AMENDMENT OF SHERMAN ANTITRUST LAW

HEARINGS

BEFORE THE SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE

CONSISTING OF

SENATORS NELSON (CHAIRMAN), DEPEW, DILLINGHAM, BACON, AND CLARKE, OF ARKANSAS

ON THE BILL (S. 6331)

TO LEGALIZE CONTRACTS AND AGREEMENTS NOT IN UNREASONABLE RESTRAINT OF TRADE OR COMMERCE

AND THE BILL (S. 6440)

TO REGULATE COMMERCE AMONG THE SEVERAL STATES OR WITH FOREIGN NATIONS, AND TO AMEND THE ACT APPROVED JULY 2, 1890 ENTITLED "AN ACT TO PROTECT TRADE AND COMMERCE AGAINST UNLAWFUL RESTRAINTS AND MONOPOLIES"

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AMENDMENT OF SHERMAN ANTITRUST LAW.

HEARINGS ON S. 6331 AND S. 6440.

THURSDAY, *April 23, 1908.*

The subcommittee met at 10 o'clock a. m.

Present: Senators Nelson (chairman), Dillingham, and Clarke, of Arkansas.

Seth Low, of New York City, president of the National Civic Federation; J. W. Jenks, professor of political economy and politics, Cornell University, Ithaca, N. Y.; Joseph Nimmo, jr., statistician and economist, of Long Island, New York; Daniel Davenport, of Bridgeport, Conn., counsel for the American Anti-Boycott Association; James A. Emery, of New York City, representing various national, State, and local manufacturing and industrial associations; Nathan Bijur, of New York City, representing the Merchants' Association, and others, appeared.

OPENING STATEMENT BY THE CHAIRMAN.

The CHAIRMAN. (Senator NELSON). We have before us two bills, Senate bill 6331, introduced by Senator Foraker, and Senate bill 6440, introduced by Senator Warner. They relate to modifications of what is commonly known as the Sherman antitrust law, and will be inserted in the record of the hearings.

The bills are as follows:

A BILL (S. 6331) to legalize contracts and agreements not in unreasonable restraint of trade or commerce.

Be it enacted, etc., That nothing in the act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, or in the act to protect trade and commerce against unlawful restraints and monopolies, approved July second, eighteen hundred and ninety, or in the act to reduce taxation, to provide revenue for the Government, and for other purposes, approved August twenty-seventh, eighteen hundred and ninety-four, or in any act amendatory of or supplementary to any of said acts, shall hereafter be construed or held to prohibit any contract, agreement, or combination that is not in unreasonable restraint of trade or commerce with foreign nations or among the several States.

A BILL (S. 6440) to regulate commerce among the several States or with foreign nations, and to amend the act approved July second, eighteen hundred and ninety, entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

Be it enacted, etc., That the act approved July second, eighteen hundred and ninety, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," be, and hereby the

same is, amended by adding at the end of said act the following sections:

"SEC. 8. That any corporation or association affected by this act, but not subject to the act approved February fourth, eighteen hundred and eighty-seven, entitled 'An act to regulate commerce,' or the acts amendatory thereof or supplemental thereto, shall be entitled to the benefits and immunities in this act hereinafter given if and when it shall register as herein provided and shall comply with the requirements of this act hereinafter set forth, but not otherwise.

"Such registration, by a corporation or association for profit and having capital stock, may be effected by filing with the Commissioner of Corporations a written application therefor, together with a written statement setting forth such information concerning the organization of such corporation or association, its financial conditions, its contracts, and its corporate proceedings, as may be prescribed by general regulations from time to time to be made by the President pursuant to this act; and such registration by a corporation or association not for profit and without capital stock may be effected by filing with the Commissioner of Corporations a written application therefor, together with a written statement setting forth, first, its charter or agreement of association and by-laws; second, the place of its principal office, and third, the names of its directors or managing officers, and standing committees, if any, with their residences.

"Thereupon the Commissioner of Corporations shall register such corporation or association under this act. In case any corporation or association so registered shall refuse or shall fail at any time to file the statements or to give the information required under this act, or to comply with the requirements of this act, or in case information furnished by it shall be false in any material particular, the Commissioner of Corporations shall have power to cancel the registration of such corporation or association after thirty days' notice in writing to such corporation or association. Any corporation or association aggrieved by such action of the Commissioner of Corporations may apply to the supreme court of the District of Columbia, in a suit or proceeding in equity, for such relief in the premises as may be proper, and said court shall have jurisdiction to hear and determine such application, subject to appeal as in other causes in equity.

"SEC. 9. That the President shall have power to make, alter, and revoke, and from time to time, in his discretion, he shall make, alter, and revoke, regulations prescribing what facts shall be set forth in the statements to be filed with the Commissioner of Corporations by corporations and associations for profit and having capital stock applying for registration under this act, and what information thereafter shall be furnished by such corporations and associations so registered, and he may prescribe the manner of registration and of cancellation of registration.

"Nothing in this act shall require the filing of contracts or agreements of corporations or associations not for profit or without capital stock, and such corporations and associations while registered hereunder, and the members thereof, shall be entitled to all the benefits and immunities given by this act, excepting such as are given by section ten and section eleven, without filing such contracts or agreements; but from time to time every such corporation or association shall file with the Commissioner of Corporations, when and as called

for by him, a revised statement giving, as of a date specified by him, such information as is required to be given at the time of original registration under section eight of this act.

"SEC. 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 a 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 concurrence of the Secretary of Commerce and Labor, 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 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; 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 other 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.

"SEC. 11. That any 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 a party to a contract or combination hereafter made, or any other party to such contract or combination, may file with the Interstate Commerce Commission 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 Interstate Commerce Commission, of its own motion and without notice or hearing, or after notice and hearing, as said Commission may deem proper, may enter an order declaring that in its 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 con-

tract 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, 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."

SEC. 2. That section seven of the said Act approved July second, eighteen hundred and ninety, is hereby amended so as to read as follows:

"SEC. 7. That any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover the damages by him sustained and the costs of suit, including a reasonable attorney's fee."

SEC. 3. That in any suit for damages under section seven of the said Act approved July second, eighteen hundred and ninety, based upon a right of action accruing prior to the passage of this Act, the plaintiff shall be entitled to recover only the damages by him sustained and the costs of suit, including a reasonable attorney's fee; and no suit for damages under said section seven of the said Act, based upon a right of action accruing prior to the passage of this Act, shall be maintained unless the same shall be commenced within one year after the passage of this Act.

Nothing in said Act approved July second, eighteen hundred and ninety, or in this Act, is intended, nor shall any provision thereof hereafter be enforced, so as to interfere with or to restrict any right of employees to strike for any purpose not unlawful at common law or to combine or to contract with each other or with employers for the purpose of obtaining from employers peaceably or by any means not unlawful at common law satisfactory terms for their labor or satisfactory conditions of employment, or so as to interfere with or to restrict any right of employers for any purpose not unlawful at common law to discharge all or any of their employees or to combine or to contract with each other or with employees for the purpose of obtaining labor on satisfactory terms peaceably or by any means not unlawful at common law.

SEC. 4. That no suit or prosecution by the United States under the first six sections of the said Act approved July second, eighteen hundred and ninety, shall hereafter be begun for or on account of any contract or combination made prior to the passage of this Act, or any action thereunder, unless the same be in unreasonable restraint of trade or commerce among the several States or with foreign nations; and no suit or prosecution by the United States under the first six sections of the said Act approved July second, eighteen hundred and ninety, shall be begun after one year from the passage of this Act for or on account of any contract or combination made prior to the passage of this Act, or any action thereunder; but no corporation

or association authorized to register under section eight of the said Act approved July second, eighteen hundred and ninety, as amended, shall be entitled to the benefit of this immunity if it shall have failed so to register, or if the registration of such corporation or association shall have been canceled before the expiration of one year after such registration, exclusive of the period, if any, during which such cancellation shall have been stayed by an order or decree of court subsequently vacated or set aside. Anything herein contained to the contrary notwithstanding, all actions and proceedings now or heretofore pending under or by virtue of any provision of the said Act approved July second, eighteen hundred and ninety, may be prosecuted and may be defended to final effect; and all judgments and decrees heretofore or hereafter made in any such actions or proceedings may be enforced in the same manner as though this Act had not been passed.

