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ADDRESSES OF

MR. SAMUEL UNTERMYER

(in print)

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Evils and Remedies in the Administration of the Criminal Law

Address

Delivered before the American Academy of Political and Social Science at Philadelphia on April 9th, 1910

By
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of New York

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Evils and Remedies in the Administration of the Criminal Law.

Mr. Chairman, Ladies and Gentlemen:

None of the many difficult problems that confront the present generation is more urgent or perplexing than the reform of the administration of the criminal law in our country. Our wealth and importance in the financial world have increased by such leaps and bounds that we have completely outgrown the laws which were enacted to meet the earlier conditions in our history.

It will be no easy task to secure the changes that are necessary to meet and curb the cupidity of the criminal rich, nor to enforce those laws when enacted.

Strange to say the chief obstruction to the administration of justice in criminal cases lies in the undue shelter afforded by our Constitution.

The prescribed remedies against crimes of violence are, on the whole, fairly administered, though there are still many abuses capable of correction. It is in the attempts to punish the crimes born of greed and cunning in the financial world that the machinery of Justice has broken down and the law is administered in a spasmodic and hysterical way.

I think it will be admitted by all fair-minded critics of our Institutions that our people have

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not that respect for the law which pervades foreign countries. Is it not because the enforcement of the law with us is not entitled to the same respect? It is either not made to reach the powerful or has been found incapable of enforcement against them. This discrimination is not due to the dishonesty of our people or public officials, nor to their unwillingness to punish rich offenders. It is owing largely to the character of the proof necessary to establish the commission of a crime involving complicated financial transactions and to the difficulty of securing such proof, because of the impassable barriers thrown around the offender by what are known as the Constitutional rights and immunities of a person charged with crime.

Even at the risk of being considered guilty of heresy I question the wisdom of these provisions. which are embodied in the Fourth and Fifth Amendments to the Federal Constitution and of like provisions in the Constitutions of the various States as they have been construed by the Courts. (In the few States, like New Jersey, which have no provisions in their Constitutions to the effect that in a criminal case no person shall be bound to incriminate himself the courts have held that the right is one inherited from the common law and have accordingly read the provision into the organic law of the State.)

The language of the Fourth Amendment so far as applicable to this discussion is:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and

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particularly describing the place to be searched, and the person or things to be seized."

That of the Fifth Amendment is that

"No person shall * * * be compelled in any criminal case to be a witness against himself."

It is hardly necessary to remind you of the history of the oppression that led to the enactment of these Amendments, as described by Mr. Justice Bradley in Boyd *v.* United States, 116 U. S., 624-626:

"In order to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution under the terms 'unreasonable searches and seizures,' it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England. The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book;' since they placed 'the liberty of every man in the hands of every petty officer.' This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.'

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"These things, and the events which took place in England immediately following the argument about writs of assistance in Boston, were fresh in the memories of those who achieved our independence and established our form of government. In the period from 1762, when the 'North Briton' was started by John Wilkes, to April, 1766, when the House of Commons passed resolutions condemnatory of general warrants, whether for the seizure of persons or papers, occurred the bitter controversy between the English government and Wilkes, in which the latter appeared as the champion of popular rights, and was, indeed, the pioneer in the contest which resulted in the abolition of some grievous abuses which had gradually crept into the administration of public affairs. Prominent and principal among these was the practice of issuing general warrants by the Secretary of State, for searching private houses for the discovery and seizure of books and papers that might be used to convict their owner of the charge of libel. Certain numbers of the 'North Briton,' particularly No. 45, had been very bold in denunciation of the government, and were esteemed heinously libellous. By authority of the secretary's warrant Wilkes's house was searched, and his papers were indiscriminately seized. For this outrage he sued the perpetrators and obtained a verdict of £1,000 against Wood, one of the party who made the search, and £4,000 against Lord Halifax, the Secretary of State who issued the warrant.

The case, however, which will always be celebrated as being the occasion of Lord Camden's memorable discussion of the subject, was that of *Entick* v. *Carrington and Three Other King's Messengers,* reported at length in 19 Howell's State Trials, 1029. The action was trespass for entering the plaintiff's dwelling house in November, 1762, and breaking open his desks, boxes, &c., and searching and examining his papers. The jury rendered a special verdict, and the case was twice solemnly argued at the bar. Lord Cam-

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den pronounced the judgment of the court in Michaelmas Term, 1765, and the law as expounded by him has been regarded as settled from that time to this, and his great judgment on that occasion is considered as one of the landmarks of English liberty. It was welcomed and applauded by the lovers of liberty in the colonies as well as in the mother country. It is regarded as one of the permanent monuments of the British Constitution, and is quoted as such by the English authorities on that subject down to the present time."

Until the decision in 1885 in the Boyd case it was not generally supposed that the provision against unreasonable search and seizure applied to the enforced production of books and papers under subpoena for use in a criminal case, so as to permit a man who was able to secure possession of evidence of this character to thwart the ends of justice. It was, to say the least, a surprise to the legal profession to find that to reqnire obedience to a lawful mandate for the production of such books, was a "search of seizure" and more surprising still to learn that it was an "unreasonable" seizure. But such is the law unless the recent decisions of the Court can be said to have modified the rule in the Boyd case.

Yet it is not clear to me that the framers of our Constitution ever meant that the Fourth Amendment should be held to forbid the courts to use the written evidence of a criminal act against the person charged with the commission of the crime, where that evidence can be secured from him through the orderly process of subpoena.

In the last few years the Supreme Court has been face to face with the difficulty of proving crime where the defendant can be permitted to

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withhold his books and papers from the operation of a subpoena and has found it necessary to "distinguish" the Boyd case so as to mitigate, in so far as possible, the many difficulties to which it gave rise. That great Court realizes the necessity, above all things, of certainty in the law and so it rarely overrules its own decisions. But it is a progressive court. Progress is more necessary than consistency, and so it has begun the process of "limiting" and "distinguishing" the Boyd case. The next stage will be to "forget" it. Let us hope so.

I need hardly say that I intend no disrespect to that greatest of the world's judicial tribunals. We should be forever thankful for its vast powers and especially for the power which it has taken unto itself of judicial legislation. The Nation owes much of its greatness to the brave exercise of that power at critical times.

As evidence of the departure from the Boyd case permit me to call your attention to Hale *v.* Henkel, 201 U. S., where the Secretary of the American Tobacco Company was subpoenaed to produce the books of the Company, which was under investigation for violating the Anti-Trust Law. A person testifying against himself is entitled to immunity under that statute. The Supreme Court held that the Secretary could not plead the priviledge of the corporation against incriminating itself. Some of the Judges were in favor of holding that a corporation was not a person, within the protection of the Constitution so as to get rid of the prohibition once and for all so far as concerned corporations although that Court had previously repeatedly held that under the Fourteenth Amendment a corporation was a person, en-

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titled to the equal protection of the laws with an individual, and some members of the Court had said that a corporation was equally within the meaning of the Fourth and Fifth Amendments.

In the case of Al Adams, charged with owning and operating policy-shops, the Supreme Court affirmed the action of the lower court in allowing his books to be used against him, although the particular evidence complained of had been forcibly and unlawfully seized, thus literally violating the protection that was clearly intended to be afforded by the Fourth Amendment. The Court held that the violation of the defendant's rights presented no Federal question and that in any event it made no difference how the evidence had been secured, so long as it had been made available. So that whilst a man could not be compelled to produce his books in answer to a subpœna in a criminal case against him, they could be forcibly taken from him or stolen from him, and used as evidence.

In the Twining case the Court decided that although a defendant on trial for larceny had been compelled to incriminate himself, no Federal right had been violated and no Federal question was involved, and that it was for the State Court to determine whether its law had been thus violated in that respect.

Within the past few days the U. S. Circuit Court in New York decided in the case of U. S. *v.* American Sugar Co. that the corporation could be forced to produce its books without granting immunity to anyone.

These cases are cited as illustrating the lengths to which the Court has been driven in order to preserve even a vestige of its machinery to detect

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and punish crime, with these Constitutional provisions in its way.

I submit, but with hesitation,—not because of doubt as to the wisdom of the suggestion, but because it will appear like sacrilege to the uncompromising worshippers of our Constitution—that the first and greatest existing evil in the administration of the criminal law, and one that should be corrected, is the undue protection still afforded to persons charged with crime by these provisions of the Constitution and like provisions in the State constitutions.

We may somewhat mitigate the evil by bold judicial legislation. That is the process we are now undergoing with respect to corporations. But the prosecution of corporations, which can result only in a fine is a farce—we cannot strike at the root of the trouble without amending our Constitution.

But for the fear of being charged with treason against this fetich which all lawyers are expected to worship, I should be tempted to say that the difficulty put in the way of the punishment of crime is not the only disability under which that great Document of Compromises has placed us. When we consider how helpless we are under it to regulate Divorce, or to tax wealth (through an Income Tax), instead of taxing poverty or to secure uniform Corporation Laws or to prevent the States from bidding against one another for "business" in the laxity of administering Divorce and Corporation laws, perhaps we may be pardoned for suggesting that great as was the wisdom of our Fathers, they did not foresee all the possibilities of the future.

The occasion that gave rise to these clauses in the Fourth and Fifth Amendments can never

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again arise. These disabilities to punish crime do not pertain in other countries; they are no protection to the innocent, but they are the cause of miscarriage of justice and the escape of the guilty in nine cases out of ten. They lead to all sorts of dishonest expedients by the prosecuting officers and bring the administration of Justice into contempt. No device, however unlawful, by which a man's papers can be seized or stolen from him will prevent their use against him, and yet, he himself cannot be forced to produce them. (We have sacrificed the substance of the Bill of Rights and are clinging to the shadow.)

It must not be forgotten that the rule that a defendant in a criminal case cannot be compelled to incriminate himself was enacted at a time when the defendant was not allowed to be a witness in his own behalf.

I would not only remove the existing restrictions but would go further and permit the defendant to be called by the Prosecutor for cross-examination, but only in open Court and at a time when he is represented by counsel. Subject to the limitation that the Presiding Judge should not put questions or turn Prosecutor, which is the vice of the Continental system, I would adopt that system, with the further qualification that there should be no private or "star-chamber" interrogation of the defendant. Nine out of ten crimes go unpunished because of this tradition, which found is birth in the abuses of the Dark Ages.

We have the most striking illustration of the vice of this rule in the pending prosecutions for violation of the Anti-Trust Law. The most flagrant of these violators are practically immune

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because they cannot be forced to disclose the "gentlemen's agreements" and other forms of unlawful combinations, as the result of which every human soul in the country is daily paying tribute to them. We have the sad spectacle of the courts of the country passing solemn judgments in civil suits enjoining and dissolving these monopolies as the enemies of commerce and decreeing that the leaders and owners of these vast industries are guilty of criminal violation of the law and yet we find the Government powerless to enforce the criminal law against the individuals who gave them birth, who conduct them and are the beneficiaries of their criminal existence. Such exhibitions, repeated day by day, are bound to educate the people to a contempt for the law and to a feeling that it discriminates between the weak and the powerful.

How long could these gigantic pools last, many of which are evidenced by the written admissions of the parties if the culprits could be put upon the witness-stand and forced to testify and produce the written evidence of their crimes? If they are innocent can anybody conceive how they could be harmed?

There are a half dozen offices in the City of New York of men engaged in the business of acting as so-called "commissioners" of these criminal pools and as expert accountants under whose direction the profits are distributed, that could be made to yield up the written evidence of a hundred or more of these vast conspiracies involving thousands of influential business men who are supposed to be reputable, law-abiding citizens but who do not scruple to commit this form of crime. The only thing that protects them

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from the enforcement of the law is the construction that has been placed upon these Constitutional limitations.

If trusts and monopolies are good things for the country, and the laws that have been enacted to suppress them are mere demagogic class legislation born of the envy of the poor against the rich, as some of our plausible friends in and around Wall Street, living in a "Fool's Paradise," still seem to think, they should be wiped from the statute books. If, on the other hand, these trusts are an economic curse to the country, are destroying opportunity for the rising generation, paralyzing the economic laws of supply and demand and levying tribute upon us by sheer brute force, more cruel and ruthless than the forced tribute exacted by the robber barons of old, we shall never be able to rid ourselves of this blight so long as there is such a thing as human greed, without the stern application of the criminal law to the men who guide and control them.

For that purpose the entire inquisitorial machinery of justice should be available. Every barrier that has been thrown in the way should be removed unless it is seen to be necessary for the protection of the innocent against oppression.

The provisions quoted from the Fourth and Fifth Amendments of the Constitution (not the entire amendments), and like provisions in the State Constitutions, constitute today the great and only barrier between the people and the execution of their will against these violators of the law.

The second great evil in the administration of the criminal law and for that matter of all

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laws in our country, is the prevalence of perjury due to the non-enforcement of the laws enacted for its punishment. I think it will be generally admitted that in no civilized country is wilful false-swearing so prevalent as here,—due largely to the fact that the penalty imposed under the laws of the various States is too severe, and that it is therefore a crime rarely punished.

In the State of New York, perjury and subornation of perjury in a criminal case are each punishable by a maximum term of twenty years imprisonment, and in a civil case by a maximum term of ten years.

It has been said, and I think rightly that the crime of perjury is committed in at least three out of every five cases tried in the courts in which an issue of fact is involved. It has become so general that the Courts regard it almost as a part of the inevitable accompaniment of a trial.

Again, contrasting our conditions in this respect with those prevailing in foreign countries, no fair-minded observer of the administration of Justice in those countries will deny that in neither England, Germany or France is there committed a fraction of the perjury that is prevalent in our courts. In none of those countries is perjury punishable with the severity provided by our law, which renders conviction well-nigh impossible.

The German courts are exceptionally free from this pollution of the judicial system. Most cases in which there is a sharply defined issue of fact that cannot be explained as the result of mistake or honest difference of recollection, are followed by prosecution. The dread of the law is upon every man who goes upon the witness-stand there.

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Permit me to suggest at least a partial remedy for this ever-increasing danger.

It should be made *obligatory* upon the Court on the trial of every issue of fact before a jury to require the jury, in addition to its general verdict, to answer the question as to whether any party or witness has been guilty of wilful false-swearing, and if so, to name the party or parties or witnesses so guilty. Where the trial takes place before the Court without a jury, the Court should be required to answer such a question. If the Court or jury (as the case may be) finds that there has been perjury, it should be incumbent upon the Prosecuting Officer to act upon such finding.

The knowledge of the parties and their witnesses that the jury will be required to answer such a question will in itself be a most powerful deterent against reckless false-swearing. Unfortunately there are many in the community who have more regard for their reputations than for the sanctity of their oaths and a far greater regard for their liberty than for either.

If the submission of the question be left to the discretion of the Court, or its answer be made discretionary with the jury, nothing will be accomplished. It should be mandatory, and a like mandate should apply to the prosecuting officer to place the evidence of perjury in every such case before the Grand Jury.

The third evil to which I desire to refer is the unbridled license of the Press in commenting upon and often trying cases in the public prints. This is a prolific source of the miscariage of justice and is most prejudicial to the rights of defendants

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charged with crime. Its effect upon the administration of justice is baneful and far-reaching:

(*a*) It creates a sentiment in the community as to the guilt or innocence of the accused, which makes it well-nigh impossible to secure an impartial jury. It may be that jurors can dismiss their preconceived impressions from their minds and be guided solely by the evidence but that is not the experience of most men. Even if that were true why should we tolerate a practice that has in it such elements of danger? Strangers to us who do not realize the difficulties under which we labor from the pre-judging of cases through the license of the press have made this part of our judicial system the subject of ridicule and not without reason. Imagine weeks of time being consumed in securing twelve men whose minds have not been so poisoned by newspaper stories concerning a case in the Courts that they are unable impartially to weigh the evidence! It should be impossible to find anything in a newspaper except what transpires in the court-room until after the conclusion of the trial. Consider also the expense to the State and the additional cost to the accused of these protracted trials brought about by this pernicious practice. In the face of public clamour, which means the goading of the press against the accused, frequently for sensational purposes, justice is rarely done.

If it be said that the courts frequently need that spur to prevent undue influence by powerful criminals, the answer is that it is an illegitimate and dangerous expedient as an aid to justice.

(b) The atmosphere and sentiment thus created around a case are bound to, and do affect not only

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the jury but the Court as well. A man does not lose his ambitions or human nature by climbing from the Bar onto the Bench. Most of our public men are known to us only as they are pictured by the newspapers, which make and unmake men. It is well-nigh impossible to exclude entirely the subconscious influence of press comments on the Judge as reflecting the views of the community in which he lives be he ever so upright. He would rather go with the tide than against it, and he, too, is not infrequently already impregnated with the atmosphere of the community gathered from the press.

(c) The prosecutor, who should be impartial, seeking only the truth and not bent upon conviction unless the facts satisfy him beyond a reasonable doubt, is put to a test that few men in public office are able to resist.

Imagine such a prosecutor, in a case that has attracted general attention due to its sensational features and the efforts of the press to exploit and magnify them, rising in open court at the close of such a case and recommending to the Court to acquit the defendant, as it is the duty of a prosecutor to do if he believes that a conviction would be unjust. It is done every day in the criminal courts in cases with which the newspapers do not concern themselves, but it would take a brave man to do so in what is known in the parlance of the criminal courts, as "star" cases.

The abuses that have arisen under this head have become well-nigh intolerable. Prosecuting officers, who are ambitious for further honors, maintain elaborate Press Bureaus for the distribution of news concerning their offices. The re-

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porters who want to stand well with the prosecuting officer and get all the news that is to be had fall into the habit of taking the prosecutor's version. Of late years nothing is sacred. A witness is called before the Grand Jury, and the testimony given there in important cases manages "to leak out" day by day. The secrecy of the Grand Jury Room is a thing of the past. The law against disclosing occurrences there is a dead letter. The prosecuting attorney is generally the chief offender and frequently the only one. The main concern of a modern prosecutor in one of the great cities of this country seems to have become to keep himself before the public, which he does by seeing to it that the public is informed of everything that happens in his office from his own point of view. I do not mean to assert that this shocking condition is universal but it is not uncommon and is growing more frequent.

Three poor, helpless, old women are about to be tried in one of our sister States on a charge of murder. The issue for the jury is whether the deceased was murdered or committed suicide. From the day that case came into the office of the Prosecutor and for weeks thereafter, so long as public interest could be aroused or sustained, whilst these poor women were under lock and key, the Prosecutor was day by day issuing or inspiring statements in the press in the community in which they are to be tried, tending to show or arguing that they were guilty and presenting such proofs and innuendoes as he had at hand to support these ex parte arguments. All this was on the eve of the assembling of a Grand Jury to consider the case.

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The Grand Jury, of course, promptly indicted these poor women and now they will have to be tried in a community in which public sentiment has been crystalized against them through the energies of the press ably seconded by the Prosecutor. These women are not being tried. They are being hounded. It is little better than mob law and in some respects not quite so fair for it is masquerading under the forms of law.

The following are suggested as remedies for this condition:

1. The enactment of laws, similar to those prevailing in England, prohibiting a newspaper from publishing anything concerning a case that is in the courts other than a *verbatim* report of the proceedings in open court.

2. Prohibiting any newspaper from commenting, either editorially or otherwise, upon the evidence in judicial proceedings until after final judgment.

3. Prohibiting any prosecuting officer, under penalty of removal and punishment for a misdemeanor, from expressing or suggesting for publication an opinion as to the guilt or innocence of a person accused, or from disclosing any of the proceedings of a Grand Jury, or from publishing or being privy to the publication of any evidence in his possession bearing on any case under his control. If an assistant or other person in his office is guilty of any of the acts charged it should be ground for the removal of the Prosecutor and the punishment of the assistant, or any other person connected with the office, so offending.

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When we consider the far-reaching effect of these press campaigns against persons under criminal charges, such regulations should be regarded as very mild compared with the evils that are sought to be remedied. The expense to which the State is put in securing impartial jurors is alone more than sufficient to justify these reasonable precautions.

The next evil, but to my mind not the greatest by far, but the one that has received most attention from the public and those in authority, relates to the law's delays.

Some of the remedies that have been suggested seem to me far worse than the disease. Chief among them, and the one that appears most generally to be favored is that of restricting the right of appeal in criminal cases. At a time when other nations are granting and enlarging this right we are considering abridging it.

There should be the most generous right of appeal in criminal cases,—far more liberal than when we are dealing with mere questions of money. And yet the supporters of this change would be shocked at the suggestion that there be no appeals allowed in civil cases. How much greater the need where the liberty and reputation, not only of the man but of all those about him, are involved?

Nor is there force in the plausible, but unsound, suggestion that no judgment in a criminal case shall be reversed except for errors that can be affirmatively shown to have materially prejudiced the defendant on the merits of the charge, and that all so-called "technical" errors are to be disregarded.

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If a mistake of law committed during the trial is not too technical and trifling to be overlooked and is such that it is regarded by the law as error it must be because the rule that has been violated in the commission of it is considered in the light of human experience as essential, or at least material to the protection of the rights of one of the parties. If such a rule has been violated the defendant has not been fairly tried and there should be no latitude about allowing such a judgment to stand.

One of the worst abuses of the present system is not the delay in executing the judgment, but the undue and indecent haste in requiring a defendant to undergo the sentence whilst his appeal is pending. We have constant object lessons in the brutality of the law in that respect in the cases of those who have undergone all or most of their terms of punishment, to find that the judgment under which they were disgraced and imprisoned was without lawful authority.

It sometimes happens, as in a comparatively recent case in New York of an official of a life insurance company that the appellate court decides as matter of law that no offense whatever was committed after the man has served nearly the entire term for which he was sentenced. The cases of this kind are not infrequent. Is not that paying too great a penalty for certainty of punishment?

Both these evils—that of delay and unjust punishment, can and should be prevented by

1. Allowing a stay of sentence as a matter of right and not of discretion, until the defendant has exhausted every remedy by appeal that the law permits;

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2. Providing that unless the appeal is moved by the appellant for hearing within a given number of days after judgment has been pronounced the stay of sentence is automatically vacated.

3. The printing of the papers or record on the appeal should be under the control of the Court through its clerk. It will then rest entirely with the Court to regulate the time when the appeal is to be argued. The parties will no longer control that subject as they do now in many of our states. This change will do away with a most prolific cause of the existing delays. There is no reason why there should be a delay of more than from two to four months between the sentence and the determination of the appeal.

4. Where the defendant makes proof satisfactory to the Court that he is unable to pay the expenses of the appeal the state should pay them. The right and opportunity of the fullest defense should not depend on the ability of a man to pay. It is not in the interest of the state to convict where there is doubt. It is in its interest to give to every man the fullest opportunity to establish his innocence.

This brings me to the next suggestion I have to offer which is that there should be an office established as part of the machinery of the criminal law to be known as that of the Public Defender.

Unjust convictions among the poor and helpless and especially among our ignorant foreign population are far more frequent than we fortunates care to admit. This is especially true in the great cities where the courts are crowded with business, the pressure is great and justice is necessarily hurriedly administered in obscure cases.

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The most prolific abuses occur in what are known as "assigned" causes in which the defendants and their families and friends are too poor to furnish bail or employ counsel. In those cases the Court assigns counsel who serve without pay except that in some states a moderate fee is allowed in capital cases only. The counsel assigned in these cases are with rare exceptions almost necessarily young and inexperienced men or lawyers without standing or ability.

Yet these are the cases above all others in which the defendants are already at the greatest disadvantage being incarcerated, unable to go about to look up witnesses and too poor to employ anyone to do so for them. If they are first offenders of previous good reputation, as they generally are (for experience has shown that professional criminals are generally able to secure counsel), their prison experience has taken the courage out of them by the time they are placed on trial.

They come to the bar of justice crushed in spirit, and if innocent, in mortal terror of the law and resigned to any fate. Their assigned counsel whose retained clients are his chief concern easily convinces himself that he has done his duty to his pauper client if the prosecutor will accept a plea of guilty to a lesser form of crime or be content to recommend a moderate sentence. And so before the poor fellow knows what has happened to him he has consented on less notice and in less time than it requires to tell the story, to take the advice hurriedly given him as he stands quivering at the bar and so he finds himself on the way to prison. There is hardly a day in the year when this scene is not enacted in the Courts of our great cities.

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That such a system results in innocent men being branded and punished as criminals admits of no doubt. That the number of such crimes against justice and humanity is very much underestimated is beyond question to anyone who has observed the system in operation. The judges do what they can to minimize the evil but from the nature of the case they must rely on counsel.

What then is the remedy?

The State has its Public Prosecutor. Why not its Public Defender to care for those who are unable to defend themselves? It is quite as much to the interest of the State to rescue the innocent as to punish the guilty. There is no danger of the privilege being abused. Every man who can afford to defend himself will exhaust every resource to select a champion of his own choice. The most helpless and unfortunate of all our citizens should not ~~to~~ be forced to go virtually undefended.

Nowhere in our social fabric is the discrimination between the rich and poor so emphasized to the average citizen as at the bar of justice. Nowhere should it be less. In an ideal state of government the lines would be made to disappear here of all places. Money secures the ablest and most adroit Counsel whose characters and reputations are powerful factors in their client's cause. Evidence can be gathered from every source and all the legitimate expedients of the law availed of. The poor must be content to forego all these advantages but surely the State should not take an unfair advantage of his helplessness.

With experienced Counsel and the entire organized machinery of the criminal law at its command it should not seek to disarm him complete-

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ly, thus accentuating the power of money in the struggle for liberty between the State and its citizens.

It is with sincere regret and reluctance that I assert that save in rare instances the modern Prosecutor does not stand between the People and the accused. He and his assistants too often measure the success of their labors by the number of convictions they have secured. It is a false and brutal conception of duty that is responsible for grave injustice but it is none the less true that it exists. Under its influence the Prosecutor becomes a partisan advocate, blind to the strength of the defence, unwilling to voluntarily expose the weakness of the People's case.

The People are as deeply interested in proving the innocence of the accused where he is unable to defend himself as to prove his guilt. By all means let us have a Public Defender in the interest of fair play and common humanity.

Many more instances of evils that may be reformed could be cited if time permitted. I have not attempted to deal with the minor abuses that weigh so heavily upon the poor who come into contact with our magistrates' Courts nor with the ever perplexing question of the relative merits of an elective or appointive Judiciary nor with a host of other problems that present themselves.

That there are such problems pressing for solution cannot be denied. In every other branch of human endeavor we are forging ahead. Why should we stand still, clinging to tradition in the field of usefulness most important of all in a progressive civilization?

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Extermination vs. Regulation of the Trusts

WHICH SHALL IT BE?

An Address

Delivered at the Annual Meeting of the National Civic Federation, at New York City on January 12th, 1911

By

Samuel Untermyer

of New York

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EXTERMINATION vs. REGULATION OF THE TRUSTS.
WHICH SHALL IT BE?

My text deals with a very technical question, but it involves the great problem of our day and one of ever increasing perplexity. Its discussion is perhaps better adapted to the contentious atmosphere of a convention of constitutional lawyers as affording endless opportunities for legal construction and differences of opinion. But in its final analysis and broadest aspects it is primarily economic. That is my apology for presenting it to you. I trust that the discussion will not prove too wearisome.

The subject will be presented on the assumption that the Judgments of the Circuit Courts of Appeal in the two important cases now pending in the U. S. Supreme Court will be affirmed by that Court.

Judging from the uniform trend of the decisions of that Court for the past five years, it is not unlikely that the principle announced by the lower Courts in those cases will be not only affirmed but emphasized in the most sweeping fashion by our highest tribunal and that every form of combination the *direct* purpose and effect of which is to hamper or limit competition will be condemned.

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Unfortunately for the welfare of the people I am not however satisfied that the decisions will afford any substantial relief from the dangers that are threatening us or that they will either furnish or point out a practical solution. The provisions of the Judgments are drastic but it does not follow that they are enforceable in practical operation. The companies appear to me to have nothing to fear from the result beyond possible changes in the forms of their organizations.

The properties and businesses are there, they belong to the shareholders and there is no way of confiscating them even if there were a disposition to do so, which happily there is not. The thought of disbanding the central organizations and resolving the constituent companies into their original parts presents an impossible problem. It bears no analogy to the simple situation presented in the Northern Securities case. Here the constituent parts and in some cases everything in the way of property that represents them has long since disappeared or lost its identity.

The shares that were issued for the properties were not earmarked or identified and have changed hands possibly hundreds of times. They have been scattered broadcast among innumerable innocent investors.

I repeat that we need therefore apprehend neither relief from the Trusts nor business chaos or other dire consequences from the decisions. If it is in favor of the Government the victory for the People will be mainly academic, with the injection into the present problem of nothing beyond temporary uncertainty and confusion, of which the "knowing ones" will not be slow to avail themselves at the expense of the timid, frightened investors.

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The situation is likely to be very similar to that of many years ago when the original Sugar Trust was declared unlawful and the property ordered sold and the Trust dissolved. The property had to go somewhere. It could not be thrown into the sea or otherwise made to disappear. It was accordingly sold under the Judgment of the Court, was purchased by the old holders, who had deposited their trust certificates with a Committee for the purpose, was paid for by these same certificates which the Court had declared unlawful and was turned over to the present American Sugar Refining Company which the old owners organized to take it over. The only effects of the long struggle were to unsettle the value of the stock, shake out the weak holders and panic stricken investors and to enable the same interests to continue lawfully and under the protection of a Judicial decree the same business that had theretofore been declared unlawful.

A like result followed the dissolution of the original Standard Oil Trust by the Supreme Court of Ohio. After the lapse of many years consumed in the "liquidation" of the Trust by the original Trustees the property was handed over by the owners to the present Standard Oil Company of New Jersey. Nothing was accomplished by the Judgments.

Under the above general title the following propositions will be treated in the order stated:

1. The attitude of the Courts during the first ten years of the existence of the Anti-Trust Law of 1890 in construing the Statute in a way that rendered its enforcement during those years almost impossible is largely responsible for the growth and development of the existing trusts.

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This is especially true as to what are now recognized to be the most permanent and powerful forms of Trusts, to wit: combinations by actual ownership and through holding Companies as distinguished from Pools, Selling Agencies and Trade Agreements, which are temporary in character and operation and are easily dissolved without affecting vested interests.

2. The Government failed or was unable by reason of the construction placed upon the Statute to prevent and suppress these offenders against Inter-State and International commerce at a time when it might have been done without public injury. As the result of this construction it tacitly assented to their continuance and expansion and thereby encouraged the formation of others. It would therefore be wrong to now attempt to exterminate them even if any such result could be accomplished (which is denied) with the accompanying destruction of public confidence amounting almost to financial and industrial chaos provided there is any other course open that will abate the evil.

I assert with confidence that the attitude of the Courts toward the Anti-Trust Law of 1890 for at least ten years next succeeding the passage of the law is mainly responsible for the growth and development of the trusts.

Mr. Walker in his recent "History of the Sherman Law" has ably performed the useful service of reviewing and analyzing the accomplishments of each administration in the enforcement of the law.

It appears:

1. That during the Harrison Administration which ended March 4th, 1893, nothing was ac-

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complished except in a single insignificant case which involved no debatable question.

The Government instituted during that time five cases in all:

(a) A criminal proceeding against the Whiskey Trust which ended in the dismissal of the indictments without trial.

(b) A criminal proceeding against a combination of lumber dealers in which the Court held that *mutual* restraint between the defendants against competing with one another was not an offense so long as it did not involve *extraneous* restraint against others. The decision and others that followed it, all of which have since been in effect repudiated by the Courts had much to do with many organizations of consolidations and holding Companies that followed. So long as that remained the law the industrial world was rightly advised that combinations did not offend against the first section and were legal so long as they did not constitute monopolies and thus offend against the second section of the Act.

Judge NELSON said on that subject in the lumber case last referred to:

"An agreement between a number of dealers and manufacturers to raise prices unless they practically control the entire commodity cannot operate as a restraint upon trade. Competition is not stifled by such an agreement and other dealers will soon force the parties to the agreement to sell at a reasonable price."

(c) A suit in equity against the Trans-Missouri Freight Association in which Judge RINER in the U. S. Court in Wyoming held that the Sherman Law did not apply to Inter-State transportation and that even if it did, it should be construed as not applying to any *reasonable* regulation of freight rates be-

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> tween competing common carriers. On the first appeal taken by the Government in this case the majority of the Judges of the Circuit Court of Appeals agreed with the Court below that the prohibition of Section 1 of the Sherman Law was limited to *unreasonable* restraints.

Judge SHIRAS, who afterwards became a member of the Supreme Court in a dissenting opinion sounded the alarm against the emasculation of the Act which was involved in that view.

Here then was another step taken by the Court in inviting the formation of trade agreements in restraint of competition, even among our great public service corporations so long as they were not unreasonable.

> (d) A criminal prosecution against the members of the combination formed to control the price of cash registers in which there were fourteen counts to the indictment ten of which were dismissed on demurrer. Before the defendants were required to defend themselves against the remaining counts they extended their combination by receiving into the fold the six competitors for interfering with whom the indictment had been found.

Thereupon the then Attorney-General dropped the case on the then generally recognized view that a consolidation of previously competing industries under a single ownership did not violate the law even though the effect was to restrain competition!

To-day we all know that this is not the law and that the form of the restraint is immaterial. We also know that these permanent consolidations which were regarded as lawful as against the temporary trade agreements in the form of Pools

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(which were considered illegal) are far more harmful than the latter. But in determining the attitude of the Courts toward the Law we must consider how these consolidations were then regarded.

2. During the Cleveland Administration from 1893 to 1897 ten cases were brought or prosecuted on behalf of the United States. Five of them were against transportation and labor strikes of which four were successful. Two of the ten cases were brought against the trusts, one the now celebrated Knight case against the Sugar Trust and the other against the Cast Iron Pipe Trust. Both of these failed. Nothing substantial was accomplished toward the enforcement of the law and nothing encouraging in the construction of the statute during these four years except in the Trans-Missouri Freight Association case; but the effect of that decision was lost by reason of the fact that after the consolidation had been held legal by the Circuit Court of Appeals and before the reversal of the decision by the Supreme Court it was voluntarily dissolved.

The only forms of combination which the Courts were successful in reaching during these years were the labor unions. It was a surprise to the legal profession to learn that they were within the scope of the Act. From the debates in Congress when the law was under consideration it seemed that labor organizations were not intended to be affected, yet the victories of the Government in enforcing the law for the first ten years were mainly against them.

3. Under the McKinley administration from 1897 to 1901 there were six cases prosecuted by the United States. The only substantial progress

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made during these four years was in two cases, one against the Cast Iron Pipe combination and the other the Joint Traffic Association case to which reference has been made; in the last mentioned case four of the nine Justices dissented. Both involved mere trade agreements.

During that same period there were eleven litigations between private parties involving the application of the Law. In only one of those cases did the plaintiff secure relief.

The fact is that for more then eleven years after the enactment of the law and up to the close of the McKinley Administration on September 14th, 1901, not a single case was brought by the Government against a consolidation, and only two such prosecutions had been begun against holding Companies, known as the Whiskey Trust and the Sugar Trust. Both of these failed.

The decision of the U. S. Supreme Court in the Knight case (the Sugar Trust case), in which it was held that the acquisition by the Sugar Company of its competitors did not constitute a combination to restrain or monopolize Inter-State commerce in that it related solely to the manufacture of refined sugar in one city of the State, doubtless did much to discourage the prosecuting officers from further attempts to enforce the law and to stimulate the formation of other great consolidations.

Looking back upon the situation at this distance we can readily see that for many years the Courts failed to recognize the economic importance of this law or the dangers it was intended to avert. It seems to have been regarded rather as a sort of "freak" statute born of popular fear of imaginary evils.

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And so we find the Law emasculated in every direction until the Courts were finally awakened by the public demand and the increasing oppression of the Trusts, to a realization of the perils it was wisely intended to avert. Then with the advent of President Roosevelt in 1901 began the first energetic attempts to enforce the law as other laws are enforced and as this should have been from the beginning. His hard common sense and marvellous intuition of public sentiment scented the real dangers and blazed the way for a genuine test of the effectiveness of the Act. But it was already too late as a deterrent measure. Whilst the present administration is honestly and energetically striving to the same end it acts like a man who knows he is on the wrong road but who lacks the courage to confess his error and retrace his steps.

Meantime Trusts in all forms had been growing like mushrooms, under the apparent sanction of the Government prior to the beginning of President Roosevelt's campaign against them. Most of these were organized toward the close of the McKinley Administration after the law had been for over eleven years on the statute books—a dead letter so far as concerned its application to the greatest of the evils against which it was aimed.

Huge combinations like the Steel Corporation, in the form of holding companies, the organization of which was openly advertised and discussed for months prior to the formation were generally regarded as lawful, and rightly so, as the law was then being construed by the Courts. Advertisements were inserted for weeks in the newspapers inviting shareholders in the constituent companies to exchange their shares for those of the hold-

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ing company on a basis of exchange outlined in the notice.

All this time there was no suggestion on the part of the Government that there was claimed to be anything unlawful in the transaction. These shares were placed upon the official lists of the Stock Exchanges here and abroad and were distributed amongst and are now owned by hundreds of thousands of innocent investors all over the world.

Why was no attempt ever made to enjoin the consummation of any of these vast combinations if they were unlawful? That was the time to stop them without affecting innocent people—before the new securities were issued.

The Sherman Law expressly and significantly points out the remedy by injunction as the central idea of that statute. What conclusion could the Bar and the industrial and financial world draw from the attitude of the Government during all these years except that it construed the decision of the Supreme Court in the Knight case and the many other adjudications in the lower courts as establishing that industrial consolidations were not within the scope of the Sherman Law?

Under these circumstances the attempt at this late day to rid ourselves of this economic danger by the ruthless method of confiscating the private property of innocent investors even if it can be accomplished, is without justification or excuse if any other means can be found to abate the evil.

3. The most permanent of the Trusts can no longer be effectively destroyed or disbanded by the Courts under the limitations of our Federal Constitution, which forbids the destruction or confiscation of property rights.

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4. It is questionable whether it would be advisable to continue the abortive attempts at extermination that have characterized the enforcement of the Statute during the past twenty years even if it were possible.

5. The present activities of the Government and those which it threatens by way of criminal prosecution are misdirected, oppressive and unjustly discriminative against the weak and in favor of the strong. The existence of those combinations most inimical to the community because they are the most permanent in form will not be imperilled and no attempt has been made to reach them by criminal process against individuals.

The criminal prosecutions of recent years (except that against the Sugar Company directors which arose out of an exceptional transaction and does not depend on the Statute) have been directed against the members of Pools and trade agreements for regulating prices or production or both. The Window-Glass, Bathtub, Fibre and Manilla and Paper and Pulp Association cases are all of that character. In all of them the various concerns maintained their ownership and independence except that in order to regulate prices and production they either sold through a common agency or reported to a "Commissioner" and in some cases deposited money to assure the performance of their obligations.

They were of course all of them clearly illegal devices to control competition and were stupidly evidenced by written agreements which made it a simple matter for the Government to reach them. Literally hundreds of them have been more or less openly operating and flourishing for at least ten years. They had resulted mainly from fierce

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competition between a large number of small concerns that had brought many of them to the verge of ruin and they had been forced to band together in this temporary form for self-preservation. In some cases they had been brought together to resist the competition of some one or few outside concerns as large as all of them combined. In none of the cases had they grown rich or reaped excessive profits nor did they represent anything like a control of the industry. They were little fellows trying to save themselves. Those are the cases which the Government is prosecuting criminally and announcing in advance through the press that jail sentences will be "*demanded*" and that the Government will not be "*satisfied*" with less.

These trade arrangements cover almost every known field of industry today. Many are still evidenced by these tell-tale writings but they are mainly the less important men who have not had the benefit of the best legal advice. The larger and more important ones have grown cautious and have substituted secret methods for their former open operations. Some are in the form of luncheon-clubs where competitors "talk over" prices and production and "exchange views." Others are regularly organized Associations that meet at stated intervals; their ostensible function is to gather "trade statistics" for the use of members and disseminate "useful information." The *minutes* of their meetings read like those of a social club—prices and production are scrupulously avoided.

In the great industries there is frequently one dominating factor so powerful as to be able to regulate prices and production without a line in writing or a money forfeit. There are many of these all of whose understandings are reached by barely more than a word or a sign—they are known as "gentlemen's agreements."

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They are the most effective of all the price arrangements because these agreements are kept and they generally include the entire industry. They are quite as unlawful and any one of them is far more powerful than those of all the weak little fellows combined. Does one hear that any of them are being prosecuted?

Very recently the Government found it necessary to enjoin the Railroad Association from carrying out a conspiracy to increase rates. The proofs were so convincing that the railroads had combined to advance rates in violation of the Anti-Trust Law that they promptly surrendered. The same proof that entitled the Government to its injunction would have answered for a criminal proceeding.

Is there any one familiar with this general subject who does not know how the uniformity of prices and the shutting down of factories and otherwise curtailing of production in the great industries is arranged? Why are these transactions immune whilst the little fellows are being pursued with a brass band and the greatest press bureau that was ever put in action to keep up "a tempest in a teapot?"

I do not mean to suggest that it would be good policy to prosecute the members of these "gentlemen's agreements" in our leading industries. That depends on whether they are taking advantage of their power to unduly restrict production or to exact unreasonable profits on the invested capital.

My point is that the pending criminal prosecutions of the men who are struggling merely to keep their heads above water, in the light of all we know of existing conditions, amounts in practice to a monstrous sham no matter how sincere may be the intention to enforce the law (which I do

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not question) and that such manifest discrimination tends strongly to bring the administration of justice into contempt.

But above and beyond all these considerations the most conclusive argument against the justice and efficacy of this procedure lies in the fact that the consolidations by ownership and through holding companies are so much more formidable than these temporary expedients that the action of the Government in pursuing the latter criminally whilst suffering the former to continue, gives one the uncomfortable feeling that our officials are floundering about and are trying to appease the public demand for the enforcement of the law by sacrificing the smaller offenders because it is impossible for them to reach the big ones.

6. There is nothing practicable in the recent suggestions that these great problems can be dealt with by the several states. They are essentially national and international in their scope and effect and can only be effectively handled by Federal action for many reasons that will occur to any lawyer.

The catch-phrase that "guilt is personal" sounds well and is doubtless valuable political capital but like much of that sort of capital it is often insincere. It cannot withstand the most cursory analysis and comes far short of solving the trust-question. General and impartial enforcement of the law would involve such a substantial proportion of our most prominent and successful men and useful citizens that it would be like indicting the entire nation. Spasmodic prosecution on the other hand is still worse.

The past history and present undignified attitude of our sovereign States in bidding

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against one another in laxity of requirements in the granting of improper powers and privileges to corporations would seem to indicate that those who believe in restricting the existing license of the great corporation have little to expect from State regulation. We could never hope for anything like uniformity even in a general policy of dealing with the subject. The attempt would simply furnish another opportunity for a humiliating scramble between the States for corporate patronage in return for unwise legislative license. We are fortunate that the entire subject is removed from their jurisdiction.

The movement for Uniform Laws among the States in which your association is taking such prominent part is a wise and necessary step, and I sincerely wish for it the success that it deserves. There are many subjects on which it will doubtless succeed, but I fear that this is not one of them.

7. *Rigid regulation under Federal Law is the only just solution.*

It is possible and practicable and would do away with the grave existing evils which are constantly becoming more serious. As substantially all the combinations that affect the public welfare are engaged in Inter-State or International Commerce within the enlarged definition of those terms under recent adjudications, there could be no serious question of the Constitutional right of the Federal Government to regulate and control their activities by a Federal license if not by a Federal incorporation. Such regulation would however in order to be effective have to take a very much wider scope than has yet been suggested.

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8. In any event and without deciding the question of *compulsory* Federal license or incorporation mere permissive Federal regulation would answer every practical purpose under existing conditions. It would afford the corporations that come within the requirements of the law, or that will so modify their existing methods as to bring themselves within it, a refuge against prosecution by the Federal Government, except for violation of the new law. It would leave those who do not avail themselves of the privilege or who are not able to do so by reason of their unlawful methods subject to criminal and civil prosecution. Whilst permissive in form so as to overcome all Constitutional objections, it would be compulsory in fact by singling out for prosecution under the existing law those that do not subject themselves to regulation.

I do not mean to suggest that any affirmative immunity can be assured to those who take advantage of the provisions of the Federal law but that would be the practical result of administering the law. It would involve nothing like the unjust discrimination which now characterizes prosecutions under the Act in which the small merchants who are organized into temporary Pools under written agreements without the benefit of skilful legal advice are being relentlessly pursued whilst the great, powerful, permanent monopolies that are holding the public by the throat have been thus far immune and are likely to remain so if I am right as to the practical results in the pending cases.

9. Regulation would secure to the public whatever advantages are to be derived from the economic benefits of combination, of which there will

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be many, such as the elimination of destructive competition. It would at the same time prevent unfair advantage being taken of that situation.

If we were satisfied that unlimited competition and overproduction are on the whole in the interest of the company our problem would not be difficult. We could then unreservedly apply ourselves to the destruction and punishment of every attempt to stem the tide of ruinous trade war. On that theory the more small merchants who are driven into bankruptcy the better for the prosperity of the country. If this is true as to our manufacturers it is equally true as to the products of our mines and forests and as to all our natural resources; upon that theory the less profit our citizens realize from the use and exhaustion of those resources and the more of them we exhaust in that way the more prosperous we will be as a nation.

If on the contrary it is more to our interest that our citizens shall be permitted to secure reasonable returns on invested capital so as to encourage our business development, then ruinous competition is a condition to be avoided rather than insisted upon. In that event the only question is as to how to prevent the evils of overproduction and ruinous competition, and at the same time protect the public against the dangers of combination and co-operation among competitors through which alone this result may be achieved. That necessarily involves the most drastic Governmental supervision and control.

10. Such regulation would necessarily have to recognize the fundamental factors

(1) That these combinations so tolerated and licensed are *quasi-public* agencies with

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corresponding duties and responsibilities to the public.

(2) That many of them are profiting by our Protective Tariff System which is based on the theory that home competition will protect the people against the extortion that might otherwise be practiced under cover of the Tariff.

(3) That since the combination is impairing home competition it must consent that something be put in its place; and

(4) That in return for the privilege of being permitted to exist in contravention of the economic laws forbidding interference with competition they must submit to Governmental supervision as privately owned public agencies, somewhat after our methods of regulating the Railroads.

11. Such regulation must therefore include as its most essential feature the power to prohibit by summary process all business oppression and other unfair methods and *particularly the exaction of excessive profits. This involves the power to limit the prices* that may be charged for any commodity beyond a fair profit.

The determination of the question of whether a party subject to the operation of the law is so offending would follow under the plan I have in mind upon the complaint of the Government or of any State or Municipality or of a given number of citizens to be presented to a judicial tribunal to be constituted for that purpose with powers similar to those that are now possessed by our Interstate Commerce Commission.

The procedure might profitably be assimilated in its main features to the admirable law on the subject that was passed by the Canadian Parliament on May 4th, 1910, entitled "An Act to Provide for the Investigation of Combines, Monopol-

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ies, Trusts and Mergers", which will be explained by the eminent gentleman from that country who will follow me. There should also be vested in the President authority similar to that conferred on the Governor in Council of Canada by Section 21 of the Act in question, as follows:

"Whenever from or as the result of an investigation under the provisions of this Act or from or as a result of a judgment of the Supreme Court (or Exchequer Court of Canada or of any Superior Court or Circuit, District or County Court in Canada) it appears to the Satisfaction of the Governor in Council that with regard to any article there exists any combine to promote unduly the advantage of the manufacturers or dealers at the expense of the consumers and it appears to the Governor in Council that such disadvantage to the consumer is facilitated by the duties of customs imposed on the article or on any like article the Governor in Council may direct either that such article be admitted into Canada free of duty or that the duty thereon be reduced to such amount or rate as will in the opinion of the Governor in Council give the public the benefit of reasonable competition."

12. The practical difficulties of regulating prices to the extent indicated are more imaginary than real.

The proposition has never had a hearing. Wherever any notice whatever has been taken of it the subject has been almost impatiently dismissed although other countries whose judgment on economic questions is entitled to our respect have adopted the plan and find it practicable.

The problem though beset with difficulties is one that we must solve. I therefore appeal for an approach to its discussion with an open mind.

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When we come to analyze the subject we find that the task is not nearly so complicated as that of framing a Tariff, which must presumably take into account not only the cost of production in this country but also such cost as compared with costs in one or more foreign countries. It is surely not nearly so complicated as will be the duty of the proposed Tariff Commission which is expected to undertake a scientific study of and report upon the domestic and foreign costs of every known commodity.

The present proposal would apply only in cases in which a responsible complaint is lodged of undue profits or unfair business methods. Only then can the judicial power of regulation be invoked. The burden is upon the complainant to establish the claim but the books of the defendant should be available for that purpose. The judgment would establish only maximum prices. The determination of cost and of what is a fair maximum profit in a given commodity should be quite as readily ascertainable as is the cost of Railroad transportation of freight and passengers or of gas, water, telephone service or electric current for light and power.

The factors that enter into the problem are not more and are frequently less complicated.

It has been objected (1) that costs are not uniform and are we to penalize the manufacturer who produces most cheaply by limiting him to the same percentage of profit as his less skilful competitor and thus destroy the incentive to reduce cost of production? and (2) that costs are variable, dependent on a variety of changing conditions so that a judgment fixing a maximum price at one time would be inapplicable to other conditions.

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The answers to these objections are (1) That the power to fix prices would not apply to cases in which the field of competition is open and that proof of this fact satisfactory to the tribunal would end its jurisdiction; but where an industry is dominated by one Company although there is competition of a kind the tribunal would presumably fix a maximum price based on the cost of the least favored competitor which would give the full benefits of skill and economies to those who are entitled to them. Besides it is not conceivable that the tribunal would so abuse its powers in fixing the maximum price as to go further than to protect the public against extortionate profit in the nature of an attempt by the offending corporation to levy tribute upon the public by reason of its control of the industry. All such judgments would presumably be the subject of review.

(2) All danger of oppression resulting from change of conditions since the rendition of any such judgment can be obviated by giving the tribunal the most liberal power of reviewing such judgments at stated periods of say not less than one year upon the application of the party claiming to be aggrieved.

There is no inherent difficulty in setting up the machinery necessary to carry out this plan of regulating maximum prices if the principle be once admitted. The rights of the producer to a reasonable profit are safeguarded and secured to him by the Constitution so that there is no danger of the confiscation of his property.

Experience with our Public Service corporations has taught us that hyper-sensitive concern for their welfare lest we confiscate their property is quite unnecessary. No legislation anywhere approaching the line of confiscation has stood the

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tests of the Courts and very little of it has been attempted. If the public were half as well able to take care of itself, as the corporations have shown themselves able to resist encroachments upon their rights there would be far less need for legislation. The people have never yet quite come into their own in their struggles with the corporations.

Laws of Foreign Countries.

The successful experiments of other Governments in legislating on this subject should encourage us to believe that we, too, can solve the problem, getting out of these corporations whatever there is of public benefit by restrictive rather than destructive legislation.

(1) In Germany trade combinations in various forms have been in existence for many years. They are extending their influence and new ones are being constantly organized. Some are in the form of consolidations or holding Companies of which the Steel, Sugar, Harvester, Locomotive and Standard Oil Companies (to name only a few out of the hundreds in our own country) are illustrations. The bulk of them, however, are what are known as "Kertelle" or Syndicates which correspond to what we know as "Pools" or Selling Agencies or Sales Syndicates except that they are organized under authority of law. They absolutely control their respective industries and are encouraged by the Government subject to rigid regulation. The constituent members of the Kartelle, like the members of our Pools, retain the title to their properties and the control of their businesses. By written agreements sanctioned by law they regu-

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late production and apportion the sales among their members. They are sometimes organized under separate Legislative Charter of which the Potash (Kali) Syndicate is an example, naming the members who constitute the Kartelle and apportioning among them their respective fractions of permitted production. The great bulk of them are however formed under the general corporation laws of the country or by agreements in the form of Syndicates.

The essential features of the law constituting the Potash Syndicate are (1) the fixing of the maximum price upon each quality of the product so as to protect the public against oppression; (2) the apportionment of the output to home consumption and for export; (3) the penalizing of each member of the Syndicate, who produces in excess of his permitted share of production by imposing upon such excess a tax or duty that is practically prohibitive; (4) the constitution of a tribunal which regulates production and price as often as is necessary; (5) provisions for allowing new members of the Syndicate and for reapportionment of the production to include such new members under designated restrictions.

This is briefly the general scheme, and it applies in some of its main particulars, with proper modifications to other like combinations in sugar, spirits, coal, iron, electric appliances and the like.

An illustration of the influence of the Socialist members of the Reichstag in framing these laws is found in the Act of May, 1910, establishing the Potash Syndicate in which the safeguarding of the workmen's rights is a prominent feature.

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(1) If the wages paid in a mine are below the average of the two preceding years the participating figure of that mine is proportionately reduced.

(2) If the hours of work are extended there is a further reduction.

(3) If the owner disproves such charges of reduction the proportion will be restored.

(4) Mine owners may make special contracts with laborers. The contracts must not forbid the right of laborers to unite.

The German Civil Code (par. 138) provides that transactions which offend against good morals are void. These Kartels or Syndicates and trade agreements regulating competition are held not to be contrary to this provision. They may however by the manner of using their powers bring themselves within the prohibition of this section. The use of such means as boycotting, cutting prices with competitors with intent to ruin the latter, and other unlawful and unfair business practices, will bring them within the condemnation of the penal laws. The Supreme Court at Leipzig decided in 1904 that a more rigid moral standard must be applied to the operations and practices of these Kartells and Syndicates because of the power of the economic interests they represent.

The law is directed only against the misuse of the powers and franchises of these organizations which is generally regarded as sufficient protection to the public.

(2) In Austria there is a law dating back to 1870 known as the "Law of Coalition," which declares illegal agreements of employers to raise

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prices of commodities to the disadvantage of the public.

In Austria, as in Germany, there are no consolidations through ownership or holding Companies. They are in substantially the same form as the German Trusts or Pools. Instances of them are the Sugar Kartelle, which regulates the quota of sugar beets to be supplied to each refinery and controls production and maintains prices; the Petroleum Block, which is a combination of producers and refiners of crude oil which regulates output and prices of oil and comprises nearly all the large oil interests of the Empire; and the Iron Kartelle which regulates the production of steel and iron.

These combinations are not only known to the authorities, but have the approval of the Government although they have no formal legal recognition.

Until within the past few days the Vacuum Oil Company, which is a Hungarian corporation owned mainly by Americans and is a large independent oil producer and refiner, was the object of embarrassing Governmental discrimination apparently with a view on the part of the Government to force it to join the Petroleum Block. This has now been arranged.

Under the Austrian administrative system the Governmental authorities have the power through bureaucratic administrative measures to regulate, control and suppress the operation of trade combinations without preliminary judicial process.

The Austrian Consul-General writes me on this subject that

> "The Austrian view as to Trusts is in effect that they cannot be legislated against because clever minds can always devise ways to circumvent the law."

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To that view I do not agree.

(3) Combinations exist also in France in the form of Pools or Kartelle much the same as in Germany and Austria. They are not formed pursuant to any special statute, but are the subject of agreement.

They are found (1) in the iron trade covering the output of the product in the interior, which has been in existence since 1876, and which in 1900 included eleven factories and various distributing agents; (2) the salt works of the East have been combined in what are known as Kartelle for the sale of the product since 1865; (3) there are also selling agents which control the product of the metal industries for small beams, sheet iron, axle trees and what is known as Thomas steel; (4) there are also Kartelle in the form of selling agencies or otherwise covering the manufacture of china, champagne bottles, looking glasses, bricks, white lead chemical products, life and fire insurance and a variety of other industries.

The petroleum refineries which have been in a Pool since 1888, with an arrangement with the Standard Oil Company, are a complete monopoly protected by the customs.

The sugar refineries of France have been in a Syndicate since 1883 with agreements among themselves dividing the market and affecting the prices. The recent exactions of the Sugar Combine have been such as to lead to requests for Government action and for the amendment of Articles 419 and 420 of the French Penal Law regulating combinations.

These are criminal enactments against combinations which cause the

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> "Increase or decrease of the price of merchandise or commodities or of public values of securities above or below the price at which the free and natural competition of commerce would have established."

The other provision of the statute is aimed against combined attempts to manipulate or increase the price of grain, seeds, flour, meal, cereals, bread, wine or any other drink. The extreme penalty for any such offense is imprisonment for from two months to two years, a fine of from one thousand to twenty thousand francs and banishment from the country for from five to ten years.

Combinations are tolerated in France provided the provisions of the Penal Code are not transgressed. It is not contrary to the law for manufacturers or dealers to dispose of their product at an agreed price *provided no attempt is made to increase the price* above the then existing price. Such agreements may be made to guard against ruinous competition and to preserve a proper ratio between supply and demand.

Monopoly in itself is not contrary to the French law provided the power is not used to increase the price or as it is called in the Code "falsifying the market price."

(4) In England there is no statute law on the subject of Trusts. The common law against conspiracies in restraint of trade is still applicable although no occasion has presented itself in recent times for the application of the rule. Public sentiment there is very potent. It has prevented the formation of any such consolidations and has led to the abandonment of some that were in process of formation.

An attempt was made three or four years ago to combine the soap manufacturers. Messrs.

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Lever Brothers were the leaders in the movement but public indignation was aroused to such an extent as soon as the first details of the proposed arrangement were published that the promoters were forced to abandon the project. The mere attempt to do so was most disastrous to the leaders. It appeared from the testimony in a libel suit recently tried that their business had suffered enormously.

It is true that there was a combination of the manufacturers of cigarettes effected in England some years ago which was supported by public sentiment. That however was due to the fact that the American Tobacco Company had purchased one of the largest factories and had begun a war of competition which forced the others to combine and which unfortunately resulted eventually in an arrangement between the English Company and the American Tobacco Company under which they divided the rest of the world between them.

There was also an attempt on the part of three prominent Railway Companies in England to wit: the Great Northern, the Great Eastern and the Great Central Railway Companies to combine but as any such combination was subject to the consent of the Government through the Board of Trade it was disapproved and rejected.

Possibly the fact that England is a free-trade country has had much to do with its immunity from all forms of Trusts and combinations. The incentive to combine the industries of a country is not so great when the combined company must in any event compete with other countries.

It will be observed that of all the countries (all of which save England have protective tariffs) England alone is free of trusts.

I have already referred to the Canadian law on this subject which is a model for legislation but

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refrain from its further discussion as I understand that it is to be exhaustively explained and discussed by an eminent gentleman from that country.

It will be gathered from the above brief resumé of the laws of other countries bearing on this subject that in all of them save our own (except in England where these combinations do not exist and where public sentiment has been sufficiently powerful to prevent their obtaining a foothold) these Trusts are mainly in temporary form and can be disbanded at any moment without injury to investors; that in one form or another they are the subject of Govermental regulation and control which prevents them from extorting undue profits from the public and that the chief purposes of their existence are to secure the benefits of economies and to prevent over production.

In no other part of the world have they had to contend with precisely the problem that confronts us as affecting the rights of investors. Herein lies one of the fundamental distinctions between mere Pools or trade agreements regulating prices and output on the one hand and combinations or consolidations through direct ownership or through holding companies, on the other. The dissolution of the pool affects none but the parties directly concerned and responsible for its operations. It can be promptly almost summarily accomplished and without injury to vested interests. The parties concerned have not parted with their property. They are simply required to resume suspended competition.

The attempt to dissolve the consolidation on the other hand involves every investor in the country. In the case of the Steel Company it would mean that nearly 200,000 innocent

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investors would be injured who were led to put their money into its securities in reliance on the fact that for twelve years the Government has tolerated its existence, collected taxes from it, permitted it to openly acquire other properties and to more or less openly dictate and regulate not only the prices and output of its controlled companies but of its competitors. During all that time it has gone unchallenged. The same is true to a greater or lesser extent of most of the others. Yet they are all practically "in the same boat."

The fact is that the Government will never try to disband them except in form and no Court could accomplish any such task. The real alternative is between forcing regulation of them or permitting them unbridled license and trying to temporize with the people from time to time by uneven spasmodic enforcement of the law against the weaker, more vulnerable ones whilst leaving the most powerful and dangerous offenders undisturbed from fear of precipitating financial panics.

The time is close at hand when we must choose. Which shall it be?

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THE MEANING AND EFFECT OF

THE ANTI-TRUST LAW DECISIONS

AND THE REMEDY.

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THE MEANING AND EFFECT OF THE ANTI-TRUST LAW DECISIONS AND THE REMEDY.

The decisions mark a most important epoch in our political and economic history. They have breathed new life and vitality into the Law. Even so, we are at last brought face to face with the question of whether, at this late day and after all the vast and irreparable injury has been done which the statute was intended to prevent and would have prevented if it had been honestly enforced, this Law is still capable of solving the problems it was intended to meet.

The fact that it has taken us over 20 years to begin (if we really have begun) the carrying out of a solemnly enacted National policy is a self-condemnation of our capacity for government more scathing and deserved than any criticism ever passed upon us by our most malignant enemies. In all that time we have made no impression upon the evil at which the Law was aimed except to see it spread and accentuated, until its baneful influence is felt in almost every department of human endeavor and has infected our entire body politic. It has been allowed to become a cancerous growth which can no longer be uprooted and eliminated without shaking the foundations of our credit and prosperity.

The most formidable of the Trusts have had their birth and development under the very shadow of the law which was intended to destroy the few that then existed and to prevent and punish the creation of others.

When Congress in its great wisdom and foresight enacted this law and entrusted its administration to the executive and judicial departments of the government the problem could have been easily solved by the use of the effective machinery which was provided and which has proven itself to have been

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admirably adapted to the purpose. The Law is a model of simplicity. Within its brief compass are contained four distinct, comprehensive and independent remedies—(1) to enjoin the creation of the combination; (2) to punish for its formation or continuance; (3) to seize its property in inter-state transit wherever found; and (4) to destroy and dissolve it by the judgment of the Court.

The last remedy is the most difficult and unsatisfactory and the least effective, although it is the sole remedy that has until very recently to any extent been invoked, and then only in the most unequal and spasmodic way.

Whilst these cases were under consideration by the Court, in an Address delivered on January 12th, 1911, at the Annual Meeting of the National Civic Federation entitled "Extermination vs. Regulation of the Trusts, Which Shall It Be?" the writer summarized the then existing situation as follows:

"Judging from the uniform trend of the decisions of that Court for the past five years, it is not unlikely that the principle announced by the lower Courts in those cases will be not only affirmed but *emphasized in the most sweeping fashion* by our highest tribunal and that every form of combination the *direct* purpose and effect of which is to hamper or limit competition will be condemned.

"Unfortunately for the welfare of the people I am not however satisfied that the decisions will afford any substantial relief from the dangers that are threatening us or that they will either furnish or point out a practical solution. The provisions of the Judgments are drastic but it does not follow that they are enforceable in practical operation. The companies appear to me to have nothing to fear from the result beyond possible changes in the forms of their organizations.

"The properties and business are there, they belong to the shareholders, and there is no way of confiscating them even if there were a disposition to do so, which happily there is not. The thought of disbanding the central organizations and resolving the constituent companies into their original parts presents an impossible problem."

A further study of the subject in the light of the decisions confirms the views then expressed.

From the very beginning the execution of the law was entrusted to unfriendly hands and so it has continued to this day. That is the key to all our present difficulties and to the many worse ones that are to come.

Throughout five successive administrations the enforcement of the Law has been shirked, evaded and treated with a degree of insincerity that surpasses anything of the kind

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in our National existence, until by reason of the long immunity and encouragement to its continued violation we are today confronted with the danger that because of the vast power of the offenders and the magnitude of the interests involved the task has grown beyond control and we shall be forced to resort to other methods to supplement those that were then furnished and were at that time adequate for the purpose.

This criticism applies with equal force to the single Democratic Administration as to the Republican Administrations that preceded and followed it, and especially to the present Administration, which is concentrating upon the "Anti-Trust Department" of its marvellous Press Bureau and upon the beginning of aimless, never-ending but utterly ineffective suits purporting to be directed against the dissolution of the offenders, all the energy that should have been directed to the prompt and genuine enforcement of the remedy by injunction and the criminal sections of the Law.

During all these years there has not been a single case out of the many that have been inaugurated in which the evidence produced by the Government in the civil suits and which formed the basis of an academically successful outcome would not have been equally conclusive in a criminal prosecution or through the summary process of seizure under Section 6 of the Act.

To those who regard the recent decisions as instilling new strength into the statute and who are so confiding as to have preserved their faith in the desire of the Government to enforce the Law impartially the semi-official announcement of the Chief Law Officer of the Government, made a few weeks ago following the decisions, that no criminal prosecutions would be considered until after the expiration of the time fixed for compliance with the decrees of the Court, will come as a surprise. To the "doubting Thomases" it may appear like a continuation of the policy of procrastination to the accompaniment of much noise and fuss and feathers, and ending in nothing.

It is at least difficult to understand the relation between the dissolution of the corporation and the long delay in the enforcement of the criminal section of the statute.

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It is not usual for the Government to stay criminal prosecutions whilst invoking its civil remedies, especially where, as in these cases, it may be inviting the plea of the Statute of Limitations with respect to some of the offenses charged. The Government did not find this course necessary in its recent prosecutions of the Beef Packers or in the case of the American Sugar Refining Company, in both of which it *first* brought the criminal prosecution for violation of the Anti-Trust Law and followed it later with the suit for dissolution of the corporation—both of which are now pending.

Here we have two cases in which the Government has judgments of the Court dissolving the corporations whilst in the Packing and Sugar cases it has no judgment. Yet we are told that we must continue to wait. Why these discriminations? The reason assigned is a trifle obscure. Is this way of administering the Law calculated to add to the respect or confidence of the community for Governmental methods?

I do not mean to imply that there should be criminal prosecutions in any of these cases at this late day in view of the encouragement and tacit assent to their legality that have been given to the formation and development of the Trusts during all these years. Such of the Companies as are willing in good faith and to the fullest extent of their ability to assist in executing the judgment of the Court segregating and dissolving them ought to be relieved from criminal prosecution, under the circumstances. But there should be no such peculiar processes as have characterized the enforcement of the law.

Equally unconvincing is the assertion made by the able and distinguished Attorney General in this same announcement, by way of apology for past inaction, to the effect that juries have been reluctant to convict and Courts have been unwilling to impose prison sentences in these cases.

Have not cause and effect been rather confused in the making of these statements? If juries have been unwilling to convict or Courts to impose prison sentences in the isolated instances of insignificant offenders in which prosecutions have been undertaken was it not because of the apparent

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unfairness of the selection of cases for prosecution? Is it not true that the small and helpless and comparatively harmless combinations in the temporary form of Pools and Trade Agreements were the ones thus pursued, whilst the powerful, dominating combinations that were in the permanent and most dangerous forms of consolidations were left undisturbed?

Insofar as the criminal sections of the statute have been invoked it has savored of persecution. Courts and juries have rightly refused to lend themselves to the perpetration of such manifest injustice.

How could any Court or jury with the common instinct of human justice have been expected or asked by a public officer to send these small fellows to prison when every Judge and juror knew from his daily experience, of the immunity from prosecution that was being extended or permitted to the big fellows?

Note, for instance, the easy frankness, cheerfulness and unconcern with which the chief officer of the Steel Corporation has been testifying before the Senate Committee concerning the way in which prices are regulated in that industry. The only difference between the facts of that case and the pooling and trade agreements whose members have been prosecuted is that the Steel Corporation dominates the industry, it almost controls the railroad situation indirectly, and it has many ways with which most of us are familiar, of compelling obedience to the "gentlemen's agreements" made with it, whilst in the other case there is no remedy against the member who breaks or repudiates the agreement, for it is recognized to be illegal and cannot be enforced by any of the parties. Yet Mr. Gary has told us nothing that we have not known for many years and that is not applicable to other businesses, for these things have been done by the Company in the open light of day and with no attempt at concealment. Everybody understood the Steel Company and the independents have for years been fixing prices.

The reason assigned by the learned Attorney General for the continued non-enforcement of the Law is more than amazing—but for one's respect for his high office it might be justly

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characterized as frivolous. Why not admit at once what everyone familiar with the subject feels—that the Government has by its action (or non-action) in years past misled the business, financial and investing world into the belief that they were acting within their legal rights in embarking upon these enterprises and that it is more largely than the offenders responsible for the present situation? The condition is rendered the more inexcusable by reason of the fact that whenever in the past ten or fifteen years the law has come before the Supreme Court it has been sustained and strengthened. There has at no time been any justification in the attitude of the Courts for the contemptuous treatment accorded the Law at the hands of the Government.

It will be time enough for our officials to complain that the enforcement of the statute is unpopular or that it is not supported by public sentiment when they have made the effort to enforce it impartially. The fact is that they are rapidly, however reluctantly, awakening to the knowledge that it is the most popular Law upon our statute books and that the people are insisting upon its vigorous and *impartial* enforcement.

With every desire to avoid injustice to the authorities having in charge the execution of the Law, it is impossible to resist the conclusion that they have not been in sympathy with and were not really anxious to support the economic policy announced by the Law. How can we otherwise account for the failure during all the years in which these gigantic combinations were forming to resort to the simple and comprehensive remedy of enjoining their creation by injunction as pointed out by Section 4 of the Act or of seizing their property in transit under Section 6?

Here again the case of the Steel Corporation by way of illustration is a fair test of the justice of this criticism. Its formation was heralded for months in advance throughout the news columns of the Press of the country. Formal and official notices that it was about to be launched were published broadcast as advertisements by Messrs. J. P. Morgan & Co., who were the official Bankers and promoters of the enterprise, in the newspapers, addressed to the shareholders

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of the constituent Companies, containing the fullest details of the basis on which the stockholders were to be allowed to participate in the exchange of their securities for those of the colossal New Company, with its one and a half billions of new stock and bond issues in addition to the hundreds of millions of underlying bonds and of floating debt of the constituent Companies.

The Steel Corporation and its shareholders have a just grievance at this belated attack upon it, for its bold and astounding plan of inflation and illegality were fully and frankly exposed in all their amazing details. The organization of the Company could readily have been prevented by injunction under the broad powers conferred by Section 4 of the Act in the same way in which that section was recently invoked to prevent the increase of freight rates by the Railroads. But there was no crystallized public sentiment at that time against the movement. It is true that few of us quite appreciated the extent of the dangers as they have since been realized, although they had been plainly foreseen and were understood by those who had studied the problem, as is apparent from the fact that the Sherman Law had then been for eight years in existence. It is manifest that it was enacted primarily as a criminal statute to *prevent* further combinations and incidentally to rid us of the existing ones.

The creation of the Steel Corporation and of the hundreds of other combinations that were organized during that period could have been prevented by the use of this remedy by injunction or by the least sign of activity on the part of the officials charged with the execution of the Law. Notice that the criminal section of the Act would be applied would have been sufficient. Both of these sections—which together with Section 6 constitute the bone and sinew of the Law—were left unapplied through all these years, whilst the Government contented itself with the most perfunctory, inadequate and manifestly insincere and circuitous procedure looking to the undoing of combinations that might easily have been prevented from coming into existence.

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The encouragement which the lax administration or non-administration of the Law has given to the formation of these Trusts and the extent to which the Government is responsible for the distribution of their securities over the entire civilized world should rightly be considered by our Courts and Legislative bodies in determining how to deal with the Companies. At this late day we are not foot-loose to inaugurate a policy such as might have been enforced to prevent them from being brought into existence, even though we recognize the injury they have done and are doing and the evil and danger they constitute to our institutions.

In dealing with this vast and complex subject we should first determine whether the Sherman Law as now construed is sufficient to meet the present situation, and if not whether it should be superseded or supplemented. It may safely be assumed that neither public sentiment nor good reason would support the repeal of the Law or the relaxation of any of its provisions. The only sentiment in favor of amending the Law comes from those engaged in violating it.

It was inevitable that the Courts would be forced to take some such construction as has now been announced. To have held that every combination that had the effect of restricting competition, however remote and indirect, was within its condemnation would have reduced the Law to an economic absurdity and have made it applicable to such a variety of proper and necessary business arrangements as to have rendered its enforcement destructive to legitimate business and to have placed a most dangerous power of discrimination in the hands of the Government.

Every agreement or combination between business men for their protection the purpose of which is possibly to save the parties to it from business destruction would have been brought within the prohibition of the Act. Such a construction would have led to the most grotesque results, some of which have already been realized, as above stated, in the few criminal prosecutions against temporary Pools and Trade Agreements that have been "successfully" concluded.

There is no force in the contention that is being made in some quarters that the Law as now construed is too in-

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definite to be applied as a criminal Statute. The argument advanced is, that what is or is not a reasonable restraint of trade now depends upon such a variety of conditions and is so uncertain in its definition that no criminal offense can be predicated of its violation. It is said in this connection that intent to commit a crime which forms so essential a part of a criminal offense will be predicated of an act when the party charged with its commission cannot know whether he had a criminal intent until so informed by a jury as a result of his trial for the crime.

The manifest answer is that we are all conclusively presumed to know the Law, and that convictions would only be asked in cases in which the jury could readily be satisfied that the main purpose of the combination, and that which it accomplished, was a substantial control of the particular industry so as to be able to regulate both prices and output.

Those pools, agreements, consolidations and other forms of combination that were entered into for self-preservation or to prevent ruinous competition or to protect the small dealers against extermination by their powerful competitors and those which in their operations demonstrated that they were not levying tribute upon the public would be in no peril. The question in each case may safely be left to the good sense and business judgment of a jury to determine, under instructions of the Court, whether upon the particular facts of that case the parties had a criminal or a lawful intent.

The one would be defined as having for its purpose the control of the industry so as to be able to regulate prices. That would necessarily be evidenced in many ways, among others by the manner of dealing with outside competition; whether competing plants were purchased and dismantled or prices arranged in certain sections of the country so as to destroy competitors and in a variety of other ways that are well known to those who have had to deal with this subject. The earmarks that distinguish the one from the other class of arrrangements are not to be mistaken. There need be no fear of difficulty, with the facts before the Court, in enforcing the Law so as to avoid injustice.

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The criminal section has been rendered more and not less easy of enforcement by the sane construction placed upon the Statute.

To those who believe in the economic policy of keeping free from restraint the arteries and channels of inter-State commerce, a close study of the opinions will tend to dispel much of the misapprehension that followed the announcement of the first decision. That the Court has retraced its steps and has unsaid and undone much of what was decided in the Trans-Missouri and Joint Traffic Association cases is, however, hardly open to discussion. No one can read the opinions in those cases and the arraignment of Mr. Justice Harlan without conceding that the logic of the argument, based on precedent, is on his side.

With all due respect to that August Tribunal which the members of the Bar so justly reveres, the progressive, constructive policy of which we so profoundly admire, one is at times disposed to regret that the traditions of the Court do not seem to permit that it admit its fallibility and frankly announce that it has decided to reject, overrule or change the Law laid down in its earlier decisions, when that is in fact its real purpose, instead of resorting to circumlocution and to distinctions that do not always distinguish.

Would it not be better to recognize that the Law is a progressive science, possessing all the elasticity necessary to meet changed economic conditions, and that the rules of Law must be formulated and applied in the light of those conditions? We may if we please criticize and denounce that exercise of power as judicial legislation and as being in theory lawless and dangerous and contrary to the spirit of our institutions, as Mr. Justice Harlan and other eminent jurists of that great Court have from time to time arraigned it. The fact, however, remains that the bold and at times ruthless exercise of that power has averted many a grave crisis in the history of our country which could not otherwise have been met under the limitations and imperfections of our Constitution, and has made possible the fabulous growth, expansion and prosperity of our country.

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The danger from the arrogation of such power as supplementing and developing rather than construing our Constitution is more fancied than real, more theoretical than practical, as experience has shown, for never in the history of the Court has the power been used except where the urgency was great and never in a way that has not distinctly made for progress and justice.

If the strict constructionists are to prevail, most of the insidious and dangerous crimes of modern finance would have to go unpunished and the criminal provisions of the Anti-Trust Law will continue to be a dead letter.

I refer, of course, to the impediments to prosecution formerly existing by reason of the Fourth Amendment to the Constitution prohibiting the right of search and seizure of papers, and by reason of the Fifth Amendment that no person shall be bound to incriminate himself—which have now been removed. Under the earlier decisions and until it became manifest that the class of crimes which the Law is now earnestly but not yet successfully trying to reach, could not be punished if the individual or corporation was allowed to withhold the books and papers that contained the evidences of the crime, there was no way in which the proof could be made. But when the urgency became pressing the Court met it by practically reversing the rule that had been laid down by it in U. S. *v.* Boyd, 116 U. S. (1) in the Al Adams case, where it affirmed the principle that even though the books and private papers of a person charged with crime were unlawfully seized in violation of his Constitutional rights, the Court would close its eyes to the means employed and would allow them to be used against him. That was a departure from precedent, although the Court cited authority to sustain its position; but the changed conditions required it, and they were met. (2) Later in the Sugar Trust and Tobacco Trust cases (Hale *v.* Henkel, 201 U. S.), and again within the past few weeks in the Wireless Telegraph Co. case (Wilson *v.* U. S.), the Court denied the applicability of the Constitutional Amendments to individuals, officers of the corporations which were charged with crimes with respect to corporate books that were in their custody, even where they contained entries

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of personal transactions. (3) In the case of Twining *v.* New Jersey, where it was decided that the Fourth and Fifth Amendments to the Constitution did not apply to prosecutions in the State Courts under State Statutes, and that a defendant charged with crime might be there compelled to testify against himself at his trial. (4) Still later and within the past few months we find the Law officers of the Federal Government, with the apparent sanction of the Law as now construed, inaugurating the practice of arresting individuals under indictment and simultaneously with the arrest breaking into their places of business and seizing and holding their private books and papers, as in the cases of Duveen Brothers, Sheftel and various brokerage houses.

The last remnant of these Constitutional safeguards are disappearing before our very eyes. With the limitations that are found to be in the way of the administration of justice thus removed, why hesitate at merely "moulding" or "construing" the Acts of Congress so that they shall read as they *ought* to have read rather than as they *do* read, especially when the Court is satisfied that it is impracticable to procure their amendment so as to make them workable according to the "rule of reason."

I do not want to be understood as criticising the decisions referred to that appear to change the Fourth and Fifth Amendments "in the light of reason" and expediency. On the contrary, I approve the result, but fail to appreciate the reasoning and attempts at justification that accompany the decisions. They have blazed the way for the enforcement of the criminal section of the Anti-Trust Law and for the punishment of crimes more dangerous to our institutions than all the ordinary offenses combined and that must of necessity otherwise go unpunished.

When we consider the history of the enactment of the laws on this subject and the circumstances under which these provisions were inserted in our Constitution, and that the defendant was at that time barred from being a witness in his own defense, there is just ground in the interest of the punishment of the most insidious forms of crime and those most difficult of proof, for welcoming the abolition of this fetish

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of protecting a man against incriminating himself. The innocent man no longer requires it, since he may now testify in his own behalf. The guilty should not be permitted to have it.

If it were possible—which it is not *as yet* under our system of jurisprudence—I would advocate the right of the prosecution to place the defendant on the witness stand, as in Continental countries, but only in open Court and in the presence of his counsel and subject to many other modifications of their system, in order to protect this right against the abuses that exist there.

But we have somewhat strayed from our text in the desire to add our tribute to the Court for its broad and statesmanlike construction of the Sherman Law as against the narrow and literal reading that was pressed upon its attention and which it had adopted in its early decisions before the value and necessity of that Law were fully realized.

The Court was confronted with a difficult alternative. If it adhered to the *words*, as distinguished from the spirit or meaning of the Act, it would have to hold that every agreement or combination that tended to restrain trade was unlawful. Such construction would render the Law unjust, unpopular, unworkable and ridiculous.

To have attempted to enforce the Law under the previously announced construction would have been tantamount to indicting a large proportion of the law-abiding business community of the country. It would have played into the hands of the interests against which it was aimed by rendering the criminal sections impossible of enforcement.

Now that the Court has, however, applied to the Law the sensible meaning that it is only intended to cover a *direct* restraint of trade, its scope and justice are made apparent and it will reach the evils at which it is aimed.

It had, however, been hoped and expected that in applying this doctrine of the "rule of reason" in the construction of the statute the Court would have avoided the use of the ambiguous words "reasonable" and "unreasonable" as applied to restraints of trade and that it would have adopted the distinction that has been so ably discussed in a recent editorial in *The New York Times*, between the restriction of competi-

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tion and the restraint of trade. The Court might well have justified its conclusions by pointing out that the Law was aimed only against the restraint of inter-State trade; that it was intended to reach every form and manner of such restraint; that there is no such thing as a *reasonable* restraint of trade; that *every direct restraint put upon inter-State trade is in and of itself unreasonable.*

On the other hand, every restriction of competition does not directly restrain trade. There are many wholesome restrictions of competition that have no appreciable effect on the course of trade, in the sense of *directly* affecting or restraining it.

The construction now placed upon the Law will render it effective, for it will be applied only against combinations, whether in the form of consolidations, pools, or agreements ("gentlemen's" or otherwise) that clearly operate in *direct* restraint of inter-State trade.

Those are the evils against which the Law was directed. Against those it will be applied without bringing upon the administration of justice the reproach that it is being enforced against a few whilst applicable to the great mass of business enterprise. It is to be hoped that we have seen the end of the spectacle of the Department of Justice engaging in the prosecution and punishment, as criminals, of little fellows banded together through temporary trade arrangements for self-preservation against their formidable competitors, whilst leaving undisturbed the powerful offenders against whom the Law was directed.

The excuse heretofore given that every agreement, however innocent and necessary, that tended to restrain competition was in violation of Law will no longer answer.

This I take to be the scope and meaning of the decisions.

Nothing more salutary, nothing better adapted to promote respect for the law has been accomplished by this great tribunal. No greater peril was ever averted than that of rescuing the law from the contempt into which it was in danger of falling by reason of the spasmodic and unfair method in which the authorities were floundering about in their aimless efforts to make the people believe that they were enforcing the Law.

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Will the decisions accomplish any substantial, practical results in restoring competition between the various constituent Companies that were combined and which are now sought to be separated?

With great regret, but with equal confidence, we assert that they will not.

The judgments are very comprehensive in *form*. If they were literally enforced, so far from restoring competition, their tendency would be to further cripple it by prohibiting the parent Company from engaging in inter-State commerce, because it will be impossible for it to comply with the decree.

As a concrete example which would equally apply to the Steel Corporation and many of the others, let us examine for a moment the practical operation of the judgment in the Tobacco case. Following the able and illuminating recital of facts in the opinion of the learned Chief Justice we find that beginning with the combination of the cigarette factories, continuing through the absorption of the smoking tobacco, plug tobacco, licorice, tinfoil, snuff, cigar and kindred branches of the industry, ending in the amalgamation of these various branches under one vast corporate ownership through its various holding and constituent Companies, at every stage factories were closed, machinery shifted and such a transformation of property and assets effected that the reinstatement or rehabilitation of the constituent industries as separate and independent entities is generally conceded to be impossible.

In the same way brands, trademarks, patents and secret processes that represented the main assets of various of the businesses acquired have been discontinued or abandoned or have disappeared with the factories that were absorbed, or have been transferred and mingled with the general fund.

But suppose the Court concludes to deal only with existing properties and assets, if that is possible. How and to whom are they to be distributed? Are the plants to be separately sold at public auction? If so, in connection with what brands or trademarks? Is that to be arbitrarily apportioned, or are the brands to be sold independently of the factories with which they are now connected?

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The control of the share capital of, let us say, the United Cigar Company, which owns the innumerable retail stores, is owned by the parent Company. How are these stocks to be taken out of its control? Is the Court going to assume the task of finding a purchaser for the shares representing the ownership of these stores who will not operate them in conjunction with the factories controlled by the parent Company? Hardly a likely contingency.

Are the present stockholders of the parent Company to have the right to combine through committees or otherwise to bid on these various properties? I understand that the judgment forbids that course.

The procedure adopted in the Northern Securities case, which has been cited as a precedent for the course to be followed here, presents no analogy and offers no guide or suggestion. The holding Company had there to deal only with the distribution of the shares of its constituent Railway Companies and a given amount of cash. It distributed the assets *pro rata* among its shareholders. The proceeding was exceedingly simple; and yet even in that case questions arose as between a distribution in specie and a *pro rata* division in which the aid of the Court had to be invoked.

Properties that were originally represented by 67 Companies are involved here in one way or another. It would be quite impossible within the limits of this Article to convey a conception of the situation in all its manifold complications.

Suppose, however, that it were far more simple and that the parent Company held in its Treasury the shares of only five Companies, each representing directly (which it does not) the ownership or control of the properties of a given industry—the cigarette business, the smoking tobacco business, the plug tobacco business, the cigar business, the foreign business, etc. It has been suggested that a distribution by the parent Company of the shares of each of these Companies among the stockholders of the parent Company in the proportion of their holdings in the latter would answer the purposes of the judgment, by analogy to the procedure in the Northern Securities case.

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But that would accomplish nothing, even if it could be done (which it could not), for here the chief industries were merged by ownership into one Company (the present American Tobacco Company), so that they can no longer be divided into separate ownership by stock distribution; but if this could be done the result would be to nominally separate five monopolies that are now held under one charter so that they will be thereafter held by the same owners and in the same proportions under five different charters. That would only give each partner five pieces of paper instead of one to represent his participation. The Cigarette Company will still have the monopoly of the cigarette business to the same extent as before. Although it would no longer be owned by the same Company as owned the snuff or tin foil industry, its domination of the cigarette industry and over the consumer would be quite as great and as objectionable as before. The same is true of the others.

But the problem is still more complicated. We have not yet begun to encounter the real difficulties. There are approximately $100,000,000 of bonds outstanding, divided into two separate issues. They constitute a debt of the parent Company. They are held by the investing public and are scattered all over the world. If the bondholders can be compelled to take their money before it is due, how can the Company provide the funds? If the present controlling owners are to be forbidden to buy the properties representing a given industry as an entirety and are unwilling to buy certain dismembered parts, how is the money to be secured to pay the bonds; and until they are paid how can the Company move in the direction of dismemberment?

Assuming that this difficulty is overcome by the co-operation of the defendants (and that is the only way in which it can be overcome), how are the cigarette, plug tobacco and smoking tobacco properties and industries to be segregated? They are not separate Companies. The properties are owned directly by the parent Company through a consolidation effected in 1904 between the Continental, Consolidated and the old American Tobacco Companies. There are no stocks of constituent Companies to be distributed so far as those Com-

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panies are concerned, and they constitute the bulk of the assets. They own factories, merchandise, brands, trademarks, etc., amounting to hundreds of millions of dollars scattered all over the world.

