lawful, it would not be objectionable by having common directors with the publicity necessary to advise the public of the true facts.

The language of this section providing that—

"The fact of such common director or directors shall be conclusive evidence that there exists no real competition between such corporations," etc.—

is an invasion by Congress of the judicial power of the Government. (United States *v.* Klein, 80 U. S., 128.)

H. R. 12120.—INTERSTATE TRADE COMMISSION.

In the message of the President to Congress on January 20, 1914, he says:

"And the business men of the country desire something more than that the menace of legal process in these matters be made explicit and intelligent. They desire the advice, the definite guidance, and information which can be supplied by an administrative body—an Interstate Trade Commission."

It would seem that the way to bring about the effective adoption of the President's recommendation would be that the body to which subjects of interstate trade covered by the proposed recommendation shall be referred should be such a body as can come to conclusions, not merely ex parte conclusions, so that the advice and definite guidance given and the information supplied can be the result of such a hearing as removes from the conclusions the elements of ex parte investigation. In other words, the body should have judicial powers and its conclusions certain judicial effects.

The advice and definite guidance given by such a body, after hearings conducted in substantial compliance with the usual procedure in the courts, would build up rapidly, upon ascertained knowledge as to trade practices and trade needs, a body of rules and definitions which would be enlightening and helpful. It would constitute the groundwork for a new custom of merchants having some analogy to that upon which our negotiable instruments law is based.

It is not meant to suggest that the body which is referred to should pass upon questions finally. It is not meant to deprive the Federal courts of any of their jurisdiction. It is not meant to take away from section 4 of the Sher-

man Act any of the duties imposed upon the several district attorneys of the United States to act under the direction of the attorney General. But it is meant to suggest a body whose conclusions will not be ex parte, but which will be the result of deliberation, assisted by the parties whose interests are involved, through hearings conducted upon somewhat the lines of usual judicial inquiries.

It is not believed that ex parte inquiries, such as are conducted by the usual commission, recommend themselves to the average fair-minded man, but a body having judicial functions and proceeding along judicial lines commands the respect of everyone.

The suggestion therefore is that Congress either create a new body with judicial functions or that it extend the jurisdiction of the existing Court of Customs Appeals. To enable a court, by a simple system of procedure, to hear the facts in respect to trade matters, as they apply to the antitrust law, and then give the definite guidance to business men, which is indicated by the President, is the desire of the country.

This body, by reason of its present jurisdiction, has the most intimate relations with the trade of the country. It deals now with the most intricate business problems in the administration of the tariff act, and discharges its duties with eminent satisfaction to the country.

In respect to antitrust matters its conclusions should not be final, either upon the particular case or upon the rules laid down by it, for the policy of Congress, as disclosed in the Sherman Act, is to give to the Department of Justice the right, in the interest of the country at large, to proceed in particular cases through the Federal courts as now established. But the conclusions of the proposed court should be sufficient to relieve the parties, who submit their matters to the court, of punishment by fine and imprisonment, but not prevent the Attorney General or the several district attorneys from proceeding to stop by injunction the practices passed upon or complained of, or to dissolve the combinations, etc., found by the courts to restrain trade within the meaning of the Sherman Act.

If such a body were open to the business men of the country to resort to in connection with their business, certainly the wide expressions of harassment of business which have found public utterance could not thereafter be justly made, and a means would be established of cooperation between business and the Government which would command confidence.

To give to any commission the rights, conferred by the proposed bill, of such wide inquiry, the compelling of the production of books and papers, the disclosure of business secrets and business affairs, the financial conditions of the companies, and such intimate things as to advise the commission of the conduct in the management of the business, and all that to be made public, and all as the result of ex parte inquiries, would, it is believed, work infinite harm and confusion. It would give to competitors such knowledge as their stronger rivals could use for their destruction. But to open a court where only the facts pertinent to the inquiry are made public, and that in connection with their proper explanation, would afford an opportunity for business men to get guidance such as the President suggests.

The idea suggested by the President is novel. It is submitted that experience shows that it is only through bodies whose hearings are surrounded with perfectly fair safeguards that satisfactory results can be obtained, and it is not believed that a body which has no judicial power, like the commission provided for in the bill, can arrive at results which will command confidence.

If a court such as is here suggested is created, will it not accomplish all the results hoped to be accomplished by the proposed legislation, without running into the numerous dangers and difficulties arising out of attempts to lay down definitions in advance of knowledge of concrete facts?

Can a commission without judicial powers define anything? Will not its work have to come back to Congress from time to time, and will not Congress at that time be obliged to have hearings in an effort to reach the very results that a court such as suggested would reach from time to time and as each case was presented to it?

SECTION 3.—INTERSTATE TRADE COMMISSION BILL.

"SEC. 3. That all corporations engaged in commerce among the several States or with foreign nations, excepting common carriers, whether required by general rules and regulations for regular information or information specially asked in special instances, shall, from time to time, furnish to the commission

such information, statements, and records of their organization, business, financial condition, conduct, management, and relation to other companies at such time, to such degree and extent, and in such form as may be prescribed by the commission. The commission at all reasonable times, or its duly authorized agent or agents, shall have complete access to all records, accounts, minutes, books, and papers of such corporations, including the records of any of their executive or other committees. Failure or neglect on the part of any corporation subject to this act to comply with the terms of this section within such time after written demand shall have been made upon such corporation by the commission requiring such compliance as shall be fixed by the commission shall constitute a misdemeanor, and upon conviction such corporation shall be subject to a fine of not more than $1,000 for every day of such failure or neglect."

Without going into the question of the constitutionality as involving unlawful seizures, it is believed that this section is so drastic and searching that it will create antagonism and produce harmful results.

The language is so broad that every method of doing business, every trade process, and every element of the financial condition of all corporations engaged in interstate trade could be inquired into by commission, and apparently only for the purpose of making the facts public, as provided in section 4.

If the bill be enacted at all, section 4 should provide that the information obtained should not be made public except in connection with recommendations to Congress by the President for legislation.

With respect to sections 5, 6, and 7, what is said as to section 3 generally applies.

If a commission, instead of a court, is created or provided for, then the provisions of the bill relating to inquiries being made by the commission should be covered by a paragraph substituted for sections 8 and 9, giving the commission authority to institute inquiries, either upon its own motion or upon the request of the Attorney General, or upon duly verified petitions setting out facts sufficient, in the opinion of the commission, to justify the commencement of a proceeding.

The duty imposed upon the commission to make the inquiries should not be mandatory, but should rest in each particular instance upon the commission's own sound discretion.

The language of section 9, as it now stands, would compel the commission to make an investigation upon any request, even though it might be frivolous upon the face of it.

It would not be practical for a trade commission to give advice for business men to follow. It could not be definite guidance, in the nature of things. It would necessarily come from ex parte inquiries or statements which could not be safely relied on. That is the difficulty which business men have experienced in seeking the opinion of the Attorney General upon matters in which they are interested. Naturally, the Attorney General can not give an opinion in advance, for he can not know all the facts except thhrough an inquiry giving full opportunity to present the facts in their true bearing; an ex parte inquiry or statement would not disclose them, however earnest and candid the parties might desire to be.

Finally, it is urged that if Congress shall decide it is wise to enact any legislation supplemental to the Sherman Act, a more just result would be obtained by either (*a*) extending the jurisdiction of the Court of Customs Appeals or (*b*) creating another court to make determinations and give to business men definite guidance based upon hearings in actual cases, based upon the actual facts involved therein. Such a court in conjunction with the Sherman Act as it now stands, and the decisions of the Supreme Court and other Federal courts heretofore rendered and to be rendered from time to time, would meet every need, it is believed, of the business men of the country and the public at large.

Respectfully submitted. HERBERT NOBLE.

STATEMENT OF MR. GEORGE S. FRANKLIN, OF NEW YORK, REPRESENTING THE McCALL CO.

Mr. FRANKLIN. Mr. Chairman, Mr. Noble, in his remarks, referred to a fashion company, and I simply want to point out to the committee one particular instance of business which will be affected in particular by section 10 of the proposed amendments to the Sher-

man Antitrust Act. I concur entirely in what Mr. Noble has said also in regard to section 1, subdivisions 1, 2, 3, and 4 of Committee Print No. 2, but as my time is so limited I shall only refer to this section 10, as it will affect a specific line of business.

I am here, gentlemen, representing the McCall Co., which is a New York corporation, which has been in existence for about 40 years, and during that time has been engaged in the publication of fashions and patterns and disseminating information in regard to fashions.

The business is essentially to distribute reliable and up-to-date information in regard to fashions, and this it does in connection with the merchants, particularly dry-goods merchants throughout the country. This business has grown up simply by its own development. There has never been a consolidation; there are no agreements with other companies, except sales agreements, which I will speak of in a moment. It is simply a development which has never in any way been questioned under the antitrust act. These merchants are really the agents of the McCall Co. Whether they are so legally or not is not the point that I make. They are the local representatives of the fashion company.

Patterns are peculiar. They are like other news which deteriorates very rapidly. Unless these patterns are sold within a short time after they are published they are dead, or they are either on the hands of the manufacturer or on the hands of the merchants, and the merchants' information on these patterns has got to be kept up to date. If he is behindhand in his patterns it is detrimental to his business and to the business of the manufacturer of the patterns. If the merchant is kept up to date on fashions it establishes his store as a fashion center and helps his trade. These patterns are sold—I think the most expensive pattern sold by this company is, of course, only 15 cents at retail. So you gentlemen will see that the volume of the business has to be enormous in order for the business to be carried on at all. The patterns are sold largely by means of fashion plates which are distributed to the merchants and are displayed by them and given by them to their customers. The customers, seeing these plates, purchase dry goods or whatever it may be, so that they can make the materials up in accordance with the patterns, and then the patterns are sold. To sell a pattern there has got to be a sale of material. Nobody would go and buy a pattern unless that person had in mind the purchase of material and the creation of a certain sort of garment. The manufacturer of these patterns could not possibly sell them except in connection with merchants.

I think I am correct in saying that there has practically never been a case of a successful establishment of a pattern store where the patterns themselves are sold. The value is too small, and it does not draw the trade there. The people that want to buy a pattern do not want to buy it except in connection with materials. This is due to the nature of the commodity. The patterns can be sold only where a garment is required, where a woman wants to make a garment, and generally make it herself at home.

Another point I want to make is that these patterns can only be sold where the illustrations and the extensive advertising has taken place to create the desire for these materials and keep the fashions

up to date. No merchant could, without an agency such as is carried by this company, keep his supply of fashion information up to date. I say no merchant. I do not means John Wanamaker, or some of the larger stores, although, of course, they use and sell these patterns; but I mean the small merchant throughout the small towns in the United States; their fashion information is kept up by receiving these periodicals from a concern like the McCall Co., and the receipt of those patterns enables those merchants to sell their materials.

This is a continuous business, and it could not be carried on unless a continuous relationship were established between the merchant and the manufacturer of the patterns. If a man could go and sell one set of patterns to a concern, and never come again, it would be like buying one magazine which would never be published again. He wants a fashion service, and that is what we seek to give him. One of the essential things about that is that the manufacturer is obliged in this trade, as it has grown up, to take off the hands of the merchant his unsold and unused patterns; they become out of date; he has been unable to sell them, and that supply can not be left on his hands. It would be absolutely useless to him. Formerly, before the Dr. Miles Medical Co. case, this business was carried on by contracts between the merchants and the manufacturer of the patterns by which the merchant accepted what I call an exclusive agency, and also agreed not to sell the patterns below a certain price. After the Miles Medical Co. case it was felt that such an arrangement would perhaps be illegal, and a new contract was drawn, which is to be signed between the McCall Co. and the merchant who represented that company throughout the country, which was substituted for the old form of contract as those contracts fell in. As I say, those contracts are between the McCall Co. and the merchants, and they are drawn to extend from one to five years. That new contract provided practically this—that the merchant might sell at any price he chose, he might take on any competing line, but if he did that the McCall Co. could not afford to take back his unsold patterns. That arrangement seemed to be entirely satisfactory to the merchants and also satisfactory to the company. It is that arrangement; gentlemen, which is in force to-day between this company and, I think, thousands of merchants throughout the country.

These merchants are receiving under those contracts information which enables them to sell their goods. It is information which they want. It is serviceable to them, and it is information they can not get except as they get it from a large concern, because if they did not get it from a large concern they could not afford to go out and hunt that information up for themselves. That is the arrangement which we want to keep in effect.

Mr. DUPRÉ. Do you think this section will terminate that arrangement?

Mr. VOLSTEAD. What do you do with those patterns which are returned to you?

Mr. FRANKLIN. They are waste. They are destroyed.

Mr. VOLSTEAD. Then, as a matter of fact, the sales are practically the same now as they were before, when you had a contract that they be returned instead of being destroyed.

Mr. FRANKLIN. The contract is so that they could return them; it is optional with the merchant.

Mr. VOLSTEAD. I do not see how the contract for their return could cut any figure. Do they get any credit for them when they return them?

Mr. FRANKLIN. Oh, yes; they get a credit. It is a very substantial amount of what they paid for them. It makes the manufacturer of the patterns assume the burden of the unsold goods, and it is a burden which we could not afford to assume unless we were going to keep the man on as a regular subscriber to the patterns.

Mr. VOLSTEAD. But your present contract does not require that they should be returned.

Mr. FRANKLIN. It does not require them to do it; it gives them the right to return them, but makes the right conditional upon their not having the agency of any other concern and that they will maintain prices.

Mr. MORGAN. In practice the new contract is like the old one; the merchants are given the right to do just as they did under the old contract?

Mr. FRANKLIN. It is different in this particular, that it gives the merchant the option.

Mr. MORGAN. I understand it gives him the option, but then, as a matter of fact they are doing in practice just what they did before?

Mr. FRANKLIN. As a general rule the merchant does not care to carry more than one set of fashions, and for the reason that the cost of this thing is in distributing to the merchant a number of fashion plates. We all know that human nature is such that if a woman comes in and you hand her a dozen fashion plates she will want the dozen, and it will cost the merchant twelve times as much as if he had one fashion plate, and he will not sell twelve times as much dress goods. The woman can not afford to buy them. So that the merchant really desires to keep but the one line of fashion information.

Mr. MORGAN. There is nothing to prevent him from doing it if he wants to, under the law here?

Mr. FRANKLIN. There is not under the present law.

Mr. MORGAN. But under the present law you can not bind him to do that. Is not that the whole thing? You want the privilege of binding him, do you not? He can do the things he wants to do under the law, the same as before. If he wants to deal with you exclusively, he has the right to do that, has he not?

Mr. FRANKLIN. We do not want to bind him.

Mr. MORGAN. But you have no right to bind him to do that; you have no right to bind him to an exclusive agency.

Mr. FRANKLIN. If he is an agent. He is not strictly an agent. His legal position is not as an agent, because the title to these patterns is not kept in the McCall Co. The title to the patterns passes, and I suppose he is not an agent, although he is in fact an agent, because the title to these patterns is turned back to us again if he so desires, and we pay that price.

Our fear is simply this, that the amendment to the Sherman Act by section 10 will go further than the mere codification, which, I take it, was intended in the Miles Medicine Co. case and the Dick

case and the Sanatogen case and other cases along that line. We want, and it is absolutely essential to the continuation of this business that we continue with the line of contracts that we now have outstanding, and we want to be sure that section 10 does not invalidate those contracts. I do not mean to say that it does, but we want to be satisfied that it does not.

Mr. McCoy. Have you one of those contracts with you?

Mr. FRANKLIN. Yes; we have; and I will submit one of the contracts.

(The paper referred to is as follows:)

Town_____ State_____ Date_____191

The McCALL COMPANY,
New York, N. Y.:

As your special agent at_____we will buy of you and you will deliver to carrier for us a stock of McCall Patterns, including the_____ issue, amounting to $_____ at 50% of labeled retail prices F. O. B. New York, N. Y., $_____to be paid by us 30 days after date of shipment. The balance $_____to remain as a Standing Credit, due and payable at the termination of this contract, on which Standing Credit we agree to pay interest at the rate of 4% a year, payable semiannually, on January 1 and July 1 of each year. Within thirty days after the expiration of the full term of this contract, patterns bought from you under this contract may be delivered by us to your New York office, and if in good salable condition, and other than "discards," shall be credited at 100% of contract prices toward the payment of this Standing Credit, provided all terms of this contract have been complied with.

Also ship to us an average of $_____per month of new monthly patterns of your selection at 50% of labeled retail prices F. O. B. New York, N. Y., commencing with the_____issue; also Fashion Sheets and other publications specified on the reverse side hereof, commencing with the_____issue.

We will reorder, weekly or oftener, patterns as sold.

All goods bought, excepting the first stock, will be paid for on or before the 5th of the month succeeding date of shipment. All prices quoted are net. We will pay all transportation charges on all goods received from you or returned by us.

We will display and sell the stock of patterns on the main entrance floor of our store. The location shall not be changed nor the agency assigned without the written consent of The McCall Company.

DISCARDED PATTERNS.

Patterns bought from you under this contract and reported by you semiannually, in January and July, as discarded, may be returned by us to your New York office during that January or February and that July or August only, at 100% of contract prices, in exchange (up to their equivalent) for any new patterns, at full contract prices, which may be shipped to us during the six months after the date of such discard report unless this contract shall be sooner terminated, but not in exchange for goods other than patterns; and provided that patterns received under this contract have not been sold, within the six months prior to the date of such discard report, at less than labeled retail prices: and further provided that this contract shall be in force at the time of such return.

In consideration of the foregoing concessions as to return of patterns (thus rendering The McCall Company largely dependent upon our sales for their compensation for patterns), and in order that there may be a fair market for McCall Patterns, during the term of this contract we will not advertise, display, or sell, nor permit to be advertised, displayed, or sold in our store, any other Pattern; but we will, in good faith, give to you, and to no other Pattern Company, the special benefit of our good will in connection with the sale of patterns in our store.

STOCK LIMIT.

A detailed inventory of patterns bought from you and on hand after each discarding will be sent to you at the time of the return of the discarded pat-

terns. If this inventory exceeds $_____at 50% of retail prices, we may return to you, within the 30 days following, patterns in excess of that amount. Such returned patterns are to be credited to our pattern account at 100% of contract prices in payment for any patterns shipped thereafter.

Should the inventory show our stock of patterns at 50% of retail prices to be less than $_____, you may at once ship, and charge to us, enough patterns to restore the stock to said amount.

We will send you at the termination of this contract a detailed inventory of our stock of patterns.

This contract is to remain in force from date hereof and for five years after_____ (date of first shipment), and thereafter until the expiration of three months' notice given in writing by either party after the expiration of the contract term.

Failure of either party to require the other to comply with the strict letter of this contract shall not constitute a waiver of any conditions of the contract, nor forfeit nor prejudice any rights hereunder.

All terms of this contract are printed and written on this form, including the reverse side hereof. No oral statements can affect its terms. It is signed in duplicate after being entirely read.

Date_____19___ Purchaser's Signature_____

THE McCALL COMPANY.
[Incorporated State of New York.]

Date_____19___ By_____

Approved and Accepted, New York, N. Y._____19___

THE McCALL COMPANY,

By_____

FASHION SHEETS.

$7.50 A THOUSAND.

Jan. issue_____	July issue_____
Feb. issue_____	Aug. issue_____
March issue_____	Sept. issue_____
April issue_____	Oct. issue_____
May issue_____	Nov. issue_____
June issue_____	Dec. issue_____

The charge for Fashion Sheets includes printing the merchant's name and address on the front page and an advertisement of approximately a one-half page on the back page, when 5,000 or more sheets a year are ordered. Back page advertisements may be changed twice each year (including first advertisement) without charge. Other changes may be had for $2.50 an issue.

_____Copies a month McCall Complete Catalogue, @ 10c. a copy.
(For Counter use and also retail sale at 15c.)

_____Copies a month McCall's Magazine, @ 3c. each $_____
(Retail price, 5c. copy. Yearly subscription retail, 50c. Commission to pattern dealers, 15c. per subscription.)

_____Copies each issue McCall Book of Fashions (Quarterly), @ 13½c. a copy.
(Retail price, 20c. Each copy contains a coupon good for any McCall Pattern free, redeemable, in turn, by The McCall Co.)

_____Copies a month McCall's Embroidery and Needlework Book, @ 9c. a copy.
(Retail price, 15c. Each copy contains a coupon good for any McCall Kaumagraph Pattern free, redeemable, in turn, by The McCall Company.)

_____Copies each issue Ready Reference Catalogue (semiannually), @ $1.00 a hundred or fraction thereof.
(On lots of 500 or more copies of any one issue of the Ready Reference Catalogue, a display advertisement of the merchant will be printed, without charge, on the outside front cover page; and the copy may be changed twice a year, including the first advertisement.)

Copy for display advertisements for the Fashion Sheets and Ready Reference Catalogues must be in the New York office of The McCall Company on or before the fifth day of the second month preceding the dated month of publication for which each change is intended.

The McCall Company reserves the right to refuse to print any advertisements which are for any reason considered unsuitable for publication.

------{Sections of Pigeon-holes containing (Finished oak or cherry.)}------{tills @ 6c. a till}$---- ----Bases (no charge).

------Sections of Drawer Cabinets {------Drawers, @ $1.00 each / ------Ends, $3.50 a pair}$--------
(Finished oak or cherry.)

------Counter Book Covers, @ 75c. each, $------
------Outdoor Metal Sign (loaned). ------Indoor Signs (loaned).
------Sales Book (no charge). ------Subscription Book, for McCall's Magazine (no charge).
------Colored Plates, Show Cards, etc. (no charge).

Mr. FRANKLIN. I have a memorandum here which I would like to submit to the committee, and I have suggested that section 10 be amended by some such phraseology as this, although the exact phraseology I am not particular about. I suggest this proviso:

That this section shall not be construed to apply to contracts that provide for the return of unsold goods, wares, or merchandise by the purchaser to the manufacturer thereof.

An amendment will, of course, have to be made also to section 1 of the committee reprint No. 2, as I fear that the fourth paragraph of that section, and perhaps the first, third, and fourth paragraphs, are so broad that they might also invalidate our present trade arrangements.

I believe my time has expired, and I would like to submit my memorandum which I have prepared.