Senator NELSON. Mr. Low called on me last week and desired a hearing, and in pursuance of that, I sent the following notice to the different members of the subcommittee:

UNITED STATES SENATE,
Washington, D. C., April 16, 1908.

MY DEAR SENATOR: Senate bill 6440, introduced by Senator Warner, and Senate bill 6331, introduced by Senator Foraker, both relating to a modification of the antitrust law, have been referred to a subcommittee, consisting of Senators Nelson, Depew, Dillingham, Bacon, and Clarke, of Arkansas.

Mr. Seth Low, of New York City, who is interested in the first-named bill, is anxious to have a hearing before the subcommittee on Thursday, the 23d instant. In compliance with his wishes I hereby call a meeting of the subcommittee to be held at the room of the Judiciary Committee on Thursday, the 23d instant, at 10 o'clock a. m., for the purpose of giving a hearing to Mr. Low and such other persons as he may bring with him, on the bills above referred to.

Please be good enough to be present at the meeting.

Yours, truly,

KNUTE NELSON.

If the subcommittee is ready, we will proceed, and Mr. Low will be first heard.

STATEMENT OF SETH LOW, CHAIRMAN OF THE NATIONAL CIVIC FEDERATION.

Mr. LOW. Mr. Chairman, I think that it may be worth while in a few words to outline to the committee the origin of this measure and the thought that lies behind it.

The National Civic Federation, of which I am chairman, called a meeting on trusts and combinations, which was held in Chicago last October. That was an exceedingly representative gathering. It was attended by delegates appointed by the governors of 42 of the States of the Union, and in addition it was attended by representatives of the principal mercantile and commercial bodies, of several agricultural associations, and a large number of labor organizations. I think that it really represented very fairly a cross-section of Amer-

ican public opinion by reason of the breadth of territory which it represented and the large variety of interests which were represented there.

I think I may say that the opinion expressed at that conference was substantially unanimous that the Sherman law as it stood, with the interpretation which has been given to it by the Supreme Court, showing that it forbade restraint of trade whether reasonable or unreasonable and in every direction, was a profound injury to the country and needed some modification.

The convention agreed absolutely upon a resolution favoring an amendment of the law as regards railroads so as to permit traffic arrangements.

Senator NELSON. Pooling, you mean?

Mr. LOW. The phrase used, I think, was "traffic arrangements." I suppose that means more the agreement as to rates within districts under the regulation and control of the Interstate Commerce Commission.

It also recognized a very large number of other questions that were involved within this law, as to which there was not the same unanimity of opinion in the conference, and it suggested that a commission should be appointed to look into those questions and recommend action.

That conference was held in October, and while we were in session the panic broke out. It adjourned after adopting these resolutions and appointing a committee to bring about their presentation to Congress and to the President. Those resolutions were presented last January, at the end of the month, I think, or early in February. They were introduced in the Senate by Senator Elkins, as chairman of the Interstate Commerce Committee. The Senator said to us that if we wanted the matter considered we must prepare a bill; that a hearing upon the resolution would come to nothing, and it was necessary to reduce the practical suggestions we had in mind to a legislative form. The same advice was given to us when the resolutions were introduced into the House.

The convention at Chicago gave no authority for the preparation of a bill, and therefore that duty fell on the National Civic Federation, of which I am the chairman, and under whose auspices the convention was held. Senate bill 6440, which is now before you, is the result. It does not follow exactly the lines of the resolutions which were adopted in Chicago, although I think there is nothing in the bill that is antagonistic to those resolutions. But in view of events that have happened since then, and in view of more recent decisions on the part of the Supreme Court, it was deemed wiser, if possible, to submit a bill that contemplated action rather than to suggest the postponement of action by the appointment of a commission.

I suppose the first point to which I ought to address myself is to justify our belief that there is a demand for the revision of the Sherman law. I think that was well shown at the conference in Chicago, to which I have alluded. I think there was no one there out of that large representative body, numbering several hundred, coming from all over the Union, who did not express the opinion that to some extent it ought to be modified. It seemed to be the general opinion (and I confess that that is the opinion I meet as I talk with men from

day to day) that the legislation which we should have ought to occupy a position between the two extremes.

We have now a law that forbids all sorts of combinations, reasonable or unreasonable. I suspect that the opinion of the country is just as strong as it was when this law was enacted, that to remove all restraints would be contrary to the public interest. This effort, therefore, is to find some middle path between the two extremes which may be safely adopted.

We have had a long series of hearings before the Judiciary Committee of the House, and some testimony has been given bearing on this subject at those hearings. Among the witnesses there was Mr. Towne, the president of the Merchants' Association of New York. It is fair to say that he was not in favor of this bill, preferring the appointment of a commission to study the question, but he did say that he thought it was exceedingly important that the Sherman Act should be amended in the public interest.

He stated, for instance, that there were three kinds of agreements that were common among business men. The first were agreements which he thought were not at all in restraint of trade, like credit regulations and matters of that sort. Second, agreements which perhaps were on the border line, having to do with the limitation of product, the regulation of samples to be given in a trade, the cash discount, and the length of credits; and then those that he thought might perhaps be subject to the condemnation of this act as it stood, agreements for uniform classification and for the maintenance of prices. He asked us to notice that unlimited competition very often spelled ruin and that the law ought to take cognizance of that. So, on the point of the necessity for some modification of the Sherman Act, I think Mr. Towne's testimony is very much to the point.

I suppose the next question that may arise is, Can there be any combination in restraint of trade in the public interest? Is it a matter as to which exceptions are possible, the Sherman law now forbidding all combinations in restraint of trade, whether reasonable or not?

Mr. Carnegie in a letter which he wrote to me the other day instanced as such a case the matter of steel rails, the customers for which, as he said, are only the railroads: and he maintained that it was much more in the public interest that all the railroads of the United States should get their rails at the same price than that railroads which happened to have steel factories near their lines should get them at a low price and others at a very high price. Whether one admits that or not, there certainly is room for a good deal of argument upon the question, and it does indicate, I think, that there may be in commercial lines agreements of that kind which are not contrary to the public interest.

Mr. EMERY. Would you pardon an interruption there?

Mr. LOW. Certainly.

Mr. EMERY. I should like to ask Mr. Low if he would mind introducing the entire letter of Mr. Carnegie in the record, because there are other matters in it that I should like to refer to, and it would save us the trouble of introducing it.

Mr. LOW. I shall be very glad to introduce it. I have not got it, but I would be glad to supply it for the record.

Senator NELSON. There is no objection made, and Mr. Carnegie's letter to Mr. Low will be put in the record.

The letter referred to will be inserted hereafter.

Mr. LOW. I think another kind of an agreement in restraint of trade that might easily be in the public interest would lie in the field of lumber. Every one realizes that our forests are being cut down very rapidly, and the rapid deforestation of the land is threatening the country with very serious consequences as to its water supply and in other directions. I suppose that an agreement to limit the cut of timber among two or more people who own timber lands would be contrary to the Sherman antitrust law as it stands at present, without any limitation; and yet I can imagine an agreement of that sort that would be very much in the public interest. I think that the true way would be that when any deviation from the policy stated in the Sherman antitrust law is to be permitted, then the representatives of the people, in some form, should say whether the particular agreement or combination proposed was of such a character. In other words, I think the policy embodied in the Sherman antitrust law that there should be no restraint in trade is undoubtedly the rule. We have no idea at all that the American people want to fly from the notion that competition, in the main, is the best regulator of business. On the other hand, we are firmly convinced that experience has demonstrated that under modern conditions occasions do arise, now here and now there, when an exception to that rule is really in the public interest.

Of course the question may then be asked, Why not amend the act in some such way as Senator Foraker has proposed, so that it shall apply to everybody, without any other machinery whatever? I think that the difficulty involved in that method of procedure is that the conditions to be dealt with are so complex and so various that in making a general amendment of that kind the chances are that as much harm will be done as good, and perhaps more, because it does lie upon the surface of this question that it is not possible to define any standard that may be used in the law itself. The Senator proposes to amend by saying that the law shall forbid only unreasonable restraints of trade; but no one knows, and no one can say in advance in any particular case, what is reasonable and what is unreasonable. That seems to me to afford the reason why, in some manner, the Government ought to be able to represent the public interest when any departure from the rule is in contemplation.