Suppose the Court subdivides the properties into the three separate industries as they existed before the Companies were consolidated and directs that each be again organized under a separate charter and the new share capital deposited with the parent Company and then distributed among its shareholders. What has then been accomplished? We have three monopolies, each owned by the same people and in the same proportions, operating separately, if you please, but in the same general interests and ownership as before. Are the stockholders in these now segregated Companies to be permitted to exercise their right as stockholders to select their Directors, or are they to be perpetually prevented from enjoying the prerogatives attaching to ownership? Shall we not have in fact the same real Boards of Directors in each of the ten Companies or the same dominating factors behind "dummy" Boards so long as the Companies continue to be owned by the same people?

This bare outline does not begin to summarize or to give a faint conception of the complexities inherent in the situation which the Court has undertaken to solve. We have not sought to deal (1) with the interest of the parent Company in the foreign Companies; (2) with the many constituent Companies the shares of which are wholly or partially held by the parent Company; (3) with the properties acquired directly by the present parent Company since its organization in 1904; (4) with any attempt to segregate any one of the seven or more distinct industries that were consolidated with the present Company either through direct ownership or stock control.

Suffice it to say that when we look into the problem of separating the constituent Companies with a view of loosening the grip of the combination on any one of the industries, the difficulties increase at every step.

With the genuine and hearty consent and co-operation of the defendants and of the general body of security holders who would presumably follow them, but not otherwise, the

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thing becomes possible on the surface and to a very limited extent. But even then the measure of the possible relief would be negligible. It is idle to expect much of a judgment that must depend for its efficiency upon the aid of the defendants against whom it is directed.

What, then, is likely to happen? What must happen?

When the six or eight months allowed for solving this hopeless problem have passed, is the Court going to enforce the injunction contained in the decree against the Company engaging in inter-State trade, without pointing out a way in which it can obey the judgment? If so, the decree will in itself effect a restraint of inter-State trade far greater than that accomplished by the Company, besides working a confiscation of vast property interests belonging to innocent investors who had every reason to believe from the attitude of the Government that they were embarking their money in a lawful enterprise.

The final outcome is as likely as not to be that the architects of this unlawful structure will be afforded the opportunity to reap as rich a harvest out of its attempted "disintegration" as they secured from its organization, if they are so disposed, of which I do not, however, for a moment believe them capable of taking advantage.

The thing attempted to be done by this judgment simply cannot be done. The Court will of necessity be forced to temporize with the situation. Something will doubtless be accomplished with the co-operation of the Company toward avoiding the appearance of continued monopoly. A few of the plants in each branch of the industry, or perhaps one or two branches of the entire industry, may be put through the form of sale to outside interests or of distribution through the shares, but it will be at best a mere pretext. Courts are not constituted to deal adequately with questions of this character and should not be asked to do so.

Instead of open ownership of the constituent branches of the industry we shall have "community of interest" with "gentlemen's agreements" wherever continued open ownership will not be tolerated; but we shall never again have actual competition between any of the properties that were

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constituent parts of the parent Company no matter how much those concerned may now desire in all sincerity to comply with the judgment of the Court.

Assuming this to be true, even to a qualified extent, the question is presented:

Is there a remedy, and what is it?

Our success in dealing with this great problem depends upon our recognizing that there is no complete remedy that will absolutely and completely rid us of the existing Trusts and combinations. But there is much that may be done to correct, mitigate and minimize the existing evil and prevent it from spreading into the industries that are not already controlled.

This, of course, involves first and foremost but merely as a step preliminary to regulation and not as affording in and of itself a remedy the enforced organization under the Federal law of every corporation engaged in inter-State trade.

There is no reason for resorting to the temporizing measure of Federal license from doubt of the power of Congress to compel Federal incorporation. There must be complete and undivided Federal control free from charter tinkering and other interference by the States in order to render any scheme effective. We are unable to appreciate any force to the contention that Congress has not full power in the premises where the corporation is engaged in inter-State trade. It is now axiomatic that the power to regulate commerce includes the power to control all the agencies and instrumentalities of commerce. Congress can at any time take unto itself the sole right to charter those engaged in inter-State commerce.

It is time the power was taken from the States wherever possible in any event. In the fierce and undignified competition between them for the privilege of granting unrestricted license to prey upon their sister States to corporations which conduct no business within their borders and with which they have no concern they have so relaxed the safeguards surrounding the issue of corporate securities and have granted such extraordinary and unjustified powers that it has long

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since become and is a National scandal. The stability of investments and the good name of the Nation require the restriction and regulation of corporate powers and uniformity in the form of charters.

The prohibition of the holding Company and the protection of the rights of minority stockholders through compulsory cumulative voting and other safeguards are among the urgent reforms that may be incidentally accomplished through a National Incorporation Law. Corporations should never have been allowed to own the stocks of other corporations. It is only in recent years that any such improper privilege has been accorded them. It is an outcome of the charter-trafficking referred to and has been the prolific source of innumerable swindles that are being constantly perpetrated upon minority stockholders.

It is to this abuse that we owe the existence of our most powerful Trusts. Through it the pressure has been brought to bear on the helpless minority stockholder to part with his securities at the price fixed by the holder of the majority.

The character of the laws enacted in recent years in the various States creating short Statutes of Limitations in favor of corporate wrongdoers against their stockholders and otherwise legislating stockholders out of remedies that would otherwise now be open to them for wrongs inflicted by promoters and controlling interests in corporations, makes it necessary that there be restriction and uniformity and greater caution in legislation affecting corporations.

The next step in the process of regulating this subject would be the creation of a Court of Commission similar in its powers over industrial corporations engaged in inter-State trade to those of the Inter-State Commerce Commission over Railroads, giving to that tribunal the power to restrict prices, to permit and approve temporary Trade Agreements that would be enforcible in the Courts similar to those that exist in Germany, Austria and France, and which are known as Pools, Kartels or Syndicates.

The writer begs to repeat in this connection the recommendations suggested by him on this subject in the address above referred to on January 12, 1911, as follows:

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"*Rigid regulation under Federal Law is the only just solution.*

"It is possible and practicable and would do away with the grave existing evils which are constantly become more serious. As substantially all the combinations that affect the public welfare are engaged in Inter-State or International Commerce within the enlarged definition of those terms under recent adjudications, there could be no serious question of the Constitutional right of the Federal Government to regulate and control their activities by a Federal license, if not by a Federal incorporation. Such regulation would however in order to be effective have to take a very much wider scope than has yet been suggested. * * *

"Such regulation must include as its most essential feature the power to prohibit by summary process all business oppression and other unfair methods and *particularly the exaction of excessive profits. This involves the power to limit the prices* that may be charged for any commodity beyond a fair profit. * * *

"The practical difficulties of regulating prices to the extent indicated are more imaginary than real.

"*The proposition has never had a hearing.* Wherever any notice whatever has been taken of it the subject has been almost impatiently dismissed although other countries whose judgment on economic questions is entitled to our respect have adopted the plan and find it practicable.

"The problem though beset with difficulties is one that we must solve. I therefore appeal for an approach to its discussion with an open mind.

"When we come to analyze the subject we find that the task is not nearly so complicated as that of framing a Tariff, which must presumably take into account not only the cost of production in this country but also such cost as compared with costs in one or more foreign countries. It is surely not nearly so complicated as will be the duty of the proposed Tariff Commission which is expected to undertake a scientific study of and report upon the domestic and foreign costs of every known commodity."

It is not suggested that this system shall supersede the enforcement of remedies or penalties under the Anti-Trust Law. They should on the contrary be merely complementary and supplementary to that Law. When a judgment is rendered against an existing offender it is proposed that it should be the province of the Commission thus constituted to determine the manner in which the judgment shall be executed. If after doing away with the violations, so far as this can be accomplished to the satisfaction of the Commission, the offending corporation continues to be engaged in inter-State commerce its future operations would be subject to the direction of this Commission.

The effective cry that has been raised by the powerful advocates of so-called "business co-operation" and "community of interest," and the one argument that has been pressed upon the students of the economic problem has been that the only alternative is ruinous competition and that this is not to the interest of any country.

Of the two evils, ruinous competition is the less disastrous. If the alternative is between the two and the Trusts are to

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be uncontrolled the people will not hesitate to accept the former.

But is it true that this is the alternative? We venture to suggest that it is not. The Sherman Law may be enforced to prevent future combinations in direct restraint of trade, the Courts may do what they can toward dissolving and curbing the existing violations, and we may still through National regulation of the agencies of inter-State trade develop a system that will ameliorate the harshness of competition, permit of co-operation and secure reasonable profits with full justice to the public if this subject can be taken out of the realm of partisan politics and dealt with on broad, economic, statesmanlike lines.

This may be partly accomplished through Pooling or Trade Agreements between the members of a given industry, regulating prices and production between them—subject to the approval of the National Commission or tribunal to be created, somewhat after the general scheme of the German Potash Law of May, 1910.

It would not be necessary to amend or take away from the Sherman law in order to reach this result by independent legislation. The law creating the Commission would provide that no agreement or combination in direct restraint of inter-State trade should be sanctioned, and that all agreements thus permitted would be held to be in reasonable restriction of competition and as not in direct restraint of trade.

The Commission would necessarily determine the extent to which production might be curtailed and the maximum prices permitted to be charged, which would be subject to change from time to time in its discretion. Any corporation desiring to acquire the business of a competitor would be required to secure the permission of the Commission, which would be granted where it appeared that there were legitimate business reasons to support the application and that no direct restraint of trade was involved.

In like manner every contract accompanying a sale by an individual or corporation engaged in inter-State commerce of the good-will of his business which restricted him

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from engaging in competing business should receive the approval of the Commission in order to be enforcible.

The plan suggested would not by any means involve the fixing of prices in every industry or anything nearly so comprehensive. The action of the Commission would only be invoked by those engaged in a given industry in the instances in which the competition had reached an unhealthy stage. Only in those cases could it hope to succeed and then only to the extent necessary for reasonable protection. Within the limits fixed by the Commission competition would still continue but it would no longer be enforced ruinous trade war if the parties willed it otherwise and were able to agree. It would of course only apply where invoked by the parties and only to those joining in the petition.

There would be many great and manifest advantages to the public in sanctioning these Kartels or Trade arrangements; among others—(1) the permission thus given would involve each owner retaining his own property; (2) it would destroy one of the incentives and the only plausible pretext for Trusts and Consolidations in the form of a single ownership; (3) inflated stock issues, oppression of competitors, closing of factories and all the greatest of the evils incident to concentrated ownership in the form of a Trust or consolidation would be avoided by permitting these agreements. There would no longer be an excuse for their existence. Such a system would also do away with the most cruel of all kinds of competition—that which is resorted to for the purpose of forcing the weaker competitor to choose between facing ruin and selling his property to his stronger rival on the latter's terms.

Under this arrangement the stronger man would know that he could not acquire his weaker competitor except with the assent of the Commission and that this would not be accorded if the situation were brought about by unlawful or oppressive methods.

None of the oppressive expedients to crush competition that are resorted to where the former competing interests have been firmly and indissolubly banded together would characterize the operation of these Pools or Trade Agree-

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ments for the plain reason that the interests of the parties are not permanent or identical. They are still competitors subject to certain restricted interests in common. Each party to the arrangement operates his own factory at his own risk and for his own benefit. The agreement is limited as to time. They may resume open and unrestricted competition upon the termination of the agreement. They cannot afford to exchange trade secrets or to go into co-operative schemes to cripple outside competition even if they were permitted to do so. On all these points their methods and operations would be in marked contrast with those of Trusts and Consolidations, where there is a single, permanent ownership with all the concentrated power and unity of interest involved.

The proposed remedy may be summarized as follows:

(1) The compulsory Federal incorporation of all corporations engaged in trade or commerce between the States or with foreign countries.

(2) The creation of a Commission similar in its powers over business corporations to those now possessed by the Inter-State Commerce Commission over Railroads and the utilization in that connection, so far as possible, of the present Commerce Court.

(3) That this Commission pass upon the right of every applicant for a Federal charter, and that where violations of law exist which would prevent the granting of such a charter such violations should be first removed.

(4) That the Commission have power to authorize and approve Agreements that will be enforcible in the Courts in the form of Pools, Kartels or Syndicate arrangements for regulating competition in any industry provided such Agreement does not have the effect of unreasonably restricting competition or of operating as a direct restraint of trade; that in that connection it be empowered from time to time to determine the extent to which prices may be fixed or production restricted and particularly to prevent any interfer-

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ence by the parties to the Agreement with outside competition.

(5) That the Sherman Anti-Trust Law be enforced against existing offenders and that the execution of the details of the judgment be entrusted to the Commission, subject (whereever necessary by reason of Constitutional limitations) to the approval by the Court and the adoption by the latter of the findings of the Commission.

(6) That (a) the criminal section of the Anti-Trust Law, (b) the provisions allowing an injunction against the creation or continuance of violations, and (c) provisions for the summary seizure and confiscation under Section 6 of all property in inter-State transit of any corporation operating in violation of the Statute be rigidly enforced.

With such a programme and an administration in sympathy with it and with the energy and ability necessary to carry it out every existing violation of the law would soon be corrected, so far as that would be possible, and we would have a consistent, workable plan instead of the present intolerable condition, floundering and insincerity on the part of the Administration and chaotic from the point of view of the business community.

It is hoped that the pending agitation will continue with all the light that can be had from every direction until the necessary reforms are embodied in constructive legislation that will remove this question from the domain of Party strife. Its early solution is too essential to the general welfare to be made the football of political contentions and ambitions.

The Congressional investigations now under way will assist in educating the people to an understanding of the peril and urgency of the situation. The testimony taken at the future sessions of the Committee of Inquiry into the Steel Corporation (which has not yet scratched the surface and from which it would appear that the investigators are thus far uninformed as to the important facts concerning the organization of the Company) has already keenly aroused

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public curiosity. The huge sums involved and the dramatic human interest attaching to the chief actors in the boldest and most gigantic financial and industrial operation that the world has ever known are bound to hold public attention.

It is important that the investigation shall be thorough and that the reports of the testimony as distributed shall be comprehensive and free from bias, color and influence (no easy task in these days). The Committee should not be compelled to rely upon the accountants and experts of the corporation. It should be furnished its own experts and accountants and all the assistants necessary for an exhaustive inquiry.

The uniform record of the corporation from the beginning has been one of entire frankness and of the fullest publicity in dealing both with the public and with its shareholders. In that respect its conduct has been a wholesome object-lesson to the Trusts and corporations that had been operating in the dark as blind pools and had been for years permitted to do so to the amazement of every other civilized country.

The example of the Steel Company more than any other factor forced the abandonment of these "dark-lantern" methods of finance. For that service the country owes it a great debt of gratitude for its power is so great that no such concession, however just or necessary, could have been wrested from it by the Law whilst the Stock Exchange, which is responsible for its securities, has ever been a willing servant of the interests that dominate the Trust.

Judging therefore by the praiseworthy past record of the Steel Company, the Committee is justified in expecting every aid. We should thus learn of the community and identity of interest and control between the Company and its dominating owners and Directors on the one hand and (1) the Railroads of the Country; (2) the great Banks, Trust Companies and Life Insurance Companies with their billions of dollars of other people's money and all that this means; (3) the inexhaustible reserves of iron ores that the Company owns and which together with its Railroad and financial connections places many of the so-called "independents" at its mercy.

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In the last analysis it will be found that the peril to the country from these vast accumulations of wealth and power has been greatly underestimated.

Without stopping to criticize the way in which this new found power, so fearful in its potentialities for evil and oppression that the brain fairly reels at the effort to realize it, has been or is being exercised, we are confronted with the problem of how to encompass its destruction and to prevent its recurrence. It may be conceded for the sake of argument that the power now happily rests in the safest possible hands with the highest sense of responsibility to the State—a benign, well-meaning, public-spirited monarch of the financial destinies of the Nation, if you please, although there are conflicting opinions as to his disinterestedness and public spirit.

But a monarch none the less and not even a constitutional one at that for he confessedly has all the power of a despot to make or destroy. How long will we patiently contemplate or tolerate the possibilities of such a condition of vassalage no matter what may be the present realities. No one can say how soon the power may drift into more ambitious and less scrupulous hands. It is incredible and intolerable that it should rest with any one man or group of men by a word to make and unmake men who have no relations with them, to close Banks and Trust Companies, precipitate and avert and compose panics in the financial world, control the security and commodity markets, dominate the Railroad and industrial world so that by a word the channels of credit are dried up and shrivelled as if by magic against any individual or enterprise whose property he may covet or that it is his will to destroy.

The picture is not exaggerated. If anything it is understated, for there is a brotherhood of self-interest between this modern King of finance and all that serve under him in the same cause that welds them together as one regardless of personal jealousies and enmities. The endless ramifications of this money Trust will be found in every Legislative Hall, whilst its headquarters have been until very lately not far away from the seat of our National Government.

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Whenever in the past our country has faced a great crisis the man to meet it has been found among us. Let us hope that we shall now find the constructive statesman and patriot to rid us of this fatal blight and put in its place a healthy industrial and financial freedom under which we may live and prosper. We need him now. His first work will be to lead us safely out of the clutches of the Trust that with our aid and encouragement have been fastened upon us and have kept us all these years in their grip. That accomplishment will be the best and highest test of his statesmanship. The rest will be easy.

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Government Regulation of the Trusts

WITH

Special Reference to the Sherman Act

Address

Delivered at the Dinner of the Economic Club of New York at the Hotel Astor November 22nd, 1911

By

Samuel Untermyer

of New York

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GOVERNMENT REGULATION OF THE TRUSTS WITH SPECIAL REFERENCE TO THE SHERMAN ACT.

If after the ceaseless deluge of oratory and literature with which we self-constituted amateur economists have inundated a long-suffering nation of patient listeners for the past few years, any new thought, however fantastic, from Bryanism to Rooseveltism can be added to the discussion then we are indeed a people of boundless resourcefulness and versatility. If there is such a thing as an exhausting and an exhausted subject, here we have both. The Trusts is one and you are the other. Such wide range and diversity of view were never known. If only we were all able to share the cheerful confidence of our optimistic President in the simple way of solving this problem our troubles would be over before they began. To him it is already solved by the mere enforcement of existing laws. To others all restrictive laws in any way regulating or affecting trade and especially the Sherman Law, are mistaken, unjust and unnecessary. Some of these economists—happily few in number—still regard Governmental interference as mere officious intrusion into private affairs. Less than two weeks ago one such speaker argued from this platform with the manifest approval of his distinguished audience that the remarkable thing about this question of the relation of Government to business was that anybody should ever be called upon even to discuss it. His idea seemed to be that the Government had no concern with business. To him apparently the

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mandate of the Constitution to Congress to *regulate* commerce meant nothing. True, Congress might enact tariff, shipping, currency, banking and other laws to promote and stimulate business, but no laws to regulate it or prevent abuses. It is so many generations since that proposition passed beyond the realm of debate that I leave it without further comment. The regulation of business is of course one of the most important functions of Government, and one without the constant exercise of which business would not be possible.

To some of us on the other hand this seems the most difficult and complicated economic question that ever confronted a progressive Nation and one that while clamoring for immediate settlement cannot be solved without further legislation, as is evidenced by the recent pitiful and humiliating fiasco resulting from the first serious attempt of the Courts to deal with it.

There is no use trying to blink the fact that the administration of the Act has completely broken down at its most vital point.

And yet, instead of being disheartened by the magnitude and difficulty of dealing with this great problem we should esteem ourselves fortunate to be living in an age teeming with such gigantic issues. No economic question has ever commanded such general attention or received such study.

I take it that we are here to discuss measures of practical policy and relief rather than to rail at and denounce a Law which is manifestly and increasingly supported by the almost unanimous sentiment of the country as one of its most cherished possessions.

The supplementary legislation that the people are demanding is in the direction of strengthening the law and making it more effective. Whatever may be said of the President's economic views on

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the subject, he certainly has his "ear to the ground" when he announces that the Law is here to stay and that the business community will have to "square itself" with that situation.

We must therefore assume, as is the fact, if we are to make any progress with the discussion, that the country is definitely committed to the rigid enforcement of the Sherman Law insofar as that Law is capable of securing practical results in the way of punishing offenders and of disbanding and disintegrating these corporate outlaws. It is the most popular Law on the Statute Books to-day, notwithstanding the opinion of Wall Street to the contrary.

It is often said, and I think justly, that the men who conduct business below Fulton Street in the City of New York and who control the financial destinies of the country, know less about the temper and sentiment of the people of the country and their views on public questions than the average village citizen.

If the handful of men in the East in control of great aggregations of capital really understood what the ninety millions of people are thinking about how could they even have contemplated the possibility of a repeal of the Law or any amendment that would weaken its operation?

It remains to be seen whether the President with this object-lesson of the abortive outcome of the Tobacco case before him will continue to maintain the untenable position that further legislation is unnecessary.

On his recent speaking tour he issued many brave challenges to jurists, publicists and political economists and others who have been criticising existing conditions to name a single offending corporation whose unlawful activities could not be

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effectively ended by applying the Law as constructed by the Supreme Court.

If an humble citizen may without disrespect consider himself included in that broad and oft-repeated challenge I venture by way of a complete and conclusive answer to refer him to this sorry result of the first attempt of the Court to deal with the first complicated case of violation, as representing the impotent limit of legal redress under the existing Law. I respectfully insist that by maintaining this attitude the President is unwittingly playing into the hands of the demagogue. His insistence is likely to further accentuate unreasoning demands for enforcing the strict letter of the criminal law in the prosecution of men who unknowingly transgressed with the silent connivance of the Government. It is right and necessary that violations since the law has been made plain and continued acts of oppression and *wilful* violations at any time should be visited with prompt punishment. But whatever may be the momentary impulse of the people due to the hopeless impotence of present methods of enforcing the law their sense of justice will in the end condemn criminal prosecutions for mere technical acts that were generally believed by everybody to be lawful when done.

We now see clearly that the enforcement of the Law from the beginning would have rescued us from the evils from which we are suffering and from the greater dangers with which we are threatened.

But recrimination over the past is idle. Both political Parties were at fault, but neither is much to blame.

There was no public sentiment to support the Law and we did not understand the question or re-

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alize the peril. There was no reason why we should. It was a new theory of business.

We do not understand it yet, for we are chasing the shadow with aimless ineffective prosecutions, whilst the substance of the corrective sought to be attained by the Law is as far as ever from solution. We are in hot pursuit of the combinations with no result except to change their forms and unsettle business, but the hundreds of secret Pools and Agreements that are to a far wider extent than the Trusts the real regulators and suppressors of competition go on in the main undisturbed.

I think most of us would agree in the light of experience that these combinations are not the unmixed economic blessing that was prophesied of them. Some of us believe that they are a peril to the country, with few if any compensating advantages and that on the whole we would be better off if they had never been permitted.

However that may be, it is no longer a question of whether the Trusts are an evil or a blessing. The policy of the Law on that subject seems to be settled and I am one of those who believe that it has been wisely settled. The Trusts have been allowed to form and grow in defiance of that policy. They are with us and the question is what to do with them and what if anything should be put in their place if they are to be destroyed provided that impossible operation can ever be brought about.

The people are beginning to realize that the methods now being adopted for the enforcement of the Law will accomplish nothing beyond mere changes in the form of organization and new devices for evading the spirit of the Law.

Recent events have brought them face to face with the startling conviction of the truth of that

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fact which some of us have been pointing out ever since these aimless prosecutions began.

I approach the delicate subject of the discussion of the decision of the Tobacco case by the United States Circuit Court of Appeals with hesitation not because there is any impropriety in such a discussion, for I believe it to be one of the highest and most sacred duties and prerogative of the Bar in the interest of the people. To criticise the reasoning of the Court is a very different thing from assailing or criticising the Judges because of their decisions, which is reprehensible. My hesitation is due to my respect for the judgment and learning of the Court.

The disposition made by the Court unless promptly corrected on appeal or by further legislation will go far toward accentuating these demands for criminal prosecutions. It demonstrates that the years of litigation are to be barren of practical results. Nothing could be more amazing or unsatisfactory to those who are looking to a settlement of the existing agitation than this puerile outcome.

I intend no disrespect to the Court that has just approved the so-called Plan of Disintegration, when I say that the public will be worse off under it than before. The old monopoly will be rejuvenated with the judicial approval. One can well understand the hesitation with which the Judgment was rendered, the apologies and confessions of helplessness to render adequate relief that accompanied the decision and the reluctant assent of the Attorney-General to the main features of the Plan.

The more one examines the unfortunate results that must follow, the more inexplicable seems the action of the learned Attorney-General in allowing himself to be beguiled into any sort of as-

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sent. His attitude should have been one of uncompromising hostility and opposition until every legal resource had been exhausted to enforce a result that would have vindicated the majesty of the law.

Is the learned Presiding Justice right in his apology for approving the Plan when he says in effect that the Court had no option but was bound as an alternative to directing a Receivership to approve any Plan that was satisfactory to the securityholders because no Plan could be put into effect to which they did not assent? Is it not possible that if the Court had withheld its approval from the Plan, of which it is manifest that it did not in fact approve, and had outlined the form of Plan which alone would meet its requirements with the alternative of acceptance by the securityholders or a Receivership and actual dissolution, that the securityholders would have found a way of conforming to the views of the Court instead of forcing their Plan upon the Court under the implied threat of submitting to a Receivership.

Surely the Court might well have placed that responsibility on the securityholders where it belonged, instead of feeling itself constrained to save them at the cost of denying adequate relief to the people.

Could there be a more humiliating spectacle of impotence in the administration of Justice than that which the Court was forced to confess?

And yet such results are not now and will not be hereafter entirely the fault of the Courts. They are not adapted to the solution of these questions. The Law in its present condition does not furnish them with the necessary machinery for the performance of the task that was imposed upon them.

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If the rule announced in this case is to prevail and to serve as a precedent it will always rest largely with the members of the convicted corporation to say whether and in what form the corporation shall resume its activities. If the Court is unable to compel the adoption of a form which it believes will meet the case it must be because the alternative remedy by the appointment of a Receiver is not adequate or that on account of the magnitude of the interests involved and the effects on business and securities of applying the remedy the Court is afraid to do so and therefore leaves the Government without redress.

As the result of this reasoning the bigger and more powerful the unlawful combination, the more dangerous to the public welfare, the more helpless the Courts will be to give relief. There is no trouble about administering stern and swift justice to the little fellows who are banded together to save themselves from ruin. Their little Pools and Agreements are scattered and disbanded in short order by the application of the criminal law. But when it comes to dealing with the dangerous aggregations of capital that strike at the very vitals of the Laws of Trade, and that have been solemnly adjudged to be outlaws, the plea of expediency by the vested interests against business disturbance that would result from impartially administering the Law is permitted to drown the people's cry for the justice to which the Courts admit them entitled but tell them that they are powerless to award.

Suppose the Attorney-General should to-morrow find four great corporations about equal in size together monopolizing the business of the country in a particular industry and that they have the same common stockholders owning shares in each of them in equal amounts and the same

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officers and management. Would not such a situation constitute as plain a violation of the Act as could be conceived? Yet that will be the precise situation here after this disintegration and resurrection have been accomplished? How could he prosecute such a violation with this precedent staring him in the face creating exactly that situation by solemn judicial decree? If this is to be the last word the effectiveness of the Law has been destroyed.

The country will never be content with such an answer. It is not right that it should be. It is announced from Washington that the Government will not appeal. I believe that decision will have to be reconsidered no matter how embarrassing that course may be to the Attorney General in view of the prominent part he played in formulating this abortive judgment. The power of public opinion will force him to take action no matter how great may be his reluctance to do so. The case should be taken to the Supreme Court that pronounced the Judgment of Dissolution. It should be there determined whether this molehill of result is to be the outcome of the mountains of agitation and prosecution of the past seven years or more. Let that Court say whether this is the meaning of its Judgment.

I am so thoroughly convinced that public sentiment is permanently crystallized in favor of exterminating the existing Trusts and preventing the births of others that such suggestions as I shall venture to advance will be predicated on the assumption that Congress will not consider any scheme of regulation which involves the reorganization of any corporation that cannot prove itself outside the pale of the condemnation of the Sherman Law as now construed.

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Even on this assumption there are radical differences of opinion as to the method of dealing with this subject, assuming that we all agree to go as far as the Courts are able to go in dissolving existing violations.

On the one hand the President, if I correctly interpret his expressions, favors the restoration of unrestricted competition and the prevention and punishment of every attempt to circumvent that result as a wise economic policy which he would not change if it were possible to do so. There he and Mr. Bryan meet on common ground. The President believes this can be accomplished under existing laws. He would not, if I correctly understand his attitude, approve any additional or supplemental legislation that would permit the making of Agreements restraining the free flow of competition under any conditions. Until within the past ten days he has repeatedly and emphatically expressed himself as fully satisfied that the problem can be worked out through the present Anti-Trust Act under the recent Supreme Court decisions without aid from Congress. Nor do I understand his latest suggestion as meaning that he recants on the crucial question of unrestricted competition although the unofficial press despatches of the past few days from Washington indicate that each day brings forth a new point of view until we are lost in bewilderment at the Administration's kaleidoscopic changes.

On the other hand there are those—of whom I am one—who respectfully take issue with the President at every point except with his policy of enforcing the Sherman Law. We believe and respectfully insist:

1. That whilst the Law should be rigidly enforced so as to bring about the actual disintegra-

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tion of the corporations that are existing in violation of it, insofar as that result can be accomplished, yet

2. That the Law is inadequate and the machinery of the Courts is ill-adapted to the genuine enforcement of Judgments of Dissolution. That as supplementing the Sherman Law there is needed and should be constituted a body with powers over Inter-State industrial corporations similar to the powers of the present Inter-State Commerce Commission over Railroads, to which shall be entrusted the disintegration of all corporations adjudged to be existing in violation of the Law, subject to review and control by the Courts by which the Judgments were rendered. This Commission would have the duty of supervising the execution of the Judgment and enforcing obedience to it; of seeing to it that the disintegration is not merely Pickwickian, but that it is made and kept real and effective.

3. That there can be no genuine enforcement of any Law that compels competition to the point of ruin; that if such a Law could be enforced it would embody an unsound economic principle, would lead to legalized monopoly and tend in the direction of Socialism.

It is worse than idle—it is dishonest and distinctly harmful—to attempt to correct an industrial evil or to build an industrial structure upon a manifest impossibility. Everybody knows that the Law is being every day violated in hundreds of cases in every part of the country to the knowledge of the Administration and that it always will be under existing conditions.

Railroads in every section are openly agreeing on rates. In fact, that is the main business of the various Traffic Associations, such as the Central

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Traffic Association, the Western Traffic Association, the Trans-Continental Traffic Association, the Trunk Line Association and the Southeastern Association.

When the Government recently brought suit to enjoin a general advance in rates that had been agreed upon at one of these meetings did it have any difficulty in establishing the facts by proof that would have sustained a conviction in a criminal Court? I do not criticize the failure to prosecute these men criminally. My complaint is that in this spasmodic, irresponsible enforcement of a criminal statute the Government should not be permitted to discriminate against the weak offenders whilst fearing to attack the powerful ones whose prosecution might cause business disturbance.

It was because of the enforced recognition of the patent fact that Railroads were defying the Law and that it was impossible of enforcement that President Roosevelt in two messages to Congress wisely recommended an amendment to permit Railroads to agree on rates subject to the approval of the Inter-State Commerce Commission.

The Republican Platform of 1908, if I remember rightly, made the same recommendation. Yet the President now tells us that competition has been and should be good enough for us and that he opposes any sort of regulation or interference with its free and destructive operation. I must and do assume that he is sincere in that belief, strange as it appears to some of us. But is it possible that he may be wrong?

Imagine the new constituents of the Tobacco Company, with their identical stock ownership, each equipped with a complete line of goods, plunging into this war of competition until the

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stronger has annihilated the weaker—the stronger and the weaker being, by the way, the same interest.

Remember, there can be no agreements or understandings, just honest uncompromising competition until the owners of one property have annihilated or crippled the other properties which they also own in the same proportions.

It is a little difficult to imagine and still more difficult to believe and quite impossible to realize. Unless something is done immediately by way of legislation to relieve the situation the uselessness and absurdity of these Judgments of Disintegration will be exposed to our utter humiliation.

If we could only get this question out of politics and into the realm of economics where it belongs and where there are no questions of Party policy or Party responsibility to be taken into account we would find little difficulty in dealing effectively with it. As it is the Administration is handicapped, as would be any Administration, by differing views and political exigencies within the Party.

Mr. Bryan's recent utterance on this subject is a fair illustration of the extent of the political handicap to the discussion. As a consistent Democrat, he considers himself bound to keep to the traditional faith of States' Rights, even over Inter-State affairs. It apparently makes no difference to him that the question is one that the States could not regulate if they had the power. His opposition to Federal Incorporation is squarely put upon the untenable ground of States' Rights.

The only practical result of substituting Federal License is to prevent the enactment of a sane Corporation Law that would destroy the illegitimate franchises and immunities now enjoyed by

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corporations through the disgraceful bartering between the States for the patronage of corporations with which they have no concern. Every such perversion of the doctrine of States' Rights to include matters which the States are powerless to control simply weakens the doctrine itself, obstructs just regulation and plays into the hands of the stock waterers and dishonest promoters of the worst types of corporate evils.

All of which is the outcome of the attempt to appease the champions of a contorted and impossible view of the sanctity of States' Rights.

The solution of this problem will be the work of far-sighted unselfish statesmen and economists who can rise above Party spirit and Party traditions.

My proposition involves the enforcement of the Sherman Law and that every corporation operating in violation of it should be effectively disbanded.

But there must be at the same time some protection, somewhere, against the alternative of ruinous competition unless we are prepared to substitute secret evasions for the existing open violations which the Government is now seeking to correct at such great sacrifices to the business and financial world. The sort of Federal Regulation for which I contend by way of a palliative from the rigors of the Sherman Law would require that the books and affairs of every Inter-State corporation would be subject to scrutiny and approval so that secret violations would be impossible. It would however give to the persons in an industry the right, by Agreement, to limit production and to fix prices within a prescribed maximum under certain conditions, among which I would suggest:

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(a) That the Agreement be approved by the Industrial Commission to which I have referred.

(b) That it be for a limited term not exceeding three years but subject to renewal by the parties to it who choose to renew, and subject to modification or rescission upon the order of the Commission on proof of oppressive methods or changed conditions.

(c) That any competitor desiring to become a party to the Agreement may do so and that it shall be enforcible in the Courts by and against the parties to it.

(d) That the Agreement will be approved by the Commission only when it is satisfied that the industry has become generally unprofitable and that the maximum prices fixed in the Agreement will not permit more than a reasonable profit.

(e) That any unfair or oppressive methods of attempting to force competitors to become parties to the Agreement should be prohibited and visited with severe penalties.

(f) That every corporation engaged in Inter-State Commerce be required to take out a Federal Charter or a Federal License but that no such Charter or License would be granted to any corporation that is now existing in violation of the Sherman Law.

(g) That the Commission have power to determine, subject to review by the Commerce Court, whether any applicant is entitled to such a Charter or License. If it exists in violation of the Law the Commission would have power to approve such a Plan of Reorganization as might be submitted for removing such violation before permitting it to engage in Inter-State Commerce.

(h) That if it were determined that the Regulation should be by License rather than by Charter in order to avoid opposition from the representatives of the States in Congress it would be necessary that many of the illegitimate privileges and immunities from liability incident to existing Charters should be surrendered by corporations applying for a Federal License, so that their powers and obligations would be substantially uniform.

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Among the powers which should be required to be thus surrendered would be:

1. The right of a corporation to hold shares in another Company.

The holding Company is an intolerable fraud upon the rights of minority stockholders. The prohibition of the holding Company should not, however, prevent the acquisition by one Company of the physical property and effects of another Company, subject to the approval of the Commission and provided they may be otherwise lawfully acquired. It would prohibit only the holding by one Company of a part of the shares of another Company which is so prolific of injustice.

2. The illicit and disgraceful protection which the States in their competition with one another for the organization and franchise fees and patronage of corporations have been extending in the way of immunity from stock liability or the payment of unearned dividends on account of stock issued without value and a variety of other immunities of like character.

3. The right to make future issues of securities except with the approval of the Federal Commission.

4. The right of any corporation acting under such a License to acquire any competing business or property or merge or consolidate with a competitor without the previous permission of the Commission, after investigation and hearing.

The difference between requiring a Charter and a License is not fundamental. It is largely fanciful.

If a prescribed form of State Charter be required as a condition of Federal license the same purpose will be accomplished as by Federal Incorporation. The inter-state corporations would in that way be compelled by amending their existing Charters to relinquish the illegitimate privileges that they now enjoy. We might then have a permissive Federal Incorporation law *in addition* to

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Federal license which could be made a model of what a Companies Act should be. But a Federal Corporation law alone or except as part of some such comprehensive scheme is meaningless.

The proposal to permit competitors to agree on prices within limits that will protect the public has never had a fair or patient hearing. It is persistently misrepresented as a proposition to have the Government fix the prices of commodities and as being in the nature of State Socialism, when in fact it is the only logical escape from that condition.

The President is responsible for adding to this misunderstanding.

In a speech of September 29th at Waterloo, Iowa, he discussed that question as follows:

"I have seen arguments based upon the attitude of foreign Governments toward great enterprises in which it is pointed out that they have encouraged, fondled and protected combinations of this character. That is true. There is a tendency among some foreign Governments to encourage what they call trusts, to take part themselves in the management of the trusts, to fix prices, and to depend upon Governmental control to secure their reasonable conduct; but such a system with us is absolutely impossible, and it might as well be understood. The countries to which reference is made are veering toward State Socialism.

This is hardly a just or accurate statement of the situation although I am sure it is meant to be fair as is every statement of our President. The foreign Governments that have undertaken to regulate these Pools or Kartels (there are no Trusts as we understand the term) do not take part in the management except where it happens, as in two cases in Germany that the Prussian Government owns two of the fifty-four

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plants included in the Agreement. In those cases it became a party on the same basis as the other parties. In no case is any person bound to become a party. Each plant must be operated to the extent of its allotted production in order to retain that allotment. The wages of the laborers engaged in the industry are jealously guarded but otherwise the parties are in no way handicapped in their operations by Government supervision.

It is quite the fashion for us to consider the lessons to be learned from the experience of other countries with tolerant indifference or ill-concealed contempt. "That may be good enough for them, but it is not good enough for us" is the spirit in which we are apt to treat these suggestions. With all due respect to our President he seems not above following that fashion in the manner in which he dismisses the arguments based on Continental methods of dealing with this problem. He says it is paternalism, that it is an evidence of their tendency toward Socialism and waves aside the whole broad subject of regulation as successfully practiced in France, Austria and Germany with scant consideration.

With all our insufferable provincial narrowness and egotism we generally manage in the end to begin about where they leave off on these question of Government. It takes us some time but we get there eventually, and so we shall, I hope, in course of time have an Employers' Liability Law; and a National Insurance Law such as England is now copying from Germany.

In time I have no doubt we shall get a scientific Corporation Law that will enforce publicity and protect the investor instead of the present jumble of laws that are a premium upon

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corporate laxity and dishonesty. We may even reach the point of just and civilized methods of taxation in the form of income tax and inheritance laws such as are enjoyed in those countries, that will place the burdens of taxation where they belong. We may even, when we become sufficiently wise, learn from them how to govern our Cities so that they will cease to be nests of corruption and be fit for human habitation. But we must first cease scoffing at what we do not understand and begin to realize that unparalleled as is our genius as money grubbers and in many more laudable directions we are still children in the science of Government. If our experience with this question has not convinced us of that fact we are indeed hopeless.

Under the Plan now suggested the Government would have nothing to do with the internal affairs of any lawful industry beyond the supervision incident to the granting of a Federal Charter unless the jurisdiction of the Commission is invoked by the presentation of the proposed Agreement accompanied by a Petition for its approval. There is nothing complicated about ascertaining whether a given industry needs the protection invoked. It is no more difficult to ascertain the profits in any business than is now experienced by the Inter-State Commerce Commission and the various Public Service Commissions, or than the Courts in reviewing their conclusions have found in fixing the cost and profits of steam and street railroads, gas, water, electric light and other public utilities. It is not nearly so difficult nor so inquisitorial as has been the work of framing Tariffs to cover every known industry or as the labors of the present Tariff Commission.

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Only those industries that need and appeal for protection and regulation are brought under this sort of control. Like every other new suggestion in Government the complexities of the problem are magnified by a mere superficial observation.

The plan does not involve forcing any competitor to join in the Agreement. It merely permits that to be done lawfully and with due regard to public protection which is being done and will continue to be done secretly and unlawfully in disregard of the public interest and to the point of extortion, unless some sort of necessary relief is given.

The failure to furnish this relief offers a pretext for circumventing the Law, of which many otherwise law-abiding citizens now avail themselves only because forced to do so by the intolerable situation created by an impossible Law which attempts to compel unrestricted competition.

It is not in the interest of the State that people should be forced by Statute to ruin themselves and one another and it is not in human nature that they should do so with relief in sight, even if they must violate the Law.

The ultimate result of enforced unrestricted competition is to destroy competition by eliminating the weaker competitor and in the last analysis to bring about a condition of legalized monopoly. The more small competitors can be eliminated, the more the field will be restricted to a few big ones, the easier it will be for those that remain to levy tribute upon the people by secret understandings and agreements upon prices, division of territory and the many other expedients that are now almost uniformly practiced in the industrial world in the very teeth of the Law.

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The trouble with the discussion of this subject of Regulation of Prices is that as soon as it is mentioned somebody shouts "Socialism," and that ends the discussion. We never really get to the examination of the merits of the question. I have been for some years vainly endeavoring to secure a hearing.

That bugaboo has, however, been robbed of its effectiveness by our experience with the Regulation of the Railroads and by the success of the States in dealing with its public utilities. Most of us remember the persistency with which that cry was raised during the early life of the Commerce Commission. The speaker from this platform a few weeks ago to whom I have referred urged as an argument against Federal control of industries that it had taken twenty-five years for the present Commission to become respectable. Even that was an unexpected concession from *him.* What he really meant was that it took that time to enforce upon him that respect for the laws under which the Commission is acting and to which he should have accorded respect and obedience from the beginning. Judging from his experience with our local Public Service Commission he is being taught more rapidly. We are now not without hope that they too will receive his august certificate of respectability in the very near future.

The accomplishments of the Inter-State Commerce Commission is the greatest triumph of modern times in scientific Government. No one who has watched at close range our progress in securing control over the Railroads will doubt our capacity for progressive Government in that direction. It saved us from Government ownership of the Railroads, as the like Regulation of

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Industrial Corporations will save us from Socialism.

Of all the accomplishments of President Roosevelt's Administrations the standards he set in the selection of the personnel of the Commission and the working out of that problem will be an enduring monument to his courage, foresight and constructive genius.

It seems strange that in the face of this experience Mr. Bryan should oppose an Industrial Commission with like powers on the ground that it would be subject to the danger of domination by the capitalistic interests and might be made a medium of political oppression. No one has ever charged the present Commission with any such tendency. The faith of the country in its integrity and independence is as great as that in any of our institutions.

Is there any greater paternalism in supervising Agreements of the kind I have outlined so as to protect the Public than in closing our eyes to them or winking at them where they are secretly made with all the accompanying evils of extortion practiced upon the public and oppression against those who are not parties to them? That is the real alternative.

But even if there were no such alternative; even if it were possible to destroy at one fell swoop all existing combinations in violation of the Law, to dissolve and disband the hundreds of Pools, understandings and "Gentlemen's Agreements" that are today operating throughout the country in almost every line of industry, to make sure of the impossible situation in which there are not and would not exist any of these "Gentlemen's Agreements" or understandings—and to enforce ruinous competition, I submit that it would be dis-

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astrous not to provide a refuge, and that the regulations proposed would still be in the public interest.

The public loses in the end by that sort of competition. People cannot go on indefinitely losing money in business. After the weaker competitors have been eliminated the stronger ones necessarily recoup themselves out of the consumer, and then they take whatever more the "traffic will bear."

Instability and uncertainty of prices is always the aftermath of disastrous commercial war. Over-production, which is the fore-runner of this sort of competition is invariably followed by under-production.

Let us test the operation of this proposed Law by reference to a few industries:

We mine and supply, let us say, about four-fifths of the copper production of the world. For the last few years there has been an over-production of copper of from 10% to 15%, which has reduced the price to a point at which the margin of profit is very small. In some mines it has dwindled to nothing. The great bulk of this copper is sold abroad, but owing to over-production it yields an insignificant and inadequate profit.

Meantime our mineral resources of copper are being exhausted. The deposits have been so thoroughly exploited that it is safe to say that the period of exploitation is about over. It is estimated that the average life of the copper mines of the country is less than thirty-five years. The result of this enforced over-production is to exhaust our resources and to give us nothing in return.

If there could be an agreement among the mine owners to reduce their output so as to supply all

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the world's legitimate demands, we should avoid this 10% of over-production that carries down the price of the entire product and would husband our natural resources to that extent, besides giving us some return for the wealth that is going from us.

Yet such an Agreement would be a crime under existing Law. Is this a wise policy? Would it not be better to permit the Agreement between the mine-owners subject to the approval of the Commission, conditioned upon their fixing the maximum price of copper at a sum which in the judgment of the Commission would keep the value of it stable and would allow no more than a reasonable profit? Would it not perhaps be good business for the Commission to have the power to go even further and permit the owners to fix a higher price for export than for home consumption if they saw fit to do so, thus stimulating home manufactures in the industries of which copper forms a substantial factor?

That is precisely what other Governments are doing in imposing export duties. All the coffee we consume is subject to such a duty and the same is true of a great number of other articles.

In like manner is there any advantage to the community in having the price of barley 60 cents a bushel one year, and $1.15 the next; or cotton 15 cents last year and 9 cents this year; or in having the farmers burn their corn for fuel one year because they cannot get a market for it, whilst the next year they have none to sell? Why should not the cotton growers be permitted, if they see fit, to enter into Agreements so that the surplus from a year of over-abundant crops would be carried over and made valuable in years when the crop is short?

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Such agreements if unregulated and permitted without restriction might prove oppressive and dangerous because of the undue restrictions or the extortionate prices that could be exacted; but where their legality depends upon Government supervision and approval, so that they have the effect of simply steadying the industry, there can be no real objection to them and they are capable of indefinite use and extension in the public interest.

The allowance of such Agreements would enable the farmer and the producer to reap the full benefit of their toil and investment. It would not be a good thing for the speculative middleman and it would put an end to the gambler's paradise. Then and only then will it be possible to enforce the criminal law against secret agreements in restraint of trade.

In all the discussion of this problem of restoring and maintaining free and unrestricted competition it has been assumed that the Trusts constitute the chief impediment to be overcome and that if they can be destroyed the problem is solved. The fact is that the monopolies and substantial domination of industries created in that form could be counted on the fingers of your hands.

It is through the Pools and "Gentlemen's Agreements" that competition has been and is being throttled to a far greater extent than by the consolidated corporations in the form of Trusts. For every Trust that affects competition to-day there are twenty pools, agreements or understandings. If all the Trusts were disintegrated and resolved into their original competitive parts to-morrow we would have the country honeycombed with secret Trade Agreements in those industries within

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twelve months as they in fact exist today in the bulk of the great industries that are not consolidated and are supposed to be competing.

We are therefore misdirecting and wasting our energies in concentrating them on the comparatively few Trusts that are able to affect the free flow of competition. We shall accomplish nothing helpful until we bring all Inter-State corporations under supervision where their books and dealings are subject to scrutiny so that the Government can ferret out and punish the far more insidious and dangerous secret pools and trade understandings.

The obstructions to the wise solution of this question come on the one hand from the political partisans who seek to make personal and Party capital out of demagogic appeals to the unthinking for extreme measures and on the other from the equally selfish or unwise leaders in the financial and industrial world who refuse to recognize the existence of grave evils and the necessity for repressive laws of supervision, control and punishment.

From neither of these extremes can we hope for relief. It must come from the education of the people through constant agitation and discussion in the forum of public opinion by disinterested citizens of all classes who have made a study of the subject and who are acquainted not only with the laws of political economy but with the practical conditions as well, which is quite another matter. The efforts of a certain insignificant section of the Press which considers itself alone qualified to deal with the question to belittle and discourage discussion as meddlesome and useless is petty and unpatriotic. We need and should welcome all the light obtainable.

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Recent events have in my judgment much hastened the solution by demonstrating the futility of present methods as evidenced by the breakdown in the Tobacco case with the accompanying demonstration of the total misconception by the Attorney General of the requirements of the situation. Much has been gained by having at last found that we have lost our way and are barking up the wrong tree. It is but a step further to put ourselves upon the right track and we shall soon be in sight of home.

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Is There A Money Trust?

An Address

Delivered before the FINANCE FORUM in the City of New York, December 27th, 1911.

By

Samuel Untermyer

of New York

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IS THERE A MONEY TRUST?

I was asked to address you this evening on the everlasting problem of the Trusts, but before taking up that inexhaustable topic I want to say something on the branch of it that I have selected as the title of my Address.

I think every candid observer familiar with financial conditions will agree that within the past ten years there has been an amazing concentration of the "money power" in a few hands. There are men among our leading financiers whose citizenship rises above self-interest and among them are many who see a peril to the Nation in this rapid concentration of power brought about by the control over other people's money.

If it is expected that any Congressional or other investigation will expose the existence of a "Money Trust" in the sense in which we use the word "Trust" as applied to unlawful industrial combinations, that expectation will not be realized. Of course there is no such thing. There is no definite union or aggregation of the money powers in the financial world. There certainly is none that can be said to be in violation of existing law.

If, however, we mean by this loose elastic term "Trust" as applied to the concentration of the "Money Power" that there is a close and well-defined "community of interest" and understanding among the men who dominate the financial destinies of our country and who wield fabulous power over the fortunes of others through their

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control of corporate funds belonging to other people, our investigators will find a situation confronting us far more serious than is popularly supposed to exist.

It is the greatest and most difficult of our many perplexing economic problems. This is so although and perhaps largely because nothing is being done in fastening this power upon the people that is actually illegal. It is therefore difficult to find an adequate remedy, though much may be accomplished through improved Currency and Banking Laws and in other ways that will be hereafter outlined to mitigate the constantly increasing danger.

What I shall have to say involves no reproaches or charges of wrongdoing against the men who have achieved this power and no serious criticism against the methods they have employed to secure their ends. They have exercised the power with exceptional justice and self-restraint except where the interests under their protection are threatened. My criticism is leveled against the business and financial system that has made such results possible and which if not corrected is likely to lead to a moneyed oligarchy more despotic and more dangerous to industrial freedom than anything civilization has ever known.

A somewhat extended explanation of current methods of financing the money requirements of our great Railway and Industrial Corporations and of placing corporate securities with the investing public is essential to an understanding of the origin of this vast power and of the means by which it retains and increases its hold and becomes more and more concentrated.

We will say that a great Railroad System or Industrial Corporation requires money through

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an issue of bonds or stock or that its debt must be readjusted or its property reorganized. This may be done to best advantage through a Banking House. If the requirements are large it can only be done in that way and only through one of the three or four great institutions in New York City that are recognized as International agencies for the issue and distribution of securities. The clientele of this Banking House consists largely of financial institutions that are underwriters or purchasers of securities and of the smaller bankers who have their own clientele of investors.

These bankers and financial institutions are invited by the so-called "Issuing House" to participate in what is known as the underwriting of the securities that are to be sold. By this is meant that each participant agrees with the Issuing House, for a stated commission, to take and pay for the amount of securities for which he has subscribed, if the Issuing House fails to sell them within the time fixed by the Agreement.

The Issuing House having thus secured itself against loss by means of this guaranty or underwriting, thereupon proceeds to endeavor to dispose of the securities. To that end it utilizes its connections with the financial institutions and Life Insurance Companies and other large corporate investors here and abroad with which it must have influence in order to dominate this class of business.

In practical operation the Issuing House frequently knows where it will place the securities before it agrees to finance them or to have them underwritten. It sometimes happens however that the underwriters are obliged to take and pay for the securities which the Issuing House was unable to sell privately and for which it failed

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to "make a market" through sales on the Stock Exchange. ("Making a market" for securities by the way, is the euphonius phrase for describing the process of selling them to the public at a profit. It has been known in the past to be accompanied by "wash" sales, newspaper "puffs" and other technical "details." That was the work of specialists like Keene and Gates, who were entrusted with this delicate task of "making the market.")

The remarkable feature of this system is that in practice the Issuing House does not solicit the subscriptions or ask the underwriters whether they want to underwrite or for what amount, but on the contrary it fills out without notice or request a printed form advising each underwriting banker or institution that it has allotted to him or it a given amount of underwriting. It is considered by the underwriters a privilege to get the opportunity. Those to whom it is offered are taken from a list of Banking friends and adherents of the Issuing House. If the issue is sufficiently large the list generally includes all the financial interests that are adherents of or are not unfriendly to and who have not offended the Issuing House by their officious independence or by supporting enterprises that were not approved by the Issuing House.

It often happens that the Banker to whom the offer is made does not want the business or would prefer to decline the underwriting or to take less than offered but he rarely does this, as it might mean his elimination from the list and the loss of future opportunities in the way of underwriting commissions.

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These commissions that are thus distributed by the Issuing House to the Bankers constitute a substantial item of the incomes of banking firms and institutions and are generally earned without involving any investment. This patronage and the lively sense of favors to come make it reasonably sure that the small concerns will do nothing to interfere with the plans of the big ones.

In like manner the few big fish in the puddle have an understanding by which the business that belongs to each of them is "labelled," so to speak, and the others take precious good care to leave these customers to those to whom they have been allotted.

This arrangement is lived up to regardless of the jealousies or enemies of the "High Contracting Parties." It is the unwritten law of the "community of interest" code. It is seldom broken. Whenever that happens the entire system gets out of joint until scores are settled and interests readjusted.

If a property for which one of these great Banking Houses acts as Banker—generally with a representation on the Board of Directors or a dominating voice in the management—wants to make an issue of securities, there is rarely a suggestion of competition. The terms are generally made between the banker and the officers of the Company who are often the mere nominees of the banker. It would be regarded as subversive of all precedent and discipline in the financial world for another banker to compete for such business. In point of fact the chance is rarely presented. If it were he would not dare unless he were very

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powerful and wanted to invite bitter controversy and enmity.

The great Issuing Houses on the other hand leave or direct the minor security issues to their friends among the less prominent bankers.

These underwriting lists to which I have referred include among the adherents of the great Issuing Houses the leading financial institutions, bankers and large investors in every City in the United States and in the principal Cities of Europe. The underwriters act as the distributors of the securities among financial institutions and private investors, but a large part of the securities are placed by the Issuing House with the Banks and Trust Companies in which it has a dominating voice even though no member of its firm may be upon the Board.

Such are their power and patronage that it is not necessary for any of the members of the firm to be officers or even Directors in the financial institutions that they control. The clumsy and expensive antiquated methods of by-gone days of depending on control through majority stock ownership and the presence of the owners on the Board have been largely discarded. The up-to-date financier selects his President and the officers of the institution that he controls. They take the legal responsibilities and conduct the current business in return for big salaries whilst he directs the policy of the corporation and the disposition of its funds. It is upon the patronage of the corporations that are under his wing and which he dispenses that the institution owes its vast deposits which are the chief source of its profits and influence.

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The use and disposition of the bulk of the enormous resources of our great National Banks and Trust Companies in New York and in many other Cities are directed by the financial powers in this way. There are a few notable exceptions. They are notable because they are exceptions. How long they will be permitted to remain so it is difficult to say. At the present rate of absorption it will not take long to bring them into the fold.

There has been greater concentration of the money power in the past five or ten years through the control acquired by these few men over corporate funds that are deposited under their direction in our financial institutions than in the entire preceding fifty years. The process of absorption is likely to continue until a few groups absolutely dominate the entire financial situation of the country unless some way can be found to check their march of progress. The way is not easy to find for, as before stated, we are not dealing with acts or methods or with a situation that conflicts with any existing law.

The organization of the Trusts and the absorption of the small Railroads by the big systems and the accompanying increasing influence of these great Banking Houses in our Railway Systems and Industrial Corporations are largely responsible for the appalling concentration of this power, although our archaic money system must bear its share of the blame for a condition that is growing steadily worse and that now seriously threatens our industrial liberty.

It was through the organization of the Trusts that these bankers secured their recently acquired power over our industries, which had previously

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been controlled by their individual owners. Their money requirements were supplied either in the localities in which they were situated or through the sale of their commercial paper by note brokers and otherwise. Their funds were deposited largely in local Banks although the large concerns occasionally carried balances in the money centres. They had no dealings with the great Banking Houses and no occasion for them. Individually they were generally too small to be of interest to the Bankers. With consolidation and the organization of the Trusts the Banking Houses assumed the direction of the affairs of the new Companies. They formed the combination, put their hall-mark upon its securities, marketed them on the Exchanges of the world, and having thus become responsible for the New Company, they naturally took an active part in its affairs and assumed control of its finances wherever they were of sufficient importance to attract them.

In that way New York City became the financial headquarters of the Trusts, and the Bankers took charge of the distribution of the patronage involved in the deposits of the money of the Trust among the Banks and Trust Companies.

It is said that the average daily bank balance of the United States Steel Company is about $75,000,000; that of the Tobacco Trust is said to be $20,000,000 or more, whilst the average daily balances of deposits of the many other Trusts whose financial headquarters have been transferred to New York, must amount conservatively stated to many hundreds of millions of dollars. When to this is added the influence of these bankers in designating or directing the depositaries of the funds of the principal Railroads of the country into the institutions controlled by the respective

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Issuing Houses we begin to get some faint conception of the sources of their power.

The strength of a financial institution is of course measured by the character and amount of its deposits rather than by its capital and surplus. It is but natural that the Banking House that directs and dispenses these deposits should practically be able to control the disposition of them by the Banks and Trust Companies in which they place these moneys, since the growth and prosperity of the institution are measured so largely by this element.

Thus it has come to pass that less than a dozen men in the City of New York are for all practical purposes in control of the direction of at least 75% of the deposits of the leading Trust Companies and National Banks in the City of New York and of allied institutions in various parts of the country.

This is true notwithstanding the fact that these men do not own a majority of the share capital of these institutions, although in the past few years they have become large owners in some of them. Their control is not however dependent upon their stock ownership. It rests upon the power they get from the use of other people's money —the money of millions of shareholders in the railroad and industrial corporations over whose destinies they preside in point of fact though they may not be themselves officers or directors.

By those unfamiliar with the situation it will be asked how it is possible for these men to wield such autocratic power over corporations whose shares they do not control and which have Boards of Directors composed of representative men in the community.

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The answers are—

(1) That the current business of lending money is in the hands of the officers and that they are with a very few notable exceptions nominees of the particular Banking House with which the institution is known to be affiliated; and

(2) The Directors, and particularly the Executive Committee, which is usually the only part of the institution that knows the details of the business, is made up largely of bankers and men who (however wealthy) are themselves either large borrowers from kindred institutions or are the recipients of patronage from the dominating Banking House in the form of underwriting or subscriptions, and are frequently both.

I do not mean to imply that the officers and Directors of these institutions are violating their duty in thus placing the funds at the disposal of the Issuing House. Experience up to this time has shown on the contrary that this method of doing business whilst it may prove disastrous to the country, has been very profitable for the institutions concerned and that they are growing daily more prosperous under this system.

It is however none the less true that this power is built, not upon the use of their money nor of the individual money of their friends and clients, but upon the money that belongs to the Stockholders of the corporations whose finances they direct and from which they derive this enormous patronage.

No fault could be found with the most unrestricted use by these men of their own money within lawful limits. It is quite as important to our prosperity that we permit and encourage the free play of enterprise in the men of wealth in

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all departments of human endeavor, as that we seek to restrain their activities in the use of the moneys entrusted to them by the people in the accomplishment of their vaulting ambition to rule the finances of the country. So long as they use only their own money we have nothing to fear from their mad race for power. It is when they tap the resources of the merchants in our Banks and the savings of the people in our Life Insurance Companies and industrial and railroad corporations that we must stay their hand no matter how well-meaning may be their purpose.

From what has been said it follows of course that these same institutions thus controlled besides lending their moneys as so directed are naturally inclined to buy the securities that are issued or dealt in by the Banking House—thus adding to the ability of the latter to handle and digest vast amounts of securities which they would not otherwise be able to do.

Nor must we in dealing with this subject lose sight of the endless ramifications of power that lead from this network of conditions. The financial institutions throughout the country still look mainly to New York for their investments. Through these connections the great New York Banks and Trust Companies whose operations I have been describing are able to act in a sense as agents for the Banking House with which they are identified in distributing the securities of the latter among the smaller institutions and through them among the investors throughout this country and abroad.

With this situation now in mind it is easy to understand that the stock market and commodity markets of the country are at the mercy of this small body of men who thus control the deposits

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of these Banks and Trust Companies. They can at will put money rates up and down, make and unmake "bull" markets and "bear" markets, create and compose panics, prevent new enterprises and destroy existing ones by reducing or curtailing credits, and in a thousand ways rule the fortunes and destinies of the business men and smaller financial institutions of the country.

To what extent they have as yet used their comparatively new-found power we need not now inquire. They have been irresponsibly charged with having precipitated a recent panic but there was no evidence to sustain the charge. If it were true, the victim would probably be the last one to utter a complaint and perhaps he would not know in what way his ruin had been brought about. If he did know and ever expected to "get on his feet" again he would be the last one to tell.

I do not intend to imply that any of these charges are true. Personally I do not believe they are. We are bound honestly to assume that these men notwithstanding their inordinate ambitions and all the temptations that surround them realize the stupendous public responsibility that rests upon them.

But assuming all this to be true and that they have gone unscathed through the crucible of temptations under which most men would fall, what assurances have we for the future, when they have passed away—what right have we to permit such irresponsible power to continue unchecked and unregulated?

No matter what may have been their genius or how well they may deserve of us, no man or body of men in private life and without defined obligations to the public or legal restraints should be

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permitted to enjoy such an orgy of power if a way can be found to avert it.

I am sure these gentlemen will be the first to agree with that proposition, for I can find nothing in the manner in which this perilous situation has been created to justify the slightest imputation upon their methods in bringing about the result.

And yet how easy it is to see now what a potent force is wielded by the Banking House so situated to prevent new competition against any Trust that is under its protecting care! It will certainly not invite competition against the industry for which it has assumed responsibility with the public and may fairly be expected to fight every time its prestige is threatened. It would be a brave man or body of men who could withstand that sort of an attack. It would require almost equal courage for an existing competitor to refuse to follow the lead of the corporation that is under that sort of protection in regulating prices and restricting production.

No writings, agreements or understandings are needed. The competitor knows that the power is there. If he requires credits he knows too, that there are a thousand good reasons for which they may be curtailed. The power to direct to whom money may be loaned includes of course the equally important function of directing to whom it shall not be loaned. If he is dependent—as he must be—on railway transportation for his raw material and for his finished product, it is not necessary to tell him the difference between what it means to his business to have prompt facilities or delayed transportation, even though he be under the protection of the Interstate Commerce Commission.

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To those who are contemplating new competition the path can be made so thorny and impossible by the use of this financial power that no body of men would care to tread it. If they are engaged in other industries reprisals are easy and many. They may want to make bond issues or sell stock or get large credits from the Banks—all of which are out of the question if it is known that they are unfriendly to the "powers that be."

With the protection of the Issuing House taken from the Trusts the argument is not without force that they will invite competition if they levy excessive tribute upon the people but in omitting this proviso the champions of the Trust leave out the controlling factor.

Here again I do not intend to assert that any such methods have yet been used. It may not be necessary to use them. The knowledge that the power is there is sufficient without an overt act.

Congress is grappling with the question of endeavoring to particularize prohibited acts of oppression on the part of the Trusts as grounds for criminal prosecution. The attempt seems to me impracticable. It would not in any event be necessary to resort to such acts where the Trust is the creature of any one of these great financial powers and is under its protection. That fact alone would ensure it against competition.

To the extent to which the further formation of Trusts may be allowed or tolerated the danger will be accentuated for it will result in adding to the concentration of the control of money in these few hands. They are the people who in the ordinary course of things would be selected to organize and finance a great combination. They are best fitted to distribute the securities and to make

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and maintain markets for them. Upon them would rest the responsibility for the success of these ventures and they would naturally control them and their patronage.

The same is true though to a lesser extent of Railway consolidations. The direction of their funds drifts into the hands of their financial sponsors and from that control radiates the power over the funds and over the institutions that receive and use those funds in the manner described.

A scientific money system with a Reserve National Bank as its central idea would tend to relieve the danger of the situation provided the Bank is operated by the Government as a part of the Treasury system and is not allowed to fall under the domination of the great financial interests whose operations we have been discussing. There are however so many powerful selfish interests attempting to influence this question of Monetary Reform that we are not likely to obtain what we need without a fierce struggle. That will take a long time.

It will mean that our representatives in Congress must undergo a liberal education on a most difficult and technical subject before they will be able to avoid the pitfalls that have been set for them.

Meantime something may be accomplished by placing the Clearing House Associations under the direction of the Comptroller of the Currency and of the Federal Courts so far as concerns their jurisdiction over National Banks and under that of the Superintendent of Banks and of the State Courts so far as these Associations deal with State Banks and Trust Companies.

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It is amazing that we should have continued all these years to permit this important public function to be performed by a self-constituted private body free from judicial and legislative control.

It is not necessary to charge that these gentlemen have not properly performed their duties, nor to discuss that phase of the subject. It is sufficient to say that it ought not rest with any body of men to say whether or when or under what circumstances a Bank should have the necessary privileges of the Clearing House given to or taken from it. It is not proper to vest in any body of men—however responsible, respectable and public-spirited—the uncontrolled power of determining when a public institution shall be compelled to close its doors. That should be a Governmental function where the institution has been permitted by the Government to receive the deposits of the people.

The despotic control exercised by the Clearing House Association is archaic and dangerous. The same money power that controls the Banks who dominate its management can control the Association.

We are cursed with so much useless and vicious legislation that every time the subject is broached of passing a new law, however necessary it may be, our people instinctively turn away with misgiving, if not in dread. We do not stop to consider how little legislative control we have over the most important parts of our financial system, and especially over those that most require supervision, such as the Stock Exchange and the Clearing House Association. They are performing public functions and it is high time that they were recognized and treated as subject to legis-

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lative and judicial control. Thus far they have existed and they are now existing above and beyond the law.

Surely every one will admit that it should not rest with a body of Bank officers to summarily put one of their competitors out of business without redress or right of review by any public official.

There are some things that we can do by legislation to ameliorate existing conditions and to prevent them from growing worse. Among them I suggest the following:

1. Limit the class of securities other than commercial paper that Banks may purchase.

2. Prohibit them from becoming Syndicate underwriters as Life Insurance Companies were disqualified from such participations by the Act of 1906.

3. Limit the proportion of capital and surplus that may be loaned Bankers and Brokers on Stock Exchange securities, so that ample funds will always be available for commercial credits instead of being at times diverted to speculative Wall Street purposes to the injury of legitimate business.

4. Prohibit every Bank from owning or loaning upon the stock of any other Bank or of any Trust Company. It was never intended that a Bank should be a "holding" company.

5. Further restrict the investments of our great Life Insurance Companies by State legislation so as to limit them in the purchase of bonds to those that have been continuously paying interest for at least five successive years. There are over one billion dollars in the three great New York

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Companies. No policyholder cares to have his Company speculate with his savings in new and untried bond issues, especially with the disastrous results of which we know and which may recur at any time. The more of their money is required to be invested in first mortgage on unencumbered improved real estate and the further they are kept away from Wall Street the better for the policyholders.

6. Prohibit any Bank or Trust Company from acting as an Issuing House for the sale of securities to the public. That is not its proper province. A disastrous enterprise may so destroy the credit of an institution as to force its liquidation, to the injury of depositors and the inconvenience of business.

7. By all means prevent the enactment of the provision of the pending Aldrich Bill, which would permit the establishment of branch Banks.

8. No person or firm should be permitted directly or through "dummies" to be a Director of more than one Bank or Trust Company in the same city where the institutions would be naturally competitive but for the community of interest thus created.

9. All corporations having securities for sale should be required in the interest of the shareholders to sell them in competition in the same way in which the Federal and State Governments and the Municipalities are now required by law to sell their securities.

10. Place the Clearing House Association under the direction of the Comptroller of the Currency and the Secretary of the Treasury with respect

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to the National Banks and under that of the State Banking Department with respect to State institutions.

11. Place the issue of securities of Interstate Railway Corporations under the control of the Interstate Commerce Commission and those of industrial corporations under that of an Industrial Commission, with ample requirements for full publicity as to all security issues before they are authorized. This would involve a full disclosure of all bankers' commissions, similar to the requirements of the English "Companies' Acts." It would also enable the Commission to determine whether the proposed arrangement had been reached as a result of competition. In that way much could be accomplished toward securing independence in corporate financing.

The admirable and comprehensive Report of the Railroad Securities Commission advising against Federal control of security issues of Interstate Railroad corporations at this time seems to me unnecessarily timid and is unfortified by the logic that characterizes other features of that instructive document. The chief arguments, that it might precipitate conflicts with the State Commissions and might be construed as vouching for the value of the securities, answer themselves without comment and are answered in other parts of the Report.

It is not claimed that these remedies would obliterate the existing dangers any more than it is believed that we can ever get rid of the Trusts. All we can now do is to regulate them and to keep a watchful eye upon them to see that they do not further encroach upon our business freedom.

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For the reasons above stated, the proposed Congressional investigation of the situation, that has been miscalled the "Money Trust," is to my mind important as the basis of pointing to legislation affecting the Trusts and our Monetary System. Congress should know the extent to which the National Banks and the Trust Companies are under the control of these banking firms, the reasons why competition between the great and small Bankers is practically non-existent and the financial system that has brought us to our present plight, with a view of proposing such corrective and preventive measures as the situation may demand.

I have dealt so much more fully than I had expected with the title of my Address that little time is left for the discussion of the general subject of the Trust Problem. Its importance and complexities require extended and independent treatment. I shall accordingly confine myself this evening to a few observations upon the very able Address that was delivered from this platform two weeks ago by Mr. Victor Morawetz, who is a recognized authority on all questions relating to corporations, and for whose opinions I need hardly say I share the high regard entertained by our entire profession.

I differ however from Mr. Morawetz in his main contentions and particularly from his construction of the meaning and effect of the recent decisions of the United States Supreme Court in the Oil and Tobacco cases and from his implied prognostications as to the outcome of the pending suit against the Steel Company.

The arguments which he has consistently been advancing along this line for some time past seem

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to me to put too narrow a construction upon the First Section of the Anti-Trust Act.

If I correctly understand his able presentation and its subtle reasoning he would confine the operation of the First Section of the Law to the cases in which the acts of the parties operate to restrain the trade of others and would not consider that Section as applying to the acts of the parties to the Agreement. The only limitation which under his construction is placed on the freedom of competitors in an industry to combine is that imposed by the Second Section of the Act, which prevents them from creating or attempting to create a monopoly.

No combination between competitors however effective in restricting competition among themselves would, according to this construction, come within the prohibition of the Act unless it had the effect of absolutely restraining the trade of others not engaged in that industry or of creating a monopoly.

In support of this conclusion Mr. Morawetz points out that the Law does not attempt in words to prevent the *restriction of competition.* Its only purpose is to prohibit *restraints of trade* as distinguished from contracts that merely restrict or diminish competition.

I agree that every restriction of competition does not amount to a restraint of trade or commerce between the States or with foreign countries. Every restriction of competition is not unlawful.

It seems to me however that any restriction of competition that affects the particular industry and which is of such character and extent as to operate as a *direct restraint of trade,* whether ac-

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complished by the act of the parties to the Agreement or of others, is within the meaning and condemnation of the First Section of the Act, even though such restraint does not amount to a monopoly or an attempt to create a monopoly.

There are many restrictions of competition created by the parties to an Agreement or by consolidation that whilst not constituting a monooly or an attempt to monopolize are so comprehensive and far-reaching that they materially and directly affect and restrain the trade of every person dealing with the industry. In fact most combinations have that effect.

If for instance fifty competitors should combine into two independent competing Companies, each controlling one-half of the business of the industry, I should insist that this would be such a restriction of competition as would constitute a direct *restraint* of trade within the prohibition of the Act. The public, instead of enjoying the benefit of competition among fifty dealers, would be limited to two.

In answer to the inquiry as to where we would place the line of demarkation between lawful and unlawful combinations according to this view of the Law my answer is that it would not be difficult in the practical administration of the Act to determine to what extent restriction of competition constitutes mere incidental and immaterial restraint and when it amounts to a *direct* restraint of trade. It seems a more workable and wholesome construction than to say that no restriction of competition constitutes a *direct* restraint of the trade of others unless it constitutes a monopoly.

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It is difficult to see how under Mr. Morawetz's reading of the decisions the Supreme Court could have reached the conclusion that the Standard Oil Company was an unlawful combination in all its parts. There were certainly some branches of the business as to which neither it nor the Tobacco Company could be said to be monopolies. If he has correctly read these decisions he may be right in his conclusion that the Steel Company is a lawful organization but to me both the form and substance of the organization are clearly contrary to the Law as interpreted by the Court. The Act does not say that a *complete* restraint of trade amounting to a virtual monopoly must be accomplished in order to bring the offending corporation within its prohibition. Any arrangement or agreement that *tends* to restrain trade is prohibited.

A partial restraint is sufficient so long as it is not merely incidental. It must be a direct restraint.

It is easy to understand why our ablest corporation lawyers believed the organization of the Steel Company to be legal at the time it was accomplished, in the light of the Knight case and the state of the authorities at that time. To some of us it is not however so easy to understand why they should adhere to that opinion in the face of the adjudications of the past ten years, every one of which seems to me to be opposed to that view. Nor should we lose sight of the fact that at the time of the organization of the Steel Company it was made up of constitutent Companies, some of which were in themselves combinations that were virtually monopolies within the defini-

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tion of that term as laid down by the Supreme Court.

Mr. Morawetz doubts the Constitutionality of a National Incorporation Law and of the requirement of a Federal License and he opposes the suggestion that Congress vest in a Commission the power to regulate prices on the two grounds that it would also be unconstitutional and would be productive of greater evils than any resulting from Trusts and Monopolies.

There has been no suggestion so far as I know to have Congress delegate to a Commission the power to fix prices. The proposal has been persistently misunderstood or misrepresented although it has been for the past year under discussion and has been repeatedly set forth in precise terms.

It assumes the power of Congress at its option to enact a National Incorporation or License Law to which corporations engaged in Interstate trade may be compelled to conform. It involves also the appointment of a Commission with power over Interstate Industrial Corporations similar to the powers of the Interstate Commerce Commission over Railroads and with the additional power to take charge of the disintegration of corporations that have been adjudged unlawful and to determine whether corporations seeking a Federal Charter or License are organized and operating in conformity with law.

Wherever the persons engaged in an industry are able to demonstrate to the satisfaction of this Commission that competition has reached a ruinous stage, such of them as see fit to do so may enter into an Agreement fixing prices and limiting production. This Agreement is subject to the

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approval of the Commission. If it finds that the terms are reasonable, that the condition of the industry warrants such an arrangement, that the prices proposed to be charged admit only of a reasonable profit and that the intended restriction of output is sufficient to meet all legitimate demands the Commission may permit the making of the Agreement for such term and under such circumstances as it shall approve. Every existing and every future competitor may become a party to the Agreement by application to the Commission.

The purpose of the arrangement is to enable competitors who are engaged in a ruinous and compulsory warfare of competition to rescue themselves by an open arrangement under legal restrictions and supervision, instead of forcing them to the alternative of either driving one another out of business or of making some secret arrangement in violation of law that permits of no supervision or protection to the public. Its object is to permit that to be done openly which would be done in any event, and to avoid making criminals of our business men. It is intended to allow the weak lawfully to save themselves from annihilation by the strong.

If such an arrangement can be said to be the vesting in Congress of the power to fix prices, I respectfully insist that there can be no Constitutional question as to the right to regulate Interstate Commerce to that extent.

If such a contract as that which Mr. Morawetz recommends on page 23 of his Address, subject to the approval of a Federal Commission, is not to provide for pooling of profits, fixing of prices, distribution of territory, restriction of output or

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for some like arrangement, it is difficult to understand to what the recommendation refers.

This general subject has reached the stage of discussion at which few will differ from the statement that a permissive Federal Incorporation Law can serve no useful purpose. There is no objection, however, to such a law in connection with a compulsory Federal License.

Whilst the statement has frequently been made that a compulsory National Incorporation or License Law as applied to corporations engaged in Interstate trade would or might be unconstitutional, our attention has not been called to any pursuasive argument in support of that view.

The Constitution reserves to Congress the power

> "To regulate commerce between the States and with foreign Nations."

The right of the States to issue Charters is of course subject to that reserved power. If it is necessary in order to regulate Interstate commerce that corporations engaged in it shall be required to be chartered under Federal Law that requirement necessarily overrides the State Charter so far as concerns Interstate corporations.

The distinction in principle between the right of Congress to delegate power to approve Agreements of the character described and the delegation of powers to the Interstate Commerce Commission over Railroads that has been sustained by the Courts is not apparent upon the face of the argument as presented.

The recent utterances in favor of the Federal Regulation of Interstate Industrial Corporations

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by public men and from high authorities within the ranks of the great corporations as contrasted with the criticism and denunciation with which these suggestions were met from the same quarters only a few years ago, are most encouraging. It is manifest from this rapidly changing attitude that the early champions of Federal Regulation will see their expectations realized, and far sooner than they had hoped or anticipated.

It cannot come too soon for the general welfare. It will mark the passing of an era of unexampled lawlessness, to be succeeded by radical and much needed reforms in corporate management and by a revived and wholesome respect for and observance of the law.

It is only a few years ago, and yet it seems like a message from a past age of semi-barbarism, since the New York Stock Exchange had on its regular list, and as its most active securities, such stocks as Amalgamated Copper, American Sugar Refining Company and others in its so-called "Unlisted" Department, that made no statements of their affairs, gave their shareholders no information as to their property and were operated as blind gambling pools for the benefit of the "insiders."

For a time all agitation against that scandalous condition by which the public was fairly swindled out of hundreds of millions of dollars by false rumors, stock jobbing and similar methods was denounced by eminent and conservative Bankers as hurtful to business and the work of demagogues and by other epithets similar to those by which every attempted reformer of financial methods has been characterized.

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Would such practices be tolerated to-day? The answer to that question demonstrates how rapidly and satisfactorily our financial system is coming into harmony with the spirit of the times.

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A LEGISLATIVE PROGRAM TO RESTORE BUSINESS FREEDOM AND CONFIDENCE

An Address

Delivered before the ILLINOIS MANUFACTURERS' ASSOCIATION at the Hotel La Salle, Chicago, January 5th, 1914.

By

Samuel Untermyer

of New York

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A LEGISLATIVE PROGRAM TO RESTORE BUSINESS FREEDOM AND CONFIDENCE.

MR. PRESIDENT AND GENTLEMEN:

Permit me to congratulate you upon the enlightened patriotism of your action of a few days ago as embodied in the Resolution passed by your distinguished and influential body and forwarded to the Interstate Commerce Commission approving and urging the granting to the railroads of the increase in rates for which they are asking. This reversal of your previous action on the same subject is evidence of rare courage and far-sightedness on your part. It was largely due to your effective protest that the previous application was denied. It would not be quite accurate to characterize your present attitude as entirely unselfish since you must have reached the conclusion, which is shared today by most of us who have studied the subject and want to be just, that unless rates are increased the railroads will have no sufficient basis of earnings to attract the capital that they need to maintain effective service and to meet the increasing demands for transportation facilities.

You have doubtless become convinced, as have many of us, that the railroads are not a thing apart. Our industrial prosperity is so interwoven with theirs that the former cannot exist without the latter. It is however none the less of a tribute to your breadth of vision that you, who will have to bear this burden, were able to cast aside the smaller immediate selfish considerations and to look beyond to the eventual outcome. That was no mean accomplishment in the face of the intensely competitive conditions under which you are operating.

It is true that great wrongs have been perpetrated upon the community by the railroad managements of the past with rare exceptions; that in their present staggering load of debt and capitalization, dishonesty, reckless waste and misguided ambition are largely represented and

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that if the modern standards of public accountability to which it is proposed to subject them hereafter were applied, their present rates would yield a munificent return on the capital invested.

But that is all in the past. We must face the conditions as we find them instead of trying to evade our problem by harping back upon the wrongs and blunders that have been perpetrated. The experience will be well worth all that it has cost us if we know how to profit by it. The country owes you a debt of gratitude for the courage with which you have met this new responsibility. It is upon this big outlook on the part of our business men that we may confidently rely for our industrial growth. Your action again furnishes gratifying evidence that our confidence is amply justified.

Now that Congress is about to deal with the great problems of regulating corporations and suppressing unlawful combinations it becomes important that we approach this difficult subject with an open mind and that all doubts as to the purely constructive purpose of the work shall be set at rest. The reactionary advocates of a "let-alone" policy fail to realize that we cannot build an enduring structure upon rotten foundations and that the clearing of the debris is as important a part of the work of construction as is the rearing of the new structure.

It is characteristic of the blindness and timidity of predatory capital that the impending legislation, like all innovations and restrictions, however wholesome, should be regarded with unreasoning dread and foreboding, as though our National legislators could have any other wish or purpose than to safeguard legitimate enterprise.

If our leaders in the world of affairs, profiting by your inspiring example, will cooperate in the work of readjustment and reform, with their minds purged of the prejudices imbedded by the years of imperfect laws and oppressive practices in the interest of special privilege under which business has been permitted, the results will be accomplished without friction and in their eventual interest. If they will meet but half way the men who are impersonally and unselfishly seeking only the public welfare, our business and finance will be speedily put upon the firm ground of new moral standards

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and public accountability that will square with the spirit of the times and they will soon wonder why they ever tolerated the practices against which the country has risen in angry protest.

If we are to secure the best results the alarmists who profess to see in the impending legislation a cause for unsettling legitimate business must be sent to the rear. Our recent experience with the Currency Bill should once more have reminded us that we must not permit ourselves to be moved by the cries that come from a boisterous little corner of our country, where the special interests are concentrated. They always display these false distress signals at every attempted economic reform on the theory that so far as they are concerned it is always a good thing to "let well enough alone" and that every change involves an interference with their privileges. Their voices have been more potent with us than has been accorded the same class in any other part of the civilized world because our legislators are less responsive to the public will and far more timid than the popular representatives of other nations in curbing the excesses and unjust prerogatives of capital.

Ours is the most reactionary of all civilized countries in the pending peaceful revolution for the readjustment of the division between Capital and Labor. England and Germany are half a century in advance of us in all that pertains to the proper protection of labor and the scientific distribution of the burdens of taxation. Their systems of insurance against accident, old age, sickness and unemployment and the new English land tax laws are the models of constructive legislation that we shall follow when we have reached their stage in the onward march toward industrial and economic liberty. This small but powerful privileged class of ours postponed the levying of an income tax for almost a quarter of a century, although it had long been recognized the world over to be the most just form of taxation. With their vast power and machinery to manufacture and mislead public opinion through their press bureaus and subsidized organs they are enabled to make an amount of noise and to stir up a degree of uncertainty and alarm over every attempt at progressive legislation that are grossly disproportioned to their real influence and that are dangerously misleading.

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We are afflicted with lamentably short memories for the pranks that are played upon us and are being continually exploited on that account. But even we can remember that only a few weeks ago Congress was solemnly warned by National and State Bankers Associations in their innumerable Conventions assembled, and speaking in suspicious unison as though inspired from a common fountain head, that if it should enact a Currency Bill based on the principle of a Government currency or under exclusive Government control or if we divided the system into eight or more regional banks the country would be plunged into financial chaos and ruin.

Leaders in the financial world with a supposed sense of responsibility vouched for statements and predictions that they must blush to find recorded. Truly we have short and charitable memories!

If these leaders and the influential Metropolitan newspapers that voice their views and that are now lauding the Currency legislation they were so busy in denouncing had dealt patriotically and impartially with the subject the country would have been spared an anxious period of business uncertainty.

This and other experiences, such as the denunciation of the Income Tax Law during the early years of its agitation as a socialistic measure intended to confiscate property and the recent extravagant claims and absurd prophecies made during the discussion of the Tariff Bill, should warn us not to take too much to heart what may be said during the heat of argument where great selfish interests are arrayed against proposed legislation.

And yet we are in danger of again finding ourselves listening to their advice as to the best way of curbing their unlawful activities as though they were the most disinterested of onlookers. It is this tendency that is largely responsible for so much of the inefficient patchwork of compromise legislation that is the almost invariable result of the hard-fought battles for industrial reform between the people and "the interests."

The underlying principles that should guide us in dealing with this question of corporate regulation are surprisingly simple but the subject is so technical and full of perplexity

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in the working out of the details that the field of debate and opportunities to mislead are boundless.

It goes without saying that we should embark on no policy and should include in our program no measure that is not purely constructive and that does not look solely to the future. The objects should be to cure existing defects, eliminate abuses and make the laws under which business is to be conducted so plain that "he who runs may read." Nothing is to be gained by reprisals in the way of criminal prosecutions for past violations that were committed before the Courts had construed the law as we now understand it and that have been remedied and definitely abandoned. Continued violations should be severely punished but there should be complete amnesty and a clean slate so far as concerns criminal prosecution as to those of the past.

The proposition on which these prosecutions are threatened, that crime can ever be perpetrated innocently or unconsciously or without criminal intent is so revolting to the sense of justice that it was not surprising to find that juries would not convict for acts done when the law was uncertain except where actual wrong and oppression were established.

The history of the Cash Register case furnishes a striking illustration of the complete change in judicial construction and popular understanding of the law since the U. S. Supreme Court created the confusion and put back the enforcement of the Sherman Law for more than a decade by its unfortunate decision in the Knight case.

The Government had brought criminal proceedings in the U. S. Court at Boston against the Cash Register Company and its officers based on the complaint of three competitors of an attempt to destroy them by oppressive and unfair business methods. Whilst the indictment was pending the Cash Register Trust actually bought out its competitors, thus securing a complete monopoly. This apparently met with the full approval of the Cleveland Administration, for strange as it may now seem the then Attorney-General moved in open Court and secured the dismissal of the indictment on the ground that the violation of law had been removed by absorbing the complaining competitors! Thus was the law in the early years of its sporadic and imperfect enforcement made

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the instrument of blackmail with apparently no adequate conception of its public purpose or usefulness.

Whilst "ignorance of the law is no excuse" as bearing upon the plain duty of the Government to effectively disintegrate the unlawful combinations that were formed during this period and that are still being maintained in violation of the law as we now understand it, the pursuit by criminal process of the men who organized and are conducting these combinations based solely on *what they then did in organizing them* is quite another question. They acted on the best legal advice based on what had been announced as the law by the highest Court in the land. To prosecute them criminally on that ground alone for acts committed prior to 1900, when the law was fairly settled, would be vindictive and monstrous.

That is quite a different matter from disbanding and removing the violations which it is the duty of the Government to do—not merely in form, but in substance and practical effect, which has as yet hardly been seriously attempted and is not believed to be possible with the present defective legal machinery.