The CHAIRMAN. You may do so.

Mr. FRANKLIN. I thank the committee.

The CHAIRMAN. You may hand the contract to the reporter and it will be printed as a part of your remarks.

Mr. FRANKLIN. I will do that. I thank you very much.

(The paper referred to above is as follows:)

To the Committee on the Judiciary in the House of Representatives:

[Memorandum submitted on behalf of the McCall Co. in respect to the bill introduced in the House of Representatives by Mr. Clayton, entitled "To supplement an act entitled 'An act to protect trade and commerce against unlawful restrictions,' approved July 2, 1890."]

1. HISTORY OF MCCALL COMPANY.

The McCall Company is a New York corporation which was organized about 40 years ago, and since that time has been steadily engaged in the development of its business. It has never been consolidated with another company, nor has it bought up or combind with itself in any way whatsoever any other business, either competing or noncompeting of any other kind or description. It represents simply a legitimate growth and expansion of the business in which the company has been steadily engaged since its organization.

2. NATURE OF THE BUSINESS.

The business of the McCall Company is as a seller and distributor of patterns. It also publishes a magazine and 12 to 16 page fashion sheets. The nature of the business is essentially to distribute correct, reliable, and up-to-date information in regard to fashions in dress and domestic interests, and to create a desire on the part of possible purchasers to obtain the patterns neces-

sary to make the dresses and other garments which they may desire to obtain because of the information in regard to fashions furnished by the company. The company does not, and no company engaged in this sort of business could, maintain agencies to distribute its products exclusively directly to the consumer. All manufacturers and sellers of patterns must act through merchants, preferably dry-goods merchants, in the various localities in which their patterns are sold.

The McCall Company does this by means of sending to merchants who act as its representatives an assortment of its new monthly issue of patterns, together with fashion sheets which illustrate these fashions. These fashion sheets are distributed free by the merchant to his customers. It also publishes magazines which are sold to its representatives and to others, in which are published plates and other information relating to present and coming fashions.

It is not practical for the manufacturer of patterns to maintain his own agents for their retail sale:

1. Because, except in very rare instances, the volume of business is not sufficient on the present small margin of profit to pay the necessary overhead and selling charges. This is due to the nature of the commodity, because a pattern is only sold where a garment is required, usually only where the garment required is to be made at home by and for a woman. Therefore the nature of the commodity so restricts the volume of sales as to make it impossible to realize sufficient profit on a fifteen-cent article where the per capita requirements are estimated as being six per user per year.

2. Because the selling cost of patterns is prohibitive, because a pattern must be sold from an illustration of the finished garment, which must be furnished free to the woman. This requires expensive portrayal in the form of bulletins, catalogues, and periodicals, which tend to greatly increase the selling cost.

3. Because the good will of the local dealer is absolutely necessary to the pattern manufacturer, because whereas it would be impossible for the manufacturer to maintain selling outlets for patterns, it is profitable for the merchant to handle patterns, because the purchaser of a pattern is thereby in the market for dress goods, linings, trimmings, notions, etc.

When selling patterns to his customers, a merchant will show and distribute these fashion sheets or give information obtained from them to his customers. This information is intended to, and naturally does, create in the purchasers of patterns a desire for materials made up in accordance with the fashions as shown by these publications. The result is that the patterns sold create the sale of other and more profitable merchandise.

This service is one which could not be rendered to the public except through the cooperation of the merchant and the publisher. It is to the interest of each merchant to have advance information about the fashions, and to be able to furnish reliable information to his customers in this respect, and this information is much desired by the merchant's customers and brings them into his store to obtain it each month. No merchant could, however, afford to attempt to procure this information on his own account. The expense of doing so would be enormous.

On the other hand, the manufacturer of patterns could not successfully dispose of these patterns except in connection with the business of the merchant. It is not practical for the manufacturer of patterns to successfully open and maintain a store for the exclusive sale of his products. His product is necessarily one which is sold in connection with the products of the merchant. The price demanded for any particular pattern by this company is in no case more than fifteen cents, and sales of this character could not bear the overhead expense of being handled by themselves.

A pattern will not sell itself in the sense that commodities such as food products, etc., will, and it has been shown that expensive advertising and portrayal are required. In order that the fashion pictures get into the hands of possible pattern buyers they must be distributed and actively promoted by the local merchant. To him they have a two-fold value: (1) They sell patterns and dress goods; (2) they advertise his store as a fashion center and illustrate the latest designs in hats, hair dressing, etc., and as disseminators of fashion news they are welcomed by women, and by creating demand for the up-to-date dress accessories add to the local prestige of the store as the distributor of such accessories.

Between the merchant and the vendor of patterns is naturally established a relation of mutual confidence. If the pattern manufacturer is furnishing reliable information, the merchant knows that he is able to give to his cus-

tomers the latest and best information on fashions that is obtainable, and ordinarily the better for the merchant the better for the manufacturer of patterns, as the more patterns sold the greater demand for dress goods.

It is essential in any business of this character that the information should be continuous and that it should be up to date. It is axiomatic that fashions are constantly and continuously changing, so that any set of patterns which are to-day up to date will six months hence be out of date, and it is essential to protect the merchant that his stock of patterns should be constantly kept up to date by the manufacturer. For this reason the privilege of returning to the manufacturer unsold out-of-date patterns is a highly valuable privilege to the merchant and is really essential to him in order to enable him to maintain an adequate supply of patterns which should include a wide choice of styles, with a further wide choice of sizes in each style.

3. CONTRACTUAL RELATIONS BETWEEN MERCHANT AND MANUFACTURER.

There is virtually created between the manufacturer of patterns and the merchant an agency by which the merchant represents the manufacturer of patterns. If the standing of the merchant is improved by acquiring the reputation with his customers of having desirable information in regard to styles, this improves the standing of the publisher whose styles the merchant represents, and if, on the other hand, the reputation of the styles of the publisher is enhanced it is to the benefit of the merchant to handle these patterns. Any benefit to one is, generally speaking, a benefit to the other.

For the interests of both it is therefore desirable that the relationship should be of more than a temporary character. No merchant could be well served by any manufacturer of patterns whose information was given once and then discontinued. Any such information is going out of date from the moment it is given, and unless the information is constantly kept up to date it is unreliable and worse than useless. For this reason each merchant acquiring the patterns from the manufacturer wants a continuous service and the right to return unsold out-of-date patterns within a certain period. This, in turn, makes the manufacturer dependent upon the actual sales of the merchant for his compensation. The merchant could not afford to buy the patterns on any other basis, and the manufacturer could not afford to sell patterns unless he were able to obtain a large and continuous market for his product.

It is, therefore, necessary that a merchant push one line of patterns only, for the profit is so small that were this effort divided it would spell disaster to both merchant and manufacturer without reasonably increasing the market. The average woman will gladly receive and carry away a number of different fashion sheets, which are an expense to the merchant, whereas the result in most cases would be to only sell garments for which she is in the market.

This business of continuous, reliable, and up-to-date fashion information was formerly accomplished by contracts between the merchant and the manufacturer, extending from one to five years, by which the manufacturer delivered to the merchant his fashion sheets, cards, illustrations, and information in regard to styles, and also patterns necessary to make up the garments in accordance with the information so furnished. These contracts usually provided that the merchant should not sell the product of any other manufacturer engaged in a similar line of business, and should not sell below a minimum price. It was formerly understood to be the law that such contracts were entirely valid.

Owing to the small profit in patterns it is extremely expensive for the manufacturer to maintain his traveling sales force which places these contracts, and if a single transaction does not insure the good will of a merchant over a considerable period, thus making it a profitable account, it would so increase the expense of sales as to place the small manufacturer at an enormous disadvantage.

In order to keep down the selling costs the dealer must operate directly with the manufacturer. It is significant that there are no middlemen, jobbers, or commission houses which are agencies for the distribution of patterns to the retail merchant, as quick distribution and the good will of the merchant are essential.

As far as this company is concerned, soon after the Dr. Miles Medical Co. case was decided by the Supreme Court of the United States, it was felt that the agreements described above might be invalid, and the company desired in every respect to comply with the law, and all future contracts were so drawn, under the advice of counsel, that they were deemed in full compliance with the law as laid down in the Dr. Miles Medical Co. case.

These contracts practically gave the merchant the right to sell the products of the manufacturer at any price, and to take on any other so-called competing product. They did, however, provide that in case the merchant desired to avail himself of either or both of these privileges that he should not be permitted to return to the manufacturer the unsold out-of-date patterns. All of the contracts which have matured since the new form of contract was adopted, whenever renewed, have been renewed on this basis. We want to call the attention of the committee to the fact that this company is scrupulously endeavoring in every respect to comply with the rule of law laid down by the courts.

4. EFFECT OF PROPOSED LEGISLATION.

This company is now confronted with the question of the effect of the proposed amendment to the Sherman law as embodied in tentative bill No. 1 of the committee reprint, which was introduced by Mr. Clayton in January, 1914. Our understanding of this bill is that it is an attempt to codify the law as laid down by the Supreme Court of the United States in the Dr. Miles Medical Co. case, the Dick case, and the Sanatogen case. The part of the proposed legislation to which we especially refer is section 10. Our fear is that in attempting to codify this line of judicial decisions, those who have drafted this proposed statute have gone further than they intended. We fear that it may possibly be held under the bill as proposed, if it should become a law, that it would invalidate the form of contract which this company has made on the advice of counsel, in respect to the right of merchants to return unsold out-of-date patterns. We do not presume that it is the intention of the authors of this legislation to invalidate any such reasonable arrangement of business which is essential to the continuance of that business. The arrangements which we have outlined above between this company and the merchants who act as its distributing agents are such that, if they were discontinued, the business now carried on by this company would be seriously injured. We have no question whatever that the business as now carried on is entirely in accord with the statutes and decisions of the courts of the United States, but we are not clear that the legislation as proposed does not go further than the decisions of the courts which it is intended to codify; and if it does go further and invalidates the contracts such as are described above, as made between this company and its representatives, the result will be a complete disorganization and prostration of the sort of business in which this company and its competitors are engaged.

5. SUGGESTED CHANGES.

It is in order to clear this doubt that we suggest that the phraseology used in section 10 of the proposed statute should be so changed as to make it clear beyond question that the proposed legislation will not invalidate the arrangements between this company and its distributors. We presume that it is the intention of the act not to invalidate such arrangements as are now entirely lawful under the decisions of the court; and in order that this intention may be carried out beyond question, we think that the phraseology of section 10 of the proposed law should be modified so as to make this matter clear beyond a doubt. Without any desire to specify any particular method of accomplishing this purpose, we have taken the liberty of suggesting to the committee that this section be amended by the addition of an appropriate proviso which would do away with any question as to whether section 10 of the proposed bill does not go further than is intended by the committee. We think that such a proviso might take the following form:

"*Provided*, That this section shall not be construed to apply to contracts that provide for the return of unsold goods, wares, or merchandise by the purchaser to the manufacturer thereof."

Dated, New York, February 25, 1914.

Respectfully submitted.

McCALL COMPANY,
By GEORGE S. FRANKLIN,
Its Attorney, 14 Wall Street, New York.

The CHAIRMAN. Gentlemen, Mr. Caffery, one of the leading members of the bar of New Orleans. He desires to be heard on some measure that is before the committee, about which he will talk.

STATEMENT OF MR. DONELSON CAFFERY, NEW ORLEANS, LA.

Mr. CAFFERY. Mr. Chairman and gentlemen of the committee, the angle from which I approach the consideration of the Sherman law is that of the person injured by monopoly in his property or business. I have charge of some damage suits under that law which probably exceed in number and in amount the aggregate of all other damage suits brought under it since its passage in 1890. It is not solely with reference to that litigation that I shall make the suggestions I want to lay before you, as I think they are rather broader than the subject which first drew my attention to them. In other words, I am not asking this committee to recommend legislation particularly with reference to any lawsuits. These lawsuits on the merits must stand or fall on the law as it was at the time of the alleged injury. We would not ask Congress to help win our suits for us, nor would Congress do so; but in considering the jurisprudence under the Sherman law one is struck with some deficiencies in that law, and I have been particularly struck with such deficiencies in preparing for the trial of the cases I refer to, which are now pending in the Eastern District of Louisiana. In going over the cases you will find that there are only two in which the Supreme Court of the United States has rendered a money judgment for damages. In view of the general belief that all the riches of Golconda have been accumulated by the trusts during the last two decades it is quite astonishing that only two judgments for damages have been rendered against them in the court of final resort during that period; and it is also astonishing that those judgments are both for insignificant amounts.

In the case of Montague *v.* Lowry the munificent sum of $500 was allowed for damages and was trebled with a like princely sum of $500 as attorneys' fees. In the case of Atlanta *v.* Chattanooga a judgment was affirmed by the Supreme Court of the United States allowing the city of Atlanta treble damages for some little extras in a bill for sewer pipe; and in the case of Loewe *v.* Lawler the Supreme Court of the United States reversed the judgment of the lower court on the question of damages and sent the case back for trial, back to limbo, where it still is.

Mr. MCCOY. They had a verdict in that case the other day.

Mr. CAFFERY. Yes; the case has been simmering along through the lower courts for many years. I understand that there has recently been a verdict, with probably another appeal to the Supreme Court. That case was instituted for damages suffered in 1902, and there has only recently been a judgment in a lower court for those damages. In other words, the machinery of the law is totally inadequate for the purposes of carrying compensation to those who are injured by the trusts.

In the suggestions that I shall make to you gentlemen as to how this machinery should be bettered I would not suggest any drastic changes in the law, either in its substance or in the remedies by which reparation is given those injured in their business and in their property.

There is a well-recognized class of cases where there must be special rules of evidence and special penalties and special procedures. It has been recognized by Congress that these antitrust cases

fall within that class. It has been so recognized by the President in his recent message to Congress on the subject. And in order to give a remedy to those who are injured, and to give a real remedy, there must be some changes, I submit, in the remedial part of the law. Just as an army crawls on its belly, so does a law depend upon its remedial processes. Without procedure you may have the statute books full of good laws which will amount to nothing. And, in so far as compensating those who are damaged by these huge combinations, I think it is apparent that the Sherman law is a dead letter.

The cases in which special penalties have been imposed by the law are these trust cases where the damages are trebled and where an attorney's fee is allowed to the successful plaintiff. There are also the insurance cases which carry in favor of a successful plaintiff against an insurance company damages for delay in settling losses and attorney's fees. Special penalties are also allowed in railroad damage cases; a railroad not paying its damage claims for cattle losses promptly is put to the necessity of paying the fees of the attorney for the plaintiff.

In the trust cases some very peculiar special penalties are imposed. Under the law of Nebraska an officer of a trust becomes personally liable for its debts. Under the laws of Kentucky, of North Dakota, of Kansas, and of Illinois it is a defense to a suit by a trust on a bill of goods to show that the plaintiff is party to a trust. Under the law of Nebraska and of Oklahoma trust property is forfeited to the State, following out the decree of Zeno, 500 years before Christ, by which the property of those who engaged in combinations in restraint of trade was forfeited to the State, with banishment of the offenders from the State.

In Texas no successor is permitted to a trust who has any connection whatever with it. In other words, there must be a thorough cleaning out and new blood put in to succeed the concern which, by operating as a trust, subjects itself to a sort of business attainder.

In Kansas, county attorneys who do not enforce the antitrust laws are fined and removed from office. Sheriffs and constables who do not report infractions of the antitrust laws to the county attorneys are fined and jailed and removed from office. And along that same line the decree of Zeno imposed a penalty of 50 pounds in gold upon any court which did not enforce the antimonopoly feature of the law.

That is a formidable array of special penalties. I mention the special penalties, not with reference to the imposition of any further special penalties under the Sherman law, as I think they are amply adequate; I mention them for the purpose of illustrating the spirit of the law and of emphasizing the reasonableness of the request that I will make that there should be some changes in the rules of evidence as to these trust cases and in the procedures. The cases in which special rules of evidence have been established by legislation are first the gambling and the liquor cases. In those cases it is laid down by the legislature as a rule of evidence that for one to be seen gambling or drinking on any premises raises a prima facie presumption that such premises are used in the gambling or liquor business for the purposes of confiscation or fine.

There is also a legislative rule of evidence in the railroad cattle cases that the killing once being established, the burden of proof is

thrown upon the railroad to show that the killing was not done negligently.

Under the Interstate Commerce act there is a legislative presumption raised in favor of the findings of the Interstate Commerce Commission, which presumption the party affected by the finding must overcome by proof.

In the Chinese exclusion cases there is a presumption that any Chinese found without his papers must be deported.

In Canada there is a special rule of evidence in favor of the report of the trade combines board. It becomes prima facie evidence as to the facts found by that board.

In France, there is a conclusive presumption of law flowing from conviction under a criminal statute in favor of those claiming civil penalties and damages.

In Australia a special rule of evidence exists making the documents found in the custody of a trust admissible in evidence against it, you may say, making them authentic. Such a rule of evidence in these Sherman law cases would be quite valuable. In the prosecution by the Government against the American Sugar & Refining Co. the Government attorneys have been met with countless objections concerning the want of proof of the signatures to letters which were found in the files of the American Sugar & Refining Co., and with objections that the letters were not received by the persons to whom they were addressed, and so on.

In Arkansas and South Carolina and in Texas proof that an agent is guilty under an antitrust act raises a presumption that the corporation is likewise guilty.

In California, Michigan, Mississippi, and Ohio the mere proof of the general reputation of a concern that it is operating in violation of the antitrust laws is sufficient to establish its character as a trust; and in the indictment in those States against it, on the criminal side, the indictment need not give details, need not state when and where and how the trust was created, but need only describe the organization and its methods in a general way.

In Illinois a conviction may be had on a preponderance of proof.

In New Zealand the court is the judge of the evidence, is not bound by the rules of evidence, and may admit what it pleases as evidence.

Antitrust suits in a great many of the States are given precedence over all other suits on the dockets of the courts so as to provide for a summary trial; and in getting evidence for the cases it is provided that the officers of the concerns under indictment may be interrogated at some fixed point and must produce all papers wanted by the State officers. And it is provided in Mississippi, in Montana, and in North Carolina that this interrogation, this probing, may take place in advance of the filing of any suit.

A peculiar special procedure is that contained in the Massachusetts Body of Liberties, section 42, where it is provided that no man shall be forced to confess, by torture, unless in a capital case after conviction, when he may be tortured to obtain evidence against his confederates. I merely cite that as of historical interest, and not as containing any suggestion as to how the trusts should be proceeded against. [Laughter.]

Now, gentlemen, in the suggestion of the President as to the Statutes of Limitations, and as to the use by private litigants of the

Government's judgment in its dissolution suit, I will say that the Statute of Limitation ought to be made applicable on the lines suggested by him whether a dissolution suit is ever brought or not. The suggestion made by the President, and I believe as carried out in the tentative bill now before the committee, is made in such a way that the Statute of Limitation will not be suspended if no dissolution suit is brought. I suggest an amendment which will suspend the Statute of Limitation whether a dissolution suit is brought or not.

The cases in which you want the Statute of Limitation suspended are those where there is no dissolution suit ever brought, because it is only upon the bringing of the dissolution suit that the private litigant begins to know anything about his rights and as to what has harmed him. The claims which we have had in Louisiana would have been impossible but for the revelations made in the dissolution suit brought by the Government against the American Sugar & Refining Co. The same methods which we complained of only recently have been going on for over 20 years, but we could not place our hands upon the source of the injury until it was all brought out in the Government dissolution suit, in which the affairs of the American Sugar & Refining Co. were turned inside out, and its intimate correspondence was exposed to the courts and to the public. Therefore I would say that the suggestion as to suspending the Statute of Limitations in the measure now pending before you does not go far enough, because if a dissolution suit is not brought according to the language of that bill, then the Statutes of Limitation would not appear to be suspended.

The next suggestion that I would make would be this, that not only should the judgment in the Government dissolution suit be admissible and receivable in evidence in any case where the question of monopoly vel non against that same defendant arises, but that all the evidence received in the dissolution suit should be likewise admissible and receivable in evidence in the suit of the person claiming to be damaged by the monopoly.

The present dissolution suit against the American Sugar & Refining Co. has been pending four years, and it is now going on in the due course through the lower courts, and will probably reach the Supreme Court in a decade hence. And what are those who now sue to do? Are they to sit down, and wait for the rendition of judgment in that case, or are they to proceed, and at their own expense and upon their own initiative compile the same immense mass of documents and evidence which the Government has gathered and introduced in evidence into the dissolution suit?

Mr. VOLSTEAD. How do you come to the conclusion that this provision in section 12 of the tentative bill only applies to dissolution suits? It says, "final judgment or decree in either a civil or criminal action." It is not limited to any class of actions.

Mr. CAFFERY. I speak of dissolution suits because the criminal procedures are unknown to us.

Mr. VOLSTEAD. I presume the civil suit to enjoin certain practices might be maintained under that same suit and that the judgment would be evidence.

Mr. CAFFERY. That is very true, but it is just such a suit that I speak of as occupying about 10 years in getting through the courts.

Mr. VOLSTEAD. Do not let me urge you away from your line of argument.

Mr. CAFFERY. On the line suggested by you, it does not subject the defendant in the case to any inconvenience or hardship to have introduced against him all the evidence and all the facts concerning which it has had full opportunity to cross-examine and where the issue as to the existence of the monopoly is the same. The truth of the matter is this, with regard to the shortening of these procedures by special rules of evidence, that in my judgment such shortening will be as beneficial to the monopoly as to the claimant in those cases, because it is certainly not a healthy condition for even the American Sugar Refining Co. to have hanging over its head claims for $100,000,000; and it can not be beneficial to any concern to have suits against it dragging through the courts for large amounts of money for a long period of years. To shorten those suits I consider will be beneficial both to the plaintiffs and to the defendants.

Mr. VOLSTEAD. Have you given any consideration to the question of whether evidence of that kind could be admitted if objected to on the charge of being unconstitutional or under the criticism of being unconstitutional?

Mr. CAFFERY. A defendant, of course, is always entitled to due process of law, both under the Federal Constitution and under all the State constitutions, and it is solely with regard to that requirement that your question is addressed, I take it. No person is deprived of due process of law when evidence is admitted against him after he has had full cross-examination of that evidence.