We thought we understood some of the difficulties attaching to this subject when we began to draft this bill. I suppose I may say with equal frankness that, much as we did appreciate it, while listening to the discussion in the House committee we realized that there are difficulties in the subject we had not anticipated at all when we began to draft the bill. Yet I think that the only way to reach any escape from the absolute limitations of the Sherman law is to try, and our bill has at least the merit of being a constructive effort along that line.

In the first place, it is an optional bill. It seems to us that in a matter of so much difficulty and so much uncertainty it is much safer for Congress to proceed along that line than to attempt to modify the law absolutely in all its bearings.

In the next place, it is frankly an attempt to deal with the business situation in the United States as it exists at the present time, as we understand it. It seems to us that the two things that are necessary in order to relieve business of some of its most serious embarrassments are, first of all, if you please, to amend the law so as to grant an amnesty for the past; and, in the next place, to provide some method by which business men can ascertain whether the combinations and contracts in restraint of trade that they want to make in the future can be safely made or not.

Owing to the broad and sweeping character of the Sherman antitrust act, it is my belief, and I think it has been strengthened by the hearings before the House committee, that a very large part of the business of the United States at the present time is being done without the slightest regard to the Sherman antitrust law on the ground that necessity knows no law. Business can not stop, and it can not be done without agreements which may involve restraint of trade, and no one can find out whether a particular agreement is of that character or not. As a consequence business men have to take all the chances.

I think that in view of the panic through which we have so recently passed, one may very fairly say that the trouble with business in this country at the present time is partly psychological. Men do not know to what extent they are in danger from the operations of this act. I think it is good judgment from every point of view to offer, as this bill attempts to offer, an amnesty for the past after making a short statute of limitations.

Then the other part of the bill is an effort, as I said before, to provide a method by which men can find out as to the future whether the business combinations and contracts in restraint of trade which they want to make can be safely made.

I have the opinion—of course it is only a personal opinion, but I do believe very strongly that if those two things could be done the good effects upon the revival of business throughout the country would be very quickly felt.

I think, perhaps, with this introduction it would be well to take up the discussion of the bill somewhat, section by section, and in that way I think the scheme of the bill will become more clear. We do not think that this amnesty as to the past, or this modification of the act for the future, ought to be given without securing publicity. It seems to many of us that publicity itself will be the cure for very many of the evils from which the country has suffered in the matter of these combinations in restraint of trade, and therefore the benefits and immunities of the bill have been made conditional upon registration, and registration has been made conditional on publicity.

I think the bill could be made a little more clear by somewhat changing the order of the sections as they are printed here, but that is a detail which does not go to the merits, and therefore, if you please, I will discuss the bill in the form in which it is printed.

The proposal is to add certain new sections to the Sherman antitrust law, and this which is in the bill printed as section 8 should be section 9, for it is not intended to affect section 8 of the existing act.

Senator NELSON. That should read section 9, then?

Mr. LOW. Yes, sir; that should read section 9, and I will, if I may, refer to it as section 9 in my discussion. It provides for registration

by two kinds of corporations, by corporations or associations for profit and having capital stock, and by corporations or associations not for profit and not having capital stock. The information that is to be asked of those two different kinds of associations differ, and I think I may justly say that except at that point there is no difference made in the bill as it relates to those different kinds of corporations or associations. The section provides that—

"Such registration, by a corporation or association for profit and having capital stock, may be effected by filing with the Commissioner of Corporations a written application therefor, together with a written statement setting forth such information concerning the organization of such corporation or association, its financial conditions, its contracts, and its corporate proceedings, as may be prescribed by general regulations from time to time to be made by the President pursuant to this act."

I suppose it goes without saying that that reference to contracts means contracts affecting interstate trade and commerce. If it does not, it would be easy to make that clear. But the point involved there is the grant to the President of power to make general regulations in regard to this information. Of course that is a well-known method of legislation. I think the entire civil-service system rests upon such a power granted by Congress. I think the treatment of immigrants under the immigration law is controlled by regulations made by the President.

On the other hand, so far as those who favor the bill are concerned, it would be equally agreeable to state in the bill the exact field of information which might be covered. It was put in this form partly to shorten the bill and partly because conditions are always changing. If the regulations can be modified from time to time by the President, they can be kept current, as the business phrase goes, a great deal better than if they are arbitrarily stated in the act. But, so far as the friends of the bill are concerned, there is no objection whatever to stating the field of information in the bill, if that is preferred.

"And such registration by a corporation or association not for profit and without capital stock may be effected by filing with the Commissioner of Corporations a written application therefor, together with a written statement setting forth, first, its charter or agreement of association and by-laws; second, the place of its principal office, and, third, the names of its directors or managing officers, and standing committees, if any, with their residences."

It seemed to those who drew the act that as to associations not for profit and without capital stock and that made no appeal to the public for their money to be used in interstate commerce no basis existed for asking of such association more than is stated there in the bill.

Mr. DAVENPORT. Would it interrupt you if I should ask you a question?

Mr. LOW. Certainly not.

Mr. DAVENPORT. Under your classification, as you have it provided there, where would such an association as the Trans-Missouri Traffic Association and the joint traffic association fall? The point was expressly made in those cases that they were associations without capital stock and not for profit. Under your classification where would they fall? I know there is another section relating to common carriers, but this was an association of the officers of certain corporations.

Mr. Low. I suppose if they had no capital and no capital stock they would come under the second clause.

Mr. Davenport. That is, they would not have to file anything except their constitution?

Mr. Low. I suppose that would be so, if the case is as you stated it. Of course that is as to registering. They would not have to register, or in registering they would not have to do more than this.

Senator Nelson. The bill evidently, unless there is something subsequent in it, does not seem to cover the case of combinations among individuals or mere partnerships. This seems to relate only to corporations, and I suppose the term "associations" is not used in the sense of a partnership.

Mr. Low. Does not the Sherman antitrust act itself, in the eighth section, define the word "person" as controlling and including corporations and associations and natural persons?

Senator Nelson. But would this include that?

Mr. Low. I think so. It is certainly so intended.

Senator Nelson. Then if you intended to include that, you would have to make provision that such individuals or firms should file something?

Mr. Low. I do not know that individuals would have to register. By a succeeding section any contract that they made, in order to get the benefit of the act, would have to be registered; but I do not know that individuals would be obliged to register under this section of the act.

The point that I should like to make in connection with this whole matter of registration is that it is a right that everyone enjoys who complies with the conditions. It is not within the power of any administrative officer to deny the right to register, if the conditions are complied with. The section provides also for the cancellation of registry in case the information which was originally given is not kept up in accordance with the contemplation of the act. It also provides for an appeal to the supreme court of the District of Columbia on the part of anyone aggrieved. Our belief is that if the Commissioner of Corporations should say that the information given did not comply with the regulations, there would be a similar appeal. If there is any doubt about it, there is no objection whatever to providing for it.

Then the next section gives to the President——

Senator Nelson. Mr. Low, excuse me. The object of this registration is to make corporations and associations that register amenable to the subsequent provisions of the bill?

Mr. Low. It gives them the benefits and immunities that follow.

Senator Nelson. In the bill?

Mr. Low. Yes.

Senator Nelson. That is the object of this registration?

Mr. Low. Yes.

Senator Nelson. Go on; that is all.

Mr. Low. Then section 9, which will become section 10, gives to the President the "power to make, alter, and revoke, and from time to time, in his discretion, he shall make, alter, and revoke, regulations prescribing what facts shall be set forth in the statements to be filed with the Commissioner of Corporations by corporations and associations for profit and having capital stock applying for registration

under this act, and what information thereafter shall be furnished by such corporations and associations so registered, and he may prescribe the manner of registration and of cancellation of registration."

That is simply to give the President the power that is implied in the preceding section and to provide for keeping the information originally given current from time to time. Then the section reads:

"Nothing in this act shall require the filing of contracts or agreements of corporations or associations not for profit or without capital stock, and such corporations and associations while registered hereunder, and the members thereof, shall be entitled to all the benefits and immunities given by this act, excepting such as are given by section 10 and section 11"—

The two following sections—

"without filing such contracts or agreements; but from time to time every such corporation or association shall file with the Commissioner of Corporations, when and as called for by him, a revised statement giving, as of a date specified by him, such information as is required to be given at the time of original registration under section 8 (9) of this act."