What then should be the lines along which to frame legislation to carry out the declared policy of the Nation for the suppression of the Trusts and the more effective regulation of our interstate corporations?

The legislation will have to deal with three classes of corporations, railroad, industrial and financial—besides the elusive secret arrangements and agreements in the form of pools and for the fixing of prices and output between competitors.

Laws are needed for the corporations that are equally well adapted for all three classes but there are other laws applicable to one class that are not adapted to the others.

The first and preliminary need is to actually and effectively dissolve existing violations among the railroad and industrial corporations and to provide adequate machinery for that purpose. The railroads should be required to part with their interests in coal, iron and other properties whose products they are engaged in transporting and to confine themselves strictly to the business of transportation. They must cease to act as "holding companies" owning the securities of

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competitive roads. Where they hold stocks of competitive roads they should be absolutely divested of them. Where the securities held are those of connecting or non-competitive lines they should be deprived of all voting power on their holdings and given a limited time either to acquire the outstanding interests on terms to be fixed by the Interstate Commerce Commission and thus to own the property if it is a legitimate part of their business, or to part with their holdings. It is against the public interest and a fraud upon the minority stockholders that a railroad property should be managed or its policy dictated by another railroad Company.

Railroads are not intended as security-holding Companies. If they have accumulated profits that are not likely to be needed in the future development of their own properties they should distribute them to their shareholders instead of using them to augment the power and opportunities for illegitimate profit of the men who have secured control of the Company. It may be a good thing for the railroad magnate and for the banker to make such use of the Company's funds but it is a bad thing for the shareholders and the public. The shareholders can do their own speculating. Not the least healthful and encouraging sign of the approaching "New Freedom" is to find that our financiers are at last awakening to the realization of that fact. But what a pity that they are so slow to feel the public pulse!

Experience has demonstrated that the procedure of the Court is not adapted and is wholly inadequate to the work of disintegrating outlaw corporations whether in the railroad or industrial world. They must not only be segregated but *kept segregated.* The accomplishments thus far of the Courts in that direction are utterly inadequate and must continue so until we have an executive body to supervise the work, to study each situation separately, to formulate and recommend to the Court a comprehensive plan of disintegration, to have constant access to the books of the outlaw corporation and its segregated parts and see to it that genuine competition is restored.

This is not an impossible task but it is an exceedingly difficult one that will involve constant vigilance and that cannot be accomplished by mere judicial fiat or decree nor by a

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series of decrees. It is peculiarly the task of an executive body as distinguished from a judicial tribunal.

Whilst freely conceding to the learned Attorney-General and to his able and distinguished predecessor the best intentions, the fact remains that the execution of the judicial decrees thus far rendered have proven generally inadequate. The outcome in the Standard Oil case is especially flagrant and pitiful. It is a standing reproach to the administration of justice and serves only to bring the Courts into general contempt. There has been no restoration of competition between any of the severed parts of the old Trust. The lines of territory are as rigidly adhered to as before the decree. None of the supposedly "segregated" Companies invades the territory of the others. It would have been wiser never to have prosecuted the suit than to have rested with such a puerile outcome as an object-lesson.

The recent experience in the case of the Union Pacific-Southern Pacific is not much of an improvement in point of practical effectiveness, however well it may work out on paper. Much as I respect and admire the ability, earnestness and sincerity of the learned Attorney-General I am unable to share his optimism on this supposed achievement. To me it gives promise of being another in the list of mountains of litigations that have labored to bring forth mice of achievement.

Many lawyers were surprised at the determination of the Supreme Court that the control of the Southern Pacific by the Union Pacific constituted a violation. They were generally regarded as primarily connecting lines complementing one another and together constituting a through line rather than as competitors, although there are minor respects in which they indirectly compete through their connections.

But after the Court had determined that they were actual and potential competitors it surely could not have been contemplated that the Union Pacific before relinquishing control of the Southern Pacific would be permitted to select and instal the entire Board of Directors and official management of the competitor whose control it was required to surrender. Yet, strange to say, that is precisely what was done and done after the decision of the Supreme Court. And still more strange, that extraordinary action was permitted to stand

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without question when the decree was finally entered with its elaborate provisions for Trusteeing the stock, depriving the U. P. stockholders of their voting power on the S. P. stock, etc.

The superstructure was changed but the common foundation and basis of control has been permitted to stand. And so we have the anomalous situation that although no U. P. stockholder who holds S. P. stock is permitted to vote the latter, the officers and directors of the S. P. are, and I predict always will be in effect, barring death, the identical persons who were selected by the Union Pacific board after the union had been ordered severed. Of what earthly use was it to prevent U. P. stockholders from voting on their S. P. holdings merely because they also held U. P. stock when the U. P. management had already designated the entire S. P. directory and management?

Notwithstanding the fanciful theories of academic gentlemen as to control of corporations by their shareholders it is common knowledge among men of affairs who are familiar with corporate management that it is practically impossible to change the control of a great corporation with widely scattered stockholdings. The one or two banking houses that dominate the managements of most of our vast trans-continental railroad systems have rarely a substantial stock interest and yet their control has remained indefinitely undisturbed. One of the best known and safest factors in corporate management and the one on which the banking interest knows from experience it can most confidently rely, is what I would christen *stockholder inertia*. It is incurable, unchangeable, immovable. It survives mismanagement, dishonesty and every form of corporate abuse. It is more than all other causes combined responsible for the corporate distrust and other ills from which we are suffering.

The Messrs. Morgan have for years dominated and still control and will doubtless continue to control the policy of the New Haven system as effectually as if they personally owned it, notwithstanding the great wrongs, and flagrant blunders and violations of law that have been perpetrated during their management and yet they own only a few thousand shares of the stock. True, there is a block of about 46,000 shares held by the Mutual Life Insurance

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Company in which the Morgan-Baker influence is potent and that the proxy on this stock has always been at the beck and call of that interest. It should have been sold years ago when the Life Insurance Companies were directed to dispose of their stockholdings and the policyholders would have been $5,000,000 better off if it had been done. But that is another story.

The 46,000 shares thus held are however a mere trifle as against the hundreds of thousands of shares of small scattered holdings that feel the utter hopelessness of trying to protect themselves. The helplessness and supineness of American shareholders are proverbial. They do not understand cooperation as it is practiced in other countries. Every attempt to organize them for their protection is cried down as "blackmail" by the great interests whose power and safety lie in the continued helplessness of shareholders and these interests are assisted by an important part of the Metropolitan press that sometimes consciously but more often unconsciously voices their views and wishes.

If when the Government undertakes the separation of the New Haven properties it permits the New Haven directors to select from their own number and instal the officers and directors of the competing Companies of which they are ordered to relinquish control, can it be fairly expected that this will accomplish practical segregation or that competition will result?

Yet that is precisely what has been done in the Union Pacific case and we must expect it to prove ineffective in practice no matter how it may work out in theory. It is a historical fact that no board of directors of a great corporation with widely scattered stockholdings has ever been dislodged, no matter how great may have been the provocation for a change.

It is possible that where, as in the case of the contested election of the Illinois Central Railroad, the struggle for control was between financial giants, the stockholders may be partly aroused from their lethargy into making a slight impress upon the result but even in that solitary instance the greater banking power triumphed over its weaker rival and the management remained unchanged.

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The outcome of the Mutual and New York Life Insurance

Companies' elections in 1906 furnished another instance of the permanency of a self-constituted board of directors. The most distinguishd body of public-spirited citizens ever banded together organized as a "Policyholders' Committee," with Hon. Richard Olney at their head and with five then Governors of States among their number to secure a change of management as the result of disclosures of the Hughes-Armstrong Investigations. The old managements had been self-convicted, their heads had been forced to resign and vast sums were unselfishly expended to arouse the policyholders but it was of no use. Less than 40% of them took the trouble to vote and of those a majority did so upon the solicitation of agents of the discredited managements who dominated the election. In any other country the discredited men would have been swept from office over-night. They would not have dared to make the fight and their subservient agents would not have dared assist.

No disintegration of unlawful combinations can be accomplished by the Government or the Courts that does not take these controlling factors into account.

If there had been in existence a Commission such as is here suggested to which the Court could have referred the decree in the U. P.—S. P. case for execution or if the Interstate Commerce Commission had been given power, (as it should be so far as concerns railroads) the first and fundamental duty of the Commission would have been to supervise an election for directors of the S. P. Co. from which the U. P. management and its agents would have been excluded. It would have invited prominent independent stockholders to form a Committee, to name a ticket and to circularize and secure the cooperation of their associate shareholders. The result thus achieved would have represented the will of the independent owners instead of, as now, recording merely the will of the U. P. as to who should constitute the Board of Directors of their liberated competitor.

There can never be an effective or impartial enforcement of the Anti-Trust Law without the aid of a Commission or like executive body and for the following reasons in addition to those above stated:

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1. The cases thus far selected for prosecution have necessarily been chosen at random either because by their size or prominence they have challenged public attention or in consequence of specific complaint lodged with the Department of Justice. They are said to constitute an infinitesimal fraction of existing violations.

2. It is impossible for any prosecuting officer to cope, unaided, with the herculean task of enforcing this law against violations that have been accumulating over a period of 23 years. The cases are selected for prosecution after a necessarily haphazard fashion that invites and accomplishes an unequal enforcement of the law and thus breeds contempt for the administration of justice.

Inasmuch as the Courts by their earlier rulings and the Government by its inaction may be said to have sanctioned the formation of the Trusts that are now found to have been illegal, at a time when their organization might readily have been enjoined and prevented, the policy of the present Administration in assisting those against which proceedings have been begun or are impending to remove violations and bring themselves within the law through the procedure of "consent decrees" is right and just and highly commendable provided such a policy can be made effective. The trouble about this plan is, that however plausible it may appear and however it may impress the theorist, these decrees are not and cannot be made workable in practical operation. There is no constituted authority charged with the duty of looking after the continued obedience to the judgments.

Besides, if the remaining tenure of office of the Attorney-General were twenty years instead of three years at the present rate of progress he would leave office at the end of his term without having dealt with more than a fraction of the cases requiring his attention. This would not be due to lack of energy and industry but to the gigantic proportions of the task.

The impossible is being attempted with the inevitable result. Those who are agitating to let the present law alone and against supplementing it by the necessary machinery are either seeking its failure or are unable to appreciate the limitations of judicial processes and procedure.

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3. The number of open or known violations is trifling as compared with those that rest in secret agreements or understandings. The latter are by far the more dangerous to the community because the tribute thus levied is accomplished without our knowledge. The country is honeycombed with cases of trade understandings in which no specific agreement is provable.

These violations are far more difficult to reach than the Trusts. They are discoverable only by a body with power to examine the books and papers of all interstate corporations and to require their officers and directors to testify under oath. In that way suspicious uniformity of price and division of territory among competitors and other earmarks may be discovered, as the giving of rebates by railroads is now traced and is rapidly being ended by the Interstate Commerce Commission. No Court and no form of judicial process could uncover such acts. Courts were not intended for any such purpose. Their function is to redress established wrongs, not to ferret out secret violations. No one should be haled into Court except to answer a specific charge or claim. This character of investigation is peculiarly within the province of an executive body. In the absence of the requisite machinery the Attorney-General has been compelled to and is constantly making use of Grand Juries for that purpose. It is now his only alternative but he should be supplied with the legitimate means to execute the laws.

4. It is quite as important in the public interest to supervise the future conduct and operations of corporations that have been declared unlawful and segregated as to segregate them in the first instance. The natural tendency of former associates will be to find ways of cooperation rather than to be forced to compete. So long as it continues to be the policy of our law as now settled to compel unrestricted competition and forbid cooperation even to and beyond the point of the financial ruin of all the competitors it will require a constant and watchful eye with the broadest inquisitorial powers to prevent competitors from exercising the natural instinct of self-preservation and to detect the endless subterfuges to which they have successfully resorted in the

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past and present and will doubtless continue to employ in the future.

No such vast power of determining corporate life or death as is now being forced upon the Attorney-General in the "consent decrees" which he is negotiating should be lodged in any appointive executive officer of the Government however devoted he may be to the public interest. The precedent is vicious. Ours ceases to be a Government of laws restricted by rules prescribed by the representatives of the people, and becomes a fitful, uncertain and irresponsible government of men with every case as a law unto itself, to be decided by the whim of one man and subject to no fixed rule or right of appeal. But it is a condition and not a theory that confronts the learned Attorney-General. There is no intention to minimize the work that is being accomplished by the Department of Justice in anything that I have said. Never in my time has the head of that great department been occupied by a man of higher purpose or with greater resourcefulness, progressiveness and concern for the public welfare or more in sympathy with the laws he is called upon to enforce. No incumbent has been intellectually and temperamentally better fitted for that great post. But not even he can accomplish the impossible as I believe this task to be without the aid of an executive body to assist him.

I know that he is assuming this vast responsibility with great reluctance and that it could not be in safer hands if it is to be entrusted to any one man, overburdened as he already is with responsibilities that no man should be asked to bear. He is compelled to take upon himself duties that should not be thrust upon him and that from the very nature of the case he cannot properly perform or supervise.

For the reasons stated I regard the establishment of an Industrial Commission (into which the present Bureau of Corporations should be merged) and the enlargement of the powers of the Interstate Commerce Commission as fundamental requisites to any effective scheme for enforcing the segregation of unlawful combinations under the Sherman Act. Such a body would not supersede the Attorney-General. It would supplement his work and greatly lighten his intolerable responsibilities. It is the only means of supervising the execution of these decrees and of supplementing them if ex-

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perience shows that they are not accomplishing the expected results.

Whether the Interstate Commerce Commission should be authorized to permit reasonable pooling agreements between railroads and whether the proposed Industrial Commission should be empowered to approve contracts between business competitors fixing prices and output between the contracting parties to protect them against ruinous competition are debatable questions that must be met and solved in the near future though they are not a necessary part of the immediate program.

A large and influential class of our students of economics claims that the law should compel uncompromising and unrestricted warfare between competitors to the annihilation of the weaker if necessary. They argue that to sanction agreements between competitors, no matter how restricted and safeguarded, would amount to having the Government fix the prices of commodities and that this is a long step in the direction of State Socialism. On the other hand it is denied that the program involves any such proposition. It is argued (1) that only those competitors will join in such an arrangement as choose to do so, leaving the others still free to compete; (2) that the Commission would be authorized only to approve agreements where the price fixed is not above actual cost and that the agreements thus approved would operate only to furnish business a lawful refuge against ruinous and annihilating competition and only to those who invoke aid; (3) that compulsory destructive competition is an economic curse and not a benefit; that it must inevitably end in monopoly; that competitors will not in any event obey and cannot be forced to respect a law that compels them to ruin themselves and that unless they are furnished open, lawful means of relief they will shield themselves behind secret illicit methods, as is now being done; (4) that as distinguished from the results of Trusts or consolidations competition will still be maintained between the parties to such agreements in reducing the cost of production, as each will reap the benefits of his own economies and will thus have the incentive to utilize the most improved appliances and other means of reducing costs; (5) that none of the evils of stock watering or exploitation, clos-

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ing of plants, etc., that have been attendant upon the organization and flotation of the Trusts and that have served as the incentives for exacting huge profits to pay dividends on fictitious capital would be involved in or be permissible under these arrangements and that they would do away with the excuses that have been urged in favor of combinations as a necessary measure of self-protection.

It is further argued that as such agreements would necessarily be approved only for short periods and subject to constant revision by the Commission the parties would be forced to retain their separate organizations in effective condition in constant readiness to resume unrestrained competition whenever they fail to agree among themselves or to subscribe to the conditions imposed by the Commission.

These are briefly the reasons presented in support of these agreements similar to the German "Kartels" but I doubt whether Congress is prepared at this time to enter upon any such revolutionary scheme of trade regulation nor is it, as before stated, a necessary part of the present program involving the inauguration of an Industrial Commission.

I firmly believe that such regulation is bound to come and within the present decade, but the Industrial Commission will have quite enough to do in the early years of its existence without having such comprehensive and far-reaching powers thrust upon it. Congress will probably want to feel its way slowly and to develop the system guardedly as was done in dealing with the Interstate Commerce Commission. The powers of the latter have been gradually enlarged year by year until it is today the most effective regulating body in the world. It has averted Government ownership of the railroads, which in my judgment would be a National catastrophe and from every point of view represents the greatest triumph in popular government yet achieved.

When the recommendations of the Pujo Committee for the exclusive regulation by that Commission of the issue and sale of securities of interstate roads have been enacted into law and when the segregation of unlawful combinations among the railroads and the reorganization of insolvent roads have been placed under the control of the Commission we will have reached the final stage of the journey in

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railway regulation. The long years of controversy on that subject are nearly ended and the country is to be congratulated that we are on the eve of the successful fruition of the most enlightened body of legislative and administrative accomplishment ever known.

With such an inspiring object-lesson why should Congress hesitate to repeat the experience in dealing with Industrial regulation? Is there less constructive statesmanship now than there was in 1887? Our present problem is child's play as compared with that which we have so successfully solved.

It is part of the proposed plan that every corporation engaged in interstate commerce having a gross annual business exceeding a given amount, say $2,000,000 or a capital or assets exceeding, say, $1,000,000, should be required to take out a Federal License under rules to be prescribed by the Commission and thus subject itself and its affairs to the jurisdiction of the Commission. In that way and not until that is done will the secret violations of the Anti-Trust Law be discoverable and an equal and impartial administration of the law secured against all offenders for the suppression and punishment of future offenses. Such punishment must not, as now, be directed against the innocent shareholders. It must reach the individuals who are the real perpetrators and who now hide behind the flimsy corporate cloak. It should leave no room for uncertainty as to what is the law.

Having now set up the Industrial Commission and clothed it with the broadest inquisitorial powers, what further laws are needed to liberate business from the thraldom under which it has been suffering and to prevent like abuses in the future?

Twenty-two separate Recommendations for constructive laws covering the subject are set forth in the Report of the Pujo Committee. Some of them are embodied in proposed Bills that are attached to the Report. The Committee explained that owing to the expiration of the then Congress there was not time to formulate the Bills embodying the others.

There are also pending in the Senate and House a number of Bills embodying proposed remedies. Many of these

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are valuable, some are essential and there are others that seem to me impracticable and unsound. The limits of this Address will require me to confine myself to the most cursory enumeration, and without extended argument in support of the propositions, of those that I regard as an important part of a body of constructive laws that is to destroy the existing dangerous concentration of the control of credit in the hands of a few men and to restore business freedom and confidence. I appreciate that this is a wide field to cover but am satisfied it can be successfully accomplished, when the interests concerned know that the Government is in dead earnest and that makeshifts will not answer.

Additional Remedies.

As Affecting Generally Banks and all Classes of Interstate Corporations:

(*a*) *Interlocking officers and directors should be prohibited:*

(1) No person should be eligible as an officer or director of a National Bank who is an officer or director of any actually or potentially competing bank or trust company in the same city, town or village.

(2) No state bank or trust company located in any city of 100,000 inhabitants or over should be permitted the use of the mails or telegraph in interstate business which has upon its board of directors any person who is also an officer or director of any such competing bank or trust company.

(3) No National bank shall own or hold and no state bank or trust company located in any city of 100,000 inhabitants or over should be permitted the use of the mails or telegraph in interstate business that owns or holds any of the shares of stock of any other bank or trust company.

(4) No railroad or industrial corporation should be granted a license to engage in interstate business and it should be made unlawful for it to continue in such business if any of its officers or directors are officers or directors of any actually or potentially competing business or if any of its shareholders are the registered or beneficial owners of more than five per cent of the share capital of any such competing corporation.

(5) No person engaged in business as a private banker taking deposits should be an officer or director of a bank nor should any person interested in the business of furnishing railroad supplies be an officer or director of a railroad corporation nor should any officer or director be per-

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mitted to make a profit or commission on any transactions with the corporation of which he is such officer or director.

(6) The "dummy" director should be eliminated by requiring every director to have a substantial beneficial interest in his own name and right, free from claim. He should be in the actual and exclusive possession of the certificate of stock.

(7) It should be the duty of all the officers and directors of every such corporation to file annually a sworn statement showing compliance with the above conditions.

What Mr. Brandeis aptly describes as the rule that "No man shall serve two masters" should be written into every line of the law of corporations and its observance rigidly enforced. Mr. Brandeis has performed a conspicuous public service by his illuminating educational campaign, in his interesting and instructive series of Articles in Harper's Weekly entitled "Breaking the Money Trust".

The very recently and belatedly announced change of policy on this subject on the part of our leading banking house gives gratifying evidence of the power of public sentiment, provided the offer of surrender is genuine. It is to be regretted that the announced conversion is not more complete. The action thus far taken by that firm is most unsubstantial and unconvincing.

The published list of resignations is significant for its omissions. It does not include any of the great institutions of which the First National Bank, The National Bank of Commerce and the National City Bank are instances. Again, whilst some of the partners of the firm resign from the Board of a given Company one or more remain, which seems to indicate that the move is more in the nature of a business convenience than a surrender to public sentiment.

Doubtless it will all come in time. Let us be patient and trustful in the hope that this is only the beginning, otherwise it is misleading and useless.

The public will do well not to exaggerate the significance of this widely heralded step. Even if it be followed by the expected further resignations by the members of the firm from all the Boards of potentially competing banks and railroads and industrial corporations, it may mean very little in and of itself. It may, so far as concerns at least the bank resignations, be prompted more largely by the

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provisions of the new Currency Bill that prevents directors from making a profit out of their banks, than by any other consideration.

It is possible also that this is regarded as an opportune moment to sever formal official relations with the tottering New Haven structure and with other like ventures that are marked for judicial investigation and discipline. It is significant in this connection that the only three Companies in which the entire representation is surrendered are the New Haven, New York Central and the Telephone Companies—all of which are now under fire by the Government. It so happens that questions of rate increase or decrease are under consideration in these particular cases.

It is also noticeable that the potentially competing Companies in which partners of the Morgan firm retain their directorships are far more numerous and important than the few from which they part official company and that the extent to which Congress proposes to apply the prohibitions against directors and others occupying conflicting trust relations is not yet realized by those who are to be affected. It is still further worthy of observation that whilst the Voting Trusts of the Guaranty and Bankers Trust Companies are dissolved "in deference to public sentiment", the Voting Trust is still retained in the Southern Railway, under which the Morgan-Baker alliance have absolutely controlled the property for twenty years, to the exclusion of the stockholders and without ever having paid a dividend on the common stock during all that time and that all other Voting Trusts carrying complete control are likewise retained by them. The people are likely to require far more convincing evidence of a desire to defer to public sentiment than appears from the action thus far taken. I have no doubt such evidence will shortly be forthcoming although the announcement made furnishes no encouragement of the voluntary solution which it was hoped would be forthcoming.

There is the further fact that the re-financing of the only three properties from which all the Morgan partners have resigned is likely to involve a vast amount of profitable financing for a banking house. The new code of corporate ethics is not going to permit the banker to sit on the Board and fix his own bargains with the Company whose stock-

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holders he is supposed to represent. Messrs. Morgan doubtless realize this and it may have had its effect in deciding them to retire from those particular Boards so as to be free to participate in financing the new requirements. Everything is grist that comes to the banker's mill. Even where he finances a property on to the shoals he creates business for himself in pulling it off!

In advancing these suggestions I have no intention of impugning the good faith of the action taken. On the contrary I believe in its sincerity and must accordingly assume that it is but the inception of a really comprehensive policy.

But assuming this to be the fact, as I do, the mere abatement of the evil of interlocking directorates will not by any means eliminate or even correct the concentration of the control of credit and industry from which the country is suffering.

The interlocking director is but one of the many symptoms of the disease, which lies far deeper. Its importance has been exaggerated. There are others equally significant. You cannot eradicate the disease by merely treating one of the symptoms. All the evils complained of may exist without the interlocking director. In eliminating him we must see to it that he is not supplanted by the "dummy" director. That would be an aggravation of the disease rather than a cure. The Voting Trust, the fiscal agency agreements, the depositary arrangements by which private bankers hold the deposits of the corporation that they dominate in one way or another and the secret understandings that masquerade under the name of "banking ethics", all of which were uncovered by the Pujo Committee, are vastly more effective as means of control. It is *the interlocking of various forms of control* rather than any one practice that together constitute the system. And so we must not exaggerate the importance of any single factor or mistake the symptom for the disease in treating the fundamental problem.

(*b*) *Holding Companies*:

(1) No corporation should be permitted to own or hold the shares of or be interested in the business of an actual or potential competitor.

(2) No corporation should acquire, own or hold any shares or interests in any other corporation whatever, even though non-competitive except with the express consent pre-

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viously obtained in each instance of the Interstate Commerce Commission or the Industrial Commission as the case may be. Wherever permission is granted a corporation to acquire or assume the practical control of another by stock holdings or otherwise, it should be made conditional upon the full and continued protection of all the outstanding holdings in the controlled corporation and to that end the dominating corporation should be required to assure to the minority or outstanding stockholders the option to sell their holdings on the same terms as were paid for such practical control. In cases in which the control is secured through the purchase of junior securities the Commission should have power to require that the principal, interest or dividends upon the prior securities of the Company thus controlled should be effectively guaranteed by the controlling Company. Nor should the latter have the right to dismantle the property or discontinue or divert the business of the controlled Company without the unanimous consent of the security holders and shareholders of the latter.

I do not agree with those who would absolutely prohibit all corporations from acquiring or holding the stocks of other Companies. There are many cases in which this sweeping prohibition is neither wise nor practicable. It would prevent the organization of purely security-holding Companies which are very desirable as a means of equalizing the risks of investment for small holders. It would also prevent many useful co-operative enterprises for exploiting mines, patents, etc.

The prohibition against holding Companies should be directed against and confined to the stocks of competing companies and to protecting minority holders against the injustice and oppression that have been and are being extensively practiced upon them by the use of their property in the interest of the controlling Company. No stockholder should ever be compelled to submit to control of the property in which he is a partner by another company in the same line of business. Every corporation should be maanged and its policies directed solely in its own interest and never in the interest of another Company.

(c) To prohibit stock watering:

This is one of the most difficult of the problems with which Congress will have to deal especially in its relation to

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industrial corporations. It is important on the one hand that good-will shall be recognized as property. It is the most valuable form of property. Without it the tangible assets in a manufacturing business are worth only a fraction of their cost. Tools and machinery have value only insofar as they represent a profit-earning capacity. It would be foolhardy and misleading to base capitalization solely on tangible assets. A business that can earn $100,000 a year over a term of years on an investment in plant of $500,000 is intrinsically worth more than the same class of business that earns the same amount on double the investment. There should be no absolute prohibition against issuing stock for good-will.

There should however be rigid restriction and supervision of such issues, among which I suggest the following:

(1) The stock so issued should not exceed in amount the tangible assets of the Company at a fair value.

(2) It should represent good-will that is reflected in the actual and ascertained net profits averaged over a number of consecutive past years on a basis of an average amount of profit of not less than 6% as determined and certified by independent public accountants and should not include anything for future prospects or undetermined earnings.

(3) All certificates representing stock issued for good-will should be stamped as so issued and should be known and dealt in as "good-will" stock.

(4) No stock so issued should be salable publicly or privately or available as collateral to any bank loan or subject to listing or dealings on any public exchange for the term of two years after it has been issued.

(d) To require disclosure of profits on selling securities:

To accomplish this purpose the carrying through the mails or other interstate agencies of any letter, circular, advertisement, inducement or representation soliciting or affecting the purchase or sale or offer to purchase or sell any securities of a corporation should be prohibited unless each such letter, circular, advertisement, inducement or representation fully sets forth the character and value of the assets represented by such securities, the total liabilities and net earnings of the corporation; in the case of a newly organized company there should also be required a full disclosure of the amount paid to the vendor in cash, and secur-

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ities, and the fees, profits, gains and commissions of all bankers, brokers, promoters and intermediaries.

(e) Cumulative Voting:

In order to secure representation for the minority stockholders on the Boards of Directors the Federal power should be exercised to the uttermost limit. To that end National Banks and all corporations that can be brought within Federal jurisdiction either through the Commerce or Post Roads clauses of the Constitution should be required as a condition of doing interstate business or of using the mails to so amend their charters as to provide for cumulative voting, thus securing to each interest in the Company the representation to which it is equitably entitled. By this means if there are, we will say, nine directors to be elected, each one-ninth of the stock will be able to elect one director. The majority will still control, as it should, but the intolerable situation of 51% taking unto itself the entire representation to the exclusion of any voice for the remaining 49% will be ended. This equitable method is now made compulsory by the Constitutions of a number of the States such as Pennsylvania and Missouri. It is an important reform in the direction of assuring honest management. It enables the minority to know what is going on and thus in a measure to protect itself. The fact that it has been so long delayed is in itself a most severe arraignment of our corporate system.

(f) Voting Trusts:

No adequate reason for their existence has ever been offered except as an incident to the reorganization of insolvent corporations. In banking corporations they are a comparatively recent and exceptionally vicious form of government. The bank widely advertises an imposing array of men of reputation as an inducement to attract deposits. The depositor assumes that these directors are elected by the shareholders. He finds to his surprise that the shareholders have shirked their duty by surrendering the power and the obligation to select the directors to two or three bankers who are active or potential competitors (generally the former) and who by the exercise of this power control the funds of

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the institution. In the two cases that were discovered by the Pujo Committee the existence of the Voting Trusts through which over $400,000,000 of resources were controlled was generally unknown to the depositors or to the financial community in which the Companies conducted their business. They are inexcusable.

Nor is there any excuse for permitting them in railroad or industrial Companies except in rare instances in which they have been useful to prevent a big, powerful competitor or a banking interest representing such a competitor from securing control of a weak property during the period of strain following its reorganization and they have seldom proven an effective protection in such case. They have very generally been oppressively imposed by large interests upon a prostrate defenseless property in course of reorganization where the interests were scattered, unable to protect themselves and virtually forced to surrender their voting power upon the demand of the reorganizers.

The Southern Railway Company came under the control of Messrs. J. P. Morgan & Co. in that way nearly 20 years ago and has ever since been and still is so held.

In like manner over 100,000 miles of railroad properties came under the domination of a few of our leading bankers to the exclusion of the true owners.

These Voting Trusts should be prohibited except when allowed by the appropriate Government Commission, for cause.

(*g*) *Against Fiscal Agents.*

This practice cannot be too severely condemned. Its purpose is to place the financial management under the control of the bankers who whilst not themselves bound to furnish the money requirements of the corporation are yet in the position to dictate terms and to prevent the corporation from borrowing elsewhere, as "banking ethics", so-called, forbids any other banking house from interfering. The result of these arrangements is to render competition impossible and to secure to the fiscal agent a "rake-off" on every financial transaction of the corporation. It is a practice that belongs to the crude moral standards of a by-gone generation. No corporation should be permitted to enter into any

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agreement that interferes with its entire freedom in supplying its needs for money or supplies in the open market as occasion requires or that compels it to pay tribute for so doing. Here again it is gratifying to note that the practice is being discontinued following its exposure and condemnation in the Report of the Pujo Committee.

Perhaps I may be pardoned for digressing here to remark that the power of the great financial interests through their vast press organizations to at least temporarily poison the public mind was never better illustrated than in its inspired attacks upon the work of that Committee and the abuse and persecution of all who were concerned with it. The aims and purposes of the Committee were persistently and systematically misrepresented from the beginning of its labors and no stone was left unturned in the effort to discredit its findings. It is surprising to what extent the press of the country unconsciously takes its cue from New York on certain subjects. The Committee was denounced for having dared to so much as attempt to examine one witness who had been evading its jurisdiction and whose illness appears to have disappeared with the termination of the life of the Committee. Again it was arraigned for having courteously examined a witness who voluntarily appeared before it in apparent perfect health because in the course of events he died in a foreign country some months later. No pretext was too far-fetched to be seized upon as a basis of attack and this campaign was so cunningly waged that the country did not realize the means by which the poison was being injected into its system. It has taken almost a year of education to remove the false impressions thus created in the minds of members of Congress and others who were unable to follow the official record. But as the Record is being more generally read and the subject studied the work is at last being judged upon its merits. The public, also, is awakening to an understanding of the extent to which it has been misled by this press campaign.

It stimulates and revives one's faith in justice and in our institutions to reflect upon the final and complete recognition of the value of this work in the face of the overwhelming and almost impossible odds that were arrayed against it.

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(h) Private bankers as depositaries of the funds of interstate corporations.

Here is another vicious practice that the law should prohibit. So far as concerns the deposits of funds of interstate railroad corporations with private bankers it is quite as legitimate a subject for regulation as affecting rates as is the control of bond and stock issues. Private bankers are subject to no supervision, they are required to keep no reserves, no publicity of their affairs is exacted of them and they are under no restrictions as to the use they may make of the funds on deposit with them. They are at liberty to use the funds of interstate corporations secretly and for their own profit as they see fit and without accountability. The situation is incongruous and intolerable. It amounts to a National scandal. It appeared in evidence in the Pujo investigation that a single banking house held over $160,000,000 on deposit in that way at the date of the inquiry, including the deposits of 78 interstate corporations. The Committee was unable to learn the names of the corporations, the amounts of their deposits or how the funds were invested. It was simply a "blind pool", so far as concerned the depositors. The officers and directors of the corporations who had dared to thus dispose of its moneys represented upwards of a million shareholders, who doubtless never suspected any such abuse by them of their official duty. The most recent object-lesson of the result of this absence of supervision of private bankers occurred a few days ago in New York City where one such "private bank" failed owing its depositors $2,500,000 and with no discernable assets.

Whilst the State of New York had been quick to regulate the petty, insignificant, and uninfluential little bankers it had not dared to include the powerful ones.

If railroad companies suffer losses the public service suffers. No corporation should be licensed to do interstate business whose funds are deposited in any place other than a duly incorporated bank or trust company. There should be no such thing as a private bank of deposit. We should abolish it as we have done away with private life, fire and casualty insurance.

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(i) Compel the incorporation of Stock Exchanges:

The intimate and fundamental bearing of this requirement upon the entire subject of corporate reform is not generally understood. Yet there is no aspect of the question that is of greater importance. It lies at the foundation of all corporate reform. The release of our corporations from banking control depends upon the ability to secure for them an open market for their securities. That involves setting up the machinery that will enable them to appeal directly to the public. So long as the Stock Exchange remains an irresponsible, unincorporated body, subject to no public control, the public will have no confidence in its published reports of sales and purchases as representing genuine transactions. Until Government protection is furnished against wash sales, matched orders and manipulation of prices the Exchange cannot be helpful as the medium between the corporations and the investing public which it can and should be made. So long as its members may with impunity rehypothecate the securities of their customers in excess of the debt owing them and pay one another in full out of the proceeds of the membership seat in case of insolvency to the exclusion of the defrauded customers, the Stock Exchange is no fit instrument for carrying out the great reforms in corporate management for which it might otherwise be used.

The laws passed in New York State in 1913 on this subject are worse than worthless. Since the exposure of its methods by the Pujo Committee and under the spur of public condemnation following these exposures the Exchange has inaugurated many reforms. I believe it is anxious to conform to public sentiment but this furnishes no reason for permitting it to remain above and beyond the law—a law unto itself. There should be no disposition to impose any conditions that would unduly hamper its disciplinary control over its members or reduce the value of membership nor would any such results follow from incorporation. The great body of the membership is composed of men as honorable as in any other calling. In some respects its code of ethics is exceptionally high but in others it has in the past been most deplorable. There are men in its ranks who will compare favorably with our most public spirited citizens. Its power

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and usefulness can be greatly enlarged. Through its agency the requirement for publicity as to corporations whose securities have a public market can be enforced through its listing department and the entire system unified. Full disclosure of profits, fees, commissions of bankers, brokers and intermediaries can be enforced as to new issues and the investing public can be thus made to feel safe in buying securities in response to public offers by advertisement without the mediation of bankers, as in other countries. No step that could be taken would be so effective toward securing the independence of corporations but the Exchange must be under rigid supervision before it can perform this service.

It must be incorporated and subjected to Governmental control so that the books of its members may be open to inspection by the authorities at any time to detect and punish frauds upon the public; to expose manipulation of values; to prevent the conversion of customers' securities and unjust preferences in case of insolvency. Then and only then will its listing of a security and the publication by a corporation of a prospectus under its auspices inspire confidence.

The books of members are now subject to the summary inspection of the Committee of the Exchange for any purpose. The suggestion that the authorities are not to have a like power in the public interest to detect frauds upon the public interest is indefensible.

Why should the greatest National and International security market be permitted to spread broadcast all over the world through the mails, cables, telegraphs and telephones the records of transactions over which there is no public supervision. They may be true or fictitious records. Courts of justice, trustees and the public act upon them as evidence of genuine values and yet we are told that the operations of this body should be regarded as the transactions of a private club with which the public has no concern!

Surely the day for that attitude has passed. The Stock Exchange is an integral and essential part of the mechanism of our National financial system. It has large public duties and responsibilities and must be made amenable to public control. It should be the recognized and responsible instrumentality of complete publicity in corporate affairs and its hall-mark upon a prospectus should be a guaranty of honesty

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and genuineness. No plausible argument against its enforced incorporation has ever been advanced.

The proposed suggestion a few days ago of the so-called "Association of Stock Exchange Partners" that proxies be asked from owners of stock whose shares are pledged with brokers for use in corporate elections is amazing for its audacity. It demonstrates once more the blindness of these gentlemen to the public sentiment of the country concerning their usefulness as a factor in general corporate reform. Investors will not be slow to resent the proposal that their securities are to be used to strengthen the grip of Wall Street upon the control of the corporations of the country by giving to the brokers the power to elect directors.

It requires no great stretch of the imagination to predict what would happen with such proxies so controlled whenever a great bank or banking house made known its wishes as to how the stock should be voted. The brokers are dependent on the banks for accommodations and the latter in turn are largely dominated by private bankers. This is especially true of the few great banks that specialize in loans on Stock Exchange securities.

The tendency of the times is and will continue to be further and further away from that sort of control. It is to be hoped that eventually such control will rest with the shareholders. This latest proposal should go far toward stimulating such a movement in self-protection against the threatened action. In order to accomplish this, cooperation will be needed but of a very different sort and under very different auspices from that which has been suggested. Public-spirited men, who are free from entangling alliances and whose motives will be above suspicion, will have to organize protective and cooperative organizations of bondholders and stockholders and policyholders to advise and guard the interests of those concerned to see to it that the boards of directors represent the interests that own the corporation and not the mere fiat of a self-constituted authority, as is now largely the case.

If the Stock Exchange wants to test public sentiment on this subject let it exercise any such power in a single instance and we shall see how long it will take to arouse the body of

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shareholders into active and emphatic protest. It will require some such incentive to arouse them.

There is however a wide field of genuine usefulness for such an Association and one in which its motives cannot be misinterpreted, if its purpose is to assist the shareholders. I refer to the task of securing protection and representation of the minority stockholder and to the furtherance of the other reforms above indicated. Such efforts would be recognized as public spirited and disinterested and would go far toward rehabilitating the Exchange in public confidence and esteem.

But they had better keep their hands off the manipulation of the proxies of their customers. There is far too much of that sort of thing going on now. Too many corporations are controlled in that irregular way. If the rules of the Exchange were formulated in the public interest, as they will be before long, they would prohibit under penalties at least as severe as that now prescribed for splitting commissions, the now common practice of brokers of voting or giving proxies to vote on stock belonging to their customers that is registered in the brokers' names without the written consent of the customer. If such a rule is not soon enacted the law will take care of that matter for them.

(*j*) *Compel the incorporation of Clearing House Associations by prohibiting a National Bank from being a member of any such Association that is not incorporated.*

This action has been approved by such financial experts as Messrs. Jacob H. Schiff, of Kuhn, Loeb & Co., and James G. Cannon, President of the Fourth National Bank of New York. Mr. Sherer, Manager of the New York Clearing House Association, Mr. Frew, who was Chairman of its Committee, Mr. Reynolds, President of the Continental & Commercial National Bank of Chicago and other prominent men in the financial world could see no objection to it.

These associations have served a useful purpose in times of stress but they exercise a despotic control over the destinies of the banks in their localities. Exclusion and expulsion of a competitor from membership mean ruin to the bank

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and disaster to its depositors. It is within the arbitrary power of a few men. It has at times been most unwisely and even cruelly exercised, notably in New York City in 1907. Through its agency new competition can be stifled. No such power of corporate life and death should rest in the hands of an irresponsible body that is accountable to no public authority for its acts. Under cover of this great power it has inaugurated rules for the compulsory suppression of competition among its members under penalty of expulsion and ruin for their violation.

Its regulations go to the incredible length of requiring non-member banks that must have the facilities of the Association and are not permitted a voice on its management or the other privileges of membership, and who must act through members, to observe all the regulations applicable to members such as the enforced charging of a fixed commission to their customers for the collection of out-of-town checks and the examination of their books and the disclosure of the names of borrowers and the character of collateral to their competitors.

The most extreme form of restraint of trade existing today is that which is embodied in the regulations of the New York Clearing House Association with respect to the charges on check collections. The member and non-member banks are forced to maintain an illegal combination under penalty of ruin. They have no choice. They must either violate the law or get out of the Association and they cannot exist under the latter alternative.

Under the new Currency Bill these local Associations may be rendered unnecessary as the law permits the Reserve Banks to perform the service of clearing checks between its members. It would be the logical channel for that purpose. The Associations should not be permitted to continue in existence as a cover for imposing illegal exactions and restrictions upon the commerce of the country.

(k) Stop the migration of "carpet bag" corporations into States that offer illicit inducements in the way of lax laws.

No corporation should be granted a license to engage in interstate trade that is not incorporated under the laws of a

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State in which a substantial part of its business is located. Here is an opportunity for Congress to perform a great service in putting an end to the National scandal of the States competing against one another in laxity of administration. It is to this illicit competition that we owe our "wildcat" corporations and loose laws. The conservatively disposed States have been driven into a policy of radicalism in order to preserve the control over and the legitimate revenues from the corporations within their borders. Stock watering, holding companies and many of the other evils incident to corporate regulation owe their existence to this abuse.

PROPOSED REFORMS ESPECIALLY APPLICABLE TO BANKS.

1. They should be required to disclose their assets in detail (except the names of borrowers and the collaterals for loans) in the same way in which the Life Insurance Companies in New York State are now required to make disclosure.

Depositors and stockholders as well as the general public are entitled to know how the business of a bank is being conducted—whether its management is conservative or reckless. It is ridiculous that National banks should be able to withhold the character of their investments from the public and from their own stockholders. Yet this is what has been done and has been sought to be justified. It was with the greatest difficulty that the Pujo Committee succeeded in securing from the Comptroller a list of the assets of the leading banks for the purpose of a Congressional investigation and then only on the understanding that the information was not to be made public. If this data had been accessible it would not have been so easy for the great banking interests to have sold such quantities of their securities to their affiliated banks.

The Pujo Report recommends that National banks shall be limited in their fixed investments in bonds to 25% of their capital and surplus and that only bonds that have paid their interest for five years should be eligible, thus excluding speculative investments. The assets of a bank should be liquid. It is chartered to accommodate the needs of legitimate commerce and not as an investment Company.

2. Another equally important recommendation of the Pujo Committee that should be embodied in legislation is that

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which would prevent banks from engaging in any promotion, guaranty or underwriting that involves the purchase, sale, public offering or issue of securities. It should not be permitted to be an issuing house. This is peculiarly the business of private bankers. Any unfortunate venture of that kind might destroy public confidence in the bank to the irreparable injury of depositors. No institution that receives deposits should be permitted to do anything other than a strictly banking business. Our great New York banks have entirely lost sight of that rule.

3. Another reform and one of still greater moment both as an Anti-Trust measure and as a necessary protection to the shareholders is the regulation of the Reorganization of insolvent interstate railroad and industrial corporations. The evils of the present system and the remedy are set forth on pages 148-150 of the Report of the Pujo Committee, in the following language:

> Our archaic, extravagant and utterly indefensible procedure for the reorganization of insolvent railroads has furnished these banking groups the opportunities of which they have not been slow to avail themselves, of securing the dominating relation that they now hold to many of our leading railroad systems. At one time or another within the past 30 years the bulk of our railways have gone through insolvency and receivership. The proceedings are sometimes instigated by the management through a friendly creditor (and are then generally collusive in their inception) or through the trustee for bondholders with the cooperation of the company. The railway company admits its insolvency, consents to the receivership, and one or more of the officers under whose administration insolvency was brought about, or their nominees, is made a receiver, and sometimes the sole receiver. Neither creditors nor stockholders, who are the parties really interested, are notified or have an opportunity to be heard either on the question of insolvency or of the personnel of the receivers. The stage has been set in advance, and so we find that simultaneously with the appointment of the receivers, or perhaps before, a self-constituted committee is announced, frequently consisting of men well known in the financial world, most of whom have no interest in the property, selected by a leading banking house. They invite the deposit of securities for mutual protection.
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> This committee in due course presents a plan for the reorganization of the property. If the security holders do

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not like it, their only alternative is to form another committee. If they can arrange to combine their scattered forces and find influential men who have the courage to oppose the banking house and who can finance the cash requirements of these colossal transactions in hostility to the banking house that was first in the field. It is not easy to find such men. It is becoming daily more difficult and it is well-nigh impossible to find rival banking houses to lead the opposition.

The usual outcome has been that the defenseless security holders take whatever plan is offered, however unjust, as against the alternative of being entirely wiped out through the sale of the property under foreclosure. There have been rare exceptions, before the power of these banking houses became irresistible, when the security holders have wrung concessions through revolt.

These plans have usually provided that the securities of the new or reorganized company shall be placed for a term of years in a voting trust named by the bankers. In that way and as a result, also, of reorganizations in which there was no voting trust, but in which the initial officers and directors were named by the bankers as reorganization managers, banking domination of the following railroad systems was secured by Messrs. Morgan and Kuhn, Loeb & Co.:

First. The Baltimore & Ohio, where Kuhn, Loeb & Co., with Speyer & Co., were the reorganization managers, the plan of reorganization being approved by J. P. Morgan & Co., and Mr. Coster, of that firm, becoming a voting trustee.

Second. The Chesapeake & Ohio, where the reorganization managers were Drexel, Morgan & Co., as the present firm J. P. Morgan & Co. was formerly named.

Third. The Cincinnati, Hamilton & Dayton, where Morgan & Co. were the reorganization managers and Mr. Morgan is a voting trustee, the voting trust being still in force.

Fourth. The Chicago Great Western, where Morgan & Co. were the reorganization managers and Mr. Morgan and his associate, Mr. Baker, are voting trustees, the voting trust being still in force.

Fifth. The Erie, where Morgan & Co. were the reorganization managers and Mr. Morgan became a voting trustee.

Sixth. The Northern Pacific, where Morgan & Co. were the reorganization managers and Mr. Morgan became a voting trustee.

Seventh. The Pere Marquette, which was reorganized by Morgan & Co.

Eighth. The Southern, which was reorganized by Morgan & Co., Mr. Morgan and Mr. Baker becoming voting trustees and still continuing as such.

Ninth. The Reading, which was reorganized by Morgan & Co., Mr. Morgan becoming a voting trustee.

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Tenth. The Union Pacific, which was reorganized by Kuhn, Loeb & Co.

During all this time the property is in the possession of the court through the receivers. The reorganization proceedings are purely extrajudicial. The court has nothing to do with them. Meantime the court authorizes the receivers to borrow money for all sorts of purposes and to issue receivers' certificates, which are usually negotiated through the committee or its bankers, who have in the interim gathered in the bonds and stock of the security holders, who have nowhere else to go.

Generally, after years of delay, the property is put through the form of a sale, but there is no bid except that of the committee, which pays by surrendering deposited securities. If a security holder has failed to deposit with the committee he gets nothing or whatever pittance may represent his infinitesimal share of the upset or minimum price fixed by the court. The cost to the security holders of the proceeding in any of the cases named is estimated to be anywhere between $500,000 and $1,000,000 for receivers, bankers, committee fees, lawyers, etc.

Nowhere is any protection offered to the security holders against oppression or injustice in the plan or its execution or otherwise. No constituted authority supervises the vast expenses he is required to pay. The bankers and the committee are made the sole judges on that and on every other conceivable question, including their own commissions and charges and those of the committee. The court has nothing to do with the arrangement and is powerless to control it.

This is briefly an outline of the process by which, as the result of real or fancied insolvency, these banking houses have come into control of many railroad systems. The remedy is simple if the Federal Government has the power to apply it to railroads and industrial corporations (for the processes and abuses in the latter class are the same) engaged in interstate commerce. It is as follows: Enact the procedure provided under the Companies Act of Great Britain, whereby the plan of reorganization is placed under the direction and control of the courts. If the plan is just and receives the consent of three-fourths of each class of security holders it becomes binding on the others. If it is unjust a single share can defeat it. No foreclosure or pretended sale is necessary. The years of delay that disgrace our administration of these properties by the courts is unknown. The receivers, instead of being selected, as is usually the case with us, by a combination of the choice of the discredited management and nominee of the court, in which real owners of the property have no voice, is selected under the English law by the votes of those interested in the property. If they fail to agree the official receiver acts at a comparatively nominal cost. No sale of the property is involved. The reorganization is accomplished without it. Six

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months is the average duration of such a proceeding in England, and the cost is well below 10 per cent of what it is with us. The owners of the property get back their property and with it their right to control it, and no voting trusts are found necessary.

In so far as concerns interstate railroads we recommend that the Interstate Commerce Commission be empowered, subject to review by the courts, to supervise every plan of reorganization and the issue of securities thereunder, to hear objections and to disapprove any plan that it may find equitable in its issue or distribution of securities. Congress, in our judgment, has the unquestioned power to delegate this duty as an important feature of interstate rate-making as affected by security issues."

REMEDIES THAT ARE PROPOSED TO STRENGTHEN THE ADMINISTRATION OF THE SHERMAN ACT:

1. Wherever the corporate or other form of combination has been declared unlawful at the instance of the Government either in civil or criminal proceedings, the judgment thus rendered should be binding against the corporation in any future proceedings brought against it by any aggrieved party. In the present state of the law anyone seeking a remedy under the Act must prove independently the illegality of the combination. The enormous expense of such an undertaking renders redress practically impossible.

2. Every stockholder, creditor or person otherwise interested in a business, firm or corporation that becomes a party to an unlawful combination and every competitor who may claim to be injured should have the independent right to enjoin the proposed violation. If that right had existed from the inception of the law, most of the Trusts would have been prevented. In the present state of the Law the Attorney-General alone can maintain such an action. The Department of Justice is unable to cope with the vast number of violations. It is slow to act. It has never yet enjoined the formation of a Trust, no matter how ample the notice. All danger of using the proposed process for blackmailing purposes can be avoided by requiring that the United States be made a party and that a suit once begun cannot be dismissed without the consent of the Government, so that

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the latter may at any time assume the conduct of the litigation.

3. Any person aggrieved by the existence of an unlawful combination should likewise be permitted to intervene in any suit by the Government and to secure in that action the relief to which he is entitled. This permission should be broad enough to include minority stockholders of any corporation. To that end the present Equity Rule of the U. S. Supreme Court which prevents the minority from enforcing remedies in behalf of the corporation until all sorts of onerous conditions have been met should be abrogated. Such suits should be encouraged as a wholesome check upon unlawful acts of the majority.

4. It should be unlawful and regarded as conclusive evidence of illegality for any corporation to do business under a name other than its own or to hold out to the public any business controlled by it as a competitor.

5. A combination among the owners of competing patents should render the patents void.

6. Give to the Interstate Commerce Commission exclusive control over the bond and stock issues of interstate corporations, the manner of disposing of the securities and the prices at which they shall be sold, as recommended by the Pujo Committee and as I have been consistently urging for the past four years.

7. I do not agree to the wisdom or justice of unconditionally requiring industrial companies to sell their goods at a uniform price throughout the country even after allowing for differences in freight charges as is proposed in a number of the pending bills. It puts them at the mercy of every local or intra-state competitor. If in order to meet competition at a given point it is found necessary to sell at cost they ought not be required to do so throughout the country. Such a rule tends to destroy rather than to stimulate competition. A limitation against thus selling below cost would

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furnish ample protection against the form of oppression that is sought to be prevented.

8. Nor should they be prohibited from selling abroad more cheaply than at home, unless the article is protected by the tariff. In the latter event there should be such a prohibition.

9. There is also grave doubt as to the economic soundness of the proposed regulation that permits the manufacturer of an article not protected by patent, to fix the price at which it shall be sold.

This looks like a very formidable program. It furnishes the reactionaries with the time-worn argument against all progress, that we have too many laws and that there is ample law if we would enforce what we have. That sounds plausible and misleads many well-meaning people. It is true that Congress and our State Legislatures enact too many laws. They deal with too many trivial matters of purely local or individual concern that clog our Statute books. It is not true that we have too many laws or any sufficient body of law for the regulation of corporations. These artificial octopuses have grown so rapidly under our very eyes that we have not had time until now to sufficiently study their operations or to realize the extent to which they overshadow our economic system to formulate a comprehensive body of laws to control them.

The Banking Law has not been revised in fifty years. It bears no intelligent relation to existing conditions. Industrial interstate corporations are absolutely unregulated except insofar as the Sherman Law applies to those that are unlawful. The States under whose laws they are organized have been brazenly competing with one another in the unrestrained license to prey upon the rest of the country, so as to get the revenues that the corporations are willing to pay to the State that offers the highest illicit inducements in the form of laxity of responsibility and administration.

Every other country has a comprehensive code of laws enforcing restrictions and fixing rigid liability. The time

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has come for us to supply our corporations with rules so that they may know what they can and cannot do.

It is to be hoped that we are not to be swerved from the performance of that imperative duty to the legitimate business of the country by the meaningless taunt that "there is too much law". So long as we have the spectacle that we are witnessing every day of looted corporations, unlawful combinations and victimized minority stockholders without redress it is idle for the interests that have been fattening upon this era of lawlessness to prate about "too much law". If there had been more law there would have been less lawlessness as they will find when Congress has equipped the Government with the legal machinery with which to cope with the crimes of high finance. Upon the thorough and fearless discharge of that duty depends our future business freedom and prosperity. It will tax the patience and courage of our public men to the limit. Truly a great responsibility, but one that must now be met.

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THE RELATION OF THE FARMER TO THE TRUST QUESTION

An Address

Delivered before The Western Economic Society and the Second National Conference on Marketing and Farm Credits at Chicago, April 15th, 1914.

By

Samuel Untermyer

of New York

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MR. CHAIRMAN AND GENTLEMEN:

Before taking up the subject assigned to me, and yet not entirely unrelated to it, I would like the privilege of repeating to you the appeal made by me in this city three months ago to the Illinois Manufacturers Association that you use your vast influence in favor of a moderate increase in freight rates on the Eastern lines. The railroads are facing a grave crisis —far graver than we realize. There is no exaggertion in the statements of their officers to the Interstate Commerce Commission nor is there any foundation for the suspicion that the wholesale discharge of men is part of a spectacular play to influence public opinion. The figures of reduced business, neglected improvements and increased expenses speak for themselves. They are appalling. There must be prompt relief. The delays thus far suffered have had their part in demoralizing business and accentuating an already difficult situation. Concede, if you please, that some of the railroads have been brought to their present plight through mismanagement, dishonesty, exploitation or what not. By all means punish the guilty if you can reach them and let Congress see to it that the misdeeds of the past are rendered impossible in the future but do not paralyze the industries of the country by denying the roads the opportunity to live and meet their responsibilities. The public interest demands that they be afforded a basis of earnings on which to finance their money requirements for equipment and improvements. This plea is not made primarily out of sympathy for the plight of the stockholders. If they have permitted their properties to be exploited and mismanaged it is right that they and not the public should pay the penalty if they were alone concerned. But it is the public that suffers from inefficient and dangerous operation and from the inability to meet transportation requirements. I am satisfied that the era of railroad dishonesty, fiscal agencies and banker-managements is nearing its end. The time is close at hand when the victimized shareholders will take their properties out of the hands of recreant

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Trustees and will assume control of their own. But for their unbelievable inertia we would have been saved these long years of exploitation that have destroyed confidence in our securities the world over.

The railroads are however now at last about to come under complete Government control. The intolerable spectacle is over of directors sitting on both sides of the table, selling securities of their Companies to themselves at prices fixed by them and selling at vast profits properties purchased by them for the purpose to the corporations that they control but do not own. The time has also passed when directors can with impunity further use the machinery of the Stock Exchange to manipulate the prices of their securities on advance inside information. The carnival of exploitation on which the vast fortunes of some of our most pious and "distinguished" citizens are so largely founded is at an end. They now realize that the new standards of honesty and obligation of Trustees have come to stay. When we reflect upon the abuses that have been perpetrated we cannot but sympathize with the impatience and resentment of the people but the resentment is unfortunately being vented upon the victims and is not reaching the offenders. The pendulum of public opinion and official mistrust has swung too far against the roads. This is no time for reprisals. Some of the roads are tottering on the verge of bankruptcy. Maturing obligations must be refinanced and vast sums are needed for replacements and improvements. They cannot be had under existing conditions. If you agree to the importance of immediate action I trust you will promptly so announce yourselves and thus do your share toward relieving the business depression and stagnation that are upon us. The increase asked is just and necessary and the need is urgent but of far greater importance will be the sentimental effect, if the relief does not come too late. It will furnish to capital the much needed assurance that Government control does not mean confiscation or injustice. There can be no general revival of business prosperity at this juncture without that assurance. Sentiment is a far more important factor in business than we realize. And so I again urge upon you that you do your part. With your permission I will now take up the main thread of our discussion.

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I expressed to your Secretary my hesitation in accepting your invitation to address you on the ground that my views on the topic on which you have asked me to speak are likely to prove unacceptable to many of the members of this Conference. He assured me however that the purpose of the meeting was to be instructed upon all aspects of the questions involved and that you are not wedded to any given point of view. I am accordingly here to speak very frankly.

The relation of the farmer to the Trust Question is of course one of the most direct personal and pecuniary interest and concern. If it can be made possible by the enforcement of existing law or by supplementary legislation to restore and maintain the free flow of normal competition and to so regulate it by law as to prevent unfair and ruinous competition, the farmer will share with the rest of the community in the benefits that should flow from the reduced cost of living.

It is not however with the relation that the farmer *should bear* to the Trust Question nor with his relation to the question as a consumer that I care particularly to deal. There is no occasion for extended discussion on that point. There can be no doubt as to what that relation *should be.* As the chief consumer of the country, it is manifestly in his interest that the value of everything he buys shall be fixed in an open and stable market where there will be no opportunity to levy tribute upon him. Ruinous cutthroat competition is no more in his interest or in that of any other class of the consumer community than is monopoly. It is an economic curse. It disturbs the natural currents of trade, leads to spasmodic periods of over-production and under-production and consequent instability of prices and is the highroad to monopoly. It is quite as important to regulate competition as to suppress monopolies and trusts.

The questions for discussion may be stated thus:

What is the real attitude of the Farmer *as a producer* to the Trust Question? Is it just sincere, consistent or public spirited? What *should be* his attitude both in his own interest and as a citizen? To these questions I answer, and shall endeavor to prove, that his attitude is unjust, inconsistent and unwise.

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This broad indictment is based upon (1) the drastic character of the Anti-Trust laws in the farming States as applied to all forms of industry other than farming; (2) the exemptions that have been engrafted upon these laws in favor of the farmers; (3) the failure to enforce the laws against them in States in which the exemptions do not exist; (4) the attitude of their Representatives in Congress and (5) the many open violations of the Federal Anti-Trust Law that exist by sufferance in the various forms of pooling and selling arrangements among the farmers in the different sections of the country.

As illustrating these unfair discriminatory laws, that are sometimes cloaked under the euphonious disguise of "Co-operative laws for Marketing Farm Products", the Kentucky Act of 1906 expressly exempts the growers of wheat, corn, oats, hay, tobacco and other farm products from the operation of its Anti-Trust statute and legalizes pools and selling agencies in the farm products.

In California in 1907, and again in Colorado in 1913, laws were passed expressly authorizing pools, combinations and agreements that would permit of reasonable profits through co-operation and the elimination of competition.

The license to discriminate in the enforcement of the Federal Anti-Trust Law in favor of the farmers is impliedly involved in the rider that was attached to the $300,000 appropriation of 1913 for the enforcement of the Sherman law, by the terms of which the Attorney-General is forbidden to apply any part of the fund in the prosecution of—

> (b) Producers of farm products and associations of farmers who co-operate and organize in an effort to and for the purpose of obtaining and maintaining a fair and reasonable price for their product.

It is common knowledge that price-fixing agreements in the form of selling agencies are in active operation in intrastate and interstate commerce in farm products all over the country, of which those in cotton and fruits are conspicuous examples. In a few staples, of which that of the cranberry growers is the most generally cited, a virtual monopoly is maintained in the form of a common selling agency which exacts for the growers whatever price they see fit to fix.

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In none of the States in which these combinations (all of which are within the condemnation of the Sherman Law) are expressly legalized and exempted from the operation of the State Anti-Trust Law, is there provision for their regulation by public authority. In none of them is any relief provided against their levying undue tribute except in the vague requirement that the combination may exact only reasonable profits—whatever that may mean in the absence of an executive body to protect the public.

The country is honeycombed with these pools, trade agreements and gentlemen's understandings under cover of selling agencies, trade associations, social clubs, information bureaus and innumerable other disguises embracing most of the departments of trade and industry. Every now and then the Government pounces upon some unfortunate industry, like the members of the wire, window glass, turpentine, bath-tub, straw-board, wood-pulp and wrapping paper pools, in a spasmodic and haphazard fashion, selecting its victims at random, collects fines from the little fellows and sometimes—generally unsuccessfully—tries to send them to jail—only to find them getting together again after the storm has blown over, but in a more elusive form as the result of their expensive and uncomfortable experience.

We all know that the dealers in anthracite coal in the larger cities agree on rates every year, which are publicly announced. There is no such thing as competition between them and the Anthracite Coal Trust would not tolerate it.

When in 1912 the Government concluded to enjoin the Western railroads from advancing their freight rates it found no difficulty in making proof of the agreement, which had been negotiated and effected in open convention. The same is true of the passenger rates and time schedules between the great Trunk Line systems that are supposed to be competitive. It is generally conceded that there is a substantial profit in the present price of steel rails. Is there any competition in the price of rails or of any of the other staples in the steel trade as between the different manufacturers? All these arrangements are in plain violation of the Sherman Law. But does any Federal official attempt to enforce the law?

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These are the daily object-lessons that tend to make of us a lawless nation.

This anomalous condition of insubordination and defiance of law by our men of affairs to whom we look up as constituting our best and most enterprising citizenship is the inevitable outcome of an unsound and destructive economic policy, from the effects of which the farmers by reason of their vast political power, are seeking to exempt themselves whilst imposing that policy upon the rest of the country.

The only possible excuse for such a position on the part of the farmer is that he, as the most valuable and the greatest wealth-producing and least-protected element in our industrial life, is entitled to exemptions and immunities at the expense of the rest of the community.

It is not intended here to suggest that these trade arrangements should not be permitted under given restrictions. That question will be discussed later. But I insist that if they are to continue under the ban of the law, as they now are, that prohibition should be generally applicable to all industries, including that of the farmer.

There is no basic principle upon which any such exemption or discrimination can be justified. Why should the cotton-growers be suffered to combine in the marketing of their product so as to regulate the price and output, whilst that right is denied to the manufacturers of cotton goods? Or why should not the coal operators have the same privilege? Why have the cranberry growers been openly permitted to maintain a selling agency in New York City through which about 90% of the product of the entire country is handled, whilst the milk dealers are sent to prison for doing the same thing? Surely such unequal enforcement of the law cannot be in the public interest.

The injustice and inconsistency of the farmers' attitude to which I have referred consist in his insistence on denying to every other industry the right of cooperation to restrict competition whilst he insists upon exemption for his own occupation and is seeking to punish as crimes when committed by others acts which when perpetrated by him are not considered as inimical to the public welfare.

It is difficult to see in the mental processes that can bring about such a result anything beyond the blindness of self-

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interest. It is not surprising that under such circumstances Courts and juries refuse to enforce the criminal provisions of this statute unless they find proof of actual oppression or unfair business methods accompanying the technical violations of the law.

What, then, should the farmers in all fairness do in the circumstances? What should be their attitude to the Trust Question? What is the wise public policy? Is there any tenable ground on which they should be exempted from the general rule? Should all arrangements and devices for regulating prices and output between competitors, including those applying to their own business, be forbidden? Or should they all be permitted? If the latter, should such permission be within given limitations and what should they be? The answers to these questions point the only just way of approaching and seeking to solve this problem.

The discussion of this question involves only the various forms of temporary agreements and understandings between actual or potential competitors in a given industry, having for their purpose uniformity of price or regulation of output whether expressed through pools, selling agencies or otherwise. They are not usually in corporate form or represented by capital stock.

The proposal does not include any change in the existing program for dealing with the Trusts and combinations that are in corporate form and with which the Government and the Courts have been mainly concerned except to render their prosecution and dissolution more effective. The impression that there has been anything like a general prosecution of unlawful combinations in interstate commerce is a mistaken one. The suits that have begun are trivial in number and aggregate importance as compared with the known violations. They have been directed mainly against the more conspicuous consolidations that are in corporate form and the practical results have been negligible.

There are many reasons why the arguments for the suppression and extermination of these Trusts should not apply to the pools, agreements, understandings and price-fixing and output-regulating devices, provided the latter are placed under rigid Government regulation and restriction as to the terms and conditions of the agreement so as to effectively

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protect the public against all danger of extortion or oppression.

1. The latter do not involve stock watering, exploiting the investing public, change of ownership or closing of mills or factories.

2. There is not the same power or incentive to exact exorbitant prices; no excessive dividends are required to be earned on inflated capital to be used as a basis for unloading stocks at exaggerated prices and there is the constant peril of inviting new competition and thus disrupting the agreement.

3. The element of individuality is preserved; there is no permanency to the arrangement; each of the parties must continue to maintain his plant and selling force in condition to resume competition at any moment. He must accordingly avail himself of all new inventions.

4. There is a continuing competition in costs of production between the parties to the arrangement resulting in economy of manufacture and distribution and of general management, since each party secures the sole benefit of such economies.

5. There is not the inducement or opportunity for the acts of oppression that are practiced by the Trusts in order to maintain their supremacy. The interests of the latter are permanently and indestructibly merged whilst under these temporary arrangements such acts of oppression are dangerous and unlikely. The friendly co-operators of to-day may be the bitter competitors of tomorrow.

6. They offer a means of escape from destructive competition without driving competitors to combination with all its attendant evils.

These arrangements should not, however, be longer tolerated in their present furtive unlawful form, whether they apply to the product of the farmer, the manufacturer or the middleman. They are a standing invitation to extortion and exploitation of the public and a menace to industrial freedom. There is only one way of exterminating them and that is by substituting in their place permissive public agreements that shall be subject to Federal approval and supervision.

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In dealing with the Trusts an entirely different policy should be pursued. I favor their enforced dissolution and actual and complete segregation, as nearly as may be, into their original parts and the enactment of legislation that will ensure their being kept segregated. None of the plausible arguments that were urged in favor of their organization have materialized. The extermination of the vital element of individuality and the substitution of bigness and bureaucracy have more than counterbalanced their supposed advantages. They can hold their supremacy only when they virtually control the industry, and they can continue to control it only through unfair practices.

It is to be hoped that this vexatious problem of subduing and eliminating the trusts is in a fair way toward eventual solution and that we are at last within sight of industrial peace. True, little has yet been actually accomplished in the way of effectual legislation, we are still as tightly as ever in the grip of the Money Trust and the laws now under consideration by Congress are as yet disappointing in that they do not adequately meet the situation. But the issues are framed in concrete form and I am encouraged to believe that the long struggle between Big Business and the people is happily nearing its end notwithstanding the reports of the past few days from Washington to the effect that comprehensive legislation is to be postponed until the next session.

The rumor is incredible. It is gratifying to note that the President is not in sympathy with any such policy. It would be the worst kind of political blunder and almost a National misfortune if after all this agitation and investigation there is to be further delay in the settlement of this question. The reason offered in favor of the proposed action is the most conclusive argument against it. The obvious dictates of business sense and political expediency require that the agitation be ended. That can be done only by the enactment of the necessary comprehensive legislation. The other method serves only to prolong the existing uncertainty, unless the party in power intends to abandon its program and violate its campaign pledges, which seems to be the hope of the interests that are now urging delay.

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The same effort was made and the same "public sentiment" was sought to be manufactured when currency legislation was under consideration. Fortunately the scheme did not work and we now know how absurdly the effect on business of the then pending legislation was exaggerated for the purpose of defeating the reform. Surely we cannot be so blind as to fail to detect the same influences behind this demand.

If action is to be postponed the Democratic Anti-Trust policy may as well be considered dead. Every Congressional contest this autumn will be conducted on the plea that the election of the Democratic candidates involves the reopening of the question, with its accompanying continuance of business unsettlement. It will also be urged that the party has no definite views on the subject and is incapable of framing intelligent legislation. These pleas cannot fail to be effective and may lead to the defeat of the party that frittered away its opportunity to settle this question. There is nothing to be gained and everything to be lost both to the business community and to the party by such a procrastinating policy.

Unless Congress now falters or permits its judgment to be beguiled by the same old false predictions of disaster that have so often in the past turned it from its plain path of duty into enacting mere palliatives instead of remedies we will soon have heard the last echoes of the conflict.

The contest seemed at one time hopelessly unequal. On one side are arrayed the most resourceful and powerfully entrenched interests the world has ever known, a magnificently trained army with colossal stakes to protect and the single fixed purpose to retain its vast special privileges at all costs; on the other hand nothing but the disorganized hosts, apparently working aimlessly and at cross-purposes in the effort to batter down this citadel of entrenched power.

The subject-matter of the contest is of exceeding intricacy and highly specialized, with well-nigh all the expert knowledge in the camp of the invaders upon the domain of industrial freedom. But the intuition of our people sooner or later penetrates beyond disguises and subterfuges into the economic truth of every proposition that affects them. It is an unfailing reliance and an endless source of wonder and admiration. We grope and blunder along in the darkness

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through difficult problems that we only half understand, but always into the light.

And so within an incredibly short time since we began to realize our peril we find ourselves well on the way toward the solution of this problem that only a few years ago threatened to overwhelm us, if the President and Congress can only resist the subterranean influences that are being exerted from every direction to end the struggle in a series of weak compromises resulting in colorless legislation that will settle nothing.

The first and an important step, but only one of many steps that we shall have to travel toward breaking the power of the "Money Trust," has been accomplished in the enactment of the Currency Law. The "Money Trust" lies at the foundation of all our troubles with the Trusts. It is the corner-stone upon which they rest. Its destruction is the only key to their solution. From it the other Trusts and combinations radiate and on it they depend. They would disintegrate of their own topheaviness but for the menace to new competition and the shield and protection against such competition that the "Money Trust" provides.

Business cannot be liberated so long as it is overshadowed by this octopus. Competition will not rear its head to give battle to the entrenched interests that are under the protecting wing of the men who wield this destructive power. No overt act is necessary on their part. The mere existence of the power is a continuing threat. So long as they dominate the sources of credit and can terrorize every new venture so long will it continue useless to attempt the emancipation of business. Disintegration of existing combinations will not in itself solve the problem. It must be supplemented by new competition with fresh young blood and comparatively small beginnings. That is not possible whilst the present concentration of the control of credits continues in a few hands. All legislation must be directed primarily against its destruction and toward thus restoring freedom throughout the arteries of trade and finance.

Our present predicament is aptly described in the Report of the House Committee on Banking and Currency of 1913 now commonly known as the Report of Pujo Committee, in the following words:

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"Far more dangerous than all that has happened to us in the past in the way of elimination of competition in industry is the control of credit through the domination of these groups over our banks and industries." * * *

"Whether under a different currency system the resources in our banks would be greater or less is comparatively immaterial if they continue to be controlled by a small group." * * *

"It is impossible that there should be competition with all the facilities for raising money or selling large issues of bonds in the hands of these few bankers and their partners and allies, who together dominate the financial policies of most of the existing systems. * * * The acts of this inner group, as here described, have been more destructive of competition than anything accomplished by the trusts, for they strike at the very vitals of potential competition in every industry that is under their protection, a condition which if permitted to continue, will render impossible all attempts to restore normal competitive conditions in the industrial world." * * *

"If the arteries of credit now clogged well-nigh to choking by the obstructions created through the control of these groups are opened so that they may be permitted freely to play their important part in the financial system, competition in large enterprises will become possible and business can be conducted on its merits instead of being subject to the tribute and the good will of this handful of self-constituted trustees of the national prosperity."

The Democratic party is taunted on the one hand by the enemies of these reforms with unsettling business and shaking confidence in the stability of securities by the continued agitation of this subject. On the other hand the party is charged by the impatient radicals in its own ranks and in the ranks of the opposition parties with having made no headway toward destroying the existing dangerous conditions and that the various investigations and exposures that it has made have had as yet no outcome other than the disturbance of business.

In answer to our insistence that the mad gallop into the abyss toward which we were furiously driving has at least been checked, that moral standards have been raised and many objectionable methods abandoned in the financial world as the preliminary results of this agitation, the radicals challenge us to point to any case in which the grip of the "Money Trust" has been relaxed or its power weakened and we are bound to concede that no such results have yet been achieved.

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But the ground has been cleared and all the preliminary work has been done.

The public at last knows the facts and realizes the evils. It has located and diagnosed the abuses that so long eluded discovery and is thoroughly aroused and determined to exterminate them. Therefore I say we are in sight of industrial peace, since there remains now only the question of applying the appropriate remedies.

We know that although our Anti-Trust law has been for 24 years upon the statute books in its present form, the evils it condemns have continuously grown and thrived until they have threatened the very existence of our institutions and that even now, when the law in its present form has been enforced to the limit of its capacity as the result of an insistent public sentiment, the practical results fail to meet our needs.

We know that the legal machinery furnished by the Act is defective and that the violations cannot be effectually reached, abated and punished without supplementing that machinery. We realize that our laws for the regulation of corporations are archaic and inadequate. They were framed before we were alive to the abuses that are sapping our industrial independence and at a time when the power of the special interests dominated our legislative bodies and dictated our laws to suit their purposes. We know that under the blighting influence of these laws and because of the absence of the protection to which we were entitled there has been foisted upon business and finance this concentration of the control of the credits of the country in a few hands that has come to be known by the misleading name of the "Money Trust" and that has made these few men the masters of our financial destinies; that it has paralyzed initiative and destroyed independent action, that it constitutes to-day the most dangerous financial despotism the world has ever known and that if permitted to continue it will be destructive of our progress.

We recognize that in the train of these evils and as the result of this lawlessness, due to lack of law, have come corporate corruption, waste and irresponsibility that have blinded the moral perspective of the leaders and of their satellites in the financial world.

All these things we know; but we do not know and it is not conducive to our peace of mind that we should know the extent to which we have been and are still being ruled and

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exploited, for the patience even of our people has its limits. We are intensely practical and so, without harking back to the mistakes or misdeeds of the past or wasting our energies in trying to settle scores with those who have brought us to this plight, our faces are set to the future to find a remedy that shall be so effective and all-embracing that the wrongs shall be undone and their repetition in the future rendered impossible. The people are not in quest of punishment or revenge. With a remedy in sight they are content to let bygones be bygones and to proclaim a general amnesty as to the past.

The legislation now under consideration by Congress represents a constructive policy. The main criticism of it is that it does not go far enough on the constructive side in the regulation of competition in the direction to which I shall in conclusion now refer.

The only aspect of the pending legislation with which we have here to deal is that which relates to the various forms of co-operative arrangements for marketing the products of the farms, factories and other industries. Under the proposed legislation they remain under the ban of the law, are made more easily discoverable and are more severely punished. They include farm products, as they should, if the prohibition of such agreements is to continue to be the policy of the Government. They include also organizations of labor, which I consider wrong. The statute was never intended to apply to them and there are other reasons that are to my mind conclusive in favor of their exclusion. But that is another story and one with which we are not now concerned.

The time must soon come when with the aid of the Industrial Trade Commission the law, whatever it may be decided it shall be, will be generally and impartially enforced. This incredible situation of extending general immunity to the farmers to violate the law whilst they are demanding and securing its enforcement against the industrial world will not and should not be longer tolerated.

Agreements between competitors that have for their sole purpose the prevention of ruinous competition and the securing of a reasonable profit should be made possible and lawful in all industries, subject to the approval and regulation of the new Trade Commission for which provision is made in the pending legislation. No one need become a party to such an

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agreement unless he sees fit to do so but competitors should no longer be compelled to ruin themselves and one another under penalty of being branded and punished as criminals. They will not do it, law or no law. The instinct of self-preservation will prevent it. This perverse policy will simply result in making of us a nation of hypocrites and lawbreakers with a criminal code of honor in which nods and understandings will take the place of tell-tale writings. Every crossroads will have its "Gary dinners" at which "the state of the weather" will be the subject of discussion and which the law will never be able to reach.

Unrestricted ruinous competition should be superseded by regulated competition. The former inevitably leads to monopoly. The latter does away with the oppression of weak competitors and with every vestige of pretext for combination. The distinction between co-operation and combination is fundamental. The former is distinctly beneficient if so supervised and restricted that the levying of tribute upon the public is prevented. The latter is economically unsound and oppressive.

Instead of the innumerable secret and unlawful arrangements that are now tolerated, under cover of which there is now taken from the people "all that the traffic will bear" it will be the duty of the parties to submit their agreement to the Trade Commission. The latter, with the aid of its expert accountants, will determine whether the conditions are reasonable and fair to the public, in the same way that the Interstate Commerce Commission now determines the far more complicated question of rates. With such relief at hand public sentiment will support the rigid enforcement of the criminal law against all Trusts and secret arrangements.

I offer, as I have for the past five years repeatedly offered this programme as an answer to your question of what should be the relation of the farmer to the Trust Question. It enables the farmer to retire with honor from his now indefensible position of using the brute force of superior numbers and political power to perpetuate an act of glaring and unprecedented injustice upon every other industry, involving the most offensive form of class legislation, the constitutionality of which is subject to the gravest doubt.

This is his opportunity to solve the problem. Will he be sufficiently wise, just and far-seeing to grasp it?

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REASONS AND REMEDIES FOR OUR BUSINESS TROUBLES

AN ADDRESS

DELIVERED BEFORE THE COMMERCIAL CLUB AND THE PITTSBURGH INDUSTRIAL DEVELOPMENT COMMISSION AT PITTSBURGH, MAY 22ND, 1914

By
SAMUEL UNTERMYER
of New York

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REASONS AND REMEDIES FOR OUR BUSINESS TROUBLES.

It is useless to blink the fact that we are in serious trouble. At the end of a long series of years of bountiful crops and with a record-breaking harvest for the present year assured, when optimism should be rampant, we are confronted everywhere by business contraction and depression. The New York banks are overflowing, call money on Stock Exchange collateral is a drug in the market, as is always the case when business is languishing, and yet it is impossible to secure loans on improved unencumbered real estate or investment funds for new enterprises on any terms. Capital is everywhere hoarding its resources for some emergency and the small investor seems to have disappeared.

Why? Until we have diagnosed the disease it would be dangerous to attempt to apply the remedy. There are doubtless contributing world-causes but they are so remote as to be almost negligible. There are such things as world cycles of business and financial depression due to destructive wars, widespread famine, panics brought about by over-straining the world's capital resources and by over-speculation—but no such conditions confront us at the moment.

True, the Balkan War and the demands upon European centres for funds with which to refinance the Balkan States are and will for some time continue to be a severe drain and will divert European capital from us, as do the attractions of the vast new enterprises in Russia, South America and the Far East.

But we have accumulated wealth so rapidly that we are year by year less dependent on the investment of new foreign capital in our country, although it is still very important to us that existing investments shall not be withdrawn as they have been recently.

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Our troubles do not however lie primarily in that direction.

Nor is the Tariff Bill to any appreciable extent responsible for our plight. A downward revision was demanded by the people and recognized as necessary by all parties. The change has been from an average of about 43% to an average of about 26% and has been on the whole wisely distributed. It is the first Tariff Bill enacted in our history that was unselfish and uninfluenced by the demands of special interests, which have heretofore dictated this class of legislation. If with that percentage of protection we are unable to meet foreign competition in our own country and stimulate our export business, we may as well count ourselves "out of the game" in the world's markets.

The statistics for the first eight months of the operation of the new law show far less disturbance in the currents of trade than was fairly to be expected. We have been a shiftless, prodigal and unscientific people in our methods of manufacturing and marketing our goods. The undue shelter of the Tariff and the elimination of home competition through the Trusts and trade agreements have weakened our business virility, encouraged extravagance, substituted bureaucracy for individuality in our Trust-controlled industries and have thereby crippled our competitive power. With our superior labor and vast natural resources we should be leading the world as an expert manufacturing nation instead of which we are in imminent peril of ceasing to be a factor.

If, as I believe, time shall demonstrate that with the return to individuality in business and the practice of skill and economy and with the resourcefulness that are ours we are able to meet foreign competition with the aid of the generous protection we now enjoy, the struggle will have been wholesome and stimulating. There is no basis for charging our present conditions to the Tariff.

What then are the reasons assigned and where lies the truth?

First and foremost, it is insisted in certain influential quarters that the policies of the Administration are responsible. Its economic program is simple—to destroy the Trusts and curb existing corporate abuses—which is said to be unsettling business. Our newspapers are feeling the effect of business

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contraction and financial stagnation in their advertising columns. In casting about for an explanation they have adopted the views of the supposed financial experts, whose interest it is to divert blame from themselves, especially when it offers them the opportunity at the same time to fasten it upon an Administration that is pledged to correct their excesses. And so we have the great power of the press honestly, but I think mistakenly, generally supporting the cry that the demoralization is due to impending legislation.

If this is an erroneous view it is doing incalculable harm. Like every treatment based upon a false diagnosis, the real disease continues to develop and progress through neglect, whilst the healthy organs are weakened by the irritation resulting from mistaken treatment.

It is therefore of the highest importance that we get at the actual facts. Our National prosperity is involved in reaching the right answer. Party spirit and party advantage should play no part in such an inquiry. In the interest of the country as well as for our own sakes let us be absolutely fair in seeking the solution. Nothing is to be gained and much will be lost if we are diverted to false leads.

I am an ardent admirer of our Chief Magistrate, but not a blind worshipper or follower of his or any other man's policies. Like all of us his judgment is fallible, but he has shown himself exceptionally responsive to the public will and has made surprisingly few if any mistakes in dealing with the stupendous problems that have been thrust upon him and in carrying out the program that he was commissioned to execute.

In fourteen months of power the party has been confronted with more grave and sudden International and National emergencies than have come to previous Administrations in as many years. The President has met the situations as they arose with candor, courage and splendid judgment and has grown day by day in the confidence and affections of the country. I believe in his high ideals of public duty and in his intense patriotism; but he has no monopoly of those virtues. They have characterized every President in the history of our Nation. That is our proud boast and the fact that it is true is the best proof of the success of Republican institutions.

Let us briefly analyze what the Administration has thus far done and what it is proposing so that we may determine

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whether there is any basis for the charge that it is to any extent accountable for the present distressing business unrest and uncertainty.

Its critics claim that our Mexican policy has been wavering and provocative of war; that we should either have recognized Huerta at the outset and thus assisted him to restore order in his country or have intervened in short order to that end with the prospect of a long and bloody conflict that would have confirmed and concentrated upon us the suspicion and hatred of our South American neighbors whose confidence and friendship we are anxious to secure.

When the history of the events that preceded the present Administration is written and the story of wholesale assassination, treachery and chicanery by which Huerta secured and maintained power, and his savage disregard of the decencies necessary to diplomatic intercourse in his dealings not only with us but with the representatives of all the Powers is told, it will be seen that quite apart from the fact that we were asked to encourage on our borders a Government founded on assassination it would have been for many other reasons impossible to have diplomatic relations with that sort of Dictatorship.

Posterity will in my judgment give high praise for the splendid evidence furnished by this incident of the depth of sincerity of our desire for world peace, as evidenced by our rare patience and self-abnegation. We have at last made our neighbors realize that we shall never wage a war of conquest. The lesson we have taught by our attitude under intolerable provocation that a giant nation need not use its strength as a giant is well worth the price. We are about to witness the triumph of a new diplomacy on this Continent that will render war hereafter well-nigh impossible and will advance the cause of humanity by centuries. No greater service was ever performed. Our Nation will head the roll of honor in the cause of universal peace.

The situation was in any event unavoidable. It was a legacy to the present Administration from its predecessor. There is nothing in it to account for the troubles we are now discussing. They were with us before the Mexican crisis arose and have not been altered by it. War would stimulate rather than depress business, temporarily at least. So we may dismiss that consideration and take up in order the domestic causes that

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are assigned; all of which are based on the past accomplishments and present proposals of the Administration by way of legislation.

Apart from the Tariff Bill, and yet a part of it, there has been enacted the Income Tax Law. Surely none will deny the wisdom of that legislation or contend that it has tended to impair confidence or unsettle business. It was a cruelly long-delayed act of justice to the toiling masses upon whom all the burdens of government had been laid. Let us hope that the present law is only an entering wedge. I believe the time is not far distant when the revenues of the Government from that source will develop our vast natural resources, convert our deserts into rich agricultural gardens, widen and deepen our rivers and harbors, maintain an army and navy that will make for universal peace, furnish prosperous employment for hundreds of thousands of our people and inaugurate, with the co-operation of employers of labor, a vast system of social reforms that shall include old-age pensions and insurance against sickness and unemployment. The enactment of this program will be the answer of Capitalism to the impracticable theories of Socialism.

The passage of the Currency Law is the other momentous accomplishment of the Administration within its brief life. Nothing more distinctively constructive and reassuring to business and nothing more necessary to its safety, stability and independence has ever been accomplished. Its detractors have been forced to recognize its value and have been converted into unwilling champions in the face of their dire prophecies of disaster. The rich harvests of the privileged few and the sufferings of the many from financial panics are things of the past, thanks to the courage and wisdom of this legislation.

Yet it is only a few months since our troubles were being charged to the pendency of the Currency Bill and a formidable movement was under way to postpone action upon it, for the same reason that is now being urged for delaying the settlement of the Trust Question. Would it have made for the betterment of conditions if Currency legislation had been left "hanging in the air" for another year? The same reasoning applies in favor of now ending the agitation and uncertainty over the problem now under consideration.

There is nothing revolutionary or unsettling in the proposals embodied in the pending Trust Bills. The only just crit-

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icism is that in their present form they are too largely made up of compromises—weak, superficial, ineffective and innocuous. They will not as they stand eradicate the intolerable evils against which they are supposed to be directed. The sub-Committee by which they were drafted and which has been for months faithfully and industriously struggling with its complicated problems has mistaken the boisterous activity of a small, selfish, powerful group, working their now familiar publicity campaign, for the voice of the business world and has timidly surrendered to the outcry. The objections that appear to come from the business community are genuine only to the extent to which they too have been misled by this campaign in which they have been cleverly thrust forward as pawns in the game that the Big Interests are playing under cover of legitimate business. The protesting resolutions of Chambers of Commerce against this, that and the other feature of the Bill, with which Congress is being inundated are old acquaintances. We now know how they are engineered. They have lost their terrors unless supported by reason. The article they furnish is now recognized as the purchasable commodity of a new but already well-organized industry that has been happily christened by one of its chief practitioners as the "acceleration of public opinion."