Mr. VOLSTEAD. But it would be cross-examination, perhaps, with reference to an entirely different issue.

Mr. CAFFERY. The issue is only with regard to the existence of the monopoly.

Mr. VOLSTEAD. As to that the judgment, under the bill, would be sufficient evidence.

Mr. CAFFERY. If the judgment is ever rendered it would, yes; and a fortiori, if the judgment is admissible in evidence, then the evidence on which that judgment is based is likewise admissible.

Mr. VOLSTEAD. I think there might be a distinction between them.

Mr. CAFFERY. There is not any question as to the power of the legislature to pass any law it pleases concerning evidence so long as it obeys the mandate that every person must have due process of law; and there can not be any denial of due process of law in admitting evidence against a person on the same issue on which he has cross-examined over that evidence.

I think it was with regard to the possibility of that question being asked that I looked up these special rules of evidence from so many jurisdictions. Not only do legislatures pass special rules of evidence, but until the constitutional provision was adopted that there should be due process of law, one of the main functions of the legislatures was to grant rehearings in cases, and in some jurisdictions the legistive granting of divorces still goes on.

Mr. MCCOY. Then your suggestion is, if I understand it, on account of the great length of these proceedings the person suing for damages should not have to wait until decree was entered, but might have the use of any testimony taken at any stage of the proceeding?

Mr. CAFFERY. Yes, sir; that is my position; and I contend that that should be done, not only with regard to the——

Mr. VOLSTEAD (interposing). I think I agree with you as to the general proposition where there is that issue, so I do not think you need discuss it any further so far as I am concerned, unless some other member of the committee desires that you should do so.

Mr. CAFFERY. I contend it should be done for this reason, that it is the duty of the Government to protect its citizens against these monopolies, against monopolies which, in so far as the cases I have been looking into are concerned, become highwaymen. If the Government permits highwaymen to operate, if through its laches it permits highwaymen to go unwhipped of justice, and to injure its citizens in thousands and millions of dollars, then it would seem to me to be equitable for whatever evidence is gathered from any legitimate source to be declared by the Government authentic against those who have violated its laws, and against whom the Government has not put into operation, as it should, the machinery of the law.

On the question of procedure, in cases of this kind, the delays amount, under the present rules of evidence and under the procedures as presently established, to a denial of justice. The case of Atlanta *v.* Chattanooga was first heard of in the One hundred and twenty-first Federal Reporter, where a demurrer was passed upon. That was in 1900. It is next encountered in the One hundred and twenty-seventh Federal Reporter, where a verdict of the jury was reversed and a new trial was granted. It was finally heard in the Supreme Court in 1906.

In the case of Loewe *v.* Lawler the damage done was in 1902. It did not reach the Supreme Court until 1908, and it would not have reached it then if the lower court judge had not said that a contested trial would consume weeks of time, with enormous expense, and that he would dismiss the complaint so as to get an early hearing in the appellate courts. But the early hearing has not availed the plaintiffs in Loewe *v.* Lawler, as they are still simmering in the lower courts.

My suggestion would be that not only sould these special rules of evidence be adopted permitting the record in the Government dissolution cases, or in the Government criminal cases, to be availed of by a person who has been injured in his property or in his business, but that here should be a special procedure the same as upon questions of jurisdiction in the Federal courts. Those questions of jurisdiction are certified up to the Supreme Court. If in Montague *v.* Lowry and Atlanta *v.* Chattanooga and Loewe *v.* Lawler there had been a process whereby the case could have been certified to the Supreme Court after the making up of the record, all these delays that I speak of would have been avoided, because in none of these cases was anything decided by the Supreme Court of the United States, when after so much delay they finally got there, but questions arising on the face of the papers.

Mr. VOLSTEAD. You mean on the face of the pleadings?

Mr. CAFFERY. On the face of the pleadings. When those questions which were presented on the face of the pleadings were decided in the Supreme Court of the United States, when those cases finally completed their long journey in the courts——

Mr. MCCOY (interposing). Loewe *v.* Lawler came up on demurrer in the Supreme Court for the first time, did it not?

Mr. CAFFERY. Yes; Loewe *v.* Lawler came up on demurrer.

Mr. MCCOY. Why was there so much delay after that suit was instituted in getting a decision in the lower court?

Mr. CAFFERY. Well, there were all sorts of delays, as will occur in every case if the ordinary procedure applies. For example, in 1905 there was a motion made requiring the plaintiff to amend his pleadings. That was passed upon in One hundred and forty-second Federal Reporter, and in One hundred and forty-eighth Federal Reporter the case finally came up and was dismissed. It should have been dismissed in 1905 for the same reasons which the judge gave in 1906.

Mr. MCCOY. In that particular case what change in procedure would you suggest which would effect the object which you have in view of getting it up to the Supreme Court any sooner than it got there?

Mr. CAFFERY. The petition, exceptions, and answer should have been certified to the Supreme Court by the lower-court judge, who then should have proceeded to take testimony in the case on the presumption that a cause of action was stated, and on the presumption, too, that if the case was dismissed by the Supreme Court the expenses of trial in the lower court, which would have been needless, would all be paid by the plaintiff, the defendant not suffering thereby.

Mr. DUPRÉ. You were desirous to have the proceeding go on on the merits and have the question of the pleadings certified to the Supreme Court for its decision?

Mr. CAFFERY. Yes.

Mr. DUPRÉ. Could that not have been done on demurrer just as well?

Mr. CAFFERY. Only in case the judge of the lower court dismissed the complaint. If it is done at all, it ought to be done scientifically. If you can get the lower-court judge to overcome his convictions as to the law in a case and invariably to dismiss it, then it will come up, just as you suggest, but only on the petition, and in the way I suggest the record will be made up—the petition, exception, and answer—and then the case will be forwarded to the Supreme Court for a ruling upon the questions of law patent on the record.

In the case of Atlanta *v.* Chattanooga long delays would have been saved, when there was nothing else delaying the case but the necessity of the Supreme Court saying whether the city of Atlanta was a person and what statute of limitations applied. That, of course, could have been decided offhand, right on the face of the papers, in two minutes; but it took many years for that question to come up under the present, I will say, archaic procedure under the Sherman law. So, in Montague *v.* Lowry and in Loewe *v.* Lawler, the remaining two of the solitary trio in which hope of reparation was held out to the person damaged by a trust, all questions finally considered in the Supreme Court could have been decided in the beginning if the record had been certified up. If there are special penalties, if there are special rules of evidence, if there are special procedures in so many classes of cases, and particularly in these antitrust cases, then there ought to be some special procedures which will be effective; special procedures of the kind such as would, I am sure, as in the language of the trial judge in Loewe *v.* Lawler, prevent the consumption of weeks with the trial, "with enormous expense," thereby bene-

fiting both parties to the litigation—certainly the plaintiff and undoubtedly the defendant.

Mr. McCoy. You would make that amendment to the law general, would you not, so that any equity suit might take the same course?

Mr. Caffery. These damage cases are law cases, cases at law, cases under the Sherman law, under the statute. No; I would make it only cases under this statute shall be affected by it.

Mr. McCoy. Why would it not be wise to have that in the equity suit for dissolution?

Mr. Caffery. It might be. I think it would probably help big business out of the mire that it says it gets into when it is sued to let it go immediately to the Supreme Court and have its rights passed upon. For example, in the dissolution suit now pending against the American Sugar Refining Co., the plea of res adjudicata is insistently set up by the defendent. Such a procedure as I have suggested would have enabled the Supreme Court years ago to have said whether there was anything in that claim. If the American Sugar Refining Co. is right in its contention it would have been saved a great deal of money.

Mr. Dupré. Do I understand you to say that where the question is raised on the pleadings, that that question should be certified to the Supreme Court for decision, and the evidence should be taken in the case and the case should proceed?

Mr. Caffery. The case should proceed in the court below. In other words, there ought not to be anything to delay matters. Delay injures both parties, and particularly those who come into court, as my clients have done in Louisiana, contending that they have been bankrupted by the inexecution of the law. If they have been bankrupted they are entitled to a speedy trial. If they have not been damaged the defendant is entitled to a speedy dismissal of the suits.

Mr. Peterson. Would you go direct to the Supreme Court?

Mr. Caffery. Yes, sir.

Mr. Peterson. Or would you go to the court of appeals and from there to the Supreme Court?

Mr. Caffery. I would go direct to the Supreme Court, the final arbiter. No one is satisfied unless he does get into the Supreme Court and gets an adjudication there.

Mr. McCoy. There is a special proceeding already provided for along the lines of your suggestion mentioned in those other special proceedings now for expediting cases.

Mr. Caffery. It amounts to nothing.

Mr. McCoy. What I meant was a principle of special proceeding is already contained in the law.

Mr. Caffery. The principle is recognized there. The law has already recognized the necessity for the principle and should put it into live operation.

It has been suggested to me by Senator Broussard that there should be a prescription fixed in the Sherman law, as we say in Louisiana, as is said in the common law, there should be a statute of limitations passed by Congress concerning the damage suits under the Sherman law. As it now stands the limitations in each State are applicable under the Sherman law. There is a want of uniformity of limitations even under the bill as prepared by the committee, and, under the bill I have suggested, that evil, if it be an evil, continues.

There has been no fixation of a time in any of the bills within which these suits should be brought. Probably there should be. In Louisiana it is claimed by the defendants in the cases I have spoken of that the prescription of one year applies—one year after the actual doing of the injury. In Tennessee, it was decided by the circuit court of the United States, in Atlanta *v.* Chattanooga, that the prescription of 10 years applies, and it would be somewhat anomalous, to say the least of it, for the same people doing business in Louisiana and Tennessee to have a right of action for only one year in Louisiana and for 10 years in Tennessee. Possibly there should be a uniform statute of limitations. It would certainly be in the direction of a scientific treatment of the whole subject matter.

Mr VOLSTEAD. Do I understand that in your State the statute of limitations would commence to run immediately upon an unlawful act, supposing it was a continuous act, or would it run from the time that continuous act closed?

Mr. CAFFERY. I think that under the jurisprudence of Louisiana the limitation would begin after the final cessation of the series of continuous acts, and also after the discovery of the exact way in which the harm was done.

Mr. VOLSTEAD. Do you have a statute that controls the running of the limitation in case you do not know how the thing happened?

Mr. CAFFERY. Well, it is not statutory. We have a statute there establishing a limitation of one year against all damages from offenses or quasi offenses.

Mr. VOLSTEAD. They have got those, I think, in a great many cases, as in the case of fraud. In that case the statute does not commence to run until the discovery of the fraud.

Mr. CAFFERY. That, of course, is our jurisprudence, but we have no general statute to that effect. But in these damage suits, where a private litigant must traverse the whole of the United States in order to find what a monopoly has been doing in Louisiana and in California and in New York, there will not be much in the law for a private litigant unless some of the special procedures that I have spoken of are applied; and it will not benefit him much to extend the statutes of limitations unless these special procedures, particularly as to permitting the testimony in the Government's cases to be introduced, are provided for. The litigants who claim that they have been damaged in these millions of dollars by the monopolies will find themselves put by the Sherman law in something like the Lazar House, which is spoken of in "Paradise Lost," where the only attendants on the wretches who are inmates are "Despair" and "Death," mocking them with what they might have received but which will not be awarded to them. There will be no chance of anything like real justice—of seeing the real money of the trusts—no matter what their rights are, no matter how they have been damaged, unless the special procedures I have spoken of, certifying the cases up to the Supreme Court, and the like, are adopted, or unless these rules of evidence are adopted permitting evidence in the Government's dissolution case to be used by them.

Mr. VOLSTEAD. It was suggested here that in those actions the laws or right of compelling discovery ought to apply. Have you run up against that proposition of compelling the defendant to surrender his books or open them so that you can inspect them?

Mr. CAFFERY. Under the present statute on the gathering of evidence that right is denied, or that right is contested; but I do not see any reason why that right should not be granted.

Mr. VOLSTEAD. Do you think that would be of any benefit to you?

Mr. CAFFERY. It would be of great assistance.

Mr. PETERSON. Is that right not now recognized—the rule of compelling discovery?

Mr. CAFFERY. It has never been availed of in such cases so far as the reports indicate. The authorities are conflicting as to the exercise of that right under section 857 of the Revised Statutes.

Mr. DUPRÉ. May I ask how many separate suits have been instituted by the Louisiana people against the American Sugar Refining Co.?

Mr. CAFFERY. There have been several hundred—not far from 200.

Mr. DUPRÉ. Each suit is independent?

Mr. CAFFERY. Each suit is an independent suit.

Mr. DUPRÉ. It was suggested here the other day—I think by Mr. Brandeis, probably—that it would be desirable to have private litigants injured by the operation of trusts permitted to intervene or to become parties to the Government dissolution suit either at some time during its pendency or after final decree. I want to ask whether you have any views on that subject?

Mr. CAFFERY. There has already been an issue raised in our suits on a question similar to that. The Revised Statutes of the United States provides, in section 921, that all causes of a like nature may be consolidated, and the plaintiffs in these cases have asked the judge of the eastern district of Louisiana, informally, what his views are on the question of consolidation, and at that same informal hearing the attorneys for the American Sugar Refining Co. were on hand and vigorously contested against any consolidation of causes, claiming that it would be a denial of justice to them to consolidate the cases on the ground that the question of limitation in each case would be different, but both sides realize that unless the causes are consolidated they will be dragged out over a great many years—possibly during the lifetime of the present judge and the present attorneys.

Mr. DUPRÉ. In what jurisdiction is the Government suit against the American Sugar Refining Co. pending?

Mr. CAFFERY. In the southern district of New York.

Mr. DUPRÉ. And do you think it would work to the ends of justice that litigants, say, in Louisiana and California should have to have their rights adjudicated on the Government suit pending in the jurisdiction of New York?

Mr. CAFFERY. I think it would be a virtual denial of justice to compel 200 Louisiana or California litigants to go to New York to prove their cases.

Mr. MCCOY. How about allowing them to do it if they care to do it?

Mr. CAFFERY. There might be some men of means who could go there.

Mr. MCCOY. I do not mean so much from that point of view as to its effect on the litigation—whether it would be too much of an interference with the Government proceeding?

Mr. CAFFERY. I do not think it would be any considerable interference with the Government proceeding. I think it would be in the direction of speedy justice, and I hope the committee will recommend the passage of a law to that effect.

Mr. DUPRÉ. You mean permissive but not compulsory?

Mr. CAFFERY. Permissive but not compulsory. Undoubtedly unless some relief is granted on those lines the Sherman law will remain a dead letter in so far as salving over the injuries of those who are damaged by monopolies. It certainly has been a dead letter up to now and it will remain one unless some such relief as I have suggested is given.

Mr. DUPRÉ. Have you read into the record the amendment, which, I understand, you had in mind, to section 12?

Mr. CAFFERY. I have only prepared one of the amendments I had in mind. The other amendments I did not prepare, as they only occurred to me after I started for this hearing.

Mr. FLOYD. I would suggest that you read that amendment into the record, and the committee will be obliged to you if you will prepare the other amendments that you have in mind and submit them later. We would be glad to have your assistance in that way.

Mr. CAFFERY. I will do that.

Mr. FLOYD. You might hand that one to the stenographer now and later you may transmit to the committee the other suggestions.

Mr. CAFFERY. Yes, sir; I will do that at once.

I thank you, gentlemen, for giving me this opportunity to appear before you.

(The suggested amendments referred to during Mr. Caffery's remarks are as follows:)

Amendment to tentative bill No. 1 by Mr. Clayton. On page 4 strike out, after the word "act," in line 1, balance of section and insert the following:

"In all cases where, under the provisions of the act entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' approved July 2, 1890, a cause of action arises in favor of any person who shall have been injured in his business or property, the statutes of limitation applicable to such cause of action shall be suspended until it shall have been finally adjudged in a suit or proceeding, civil or criminal, by or on behalf of the United States that the act aforesaid has been violated, and such statutes of limitation shall not again become operative until after the rendition of final judgment in such cause; and whenever, in any suit or proceeding, civil or criminal, brought by or on behalf of the United States, under the provisions of this act, evidence shall have been taken, filed, or adduced therein, in any stage of the case, on the issue whether said act has been violated by the defendant, such evidence shall be likewise admissible and receivable in any suit for damages, under the provisions of said act, wherein the issue as to the violation of said act arises, and wherein the defendant is the same, either directly or indirectly, through its officers, if it is a corporate defendant; this provision being applicable in favor of any party plaintiff or defendant in such suit for damages."

Proposed new section to bill No. 1, by Mr. Clayton, to be inserted on page 4 of the tentative bill between sections 12 and 13; this section to be section 13, and the present section 13 to become section 14:

"SEC. 13. That whenever any person shall sue, under section 7 of the aforesaid act, to recover threefold damages for injury to his business or property, the district judge shall, as soon as the cause is at issue, decide whether the petition states a case and whether the answer, or the exceptions and answer, constitute a defense; and upon motion by the aggrieved party the judge shall certify the record to the Supreme Court of the United States, where said cause shall be placed upon the summary docket, and where, when it shall come to be heard, all questions of law arising on the face of the papers shall be examined into and decided; and if the cause is proceeded with in the meantime in the lower court the plaintiff shall pay, in addition to the costs, a reasonable attorney's fee for the defendant in the event the Supreme Court of the United States shall dismiss the action."

STATEMENT OF MR. BERNARD FLEXNER, OF CHICAGO, ILL., REPRESENTING THE MIDDLE WEST UTILITY CO.

Mr. FLOYD. Will you state your full name to the reporter; and if you represent any special interests, will you state that also?

Mr. FLEXNER. Bernard Flexner. I am here, Mr. Chairman, especially with reference to the suggestion about holding companies. I represent a large holding company that is engaged in holding stocks of public utilities in the gas and electric light business, mainly.

Mr. FLOYD. We will be very glad to hear from you on that subject, Mr. Flexner. I will state, however, while the matter is under consideration, that unfortunately we have not the proposed drafts ready for submission, but we will be glad to hear your views on that particular subject.

Mr. FLEXNER. We have been watching for the tentative draft of the bill that was intended to affect holding companies, because we felt that there was good reason, in the light of the thought underlying the proposed legislation, why a holding company that was holding the securities of a gas and electric light company, or a utility, should be excluded from the operation of such a statute, and with your permission I should like to state briefly the reason why we think a company of that kind should be excluded from any such proposed legislation. Of course if there is no intention to include them it would be useless to take up the time of the committee to discuss this phase of the question.

Mr. FLOYD. We will be very glad to hear you. I might say that there is a bill in contemplation or in preparation, and we are holding these hearings for the purpose of getting suggestions in regard to proposed legislation. You propose to furnish exactly the kind of information we will be glad to have, and we will be glad if you will proceed.

Mr. FLEXNER. In the first place, if the committee please, these holding companies—and I am using the one that I represent as being typical of them all——

Mr. FLOYD (interposing). Would you mind stating what that is?

Mr. FLEXNER. The Middle West Utility Co. It holds the securities of electric-light properties that are being operated in Indiana, in Illinois, in Kentucky, in Oklahoma, a few in Missouri, and some in the New England States.

You will note that they are widely scattered properties. All of those properties are being operated by domestic corporations of the States in which the utilities are located. They are being operated by domestic corporations, because under the laws of those particular States they must be operated by domestic corporations. Most of the States that I have mentioned have public service or public utilities commissions or corporation commissions, and the very thing that it would be sought to accomplish is being done by the States themselves. The States themselves are undertaking to regulate all of the relations of these companies to the public. They regulate the rate, they regulate the service, they regulate the issuance of securities, they regulate the return of those securities. The companies which are holding the securities of those various operating companies have made it possible to develop in the communities in

which those companies are operating a character of service that otherwise would have been absolutely impossible.

Let me cite an illustration. Take the State of Illinois, for instance. The domestic corporation of Illinois which owned the utilities must be an Illinois corporation, and in order to get a right of eminent domain has taken over and is operating about 100 utilities in 100 different municipalities. Most of those cities, prior to the time that this group of properties was gathered together, were getting only electric light at night. They did not have what is commonly known as a 24-hour service.

Mr. VOLSTEAD. They had the moonlight schedule?

Mr. FLEXNER. Yes; a good many of them had the moonlight schedule. They have been tied together with the result that every one of these municipalities has a 24-hour service.

There are other advantages: The advantage of expert knowledge that these holding companies have brought to these monopolies——

Mr. McCOY (interposing). What has been the effect on the prices?

Mr. FLEXNER. The tendency in the prices everywhere has been lower. They have been steadily decreasing.

The District of Columbia, through the United States courts, has recognized the principle that a public-service corporation in a municipality doing an electric light and gas business is a monopoly to be regulated by the State or by the District of Columbia.

I would like to give a striking illustration of the distinction between that character of company and an industrial company that is doing a competitive business.

Mr. CARLIN. To what company do you refer in Illinois?

Mr. FLEXNER. The Central Illinois Public Service Co. It is a recently organized company.

Mr. CARLIN. With headquarters where?

Mr. FLEXNER. At Mattoon, Ill.; headquarters at Mattoon, Ill.

Mr. CARLIN. Is that Judge Grosscup's company?

Mr. FLEXNER. It was formerly Judge Grosscup's company. He had a bad accident and got out of it. I also spoke of some companies in Oklahoma. There were two electric-light companies in Chickasha, Okla.. The people I represent had owned one of them. The other one was in the hands of a receiver. There had been a very bitter warfare on the subject of rates. The service in the community was abominable. As I understand it, under the constitution of Oklahoma, two public-service corporations operating in the same community can not be consolidated, nor can one acquire the other without the consent of the corporation commission of Oklahoma, through a special legislative act. The commercial body of the city of Chickasha was so disgusted with the competitive conditions of these two companies that it petitioned the corporation commission to have a hearing, and the corporation commission of Oklahoma went to the legislature and requested permission to consent to the consolidation of these two companies in order to remove the conditions of competition, and that has been accomplished within 60 days.

Mr. McCOY. Do any of your companies do an interstate business?