Our idea was, Mr. Chairman, that this distinction between corporations for profit and not for profit was a legitimate and reasonable one; that the corporations that existed for profit and for business purposes were constantly appealing to the public as investors, and that it was therefore perfectly reasonable to ask of them their financial condition and the like.

It seemed to us, as we drew the bill, that the distinction between corporations for profit and not for profit covered the ground. It may be that there are classes of corporations that would be included in the second description that ought to be compelled to register. When the bill was being drafted I had not thought of any such combinations as Judge Davenport alluded to just now. I think, however, that while those details are important, it would not be difficult to meet them, when one knows what they are, by amendments that do not go to the root of the matter. The principle of this bill is, perhaps, the most important part of it, and the principle, I hope, will appear as the explanation goes on.

Senator NELSON. But can you suggest an example of a corporation not for profit that would be liable to make a contract in restraint of trade? How could such a case occur if it was not a corporation for profit in some form? Why should such a corporation be disposed to make a contract in restraint of trade? Can you suggest such a corporation? I have been trying to think of a corporation that would not be a corporation for profit at all, but still might be engaged in a contract in restraint of trade.

Mr. DAVENPORT. Suppose the American Federation of Labor became incorporated, as it may, under the act of Congress. That would have no capital stock, nor be formed for profit, and yet it is quite conceivable that it could enter into combination which would be in restraint of trade.

Senator NELSON. I see. That did not occur to me. I was simply thinking of what might be a case. I am glad you referred to that. I can see the force of it.

Mr. Low. It did occur to us, of course, that labor organizations and associations of this kind are not for profit and have no capital stock, and it also seemed to us that there was no reason why contracts which they might make should be filed as a condition of registration. In the first place, so far as such contracts relate to employment it does not seem to me that they have anything to do with interstate trade and commerce. Certainly if manufacture is not interstate trade or commerce, as I believe was decided in the Knight case, the labor that enters into the process of manufacture can hardly be considered interstate trade or commerce.

Mr. Davenport. On that point you have the authority of the Supreme Court of the United States, that an agreement between the locomotive engineers, for instance, of an interstate railroad not to work for less than a given rate of wages is not covered by the Sherman antitrust act; that it is collateral and indirect in its operation——

Mr. Low. Exactly.

Mr. Davenport. As long as they do not resort to something else to stop trade.

Mr. Low. Professor Jenks has called my attention to the fact that while they may register without filing their contracts, if associations of this kind want to get a ruling as to the validity of their contracts under sections 11 and 12, as the bill will be with its renumbering, they must file their contracts or else they take their chances under the Sherman antitrust act as it stands.

Mr. Emery. Mr. Low, if you will pardon me, do they not get the advantage of all the immunities contained in section 4 without registration; that is, as to the statute of limitations and as to no action being begun after the passage of the act unless the contract be unreasonable and in restraint of trade?

Mr. Low. I do not understand that they get those immunities without registration.

Mr. Emery. I call your attention to the fact that it provides there——

Mr. Low. They get those immunities by registration without filing their contracts.

Mr. Emery. Yes; without filing their contracts.

Mr. Low. But they have to register to get those immunities.

I repeat, Mr. Chairman, I think it can be justly said of this bill that there is no point at which there is any distinction made between those affected by it except in the matter of the amount of information to be given at the point of registration, and that is made along the line that I have indicated.

Section 10, as printed, which should be section 11, undertakes to deal with new contracts or agreements to be made by "any corporation or association registered under this act, and any person"—that covers an individual—"not a common carrier under the provisions of the said act approved February four, eighteen hundred and eighty-seven, or the acts amendatory thereof or supplemental thereto." Such parties who are registered have the right to file their contracts or agreements "with the Commissioner of Corporations," "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 concurrence of the Secretary of Commerce and Labor, 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 proceeding by the United States shall lie under the first six sections of this act," which is the Sherman 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."

That proposition has been criticised from the practical point of view as giving too much authority to the Commissioner of Corporations. Those who have presented the bill are quite willing to amend that section so as to provide for a rehearing, if desired, by the Interstate Commerce Commission, and also for an appeal to the courts of the District of Columbia. We think that such a rehearing and such an appeal, while in one sense cumbrous, would after all tend to the ready administration of the law. We think that in a great majority of cases a rehearing of an administrative character is all that would be wanted, and that an appeal to the court would come very seldom after such a rehearing. We can submit later the text of such a provision. It does not seem to me to change the legal question involved in such a provision, although I think it does meet to a very great extent what you might call the mercantile objection of giving so much apparent power to one person.

Senator NELSON. Does not this section in substance amount to this, when you boil it down: That the Commissioner of Corporations can determine whether any corporation or association or individual, if you please, shall have immunity from prosecution for violating the law?

Mr. LOW. Well, it may practically determine whether a suit shall be brought by the United States under the law or not. That business now really depends, as a matter of fact, upon the determination of the Attorney-General. Of course theoretically it is his business to sue everybody who breaks the law. Practically that is not possible, and also practically three or four combinations have been picked out and sued. That probably would be the course of events just as well as under the law if it remains as it is.

Senator NELSON. Does it not practically amount to this, that before the prosecuting officer of the Government, whether it be the district attorney or the Attorney-General, can proceed at all he must get the leave of the Commissioner of Corporations?

Mr. LOW. Of the Commissioner of Corporations, with the review provided of which I have spoken? I think not. The Attorney-Gen-

eral remains as free as before to bring a suit, but if he does he must prove that the combination complained of is unreasonable. In other words, the scheme is really to provide for an orderly determination as to whether a suit shall be brought or not, and what the Government shall have to prove.

Mr. DAVENPORT. Would it interrupt the train of your thought if I should ask a question?

Mr. LOW. No, sir.

Mr. DAVENPORT. The first section of the Sherman antitrust act is to stand. These acts are still to be criminal under that law, but this is a scheme proposed by which people can know in advance whether they are to be prosecuted for those crimes which they shall commit or not. That is to be reached by the decision, we will say, of the Commissioner of Corporations. Have the friends of this bill considered the question whether it would be in the power of Congress to prevent the Executive Department from prosecuting people for crimes that shall be committed under a state of affairs like that? It is not amnesty for past offenses, not a statute of limitations for crimes already committed, or anything of that kind, but immunity for future crimes. Now, is it in the power of Congress to limit the Executive when the power to prosecute is vested in the Executive by the Constitution and it is made his sworn duty to see that the laws are faithfully executed? Is not this very provision an unconstitutional invasion of the Executive function committed by the Constitution to the President of the United States? You say that he has a right of decision now. Of course that is involved in his duty. It is the duty of the President, having these officers under him, to decide whether or not a case has arisen which should be presented to the court. That is necessarily involved in the Executive discretion: but can Congress step in and say that he shall not exercise that discretion under certain conditions?

Mr. LOW. As I have said, the Attorney-General remains as free as before to bring a suit.

Senator NELSON. Mr. Low, will you allow me in this connection to call your attention to a historical fact? In the English revolution of 1688, when for the first time the British Government was put on a sound, constitutional basis, one of the grievances involved, and supposed to be settled at that time, was what they called, I think, the dispensing power; that is, the royal power had been in the habit of granting people immunity from prosecution. It was one of the questions the English revolution of 1688 settled that the royal power never should have the right to set aside the enforcement of a criminal statute. Would not this be retrograding, and would we not go back and adopt that old principle which was set aside by the revolution of 1688? I submit that to your thought.

Mr. LOW. We have thought that while the amnesty power is an executive power, it is within the power of Congress to determine the conditions under which it can be exercised. It seems to us that this provision relates to the use of this power. It certainly does not make it more stringent than it is now. So far as it goes it is an alleviation of the rigors of the law at the present time.

Senator NELSON. Excuse me for the interruption. Go right on.

Mr. Low. Certainly. I am much obliged to you for the suggestion. The section goes on to provide that—

"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 other 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."

In other words, the act makes that much of a distinction between new combinations and contracts in the ordinary course of business as between existing combinations and new combinations that are being formed, the thought being that in many States, in New York State certainly, and I think in some others, if not in many, no new railroad can be constructed without the determination of public officials, in some form, as to whether it is desirable and in the public interest. It seemed not an unreasonable thing that some one should decide, in the public interest, whether a new combination should be formed or not. All contracts of that kind, therefore, have to be filed. The contracts in the ordinary course of business that might be in restraint of trade are filed or not as the people desire.