Comprehensive regulative laws, covering this entire field, are essential to the continued existence of small business and to restore its independence. We are constantly being deluded by the cry that we have too many laws and that what we need is a proper enforcement of those we have. This is not true in the field under discussion. Our corporate form of business has developed so rapidly and on such a vast scale that the laws to regulate it have not kept pace with the growth and development of corporate government. The absence of these restrictions is largely responsible for the corporate corruption from which we are suuffering, the evidences of which are gradually coming to light.

The public has been for years warned of its existence and of the necessity for relief by those who are familiar with the facts and who have had the courage and public spirit to speak out, but their voices have been drowned by the power of the entrenched interests and they have been rewarded chiefly with inspired abuse and misrepresentation of their motives. Nothing

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has been disclosed within the past year that was not plainly foreshadowed by the testimony and report of the Pujo Committee. The time has at last come when legitimate business and the community that have so long been victimized are beginning to recognize the peril. Substantially all the pending legislation is outlined in the Recommendations of the Report.

We need laws:

1. Prohibiting all forms of interlocking control of big competitive businesses, of which interlocking directors is but one of its many manifestations, but it is not necessary to interfere with small business or to bring it under Federal regulation.

2. Prohibiting holding companies that are in restraint of competition. Here again small companies should be excluded from the operation of the Act.

3. Regulating competition with a view of preventing the practice of unfair business methods by Big Business to the injury of small competitors.

4. Prohibiting the "dummy" director and all other forms of secret control so that the responsibility for corporate action shall be fixed upon those who in fact dominate and guide the corporate policy and benefit by its lawless acts.

5. For the protection and proper representation of minority stockholders.

6. Rigidly regulating and supervising the issue of corporate securities through the agency of Federal Commissions and requiring complete publicity of the purposes to which the proceeds are to be applied and of the profits of the bankers, promotors and intermediaries.

7. Abolishing the "graft" of constituting private bankers as the sole fiscal agents and depositaries of the funds of the corporations whose policies they dictate and requiring that their funds be placed in banks where they will be subject to supervision.

8. Placing the operations of the Stock Exchange under Federal supervision so as to put an end to the long era of shameless manipulation of security prices through the use of the machinery of the Exchange and to which dishonest practice many of our vast fortunes may be traced.

9. Releasing the grip of the handful of men constituting the "Money Trust" over our great interstate railway and indus-

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trial systems by abolishing voting trusts, reforming our methods of appointing Receivers of insolvent corporations and by placing Reorganizations under the control of the Courts and of Federal Commissions.

10. For a systematic and impartial enforcement of the Anti-Trust Law, which has never been and is not now being generally enforced.

11. Taking out of the hands of the Attorney-General and furnishing the necessary legal and executive machinery for the enforcement of the decrees of the Courts for the dissolution of combinations that have been adjudged to be unlawful and for actually disintegrating and keeping segregated such corporations and thus ending the farce in which our Attorney-Generals have been engaged and that is bringing the administration of justice into deserved contempt.

12. Giving to every party who is injured by the existence of an unlawful combination the independent remedy to enjoin the illegal acts or suing to dissolve the combination without awaiting the slow, uncertain and spasmodic processes of the Department of Justice. This right should however be safeguarded against abuse by allowing the Government to assume control of any such action at its pleasure and by preventing any settlement or other disposition of the action between the parties without its consent.

These are the more urgent of the many subjects that it is hoped to include in the pending program when perfected, as it should be and as I have every reason to believe it will be.

It is not so formidable a program as would appear at first glance, but the entire field is so highly technical and specialized that the opportunities to mislead are endless. There is nothing in any feature of the program that should disturb or unsettle legitimate business or finance; nothing that is not distinctly wholesome and constructive. Its enactment will protect and reassure honest investment and should give a new impetus to independent enterprise.

In order to determine whether the pendency of this legislation is in fact injuriously affecting business, it might be worth while to analyze briefly the objections that have been urged against it. They are directed mainly against the prohibition of interlocking directors and holding companies and they come apparently from many sections of the country.

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The necessity for this legislation was developed as the result of the investigation of the Pujo Committee, from which it was demonstrated that these were the most formidable instrumentalities through which the "Money Trust" obtained its grip upon the finances of the country. Through the medium of interlocking control many of the great banks, railway systems and industrial combinations were welded together into a single "community-of-interest" against which independent enterprise found it impossible to contend and which still remains undisturbed. We shall never achieve industrial independence or peace until it has been destroyed, root and branch.

It was through the agency of the holding company and the supineness of the Department of Justice that the organization of the great Trusts became possible. The idea of any corporation being controlled by another corporation—a puppet moved at the direction of a power other than of its own governing body—is repugnant to all conceptions of justice. It was not intended that a corporation should ever be governed by another corporation. That form of management involves on its face a breach of trust toward the outstanding stockholders, who are entitled to have the benefit of the undivided judgment of their managing trustees in the sole interest of their own corporation and without regard to the interests of any other agency. Under this system of government the management of the controlled company is necessarily conducted primarily for the benefit of the controlling or holding company, which may be and often is opposed to the welfare of the controlled company.

The claimed embarrassment to business that will result from unlocking these interlocking interests is more fancied than real, provided the operation of the law is confined, as it should be, to the larger corporations. A reduction in the number of Directors will answer the important purpose of concentrating responsibility. The large corporations are managed mainly by their Executive Committees. The Boards, consisting of from 20 to 40 Directors, are unwieldy and a distinct impediment to effective administration. They are mere registering machines for the Executive Committee. Their names are advertised to the public as a guaranty of management, which is in fact misleading and intended so to be. In financial institutions they are meant to attract business without attending to it. With the reduction of Boards to a work-

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able body the interest and activities of each man will be centered in his own institution and we shall have a consequent resumption of competition.

The disintegration of the holding company can be accomplished with still less friction or disturbance, by merely distributing the shares so held among the shareholders of the holding company. The only "disturbance" to business that would thus be involved would be to restore the competition that has been thus restrained. If the stock-holdings involve no restraint of competitive conditions the pending Senate Bill offers complete relief through application to the Trade Commission, or in the case of common carriers to the Interstate Commerce Commission, which has power to permit holdings of that character.

I agree however and have earnestly urged that these prohibitions against interlocking directors and holding companies should be limited to cases in which the interlocking of directors or stockholdings would substantially affect the public interest and that the smaller corporations be accordingly eliminated from the provisions of the Bill. There is no reason for hampering small business. None of the perils sought to be avoided lurk within its borders. The operations of the small corporations are not charged with a public use and do not affect the public welfare in the sense that applies to the larger ones.

The suggestion for restricting the jurisdiction of the Trade Commission in these respects has been embodied in the form of proposed amendments, limiting the Bill to interstate corporations having $1,000,000 capital or $2,000,000 of gross assets or $3,000,000 of gross annual business. Such an amendment will confine the operations of the Bill to a comparatively few cases. It will eliminate at least 90% of the corporations that do an interstate business.

I cannot conceive why any business readjustment, embarrassment or inconvenience would be involved in enacting any of the other reforms that are now under consideration. The dummy director and the secret and indirect control cannot be justified. No defense of these practices has ever been attempted. No one has the right to accept the benefits and attempt to escape the responsibilities of corporate management through such devices.

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Nor has there ever yet been any justification attempted of the failure to enforce minority representation in corporations through cumulative voting. Some of the State Constitutions of which those of Missouri and Pennsylvania are ready illustrations, make it compulsory to provide such representation, as it should be in every State. If for instance a Board of Directors is composed of nine members, there is no reason why the owners of each one-ninth of the stock should not be represented by one Director, which is automatically accomplished through what is known as cumulative voting. The majority would still control but the minority would have the privilege of knowing what is being done, of protecting itself against unlawful acts and of having its voice heard on questions of business policy in which it is vitally interested.

The supervision of the issue of bonds and stocks of interstate corporations by Federal authority, which is now proposed, is still another of the Recommendations of the Pujo Committee. It is a tardy recognition of the right of the pub lic to be protected against exploitation through banking control or by the sale of worthless and inflated securities, to secure an accounting of corporate expenditures and to prevent the use of corporate funds in the corruption of public officers and legislative bodies. If these safeguards had been in existence in past years we should have been saved the National scandals that are being from time to time unearthed to the destruction of our credit and reputation abroad and at home.

The Bill to require the incorporation of Stock Exchanges and to place them under Federal supervision is an essential part of any comprehensive program for corporate reform. No legislation will be thoroughly constructive that omits to take this factor into account. Its overshadowing importance is unfortunately little understood by Congress. The manipulation of securities through the machinery of the Exchange and their wide distribution under cover of such manipulation has been the most prolific incentive for the organization of Trusts. It has cost the public more hundreds of millions than they have suffered through any other of the many devices through which they have been plundered.

The remaining provisions that are intended to secure the general and impartial enforcement of the Anti-Trust Act, the effective execution of the judgments of the Court and the

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remedies to individuals who are injured by violations of law, can hardly be claimed as disturbing elements. If the Act as originally framed had secured to individuals aggrieved by its violation—as it should have done—the right to prevent the organization of unlawful combinations or to enjoin their operations, the country would have escaped this vexatious problem. Few if any of the Trusts would have been permitted to come into existence. Threatened private interests would have realized their peril and would have been alert to protect themselves. The Government stood idly by and by its silence lent consent and encouragement. The sole remedy allowed by the Seventh Section of the Anti-Trust Act to private interests, to recover treble damages for such injury, has proven inadequate, as might have been expected. The burden of conducting such litigation is in itself prohibitive and the necessity of proving the damages under our rules of evidence requiring that it must be the proximate cause of the injury, renders relief impossible.

The only reason that has ever been assigned for not permitting an aggrieved party to sue in equity to enjoin or dissolve the combination, that it would give rise to blackmailing suits, has never seemed to me a sufficient answer. Anybody can be sued without cause and must defend himself. Corporations as well as individuals are now subject to suit on every other conceivable ground. Why should the Courts have been so solicitous to protect them against attack on this particular ground in which the public is so vitally interested when it is notorious that the Department of Justice has never attempted to enforce the law except in a comparatively few spasmodic cases of conspicuous corporations out of the thousands of known open violations. It would be physically impossible for the Department to enter upon any general enforcement of the law even if it were disposed to do so and it has never shown any such disposition.

It must have been manifest from the beginning that if the enforcement of the law was really desired the only way to secure it would be to permit it to be done by private individuals who are affected by its violation.

The proposed amendment meets the objection that has been made, in that it requires any individual who sues in equity, to join the Government as a party so that the suit

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cannot be discontinued or dismissed by agreement between the parties without the consent of the Government. The latter is given the right also to assume the prosecution of the case at any stage of the proceedings, or to withdraw from the suit and is not to be bound by the judgment unless it assumes the prosecution and continues in it to the end.

Is there anything in these provisions that should be disturbing to business? Or in the further requirement that the new Trade Commission shall be consulted and its approval obtained in determining the manner of dissolving unlawful combinations and the form of the decree and that it shall see to the proper execution of that decree? These requirements will doubtless be very disturbing to certain classes of business, especially to the Trusts that have been declared unlawful, have been decreed to be dissolved and that are still flourishing as though nothing had happened. It may also prove somewhat disconcerting to the public officials who have frittered away the practical results of hard-earned Government victories through meaningless decrees of dissolution. It is high time that we did away with these performances. I venture to predict that if this amendment is passed the Trade Commission will find a way of securing an actual dissolution of the Standard Oil Company and of numerous other violations that have been dissolved in form but not in fact.

If, then, it be true that the pending legislation involves no disturbance of legitimate business, we return to the inquiry as to the reason for the existing unsettlement and depression.

There has never been any doubt in my mind as to the true reason.

It is due to the lawlessness and corruption in the management of our great corporations and to the destruction of the confidence of our home and foreign investors following the exposures of a few of the many instances that have characterized the conduct of our corporate affairs in the past. There is nothing exceptional or that should be considered surprising about the disclosures with respect to the management of the New Haven road that have recently been engaging public attention. In this particular instance the investigation thus far has barely scratched the surface. It relates mainly to a single phase of the New Haven road and involves the diversion of only about $11,000,000 out

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of a total of over $200,000,000 that will have to be accounted for some day, provided the comatose shareholders will ever awaken and have the sense or can summon the courage to assert their rights. If the investigation of the Interstate Commerce Commission is extended into the other transactions so as to include the vast purchases of comparatively worthless competing properties at fabulous prices for the purpose of destroying competition, the dimensions of the offenses committed against the stockholders of that Company will be of a character to render the exposures incident to the French Panama Canal scandal as a moonlight silhouette compares to a volcanic eruption.

I do not mean to suggest that the bankers or the body of dummy directors have been guilty of or actively privy to any actual dishonesty or that they have personally profited by the transactions in any illegitimate way. I do not believe that they have. But in the final analysis the reckless waste of corporate funds for unlawful purposes has brought about the same result so far as concerns the shareholders.

I believe also it will be found that if the affairs of a number of other equally or still more prominent railway systems that might be mentioned ever come under the scrutiny of an executive or legislative investigation or of a Court of Justice, we shall find facts far more startling than anything that has been or will be exposed in the investigation of the New Haven road.

It is however to be hoped that the Government will not embark upon any such general crusade. Our credit and reputation have already suffered sufficiently from the mere suggestion of the general corruption that lies underneath the surface of past corporate management. These are things of the past that should be prevented for the future. The country seems sufficiently aroused to the realization of its disgrace to offset the machinations of the interests that would ordinarily be able to prevent reformatory legislation and it is not worth while to further disturb confidence by turning up any more of the horrible facts. We know in a general way enough of the evils to be able to apply the remedy.

None of these things could have happened under proper Federal supervision, nor if we had laws as in other civilized countries prohibiting Directors from dealing with themselves

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or lining their pockets at the expense of their shareholders or "rigging" the stock markets in their own securities or gambling on inside information.

These mentors of the business and financial world sternly admonish us that every attempt to expose or correct these evils is "disturbing" business. Until that kind of business was disturbed and destroyed by exposure and by the legislation that is needed to punish it as it deserves, we would not have and have no right to expect the return of public confidence. There is one aspect in which the shareholders of these corporations and the public deserve just the kind of treatment they have been receiving at the hands of the men who dominate these corporations solely by reason of the supineness of the real owners. If they know how to protect their rights they have never given any indication of it.

Here again the case of the New Haven is only one of a hundred striking illustrations of the criminal *inertia* of stockholders. When the trouble first arose they sat aimlessly by and saw a highly respectable decoy "Protective" Committee organized apparently in protection of the management to ward off real investigation.

What has become of that Committee? If there was any member upon it who really represented the true interest of the stockholders why was nothing ever done to uncover the recklessness of the management? If they made an examination of the accounts why did they not report the existing conditions to the stockholders? Why did they permit the investing public to go on buying the shares in ignorance of the facts ? Why have the stockholders never organized and elected their own representatives to protect their rights and to secure restitution? What is the matter with these people who have had the intelligence and frugality to amass these interests that they lack the common instinct of self-preservation? They have been told that over $60,000,000 in unearned dividends have been paid; that a huge corruption fund has been used to procure franchises for a worthless property and that there has been more corrupt politics than there has been of railroading; that a large part of $200,000,000 that has been expended has been devoted to the buying of competing properties at fabulous prices in violation of law and that almost every crime in the calendar against corporate management has

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been perpetrated under the very eyes of their Trustees. Thousands of these stockholders acquired their interests in recent years upon the faith of the inducement of the dividends that were being paid and of the representations contained in the annual statements to the effect that the earnings were in excess of these dividends. What right have these men and women who are idly standing by with knowledge of these facts to expect sympathy or consideration? If they have no regard for their own investments they have at least a public duty to perform which none of them seem willing to undertake.

For years past our leaders in the financial world have been educating the public to the belief that every attempt to uncover corporate rottenness or enforce accountability for the sacred trusts reposed in the officers and directors of these corporations was a "strike" or an attempt at blackmail. No stone has been left unturned to crush and disgrace the few men of courageous spirit who have tried to protect the shareholders and the public. When Mr. Louis D. Brandeis led the assault upon the New Haven management and tried to open the eyes of the stockholders to the situation, when he told them that they were being deceived, that the dividends were not being earned, he was denounced and traduced as an enemy to society. Almost every Representative from his State in Congress and prominent men in public life from adjoining States banded together, largely through the influence of the New Haven road, to prevent him from securing an entrance into public life in the position in which he would have been of inestimable aid to the Nation and which he would have graced and honored by his acceptance. It has been notorious that for decades the New Haven road has practically owned the Legislatures of certain of the New England States. It regarded these exhibitions of its power to punish enemies and reward its friends with high public office as essential and it has never hesitated to give such object lessons whenever occasion presented itself.

I repeat that we are getting just the kind of corporate management we deserve and that so long as this spirit is permitted to pervade the public mind we shall continue to get that sort of management and none other.

And yet we continue to permit ourselves to be beguiled as

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to the cause of our present troubles. Is it any wonder that the investors of other nations have been throwing our securities back upon us at any price they can get for them, glad to be rid of us on any terms? Or that we are unable to sell any more securities abroad? Or that our markets are depressed and we find difficulty in financing the requirements of the maturing obligations of our public service corporations? Why should the small investor entrust his hard-earned savings to the men who have mercilessly exploited and betrayed him whilst moralizing in public upon the importance of character as the essential to success, to the chorus of a worshipping press led by their chosen press bureaus?

This only begins to tell the story of the callousness and stupidity of our people. Not even when their eyes have been opened against their wills and in the face of their resentment at the exposure of the faithlessness of their chosen trustees, do they begin to see or act. They go on permitting and encouraging these same men to manage the trusts they have betrayed. The powers behind the throne that have named the presidents and trustees of the looted corporation proceed to discipline their tools by removing the chief scapegoat and selecting another man, always of previous untarnished reputation, but always pliant to their will, in his place, not even taking the trouble to change the minor puppets. At the next election of shareholders the proxies are gathered with the same ease by the same people and the old order of things is continued without even a semblance of change, except in the nominal directing head, but subject to the same mysterious control.

We had a like disheartening experience following the exposure of Life Insurance corruption in 1906. The nominal heads were deposed but the power behind the throne and the old disciples remain. Yet none of these men had or has had a single dollar of actual investment in the companies.

As indicating the close relations of the operations of the various departments of the "Money Trust" to one another, I call your attention in this connection to a few significant facts. Prior to the insurance upheaval Mr. George F. Baker was the Chairman of the Finance Committee and the dominating spirit in the Mutual Life Insurance Company. He is now more firmly than ever in control. Mr. Baker is and has been for many years a partner of Mr. Morgan in all of the great

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enterprises. They together dominate or control the Equitable Life Assurance Society, the First National Bank, the National Bank of Commerce, the Bankers Trust Company, the Guaranty Trust Company and numerous other great financial institutions. When Mr. McCurdy was forced to resign as the result of the Life Insurance exposures there was placed in the Presidency of that Company with $500,000,000 and more of assets the law partner of Mr. Baker's uncle who was incidentally Mr. Baker's private Counsel and the Counsel for his bank. The Mutual Life held 35,640 shares of New Haven stock. The law passed in 1906 as the result of the scandal required them to dispose of all their stocks within five years, which they subsequently had extended for a further term of five years, to the disgrace of our Legislature. The New Haven stock, which is now selling at $68 per share, could readily have been marketed during those years at $200 or thereabouts. The Company has not parted with a share. The difference in price means a loss of over $4,000,000 to the policyholders of the Mutual Life Insurance Company, but this large block of stock is important to Messrs. Baker and Morgan in their control of the New Haven road and it is steadily voted from year to year as they direct.

But I have digressed.

With a few exceptions the Presidents of these roads and great industrial organizations and all the Directors are named by the same authority. The shareholders have no real voice in their selection.

The Interstate Commerce Commission is doing the right thing in ripping the lid from this nest of corruption to the extent necessary to guide Congress in legislating to correct these evils, even though it involves immunity to the chief puppet of the men who guided the destinies of the Company. I am not so sure that it is necessary or advisable to extend the immunity further or that any valuable results will come from so doing, but the inaction of the Department of Justice has been so exasperating and its purposes so unfathomable that everyone has despaired of results in that direction.

With such conditions surrounding us we ought not be surprised to find these men "advising" us that if we seek to correct the evils for which they are responsible and which have

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destroyed public confidence the Administration will be chastised by the "business" community for which they assume to speak. The proposition that we continue to permit ourselves to be guided by them is so staggering in its temerity that one is at a loss for words to characterize it.

The remedy is simple. Public confidence in corporate management must be restored. The existing legal machinery does not assure responsibility and punishment for the misdeeds of Big Business. The enactment of the pending Bills properly strengthened will help accomplish that result. Ours is a rich country. Our wealth is fairly well distributed, notwithstanding the many hundreds of millions that have been confiscated by these men in one way or another by way of tribute or through gross neglect. A fraction of it can still be recovered by the shareholders if they will stand together in each of these great corporations to enforce restitution and protection for the future.

If the lessons of the past have taught them to manage their own affairs hereafter it will have been worth the fearful cost. When they are able to do that as in former years, when these great properties were built up and operated by their real owners, and not until then, the investing public here and abroad will again interest itself in our enterprises. Meantime we can do our share toward reassuring the civilized world that we are not a Nation of freebooters and that we have sufficient of the capacity for self-government left to end the recklessness and lawlessness of High Finance so that capital will hereafter be as safe with us as in other countries.

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SPECULATION ON THE STOCK EXCHANGES AND PUBLIC REGULATION OF THE EXCHANGES

An Address

Delivered before the AMERICAN ECONOMIC ASSOCIATION at Princeton, N. J., December 29th, 1914.

By
Samuel Untermyer
of New York.

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SPECULATION ON THE STOCK EXCHANGES AND PUBLIC REGULATION OF THE EXCHANGES.

It is fortunate for the country that we are at last to have a dispassionate consideration of this vastly important subject in a forum where economic problems are fearlessly, dispassionately and impartially discussed and analyzed on their merits. There has been so much of honest misunderstanding, senseless hysteria and ignorant, demagogic denunciation of the Stock Exchange on the one hand and on the other such a long, unbroken record of intemperate and misleading propaganda by the interested champions of the Exchange to justify the abuses of the system and its irresponsible form of organization and such persistent misrepresentation of its critics, that it is a positive relief to find ones-self in an atmosphere where the subject will receive the judicial treatment that its commanding public importance demands.

The partisan and disjointed discussions heretofore had have been conducted under the unsatisfactory conditions under which much of our ill-digested legislation is considered, amid the heat, hurry and confusion of Committee hearings, distorted by bitterness and abuse of the champions of the reforms by the vast personal interests that conceive that their privileges are being attacked. There has been no opportunity for proper study and understanding. The merits of a proposed change of broad public policy can never be properly developed under such conditions. This is especially true where, as here, there is arrayed on one side the most powerful body of financial interests in the land, with their endless business, social and political influences and ramifications, resisting reforms that are sought to be forced upon them, with unlimited funds and vast advertising patronage at their disposal and with incredible facilities for influencing public opinion through the nation-wide press bureau they are able to maintain.

The other side is represented only by a few scattered, disorganized volunteers with no personal interest in the question at issue, whose labors are prompted only by the public concern and whose sole reward for their thankless championship is the enmity of the powerful army whose privileges are

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being assailed. I repeat that it is therefore a privilege to find such a forum as this for the discussion.

I shall take the liberty of reversing the order in which the two questions have been submitted for consideration, so that they will read as follows:

> 1. Should the Stock Exchange be subjected to regulation? and
> 2. Should such regulation include the suppression or restriction of speculation?

The New York Stock Exchange towers above all the Exchanges of the country, exceeding many times in importance and in the magnitude of its dealings all the others combined. It absolutely controls the transmission and distribution throughout the country of the quotations of all the securities that are dealt in upon its floor, by exclusive contract with the Western Union Telegraph Company. All other Exchanges are guided by its quotations. Their forms of organization and regulations are in the main framed on the lines of the New York Exchange and I shall accordingly discuss the subject with reference to the New York Stock Exchange, intending thereby to include the others.

Permit me to explain at the outset that I have no patience with the legislators, agitators, demagogues and ignoramuses throughout the country who regard the Exchange as a sort of gambling den or its membership as a coterie of gamblers whose activities should be suppressed. The Exchange is a wholesome public necessity. Without a legitimate public security market which is furnished by its machinery, properly controlled, no great business or financial enterprises would be possible. We can no more get along without it than without banks. It is in fact more important than any other agency of finance. Our ventures have reached a magnitude that private capital cannot supply. Its elimination would soon paralyze the wheels of industry. It is not healthful or desirable that a few banking houses should monopolize the prestige and profit of acting as intermediaries between those who need the capital for these enterprises and the investors who are able to supply it. That need should be supplied by a public market for securities. It is because of its important place in the economic system that the greatest care should be exercised to confine it to its legitimate functions. Its power for usefulness is unlimited. Its disrepute is a loss and a misfortune to the entire community.

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Judged by the standards of the past no more honorable men than the general body of the membership of the Exchange can be found anywhere in any branch of industry. In some respects the code of ethics is above that encountered in any other calling. Transactions involving fabulous sums are conducted and obligations incurred without a scratch of the pen and are concluded and discharged day by day without friction or question.

Like every industry and profession, it contains black sheep within its fold but unlike others its regulations and practices have heretofore held out to them and to the gamblers whose tools they are temptations, inducements and immunities of which they have freely availed themselves, to the great detriment of the Exchange and the injury of the great body of its members.

There are phases of the business conducted on the Exchange constituting at times the bulk of its dealings, that involve the most reckless and unconscionable forms of gambling, dishonesty, misrepresentation and manipulation, which have been so long tolerated that the members are obsessed on the subject of their right to continue these illicit transactions. Their state of mind is not unlike that which had taken possession of officers and Directors of railroad corporations as to their duties and obligations to the public and to their shareholders, until within a very recent time and from which they are now slowly and painfully recovering. The same sort of awakening is in store for the Exchange, but its members will not see it. Methods that were considered legitimate ten years ago and that are still practiced in many quarters of the financial world are now seen to be intolerable. Others, such as the dealings of officers and directors with their corporations that are still permitted, will soon be defined as crimes, as they are in other countries. It will not, for instance, be long before bank officers and directors will be prohibited from exploiting their banks and other corporate officers will be prevented from withholding information and speculating on advance knowledge.

The Exchange, properly regulated and administered, performs an invaluable service in our economic system and is destined to still greater public usefulness if it can be rid of the abuses that inevitably attend its present irresponsible form of organization and can be placed under responsible pub-

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I believe also that except for the blunders of remaining open for two days in July after the world's other Exchanges had closed their doors and of permitting the evils of short selling and manipulation, our Exchange has on the whole met the exceptional conditions arising out of the war with wisdom and conservatism. True, it has assumed powers over the property and destinies of the millions of securityholders of the country that are not tolerated by any other body on earth, public or private and that seem incredible; but that arrogation of power, as I shall endeavor to show, is due to the absence of the Governmental regulation to which the Exchange should be subjected. There are other criticisms as to its present attitude in permitting short selling within the minimum prices fixed by its self-imposed regulations and there are fundamental abuses which it refuses to and will never voluntarily correct and which can only be removed through Government supervision, to which reference will be hereafter made.

There have however been many minor reforms inaugurated within the past two years under the spur of the exposures and public criticism of its practices that were made in the so-called "Money Trust Investigation" by the Committee of Congress known as the Pujo Committee. Whilst the Exchange ungraciously refuses to admit that these reforms have been forced by the public agitation due to this investigation, that is now generally recognized to be the fact. The Exchange has at last partially awakened to a realization of its sense of public responsibility but it strangely continues to resist all attempts to so control it as to permit any public authority to inform itself of violations of law by its members or of abuses that now exist or that may hereafter arise from time to time or to enforce responsibility. Through the elaborate press bureau that it maintains under the name of the "Library Committee" its reforms are exaggerated and its abuses and defects are hidden as never before in its history. As the result of this systematic propaganda and of the temporary diversion of public interest to international affairs, it is becoming daily more difficult to secure the necessary attention to this subject that so nearly affects the fortunes of the entire community.

The oft-repeated warnings of the advocates of Governmental regulation of our Stock Exchanges of the perils to the

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by recent events to have been prophetic and grossly understated, notwithstanding the fact that we have fortunately thus far passed through the present crisis without encountering the disasters that we have invited by the absence of public control. Like flashes of lightning illuminating the landscape on a dark night the experiences that have come to us from this world cataclysm have lighted up the obscure corners of this problem and have exposed the specious arguments against regulation that have so long been permitted to pass uncorrected. The community at last begins to get a glimmer of the important mission of the Exchange; to realize that it is a public institution and an integral part of our National financial system and not a private business; that it is ridiculous that it should pose —as it has up to this time—as a mere convenient meeting place between the members of an unincorporated association in the transactions of which the public has no interest or at most a remote, academic concern.

We are at last able to appraise at their true value the claims of its members to which, strange to say, they have in the past been able to secure the sanction of the Courts, that the rights and obligations of membership are to be likened to those of a private Club.

In the light of recent events, demonstrating its dominating influence in our National and International financial structure, it seems incredible that its discipline, regulations and transactions are subject to no judical or administrative scrutiny or review, that it is governed by no law other than its own unrestrained will and that it and its operations have by the mere fiat of its self-made rules been consecrated and set apart, outside and beyond the law—a law unto themselves.

Yet such is the amazing situation in which the country finds itself. Applying every possible test to the determination of whether this is or is not an accurate and moderate statement of the actual conditions, what do we find?

1. The Exchange is unincorporated and is as such subject to no legal regulations or restrictions other than those imposed by its own members. Although there is and has been for many years upon our books a statute entitled

> "An Act for the Incorporation of Boards of Trade and Exchanges"

it has not been found necessary to comply with that statute or to take out a charter under it.

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2. Its membership is limited to 1100 persons. This limit was reached about forty years ago and has not since been permitted to be increased, notwithstanding the revolutionary changes in conditions of business and finance since that time. No public authority has any supervision over the selection or expulsion of members, the increase of membership or over any matter connected with the formulation of its rules of trading or other features of its management. Not even the Courts are permitted to review its regulations for conducting the public business or any other feature of its organization or manner of discharging its public duties. When a vacancy in its membership occurs through death, bankruptcy, resignation or sale of the right of membership, it can be filled only by a two-thirds vote of the Board of Governors, ratified by a majority vote of the Association. This action is also final and unreviewable by judicial authority or otherwise. By reason of this limitation of membership a seat has of late years varied in price from $30,000 to $95,000, dependent upon conditions of business; and no securities can be bought or sold on the Exchange except through a member.

3. The exclusive power of discipline is vested in the Association through its Committees. It may expel or suspend a member and thus destroy his reputation and occupation and deprive him of the right to earn a livelihood, on any grounds that it deems sufficient and he has no right to review its action in the Courts and can get no redress so long as he has had the opportunity of a hearing, without Counsel, before the body composed of his competitors.

4. In the exercise of its unrestricted right of discipline, great abuses have developed. The Association requires every member to charge a fixed commission upon all purchases and sales for customers of securities that are listed on the Exchange, regardless of the price of the security. A share of stock that costs $11 is charged with the same compulsory commission as one that costs $200. Any member who violates or evades this rule or attempts by indirection to do so is subject to expulsion. The infraction of this regulation was characterized under oath by one of the most distinguished ex-Presidents of the Exchange as

"the most heinous offense a member can commit"

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more heinous than frauds perpetrated by a member upon his customers, as is evidenced by the fact that the penalties which have at times been imposed for this offense have been more severe than those inflicted for obvious fraud. Expulsions and suspensions on this ground have been held not reviewable by the Courts.

In the exercise of this unrestrained power of discipline the Exchange may expel a member for having had any dealings or communications whatever with or for even writing a letter to or speaking over the telephone with a respectable member of a reputable rival Exchange or for buying securities for or from or selling them to or for such a person, even though the securities are not listed or dealt in on the rival Exchange, or for that matter on any Exchange. Incredible as this may seem, members have in fact been severly disciplined on that account. It has resulted in the most effective boycott of men who have dared to accept membership in another Exchange. As a result, men in good standing in the community have found themselves unable to dispose of securities owned by them that are listed on the New York Stock Exchange and not listed on the Exchange of which they are members, solely because they have been guilty of membership in a rival Exchange.

5. The Exchange is the sole judge of the conditions under which it will permit securities to be placed upon the official list of those that may be dealt in on its floor and it may at its own discretion strike from the list securities that have been so listed, without notice either to the corporation or to its investors, who bought on the faith of the fact that the securities were so listed. The far-reaching effect upon the value and marketability of listing a security or striking it from the list is not generally appreciated. Its quotations constitute evidence of value and the securities become available as collateral for loans at the banks. When not listed the security largely loses this important element of availability. Such action on the part of the Exchange is likewise not the subject of review or redress by the Courts. The character and extent of the data that the Exchange shall from time to time exact from the corporations whose securities are thus listed for the information of the public rests solely with it. There is no protection to the public other than that which it chooses to afford and no power to review or revise its action. Banks, Life Insurance Companies, guar-

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dians, Trustees and others who hold, buy and sell these securities are forced to rely entirely upon the voluntary and unreviewable action of the Exchange as affecting such securities. It formerly maintained on its official list securities of corporations that refused to furnish information of their affairs or even to disclose their earnings and that were conducted as "blind pools" for the benfit of the insiders, who were thus enabled to manipulate the price on rumors and "inside information." Amalgamated Copper and American Sugar Refining are illustrations of this class of dealings that were permitted. They had their alphabetical position on the list with the Companies that were required to furnish information for public guidance. The only differentiating sign was an asterisk placed before the names of the so-called "unlisted" corporations. They were placed there for gambling purposes and were at times by far the most active stocks on the list. That practice, happily, became a nightmare of the past some years ago but its discontinuance was not accomplished without a struggle. The men who foisted it upon the Exchange and kept it there for their own profit, many of whom were leaders in the world of finance, were permitted for years to exploit the public in that way to the extent of many millions. It is only when we reflect upon the extent of these buccaneering projects that we realize the vast and growing improvement in the morale of the Exchange.

6. The so-called "continuous quotations" of prices of securities are not available to any individual or corporation in the United States except with the express permission of the Exchange and there is no right of review from its fiat to the Courts or to any public authority. It may at any time suspend the publication of quotations and leave the securityholders of the country to their own devices, without information as to the transactions in this public security market.

The latest recorded revolt illustrating the extent of this despotic power is in the form of a suit instituted within the past two weeks at Pittsburgh by John L. Moore & Co., a brokerage house of that City, against the Western Union Telegraph Company in which the plaintiff alleges that in the exercise of the agreement between the Telegraph Company and the Exchange forbidding the Telegraph Company to furnish quotations to any person not sanctioned by the Exchange, the Telegraph Company has been instructed by the Exchange

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not to furnish the plaintiff with quotations and as a result the plaintiff's brokerage business will be ruined.

In the present state of the law on this subject Moore & Co. can probably get no redress. The pretext under which the Exchange exercises such power to control the action of an interstate common carrier is its desire to suppress "bucket-shops," which admittedly cannot conduct their illicit operations without the aid of these quotations. The same, however, is true of a broker doing a legitimate business. It is said, for instance (I know nothing of the merits) that Moore & Co. buy and sell stocks and bonds only for cash and that unlike most members of the Exchange, they deal only in the actual stock certificates and do not even buy or sell on margin. For years and until the Exchange closed on July 30th they received these quotations that are essential to their business. Now they are arbitrarily refused.

While the suppression of bucket-shops is a consummation quite as devoutly to be wished (and quite as far from realization) as would be the actual and permanent prevention of manipulation of prices on the New York Stock Exchange, the bucketing of orders is a criminal offense and can be detected and punished as such like every other offense. It should not rest in the unrestricted power of any body of private citizens through their control over the operations of an interstate Telegraph Company to determine for itself and without the right of appeal to the Courts or to any public authority and without even giving a reason or the opportunity of a hearing, who is and who is not lawfully conducting a brokerage business and who shall or shall not receive the information that is necessary to his business existence. It should not be permitted to maintain a dangerous monopoly under the pretext of acting as a self-constituted policeman, with the added power of judge and jury to determine the fate of citizens in this *ex parte* fashion.

The sworn complaint of Moore & Co. may be untrue and the purpose of the Exchange may be commendable. The point is that the Exchange may, under existing law, admit its truth and still Moore & Co. can get no relief. To concede any such despotic power over the life of a legitimate business is a situation too perilous to be tolerated.

By the express terms of the agreement recently executed between the Exchange and the Western Union Telegraph Company the quotations are collected by the Exchange

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upon its floor and by it transmitted to the Telegraph Company, which distributes them only to such persons and agencies as the Exchange may direct, so that these quotations that are at the foundation of the business of the brokers and investors throughout the country remain at all times under the exclusive control of the Exchange.

Assuming that this vast power of business life and death over the brokers throughout the country is at present being honestly and judiciously exercised, does that fact justify its existence? Is it within the spirit of Democratic institutions?

It is not so long since the power was used in the effort to destroy a small competitor in New York City—the Consolidated Exchange—and the latter was compelled to conduct a long struggle for existence.

The following instances fairly illustrate the character of some of the powers recently assumed and exercised by the Exchange over the business of this country and the destinies of securityholders, growing out of the pending European war:

> (a) It forbade its members, under pain of expulsion, from buying, selling or dealing in any class of securities, whether bonds or stocks, whether listed on the Exchange or unlisted, except with the express approval of a special Committee selected by the Governors and then only under certain regulations and restrictions as to the price, terms of delivery and other conditions promulgated by the Committee from time to time.
>
> (b) If you or I happened to own securities on which we were forced to realize to meet our obligations or chose for any other reason to do so, there was no way of selling them on or off the Exchange, through any member, publicly or privately, below the prices fixed by this Committee, nor except through its consent. Anyone who was concerned in such a purchase or sale was subject to discipline.

Other powers quite as drastic and comprehensive were assumed relating to the operations of what is known as the "Curb Market," with which the Exchange has no more legitimate concern than "the man in the street".

The Curb is also a public security market, entirely separate from the New York Stock Exchange, with an independent membership, but such is the power of the Exchange that the members of the Curb are not allowed by the Exchange to deal in any securities that are listed on the Exchange or that the latter may at any time choose to place upon its list. For

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bers dealing with any Curb member or buying or selling any security listed on the Curb. That would mean the instant extinction of the Curb.

The members of the Curb conduct their business in the open street, within a roped line fixed by the police. They are subject to the inconvenience and interruptions of business due to the inclemencies of the weather and the passing traffic. They are well able and have long desired to locate under the shelter of a roof, but there is a regulation of the Exchange which would in that event prevent a Stock Exchange member from dealing with a Curb member. The Exchange shows no disposition to relent or relax that rule. Hence the Curb Association, a body with its own regulations (to which it adheres quite as rigidly as does the Exchange to its rules) is forced to remain in the street and to surrender to the big Exchange whatever business in securities the latter may from time to time elect to take from the Curb and unto itself. It is hard to believe that such things are possible.

Within the past few days we have read of a meeting of the Exchange, widely advertised through its press bureau, at which resolutions were passed congratulating and thanking the Committee of Five for its services in the late emergency and showering praises upon themselves for the manner in which they conducted the public business in that crisis. On that same day and the preceding day the "shorts" smashed the minimum panic prices of July 30th to such an extent that this same Committee was forced to reduce the minimum in certain active speculative stocks. But for the wisdom of the Committee in establishing a minimum these short-selling gamblers would have been free to precipitate a panic as they have often before done. The resolutions were fairly well deserved but they would have been better earned if the Committee had entirely prohibited short-selling in this crisis, as they could well have done and as has been done by the London Stock Exchange by its recent rules since it has been, as it now is, under rigid Government regulation.

I am not discussing the wisdom or necessity of the recently adopted rules restricting dealings in securities in the crisis through which we are passing, nor the arbitrary control by the Exchange over the transactions of its own members for private account in securities with which the Exchange has no concern, nor in assuming, as it does, to dom-

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inate the outside bond and Curb markets and the entire course of security dealings throughout the Country, as reflected from its fountain head in New York. These may or may not be wise restrictions if enacted under the supervision of responsible officials or subject to the veto of some such authority. It is not necessary to enter upon the merits of that discussion. The fact that the Exchange is physically able without outside assistance to inaugurate and enforce such far-reaching regulations affecting the tens of millions of individual securityholders and all the great corporations throughout the country and that there is now no legal restraint upon its action is the most eloquent argument in favor of the necessity for public regulation.

My criticism is not of what has been done to meet this emergency but of a financial system that not only permits but which it is claimed by its authors and those who are executing it self-made law to render it *necessary* for a handful of private citizens to seize and exercise such vast powers *because* there is no constituted authority to protect the public or with the right to restrain, direct or review their action.

Herein lies the anomaly of our situation—unlike anything of its kind in the civilized world. If these gentlemen had chosen to permit dealings to continue after July 30th, as many of them were desirous of doing and as they are said to have decided to do the night before, there would have been no public authority anywhere to restrain them. They would probably have bankrupted the banks, Life Insurance Companies and other public institutions. Fortunately for us these particular men at this particular juncture had the enlightened selfishness to realize that in the tottering markets which they would have encountered the following day if the Exchange had been opened, the margins on their pledged collateral with the banks would have been exhausted and they would have bankrupted themselves. If the banks and brokers had been comparatively free of stocks and with plenty of cheap. "easy" money in hand and a band of rich, reckless speculators had been in control, as has happened and may well happen again, imagine what a catastrophe could have been precipitated upon us with the cheerful, ever-ready aid of the "short sellers"! I do not mean to imply that any such brutal thing would have been done, although we have had some unfortunate experiences of that kind on a smaller scale at times. The fact that

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any public officer to control such a situation is the point I want to make in this connection.

The necessity for regulation is not to be tested by what was done but by what may be *lawfully* done under existing law without fear or opportunity of discovery or punishment under given conditions and in the absence of regulative and restrictive laws. Security markets have been habitually raided and manipulated in the past and there has been no legal responsibility or redress. Assuming this did not happen to any extent in this emergency,—does that fact render it any less essential to ensure legal protection against its recurrence, especially now that we know the extent of the peril? Why have we any repressive laws if we can rely on people refraining from public injury without fear of punishment? Does anyone doubt that the crashing of values during the two days the Exchange unwisely remained open, was assisted if not precipitated by short-selling? Or that it would have been more acute if speculators had been a trifle more daring or inside information had happened to be available? Or that it would have happened anyway if the Exchange had not closed when it did? Why should the determination of such vital public policies be left in private and interested hands? It is incongruous and unthinkable no matter how well the power may have been exercised. Banks, Trust Companies, railroads, Life and Fire Insurance Companies and a vast number of other industries in which the public is far less interested than in the Stock Exchange were formerly regarded as purely private enterprises. It seems a long time and yet it is not so long since anyone would be so bold as to question the wisdom of their regulation. The Pure Food Law, Packing-House Inspection Law, Factory Inspection Laws are a few of the multitude of instances that will occur to you of the growth and recognition of the modern demand for supervision of industries involving the public welfare and protection.

The Stock Exchange and Clearing House Associations, the operations of which are more important to the public credit, security and stability than any of them, are the only ones that have managed to remain immune. It is a great tribute to their power and is due also largely to the fact that their activities are highly specialized and no one has been sufficiently interested to educate legislative bodies to the perils of the situation. The present crisis has done much to accomplish this as to Stock Exchanges and the New Currency Bill

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will in time so far supplant the Clearing Houses or curtail their powers as to render them a negligible quantity in the financial system.

How differently these things are done "on the other side." And how much we yet have to learn from them! Immediately following the declaration of war and before England entered the conflict, the British Government, through the Treasury Department, promptly stepped in and closed the London Stock Exchange and it has ever since determined its policy. It will be for the British Government and not for the Governors or members of the London Stock Exchange to say when and under what conditions it shall reopen. The French and German Exchanges are and always have been essentially Government institutions. All their operations are at all times under the most rigid and minute Governmental regulation. There are elaborate statutes providing the conditions under which securities may be listed and dealt in and for the active participation of Government officials in the conduct of the Exchanges.

In like manner the Dutch Government at the outbreak of hostilities promptly took control over the Amsterdam Stock Exchange and has ever since directed its policy, although Holland is not at war. We alone permit this vast power to remain in private and interested hands.

Much that is confusing and misleading has been said and written in the course of the discussion of this subject as to the constitution of the Continental Exchanges and more particularly as to the experience of Germany in its attempts to stop speculation. The manifest purpose of this argument has been to lead the uninformed to believe that the efficacy of the then and now existing German Government regulation and jurisdiction over the general business of the Stock Exchange was in some way involved in that controversy, that it had proven a failure and that the regulatory law had been repealed or materially changed so that it now conforms more nearly to the claims of the opponents of Government control.

In order to make it entirely clear that there is no basis for any of these contentions and at the same time to demonstrate the wisdom, efficiency and success of Government control, it may be proper at this point to refer briefly to the German and French systems and to the change that was found advisable in the German laws that had been passed for the

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purpose of restricting speculation and that had reference solely to that branch of the subject. There has never been any change in the situation of the German and French Stock Exchanges as essentially Government institutions. They are and have been as completely a part of the machinery of the government as is our Treasury Department or the Bureau of Commerce or any other of our governmental agencies. Their membership consists of private individuals, although that of the Paris Bourse is limited to seventy members, all of whom are Government appointees and enjoy a Government monopoly of the business.

In 1896 the German Agrarian party procured the enactment of a law that was intended to modify the then existing Governmentally approved regulations so as to curb speculation in grain, commodities and mining and industrial securities. The subject of the legislation is admirably treated by Professor Henry C. Emery, of Yale University, to whom we are to have the pleasure and privilege of listening today, in a carefully considered Article published in the Yale Review of May, 1908, under what seems to me the misleading title of

> "Ten Years Regulation of the Stock Exchange in Germany."

The features of the law discussed by Professor Emery had to do entirely with the attempts to limit speculation in stocks of mining and industrial Companies. It did not seek to do away with or modify the complete Government control of the machinery and operation of the Exchanges, which were then and ever since have been and are now a part of the fundamental statute law of the German Empire. It was increased and amplified rather than restricted by the law of 1908 to which Professor Emery refers as the Act repealing the law of 1896.

The course of the legislation of 1896 is thus accurately described by Professor Emery:

> It should be said, however, that the original bill was the result of a very remarkable inquiry made by a special commission, whose report constitutes the most important body of material on the whole subject of speculation. The proposals of the commission, recognizing as they did the necessity and legitimate function of speculation in modern business, were relatively moderate. In the Reichstag, however, the Agrarian party had the upper hand and much more radical provisions were included in the act as finally passed. Without considering the regulations providing for a closer government su-

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pervision of exchange dealings, we may note at once the three most important provisions.

(1) All "Exchange dealings for future delivery" (Borsentermingeschafte) in grain and flour were forbidden.
(2) All "Exchange dealings for the account" (Borsentermingeschafte) in the shares of mining and industrial companies were forbidden.
(3) An "Exchange Register" was established in which was to be entered the name of every person who wished to engage in exchange transactions for future delivery. Contracts made by two persons entered in the register were declared binding and exempt from the defense of wager. Where either party was an unregistered person the contract was void.

It is claimed that the effect of this legislation was (1) to prevent dealings in commodities for future delivery and in mining and industrial shares for the "accounts," (which means transactions that are to be adjusted at the next monthly settlement), and (2) thus to divert German capital to the fianncial centres of other countries and to build up the great banking houses at the expense of the smaller and less prominent bankers by reason of the fact that the latter, who also received money on deposit feared the injury to their reputations as conservative bankers from the placing of their names on the register.

The result of the prohibition against dealings in mining and industrial shares "for the account" was to require them to be settled for and taken up the following day. This is now and always has been the rule with us as to all transactions on the Exchange but in Germany the settlement of these transactions is made monthly and in England semi-monthly. In order to meet this requirement the course of business had to be altered so that the brokers could borrow from the banks or bankers with the securities as collateral the money with which to pay for the purchases made, as is done with us. The only effect of the modification in 1908 of these provisions of the law of 1896 was to reverse this practice and to reinstate the method of monthly settlements as being better adapted to the customs prevailing in Germany.

Whilst the history of this legislation and its effects may be instructive on the merits of permitting speculation within certain limits on public Exchnges, it is difficult to understand what it has to do with the main proposition we are here to discuss "whether there should be *some form* of Government supervision, regulation and control of the Stock Exchange."

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Whether, to what extent and under what restrictions speculation shall be permitted has nothing to do with the determination of that fundamental question.

Let us not be misled on this point. There has long been the most effective Governmental regulation in the Continental countries and there is no proof of failure or friction from that cause. From all accounts it has been wholesome and in the public protection, except where it has gone the length of attempting to outlaw all forms of speculation. Whether the extension of such regulations to the extreme points to which it was attempted in Germany by the law of 1896 was wise or proved effective is a debatable question with which we have nothing to do as bearing upon this branch of the discussion.

The first six sections of the German law of 1908 (the present law) consisting of 38 sections and occupying 79 pages of U. S. Senate Document No. 574, which is said to have modified and superseded the law of 1896 on the subject of speculation and which is the existing law regulating Stock Exchanges in Germany, read as follows:

> SECTION 1. Exchanges may be established only with the permission of the State governments (by which is meant the governments of the Federal States of the German Empire). The latter may also order the suspension of operating exchanges.
>
> The state governments exercise supervision over the exchanges, which supervision may be intrusted to commercial organizations (the chambers of commerce and commercial corporations).
>
> Notifying offices, clearing banks, clearing associations and similar institutions connected with the exchanges are also subject to the supervision of the state governments or the commercial organizations exercising the direct supervision.
>
> SEC. 2. The state governments are to be represented on the exchanges by state commissioners, who shall control, in accordance with the detailed instructions given to them by the state governments, the transactions on the exchanges, and enforce the laws and provisions concerning the latter. The commissioners are authorized to be present at the business conferences of the members of the exchange, and to call the attention of the said members to any abuse which may take place. They are also required to report all abuses on the exchange and to suggest preventive measures.
>
> The activities of the state commissioners in particular exchanges may, with the approval of the Bundesrat, be restricted to cooperation in the proceedings of the Courts of honor, or, in case of small exchanges, the appointment of state commissioners may be entirely dispensed with.
>
> SEC. 3. An expert exchange committee (Borsenausschuss) is to be formed with the purpose of reporting upon matters which are, according to this law, within the jurisdiction of

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the Bundesrat. The exchange committee is authorized to tender its motions to the Imperial Chancellor and to consult with experts.

The exchange committee is to consist of not less than 30 members, who are to elected by the Bundesrat for a period of five years. Members of the Committee are eligible for re-election. One-half of the members are to be elected upon nomination by the members of the exchange. The Bundesrat is to determine the number of candidates which the individual exchange departments may nominate. The election of the other half is to take place with special consideration of the conditions of agriculture and industry.

The regulations for the committee shall be enacted, after a conference with the latter, by the Bundesrat. The daily remuneration and travelling expenses to be allowed to the members of the committee are to be fixed by the Bundesrat.

SEC. 4. Regulations must be issued for each exchange separately.

The regulations must be approved by the state government. The latter may demand the incorporation of certain provisions in the regulations of the exchange, and particularly the incorporation of the provision which stipulates that the interests of agriculture and allied trades be adequately represented in the boards of directors of the produce exchanges.

SEC. 5. The exchange regulations shall contain provisions concerning (1) the administration and the departments of the exchange; (2) the transactions authorized on the exchange; (3) the admission of the exchange; and (4) the quotations of prices and rates.

SEC. 6. The regulations may allow the use of the exchange for branches of business outside of those designated in section 5, figure 2, unless particular sections of this law (secs. 42, 43 and 51) provide to the contrary. In the latter case the persons concerned may lay no claim to the exchange for any purpose other than that for which it was established. The Bundesrat is authorized to prohibit either completely or partially the use of the exchange for particular branches of business.

The Bundesrat is a Department of the Imperial Government. The regulations that have been established under this authority cover in the most minute detail every feature of administration—

> "Suspension over the brokers shall be exercised by the Chamber of Brokers (in which the Government is represented) and the State Commissioner."

Elaborate provisions are made for the trial of a member for violation of the rules by a so-called "Court of Honor", in which the Government representatives participate (which must be approved by the Government) and for the right of appeal. The requirements for the listing of securities constitute the most significant and carefully worked out—as they

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are by all means the most important to the public—of all the features of this splendid body of laws. They involve the fullest disclosure of all the details of the corporate assets, securities, business, earnings, etc., and the issue of a public prospectus containing the details required by law to be specified when the securities are offered for sale.

Time will not permit and it will serve no useful purpose to discuss the many other particulars of this body of model legislation. Suffice it to say that at every step the public safety and welfare are considered and its interest is safeguarded. The same is true of the French law, which is equally exacting in its demands for official supervision of the Exchange and publicity of the affairs of all corporations whose securities are there listed.

The contrast between the solicitude and protection with which the transactions on the Continental Exchanges are surrounded in the public interest and the reckless disregard of the public that has characterized our failure to deal with this subject is not flattering to our capacity for self-government.

A passing survey of the intimate public relations of the Stock Exchange to our National and International financial life will demonstrate the enormity of the offense of omission of which Congress has been guilty in permitting its organization, management and operations to be conducted throughout all these years without supervision or control. Many of the vast illegitimate fortunes that have debauched our citizenship are attributable directly to that cause. For many years the pretended market prices of securities of our greatest corporations have been "rigged" and manipulated at the will of a handful of gamblers and operators and the people of the country have been literally robbed of hundreds of millions of dollars through such transactions. Some of the best known names in the country were those of men who amassed great fortunes from the recognized business of "operators" in the securities of given corporations that they were employed to manipulate, sometimes on the "bear" side and sometimes on the "bull" side of the "market". Nowhere was there any restraint upon the malign activities of these men or their powerful and respectable principals, among whom were numbered the greatest financiers of the country.

The following from the testimony of the late Frank K. Sturgis, one of the then Governors and a former President of

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the Exchange, before the Pujo Committee, is instructive on this point:

> Q. How do you justify as legitimate the transactions of a pool or syndicate in giving out buying and selling orders to brokers for the purpose of lifting the price of the stock or of depressing it?
>
> A. Those are the acts of individuals. I cannot be responsible for what thousands of people throughout the country do.
>
> Q. Do you seek to justify it?
>
> A. It depends entirely upon circumstances. I have already said that under certain conditions, orders given out, commissions paid, no collusion whatsoever, the broker who buys not having the slightest idea where the order comes from that the broker executes to sell—I say it is not an illegitimate transaction.
>
> * * * * *
>
> Q. * * * Will you be good enough to answer that question? Is not the operation, at times, resorted to to depress prices and at other times to lift prices?
>
> A. Yes; I can consistently answer that.
>
> * * * * *
>
> Q. You approve of those transactions, do you?
>
> A. I approve of transactions that pay their proper commissions and are properly transacted. You are asking me a moral question and I am answering you a stock-exchange question.
>
> Q. What is the difference?
>
> A. They are very different things.
>
> Q. I thought so. There is no relation between a moral question, then, and a stock-exchange question?
>
> A. Sometimes.

Another witness (Mr. Morse at p. 719) described the mechanism of manipulation as practiced on the Exchange as follows:

> He is the gentleman who manipulates the stock, giving the buying and selling orders.
>
> If he merely wishes to make a stock appear active, he gives buying and selling orders in about equal volume; if he wishes to put up the price, he gives an excess of buying orders; if he wishes to depress, he gives an excess of selling orders.

Statistics were presented to the Pujo Committee of thirteen selected active stocks dealt in on the Exchange, showing day by day, month by month and year by year for many years and up to the time of the inquiry in 1913, the character and extent of the dealings, by way of illustrating the fabulous proportions to which manipulation had been permitted as the result of the absence of regulation by public authority. It is

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claimed that all these transactions represented manipulation, but the following Summary from the Report of the Committee, based on that evidence, will give a faint conception of the extent to which this orgy of gambling was carried:

> Stating the results shown, only in the most general way, it appears:
>
> (1) That there has not been a year since January 1, 1906, when the Reading Co.'s entire common stock issue listed and subject to sale was not sold at least 20 times over and from that on up to 43 times; that in a single month of that period it was sold 6 times over and that in only two months of the entire period was it sold less than once over in a single month; and that although it is a dividend-paying stock the number of shares transferred on the company's books averaged for the period 8.6 per cent of the shares sold.
>
> In 1906 and 1907 there were in all 1,400,000 shares of Reading Common stock listed. There were over *eigthy-one million shares* sold in that time, starting at $164 per share and ending at $90. Those transactions represented *over eleven billion dollars* in money in sales and the same amount in purchases.
>
> (2) Summarily stated, it further appears that in each year since January 1, 1906, the entire listed common stock issue of the United States Steel Corporation has been sold 5 times over each year on the average, while the number of shares transferred on the company's books has averaged 25 per cent of the number sold.
>
> In U. S. Steel with 5,084,000 shares of common stock outstanding there were 74 million *shares* sold and the same number bought in 1909 and 1910. In a single month (January, 1910) there were over 6 million shares sold.
>
> It will be said that this largely represents speculation. But is it *honest* speculation or speculative excitement brought about by pool manipulation? What part of it is pure manipulation?
>
> Here again there have been selected by way of object-lesson only a few of the instances that might be multiplied but prominent cases have been taken to illustrate the point. Until these practices are made discoverable and punishable there is no reason why they should not be repeated when conditions are again favorable.
>
> Many of our great fortunes have been amassed by these methods. Who first knew when U. S. Steel common stock was to be put upon a dividend basis? Or when Union Pacific was to increase its dividend to 10%? Or when Amalgamated Copper would reduce or pass its dividend? Or when and on what basis it would resume dividends? The determination of these questions generally rests with one or at most a few men in each Company. It was natural that they should make use of their advance knowledge so long as there was no law or public sentiment to restrain them. But the temptation to force dividends and to suspend dividends and otherwise to use their vast power are too great. They must be removed if we are ever to have honest cor-

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It may be that under the new order of things we shall not have the same class of men in our Boards of Directors. That is probably true. The incentives will no longer be there. They were dishonest incentives but strange to say it was not considered dishonest for a trustee to exploit his shareholders. It was considered rather clever even to the point of selling the stock of his own Company "short" and shaking out his shareholders.

It should be made impossible for the men who are in control of these vast enterprises to go on fleecing the public. It is high time that they were brought to realize that they are trustees for their shareholders.

(3) That in the same period the entire common stock issue of the Amalgamated Copper Co. has been sold 8 times over each year, on the average, while the numbers of shares transferred has averaged about 20 per cent of the number sold;

(4) That since January 1, 1906, the entire listed common stock issued of the Union Pacific Rallroad Co. has been sold 11½ times over each year, while in 1912 the number of shares transferred was only 16 per cent of the number sold.

(5) That in 1912 the entire listed common stock of the American Can Co. was sold 8 1-3 times over, while the number of shares transferred was 25 per cent of the number sold.

(6) That since January 1, 1906, the entire listed common stock issue of the Rock Island Co. has been sold twice over each year on the average, while the number of shares transferred has averaged a little more than 27 per cent of the number sold.

(7) That since January 1, 1906, the entire common stock issue of the American Smelting & Refining Co. has been sold twelve times over each year on the average, while the number of shares transferred has averaged about 18 per cent of the number sold.

(8) That since January 1, 1906, the entire listed common stock issue of the Erie Railroad Co. has been sold more than twice over each year on the average, while the number of shares transferred has averaged only 30 per cent of the number sold.

(9) That since January 1, 1906, the entire listed common stock issue of the Consolidated Gas Co. has been sold more than once over each year on the average, while the number of shares transferred has averaged only about 40 per cent of the number sold.

(10) That since January 1, 1906, the entire listed common stock issue of the Brooklyn Rapid Transit Co. has been sold six times over each year on the average, while the number of shares transferred has averaged 23 per cent of the number sold.

(11) That since January 1, 1903, the entire listed common stock of the Colorado Fuel & Iron Co. has been sold five times over each year on the average—in 1906 18 times over—while the number of shares transferred has averaged less than 20 per cent of the number sold.

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> the common stock of the California Petroleum Co. was listed, the entire issue was sold more than three and one-half times over; and
>
> (13) That in the seven months from April (when it was listed) to October, 1912, the entire common stock issue of the Mexican Petroleum Co. was sold nearly nine times over.

In answer to this showing we are told,

> (a) That these statistics do not prove the manipulation of prices since there is no way of determining which of the transactions represented honest speculation and which represented dishonest speculation in the form of manipulation or fictitious purchases and sales; and
>
> (b) That these transactions are now made unlawful in the State of New York through the enactment in 1913, following the disclosures of the Pujo Committee, of a bill entitled "Manipulation of Securities", by which statute such acts are constituted misdemeanors.

In point of fact the law in question is a mere blind. It does not define manipulation. On the contrary, it legalizes and perpetuates the existing abuse by excluding the worst features of manipulation from the definition, which should have included them. The offense is made to apply only to cases in which no simultaneous change of ownership is effected. It is confined by the terms of the Act to

> all *pretended* purchases or sales whereby no simultaneous change of ownership is effected.

The bill is aimed only at fictitious transactions. Manipulation of securities is not now accomplished to any appreciable extent by fictitious transactions, although it was formerly conducted at times by that means. As now practiced it *does* result in a change of ownership, so that the most widespread forms of manipulation practiced on the Exchange are not reached by this Bill. It stands in the way of effective legislation to prevent manipulation.

I do not propose to discuss here at any length the ethics or merits of speculation except insofar as it is accompanied by manipulation or short selling. There is much to be said in support of the argument that there can be no broad and active public market in the absence of speculation. If it can be established that there should be regulation, the public authorities will determine the subsidiary question of whether and if so to what extent and under what conditions speculation shall be permitted.

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An interesting and instructive pamphlet has been published on this subject within the present year by Mr. John Henry Piper entitled "The Technology of Stock Market Manipulations."

The author quotes as follows from the book of Mr. W. C. Van Antwerp (now one of the Governors of the Stock Exchange, who conducts its vast press bureau), entitled "The Stock Market from Within:"

> The great evil of speculation consists in the buying of securities by uninformed people who cannot afford to lose.

He analyzes and dissects that assertion with great skill, evidencing an intimate knowledge of stock market technique and concludes with the suggestion that he has proved that Mr. Van Antwerp should revise this statement so as to read as follows:

> The great evil of speculation consists in the buying and short selling of securities by the people who cannot afford to lose all the time, who do not lose all the time but who do lose all, in time.

Or:

> The great evil of speculation in Wall Street is the buying and short selling of stock by people deluded with the idea that they speculate in values, whereas they only gamble in manipulated prices; and this evil will never be corrected until the people are informed that the essential thing for a speculator to know is the technical or *manipulated position* of the price of a stock in relation to the plan of campaign that is being engineered by outside financial powers who have the public, the Stock Exchange, especially the heads of it, under their heel.

Summarizing Mr. Piper's deductions, they are based on the following premises, which I believe are in the main correct as applied to the small operators and people of limited means who speculate in stocks and who are not members of pools or "insiders" with unlimited means for manipulating or controlling the market in the particular stock:

> 1. That about 98% of those who speculate in Wall Street sooner or later come to grief.
> 2. That with the development of "high finance" (which he characterizes as synonymous with dishonest finance), the dealings on the Exchange have become mainly speculative and that prices are regulated, not by intrinsic values, but by the technical phase of the market created by the manipulation of the particular security by the big interests that happens to be interested in operating in it at the time, ex-

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cept as to the small proportion of dealings that are of a strictly investment character.

3. That the man who bases his speculative operations in a given stock upon a study and mastery of the past, present or future merits of the property is bound to lose as against the speculator who ignores those factors, but acquaints himself with the identity and purposes of the individuals or men constituting the pool who are dealing in the stock; that if they are operating without price limits or within certain limits to bring about a rise or fall in the price or to make money trading back and forth and have the necessary means or financial support, the stock will fluctuate within those limits regardless of its merits so long as that sort of activity is being continued.

In the main these propositions are true in normal times. They may not be true at the moment but when confidence, activity and speculation revive they will be as true in the future as they have been in the past unless they are checked by regulation that will furnish the means of discovering and punishing them.

Manipulation of prices is the great curse of the Exchange.

It paralyzes its usefulness. The arguments in favor of speculation are destroyed by the presence of manipulation. It is said by the defenders of speculation that it represents the collective judgment of the value of a security; that besides creating an active market it furnishes the supreme test of value. Whether that be true as applied to *honest* speculation it is not necessary to determine so long as manipulation is tolerated. Manipulation is *dishonest* speculation. It is playing with marked cards to defraud the investor as well as the speculator. It converts the Stock Exchange into a mock auction. If there were no other reason for demanding Governmental supervision of the Exchange (and there are many apart from those already discussed) the fact that without regulation manipulation cannot be discovered would be conclusive of its necessity.

There may be said to be three principal forms of manipulation, apart from those that were formerly conducted through what are konwn as "wash sales" and fictitious transactions, which have largely been abandoned, and others which it will not be necessary to discuss:

1. The most common and most vicious form is effected by what are in substance bogus purchases and sales to create a false appearance of activity for the purpose of unloading the stock on the public at high prices. The same person or group gives buying orders to one set of brokers and selling

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orders to another, but the selling orders exceed in volume the buying orders until the stock is marketed. The apparent purchases and sales may and often do exceed the actual purchases by the public ten or twenty times over. In order to actually unload 100 shares on the public the manipulator may have to apparently deal in thousands of shares. So long as commissions are paid on these sham transactions on both sides of the bargain the Exchange has regarded them as entirely legitimate, even though the real nature of the dealings is apparent from their volume and from general report and can readily be verified from the books of the brokers to which the Exchange has free access at all times .

2. A series of transactions conducted for the purpose of acquiring or selling a large block of the stock of a given corporation not for investment but with the intent of realizing an immediate profit, brought about by purchases and sales that are calculated to affect the price in the way best adapted to accomplish the end in view. If the purpose be to accumulate stock so as to sell at a substantially higher level, the plan involves selling part of the accumulations as the stock rises so as to depress the price and then make larger purchases. If the intention is to sell the opposite course is adopted. The ultimate object is to buy stock that you do not want or to sell stock that you do not want with the view of affecting the price.

3. Where a new security is to be introduced: Instead of advertising its merits by the publication of a prospectus or by open solicitation the security is here again given a false appearance of activity to attract dealings. After the public has been led to buy on the assumption that it is acquring a security with an active market that is readily saleable those who were interested in creating this impression and who have probably disposed of the stock they had to sell, find it unnecessary to continue the heavy expense of paying commissions on what are in effect fictitious transactions and the buyers' apparently active market gradually and sometimes suddenly fades away.

Under the head of "Manipulation of Prices" the eminent Commission appointed by Gov. Hughes in 1909 had the following to say:

A subject to which we have devoted much time and thought is that of the manipulation of prices by large interests. This falls into two general classes:

(1) That which is resorted to for the purpose of making a market for issues of new securities.

(2) That which is designed to serve merely speculative purposes in the endeavor to make a profit as the result of fluctuations which have been planned in advance.

The first kind of manipulation has certain advantages and when not accompanied by "matched orders" is unobjectionable *per se*. It is essential to the organization and carrying through of important enterprises, such as large corporations, that the organizers should be able to raise the money necessary to complete them. This can be done only

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> by the sale of securities. Large blocks of securities, such as are frequently issued by railroad and other companies, cannot be sold over the counter or directly to the ultimate investor, whose confidence in them can, as a rule, be only gradually established. They must therefore, if sold at all, be disposed of to some syndicate, who will in turn pass them on to middlemen or speculators, until in the course of time they find their way into the boxes of investors. But prudent investors are not likely to be induced to buy securities which are not regularly quoted on some exchange, and which they cannot sell, or on which they cannot borrow money at their pleasure. If the securities are really good and bids and offers *bona fide,* open to all sellers and buyers, the operation is harmless. It is merely a method of bringing new investments into public notice.
>
> The second kind of manipulation mentioned is undoubterly open to serious criticism. It has for its object either the creation of high prices for particular stocks, in order to draw in the public as buyers and to unload upon them the holdings of the operators, or to depress the prices and induce the public to sell. There have been instances of gross and unjustifiable manipulation of securities, as in the case of American Ice stock. While we have been unable to discover any complete remedy short of abolishing the Stock Exchange itself, we are convinced that the Exchange can prevent the worst forms of this evil by exercising its influence and authority over the members to prevent them. When continued manipulation exists it is patent to experienced observers.

The fact is that manipulation is dishonest whether resorted to for the purpose of introducing a new security or for any other purpose. True, it is six years since the Hughes Commission made its report and there were many things then tolerated in corporate management and in the financial world generally that would not dare be attempted to-day, thanks to the exposure of corporate abuses by the much-despised "reformers" and to the improvements in moral standards of business for which their unwelcome activities are responsible. But it is still inconceivable that even in 1909 a body of New York gentlemen as distinguished as were the members of this Commission should have become so permeated with the customs and atmosphere of the financial world in which they moved as to have been led into putting in an official document the statement that manipulation

> which is resorted to for the purpose of making a market for issues of new securities is unobjectionable *per se*

or that

> It is essential to the organization and carrying through

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It is nothing of the kind. It is distinctly disreputable and the Exchange will shortly be made to see it in that light as they have been taught to see other practices that they once thought to be legitimate.

Is it to be wondered at that no legislation looking to the correction of the abuses that were pointed out by this Commission followed its report and that nothing was done in that direction until July, 1913, following the public exposure by the Pujo Committee of the same conditions that this Commission privately investigated? Is there any occasion for surprise that there was no abatement of the practice of manipulation in view of the quasi-encouragement lent to it by this Report? It is no exaggeration to say that the bulk of the securities on the list has been at one time or another manipulated—not for the purpose of creating a market or an appearance of activity in a new security, but, as stated in the Hughes Report, either

> to create high prices for particular stocks in order to draw in the public as buyers or to unload upon them the holdings of the operators or to depress the prices and induce the public to sell.

The greatest sufferers from this form of swindling are not the speculators but the small honest investors. The use of the market-news columns of the newspapers is an invariable accompaniment and a necessary part of the equipment in playing the game. The payment of dividends represented to be earned but only too frequently not earned and the publication of articles calculated to show the prosperous and growing condition of the property attract the conservative investor. With such instances in mind as Rock Island, Metropolitan Street Railway, Third Avenue Railroad and New Haven, all selling at one time over $200 per share and paying large dividends and all of them since bankrupt or nearly so, what chance has an outsider of getting a square deal? What had become of the "insiders" investments in these properties when they came to grief. True, they still held control of the management but the dear public, the widows and orphans and men and women of small means who through years of toil and self-sacrifice had scraped together the money with which to buy what they were led to believe was a safe, conservative investment, held the securities.

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If manipulation can be made disreputable and can be discovered and punished it can be prevented. If it can be prevented there will be no incentive for concealment and misrepresentation of the conditions of a property. It can never be discovered until the transactions on the Exchange can be officially supervised and the books of its members subjected to inspection of some public authority. The Postmaster General is the logical official to whom to delegate this duty. These quotations on which the investors of the whole country rely are distributed through the mails, by telegraph and in the newspapers. If they are fraudulent and fictitious, representing bogus or manipulated transactions intended to deceive investors, the originators of the frauds should be punished through the same machinery as the Post Office Department so successfully employs to detect and prosecute other false statements that are carried in the mails. What is the difference between falsely describing the merits and value of stock representing a mine or a patent or any other form of business venture by means of a circular or advertisement and the use by these captains of high finance of the machinery and published quotations of the Exchange and of market "puffs" and press bureaus, which is their means of advertisement to attract investors to stocks that they are selling by having it appear that vast quantities of the stock are being daily bought and sold at given prices, thus deliberately representing that the general investing public believes that they have that value and are actively buying and selling them when in point of fact there are no such transactions to any extent except such as are being manipulated by them for the express purpose of deceiving and drawing in the unwary?

The methods of the big operator, that are now considered legitimate, are far more insidious, dangerous and effective than are those of the man who plies his disreputable and precarious trade through circulars and advertisements. The latter is at least forced to disclose his identity and to be reasonably cautious lest he bring himself within the clutches of the Federal law, which is ever on the alert to discover these violations; but the powerful men of high finance who have for years practised this game with immunity are able to hide behind respectable and influential brokers and the machinery of the Exchange. For every investor who is swindled by the former method tens of thousands are victimized by the latter. The former generally lands in jail; the latter are financial

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giants, philanthropists, leading citizens and pillars of society. Their offense is the same—only their methods are slightly different. It is the prostitution of the machinery of the Exchange that renders their raids on the public possible.

Paul Clifford's occupation was humane and courageous beside theirs. He was at least kind and generous-hearted and took his chances. They "keep prayerfully within the law"—a law that is a disgrace to a community that rests in the smug self-complacency that it is civilized. The Exchange can put an end to this colossal confidence game whenever it chooses, but it is evident from its attitude in opposing regulation that it will never choose except spasmodically, when it is under fire, until it is compelled. It can never be compelled to do so until the books of the brokers can be opened and the facts exposed.

In view of the overwhelming evidence as to the existence of manipulation and the reports of various Committees on the subject, I fail to understand why it is constantly asserted that there is no proof of the existence of manipulation, nor why we are constantly challenged in the face of these findings to disclose "when, where or how these alleged transactions manifest themselves."

It matters not whether the work of Federal supervision be in charge of the Post Office Department or of the Treasury Department as part of the financial system, as in Continental countries, or of the Bureau of Commerce so far as concerns the quotations of shares of interstate corporations or of the Interstate Commerce Commission as applied to railroads, except that under our Constitution the authority to regulate through the Post Office is less open to legal question.

Unless the power to unearth these frauds is lodged somewhere they cannot be discovered and manipulation cannot be stopped. *The Exchange* now has that power through its control over the books of its own members but to ask or expect them to expose the law-breaking of their own members, by which they have in the past earned a large part of their income and which the Exchange encourages and has at public hearings and through the testimony of its officers insisted to be within the rights of its members is hardly a reasonable proposition for discussion.

Mr. Sturgis said that paying commissions to manipulate a market was like spending so much money for advertising

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the security. He was quite oblivious of the fact that a man who in the ordinary course of business should sell stock by advertising that so many thousand shares were actually being bought and sold day by day at a given price, and who was actually "going through the motions" and paying commissions on both sides of the transaction for the sole purpose of deceiving would-be purchasers whom he was thereby seeking to attract into the belief that such purchases and sales were genuine, would clearly be guilty of larceny. Yet that is precisely the intent and effect of these manipulated transactions that have heretofore formed so large a part of the business of the Exchange. It is passing strange that the members are so obsessed by self-interest that they cannot appreciate the perfect analogy in principle between the two transactions.

Anyone who is interested in creating an active market in a given security should hereafter be required to frankly set forth his purpose over his own signature, advising its purchase, for which someone can be held responsible, instead of continuing the underhand methods of false rumors of impending developments, "melons" to be cut, dividends to be increased, large earnings, great market activity (manufactured for the purpose of misleading), etc., that are the accompaniments of "creating activity," "stimulating speculation" and of the various other forms of manipulation.

Successful manipulation of established securities depends on these methods. In order to get the speculative public interested in the stock there must be "something doing" in it. They must be made to believe that they are getting advance information of what is "doing." The whole performance when thus conducted is essentially in the nature of a "confidence game."

When manipulation has ceased or effective means for its discovery have been supplied, the time will have arrived to take up the question of speculation. Then and not until then can we have open, honest speculation based upon conceptions of value. Then and only then will speculative transactions furnish a guide to values.

I have read with interest the Articles, Addresses and testimony of Professor Emery on this subject and would be at many points in accord with his views as to the value of speculation if it could be disassociated from manipulation; but I am unable to agree to his argument that there should be no limit even upon honest speculation.

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I take issue with him in his championship of unrestricted short selling and insist upon the necessity for Governmental regulation of all transactions on Stock Exchanges, which he opposes.

Here again the events of the past five months have demonstrated the peril of unrestricted short selling. The Exchange has been forced to admit that it is an evil that should be guarded against in troublous times by the enactment and rigid enforcement of a rule, now in force, under which an arbitrary minimum price has been fixed upon the bulk of its listed securities, so that they cannot be dealt in below that figure. Now that the London Exchange is under the control of the Treasury Department all short selling is forbidden. The Stock Exchange view of short selling that prevailed before the experiences brought about by the war, is fairly set forth in the testimony of the late Mr. Sturgis before the Pujo Committee, as follows:

Q. What is the purpose of short selling?
A. Generally speaking, to make a profit.
Q. To make a profit by what process?
A. By repurchasing the short sale at a declining price.
Q. That is, by selling a security that you have not got and gambling on the proposition that you can get it cheaper and deliver the thing that is sold. Is not that it?
A. That is the usual process—selling when you think the price is too high and repurchasing when you think it has reached the proper level.
Q. But is it, or not, the process of selling a thing you have not got?
A. It is.
Q. And is it, or not, with the idea that it will go lower, or can be depressed down, and bought cheaper and delivered?
A. Truly.
Q. Do I understand that you regard that as legitimate and defensible?
A. Do you wish my personal expression of opinion?
Q. Yes.
A. I think it depends entirely upon circumstances.
Q. Under what circumstances would you regard that sort of short selling as legitimate and proper?
A. I would regard it so if there was a panic raging over the country and it was desirable to protect interests which could not be sold. I think it would be a perfectly legitimate thing to do.
Q. Let us see about that. If there was a panic raging over the country and a man sold stocks short, would not that simply add to the panic?
A. It might. Self-preservation is the first law of nature.

* * * * *

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Q. But, as I understand it, if there is a panic raging over the country, you think it is defensible for a man to depress stocks by selling stocks he has not got, with the idea of adding to the panic?

A. Mr. Untermyer, if a person has property which is absolutely unsaleable and he can, so to speak, protect his position by selling something for which there is a broad market—

Q. That he has not got?

A. (Continuing). I do not consider it wrong.

Q. Mr. Sturgis, let us just analyze that, because I do not think I understand you. You do not want to be misunderstood, do you?

A. It is not my wish.

Q. And I do not want you to be misunderstood. Do you mean to say that if there is a panic raging it is a defensible thing for a man, under any circumstances, to sell stock that he has not got, with the idea of getting it back cheaper?

A. I do think it is defensible. I certainly think it is defensible.

Q. For what purpose does he do that except to try to make money?

A. To try to save his credit, perhaps.

Q. How does he save his credit in a panic by selling stocks that he has not got, with the idea of adding to the panic and getting them cheaper?

A. Because if he can make a profit on that sale it may repair the loss that he has made on stocks he cannot sell.

Q. I see. You know that that would simply accentuate the fierceness of the panic, do you not?

A. It could not be otherwise.

Q. Certainly. And his only purpose in doing a thing of that kind in time of panic would be to make money, would it not?

A. To protect himself.

Q. It would be to make money, would it not?

A. Yes; and that would protect him.

Q. Of course it always protects a man to make money, no matter how he makes it, does it not?

A. Yes, sir.

Q. And that you think, is justifiable?

A. I think under those circumstances it is.

Q. You do not want to make any further explanation of that proposition, do you?

A. I do not.

Q. Is it any more justifiable for a man to sell short in a panic than in a normal market?

A. It depends very much upon his financial necessities.

Q. Do you regard it as justifiable in a normal market for a man to sell a thing he has not got, with the idea of depressing prices in order to buy in the stock at a lower level?

A. I think it is a question between a man and his own conscience.

Q. I am asking for your judgment. You have been many years in the exchange, and you are a careful observer, and I would like to have your judgment

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A. I think a great many people deprecate it. Others approve it.

Q. Do you approve it?

A. You ask me personally?

Q. Yes.

A. I never sold a share of stock short in my life.

Q. Then you do not approve of it, do you?

A. I just happen not to have done it. My private business, if you please, I beg you to omit.

Q. I have not asked you your private business.

A. Yes; you asked me what I did myself.

Q. I did not ask you that, sir; I asked you what you thought about it.

* * * * *

Q. Do you approve of short selling in others?

A. Under what conditions?

Q. Under any conditions.

A. Yes; under some conditions.

Q. Do you approve of short selling in a normal market?

A. I will answer that question by saying it is a moral question with the individual himself. It is not up to me to express my opinion upon it.

Q. Do you personally approve of short selling in a normal market?

A. Not I, personally, no.

Q. You do not. And is it or not the fact that the bulk of the short selling is done in a normal market?

A. I should say no; more often on an excited market.

Q. It is done every day, is it not?

A. Oh, yes; to some extent.

Q. And it is done in large volume, is it not?

A. At times.

Q. The stock exchange does not discourage it, does it?

A. The stock exchange does not enter into it at all.

Q. The stock exchange does not discourage short selling, does it?

A. The stock exchange takes no position in the matter at all.

Q. Has the stock exchange any rule or regulation against short selling?

A. None.

Q. Why is it not just as simple a matter for them to have a regulation against short selling as to have a regulation against a broker splitting his commissions?

A. There is no regulation against short selling; that is all I can say to you about it.

The Stock Exchange can of course restrict or stop short selling whenever it sees fit to do so. It is doing so now to a limited extent. There are many other ways in which it can be more effectively accomplished.

(1) It can be limited as provided by the pending Owen Bill by forbidding a broker to lend his customers' stock in satisfaction of short sales. Or,

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(2) It can require each member to deliver at the Stock Exchange Clearing House certificates representing all the stock he has sold and take and pay for all the stock he has purchased the preceding day instead of merely settling differences between total purchases and sales and taking or delivering the balance, as is now done,—in the same way in which the Clearing House for banks now requires every bank to surrender all the checks payable to it and receives all that are paid by it.

The present regulations of the Stock Exchange Clearing House facilitate and are intended to facilitate gambling and especially short selling. Without them it could not be conducted on a large scale.

Or

(3) The selling broker can be required to disclose the numbers of the certificates. If he is selling for foreign account there is no difficulty in cabling the numbers of the certificates with the order.

Or

(4) The Exchange can simply enact a rule forbidding it and enforce it just as it now enforces the rule for a uniform commission and far more readily, for it is more easy to control.

There is not time to review the arguments for and against short selling nor is it germane to the present discussion. It bears, not on the question of whether there should be regulation but as to what shall be the character of such regulation.

I may, however, be permitted to say in passing that the champions of short selling studiously ignore the main argument against its legitimacy. They insist that it is a safety valve against undue inflation and depression, in that it tends to check an undue rising and falling market in a security.

It is said that the short-seller sells when in his judgment a stock is too high and is compelled to cover his sale by buying when it has reached what he believes to be its real value. That sounds well in theory. In practice short-selling is a dangerous factor in times of depression. It is a direct incentive toward creating and accentuating panics in the security market.

But above and beyond this, it is not in fact to any extent employed, as is claimed, as a test of the value of a given secur-

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ity, and does not in practical operation perform any such useful function, except in rare cases. Speculation is the main feature of the stock market. The bulk of its transactions are in the nature of gambling, the brokers being themselves and for their own account the chief speculators and the customers who trade through them buying and selling from day to day making up the remaining speculative contingent.

Mr. Sturgis testified on this subject as follows:

> Q. We are speaking of transactions that are made by members of your exchange in the way of short selling. Would not their books show whether or not they were selling short?
>
> A. If the broker is operating for his own account, yes.
>
> Q. And you say from a quarter to a half of the transactions on the exchange are for the broker's own account?
>
> A. We agreed upon a third, I think.

The Commission appointed by Governor (now Mr. Justice) Hughes found:

> It is unquestionable that only a small part of the transactions upon the Exchange is of an investment character. A substantial part may be characterized as virtual gambling.
>
> * * * * *
>
> The patrons of the Exchange may be divided into the following groups.
>
> (1) Investors, who personally examine the facts relating to the value of securities or act on the advice of reputable and experienced financiers, and pay in full for what they buy.
>
> (2) Manipulators, whose connection with corporations issuing or controlling particular securities enables them under certain circumstances to move prices up or down, and who are thus in some degree protected from dangers encountered by other speculators.
>
> (3) Floor traders, who keenly study the markets and the general conditions of business and acquire early information concerning the changes which affect the values of securities. From their familiarity with the technique of dealings on the Exchange, and ability to act in concert with others, and thus manipulate values, they are supposed to have special advantages over other traders.
>
> (4) Outside operators having capital, experience and knowledge of the general conditions of the business. Testimony is clear as to the result which, in the long run, attends their operations; commissions and interest charges constitute a factor always working against them. Since good luck and bad luck alternate in time, the gains only stimulate these men to larger ventures, and they persist in them till a serious or ruinous loss forces them out of the "Street".
>
> (5) Inexperienced persons, who act on interested advice, "tips", advertisements in newspapers, or circulars sent by

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confidence in their luck. Almost without exception they eventually lose.

A "short-selling" movement is not ordinarily directed against a particular security on its merits. In order to be successful on a substantial scale it attacks the entire market. The big operator sells, without owning, a number of the most active securities on the list without regard to their merits or whether they are intrinsically worth more or less than their then selling price. There is rarely a substantial selling movement that does not attack and depress prices in the active stocks all along the line. The market prices move up and down by sympathy. That being true, explodes most of the fine-spun theories as to the justification for short-selling in fixing and steadying the value of a given security.

Unless I wholly misapprehend the operations of our financial system the regulation by law of the Stock Exchange is an indispensable condition precedent to the destruction of the control of great financial credits by a few men or to any effective corporate reform in this country. It is by the illegitimate use of the facilities of this, the world's greatest security market, that many of the vast predatory fortunes have been filched from the public. The relation and importance of the Exchange to corporate independence of banking domination are little understood. We shall accomplish nothing substantial in the direction of the coveted goal of financial emancipation toward which we are striving until this factor is appreciated and dealt with as an essential factor in the general scheme of reform.

The reasons in favor of Federal regulation and control of the Exchange are vastly more weighty than those appertaining to any of the many occupations that are now required to be incorporated and are so regulated and controlled. As before stated, the Exchange is in no sense a private or local enterprise. It is grossly misleading to say, as has been argued by the defenders of its present irresponsible form of association, that it is not engaged in business and that its only function is to provide a meeting place where its members may deal with one another under prescribed rules.