Mr. FLEXNER. I might say this, that possibly with the exception of New England——

Mr. McCOY (interposing). Assuming that none of them do an interstate transportation business, what would you find in these bills,

or do you think that we could put anything into a holdir g bill, which would interfere with what you want to do?

Mr. FLEXNER. Well, it might be that a company was sending current across a State line, say from Illinois into Indiana.

Mr. McCOY. I assume the business of such a company is a transportation business.

Mr. FLEXNER. Your question presents this, whether or not—and as I read the cases it has not been decided—but let us assume that there is a holding company organized in the State of Delaware; that this company is holding the securities of a group of properties such as I have enumerated here, whether or not the operation of that holding company in its contracts between those subsidiaries would be deemed interstate commerce or interstate trade?

Mr. McCOY. That is it.

Mr. FLEXNER. It is an open question.

Mr. FLOYD. It would be almost inconceivable that a holding company holding the stock of corporations like your concern would not have some that were doing an interstate business, which would bring you clearly within the law.

Mr. FLEXNER. In New England, for instance, we do transmit current from New Hampshire into Maine. It is generated in New Hampshire and sent across the line, and I take it that might be held to be interstate commerce; and whether or not this committee would go the extent of recommending that a company should not hold, or if it did go to the extent of holding that one corporation should not hold the stock of another corporation engaged in interstate commerce—I am inclined to think if they were simply to hold that it would hit us, and it might work a very serious injury.

Mr. VOLSTEAD. Some of your subsidiary companies, I suppose, operate a trolley line?

Mr. FLEXNER. Yes.

Mr. VOLSTEAD. And they may go across the State line?

Mr. FLEXNER. Yes.

Mr. VOLSTEAD. Or they may connect with some other interstate carrier so that the traffic over them might be interstate commerce, even though it were not itself an interstate carrier after crossing the State line.

Mr. FLEXNER. The question you put is quite of common occurrence where these trolley lines are being developed.

Mr. VOLSTEAD. Especially if they carry any freight?

Mr. FLEXNER. Yes. And it would be interfering with what has been a very considerable and legitimate development of business. It would unwittingly hit that form of enterprise. There are no conditions of competition such as I understand have been the underlying thought in much of this discussion.

Mr. McCOY. Are you familiar at all with the controversy that has arisen out in Seattle in reference to trolley lines?

Mr. FLEXNER. No.

Mr. McCOY. I think that they have contended out there that the great strength which is back of about all the lines out there has worked to the detriment of the public in the way of checking, for instance, municipal ownership of power lines and lighting companies. I believe that the stock of those companies out there—some of them,

at any rate—is held by a holding company. At any rate, there is one big concern, as you know, that has control of the business out there.

Mr. FLEXNER. Yes, sir.

Mr. McCOY. I suppose that some of our representatives from Washington say that they would like to use the power which the big holding companies have taken away from them. At any rate, there is one of the big concerns you know that has controlled all that business out there?

Mr. FLEXNER. Almost killing competition, due to large resources of capital.

I am not familiar with the details of that controversy, but answering generally the question that you raised, it seems to me to present a condition that is being cared for by the States through their commissions.

I have had drawn here, illustrating the trend of that development, a chart of the United States, beginning with the year 1907, and showing to what extent the States have taken over the absolute regulation of these companies, and it presents a very interesting history.

Mr. FLOYD. Permit me to ask a question. What is the name of your holding company?

Mr. FLEXNER. The Middle West Utilities Co.

Mr. FLOYD. Where is it located?

Mr. FLEXNER. We are incorporated under the laws of Delaware. It has an office in Chicago, as well as in Wilmington.

Mr. FLOYD. And its work is limited to electric lighting?

Mr. FLEXNER. Limited to electric lighting and gas, and it has one or two water companies.

Mr. FITZHENRY. You say you have some gas companies?

Mr. FLEXNER. Yes.

Mr. FITZHENRY. Are you connected in any way with the Susquehanna Light & Power Co.?

Mr. FLEXNER. No, sir.

Mr. FITZHENRY. Or with the Hoden-Pyl-Walbridge Co.?

Mr. FLEXNER. No, sir.

Mr. FITZHENRY. Are you connected with Gaines?

Mr. FLEXNER. No, sir.

Mr. FITZHENRY. You are entirely separate from those concerns?

Mr. FLEXNER. Yes, sir.

Mr. FITZHENRY. And the business of your holding company is to hold the bonds and stocks of these local companies?

Mr. FLEXNER. Yes, sir.

Mr. FLOYD. Is not that the only way you could get into interstate commerce—through the merchandising of securities of these local companies?

Mr. FLEXNER. Yes.

Mr. FLOYD. Every holding company that operates is operated under a local franchise under the several States to do business?

Mr. FLEXNER. Yes, sir.

Mr. FLOYD. And regulated exclusively by them?

Mr. FLEXNER. Precisely.

Mr. FLOYD. And the only expense you would be to under this legislation would be as it might affect you as holding stock of these companies?

Mr. FLEXNER. Precisely.

Mr. FITZHENRY. I want to know whether you represent this man in Indiana known as Geist?

Mr. FLEXNER. No. Geist, as I remember it, owned one of the Indianapolis companies, or acquired one of the Indianapolis companies.

Mr. FITZHENRY. Quite a good many of those northern Indiana companies?

Mr. FLEXNER. We have not any connection with Geist; I do not know him at all.

Mr. FITZHENRY. Is it a Baltimore concern?

Mr. FLEXNER. Philadelphia, I think.

Addressing myself for a moment to the question that the gentleman asked: About a week ago three of the United States district judges, sitting in Detroit, declared unconstitutional the Michigan "blue sky" law, and in the discussion—and I merely mention this to show what has been running through my mind with reference to interstate trade. One of the grounds upon which that was declared unconstitutional was that it put an undue burden upon interstate trade. Now, the trade consisted in the selling or offering of certain securities of a corporation outside of the State of Michigan in the State of Michigan without the approval of the particular commission that this law provided for.

Mr. FITZHENRY. Did that "blue sky" law provide a certain method of procedure before it could become a holder of bonded indebtedness?

Mr. FLEXNER. No; it provided in detail for certain kinds of statements that had to be furnished to the commission, its absolute approval of the organization of the company, and the conditions back of the obligations before they could be offered.

Mr. FITZHENRY. Has there been any attempt on the part of the Legislature of Michigan to regulate the exercise of the franchise?

Mr. FLEXNER. No.

Mr. FITZHENRY. But merely the marketing on certain securities?

Mr. FLEXNER. Yes, sir. The public is absolutely protected, as you gentlemen know, in those States where you have commissions—Indiana, for instance; Illinois is just beginning and Oklahoma has done it extremely well; the New England States have commissions, and they do regulate every detail of the operation of business of the operating companies. So that it would interfere very considerably with the legitimate development of business in reaching these companies where they do not any of them present the elements of competition, nor can they present the elements of competition. Congress has recognized them as monopolies to be regulated and every State has recognized them as monopolies. They have gone so far, as you gentlemen know, as to provide in the State commission laws that where a utility is operating in a locality a second utility can not operate there, unless after a public hearing it is proven that the combination exists and the necessity of the public requires it. So that the very purpose of all these laws is to create a condition of regulated monopoly with reference to this character of business.

Mr. VOLSTEAD. The law you refer to is the Wisconsin law, is it?

Mr. FLEXNER. That is the scope of the Wisconsin law, which has been so largely copied all over this country.

Mr. FLOYD. That is the law in Indiana?

Mr. FLEXNER. That is the law in Indiana to-day. I merely wanted the opportunity of presenting the matter.

As related to that, if I could just throw out this suggestion with reference to the interlocking-director bill, there ought to be an exception in favor of the corporation and its lawful subsidiaries; in other words, a common director ought to be possible between a corporation and a subsidiary the securities of which it may lawfully hold.

Mr. DANFORTH. Can you get along under your scheme with dummy directors?

Mr. FLEXNER. Not very well. The operation of an electric-light property and the operation of a gas company and a water company requires more skill than the average dummy director has.

Mr. DANFORTH. You have a managing director in each one of these subsidiary corporations, but the interlocking directors can all be dummies, can they not?

Mr. FLEXNER. No; very frequently the reverse of the situation is true. For instance, take the Indiana law as an illustration. It provides that it shall be unlawful for the executive officers and less than the majority of the directors to be residents of any other State than the State of Indiana. So that the common directors would not be the actual operating people. The people in actual charge of the company must be competent people, residing in the State of Indiana. And that has been the policy of this company right along, to build up a strong local organization and, as far as possible, to get along without common directors; but it is not always possible to do it.

Mr. DANFORTH. There is nothing in this tentative bill No. 3 which would interfere with that system or the Indiana system?

Mr. FLEXNER. I think there is not, unless it is section 3, and I am inclined to think that it does not touch it.

Mr. DANFORTH. It covers nothing but directors, I think.

Mr. FLEXNER. Yes; but it fits in with the suggestion I made.

Mr. DANFORTH. Section 3 is the one giving the penalty. I think you are thinking of section 4.

Mr. FLEXNER. Section 4, that is. As I read that, it is intended to apply to competing companies engaged in interstate commerce.

Mr. Chairman, I am somewhat reluctant to suggest this. I have been engaged in the compilation of a section intended to carry out the suggestion I have made here.

Mr. FLOYD. We would like to have it.

Mr. FLEXNER. I would like very much to submit it with this statement for what it is worth.

Mr. FLOYD. We would be very glad to have it. I think when you were interrupted you said you had some chart.

Mr. FLEXNER. This is a graphic illustration of the growth of these companies by commission throughout the United States and presents a very interesting history. I shall be very glad to furnish it to the committee.

Mr. VOLSTEAD. Does this cover all the States?

Mr. FLEXNER. All of the States have not passed legislation. This covers the situation as it is to-day, beginning with the year 1907.

Mr. FITZHENRY. What does that chart show, Mr. Flexner, in a general way?

Mr. FLEXNER. I think you can see the colors there. [Exhibiting chart to the committee.]

Mr. FITZHENRY. Just state it, so it will go into the record.

Mr. FLEXNER. This chart is a series of maps of the United States and shows, beginning at the year 1907, the growth of the establishment of State commissions throughout the United States.

Mr. DANFORTH. For each year?

Mr. FLEXNER. Yes, sir; for each year.

Mr. DANFORTH. Showing the territory that has accepted that method of handling utilities?

Mr. FLEXNER. Yes, sir; I should be very glad to file that.

Mr. FLOYD. I suggest you hand that to the stenographer to be filed, but not to be printed.

Mr. VOLSTEAD. Let me ask you, as that is not to be printed, whether you can give us a broad outline for that development?

Mr. FLEXNER. How much it has grown?

Mr. VOLSTEAD. Yes; give it in a general way, so it can go into the record.

Mr. DANFORTH. One more question. Does this proposed amendment of yours go beyond the situation in which you are personally interested?

Mr. FLEXNER. Oh, yes.

Mr. DANFORTH. That is, you cover other kinds of holdings and interlocking directors?

Mr. FLEXNER. I proceed on this theory, that this committee intended to draft such a bill, affecting a certain class of holding companies, and with that in mind, and with certain line cases before me, I undertook to draft a section that from the discussion and from the tentative bills seemed to me to be the line of thought that was being pursued here; and it is a bill that undertakes to prohibit the holding of stocks of certain classes of corporations. It is drawn in such a way that it would exclude, in my opinion, the class of companies which I have been discussing here.

Mr. DANFORTH. Does it exclude any other classes?

Mr. FLEXNER. I think not. The thought in my mind, and as I gather it—of course I do not know what the committee has had in mind—I thought the committee possibly had in mind the exclusion of a corporation engaged in interstate commerce from holding the securities—stocks, bonds, etc.—of another corporation engaged in interstate commerce and actually or potentially competing.

Mr. PETERSON. In other words, subsidiary companies?

Mr. FLEXNER. And to reach the situation with reference to the relation of certain industrial companies to common carriers, where there has been a holding of securities, by either one or the other.

Mr. DANFORTH. It has been suggested by the committee that we ought also to exempt from the provisions of that section—the holding company section—subsidiary companies or holdings companies which have subsidiary companies in foreign countries, to enable them to do business in competition with foreign competitors. You do not reach as far as that?

Mr. FLEXNER. No; I had not thought of that.

I think that is about all I desire to submit, Mr. Chairman.

(Whereupon, at 4.50 o'clock p. m., the committee stood adjourned to meet to-morrow, Friday, February 27, 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 G. 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 24.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Friday, February 27, 1914.

The committee this day met, Hon. Henry D. Clayton (chairman) presiding:

The CHAIRMAN. Mr. Copeland, of Boston, is present, and the committee will be glad to hear from him. Please give your name, occupation, and residence to the stenographer.

STATEMENT OF MR. WILLIAM A. COPELAND, PRESIDENT BOYLSTON MANUFACTURING CO., BOSTON, MASS.

Mr. COPELAND. I am president of the Boylston Manufacturing Co., the business of which is the manufacture of shoe machinery, and my address Boston, Mass. I represent that company before you.

I suppose you are somewhat acquainted with the conditions of the manufacture of shoe machinery, and the leasing of shoe machinery by the United Shoe Machinery Co. The concern that I represent and of which I am president is a competitor of the United Shoe Machinery Co., but a competitor only in the lesser or minor machines. It is not a competitor in the major machines. Those machines we have a full line of, but we do not put them on the market, for the reason that the leases or contracts of the other company restrict us from so doing. The principal thing I wanted to say to-day is that the justification of these leases seems to be that of patents, namely, that

they have the privilege of combining the various companies which they have, and of having these restrictive contracts, tieing one machine to another and excluding other machines, on account of their machines being subject of patent. Their monopoly is not really a patented monopoly, for the reason that it is perfectly feasible to make a line of machinery without infringing any existing patents. The company that I represent has made a line of essential machinery, and it has from its patent attorneys a clean bill of health as to the infringing patents of others. The monopoly of the United Shoe Machinery Co. consists in having gotten together most, if not all, of the competitive machines, and then by their exclusive leases and contracts having tied those machines together—that is, the essential machine—directly or indirectly, so that in order to get one machine you have to take all of the essential machines, or practically so.

The justification of this condition is that they are protected by patents, and that they are exempt from the penalties of the Sherman law on account of their business being based on patents. What I want to ask to-day is that there shall be some clause in some of these tentative bills that will make it illegal to combine patented articles in restraint of trade—just as illegal as it is to combine articles that are not protected by patents.

Some time ago a decision was rendered in the Federal courts against the Waltham Watch Co. In their appeal, so the newspaper reports said, they stated that they were different from other concerns—I believe it was a resale price decision—because they were not under the same conditions, and their business was governed by patents, and therefore not amenable to the Sherman Act. It is this same refuge that most patented monopolies take, and until these various cases, which are now before the Federal courts, go to the Supreme Court of the United States and are decided one after the other, and in each particular instance defining some specific act, then there is no relief, and a concern like the one which I represent has to sit idle and do nothing, with its money tied up, and can not put out a single machine; but if you gentlemen will put into some of these tentative bills something that will make it illegal to combine patented articles and other articles, then we shall get some relief.

Judge Floyd has asked me to throw out a suggestion as to one of these bills, and I have done so, and I shall be glad to present it for your consideration.

Mr. WEBB. You may just read it now into the record as a part of your argument if you so desire.

Mr. COPELAND. I have to suggest this as part of section 10, in bill No. 1 [reading]:

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, *offer to make, or receive any benefit under* any sale, *lease, or license of, or any agreement or arrangement respecting*, any goods, wares, merchandise, *machine, article, or device, whether the same be protected by any patent, copyright, trademark, or label, or not*, or fix a price charged therefor or *for the use thereof* or discount from, or rebate upon such price, on the condition or understanding that the purchaser, *lessee, licensee, or user thereof* shall not deal in *or use* the goods, wares, merchandise, *machine, article, or device* of a competitor or competitors of said person, *or on the condition or understanding that the purchaser, lessee, licensee, or user shall purchase, lease, or use some other goods, wares, merchandise, machine, article, or device of said person either partially or exclusively.*

Mr. WEBB. Does not the validity of some of these contracts or leases that you speak of depend upon some machine that is patented? Could they carry on this exclusive business if they had no really patented articles to sell?

Mr. COPELAND. So long as they had preempted markets and tied their machines together they could carry on their business irrespective of patents, but then they would not have the refuge of the patent law.

Mr. WEBB. Why could not you build up the same sort of system by tieing your machines together?

Mr. COPELAND. Because there is no market for my machines

Mr. FLOYD. If I understand you, the Shoe Machinery Co. have contracts with the manufacturers of shoes throughout the country which bind the shoe manufacturers not to use machines of any other company?

Mr. COPELAND. The essential machines.

Mr. FLOYD. The essential machines of any other company?

Mr. COPELAND. Practically so, in every instance.

Mr. FLOYD. In other words, they monopolize the market completely by that process?

Mr. COPELAND. Exactly, sir.

Mr. DANFORTH. You have a full line of machines, as I understand?

Mr. COPELAND. I have.

Mr. DANFORTH. That you could put on the market?

Mr. COPELAND. I could.

Mr. DANFORTH. And could you market those machines for the same price that the United Shoe Machinery Co. charges for its group of machines, or whatever they call it?

Mr. COPELAND. Very easily.

Mr. DANFORTH. And meet them competitively successfully?

Mr. COPELAND. In all instances.

Mr. DANFORTH. Then what prevents your doing it?

Mr. COPELAND. There is no market for it.

Mr. DANFORTH. Why not?

Mr. COPELAND. No manufacturer will take it. He is tied, and he would have to break his contract with the United first.

Mr. DANFORTH. But, if you have your full line and you can sell them at a competitive price, why can you not make it worth the while?

Mr. FLOYD. It involves this difficulty, if you will permit me——

Mr. DANFORTH. I want to see what his answer is to that situation.

Mr. FLOYD. Excuse me.

Mr. COPELAND. In the first place, the shoe manufacturer has a going business in which he has perhaps several hundred machines running. In order to put in my machine he must stop his business entirely, take out all of their machines, break his contract with them, and pay a return charge, then put in my machines.

Mr. DANFORTH. There are now shoemaking companies or partnerships or individuals starting in business all the time.

Mr. COPELAND. Yes; that is true.

Mr. DANFORTH. What would prevent, according to your statement, such a new concern buying your group of machines?

Mr. COPELAND. There is nothing to prevent that, when I commercialize my machines.

Mr. DANFORTH. Then, you have not commercialized your machines?

Mr. COPELAND. I am beginning to commercialize them. I have had them for some time in a stage where they have been tried and perfected; but, now, in order to commercialize them you have got to get money, and nobody will put money in any concern unless there is a market for the wares, and there is no market for my wares in essential machines.

Mr. DANFORTH. Then, the practical difficulty is that the United Shoe Machinery Co have covered the field so successfully that it pays no one to put the capital in to commercialize your line of machinery?

Mr. COPELAND. Yes; or any other line of essential machines.

Mr. DANFORTH. Or any lines?

Mr. COPELAND. Yes.

Mr. DANFORTH. In other words, the United Shoe Machinery Co. has taken such good care of its customers that the customers are satisfied and do not want to change?

Mr. COPELAND. They are not particularly satisfied, but they can get nothing else. They are not allowed to get anything else. It is skimmed milk or nothing.

Mr. DANFORTH. If you have your line of machinery ready for market, you have the capital to enable you to market it, there is nothing to prevent your competing successfully with the United Shoe Machinery Co., as I understand it?

Mr. COPELAND. On new business?

Mr. DANFORTH. On new business. Well, now, new business is springing up all the time; old firms are going out of existence and new ones are coming in?

Mr. COPELAND. New business in the shoe manufacturing business is not springing up very much with new concerns. The history for the last five years of the shoe manufacturing business is that the large concerns have grown larger, and have been augmented by new factories and the like. The small concerns have not increased their business and there have been very few new concerns come into the market.

Mr. DANFORTH. I come from Rochester, N. Y., where we have quite a large shoemaking industry, and I should say there were a large number of firms annually going into the business, or such changes in firms as to require starting at the outset, or beginning of the business, that if you should go to such men you could certainly sell if you had your machines ready to sell.

Mr. COPELAND. I do not know of any new concerns, except exceedingly small ones, having gone into the business in Rochester recently. I do know of one or two very small concerns, but I do not know of any large concern or concerns starting in new.

Mr. DANFORTH. How small a concern is it worth while to do business with as a manufacturer of these machines?

Mr. COPELAND. Why, I could not state the limited quantity that the manufacturer should make, but, say, something like 250 or 300 or 500 pairs a day.

Mr. DANFORTH. I have talked somewhat to the men who make a business of repairing shoes, and they have pointed out the machines which belonged to the United Shoe Machinery Co., and they say they could not afford to do without them; they could get other machines, but that they would not serve their purpose, because the United Shoe Machinery Co. makes a business of having repairmen to adjust

the machines, men to keep them in order, always at hand or within call; that they can buy the other machines outright, instead of leasing the United Shoe Machinery Co. machines, but then the interest of the manufacturer of the machines ceases when the sale takes place.

Mr. COPELAND. You have reference to what is known as "repair outfits"?

Mr. DANFORTH. Yes; at least, I suppose so, because I saw it in repair shops.

Mr. COPELAND. In the repair shop there is considerable difference, as in those cases they do not have to use the essential machines, or many of them; and a machine may be very inefficient in factory work, and yet be sufficiently efficient in a repair shop, and therefore there are some other machines used in repair shops than those of the United Shoe Machinery Co.

Mr. DANFORTH. Do you sell or lease your machines?

Mr. COPELAND. We have one machine that we lease: other machines that we sell outright. One machine we lease is one on which we have a pretty strong basic patent; it does not interfere with any of the essential machines of the United Shoe Machinery Co.

Mr. DANFORTH. And those machines that you sell outright, the purchaser has to take care of and find a mechanic to repair them, if they get out of order?

Mr. COPELAND. Exactly that way, and he does it. It is a common practice abroad in many factories for the manufacturer to take care of his own machines, and it is quite worth his while to do it, because he can do it, if he has a sufficient force, more economically than can be done by paying the price of parts, etc., from the other company.

Mr. DANFORTH. I imagine that is true, where he is running a factory, but I have in mind now the repairman who has one line of machines—I do not know the names of them.