I think that perhaps is a partial answer, at any rate, to the thought suggested in your inquiry. No one is obliged to have anything to do with this act unless he wants to, and the question is whether, if people do so by choice, the conditions that are contained in the act are not reasonable.

Section 11——

Senator Nelson. That should be section 12.

Mr. Low. It should be section 12. It contains substantially the same conditions contained in the previous section, only relating to common carriers instead of to those not common carriers. It is worded in such a way as perhaps to include combinations and contracts that we did not intend it to include, and we are quite willing to modify it so that it shall relate only to traffic agreements.

Senator Nelson. That would practically amount to a legalization of pooling contracts, would it not?

Mr. Low. Well, unless worded so as not to do so, but I think it is very easy to recognize traffic agreements without——

Senator Nelson. I use "pooling" in a more general sense than the mere pooling of revenues and the disbursement of profits. I mean pooling as to rates.

Mr. Low. I think it would recognize agreements as to rates, subject to regulation by the Interstate Commerce Commission. That much is intended.

Now, all of those sections added to the other act are in one section of the amending act, section 2.

Senator Nelson. Before you leave this point, practically the object of section 12, then, would be to assist the Interstate Commerce Commission to legalize or permit——

Mr. Low. Traffic arrangements.

Senator Nelson. Any traffic arrangements that the railroads might make between themselves?

Mr. Low. Yes.
Senator Nelson. Of any kind, as to rates?
Mr. Low. Yes; so far as traffic agreements go.
Senator Nelson. As to rates or anything pertaining to rates?
Mr. Low. Yes.
Senator Nelson. Go on.
Mr. Low. I think the act would be clearer, Mr. Chairman, if what is given as section 2 were placed at the beginning of the act, because section 2, which includes the amendment of section 7 of the Sherman antitrust act and section 3 of the amending act, which relate to the same subject, are actually amendments of the Sherman antitrust law, and if they were placed at the beginning of the amending act I think that one uncertainty which was revealed in the hearing before the Judiciary Committee of the House would disappear; that is to say, whether they were covered by the immunities obtained by registering. We do not think that registering has anything to do with section 2 or section 3, because they apply to everybody, whether they register or not, and so far they are amendments of the Sherman Act.

"Sec. 2. That section seven of the said act approved July second, eighteen hundred and ninety, is hereby amended so as to read as follows:

"'Sec. 7. That any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit, including a reasonable attorney's fee.'"

Senator Nelson. Wherein does that change the law? I have not the terms of the act before me.

Mr. Low. It simply removes the provision for threefold damages, and it seemed to us, frankly, that that was wise. Of course we know that the idea of triple damages is well known in the law, and yet it seems to us that if people have the right to sue for the damage that is done to them in cases such as are covered by the Sherman antitrust law it is all that is reasonable. I think that if you apply the thought especially to labor organizations and to the members of labor organizations, which have been included under the operation of this law by the recent decision of the Supreme Court, it involves a rule of very great hardship to hold the individual members of a union, and perhaps of the whole Federation of Labor, for threefold damages because they have been involved in a boycott which has been declared illegal.

Those who have proposed this bill have no disposition to leave the boycott in any other position than it is in under that decision; but, on the other hand, I confess it does seem to me personally, and I think to many others, to be a very great hardship that frugal workmen who have saved a home and have perhaps laid up a little property should be exposed to threefold damages because they have indulged in a practice of that kind, the legal status of which has only recently been decided.

That is the thought which lies behind that amendment, and of course it is made available for everyone. I do not know what the particular argument may be for threefold damages.

Senator NELSON. I presume the argument is this, Mr. LOW, that there are many cases of combinations in restraint of trade that are very pernicious, but at the same time, in any single individual case the damage in itself may be a very small amount, because of the fact that the combination or the corporations involved in the combination do not care much, as in each case it is so light a matter that they feel that they can afford to run the risk. But where they have to pay three times the amount of the damage it operates as a restraint upon them and they are not so willing to take the risk of combining.

Mr. LOW. That is purely a question of public policy, but we have thought that it was more fair to eliminate triple damages.

Mr. DAVENPORT. Would it alter your view on that subject if your attention was called to the fact that immediately after the decision was made by the Supreme Court in the hatters' case, Loewe *v.* Lawlor, at the present term, the officers called upon each member for one penny and they raised $15,000? Just one penny trebled would make 3 cents apiece and would raise $45,000. The gentleman who was subjected to their operations had to fight that thing all through the courts. You speak of the hardship upon labor unions, but when you consider their enormous numbers and their facilities by small sums of a penny apiece to raise funds, would that alter your idea as to the danger of any injustice being done by leaving the law as it is?

Mr. LOW. It is perhaps because I have never come in contact with such matters that I feel so. It seems to me perfectly reasonable that where a man is damaged he should have a suit to recover damages. I do not find it easy to accept the idea that he should recover threefold damages. At any rate that is the only point involved in that section. Section 3 provides:

"That in any suit for damages under section seven of the said act approved July second, eighteen hundred and ninety, based upon a right of action accruing prior to the passage of this act, the plaintiff shall be entitled to recover only the damages by him sustained and the costs of suit, including a reasonable attorney's fee; and no suit for damages under said section seven of the said act, based upon a right of action accruing prior to the passage of this act, shall be maintained unless the same shall be commenced within one year after the passage of this act."

The last section of the act reserves all existing suits, and the object of that section appears on the surface.

Senator NELSON. The first branch of section 3 practically says that in all violations of the law heretofore committed, instead of the parties being liable to treble damages, as they are now, they shall be relieved from that liability?

Mr. LOW. Precisely.

Senator NELSON. And be liable only to single damages?

Mr. LOW. Precisely. In other words, the idea of those sections is to reduce triple damages to single damages and make it available——

Senator NELSON. As to all past cases as well as to future cases?

Mr. LOW. Yes; without actually interfering with actions that are in course of litigation and to make a statute of limitations for one year under that head.

I think that is fair, Mr. Chairman, for another reason, as it applies to the past. There has been very great doubt as to what the law does signify under that head. It has only recently been determined. I

think there is the same reason for treating the past with leniency in such a matter as there is in the domain of mercantile business.

Senator NELSON. My recollection is that there is a California case—you will recall it—which sustains this part of the law as to triple damages. It is my recollection that the law has been held valid by the Supreme Court.

Mr. DAVENPORT. Oh, yes; in the case of Montague & Company *v.* Lowry (193 U. S.).

Mr. LOW. I do not question that, Mr. Chairman. Beginning in line 24, section 3 covers another aspect of the labor situation, which to me is very important:

"Nothing in said act approved July second, eighteen hundred and ninety, or in this act, is intended, nor shall any provision thereof hereafter be enforced, so as to interfere with or to restrict any right of employees to strike for any purpose not unlawful at common law or to combine or to contract with each other or with employers for the purpose of obtaining from employers peaceably or by any means not unlawful at common law satisfactory terms for their labor or satisfactory conditions of employment, or so as to interfere with or to restrict any right of employers for any purpose not unlawful at common law to discharge all or any of their employees or to combine or to contract with each other or with employees for the purpose of obtaining labor on satisfactory terms peaceably or by any means not unlawful at common law."

This clause has been amended in the bill, as it is before the Senate, from the form in which it was when presented to the House, but the amendments in the Senate bill, which consist in the insertion of the words "for any purpose not unlawful at common law," or "by any means not unlawful at common law," and so forth, are perfectly satisfactory to those who favor the measure. We think that the clause would mean the same thing without them as it means with them, but if they make more clear what is the object of the clause we certainly are in favor of them.

Mr. DAVENPORT. Mr. Low, on that point I presume the words "not unlawful at common law" were put in after mature deliberation, but I would suggest that according to their legal effect they defeat the very purpose which you have in mind, because no strikes were lawful at common law; strikes by people to raise wages were criminal conspiracies. On the other hand, combinations of employers to depress wages were unlawful at common law, and many other things. You would hardly want to take away from the working people of this country the right to strike because it was forbidden at common law.

Right there the question would be, what common law—the common law of England or the common law of the different States? That phrase is not happily chosen to either obviate the objections that we have to the bill, or, I think, to carry out the thought that you have in mind. I simply throw out that suggestion.