The Exchange *is* engaged in business and of a highly important and distinctly National character. It owns the entire stock of the New York Quotation Co., which for a specified rental, supplies members' offices south of Chambers

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Street, New York City, with a ticker service that registers, impartially and without earmarks, every genuine and manipulated or fictitous transactions that takes place on its floor. For $100,000 a year, under contract terminable upon one day's notice, it sells these quotations to a subsidiary of the Western Union, the Gold & Stock Telegraph Company, which also maintains a like ticker service. The latter, however, can supply the quotations *to such persons only as the Exchange approves* and under no circumstances to members' offices south of Chambers Street or to any competing Exchange in New York City. The quotations are gathered upon the floor of the Exchange by its employees and transmitted by its own operators to the officers of the New York Quotation Co. and the Gold & Stock Co. and thence distributed throughout the United States and by cable to foreign countries, but the Exchange retains the right to determine absolutely who shall and who shall not receive these quotations throughout the length and breadth of the land and all over the globe. There is no other method by which quotations of transactions on the Exchange are obtainable (a new agreement is said to have been recently effected with the Western Union that places these quotations still more completely in the control of the Exchange, if such a thing be possible).

The Exchange is the market place of the entire country and of foreign countries for securities and the only public market in the United States where money is loaned and borrowed.

The business transacted by its members has no relation to State lines. It comes to them from almost every corner of the civilized world. Its members maintain private wires to all the principal Cities of the United States and the transactions conducted on this open Board are for the account of customers from all parts of the country and from foreign countries.

Its hall-mark as to the genuineness of a certificate of interest in a corporation passes current everywhere and it is rightly supervised with jealous care and at considerable expense to the corporations concerned.

It undertakes to prescribe the form and conditions of every corporate security in which it authorizes dealings and its determination is final through its control over the listing of such securities. It reserves the right to exact the minutest details of the business and affairs of the issuing corporation,

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such corporation shall declare and pay interest and dividends and in the matter of the transfer agents and registrar and as regards endless other details; all this very properly on the ground that it is performing a public function national in its scope.

It jealously controls the reports of every transaction on its floor, issues and distributes the records of every purchase and sale, or offer of purchase and sale, which it thereby impliedly represents as an honest and genuine transaction. Courts of Justice, Trustees, financial institutions, tax officials, State Superintendents of Banks, Trust Companies and Fire and Life Insurance Companies and other corporations that are subject to supervision in the several States throughout the country and the Comptroller of the Currency in fixing the value of securities of National Banks and the public the world over, act on this information. It exacts compensation for the service of listing securities, sells the quotations to interstate and international telegraph companies for large sums of money and scatters them broadcast through the newspapers, over the telephone and telegraph, but always under its control.

In the face of this array of undisputed facts, this stupendously powerful National and International agency of finance contends that it would not be a reasonable or legitimate exercise of the power of Congress to prevent the use of the mails, telephone and telegraph in interstate business as a means of perpetuating frauds upon the public. Congress not only has the unquestioned power—it has become an imperative duty. It is a necessity of modern finance from which there is no escape. Ours is the only country that has failed to realize our duty and to do it.

Regulation is not only needed as a preventive of fraud. It will accomplish still greater results as a constructive measure.

Great and much-needed reforms in the organization and methods of our corporations may be legitimately worked out through the power wielded by the Stock Exchange over the listing of securities. Much of the confusion and many of the defects in corporate regulation due to the diversity of State laws and the bidding of the States against one another in laxity of administration in order to attract corporations within their borders may be corrected and uniformity of methods

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Thus complete publicity as to all the affairs of a corporation may be uniformly enforced. It may and should require as a condition of listing a security that all the intermediate profits and commissions of bankers, brokers and middlemen shall be fully disclosed, thus throwing about the investor the protection afforded by the "Companies Act" of Great Britian and of other civilized countries. Every new security should be required to be publicly issued and offered to the public through the publication of a prospectus so as to eliminate the secret profits of the middleman as far as possible. It is the only way to create confidence in and to popularize investments in corporate securities.

Detailed annual statements should be exacted from all corporations whose securities are listed, disclosing all payments made or profits or emoluments received, directly or indirectly, by officers, directors, bankers and brokers from the corporation, so that every security holder may know whether and to what extent his Company is being exploited.

The scandalous practices of officers and directors in speculating upon inside and advance information on the action of their corporations may be curtailed, if not stopped, by requiring that the officers shall make full disclosures of all their transactions in buying and selling securities of their Companies. The Act incorporating the Exchanges should provide that all statements required to be made by corporations shall be under oath and that false swearing shall constitute perjury. At present they are extra-judicial.

In short, the opportunities of the Exchange as an agency of corporate reform are almost endless, provided its own practices can be reformed so as to entitle it to exercise these broad powers. Instead of the investment business of the country abandoning the Exchange as is now and has been to an extent the case for some time past, it will become necessary to the reputation and salability of a security that it should be listed by reason of the protection thereby afforded the investor. The general public, which has grown to look upon the Exchange with distrust because of the practices that have been tolerated in the past, will be given new confidence in it when it *is* under legal supervision.

The argument as to the effect of this legislation in enlarging the usefulness of the Exchange has been referred to as an admission that the ultimate purpose is to secure pub-

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corporate reform through the use of the Post Office Department. It is nothing of the kind, although it would not be a misfortune if it should indirectly lead to uniformity in requiring publicity of the affairs of corporations and to restricting the bidding of the States against one another in laxity of administration. If it incidentally reduces the incentives for the organization of "carpet-bag" and "wild-cat" corporations it will hardly be objectionable on that ground if it is otherwise a legitimate exercise of power.

It is as essential to protect the mails against being used as an agency for facilitating the perpetration of fraud to require that the public market whose quotations are to be carried by the mails shall be restricted to the listing of securities that conform to given requirements of publicity of their affairs as it is that the quotations of those securities shall represent only actual and not fictitious or manipulated transactions.

There is no ulterior purpose in the first requirement, even though it may serve another useful purpose. The intended protection of the public cannot be secured without compliance with both requirements.

If there has been any argument advanced to justify our permitting this unincorporated association to determine, without public supervision, when and under what conditions these great security markets shall be opened and closed, it has not been brought to my attention. The action thus taken is of the most distinctive public concern. It directly affects the fortunes of every business and financial institution in the country. Why should we tolerate its being longer subject to the whims or the judgment, good or bad, of a few interested men who are responsible to no one for its far-reaching results?

Incorporation is not, however, the only means of regulation. It has been put forward as the most practicable means and as rendering regulation effective with the least possible interference with the liberty of the members of the Exchange.

The suggestion that the members be required to keep separate books containing entries of transactions on the Stock Exchange and that these books be subject to inspection by public authority for the purpose of discovering manipulation and other violations of law has met with a great outcry from the gentlemen whose transactions are thus sought to be subjected to supervision. They entirely overlook the fact that there are innumerable occupations, only remotely affecting

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the interests of the public, in which such inspection is provided for by State and Federal authority. Manipulation can no more be discovered without such power of supervision than could the practice of rebates have been repressed and punished without access by the Interstate Commerce Commission to the books of the railroads. The same is in a degree true of the violations of the Anti-Trust Law. Only in isolated instances have they heretofore been discoverable but with the aid of the Trade Commission Bill it will be possible to reach the secret agreements and arrangements in restraint of trade that have thus far eluded detection.

With few exceptions the members of the Exchange are mere puppets of the big operators and financiers with inside information, in the practice of manipulation. They can be reached only through the brokers' books.

It was established before the Pujo Committee that many of these accounts are kept on the books of the brokers by numbers and that the names of the principals were unknown to those in charge of the accounts. In that way the identity of the men who were "rigging the markets" was effectively hidden. One of the first acts of the regulating body would be to put an end to such practices and to require that the books of the brokers should state the facts, through which the operations of their principals would be discoverable.

Certain objections have been urged against the regulation of the Exchange by public authority which should now be considered.

Mr. Van Antwerp has been the chief spokesman in voicing these objections. They were summarized by him a few weeks ago from his press bureau as follows:

1. That the subject of incorporating the Exchange was considered by the New York State Senate in 1913 and there overwhelmingly rejected.

The fact is that the Bill that was then presented was opposed by me before the Senate Committee as a mere subterfuge and as intended to defeat effective regulation by applying a quack remedy. As bearing on the conclusiveness of this "argument" it may not be out of place to remark here parenthetically that the body which defeated the Bill is the same legislative body that, by an overwhelming vote, acquitted one of its members (Senator Stilwell) of the charge of bribery on identically the same evidence on which he was a few weeks

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later convicted in a criminal court and for which he is now serving a term in the State Prison.

2. It is next said that there is no public demand for this reform.

In evidence of that fact Mr. Van Antwerp asserts that at the hearing before the U. S. Senate Committee on the pending Owen Bill for the enforced incorporation and regulation of the Exchange:

> 36 witnesses appeared against the Bill and only one in favor of it—the latter the lawyer who drew the Bill.

The reference to "the lawyer who drew the Bill" is intended for me; but Mr. Van Antwerp omits to state that it was prepared by the House Committee on Banking and Currency; that it was revised by the Committee; that it was recommended by it and that the same Bill has been introduced by Senator Owen in the Senate and by Congressman Henry, the Chairman of the Committee on Rules of the House (who is not a member of the House Committee on Banking and Currency) and that this Bill is now pending in both Houses.

The facts are further:

> 1. That there were in all *18* and not 36 witnesses heard before the Committee, as appears from the official record of the proceedings.
>
> 2. That none of them were under oath or subject to cross-examination.
>
> 3. That 3 of the 18 appeared in favor of the Bill and and of the 14 who argued against the Bill in its then form a number of them directed their arguments to the particular phraseology of certain parts of the Bill and that of this number 7 were Presidents, ex-Presidents, Governors or members of the Stock Exchange, whose abuses were sought to be corrected by the Bill; 1 was the General Counsel for the New York Stock Exchange and another the General Counsel for the Consolidated Stock Exchange. They were there in the capacity of Counsel and made oral arguments and filed Briefs and are by reason of that fact—and that alone—included in Mr. Van Antwerp's "list of witnesses". 2 were the President and Counsel for the Boston Chamber of Commerce, both of whom admitted the wisdom and necessity of Federal regulation and presented a proposed Bill embodying their views of the form of regulation they deemed desirable. One was a merchant who had been a member of the Hughes Commission and whose testimony was directed largely to explaining and justifying the virtues of watered stock; and the three others were financial experts, including Professor Emery.
>
> 4. That the Bill which is described by Mr. Van Antwerp as having

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"only one in favor of it—the lawyer who drew the Bill"—is the identical Bill that was favorably reported by the Pujo Committe of the House of Representatives in February, 1913, after a long investigation in which many witnesses were examined and cross-examined under oath, with the recommendation of 10 of the 11 members of that Committee, including all the 7 Democratic members and three out of the four Republicans.

and

5. and finally,—That it is the same Bill that has received the unqualified approval of five of the seven Democratic members of the present Senate Committee on Banking and Currency.

Inasmuch as it is nobody's particular business except that of the general public, which has no spokesman, to press this reform, whilst it *is* the particular business of the Stock Exchange and its officers and specially employed Counsel to defeat every attempt to bring the Exchange under legal regulation, the consensus of independent opinion in favor of regulation as represented in the Committees of Congress would hardly seem to justify the implication that there is no public sentiment in favor of this reform.

3. The most surprising and, if I may say so, the most misleading of the arguments urged against regulation, is to the effect that if the Exchange were now incorporated or under Federal regulation, its action during the recent crisis arising out of the war in prohibiting its members from trading privately in stocks that were not listed on the Exchange and with which the latter has no more concern than a stranger and with respect to which it has legitimately no more power to control its members than is possessed by a stranger, would have been rendered impossible and that such action would in that event have been preventable through injunctions issued by the Courts against the exercise of its unauthorized restraint upon the free action of its members in matters not the concern of the Exchange.

There is no means of knowing on what this fanciful assertion is based. It has no legal warrant so far as can be ascertained. The fact that the Exchange has been able to enforce this unauthorized action against its members does, however, shed a flood of light upon the extent of its unlawful domination and the despotism that it is able to wield over its members with respect to their dealings in securities that are not listed or dealt in or on the Exchange and with which the latter has no concern.

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I do not criticize the fact of the general acquiescence by the members in the action it has taken, however arbitrary it may have been. It was an act of self-preservation and would probably have been agreed to for that reason whether the Exchange was or was not subject to regulation by the authorities. But there is no reason why that act or any other act of a body of this character gratuitously exercising public functions without public authority should not be subject to the scrutiny of the Courts if any member felt that his legal rights had been invaded, without subjecting him to arbitrary expulsion for daring to invoke the law of the land. The suggestion that this, the most important link in our financial structure, should be set apart and permitted to be a law unto itself, lest the Courts might otherwise interfere to review its action and redress grievances, is inadmissible in any community that professes to be governed by law.

The Governors of the Stock Exchange are obsessed with the lawless notion that the great peril against which they must jealously guard their institutions is the possibility of reserving to a member the right of appeal to the Courts from their judgments—however unrighteous and despotic they may be. Unfortunately the decisions of the Courts based upon their present peculiarly irresponsible form of organization, have encouraged them to believe that they are a law unto themselves. It is largely because of this current of judicial authority that the law requires change.

The Exchange dreads regulation because, as it naively admits, regulation would interfere with that despotism which they call their "disciplinary" powers that are not subject to review, as they should be. Why should not a member have the right to a determination by a Court of whether his engaging in a private transaction for the purchase or sale of stock not listed on the Exchange and with which the latter has nothing to do, either for his own account or for others, is within his rights as a citizen, without being summarily expelled for his temerity in daring to appeal to a Court of justice?

I am not now discussing the wisdom of this particular regulation under the exceptional circumstances under which it was put into effect nor do I believe that it would have been questioned, whatever may have been the right of members to secure a judicial review. A rule that might be wise and justifiable under certain conditions may be intolerable under

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overturn it; if it is wrong the power should be lodged somewhere to correct it.

I am objecting to the principle involved in the arbitrary contention that the Exchange must be permitted to remain unregulated so that its acts, however, ill-considered or oppressive, shall not in any event be subject to judicial review. It is a plea for mob law. No more insidious form of anarchy was ever preached.

We are finally told that as the result of the foolish, muckraking agitation for regulation which the Exchange has never tired of denouncing, there was enacted in 1913 a law against manipulation and that anyway none has been practiced during the past few weeks of stagnant business since the Exchange reopened. Granted, though I doubt it. In the absence of regulation there is no way of proving or disproving this statement and as before stated the law is a humbug and it would in the absence of regulation be a dead letter in any event.

The Exchange has openly and heatedly defended the practice so long and so recently that it does not seem reasonable that it would now go out of its way to end it, especially as it has been an important source of profit to so many of its members, who do not yet consider it morally wrong.

If this argument is sound, we should repeal all supervisory and visitorial powers over our banks, trust companies, railroads, life insurance companies, packing houses, factories and other businessess having a quasi-public relation, for have we not stringent penal laws against their unlawful doings and those of their officers?

Officers of corporations may then with impunity steal from their banks, packing-houses may be in a state of filth breeding disease, all health regulations and safety appliances in factories may be disregarded and every penal law affecting their safety defeated, since there would be no way of ascertaining the extent of the violations.

The Superintendents of Banks and Insurance may now overhaul all the accounts and transactions of the institutions under their charge and may examine the officers and directors of the corporations under oath as to all matters pertaining to the corporation and thus discover violations of law. The Exchange indignantly persists that to subject its members to like visitation involves an imputation upon their honor and they resent it with as much heat as if there were no precedent and no necessity for action.

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In the absence of these powers of visitation and regulation over banks, life insurance companies and other businesses we would be in the same predicament as to them that the Exchange claims we now are with respect to it—we might have ample repressive and punitive laws to reach illicit practices, when discovered, but no means of discovering them and so we may as well have no laws whatever.

Lastly, It is said that incorporation or regulation of the Exchange would necessarily involve the right of the Court to review the discipline of the members, which must at all costs be prevented since it would mean the granting of injunctions to stay the action of the Exchange pending review and that this would be destructive of effective control over the members. Summary action is claimed to be necessary to enforce discipline.

It by no means follows that regulation would involve undue interference with the discipline of the members. That would rest in the judgment of the public body having the regulation in charge. All would depend on the form of the legislation. The Exchange has no right to assume that anything would be done to interfere with its efficiency. This is believed to be a pretext. Its real fears are (1) that the limitation upon its membership, its rigidly enforced rule requiring the charging of uniform commissions, its at present unreviewable discipline of members for action involving no moral delinquency, its unwarranted control over public quotations of securities and its despotic rule over the smaller Exchanges will be ended; and (2) that its transactions involving the manipulation of prices, would come under the ban of the law and be discoverable and punishable. In this it is entirely right.

Such of these practices and regulations as are found to be contrary to the general interest would be ended by regulation, but it does not follow that reasonable limitations upon its membership, nor a fair uniform rate of commission, nor just discipline of its members, would meet with interference.

The continued assertion by the Exchange that it and it alone shall continue to determine when the doors of its great public security market shall open and when they shall close, is a fair illustration of the extent of its obsession on this subject. The fact of its great public position and responsibility having now been brought home to the Exchange, it continues stolidly to insist that there shall be [redacted]

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view of the manner in which it discharges its public functions. Its only answer is that being at the moment on its good behavior, whilst it is under public scrutiny, it should be allowed to contiune to do as it pleases in the discharge of this stupendous public trust that so vitally affects the entire country and all its business and financial interests.

It rightly scents the danger to its illicit transactions and lawless arrogation of power from regulation, hence the desperate struggle it is waging against the inevitable.

I believe it fails, however, to appreciate the broader aspects of this important public question and the eventual gain to it in increased stability and revived public confidence.

In this connection I take the liberty of repeating the statement made by me before the U. S. Senate Committee:

> I am convinced that the time will come, and before long, after regulation has been enforced, when those who are now bitterly assailing the champions of this legislation in the vain hope of thereby diverting the issue will find that it has marked the dawn of a new era of usefulness and prosperity for them and that the Exchange will feel grateful to those who have pointed the way.

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THE LAWYER-CITIZEN—
HIS ENLARGING RESPONSIBILITIES

An Address

Delivered at the Meeting of the COMMERCIAL LAW LEAGUE, at the Hotel Breakers, Atlantic City, N. J., on July 27th, 1916.

By
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THE LAWYER-CITIZEN—

HIS ENLARGING RESPONSIBILITIES.

There have been revolutionary changes in the field of activities of our profession since I began the practice of the law in the City of New York 37 years ago. The evolution has been more marked in the great cities and especially in the metropolis of the country than in other sections but it has everywhere involved the development of qualities that were not required as part of the equipment of the lawyer of the earlier days.

The conveyancer has been replaced by the Title Company; co-operative commercial bodies and collection agencies have taken the place of the lawyer whose practice was devoted largely to claim-collections; Chambers of Commerce and Boards of Trade, with their enforced and voluntary Committees of Arbitration are happily reducing the volume of important litigation to a minimum. The Casualty Companies, the Employers' Liability and Workmen's Compensation Acts and the numberless other forms of co-operative and Governmental devices for dealing with claims arising out of personal injuries are rapidly eliminating this field of legal activity; whilst the simplification of procedure and of legal documents and the abolition of cumbersome technicalities, that were an impedi-

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ment and a reproach to the administration of justice in all branches of the law, mark the passing of the technical specialist-practitioner.

In the olden days advocacy was the chosen field of the giants of our Bar. There and there alone was the arena in which, free to all and without fear or favor, reputations were won. Our greatest advocate was our acknowledged leader. No man aspired to leadership except through his work in the Courts, which was the supreme test of his right to lead. In our community as in yours the men who rose to eminence were without exception advocates who owed their material and professional success wholly to their eloquence and legal learning. Charles O'Connor, William M. Evarts, William A. Beach, James C. Carter, Joseph H. Choate, Francis N. Bangs, John K. Porter and William Fullerton were national figures and names to conjure with in my early days and solely by reason of their reputations as advocates. Not one of them was a money-maker or a business man. Many of them died poor and some of them penniless. All this is now changed. We have nothing to compare with them to-day. Advocacy is with us almost an extinct art. The work in the Courts is regarded as a necessary evil of the practice. The men who engage in it are, with rare exceptions, mere pigmies in learning and eloqeunce as compared with the men of the last generation. In great offices the "business" is either farmed out to specialists in trial work, or entrusted to junior partners whose ambition is to

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escape from its arduous labors by promotion to the more lucrative work of acting as highly paid clerks to financiers in guiding them to keep "prayerfully within the law."

Nowadays we rarely find a leading advocate at the head of or connected with a great Metropolitan law firm. The flower of our Bar in the great cities have been seduced by the temptations of business and money-making from the proud position once held by the leading advocate. What was the primary and legitimate function of the lawyer has become a very subordinate part of his professional life, whilst his office is conducted more on the lines of a business organization than a profession.

With every year that passes, men who have achieved distinction in our profession are drafted out of it to lead great banks, banking houses, railroad systems or industrial concerns of national and international importance because of the specialized knowledge and training that have come to them from the practice of the law at their desks under modern conditions. Some of our present so-called "leaders" have never tried or argued any kind of a case whilst others who have on rare occasions tried, or tried to try, or argue a case have been such strangers to the atmosphere of the Court and have done it so badly that they have injured rather than helped their reputations in the attempt.

The fault is not ours nor is it due to a declining love of our profession. It is because the Courts are too busy and there is a lessening relative importance

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to the controversial side of the law as compared with the growth and magnitude of business and finance requiring the aid of the lawyer.

Our big and successful business men have no time or disposition to litigate. They are not much concerned with abstract principles of right and wrong. They are looking impatiently for results. They cannot afford the delays and uncertainties of the law in large affairs. Important litigation is therefore exceedingly rare as compared with the complexity of modern affairs. The old way of settling differences is rapidly being supplanted by arbitration in this as in the other relations of life, and so we must not look to advocacy as the forum for the larger activities of the lawyer of the future.

Whilst therefore our scope of private endeavor is being more and more circumscribed, I venture to suggest that the field for public usefulness has been constantly broadening and on bigger and more constructive lines than at any time in the past, and that we are confronted by boundless opportunities and new responsibilities that we cannot escape.

Our profession has been conservative to the point of reaction. Instead of bending our powerful influence and expert knowledge to correcting the abuses and defects in the law, we seem to regard such service as the exclusive province of the legislator, which is far too narrow a conception of our professional duties.

The influence of the lawyer is waning and justly so on economic questions. We are too much inclined to

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permit our views to be moulded by the selfish interests of the clients whom we happen to represent. We have no right to allow the source of our retainers to blind us to our duties of citizenship or to destroy our independence. It would not be a reproach to be known in the community as a corporation lawyer if those among us who specialize in corporation law were fearless in our denunciation of corporate abuses and earnest in championing reforms. We above all others are familiar with the weak spots. Upon us as specialists and as sworn officers of the law devolves primarily the duty of pointing out the need for corrective legislation and the public has the right to rely upon us for guidance. When we sell our expert knowledge to our clients our opinions of what is right and wrong in existing law do not go with it. It does not follow that because we advise the client as to what the law is that we should insist that it is as it should be, or should fail to exert ourselves to change it if it is not as it should be.

We are today face to face with the task of moulding our antiquated laws to meet modern conditions, which is a vastly more important service than that of mere interpretation. One of the many needed steps in that direction has been taken by the American Bar Association through its Committee on Uniform Laws, but it has hardly scratched the surface of the urgent reforms that must be accomplished before ours will be entitled to be classed among the progressive sciences.

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Whilst much may be done through such agencies where there is substantial agreement among the members upon the wisdom of the proposed change, the controversial reforms, which are generally the most important, cannot be effectively accomplished by the concerted action of a large body of men of differing opinions, however wise or patriotic. They must be the result of independent, individual conviction and agitation where each man may be as radical in his program as he believes to be necessary, unhampered by the inevitable compromises and perils of non-action that are the outcome of the divergent views of collective bodies.

We must invade the realms of economic and social and industrial reform wherever the skill of the lawyer is required to translate the principle into action. Yet every Bar Association has studiously refrained from encroaching upon this, which is peculiarly the province of the public-spirited lawyer.

The number and importance of such subjects of reform that occur to one are so great that it would be impossible fully to discuss any one of them within the compass of a single Address. I will confine myself to-day to indicating briefly a few of the many such subjects, in which we are to-day stumbling along under intolerably obsolete conditions, far in the rear of other civilized nations. They include our Corporate Laws; Social Justice; and the Administration of the Criminal Law.

Our corporation laws are without exception the loosest, most unjust and inadequate and in every way

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the worst with which any civilized nation is afflicted. They are a snare to the investor, minorities are helpless, they offer a premium upon dishonesty and furnish the safest and most fruitful field to the criminally disposed exploiter for the practice of fraud and oppression upon the public. Every safeguard that other countries have thrown about their citizens has been rejected by us. From the birth to the death of the corporation, the system is utterly wrong and designedly so. It is the creature of the long line of powerful men (under the guidance of their clever advisers) who framed the legislation to serve the ends of the financial buccaneer to the exclusion of the public protection. Under normal conditions it would not have been possible in a justice-loving country such as ours. For this unspeakable situation we are primarily indebted to our form of Government. Upon the fetish of the sovereignty of the States rests the main responsibility. It is one of the many penalties that has been and is being inflicted upon us for this worship of the empty shell of States' rights.

The clever men who have been profiting by the continuance of the lax administration of our corporations have not been slow to seize upon this prejudice and to exploit it wherever their interests have been threatened. The politicians who are the creatures of these selfish interests have taken refuge behind this appeal.

I am and have been for thirty years an avowed Nationalist, for I believe that there is only one great

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issue that separates the parties to-day and that is the issue of Democracy—that of the privileged and predatory Classes vs. the Masses and that the rights of the Masses can only be worked out through Federal action.

Whatever merit there was in the doctrine of State Soverignty in past times—it was a virile and compelling issue—has been long since outgrown and is completely overshadowed by the interstate character of modern business which cannot be conducted within State lines. The country is more unified and smaller in the sense that transportation and communication have drawn it together in closer and more intimate relations. It required as many weeks to reach one another as is now accomplished in days.

In analyzing the reason for our anomalous corporation laws, we find that to each State there is reserved the sovereign right to grant corporate charters regardless of the residence or place of business or actual domicile of the corporation or of its officers, directors or stockholders and without reference to the interstate character of the business. The granting of such charters assures substantial revenues to the State for the franchise and valuable perquisites to lawyers and others within its boundaries for organizing the corporation and keeping alive the corporate existence. It also assures important business for the Courts of the State, since litigants must ordinarily come there to redress their grievances against the cor-

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poration, regardless of the fact that the corporation has all its property and conducts all its business in another State.

The organizers of the corporation, grotesque as it would appear to the "man from Mars" have the choice between the forty-eight States of the Union, as to where they will select their corporate home, regardless of the place of actual domicile. They naturally select the State whose laws offer the least restrictions and the greatest freedom from personal liability for the acts of the officers and directors. Incidentally, the policies of the Courts of the various States toward corporations and their stockholders are important factors in determining the State that is to be selected. If, for instance, as was formerly the case, the laws of Massachusetts or Ohio should require the stock to be in fact fully paid to avoid personal liability and stockholders were held liable to creditors in an amount equal to the par of their stock, those States are boycotted even by the corporations that operate exclusively within their borders in favor of a State with less rigid regulations. Thus the many States that were anxious to assure reasonable corporate responsibility and proper protection to stockholders and creditors and to the public and clung to decent laws as long as they could, have been literally driven into enacting reckless, irresponsible legislation in order to "get their fair share of the business" of harboring wildcat corporations or to retain within their own borders the legal domicile of the Companies to which they were legitimately entitled.

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Even the great State of New York, finding itself unable longer to withstand the cut-throat competition of its enterprising neighbor States, was finally forced to throw conservatism to the winds and "went its Sister States one better." It placed its merchandise on the bargain counter by offering to issue unlimited shares of stock without par value and free from all personal liability, without regard to the actual values behind the shares, as the result of which it has secured very large customers whose "patronage" was supposed to be firmly held by its New Jersey neighbor. What New Jersey will now do in the way of charter-offering or in the line of favorable judicial decisions or in reducing or remitting its incorporation or annual franchise dues remains to be seen. That it will do something to retain or increase its threatened "trade" is a foregone conclusion.

Whilst this auctioning of the dignity of the States is thus merrily proceeding is it likely that the Courts of the States which have thus bartered away their birthright and in which the revenues from this source have become valuable will incur the hostility of the corporations whose patronage they secured at such sacrifice, by decisions that will unduly protect creditors and stockholders? Or will they, wherever possible, so construe the laws as to attract to themselves corporations whose legitimate homes are elsewhere, by illicit methods of which the average honest business man would scorn to avail himself?

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And so we find ourselves in the intolerable, humiliating situation in which our States, which should have a uniform law, are bidding against one another in laxity of administration on a subject where public protection is essential and none is to be had under existing conditions. The States that are profiting by this traffic will not surrender it, so that uniform laws by concerted action is out of the question. We are deliberately playing into the hands of dishonest exploiters by adhering to the present system. The remedy is obvious.

1. **Enact a National Corporation Law.** President Taft recommended such a law under the advice of his Attorney-General. I have been contending for such a law for the past ten years and have never doubted its constitutionality. Most of the important corporations, except banks and local utilities could be reached by it, as being engaged in foreign or interstate commerce as now understood.

To those who are still so wedded to the academic idea of States' rights that they are content that the country shall continue to suffer from this intolerable condition that strikes at the very foundations of business integrity, we might if necessary offer by way of compromise a system by which the States may continue to issue charters subject to the restriction that corporations engaged in interstate commerce be required to secure a license from the Federal Government to conduct interstate business. In this way Congress might prescribe such uniform conditions as

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to the form of charter and the protection of security-holders as would secure civilized corporate administration. Whether the result be accomplished by direct National incorporation or through the indirect method of Federal license and control is immaterial as compared with the inestimable advantages of either method over the prevailing lawless situation which constitutes a reproach to our institutions. Substantial progress might also be made through the agency of the Stock Exchanges by placing them under the supervision of the Federal Government as is now the law in every European country.

The New York Stock Exchange is the great security market of the world. Its far-reaching power over the business and finances of the country is not understood. It is essentially a public agency international in its scope. Its quotations of the prices at which securities are supposed to be bought and sold day by day are scattered broadcast all over the world. These quotations are accepted by Courts of Justice in all matters of litigation, by the Federal and State banking officials in determining the solvency and standing of banks, trust companies, insurance companies and other corporate bodies, by our National and State authorities for the many purposes of taxation, by trustees of estates and in short in all the complex affairs affecting the values of properties whose securities are listed on the Exchange. Yet, strange to say, such is the power of the Exchange over legislation, that is has managed to circumvent all efforts at super-

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vision and to remain an unincorporated, irresponsible, self-governing body which has maintained the status before the law of a private club with which the public is supposed to have no concern. Its members may with impunity manipulate securities on its list, depress and inflate values by fictitious transactions and use its vast and powerful machinery to defraud the public through dishonest gambling. It stands alone among our public institutions above and beyond the law—a law unto itself. As now constituted it is a sinister influence, but it has potentialities for invaluable public service if properly regulated by law.

If its operations and the listing of its securities were subject to supervision as are the transactions of banks, trust companies, life, fire and casualty insurance companies and other corporations having recognized quasi-public functions and responsibility, whose transactions affect the public far less than do those of the Stock Exchange, Congress might as a condition of permitting its quotations to be carried in interstate commerce by the mails and over the telegraph and telephone, exact supervision over its operations for the public security which would include certain charter provisions and a measure of publicity of the affairs of the corporations in whose securities the Exchange is permitted to deal. The swindles that are being perpetrated through the abuse of its machinery and without redress or fear of detection would be impossible.

Among the other urgent corporate reforms there may be mentioned:

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A uniform law for corporations engaged in foreign and interstate commerce on the general lines of the "British Companies Acts," which requires among its other drastic provisions, (1) that the organizers fully disclose and deposit at the public office designated for the purpose, all contracts showing the profits of bankers, brokers, promoters, underwriters and middlemen under severe criminal penalties for violating these requirements; (2) that the stock be publicly offered and fairly allotted among the subscribers before it can be listed or dealt in on the Stock Exchange; (3) that the books be audited by independent public chartered accountants, who must prepare and send to the stockholders annually in advance of the annual meeting a statement of the accounts for the year. These accountants must be elected annually by the shareholders. They cannot hold over. (4) The directors must make full disclosure to the stockholders of the business of the corporation and must attend at the annual meetings to answer such questions as may be put to them. The compensation payable to them is voted by the shareholders and under the English customs they cannot gamble in the securities of the Company to which they hold a trust relation that is regarded as sacred everywhere save with us.

There is no such thing in England or on the Continent, under their laws, as a director making money out of his corporation directly or indirectly, whilst with us it is the rule rather than the exception and nothing is thought of the vicious practice.

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They have no banking houses that name the directors, control the policies, buy from the companies the securities thus controlled at prices fixed by themselves, sell them at a profit to themselves and act as fiscal agents by putting the funds into their own bank accounts on their own terms and then solemnly pass resolutions ratifying all they have done.

A director who did the things there that are tolerated with us would be disgraced and drummed out of the community.

2. The entire procedure affecting insolvency and the reorganization of insolvent corporations must be revolutionized and reversed.

It is an invitation and encouragement to the practice of fraud and oppression, to which the Courts are parties. It has reached the proportions of a National scandal and is a standing reproach to our administration of justice. Yet the Bar, that must realize the extent of the evil and is a beneficiary of the system, sits supinely by without lifting a hand to correct it. The wide-spread injustice and the far-reaching injury to our National credit that are wrought by the present practice may prehaps be most conveniently illustrated by selecting at random one of the many recent railroad receiverships and by following the recognized procedure.

They are all inaugurated and conducted on substantially the same lines whether they relate to rail-

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ways or great industrial concerns engaged in interstate commerce and any one of them is typical of the others.

The directors, under whose management the corporation has come to grief, or to whose interest it is found that it should be taken out of the hands of its owners — the stockholders — are the only ones who know of its predicament or of their intention to create a crisis in its affairs. One would suppose that under such circumstances they would be required to come frankly into Court, state their case and place the property under the protection of the law after notice to the stockholders, creditors and security-holders and to the Interstate Commerce Commission or other constituted authorities, there to be dealt with after an opportunity to all parties interested to be heard. Nothing of the kind happens. What does in fact happen is the following:

One or more of the officers, sometimes with and sometimes without the knowledge or consent of the Board of Directors or any of its members, and always without the knowledge of the creditors, security-holders or stockholders or of any of the public authorities charged with the supervision of the affairs of the Railway, selects a friendly creditor, who at the request of this officer and on a petition that is usually prepared by the Company's lawyer, becomes a plaintiff in a collusive suit ostensibly against the Railway, in which it is charged that the Railway is or will be unable to meet its matured or maturing obligations. This allegation

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is conveniently admitted by an answer, verified by this same officer of the Railway, who procures the action of the petitioning creditor. The petition and answer are not infrequently drawn by the same lawyer—both selected by this same officer of the Company.

Armed with these formidable documents the Counsel for "both parties" select the Judge to whom they are to apply for Receivers for the Company, sometimes taking the precaution of discussing the application and exchanging views with him as to the personnel of the Receivers, before making the formal application. The Receivers not infrequently include one or more of the officers under whose management the Receivership became necessary or was found advisable.

Not an inkling of what is contemplated is required to be given to any of the real parties in interest whose rights are so vitally involved or to the public authority that should be afforded the opportunity to protect the public and the parties in interest and more particularly to be heard on the crucial questions of whether there is any necessity for taking the property out of the hands of its owners without their consent and if so, as to the personnel of the Receivers to whose care it is to be entrusted. It is safe to say that the owners would rarely, if ever, elect to hand it over to the tender mercies of the men under whom it was wrecked, if they had the chance to be heard. But, strange to say, it is never considered essential or proper to consult them or even to have them learn in

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advance of the impending calamity to their property.

Meantime the "insiders" who alone are in possession of knowledge of the intended action are enabled to "rig" the stock market in anticipation of the impending catastrophe and the victimized stockholders are at their mercy. In a recent case the stock was driven up within a few days of such a secret Receivership from $20 to $36 per share and dropped to under $18 on the announcement of the Receivership, on enormous transactions. It was subsequently established on an investigation before the Interstate Commerce Commission that the Receivership papers were in preparation for a week or more whilst these wild transactions in the stock on the Exchange were going on, to the extent of hundreds of thousands of shares, and that a number of the "insiders" were in the secret.

The naming of Receivers at the instigation of the management through this circuitous and dishonest method means that the management have decided that there should be a reorganization of the property. Reorganization under such circumstances in turn means, that the stockholders will be required to supply more money to save their present investment. The fact that the Receivers in charge or one or more of them are nominees of the old management, gives to the latter a great advantage in controlling the Reorganization and in dictating its terms.

One of the many anomalies of the intolerable practice that has grown up in these cases is,

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that notwithstanding the collusive character of the suit on which the jurisdiction of the Court is invoked and secured and that the whole thing is the act of the discredited management, the control of the suit is from beginning to end left absolutely in its hands to the exclusion of the real owners. In most jurisdictions the latter are not even allowed to intervene or become parties to the action or to secure any standing in Court or right to be heard or to protect themselves at any stage of the proceedings. They are not consulted or even notified of the issuance of Receivers' Certificates that are often negotiated to the extent of many millions in priority to their interest in the property, to purchase equipment or make improvement and for other purposes—all to be disbursed by the Receivers in whose choice they have not been consulted.

The next step in this incredibly oppressive and inexplicable game of prostituting justice under the forms of law is that of reorganizing the property.

It is not unusual for the interests that prompt the Receivership to set the stage for Reorganization before the appointment of the Receivers is made. This is done by selecting a Committee of eminently respectable figureheads, usually composed of bankers and men connected with financial institutions who are named by the prominent banking house which controls the Reorganization as Syndicate Manager. The members of the Committee rarely have any substantial interest in the property. They lend the use of their names in return for generous compen-

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sation, the amount of which they fix and collect from the securityholders.

The Committee publishes a call for the deposit of securities with them under a drastic form of agreement, containing extraordinary powers. The influence of the banking house and of the members of the Committee in the financial world is such that with the aid of the brokers who hold the securities as collateral to loans and in others ways, they secure such a hold upon the securities that the scattered securityholders have usually no alternative but to assent to the Plan of Reorganization. This ordinarily involves the raising of new money by way of assessment from the securityholders. These cash requirements are underwritten for a commission by a syndicate formed by the banking house or the Committee.

Unless there happens to be a concerted movement among the securityholders for their protection, which is very difficult and rarely happens, these Reorganization Committees begin their activities as self-constituted guardians of other people's property. When the securities have been deposited with them, they secure such a grip on the property that the scattered owners have in effect no voice in the formulation of the plan for the reorganization of their property. No matter how unjust the Plan may be to a given class of securityholders, or how unfairly it may discriminate between one class and another, they are helpless because of the large sums usually required to rehabilitate the property and the difficulty of concerted action.

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The proceeding is extra-judicial from beginning to end. The Courts have no control over it. If a securityholder does not happen to like the way in which his property is being dealt with by strangers to it, whose only interest is in making money out of his misfortunes, his only remedy is to attend the sale and bid upon the property in competition with the Committee, which alone holds the bulk of the securities and can deliver them in payment of the purchase price. This means that his position is impossible and that he is forced to subscribe to any terms that the Committee may impose on his participation in the Reorganization. The Committee controls the judicial proceedings. When it is ready to reorganize the Court is asked to sell the property at public auction. As the Committee then speaks for the securityholders, the Court has no alternative. The so-called "sale" under these conditions is always a farce. The property is invariably bought by the Committee at the upset price fixed by the Court—just about enough to pay the Receivers' Certificates that have been issued by the Court against the property and the vast expenses of foreclosure. Neither the Interstate Commerce Commission nor the Courts have any jurisdiction over the Plan or power to pass upon its justice.

Throughout the legal proceedings resulting in the elimination of the stockholders, and often of the creditors and bondholders, the voice of those interested in the property is not permitted to be heard. If it be said that the Committee merely executes the trust re-

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posed in it by the depositing securityholders, the answer is that the securityholders have been stripped of all ability and opportunity to protect themselves under the stupid and antiquated processes of law that govern these proceedings. If, as often happens, the property is located in different States, the Courts of each State go through the mummery of conducting "sales" that are ancillary or subsidiary to the sale in the main jurisdiction. The entire procedure is so cumbersome, complicated and expensive that not even the large securityholders could afford to take an active part if the opportunity were afforded them to do so.

The cost of Reorganization of the average trunk line system is anywhere from $1,000,000 to $3,000,000, which comes out of the pockets of the securityholders, either in cash or by way of further burdens on the reorganized road. It is easily ten times as large as in any other country and necessarily so because of the complications of the procedure.

This grotesque condition can readily be remedied if the lawyers who understand this branch of the law would sink their private interests and take a hand in the work of reforming an intolerable system of which they are partly beneficiaries.

(a) A National Incorporation Law is the first necessary step in the process of simplification of the procedure.

(b) The Court proceedings for the appointment of Receivers should be instituted by the Interstate

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Commerce Commission, somewhat after the fashion in which the Comptroller of the Currency appoints Receivers for insolvent banks. The inauguration of that method of dealing with National Banks and in the several States in which the Bank Superintendent acts for State Banks and Trust Companies and the Superintendent of Insurance for insolvent Insurance Corporations, resulted in minimizing the expenses and in expediting the closing out of insolvent Companies in their respective jurisdictions.

(c) Notice of the application for Receivers should be given by publication or otherwise to all securityholders, with the opportunity to them to be heard as to the necessity for the Receivership and the personnel of the Receivers.

(d) The Plan of Reorganization should be subject to the approval of the Interstate Commerce Commission and of the Court in the case of railway companies and to the Trade Commission and the Court where industrial corporations are concerned. If it is just it should be put into effect upon the approval of three-fourths of each class of securityholders. If it is oppressive any securityholder should be able to defeat it.

(e) The farce of selling a property of this character should be abolished. Upon the approval of the Plan by the Court, the new or Reorganized Company should take the place of the old Company. Every securityholder would be bound by the Plan and the securities of the new Company would stand pledged and liable to sale for the payment of such assessment as

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the Court may deem necessary to rehabilitate the property.

(f) All the expenses of Reorganization as well as the amount and character of new securities to be issued, should be subject to the approval of the Commission. The entire procedure should be under its control, subject to review by the Courts.

The Commission would call together the security-holders, who would form their own Committees, select their bankers and eliminate the graft and manipulation that now characterize the proceedings. It would incidentally put an end to the perilously increasing concentration of our great corporations in the hands of a few men which is now proceeding at a rate that will startle our people into protecting themselves when they learn the facts. But it will then be too late.

3. Representation and Protection of Minority Stockholders.

It is manifestly right that the majority should control, but it is fundamentally wrong that the minority should have no representation in corporate management and no opportunity to inform itself of the way in which the majority is administering its trust. Compulsory cumulative voting, which means proportional representation on the Board of Directors, should be a condition of every corporate charter. This means that if, for instance, the governing body consists of nine members, each one-ninth of the stock should be able to elect a director. Five-ninths of the stock would thus elect five of the nine directors but the minority

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would be able to participate in the management, to know what is going on and to prevent illegal and oppressive action by the majority which is now impossible because it has no means of knowing what is contemplated. Some of the States require cumulative voting by their Constitutions. The Bar should agitate its enactment by the others but has taken no step in that direction. It has on the contrary permitted without protest the partial emasculation of this salutary provision by the corporations through laws classifying the directors and thus requiring a larger proportion of stock in order to elect a minority director.

Many of the worst scandals and most cruel wrongs that have characterized corporate management would have been averted if minority representation had been made compulsory.

4. **The existing methods of electing Directors should be abolished and an entirely new system substituted,** by (1) requiring the Board of Directors to nominate its candidates before the election and to advise the stockholders of such nominations; (2) abolishing proxy voting; (3) permitting stockholders to vote by mail as well as in person, but not by proxy and (4) prohibiting any one other than the true owner from voting the shares.

In great corporations where the stock is widely scattered the control is frequently retained for a decade or more by interests that have little or no financial stake in the corporation except to exploit it for their own gain and it has been found well-nigh impossible

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to dislodge them in the face of their demonstrated unfitness. This is especially true with respect to railroad corporations and great interstate industrial combinations. It is due partly to the secrecy that is tolerated in corporate affairs and the difficulty experienced by stockholders in discovering what is being done with their property. It is however mainly due to the antiquated election machinery; the absence of minority representation; and the vice of proxy voting.

The stocks of the so-called "public" corporations—the stocks that are listed and actively dealt in on the Stock Exchange—are usually to a considerable extent in the hands of brokers who have bought them for customers on margin and hold them as security for the payment of the balances owing them on the purchase. These stocks are the pawns in the gambling game that constitutes the great bulk of the dealings on the Exchange. They are usually carried on the books of the corporation in the brokers' names, although the stock certificates are constantly passing from hand to hand among the brokers without apparent change of ownership on the stock books of the Company.

In the very rare instances in which disgusted stockholders outside the Wall Street circle, driven to desperation by mismanagement or worse by their Trustees, are so reckless or foolish as to imagine that they can change the control under existing law, the "insiders" gather in the proxies from the brokers in whose names these pawns are registered and in which the brokers have no interest except as pledgees. The specu-

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lating owner who owes his broker money on the stock for which, by the way, the broker sees to it that he is and remains amply secured, has no voice in the matter. The broker should not be permitted to vote this stock without the written consent of the owner and the Stock Exchange, instead of encouraging him to do so, should not permit it. The law should require every person to accompany his vote with an oath that he is the beneficial owner.

The stockholders are widely scattered. They cannot attend elections at distant places. Under the present vicious system they are asked to give a proxy to some one connected with or representing the Company to vote for them for directors whose identity is never disclosed and being helpless to protect themselves or be otherwise represented they adopt the only course open to them. Why should not directors be nominated in advance of the election by the management and by any outside interest that chooses to contest and the stockholders advised in ample time to make their choice? Why require them to act in the dark? And why should they not be permitted to vote by mail instead of being virtually compelled to entrust the exercise of their rights to others? When this is done the abolition of proxy voting will logically follow.

All the machinery surrounding these elections has been designed to throttle the will of the true owners in the management of their properties and to perpetuate the rule of the exploiter with its attendant ills that are the outcome of secrecy.

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It is to be hoped that the Joint Committee just appointed by Congress to investigate the railway situation will address itself to these problems and that in doing so it will embark upon a course of independent inquiry and will hear all sides. The infirmity of these investigations in the past has been that the committees have neither the time, experience nor expert knowledge for research work and that they get only one side of the question—the corporation side. Their interest is such that they can prepare their case in its most attractive form but the public gets no fair hearing, since what is everybody's business is nobody's business.

So much of the time you have so kindly allotted to me has been consumed in merely scratching the surface of the subject of Corporate Reform, that I must reluctantly surrender my purpose of discussing the big work of Social Justice that demands the immediate attention of our Bar. My study of Socialism has satisfied me that it is a beautiful, iridescent dream of the idealist and not a practicable working program. The agitation of its principles by the splendid, earnest, unselfish scholars and thinkers who are championing its cause has done much to wring concessions that would not otherwise have been obtained. Its continuance as a standing protest against existing injustice is invaluable.

If the Capitalist System is to continue, it must be reconstructed upon lines that offer to the workers a greater measure of protection and a fairer distribu-

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tion of the industrial wealth to which the Masses contribute by far the greater proportion.

A long stride in the direction of progress was made when Congress wrote into the Clayton Act the sentiment that human labor is not a commodity in connection with certain exemptions of labor organizations from the laws aimed at the Trusts.

That Act has other important progressive features which the railroads are engaged in attempting to destroy by an amendment that is now pending in Congress.

It is the part of good bookkeeping to carry a depreciation account to cover the wear and tear on mechanical machinery in a manufacturing business as a part of the cost of the product. The time has come when provision must be made for the wear and tear on the human machinery engaged in the industry which is quite as much a part of the cost of production as is the wear and tear on the plant. We are accordingly getting Workmen's Compensation Laws to protect the laborer to a slight extent against accident and to provide for his family in case of death in the course of his employment. We must now have laws to protect him against Old Age, Sickness and Enforced Unemployment, such as have long prevailed in other countries.

It is a field of constructive legislation in which the skill of the lawyer will be taxed to the limit, for there is no subject so beset with ramifications and complications. Our conditions differ from those prevailing in

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the countries in which those laws are being administered, so that the subject will perhaps require other treatment; but the problem is one that will have to be met. We must now apply ourselves to it.

The imposition of the Income Tax and especially of the graduated super-tax on large incomes was a step in the right direction. The doubling of the tax that is now impending is another salutary step and the imposition of a substantial tax on munitions is still another. The toiling masses are at last being encouraged to believe that the taxes of the future will be imposed on wealth, where they belong, and that hereafter their backs will not be bent under the ever-increasing burdens of government to the exclusion of those who should be made to bear them but have thus far escaped their just share. It is gratifying and encouraging to feel that the greater preparedness of which we are so sadly in need is to be accomplished through taxing the men who receive the lion's share of its benefits and to whom its payment involves no hardship. The tax on incomes, and especially the heavy super-tax on great incomes, is the most just and the least burdensome of all forms of taxation.

The lawyer understands the inequalities that have so long been suffered. He should have been the first to demand justice.

In the field of the Reform of the Criminal Law, much remains to be done and still more that has been done must be undone. We must cut loose from some

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of our cherished prejudices. I am among those who believe that our Grand Jury System should be discarded. It served a useful purpose but it has become a prolific source of oppression. It ought not to be possible in these days to brand a fellow-being by an indictment resulting from a star chamber proceeding, in which only one side has had the opportunity of being heard. Every criminal prosecution should be inaugurated by a complaint supported in open Court by sufficient legal proof to make out a *prima facie* case. The defendant should not be permitted to waive examination. It is in the interest of the State that the Court should be satisfied that such a case has been presented and that the defendant should have the privilege of testing the sufficiency of the evidence before being called upon to answer before a trial jury.

Either party should have the right of appeal from an adjudication that there is or is not sufficient evidence to warrant placing the defendant on trial.

The State should on the other hand have the right to place the defendant on the witness stand in such a preliminary hearing or at the trial. The ancient rule that the defendant cannot be compelled to incriminate himself should be abolished. It also served a useful purpose in the olden days but has long since been outgrown. It is a prolific cause of unpunished crimes. There is no good reason to-day why the commission of a crime should not be proven out of the mouth of the defendant. It is often the only

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way in which it can be established, especially in complicated cases such as those arising under the Banking and Anti-Trust Laws.

There is more that I would like to say but I must not detain you longer.

Permit me in concluding to express the hope that we will realize the broader conception of our duties that demands of us as lawyers to take our part in the public work of formulating and perfecting the laws as well as interpreting them in the private interest. When we do our share of the creative constructive work we shall no longer be subject to the reproach of being counted among the parasites of society. Herein lies our field of future usefulness. Will we see and embrace our opportunities?

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An Answer to Mr. Roosevelt —

"The Only True American of Us All"

Delivered at Newfield, Maine
September 4th, 1916

Shall Invisible Government Be Restored? —

The Only Real Issue

Delivered at Portland, Maine
September 7th, 1916

Addresses by
SAMUEL UNTERMYER
of New York

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An Answer to Mr. Roosevelt,

"The Only True American of Us All."

I propose to analyze the speech delivered by Col. Roosevelt at Lewiston on Thursday last, to take issue with his facts and conclusions and to discuss the conduct of our foreign relations by the present Administration insofar as is possible within the brief limits of an address of this character; but before doing so there is one very serious criticism which I shall venture to make upon the temper of the Lewiston speech and of previous utterances from the same source. I do so with reluctance because of my great respect for the exalted office of President of the United States and for any man who has occupied that high place of honor, and also because of my recognition of Col. Roosevelt's aggressive public spirit, of the public services he has performed and of his many admirable qualities as against the defects which we have learned to deplore, but with which the country has patiently borne, although at times sorely tried.

There are times when in the heat of partisan excitement our people appear brutally unmindful of the feelings and ungrateful for the services of their public men to whom they are under the deepest debt of gratitude. In no other country are such bitter vituperation and misrepresentation permitted to go unchecked and unpunished. The ordeals through which our public servants must pass is cruel and at

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times heartbreaking. It is not a wise system, for it deprives us of the services of sensitively constituted men and it does not truly represent our real attitude toward those who bear for us the burdens of government. We are not really an ungrateful people, however much we may on occasion appear to be when our passions are aroused. We are in truth at heart kind, tolerant, forgiving and appreciative.

That this is true is abundantly proved by the attitude that we have managed to maintain toward the vagaries, recklessness in statement, bad temper and indiscriminate partisan abuse of public men by Col. Roosevelt since he retired from the Presidency. The great party to which he owes the honors that have come to him has with forbearance and good nature forgiven him his disloyalty in attempting to destroy it from motives of hatred, revenge and disappointed ambition and, stranger still, his actions have been covered by the mantle of charity from all sides. Such is the glamour that still surrounds the name of this magnetic, impetuous, arrogant personality that I doubt not that many of the millions of earnest, sincere men who were betrayed into deserting their party in 1912 to further his personal ambition under pretense of a great moral movement, have already half forgiven him for hauling down the flag and deserting the standard when his personal fortunes could no longer be served through that agency. What better evidence could there be of the loyalty and gratitude of our people than the forbearance they have repeatedly shown Col. Roosevelt under the most serious and persistent provocation?

But there is, I believe, a limit to patient consideration beyond which our people will not go, and I want to stop here to inquire whether that limit has

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not now been reached, with all due allowance for the growing infirmities of temper to which we have become accustomed.

I refer, of course, to the unbridled and inexcusable abuse and the unexampled malice and hatred of his successful rival of 1912, with which Col. Roosevelt has for some time past and again on Thursday last assailed the President of the United States, against whom and against whose Administration no breath of scandal has been uttered by his most bitter partisan adversaries. In all of his long, distinguished public career, Col. Roosevelt has not yet learned that invective is not argument. We have never before tolerated an equally intolerant man in the public life of the nation. Everyone who differs from him is a liar and everyone who questions "My Policies" is un-American and little short of a traitor.

If there are any real issues in this campaign, it should be possible to discuss them temperately and with due respect to the great office of President of the United States. Gratuitous insult of your adversary lends nothing to the force of your argument. It generally indicates the absence of merit in your own contention. Here are some of the "gems of persuasiveness" from Col. Roosevelt's Lewiston speech. They were not words impetuously spoken in the heat of debate, but were deliberately planned baseless insults, carefully penned and widely distributed for publication throughout the country in printed form long in advance of the date fixed for formal delivery of the speech:

> Hundreds (of Americans in Mexico) have been killed and **Mr. Wilson has watched their fortunes as disinterestedly as if they had been rats pursued by terriers.** This Administration has displayed no more feeling of responsibility for the women who have been raped and for the

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American men, women and children who have been killed in Mexico than a farmer shows for the rats killed by his dogs when the hay is taken from the barn.

Does that appeal to you as a truthful or temperate statement in the light of the anxious days and months and years that have been devoted by the President by day and night in and out of season to the patient effort to restore peace to Mexico?

Has any President since or before Lincoln's time been as sorely tried? Has any of them or have all of them combined been confronted with problems so many or so vital to the life of the Republic? Have you ever felt, regardless of your political faith, such ease of mind that they would be honestly, justly and rightly studied and solved? Col. Roosevelt knows that the revolting picture he there draws is cruelly and wilfully false. He knows that no man of ordinary sensibilities could be callous to the loss of lives of our citizens in Mexico and that the heart of the entire country bleeds in sympathy for them. He must know, fatuously partisan and intemperate in speech as he is at all times, that the President is a peculiarly sensitive nature, with an exalted sense of responsibility. Unless I mistake the sense of justice of our people, it will not be easy to forgive even him such wanton insults to our Chief Magistrate.

Mistakes may have been made in the many years during which we have had to contend with this anxious Mexican problem by the present Administration and by the predecessor Administration from which this legacy of care was inherited.

I assume that is inevitable so long as we are human, although my study of the situation and understanding of the idealism that underlies our policy have failed to disclose any from my point of view,

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for I believe it would have been a crime and would today be a still greater crime against humanity for us to intervene so long as there is any alternative or experiment that may avoid it. Men who make no mistakes make nothing else. No one could foresee the kalaedoscopic shifts and changes in the scene of action that have convulsed that unhappy country or anticipate the treachery and selfishness of successive leaders. The common scold and fault-finder who can always do things better than the people who are charged with the responsibility of doing them and who is accordingly always dissatisfied with whatsoever has been done and that cannot be undone, makes up in hindsight what he lacks in foresight.

In his denunciation of hyphenated Americans and divided allegiance, with which everyone will agree (except possibly Mr. Hughes and the Republican party that are appealing to that vote), after venturing the startling intelligence that "some of the very best Americans I have ever known were men who were born abroad," Col. Roosevelt, by a process of reasoning which I find myself unable to comprehend, calmly places the responsibility for the existance of the hyphenated American at the door of President Wilson in the following words:

> During the last two years we have seen an evil revival in this country of non-American and anti-American division along politico-racial lines and we owe this primarily to the fact that President Wilson has lacked the courage and the vision to lead this nation in the path of high duty—

from which I gather we are to assume that if the President had meddled in the quarrels of Europe by protesting against the invasion of Belgium and if he had gone to war with Germany, the German-Americans, who are said to be so deeply offended because

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he forced a settlement of the submarine controversy, would have felt no resentment whatever at his having thus violated the laws of neutrality and arrayed us on the side of the Allies.

In all seriousness I ask you, my fellow-citizens, with what degree of patience you would have listened to an unknown man who should go to such extreme lengths to offend your intelligence? Is any further evidence required of the generous tolerance and of the forgiving spirit that we accord our public men?

That is the kind of criticism that constitutes the sum total of Col. Roosevelt's arraignment of the President's foreign policy. But we shall have occasion to refer to that later. What I want to emphasize now is the shameless villification of the President before the country involved in the brutal slander that the President had no more concern over Americans who have been killed in Mexico than if they had been "rats pursued by terriers."

But this is by no means all. In speaking of our European relations and our omission to protest against the violation of Belgian neutrality, Col. Roosevelt makes the following pleasing comparison of the President with Pontius Pilate, who condemned Christ to death:

> Such neutrality has been compared to the neutrality of Pontius Pilate. This is unjust to Pontius Pilate, who at least gently urged moderation on the wrongdoers. The President's fine words were used merely to cloak ignoble action and ignoble inaction.

In that connection it will be recalled that of Pontius Pilate it is recorded in the Scriptures that "he mingled the blood of some unknown Gallileans with their sacrifices"; that "he slew the Samaritans who came to Mount Gerizum to dig up sacred vessels hidden by Moses there," and that Agrippa defines

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him, according to the Encyclopaedia Britannica, as a man "inflexible, merciless, obstinate."

If anybody believes that Col. Roosevelt—bitter partisan that he is, who has never been able to see anything commendable in his political adversaries—is sincere in a single word of the wild, reckless invective he has launched against our President, he has a poorer opinion than I have of him; but it is right that we should test the extent of his insincerity in weighing what he has to say.

In the sentence next succeeding the one from which I have read, Col. Roosevelt quotes a statement by "an American with exceptional international knowledge" whom he does not name, but who happens to be his former friend and adviser, Mr. Elihu Root.

The speech in question was delivered by Mr. Root in the Senate on the occasion of the debate on the resolution justifying the Vera Cruz expedition. In speaking to that resolution, Mr. Root said of the President:

> I have the highest respect—more than respect, I have regard and admiration—for the President of the United States. I have entire confidence in the sincerity of his purposes, in the lofty quality of the ideals which he pursues, and in the genuineness of his adherence to peace.

Is Mr. Root right in his conception of the "sincerity of the President's purposes, the lofty quality of the ideals that he pursues and the genuineness of his adherence to peace" in dealing with the Mexican situation, or is Col. Roosevelt right in ascribing to him ignoble action and the same interest in our citizens in Mexico "as if they had been rats pursued by terriers"?

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In that same debate, Senator Lodge said:

> I have no desire to criticize the President for his refusal to recognize General Huerta. The President no doubt proceeded on grounds which seemed to him good and sufficient. I condemn as strongly as he can the methods of treachery and bloodshed by which General Huerta has reached his present position.

The resolution was passed in the Senate on April 21st, 1914, by 72 votes, including many Republicans, and with only 13 dissenting votes, including those of Messrs. Root and Lodge, who counselled more drastic action.

This action is significant as illustrating the utter futility of the criticism now made of the Vera Cruz incident. It demonstrates anew how hard pressed our adversaries now are by the facts in their efforts to manufacture an issue out of the Mexican situation. Both Senators Root and Lodge were members of the Committee on Foreign Relations, which is especially charged with the subject. If they or their Republican colleagues advocated or now advocate intervention, which always and inevitably meant and means war or a different treatment of the situation, why did they not have the courage to offer such a proposal and in language that could not be mistaken? If the Republican party or Col. Roosevelt or Mr. Hughes favors intervention or any policy other than that we have been and are pursuing, why in the name of common honesty do they not frankly say so and take the verdict of the country? Then we would at least have an issue. They keep their ears pretty close to the ground and they dare not. If a given policy is wrong there must be some other line of action that is right. Why has none ever been concretely suggested in Congress? It is so much easier to criticize and destroy than to upbuild!

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The speech begins with the re-assertion by Col. Roosevelt of his sole title to be the discoverer of the idea that America should be first in the thoughts and hearts of Americans. There are some of us who might be disposed to question that title and even to become a little impatient at the absurd attempt to make a political issue out of the slogan "America First," as though there were any citizen within the borders of our land in whose mind and heart the welfare of "America First, Last and All the Time" were not the first and uppermost consideration. Is any further comment needed upon the barrenness of this campaign than that we should be found discussing such a question? You might as well try to base a great National political contest upon the issue of whether two and two make four or whether honesty is the best policy or whether treason should be a punishable offense. You cannot get a civilized people excited by the empty high-sounding platitudinous truisms that make up the bulk of this appeal.

It is quite on a par with his argument that because some of our brave soldiers have been killed by bandits who crossed our borders or because in our punitive expeditions against these bandits we have sustained losses through mob-action, we now are actually at war with the Mexican people whose government is exhausting every resource at its command to capture and punish these murderous marauders, who are our common enemies.

From the time of Washington, extending down to the date of the second Harrison Administration, our history is replete with instances in which we have invaded the rights of neutrality of other nations or our rights of neutrality have been violated and thousands of our soldiers, sailors and civilians in the

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aggregate have been killed, seized, captured or forced into foreign service and our ships and other property to the extent of hundreds of millions of dollars have been wantonly confiscated by one or more of the great European powers and sometimes by a number of them in combination. When we violated neutrality the nation against which we offended did not find it necessary to go to war nor have we adopted any such course. Wrongs inflicted by us and those suffered by us have been settled by negotiation through the recognized channels of diplomacy as President Wilson has endeavored to do today.

In 1891 we were in serious danger of disruption of our relations with Italy, with whom we had a treaty by the terms of which our Government guaranteed to protect Italian subjects in our country. In March of that year nine Italians, resident in New Orleans, who were members of a secret oath-bound society known as the Mafia, and were supposed to have been in a plot to murder the Chief of Police of New Orleans, were awaiting trial. The jury acquitted six of the nine and disagreed as to the remaining three; but before the prisoners could be released the jail was surrounded by a Vigilance Committee consisting of prominent members of New Orleans and the prisoners were seized and lynched.

The Italian Government, finding itself unable to obtain any redress from us, recalled its then Minister. Finally the difference was compromised by the payment by us of $25,000 to the families of the victims and diplomatic relations were resumed.

During the Administration of Abraham Lincoln our neutral rights were openly flaunted and trampled upon on every side and our lives and property de-

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stroyed, to such an extent in turn by France, Russia, England, Spain and at times by all of them acting in concert, that we were on the eve of declaring war on all these countries at the same time, and our then Secretary of State, William H. Seward, prepared a plan to that end.

France went to the borderline to injure us. Among other things she permitted war vessels to be built and equipped for the Confederacy in her Government yards and supplied them from her Government arsenal. England allowed the invasion of our territory by a band of Southern sympathizers from Canada, who killed one of our citizens, wounded several and looted our homes.

Again and again we protested and called England to account for flagrant and deliberate violations of our neutrality in connection with the seizure of the U. S. S. Chesapeake on the high seas, bound from New York to Portland; the burning of the U. S. S. Roanoke off Bermuda, the seizure on Lake Erie of the ship Philo Parsons, the scuttling of the Island Queen and the shooting of its engineer and the wounding of its passengers. We finally protested against the use of British ports and British borders as a base for felonious depredations against the citizens of the United States.

The outcome of the arbitration of our claims against England arising out of the depredations upon our commerce by the Alabama is still within the memory of the present generation. Over $100,000,000 of our property was destroyed, 84 of our vessels were captured and our flag was virtually driven from the sea. After many years of waiting we secured a measure of reparation for these

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wrongs, but we did not find it necessary to go to war to redress our injuries.

These instances might be many times multiplied if time permitted. It is sufficient to remind you that they were all settled by negotiation.

If when nations with which we are at peace are at war with one another in what they believe to be a struggle for their national existence, we are to regard every violation by them of our neutrality and every breach of international law against us in their desperation as a ground for war, we would be in a state of perpetual war. When we are satisfied that the act was not prompted by any unfriendly motives for us or as an affront to our honor or sovereignty, but is an act of self-preservation, however unjustified, the invariable policy of all civilized nations has been to adjust such injuries through the channels of diplomacy.

I would like now to take up the task of answering the attacks made by Col. Roosevelt on our foreign policy and shall endeavor to demonstrate to you that it has been strong, just, consistent, humane and unselfish; that it has been an inspiration to a higher and better humanity; that it has removed the cloud of suspicion of our motives that hung over our heads; has converted enemies into friends; has cemented the relations of the nations of the Western Hemisphere into bonds of everlasting friendship, and that it should go down to posterity as one of the brightest pages in history at a time when all the rest of the world is being turned into a charnel house and is running red with the blood of martyred humanity.

Let us first deal briefly with this Mexican question out of which our adversaries are desperately trying to create a political issue. It presents no pol-

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itical issue, for the reason that whilst Col. Roosevelt and Mr. Hughes are loud in their indiscriminate and unreasoning denunciation of everything that has been done, they persistently refuse our challenge to take the public into their confidence and tell them whether and if so how they would change the existing policy and if so what they propose to do.

In the face of the crisis that still confronts us, is it fair or statesmanlike or worthy of a great party to play this "dog-in-the-manger" part and to go before the people without a definite program and with nothing beyond carping criticism? Is it possible that with no better policy to offer in place of that which they assail the nation will be so blind and reckless as to turn out of power and deprive ourselves of the knowledge, experience and faithful service of the pilot who is at the helm, who has carefully charted and knows every foot of the perilous course and has throughout the long, trying period of the past three years of storm and hurricane thus far guided us safely between the rocks and shoals? It is inconceivable. Our people are not such fools. They want to know why they should make a change and at such a time above all others. They realize that if Mr. Wilson is defeated there will be five perilous months between November and March when we shall be rudderless and adrift with our present policy repudiated and none formulated in its place. That may well prove to be the most crucial and perilous period in our national history.

Is this new and untried candidate a super-man to whom we must blindly trust our fate? What is the exigency that calls for such reckless action on our part? Of all the great nations of the earth, we are, happily, at peace with the world and likely to

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remain so. If we had been driven into war we would not think of making a change, but because the statesmanship of our President has averted that calamity it is assailed by these querulous, fault-finding pinpricks of this army of clamorous, office-seeking fault-finders. Lincoln went through the same experience during his struggle for our national existence, but the people made short shrift of the men who tried to overthrow him.

What are the superior qualifications of the candidate who asks that we displace our tried and loyal servant in this crisis, when above all times we most need his statesmanlike and experienced guidance? Has Mr. Hughes any cure-all to offer us for our troubles? If so, let us see to it that it is not a quack remedy. Let him submit his plan and we will scrutinize it, for we have not yet seen any reason to steer by any course other than the one we are now following with honor and in safety.

"But," says the candidate, "I have no remedy to offer. True, I do not know the course or for what port you should steer other than the one for which you are headed, but you must take my assurance and that of my champions that you will be safer in my hands than with the pilot who has brought you within sight of port. I want you to trust yourselves to me, for although I have never steered a ship of state and have no greater knowledge of the treacherour shoals that surround the shores of foreign lands than the average intelligent land-lubber, please remember that I was at one time, many years ago, in charge of a tug-boat and I guess that should be sufficient evidence of my qualifications and should answer all your doubts."

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Isn't that a fair statement of the attitude of the Republican party in this campaign?

I insist:

(1) That **the President was right** when, to his everlasting honor and that of our country, he laid down the principle that we would not recognize a military dictatorship based upon the overthrow of lawful government by assassination and accordingly refused to accord recognition to the bandit and murderer in the person of the dictator.

(2) **He was right** when he occupied Vera Cruz.

(3) **He was right** and marvellously wise and far-seeing when he agreed to the offer of mediation extended by the Republics of Argentina, Brazil and Chile and accepted the agreement reached with them.

(4) **He was right** to withdraw from Vera Cruz after Huerta had been driven from power, and was no longer in position to force us into intervention and thus extend his reign of despotism by heaping insults upon us. The purpose of our expedition had been accomplished.

(5) **He was right** when, as a result of the decision of the Niagara Falls Conference, he recognized Carranza.

(6) **He was right** when, in response to the insistent public demand and with the consent of the **de facto** Mexican Government, he sent our troops into Mexico to avenge the murderous bandit raid on Columbus.

(7) **He will be right** in withdrawing our troops when we have either wholly or partly accomplished our purpose or find its further accomplishment impossible or contrary to the best interests of the Mexican people and ourselves.

The President's policy has been throughout

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dominated by the consistent determination that whilst we will take every reasonable step that will not invade the sovereignty of our neighbors to protect the lives of our citizens we shall not intervene and force our will upon this people, weak, helpless and stricken as they are. Just because they are defenseless against our will we shall not put this wrong upon them so long as we have reason to believe that they will work out their own salvation in their own way. It is a noble and exalted conception of the duty of a great, rich and powerful nation toward a poor, distracted neighbor that is bravely struggling toward liberty.

Perhaps ours is not the easiest way, but it is the right, the just, the generous way and the only road toward lasting peace. It is the way in which we can make our actions square with our professions of Pan-American friendship and unity. It is an object-lesson to the world in its unselfish grandeur. Like most big, fine, just, generous things done by men and nations, it will incidentally pay in the end. Whatever it may have cost in lives and property will be the merest bagatelle as compared with the intolerable burden of misery from the ravages of war and of the heritage of hate and bitterness that would follow and would be handed down to our children's children.

Whether it pays in terms of dollars and cents is not to be considered. The President has truly described his policy in that phrase that will always be a memorable one. He is "playing for the verdict of mankind."

Whether that policy shall be now approved or condemned and with nothing to offer in its place, is a decision we shall be shortly called upon to make. It is fraught with far-reaching consequences that will

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be felt for generations to come. Shall history write us down as the Conquerors or the Deliverers of Mexico?

That is the real question we are called upon to decide.

No true understanding of the problem that confronts us is possible without a knowledge of comparatively recent Mexican history.

Diaz was the most absolute military despot of modern days. He ruled with an iron hand by force and fear and so there was a long period of the peace that comes from poverty, misery, ignorance and oppression of the masses. They had as much liberty as though they were literally sold into slavery. They were virtually slaves to the absentee land-owners. They had no representation in the Government and not even the fundamentals of Constitutional rule. The mockery of justice was administered virtually by Executive favor and decree. The land and mineral resources had been parcelled out to a favored few in vast holdings. Corruption was rampant in every department of the Government.

Huerta had been trained under Diaz, but he lacked the education and the rare genius for government that stamps Diaz as one of the greatest men of the past century. Huerta inherited Diaz's conception that Mexico could only be governed by a despot with the aid of a small ruling class in whose hands should be concentrated the wealth and power of the nation through the ignorance, poverty and helplessness of the people. When Madero became President, Huerta was his Commander-in-Chief. Madero was a man of education, but he was weak. His dream was to liberate the people and to return to them the land that had been their heritage and

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had been taken from them. His ambition was to establish popular government.

When Madero and his Vice-President, Suarez, were murdered, Huerta seized the reins of government, announced himself dictator and advised our Department of State that he had "overthrown the government." The evidence of his responsibility for the assassination of his chief and of Suarez is overwhelming.

Felix Diaz, a nephew of the former President, had begun a revolutionary movement and Huerta, who was the leader of Madero's army, treacherously joined forces with him to overthrow Madero. On February 16th, 1913, Madero and Suarez were taken from the prison in which they had been confined by Huerta's order and put to death. All this happened within a few weeks before Mr. Wilson's inauguration. President Taft, to whom this problem had been a source of great concern for a long time prior to the murder of Madero, growing out of the depredations on our border under the Huerta regime, properly refused to pass judgment on Huerta's demand for recognition, as he did not feel justified in binding the action of the incoming Administration.

In that connection it should be stated as an important part of the history of the Mexican question that in March, 1912, just one year before Mr. Wilson assumed office, a resolution calling for our intervention had been introduced in the Senate, following the killing of a number of American citizens on the Arizona border and that President Taft had vigorously opposed the proposed action.

It has been widely suggested that under these conditions we should have recognized Huerta; that the means by which he had seized the Government

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was none of our concern and that all our troubles are traceable to our refusal of such recognition.

How could we, as the world's greatest republic, recognize a military despotism based on murder? Would it not have been notice to every Latin-American State that the reward of murder and despotism would be recognition and support at our hands? Would that have been a service to humanity? Would it have advanced the cause of popular government? By withholding such recognition and using every legitimate means at our command to discourage the overthrow of constitutional government by military despotism, we are exerting our influence in the direction of stable, orderly constitutional government.

It is idle in the face of the facts to say that our recognition of Huerta would have secured peace for Mexico. The revolution against him began immediately on the announcement of Madero's death. It spread like wildfire throughout Northern Mexico as soon as the manner of and the responsibility for his murder became known. To have taken sides with Huerta and bolstered up that sort of despotism against the brave and patriotic struggle for liberty that was being waged against him would indeed have been a poor part for us to play. It would have involved supplying Huerta with arms and destroying the last hope of the Constitutionalists. That would truly have been taking sides—and the wrong side, at that.

If you want to know whether General Carranza —stubborn and unreasoning as he may be and has been at times, and suspicious of our motives—is a real patriot, and whether he is waging an unselfish struggle, read the correspondence between him and

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Huerta just after the latter had seized the reins of government. Every advance and every inducement was indignantly put aside.

If it had been possible to have saved the lives and property interests of our citizens in Mexico by the recognition of Huerta and the suppression of the revolution for liberty, it would have meant the inevitable death-knell of democratic rule and the lending of our powerful aid toward establishing a hateful despotism in the Western Hemisphere and on our borders. Without our aid it could not have been done and even with our assistance I do not believe it would have been possible so long as a spark of the holy fire of liberty was left still burning in the hearts of the Mexican people.

It is a mistake to characterize the President's action with respect to the refusal to recognize Huerta as interference. He was bound to act one way or the other. Recognition under the circumstances under which Huerta came into power would have been quite as active interference as was the refusal to recognize. When the President accepted the alternative of non-recognition, he was quite as much bound to enforce his position as though he had adopted the other alternative. No one has the right to assert or assume that the consequences of recognition would have been less disastrous than the course which was adopted.

If we had had in mind only the easy way of protecting the lives and property of our citizens and were willing to surrender all our ideals by placing our heel upon the necks of the patriots who were sacrificing their lives in the struggle to rescue their country from the rule of despotism and assassination, it by no means follows that we could have

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crushed the revolution. We would have succeeded only in making ourselves a party to the crime.

In this connection I cannot refrain from expressing my deep mortification at the unenviable part that has been played by Mr. Henry Lane Wilson, our Ambassador to Mexico. The publication by him of the confidential correspondence, marked "Confidential," that passed between him and our Secretary of State during the Taft Administration, is one of the most shameful incidents in our diplomatic history. The fact reported from time to time in the newspapers that Mr. Hughes has been in consultation with that gentleman, in the face of such a performance and has apparently gotten his information concerning Mexican affairs from that source, is the most surprising development of this campaign. Nobody who knows Mr. Hughes can understand it.

Apart from the gratuitous and deliberate insult that was perpetrated upon our sailors and our flag, the President was right in occupying Vera Cruz. Huerta had been heaping insults upon us after the refusal to recognize him. He had tried to force intervention so as to solidify the warring elements. The expedition was not made against the Mexican people, but against him; and it was necessary to have them understand that he could not humiliate us with impunity, to whatever lengths we might be willing to go in our sympathy with a weak and powerless nation.

Col. Roosevelt and Mr. Hughes have repeatedly given the misleading impression that we went to Mexico merely to enforce the salute to our flag and that we left there without having accomplished our purpose.

We went there (1) to make it plain that Huerta

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must go. Huerta was driven from power on July 16th, 1914, and we left Vera Cruz on November 23rd following, as the result of the plan of mediation with the A. B. C. countries agreed upon at Niagara Falls. (2) To prevent the landing of a great consignment of arms from Germany which was about due at Vera Cruz whilst our fleet was on the way.

If when Huerta was deposed the Revolutionists had held together, we should have had peace in Mexico. The circumstances under which Villa's break from his Chief (Carranza) occurred and the starting of a revolution on his own account are fairly familiar to us all.

That unfortunate break upset the President's well-matured plans for restoring peace. Then followed conflicting claims of sovereignty on our border and it became necessary to determine to whom recognition should be given. It was essential that we have some constituted authority with which to deal and which could be held to accountability. Thereupon a conference was called by our State Department of the representatives of Argentina, Bolivia, Brazil, Chile, Guatamala and Uruguay for the purpose of getting the benefit of their knowledge of the situation and their advice.

The despicable effort in some quarters to make political capital out of Carranza's alleged treatment of the Catholic Church in Mexico and to charge the President with the responsibility for having recognized him is sufficiently answered—if answer is necessary—by the fact that these six Catholic countries, upon whose advice Carranza was recognized, were unanimous in the decision that this would be the proper course and recognition was accordingly given to him by all the Pan-American countries.

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After referring to Huerta as a bandit, this is the nearest Col. Roosevelt, in August, 1916, approaches the announcement of a policy that he would have adopted in February, 1913:

> There was much to be said in favor of the policy of recognizing Huerta and avoiding intervention. There was also much to be said in favor of the policy of refusing to recognize Huerta, which was intervention and then of fully accepting the responsibility implied in intervention. But there is nothing to be said in favor of wabbling between the two policies. * * * There was no excuse for the recognition of Carranza in view of Mr. Wilson's failure to recognize Huerta. All the objections to Huerta apply with greater force to Carranza.

You will note how carefully Col. Roosevelt refrains from deciding even now, with the aid of hindsight, which course he would have pursued. There was no such "wabbling" and dodging the issue on the part of the President as is here evidenced by Col. Roosevelt more than three years after the event which he is criticizing.

Here again Mr. Roosevelt is wrong in his facts. The President did not "wabble" for a moment. On February 26th, 1913, six days before he was inaugurated, in a speech at Washington, he said:

> We must avoid in every way that which is called intervention and use all the patience possible, with the prayer that some power may arise there to bring about peace throughout that great country; but I have no sympathy—none at all, and the charge of cowardice does not frighten me—with that which prompts us for purposes of exploitation and gain to invade another country and involve ourselves in a war the extent of which we cannot realize and the sacrifice of thousands of lives and of millions of treasure.

On March 12th, 1913—eight days after his inauguration—the President issued a formal statement of his Administration's policy in which he said:

> Co-operation is possible only when supported at every turn by the orderly processes of just government,

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based upon law, not upon arbitrary or irregular force. * * * We cannot have sympathy with those who seek to seize the power of government to advance their own personal interests or ambitions. We are the friends of peace, but we know that there can be no lasting or stable peace in such circumstances.

Thus the President gave notice to the world that he would not recognize the Huerta dictatorship. Within two weeks thereafter the Revolution aimed at the overthrow of Huerta resulted in the establishment of a constitutional government headed by Carranza, the Governor of Coahuila, who had from the outset refused to recognize the Huerta Government. Before the end of March Carranza had published the declaration of the purposes of the Constitutionalist movement and had assumed the leadership. As soon as the advice of the six Latin-American Governments above mentioned could be secured, Carranza was recognized.

The statement that because the President had refused to recognize Huerta there was no excuse for his recognition of Carranza requires no comment. The one was loyally struggling for constitutional government; the other had sought to destroy it.

It is apparent from what Col. Roosevelt states later on that he favors and would then have favored intervention although he has not quite the courage to say so. He rather unsuccessfully attempts to draw a comparison between the case of Mexico and that of Cuba. The same considerations of humanity that have moved the President to steadily set his face against Mexican intervention called for the contrary action in Cuba. To intervene in Mexico means certain war with the Mexican people. They insist on solving their own problems. They suspect us of selfish motives. No one has done so much to arouse

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and keep alive that suspicion among the Latin-American people as did Col. Roosevelt when, to use his own words, he "took Panama"—stole it from Colombia. That is the foulest stain upon our country's history. One cannot but wonder at the blind egotism of a man who, knowing the great wrong he perpetrated upon poor, weak Colombia descants in high moral accents upon our failure to plunge into the maelstrom of the European conflict by protesting against the invasion of "poor little Belgium."

We went to Cuba at the earnest solicitation of the Revolutionists to aid them in their brave struggle for liberty. If Carranza and his people were to ask the same of us there would be some analogy between the two cases.

I quote from Col. Roosevelt's speech against himself as follows:

> It is rarely morally wise to do the thing one thinks unjust. It is never morally right to enter on a course of action as to the justice of which the actor is himself in doubt. These principles are as applicable to nations as to individuals.

To those of you who have followed the President's course in international affairs no argument is needed to refute the assertion that the President's determination and consistent refusal to intervene were prompted by fear of consequences. He has again and again made it plain that we are and intend to remain the firm and helpful friend of the people of that stricken land and of all Latin America. We want to serve Mexico. We cannot do so in our own way by friendly intervention with her consent, since her way is not our way. We must therefore show the depth of our friendship by helping her in her own way. That is true magnanimity. The other is amiable despotism. She suspects our offers of

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friendship. She does not understand and we have not been able to make her understand.

That suspicion has until the advent of the present Administration been shown by all of our sister Republics in this Hemisphere. Col. Roosevelt is mainly responsible for having aroused that suspicion and for having kept it alive. Every time he discusses Pan-American affairs, every time he swings his "Big Stick" and clenches his mailed fist, the suspicion deepens. They do not realize that his bark is worse than his bite, and that back of his brave words there is somewhere hidden a big bump of precaution, for he knows that we are not quite prepared to fight the world.

It is fortunate for us that we are not, for if we were I have no doubt he would promptly "get on the job," cause or no cause. With the spirit of conquest that moves him, he would soon find a cause, just as he found a way to take the Panama Canal when Colombia did not like his terms.

Nothing short of three and one-half years of the generous, humane policy of the Wilson Administration and our forgiving, magnanimous sympathetic treatment of Mexico could have allayed the hatreds and suspicions that he has aroused and is trying to re-kindle. We have progressed far toward a better understanding in those three and one-half years, but not until we have redressed the wrong he did Colombia will the breach be entirely healed.

In the present state of mind of the Mexican people, we have nothing to gain and everything to lose by intervention. By this I do not mean material gain. I mean that we have nothing to gain for the cause of humanity by adding the blood of our brave soldiers to the soil of that blood-stained land.

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There is nothing we can do for Mexico against her will to recompense us for the loss of life, the blight of plague, the years of guerilla warfare with mountain bandits that it would require to conquer and pacify that land, leaving behind us a heritage of hatred and revenge.

All that duty now requires of us is that we shall protect our border and patiently, with helpful hands outstretched to Mexico, await the day that is now dawning when she will be blessed with a lasting peace, based upon true liberty of her own choosing, worked out in her own way.

There is much more I would like to say to make it plain to you how wise and just and generous has been the treatment of this subject by the Administration and how proud we should be of its record.

Permit me to say a few words regarding Col. Roosevelt's fault-finding at our European policy. Little need be said because the fruits of that policy speak for themselves and need no vindication.

He arraigns the President for not having protested against the invasion of Belgium and for the slow processes of diplomacy that failed to put an end to Germany's warfare overnight.

Whilst he scores the President for having succeeded far beyond our most sanguine hopes (but too slowly for his impatient disposition) in our controversy with Germany, he significantly omits to criticize our failure thus far to bring Great Britain to terms for its persistent and long-continued flagrant violations of international law. He does not even mention that phase of our difficult problems. I wonder why? Is it perchance because he loves Great Britain more or because he loves Germany less? I greatly fear that the Colonel forgot

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his slogan of "America First" in his tender sympathy for the Allies' cause—but perhaps that is because he, too, like his friend and protege Mr. Bacon, is frankly unneutrally pro-British. Has he forgotten that Mr. Hughes is deftly angling for the hyphenated vote and has so framed his campaign that he is in a fair way to get it unless Col. Roosevelt upsets the apple cart for him? It is high time for these two eminent statesmen to get together and agree upon a modus vivendi, as we lawyers say. The hyphenated vote is a sensitive plant. It may yet get away from them, after all.

But to return to Belgium. Her territory was invaded within a few weeks after hostilities began. If I remember rightly (I am here speaking from memory) the President had just issued his Proclamation of Neutrality. Belgium had been invaded. We could no longer prevent it, if we chose. Were we to follow that Proclamation by plunging headlong into the mad vortex of the barbarous conflict or to array ourselves on one side? True, we were in a sense formal parties to the Treaty, but we were not real or interested parties. The matter was not one that concerned us, except in the altruistic sense in which all civilized countries are concerned that treaty obligations shall be observed. But with our experience of the way in which International law, which is the highest form of obligation, has been observed in this conflict, as affecting our rights or when we contemplate Great Britain's treatment of Greece or the sordid conditions under which Italy entered the war or the trading that has been going on in the Balkans as to the side on which the nations will align themselves, it is not easy for those of us who really think in terms of "America First" to get very much ex-

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cited over the breach of treaty rights. All of them over there seem to be scraps of paper and of blank paper at that. The sight is truly sickening. We should thank God and bow down in gratitude to our President every day of our lives that we have not been drawn into the maelstrom instead of itching and nagging our representatives to force us into it.

Of what use would it have been anyway to protest? According to Col. Roosevelt, when we have protested again and again without avail against the seizure of our mail, the blacklisting of our merchants, the destruction of our neutral commerce and against innumerable other infractions of international law by the various belligerents it has done no earthly good. We are told by Col. Roosevelt and Mr. Hughes with fine sarcasm that phrase-making and letter-writing are the President's specialty and that words without action are worse than useless.

What sort of action do these gentlemen suggest to back up our protest? Why don't they tell us? Surely we are entitled to know, so as to judge for ourselves whether their advice is wise or otherwise. In justice to themselves as patriots and as sole possessors of the title of "America First" they should enlighten us, for we are quite in the dark.