Mr. COPELAND. I think there would be a difference of opinion on that. I think you would find that many repair shops would say that they prefer to take care of their own machines.

Mr. DANFORTH. I was very much interested in talking to one or two repairmen here and at home to find out that they all agreed that they were better served by the United Shoe Machinery Co. Until I talked to them I did not suppose there was any argument in favor of the United Shoe Machinery Co. system. These men all assured me that they got better service and cheaper by paying the royalties or leasing.

Mr. COPELAND. I think they would; but in a repair shop, I am quite unable to say, as I have had no experience with it; but the service that can be given a manufacturer of shoes in a factory can be given by others just as well as it can be given by the United Shoe Machinery Co., and just as efficiently and for less money.

Mr. DANFORTH. Is it given?

Mr. COPELAND. It has never had a chance to be given. If you give us an opportunity of showing whether we can give as efficient service as the United Shoe Machinery Co. can, we will show that we can.

Mr. DANFORTH. You can sell now without any difficulty to those repairers, as I understand it?

Mr. COPELAND. I do not try.

Mr. DANFORTH. But you can compete with the United Shoe Machinery Co. in that line?

Mr. COPELAND. Yes; but that is hardly worth while.

Mr. DANFORTH. There must be a good many of them stretched through the United States?

Mr. COPELAND. It is so; but, at the same time, that repair business is merely an adjunct of the United Shoe Machinery's line, you know; it is not of much consequence to them.

Mr. FLOYD. If I understand the system of the United Shoe Machinery Co., they do not sell any of these essential machines outright?

Mr. COPELAND. They do not.

Mr. FLOYD. They lease?

Mr. COPELAND. Exactly so.

Mr. FLOYD. And in this contract of lease they require the lessee to enter into a contract to use no other essential machinery in his establishment except the machinery that the Shoe Machinery Co. furnish. Is that the way that you understand that contract?

Mr. COPELAND. Practically so. There are varying forms of leases, but when you get down to the last analysis——

Mr. FLOYD. That is the effect of it.

Mr. COPELAND. That is the effect of it.

Mr. FLOYD. And the effect of it on the business of an independent concern is that while nobody is questioning the valuable quality of many of their machines, the effect on an outsider, an independent dealer, is that when he goes to another concern to sell a machine which involves that man disposing of all the machinery in his shop, and taking an entirely new outfit, because if he takes in any of your essential machines, they own the machines in his house, and under the contract have a right to withdraw them, which would stop his entire business until he could refit his establishment.

Mr. COPELAND. That would be substantially so.

Mr. FLOYD. Is not that the evil that you complain of?

Mr. COPELAND. Yes. The evil we complain of is that they have it.

Mr. FLOYD. What you desire in the law is to put a prohibition against that kind of a contract?

Mr. COPELAND. Exactly, sir. In other words, I want an opportunity to do business. I do not care about criticizing the methods of the United Shoe Machinery Co.; I am not here for that purpose. I simply want an opportunity to do business myself, and I think that I should have it. I think that the ground of a patent should not exclude me from making machines which have been covered by expired patents, and putting those machines on the market.

Mr. WEBB. Is there not bound to be some criticism of their methods; otherwise there would be no necessity of changing their methods?

Mr. COPELAND. If you made it illegal to combine patented articles their method would change automatically.

Mr. WEBB. Then you are criticising their method of combining patented articles, are you not?

Mr. COPELAND. Yes; so far as that is concerned.

Mr. FLOYD. What you are objecting to is that they, under the present system, exercise a virtual monopoly over essential shoe machinery—machines used in the manufacture of shoes. Is not that the real trouble?

Mr. COPELAND. Yes.

Mr. FLOYD. And exclude everybody else from an opportunity to compete with them in a business way; that is, a reasonable or free opportunity. Do not they make these contracts long-time contracts?

Mr. COPELAND. They are perpetual, practically—their monopoly is perpetual.

Mr. FLOYD. I am talking about their contracts now.

Mr. COPELAND. Their contracts are perpetual, in a sense.

Mr. FLOYD. I understood they were long-time; I did not know they were perpetual.

Mr. COPELAND. They are for 17 years.

Mr. FLOYD. They are for 17 years in the first instance?

Mr. COPELAND. In the first instance.

Mr. FLOYD. With the provision that they may be renewed?

Mr. COPELAND. With provision that they may take from the machine or add to the machine any device that they see fit.

Mr. FLOYD. Let me ask you if in these 17-year contracts there is not a provision that if the customer or the lessee of the machine violates any of the provisions of the contract that the lessor has a right to take all of the machines?

Mr. COPELAND. Cancel all the contracts; that is in the form of a rider.

Mr. FLOYD. And demand the return of all the machinery in his possession?

Mr. COPELAND. On 30 days' notice, as I understand it.

Mr. DANFORTH. How long does it take you to set up a full line of machines in a factory, if you persuaded the manufacturer of shoes to put your line into his factory instead of those of the United Shoe Machinery Co., which he is now using—in a factory, we will say, of 500 shoes, or a good sized factory?

Mr. COPELAND. If a line of machines was commercialized, it would probably take a few days, the mere setting them up, the physical act. It might take a long time to teach the operators, if the machines were not exactly like those that they had been using; it would take time to accustom the operators to the changes. That would have to be done one at a time rather than take the factory as an entirety and change it over.

Mr. McCOY. Mr. Copeland, if the United Shoe Machinery Co. were at this minute prevented from carrying out their present scheme, could anybody besides themselves step in and equip a factory at once with a full complement of the necessary machinery to make shoes?

Mr. COPELAND. They could not.

Mr. McCOY. How long would it take to get themselves into readiness for that?

Mr. COPELAND. That would depend a good deal on the size of the factory. If a factory, with what independent shoe machinery concerns there are in this country—and there are very few—if they were all combined and started to commercialize to morrow, it would take them three years to get in shape to fit up a factory making 10,000 pairs of shoes a day, so as to have their machines as efficient and the parts interchangeable as are those of the United Shoe Machinery Co. It is not a matter of a moment; it is a matter of a long time to get the thing in such shape that a man can do business.

Mr. MITCHELL. Mr. Copeland, would there not be great reluctance at the present time on the part of any manufacturer to take your machinery, on the ground that the United Shoe Machinery Co. might put them out of business? In other words, you are having a great deal of difficulty in getting your machinery into any factory now, are you not?

Mr. COPELAND. Yes. Of course, a man manufacturing would be very reluctant to break his contract, even though they allowed him tacitly to do so for the time being, because it would be in their power any time to stop his business.

Mr. MITCHELL. Could you give any estimate, Mr. Copeland, of what you think the difference in cost would be of having new parts supplied and the repairs made and this service given to the machinery between what it could be done independently by some local machine concern and as done by the United Shoe Machinery Co.?

Mr. COPELAND. No, I hardly think I could do that, because a local man could not get into shape to do that thing as efficiently as the United Shoe Machinery Co., could do at once. The custom abroad among the manufacturers that use independent machinery is to have small machine shops in their factories. In other words, they have a corps of engineers in some of the large shoe manufacturing establishments abroad, and they make or supply their own parts, and they have no more difficulty there in making shoes with independent machinery than they have in making them with the United Shoe Machinery Co. machinery. In some of the large factories thay have a partition in the middle, and one half of a factory uses independent machinery and the other part the United Shoe Machinery Co. machinery. There are other factories that are running with independent machines entirely.

Mr. DANFORTH. Does the United Shoe Machinery Co. allow them to use independent machines?

Mr. COPELAND. I could not state as to whether they allow them or not.

Mr. DANFORTH. Your statement would indicate it.

Mr. COPELAND. They do make a great many shoes abroad with independent machines.

Mr. DANFORTH. And where they have both kinds in one factory—independent and the United Shoe Machinery Co. machines.

Mr. COPELAND. I could not state that positively, but I know that in many factories they have them separated, and in one or two factories they have the factory divided so that half of the shoes are made with one system and half on the other; and there are factories there which have machines of independent manufacturers side by side with those of the United Shoe Machinery Co.—essential machines.

Mr. DANFORTH. Does not the United Shoe Machinery Co. manufacture over there, in several of the countries?

Mr. COPELAND. It does.

Mr. DANFORTH. Apparently they lease their machines in Europe on some different basis from that on which they lease them here.

Mr. COPELAND. There are a greater variety of contracts abroad than here.

Mr. McCOY. Was it not stated in the hearings before this committee during the Sixty-second Congress that the laws on the other

side of the water would not permit doing there what the United Shoe Machinery Co. does here, in the way of tying up machines?

Mr. COPELAND. I could not say——

Mr. McCOY. My recollection is that it was.

Mr. COPELAND (continuing). As to the leases, but I know the conditions there are very different from what they are here, and there is competition there, and a great competition.

Mr. FLOYD. Are you familiar with the Oldfield patent bill?

Mr. COPELAND. Somewhat.

Mr. FLOYD. You spoke to me something about it?

Mr. COPELAND. Yes.

Mr. FLOYD. If I understood you, some of the provisions of that bill would prevent this?

Mr. COPELAND. I think it would.

Mr. FLOYD. I understand, Judge Danforth, that the Oldfield bill is substantially the English law on the subject. They have a law in Great Britain which prohibits the thing that is being done in this country by the United Shoe Machinery Co., and I understand that the Oldfield bill was modeled after and carried the essential features of the English law on that subject. I do not know whether it carries them literally or not.

Mr. DANFORTH. The part of the Oldfield bill to which you refer is that in regard to enforced licenses or enforced use of machines, which were not used by the patentees.

Mr. FLOYD. It has many provisions and is quite a comprehensive bill.

Mr. DANFORTH. I think that is the provision.

Mr. FLOYD. It has quite a number of provisions.

Mr. NELSON. What proportion of the machinery used in the manufacture of shoes is controlled by the United Shoe Machinery Co. as compared with the independents?

Mr. COPELAND. I speak, of course, now of the bottoming shoe machinery—that is the only machinery that the United Shoe Machinery Co. supply. Sometimes people get a bit mixed in speaking of shoe machinery. That which stitches the upper to the bottom of the shoes, such as the Wheeler & Wilson—these are the machines which I have reference to as bottoming machines—and I should say that they supply about 99 per cent or perhaps 99½ per cent of the machines that make welt shoes in this country.

Mr. NELSON. Put it the other way—99 per cent of the shoes are made by the United Shoe Machinery Co. machinery?

Mr. COPELAND. Of the welt shoes, yes; I should say 99 to 99½ per cent. Of the other shoes perhaps not as great a proportion; but of all machine-made shoes at least 95 to 98 per cent.

Mr. NELSON. And that is due to their peculiar methods, outside of their control that they have of patents, that they are enabled to command that monopoly of the business?

Mr. COPELAND. It is due to the methods by which they have gotten the various machines together and then tied them together.

Mr. NELSON. By the leasing system?

Mr. COPELAND. By the leasing system, practically so.

Mr. VOLSTEAD. Have they got any patents of any particular consequence?

Mr. COPELAND. They have a great number of patents—a very great number.

Mr. WEBB. I think they had most of the leases covering the Goodyear welt for quite a while; possibly that patent has expired now.

Mr. COPELAND. Apparently they have tied the other machines to the Goodyear welter; nearly all the other machines they have tied to the Goodyear system.

Mr. FLOYD. The patent would not be an essential thing any further than they could prevent the use of that particular machine by any other company. As I understand it, if you could secure a monopoly on any line of business by contracts, such as they have, and supply the entire output to such an extent that there would not be any opportunity for anybody else manufacturing the same line of goods, it would have the same effect whether there was a single patent controlled by them or not.

Mr. COPELAND. Exactly so.

Mr. FLOYD. So, it seems to me, that the vice of it is not essentially in the question as to patents, but in the mode of doing business, the perpetual contract, and the fact that they have supplied the principal shoe manufacturers of the country with a complete outfit, and having them tied down so that they can not use anybody else's essential machinery except their own, and it does not necessarily rest upon a patent, any further than a patent is necessarily an aid, because no one could use that particular form of machine without their consent.

Mr. COPELAND. But that being so, they say they have the right to do this because their business is protected by patents, and they are not amenable to the Sherman antitrust law; that is the particular point I want to impress upon this committee at this time.

Mr. FLOYD. And now they claim they have—but I do not think there is anything in that claim that would prevent us from legislating concerning a patented article the same as we could in relation to any other when it comes into interstate commerce, if we saw fit to legislate about it.

Mr. COPELAND. Exactly so.

Mr. FLOYD. I know in my State in the antitrust laws we use the word "patent" and prohibit the regulating or the fixing of the price of any patented article; and the Supreme Court of the United States has upheld the validity of that State law, and I am under the impression that we can do anything in regulating interstate commerce that the States could do in regulating commerce within their own borders.

Mr. WEBB. We can amend the patent law so as to cover that; that is the more direct method.

Mr. FLOYD. The patent law gives a man the right to use and dispose of that particular article patented, but when he has sold that article in interstate commerce and it becomes the property of another, then it is subject to all the laws of interstate commerce on the subject.

Mr. WEBB. That is true, but that would not reach the evil this gentleman complains of, I imagine.

Mr. FLOYD. The leasing problem?

Mr. WEBB. His business is purely in the State of Massachusetts, and interstate commerce would not affect him, because he is in the same State where the United Shoe Machinery Co. is.

Mr. FLOYD. These contracts are not restricted to Massachusetts?

Mr. COPELAND. Our business is all over the world and in every State of the Union.

Mr. FLOYD. And they are shipping that machinery all over the United States, too.

Mr. WEBB. What proportion of the shoe machinery of the United States is sold in Massachusetts, do you suppose?

Mr. COPELAND. I could not answer that question exactly; you mean sold or leased?

Mr. WEBB. Leased, I mean.

Mr. COPELAND. I could not answer that question.

Mr. WEBB. A very large proportion of the shoe machinery?

Mr. COPELAND. Yes, it is; in Massachusetts and the immediate vicinity; in New Hampshire also.

Mr. FLOYD. Congress could very easily pass a law revoking the patents on these various machines, in case a lease is made like you describe here, and then it would apply to every State, whether the machinery came in interstate commerce or not?

Mr. COPELAND. That is so.

Mr. FLOYD. Do you not suppose we could say to a corporation engaged in interstate commerce that it must not make a contract of that kind in restraint of interstate commerce?

Mr. WEBB. Of course.

Mr. FLOYD. Even without saying it was or was not in restraint of interstate commerce?

Mr. WEBB. It would not affect their rights to make that sort of a contract in Massachusetts.

Mr. FLOYD. I think it would.

Mr. WEBB. Not at all.

Mr. FLOYD. We could say, "You must not engage in interstate commerce, if you make this class of contract."

Mr. McCOY. Did not the Supreme Court upset the safety-appliance law just because it undertook to do that very thing? It was either the employers' liability or the safety-appliance law, as I recollect it. One of them was upset, because the Supreme Court said it went too far and undertook to control things exclusively within a State.

Mr. VOLSTEAD. And I remember in the safety-appliance law they have incidentally held that it is unconstitutional, without it ever having come before the Supreme Court that I know of directly; but this is the employers' liability act, and in that they held it unconstitutional because it applied not only to transactions in interstate but also to transactions in State matters; but that was dealing directly with the individual. Here is another proposition. This is dealing with a corporation, and the question is whether you can say to a State corporation, "You must not do this or that if you are going to continue in interstate commerce."

Mr. McCOY. What can you say to an individual that you can not say to a corporation or vice versa?

Mr. VOLSTEAD. I think you can say a good many things to a corporation that you can not say to an individual.

Mr. McCOY. I do not think so, except a State can say anything it pleases about a corporation.

Mr. VOLSTEAD. The Supreme Court, speaking through Justice Brown, has said this, that we have the same power to deal with State

corporations as a State would have in dealing with a foreign corporation. The State can not give any power to its corporations beyond its own limits. If that corporation goes beyond the limits of the State it becomes subject, I take it, to the laws of other States. Now, it comes into the interstate commerce, the National Government controls interstate commerce, and when it comes there we can say to that corporation, "You must come on conditions prescribed by Congress."

Mr. WEBB. Has not this case been decided in the Massacusetts courts?

Mr. COPELAND. There has been some legislation there; I believe also some litigation.

Mr. WEBB. Litigation, and has it not gone to your supreme court?

Mr. COPELAND. No; this case has really never been decided in the courts, to my knowledge.

Mr. McCOY. It is now in the Federal courts.

Mr. COPELAND. It is now in the Federal courts; yes.

Mr. WEBB. I thought there was a suit in the State court up there.

Mr. MITCHELL. There was some litigation there.

Mr. WEBB. I may be mistaken; my recollection was you had a suit involving the very system that you have described here in your State supreme court.

Mr. MITCHELL. There was a statute passed in 1908.

Mr. COPELAND. There have been some suits on contracts, I believe, but I believe this particular thing has never come before the supreme court.

Mr. WEBB. Have you any law in Massachusetts which makes this system of leases illegal within the State of Massachusetts?

Mr. COPELAND. I think not; I do not know of any, but I am not a lawyer.

Mr. WEBB. Do you not think your State ought to pass some such law before you insist upon us doing it for you?

Mr. COPELAND. I am afraid again, that they would take refuge behind the patent law, and say that the States have no control of their business; that is the refuge that most corporations that own patents use for their defense.

Mr. WEBB. They have made all these leases with the patent right as the basis, not the mere right of contract, but I think they have founded all their contracts and leases upon some patented machinery; that is my recollection; and they go behind the patented rights which Congress has given them.

Mr. COPELAND. The State has the right of police power, that is all.

Mr. McCOY. There is a Massachusetts statute on the subject. Mr. Mitchell has called my attention to it here—an act of 1907, and an act of 1908, and another one of 1911.

Mr. COPELAND. They merely put a "rider" in their leases and that takes care of that situation. I could not repeat the substance of it exactly.

Mr. FLOYD. The local statute in Massachusetts would not give you relief in any way, so far as interstate commerce is concerned, because the laws of Massachusetts would only restrict them within Massachusetts, and you are selling your machines or desire to sell your machines throughout the country, as you sell them now in foreign countries. So, in order to get any relief from your condition, and

that is of very great value to you, it must not be local; it must be by Congress.

Mr. COPELAND. It must, that is true, include interstate commerce, of course.

Mr. FLOYD. After that statute was passed they changed their leases and practically the same condition exists as did prior to the passing of the Massachusetts statute?

Mr. COPELAND. Practically so; it has not changed the conditions.

STATEMENT OF MR. J. VAN HOUTEN, PRESIDENT ST. LOUIS, ROCKY MOUNTAIN & PACIFIC CO., RATON, N. MEX.

Mr. VAN HOUTEN. My name is J. Van Houten, and my address Raton, N. Mex. I am the president of the St. Louis, Rocky Mountain & Pacific Co., which is a company engaged in the mining of coal and the manufacture of coke in the northern portion of New Mexico. The company has been in this business since 1905 and owns and operates five different coal-mining properties. We employ about 1,400 men, and directly and indirectly there are about 4,000 people depending on our operations. The tonnage produced last year was 1,400,000 of coal and about 200,000 tons of coke. So that you see that while the company is not as large as some of them, it is a fair-sized corporation.

The company also owns all of the stocks and bonds of the St. Louis, Rocky Mountain & Pacific Railway. The coal-mining company is called the "company" and the other the "railway company." The railway was chartered and built in 1905, and I desire to call your attention to the dates, because it was prior to the passage of the act which prohibited railways from being interested in coal properties. In our case it was just the reverse—the coal company owns, through the stock ownership, the railway. The railway was built originally in order to expand the market for the coal products. As we were situated at that time the only markets we had were the markets along the Atchison, Topeka & Santa Fe Railway. I have a map here [exhibiting map to the committee] that I have made up in a hurry. I have sent for some maps, but they miscarried in the mail in some way and we did not get them here in time. I want to submit to you gentlemen here——

Mr. WEBB. Just make any description of the parts that you desire, in order that it may properly appear in the record.

Mr. VAN HOUTEN. We were of the opinion that we could greatly extend our markets if we had more than one railroad connection. It was at a time that the supervision of the rates by the Interstate Commerce Commission and the general supervision of railroads by the State commission was not as strict as it is to-day. I presume if we were in the same situation to-day we possibly would not have to build a railroad; in fact, I know we would not. Anyhow, we decided to build this railroad, which formed a connecting line between the different coal mines, and the Atchison, Topeka & Santa Fe Railway, the Colorado & Southern Railway, and the El Paso Southwestern Railway. In this way we got access to not only markets of the South in New Mexico and in old Mexico, which we had not originally, over the Santa Fe Railroad, but we also got access to the markets of Texas, Oklahoma, and Kansas, and in that way created the competition in

that region with the coal produced in Colorado and the coal produced in what used to be the Indian Territory. We operated the railroad for about six years, and we found during these six years that it was impossible to make it pay. At the time of the construction or at the time of the planning of the railroad, we calculated that the divisions of rate that the short line would receive from the trunk line were a good deal larger than was finally proven to be the case, the fact of the matter being that of late years the railroad rates have been under such close supervision that the trunk lines can not afford to give the divisions what they used to give in the olden days. In the early days a short line like ours was, built to originate the traffic, never had any trouble to get a division of rates out of proportion to the service performed. In other words, the short line would gather up the business and deliver it to the trunk line, and they would pay more per mile than the actual mileage performed. Of course, that is all over now.

Mr. McCoy. You mean the trunk line would have to pay to the short line?

Mr. VAN HOUTEN. To the short line; yes.

We also found that while we had—our line being 106 miles long—we had some 600 cars, we could not keep the cars on our line. They were scattered all over the United States. In the course of business they would go down into Texas, and they would not be returned onto the home rails, as they should be or as the railroads agreed among themselves they should be. We found that in the wintertime, when we needed cars for coal shipments, that we could not get sufficient cars from our connecting lines; they would always naturally send the cars on their own rails first before they would give these cars to the short-line railroad or to the line in which they had no direct interest. The Interstate Commerce Commission decided at the time that every railroad should supply, as far as possible, a sufficient number of cars for all the tonnages that originated on their line. Our line was a great originator of tonnage, not only of coal and coke but also of timber. There was quite a large timber tract adjacent to the line, and it was impossible for us to get enough money to buy a sufficient number of cars to do the business. As I have said, after we had been operating for six years we decided that we would be just as well off or that the coal company would be just as well off if they did not have the railroad. The Hepburn Act had passed, and we realized that it would only be a step from the prohibition of the railway owning the coal company until the coal company could not own the railway, and we thought it would be better policy for us if we could dispose of the line to some trunk line.