Mr. LOW. Certainly, Mr. Chairman, if those words make it unlawful to strike we would much prefer the wording of the House bill, which leaves them out. But I should like to point out exactly what was in the minds of those who framed the bill.

In the first place, you appreciate very clearly the condition of mind of organized labor at the present time all over the country. Without attempting to give a complete diagnosis of it, I think I am within

bounds in saying that the present excitement has been caused, very largely, or, at any rate, it has been brought to a head, by the decision of the Supreme Court in the hatters' case. The Supreme Court condemned the boycott, but they found a conspiracy in restraint of trade which brought the actions of the union and the Federation of Labor under the operations of the Sherman law in three things: First, in the strike at the factory; second, in the trade agreements by which 70 out of 82 of the hat factories in the country had been unionized; and, third, in the actual boycott of the hats of that firm all over the Union by the agents of the Federation of Labor.

Senator NELSON. May I interrupt you for a minute?

Mr. LOW. Certainly.

Senator NELSON. Do I understand that the court held that a mere agreement to strike was an unlawful combination in violation of the Sherman law?

Mr. LOW. No; I did not intend to say that, Mr. Chairman. What I meant to say is that they found the fact of a conspiracy in restraint of trade resting on those three points. Am I right, Mr. Davenport?

Mr. DAVENPORT. Of course the case came up on a demurrer to the complaint, and the allegations of the camplaint set forth what the combination was. The allegation was that they had entered into a conspiracy to force all the manufacturers of fur hats in the United States to unionize their factories by destroying the interstate trade of everyone who would not yield to their demands. That was the fundamental conspiracy, and it was alleged that in carrying it out they had succeeded, so that they had forced 70 out of 82 hat manufacturers to succumb.

In the due order of events in carrying out their conspiracy they came to this concern of Loewe's and made the same demand upon him in order to carry out that combination, and upon his refusal they then proceeded to destroy his interstate trade by first calling out all his union men, and, second, by driving off his nonunion men, so as to prevent production. In connecton therewith and for the same purpose of carrying out the conspiracy, they sent out their men all over the country to the wholesalers in other States, his business being all but $10,000 interstate, and threatened them that if they bought of Mr. Loewe they would destroy their business, and upon the refusal of any such person to yield to their demands, they then proceeded to threaten that wholesaler's customers if they should trade with him.

The whole scope of that Supreme Court decision is that there was a direct combination alleged in the complaint to restrain and destroy interstate trade in order to accomplish an ultimate result, and the means used to carry out that combination were all tinged and colored and made illegal by the nature of the combination.

There is nothing in that decision which would forbid any association of men from striking per se, but since every act done to carry out an illegal combination is itself illegal and any person injured by such illegal acts can resort to the courts under this law and have his remedy, the court held that there was a case stated under the Sherman Act. The Supreme Court further said that such a combination as was set out in the complaint was also clearly unlawful at common law.

Now, as I said, the Supreme Court, in 171 United States, stated in detail what sort of combinations are not covered by the Sherman

Act. They state specifically that an agreement among the locomotive engineers on an interstate railroad not to work for less than a certain sum is not covered by the act, because it is collateral and not direct in its action in restraining interstate trade. Most of the things that are bothering the business men of this country to which you have alluded, Mr. Low, have been expressly excepted by the court from the scope of the Sherman Act, with the solitary exception of agreements between business men to limit their output for the purpose of controlling prices in interstate trade, or agreements to keep up prices in interstate trade, or to eliminate competition in interstate trade by parcelling out the country between them. Those are within the prohibitions of the Sherman antitrust act, but all these other things you mentioned that bother Mr. Towne so much and which are apparently bothering the labor unions, according to your understanding, are as clearly outside the scope of the Sherman antitrust act and indeed of the power of Congress as if they were occurring in a foreign jurisdiction. The observations that you make might well perhaps be applied to the antitrust laws of some of the States, but they are entirely outside of the legitimate operations of the Sherman antitrust act as it is upon the books to-day. They do not fall within either the letter or spirit of the Sherman antitrust act, and indeed are wholly beyond the power of Congress to attempt to regulate under the commerce clause of the Constitution.

Mr. LOW. May I ask you for the title of the particular case in 171 United States?

Mr. DAVENPORT. It is the case of Hopkins *v.* United States.

Senator NELSON. One case was an Ohio case, was it not, a case about the engineers?

Mr. DAVENPORT. What I refer to now is in the Hopkins case. This was a case in which an agreement was made among stock brokers out in Kansas City——

Senator DILLINGHAM. What book are you reading from?

Mr. DAVENPORT. The 171 United States.

Senator NELSON. What is the title of the case?

Mr. DAVENPORT. It is the case of Hopkins against the United States.

Mr. LOW. What page in that volume?

Mr. DAVENPORT. Page 593. The court says:

"It is not difficult to imagine agreements of the character above indicated. For example, cattle when transported long distances by rail require rest, food, and water. To give them these accommodations it is necessary to take them from the car and put them in pens or other places for their safe reception. Would an agreement among the landowners along the line not to lease their lands for less than a certain sum be a contract within the statute as being in restraint of interstate trade or commerce? Would it be such a contract even if the lands or some of them were necessary for use in furnishing the cattle with suitable accommodations? Would an agreement between the dealers in corn at some station along the line of the road not to sell it below a certain price be covered by the act, because the cattle must have corn for food? Or would an agreement among the men not to perform the service of watering the cattle for less than a certain compensation come within the restriction of the statute? Suppose the railroad company which transports the cattle itself

furnishes the facilities and that its charges for transportation are enhanced because of an agreement among the landowners along the line not to lease their lands to the company for such purposes for less than a named sum, could it be successfully contended that the agreement of the landowners among themselves would be a violation of the act as being in restraint of interstate trade or commerce? Would an agreement between the builders of cattle cars not to build them under a certain price be void because the effect might be to increase the price of transportation of cattle between the States? Would an agreement among the dealers in horse blankets not to sell them for less than a certain price be open to the charge of a violation of the act, because horse blankets are necessary to put on horses to be sent long journeys by rail, and by reason of the agreement the expense of sending the horses from one State to another for a market might be thereby enhanced? Would an agreement among cattle drivers not to drive the cattle after their arrival at the railroad depot at their place of destination to the cattle yards where sold for less than a minimum sum come within the statute? Would an agreement among themselves by locomotive engineers, firemen, or trainmen engaged in the service of an interstate railroad not to work for less than a certain named compensation be illegal because the cost of transporting interstate freight would be thereby enhanced? Agreements similar to these might be indefinitely suggested. In our opinion all these queries should be answered in the negative."

Mr. Low. The fact of the actual existing situation is that labor men and those interested in organized labor all over the Union are greatly alarmed lest this decision in the hatters' case should limit their right to combine into unions and with each other, should limit their right to strike, and should limit their right to make trade agreements with their employers. I think that lawyers almost uniformly say, what Judge Davenport says, that it does not do any such thing. But members of the labor unions are not lawyers, and they fear it does. I do not know whether all their leaders think so. But that is the genesis in my view of the fear on the part of organized labor—the very fact that the strike was mentioned and the trade agreement with their employer was mentioned—that those things, if they came before the Supreme Court in some form would be declared illegal, and that other rights which are admitted almost everywhere, and which are, as most of us think primary rights on their part and on the part of their employers, may be called in question.

At any rate, it is because of that that we propose this absolute recognition in the Sherman law.

Senator Nelson. The Supreme Court in a recent case, I think a Kentucky case against the Louisville and Nashville Railroad, practically decided that that was a case in which the question involved was whether they had a right to discharge an employee because he belonged to a labor organization. And the court in its opinion held that the company had an absolute right to discharge the man, and the man had the absolute right to quit without assigning any reason. It seems to me that that has a bearing on the strike question.

Mr. Davenport. Also the court expressly held that there is no real relation between a labor union and interstate commerce. Of course the members of a trades union, like the members of a church, could

get together and conspire against interstate traffic, but so far as concerns the right of labor unions to organize and do everything legitimate it is provided in the statutes of the United States that they may organize, and this fear that exists on the part of labor unions, if any such fear existed, could be very easily dissipated.