Of course, the President did wisely in not protesting against the invasion of Belgium or against the beginning or continuance of hostilities by any of the European countries against any of the others. We have held firmly to our traditional policy of keeping aloof from European complications and of maintaining a strict neutrality. What would have become of the Monroe Doctrine if we had followed Col. Roosevelt's advice? Suppose he had been President

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and had carried out his pet plan of intervening in Mexico (perhaps of "taking" Mexico as he "took" the Canal). Suppose Germany, which has large interests in Mexico (I refrain from saying Great Britain, for obvious reasons), objected to our intervening and particularly to our annexing Mexico. With what saving grace could he have invoked the Monroe Doctrine and have told her that it was none of her concern? Suppose Germany had followed her protest by action on the ground that she had the same right to make effective her protest against our invasion of Mexico as we had to protest against her invasion of Belgium. How would the ever-resourceful Colonel have justified himself except by the use of the "Big Stick"?

We have strengthened the Monroe Doctrine by refraining from protesting. It was wise statesmanship.

What does Col. Roosevelt mean by saying that America "has stood **an idle spectator"** "of the sinking of the Lusitania, of the constant slaughter of our own citizens and of the anarchy, rapine and murder in Mexico"?

Human foresight could not visualize the disaster and could not bring the lamented dead to life again. Everything short of that within the power of human agency has been done and most effectively done, with honor and without bloodshed. What we have accomplished through that disaster reaches the proportions of the most noteworthy bloodless victory in the service of humanity in the annals of history.

He tells us that "the next four years may well be years of tremendous national strain" and concludes with the **non-sequiter** that because of that we should

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replace the man who has guided us with honor and unharmed through this labyrinth of fire and blood, under whom we have reached a state of prosperity never before known, by an untried pilot.

Perhaps so, but not until the moral and intellectual senses of the American people have been chloroformed into insensibility.

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Shall Invisible Government Be Restored?—

The Only Real Issue.

The European war has brought us many problems that are yet to be solved. Among them must be reckoned the temporary increased cost of living due partly to the abnormal European demands for our products but more particularly to the fact that the Trade Commission has not yet had time to unearth and scatter the secret trade combinations that are extorting exorbitant prices under cover of the unexampled prosperity we are enjoying. Thanks to the constructive statesmanship of the present Administration we now have in existence an executive body properly equipped to investigate, uncover and deal adequately with these conspiracies against the public welfare. Courts of justice were not intended and are not adapted for that sort of inquisitorial service. Their decrees dissolving unlawful combinations have in the main been a farce.

It is doubtful whether the temporary material benefits that have come to us as a result of the war are not more than offset by corresponding evils. The foreign business in munitions has been grossly exaggerated. It constitutes less than two and one-half per cent. of our total exports for the past year ending June 30th. Our prosperity is based primarily on the tremendous revival of our domestic business of

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which munitions amounts to less than one-half of one per cent.

It must never be forgotten that we have by far the greatest mineral and agricultural resources of any country on earth and that we have free trade between our 48 States to an extent that is a hundred fold more important than our entire normal foreign trade. Herein lies the real sources of the permanent prosperity that is under way.

The advent of peace in Europe will give an additional stimulus to business which we will be unable to meet for years to come. The idea that these stricken and devastated countries, with their depleted population, disorganized industries and intolerable burden of debt will be able to rehabilitate themselves and rush over night into the markets of the world in competition with us is too grotesque for the serious consideration of grown men. For years to come they must rely upon us to assist with our products in their upbuilding and rehabilitation—slowly and gradually, as they are able to pay for them. We will be the creditor nation of the world. The balance of trade is with us and will so remain. Their credit is gravely impaired and will so continue for a long time to come and they must accumulate new capital in place of the billions that have been destroyed, in the face of the staggering load of taxation and other obstacles that await them.

The only cloud upon our horizon is the approaching National election. If we now fly in the face of fortune by ruthlessly disrupting our present fiscal and financial system we shall unsettle business conditions and bring down upon our heads the house that is now built upon the rock of sound prosperity. If we are so fatuous as to be beguiled into doing this

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evil thing at the behest of the selfish interests that for so long controlled our law-making power and used it to enrich themselves at our expense, we shall richly deserve the fate that awaits us. Do not allow yourselves to be deceived into believing that the tariff or due protection of our industries is or can be made an issue in this campaign. The Wilson Administration has taken the tariff out of politics and taken politics out of the tariff forever. President Taft said we should have a non-partisan tariff commission for that purpose. The Democrats agree with him.

The revenue bill that passed yesterday and is to be signed today or tomorrow provides over $200,000,000 in revenue by doubling the income tax, and by placing a substantial tax on the profits from munitions and puts a large protective duty on dyestuffs to permit of establishing that industry so that we shall no longer be at the mercy of a foreign country for the things we use in manufacture. Above and beyond all this it establishes a Tariff Commission that will impartially and in a systematic way gather the facts as to each industry as a basis for a scientific tariff based on actual conditions. Unless this happy solution is disturbed we shall have seen the last of the long years of business unsettlement resulting from the periodical dickering at the behest of special interests in return for campaign contributions. It is right that our industries should be amply protected against enforced competition with European and Asiatic labor conditions. We have no free trade party in this country and never had or will have. Our great and increasing needs for revenue have always assured us against that contingency. It has always been merely a question as to the measure of such protection and the way in which it should be

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imposed. Just protection equitably distributed is a very different proposition from the corrupt "fat frying" methods that characterized such indefensible corruption as found its expression in the Payne-Aldrich bill, which was repudiated by the best elements of the Republican party. The hasty, haphazard, superficial, misleading methods by which this delicate and intricate function of government has been administered has been unworthy of us. In the memorable words of General Hancock, "the tariff became a local issue." The locality that had the greatest pull and the biggest campaign fund to its credit secured undue and often prohibitive protection at the expense of localities and industries that were not so favored. No one was heard except the interested parties and there was no opportunity or inclination for investigation or study. The people never had a hearing. All this is now changed.

But I did not come here to discuss the tariff. That has fortunately been placed beyond the range of political discussion. I want to point out to you that there is one great overshadowing issue in this campaign and only one, and that your attention has not yet been directed to it. It is not Mexico. That is no issue, for neither the Republican candidate nor his champions will tell you what they would do with the Mexican question different from what is now being done. All efforts to prevail upon them to outline a policy have failed. Would they intervene which means certain war and an undying legacy of hatred and revenge after we have spent years spilling the blood of our brave men upon that unhappy, blood-stained land. The Mexican troubles are in a fair way of peaceful solution. Surely the European situation presents no issue. It has been solved with peace and

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honor by diplomatic statesmanship unequalled in the annals of history. If our adversaries, in their vain and desperate hunt for an issue, want to make one out of the eight hour law that did justice to the laborers' demands and prevented the most disastrous paralysis of industry ever known to us, we will meet it with confidence in our ability to demonstrate that it was a wise and statesmanlike solution.

The one great issue to which I refer is the struggle between invisible government and the people. Shall Invisible Government, the phantom, that stood behind the throne of visible government and ruled its action for many years until it has almost wrecked our experiment in self-government, be restored in this land of ours? Or shall we, having at last shaken the shackles from our benumbed feet and well-nigh exhausted frames again offer our body politic to the monster to be again enslaved in a tyranny more complete than ever before known?

What then is meant by the intangible thing called Invisible Government? It is the most real, the most subtle peril that confronts the people today, but it takes many shapes and is not easy to define. It means rule under hidden influence, by a handful of the most ambitious money kings with which any country has ever been afflicted, bound together by a common malign purpose to exploit our great wealth and resources for their own selfish ends. It means that through their control over the lawmakers they mould our policies of tariffs, taxation, finance, railroads and business and that we must pay tribute to them in known and unknown ways in almost every phase of our industrial life. Six body blows have been dealt this invisible monster under the present Administration:

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(1) When the Federal Reserve Act was enacted, which took the control of the country's money out of their hands and placed it where it belonged so that they could no longer create money panics at will. We shall never again have the sort of panic we had in 1907. It has been made impossible.

(2) When the election of Senators by the people was substituted for election by Legislatures that they were able to control. The Senate will soon cease to be the rich man's club subject to the dictation of these men. It has already become more responsive to the popular will and will become more so as time goes on.

(3) When the income tax law was passed and again when it was amended yesterday to require that wealth pay its just share of the burdens of taxation, which has heretofore escaped taxation.

(4) When the parcels post was established and extended which did away with the abominable express company monopoly.

(5) When the Sherman anti-trust law was galvanized into life by the enactment of the Clayton anti-trust bill and the bill establishing a Trade Commission, which together have made the law capable of genuine practical enforcement.

(6) When the Farm Credit bill was passed that will prevent the exaction of usurious and ruinous interest rates and will in time render farm lands available as security for loans.

Do you wonder that nowhere in the length and breadth of this land can there be found a great financier, railroad or trust magnate or captain of big business who is not relentlessly, malignantly on the warpath to defeat President Wilson and the Demo-

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cratic Administration at all costs by hook or crook and to restore Invisible Government?

Do you want a government that has come to power through the active aid and support of these influences, or one in the open light of day that can go forward with this work of reform, for there is much that remains to be done? Are you prepared to encompass your own undoing? That is the one and real issue of the campaign.

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A HISTORICAL REVIEW OF MR. HUGHES' SURRENDERS TO INVISIBLE GOVERNMENT

AN ADDRESS DELIVERED AT THE NEW STAR CASINO, NEW YORK CITY, OCTOBER 30, 1916

BY

SAMUEL UNTERMYER

OF NEW YORK

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A HISTORICAL REVIEW OF MR. HUGHES' SURRENDERS TO INVISIBLE GOVERNMENT

Address by Samuel Untermyer at the New Star Casino, New York City, October 30, 1916.

Mr. Hughes takes vigorous exception to the charge that he is a friend of the predatory financial interests that dominated the Federal Government for a generation or more until the advent of President Wilson and that have become very aptly known as "Invisible Government." The fact that these powerful interests have adopted him as their candidate and are his enthusiastic champions and that the men who have for years been their recognized spokesmen are his closest advisers and in charge of his campaign cannot be gainsaid. If a man's consistent public record and associations are to determine his classification as against his unsupported protestations, I insist and shall endeavor to demonstrate to you that the charge is overwhelmingly proved and that the most complete and disastrous surrender of the people's interest ever made by a

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high public official was made by Mr. Hughes as Governor of the State of New York to "Invisible Government" in its most discreditable form.

What, then, is meant by this intangible thing called "Invisible Government?" It is the most real, the most subtle peril that confronts the people today, but it takes many shapes and is not easy to define. It means rule under hidden influence, by a handful of the most ambitious money kings with which any country has ever been afflicted, bound together by the common malign purpose to exploit our great wealth and resources for their own selfish ends. It means that through their control over the lawmakers they mould our policies of tariffs, taxation, finance, railroads and business and that we must pay tribute to them in known and unknown ways in almost every phase of our industrial life.

We have heard so much from Mr. Hughes by way of criticism of the President for having yielded to the demands of organized labor and of assertion of his greater courage to withstand legislative pressure and he has made so many protestations of his freedom from the control of "Invisible Government" that it is about time for us to call a halt, whilst we engage in that impartial analysis of Mr. Hughes' record, which he has so persistently challenged and which it is therefore entirely proper and respectful to undertake. Mr. Hughes' speeches extolling his

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own wisdom, firmness and many other virtues remind one of the story of the trombone player to whom one of his friends said one day, "They tell me you claim to be the greatest trombone player in the world," to which he, being devoid of the sense of humor replied, in all seriousness, "I do not claim it. I admit it."

If Mr. Hughes' estimate of himself is correct, he is the only man in the United States who now knows exactly how, if he had been President, he would have met every one of the many crises that have confronted the country in the eventful years since the war began; and he also knows and assures us that he would have met every such crisis with superhuman foresight and never would he have blundered or faltered, and that this is true not only as to the past but for the future. In a speech delivered by him at Youngstown, O., on Thursday last, he gave to his audience the following delightfully modest assurance:

> "A vote for me means a vote for national self-respect."

A man with such pre-vision belongs not among us frail humans. He should be enshrined among the prophets. Any common mortal who should lay claim to such prescience and venture to practice his talents in our State would come within the condemnation of our penal code. One would expect that

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a man so gifted would at least be able to tell us something about his policies as to our existing foreign relations in which we are more deeply interested than in what has passed and gone, but at that crucial point Mr. Hughes' extraordinary talents seem to have deserted him and he stands mute. What can we do with a man with such naive egotism and absence of sense of humor? Vice-President Marshall wittily said in a speech a few days ago, apropos of Mr. Hughes' marvellous hindsight, that he (Mr. Marshall) really could not say whether he would have eaten the apple if he had been in the Garden of Eden. I am sure Mr. Hughes would confess to no such doubts. Of course he would not only have refrained but would have prevented Eve from partaking of the fruit of the tree of knowledge.

In his desperate hunt for an issue Mr. Hughes recklessly seizes upon the enactment of the Eight Hour law (which I am sure he has many times since regretted as having handed himself a gold brick) and has been travelling up and down and across the country, violently denouncing the legislative program of the President by which the greatest industrial calamity of our times was happily averted. It was possible for Congress to carry out only a part of that program in the few remaining days of the unusually long session that was about ended when that crisis arose. The program, taken in its en-

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tirety, gives added evidence of the rare vision and statesmanship of our President. It will when completed constitute a just and enlightened solution of our most difficult industrial problem and will render labor strikes on interstate railroads hereafter impossible as they should be.

Mr. Hughes insists that no matter how just may be the cause of labor, it has no right to enforce its demands by a strike, which is the only means of redress at its disposal unless it is willing to surrender by accepting the kind of so-called "arbitration" that the railroads choose to offer. He denounces the action of the brotherhoods in ordering the strike and in thereafter accepting by way of compromise the legislation enacted by Congress. He bluntly characterizes the action of our President and Congress in protecting the public against the disaster that would have resulted from the failure of the men and the roads to agree, as a "cowardly surrender" to organized labor and as a submission to virtual blackmail.

I am not at the moment concerned with a discussion of the merits of that preposterous charge. You have doubtless many times heard it so fully argued that it requires no justification at the hands of myself or anyone else.

These violent denunciations of surrender to organized labor and the brave talk of what he would

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have done in this or that emergency revive active recollections of a page in the history of Mr. Hughes as Governor of New York, when he was guilty of a very different kind of surrender, and a discreditable one, if I may say so, that drags into bold relief the difference between promise and performance on his part. True, his was not a surrender in the interest of labor or of the conservation of human life or health. No such weakness was involved in that surrender. There was no exigency confronting him. He was not faced with the alternative of a general paralysis of trade and industry or of starving millions of his fellow citizens or of the cataclysm that would have followed the threatened action for in his case there was no action threatened or impending.

The surrender to which I refer was complete and ignoble and without excuse. It was consistent with every act of Mr. Hughes whilst Governor. It was made to the gambling element of the Stock Exchange and enabled them to continue their dishonest practices unrestrained by the law and was made under the following circumstances:

The so-called "washing" and manipulation of stocks and the fictitious transactions on the Stock Exchange and the practice of all manner of fraud and oppression upon the investing public through the machinery of the Exchange had reached the pro-

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portions of a National scandal. Various bills had been introduced in the Legislature looking to a public investigation of the operations of the exchange. In response to insistent public demands, Governor Hughes had, in a message to the Legislature in 1907 and again in 1908, recommended the appointment of a legislative committee

> to inquire into the facts relating to speculation in securities and commodities, with the view of ascertaining the manner in which illegitimate transactions may be prevented and legitimate transactions safeguarded.

Strange to say, the Exchange had been and stranger yet and to our shame be it said, it is still an unincorporated body, responsible to no public authority, immune against visitation, supervision or regulation and with almost unlimited power over the security markets of the country. It is above and beyond the law—a law unto itself. Whilst banks, trust companies, insurance companies and other quasi-public bodies are required to be incorporated and are subject to inspection and regulation, the transactions on the Stock Exchange which are scattered broadcast over the world and constitute the guide to values, are a closed book and there is no means of detecting fraud or of protecting the public. Courts of Justice, the Comptroller of the Currency, Bank and Insurance Superintendents and other pub-

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lic officers are virtually forced to accept the quotations of the Exchange as fixing the values of securities and yet there is no method of safeguarding the integrity of those quotations, although it has been overwhelmingly shown that they have been permeated with fraud and manipulation by which the public have for years been victimized to the extent of hundreds of millions of dollars.

The agitation to place the dealings of the Exchange under some form of Governmental control was widespread throughout the country but as its operations were conducted in the State of New York its regulation was supposed to be primarily the concern of the State. It was the occasion of recommendations by Governor Hughes for a public Legislative investigation with power to subpoena witnesses and compel the production of books and papers.

The malign power of the Exchange over legislation was however, as it still is, so great that the Governor's recommendations went unheeded. Unlike our President, his influence over his own party was not sufficient to enable him to secure favorable consideration upon his recommendations and so his first term of office drew to a close without action.

The date for his renomination was near. It looked for a time as if the great financial interests represented by the Stock Exchange would align

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themselves against him from fear of this investigation. Governor Hughes was committed to a public investigation. If he persisted in that determination, he would meet with the opposition of these interests.

He had to choose whether he would fight or surrender—and he made a compromise with these interests that was regarded and characterized by his political friends and supporters at the time as a political straddle and that amounted to a palpable and ignominious surrender to the Exchange of the vital public interests. Instead of defying this powerful clique and pressing his demand for a public investigation to be conducted with the aid of Counsel and with power to compel the attendance of witnesses and the production of books and papers such as had been conferred on the Committees he had represented in conducting like legislative inquiries, Mr. Hughes on December 15th, 1908, just after his reelection and on the eve of the assembling of the Legislature at the beginning of his second term of office, when he should have repeated his demand, virtually capitulated and invited the Stock Exchange to investigate itself in secret session in order to head off the inevitable public investigation that public opinion would have forced. To that end he appointed a Committee of nine highly respectable well intentioned gentlemen to superintend the performance. They were a voluntary, self-constituted body who

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had no commission from any source, no official standing whatever whom the Governor had no more power to appoint than you or I. It was an attempt to anticipate the action of the Legislature and to pretend to appease the public demand whilst doing nothing to disturb the serenity of the Exchange. The so-called "Commission" had no legal existence, no right to enforce the attendance of witnesses or the production of books or papers or to administer an oath. They had no appropriation even for their necessary expenses and it is today a mystery whether the members personally or the Exchange paid these expenses. The Stock Exchange was not under the slightest obligation to take any notice of their existence and when the Exchange did so it was done in their own way and on their own terms. The Commission could secure just such information as the Exchange chose to furnish them and none other. The entire farce was generally regarded at the time as the result of a deal made before the election and it was openly so charged. Every surface indication justified that conclusion. The way in which the Committee went to work demonstrated its helplessness and ineffectiveness, if demonstration were needed, beyond the manner of its appointment.

Whilst the question of Governor Hughes' renomination was trembling in the balance there were many newspaper comments upon the reason for his

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mysterious refusal to press for the investigation that he had been recommending in his messages to the Legislature. The following is a fair sample of such comments:

> There are many instances to justify the belief that he does not favor a public investigation because of the certainty that the Wall Street interests will attempt to influence the Republican organization, with a fair prospect of success.

It appears from the testimony taken by the Pujo Committee in 1912 that the Hughes Commission examined no witnesses and took no oral testimony. It went through the mummery of preparing a list of written questions with the aid of the members and Counsel for the Exchange. These questions were submitted to the Counsel and Governing Committee of the Exchange and written answers were prepared after days of consideration and discussion of the questions by the Governing Committee in secret session and with the aid of their Counsel. A fine kind of investigation! No more transparent "whitewashing" was ever attempted by the most subservient political hack. No wonder that it proved ineffective to alleviate the evils at which it was pretended to be aimed or to prevent the real investigation that Congress felt impelled to undertake three years later. The Exchange had not availed itself of the invitation of Governor Hughes' Commission to reform it-

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self at the sacrifice of the bulk of its business, which was illegitimate. And so the scandals of stock manipulation and other abuses continued to grow until they culminated in the Pujo investigation whose Report contains a full exposure of the character of the Exchange, accompanied by recommendations for compulsory incorporation and other legislation calculated to correct the evils that were uncovered. Following this investigation and as a result of it, the New York Legislature in 1913 enacted laws aimed at stock manipulation and other of the abuses that had been exposed but here again the malign influence of the Exchange proved too powerful to permit of the genuine and drastic reforms that are required whilst the Bill recommended by the Pujo Committee is still held fast in Committee. But to resume my story. Upon the showing made by the Stock Exchange itself, the Commission found itself forced to report among other things as follows:

> It is unquestionable that only a small part of the transactions upon the Exchange is of an investment character. A substantial part may be characterized as virtual gambling.
>
> The patrons of the Exchange may be divided into the following groups: * * * * *
>
> (2) Manipulators, whose connection with corporations issuing or controlling particular securities enables them in certain instances to move prices up or down and who are thus in some degree protected from dangers encountered by other speculators.

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(3) Floor traders, who keenly study the markets and the general conditions of business and acquire early information concerning the changes which affect the values of securities. From their familiarity with the technique of dealings on the Exchange, and ability to act in concert with others, and thus manipulate values, they are supposed to have special advantages over other traders.

(4) Outside operators having capital, experience and knowledge of the general conditions of the business. Testimony is clear as to the result which, in the long run, attends their operations; commissions and interest charges constitute a factor always working against them. Since good luck and bad luck alternate in time, the gains only stimulate these men to larger ventures, and they persist in them till a serious or ruinous loss forces them out of the "Street."

(5) Inexperienced persons, who act on interested advise, "tips," advertisements in newspapers, or circulars sent by mail, or "take flyers" in absolute ignorance, and with blind confidence in their luck. Almost without exception they eventually lose.

The following are some of the newspaper comments made upon the Report at the time:

Upon the publication of the Report, the New York World (which was at the time an ardent supporter of Governor Hughes), published an article entitled:

Wall Street Grins at that Report to Governor Hughes. Recommendations Virtually are Nothing but a Transcript of Suggestions made by the Governors of the Stock Exchange.

The Article continues:

Wall Street grinned yesterday. The reason was that

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the report made by Governor Hughes' Committee on Securities and Commodities was found to be virtually nothing more than a transcript of a long list of suggestions made to the Governor's Commission by a Committee from the Board of Governors of the Stock Exchange.

The Saratoga Sun, in its issue of June 19th, 1909, said:

The report of the Commission as regards the organization and operations of the New York Stock Exchange is as near a whitewashing report as it well can be and save the face of the Governor for having secured its appointment.

Another contemporaneous issue reads:

The Governor never appealed to the race track gamblers to reform themselves. No Commission ever urged the pool rooms to reform themselves. Mr. Hughes is not imploring the political bosses of this State to reform themselves; yet the public has been asked to believe that some superhuman virtue attaches to the trade of stock jobbing by which the New York Stock Exchange will place the general welfare above its own pocket-book.

Another paper contained the following:

Governor Hughes can hardly afford to leave the reform of the Stock Exchange where his Commission left it. Too much is known, too much has been said, to drop the matter now. He has before him the example of every enlightened nation of Europe.

On March 29th, 1910, in an article entitled, "The Governor's Hesitation," the following appeared:

The Governor was an opponent of race track gambling, but he has not been greatly disturbed by the Stock Exchange game. He has seen clearly enough the evils

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of the caucus and convention system, by means of which a few insiders dominate politics, but the Wall Street device has never drawn his fire.

It will be said in many places and with some truth that the Legislature has been compelled by Mr. Hughes to accept his measures, most of which are worthy. Why should not that body give its constituents an opportunity to say that it compelled him to accept the popular judgment that Wall Street should be thoroughly exposed, radically reformed and completely stripped of the privileges which it now engages?

Later, when it appeared that the Exchange was still abusing the immunity from investigation that it owed to the surrender of Governor Hughes, the New York World said editorially:

It is more than a year since the Hughes Wall Street Commission was appointed. More than eight months ago it favored leaving to the Stock Exchange the duty of reformation. Its iridescent dream has been shattered; the Stock Exchange remains what it was. The time is ripe for the Legislature to act decisively.

But not a move did Governor Hughes make in that direction during his second term of office. The Exchange had been convicted on its own showing by the verdict of his own Commission of knowingly countenancing and permitting transactions that constituted a large part of its dealings that were not more respectable than those of a crooked gambling house but the investing public to whom its legitimate facilities were essential and who were the victims of

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these dishonest practices was sentenced by the Governor's action to be left without redress until such time as the Exchange should see fit to reform itself, which would involve cutting off the bulk of the business of its members! Does anybody believe that the Governor or his Commission ever expected any such voluntary renunciation?

The following is an extract from another newspaper article on the subject at the time which fairly reflects the situation:

> Confidence men who operate elsewhere than in Wall Street are pursued by law. Gambling contracts elsewhere are not enforcible in the Courts. Will Governor Hughes and the members of the Legislature explain why an exception should be made in behalf of Wall Street?

The New York American on June 17th, 1909, said with respect to the Report:

> It (the Commission) made not a loud but a muffled report. But the public would be vastly enlightened to hear from him on the subject of the villains being the lambs that are sheared.

The comment of the Niagara Falls Gazette of June 19th, 1909, upon the Report was:

> What is especially satisfactory to the Street is the fact that there is no recommendation in the report demanding legislative action.

The Brooklyn Union of June 17th, 1909, commented as follows:

> Everybody understood when Governor Hughes ap-

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pointed his Committee on Speculation in Commodities and Securities nearly six months ago, that the act was political rather than administrative; or, to put it more plainly, that it was the answer to the demand that Wall Street and the Stock Market should be regulated and fraud suppressed.

Why did Governor Hughes voluntarily make this abject surrender at that critical time? Why did he not stand upon his messages to the Legislature calling for the usual public legislative investigation? He knew that he could have secured such an investigation if he had forced the issue.

Governor Hughes was not without experience in legislative investigations. He had been Counsel for the Stevens Gas Investigating Committee and for the Armstrong Life Insurance Investigation. They were both Legislative inquiries, conducted in the open with him as Counsel and with the fullest power to compel the attendance of witnesses and the production of books and papers. No one knew better than he that in a secret inquiry of that kind, relying entirely on the information that the Exchange chose to furnish, without Counsel or funds or the aid of publicity or the right to subpoena witnesses or place them under oath or to require the production of books or papers he could never expect substantial results. The net outcome must necessarily have been worse than no investigation (no

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matter how independent of the influence of the Exchange or how well-intentioned his Commission may have been) and this proved to be the fact. Why then did he become a party to choking off this much needed inquiry?

The Gas Company was not invited to voluntarily reduce the price of gas after secretly investigating itself to determine whether it should do so. It was compelled to do so. Neither was it left to the Life Insurance Companies to determine whether their management and methods required reform. They were publicly pitilessly investigated, frauds in their management were exposed and the necessary remedies applied by the Legislature. Why this tender discrimination in favor of the Stock Exchange that resulted in its complete immunity and the death-knell of the much needed reforms?

This incident in the public career of Mr. Hughes is quite consistent with other parts of his record. Throughout his terms as Governor he generally managed to land on the side of the vested interests. He always found a plausible pretext for doing so. They always do. He did everything in his power whilst Governor to defeat the enactment of a Federal Income Tax whilst professing that he favored such a tax. When in April, 1910, the State of New York was called upon through its Legislature to vote upon the amendment to the Federal Constitu-

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tion that would permit Congress to tax incomes, Governor Hughes in transmitting the resolution of Congress proposing the amendment, concluded as follows:

> I therefore deem it my duty as Governor of the State to recommend that this proposed amendment should not be ratified.

Five days later he was appointed to the United States Supreme Court by President Taft. The pretext assigned by him for his opposition was trivial and proved to be frivolous. He based his opposition on the ground that under the amendment as framed and as it had already been accepted by a number of the States, allowing the taxation of incomes "from whatever source derived," Congress would have the power to tax the incomes derived from State and Municipal bonds. No other Governor or Legislature had raised any such question. The amendment as adopted and as now a part of the Constitution contains the provision on account of which Governor Hughes attempted to defeat the Income Tax. Yet nobody has ever heard of Congress attempting to tax incomes derived from State and Municipal bonds and nobody ever will.

But Governor Hughes in his anxiety to defeat the law apparently assumed that if he could succeed in that contention he would put back the enactment of an income tax for another ten years or

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more, as it would then be necessary to frame another amendment and have it re-passed by the several States that had already acted. His Republican Legislature, acting upon his recommendation, refused to ratify the amendment but the succeeding Democratic Governor and Democratic Legislature of New York ratified it and thus the power of the Federal Government to tax incomes—the most just form of taxation—became part of the law of the land in spite of the attempts of Governor Hughes to defeat it.

Again, when the New York Legislature in 1908 passed a law known as the Coney Island Five Cent Fare Bill, Governor Hughes vetoed it on the ground that there had been no investigation to show that to limit the fare to five cents would not be confiscatory, thus overturning every precedent as to the burden of proof, in the attempt to defeat this law. He repeated the same exploit in his veto of the two cent railroad fare bill and on the same untenable ground. Since when has it become the right or duty of the Governor to impose upon the State the burden of proving that a law passed by the Legislature will **not** be confiscatory? The Legislature is presumed to know and to do its duty. If Governor Hughes had signed the Bills the burden would have been upon the corporations to show affirmatively that they **were** confiscatory before they could have been de-

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cleared unconstitutional. By vetoing the Bill, the people were deprived of the opportunity of having their day in Court on the question of whether the law was or was not confiscatory. The most narrow and rabid corporation partisan could not have done worse by the people of the State.

Where and how anyone ever conceived the idea that there was anything progressive in the makeup or record of Mr. Hughes is beyond conception. True, he temporarily stopped gambling on the race course, which has since been resumed; but there was not much in the way of power behind that form of vice. When it came to investigating or stopping the dishonest gambling on the Stock Exchange, which is like playing with loaded dice or marked cards but which has the charmed protection and support of Invisible Government, he tackled the job before he realized the powerful influences that were behind the game but when he was confronted with the peril to himself that lurked in the championship of what appeared at first blush to be a popular measure, discretion took the place of valor and he ran away from the problem with even greater alacrity than he had undertaken it.

If the President had the same keen scent of danger from the enmity of Invisible Government or feared their emnity he would not have taken the banking system out of their control or signed the

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Clayton Bill or the Eight Hour Law or any of the other progressive legislation for which he is responsible and he would now be enjoying their powerful support instead of their bitter hatred and opposition. The enemies he has made and the way he has made them establish his right to the gratitude and support of all right-thinking men. By the same token and judging Mr. Hughes by his friends and champions, the people who have no special interests to serve will do well to be on their guard no matter how well intentioned they may believe him to be. No man is sufficiently strong to withstand such influences in his own camp.

It may be that the false conceptions of the progressiveness of Governor Hughes are due to his activities just prior to his election as Governor. He had been concerned in the two important investigations above referred to, first as Counsel for the Stevens Gas Investigating Committee and then for the Insurance Committee. Having been retained by the State, he had done his duty as a lawyer. If he had been retained by the corporations he would doubtless have been equally loyal and efficient in the championship of their rights. His action in those two cases may be evidence of his efficiency, which no one questions, but they constitute no evidence of public spirit or public service. It is the natural in-

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stinct of the lawyer to serve his client to the best of his ability.

By way of parenthesis, the record in the Gas case throws a strong light upon the good faith of these public-service corporations in their dealings with the court and public and affords us a guide of the measure of the sincerity of the assertions of the railroads of the effect of the eight hour law on their earnings. It will be remembered that the Consolidated Gas Company contested the Constitutionality of the eighty cent gas bill through the Courts and to and through the United States Supreme Court, on the ground that to limit them to a charge of eighty cents for gas would be confiscatory and would destroy them. The Gas Company was defeated and eighty cent gas has now been in existence for over ten years. The stock of the Gas Company is now selling at $140 per share, is paying 8% dividends and earning vastly more. Perhaps the railroads will find themselves equally "mistaken" as to the effect of the Eight Hour Law.

Mr. Hughes was paid for his services to the State—modestly, it is true, but he was paid; and no lawyer is entitled to credit for such a service performed for his client, whether that client be the State or a private individual. Perhaps if Mr. Hughes had been Governor instead of Counsel for the Committee that drew the Bill when the Legisla-

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ture passed the eighty cent gas law he would have vetoed the law as he did the Coney Island five cent fare bill and the two cent railroad fare bill, on the ground that it was confiscatory, and the Courts would never have had the opportunity to decide (as they did) to the contrary. I have yet to learn of any public professional service than was performed by Mr. Hughes at the Bar without compensation or of any reform or public movement to which he volunteered his time or service. It is not injustice to him to say that the record of his service at the Bar is exceptionally barren of any incident of that kind.

The Act creating the Public Service Commissions for New York State and City is referred to by the supporters of Mr. Hughes as evidence of his progressiveness. The personnel of his appointments does not sustain that contention. Whether the existence of such a Commission is to prove a blessing or a curse to the people depends entirely on the men who are named, for they have vast discretionary powers that are not subject to review either by the Courts or elsewhere. If they are faithful public servants they are a protection against the rapacity of the corporations they are intended to supervise but if they are the creatures of those corporations they render far more easy the exploitation of the public than if they did not exist. There are two Commissions in our State. The jurisdiction of the Commis-

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sion for the first district covers the City of New York and that of the second district includes the balance of the State.

The New York Central and New Haven roads, among others, are under the jurisdiction of the Commission for the second district. In a speech before the Republican Club of New York City on January 7th, 1912, I said of this Commission:

> Whether rightly or wrongly one of the Public Service Commissions for this State is generally regarded as an annex to the New York Central and New York and New Haven roads.

I then proceeded to instance a case of gross abuse that had come under my professional observation.

The chairman of that Commission, who was the appointee of Governor Hughes, as were all the members, went into the employ of the New York Central immediately upon being succeeded by the appointee of a Democratic Governor and has been there ever since. Other appointees of Governor Hughes found similar employment with corporations that had been subject to their jurisdiction upon the expiration of their terms of office. In drawing his Bill the Governor took no such precaution as will be found in the Federal Reserve Act which disqualifies a member of the Board from entering the employment of

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a National Bank for a given number of years after the expiration of his term of office.

In common with many members of our Bar throughout the country I regard the candidacy of Mr. Hughes as peculiarly unfortunate in its effect on the United States Supreme Court. I do not believe that the Court will ever recover in the public esteem from the cruel blow that was struck at it when Mr. Hughes accepted the nomination for which his friends had been long and adroitly angling. The men who had been put into that exalted office were supposed to have dedicated their lives beyond recall to the work of that great tribunal. There was no suspicion in the public mind that their decisions might even unconsciously be swayed or colored by the ambitions of office or that their opinions would ever be dragged into the arena of political discussion. Yet we now find these decisions criticised from the stump whilst Mr. Hughes and his party are engaged in the humiliating spectacle of defending them. If Mr. Hughes should be elected, the Court would become the hatching nest for political ambition. It would be the signal to draw upon it for candidates for political office and all the traditions that have surrounded that great post and have enshrined it in the reverence of the people will have been swept away. The very integrity of the Court requires his overwhelming defeat. The greatest service he could

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have done the country would have been to have refused to drag the tribunal that had so greatly honored him into the arena of political controvery. The idea that there was any National exigency that required his sacrifice of the Court is the veriest rubbish. We have very short memories in this country, but they are not so hopelessly short for us already to have forgotten the methods by which his nomination was brought about nor the alacrity with which the 100% Judge—for he was in every sense a 100% Judge—became the 100% Candidate.

The tone of the campaign has been a sad disillusionment to the many admirers of Mr. Hughes. The nominations gave birth to high hopes. At last we were to have a truly educational campaign covering the great economic problems of our time, conducted by both candidates on a high moral and intellectual plane, free from the personalities that have been so humiliating to our National pride. It never occurred to us before the meeting of the National Republican Convention that either party would be so devoid of patriotism as to dare drag delicate pending questions of foreign policy into the arena of political controversy thus paralyzing the efforts of the party in power to deal with them.

So far as concerns the President we have not been disappointed. He has maintained the discussions on the high plane that was expected of both candidates.

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In these exceptional times there must necessarily be many things connected with our past and pending negotiations with foreign governments upon which his lips are sealed regardless of the consequences to his party and himself, but he has discussed such issues as it was possible seriously to discuss in a dignified, impersonal way and with the restraint that becomes his high office that has commanded the unqualified respect and admiration of the Nation, including those who are not in agreement with his political views and policies.

It was left for Mr. Hughes and Col. Roosevelt at this time, when patriotism should have risen above party expediency to conduct a campaign based upon nothing more substantial than petty, querulous fault-finding with the conduct of our foreign relations and in a way that has manifestly embarrassed and weakened the President in the performance of his delicate tasks.

All his policies are under fire. Foreign nations no longer regard him as the spokesman for the country since everything that he has done is assailed as wrong. If, however, the President wins his decisions will be taken as the voice of the country. If he is defeated it is impossible to exaggerate the far-reaching effects. Pandemonium will reign in our foreign relations. His policies will rightly be regarded as condemned, whilst nothing will have been substi-

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tuted in their place, especially since his adversary has no policy that he dares announce from fear of alienating some one or more of the mongrel, conflicting elements of discontent upon which he is depending for success. And so the triumph of Mr. Hughes will mean a perilous state of chaos for at least four months that may well prove to be the most critical time in our history, with all existing policies discarded, all pending negotiations suspended and none others capable of being effectively undertaken.

Such is the situation that these gentlemen are willing to take the responsibility of creating and that they invite you to bring about in the affairs of our Nation. In order to accomplish this result Col. Roosevelt is not only permitted without protest by Mr. Hughes, but is encouraged to stalk about the country comparing our President to Pontius Pilate, likening his concern for our citizens who have lost their lives in Mexico and in the Lusitania disaster to that for "a rat caught by a terrier" and emptying the vials of his vitriolic abuse upon the head of our Chief Magistrate with a disregard for the truth and for that great office that is bound to do permanent harm, although we should by this time have become accustomed to the irresponsible intemperate language of that broken idol.

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THE OPERATING CONTRACT AND THE FUTURE OF RAILROAD SECURITIES THEREUNDER

AN ADDRESS DELIVERED BEFORE

THE AMERICAN BANKERS ASSOCIATION

AT CHICAGO, SEPTEMBER 24, 1918

By

SAMUEL UNTERMYER

OF NEW YORK

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Address of Mr. Samuel Untermyer before The American Bankers' Association at Chicago September 24, 1918

The Operating Contract and the Future of Railroad Securities thereunder

The question you have invited me to answer is one of exceeding perplexity, that is more easily put than answered. It involves so many unknown factors and depends so largely upon the manner in which the Railroad Administration will administer its sweeping autocratic powers under the Operating contract that any conclusion must necessarily rest largely upon conjecture. The logic of the situation and the plans that have already been put into execution would however indicate that these powers are intended to be exercised and I accordingly feel impelled to discuss the subject on that assumption.

Fortunately for the country we have at this time at the head of this great venture, in the person of the distinguished Director-General, not only a man of affairs who has with conspicuous brilliancy and success administered the most difficult, delicate and important public office in the Nation, next to that of his great Chief, but one who is a close student of the intricacies of finance, with exceptional subtlety, infinite tact, wide experience with his subject and statesmanlike vision. His courage, the swiftness and accuracy of his decisions and the rapidity with which his horizon has widened under the spur of staggering responsibilities are fairly bewildering.

Therein lies a wide margin of safety. On the other hand his advisers have construed the Federal Control Act as requiring the contract to delegate undreamed-of powers over the credit and future of the roads, almost as unrestricted as

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if the Government had paid for and owned them and we must confront the further peril that the destiny of the roads is now more than ever plunged into the vortex of political strife and that their future will be largely determined by the political ambitions and exigencies that will become inseparable from the intrinsic merits of the problems involved.

This is not meant to imply that the present Railroad Administration will be swayed by any such considerations, except insofar as may be necessary to conform to the limitations that may be placed upon it by Congress. Thus far the indications are that the Director-General will ignore party considerations, if the selection of his aids and advisers is any guide to his policy, for he has both here and in the recent choice of leading Treasury assistants made his selections largely from men who happen to be conspicuous in the opposition party—or more accurately speaking, he has in a spirit of broad, wise statesmanship ignored party considerations.

But with every allowance for the fair start that has been made with this experiment in that respect it would be unsafe and unsound to predicate the final outcome upon the human or political life and power of any single individual. We are here today and are gone tomorrow. The problem must be analyzed in its wider aspects, from the standpoint of the powers that have been delegated by the Contract. We have no right to assume that they will not be exercised. The status of the security holders must be judged by what *may be* lawfully done under the contract and not by speculating on what *will be* done.

Viewed in that aspect I greatly regret that I have no very cheerful or encouraging answer to your question to bring you, in the light of the Operating Contracts that are being entered into with the Government, and for reasons that will be hereafter stated. There is however ample ground for consolation in the reflection that the future is shrouded in uncertainty and that the opinion of the individual is valuable only to the extent of the validity of the arguments by which it is supported.

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Before presenting these arguments it may not be out of place to refer briefly to the history of the railroads as bearing upon their present unfortunate situation, due largely to the public attitude towards them as reflected in the hostile State and Federal legislation and regulation of the past two decades.

The debt we owe to the bold adventurers to whose enterprise and enlightened selfishness we are in large part indebted for the magic rapidity with which this vast country has been brought and tied together in one indissoluble bond, space annihilated and its resources and industries developed, has never been properly recognized by our people except in the mere monetary rewards that only a few, and those the least deserving, were able to reap, and which the span of life was too short to permit those few to enjoy. The reasons for this want of recognition and for the hostility that followed are well understood. The era of railroad construction was followed by a long trail of official and political debauchery that constitute a lasting disgrace in the history of our National development. Vast trunk-lines that were built with Government money, were further subsidized by gifts of millions upon millions of acres of our most fertile lands and most valuable forest and mineral resources, in addition to their rights-of-way. Incredible fortunes were harvested from issues of reams of bonds and stocks that were printed by the promoters at will and without restriction or supervision and sold to the public based largely on these gifts of land and loans of money from the Government; stations and town sites were located along the lines of those new highways carved out of the public domain without Governmental restriction, and the "insiders" were thus permitted to pre-empt for their personal profit great tracts of land and mineral resources that were the heritage of the people. All this was accompanied and followed by an orgy of political despotism and personal corruption that made of our Government the by-word of the world.

In order to further their schemes and to encompass the many others that followed in close succession, the public life

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of the Nation as well as of the States was debauched, the Courts were corrupted, the press was subsidized or silenced and our moral standards were brought to the lowest possible ebb. For generations the money influence of these men and their associates and successors placed and kept men in high public office who recorded their wills and furthered their unholy deeds. Of those who were not in one way or another in their pay, the fear of their destructive power and the hope of their powerful political support kept many in check.

Meantime there were no such things as rate regulations, limitations upon bond and stock issues or restrictions upon favoritism in the way of rebates and freight discriminations, by means of which they and their friends and allies were rewarded and their enemies were ruined. It was truly a reign of terror in the business, financial and political worlds of the country.

The awakening and reaction that were bound to come, at first came slowly and painfully—not because the people were not ready to turn upon their enemies when their eyes were opened but because the power of these interests had been gradually expanding and was sufficient to hold the political movement in abeyance for a long time and until the real offenders were safely under cover. They got "out from under" by selling their holdings upon the then greatest and most crooked gambling pit that the world has ever seen. "Wash" sales upon fictitious and manipulated security markets and other scandalous devices were created through which the paper proceeds from these ill-gotten gains were dumped upon an ever-credulous public at fabulous prices as compared with intrinsic values.

It is however but just to say in this connection that under pressure of the threat of Government regulation of the Stock-Exchanges these evils have been largely eliminated. These gentlemen had the wisdom to take their own house-cleaning in hand before it was done for them so that their present situation, whilst still leaving much to be desired and more that could only be accomplished if they were, as they should be, subject to regulation, is vastly different from what it was in

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the olden days. It now, with occasional lapses, approaches more nearly the conception of the legitimate security market that is so integral and necessary a part of our financial system and should be subject to the same character of supervision and control.

The era of constructive railroad legislation began with the creation of the Interstate Commerce Commission. Their powers at the beginning were practically negligible but were expanded from time to time until they are now all-embracing but none too broad if wisely administered.

The States followed with remedial laws, not without violent opposition from the railroad men, who in many of the States, and particularly in the East, still firmly held the reins of political domination, so that the West, as usual, far outstripped the East in placing restrictive regulations upon their Statute books.

The people were at last beginning to fully know their power. As flashes of lightning from a clear sky illumine the darkness, they were now able to see the foul spots and that their hands were free and they lost no further time in throwing off the yoke that had been so long wound around their necks that they had believed it to be one of the natural and incurable ills of existence. Then they arose in their new-found wrath and began to wreak their vengeance in response to this awakened public sentiment, and the pendulum started swinging violently the other way.

But, alas, it fell and has ever since continued to fall upon the victims and not upon the offenders. The latter had reaped their harvest and had it securely tucked away, protected by Statutes of Limitation, memories that were a blank, books of account that were lost or destroyed and the many other devices against which predatory wealth has managed to keep prayerfully outside the grip of the law. When the storm broke the torrents of indignation fell upon the helpless, inert and scattered security holders, who have never known and probably can never be taught to protect themselves. They never really try and they never strike back. They do not even remember their wrongs long enough to seek to right them. In

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the face of repeated disclosures of corruption and gross mismanagement of these companies there is hardly an instance on record of the ousting of these recreant trustees although they rarely own any substantial part of the securities of the properties they are administering. With all these experiences before them the shareholders of the roads are today without a protective organization. Their supineness is a characteristic upon which experience has shown that the unconscionable promoter can safely rely. Above all others he realizes their impotence and has never failed to count upon that knowledge.

Resuming our historical review, the Interstate Commerce Commission and the State Commissions were now given authority to regulate rates, to put an end to rebates and to investigate the accounts of the carriers and examine witnesses under oath, thus enabling them to discover violations. After more than ten years of indefatigable effort and innumerable prosecutions they have (to their great credit be it said) fairly exterminated the evils of freight discriminations and rebates, but not until after many of the greatest fortunes of the country and its most colossal monopolies had been built up from that evil and had become so powerful and so firmly rooted in our soil that they could no longer be effectively reached. These reforms were closely followed by restrictions upon and supervision of security issues by the States, which also exercise co-ordinate jurisdiction with the Federal Government in the rate-making power as to the roads within their borders and to such an extent as to have created innumerable conflicts of jurisdiction that have unduly hampered the operations and prosperity of the roads.

Having long since reached the boundary of just regulation and reform (except as to security-issues by the Interstate Commerce Commission as to which authority should have been granted), the Commission apparently believes that the pendulum of public opinion has continued to swing against the roads, which in my judgment is not the fact.

It has accordingly, in response to what I regard as a mistaken conception of public sentiment, continued to pursue a consistent policy of keeping the roads on the verge of starva-

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tion and barely within the Constitutional limitations against the confiscation of property in the fixing of rates, until as the result of that policy they were, at the time the control and operation of the properties were taken over by the Government, in the financial condition graphically described by the Director-General in the following language:

> "These conditions, together with the necessity railroads would have faced for raising wages and the difficulty of borrowing money, would probably have resulted in the failure of some of the most important railroad companies in the country to meet their obligations under private management."

If that be true as to prosperous roads (and it is unfortunately only too true—and more), what shall be said of the less prosperous roads that together constitute the great bulk of mileage of the country!

Whatever may have been the past sins of the companies they have long since been more than expiated by their victims, upon whom these sins have been visited, as the sins of the fathers are said to be visited upon their children and their children's children, except that here the punishment has not been visited upon the offenders or upon their children but upon the children and children's children of their victims—which is not according to the Scriptures. For many years the roads have been far more sinned against than sinning. Fortunately in one respect and unfortunately in others, they have been under such rigid Governmental regulation that their power to offend against the public has been destroyed.

No such emergency as is said by the Director-General to have confronted the roads when Government control intervened could have been brought about if the public and Congress and the Commission could have been made to realize that the ownership of these properties does not rest to any extent in the hands of their officers and directors. I venture to say that all of them do not together own anything like as much as one per cent. of the securities of the roads they are administering. The ownership of the remaining ninety-nine per cent. and upwards, is scattered among 50,000,000 people

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or about one-half the population of the country, distributed approximately as follows:

There are more than 33,000,000 industrial and agricultural workers in the United States to whom solely and directly belong the railroad securities that are held by the industrial life insurance companies that have outstanding policies held by that number of human beings (unduplicated) against death and casualty; there are additional life insurance policies held by well upwards of 3,000,000 people for larger sums, in what are known as the "old line" life insurance companies such as the Mutual, New York, Equitable, Home, Connecticut, Northwestern, etc. All of these are now mutual companies. No one other than the policy-holders has any interest in them. These companies hold billions of dollars of railroad securities for their policy holders, bought with the money belonging to the latter and out of which these death and accident claims must be paid. All insurance rates of premiums are based upon the stability and maintenance of the values of these securities. The very solvency and existence of the companies depend on maintaining these values. There are upwards of 10,000,000 depositors in the savings banks in the same situation, whose sole safety rests upon these securities. When to these figures are added the individual holders of railroad bonds and stocks throughout the country, the amounts held by the State and National Banks and Trust Companies, Fire, Casualty and other Institutions, by the Universities and Colleges, it will be seen that the statement of the number of persons interested in railroad securities is ultra-conservative and that the National credit and stability are inextricably involved in their fate, to an extent that was little realized until the taking over of the operation of the roads forced a study of the subject.

I now propose with your permission to discuss the Contract from five points of view, but it must be clearly understood that nothing that I may say is intended to carry by words or implication any criticism upon the Railroad Administration for the present form of contract. The security holders have fought their

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fight for better protection against the rigors of the contract and have received long, patient and painstaking consideration, have won on many relatively minor points that are now embodied in the contract but have been unable to secure relief on two vital and fundamental features on which the greatest insistence was placed.

The failure to secure relief on these two points is said to be due mainly to differences between the Government advisers and the security holders in the construction of the Federal Control Act, in the judicial determination of which the Railroad Administration (doubtless for what the latter regarded as valid reasons) declined to cooperate with the security holders. The latter were on the other hand unwilling at this time to become responsible for a controversy that might even remotely disturb financial conditions and thus possibly affect the success of the impending Government loan. The points that were at issue were, however, crucial, as will hereafter appear. It accordingly remains now only to discuss and speculate upon the probable effect of the document as an accomplished fact.

1. Does the contract conform to the President's Proclamation on which the roads were taken over? If not, to what extent is it a departure?

2. What assurance does the contract furnish of the continuance during Federal control of (a) interest payments and (2) of dividends?

3. What may be and what is likely to be the financial condition of the roads upon their return to private control, if they are returned?

4. Are they likely to be returned? Or is Federal ownership to be the probable outcome?

5. If we are to have Federal ownership what will be the probable basis of compensation payable to the roads for their properties and to what extent will the measure of compensation be injuriously affected by the provisions of the contract?

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The following is from the Proclamation of December 26, 1917, pursuant to which the roads immediately passed under Federal control:

> "The director shall, as soon as may be after having assumed such possession and control, enter upon negotiations with the several companies looking to agreements for just and reasonable compensation for the possession, use, and control of their respective properties on the basis of an annual guaranteed compensation *above accruing depreciation and the maintenance of their properties equivalent, as nearly as may be,* to the average of the net operating income thereof for the three-year period ending June 30, 1917, the results of such negotiations to be reported to me for such action as may be appropriate and lawful.
>
> But nothing herein contained, expressed, or implied, or hereafter done or suffered hereunder, shall be deemed in any way to impair the rights of the stockholders, bondholders, creditors, and other persons having interests in said systems of transportation or in the profits thereof to receive just and adequate compensation for the use and control and operation of their property hereby assumed.
>
> Regular dividends hitherto declared and maturing interest upon bonds, debentures, and other obligations may be paid in due course; and such regular dividends and interest may continue to be paid until and unless the said director shall from time to time otherwise by general or special orders determine; and, subject to the approval of the director, the various carriers may agree upon and arrange for the renewal and extension of maturing obligations."

The authority for that action is contained in the last paragraph of the Army Appropriation Bill of 1916 and reads as follows:

> "The President in time of war is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary, of all other traffic thereon, for the transfer or transportation of troops,

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> war material, and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

Owing to doubt as to the authority of the President to agree with the roads upon the compensation as an incident of the power to take over the properties, as to which there were varying opinions, Congress was asked to legislate on the subject. That legislation is embodied in the Federal Control Act, which is obscure in its main features and will require judicial interpretation as to the roads that do not enter into contracts with the Government. But where contracts are made all doubts are thereby conclusively resolved in favor of the Government's construction, since *the roads are required by the contract* to stipulate not to question either the Constitutionality of the law or the interpretation placed upon it by the Government.

Briefly stated, the Act, after ratifying the action of the President in taking over the properties, divides itself into two principal parts:

1. Such of the carriers as elect to do so may enter into agreements with the Director-General. By these agreements the compensation for "the use, possession, control and operation of their properties" is fixed at a sum not exceeding in each case the average annual net operating revenue of the three year period from July 1, 1914, to June 30, 1917, which is known as the test period. The agreement is to contain—

> "adequate and appropriate provisions for the maintenance, repair, renewals and depreciation of the property, for the creation of any reserves or reserve funds found necessary in connection therewith, and for such accounting and adjustments of charges and payments, both during and at the end of Federal control as may be requisite *in order that the property of each carrier may be returned to it in substantially as good repair and in substantially as complete equipment as it was in at the beginning of Federal control.*"

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2. The carriers that do not elect to make the agreement may have their compensation for "the use, possession, control and operation of their properties" during Federal control fixed by a board of referees of three members who may be selected by the Interstate Commerce Commission from its own staff or members, subject to review in the Court of Claims, but the decision of this Board is presumptive evidence in the Court of Claims of the amount payable as just compensation and of the facts stated in its report. Pending such determination the roads may be paid *not exceeding* 90 per cent. of their just compensation.

Section 6 of the Act, the construction of which has been one of the important points of contention, provides as follows:

> "The President may also make *or order any carrier to make* any additions, betterments, or road extensions, and to provide terminals, motive power, cars and other equipment necessary or *desirable for war purposes* or in the public interest on or in connection with the property of any carrier. He may from said revolving fund advance to such carrier all or any part of the expense of such additions, betterments, or road extensions, and to provide terminals, motive power, cars, and other necessary equipment so ordered and constructed by such carrier or by the President, such advances to be charged against such carrier."

The fundamental questions upon which the security holders asked that the Government join with them in securing a friendly judicial construction of the law, which the Government declined to do, are as follows:

(a) By the terms of subdivision (a) of Section 3 of the Contract, known as the "Acceptance Clause" the carrier is required to accept the annual compensation which the security holders say was intended as an equivalent only for the proper use, possession, control and operation of the property during Federal control, not only

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> "in full adjustment, settlement, satisfaction and discharge of any and all claims and rights at law or in equity which it now has or hereafter can have for the taking possession of its property and for the use, control and operation thereof during Federal control,"

to which there is no objection, but further (to which there has been the gravest objection)—

> "and for any loss and damage to its business or traffic by reason of the diversion thereof *or otherwise*, which has been *or may be caused* by said taking or by said possession, use, control and operation."

It will at once be seen that this provision expressly sanctions not only the diversion of traffic but the abandonment of operations, the abrogation of all traffic agreements and connections and the complete dismemberment of the property and destruction of its business and good will that may have cost decades of labor and millions of expenditure to upbuild. Under it the bare physical properties may be returned stripped of everything that made them valuable, with their future operation converted into a liability instead of a source of profit. In the execution of the program of unification upon which the Government is embarking, spurs and connections with other roads may have been built and other changes made, by which the business has been forever diverted to other roads that are not required to pay for it.

This is only a part of the story of what may and is likely to happen under this contract to many of the smaller roads that have been in successful competition with great trunk-lines that will now obsorb their business.

If Federal ownership should be the outcome of Federal control the security holders may well fear that this provision will also prove disastrous to the roads when they are called upon to make their claims for compensation. It may then be contended by the Government that when the carrier agreed that its physical property might be returned to it with its operations abandoned, its traffic diverted and its value as a going concern destroyed, it can no longer claim compensation for

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those intangible values without which the roadbed and equipment have a mere scrap value, and that in any of these events even its physical assets may be valued as abandoned property.

The Director-General, whilst admitting that this may be the effect of the provision, replies that he is advised that the compensation fixed by the Act was intended to include such a use of the property; to which the security holders rejoin by pointing to the express provision of the law that the agreement shall provide

> "in order that the property of each carrier may be returned to it in substantially as good repair and in substantially as complete equipment as it was in at the beginning of Federal control,"

which they construe to mean that the Government is not to return the mere shell with the kernel extracted but is to restore the property to normal conditions, and that the twenty-one months' period after the war allowed for the return of the property was provided for that specific purpose.

The demand for protection against the effect of this provision in its bearing on the award of compensation in the event of Government ownership was denied on the same ground.

(b) As the result of the construction placed upon section 6 of the Act above quoted, the contract requires that there be charged against the carrier the cost of all additions, extensions, motive power, equipment, etc., that the Director-General may see fit to put upon or add to the property for purely war purposes or in the process of unification or for other purposes from which the Government gets the entire revenues and benefits during Federal control and which the carrier may not want or be able to use if the property is returned to private ownership. Under the contract the only remedy of the carrier (if that can be said to be a remedy) is to establish its loss in the Court of Claims after all these expenditures have been made at its expense and the property has been turned back to it burdened with these charges,

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possibly then due, or represented by short-term obligations that it may be unable to meet.

When it seeks to prove these damages for burdens placed upon its property without its consent it is met by another provision of the contract to the effect that the prices paid for these war improvements, extensions and equipment in these abnormal times, and not their fair value to the carrier, is to be taken as the basis of determining the extent of the eventual charge against the carrier.

With this understanding of the relative rights and obligations of the parties under the contract before us we may proceed to the discussion of the questions above enumerated.

1. There is a reasonable assurance that the fixed charges will be met in most cases where the annual standard return, which is to be written into the contract in so many dollars and cents, is sufficient to pay them. The certificate of net operating revenue during the test period, which the law provides shall be given by the Interstate Commerce Commission, is to be the basis of the standard return. That in turn will be based upon the figures that have been from month to month filed by the carrier with the Interstate Commerce Commission and published by it, except that where there have been clerical errors in accounting or the figures have been arrived at by violating or ignoring the Interstate Commerce Commission Rules of Accounting, they will be corrected accordingly. They will not, however, be subject to change, as was at first insisted by the Government, by revision or readjustments of the accounts by the Commission either on the subject of depreciation or maintenance.

As the contract was originally framed and as was for a long time demanded, expenditures for additions and betterments might be deducted in priority to fixed charges, but this was changed so that all these charges are now still deductible out of the standard return when not made for the benefit of the United States, in priority to dividends but after fixed charges. As the result of a final hearing before the Director-

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General, after protracted and unsuccessful negotiations with his representatives, charges for excess maintenance that were likewise deductible in priority to fixed charges, are now placed behind such charges but still in priority to dividends.

There were many other conditions that made the future payment of fixed charges an uncertain and undependable factor that were eliminated in the last two or three drafts of the contract, so that it may now be assumed with reasonable safety that where interest charges were fully earned during the test period they will continue to be paid during Federal control, provided the carrier is able to re-finance its maturing obligations.

2. The continuance of dividend payments rests upon an entirely different basis. There are a few roads whose margin of standard return over fixed charges is so generous and whose ability to finance the onerous Government requirements for additions and betterments is so unquestioned that their future dividends are reasonably assured so long as they consider it sound business policy to continue their payment; but as to the others, my own guess is that they will be forced to gradually reduce and finally to discontinue their payment and that this will apply to roads that have paid dividends continuously for many years.

3. There is not in my judgment the remotest prospect of increased dividends as to the solvent roads that have been paying dividends nor in any case in which the contract has been based on the standard return—no matter how largely the return may exceed the dividends heretofore paid, except possibly from revenues from sources outside the operating properties. In no case are increased dividends permissible, even from outside resources, without special dispensation from the railroad administration, which is not likely to be forthcoming, in view of the right reserved to the Government by the contract to use the entire standard return over fixed charges *for additions and betterments not chargeable against the United States* and the authority it acquires by

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the same document to commandeer the entire financial credit and resources of the carrier for its war and other purposes.

I refrain from expressing an opinion as to the wisdom or unwisdom of the roads, or of any of them, in electing to make the contract as against resting upon their Constitutional right to just compensation. That too would depend to some extent upon whether in the absence of an agreement, Section 6 can be construed as granting to the Government the right to charge the cost of additions and extensions for purely war purposes against the carrier, without its consent and against its protest, at current prices of labor and materials, and whether if so construed, the Section violates the Constitutional prohibition even though the carrier is permitted thereafter to prove and recover its loss, measured, not by the fair value to it of such additions and expenditures, but by the cost thereof to the Government. We are here dealing with the problem on the assumption that the contract has been made and these questions become pertinent only in their bearing on the future of the carriers on that assumption.

It may be said without appearing to criticise the action of the Government in insisting upon the contract in this form that it is a wide departure from the terms impliedly held out by the Proclamation, which did so much to quiet the fears of investors and to steady the security market, when the President said

> "Regular dividends hitherto declared and maturing interest upon bonds, debentures and other obligations may continue to be paid in due course."

To this the Railroad Administration answers (1) that if there be such a departure it has been due to the action of Congress for which the Director-General is not responsible, and (2) that it was not possible to settle the terms of the agreement in the Proclamation since the President admittedly had no power to do so, and that it would have been in any event impracticable.

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4. The probable operating and financial condition of the roads at the end of Federal control are of course the chief concerns of those interested in them, vastly more important to them than the amount of compensation payable during the uncertain tenure of Federal control. There is room for all manner of speculation on these subjects. That the roads that are continued in operation will be in at least as good physical condition as when taken over to the extent to which they are not dismembered, except as to the business that is diverted from them may, I think, be reasonably assumed. The danger is rather that many of them will be in better condition and with more equipment, better roadbed and heavier rails than they can afford and better than their normal requirements demand.

These improved conditions will be largely represented by charges against their properties that they may be unable to meet. Added to these burdens will be the expenditures that may be made for their account for additions, extensions, equipment, etc., for war and other purposes for which it may eventually be determined that they are not liable. But meantime the obligations have been fastened upon them whilst it may take years of litigation for them to judicially establish the *negative* proposition that they are not liable for them, the burden of establishing which is placed upon them. If they fail to successfully carry that burden they must take and pay for these additions and extensions on the basis of their cost to the Government at inflated prices.

It would seem as though in most cases this would destroy their credit and render them unable to finance these onerous requirements. If the systems of transportation are unified and co-ordinated, parallel and competing lines discontinued or diverted into other channels, new connections and other changes made that will unquestionably result in greater efficiency and economy in the operation of all the systems taken as an entirety, some roads will benefit whilst others will be virtually destroyed. Even of those that are benefited the burdens may be too great to carry. I can see little hope for

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most of them except through Federal ownership on almost any terms that the Government may impose.

5. For me Government ownership has no terrors. I include in that statement not only the railroads, but the telegraphs, telephones and the natural resources, such as our deposits of coal, iron, copper and oil and our forests, that of right are the heritage of the entire people and should never have been allowed to go from them. This view is, I know, opposed to that held by most of you as it is contrary to that of the Security Holders Committee that I have been representing in negotiating the contract between the Government and the railroads and I would not refer to it here but for the fact that to my mind it is an essential feature of the discussion, as I am sure you will agree after hearing what I have to say. After all, whilst the lawyer sells his services to his client he does not sell his views on economic questions nor his freedom to be a loyal, sincere citizen according to his own lights.

I have, as is well known and was well known to my clients when they employed me, long been an advocate of Government ownership but have always hoped and expected that it would come through just and adequate compensation and not through quasi-confiscation. The good faith of our Government, the rules of fair dealing and the sanctity of property rights alike demand that it shall not be less. Whether these utilities and resources, or which of them, shall be operated or developed, as the case may be, by the Government or leased to private enterprise to be conducted under Government regulation is another question which need not be here discussed.

We may as well realize that as an aftermath of this war much of the inequality and injustice of the old social order will be gone, never to return and begin now to adjust ourselves to the new conditions that are upon us.

Pray do not misunderstand me—I am opposed to Socialism—To my mind it is an impracticable, unworkable scheme of Government, a beautiful, idealistic, iridescent

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dream, the exploitation of which in opposition to existing theories has done much toward liberalizing our views of human rights. We should be grateful to the Socialists for what they have accomplished as an educational and restraining factor, but as a constructive policy their tenets will not bear analysis. Government ownership of the instrumentalities and resources that belong to the people and are not the result of human effort, such as the public domain, is not socialistic. Wherever the Government has permitted and encouraged them to be used and developed by human effort it would be bad faith on its part to take them away either by open, or still worse, by covert and dishonest forms of confiscation.

But to return to our subject: How are the security holders of the railroads likely to fare under Government ownership in the light of this contract, if I am right in assuming that they will be in a helpless condition because of its sweeping powers and of what is necessarily intended to be done under it?

Here again the entire field of conjecture is open but there are signposts along the road. Reference has already been made to the possible effect of the provisions of the contract on those properties, the operations of which are destroyed, abandoned or materially curtailed. Not only will the Government be able to return the properties bereft of their chief element of value and be furnished the basis for valuing them for the purpose of acquisition on that quasi-confiscatory basis but far more serious in its results may be the valuation placed upon the tangible assets in the light of these provisions.

It may well be doubted that the courts would hold that as to properties the operations of which have been abandoned, the rails, yards, shops, stations, roundhouses, elevators, warehouses, &c., would be valued at their scrap value, and yet this is not beyond the range of possibility having regard to the fact that the carriers that have signed the contract have thereby agreed to such abandonment and have given express permission for their return in that condition. It was largely in order to avoid that construction that a persistent effort was made to safeguard against such a contingency, the result

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of which is embodied in the document but in a somewhat equivocal form that is far from satisfactory.

6. Assuming that the peril from this source has been overcome and that the properties will be justly valued the next question that occurs to the present and future investor is as to the basis and method of compensation that will in that event be adopted. Here we have something of a premonition as to the attitude of the I. C. C. if, as is probable, the valuation is placed under its jurisdiction, in what is being done in connection with the valuation of the properties that is now and has been for four years or more under way by the Commission under the Act of Congress providing for such a valuation.

The chief purpose of that Act was apparently to furnish an accurate basis for the regulation of rates in place of the haphazard method that has prevailed in the absence of accurate data. A vast organization with corps of engineers, field forces and accountants is employed in this service; many millions of Government money have already been expended and many more millions will be required, in addition to the expenditures already made and that must be made by the roads in the preparation of data, &c., toward accomplishing this stupendous task. Tentative valuations of several of the smaller roads have now been completed and others are well on the way to completion but it will take years to finish the work.

Certain principles have been tentatively announced by the Commission whcih, if adhered to and upheld by the courts, will seriously impair property values as at present understood but I do not believe that they will be sustained. The subject is exceedingly technical and complex and there is neither time nor inclination to complicate this discussion by attempting to explain the many important questions that are at issue. Suffice it to say that if the views of the Commission as to values and elements of value as there announced are adopted in the acquisition of the roads the recovery may be limited mainly to replacement cost, which does not begin to represent the present cost of acquisition.

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7. Having ascertained the basis of compensation, in what way is the Government likely to offer to pay for the properties? To pay outright in cash would seem impracticable in view of our financial condition at the end of the war, nor would it be necessary or profitable to either party. The most logical and probable method would seem to be to guarantee interest and dividends on the outstanding securities to an amount that would yield a reasonable rate of return on the values of the properties, or for the Government to issue in exchange its own long term securities at rates of interest that would give to them a par value having regard to their greater market and intrinsic value as Government obligations.

If, for instance, a high class four per cent railroad bond normally sells at 90, a long term Government bond or guarantee at 2½ per cent should under peace conditions have an equal value. If a stock paying 6 per cent and earning an average of twice that amount over a long series of years has commanded an average price of par, shareholders would doubtless be willing to accept a 4 per cent or even a 3 per cent Government obligation as an equivalent in market value. There should be no difficulty in carrying out such a plan as to the prosperous road. It would be fair to the security-holders and highly profitable to the Government. If a road has been paying, say, 4 per cent on $50,000,000 bonds and earning and paying 6 per cent on an equal amount of stock, or $5,000,000 in all, and the Government would guarantee 2½ per cent on the bonds and 4 per cent on the stock, the annual charge to the Government would be $3,500,000, leaving it an annual profit of $1,500,000 or equal to a profit of 30 per cent, and the securities would have at least as great a market value as those of the company paying the higher rates. I am assuming that the value of the properties is fairly represented by the outstanding securities inasmuch as rates are supposed to be based upon a fair return on capital investment.

8. The difficulties will be encountered when it comes to fixing values on properties representing capital investment

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that are out of proportion to their net operating revenues. Will their compensation be regulated by the investment or the returns? Probably by a combination of both elements. Whatever the result, they could also be compensated by Government guarantees equivalent to a return on whatever is found to be the selling or condemnation value.

In any event even if the Government pays generously for the properties its net revenues will be greatly augmented by reason of the greater value of the low interest bearing securities it may issue by way of payment or guarantee on acquiring the properties. If ten billion dollars par value of securities of privately owned roads now yielding an average return of $400,000,000 per year have a market value of, say, five billion dollars, would not six billions of these securities with a Government guarantee of 3½% have an equal or greater aggregate value? Assuming a continuation of the same net operating revenues this would leave to the Government a net profit of $190,000,000 per year.

There is no occasion for driving an oppressive bargain with the security holders. Assuming that a fair price is paid, sufficient to maintain at least the present market values of the securities, the savings in interest and dividends by reason of the lower rate required to command the same market price would alone constitute a sinking fund sufficient to pay for the roads in from thirty to forty years without a dollar of actual cost or outlay to the Government, and this without taking into account the vast economies from operations made possible through unification of the systems, the elimination of parallel lines, the coordination of traffic and the thousand and one other directions in which savings can be effected, thus eventually decreasing the cost of transportation without depleting revenues.

Government ownership at a fair price will be far more advantageous for the Government and infinitely better and vastly more just to the security holders than Federal control under the onerous conditions of this contract. Strange to say the time has come when instead of looking forward to it with dread and misgiving as the entering wedge of a

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Socialist state we should contemplate it as a relief from intolerable hardship.

Inasmuch as on such a plan the properties would cost the Government nothing, the difference between acquiring on a niggardly quasi-confiscatory basis and on a just compensatory basis would mean only that on the latter basis it would take a little longer—possibly five years longer—to pay for them out of their own surplus earnings.

Common stocks of the safest and most prosperous of the roads the continuance of whose dividends are the best secured and where standard returns show margins of from 40 per cent to 60 per cent over the dividends that are being paid are to-day selling on a basis of between 7 per cent and 8 per cent return. Can there be any doubt that with a 4 per cent Government guarantee they would command a higher price?

Reviewing the problem in all its various aspects there may be reasonably deduced from the situation the conclusions (1) that the well secured bonds of prosperous roads are not likely to suffer substantial shrinkage; (2) that the, at present, indifferently secured bonds will be subject to serious deterioration in value; (3) that the established dividend paying stocks will be somewhat injuriously affected, and (4) that the values of the non-dividend earning stocks will to a large extent be eliminated.

The prospects cannot be said to be alluring but if we are prepared to meet the worst there is always the hope that we have been taking counsel of our fears and that after all they may not be realized. There is also the cold consolation, which I do not believe will be the result, that Government operation may prove so expensive and unpopular or so unsuccessful that the roads will be returned and that the Government having by experience learned something of the injustice that has been done to the roads and the public by a policy of inadequate rates, will conclude that it is good business to treat them fairly and thus to attract investors and secure the best service. Let us therefore, whilst prepared for the worst, hope for the best outcome of this stupendous epochal experiment.

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WHAT THE WAR WILL DO FOR AMERICA

ADDRESS

BEFORE MEETING OF SPEAKERS FOR THE
FOURTH LIBERTY LOAN AT CHICAGO
WEDNESDAY, SEPTEMBER 25, 1918

By

SAMUEL UNTERMYER
OF NEW YORK

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WHAT THE WAR WILL DO FOR AMERICA

With your imaginations aroused and your hearts aflame with the fire and glow of patriotism inspired by the presence among us of these youthful battle-scarred veterans and heroes of the world-famed Foreign Legions of France and the blood-curdling stories of their heroic achievements, it is no easy task for you or for me to descend to the reasoning commonplaces of discussing the arguments by which you are to encompass the work that lies before you, and I shall not attempt to do so.

The Government has worked for months over the valuable handbook that presents them in concrete form and sets forth many persuasive suggestions that are to be put before your audiences. It would indeed be presumptuous of me to expect to be able to contribute anything of moment. When I was asked in New York, whilst here addressing the American Bankers Association, to speak to you on the Liberty Loan I assumed that what I had to say was to be spoken before an audience of bond-buyers and jotted down my ideas on the train for such a speech. I now find myself confronted by a body of expert bondsellers who, judging from past performances, know far more than I do of the arguments that will sell bonds. Having been one of you on all the previous loans, as I shall be again this time, I have what amounts in effect to a single suggestion to add that may or may not be of value to you.

Throughout this war we are recounting with justified pride what America has done and is doing for the unborn generations of humanity. But the debt is not so much on one side as this line of reasoning would imply and I propose now to ask you to turn the thoughts of your audiences to the proposal suggested by the theme of my discourse.

The time has long since passed for discussing the now threadbare theme, Why we entered the war, or, What are our war aims, now that we are in it to the bitter end. If

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there is any one in the country who does not understand he never will. It has been well said that we now have but one war aim and that is our aim to win the war, no matter how long it may take nor what may be the sacrifices in blood and treasure and we cannot close our eyes to the grim fact that the toll will indeed be heavy. But the stake is so much higher that we cannot consider the price. It is higher than material prosperity, higher than mere human life, higher even than National honor. The stake is civilization itself, the future peace of the world and the freedom and happiness of all mankind.

Who would have imagined, how could the human mind have visualized only a few short years ago that it would be possible for the whole world to be enveloped in flame and that it would be the proud destiny of this peace-loving Nation by the brute force of arms to become the champion and saviour of civilization!

Everyone now knows that we are in this bloodiest of all wars in history only because we were not permitted to keep out of it. But now that all this horror and sacrifice have come to pass and more, much more, is to follow, can it be said that it is wrong of us, in order that we may steel our hearts and take counsel of our courage to gird ourselves to further sacrifice, to now pause and take account of what will come to the Nation by way of return?

I think not, for we are not speaking in terms of territory to be wrested from a fallen foe, nor indemnities that we shall exact, nor of any of those sordid material gains for which past wars have been fought. None of these things are for us. We will have none of them, no matter how heavy the burdens we must bear, nor how glorious may be our victory on the field of battle. Ours is the most unthinkably unselfish struggle ever conceived by the brain and soul of man or Nation. To such transcendent heights of grandeur and self-sacrifice have we risen, that the heart of the Nation fairly leaps with joy and pride at the conception.

The biggest thing that will be done by the crucible of fire through which we are passing will be to spiritual-

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ize our people, who were steeped in materialism and commercialism. The whole world believed that we were a Nation of mere money-makers to whom wealth was the chief ambition of life and the sole standard of individual success and it was at least to some extent true. The mad race for money was becoming every day fiercer, when we were almost without warning dragged into the war to save the national honor. The European conflict had then reached the stage at which our farms and mills and factories were toiling day and night to supply their needs and we were draining their centuries of accumulated wealth to the dregs. The country was drunk and mad with the fever of money-making; extravagance and self-indulgence ran riot as never before and we were well on the road to our spiritual undoing.

Suddenly, as if by magic, with the declaration of war the whole face of the earth changed for us. And the change has continued to grow day by day ever since, until the gruesome reality is gradually entering our consciousness in all its horror and grandeur.

It was natural that it should have been impossible at the beginning in our then frivolous and wealth-worshipping state of mind and with the realities of war so many thousands of miles away, to grasp the enormity of the task to which we had dedicated our lives and fortunes and all, save honor, that we held dear. It is no disparagement to us to say that if we could have visualized the future as we now see it we would have hesitated, for we are after all but human, though our mission is divine.

The event has demonstrated that the spirit of the Nation would have forced us into the struggle in the end, but all has been ordained for the best, for perhaps we would have been too late. Under the guidance of a divine Providence

"Who sees with equal eye as God of all
A hero perish or a sparrow fall,
Systems and atoms into ruin hurled
And now a bubble burst and now a world,"

we builded far better than we knew in making that momentous decision. Picture, if you can, what would have been our

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position today if, like the small nations that were forced to do so by reason of their helplessness, we had meekly submitted to the dishonor of complying with the insolent demand that we take our commerce off the seas and tie up our ships in our ports at the command of Germany as though we were a conquered province. Besides being forever disgraced in the eyes of the world, we would have been so dishonored in our own estimation that the morale of the Nation would have been gone.

Every ideal for which we stood and for which our forefathers suffered and every reason for our existence would have been destroyed. Our heads would have been bowed in shame and our spirit broken. As has been eloquently said by Secretary Lane:

> "American is not the name of so much territory. It is a living spirit, born in travail, grown in the rough school of bitter experience, a living spirit which has purpose and pride and conscience—knows why it wishes to live and to what end, knows how it comes to be respected of the world, and hopes to retain that respect by living on with the light of Lincoln's love of man as its Old and New Testament. It is more precious that this America should live than that we Americans should live."

And so it is now known of all men (and that is the first thing this war has done for America) that here we have taken our irrevocable stand. The soul of America has spoken. Never could it have been truly said of us and no longer will it ever be said, even by the ignorant and unthinking, that we hesitated to suffer and die in the defense of the great principles on which this Republic was founded.

May I not in this connection suggest to you that you convey to your audiences just one word of caution and reminder at this time, when in our anxiety for the dear ones who are bearing the brunt of this bloody struggle, passion runs high and there is danger lest in our frenzy of pain and longing we say and do things that are unworthy of the sacred cause in which we are embarked? I refer to the disposition in some

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directions to stir up hate and prejudice against our loyal citizens of German birth and ancestry whose brothers and sons are fighting side by side with ours. I appeal also, though not in the same way, for the law-abiding German citizens who have made their homes with us. Our great President has repeatedly reminded us that we are warring, not upon the German people but upon their autocratic rulers who forced them into this war, and that we ought not add to the burdens of these people. Within the past few weeks the State Department announced the appointment of a Commission of distinguished Americans with Dr. Norman Bridge of Washington as Chairman. The purpose of the Commission is stated by Secretary Lansing as follows:

> "The duties of this Commission while few and relatively simple are of a delicate nature and require the greatest care in their accomplishment. For the present these are twofold. First, the recording and control of assistance given to the families of interned aliens by the legations of Sweden and Switzerland; and second, rendering of aid and assistance both financial and social to the vastly greater number of law-abiding industrious and discreet subjects of Germany and Austria-Hungary in the United States. Many of this latter group, although loyal to the United States are through unjust and unfounded suspicion or prejudice of which they are the victims, prevented from or seriously handicapped in earning their livelihood and are in consequence reduced to great financial straits."

That, it seems to me is the temper in which we should deal with this subject. It is incongruous and unthinkable that a people engaged as we are in this great cause of humanity should visit the sins of the War Lords of the Central Empires upon the heads of their victims who happen to be under our hospitable roof where they were invited and welcomed, merely because of the accident of their birth in a country which they have forsaken for ours and with which we were at peace when they came to us.

Hate is always unreasoning and intemperate. We have truly a grim business to execute and we propose to keep at

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it until we finish it in a way that will render it impossible of repetition. But the cause is too big and too holy to make room for hate. The upright Judge who sentences the criminal to death or penal serviture is not moved by hate or revenge. He is more often stirred by pity, but he has a stern duty to perform in which neither hate nor pity must play a part. He, like this Nation, is a High Priest in the sacred temple of justice. He is protecting society as we are safeguarding civilization. We have nothing to gain and much to lose in self-esteem by giving way to impulses of which we may hereafter be ashamed. The self-restraint that we practice now will add to the lustre of our victory. To be truly great the Nation must be just, generous and merciful. It is not brave or fine to strike at men who are harmless, unarmed and defenseless. We are not bullies.

The next great lesson has been to revolutionize our standards of men and values. In one short year our people have learned that money does not make the man or add one jot to his title to the respect of his fellowmen. Whilst money will not cease to buy comforts and luxuries, it will never again be possible for any single person to amass it in fabulous and unusable amounts and it will be still less possible to transmit it so as to perpetuate an indefinite aristocracy of wealth. The aristocracy of the future will be an aristrocracy based on *Service*. That will be the sole test and men will prosper or fail in their life's work, in the estimation of their neighbors and of the country, in the proportion in which they meet that test of public usefulness.

Our system of Federal taxation prior to the war was the most crude, unscientific and blindly unjust of that of any Nation on earth. We were a half century behind other countries in enacting an income tax law. Whilst they were collecting their chief revenues from that source without interfering with their successfully competing with us in the markets of the world, our statesmen were still loudly denouncing the proposal as Socialistic. It required over twenty-five years of agitation to get an enforceable law on the statute books and even then the tax was trifling. We had

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been placing all the burdens of government on the shoulders of the workers. The rich who are necessarily the main beneficiaries of Governmental protection, since they have more to be safeguarded, escaped, whilst the protective tariffs furnished the revenues.

I believe in a tariff for protection but the existence of that source of revenue constitutes no reason for exempting wealth from its just burden. The necessities of the war have taught us that the burdens of taxation can without difficulty be placed upon those who can best bear them. They should have been so placed and the money should have been employed for the benefit of those by whom the wealth was created and in building for the future; in the irrigation and reclamation of hundreds of millions of waste lands; the preservation of our forests; the utilization for the whole people of our vast water powers and other undeveloped natural resources; the construction of great national highways by land and water; the acquisition by purchase or condemnation of the lands that were shortsightedly given to the railroads and of the coal, iron and copper mines and the oil fields, that are the heritage of the people and should never have been permitted to go from them. These are some of the many uses to which the taxes from untaxed wealth that should have been taxed might have been and will be put as one of the results of what we have learned from this war.

When to the expenditures for these purposes there are added the untold hundreds of millions of annual revenue that will be required to care for the men who have been injured and the families of those who have died in our cause and the further sums that will be needed to carry out the long-deferred program of Social reform that will be justly demanded, it is easy to see that the Government will urgently need every dollar that can be raised from a substantial tax on incomes and from inherited wealth, in addition to the revenues from customs duties.

The necessities of the war have involved the temporary surrender of an undue proportion of incomes and profits. I say this, not by way of criticism or complaint, for the money must

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be raised and the least oppressive way of securing it is by the means that has been provided. Patriotism and the National credit are being strained to the uttermost to provide the larger proportion of our needs through bond issues. No other method of taxation has been suggested that would involve less real hardship. If men of independent means were asked in such a crisis to contribute every dollar of their entire incomes and business profits and to live upon their capital for the duration of the war the sacrifice would be negligible as compared with those that are being made by the millions of our countrymen who are contributing their lives and the happiness of those more dear to them than life, as well as their earning power, to the Great Adventure upon which we are embarked.

It is only from the point of view of the effect of the retention of such taxation upon enterprise in normal times that the rates provided by the pending bill would be unwise and oppressive. If they would accomplish the result of permanently raising the required income, they would be justified in view of the better purposes to which the money could be put. But if their effect would be to relax effort and initiative and drive capital into hiding, they would be unjustified from the economic point of view, since they would fail of the purpose for which they were intended and that would doubtless be their effect.

The people who from motives of patriotism, or because they know existing conditions to be temporary, are willing to forego the rewards of their risks and labors would not go on with such sacrifices indefinitely under normal conditions with an alternative open to them. Whilst these burdens will therefore be substantially lightened when our stupendous war requirements are ended, we need not expect and I sincerely hope that we shall never live to see anything like a return to the old basis of taxation. Large incomes and inheritances will have to be heavily and permanently curtailed by taxation unless we are to have continuous warfare between capital and labor.

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It is necessary for the encouragement of thrift and enterprise that men shall be able to reap the reward, but it is not necessary that their children and their children's children shall be permitted to live lives of idleness and become parasites upon the community because of the thrift of their ancestors. In my judgment the time is near at hand when the bulk of every great fortune will revert to the State upon the death of the man who amassed it.

Let us hope and pray that world-disarmament will be the blessed outcome of this brutal war. If we achieve a complete victory that is likely to be our main contribution to humanity. But even then we will have to provide our share of the cost of armament for "The Nation of Nations" that will in some form constitute an International Police to keep the peace of the world. Again we shall need money to pay generous pensions to the men who were disabled and to the dependents of those who were killed and in order to spread our commerce over the world in our own government-owned bottoms, and to answer the demands for social reform that are knocking at our door.

These considerations suggest what to my mind is the greatest service that this war will do for America. It will usher in the era of Social Justice and will put us forward as one hundred years of peace could not have accomplished. It will bring about almost without a struggle and by a peaceful revolution the changes that could not have been wrought without civil war.

We may as well realize that the old order has gone, never to return. By this, I do not mean that we shall enter upon what is generally understood as a Socialist State nor that the legitimate rights of property will be destroyed. Until men are born and remain equal in character, intellect, endurance, industry and resourcefulness and in all the other attributes that make for deserving success, until they can contribute useful service in equal proportions, the contemplation of a Socialist State must remain an iridescent dream. There must always be allowed full play and ample inducements for private enterprise and initiative within legitimate bounds. The re-

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wards must be commensurate with the risks, effort and accomplishments unless we are content to abandon our place in the world.

May I not briefly sketch for you the rough outlines of my mental picture of this peaceful social revolution?

1. The scourge and curse of war will be forever banished from this fair earth and there will be ushered in the era of International Justice to be administered through a "Nation of Nations" that will maintain the peace of the world. That will be our glorious contribution to posterity. The world will owe that priceless gift to America and to it alone for until we were forced into this war the contest was mainly for commercial and territorial supremacy. We have eliminated those sordid issues and have lifted the struggle into the transcendental realms of idealism and world-service.

And so we will have earned the proud position that we shall maintain of being the recognized leader of the moral forces of the earth. From a reputed nation of money-getters we will have evolved into the spiritual crusaders of the world and thus this war of all wars will have justified itself. And all this we shall owe largely to the inspired leadership of one master-mind. What a debt!

2. We will have been converted from a nation of prodigal spendthrifts that has been squandering the most bountiful gifts ever bestowed by nature upon man, into a fairly thrifty provident people. In a few generations the ravages of this war will thus have been made good to us a hundred-fold.

3. The National purposes will be purified and spiritualized and men of all classes and nationalities will be united as never before into one indissoluble bond of true Americans. The hyphen will be no more. No matter whence we or our ancestors have come we shall be known hereafter only as Americans, for we have together been baptized in American blood in a common cause.

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4. The cost of Government will be raised largely from taxes on incomes and inheritances.

5. The public domain, the public utilities and the natural resources of the country, among which I include our deposits of coal, iron and copper and our forests, all fields and water powers, will revert to the people; they will be administered for their benefit and will not be longer exploited for the profit of any individual or aggregation of individuals.