After considerable negotiation we made a contract with the Atchison, Topeka & Santa Fe Railway by which the St. Louis, Rocky Mountain & Pacific Railway would pass over into their hands. The first thing that the attorneys considered was the question whether by such transfer it would be a violation of the Sherman Act. The matter was gone into in considerable detail, and it was found that there was no competition on the rails of the Rocky Mountain Railway itself with the Atchison, Topeka & Santa Fe; that there was some competition at one point, which originated on connecting lines. The amount of actual competition was in a little town called Raton, a town of about 5,000 people, and amounted to less than 7 per cent

of the total business—the total business in money. The amount of business in tonnage was a good deal less than that, but it was impossible to find out just what it was; but I dare say it was less than half of that. The competition was not natural; the competition was forced in this way, that we had living in the town our agents drumming up the business; we had to be continually getting after merchants and after people in order to get the merchants to route the business over our line. Our long-line service was not as good, and they generally preferred to ship over the other line. So there really was not any competition; if there was any, it was so small it was hardly worth while.

We have made this contract; we have turned the property over to the Atchison, Topeka & Santa Fe; and we are now in the position that if the tentative bill here should pass that the whole proposition would prove to be illegal. It would work a great hardship, not only on the stock and bond holders of these corporations, but it would work a great hardship on the people living there adjacent to the line and living in the coal-mining towns, for the reason that the railroad, as it is now, in the hands of a strong corporation can give better service and serve the people better and serve the industries better than it ever could or would under our management.

Mr. FLOYD. What particular division of this bill would affect you?

Mr. VAN HOUTEN. That is the——

Mr. VOLSTEAD. Does the coal company own any of the stock now in this railroad company?

Mr. VAN HOUTEN. The coal company is the owner.

Mr. VOLSTEAD. Still the owner?

Mr. VAN HOUTEN. Still the owner. We were not able at the time to make a clear title. We had to get some consents of bondholders, but just as we get the consents and get the title clear we will deliver the stocks and bonds over to the Atchison.

Mr. NELSON. Mr. Van Houten, do they pay you with stocks and bonds in the railroad company, or partly in cash?

Mr. VAN HOUTEN. Partly in cash and partly in bonds.

Mr. VOLSTEAD. You want to do that?

Mr. VAN HOUTEN. Yes, sir.

Mr. DYER. Mr. Floyd asked you a question there which I wish you would answer.

Mr. VAN HOUTEN. It is tentative bill No. 2, Judge, and clause 3, where it states, "To prevent competition in manufacturing, making, transporting, selling, or purchasing of merchandise, produce, or any commodity."

And in the fourth clause, the word "transportation." We feel that the words "transporting" and "transportation" there might possibly apply to our case.

Mr. DANFORTH. How long is it going to take you to clear this title?

Mr. VAN HOUTEN. I think we will have it all cleared up by the 1st of July next.

Mr. DANFORTH. And you are advised that it would be legal if you could get it through before this bill is enacted into law?

Mr. VAN HOUTEN. If this bill is explanatory—I am no lawyer—to the Sherman Act. In other words, if what we say here was

originally the Sherman Act, while not in so many words, the transaction would be illegal, to start with.

Mr. DANFORTH. The only competition is in that one town?

Mr. VAN HOUTEN. The competition is, I think, less than 5 per cent; and it is not natural competition.

Mr. DANFORTH. Five per cent?

Mr. VAN HOUTEN. Of the tonnage.

Mr. DANFORTH. Five per cent of the tonnage of your road?

Mr. VAN HOUTEN. Yes, sir; and the competition is all through a connecting line—no competition on its own rails, and we felt at the time that we were perfectly safe, and we had quite a few attorneys—attorneys of the Atchison Railroad and the trust company and ourselves, and they went over it and they all felt we were perfectly safe in doing it.

Mr. FLOYD. If you will pardon me there. Do I understand that that fourth provision would apply to the sale of a railroad?

Mr. DANFORTH. He says——

Mr. FLOYD. The third and fourth sections prevent the transporting, manufacturing, selling, or purchasing of merchandise. A railroad could not make or sell or purchase merchandise, produce, or any commodity.

Mr. MCCOY. As I understand Mr. Van Houten, he says their contract is between corporations which prevents competition in transporting merchandise.

Mr. FLOYD. I understand; so I would construe it, too. (Reading.) "Every contract between two or more persons, to prevent competition in manufacturing, making, transporting, selling, leasing or purchasing merchandise, produce, or any commodity."

Mr. MCCOY. You think this applies merely to transportation of merchandise.

Mr. FLOYD. Within the clear meaning of this language that could not and would not be brought in the terms of this provision. Whether they are under the Sherman law or not is another and a very much graver and broader question, but to make any contract between two or more persons, firms, or corporations, to prevent competition in what? In making, selling, or purchasing and transporting what? Merchandise, produce, or any commodity.

Mr. WEBB. Section 4 is more strongly against Mr. Van Houten than section 3.

Mr. FLOYD. No; not any stronger than the other.

Mr. MCCOY. Why is not the contract which Mr. Van Houten has been describing——

Mr. FLOYD. Because it does not relate to purchasing and selling of a commodity.

Mr. MCCOY. It relates to transportation of a commodity.

Mr. FLOYD. There is no transportation in that third provision.

Mr. DANFORTH. It says transporting.

Mr. FLOYD. Transporting the merchandise of a line.

Mr. VOLSTEAD. Let me read. It is unlawful to "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."

Mr. FLOYD. In what? In the production, transportation, or what?

Mr. McCoy. Let us stick to the third provision before we take up the fourth.

Mr. Van Houten. Here are two corporations entering into a contract to sell a railroad to possibly prevent competition in transportation of merchandise or commodities. That may be a little far-fetched, but I think it is in there.

Mr. Floyd. If I understand your proposition, you have made a contract to sell your railroad to the Santa Fe. Whether or not you are within the terms of the Sherman law as written now I would not undertake to say, but to my mind it is clear that there is nothing in either the third or fourth provision of this tentative bill that relates to your transaction in any way whatever. You will see——

Mr. Volstead. I can not see that.

Mr. Webb. I do not think the Sherman law covers it, but believe that these third and fourth sections of the tentative bill do cover it.

Mr. Volstead. I do not think the Sherman law covers it as the courts construe it.

Mr. Floyd. I am not saying it does, but I am saying it is a much graver proposition than this. Let me see if I can not convince you. [Reading:]

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. * * * To prevent competition in manufacturing, making, transporting, selling, or purchasing of merchandise, produce, or any commodity.

Mr. Nelson. Does it not directly prevent two people from transporting? There is an agreement now that they are going to eliminate one of them as transporting agent of the other.

Mr. Floyd. A transportation and selling of what? Not railroads.

Mr. Nelson. There are two railroads now doing the same thing. They are transporting commodities, and this is a prohibition against two agreeing that one of them will no longer compete with the other in transporting a commodity. It comes clearly under that provision.

Mr. Floyd. The purpose of these provisions, as tentatively drafted, was to relate to industrial corporations, like manufacturing and mining.

Mr. Volstead. You have included railroad corporations.

Mr. Danforth. It says "corporations."

Mr. Volstead. They raised that question in the Sherman Act, whether it applied to corporations. Here are two railroads. You say they are prevented from entering into any agreement to prevent competition in transporting commodities. They are competing now with each other, and when they make that arrangement, one selling to the other, it of course prevents competition between them; consequently, you have come clearly, it seems to me, within the provisions of the proposed act.

Mr. Nelson. I understood that is the very provision of your act—to prevent two possible competitors from getting together so as to eliminate competition in transporting commodities; otherwise, what have you the word "transporting" for?

Mr. Floyd. You might have a contract with regard to transportation and not be owning a railroad.

Mr. McCoy. That is true, but that is only the broader phrase. Two manufacturers could make arrangement in regard to transportation of their merchandise; that might be included.

Mr. Floyd. That is different.

Mr. McCoy. But the railroad is clearly transporting merchandise.

Mr. Floyd. Mr. Carlin is not here, and I can only speak for the subcommittee. Our purpose is to leave the railroad question entirely subject to the jurisdiction of the Interstate Commerce Commission.

Mr. Webb. In line 1, page 2, you would insert "other than railroad companies"?

Mr. Floyd. We have that under consideration, if it becomes necessary to do that. The purpose is to clear that up. We do not intend by this act to disturb the operations of the Interstate Commerce Commission in dealing with these railroad questions. It is difficult for me to see the construction that you gentlemen put upon it, but if it is susceptible of that construction, it can be very easily freed from that difficulty by the simple phraseology showing it is not intended to apply.

Mr. Danforth. How about the two expressmen doing business between Pennsylvania Avenue and Chevy Chase here? You cut them out.

Mr. Floyd. If they were engaged in interstate commerce, I guess it might apply to them.

Mr. McCoy. I think that Mr. Van Houten has now made his point on the proposition. Judge Floyd says it has already been raised, and that it is contemplated to put in the express provision excepting railroads, and that would cover that proposition. Then you would be in the hands of the Interstate Commerce Commission.

Mr. Van Houten. We simply want to take away all uncertainty.

Mr. Floyd. We do not want to interfere with the operation of the Interstate Commerce Commission in dealing with these railroads, but to apply these provisions, as I understood, to industrial transactions like two merchants who make some contract relating to the selling or the transporting of commodities; and in the third one the word "transportation" applies in the same way, two men running a mercantile establishment or manufacturing establishment might arrange in regard to the transportation of their commodities to favor the railroads.

Mr. Webb. Is there anything else now?

Mr. Van Houten. That is all.

Mr. FitzHenry. I was not here when you explained your position, Your company is the coal mining company?

Mr. Van Houten. Our company is the coal mining company.

Mr. FitzHenry. And you are also incorporated as a railroad?

Mr. Van Houten. The coal company owns the bonds and stocks of the railroad.

Mr. FitzHenry. Then it is a railroad system built for the purpose of developing your own property and giving you connection with the Santa Fe? Then you run a spur on across to this one [indicating on map]?

Mr. Van Houten. It gives it access to Texas, you see.

Mr. FitzHenry. As a matter of fact, you are not a common carrier?

Mr. VAN HOUTEN. We are absolutely a common carrier, with standard-gauge railroad 106 miles in length.

Mr. FITZHENRY. Do you serve anybody besides yourself?

Mr. VAN HOUTEN. Oh, yes. We haul timber and run a passenger train every day, including mail service, and we accept all the burdens of railroading.

Mr. FITZHENRY. Then you are a common carrier, and as a common carrier you are exercising a franchise?

Mr. VAN HOUTEN. Yes.

Mr. FLOYD. You have a distinct and separate corporation, and your coal company owns all of the railroad stock?

Mr. FITZHENRY. You have a spur running up to the different mines?

Mr. VAN HOUTEN. They are our mines, but we do not have any competition at the mines. They have spurs at some mines, and we have spurs at other mines, but the fact of the matter is now that the coal company has no competition in rates, because the Interstate Commerce Commission makes the determinations as to what the rates will be, and the State commission has supervision over the service; so that there is really no competition between the railroads.

Mr. MCCOY. Except to get the business?

Mr. VAN HOUTEN. Except to get the business.

STATEMENT OF THOMAS B. HARLAN, DIRECTOR AND GENERAL COUNSEL ST. LOUIS, ROCKY MOUNTAIN & PACIFIC CO., ST. LOUIS, MO.

Mr. HARLAN. Mr. Chairman and gentlemen of the committee, my name is Thomas B. Harlan. I am a member of the firm of Reynolds & Harlan, St. Louis, Mo., and I am a director and general counsel of the St. Louis, Rocky Mountain & Pacific Co., this being the company referred to by Mr. Van Houten. I was one of the organizers of this company, and, in fact, had worked on the proposition some years prior to its organization. The St. Louis, Rocky Mountain & Pacific Co. was organized in 1905, financed in that year, and the railroad construction started and completed in the early part of 1906. The St. Louis, Rocky Mountain & Pacific Co. owns the coal land, the mines, coke ovens, and mining equipment. The St. Louis, Rocky Mountain & Pacific Railway Co. is a separate corporation, required to be a separate corporation in order to engage in the business of a common carrier under the laws of the then Territory—now State of New Mexico. So in order to make a complete and practical plan of financing, the St. Louis, Rocky Mountain & Pacific Co. acquired the stocks and bonds of the St. Louis, Rocky Mountain & Pacific Railway Co. The St. Louis, Rocky Mountain & Pacific Co. issued a mortgage, which is a first lien upon the coal land, coking ovens, mining plants, and a collateral lien upon the stocks and bonds of the railway, which stocks and bonds are pledged with the Metropolitan Trust Co. in New York, under the mortgage of the St. Louis, Rocky Mountain & Pacific Co.

As Mr. Van Houten has stated, the company continued to operate that railroad until last year. The railroad was built, as Mr. Van Houten has explained, to serve primarily these coal properties, to open them beyond the limited points where the Santa Fe had a line. At that time, as I remember, the Santa Fe had a line into two points,

which it still maintains and operates, and that that was not sufficient to open the property, and it was deemed advisable to build this road and serve the public so far as there was any further demand for public service of that kind, and which there was, because the territory that we reached on the western end of this line was not served by either of the trunk lines.

The railroad has never been a paying proposition, and, as Mr. Van Houten has explained, partly because of that and in anticipation of the commodity clause of the Hepburn Act being ultimately extended to our situation—you see we were just the reverse; we were not within the language of the Hepburn Act, in that it was a case of a coal company owning a railroad instead of a railroad owning or mining the coal. But in contemplation that the statutes might be changed to meet that situation, that was very substantial inducement in our deciding to part with this railroad. We were able to negotiate a contract with the Atchison, Topeka & Santa Fe Railway Co.; that contract is dated July, 1913—I think the actual date is the 23d of July.

Mr. VOLSTEAD. Not 1914.

Mr. HARLAN. 1913. And in order to make title to comply with the contract it is necessary for us to get the consent of our bondholders, or a sufficient number of them, to the substitution of the bonds that we are to receive from the Santa Fe Railroad as a part of the purchase price for the stocks and bonds of the St. Louis, Rocky Mountain & Pacific Railway Co. Those consents are being obtained, and at the present time more than 80 per cent of the bondholders have assented to the transaction. We took two years in which to get those assents, because the bonds are widely scattered over the United States and in foreign countries. We hope, however, that we will not be required to wait the entire period of two years. As the consents are coming in rapidly, we really hope to close this transaction by the 1st of July, though we may not be successful in that.

The contract, therefore, is still in the form of an executory contract, so far as the delivery is concerned. The contract contains an arrangement whereby the Santa Fe has taken over and is operating the railroad while we are getting in these consents. Before the contract was entered into the question arose as to whether or not the Santa Fe Railroad was in a position to buy the St. Louis, Rocky Mountain & Pacific Railway without violating any of the provisions of the Sherman Act, and that question received serious and lengthy consideration by the legal department of the Santa Fe, both in Chicago and in New York, as well as New Mexico, and by Judge Reynolds and myself, and we concluded that as there was no actual competition on the business originated and handled on the rails of the St. Louis, Rocky Mountain & Pacific within its own terminals, and as the only competition was at one point, the town of Raton, and that by reason of the Colorado Southern connection, and as that competition was only about 5 per cent of the amount of the business in dollars and cents transacted by the St. Louis, Rocky Mountain & Pacific Co. and only about 2 per cent on the tonnage basis, we all reached the conclusion that we were not within the prohibition of the Sherman antitrust law; in other words, that it was not the competition contemplated by that act.

The proposed amendments, which, if they have any purpose, must necessarily have the effect of extending the provisions of the present antitrust law, necessarily have given us much concern, particularly in the bill as mentioned by Mr. Van Houten. I believe that is tentative bill No. 2, and the clauses he referred to, to wit, the third and fourth; but as that question has been disposed of by the committee, as I understand the committee will modify that language, it is unnecessary to discuss that phase.

Mr. FLOYD. I think it has not been disposed of, Mr. Harlan. There are 21 members of this committee, and matters are not so easily disposed of. I simply made an explanation, as one member of the subcommittee that had prepared the bill, as to my view of it. I would be very glad, if you think as some of these other gentlemen, that you are included within the language of the provision, if you would state your views in regard to it.

Mr. HARLAN. I think that the word "transportation" there or "transporting" as used in the third clause and "transportation" as used in the fourth clause would be construed to apply to common carriers and would affect just such a contract as this, provided, of course, that the degree of competition came within the purview of the act; and as the language does not attempt to determine the amount of competition necessary to make a violation of the act, and as its purpose is to extend the provisions of the present act, to be on the safe side, at least, we have to construe that to mean the prohibition of any contract that would prevent any competition, even though the degree of competition might be relatively small; and the word "transportation" as used here would undoubtedly apply to contracts between railroads where such contract took out of the business one of the contracting parties, as this contract does.

Mr. FLOYD. Let me call your attention to the line 1. Suppose we transposed the words there and make it "combination or agreement between persons, firms or corporations other than common carriers." Would you think then you would be excluded, leaving the words "transportation" and "transporting" in?

Mr. HARLAN. I think, if your honor please, that might meet the situation that we have in mind, and very effectively.

Mr. FLOYD. That would be my judgment, instead of saying "between corporations, firms or persons" transpose the language and say "persons, firms or corporations other than common carriers."

Mr. HARLAN. That is line 1?

Mr. FLOYD. On page 2.

Mr. HARLAN. On page 2 of tentative bill 2 "or persons other than common carriers." Yes, it seems to me that that would accomplish that.

Mr. FLOYD. That would restrict the meaning of "transportation" to simply firms, and would not apply to common carriers, it seems to me?

Mr. HARLAN. Yes, sir.

Mr. FLOYD. But, I just want to repeat what I said before, that that was the clear purpose and intention of the members of the subcommittee, to leave it that way.

Mr. NELSON. What you want then to imply is that you would let the railroads combine? By implication would you then confer upon

the railroads the right to be exempt from the restrictions of the Sherman law?

Mr. FLOYD. I do not think so.

Mr. NELSON. Why not? This is an amendment to the Sherman law.

Mr. FLOYD. As I explained, Mr. Nelson, that modification may not meet the difficulty. But my idea was that these agreements—paragraphs 3 and 4—related to merchandise, products, and commodities being transported as sold in interstate commerce.

Mr. HARLAN. Yes, sir.

Mr. FLOYD. And whatever language is necessary I think we can modify so as to make that clear, at any rate.

Mr. HARLAN. There seems to be no difference between what we desire and what the committee desires, to wit, that this amendment would not apply to contracts between rail carriers by extending the provisions of the antitrust law; that railroads are within the purview of the antitrust act, at the present time, has been decided, and that situation we accept and did accept at the inception of our negotiations with the Santa Fe.

Mr. FLOYD. Let me ask you another question, in connection with that: Suppose we do not modify line 1 and leave it as it is, and then strike out the word "transporting" in the third paragraph and "transportation" in the fourth?

Mr. HARLAN. Then that would leave the railroad just where it is, so far as the application of the antitrust law is concerned.

Mr. VOLSTEAD. I think you are mistaken, if you will pardon me. Look at subdivision 4, "make any agreement or enter into any arrangement by which they directly or indirectly undertake to prevent free or unrestricted competition, among themselves;" you can quit there, "or among any purchasers or consumers."

Mr. HARLAN. Among themselves?

Mr. VOLSTEAD. It seems to me you have got it there just as broadly

Mr. HARLAN. Or among any purchasers or consumers in the same.

Mr. VOLSTEAD. The same provision in subdivision 3.

Mr. FLOYD. That is all modified—"any product, article or commodity."

Mr. VOLSTEAD. If it had been "of any product," but it says "or," "or among any purchasers or consumers in the sale."

Mr. FLOYD. "Free and unrestricted competition among themselves, or among any purchasers or consumers" in relation to the production or sale of any product, article, or commodity.

Mr. VOLSTEAD. But the first part of that, down to the word "or" in line 20 makes a complete sentence.

Mr. FLOYD. It would if you stopped there, but you do not stop there. The last clause modifies it all.

Mr. VOLSTEAD. I do not think so.

Mr. FLOYD. That is the way I understand it.

Mr. HARLAN. You see, we are brought to another situation. This being an executory contract, the Atchison, Topeka & Santa Fe Railroad, either by that contract being declared invalid or through its breach in some form, we may find that we shall have this railroad on our hands. So, as there was before the contract with the Atchison, we have the same directors of the coal company practically

in the railroad company, and as the coal company owns the stocks and bonds of the railway company, if it is denied the right to manage the railroad by reason of a prohibition against interlocking directors, then we would be denied the right to manage that railroad. So, we have to consider, if your honors please, the other phase of this.

Mr. FLOYD. While we may miss you in the Hepburn Act, we have got you both ways now?

Mr. HARLAN. You have got us both ways now. [Laughter.]

Mr. NELSON. It is a very thoroughgoing law?

Mr. HARLAN. It is, indeed.

We could not give the road away, because it could not be made to earn its operating expenses, and nobody would have it.

Gentlemen, we come to the committee for relief.

Mr. DANFORTH. You could put in some dummies.

Mr. HARLAN. Well, I take it that the legislation will ultimately take such shape against interlocking directors that it will prevent "dummy directors." It seems to me that it must necessarily be so to give it effect.

Mr. VOLSTEAD. It has been suggested to us we are trying to legislate to create dummy directors.

Mr. DANFORTH. Have you seen any provisions which would prevent dummy directors in this bill?

Mr. HARLAN. No; I have not; but I understood these were merely tentative bills.

Mr. DANFORTH. I think you would confer a favor on the committee in this particular if you would suggest an act which would prevent dummy directors.