Mr. EMERY. Long before the decision in the Comer case contracts were made by employers with organized labor and by even receivers; and under this very act a United States judge instructed the receiver of a railroad to enter into a bargain with the locomotive engineers and commended the bargain itself, and clearly pointed out the right of the men to make such bargain, while at the same time objecting to certain things in the proposed contract which in the opinion of the court were in restraint of trade.

Mr. LOW. What is the case?

Mr. EMERY. Waterhouse against Comer.

Mr. LOW. I know perfectly well the attitude of the leaders of organized labor in reference to the decision in the Adair case, referred to by the chairman. They were not disturbed by it in the slightest degree, because they said that whatever restriction is put on the employer is certain to be put on the employee. And their attitude is that both the employer and employee ought to be free. To use an illustration which I heard used at the time: If an employer wanted to say that he would employ only redheaded men, that might be foolish, but he was within his rights. In other words, I do not think that the leaders of organized labor, the wiser ones, at all events, were at all disturbed by that decision. That decision being followed shortly afterwards by the decision in the liability bill and the hatters' decision, the three decisions together made upon organized labor the impression I have mentioned.

It was because we thought that the claims of organized labor in connection with this situation were partly right that we tried to recognize that fact in our bill.

In other words, what has been said to me, for example, in connection with this bill, when it was being drafted, was that organized labor thought it ought to be exempted altogether from the operation of the Sherman Act, and that position has since been publicly taken by the Federation of Labor. They do not think they ought to be in it at all, on the ground that the labor that produces is so different from the thing produced that you can not legislate wisely in the same law as to both things.

Now, so far as labor is engaged in production, I think that is a good claim. I think that they have the right to combine, the right to strike, the right to make trade agreements. But when labor undertakes to interfere with the sale and distribution of the products of labor, it seems to us that it has left the field of labor and entered the field of restraint of trade, just as definitely as any trust, and that it therefore ought to be amenable to the Sherman law so long as that law is on the statute books.

The purpose of this amendment, as we submitted it to the House, is that nothing in this law should hereafter be enforced "so as to interfere with or to restrict any right of employees to strike for any purpose not unlawful at common law, or to combine or to contract with each other or with employers for the purpose of obtaining from

employers, peaceably or by any means not unlawful at common law, satisfactory terms for their labor or satisfactory conditions of employment, or as to interfere with or to restrict any right of employers for any purpose not unlawful at common law to discharge all or any of their employees or to combine or to contract with each other or with employees for the purpose of obtaining labor on satisfactory terms peaceably or by any means not unlawful at common law."

In other words, we want to recognize the right of both employers and employees in fields that seem to us to lie outside the Sherman law altogether.

But the necessity for such action, the importance of it, I think, lies in a psychological condition in the minds of organized labor all over the United States at the present moment.

Mr. EMERY. I would ask Mr. Low if the present section that he is discussing here is satisfactory to organized labor at the present time—if they indorse it?

Mr. LOW. No; they do not, because they want to go further. They want to be taken out of the act altogether.

Mr. DAVENPORT. When you speak of organized labor, you of course speak of the officers, the spokesmen? You have no idea of speaking so with reference to the great mass of laborers?

Mr. LOW. I am dealing with the situation as it unquestionably exists. Those who were represented, for instance, by the American Federation of Labor at the conference held in Washington a few weeks ago—one of the most representative conferences of that body ever held in the United States—did demand the right to be excluded from this law.

My proposition is that it is far wiser to recognize that demand so far as it is just than to turn a deaf ear to a proposition of that sort and say that the law does not mean that now. They say it does. I do not think that any assurance from the legal fraternity would make them believe otherwise. Therefore I think it is desirable to amend the law, so far as we think it desirable to amend it.

In other words, I believe in recognizing the right to strike, to combine, and to make trade agreements. I do not believe that there is, or ever has been, any right on the part of labor to maintain an interstate boycott such as was condemned in the Loewe case.

Senator DILLINGHAM. Has there been any decision of a court that requires such recognition as you have mentioned now to overcome it?

Mr. LOW. There have been several decisions that have created the fear. I want to say that they suggest fear; because every legal friend I have takes exactly the position that Judge Davenport and Mr. Emery take. On the other hand, notwithstanding that, the fear has arisen and is very strong at the present time, and I think it is good judgment to recognize it.

Senator NELSON. Permit me to suggest that I think you misunderstand these labor men. It is not the fear that they have not the right to strike or to combine to raise wages; but what they are driving at is they want to have what they call the "closed shop" legalized, and they want the right to boycott. Those are the two points that they are aiming at, and not the others. Now, are you in favor of anything that tends to legalize the closed shop and prevent men from working unless they belong to the union, or are you in favor of boy-

cotting a man's trade? Suppose you were a manufacturer of boots and shoes and they came to you and said that you should not employ any but union men: would you feel that you must submit to that, and if not that they would travel all over the country and break up your trade? Do you want that legalized?

Mr. Low. No; that is exactly what I say I object to.

Senator Nelson. Is not that exactly what they want when you boil it down?

Mr. Low. They say that they want to be exempted from this law. Mr. Gompers said before the House committee and in public that he believed in the right to boycott, but that in the broad sense we have no desire to recognize, and we do not think it ought to be recognized. Personally, I stand in the position of the Anthracite Coal Commission when they made a distinction between what they called a primary and a secondary boycott. They thought it might be perfectly legal for all the members of the union together not to patronize anyone whom they wished not to patronize. That is what they called a primary boycott. But when the men went beyond that, and tried to prevent others from dealing with those whom they had ceased to deal with, they went into what the Commission called a secondary boycott. This the Commission condemned, and so do I condemn it.

With regard to the closed shop, the matter came before me some ten or twelve years ago in a request to arbitrate that question in New York City between the Typothetæ and Typographical Union No. 6, and I found in favor of the open shop, on the ground that the union had no more right to say to an employer whom he should employ than he had to say whom they should admit into their union. But that does not mean that if I were a manufacturer I should not prefer to deal with union labor. Personally, I am very much in sympathy with many of the aspirations of union labor. I think organized labor has done a great deal to improve the conditions of laboring men; but I can also imagine conditions in which it might be more advantageous to employ nonunion men. Were I an employer, I should want to be free to employ either all union men or all nonunion men, or both together, just as I should want.

Senator Nelson. Would you favor a proposition allowing men to combine to strike for better wages, provided, however, that they can not combine to exclude nonunion men from getting employment, and provided that they can not combine to boycott a man's trade who employs nonunion labor? How would such a provision as that suit you?

Mr. Low. I do not know what effect such a provision would have on interstate commerce. I think the provision, as I suggested it first, really covers the whole situation. As I understand, there are decisions that recognize the right of labor to strike for any or for no cause. I do not see how it is easy to do otherwise, because you can not make men work if they do not want to work.

Senator Nelson. They have now a right to combine for higher wages and to strike. Having those two rights, what others do they want, or what others ought we to give them? That is the question.

Mr. Low. The right to make trade agreements with their employers. I think that the right to interfere with the distribution and sale of

the finished product, by labor, through restraint of trade, should be denied. That seems to me the only question that is in the contemplation of this law at all. I do not think these other rights interfere with interstate commerce.

Mr. DAVENPORT. Take the first case that came up in 1893 in New Orleans under the Sherman act, United States *v.* Workingmen's Amalgamated Association, 54 Fed. Rep. 998. There the employees concerned struck, and the matter grew to such proportions that finally all the unions engaged in hauling stuff from the railroad depot and the steamships struck for the purpose of forcing the original concern to yield to their demands. Now, that was a combination to paralyze interstate trade for the purpose of coercing that concern. Do you think that the employees of an interstate road ought to have the right to strike for the purpose of tying up the business and inflicting on the community all the loss and injury and suffering necessarily entailed by such a course? Or, take the Debs case (158 U. S.). That was a strike gotten up because the men were trying to prevent the railroads from hauling Pullman cars. They were aiming at the Pullman Company, because the Pullman Company had a disagreement with its workmen at its factory, those engaged in building its cars. If that had gone on for three or four days longer the country would have been starved to death.