6. Child labor will be contraband throughout the land; every child will be truly the ward of the State, which will see to it that it is properly nourished, clothed and educated and equipped with a means of livelihood.

7. The law will not permit of labor being longer regarded as a mere salable commodity subject only to the economic laws of supply and demand. There will be compulsory arbitration, binding alike on the employer and the employed, to the end that the men and women who create the wealth in a given industry shall be paid in wages their just share, no more and no less, of the wealth that they create, after proper allowance for the risks and value of capital and initiative.

8. The reserves that are made by conservative business by way of depreciation for wear and tear on buildings, plant, machinery and tools as part of the cost of doing business, before calculating profits, will be made to apply to and include the human machine as well. The law will see to it that the interest of the employer is directed just as much to securing sanitary working conditions and promoting the health of the workers as though he were conserving his mechanical appliances. To that end he must provide, or at least join in providing, reserves as part of his operating expenses, for insurance against illness and unemployment and old age pensions, to which the State, the employee and the employer shall be required to contribute.

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9. So far as possible unemployment will also be guarded against by Government undertakings in times of industrial and agricultural depression, in which the surplus unemployed labor will be employed.

10. The vast land grants still held by the railroads will be opened up to settlement.

11. Monopolies and combinations will be punished and suppressed and ruinous competition will be prohibited. To that end competitors who choose so to do will be permitted to agree on prices subject to Government regulation and approval as to their reasonableness.

It will be said, as it has long been argued, that even if this ambitious program were in the interest of the people, the Government is not adapted and can never be equipped to carry it into successful execution. That is what many of us believed but believe no longer. The incredible accomplishments of the past eighteen months must have satisfied the most sceptical of the unlimited organizing efficiency of our people. Almost as if by magic we are well on the way to perfecting the most stupendous war machine of which the world has ever dreamed, overcoming obstacles that men of the widest vision regarded as insurmountable, as though they had not existed. To us nothing is longer impossible with the united will of the Nation behind us. Never again will this country take counsel of its doubts or fears when once satisfied that its cause is just. Not by far the least valuable of the many lessons of the war is the confidence to dare and do that has been instilled in us by the marvels that have been done. In the light of our bewildering experiences no one can predict the heights of accomplishment we shall reach in the next twelve months, and we are fully justified in casting all doubts behind us. At last the people know their strength and it is idle to believe that they will not use it to wipe out the injustices of the existing order.

Our soldiers and sailors will come home with this newfound knowledge of their power, as eager to right conditions

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at home as they were to venture their lives to assure the freedom of the old world. Their spirits will have been uplifted and their hearts chastened by their sufferings and by the memories of the dead comrades they left behind. Home and liberty will have new meanings for them. As they will by their sacrifices have made the rest of the world a fit place in which to live so will they see to it that their own beloved country, for which they and their comrades have fought and bled, shall become the guide and leader in the onward march for Social Justice.

And they and their stricken brethren will be the heroes of the coming days, for they are the saviours of the honor and destiny of the Nation. What they want they will get for they will have paid the price of the unselfish victory that will emancipate the world. The country will be divided into just two classes when this war is over—not into white men and black men, nor Jews and Gentiles—but into those who did their duty and those who did not. And woe be to those who did not!

All of us are not privileged to risk our lives and the future of our homes. Many of us are too old and others are needed at home to take care of the men at the front by supplying food, ships, ammunition and what not. Still others must direct the activities of the war and yet others must furnish the money without which it cannot be prosecuted, but theirs happen to be the safe and easy tasks.

The Government has done and is doing its duty nobly, beyond all hopes and expectations. Its accomplishments are the wonder of the world and the pride of every man and woman. All of us are a part of that Government and are sharers in that honor. Let us ask ourselves now, and again and again, how far we have deserved to share. Our boys have offered *to give* and many have already and others, alas, will be called upon to give all, every drop, of their blood. We are asked to *give* nothing. Our duty is done, not when we *give* all our dollars but when we lend them upon the best, safest and most profitable investment of its character in existence.

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The meanest of all slackers is the man who can save and lend his share and fails to do so because his Government generously refuses to *force* him to do so. He is worse than the fellow who takes his motor car out on Sundays because the Government has merely requested him to keep it at home instead of compelling him to do so. The difference between the two is that the motor car man must expose his want of patriotism in the sight of his neighbors and face their just indignation and contempt, whilst the other can escape observation.

In either case the Government has the power to *order* the one to keep this car at home and the other to buy the bonds that he can afford to buy. In both cases the Government relies upon the honor, spirit and patriotism of each man to do his duty and I am satisfied that the result will not prove a disappointment.

If I am wrong it will be necessary to commandeer the money, for nothing will be permitted to stand in the way of protecting the men who are carrying our flag and fighting our fight and winning this war and these things cannot be done without the money. To fail at this time when we are on the highroad to victory would be betrayal. We need not fear, for we are not traitors.

I congratulate you, gentlemen, upon the high privilege that has come to you of being selected to educate and arouse public sentiment so that all will know and do their duty. The war spirit and the determination of our people to see this thing through to the end have at last become so universal throughout the land that I believe your task will not be so difficult as with previous loans. Your enthusiasm in the justice of your cause is bound to bring success and I wish you Godspeed in your unselfish mission to make possible the greatest service to mankind ever undertaken by man.

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AN ANSWER TO COLONEL ROOSEVELT

AN ADDRESS

BY

MR. SAMUEL UNTERMYER

AS PRESIDING OFFICER

AT A MEETING AT TAMMANY HALL

OCTOBER 29, 1918

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An Answer to Col. Roosevelt.

We are met tonight at the supreme moment in our history when victory is within our reach and we have but to garner its fruits with the aid of the same superb leadership and guided by the same masterly statesmanship that have carried us triumphantly through this great ordeal. It is well-nigh incredible that it is this critical moment just as we are on the eve of triumph and the fulfillment of our fondest dreams for the future of humanity that the Republican party has selected to precipitate this petty, ignoble broil, in the hope of sowing the seeds of discord and of undermining the confidence of the Nation and of our allies in our Commander-in-Chief by launching a series of bitter, partisan attacks against his leadership.

The effort is to rob our leader, who is now the acknowledged spokesman of the civilized world and whose vision and organizing genius have made this result possible, of his magnificent handiwork, and to dim the glory and prestige of the Nation, lest the opposition party thereby suffer in influence. It is a spectacle that should bow our heads in shame.

A more wicked, distorted, vitriolic assault would be difficult to imagine. It represents the climax of years of pent-up gall, hatred and jealousy, and I predict that it will prove a ghastly failure and will react as it deserves. We need have no fear that this State and country will not stand behind their President at such a time.

Chief among the offenders is a man, who, notwithstanding his intense partisanship and his faults of temperament, has long held a high place in the affections of the people. Much has been forgiven him in the past and at this particular time much more will be forgiven him because of his past services and the sacrifices that have been made by his brave and patriotic sons, for which they, and not he, are entitled to the glory. But there is a limit to the forbearance of even the most generous of people, and I believe he has passed that limit, for we are

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in no mood to permit either political expediency or personal jealousy and animosity to play havoc with the grim business that the Nation has in hand. His intemperate partisanship, fanned into flame by personal hatred and envy, appears to know no bounds. His attitude has been throughout this war one of continuous, blind, bitter carping and ungenerous fault-finding at a time when support, encouragement and calm and discriminating criticism constitute the highest duties of citizenship. At no time since we entered the war, in fact at no time since the outbreak of the European war, has he had a kind, just or encouraging word to say concerning any of the many colossal, constructive things that have been done and that have evoked the wonder and the enthusiastic praise of the world. If he could not or dared not openly condemn, he maintained a sullen silence,—and silence is no easy task for that gentleman under any conditions.

His has been, throughout, the highest discordant note among the men of his party who hold the public attention. He is the self-appointed ringleader of the little band of malcontents in whom the national pride and admiration that they should have felt and voiced for the great deeds that have been done by this administration have been stifled by hate and jealousy, and who have blindly refused to accord to this world-leader the credit that is his just due.

Here is a sample of the diatribes that have been dripping from his pen. This particular fulmination was let loose throughout the land on Friday morning (the day before the President felt forced to issue his appeal), through the Associated Press, under cover of a telegram to leaders of his party in the Senate.

> "The language of the fourteen points and the subsequent statement explaining or qualifying them is neither *straightforward* nor plain, but if construed in its probable sense, many and possibly most of these fourteen points are thoroughly *mischievous*, and if made the basis of a peace such peace would represent not the unconditional surrender of Germany, but the conditional surrender of the United States. Naturally, they are entirely satisfactory to Germany and equally naturally, they are in this country satisfactory to every pro-German and pacifist and Socialist and anti-American so-called internationalist. * * * Moreover, we should find out what the President means by continually referring to this country merely as the associate instead of

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> the ally of the nations with whose troops our own troops are actually brigaded in battle. * * * When the German people repudiate the Hohenzollerns, then and not until then it will be time to discriminate between them and their masters."

What can he mean by this screed criticising the President for referring to our Allies as our "associates," except to be painfully hypercritical at every opportunity? And what, pray, is the point of "the German people repudiating the Hohenzollerns" in view of the President's note to Germany that appeared in the press of the preceding day, the concluding paragraph of which is as follows and to which this telegram was supposed to be a reply:

> "If it (America) must deal with the military masters and the monarchial autocrats of Germany now, or if it is likely to have to deal with them later with regard to the international obligations of the German Empire, it must demand not peace negotiations but surrender. Nothing can be gained by leaving this essential thing unsaid."

Has he not voiced and repeated the same sentiment as that announced by the President and—as though he had discovered the thought? If, in the use of intemperate and offensive language and in this and other similar outpourings on the same subject, Colonel Roosevelt is speaking for his party, the country should know it so as to understand where to place the responsibility. If he is not speaking for his party, he should be repudiated.

These are the gentlemen who are now appealing to the country to elect a Republican Congress to "assist" the President in the prosecution of the war on the ground that their party is "standing by the President"! Every Republican candidate and party leader is loud in his protestations to that effect, but their utter insincerity requires no comment.

Is that the brand of "friends" with whom you think we should surround our Chief Magistrate at such a time? Is that the sort of support you want him to have? Is it not necessary for us, and is he not entitled at this crisis to have about him men who are sympathetic with his aims? Or do you want him surrounded by political enemies who are more intent upon destroying him than upon helping him solve the stagger-

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ing problems that are confronting him? When you send troops to the front, do you surround your commanding officer with that kind of an army, or do you think he is entitled to have men who confide in his judgment?

When one contrasts some of the assertions in the speech delivered by Colonel Roosevelt last evening, with the facts, one is reminded of the old days when he was President and was adding day by day to his Ananias club, that grew so rapidly in membership that at the close of his term the country wondered whether there were any men left in public life who had not qualified as members?

So utterly bewildered does one become in wading through this maze of disingenuous and untruthful statements and implications that it is difficult to know where to begin the task of disproving them. Some of the situations he attempts to create are not without their unconscious humor, especially when *he* pillories the President as a partisan and an autocrat and complains of his failure to invite Republicans into his cabinet. Imagine Colonel Roosevelt in the guise of a preacher of nonpartisanship! Imagine him inviting Democrats into his Cabinet!

It is not true that this issue has been injected into the campaign by the President or that it was invited by him. It has been forced upon him by the conduct of the Republican leaders in and out of Congress, culminating in bitter and concerted attacks upon his splendid diplomacy and leadership within a few days before he found it necessary to issue his appeal to the patriotism of his country for support in his policies.

I charge that the Republican leaders are conducting a campaign of hypocrisy and misrepresentation in the Nation as well as in the State, and that their attitude does not represent the conscience of the rank and file of their own party and will meet with their condemnation. To the accompaniment of loud protestations that the party has been "standing behind the President", it has been playing partisan politics day by day in the Senate and through its organized leaders outside of that body in the attempt to obstruct him in his efforts to bring the war to a successful close and to discredit and undermine his influence at home and with our Allies.

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The President's appeal to the country for the election of a Congress that will give him its whole-hearted support instead of "back-capping" him whilst pretending to sustain him, is the climax of months of insidious partisan assaults upon his prestige and authority, in the vain search for an issue on which to conduct the now pending Congressional campaign. Within the last few weeks, with the elections in sight, their predicament has become desperate and so they have allowed themselves to be persuaded to ruthlessly attack his diplomatic policy, that is now in its most crucial stage, and at a time when above all others it behooves good citizens to support their Chief Executive and the Commander-in-Chief of their Army.

As the President's brilliant conduct of the war and his superb diplomacy in the pending crisis have been gradually unfolded before our admiring eyes and as they are about to bear fruit, these gentlemen of the opposition party are so disturbed by the contemplation of the effect of his success on the political fortunes of their Party that their discomfiture threatens to outrun their patriotism.

They profess to see in the appeal of the President to the country a reflection upon their patriotism, although this is expressly and categorically disclaimed in his appeal in the following words:

> "I have no thought of suggesting that any political party is paramount in matters of patriotism. I feel too deeply the sacrifices which have been made in this war by all our citizens, irrespective of party affiliations, to harbor such an idea. I mean only that the difficulties and delicacies of our present task are of a sort that makes it imperatively necessary that the nation should give its undivided support to the government under a unified leadership, and that a Republican Congress would divide the leadership. * * * This is no time either for divided counsels or for divided leadership. Unity of command is as necessary now in civil action as it is upon the field of battle."

And yet, they cry that their patriotism is questioned because he very justly says:

> "At almost every turn since we entered the war, they have sought to take the choice of policy and the conduct of

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> the war out of my hands and to put it under the control of instrumentalities of their own choosing."

Can there be any doubt of the truth of this statement? His well-timed and well-merited strictures have cut so deeply that the Chairman of the Republican National Committee has felt impelled to go to the indecent length of characterizing the action of the President by such polite epithets as

> "more wanton, more mendacious than that of the most reckless stump orator."

If you really want an illustration of superb mendacity, permit me to refer you to the claim of the Republican leaders to credit for having voted for the men and money necessary for the conduct of the war. Having voted for the war (at least some of them), there was nothing else for them to do. They dared not do less. In answer to their claim that they did this as unstintingly as the members of the President's own party, let us glance at the record:

The McLemore resolution, which would have warned Americans off the high seas and which was in itself a recognition of Germany's right to sink passenger ships, had 103 Republican House supporters and only 32 Democratic supporters who voted against tabling this resolution.

The resolution declaring the existence of a state of war with Germany was opposed in the House by 32 Republicans and 16 Democrats.

76 Republicans and 47 Democrats in the House of Representatives voted for the Cooper amendment which would have prevented the arming of American ships for defense against submarines.

On the Espionage Bill, 97 Republicans and 1 Democrat were opposed.

160 Republican members of the House and only 1 Democrat voted against the Shipping Board Bill, while in the Senate 20 Republicans and only 1 Democrat voted against it.

In this connection it may not be out of place to call your attention to one of Colonel Roosevelt's innumerable "specifications" of shortcomings on the part of the ad-

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ministration, which for accuracy and reliability is on a par with the others. He says:

> "Two-thirds of the ships in which we have ferried our troops across the ocean were from the British."

But forgets to mention the fact that by reason of Republican opposition the passage of the Shipping Bill was delayed for almost two years in Congress, as Secretary Daniels reminded us in a speech at New Haven last evening in the following words:

> "From the day the United States entered the war unto this hour, the neck of the bottle has been and is ships. The number of soldiers early sent to France was measured only by the tonnage. In the light of the gigantic achievements of the Shipping Board, who will say that if Senator Weeks and his formidable array of Republican Senators had not blocked the way for nearly two years, the victory which is now in sight would not have long since been achieved."

The Republicans are welcome to whatever comfort they can get out of this vaunted record of theirs in "standing by the President." I do not mean by this to condemn the men who voted as they did. They were doubtless animated by the highest consideration of public duty as they saw it at the time. My objection is to the demand that the country shall elect Republican Representatives to Congress to "aid" the President on the ground that their party is entitled to the credit of having "stood by the President."

In truth, they have, as stated by him, throughout this war and at every opportunity

> "sought to take the choice of policy and the conduct of the war out of my hands and to put it under the control of instrumentalities of their own choosing."

His splendid achievements have not evoked a word of commendation such as a just and generous political adversary would be unable to withhold if he were a patriot first and a politician afterward.

In their fear and impatience lest the President, in the discharge of the responsibility placed primarily upon

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him by the Constitution, should effect a triumphant peace without their intercession and thus deprive them of part of the credit, they stagger from one premature, unfounded criticism into another of almost everything he does or says or fails to do or say, only to find themselves checkmated at every step by his vision and statesmanship and by his intimate knowledge of situations of which, in the every nature of things, they cannot possibly be informed.

It is axiomatic that a successful war cannot be conducted in Town Meeting and that peril lurks in a multiplicity of counsel. Concentrated power is essential. The same is true of diplomatic negotiations, where every move is influenced by considerations based on information that is properly available to the President alone and that at times cannot be disclosed. This rule applies in equal, if not even in greater, measure to the delicate negotiations now under way looking toward what will amount in effect to the unconditional surrender of the enemy—and worst still without the aid of Colonel Roosevelt, who will then doubtless, all undaunted and unsuppressed, transfer his irrepressible faultfinding activities to the Peace Table.

I repeat that the Republican campaign for the election of members of Congress is one of hypocrisy. Not daring to refuse him men or money with which to conduct the war, they have never lost an opportunity for carping criticism, and one cannot resist the feeling that their leaders in Congress are ever alert for an opportunity to make political capital by embarrassing him whenever a decent pretext can be found or manufactured.

If you believe, as I am sure you do, that through the sheer force of character, statesmanship and organizing genius of our President and his advisers, the impossible has been accomplished and that by sheer force of character, vision and statesmanship he has become the outstanding figure of the world, what reason can any citizen, irrespective of party, have for failing to support him at such a time?

Let us analyze what has been the provocation for this stream of invectice: The President asserts that whilst the Republicans in Congress have been pro-war, they are anti-Administration, and he asks that if the people

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approve his conduct of the war and his announced policies of bringing it to an end, they shall so state in no uncertain terms by a vote of confidence that would strengthen his hands in the performance of the gigantic tasks that lie before them. He tells them also that their failure to do so at this time will weaken his influence with our Allies and may give to the enemy the aid and comfort that come from the appearance of divided counsels. Every word of this is literally true and will appeal to the patriotism and common sense of our people. Is this outburst of indignation at his appealing to his countrymen for their well-merited support in this crisis genuine or is it assumed? Or is it a mere outburst of fury by these gentlemen at the thwarting of their schemes to sow dissension for political ends?

The world knows that we ask and want no sordid or material gains in this war in return for the sacrifices that we have made and are prepared to make, and that our aims are the most unselfish for which war was ever waged. It was accordingly unnecessary for this Nation to cloak its purposes by any of the arts of diplomacy under which selfish aims have in the past been hidden. It was our right and duty at all times to make known the terms on which peace could be had. This our President has done again and again. As the statement of these terms has been specifically endorsed by all our Allies and has met with universal approval for more than nine months, they constitute the generally accepted Code of the peace terms of all the Allies as well as of ourselves.

They went for months unchallenged even by the great Oracle who, though he happens at the moment to be out of power, still considers himself the Government. There was not a word of dissent from the terms thus laid down from any quarter until the Congressional elections loomed up before us. Then and not until then, when the Republican leaders were desperately casting about for a peg on which to hang their campaign, did it occur to them to question what had been done and magnificently done with their tacit approval, and now that they are seeking to cast doubt upon the wisdom of a course that they have never before dared to question, the President asks the country to sustain him in his attitude and to give him the power to continue his task unhampered by

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the obstructions of an unfriendly Congress. This appeal is denounced as "mendacious", and one would imagine from the shouts of injured innocence that rend the air that it is unprecedented.

And yet when we turn to the record, what do we find? We find conclusive and almost unbelievable evidence of bad faith and hypocrisy. We find that this same party and the same men, who are now loud in their cries of anguish at this pretended thrust at their loyalty, are the identical party and men who, during the Spanish-American war, made the same plea that is now being made by the President, without the provocation that has called forth this appeal and that no criticism was directed against them on account of their action. Chief among these self-convicted gentlemen is Colonel Roosevelt, whilst there follow in close succession Senators Lodge and Penrose and such leading Republicans of their day as ex-President Benjamin Harrison and Senator Foraker. And the country rightly heeded that plea, as it will heed this one.

The only differences between the two situations are that the conduct of this war has been singularly free from the scandals and inefficiency of the other; that our soldiers have not been fed on embalmed beef that was unfit for cattle, that they have not been sent forth half-clothed and without adequate ammunition, and that the other compared with this gigantic struggle was a tin-toy affair not worthy the name of a war. When the terms of peace were being concluded, which resulted in our being saddled with the Philippine Islands and penalized to the extent of $20,000,000 for having won the war, these Republican leaders still demanded, and the country consented, that the party that had conducted the war should without interference negotiate the terms of peace.

Colonel Roosevelt was then a candidate for Governor of the State of New York. Contrast what the then Roosevelt said on this subject with what the present Roosevelt says:

What Colonel Roosevelt said in 1898:	*What Colonel Roosevelt says now:*
"Remember that, whether you will or not, your votes this year will be viewed by the nations of	"Remember that the terms of peace are not to be settled by the President alone but by the President

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Europe from one standpoint only. They will draw no fine distinctions. A refusal to sustain the President this year will, in their eyes, be read as a refusal to sustain the war and to sustain the efforts of our peace commission to secure the fruits of war. Such a refusal may not inconceivably bring about a rupture of the peace negotiations. It will give heart to our defeated antagonists, it will make possible the interference of those doubtful neutral nations who in this struggle have wished us ill.

"You could get the benefits of the victories of Grant and Sherman only by reelecting Lincoln, and we will gain less than we ought from the war if the administration is not sustained at these elections."

acting in conjunction with two-thirds of the Senate. Both the President and the Senate must be responsible to the American people. * * * This is no one-party war. It is an American war and we denounce all attempts to make the support of Democratic candidates a test of loyalty."

What Senator Lodge said in 1898:

"But there is one question on which I wish to say a few words and that seems to me to cover all others. It is whether we shall stand by the Administration and the President at this juncture. If we give a victory to his political opponents, we say not only to the United States, but we say to the world, we say to the Spanish Commissioners in Paris, that the people of the United States repudiate its result and repudiate the man who has led us victoriously in the war and is now leading us back to peace—William McKinley."

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What Senator Penrose said in 1898:

"In his recent speeches the President has appealed not to a partisan, but to a national spirit. He wants Pennsylvania to remain the Keystone State for the Republican Party. It is difficult to overestimate the supreme importance of sustaining the President of the United States and the Republican Party at the present critical crisis in our foreign relations."

What ex-President Harrison said in 1898:

"If the word goes forth that the people of the United States are standing solidly behind the President the task of the Peace Commissioners will be easy, but if there is a break in the ranks—if the Democrats score a telling victory, if Democratic Senators, Congressmen and Governors are elected—Spain will see in it a gleam of hope, she will take a fresh hope; and a renewal of hostilities, more war, may be necessary to secure to us what we have already won."

What Senator Foraker said in 1898:

"The war came while a Republican Administration was in power and must now be settled by that Administration. I do not believe any fair-minded Democrat would question the fitness of the Republican Party for the discharge of this duty, but, however, it might be otherwise, the work is already in the hands of President McKinley. What he wants is the support of the House of Representatives."

What is your opinion of the sincerity of great party leaders who can be thus convicted out of their own mouths?

If, as now appears, it is the intention of the Republican party to take issue with and attempt to repudiate in principle the terms of peace that have been set forth by the President in consultation with our Allies, and with their approval, and which they have adopted as their own, doubtless after long deliberation between

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them, the situation thus presented takes on a significance far transcending in importance the result of this or any other election.

The enforcement of the demand for an effective "League of Nations" of all the countries, belligerents, allies and neutrals, accompanied by partial disarmament, to enforce and assure the future peace of the world, has been the fundamental thought in all our minds. Is the Republican party prepared to support Colonel Roosevelt in his outspoken repudiation of that program and all that that implies? If they are as desperate as that for an issue, the sooner the country expresses itself on that subject the better it will be for all concerned.

The man who put self above party to the extent that he did not hesitate to wreck his party once because his personal ambitions were thwarted and whose sense of humor is so dormant that he berates the President as a partisan, an autocrat and as making personal loyalty his test, will doubtless be willing to shipwreck it again upon this issue if the party is willing to follow him? But will it do so this time? Or will it choose self-preservation by repudiating him? He has tendered the issue. It will be interesting to note how far the party will steer clear of his latest effort to lead it into a bottomless abyss. That seems a pretty quarrel as it stands and one that we may safely leave to Colonel Roosevelt to settle with his discomfited party when the significance of his attitude has sunk into the public consciousness.

He characterizes "many if not most of the fourteen points" that have been evolved and stated in their present form as the result of the combined thought and wisdom of the best minds of the world, as *"thoroughly mischievous"* and intimates that they are worse. He tells us in fact that taken in their entirety *they "represent our conditional surrender to Germany"* but we have all been too dull to see it. It appears that Germany alone has had the true discrimination, for "they are entirely satisfactory to Germany." If this be true, how are we and our Allies to go further with this business without him? His subtle and discerning mind is indispensable in this emergency! Manifestly this job can never be properly done until *He* does it! Whom the Gods would destroy they first make mad!

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THE IDEALS OF ZIONISM

ADDRESS

DELIVERED BEFORE THE JEWISH TELEGRAPHIC AGENCY
AT HOTEL BREVOORT

October 1, 1921

BY

SAMUEL UNTERMYER
of New York

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Address of Mr. Samuel Untermyer before the Jewish Telegraphic Agency, at Hotel Brevoort, New York City, on October 1, 1921.

MR. CHAIRMAN AND FRIENDS:—

Let me first thank you for the honor you have done me in inviting me to be your guest at this representative gathering of the leaders of thought and the guides of public opinion among the men of our race in America. I never feel so much at home nor such warmth around my heart as when among my own people, for in instinct and sympathies I am an intense Jew both racially and religiously. In connection with my recent more prominent association with Zionism to which I will, with your kind indulgence, take the liberty of referring a little later on, the criticism has been levelled against me by a few of those who do not share my views on that subject that whilst I may pass muster as a racial Jew, I am a rather indifferent brand of Jew from the religious point of view. Some have gone so far as to spread the rumor, that seems to be generally believed, that I am not a professing Jew at all.

I owe it to my people, to the cause with which I am identified and to myself, once and for all to set these rumors at rest. To that end I ask you bear with me for a few moments whilst I burden you with a personal explanation that may bore you but which you will find to have a purpose that is not entirely personal.

I was reared in the Jewish faith by a mother who was throughout her long and useful life one of the most devout and orthodox women I have ever known. Up to the age of 13 when I became baar mitzvah I was destined to be a rabbi and had acquired a fair knowledge of Hebrew so that I could fluently read much of the Talmud. It was only because of our family's necessities that I went to work instead at the age of 15 and subsequently took up the law as my profession. Our household was conducted as a strictly Jewish home. At the age of 22 I married. I am a member of Temple Emanu-El in New York City and an active member and pewholder of the Synogogue at Yonkers, where most of my time is spent, and where I was instrumental in the organization of the Young Men's and Young Women's Hebrew Associations of that City. All my life I have been identified with and have been a

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substantial supporter of the various Jewish charities and other movements, local, national and international, and was for many years a Director in the Montifiori Home. There has been no Jewish movement in the last thirty years in which I have not done my part, though my work has until late years been done in the ranks rather than in the limelight.

So completely misunderstood and misrepresented has been my position in the Zionist cause that so able, accurate, temperate and fair-minded a publication as the American Hebrew, in a leading article on the front page of its issue of September 2nd in discussing the controversy on Zionism between Mr. Morgenthau and myself (doubtless in entire good faith) opens the discussion in these words:

> "Mr. Untermyer *recently become a Zionist through his friendship with Dr. Weizmann* attacks Mr. Morgenthau with the zeal common to new converts."

This statement is hopelessly inaccurate in every particular.

> 1. I have been a Zionist for about ten years, having made my first contribution of $3,000. at that time.
>
> 2. I had never met, known or communicated with Dr. Weizmann until his visit to this country in the Spring of this year.
>
> 3. Before that time I had contributed $13,000. to the cause.

And here I am represented as "a new convert to the cause"! And that is only one and the least important of the innumerable errors into which the distinguished author of that article has been unconsciously led.

To me the ideals of Zionism are among the most thrilling and inspiring of which the human mind and heart are capable and Dr. Weizmann, one of the greatest, most unselfish and statesman-like leaders of modern times. The hope and dream of centuries, now well nigh realized, that our race is at last to re-inhabit its ancient home, surrounded by the religious and historic traditions and landmarks so dear to us and is there to resume its industrial life and cultural development in the interest of world-progress on a broader and more comprehensive

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scale than could have been forecast by our forefathers in their wildest dreams, is one that must inspire the imagination of every Jew.

In that blessed land we are about to establish ourselves as a Nation and the nightmare of the "wandering Jew" kicked and buffeted about the world from pillar to post by the Hosts of hate, bigotry, jealousy and persecution is soon to become a thing of the past to take its place in the blackest pages of history alongside the Inquisition and the other horrors of the Dark Ages.

And when the semi-civilized nations, who have found the outlet for their barbaric cruelty in torturing and casting forth our people into starvation, death and worse, awaken to the realization of the fact that we too have a home and a national future and refuge—a center from which we can protect and vindicate the rights of our persecuted people—and that there are at least spiritual and political forces with which they must deal in the sight of all the world, our brethren in these lands will know something of the protection that is their just due.

Then, too, we shall have other persuasive means of destroying this cruel gospel of hate and bigotry or of counteracting its outer manifestations, for our ambitions have no mean or narrow limitations. All the genius, energy and resourcefulness of our race, all the lessons in patience, charity and understanding that we have learned in this bitter school of bigotry and torture of the centuries will now have their opportunity to bear sweet fruit in the accomplishments for the uplift of the entire human family, that are for the first time within our reach.

Whilst our people in Palestine are being made self-sustaining and are being placed on the high road to material prosperity in agriculture and in the industries that will be founded for them, their traditional cultural life will enter upon a new phase that shall furnish free outlet and expression for the manifold types of genius that we know to be ours and that not even the centuries of the most odious oppression to which mankind was ever subjected has been able entirely to suppress.

The inspiring and altruistic scheme has already emerged from its nebulous state and the foundations for its realization have been laid. I refer, of course, to the great international University whose beginnings are now in operation on the modest scale that befits the

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launching of so vast an undertaking. At this center there will be assembled a seat of learning that shall surpass in its idealism and in the variety of its culture, anything that the world has every known. It will include the leaders of Jewish thought and accomplishment in art, science, literature, theology, law, agriculture and industry. From that cultural center will radiate to every corner of the earth racial and religious Jews to whom the world will be forced to acknowledge recognition for its future inspiration, development and betterment in the manifold fields of activity by which the world is to be made a better and a happier abiding place for the human race.

We know that the material is among us. This University is to be the medium for its outlet and opportunity. Our mission is to be one of peace, liberty and good will. Surely such a vision and to work toward its realization are sufficient to stir the hearts of all mankind and to still the ancient hatreds of which our race has been the victim through all the centuries that have gone before. This is my conception of Zionism.

In this picture there is no place for political ambitions or rivalries. No Jews out of Palestine who are citizens of other liberty-loving countries and who are striving to realize these ideals for their oppressed brethren will thereby lessen their loyalty and devotion to their adopted countries by so much as a hair's breadth by assisting in the realization of these ideals. On the contrary, they will be all the better citizens for having lent this aid and for their continued interest in the success of this great humanitarian enterprise. You might as well charge our loyal and devoted American citizens of Irish birth and descent with treachery to our country because they are seeking to regain the freedom of their native land. Here within the family circle we may as well confess that the chief obstacle to the accomplishment by the men of our race of still greater things than we have yet done comes from within our own ranks. Whether this spirit of disloyalty to the cause that the overwhelming majority of his people have so near at heart is prompted by envy or is merely the result of the unsuppressible spirit of contention or cussedness I do not know. Perhaps it is sometimes the one and some times the other. But whatever the motive the fact remains that the discordant note struck at such a critical time when it is the duty of every

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self-respecting Jew at least to hold his peace, lends aid and comfort to the enemy and is accountable for most of our failure.

Is it thinkable that any Irishman could be found who under such conditions could find it in his heart to lift his voice to confound and shatter the hopes and aspirations of his race and countrymen? That is why, thank God, their great cause is about to triumph. In unity there is strength. In dissension there is disaster. I do not by this mean to refer to the little family unpleasantness between the Brandeis-Mack and Weizmann groups for they are all Zionists—all equally devoted to the cause. I refer to the peculiar make-up of Mr. Morgenthau—men who owe their prominence and are able to secure a hearing for their heresies to the fact that they pose as Jews and to that alone and who by indicting their race the world over keep alive and intensify the fires of bigotry and prejudice that the patriotic leaders among our people are striving so hard to overcome and extinguish.

May I not therefore be pardoned if the plain implications of treachery contained in the article in the Worlds Work over Mr. Morgenthau's name against Zionism and its distinguished leaders such as Judge Brandeis, Dr. Weizmann, Judge Mack, Mr. Wise, Nathan Straus, Lord Rothschild, Sir Alfred Mond, Dr. Frankfurter and scores of other leaders of Jewry because they are Zionists impelled me to express my resentment in terms that were perhaps more emphatic than measured.

Mr. Morgenthau is, and has been for many years reputed to be, a man of great wealth, worth many millions of dollars. If he has devoted any part of his great wealth toward promoting any Jewish cause whatever, I have never heard of it. The mere giving of money by men who can afford to give without sacrifice is not in itself very convincing evidence of the depth of sincerity of a man's Judaism; it is about the easiest thing he can do. The real debt of gratitude of the Jews is to the men who are unselfishly dedicating their lives to our cause at great personal sacrifice, men of the type of Dr. Weizmann, Mr. Marshall, Dr. Wise and Dr. Magnes. Of course, money plays its part in this practical world; we need the money as well as the men, but since neither Mr. Morgenthau nor I have sacrificed very much except to give money (if he has given any) and practically nothing in the way of real work beyond grandiloquently expound-

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ing our views, oftentimes half-baked and unsolicited, perhaps the best test of our relative usefulness to the Jewish movement is measured by the amount of money we have given in proportion to our means.

I would like to add a few words on the subject of the unfortunate controversy that has caused what I fondly hope and believe to be only a temporary breach in the ranks of the Zionists of America but which while it lasts is seriously demoralizing and crippling their world-cause at the most critical time in its history. I have the most intense admiration, respect and gratitude for the men who have led the Zionist cause in America up to the time of this breach and who I hope will again lead it, for their splendid and unselfish work. No matter what happens in the future, our debt of gratitude to them can never be repaid. When I accordingly say to you that I believe they were in the wrong in the attitude they assumed to the World Zionist organization as represented by Dr. Weizmann, which I shall endeavor to prove to you, it must not be understood that I am approaching this delicate subject in a spirit of captious criticism or that I am lacking in profound respect for the point of view or the absolute good faith of these gentlemen. It is not only conceivable but it is often the conceded fact that all the parties to a controversy are acting in good faith and from the highest motives and yet one of them must be in the wrong otherwise there would be no controversy.

It so happens that I became the intermediary at one stage of this controversy. I did so at the earnest solicitation of my dearly beloved friend Nathan Straus whose devotion and sacrifices to the Zionist cause had long invoked my profound admiration and respect, for I knew that he had given bounteously with a love and affection for the cause and in a way that few of us, if similarly situated, would have believed ourselves able or justified in giving. For some reason Nathan Straus believed that as I had not been in any way involved in the quarrels of the warring factions, I might be able to bring peace. I cheerfully took up the task and had the good fortune to succeed in formulating in writing an agreement that covered all the questions in dispute, most of which seemed to me to involve mainly questions of administration. This arrangement was completed on the Saturday preceding the Monday when the Cleveland Convention was to open. I secured its approval by Dr. Weizmann and

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his associates and was advised that it had the approval of Judge Mack and his associates. Here is the document which is attached marked "A" from which it will be seen that it covered every phase of the controversy. It certainly covered every question that was then regarded by either party as the subject of contention.

My information from all sides is that when the parties reached Cleveland the agreement thus reached was upset upon the wholly extraneous ground that Dr. Weizmann or one of his associates in the World Organization was reported to have insisted that the connection of Mr. Frankfurter and Mr. DeHaas must be severed. No such question had been raised or discussed at any stage of the negotiations and I would have resented such a suggestion with respect to these gentlemen, whose years of service and usefulness in the cause were entitled to the recognition and thanks of everybody concerned in it.

When Judge Mack informed me over the telephone that he understood such a condition had been imposed, I immediately communicated with Dr. Weizmann, who emphatically denied it and this denial was in turn put by me before Judge Mack, so that when that question was obtruded into the situation at Cleveland I could find no justification for such a course and I can still find none. Whether Dr. Weizmann had or had not at any time made such a condition or suggestion became immaterial after it had been withdrawn and repudiated by him. It is upon that ridiculous pretext that these splendid men were to part. I understand it to be now claimed that there were other reasons but am bound to say as one who is impartial between the factions that that contention seems to me an afterthought. I have read and reread the statement signed by Judge Mack and his associates to the delegates of the Twelfth Zionist Congress. If there is any substantial reason why this great movement should be split with dissension at this end nobody has yet furnished that reason. The document is filled with recriminations that always follow such a breach but when they are analyzed the onlooker is impressed with the feeling that they do not constitute the real cause of the controversy. Whatever may have been the mistakes or shortcomings of the administration in the past (and it would have indeed been strange if there had been none in the management of so huge an undertaking at so great a

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distance) their recurrence was amply safeguarded by the agreement that had been reached.

It is because this break occurred in the heat of passion based largely upon trivial personalities and not upon any fundamental controversial question of principle that I believe it can and should and will be healed. At any rate that shall be my task. The movement cannot afford and must not be permitted to lose the intimate aid and guidance of these representative and unselfish leaders of Zionism. If that can be accomplished I shall feel that I have at last made the greatest contribution within my limited power.

This is perhaps as auspicious a time and place as could be chosen to dispel the false impression that Nationalism is or has ever been any part of the program of Dr. Weizmann or of the World Zionist Organization or that the break between the two groups had anything to do with a dispute as to the use of any part of the funds for "Gegenstwartarbeit or Diaspora Nationalism".

The contention is completely disposed of by paragraph 2 of the agreement that I have read to you and which I herewith take the liberty of re-reading. It is in the following words:

> "The Keren Hayesod fund is to be used solely in Palestine. No portion is to be used anywhere else with the exception of such limited amounts as it may be deemed desirable to advance to immigrants for the purpose of defraying the expenses incidental to their voyage from their homes in Palestine".

At no time during the negotiations did Dr. Weizmann demur to this provision and there was no discussion upon it.

Here is still further proof on the subject if any were needed. I am as fundamentally opposed as any man in the movement to any Nationalist movement outside of Palestine and would have nothing to do with it on that basis as was made quite plain to Dr. Weizmann before I consented to head the Keren Hayesod in America and to which he readily assented.

Being somewhat disturbed on the question of whether such an issue might be precipitated at the Karlsbad Congress and finding that I might be unable to attend the Congress I wrote Dr. Weizmann from Karlsbad to Lon-

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don on August 2nd an extract of which is attached marked "B". I have here his reply of August 10th from London of which an extract is attached marked "C".

If that evidence and the proceedings of the Congress do not dispose of this bugaboo to the satisfaction of even so analytical a critic as the respected editor of the American Hebrew it looks to me as though it is because these gentlemen refuse to be convinced. Does it not strike you that way?

One further word and I have done. I have no quarrel with the non-Zionists, such as the American Hebrew, who by a lifetime of devotion to the cause of Jewry have earned the right to speak. However greatly we may deplore their attitude and the injury they are doing we know that they are sincere. My grievance is against those eleventh-hour carping critics who held their peace and took no part in the fight until they thought they saw a cleavage in our ranks and then rushed in to widen the breach; against those who whilst the power and prestige of the great Jewish names of America were solidly arrayed on one side lacked the courage to antagonize the cause; those pussy-footed individuals who moved very softly lest they tread upon the toes of the great and powerful but who roared like lions when they foolishly imagined that our temporary family differences spelled their opportunity.

But fortunately they reckoned without their host. I bow to no man in my confidence in the loyalty and devotion of the Brandeis-Mack group and their followers to Zionism. I will match it against that of any of its followers anywhere in the wide world. My sincere thanks to you, gentlemen, for your patient and indulgent attention.

"A".

June 3rd, 1921.

1. Since under the mandate, the World Zionist Organization is recognized as the legal body to cooperate with the mandatory, it must have the power to control the funds contributed for the upbuilding of the Jewish National Home in order that the activities may be effectively coordinated. It is therefore necessary,

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(a) That the Charter of the Keren Hayesod, Ltd., be so amended as to make it only a collecting agency for the World Organization. The contributors are to have a voice on the Keren Hayesod but the World Executive to have control.

(b) That the Keren Hayesod in the United States be the Agency of the World Zionist Organization and it is hereby also approved as such agency by the Zionist Organization of America, for the purpose of collecting contributions to the World Organization to be spent in upbuilding the Jewish National Home.

(c) That a method be devised for transferring the contributions already received in the United States by the Keren Hayesod, Limited, to the Keren Hayesod branch in the United States.

(d) That a method be devised for coordinating the activities of all Zionist and non-Zionist collecting agencies for the Keren Hayesod in the different federations.

(e) That all funds collected by the Keren Hayesod be transmitted monthly to the World Zionist Organization which shall be the disbursing agency.

2. The Keren Hayesod fund is to be used solely in Palestine. No portion is to be used anywhere else with the exception of such limited amounts as it may be deemed desirable to advance to immigrants for the purpose of defraying the expenses incidental to their voyage from their home to Palestine.

3. There shall be a quarterly budget established by a budget committee of the World Zionist Organization for the expenditures in Palestine. The local administrative officers in Palestine shall have no authority to deviate from such budget except by majority vote of the budget committee.

4. There shall be appointed as the official auditor of the World Zionist Organization one of the following three firms of accountants, either Touche, Niven & Company, or Price Waterhouse Company or Sir Wm. Plender, to be selected by the Executive of the World Zionist Organization. Such firm of accountants shall be authorized

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(a) To make a monthly report of the income and disbursements of the local administrative officers. Such monthly report to be forwarded to each of the constituent organizations of the World Zionist Organization.

(b) To furnish quarterly audits of the books of the World Zionist Organization, the Keren Hayesod and the administrative officers in Palestine, such quarterly audits to be forwarded to each of the constituent organizations of the World Zionist Organization.

(c) For the purpose of carrying out (a) and (b), the firm of accountants shall be authorized to send out a representative to remain on the spot in Palestine.

5. The Zionist Organization of America is to have substantial representation on that budget committee of the World Zionist Organization which shall have charge of the disbursements of funds and incidental thereto of the formulation of the budget.

6. The World Executive is to be so constituted by the Congress in the judgment of the Congress to command the confidence of all Federations and all Zionists and non-Zionists.

7. With the end in view of consolidating under one administration all Zionist activities in Palestine, a method shall be devised in agreement with the Joint Distribution Committee for eventually transferring the American Zionist Medical Unit and its funds to the jurisdiction of the World Zionist Organization.

"B".

Extract from letter August 2, 1921, Mr. Untermyer to Dr. Weizmann:

"I have been quite disturbed and unsettled by the knowledge I have gained of the point of view from which Zionism is regarded in these Central European and Southeastern countries and by the studies I have been able to give to the subject by reading and otherwise during my stay here. I have also had the opportunity of discussing the subject with a number of men identified

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with the Zionist cause, the most intelligent of whom I found to be Dr. Zollschan, who is a practicing physician in Karlsbad. Dr. Zollschan has, as you know, written a number of works and articles on certain phases of the question which I have been privileged to read. His point of view corresponds more nearly to my own and to that which prevails among a large section of the American Zionists than any I have yet encountered.

I was greatly surprised to learn that in some of these countries there is a large body of opinion that goes to the extreme of regarding Zionism as a purely nationalistic movement even to the extent of championing and insisting upon the view that the Jews in the various countries should set themselves apart in their communities and constitute themselves a sort of pseudo-nation. It is said that this view will be insisted upon at the Congress as one of the tenets of Zionism and some profess to believe that this point of view will prevail. It is of course contrary to all that we understand and if persisted in, I cannot but believe that it will prove disastrous to the cause in our country. So far as I am personally concerned (although that matters little or nothing to the cause), I would refuse to identify myself with any such movement or with any cause of which this view should form an integral part. To me it seems unpatriotic and I cannot conceive of any American or British citizen who above all things loves his country and its institutions assenting to be identified with any movement that involves a virtual separation or conflict in thought or feeling between his loyalty to his country and his racial aspirations, nor do I for a moment believe that you would subscribe to any such monstrous theory. It would serve only to divide your forces into contesting and bitterly hostile camps and is in no sense essential to our aspirations to secure a Homeland in Palestine for the oppressed Jews of the world which may, in time, develop into a national home.

If I thought that any such proposal is to be seriously considered at the Congress and that I could do anything as voicing the American point of view in bitter hostility to such a program, I would come to Karlsbad for that purpose. Much as I deprecate the idea of a sort of unofficial super-government of the Jews in any country, it is a matter not essential or germane to Zionism and with which Zionism as such should have nothing whatever to

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do. There is sufficient room in the movement for Zionists of all shades of opinion for men of any one shade of opinion to intrude their nostrums upon the body as a whole.

If you have time, it would interest and instruct me greatly to hear from you on this subject.

Why not permit the political future that would follow the colonization of Palestine by the Jews to take care of itself? It is not involved in the present phase of the movement and has no just relation to it. Great Britain has the Mandate and Palestine will be under British rule if the Mandate is accepted as we all hope it will be. The time for self-determination by the people of Palestine lies in the dim future. Not even a prophet of the olden times would undertake to predict the various changes and contingencies that may arise before that time arrives. Why take a chance of disrupting the work by now attempting to discount the future?

It is hardly necessary for me to remind you that I am a novice or of the amateurishness of my views, but this one point stands now and has stood from the beginning clearly before me. If the Congress so much as touches this subject of nationalism, it will in my judgment split the entire movement into so many pieces that no human being hereafter will again be able to put them together.

With kind regards,

Yours sincerely,

SAM'L UNTERMYER.

"C."

Extract from letter August 10th, 1921, Dr. Weizmann to Mr. Untermyer:

"I was sorry to read in your letter about Zollschan's conversations and suggestion. I do not know Dr. Zollschan at all personally, although I have read his books with great interest, particularly his first book on the Jewish race which seems to be the best scientific attempt at proving that there is a Jewish nation in the racial though not in the political sense of the word. . . .

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There is no shadow of truth in the assertion that nationalism is going to be the salient point of discussion at the Congress. It never has been, and it never will be. It is all a mere bogey which has unfortunately been started in America and is being imitated on the Continent.

I am sending separately the Agenda of the Congress from which you will see that our hands are full with other questions, and that we are leaving academic matters alone. I do not remember that these questions have ever formed the subject of discussion at the Congress.

It is quite true that certain Zionist groups, particularly the Polish one, did take part in the local political affairs of Poland, but they did not do so as Zionists, but as Polish Jews who happen to be Zionists. As always happens, particularly in European countries, the Zionists are the most active members of the Jewish communities and therefore participate in all matters concerning Jewish life. But the Zionist Organization *qua* organization has scrupulously avoided being dragged into internal political affairs, perfectly conscious of the fact that that would mean the destruction of Zionism.

Three years ago in 1918, when there were in Paris continuous meetings of Jewish delegates from all countries presided over by Judge Mack, and when attempts were made to drag me into the discussion of their political affairs, and when I was hard pressed by the people to use my political influence in favour of the various political demands made by the Jewish communities in the newly formed states, I flatly refused to do so on the plea that every ounce of energy which we possess must be thrown in in favour of Palestine; and that the political struggles of each community must become the burden of the respective Communities and not of the Zionist Organization. This line of conduct has been followed since, and I know of no deviation from it.

Dr. Zollschan was therefore not justified in raising this question at all with you and in causing you this uneasiness.

With kind regards

I am,

Yours sincerely,

CH. WEIZMANN.

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HOW TO SUPPRESS COMBINATIONS

AND

STIMULATE HOUSING

Address By

SAMUEL UNTERMYER

BEFORE NEW YORK STATE ASSOCIATION OF REAL ESTATE BOARDS,
AT SYRACUSE, ON OCTOBER 7th, 1921.

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Address of Mr. Samuel Untermyer before New York State Association of Real Estate Boards, at Syracuse, on October 7th, 1921.

I am here tonight at the earnest solicitation of the Joint Legislative Committee on Housing to discuss the Housing situation and the remedies for the present critical conditions with which your Association has such intimate concern. This is the first time I have been willing to accede to any one of the hundreds of invitations to present my views on this subject or to publicly refer to our work except in an official way at the sessions of the Committee. You will please understand that so far as concerns remedial legislation, they are *my* views and not those of the Committee.

The silence maintained by me on this subject up to the present time is due to my conception of the powers, duties and province of a legislative committee which some people may regard as a trifle old-fashioned, but holding as I do that point of view, my presence here calls for an explanation. That explanation is to be found in the fact that the Committee and its Counsel are agreed that the situation is so critical, not only in the City of New York but in all the great cities of the country, that this silence should be no longer maintained.

The powers of investigation lodged in the Legislature through its Committee is one of the most wholesome and at the same time one of the most drastic and far-reaching of any of the great legislative prerogatives. They should never be exercised except with the sole view of gathering the facts on which to base remedial legislation to correct evils or defects in existing laws. That necessarily involves exposing the evils that are sought to be remedied.

The powers thus granted should be exercised with great caution and conservatism and with a grave sense of responsibility, for they are vast and liable to abuse. For their proper exercise they necessarily at times involve the right to intrude into the business and private affairs of the citizens in order to be effective. They are *ex-parte* except to the extent that the Committee's sense of decency and fair-play permits both sides to be heard. It is impossible in the very nature of things that every witness called before a legis-

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lative committee should have the right to be represented by counsel. If that were permitted investigations would be endless and none could be conducted with profit to the State. They would develop into public wrangles and debating societies. In order to be effective and to command the public confidence they must, while conducted with energy and aggressiveness, be permeated by a highly judicial spirit. Inasmuch as the dominant political party is responsible for the life of the committee and the majority of its membership represents that party, it is not advisable that these investigations should be held during the excitement of a political campaign. If they are to influence the public mind and prepare it for needed legislation as they should, they must be kept absolutely free from the taint of partisanship or from the suspicion of political bias.

It was in that spirit that the Committee announced at the opening the hearings that whilst it would be impossible and contrary to all precedents of legislative investigations to permit witnesses to be represented by counsel, every witness would be accorded the right upon the conclusion of the examination of Committee's Counsel, to make any explanation he saw fit bearing upon his testimony and that if he so preferred he might examine the testimony after it had been transcribed and might then return to the witness-stand to explain it or modify it. The Committee went also the unusual extent of advising every person who might be implicated in any testimony given by other witnesses, to be present at the time and that he would be afforded the opportunity of immediately taking the witness-stand so that both sides could be immediately placed before the public and every chance of injustice thus avoided.

It was in the carrying out of that policy that Mayor Hylan was invited to appear in response to the testimony showing his transactions with Hettrick and to give any explanation he saw fit to make concerning the remarkable correspondence that took place between them and between him and the City officials concerning the limestone contract for the new court house, the ratification of which was happily averted by the exposure of that criminal transaction by the Committee.

It was on that occasion that Mayor Hylan testified under oath that he did not know Hettrick, although he "might know a man by the name of Hettrick" and as to

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which his intimate acquaintance and correspondence with Hettrick were afterwards overwhelmingly established.

The burden of the work of such an investigation rests upon counsel. Having regard to the vast powers thus exercised by him, subject only to the control of the committee, it is necessary that he realize at every step his public responsibility, that he knew neither friend nor foe, fear nor favor, and that he exercise the utmost restraint to avoid the appearance of sensationalism or of exploitation for personal or political purposes. Reputations are in his keeping and at his mercy; he must see that the scales of Justice are evenly balanced and that no wrong is done. The besetting sin of most of these legislative committees has been their partisan attitude and willingness to accept hearsay evidence which in times past has done such grave injustices and has in the end reacted, as it should, upon the committee that has been willing to surrender to the temptation thus to abuse its power and from whose action there is no redress except in the forum of public opinion.

May I be pardoned the one boast that the Lockwood Committee has kept absolutely free from every personal or political consideration and entanglement? In our discussions we have not known one party from another; no hearsay evidence and no evidence that would not be admissible in a court of justice soils the pages of our record. So rigid and scrupulous have been the methods of the Committee that every document has been proven as though it were being offered in a court of justice. Whilst this procedure has prolonged our proofs and has seemed at times irksome and unnecessary, especially where there was no doubt about the authenticity of the document in question, this policy of "hewing to the line" of legal evidence, has, I think, justified itself in the end in the public confidence with which the work of the Committee is regarded.

It is for this same reason that I have declined to continue the hearings of the Committee during the pending political campaign although the majority of the members of the Committee were anxious, as was I, to resume the sessions because the time is so short to complete our evidence and prepare our report and recommendations for legislation during the approaching legislative session. Much is to be said for their point of view but I believe still more is to be said in favor of

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avoiding even the appearance of activities that may be charged and by some believed to be political, even though it were not true.

Of all the domestic problems that confront the country at the moment that of Housing is the most critical and urgent and the one that has received the least intelligent consideration at the hands either of the Federal or State Government. It is estimated that the item of Housing represents about one-fifth of the cost of living in all of the great cities of the United States. It is, of course, by far the most important of the items of cost. A famine in Housing with its accompanying invitation to extortion, profiteering and exploitation is therefore by far the greatest deterrent to any effort to secure a reduction in the cost of living. Until a condition of normalcy in that item can be restored no substantial reduction can be expected. It is not only far-reaching in its direct effects but it indirectly inflates every item that enters into the cost of living, for the reason that increased rents on business places must be added to the cost of everything we buy.

It is, of course, impossible to separately review in detail or with accuracy conditions in all the communities of the State within the limited time at our disposal tonight. I believe that conditions in the City of New York, although more acute than in the smaller cities, fairly represent general conditions throughout the great cities of the country. We are told from time to time that these conditions are improving. I wish it were true but I find the contrary to be the fact. In my judgment they are growing worse and we are being foolishly misled and our fears set at rest when they ought to be kept continually alive and so spur us on until the problem is on the way to solution. A false sense of security may prove our undoing. We should meet the situation face to face in order to cope with it before it is too late. What then are the facts?

Here is a statement year by year from 1910 to the present time, of the population of Greater New York, showing the increase or decrease in the number of tenements and apartments for each of these years, from which you will note that whilst the population from 1918 to the present time has increased over six per cent there has been a large decrease due to fire, demolition or conversion in the number of available tenements and an actual

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decrease for the past 18 months in the number of apartments.

Year	*Population of Greater New York*		*Tenements*		*Apartments*
1910	4,766,883		plus 80	plus	11,702
1911	4,822,950		plus 588	plus	21,495
1912	4,879,017		minus 735	plus	13,894
1913	4,935,084		minus 839	plus	5,326
1914	4,991,154		plus 73	plus	21,557
1915	5,047,221		plus 522	plus	17,094
1916	5,161,786		plus 1007	plus	21,507
1917	5,276,351		plus 888	plus	19,923
1918	5,390,917		minus 1006	plus	5,451
1919	5,505,482		minus 62	plus	1,297
1920	5,620,048		minus 236	minus	1,616
		Jan. 1921	minus 381	minus	219
1921	5,734,513	July 1921	minus 156	minus	209

The statistics taken in their entirety are startling and most discouraging. In 1910, when the population of the City was 4,766,833 there were 844,599 apartments available in New York City. In 1917 when the population was 5,276,351 there were 981,843 apartments available, being an increase of 134,249 apartments to meet an increase of approximately 624,034 in population.

The population in Greater New York as of July 1st, 1921, is estimated at 5,734,613 and there were then only 982,771 apartments available or an *increase of only 923 apartments to meet an increase of 342,696 in population.* As against an increase of 157,249 apartments in 9 years before the war, we have an increase of 923 apartments for the last 3½ years. There have, of course, been more than 923 apartments constructed during that period but the demolitions due to fire, old age and conversion to business purposes has brought the net increase of available dwelling space in 3½ years to less than 1,000.

From 1910 to 1917 inclusive there were net annual gains in available dwelling space of 16,570 apartments per year.

As against this here is a table of the net increases and decreases of construction in apartments for the years 1918 to July, 1921, inclusive, from which it will be noted as above stated, that there have been actual losses from 1920 to the present time.

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Year	*Number of Apartments*
1918	a gain of 5,451
1919	a gain of 1,297
1920	a loss of 1,616
Jan. 1 1921	a loss of 219
July 1 1921	a loss of 209

The sum total of these figures shows that construction fell behind 69,797 apartments from 1917 to July 1st, 1921.

From 1910 to 1917 an average of 24,922 new apartments were built each year. From 1918 to July 1st, 1921, the following construction in dwellings took place:

Year	*Number of Apartments*
1918	5,706
1919	1,624
1920	4,882
July 1st 1921	1,183

This shows an average of 3,642 new apartments constructed in the post-war period, so that the gross construction fell behind 73,832 apartments. The *gross* construction in 3½ years fell behind 4,034 more than the *net* construction which, as above stated, fell behind 69,797. All these calculations are based on official figures showing a shortage of nearly 70,000 houses on July 1st, 1921.

I see a dim ray of hope, but only a dim ray, in the record of the Department of Buildings, from which it appears that whilst in 1920 there were plans filed providing homes for 7,345 families there have been filed up to September of this year, plans for 25,441 families (which is still below normal), but experience has shown that there is a great hiatus between the plans that are filed and the houses that are actually constructed on them.

Wellnigh the same situation exists in all the great cities of the country and in all parts of the world. The only difference is found in the fact that other countries are doing something to correct this grave menace to our health, growth and prosperity whilst we have as yet done nothing. In France the Government lends money to home-builders at 2½% for which the Government has to pay 7 or 8% on borrowings. The budget in England contains an estimated loss of $100,000,000. per year for

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60 years represented by subsidies for the construction of houses.

I do not approve of government aid in our country. It is not necessary. If we will put a stop to the misuse of the billions in the savings of the people and insist upon their being directed into the channels where they will yield the safest investment, the best returns and the highest public service, this situation will correct itself provided the cost of building can be forced to a normal level by putting a stop to the criminal conspiracies that are restricting production and maintaining artificial, exorbitant prices for building materials. A reduction in this overshadowing item of the cost of living through reduced rentals will automatically bring a corresponding decrease in the cost of labor, which is already low as compared with the general increased cost of living.

I do not subscribe to the wholesale assaults upon labor costs or to the view that labor is in any considerable degree responsible for retarding building. The mechanic and the laborer can buy no more for the wages that are paid him today than he could have bought ten years ago for the wages he then received. It is not he who has "screwed up" the cost of living by his increased demands. He has done his part in a way but it has been forced upon him by the pressure from behind in the way of increased costs of living to him. The profiteers and the criminal combinations have compelled him to ask more in order to secure a living wage. They have led the procession of rising prices and it is at them that we must first strike to secure reduced costs of living in the way of labor as well as of material.

Lest there be any doubt on this subject, suppose we glance for a moment at the statistics of *wholesale* prices of building materials from January, 1917, to September 1st, 1921. Mind you, this is the range of *wholesale* prices only. It does not take into account the exploitation that is still being practiced by jobbers and retailers on a large scale and adds enormously to the inflated costs of building.

The United States Government uses 100 as a unit to indicate *wholesale* prices of commodities. In April, 1920, building materials reached a maximum of 341 while general commodities, notwithstanding the extent to which they, too, have been exploited in every direction, were at their highest point at 272. In December, 1920, building

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materials fell to 266 while general commodities fell to 189. In February, 1921, while general commodities were at 177, building materials were still at 222.

The following statistics are from the Bureau of Labor Statistics of the U. S. Department of Labor. They show the index numbers of wholesale prices of lumber and building materials and of commodities in general by months from 1917 to September, 1921:

Year and Month	*Lumber and Building Materials*	*All Commodities*
1917		
Average for year.....	124	176
January	106	151
February	108	156
March	110	161
April	114	172
May	117	182
June	127	185
July	132	186
August	133	185
September	134	183
October	134	181
November	134	183
December	135	182
1918		
Average for year.....	151	196
January	136	185
February	138	186
March	144	187
April	146	190
May	148	190
June	150	193
July	154	198
August	157	202
September	159	207
October	158	204
November	164	206
December	164	206
1919		
Average for year.....	192	212
January	161	203
February	163	197
March	165	201
April	162	203
May	164	207
June	175	207

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Year and Month	*Lumber and Building Materials*	*All Commodities*
July	186	218
August	208	226
September	227	220
October	231	223
November	236	230
December	253	238
1920		
January	263	248
February	300	249
March	325	253
April	*341*	265
May	*341*	*272*
June	337	269
July	333	262
August	328	250
September	318	242
October	319	225
November	274	...
December	266	189
1921		
January	239	177
February	222	167
March	212	162
April	203	154
May	202	151
June	202	148
July	200	148
August	198	152

During all this time there were no increases in labor comparable to these.

I am and have always been a champion of organized labor. I regard the slogan of the "open-shop" as a fraud. It is the old "stop-thief" cry. In my opinion there is no such thing. In its final analysis a shop is either union or non-union. In times of depression when there is an over-supply of labor, the non-union workmen are retained and the union workmen discharged, from the natural desire of the owner to secure a more complete control of his business. In times of great business activity when there is an undersupply of labor, the union gets the upper hand and forces out the non-union men.

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The greatest enemy to our industrial life and peace based upon a friendly understanding between capital and labor is in my opinion the United States Steel Corporation which under the pretext of the open-shop has been for years concentrating its vast power in the carrying on a country-wide campaign of espionage and oppression aimed at the destruction of all organized labor. The reports of the Interchurch Association must have convinced any fair-minded man if he had not previously been a student of the subject and had been unacquainted with the "second-story bludgeon" methods of the company in dealing with labor, that the Steel Company will sooner or later have to be brought to a severe reckoning before we can have industrial peace in this country.

What an impertinence for a combination, in itself illegal, to say that whilst it may maintain its strangle-hold over industry no combination of its workmen with others for protection against its autocratic power shall be recognized! The mere fact that such a stand is tolerated is in itself a grave indictment of our form of government. We have a characteristic object-lesson of the methods of the Steel Companies in dealing with their labor and with the public in the testimony before our Committee. The Companies determined to destroy union labor in the building industry in the Cities of New York and Philadelphia as a preliminary to their campaign throughout the country. So they organized the National Erectors' Association of which most of the great Companies were directly or indirectly members. They also organized what is known as the Iron League in New York City. The U. S. Steel Corporation was not directly a member either of these criminal conspiracies. It never is. But in the final analysis it dominates them all the same whenever it suits its purpose to do so. Prior to 1919 any New York City builder could buy his steel f. o. b. alongside the New York dock and construct it with union or non-union labor as he chose. The fact was, however, that as all the other industries allied with the building trades were using union labor, it would be necessary for the builder to erect the steel with union labor and that is what he had been doing.

All of a sudden in 1919 he found that he could buy no steel f. o. b. and that the only way he could get steel for his building was by purchasing it from a member of the Iron League, (steel manufacturers), erecting it by non-union labor. Besides thus increasing construction

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costs in order to wage their warfare against union labor, the Steel Companies put the builders in the predicament of having strikes of organized labor on all their buildings.

That furnished Brindell his opportunity. It was the unlawful activities of this combination that was, more than any one factor, responsible for Brindell's meteoric rise to power and ill-gotten wealth. He would threaten a strike on the ostensible ground that non-union labor was being used in the steel construction and when told that he knew that no steel could any longer be obtained except on that condition, he would exact and the builder would be compelled to pay blackmail in order to permit the construction to proceed. This Iron League and the National Erectors' Association as shown from their own minutes, is the most vicious form of criminal conspiracy. Upon my insistence, the facts were placed before a Federal Grand Jury during Attorney General Palmer's administration but strange, no—not strange—to say no indictment was found. Subsequent inquiry developed the amazing fact that contract to the custom prevailing throughout the country in federal investigations before grand juries, certain of the defendants were permitted to go before the Grand Jury which in my opinion accounted for the failure to find an indictment.

But that is far from the end. We are now told that this criminal conspiracy has been disbanded and that any builder can, at least for the moment, buy his steel f. o. b. and erect it with union labor. If a man is arraigned for having picked my pocket last year, it is no defence for him to say that he has stopped picking pockets pending his trial and yet some of the federal authorities seem to imagine that because these great corporations have under the stress of this Investigation and from fear of punishment temporarily stopped picking the public's pocket, they have thereby absolved themselves from responsibility for their criminal acts. If that be so why should not all criminals go merrily on until they are caught and then plead as their sole defence, that they have stopped!

I admire and respect the patience, moderation and respect for law of the great body of organized labor in the face of the persecution to which it has been subjected at the hands of the United States Steel Company and its instruments. Of course there are occasional grafting and corruption in the ranks of organized labor as there are in

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other industrial activities but it is rare and on a small scale. It amounts to the most insignificant form of petty larceny as compared with the gigantic proportions in which the public is "sand-bagged" and "held-up" by the innumerable criminal combinations of industrial buccaneers that infest the country. The methods of these few labor pirates are so crude and they must necessarily work through such open agencies that it is not difficult for the law to reach and punish them. If it were as easy to get at the other fellows, our problems would be readily solved. It was no great task to expose the operations of Brindell and the four lieutenants through whom he operated in blackmailing building operations in the City of New York to the extent of well over a million dollars within less than a single year. It required less than four months from the time we started upon our Investigation to land him and his lieutenants in prison. One of the four lieutenants escaped the jurisdiction with three indictments hanging over him and has not yet been found but the others are safely in jail.

It was not a much more difficult task to reach the smaller employer such as the plumbing, lime-stone, building material and other lesser dealers and contractors who had entered into secret combinations to boost and keep up the prices and restrict the output of materials, and to lay hands upon Hettrick who was the legal architect and manager of some of these organizations. Hettrick is now serving a maximum sentence of three years and a number of his victims and co-conspirators to the extent of twenty or more, have received jail sentences.

It was when we started at the big, powerful fellows in business, financial and political life among the employers that we encountered our real problems, as I predicted from the beginning. Everybody agreed that jail was the right place for the small offender whether a labor leader or an employer but when it came to punishing the big offenders, we struck a snag in every direction. We were warned that business and finance were in a very sensitive state and we must on no account do anything that would look like a crusade against "big business"—as though it were positively disloyal to bring to justice important offenders for the crimes for which the small men were being punished with general public approval and satisfaction! When we reached that stage even the Federal Government and members of the Cabinet took a hand

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and announced that there would be no "drive" against big business—whatever that may mean.

The dealers in building materials were peculiarly fortunate in the tribunal before which they were arraigned on their pleas of guilty of violating the State law against criminal conspiracies. Against our protests and in the face of our appeals that this vicious circle could not be broken unless these offenders were sent to jail, the court before which they were arraigned was of opinion that the "humiliation" of being compelled to plead guilty to a criminal offence accompanied by the payment of fines that amounted to less than one-one hundredth of one per cent of the money out of which they had robbed the public was sufficient punishment. And so the thousands of other offenders of their class who had temporarily abandoned or pretended to have abandoned their criminal practices and had crawled into their holes to await events, emerged boldly forth to resume their old-time activities, encouraged and re-enforced in the belief that Justice errs on the side of mercy and is not quite so blind as it sometimes seems to be!

But I think it will be found that these gentlemen, big and small, whose numbers are legion and who cover not only most of the industries connected with the building trades but a large proportion of the other activities of the country, will find before long that they have reckoned without their host and that there is a day of stern reckoning ahead for them.

As a result of our persistent demands, the Federal Government has finally taken a hand with us in the game and I am satisfied that they have become convinced of the gravity of the situation and are at last in dead earnest. It took a long time to interest them but we are now together on the job hand in hand. Indictments have already been found against 150 and more individuals and corporations constituting the Cement Trust, the Terra Cotta combination, and the Tile, Grate and Mantel Manufacturers, jobbers, dealers and contractors, covering the entire country. Others are under way and will, I believe, soon follow. Trials will soon begin in the Federal and State Courts. Col. Hayward is sincere and enthusiastic and has been from the beginning. He realizes the significance of this movement to force business back to the normal healthy condition of competition. He has gath-

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ered about him special assistants of fine ability—such men as Messrs. Podell, Duer and Wise.

What we most urgently need at this time in order to press the many cases we have in hand is a large staff of able assistants and investigators. To that end we must have at once an appropriation from the Federal Government to enable the Department of Justice to cope with this vast undertaking. We must also have the force of public opinion behind us. The Attorney General and Col. Hayward are lending every possible aid with the limited force and money at their disposal but they are severely handicapped from lack of funds and it is impossible to accomplish the task without more money and a large additional staff. If there is to be a thorough clean-up we shall need at least $250,000 now and perhaps more later. I am satisfied that the people of the country could make no investment that would bring a fraction of the relief and practical results that can be had from this expenditure, and none more urgent. The object-lesson of 500 or 1,000 of the many thousands of law-breakers who have been masquerading as prominent business men, behind prison-bars will do more to bring back business to an honest basis than anything we can do. It is the only way and unless it is done quickly the Government will no longer be able to cope with these forces.

At no time since the passage of the Anti-Trust Law in 1890 have the criminal laws against conspiracies in restraint of trade been enforced. Neither the Federal Government nor the State Government in New York have ever really believed in the efficacy or in the economic wisdom of these laws; otherwise the country would not be facing the conditions that confront it today, where a great proportion of all the industries of the country are dominated by these combinations. There was a time when many of the best and most sincere experts in economics believed that combinations should be permitted under Governmental regulation and there is still a considerable body that adheres to that belief. There is another school of economics which whilst recognizing that competitive conditions should be restored in this country, have reached the conclusion, due to the inability or unwillingness of the authorities to enforce the laws, that since combinations have been permitted to grow in number and power to such an extent that to exterminate

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them would amount to an indictment of a large proportion of the entire business community, and especially big business, the only alternatives remaining to us now is tolerating them and regulating them so that they do not prey upon the public. If effective regulation were possible that would probably be the better policy but that furnishes no excuse for failing to destroy those that are operating secretly and in violation of existing law. We can deal with the question of regulation as an independent proposition. We must first enforce the criminal laws against these people as they are enforced against other law-breakers.

My recent study of conditions in Great Britain and Continental Europe has convinced me of the increasing necessity for exterminating and punishing these trade conspiracies, because I believe that this country will have to protect itself by tariffs still more adequately than it is now protected against foreign competition. When a skilled workman in Germany can live comfortably with his family at thirty cents a day of our money and on less in Austria, Hungary, Czecho-Slovakia and other Eastern and Southeastern countries of Europe, we shall not be able to keep our men at work as against that sort of competition without a protective tariff that shall be equivalent to the difference in labor costs. I have always been a "Randall Democrat"—a believer in a tariff for protection rather than for revenue, and my experiences in Europe have confirmed me in the opinion that at no time in our history was it so essential as at this moment. The necessary tariff restrictions against foreign competition renders it all the more essential that the channels of home competition shall be kept free and open. So long as these combinations would have to compete against the world their peril to our country is not nearly so great as where they would have the field to themselves in this country. That would enable them to extort from the people whatever prices they pleased. Even if foreign goods are required to pay high duties we can be protected against undue exactions only if we can restore healthful competition at home. If we permit that to be choked or clogged, we are helpless. Herein lies the great importance of punishing every man who under cover of the protection he gets from his Government seeks to stifle competition at home.

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There will accordingly be asked from Congress as well as from the New York State Legislature, an amendment to the Laws against trade conspiracies so as to take from the courts the power to permit this class of offenders to escape with fines and to require that the punishment of imprisonment shall be imposed. The entire administration of justice has been brought into contempt by imposing fines in these cases after the expenditure of months of effort in preparing the complicated facts for trial and after an outlay by the Government in most of these cases equal to many times the amount of the fines collected.

The scarcity of building and the present abnormal building costs are due principally to two factors, both of which can and will be corrected if we can but bring home to you and those like you the peril of the present situation:

> (1) To the fictitious maintenance of prices through secret and criminal combinations among competitors in almost every line of industry embraced within building construction, and
>
> (2) To the inability to obtain money for building purposes or upon improved property upon the very best of security due to the restrictions of the loan market.

I have dealt in a general way with the former. Few departments of industry can be mentioned that are not at some stage artificially controlled. In some of the cases the control extends from the raw material down through the manufacturer, the jobber, the contractor and the retailers, so that at every point an abnormal profit is taken. As a result of the activities of the Committee, whilst that condition is not true in the building trades to the same extent that it was a year ago, it still exists and I attribute its continuance largely to the want of cooperation on the part of the courts as evidenced by their refusal to send the guilty men to jail. I can name important lines of industry essential to building where the prices are maintained at anywhere from 400 to 800% over what they were before the war and where criminal agreements have existed and still exist under cover and a more guarded way between labor unions and unions of employers in a given line of industry, that is largely responsible for this condition. The employer gives the union illegitimate protection while the latter safeguards the employer against

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competition outside the Employers' Association and thus assures the latter extortionate profit. Employers who may want to compete are literally forced to join these Associations and to become parties to the conspiracies under penalty of being unable to secure skilled labor and many who refused have been driven out of business.

But above and beyond all these considerations lies the absence of a loan market. Without it there can be no construction on a large scale. The principal expenditure of the Committee in connection with this Investigation has been in the employment of expert accountants. We have had at times as many as fifty men working on this stupendous undertaking and have expended upwards of $40,000. in that direction. The significance of the figures already produced before the Committee has never been understood. The subject is too technical to arrest general public attention but the results are overwhelmingly convincing. These proofs show the investment operations of all the leading life, fire and casualty insurance companies of the Uniited States and of all the savings banks in the State of New York and of New York state banks and trust companies, all covering a period of fifteen years and separately stated year by year. They demonstrate to a mathematical certainty that year in and year out throughout all the states of the union, the investments of these public corporations on bond and mortgage on improved real property have been easily the safest and most conservative and that they have yielded by far the lest returns of any of their investments. The losses have been only a fraction of those suffered on investments in railroad bonds and in bonds and stocks of industrial and other Wall Street securities and the income from them, quite independently of the question of losses on capital, has been from 15 to 20% higher.

From these statistics it further appears that the savings banks of the State of New York have an average of upwards of 49% of their total assets invested in this class of security. The best, largest and most prosperous of them have from 50 to 65% and over so invested. Every savings bank depositor has the right to withdraw his entire deposit on sixty days' notice, whilst the life insurance company tables show a well-defined ratio of losses per year and this is true also with rare exceptions of fire and casualty insurance companies.

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And yet the great life and fire insurance companies that are the trustees for the masses of the people and that hold these billions of money for them are not willing to apply 40% of their investible funds in that way. The great fire insurance companies have practically no investments on real estate mortgages; they prefer to put a large part of their money in "wild-cat" Wall Street stocks. You will find their lists loaded down with oil, copper and other varieties of industrial stocks, the depreciation on which has been enormous. Life insurance companies were prevented by the Legislature of 1916 from making further investments in stocks and were required to sell their stocks within five years. Some of them, notably the Mutual Life Insurance Company, are still holding many of these stocks after fifteen years; strangely (and to the discredit of the Legislature be it said), they were able to secure further legislation permitting them to hold them indefinitely and this, too, on the recommendation of the Superintendent of Insurance! A few of the great life insurance companies, notably the Metropolitan Life, have done splendid public service in the pressing Housing emergency and have at the same time done well for their policyholders, by making large investments on bond and mortgage on residential construction toward assisting the building of small homes. The investments of the Metropolitan on real estate loans have increased from over $72,000,000 to upward of $400,000,000 whilst companies like the Mutual Life have been calling their loans, and decreasing their real estate mortgage investments in the ratio on which their assets are increasing.

The question for the citizens of this State and for their Legislature to determine is as to whether this performance is to be permitted to continue. The men who control these institutions, without having a dollar of financial interest in them as though the assets were their own, and who are a self-perpetuating body subject in practical effect to no control but their own sweet wills, are defiantly refusing to devote any part of the policyholders' money toward the relief of this situation. Apparently no moral pressure and no sense of duty will move them. The ability to wield power in the financial world through the control of these vast trust funds is one that they will not voluntarily surrender. Bond and mortgage investments carry no such power. Nothing short

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of legislation will move them and we shall accordingly have to resort to the Legislature where we shall need your help.

(1) Fire insurance companies must be prevented from investing the funds of their policyholders in "wild-cat" stock and other securities and must be limited in their investments, as trustees of estates and life insurance companies are now limited and are to be limited.

(2) As above stated, 49% is the average proportion of savings banks deposits now invested on bond and mortgage on real estate but some of the banks have a greater proportion invested and some have far less. Why should not 45% be the minimum of the deposits to be so invested? In that way the delinquent institutions would be compelled, up to a certain point, to do their duty.

(3) The greatest, most successful and best managed life insurance company in the United States, the Metropolitan Life, *has now about 40% of its one billion and over of funds invested in bond and mortgage on real estate* and another $120,000,000 in U. S. Government bonds. Why should there not be a minimum required for New York companies and for other life companies doing business in the State?

The same cry that is made against this proposal was made in 1906 when the companies were forbidden to make further stock investments. It has proven a wholesome reform. The companies have grown and thriven under it. Those who have been slow to obey the law and have secured its extension from time to time have lost vast sums through that policy. Those who have sold in time have been the gainers.

The same stale old line of argument that the financial institutions urged against the Armstrong legislation, against the Federal Reserve Act and against every reform that has been forced upon them, and to the enactment of which against their violent protests, they owe their prosperity, is trotted out by way of opposition to this proposed legislation. We are told that if New York State puts any such limitation upon investments of these companies as will require a percentage to be placed upon bond and mortgage within the State, every State in the Union will make a like requirement with respect to the proportion of the dividends collected within that State.

We have no right to assume anything of the kind and I believe it is no more true than have been many of their false fears and prophecies in the past. New York im-

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proved real property is recognized the country over as an exceptionally prime and marketable class of investment. It is in a class by itself. The same is not true of other communities, with few exceptions. We are bound to assume that the main concern of each State is for the safety of the dividends collected from the citizens of that State, the welfare of their policyholders and that no selfish consideration will control their action. The authorities know that there is no place where there is such certainty, profit, safety, marketability and stability of values as there is in this class of security when limited, as it should be, to 60% of the appraised value of the property.

But even if these familiar false alarms were true, the statistics that are in evidence before the Committee will demonstrate that if every state in the Union were to pass such laws as are suggested by the pretended fears of these gentlemen, we would still get hundreds of millions of money annually for real estate investment from those companies based on the proportion of their business in the State of New York, if we require them so to invest a proper proportion of their funds.

But why, may I ask, should the other states object to such a limitation when they have never objected to the dividends of their policyholders being invested in all sorts of Wall Street securities and of railroad properties which have no market and in which they have no interest or concern? Why is it not fair to assume that since mortgage investments have proven the safest and yielded the best returns over a long series of years, they would rather see them so invested than that they should be used as "chips" in the game to augment the power and riches of their self-perpetuating trustees? It is a mere bugaboo to frighten the timid and unknowing.

The same line of talk is threatened by the fire insurance companies, some of whom are and have been for years, literally gambling with their policyholders' monies for the benefit of their stockholders and who want to be permitted to continue to do so on the specious pleas that their assets must be "liquid" and that real estate mortgages are not liquid.

The plea is not only specious; it is intellectually dishonest. They hold millions upon millions of securities that are rarely dealt in on the Exchanges and that it

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would be far more difficult to sell than would be a gilt-edged mortgage. Anything is liquid at a price. When they talk of liquid assets do they mean that they could sell them on short notice without loss, to cover exceptional requirements for money? Of course not. They might be able to sell a few of them at a great sacrifice and perhaps not at all.

But if they wanted to sell a high-class 6% first mortgage on improved property they could always get par or nearly par for it. If any company or number of companies wanted to sell all of that class of mortgages upon advertisement on the auction block at a discount of 10%, they would sell like hot-cakes! For it must be remembered that they have average due dates of less than eighteen months. If they wanted to sell them at a 10% discount, it would mean that the purchaser would be getting at least 12½% on his money on the best security in the world. It would never be necessary to make any such sacrifice and it would be criminal to do so but if it were necessary how trivial would be that sacrifice as compared with what they would have to do in order to get rid of speculative securities or even to dispose of the average class of high-class railway or other bonds that they hold.

I charge that there is no sincerity whatever in the claim and that the argument is a mere cover under which they hope to be permitted to continue in the control of these funds to the disadvantage of their policyholders and of the public.

There is no time here to go into detail for the purpose of illustrating this argument. I ask that you consider the subject with painstaking care and if you believe we are right that you lend the impetus of your great influence toward opening up the coffers of these companies that contain your money and force these astute gentlemen to use part of this money in the interest of the owners of that money, as we have overwhelmingly proven it to be.

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A CONSTRUCTIVE CRITICISM

OF THE

TRANSIT PLAN

ADDRESS BY

SAMUEL UNTERMYER

Before The City Club

Thursday, October 13th, 1921

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A Constructive Criticism of the Transit Plan

Address by Samuel Untermyer before The City Club, Thursday, October 13th, 1921

I approach the discussion of the tentative Plan of Reorganization put forth by the distinguished members of the Transit Commission with diffidence and with a feeling of respect and appreciation for the sincere, intelligent and painstaking effort that is manifest in every line of the document. It deals with one of the most complicated problems that ever confronted a municipality and frankly meets every contingency in a way that entitles it to the thanks and to the confidence of the community in its integrity and disinterestedness of purpose, however greatly we may differ from its conclusions.

In the criticisms of the Plan that I shall present I realize also that there is nothing conclusive about the proposals; that the Commission has an open mind and that it has very wisely put forth this proposed Plan to invite constructive criticism and correction.

It is for these reasons that I deeply deplore to find myself at variance with the Commission on many important points and to have been impelled to the conclusion that in its present form the Plan is unsound and unjust to the City in most of its fundamental and essential features and should be contested. It could hardly have leaned more heavily in favor of the railway security-holders if it had emanated from their own offices, which I know is not the case, for I unhesitatingly accept without reservation the assurance of the Commission that, in so far as they know, the Companies had no part in its formulation, that they have not been consulted and were not even aware of its contents until it was publicly issued.

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The roads and their security-holders have already begun their publicity campaign to put through this Plan with as few changes as possible by widely advertising their opposition to it. We are told that public hearings by the Commission will begin on Monday next and that the railway officials will then testify. These hearings should be postponed. The Commission should allow time for the employment by the City authorities of expert Counsel who are familiar with railway reorganizations and who in conjunction with the Counsel for the Commission should be accorded the privilege of cross-examining these officials and every other witness who may be called, either openly or covertly in the interest of the roads. I have every confidence in the sincerity and integrity of purpose of the learned Counsel for the Commission but he will naturally try to justify the Plan. The City should be represented by Counsel in these proceedings who will uncover its defects.

I attribute what I shall endeavor to show to be its injustices and defects to the unfamiliarity of the distinguished members of the Commission with the intricacies of financial reorganizations of insolvent railway corporations, which is a highly technical and specialized department of law and finance, as against the matchless wit, resourcefulness and experience of the astute experts representing the Companies and the various Committees of security-holders with whom the Commission has necessarily had to come in contact. In plain English, I believe they have "had the wool pulled over their eyes" but it is fortunately not too late to restore their sight.

The following is a summary of the objections and suggestions of changes that I propose to discuss with you this evening:

(1) I most emphatically protest against the provision for a barometer or sliding scale of fare that will furnish a perpetual guaranty for the payment of the principal of the bonds that are to be issued for the properties, thus creating at the expense of the fare-payers of the City the highest grade bond anywhere extant today, not excepting U. S. Government Bonds, with an assured interest return of 5% and a possible "return" of 6½% per annum.

My contention is that the Plan should on the contrary absolutely limit the fare to five cents and that if that

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involves temporary deficits (which the Commission does not anticipate and to which I agree), they shall be provided for as hereinafter explained.

(2) I object to the suggested method of securing future investments by the City for extensions (estimated at $250,000,000. at the rate of $50,000,000. per year). The proposal to place the security for such payments in a position even less advantageous than the bonds that are to be issued for the properties, or even to place them alongside of and on a par with the purchase-money bonds, I consider grossly inequitable, for the reasons hereafter to be stated.

This new money should be represented by a prior-lien bond *ahead* of the purchase-money bonds and *ahead* of the bonds of the same class that should be issued to the City for its present investment of $233,000,000. in the City-owned subways.

(3) The accrued taxes of over $13,300,000. now past due and all taxes that may be imposed before the Plan takes effect, all of which the Commission proposes to cancel and forgive, should be paid and funded in prior lien bonds.

They are now liens ahead of all the securities on these properties. The roads can be forced to pay them. The properties may be sold free and clear of those liens if they are not paid. Why should they be cancelled? If, as the Plan seems to contemplate, physical value of the property is to be a basis and the security-holders are to get a guaranteed bond, and their damage and tort claims are to be provided for, (as they certainly should be, in full, even at the expense of the bonds, if necessary), what, pray, are they sacrificing to entitle them to secure the cancellation of the $13,300,000. of tax liens that are ahead of them? If it be said that the $233,000,000. subway debt which now ranks subject to the $200,000,000. of bonds held by private investors is to rank equally with such bonds in the Plan, my answer is—thank you—for nothing. If all the bonds are to be guaranteed by this barometer fare and paid for by the travelling public by increased fares it does not concern the security-holders how many bonds other than theirs are issued, or to whom nor what are their relative priorities.

(4) I object that the $233,000,000. which the City now has invested in its subways that are to be turned over to "A" Company and to be subjected to the lien of the bonds to be issued for the properties, is not to be likewise evidenced by the physical issue and delivery of

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bonds to that amount, at the time the bonds are issued for the other subway properties. Who knows whether the City may not in the future want to sell or hypothecate these bonds without regard to its debt limit. Does not the City's money, representing its construction investment look as good as the private money that was put in at the same time? True, it now stands subordinated, which was an outrage, but we are now making a new deal in which the Commission proposes to put it alongside. And yet the Plan goes only part of the way in carrying out its own proposals in that respect.

At page 10 of its Report the Commission calls attention to the fact that the effect of this sliding scale will be to relieve the debt limit to the extent of the $233,000,000. present investment that will thus be assured its interest and amortization and so pave the way for the necessary future investments for extensions, all of which is true.