Mr. HARLAN. Well, I happen to have a little theory on this. I do not know that it would be of any interest to the committee, but it is a little departure from the theory of the bill. It is not a matter of interlocking directors. The evil is in the act of the directors. It is not a question of the personnel, but it is a question of what is done, and it is not prima facie a matter of wrong or an abuse of power if one person is a director even in competing corporations. That certain evils have resulted from that situation where persons have been, by reason of their position of trust and power in competing corporations, practically in the position of buyer and seller at the same time; and that the public has suffered thereby there is no question. And that is the evil to be corrected. On the other hand innumerable benefits result particularly in smaller enterprises by having a banker as a railroad director. In fact in building railroads in new communities the railroads must be built as a rule (and so far as my information goes it has been substantially the history of all of them) either by local business men or some local industry that has to be developed, or by local capital, which local capital is usually represented by local bankers.

Now, my thought in dealing with the situation is to deal with the evils of it and let the benefits remain, which I would do in this way: Take the well-known rule in equity of a person in his individual capacity dealing with himself as trustee in his trust capacity. Equity does not prohibit that transaction, but it says to the individual, You shall not profit thereby; you will be held to the highest degree of responsibility by reason of the fact that you are dealing in your

personal capacity on the one side with yourself as trustee on the other. And if you will just apply that principle to the problem——

Mr. VOLSTEAD. How would you apply it?

Mr. HARLAN. I will give you my thought on it. There are to be considered the stockholders, the corporation itself, and the creditors and, more particularly, the public. Now, if you provide that where a person, by reason of his being a director in two or more competing companies, shall be personally liable to the extent of any loss that the corporation, its stockholders, or creditors may suffer by reason of any transaction between such competitors and by reason of his vote, action or promotion of such transaction, you have protected the stockholder, because any minority stockholder could assert the right; you have protected the corporation and you have protected the creditor. Now, go one step farther, to protect the public—that is what we are interested in—and provide that if it appear that his act was done intentionally, and go one step farther and provide that the fact that he was a director in the competing corporations or concerns and by reason of which the wrong accrued, that he shall be held criminally responsible and, as I say, the fact that he was such interlocking director shall be prima facie evidence of the criminal intent, and then make the punishment so severe that no one would dare take any chance on it, and you can put it into statutory form.

Mr. VOLSTEAD. I would like to have you put it in form. That is probably asking a good deal——

Mr. HARLAN. No; I would be pleased to do it. I would like, however, to do it after I return to my office, where I could do it with deliberation and under due consideration and care.

Mr. DYER. If such a law had been in existence, would that have fully protected the stockholders of the Frisco Railway Co. in the difficulties that that road has had with officers of the Frisco being officers in some other companies buying and selling to each company?

Mr. HARLAN. It seems to me it would. In fact, the suits that have been brought must necessarily proceed on that theory.

Mr. MCCOY. Do you think, Mr. Harlan, that Congress has power, so far as corporations engaged in interstate commerce are concerned, to provide that under such circumstances as you have narrated the common director or common directors shall be treated as trustees of an express trust? If you do not mind, just take a look at this bill [handing paper to witness]. Have we power to legislate as suggested in that bill? That is what I would like to know.

Mr. HARLAN. It does not occur to me, on a reading of that bill (H. R. 12927) there are any constitutional objections to it.

Mr. MCCOY. You see, the situation to-day is, on the decisions, that nearly all the courts (the United States courts, at any rate) hold that because a director is not present when a contract between him and his company is authorized, that the contract is the ordinary contract; in other words, that he is to be treated as an individual and not as a director. Now, then, if we could legislate that way, under those circumstances he would immediately become the trustee of an express trust.

Mr. HARLAN. Exactly.

Mr. MCCOY. And as in the case where there are private trustees, we will say of a trust under a will, two of them could not act for the estate with a third man acting as an individual without having any

action called into account by the beneficiaries. So, in a case of this kind, if we could make them trustee of an express trust, any stockholder could immediately call the action into account.

Mr. HARLAN. Yes.

Mr. McCOY. And if it had not been disclosed to him, if the circumstances had not been disclosed in advance of the contract being authorized, equity would interfere, whether it was beneficial or not beneficial to the stockholders. That is to say, if the stockholders wanted to contest it, they could. Whereas, if it had been explained in advance and the stockholders knew fully in advance what was going to be done, then it would stand.

Mr. HARLAN. It would stand so far as the stockholders are concerned; and necessarily that must be, as a matter of corporation law, that it would be true even of the stockholder.

Mr. McCOY. As it is to-day, any stockholder can question a contract because it has been entered into between the corporation and one of the corporation's directors— they can, if there are reasons; fraud or anything of that kind.

Mr. HARLAN. Yes.

Mr. McCOY. That is, express fraud.

Mr. HARLAN. Yes.

Mr. McCOY. But simply because of that relationship they can not question it.

Mr. HARLAN. I do not see any reason (at least none occurs to me at the moment), I do not think of any constitutional provision, that will prevent Congress from increasing the responsibility of directors in corporations engaged in interstate commerce. I do not see why it should not do it.

Mr. McCOY. That might be, so far as legislating with reference to interstate commerce itself is concerned; but this might be held, if it went into effect, to create a new equity in favor of the stockholders. Can Congress create a new equity which the courts have to apply? Has it the power? I do not know myself.

Mr. HARLAN. It seems to me it would constitute a cause of action in the Federal courts. It might not in the State courts.

Mr. McCOY. If it applies only to the Federal courts, of course.

Mr. HARLAN. It is within the power of Congress to state what should be actionable, subject of course to constitutional limitations, and then to confer upon citizens a new action. And there are several statutes that do confer upon the citizen an action or a right which he can assert in the Federal courts which he is denied in the State courts.

Mr. McCOY. That would not clean up the whole situation if it should become a law, but it would be a step in the right direction—in the direction you are giving.

Mr. HARLAN. I would go one step farther—we are dealing with the public question, to wit, the corporate abuses and restraints of trade, the establishment of monopolies—and impose the the criminal liability. The most effective manner which the State has ever found to protect its interests is through the enforcement of the criminal law.

Mr. McCOY. I should think that if the suggestion you make was carried out you would not need to have any bill against interlocking directors. No man can act in two companies.

Mr. HARLAN. I think that would be the practical effect of it. In fact, we know from experience that when public opinion is crystalized into a statute, the statute is seldom violated.

Mr. NELSON. Except the Sherman law.

Mr. HARLAN. Well, there is no disposition any longer even to take any chance under the Sherman law; and whatever the spirit might have been at one time it has completely changed, and I know from experience that the rule of no chance is the present rule of conduct.

Mr. MCCOY. It has gone further than that, hasn't it? It is claimed now, instead of complaining that the Sherman law has disturbed business, that actually it is a very beneficient statute? Is not that the frame of the public mind to-day?

Mr. HARLAN. I think it is, undoubtedly.

Mr. MCCOY. I mean among business men who have been affected by it.

Mr. HARLAN. Yes. There is no doubt but what monopolies are pernicious and, in our form of government, should be prohibited.

Mr. NELSON. What is your position? Won't we get you in the interlocking directorate?

Mr. HARLAN. We have gotten quite beyond the point. I did not mean to advance my theory on that; but on the theory it was intended to be drawn only to suggest a change in the language.

Mr. DANFORTH. This is the third tentative bill?

Mr. HARLAN. Yes; it is No. 3. On page 2, line 1, after the word "railroad," insert the words "more than 150 miles in length," my purpose being to exempt railroads under 150 miles in length from the provision of the act so far as interlocking directors are concerned.

Mr. MCCOY. That would not be feasible, I think, in view of some of these spurs, for instance, which the United States Steel Corporation operates. Take it out in Gary, Ind.

Mr. HARLAN. Yes.

Mr. MCCOY. That is the thing that the Interstate Commerce Commission is after now.

Mr. HARLAN. I understood their railroads were of greater length. I am not informed on that, however. I use the words here "more than 150 miles in length"—possibly, to put it more accurate, the exception should be in favor of the railroads owning or operating 150 miles or less of track, so that spurs and double track and all of the various elements that constitute a railroad could be figured in the mileage.

Mr. FITZHENRY. How about the terminal associations; would they be in it?

Mr. HARLAN. The terminal association of St. Louis?

Mr. FITZHENRY. Yes.

Mr. HARLAN. The Terminal Association of St. Louis is an association composed of railroads entering that city, and I do not just know how the stock is held, but in some manner most of the railroads are interested in the terminal association.

Mr. DYER. They own all the stock—the railroads.

Mr. HARLAN. The railroads own all the stock. There are some railroads, however, that are not interested in the association.

Mr. DYER. I might add, if you will permit, that the railroads own the stock, but they are not permitted to make anything out of their investment.

Mr. HARLAN. I have never really gone very thoroughly into that terminal problem and I am not competent to speak on it. To answer your question, of the exception that I make, I think the terminal railroad has more than 150 miles of track. But let us assume that it has not. That is rather an odd situation, and it would be better in the public interests, even though the terminal association there were excepted, than to prevent the operation of short-line railroads through the country, and particularly to put further obstacles in the way of their construction. I think some exception ought to be made.

Mr. FITZHENRY. Mr. Harlan, in this case of yours: Your company is a coal-mining company, isn't it?

Mr. HARLAN. Yes, sir.

Mr. FITZHENRY. And the reason you went into the railroad is probably you could not get the Santa Fe to build tracks up into your mines so that you could develop your property; is not that true?

Mr. HARLAN. We felt the railroad was necessary for the protection of our investment and the development of the property.

Mr. FITZHENRY. And you could not get the railroad to build there and you organized a railroad company of your own?

Mr. HARLAN. We did not apply to them to build a railroad, and then, after they refused to do so——

Mr. FITZHENRY. You did not suppose it would be a profitable investment for the railroad company—you didn't think much about it, but knew you had to have it to get your stuff out and so you put the tracks in yourself?

Mr. HARLAN. Yes, sir.

Mr. FITZHENRY. And the common-carrier business you have done has been simply incidental to accommodate the people in that community?

Mr. HARLAN. Very largely.

Mr. FITZHENRY. But didn't you ever stop to think of the proposition this might come within the rule of the spur and probably really is a part of the Santa Fe Railroad, like a private individual building a switch from the railroad track down to his factory into his warehouse, where in a great many instances the courts have held that the individual had no right to operate a railroad, and he was operating it really as a part of the railroad with which it was connected? Have you ever thought of that?

Mr. HARLAN. Yes, I have thought of it and particularly, very seriously, in an action taken against timber roads by the Interstate Commerce Commission some years ago. The question came up for actual consideration in our office whether or not our railroad, our St. Louis, Rocky Mountain & Pacific, might not be regarded as a tap line (that is what you refer to), and we held not. We have a little over 106 miles of direct line. With the sidings and terminals it is about 120 miles, isn't it, Mr. Van Houten?

Mr. VAN HOUTEN. Yes.

Mr. HARLAN. About 120 miles of track. It was necessary to build that much in order to reach the distance that we desired. We followed the decisions of the Interstate Commerce Commission pretty carefully, particularly in the Manufacturer's Railroad case where that question is gone into very fully by the commission, and we

reached the conclusion that our road would not be considered a tap line.

Mr. FITZHENRY. Could not be?

Mr. HARLAN. Would not be. That is only our office opinion, however.

Mr. FLOYD. It is an interstate railroad?

Mr. HARLAN. No; the rails are all in the State of New Mexico.

Mr. VOLSTEAD. But like every other railroad, does an interstate business?

Mr. HARLAN. Like every other railroad, though its connections do an interstate business.

Mr. VOLSTEAD. We have a rather interesting illustration of that in connection with iron ore in our own State, from the northern part of the State, which moves to Duluth. It does not go outside of the State. They dump that iron ore on the docks with practically no contract to move it. In most cases there is no contract to move it; but it is destined for some other State, because there was up until recent times no smelter at Duluth. So they held, when we tried to regulate the freight rates on that road, all of that was interstate business and we had no business with it.

Mr. FITZHENRY. Who held that?

Mr. VOLSTEAD. It was held by the State lines' commission; I do not know whether it ever went to the supreme court, but the man at the head of the commission is a very good lawyer. My impression is our State supreme court held it, and the shipment does not have to go outside of our State lines, sometimes, to be an interstate shipment.

Mr. HARLAN. Yes. Most of the freight business we originate is interstate freight.

Now, I do not believe, gentlemen, it is necessary for me to any more than indicate that some exception in an interlocking director bill should be made in favor of the short-line railroad. We are all quite familiar with how these railroads come into existence. There is no desire to stop the development of the country, and particularly in the West, because it must be developed, and it has the resources and the energy, and with reasonable safeguards in the legislation, can usually get the money; and to say that every railroad, however short, should be under the prohibition of interlocking directors would make financing quite difficult and, I am very much afraid, almost impossible; and it just occurred to me that a limit of 150 miles would not make such an exception as would endanger the public interest and yet cover the usual length of a branch line of railroad.

Mr. FITZHENRY. Would not that eliminate nearly all terminal associations in the United States?

Mr. HARLAN. Well, how many are there? Outside of St. Louis there is the Belt Line of Chicago; there is a belt line in Kansas City—

Mr. FITZHENRY. And the Union Depot at Chicago.

Mr. HARLAN. If you please and in your wisdom you think it prudent, you need not extend the exception to terminal lines. That I think is a question for the committee to adjust as to the matter of phraseology.

Mr. FLOYD. You are in the prohibition simply because you are in the business of mining and selling coal?

Mr. HARLAN. Yes, sir.

Mr. FLOYD. That would not apply to a short line or timber road, would it?

Mr. HARLAN. It would not except in this, that it would apply to the banks in a community, but would not apply to the timber operator. Of course, in our case, where we own the coal company and the coal company owns a railroad, the bill would prohibit us from operating a railroad unless some exception was made in our favor.

Mr. MCCOY. Mr. Harlan, we have heard complaints on the floor of the House to the effect that by permitting the so-called investment bankers to be interested as directors in railroads it has had the result that when anybody thinks of building a new railroad he can not do it except with the consent, practically, of the directors in competing railroads, because he can not finance the operation. That is, we know of the well-known case of the Morgan firm, so much interested in all these railroads one way and the other. A man wants to build a competing line and wants to get capital, and everything immediately focuses in their office, and if they want to allow the line to be built, the capital is forthcoming; if they do not, he can not get the capital.

I have never investigated a case of that kind, but I have heard it stated circumstantially on the floor.

Mr. HARLAN. However much or little there may be in that as a matter of substance, certain it is that their opposition would not extend beyond the sphere of their interests; and while they might, by reason of community of interest, deny financial aid, or even have sufficient power and influence, through banking institutions, to prevent a short-line road or new railroad in a territory where they were interested, from getting the money, they would not be interested in extending that into a territory where they have no interest. Whereas, the bill as drawn would prevent the local bankers or local coal dealers or iron dealers, usually those interests other than timber that build these enterprises, from going forward and standing responsible for its management. I think that there should be some exception in favor of the short-line roads.

Mr. DYER. Let me ask you this question: Can you explain to the committee how you would differentiate between your case and that of the Steel Co. who own short-line railroads—the Steel Trust? There has been a good deal of complaint about that. That, no doubt, is in a measure responsible for the demand for some such legislation as proposed in this bill you have been speaking of.

Mr. HARLAN. Yes. I do not know just what their railroad problem is, and it is very hard to deal with it in an abstract way, without full knowledge.

Mr. DYER. If you have not given that consideration, I won't ask the question.

Mr. HARLAN. Only in a very general way. They may have some lines of road that are not 150 miles—that is, where the entire track would be less than that. But is there any public harm, even though it be the Steel Corporation, in its operating and managing a railroad of less than 150 miles in length?

Mr. MCCOY. The Interstate Commerce Commission has just pointed out, I think, the harm is that these spurs claim an inordinate share in the total freight earned on shipments and that they have been milking the railroads to the extent of $15,000,000 a year more

than they were really entitled to in comparison with the service they were rendering to the total haul.

Mr. HARLAN. That is an evil that exists that is entirely within the power of the Interstate Commerce Commission to regulate or prohibit; but you do not regulate it, but prohibit it, by saying that the Steel Corporation, by way of example, shall be denied through directors of its choosing the operation of its property.

Mr. McCOY. Now, let me make another suggestion, then. It has been stated in regard to one big railroad corporation (and I know it is true to a certain extent) that they organize these subsidiary companies, so to speak, or a separate company from the main company. Some of the directors in the main company, whatever it may be, will also be directors in the subsidiary company, but there is a difference in the stock ownership; that is, all the stockholders of the main company are not interested in the stock of the subsidiary company. Now, it has resulted, as I am told, that through their common directors they are able to influence contracts which result in an inordinate profit to the subsidiary company and sometimes in a loss to the main company. Consequently, on the question of that interlocking directorate, those practices go on and the stockholders in the main company who are not also stockholders in the subsidiary company are deprived of what they ought to have.

There is one very flagrant case of it, which I know of outside of the railroad companies, where the subsidiary companies are making and have been making 40, 50, 60, and 80 per cent and the main company only barely paying dividends; and people who try to get in and contract with the main company at lower prices have absolutely been shut out from doing it. There is one of the evils.

Mr. HARLAN. So far as the railroads are concerned, the regulation of the issuance of securities under the direction of the Interstate Commerce Commission is going a long way to stop that abuse.

Mr. McCOY. I do not see how it can, because as I understand the Interstate Commerce Commission or the local or State commissions do not pass upon the ultimate ownership of the stock or bonds; they simply say you can bond to this extent and you may issue stock to this extent, but where it shall go they do not say—at least so far as I know anything about it.

Mr. HARLAN. Well, that is purely a matter of regulation. The only experience I have had with any of the State commissions was in passing on a matter that had been approved by the Ohio Public Service Commission, and that recently. They went into every detail of construction, figured out for themselves how much money it would require for the new construction——

Mr. McCOY. Yes.

Mr. HARLAN (continuing). And then limited the issuance of the securities to the amount which in their judgment they thought was necessary.

Mr. McCOY. That is right; that is what they do, exactly. They say how much you shall bond for and how much you shall capitalize for; but as to how those bonds shall be owned when they permit them to be issued and how the stock shall be owned when they permit stock to be issued, they do not say.

Mr. HARLAN. No.

Mr. McCoy. Now, there is nothing, for instance, in the way of regulation I know of, unless we indulge in it, that will prevent a separate corporation from owning the spurs which the United States Steel Corporation operates at Gerry. There may not be that objection there, but it is possible that a few stockholders of the United States Steel Corporation may own those spurs through their stock ownership if that has been permitted by Indiana.

Now, then, the interlocking directors permit the abuses which result to the detriment of the stockholders of the Steel Corporation and to the benefit of the separate corporation which owns the spurs.

That is only by way of example; I do not know that it exists there.

Mr. HARLAN. The way to get at this evil is to increase the responsibility of the parties that are guilty, increase the responsibility of the directors; and not because here and there there may be abuses to stop the development of the country.

Mr. McCoy. We have had quoted here the old Bible saying that a man can not serve two masters, and you and I as lawyers, I believe, never undertake to serve two masters; not because under some circumstances we could not do so successfully, but because we do not permit ourselves to be tempted to favor one at the disadvantage of another. Now, why should we permit, if we have the right to prevent it, the existance of that temptation in serious matters, by men acting in two capacities? Why put him to the risk of going wrong; why let him put himself to the risk of going wrong?

Mr. HARLAN. Of course, the reply to that is that as a rule the trust is not abused.

Mr. McCoy. That is not what the Bible says.

Mr. HARLAN. I think the illustration, while we use that illustration that a man can not serve two masters, really does not fit this kind of a case. One may serve two masters. I mean it is physically and mentally possible to do it. He may serve one well and he may serve one badly. Then you seek to hold him responsible for serving the one badly, and you do that by penalizing him for it. Now, it is true he should not serve two masters; but if he undertakes it, punish him, and the punishment will usually be severe enough to prevent the attempt.

Mr. McCoy. Then why not go at it straight?

Mr. HARLAN. Well, because the trouble is if you don't extend your rule too far. I am merely contending that you should not deny to all short-line railroads the right of a man to be a director of that railroad because he is also a director in the local bank, or because he is a director in the coal company, or the iron company. It does not affect the public interest. If that same condition, carried on to a greater extent where the trustee became more powerful, made abuses, we step in. But a wholesale prohibition does not reach the trouble; it is not the proper remedy for the abuses.

Now, there is one other point here. We are affected by Bill No. 1. The provisions of Bill No. 1 affect us as producers and shippers of coal and coke, in that the bill is made to apply directly to the operators of any mines engaged in selling its products in interstate or foreign commerce who refuse arbitrarily to sell the same to a responsible firm or corporation who applies to purchase.

Using the word "responsible" as it appears in line 17 of page 2 of the tentative bill No. 1, seems to me is going to lead to confusion

and a great deal of litigation. If "responsible" has any legal meaning in this connection it seems to me it must mean solvent; and we know that under the legal construction of the word "solvent" for many purposes it is just the reverse of insolvency, to wit, one is solvent until he becomes insolvent, and he is not insolvent so long as he can keep going. So by the use of the word "responsible" you might find that one who is not entitled to any credit would be entitled to a remedy under this act. It seems to me that that word is unfortunate, and that as this act assumes to confer upon a class of citizens a right which does not now exist and to take away from another class of citizens a right that it has, to wit, to arbitrarily refuse to sell its product, that before the person who is to enjoy this new right should be in a position to do it he should offer the price—he should actually make a tender.

As to whether the bill is constitutional or otherwise, I have not considered.

Mr. FLOYD. In connection with that point, Mr. Harlan, you understand the purpose of that to be to prevent persons that control natural products from refusing to sell and thereby exercising a monopoly. Would you see any objection to it if the word "responsible" was stricken out and there was substituted "to any person for cash?"

Mr. HARLAN. That would relieve that, certainly, Judge Floyd.

Mr. FLOYD. You see there is such a thing—take coal, for instance, as the basis of illustration.

Mr. HARLAN. Yes, sir.

Mr. FLOYD. If those who own coal should conclude to sell their entire output to some one concern and refuse to sell other opeople who needed coal, in that way some particular dealers would get a monopoly of the commodity and would injure the public by raising the prices. That provision was intended to meet that kind of an evil.

Mr. HARLAN. Yes, sir.