Now, there was a combination on the part of these people to paralyze interstate traffic for the purpose of helping out somebody else. Or, take the case of the Toledo, Ann Arbor and Michigan road *v.* Pennsylvania Company et al., where the employees of a railroad, the Toledo and Ann Arbor had refused to work, and in order to coerce that road Chief Arthur was going to enforce rule No. 12 of the Brotherhood of Locomotive Engineers, which prohibited the engineers from hauling, or authorized him to direct the engineers on connecting roads to refuse to haul, any of the cars of the Toledo railroad. There the trouble was that the Pennsylvania road and other connectings roads were about to agree with Chief Arthur and his men not to haul the cars of the Ann Arbor road.

Now, that has nothing to do with production. I do not know whether the common law would bear upon it. I think that the court would hold that it did, and did so hold in the Debs case. Now, do you not think that everything between employers and employees, for instance, to tie up interstate traffic, ought to be prohibited?

Of course, in the case of Arthur *v.* Oakes in the 63d Federal Reporter, Mr. Justice Harlan lays down the distinction as plainly as can be. Judge Jenkins had absolutely prohibited the employees of the Northern Pacific from striking.

Senator NELSON. And from quitting?

Mr. DAVENPORT. And from quitting, yes; or agreeing to quit. When the matter came before the circuit court of appeals, Judge Harlan said these man have a perfect right to quit, so far as striking per se is concerned, and this injunction of Judge Jenkins forbids that. It should be modified. To what extent? Why, there are allegatio s in this complaint that they are striking for the purpose of injuring the business of the company, and so far as that is concerned it should not stand. Motive makes all the difference in the world as to the legality of a strike, just as motive makes all the dif-

ference in the world as to the legality of other acts, and the trouble about this provision, as I view it, is that it would legalize strikes for the closed shop. Of course, the introduction of this phrase "for any purpose not unlawful at common law" may have some effect, but it would certainly confuse it. The effect of that would be to legalize strikes for the closed shop. The engineers, for instance, could refuse to work for any railroad that would hire nonunion men. It would prevent agreements between employers and employees. It would legalize boycotts in every phase and would sanctify this infernal blacklist which employers have indulged in, by which a poor fellow who fell under the ban of one railroad company could not get work from any other company.

This modification suggested here, "for any purpose not unlawful at common law," may have some effect in changing it, as I have suggested. It goes very much further, I think, than the gentlemen proposing it would want to go; because you remember what Mr. Gompers said before the House committee, that men were at one time hanged for striking. There is no doubt that at common law any combination on the part of laboring men to raise their wages beyond the current figure and every combination of employers to depress wages below the current figure was a criminal conspiracy. That was the common law of England. And, as I said before, this expression here, "not unlawful at common law," is not a happy one.

Mr. JENKS. Mr. Chairman, may I ask Mr. Davenport a question?

Senator NELSON. Yes.

Mr. JENKS (to Mr. Davenport). When you refer to the common law, in connection with Mr. Gompers's suggestion as to the common law at a time when it provided that people could be hung for striking, you did not make a distinction between what the common law was under King James and Queen Elizabeth and what the common law was when it became more developed.

Mr. DAVENPORT. I catch your point.

Mr. JENKS. Let me complete my statement. I quite agree with you that motive makes all the difference in the world when it comes to the case of laboring men or others. But I think it is fair to question whether any body of laboring men could have as a primary motive the object of destroying interstate commerce or tying it up. I think we ought to be careful when we speak of a thing so indefinite as motive. The primary motive, of course, of the laboring men is to increase their wages or do some such thing. They may take an unlawful means to carry out what may be a good motive. It seems to me that in speaking of their motive you should make that distinction. I think it is absurd on the face of it to say that the unions would have for their primary motive these illegal things. Their primary motive is to get some good thing for themselves by lawful means.

Mr. DAVENPORT. Well, we will take a concrete case. I assume that you will admit that if it is possible for men to do these things the law ought to be that they shall not do them. Motive, of course, has everything to do in determining the quality of an act. An act may be innocently done for one purpose that may not for another. That was held in Aikens *v.* Wisconsin (193 U. S.).

In the case mentioned a while ago, the case of Loewe *v.* Lawlor (208 U. S.), they did not want Loewe's business particularly to be union-

ized. His relations with his employees were wholly satisfactory. The object was to get a hat of a certain grade with the union label in it in order to enable them to attack the business of a large manufacturer in Yonkers who would not unionize his shop. Loewe was only a pawn in the game. They actually told Mr. Loewe that they had no fault to find with his business; that his wages and all other conditions were satisfactory; but they said we want you to unionize your shop, and thereby gain the right to use the union label in your hats, so that we can go to the dealers and say, "You must not buy Waring's hats because here is a hat of a similar quality with a union label in it." Do you consider that a commendable motive—to destroy Mr. Loewe in order that they may attack the Yonkers people?

Or, take the case of the Buck Stove and Range Company. That company had agreements—that fact was admitted—with the metal polishers' union and with the molders' union that all disputes should be submitted to arbitration. The particular dispute in question was submitted to arbitration and the award and decision were against the union. Nevertheless, the union officers in St. Louis, throwing overboard their agreements, began this business of applying the boycott. They applied it through the labor unions of St. Louis. They then applied to the International Union of Polishers, with the result that all labor unions in the United States, through the machinery of the American Federation of Labor, are being brought to bear to destroy the interstate trade of the Buck Stove and Range Company, when the men out there were entirely in the wrong, as is established by the finding of Justice Gould.

So I say that your hypothesis that it is inconceivable that men would resort to these things from wrong motives, or, to put it in other words, from misguided motives, is an incorrect assumption. The fact is, it is because these things are done that the law was passed, and it is because they have been done that the courts have denounced them and applied the law to them.

The implication is that these people ought to be permitted to do these things by express terms of law because it is inconceivable that they would do these things. That is a mistaken assumption.

Senator NELSON. It is now five minutes of 12, and we shall have to quit for the day. I wish to see if we can make an arrangement about time for another hearing. You want to be heard further on this, I presume, Mr. Low?

Mr. LOW. I myself have almost finished, but I think there are others who desire to speak.

Senator NELSON. Are there others who would like to be heard on the same side?

Mr. LOW. I think Professor Jenks would like to be heard.

Senator CLARKE. The session of Congress is approaching a close, and we ought to meet shortly.

Senator NELSON. Can you meet next Tuesday?

Senator CLARKE. Why not take it up on Saturday—but perhaps there will be a session of the Senate on Saturday.

Mr. EMERY. We have a hearing before the House Judiciary Committee on the Hepburn bill on Saturday.

Mr. LOW. Could we meet to-morrow?

Senator DILLINGHAM. I have another committee for to-morrow, at which I preside, that has important bills before it.

Senator NELSON. And on Monday we have a meeting of the full Judiciary Committee, so that this subcommittee could not meet then, but on Tuesday it could.

Senator DILLINGHAM. I can be here on Tuesday morning.

Senator CLARKE. So can I.

Senator NELSON. Let us meet, then, on Tuesday, sharp at 10 o'clock. The trouble with us is that we are all members of other committees. I am myself a member of four working committees, and the other members of this subcommittee are in the same situation. Then we have to attend the sessions of the Senate, so that we have only the forenoons at our disposal. We will adjourn, then, until Tuesday, next.

Mr. LOW. Would it be convenient for Mr. Davenport and Mr. Emery to go on at that time?

Mr. DAVENPORT. Yes.

Mr. LOW. I believe it will be inconvenient for Professor Jenks to be here before the end of the week.

Senator NELSON. Let us all be here promptly at 10 o'clock on Tuesday. I should be glad to call a meeting for an earlier day if I could.

Mr. DAVENPORT. I should like to have an hour or so to point out the objections we have to this bill and the Foraker bill, because there is the same vice in both.

Senator NELSON. I shall be glad to hear you on the Foraker bill.

Senator CLARKE. Whom do you represent?

Mr. DAVENPORT. The American Anti-Boycott Association.

Senator CLARKE. Composed of railroad companies and manufacturers' associations?

Mr. DAVENPORT. Composed of employers.

Senator CLARKE. Railroad companies and manufacturers?

Mr. DAVENPORT. Manufacturers and employers. Railroad companies do not have anything to do with us.

Mr. NATHAN BIJUR. I should like to be allowed to furnish a brief in lieu of a personal hearing, as I can not be here.

Senator NELSON. That will be sufficient. We will have your brief printed in the proceedings.

(The subcommittee thereupon adjourned until Tuesday next, April 28, at 10 o'clock a. m.)