Mr. FLOYD. And if the word "cash" was used, that has been objected to also on the ground that it would not allow you to make definite contracts; but I do not think that would be a tenable objection, because if you had so much that you contracted to a particular person you would be under obligations to carry that out.

Mr. HARLAN. Yes; undoubtedly the language would be considered to mean if you had the product for sale.

Mr. FLOYD. The product on hand and for sale.

Mr. HARLAN. Yes; I think that the change suggested, for cash, would meet that situation. In other words, it removes the argument as to when a condition exists that a mine owner could comply with.

Mr. FLOYD. It would make it absolutely definite.

Mr. HARLAN. Then the language is used a little further up in that clause, the antidiscrimination clause, page 2, line 1:

"* * * 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."

Now, the competition injures a competitor. If we take a contract from the Colorado Fuel & Iron Co., to that extent the Colorado Fuel

& Iron Co. is injured, or vice versa. Isn't it the intent to use language here that prevents such discrimination for the purpose of establishing a monopoly?

Mr. FLOYD. The purpose was to prevent a condition that has occurred—where one powerful corporation would lower the prices of its commodities for the purpose of driving out a competitor and destroying the business—and there are a number of statutes that have been passed by different States along the same line and for the same purpose. That is the real purpose of the provision. This follows, generally, the New Jersey statute.

The purpose is to prevent one competing powerful corporation from underselling for the purpose of destroying a competitor. It is worded differently in different State statutes. Some statutes say "to sell below cost of production."

Mr. HARLAN. Well, we have an antidiscrimination act in Missouri. I do not know that it has ever been brought into use; I have never heard of any case that has ever come up.

Mr. FLOYD. What would be your suggestion as to the appropriate language to meet what is intended?

Mr. HARLAN. My judgment is that the provision in the constitution of Oklahoma is a very carefully worded provision and makes an effective and splendid statute.

The CHAIRMAN. Have you it there before you?

Mr. HARLAN. Yes.

The CHAIRMAN. Read it.

Mr. HARLAN. Of course this is a constitutional provision; hence the first two or three words would not fit our particular case.

> Until otherwise provided by law, no person, firm, association, or corporation engaged in the production, manufacture, distribution, or sale of any commodity of general use shall, for the purpose of creating a monopoly or destroying competition in trade, discriminate between different persons, associations, or corporations, or different sections, communities, or cities of the State by selling such commodity at a lower rate in one section, community, or city than in another, after making due allowance for the difference, if any, in the grade, quantity, or quality and in the actual cost of transportation from the point of production or manufacture.

Now, there is a clear-cut statute. Take this St. Louis, Rocky Mountain & Pacific Co. we have been discussing here. It does a very large business in Oklahoma. And the statute serves the purpose of prohibiting attempts to create a monopoly. Under the provisions of this statute I do not believe that any corporation selling commodities in the State of Oklahoma would attempt the practice which you have in mind and which these discriminatory acts usually refer to, to wit, selling to one or more customers a particular line of goods at a price to kill off the competition and then ultimately to have the market to itself, a practice that did exist quite extensively some years ago.

Mr. MCCOY. Would not that be reached now under the Sherman law, as far as interstate commerce is concerned?

Mr. HARLAN. Well, the language "in restraint of trade" is very broad language.

Mr. MCCOY. And take the monopoly section, too.

Mr. HARLAN. And the monopoly section. But I am not prepared to say that the act is not broad enough as it now is to prevent any steps that would tend to create a monopoly. As the purpose of this bill and the purpose of this legislation is to remove doubt and, so far

as I know, the Supreme Court has never passed on that particular question, I take it, it is the purpose of this committee to bring forward an antidiscrimination bill.

Mr. McCoy. They did refer to that practice in the Standard Oil case. That was one of their notorious practices; likewise, the tobacco company.

Mr. Harlan. They referred to it as a matter of practice, but I do not believe it was condemned specifically as a violation of the act.

Mr. Floyd. Mr. McCoy, I want to suggest in that connection my idea of a distinction of those acts prohibited under the Sherman law as matters of practice which collectively establish the fact that the corporation is guilty of an unlawful combination and, on proof of those practices, it may be dissolved as an unlawful combination; but I do not think you can find an instance under the Sherman law where a person could be indicted or where a person has been indicted and the indictment has been sustained, for being guilty of one single practice.

Mr. McCoy. Why, Mr. Levy, of New York, read us from the indictment that was found against McAndrews and Forbes, as I understand it, and one of the counts in the indictment was that one of these men had written a letter to the other man suggesting something or other which was in restraint of trade, and on that the grand jury indicted them and, as I understand it, the indictment has been upheld on a motion to quash. It has not reached trial yet.

The statute says "every contract in restraint of trade," and does not confine itself to a combination. It happens that the Standard Oil Co. and the tobacco company engaged in every heinous practice anybody could imagine.

Mr. Floyd. It is "any contract, agreement, trust, or combination."

Mr. McCoy. And then "an attempt to monopolize" in the second section.

Mr. Floyd. Yes; I understand—"used in an attempt to monopolize."

Mr. McCoy. It is an attempt to monopolize and they were indicted under that section and that indictment is in the hearings somewhere.

Mr. Floyd. It possibly might be within the law, but I do not think it would be objectionable to make it specific here, even if it was.

Mr. Harlan. It seemed to me that the language used in the bill, "to injure a competitor," was too broad and was likely to lead to untold controversy, because in competition, especially where you are competing for large contracts (and coke contracts are a very good illustration) they are contracts for a period of years and in that southwestern country run into very large amounts. And to take over one of those contracts from a competitor it does injure him and I felt that that language possibly was too broad.

Mr. Floyd. I am glad you called attention to the provision in the Oklahoma constitution.

Mr. Harlan. So far as I have any knowledge of any discriminatory acts, that to my mind is the best and it has been effective. It was actually applied, you know, in the Waters-Pierce case where they were fined $70,000 for its violation. And I know that corporations selling in the Territory or in that State are very careful not to even get too close to the line; so it is quite effective.

Now, gentlemen of the committee, I must thank each and every one of you. New Mexico has no representative on this committee. I hope that we have made plain our local situation, our particular problem; and if we have, why I have full confidence in the committee finding a way to at least prevent us from being caught going and coming.

We greatly appreciate this opportunity of being heard.

Mr. McCOY. I just want to call attention to the indictment to which I referred. At page 271 of part 7 in our reports of the hearings, Mr. Levy puts in a quotation from the indictment of McAndrews and Forbes:

> And the said grand jurors aforesaid, upon their oaths aforesaid, do further present that, further, in pursuance of the said unlawful combination, and to effect the object of the same, and as an act on his part of engaging in the same, the said Howard E. Young at and within the said city of Baltimore, unlawfully did sign his name, to wit, H. E. Young, to a certain letter directed to the said other defendant in the city of New York, which letter is as follows.

That is one of the counts in the indictment and the indictment was upheld, showing how possible it is to indict for any specific abuse.

Mr. HARLAN. Yes.

Mr. FLOYD. What was that, an alleged contract or a contract in that case?

Mr. McCOY. I really do not know.

Mr. HARLAN. Gentlemen, I have enjoyed the discussion immensely and I thank you very much.

Mr. DANFORTH. Do not forget to send us that amendment of yours.

Mr. HARLAN. I will prepare that.

Mr. DANFORTH. Send it to the clerk of the committee.

(Thereupon, at 4.55 o'clock p. m., the committee adjourned until Tuesday, March 3, 1914, at 10.30 o'clock a. m.)

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Washington, D. C., Thursday, March 5, 1914.

The committee met at 10.50 a. m., Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. The committee will be in order.

Mr. FAULKNER. Mr. Chairman, Mr. Loree, president of the Delaware & Hudson, is here this morning, according to appointment, and is ready to proceed.

The CHAIRMAN. The committee will be very glad to hear from Mr. Loree. Please give your full name to the stenographer, Mr. Loree, and your address, as well as your position.

STATEMENT OF MR. L. F. LOREE, OF NEW YORK CITY.

Mr. LOREE. L. F. Loree. I reside in New York City. I am chairman of the Kansas City Southern board; vice chairman of the bondholders' committee of the Kansas City, Mexico & Orient Railway; president of the Delaware & Hudson Co., and one of the members of the Railway Executives' Advisory Committee on Federal

Relations, representing about 155,000 miles of railroads or about 70 per cent of the total in the country.

If the committee is indulgent, Mr. Chairman, I would prefer to read my remarks, which I wrote out last night, as I am not accustomed to public speaking.

The CHAIRMAN. The committee will be glad to hear you in that way, Mr. Loree.

Mr. LOREE (reading):

I suppose the real problem with which we are engaged and from which there is no possibility of escape is how to sustain life and how to make living as secure, as comfortable, and as enjoyable as possible. The Caucasian family now numbers between 500,000,000 and 600,000,000 of souls. Whereas at the beginning of the last century it was increasing at the rate of about 5 per cent each decade, it is now increasing at the rate of about 15 per cent each decade, and by the time the infant of this year reaches his majority we shall have added to this population the numerical equivalent of the entire race at the beginning of the last century. It is not alone the enormous number of this people and the rapidity of their growth, but the tremendous improvement in the standard of their living that must be reckoned with. Hazen describes the latter as constituting as great an advance over that of the time of Louis XVIII as conditions in his time were advanced over those of the time of Rameses II.

It would be impossible to enumerate the multitudinous discoveries and inventions that have made possible this growth and this improvement, but they are closely related to the development of the steam engine, which, first employed in mining, made possible the factory system of production and the steamship and railway in transportation; and the result of this transformation is that the race which formerly lived in small communities, producing each the necessities which it required and using of articles moved in commerce only those of luxury, light in weight, is now distinguished by the size of its cities, its dependence upon food, and the raw materials of manufacture drawn from far-distant countries, such commerce in the main consisting of articles of bulk, food products, and raw materials.

Never before has mankind occupied so strong a position as now, whether we regard the height to which the plane of living has been raised, the knowledge and control of the forces of nature, either in the production of the necessities of life or in the prevention of disease, the preservation of the public peace, and the avoidance of international wars. This condition which we speak of usually as an advancing civilization is made possible by organized industry, which is a combination of labor, capital, and management, and it is the distinguishing characteristic of this improving condition and one of its greatest merits that the contributing effort which labor is called upon to make steadily and rapidly declines, while the effort contributed by capital and management correspondingly increases, and that the distributive share enjoyed by labor steadily and rapidly increases, while that of capital and management correspondingly decreases.

Some suggestion of these relations may be gained by considering the transportation ability of an American soldier who, especially trained for such effort, is expected to be able to carry not more than 67½ pounds 15 miles per day, which in 300 working days would be equal to almost 152 ton-miles per year. In the year 1911, the latest for which official data are available, the work done by the railways of the United States was equivalent, on the average, to the movement of 19,883 passengers and 151,983 tons of freight 1 mile for each person on their pay rolls, so that at least 99⅘ per cent of the efficiency of the railways of this country is the efficiency of capital and management and only one-tenth of 1 per cent the efficiency of labor. The fact that of the total compensation for railway transportation labor receives approximately double the amount received by capital and management does not of itself raise any question as to the justice of the distribution, but the vast disproportion between the efficiency of the contributory effort and the reward received indicates the extent to which it is to the interest of labor that the volume of capital and the efficiency of management should continue steadily and rapidly to increase.

If the vast population of the Caucasian family is to be sustained, its rapid increase provided for, its advancing comfort and security assured, then no training or aptitude of labor, no discovery or invention of the past, least of all the efficient devices and methods of management, can either be parted with or checked in their development.

The business corporation is merely a form of association for the purposes of conducting business. The development of mechanical production made necessary the utilization of the capital of very many individuals under single control. The emergence of this necessity was the imperative demand for a new type of association and

pointed at once to the deficiencies of the only form of combination then known, the partnership, and to the new requirements of the new industrial methods. It swept away the personal relation, the hazards of dissolution, the necessity for unanimous consents, the ability of one to speak for all, and by his separate action to control and imperil the joint assets, while, on the other hand, it enabled large numbers of individuals to combine their capital for single undertakings and insured a continued existence, required the concurrence of a majority, but made that majority's voice effective, and gave a voting power proportioned to the respective contributions of capital.

As we now know it, it is an evolved product of necessity, not a thing springing fully developed from the mind of any man or set of men, and utilized by the industrial associations under conditions to which some other form might have proved to be equally well adapted. On the contrary the business corporation is because it had to be, and more than that, it is what it is because its every attribute was and is necessary to industrial efficiency. If proof of this were necessary it could be found in the fact that no nation, whatever its system of law, has ever enjoyed great industrial expansion until it had met this necessity by developing a method of association substantially equivalent to the business corporation as it is known with us. This is true of the nations whose legal system is based upon the Civil Law as well as of those whose system rests upon the Common Law.

Moreover, it lies within the potentiality of this device of association, the business corporation, to make industry, so far as may be, democratic, for this method of association is the means by which those whose savings are the smallest can become participants in industrial enterprises organized upon the largest scale and can share the profits of the industrial processes that require the most costly machinery. Without this method all such enterprises would be closed to all but the owners of vast wealth. As it is, whoever can accumulate even as much as the fortnight's wages of an artisan may, with his savings, become a part owner in almost any great undertaking, and thereafter the labors of its directors and officers will be in part for his benefit. Thus this modern method of association places at the disposal of those of most modest accumulations the industrial skill, training, and genius of the relatively small but highly efficient group of men whose leadership in matters of finance and industrial management has emerged as naturally from controlling economic conditions as has the corporation itself.

This opportunity for safe and profitable investment is at once a stimulant of frugality and an incentive to the employment of accumulations which, if made at all, in the absence of such an incentive would be hoarded. Consequently the business corporation tends to increase the material possessions of society and to promote the diffusion of their ownership among the diligent and worthy.

No substitute for the corporate method of association which does not involve the abandonment of the institution of private property has been suggested or devised. No one in a condition of sanity has suggested or will suggest that from 50 to 50,000 part owners of the same property (there are many more than the larger number in several American corporations) could be combined without the incidents of limited liability, perpetual succession, proportionate suffrage, majority control, and delegated management.

When the organization of industry loses its efficiency disaster must come. Under these plain conditions it is incumbent upon those charged with the duties of legislation to guard well against any injury to the corporate method of management; if changes are necessary, they should be in the direction of greater rather than less efficiency.

It is necessary to revert to first principles and to consider the essential character of the office held by a corporate director.

The board of directors is the nexus between the multitude of corporate owners and the corporate property, the sole means by which the former exercise over the latter for their own advantage and protection, and subject, in the case of public service corporations, to the paramount rights of the public, the ordinary rights of ownership. The right of every owner to participate in the election of directors and thus in the management is a fundamental incident of the corporate form of organization and the moral right of owners of minority shares to proportionate representation, when such representation does not become a means of furthering interests adverse to the corporate interest, is commonly recognized and has often been guaranteed by provisions for cumulative voting and other devices.

Any curtailment of the ordinary right of every corporate owner freely to choose those whom he will support for directors and to vote for any person or persons by whom he may wish to be represented in the directorate is a restriction upon the power of the owners to control the property. Every curtailment of the ordinary rights of ownership must reduce the number of those who are willing to be owners (that is,

reduce the attractiveness of the investment and so impair ability to obtain needed capital) and the process may go far enough seriously to cripple the industry affected.

The United States are not yet free from the need of resorting to foreign money markets in order to secure capital in excess of that which their own citizens are able to furnish. In every such case the appeal for foreign support must be made through persons who have the confidence of the foreign investors or the foreign bankers through whom these investors may be reached. In the nature of things it is impossible that the number of Americans enjoying such confidence at any particular time should be very great, and this fact restricts the choice of the directors through whom such foreign investors are represented. If the individuals who have hitherto represented foreign investors on two or more directorates are forbidden to continue their services as in the past, these investors are likely to feel that their rights of ownership have been infringed and to withhold further capital, possibly to withdraw much that has already been invested. And it should be remembered that American shares and bonds held abroad, so nearly approximate, as to this country as an whole, the status of demand notes, that their redemption, at a price, whenever Europe chooses to sell, can not well be avoided.

That section of the United States which lies west of the Mississippi river obtains its railway capital from the eastern States and from Europe at rates of interest ranging from 2 to 6 per cent per annum lower than those currently paid by local borrowers on the best security. An essential condition of this arrangement is that those who furnish the funds to create the properties shall be permitted to manage them through directors freely selected. These investors have chosen to act through a limited number of individuals in whom they repose confidence sanctioned by experience, and when they can no longer exercise rights of management in this way, the trans-Mississippi region is very likely to be obliged to finance its own transportation system and the shipping and traveling public to pay rates of fare and freight based upon the much higher local rates of interest.

The great fiduciary corporations, life insurance associations, savings banks, fire insurance companies, guaranty companies, trust companies, even endowed universities and charitable institutions, are investors and have greatly aided the development of American railways and other incorporated industries. To protect their funds these concerns always expect and are entitled to representation on the directorates. If they are denied the right to place their authorized agents in these positions, as they find convenient, they are certain to regard the investments affected as much less desirable.

The number of those who can serve as directors to the advantage of any corporation is limited to those within a reasonable distance of the place where the board must ordinarily meet. So long as large enterprises are financed principally by or through particular financial centers, most of these boards must meet at those centers. Experience shows that members residing at great distances from the meeting places rarely attend, and their membership is, therefore, of less advantage to the corporation and to those whom they represent. Owners can not be expected to abdicate their rights of ownership in favor of other regions nor to invite additional membership on the part of those who will not attend board meetings.

Boards of directors are responsible to the owners for the quality of their management, and competent owners naturally seek to be represented by directors of demonstrated competence. The available number is limited, and while it is not denied that there may be, among those who have had no opportunity to demonstrate this sort of competence, many who could do so on occasion, it is perfectly obvious that the owners have no means of suddenly finding three or four more equally qualified for each individual now serving them. In other words, where industrial processes have in the course of years delimited a group of, say, 1,000 competent directors, arbitrary selection can not increase the number to 3,000 without seriously diminishing the average of individual capacity and greatly lowering the marginal ability required for admission to the group. In the long run the method of industrial organization which most promotes efficiency must be most to the general advantage.

If John Doe serves in two boards of directors, the responsibility for what he does is directly traceable. But if John Doe sits in one board, and sends Richard Roe, who is subject to his orders, to sit in the other, a relation which in the first case was frank and open, visible and acknowledged, becomes, in the second case, secret and conjectural. Perhaps the general welfare is best served when what is done is done by direct rather than by indirect methods. In other words, we should have a reponsible directorate, not a dummy directorate.

Directors do not vote upon matters in which they have personal interests adverse to those of the corporation. Whoever violated this principle would speedily lose the reputation for integrity without which no one can have the confidence of investors and of the business community. With the additional check supplied by the common sentiment of his associates and the actually high standards of probity insisted upon

in the business world of America, the relation of a director in two corporations which have business dealings with each other may be compared with that of a parent whose interest in his several children does not deprive him of the ability and desire to deal justly between them.

The same individual, in many cases, represents the same group of investors in corporations so widely separated, that there could be between them neither identity of interest nor conflict of action. In such cases, even the most extreme notion of public policy would not justify a statute imposing a restriction upon the owners' right to be so represented.

The necessarily intimate relation between the banker and the seeker for accommodation is not changed when the latter ceases to be an individual or partnership and becomes a corporation. Precise and detailed disclosures concerning the affairs of the borrower are the recognized prerequisite of an application for credit and constant information on the part of the banker is the desideratum when the applications for credit frequently recur. The simplest and most natural provision to meet this necessity is representation of the banker on the corporate board. Such a membership imposes a special obligation to deal fairly which is rarely, if ever, abused and the banker-director invariably refrains from voting in the board of directors, giving his advice only, in matters in which he is interested as a banker.

It is said that section 4 of the tentative bill is intended to be directed against industrial corporations only. But the language is broad and sweeping, and I am advised would probably include railway companies. If so, it would cause infinite confusion. Nearly all railroads may be held to be in a sense natural competitors, and if there are to be no common directors, it is difficult to see how the larger railroad systems can control their component companies. It is suggested that the tentative bill be so changed as clearly to exclude railroad companies.

The purpose of the legislation recommended is to prevent the common representation of possibly conflicting interests. The tentative bill, however, goes far beyond such purpose. The mere status of a director of a supply company or a bank disqualifies him from being a railroad director, notwithstanding the different corporations may have no dealings whatever. In this respect it disqualifies many competent persons from acting as railroad directors without the possibility of public benefit.

Whether justifiable from an economic point of view or not, the evil thought to exist and sought to be remedied in respect of the railroad company is the presence in its board of the directors of corporations from whom it either buys or borrows. It is suggested that the railroads should be eliminated from section 1. It is submitted that a dishonest man who is interested in a number of companies can use his influence dishonestly whether he be a director of the companies or not, and such influence would be likely to be stronger were the board deprived of the benefit which they now obtain by the knowledge of the honest men who are directors in many companies and can thus bring general business knowledge and trained acquaintance with business conditions to the service of their companies.

The immense number of the Caucasian race—that is to say, of the principal inhabitants of the civilized world—their vast annual increase and their improving standards of living, with the consequent increase in aggregate wants, require an industrial organization which must regularly attain a progressively increasing maximum of efficiency. To restrict the service on these boards of men of demonstrated competence must tend to impair the quality of the service performed, to the substitution of agents for their principals (often with the relation of agency and the identity of the principal undisclosed), and to impair some of the fundamental conditions of credit. There can not be, without imminent risk of economic disaster, any such crippling of the only effective system that human experience has yet devised for utilizing, in combination, modern discoveries and processes, the capital of large numbers of investors, large masses of labor applied under the best practicable conditions of comfort and security, and directive ability of the highest type. If such impairment could ever be risked with impunity, it would be especially injurious at this moment, on account of the numerous doubts and difficulties which now, we hope temporarily, confront the principal corporate enterprises of the United States.

The CHAIRMAN. Is there any other gentleman here who desires to be heard?

Mr. FAULKNER. Any questions, gentlemen?

Mr. WEBB. If there is nothing further to come before the committee, I move that we adjourn.

The CHAIRMAN. Without objection the committe stands adjourned.

(Thereupon, at 11.20 a. m., the committee adjourned.)