But at what a sacrifice, if it involves increasing fares! If it does not and if these charges can be met by a five-cent fare as the Commission expresses the opinion at page 9 of its report and as I believe that they can, this item will thereby be relieved from the debt limit. It is difficult to imagine a more unsound or extravagant form of financing than this would be. If the Commission's opinion proves to be justified, there will be no deficits for the City to finance under the plan suggested by me. If the Commission proves to be wrong the securing of the City's new money by a prior lien bond (which renders certain the payment of its interest no matter what may temporarily happen to the interest payments on the purchase-money bonds) will relieve that $250,000,000. from the debt limit instead of relieving the $233,000,000. of present investment. It would be in that respect a case between tweedledum and tweedledee except for the outstanding fact that the five-cent fare will have been preserved without increasing the debt limit beyond that contemplated by an increased fare and nothing will have been gained in the direction of the debt limit by this vicious provision for a sliding-scale fare.

(5) I do not object to laying aside and appropriating, when earned over and above 5% interest on the bonds, an annual sum based on economy and efficiency of operation not to exceed 1½% of the bond issue, as a means of assuring the most efficient management. It is a wise suggestion, provided all of it is to be actually distributed among the operating personnels and that none of

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it is to go to the bondholders as such. I do, however, most strenuously protest against an additional 1½ per annum over their 5% interest going to the bondholders *in any event.* And that, too, presumably to the exclusion of the bonds that the City is to or should receive for its investment. The Plan is silent on that point but the plain inference is that the City's debt is excluded from participation in this bonus. Why? Surely the 25,000 investors scattered all over the world can add nothing by way of efficiency except through their elected boards of directors and officers for the encouragement of whose efficiency provision is wisely and separately made. If these bonuses can be earned out of a five-cent fare, well and good. But if fares are to be boosted there should at least be no bonuses whatever to anybody or any conditions.

(6) I object to the provisions for control of "A" Company, (the holding Company) and of "B", "C" and "D" Companies, (the operating Companies). Under the Plan the Mayor is to appoint three and the security-holders three of the seven directors of "A" Company and these six directors together to choose the seventh. All the directors of the operating Companies are to be chosen by their security-holders except that even where, as in "B" Company, the City's money investment will doubtless be greater than that of all the bondholders, it is to have no voice in that Company except such carefully restricted and indirect representation as it may secure through the holding Company.

My contention is that the City should have four of the seven directors, equal to a clear control of the holding Company, and that it should at least have substantial representation on the boards of the operating companies so as to be able to protect the City's vast interests in the regulation of the action of these vital organs of the corporate life of which the holding Company is the mere shell and outer semblance. The City is given the shell whilst the security-holders "get away" with the substance.

My proposal does not mean municipal operation. To that I am opposed. It means private operation with the City's money but with municipal participation and co-operation. It is a small part of that to which the City would be entitled and which it would exact if it were a private interest, and it is entirely workable.

The idea of permitting the old traction interests with their long, slimy trail of corruption and stock jobbing and their record of financial disaster and inefficient

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service, to continue to operate this system and to hand over to them, besides, on long term leases, the subways that are to be constructed with new City money, without so much as City representation on the directorates of the operating Companies is unthinkable. The insistence on any such condition will be and should be in and of itself sufficient reason to wreck any Plan that the Commission may present. If there is no other remedy by way of protest the aroused force of public indignation will prevent any such disposition of these properties.

There should be not only a clear majority of City nominees in the holding Company besides City representation in each of the operating Companies but above and beyond all, the holding Company should have reserved to it a right of veto upon the continuance of the then constituted management of any of the operating Companies and to require the holding of a new election for directors. As the City will probably have a larger investment than the private investors there is no reason why it should be content with the mere perfunctory and inadequate participation in the operating Companies that is given to the holding Company under the Plan. The details of the regulatory powers as between the Companies, by which the City will reserve the unquestioned right to get rid of a dishonest, inefficient or extravagant management cannot be settled in any plan. It must be provided for by the terms of the various charters and leases.

I assume that in view of the overshadowing importance of this branch of the subject these documents in their entirety will be submitted for public inspection and criticism at the time the formal statutory Plan is filed and as part of that Plan.

(7) I object that the City is not to be directly represented and is to have no voice or right of veto, except through a State Commission, in the fixing of the values of these properties. This the Commission can correct by providing for such representation and the Transit Act should be so amended as to secure to the City the right of judicial review. The Federal Railroad Valuation Act under which the Interstate Commerce Commission is now valuing the railroads for the purpose primarily of fixing rates and not with so comprehensive a purpose as that of fixing the purchase price, reserves the right of appeal to the Courts. If it should unfortunately transpire that physical value is to be the primary basis for these purchases great injustice is likely to be done the City,

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however conservative may be the valuations. A business property or enterprise is never worth more than the capitalized value of what it can earn no matter at what sum its physical property is appraised. An industrial plant that has no earning capacity is worth its junk-value and no more. If the Commission should lay down a basis or principle of valuation that the City believes to be indefensible there should be a right of review somehow, somewhere.

That question is bound to arise almost immediately in valuing such (if any) of the antiquated, wornout surface lines as the Commission may decide are needed for a comprehensive unified system. As matters now stand the situation is very one-sided and unjust to the City. If the Commission's price does not suit (or they so pretend long enough to tire out the patience of the Commission), the Companies need not take it. If, in the very natural desire to see its stupendous task crowned with accomplishment, the Commission is outtraded or surrenders to these, the most clever and experienced traders anywhere to be found, the City is helpless to protect itself against the Commission's errors of judgment. That should not be. The City should also have the right to be heard on the valuations of the properties that are to be taken over and those that should be rejected. Most of the surface roads should be rejected. Their removal from our streets will be a blessing. They are an obstruction to our already congested traffic and are a liability rather than an asset. Buses should be the form of transportation for short hauls and the subway and elevated systems should handle the bulk of the remainder of the traffic. It will, however, doubtless be advisable to retain some of the surface roads, but not many of them—at a price but not at physical values.

This complication of finding our City unrepresented is the result of State interference in our affairs. I realize that this humiliating situation has been forced upon us by the demagogic, drifting policy (or want of policy) of our Chief Executive during all the years he has held office, whilst our transportation system has been deteriorating and disintegrating and fares have been mounting through the elimination of transfers, whilst the general discomfort and loss of time through bad and insufficient service were constantly increasing before his unseeing eyes and he did not himself have, and did not have the sense to

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look elsewhere for, the brains to rescue it from destruction.

Even under these tragic conditions and in the face of this provocation I opposed State action and still believe it was wrong. Hard cases make bad precedents. We had drifted so long that we could better have afforded to wait another year than to violate the principle of home rule. The need of relief was urgent and yet I do not feel that the end justified the means. If this interference in our purely local affairs should vindicate itself (as I hope it may, now that the deed has been done), it will be the signal for more like incursions into our local affairs, for there are few departments of our demoralized public service that would not be benefited by the same kind of intrusive absent treatment.

I have not lost faith in the hard common sense of the people of our City. To think otherwise as to a community of six million souls in the greatest City of the world would be a confession of the failure of popular government. Left to our own devices, as we should have been, I am sure the people would have awakened to their plight and that in the end we would have elected a Mayor who understood and was able to cope with our problem. This particular individual is about as capable of comprehending this difficult subject as is a cow of understanding astronomy. I doubt whether he has ever read the Commission's Report and Plan and am sure he would not know what it was all about if he had done so. Considering the gravity of our predicament we had, however, the right to hope that he would at least get a faint glimmer of the importance and complexity of the task and would call to his aid the best available talent for their disinterested expert advice. But we will return to that subject later in connection with that amazing "constructive plan" emitted by him that must have been written for him by a wag with a fine sense of humor.

I would like now to outline and elaborate my first proposition. I have, as is well known, and as the Mayor, above all others, knows from the correspondence between us in 1919, always held to the view, which I still hold, that the transportation system of the greater City can be profitably operated as a unified system *with universal free transfers* on the basis of a five-cent fare under mu-

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nicipal ownership with private operation and municipal participation to the extent necessary to assure adequate and efficient service, and have repeatedly so expressed myself. I have accordingly consistently opposed every attempted increase in fares. The proposition assumes, of course, effective, legitimate business management; the lopping off from the system of that part of the ancient, dilapidated junk of such of the surface lines as are now an incubus (and that includes a substantial part of the present mileage) with their worthless, water-inundated so-called "securities" and the elimination of the graft and stock-jobbing that have characterized past juggling with the properties. The security-holders of those exploited roads should be left to shift for themselves. The Plan should be based, not upon misplaced sympathy but upon sound business principles as though the dealings were between private interests.

If as thus reorganized the maintenance of a five-cent fare involves temporary deficits in operation (which as before stated I do not believe and the Commission tells us it does not believe will happen under anything like decent management under a drastic reorganization that will reject the chaff and retain the substance, no matter whose toes may be trodden on) it would be by far fairer in that very remote event to have the City temporarily advance the money to meet any such deficits but *on a prior lien security* to be amortized and repaid out of future profits before the purchase-money bonds are retired, than to leave room for the possibility of at any time increasing fares.

But if the unexpected and well-nigh impossible should happen at the beginning and the roads did not even pay their operating expenses it would be wiser and more just to have the City *loan, not give,* the difference, taking for these advances a lien ahead of everything else and on a par only with the bonds that the City should receive for expenditures for future subway extensions and for the arrears of taxes owning it.

If there were any deficits they would necessarily represent mainly if not entirely operations in the new outlying sections. As this transportation will add to the growth and extension of the City, of which all the taxpayers would enjoy the ultimate benefits in the way of

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new and increased taxable values in which they would presumably share through the reduced tax rates thereby created, there is no justice or wisdom in placing the burden of increased fares on the users of the system. That burden should be distributed among the entire body of taxpayers to whom the ultimate advantage will come.

As these prior lien bonds would unquestionably earn their interest they should be readily saleable in normal times on their merits without pledging the City's credit, and would not affect the debt limit. The same is true of the prior lien bonds which should be given the City for future advances for construction. Giving them the priority, as new money is entitled to receive under all the rules of the game of reorganization of insolvent corporations, would remove them from the debt limit. The Plan erroneously gives them no tangible security and puts them on a par with the purchase-money bonds, although I believe, as does the Commission, that even then they would earn their interest and sinking fund requirements on the basis of a five-cent fare.

There is another reason why this proposal to permit of a sliding or barometer increase in fare is in my judgment fundamentally wrong and should be resisted to the last ditch. It is not only an encouragement but a distinct incitement to inefficiency and extravagance. Under its operation it is so much easier to raise fares than to practice economies. Remember, that it is proposed to have the security-holders operate these properties, without even government supervision or representation on the boards of the operating companies if the Commission has its way—with City supervision if my suggestion is adopted—but in either event, the security-holders will control operations. If they are made to realize that they *must* earn their interest and sinking fund requirements on a five-cent fare basis are they not more likely to do so than if they know that by merely failing to do so the fare will be increased?

The improvement and values of property in the outlying sections of the City will also be adversely affected by uncertainty in the rate of fare. A fixed, stable rate is important to the stability and development of these properties.

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Incidentally, one of the peculiarities of this Plan is that if the fare were increased to eight cents, or even higher, and the system earned sufficient on that basis to pay the 1½% annual bonus on the bonds and the 1½% annual bonus to encourage efficiency both classes would be entitled to it. The intention of thereby stimulating efficiency becomes meaningless and an added peril to efficiency is created unless the premium is based on earnings reckoned on a five-cent fare.

There is every reason why the security-holders should be, and I believe will in the end be, more than satisfied to accept for their properties bonds of the kind I have described. They will certainly do so if they have any faith in their professions of the values of what they are selling. They are the shrewdest traders living. Thus far they have ridiculously out-traded at every turn the hopeless amateurs whom the City has put up against them and they are more than likely to do so again. The only property whose securities are worth serious consideration is that of the Interborough and that is operating at a huge loss when taken in connection with the disastrous Manhattan elevated road guaranty that was given as part of a huge stock-jobbing enterprise. The value of the Interborough bonds and notes is partly reflected in the market quotations. I say partly because for aught we know the quotations may be artificially maintained for the purpose of this negotiation. That would not surprise anyone who knows how these things are done.

Again, the quotations doubtless, and legitimately, reflect the possibility of a successful outcome of these negotiations from the point of view of the bondholders. We know that the Manhattan guaranty and other liens are ahead of them, that they cannot get rid of the guaranty, that with that burden they are facing a huge annual deficit with certain ruin staring them in the face and that the bonds are selling at 55% of their par value, in which quotation there is included the capitalization of the hope that their clever and powerful representatives will pull them out of their predicament through this negotiation.

If the new 5% bond with a possibility of another 1½% that the Commission proposes to give them for their property were automatically guaranteed by this sliding-scale or barometer fare it would be well worth over par.

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even in these exceptional times of depressed security values. The City is not yet at the mercy of these gentlemen to that extent and never will be. Probably few, if any, will blame them for making the best bargain they can—if they "can pull it off". Considering the quality of the commodity the owners of these properties have to sell and the new money they must immediately furnish if they do not sell, they will do a fine day's work if they can get a bond based on a five-cent fare subject only to a prior lien for taxes and new moneys advanced by the City. Assuming a fair value for their properties based on a combination of conservative physical values and earning power on a five-cent fare basis, to the latter of which they are committed by their contracts with the City, and for which the latter has dearly paid, they can ask no more than to be paid in bonds in a security that shall be junior in rank to that representing the new money.

The cries of distress that will go up from these interests at these suggestions and the abuse that will follow will not be new to me or unexpected. That always happens. We heard them in 1906 from the life insurance companies when the legislation was passed following the Armstrong investigation; we heard them in 1913, from every great financial interest in the land when the Federal Reserve Act was under consideration, solemnly warning us of the country wide disaster that would follow if Congress were to provide in the Act for Government money and Government control instead of for banking money and banking control, which Congress promptly and wisely did in the face of their "prophesies." Yet they all now admit that these were wholesome reforms and that the Federal Reserve Act proved our salvation in the late crisis. At the moment the Fire Insurance Companies are predicting universal upheaval if they are stopped, as we propose to stop them, from putting their policyholders' money into "wild-cat" and gambling securities and maintaining rates to cover their losses incurred in that way.

So we shall now hear no end of thrilling hard-luck stories and denunciation if these traction gentlemen do not get what they will try to make the Commission believe they think they ought to have. They should of course receive all to which they are justly entitled and

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no undue advantage should be taken of their manifest predicament. On the other hand it is to be hoped that the Commission will not take their claims too seriously or be too much impressed by their apparent disappointment.

In conclusion I have a few words to say concerning the extraordinary statement emitted through Mayor Hylan in his address last week accepting renomination as Mayor, which that same wag labelled "Mayor Hylan's Constructive Plan" for solving our transportation problem and which is as much his plan as are the streets he has closed and plastered all over with the sign "Mayor Hylan's Playgrounds", his playgrounds.

Here is the precious curiosity, penned by a hand that manifestly knows as much about the subject as does his Honor himself except that he is perhaps able to express his ignorance in fairly good English:

> *"What is the constructive remedy for the transit crisis in New York City?*
>
> "Our recommendation is that the private operators turn the City-owned subways back to the City for municipal operation at a five-cent fare. These lines carry more than two-thirds of all the passengers in the City. The remainder can can be better accommodated by the operation of modern automobile buses. Surface lines that have become obsolete can and should be taken off the streets of our City."

Short and simple, is it not? Parenthetically I may interpolate here that the solitary statement of fact that "the City-owned subways carry more than two-thirds of all the passengers in the City" is not true. They carry 2/5 or 6/15, whereas 2/3 are 10/15. But that is after all a mere detail.

There are $263,000,000 of private moneys invested in these subways by about 25,000 investors scattered all over the face of the earth, as against the City's investment of $233,000,000. All of these private investments have been made within nine years and a considerable part of them within the past two years. Without these recent investments the subways could not have been constructed.

They are not tainted with the frauds that characterized the operations of the old surface lines managements. These moneys were expended as honestly as were the City's moneys and at the same time.

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Most of these securities were sold through the firm of J. P. Morgan & Co. and the original investors paid an average of over 95% of the par value for their securities. Leaving out of account the many millions of dollars of other outstanding securities against these subways, the Mayor proposes to solve this perplexing problem by inviting these 25,000 investors to come together and make a bonfire of these bonds. He will preside over the festivities, the bonds will be consumed by the flames, everybody will be happy and so the roads will go back to the City free of all debt (even then they would not be) except the City's $233,000,000!

Is it just crass, dense ignorance that would disgrace a schoolboy, or unexampled mendacity, or a good deal of both, that is responsible for this absurd camouflage and demagogy? Is it possible that our people are so stupid and unthinking as he believes and that he can "get away" with such stuff? Try as one may out of respect to the office of the Chief Executive of our unfortunate City, it is simply impossible to discuss such drivel and cheap political clap-trap. What a commentary upon the quality of our citizenship when that type can be permitted to present himself for our suffrages backed by a great political organization! It is incredible. But it is just as well that the taxpayers of this City should at the opening of this discussion that is so vital to them once and for all realize their defenseless situation.

If the proposed Plan is to be defeated or so modified as to safeguard the City's rights and equities it is evident that we must look elsewhere for the aid and protection that we should receive at the hands of the City's elected representatives. The Mayor's advisers (for he has not the faintest conception of the problem or of any business, financial or economic proposition) have made a sad mess of this affair. So far from doing anything toward solving it they have rather encouraged its going from bad to worse, as so much political capital.

Whilst fares have been constantly increasing through the elimination of transfers and the service has been steadily deteriorating to the point of exasperation, until our citizens are now paying higher fares and getting poorer service than ever in our history, this man has stood idly by not knowing what was happening. And all

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this nothwithstanding our $233,000,000. investment in new subways and the $13,300,000. and over arrears in taxes that have been permitted to accumulate.

He has absorbed but one idea, and that has been to capitalize his own hopeless inefficiency into a political slogan to deceive the ignorant. And so we hear him dully, mechanically, repeating, day by day the cry—"We want a five-cent fare—'the interests' are abusing me and trying to rob you". And on that record and with that false alarm he expects to ride back into office. We shall see whether such a thing is possible.

I charge the Mayor with the chief responsibility for the disrupted and chaotic condition of our transit system. I realize that this is a severe indictment but it is absolutely just, temperate and understated. This is no time to mince words. No amount of personal vilification by the Mayor or his satellites can change the facts. If the Mayor believes the charge to be unjust, I challenge him, here and now, to a joint debate on the question of the "Solution of the Transit Problem", giving each side one hour to state its case and each side twenty minutes to reply to the other. He may either open or close the debate as he chooses but it must be confined to an impersonal discussion of a constructive policy. That is what the Commission has proposed, however wrong in principle and faulty in details it may be.

It has probably never occurred to the Mayor that whether for better or for worse his election or defeat can no longer make any difference in our sad situation. The entire transit question has been taken out of the hands of the City authorities and placed in the exclusive control of the Commission by the Transit Act under which the Commission is operating. That much we owe to him! If the people can but be made to understand they will know how to repay the debt.

But, after all, "that water has gone over the dam" and our problem is still with us, more acutely than ever. Fortunately we have a Commission in whose high purposes we can safely confide. That act should go to the Governor's credit in mitigation of his offense of having violated our right to home rule. These Commissioners tell us that they have open minds and we believe them. Our immediate task is to try to persuade the

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Commission of the justice of our cause. If that fails and we are still satisfied that they are in the wrong and we are in the right in our demands, we will cross that bridge when we get to it. Of two things at least we may be sure—that we shall get a square deal, as the Commission sees it, and that no matter what may happen things can never be worse and are certain to be better for our City than they are today. And so let us do whatever lies in our power and hope for the best.

On Sunday last Comptroller Craig issued a list of objections to this Plan which should be considered, for he at least knows his subject. He is the only capable man in the City Government. If he were as intellectually honest as he is able he would be of great aid in the solution of this perplexing problem. A speech made by the Comptroller on Monday night before the Real Estate Owners Protective Association after this Address had been printed in which I had already attacked the 1½% bonus to bondholders, but on other grounds, contains in itself strong confirmation of this charge.

(1) The Comptroller's speech ignores the following provisions on page 31 of the Plan with respect to this bonus:

> "with any increase or decrease of fare above or below the rate of five cents, such fund, (the 3% fund of which one-half is to go to the bondholders and the other half to the operating personnel), shall be decreased or increased, as the case may be, *on the basis of one per cent interest on the bonds with each cent of fare variation.*"

This means that if the fare is maintained at five cents the bonds get an additional 1½%, if at six cents, an additional ½%, and if at seven cents, the bonds get no bonus. As I understand this provision the fare must be maintained at five cents in order to give the bonds this 1½% annual bonus. Even on that basis I am opposed to it for the reasons heretofore stated. The bonds are getting enough at 5% on the valuation.

(2) The assertions of the Comptroller, however, that even if this provision were to continue part of the Plan, it would be

> "the wickedest device since Gould's time to plunder the investing public"

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or that there would be anything in it that would render the bonds in any substantial sense speculative is nothing short of catch-phrase "play to the gallery" to attract the unknowing and unthinking. It is unworthy of the Comptroller. There are enough really important defects in the Plan without attributing sinister motives to the Commission which will not bear analysis. The Comptroller knows that a bond with a fixed rate of interest of 5% and a bonus *limited* to 1½% based on the maintenance of the five-cent fare is not in a class with a speculative stock and that a possible spasmodic fluctuation of 1½% in the interest rate cannot be made the basis of speculation. With so many sound arguments at hand against the Plan in its present form, that sounds like grasping at gnats for the purpose of immediate political expediency. The heat of a political campaign is a poor time and place to select for this discussion, especially by the parties most concerned as candidates. Most of the Comptroller's objections (some of them are mere repetitions) are covered by what I have already said. With many of them I agree. My complaint against him is that he lacks the courage to propose a remedy for the existing and increasing state of chaos. He is the only man in the City Administration with the ability to construct a Plan and he dares not do it. It is so much more easy to criticize than to improve. Has he a plan? If so, why has he, as the head of the finance department of the Government, held his silence all these years, when it was his duty to have spoken? If he has no remedy to suggest he has no justification for destructive criticism such as he now indulges,—from motives of mere political expediency. I challenge my friend the Comptroller with all his resourcefulness to put forth a Plan. If he does so we may at least be sure that he will not propose as a solution that the bondholders make a bonfire of their securities and make the City a present of their huge interest in the roads!

It is gratifying to note that since this paper was prepared Major Curran has announced his insistence upon the maintenance of a five-cent fare and that the City shall have a final voice in any solution of the problem. I am, however, disappointed to find that whilst he politely condemns the Commission Plan he offers none for

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bringing about the results upon which he rightly insists. It is all very well to talk about five-cent fares and City participation but how is it to be brought about? The Transit law is with us and so is the Plan of the Commission. The latter as it stands assures us neither. It is on the contrary on its face destructive of a five-cent fare and unequivocally denies us any voice in the selection or valuation of the properties that are to form part of the system in their operation. It is radically wrong in principle.

How is it to be remedied? We have had entirely too much of the do-nothing policy. It is idle to expect the Legislature to help us change any Plan that the Governor and his Commission may approve. What does Major Curran propose? Why does he not commit himself to a definite plan apart from the mere promise to test in the Courts the Transit Act, of the legality of which there is no question. Come, Major, you have done very well so far but you have not gone far enough. You, too, like the others have thus far given us mere platitudes. Of course, everybody would like to have a five-cent fare. The Commission says it would like and hopes to get it but does not assure it. How do you propose to make good that assurance? Your criticisms are just and encouraging but you, too, have failed to give us anything constructive in place of what the Commission offers and which you rightly condemn. What do you say to the Plan I have outlined? That will assure it beyond question. Wherein do you differ from it?

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CAN WE SUPPRESS OR MUST WE TOLERATE AND REGULATE TRADE CONSPIRACIES?

AN ADDRESS

delivered before the Building Trades Employers' Association and the General Contractors' Association of Massachusetts at a Banquet of the City Club of Boston, Mass.,

Wednesday, January 4, 1922,

by

SAMUEL UNTERMYER
OF NEW YORK.

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CAN WE SUPPRESS OR MUST WE TOLERATE AND REGULATE TRADE CONSPIRACIES?

AN ADDRESS BY MR. SAMUEL UNTERMYER BEFORE THE BUILDING TRADES EMPLOYERS' ASSOCIATION AND THE GENERAL CONTRACTORS' ASSOCIATION OF MASSACHUSETTS AT A BANQUET OF THE CITY CLUB OF BOSTON, MASS., WEDNESDAY, JANUARY 4, 1922.

As a result of the apparently insurmountable resistance of the high cost of living to all economic laws, the answer to the question that constitutes the text of this Address has been suddenly driven to the front as the foremost domestic problem of the day. Until that problem is solved the cost of living will continue to refuse to respond to the laws of supply and demand, for it is these trade combinations that are mainly responsible for the present intolerable conditions.

The increased cost of labor is, of course, a contributing factor but it is more properly an effect than a cause. When the price of everything that labor uses to create the product is artificially controlled it is hardly fair to place upon labor a large share of the responsibility for increased costs, and when, as the result, the laborer's wage must be increased to a point where his purchasing power will give him the same living wage as he had before, it is not just to place upon him any part of the burden. Wages have not increased in anything like the general increase in the cost of living.

The recent and continuing revelations of the Joint Legislative Committee on Housing of New York State have riveted the attention of the country upon this problem of what to do with these combinations. It demands instant solution. These conspiracies infest almost every industry in the land. They have taken root in every nook and corner of the country. They are not only nation-wide,—in some industries they are international in their

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scope and operation. They are rarely brought into being spontaneously by the action of those engaged in the industry or as a result of the need for mutual protection. They are generally the result of the solicitation of professional promoters, agitators or organizers not connected with the industry who inject themselves into it for the purpose of blazing the way for those in the industry to secure higher prices by eliminating competition. They are paid large sums for their expert services of creating these artificial barriers to the free flow of competition and generally become the high-salaried secretaries or managers of the Trust. The task they pretend to be able to perform is that of "keeping the members prayerfully within the law" whilst going just about as near to the verge and skating on as thin ice as is necessary without being caught in the net of the criminal law.

In many of the industries there has been built up an intricate network of these combinations, beginning with a local Association in each great city. These Local Associations are in turn banded together in a State Association and the State Associations are then bound together in an all-embracing National Association, thus encircling the entire country in the grip of that particular industry. In many lines of business, of which plumbing supplies is an illustration that occurs to me at the moment, there is one such network of the Association for the manufacturers, one for the jobbers, another for the contractors and still another for the retailers, the prices and terms of sale being directly or indirectly regulated all the way down the line.

It is to these excrescences upon our economic and industrial life that we are mainly indebted for the high cost of living, which will never come down until these barriers are destroyed. It is through these operations that the natural trend of declining prices is intercepted. Even if at some point along the line in which there is competition, whether between manufacturers, contractors or retailers, resulting in substantially reduced prices at that particular point, these reductions cannot reach the consumer if there is anywhere in the chain a place where one of these combinations is at work to intercept and absorb the reduction.

When we consider the combinations of this character in the building trades alone that have been exposed by the

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Committee within a few months (there are upwards of 2,000 individuals and corporations involved that are not included in any of the state organizations of like character or in any of the local combinations that exist in perhaps 25 of the cities of the State), one may gather some idea of the extent to which the country is honeycombed with these pestilential cancers upon business enterprise. I estimate that in the lines of industry directly connected with the building trades alone, there are 20,000 conspirators masquerading as respectable business men engaged in these nefarious practices.

Gauging other industries that are infested in the same way with these combinations of which we know something, it is estimated that there are more than one hundred thousand of this class of law-breakers in this country today. It is shocking to have to confess that our business life is so contaminated that it amounts almost to an indictment of a vast section of our citizenship. And yet it is all too true. Worse still, the offenders are rapidly multiplying whilst the machinery of justice has for years stood stock-still until it is now unable to cope with this growing evil. For ten years, with an occasional isolated gesture of enforcing the Anti-Trust Laws by the wholly inadequate process of injunction and civil suit, the law has been almost a dead letter, until its violators have now almost earned the right to assume that they would be immune.

Such a thing as enforcing the law as a criminal statute which it was supposed to be had not occurred either to the Federal or State authorities in a decade or more and yet the ordinary crimes against private property that bring swift and sure punishment such as larceny, forgery, counterfeiting, pickpocketing and the like, are not nearly so perilous to the public safety and welfare as have been these combinations. What would happen to our social order if the same sort of moratorium were granted to them for a single year as has been applied in the case of these conspirators?

There was a time not so long ago when these combinations found their defenders and apologists. The country was covered with propaganda in which cooperation and combination in business were hailed as the legitimate business evolution that was to supplant competition. We were told that the Trust, instead of being an economic

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curse as it is, was a blessing; that through combination great economies were brought about in the cost of production and distribution and that it was the "stabilizer" of prices; that so-called unfair or ruinous competition was illegitimate and hurtful and that on the whole these combinations should be encouraged rather than outlawed, etc., etc., *ad nauseum*.

No small part of the responsibility for the rapid increase and the "strangle-hold" of these conspiracies rests upon the Federal Government, brought about by inanition and inefficiency and further encouraged by the exigencies of the war. In that crisis it was thought necessary (very unwisely so, in my opinion) to bring together competitors in various industries where increased production was important due to the emergency created by the war and to stimulate such production and at the same time prevent exorbitant profits by encouraging and assisting competitors in fixing uniform prices upon their product.

That may or may not have been defensible as a war measure and in order to curb extortion. It would have been far wiser and more logical for the Government to have taken advantage of its war powers to limit prices, as it did, without offering additional incentives for fastening upon the community combinations among competitors that the Government must have known it would be difficult to disintegrate when the time came for the resumption of free competition. It is not an easy or consistent task for Government to denounce and punish at one time acts that it has encouraged at another.

It taught those who were not already "wise to the game" how to eliminate competition and to tax the public all that the "traffic would bear" and they are profiting by their teachings. The war limits upon prices to be charged for a given commodity could have been enforced and increased production could have been stimulated without resort to the shortsighted methods that were adopted and that have since been continued, improved upon and perfected, to the great detriment of the community. A problem sufficiently difficult has thus been further complicated by Government action until it well-nigh baffles solution.

Among the most vicious, ingenious and insincere of these developments is the form of combination known under the alluring and misleading title of "The Open-

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Price Competition Plan" or the "Eddy Open Competition". Many of the great industries of the country are banded together under that wicked and hypocritical device. Its ostensible purpose is to furnish every member of the organization with a daily, weekly, monthly and quarter-yearly statement of all purchases and sales in the particular industry in question, including the name of each seller, the amount sold, the price, terms of delivery and every other detail so that each pretended competitor in the combination will know all about the business of every other competitor and will be able to regulate his business accordingly. As though sane men can be made to believe that real competitors would enter into any such scheme!

For instance, in a great industry such as that of the cement manufacturers, against whom this character of proof was made in detail before the Lockwood Committee, the execution of the Plan throughout the country involves a large permanent organization at enormous expense. In the business of plumbers' supplies, in which there are upwards of 550 members, the expense is still greater.

Every vicious, illegitimate business practice can, as a rule, be supported by some sort of an argument or pretext. The only pretext I have heard for this elaborate machinery is that it protects the members of the organization from misrepresentations by unscrupulous buyers who will say to a manufacturer that they have a better offer and secure illicit advantages by the practice of fraud; as though the seller could not ascertain the truth of such a representation by simply communicating with his competitor over the telephone without the maintenance of a vast permanent organization at an annual expense of hundreds of thousands of dollars.

If the competitor is willing, as he must agree to do under this "Open Price Competition Plan," to acquaint his competitor or his business rival with each and every detail of his business from day to day, he will surely not hesitate to acquaint him with a single detail concerning an isolated transaction.

The "argument" is, of course, a transparent sham as is the entire plan. Its purposes are to maintain uniform prices and restrict production against the free flow of competition. The objects of a given line of action are

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best evidenced by the result. In the case of the cement manufacturers, as in innumerable others that could be cited, the result has been as was intended, that prices of cement have continuously for years ever since the plan went into effect, moved up and down with automatic uniformity. If you live in New York City and want to buy cement, whether it comes to your dock from the manufacturer by barge from along the Hudson River or by the carload from Pennsylvania or by motor truck from the adjoining town, and no matter what kind or quality of cement, the price is precisely the same to a penny. In the past four years the price has fluctuated from time to time to the extent of over 200% but always on the same day to the same extent and with clocklike uniformity.

A few of the many oppressive features of this misnamed "Open Competition Plan" as applied to the cement industry (and they are illustrative of all of them though they sometimes vary slightly as to form), are:

(1) The refusal to sell a dealer in excess of a normal supply for 15 days of business.

(2) Or to sell any goods for a given job of construction unless the purchaser will agree to return the merchandise that is left over when the job is completed,—the purpose being always to curtail and control the supply so as more effectually to regulate the price.

And yet, strange to say, many prominent lawyers in various sections of the country were willing to champion the legality of this form of combination, which was manifestly a mere "smoke-screen" behind which price-fixing and the restriction of supply were thinly concealed. That transparent device has at last been effectually "knocked in the head" and everlastingly put out of business by the decision of the United States Supreme Court rendered a few weeks ago in the Hardwood Lumber Case, although it was about the weakest case from the point of view of the Government in which the question could possibly have been presented to the Court. Why that case was selected as a test can be well understood from the point of view of the defendants but why the Government should have consented to accept it will always remain a mystery. The record was made up entirely of documentary evidence. It was practically an agreed case between the parties on

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the facts and contained none of the overt acts of illegality that accompany practically every one of these Open Price Combinations.

And yet the Court (true, it was by a vote of 6 to 3) was happily able to pierce the thin disguise and to expose and strip bare the essentially unlawful purpose and intent of the arrangement that lay underneath the surface. It is a great triumph for the principle of genuine competition and a landmark in the cause of business freedom.

There are thousands of these so-called "Open-Price" Associations operating throughout the country today. Few industries are free from them. They have now been judicially branded as a crime. Will they now disband or will their members, with the aid of their resourceful criminal promoters, succeed in evading the law by reorganization in some other form?

Since the members of the Eastern Division of the Cement Trust's "Open Competition" Plan (there are 3 divisions covering the country, all joined together and operating together), have been indicted in the Federal Court in my District as a result of our investigation, and largely because of that action the price of cement has been cut to less than one-half of its former price but it is still 150% higher than it was before the war and I insist that the price can readily be reduced another 50% and still leave a fine profit to the manufacturer. The same is true with respect to many other materials used in building, such as window-glass, plate-glass, tile, terra cotta, iron pipe, plumbing materials, trim and a dozen or more other articles that might be mentioned that have been boosted from 200% to 700% by means of these "Open-Price" and similar unlawful devices.

It is preposterous to charge the high cost of building against labor when these forms of extortion are still being practiced.

This being our situation, what are the people of this country going to do about it? The evil has been allowed to run so long unchecked and has so permeated every nook and corner of the industrial system that it has grown to the dimensions of a Fixed Institution. Most of these combinations are interstate and nation-wide. The judicial machinery within the jurisdiction of a State cannot effectually reach them. It can only correct local conditions and can do that only temporarily. So long as the

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national organizations are still active, the interruption of these local conditions by State action that would disturb the smooth-working of the national machine would necessarily be short-lived unless the national organization can be suppressed, its actitvities destroyed and its members adequately punished.

That can never be accomplished by injunctions or any other form of civil process. Whenever the Federal Government, under the pressure of insistent demands from a given locality (which is about the only occasion when it ever attempts to act), takes that course, it is to me conclusive evidence that it is not in earnest.

But whether or not the Department of Justice believes that such efforts are serious, experience has shown that they are futile and puerile. I regard them as mere "camouflage." The Anti-Trust laws are essentially criminal statutes and should be enforced as such. For almost three decades the authorities when pressed to enforce the law as a criminal statute have given as their excuse for nonaction that juries will rarely indict and will never convict. They had no justification for so saying. It is not true.

That pretext has been exploded by the experiences of our Committee. In no single instance of the many cases that we have already put before Grand Juries, both State and Federal, has there been a vote against indictment and in no instance in which an indictment has been found and brought to trial has the jury failed to convict. There has not been an acquittal or disagreement of the jury. The communities from which these juries are drawn realize apparently more thoroughly than do the public authorities the great peril to the community from this insidious form of crime. It strikes at the very heart of our economic system.

The half-baked views of ill-informed men in high station in the Administration, who have manifestly never studied the subject and know just enough about it to be dangerous to the community, have greatly complicated the solution of this problem by lending encouragement to the formation of these "Open-Price" Associations. Whilst the revelations of the Lockwood Committee were at their height and we were denouncing the so-called "Open-Price" Associations as not only vicious but criminal, Secretary Hoover in a public speech unburdened himself of the following:

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> "Today many students of combination and restraint of trade are much exercised over the creation of open price associations; yet every single one of these associations that I have been able to investigate originated from the rightful desire to secure accurate, complete information on the volume of production, on stocks, on consumption and on price. The associations can only be suspected of acting against the public interest when they use this information for the benefit of the few and to the exclusion of the many. The general publication of such information will go far in the cure of this wrong in itself; in fact, it is a far more sure cure than threats of jail. You cannot catch an economic force with a policeman. You can only maintain economic right by public understanding; and by public understanding of economic facts you can maintain public confidence, you can destroy economic evil."

I have a high regard for Secretary Hoover, especially as a mining engineer and a great organizer and am, in common with millions of my fellow-countrymen, grateful to him for his splendid public services. On this account I wish that some one other than he had made these foolish, incoherent fulminations or that he, before delivering himself upon grave industrial problems that he knows nothing about, would have his speeches censored by a lawyer or that he would at least consult one. It is true when he says that "many students of combination and restraint of trade are much exercised over the creation of open price associations," but his statement as to the reasons for the origination of these abominations is untrue. He has been badly, sadly fooled. Worse still, I suspect that it was he who passed along his misinformation to the President who, in his Annual Message, said something of the same kind concerning these Associations that have now been condemned by the Supreme Court as criminal conspiracies.

There may be some people who can understand the balance of the high-sounding, glittering generalities contained in the speech I have quoted and their application to the subject that Mr. Hoover was discussing, but unfortunately for me I am not one of them!

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To those of us who have consistently opposed these combinations in all their varying forms and who have insisted upon keeping free and open the arteries of competition, the Federal Trade Commission has proven a keen disappointment. Much was expected from it. Little has been accomplished. With its vast and expensive organization it was its duty to have been ever on the alert to uncover and prosecute these conspiracies in restraint of trade. If the Commission had done a fraction of its duty, the country would not find itself confronting this crisis.

Its accomplishments have been puerile as compared with its opportunties. There is no reason why there should be so much secrecy about the results of its investigations. All of them should be an open book. The rapid accumulation and increasing power of these criminal combinations is the most unanswerable of indictments against the ability of the Commission to perform the tasks for which it was created. True, it has done some good work, notably in the case of the Meat Packers, but its accomplishments are infinitesimal as compared with its lost opportunities. The friends of the Commission have abandoned hope of effective relief in that direction.

The question still remains,—can we suppress these festering barnacles upon our industrial life that are fairly choking it to death? Frankly, I doubt whether we can, but we can and must try before resorting to makeshifts and compromises though I fear the evil has gone too far. At most we can select here and there a few hundred scapegoats from among the most flagrant and persistent lawbreakers whose extortions have been the most unconscionable and by sending them to prison for substantial terms we may for a time drive tens of thousands of other offenders to cover. Whether they will stay there will depend upon the way in which the Courts enforce the law in cases of conviction. If they continue, as they have been doing in the cases brought to their attention through the activities of our Committee, to let off most of the offenders with innocuous fines, they will simply encourage repetitions of the offense.

Grand Juries and Petty Juries understand the peril and are ready to enforce the law but the Judges, both State and Federal, seem to have a strange obsession and want of understanding concerning the evils with which they are called upon to deal. Thus far, they have proven

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the worst obstructionists in the path of the prosecuting officials. It may yet be dealt with if they can only be brought to a realizing sense of the economic curse and far-reaching effect of this form of crime, but not otherwise. Our experiences have determined us as a *dernier* resort to ask our State Legislature and to memorialize Congress to amend the laws so as to take it out of the power of the Court to condone or minimize this form of crime by inflicting this form of trifling fines or suspending prison sentence and to compel them to send these men to jail. If that can be accomplished and the Federal Government can be induced to furnish the funds with which to set up a separate organization with a liberal appropriation for the prosecution of these offenses somewhat on the lines of what is being done to enforce the Prohibition Law, but in a smaller way, we may still be able to cope with this evil.

Whether or not that will be possible even under these conditions, can only be determined by experience. Our present situation may be likened to what would have been the condition if for 20 years after the enactment of the Prohibition Amendment to the Constitution and the Prohibition Law, no serious attempt had ever been made to enforce that law and no machinery had been set up for that purpose, for that is in effect what has happened with respect to the Anti-Trust Law.

On the assumption that we shall not be able to exterminate these combinations, there are two other alternatives:

> (1) To grant what amounts to an amnesty to the associations, organizations, members and parties to agreements and understandings who within a given time make full disclosures of the existence of such associations and agreements, together with all the facts and documents bearing thereon, to the public authorities and who within the time allotted by the public authorities shall make proof of the permanent disbanding in good faith of all such associations and arrangements, subject, however, to the qualification and condition that no such amnesty shall be granted in any case in which there has been ruinous competition, coercion or other form of oppression of competitors or where the combination has involved the commission of a crim-

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inal offense other than that of violating the Anti-Trust Law.

The granting of such amnesty to those applying therefor and complying with the conditions should be accompanied by the vigorous prosecution of all who do not promptly meet these amnesty conditions and particularly of all future offenders. For that purpose there should be maintained by the Department of Justice and in the office of the Attorney General of each State a separate organization with investigators and others whose duty it would be to inquire into and prosecute violations of the law.

The suggestion of such an amnesty, I repeat, is prompted solely by my conviction that the great mass of the culprits are no longer reachable. They are too numerous. It would take an Army of lawyers and investigators and scores of additional Judges devoting themselves to this task alone, to cope wtih the situation so as to do equal justice and it would require well-nigh a decade in which to accomplish the work if it could be accomplished at all after this lapse of time. To attempt it on a small scale by prosecuting a few unfortunates here and there whilst allowing the others to go free would be a travesty upon justice. The result would be likely to be, as is usual in these cases, that the little fellows will be ensnared in the meshes of the law whilst the big fellows would escape. That happens far too often in the administration of Justice to maintain public respect for law and order.

(2) If, unfortunately, experience should confirm my prophecy that these combinations can no longer be exterminated or their members adequately and impartially punished, we are driven to the only remaining alternative of tolerating them in their least objectionable form and placing them under rigid supervision and control. Surely all must agree that to leave them in the present situation, absolutely uncontrolled and free to prey upon the public, with their own ideas of the extent to which they will elect to control production and boost prices, is unthinkable.

The regulation I have in mind will require both Federal and State legislation. This legislation would be

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aimed only at corporations. It would be of questionable constitutionality as applied to individuals or partnerships, but inasmuch as these combinations are ineffective unless they control a substantial part of an industry the inclusion of corporations would answer every practicable purpose. Legislation would proceed somewhat on the following lines:

(a) The establishment of a State Trade Commission to deal with questions of intra-state trade. The corporations engaged in interstate commerce would come under the jurisdiction of the Federal Trade Commission.

(b) All Trade Associations or organizations or societies and all agreements between actual or potential competitors would be under the control of the Commission and all their acts and doings would be subject to supervision. This would include so-called "businessmen's clubs," "gentlemen's agreements" and every variety of activity between competitors, however loosely or informally put together.

(c) Every such Association would be required to have the express written approval of the Commission for each of its business activities and every agreement between competitors would have the like approval.

(d) It would be unlawful and a misdemeanor for which the corporation and each of its officers and its directors shall be punishable for any corporation or Joint Stock Association to become a member of or contribute to or act in conjunction with any such Association or to become a party to any agreement that has not received the approval of the Commission.

(e) No such Trade Association or other organization shall be used for the purpose of conducting joint enterprises of any character between competitors, whether it be for the standardization of the product or the exchange of information concerning their respective businesses or having a tendency to regulate or stabilize prices or output or with any other business purpose, and no agreement shall be entered into between competitors with any such object in view until the same in its entirety and all

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resolutions, bylaws, rules and regulations made with respect to the subject matter thereof shall have been submitted in detail to the Commission and approved by it in writing. Any departure from these requirements shall constitute a conspiracy injurious to trade for which all parties concerned shall be punishable.

(f) The Commission shall be empowered among other things to approve reasonable arrangements that are by it believed to be beneficial to the public made through the agency of such Associations or by agreement between competitors having for their purpose: (1) the standardization of products with a view to eliminating unnecessary duplication; (2) the prevention of ruinous competition by permitting the regulation of output and an agreement upon prices; provided, however, that the Commission shall have no power so to regulate the output that it will not at all times fully meet public demand, nor to permit any agreement on prices which allows anything beyond a very moderate profit based upon the result of the business of the most efficient competitor as determined by the Commission after full investigation.

(g) The approval thus permitted to be given by the Commission shall in all instances be for a term not to exceed one year and only from year to year and may be modified or rescinded by the Commission from time to time upon proof of changed conditions or whenever it shall appear to the Commission that the privilege thus extended is being abused or that it is resulting in undue restriction of competition or is oppressive to competitors who have elected not to become parties to the arrangement.

(h) It shall be the unrestricted right of every individual, partnership and corporation to conduct business independently of any such Association or agreement and to wage unrestricted competition and none of the provisions of the law above referred to shall apply to anyone electing so to conduct his, their or its business. It shall be unlawful and shall constitute a misdemeanor for any such Trade Association or the parties to any such agreement or any of them to do any act or thing tending

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to oppress or discriminate against any parties that have elected not to avail themselves of the provisions of the Act, but any competitor desiring to become a party to any such Trade Association or agreement and to get the benefit and protection of the Act shall be at all times at liberty to do so.

(i) Any member of a Trade Association or any party to any such Trade Agreement who shall exact or receive upon any business transaction a price or compensation greater than that permitted by the Commission shall be guilty of a misdemeanor and the privilege to do business of any Trade Associatoin that knowingly permits such action shall be subject to revocation by the Commission.

(j) No member of such Association shall be bound for a term exceeding one year and no agreement between competitors shall be for a longer period than one year nor shall any payments or contributions be made for the support of any such Association to further any of the objects thereof that are not promptly reported to and approved by the Commission every three months.

I have not here attempted to work out the details of a plan that would necessarily be complicated in order to carefully protect the public.

It is, in a sense, a price-fixing, output-restricting program but under such strict surveillance that the public would be safeguarded. It is presented as a choice of evils as against the present secret, predatory Associations and arrangements whereby production is being kept below the demand so as to enforce exorbitant price-fixing between competitors without limitation and so surreptitiously accomplished that the offenders cannot be or at least have not been and are not likely to be reached.

Under this plan the profits in any given industry would be an open book to the public and the Commission would be forced by public opinion to condemn any plan that allowed for excessive profits. It would have to hew rigidly to the line of permitting price-fixing and restriction of output only to the point necessary to prevent ruinous competition. Regulation limited in that way is economically sound and is a blessing rather than an evil for in the end there is nothing to be gained by the public

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and much to be lost by ruinous competition. When the stronger competitors have destroyed the weaker and eliminated that character of competition they find no difficulty in recouping themselves out of the public for such temporary losses by piling on to the profits "all that the traffic can bear."

* * * *

In conclusion, I urge you and like Trade Associations and commercial bodies throughout the country to awaken to the peril of the present situation. Unless effective steps are taken to destroy these illicit secret combinations the cost of living will continue to mount regardless of all economic laws and as the result our ability to compete in the markets of the world will be destroyed as they are already well-nigh destroyed. More than at any other time in our history this country now needs a high tariff to protect its industries against the pauper competition brought about by the tragedies of the war. Such protection involves leaving our home markets to our home producers.

So long as the channels of competition are kept open between competitors at home, our people will be thereby protected against extortion. But if competition at home can be eliminated by these combinations and competition from abroad can be shut out by a protective tariff, it is not difficult to understand what will happen to us.

I repeat, therefore, that never has the solution of the question I have been discussing with you been so urgent as it is today.

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HONEST AND DISHONEST TRADE ASSOCIATIONS

AN ADDRESS

DELIVERED AT TEMPLE BETH-EL, SUNDAY EVENING,

April 23rd, 1922.

BY

MR. SAMUEL UNTERMYER

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Of all the domestic problems that confront the country, none begins to equal in its importance and ultimate effect upon our prosperity the determination of the means that shall be employed to exterminate the price-fixing and other illegal combinations that now infest almost every line of industry throughout the length and breadth of the land.

Many of them are local, some are State-wide, more are Nation-wide and some are international. In my judgment their operations constitute the chief reason for the maintenance of the present high cost of living. To them more than to any other single factor in our industrial life and perhaps more than to all the others combined, we are indebted for the stubborn resistance to the downward trend of living costs that should have accompanied the restoration of economic normalcy following the war.

The most vicious of them are the outgrowth of war conditions, when the exigencies of our situation required the artificial stimulation of production and the Government found itself forced at any cost, and regardless of the day of reckoning that was bound to follow, to bring competitors together so as to encourage increased production for the safety of the nation in that great crisis. The lessons taught by that emergency and the abnormal profits that resulted from it were learned all too well. We are now suffering from the aftermath of that necessary war measure and will continue to suffer in increasing degree unless the evil is promptly eradicated. That will require heroic methods, for the vicious growth

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that should have been extracted by a major surgical operation as soon as the patient was able to withstand the shock has been permitted to grow until it has eaten into our very vitals.

The extermination of that cancerous growth from the body politic cannot be brought about by drugging the patient with poisonous anasthetics or by any of the coddling and 'pussy-footing' policies which certain members of the present Administration have been misguidedly but doubtlessly well-meaningly following.

At no previous time in our history has it been so essential to enforce heroic treatment to abate the evil, for never has it been so necessary to maintain a protective tariff that will cover the increased cost of living and that will safeguard the workers from the destructive competition of pauperized Europe.

The grotesquely cheap cost of living and the low living standards in the highly-developed industrial centers of Continental Europe render it imperative that, to avert impending disaster to our industries, we adequately protect ourselves against such unequal competition. That situation emphasizes the need for keeping free and open the channels of competition at home. The higher we fix our protective duties, the more important it becomes that our industries shall not be permitted, by the elimination of home competition, to shelter themselves behind the tariff, thereby extracting from the public everything that can be had in the way of profit brought about by the exclusion of foreign-made goods.

If it were possible to open wide our doors to the exterminating competition of a pauperized world there would be less danger from home combinations and less need for protection against them. The peril from the

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Trusts that so justly aroused the fears of our people and that led to the Sherman Law of 32 years ago is not comparable to those that confront us from these Trade Associations and agreements that have for their purpose the destruction of competition.

When competitors federated together in a Trust they divested themselves of their properties and became merged for all time, for better or for worse, in a single entity; the securities of the new organization, generally waterlogged beyond all conscience or sense of decency, were landed upon a credulous public with the air of pools, stock manipulation and the many other devious ways supplied by the illegitimate machinery of the Stock Exchange; the owners usually managed to escape with their booty and the element of individuality, having largely disappeared, there was opportunity in the industry in which competition was thus eliminated, for new blood with modern appliances, free from capital inflation, and with substituted individuality for that which had thus been destroyed and replaced by bureaucracy, as against the old concerns that had been thus merged.

There was also the chance, of which some of the vendors who had parted with their securities on the market were not slow to avail themselves, to re-enter the field against the octopi of their own creation; and so in the course of time competition might again be made possible against the Trust. This was especially true where the financial and industrial power of the Trust were not so overshadowing as to constitute a standing threat of deadly reprisals against competition.

Not so, however, with respect to these temporary, loosely-constructed, elastic, price-fixing, territory-dividing and output-restricting combinations between competi-

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tors masquerading under the innocent guise of Trade Associations. They are vastly more subtle and dangerous than were the Trusts by the very form of their organization.

Here there is no closing or consolidation of plants or factories; no curtailment of production, except in a temporary way and as from time to time regulated by the members and for the sole and avowed purpose of maintaining prices by keeping the production below the demand; no abrogation or reduction of selling agencies or selling force; no retirement from business of the men whose skill and industry built up these great industrial machines.

All these are kept intact and are readily at hand to be hurled against the new competitor or the old one who has been excluded from or has had the temerity to hold aloof from the charmed circle. He finds not only organized capital but ofttimes organized labor as well solidly arrayed against him. The efforts of the combination are concentrated upon squeezing the last dollar out of the consumer and so the economies that come from consolidations in the form of Trusts are wanting whilst the evil features of the Trust are accentuated and made the more permanent just because of the elastic character of the structure.

New capital is rightly timid in embarking against such shifting, flexible arrangements that may at any moment concentrate their combined force against him. Time could and did to a large extent correct the evils of the Trust. Time will serve only to emphasize and strengthen the evils of the new form of industrial piracy if it is permitted to continue and further to entrench itself.

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There was a period in the evolution of these devices for exterminating competition when economists differed as to their ultimate effect upon our industrial life. The Trusts had many apologists. The bigger they were, the more distinguished the apologists. It was said of them that they were the logical modern form of conducting business; the only way in which great economics could be effected. No end of like 'stock' arguments were employed in their defense and many honest thinkers were at one time deluded into subscribing to these specious arguments.

The greatest of these Trusts—the Steel Trust—became and remains so all-powerful that, notwithstanding its glaring illegality, the Courts dared not dissolve it from fear of the national financial cataclysm that would have followed the decree of dissolution; and so it remains the Czar of American industries, its power ever-increasing, a fearful, standing menace, a monument to the helplessness of the law to cope with concentrated wealth and power in their endless ramifications and their ability to strike down with an unseen hand and at the most unexpected times and places. The decision in the Steel Trust Case is the most humiliating defeat that the champions of the equal enforcement of the law have ever suffered in our history. And yet when one reflects upon the alternative that faced the Court in those critical times it is easy to understand. The fault lay with the public authorities that permitted this flagrant violation of law to be consummated in the open light of day.

When this Trust, with its comparatively few modern plants was first put together and its myriads of antiquated shambles that were capitalized at preposterous figures, its actual tangible assets were fully covered by its

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bonded debt. Most of its then $500,000,000 of preferred stock and all of its $550,000,000 of common stock represented neither more nor less than the capitalization of future expectations, mainly "wind and water", plus the controlling asset (worth more than all the others combined) of the overshadowing financial power of the giants of finance who stood behind it and whose very presence there drove competitors into submission.

So stupendous has been the tribute that it has been and is levying that, besides paying large dividends on this $1,000,000,000 or more of "water", it has constructed the greatest and most modern plants in the world; it has fabulously increased its working capital and is today possessed of assets representing in value considerably more than the par value of what was its entire phantom capital at the time of its organization.

That its business policies have been wise, generous and far-seeing cannot be denied. Instead of mercilessly crushing and exterminating its competitors, as it could have done by a wave of the hand, it has kept them under control by a paternal system of cooperation, by the hope of rewards and by the fear of punishment which have been so obviously within its power to administer that it has never been necessary to strike a single blow in that direction.

The Trade Associations of which I am speaking include those that are connected with the various branches of the steel industry, into which the chief competitors of the U. S. Steel Corporation have been gathered. They are instrumentalities through which it operates to control the industry. It has wisely refrained from becoming a member of any of these Associations in the varied lines of industry in which it is engaged. But it is none the

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less the guiding hand and the dominating voice. Whilst agreeing with those who believe that its activities are vicious and dangerous, one cannot resist the tribute of admiring awe at the contemplation of this wonderful structure and of the vision that has guided its extraordinary career. One can only wish that the great constructive geniuses who conceived and are piloting this colossal pirate-ship might have employed their superlative talents in the public interest.

Perilous as I regard the overshadowing power and malign activities of the Steel Corporation as such, those dangers are insignificant as compared to the effects of the control it wields over its potential competitors through the Trade Associations that it dominates.

The inner history of the methods by which prices in all the ramified branches of this great industry have been 'stabilized' has not yet been told. They are not well-known, but no one who has studied the figures or who understands the workings of the various Trade Associations that are operating under the dominating will of the Steel Trust can be in any doubt as to what is happening, notwithstanding the widely heralded 'cuts' in prices that are announced from time to time.

The Steel Trust is in point of fact the parent of the now familiar system so widely used by the members of these "gentlemen's agreements" by which one of the members is selected as a pacemaker in price-fixing and prices changes and the others automatically follow by tacit agreement or private understanding.

Where, as in this case, the leader in the industry largely controls the raw material as well as the bulk of the manufactured product and has through its financial agencies a dominating voice in transportation, none of

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the clumsy shifts and devices that are resorted to by the price-fixing Associations that are not so fortunately situated are necessary. It possesses so many kinds and sizes of 'clubs' with which to beat recalcitrant potential competitors into line that obedience to its slightest wish is the highest sort of mandate and one that commands instant and obsequious obedience.

I can, however, conceive of no form of legislation, regulation or judicial or administrative process that can now completely dislodge an industry that has been unwisely permitted to become thus entrenched and since there is no remedy in sight in this particular instance, except in a modified way through the regulation of Trade Associations, it would be unprofitable to further pursue that feature of the discussion.

It could and should have been prevented from coming into being. There was ample legal warrant for enjoining its formation for its intended organization was widely heralded. The public authorities that permitted this octopus to be fastened upon us should have been impeached. But that is an old story. If newspaper reports are to be credited history is about to repeat itself unless the note of warning that I am now sounding is heeded by the Department of Justice. We are told that seven of the great (so-called) 'independent' companies with a combined capacity almost equal to that of the U. S. Steel Co. are about to consolidate with a capital of about one billion dollars. If that be true it must be prevented, before it is too late. It would be a mere tender or annex to the U. S. Steel and could not be accomplished unless financed by the latter, directly or indirectly and would still further entrench the U. S. Steel Co. beyond hope of future relief. The situation in that industry is truly hopeless.

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There are, however, many other lines of business activity that are not yet so entrenched and that are not managed with the superb ability and enlightened selfishness that characterize the steel industry, that may be prevented by timely action from getting beyond the reach of the law and it is to those that I will now more particularly address myself. In their dire extremity, when driven to the wall and thrust beyond the pale of legitimate business by the stern judgment of the Courts, these cunning, powerful and resourceful buccaneers in 'Big Business,' with devilish ingenuity boldly ensconced themselves for a time under the protecting wing of the distinguished but credulous Secretary of Commerce, hoping there to find refuge from the judicial branch of the Government by which they had been condemned.

I have a high personal regard and admiration for Mr. Hoover and share the gratitude of my fellow-countrymen and of the entire civilized world for his superb unforgettable services to humanity. On that account I the more regret the part that he was for a time deluded into playing and from which he has now fortunately partly extricated himself. Nothing short of a realization of the seriousness of the situation could have induced the public discussion of his attitude to which I have reluctantly resorted in order to do my small part toward bringing the force of public opinion to bear before it was too late and in order to induce him to desist. There can be no question of his public-spirited purpose but it is none the less true that he was headed straight toward disaster. To quote his own words:

> "The problem involved is one that goes to the very foundation of our whole social and economic system."

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Fortunately for us and for him, his course has now been changed. but it is idle for him to contend that at the time this warning was sounded he was not steering straight for the rocks and steaming as fast as he could travel on his misguided course. The record as made by himself is so "dead against him" that in my judgment he was most unwise in forcing this issue by his repeated public utterances and especially by his country-wide challenge to me to withdraw the charge I had made that he, by his attitude had been unwittingly encouraging these outlaw Associations and the request that he desist.

Mr. Hoover is entitled that I either prove that charge or withdraw it. I propose to prove it by his own words, although he has fortunately recently so completely recanted and reversed his position that the question has become largely academic and there is no longer any substantial difference between us on this subject.

Mr. Hoover, in a public address made in New York, is quoted as follows:

> "In my experience I have not known of one Trade Association that did not originate in a legitimate desire to disseminate statistics as to production, stocks on hand, volume of orders, etc."

In point of fact, there is not one of the hundreds of the class of Associations to which he refers that has come under my observation that is engaged in exchanging information of the character referred to by him between pretended competitors that did *not* 'originate' in the *unlawful* desire to restrict production and maintain prices in defiance not only of the law but of the economic laws of supply and demand. The members of one of the most important of this class of Associa-

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tions, doing a business of about $100,000,000 per year, is now on trial upon an indictment for this identical offense. The members of another, also country-wide in its scope and likewise dealing in a public necessity, composed of over 100 corporations and individuals, are about to be tried, whilst others of the same class and engaged in the same practices have been indicted and still others are facing indictment.

All of these Associations were organized with the *sole* object of accomplishing these unlawful purposes. In some of them this "dissemination of statistics" resulted in the "jacking-up" of prices of these commodities anywhere from 300% to 500% and there the prices remained until the Lockwood Committee exposed 40 or more of them connected with the Building Trades alone. That should furnish a fair indication of the extent to which they have gripped the country. If there are any of this numerous type of Associations that originated "in a *legitimate* desire" it would be interesting to know which they are.

Following the decision of the U. S. Supreme Court in the Hardwood Lumber Case, Mr. Hoover became apparently less confident of his ground and more guarded in his statements; and yet in an article contributed by him to the New York "Evening Post," published on March 18, 1922, in the nature of a foreword to a most interesting, instructive and illuminating discussion in the form of a series of articles contributed to The "Post" on this important subject, we find Mr. Hoover making the following observation:

> "While some minority of Trade Associations do things that in effect restrain competition, many of the activities of even this residue do not have this effect."

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What did Mr. Hoover mean by that statement? Did he intend to argue that the activities of Trade Associations in doing things "that in effect restrain competition" should be permitted to continue because those Associations are also engaged in other activities that do not result in the restraint of competition? In a letter to Mr. Hoover protesting against that line of argument in defense of these unlawful Associations, I suggested that this naive bit of special pleading is very much like arguing that a man who picks pockets or robs banks may be a good husband and father or that a receiver of stolen goods may be also doing an honest business on the side! Did Mr. Hoover desire to draw the deduction that the unlawful practices should be tolerated because the Association is also engaged in lawful practices?

Apparently Mr. Hoover was thus championing or excusing the continued existence of these Open Price Associations even after they had been condemned by the Supreme Court. His earlier attitude, however unjustifiable, is understandable. But why he should have clung to it after the decision of the Supreme Court in the Hardwood Lumber Case is hardly understandable, especially in view of the fact that he had long been forewarned of the attitude of the Administration on this subject by an Address of the President to Congress on April 12, 1921, in which, after referring to the failure of living costs to decline proportionately with prices in primary markets, the President said:

> "I have asked the Federal Trade Commission for a report on its observations and it attributes in the main the failure to adjust consumers' costs to basic production costs to the exchange of information by 'Open Price Associations' which op-

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> erate evidently within the law to the very great advantage of their members and equal disadvantage to the consuming public."

The President was erroneously advised when he stated that these Associations "operate evidently within the law." They have always been outside the pale of the law. Before that message was written I had been insisting before the Lockwood Committee and in the Courts and have ever since consistently insisted long before the decision in the Hardwood Lumber Case, that they were defiant law-breakers and a number of them had hurriedly agreed to disband and had in fact disbanded upon the demand of the Committee under threat of indictment following their exposure by the Committee. All this was matter of public knowledge at the time Mr. Hoover wrote his "Foreword" for the The "Post."

It is not strange that an Administration which has itself become a party to price-fixing of the most extortionate character as has the present Administration through the Shipping Board in joining with the other Steamship Companies in fixing and boosting the freight and passage rates on transatlantic rates to unconscionably high sums, should regard these Open Price Associations as operating evidently within the law. How could an Administration that is itself a breaker of its own laws be expected at the same time to enforce them? If our Government cannot conduct the shipping under competitive conditions the best thing it can do is to get out of the business as quickly as possible. If private initiative cannot carry on the business successfully because of our many handicaps and the country feels that they should remain in the business so that we shall maintain a merchant marine, it would be wiser policy to subsidize our private operators

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to the point at which they can compete than to penalize all shipping through boosting the rates through illegal combinations. It requires no expert to realize that having regard to the small proportion of our shipping that is or ever can be carried in our own bottoms we are paying ten dollars to foreigners for every dollar we illictly save by such combinations on rates besides crippling our ability to compete in foreign markets by helping to maintain excessive carriage charges on all our imports for the enrichment of foreign shipping companies. The policy is too absurd and short-sighted for words.

The facts with respect to Mr. Hoover's attitude to these Trade Associations are:

> (1) That the movement for a conference of Trade Associations with the distinguished Secretary of Commerce was inaugurated at the covert instance of the so-called "Open Price" and other outlaw Associations, although Mr. Hoover may not have been aware of that circumstance.
>
> (2) That at that time Mr. Hoover had apparently been persuaded that their vicious and unlawful operations were lawful and beneficient.

Not being a lawyer and having unfortunately failed to take timely legal advice until after he had made the plunge, he did not realize that the stump speeches embodied in the constitutions of these conspiracies between potential competitors about "stabilizing the industry, exchanges of trade statistics of contracts, closed orders, production demands, standardization, etc.", were mere "camouflage" under cover of which production was being kept below legitimate demands and price-fixing made easy.

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If he had consulted the Department of Justice before acting instead of afterward he would not have fallen into this error. When he finally did so he was promptly advised not to deal with these lawbreakers. When the Conference of Secretaries of Trade Associations met he finally announced that as his course and thereby saved himself from still further embarrassment. It was not, however, until the 19th of this month that the semi-official announcement came from Washington that Mr. Hoover had effected a compromise with the Attorney General by announcing that he—

> "would not and could not countenance the Open-Price Associations. The Secretary has elicited a willingness on the part of Mr. Daugherty to consider further proposals."

He must indeed have been naive to have been persuaded that the astute gentlemen who were maintaining these vast organizations at enormous expense with their armies of statisticians and accountants and their other complicated machinery for gathering and disseminating statistics of their innermost business secrets, *day by day,* by written reports exchanged between them, each laying bare to the others all of their business affairs and every transaction between them and their customers, were engaged in an innocent campaign for mutual education so that they would thereby be better equipped to intelligently compete with one another and that there was no selfish or ulterior object in this enormous expenditure of time, money and energy and these disclosures to one another. Mr. Hoover must indeed have been as credulous and confiding an official as he is a superb organizer and a great unselfish humanitarian.

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Let us not be misled by this cant about "regulating competition," "cooperative competition" and like "smoke-screens" behind which the members of an industry seek to enforce undue tribute from the public. Competition is war. The most civilized forms of warfare are barbaric. A war in which the combatants exhaust their resources but in which neither side seeks to kill or cripple the other would hardly be worth the waste of human effort and treasure. And so competition in which the lazy are permitted to prosper equally with the industrious, the able and resourceful with the ignorant and stupid, in which each competitor gets the benefit of the skill and business secrets of the others would indeed be a queer kind of competition.

Mr. Houston of the Federal Trade Commission made an illuminating expose of the pernicious activities of these Associations a few days ago in a public address that admirably sums up the situation.

This is my answer to Mr. Hoover's criticism of my criticism of his action.

Now that the record has been set straight and the peril from these Associations has been at least temporarily averted and Mr. Hoover is now on the right road, we may turn our attention to the problem of how to suppress these conspiracies against prosperity that are mainly responsible for the maintenance of the high cost of living—provided the Government will cease to be a part of one of them.

The Anti-Trust Laws have never been enforced. This has been true of every Administration regardless of party. The social, industrial and political power of 'Big Business' have always stood in the way. There has not been one prosecution for each 1,000 known violations. On

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the rare occasions on which they have been invoked it has, with few exceptions, been hesitatingly and half-heartedly done and generally in the face of roars of protest and indignation and threats of political reprisal from the overshadowing financial interests under whose protecting wings these powerful lawbreakers have been and are sheltered against law enforcement.

Every legislator and almost every man prominent in public life has been repeating for 30 years—during political campaigns—that the Anti-Trust Laws are criminal statutes; but they have not been enforced as such. That is the chief reason why these combinations have grown and prospered until they can no longer be reached by ordinary judicial process. If the law had been enforced as a criminal statute, as it was intended, our problem would long since have disappeared. The attempt to administer these laws by a series of judicial decrees in civil suits, each case involving years of effort and delay on the part of the Department of Justice has yielded the barren results that must have been expected.

By the time the case has reached the stage of final judgment and the decree has run the gamut of the Courts and of the years of intervening delay, the offending combination has had the opportunity to go through so many varying forms of organization and reorganization that when the time comes for executing the decree in the tame and timid way in which the few that have been granted have been executed, the original organization has long ceased to be recognizable.

It was never practicable to adequately administer these laws by any form of judicial process, whether civil or criminal. There should have been supplementary ad-

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ministrative machinery such as the Federal Trade Commission was intended to furnish. It is regrettable that this wisely conceived Commission has not been given the power, the encouragement or the appropriation that would have permitted it to function to anything like the extent of its potential usefulness. The criticisms levelled against it are largely unfounded. It has been an exceptionally progressive body and most of the attacks upon it are inspired. The work that it has been able to perform has, on the whole, been well-done and it has accomplished much good.

The bulk of the comparatively few important prosecutions that have been undertaken by the Department of Justice have been basd upon the investigations of the Commission. But for its interposition these "Open Price Associations" would still be proclaiming their innocence and innocuousness and would be flourishing. It was the Commission that gathered the evidence and instigated the Hardwood Lumber Case. To it we likewise owe the exposure of the methods in the packing industry and a substantial number of disclosures of other violations of law that have been abated, whilst many unfair business practices not amounting to criminal offenses have been ended through its activities.

The proceedings that have been taken are, however, a mere "drop in the bucket" as compared to what should have been done. None of them has operated as a deterrent. A few scapegoats have been selected as the subjects of mild and long drawn out litigation whilst the great army of law-breakers have remained undisturbed. The proof that justified the decrees that have been made in most of these cases would equally have justified conviction upon an indictment. The Commission's chief

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blunder has been in failing to insist upon criminal proceedings rather than civil suits in the cases that have been brought based upon its disclosures. A few dozen prison sentences would have acted as a deterrent, but the influences have apparently been sufficiently powerful to prevent the Department, irrespective of party lines, from adopting this obvious method of enforcing a criminal statute. Putting into these eminently respectable buccaneers "the fear of the Lord" is the only thing that counts.

The Lockwood Committee entered upon the investigation of illegal combinations about January, 1921. It was a State Committee, and its jurisdiction was confined to the housing problem. Its process could not go beyond State lines. And yet, within that limited field, with these handicaps and in the space of a few months, it uncovered and established the existence of 40 or more including 20 nation-wide criminal conspiracies in the form of combinations in almost every line of industry connected with building, and it instituted and prosecuted to trial and conviction a large number of cases. And that mind you, was in this one industry.

Time will not permit of an extended resume of this work nor is it necessary. The facts have become reasonably familiar. Suffice it to say that until the Federal Government was urged by the Committee to take action and furnished with the evidence, these criminal conspiracies had remained undisturbed. Even then it was for a time impossible to secure cooperation from the Federal Government under the previous Administration. With the advent of the present Attorney General, a more sympathetic disposition was shown (subject to a few glaring exceptions for which the Attorney General and not

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the U. S. Attorney at New York is responsible), especially on the part of the District Attorney at New York to whom this work was assigned at the urgent solicitation of Counsel for the Committee and who, with his Special Deputy, Mr. David L. Podell, have been enthusiastic and unremitting in their labors and fairly successful in their results so far as they have gone.

Here again, however, we have been and are seriously handicapped by an insufficient appropriation, and more particularly by want of sufficient Judges and Grand Juries to deal with the large number of cases that have been called to the attention of the District Attorney and more particularly by reason of the reluctance of the Court to impose prison sentence even in the aggravated cases in which fraud and other overt acts of moral turpitude were established quite apart from violations of the anti-trust laws. Although the evidence has been in his hands for about one year of a dozen or more important cases involving hundreds of members of these combinations in the building industry, it has been impossible to present these cases to the Grand Jury. The inevitable result will be that the witnesses will scatter, the records will probably be lost, the charges will become stale and the chances of convicting these lawbreakers will have been seriously impaired and perhaps destroyed.

I do not charge or suggest that the Federal Officers at New York are responsible for this situation. I know they are not. No public officials could have been more faithful or industrious. It simply exemplifies the helpless situation of the officers of justice in endeavoring to enforce these laws even where they are well-disposed, as they are, especially where no powerful influence can be exerted from above to stay their hands.

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I am referring to these matters in support of my contention that, with our present judicial machinery, and especially having regard to the insufficiency of Judges to deal with the current business of the Courts and the lack of Grand Juries and prosecutors and of adequate appropriations, no proper enforcement of law can be expected. If the judicial machinery were as inefficient in dealing with everyday crimes such as larceny, counterfeiting and the like, the social fabric would go to pieces. And yet it is, in my judgment, at least quite as important to stamp out this form of crime as any of the others.

Adopting as a standard the accomplishments of the Lockwood Committee as the result of a single State investigation on a limited topic such as housing (and there has been nothing extraordinary about it), imagine, if you can, what would be the effect of a thorough Federal inquiry where the process would reach all over the country, conducted on the same lines, into all departments of industry. To say that it would uncover not less than 500 such combinations involving at least 20,000 individuals and corporations, would be an ultra-conservative statement.

The Government is, of course, not equipped for any such undertaking and if it were no political party would dare enforce the law, especially against the worst and most important of the offenders. It is all one can do by endless prodding and public criticism to have a few of the lesser important ones brought to trial. I should hate to tell you what it has meant to get as far as we have gone, and I regret to say that we have not yet gone very far,—certainly not far enough to instil "the fear of the Lord" into the hearts of the men of "Big Business" who are involved in these conspiracies and who are masquerading

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under the guise of Trade Associations. I will give you one striking illustration of our difficulties:

It is now almost 5 months since the criminal activities of the General Electric Co. were exposed by the Committee. Much time was spent in the preliminary investigation. Most of the proof came from the records of the Company and the mouths of its officers. The Company was invited to state its case and was given the fullest opportunity for explanation. The evidence establishes one of the most brazen, long-continued, firmly entrenched and iniquitous monopolies in the country. It controls 98% of the electric light bulb business all the way down the line from the manufacturer to the consumer and it has the remaining 2% at its mercy. In 1911, when it controlled 60% of the business it was declared unlawful by the Federal Court at Toledo by a decree entered upon its own consent. Since then it has increased its monopoly from 60% to 98% and has continuously violated the letter and spirit of that decree. It has also gathered in actual and potential competing patents in violation of law and has driven its competitors out of business.

Although the business of the Company in bulbs constitutes less than 1/5th of its entire business, over 80% of its entire annual net profits, admittedly, come from this this 20% of business even after deducting all manner of exorbitant charges with a view of reducing the apparent profits. For instance, its capital account of $187,000,000 stood on its books at the end of 1920 at $66,000,000 which was about the amount expended during the three preceding years on new construction. The stock of this Company is widely scattered, but the guiding spirit and controlling factor in the business is the great banking house

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of J. P. Morgan & Co., under whose protecting wing this monopoly has been fostered until it has grown to its present colossal size and power.

The main function of these great banking houses nowadays seems to be to act as guardians in protecting their "wards" against the rigors of the law. This same firm has very effectively discharged that duty with respect to the U. S. Steel Corporation as to which Mr. J. P. Morgan, now deceased, testified before the Congressional Money Trust Investigating Committee that he selected all the Directors. It is likewise interested in or concerned for others of these Associations.

For months I have been endeavoring to secure action by the Department of Justice against the General Electric Co.; (1) for contempt of the Federal Decree of 1911; and (2) for maintaining this illegal monopoly. The Attorney General has been again and again urged to send this case to the U. S. District Attorney at New York under the same direction as are the other cases. This he declined to do. I then offered on behalf of our Committee to take charge of the prosecution, if desired, without expense to the Government, in order to abate this oppressive monopoly. That, too, has been refused, as was his right. I have also urged that the Department take action from Washington, but all attempts to secure relief have thus far proven futile. At last accounts this prosecution has been taken in hand and it looks now as though something may be done. I hope so.

In plain English, it is my belief that these people are being protected mainly by the influence of J. P. Morgan & Co., and that if the Attorney-General finally undertakes to prosecute it will either be some sort of ineffective civil proceeding or, if criminal prosecution is decided

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upon, that we shall probably get nowhere in the end. If the Government proceeds by civil process in this aggravated case in which criminal prosecution is the manifest and the only swift effective remedy we shall know that we have nothing to expect. I say this in all good will, especially as I have had a certain amount of genuine cooperation from the present Department of Justice, which was not accorded under the previous Administration, but when we come up against these powerful influences justice apparently goes blind or becomes paralyzed, no matter who may happen to be the then head of the Department of Justice. However well meaning he may be the pressure finally overcomes him. It seems to make no difference whether we have a Democratic or a Republican Administration, so far as concerns the power of J. P. Morgan & Co. It was quite as potent in the last Administration, if not more so, than in this. I trust that this time I shall be agreeably surprised.

We had another illustration of this same sort of far-reaching influence under the previous Administration in the effort to indict officials of Steel Companies who were members of the National Erectors Association and the Iron League and as such were obstructing the erection of structural steel in New York City in which the then Department of Justice went to the unprecedented lengths of permitting the defendants to call witnesses before the Grand Jury, resulting in a grave miscarriage of justice. We have asked to have that case re-submitted. One could go on almost *ad infinitum,* recounting his unsuccessful experiences in the attempts to enforce criminal prosecution against the leaders of 'Big Business' who are backed by these influences, no matter how serious or how clear may be the offense.

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These experiences have satisfied me that if the people of this country want to exterminate these combinations, especially the most far-reaching and most vicious of them, Congress must furnish administrative machinery for the purpose. It cannot be accomplished by a series of law suits with the accompanying delays and uncertainties, even if the necessary money and legal machinery were available, which it is not and probably never will be. These people care nothing about civil suits. They hand them over to their legal departments, that are maintained as an expense of the business like their rent for which the public is made to pay and never give the subject another thought.

That brings us to the consideration of the remedy. Is there one and, if so, what is it? I say that there is a simple and effective remedy.

At the last Session of the Legislature, a Bill was introduced by our Committee accompanied by a "Memorial to Congress," dependent upon the passage of the Bill, which in my judgment furnishes the only solution of this vexatious problem. The Bill is known as the "State Trade Commission Bill". In brief it sets up a Trade Commission and requires every Trade Association to secure a license. In order to secure such a license the Association must establish that its purposes do not include any of the unlawful activities that have been condemned by the Courts and which are there enumerated. Its constitutions and by-laws and all its rules, regulations and practices are made subject to the visitation, inspection and approval of the Commission. Any person or corporation becoming a member of an Association thus licensed, is protected, provided he does none of the acts prohibited by the Act. Any person or corporation join-

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ing a Trade Association that is not thus licensed knows that he is doing wrong and is presumptively guilty of a misdemeanor and the officers are punishable by imprison, without the farcical option of paying a fine.

The "Memorial to Congress" recites that New York State is infested with these illegal combinations engaged in inter-state commerce that radiate from here throughout the country and asks that the powers of the Federal Trade Commission be enlarged in conformity with provisions of this State Trade Commission Act. The Bill passed the Senate and had the enthusiastic approval of the Governor, but it failed of passage in the Assembly through the action of the Rules Committee in refusing to permit it to be brought to a vote in that body. The excuse given was that the Bill was introduced too late in the Session for full consideration of so important a measure, although it had been then two weeks before the Legislature, there had been a public hearing upon it and other bills of importance subsequently introduced had been passed.

I hope and believe that the Bill will be enacted at the next Session of the New York Legislature and that it will be followed by like action by Congress. If enacted in substantially its present form and if the "teeth" are not extracted from it, I am convinced that it will automatically exterminate these criminal conspiracies, especially as they will be under the watchful eye of the Commission that will have authority to investigate their books and affairs from time to time.

Senator Edge of New Jersey has introduced a Resolution in the Senate providing for an investigation of Trade Associations. I understand its purpose to be to

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secure the data on which to base regulatory legislation that would permit these Open Price Associations to operate under Government supervision. It is too soon to judge of the purpose of the proposed inquiry, but I hope it is not intended to give encouragement to these so-called cooperative Associations that are now outlaws. The public safety requires their prompt extermination. Legitimate Trade Associations require no investigation or legislative assistance. There is only one way to deal with the others and for that purpose no investigations are required. The people of the country are warned to be on their guard against further attempts to fasten these destructive agencies upon them.

Its first step toward reducing the cost of living is to destroy them, root and branch, and to restore unrestricted comeptition. We have been fed upon dangerous sophistries about modern business methods until the young, ambitious man seeking a business opening is confronted on all sides with these secret artificial barriers and the victimized consumer finds himself tied hand and foot, whichever way he turns.

The Trade Commission Bill is our only remaining hope of relief. It will be a new Charter of Freedom.

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HOW TO STRENGTHEN LABOR UNIONISM

AN ADDRESS

DELIVERED AT PAUL REVERE LODGE, MONDAY EVENING

May 1, 1922

BY

SAMUEL UNTERMYER

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"Whom the Gods would destroy they first make mad." That thought best expresses the effect of the short-sighted and mischievous policies of organized labor which are discouraging its friends and playing into the hands of its enemies. All the machinations of these enemies cannot do it the injury that it is inflicting upon itself.

I am a lifelong friend and champion of organized labor and am entitled by years of arduous and gratuitous service to have the workingmen hearken to my words of advice and warning as those of a tried and sincere friend. It is not only the right but the duty of such a friend to point out the weak spots and by helping to eliminate them to strengthen the cause. It is against the weakest links in the chain of the system by which organized labor is held together that the attacks of its enemies are naturally concentrated. If the system cannot stand the strain at those points the structure will eventually crumble. The man who will not do his utmost to strengthen the cause at those points by exposing the weak links is playing into the hands of the enemy.

While my sympathy with the workers is conceded, it has been asserted that I do not understand them or their aspirations. I believe that my record proves that I have such understanding. Certainly I have contributed something to the cause of labor. For years I have insisted that the workers are not receiving their just share of the wealth they produce; that but for organized labor their lot would be one of misery and virtual serfdom; that collective bargaining is their right and their only safety; that the privilege collectively to strike or refuse to work is one with which the law must not interfere, and I have openly and consistently opposed all attempted legislation, such as the Knight Bill that was before the last legislature, that would have curtailed such rights, and openly championed before the same legislature the bill making Workmen's Compensation Insurance a state monopoly. I have persistently fought the Steel Trust and its satellite associated corporations in opposition to the principle of the so-called "Open Shop" on the ground that "there ain't no such critter" and that the cry is a high-sounding fraud and sham; I have recently defended the West Virginia miners against the operators before the U. S. Senate Investigating Committee; championed the cause of the Garment Workers' Union against the employers, and that of the Actors' Equity Union against the managers, and in a host of other struggles I have been arrayed on the side of labor because of the conviction that its cause was just.

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I know of the fierce uphill struggles of organized labor against the ever-increasing power of organized capital and of what it has done for the workers, of how hopeless would be their plight without its aid, and my intense sympathy is with the workmen in their just aspirations for better living conditions and for provisions that will assure them against want in their old age and their families against dependence when they have passed away. I was perhaps the first advocate in this country of old age pensions and insurance against sickness and unemployment, having studied the subject at the time of its introduction in Germany.

On the other hand, standing as I do to a certain extent aloof from the conflict, having no personal interest in either side of this great controversy in which my sympathies are arrayed on the side of the workers, my judgment may possibly be a trifle more reliable than that of one whose duty it is to defend whatever may be done by organized labor.

The Courts are not free from criticism in their treatment of labor problems that have come before them; they are ofttimes far too solicitous for the protection of property rights as against the higher claims of human rights; there is a certain lamentable inequality as between the rich and the poor in administering justice, and the use of the injunction in labor disputes has reached the point at which the action of the courts comes dangerously near the line of interference with the individual rights of the citizen to freedom of speech and action. All this may be freely conceded for it has never been claimed that the courts or any other form of human justice is infallible. Like all other things in the world, it is in a state of evolution. But it is constantly approaching a higher level, and fallible though it may be, it is the only peaceful agency thus far devised for determining the controversies between man and man.

The infirmity of the Courts in administering justice in the controversies between capital and labor is not sufficient reason for withdrawing from or denying to the courts all jurisdiction to correct the injuries inflicted upon capital by organized labor. It cannot be that redress shall be denied for injuries resulting from recognized and admitted abuses wilfully inflicted upon the employers or the public by the regulations and practices of the Unions, however indefensible they may be.

Whilst admitting the wrongs and lamenting the helplessness of the authorized representatives of organized labor to correct those wrongs, a proposal is made that the community must permit them to continue and must suffer such additional abuses as may be inflicted, whether with or without rhyme or reason until those who are responsible for

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these wrongs and who are practicing these abuses shall in the whirligig of time have become so humanly just and perfect that they will mend their ways and will voluntarily abate the injuries of which they are the beneficiaries. Surely no such proposal can be for a moment admissible in a civilized community. Organized society would be headed for the rocks and would be dashed to pieces if any such revolutionary proposal were arguable.

If labor unions are permitted to operate above and beyond the law, practicing innumerable acts of oppression, not only against property rights, but against the manhood and independence of their members and against liberty itself, why should not the same immunity be extended to organized capital? Why should one be beyond the reach of the law and the other subject to its restrictions? Why should the same quality of act be punishable as a crime when perpetrated by one element in the community and permissable when perpetrated by another?

Human and fallible as the courts may be and doubtless are, like all other human institutions, they must continue to function as best they can if the present social structure is to continue. The legal maxim that "Where there is a right there is a remedy" if the invasion of that right has caused damage, must apply to all alike. There must be no class in the community, whether it represents labor or capital, to which the law does not equally apply. If manifest wrongs against life, liberty, or property have been or are being perpetrated for which there is no remedy, it is the highest function and duty of the lawmakers to supply the remedy. As to the application of these fundamental principles there can be no question between thinking men.

It is sought to suspend the application of these principles so far as concerns the correction of wrongs inflicted by organized labor, the reason assigned being that the judicial tribunals established as an integral part of the social order have broken down and that whilst they function with reasonable impartiality as between members of the capitalistic class and in the repression of ordinary crimes, their attitude toward the controversies between capital and labor is so unjust to the latter that labor feels justified in using its political power to resist the application of those laws against them. I regard that doctrine as a challenge to government which cannot be permitted to go unanswered.

We are told that the poor have not an equal chance in the courts against the rich. As there are one thousand or more poor men for every rich man, all possessing the ballot, why should not all the poor, whether wage-earners, clerks or what not, be able to invoke the same lawless doctrine and see to it that the jurisdiction of the courts is confined to controversies between the rich, where it is admitted that justice

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is equally administered. If any of our human institutions are vulnerable or defective, why seek to correct them? It is so much easier to ignore them and substitute your own sweet will—be your own prosecutor, judge and jury, if you have the power.

Everybody admits that we must have courts. If they are not doing their duty, why not apply the corrective that is within the reach of those who complain of their inefficiency instead of defying an arm of government that is admitted to be essential to the peace and liberty of the nation? The disclosures of abuses made by the Lockwood Committee have been confined to a single industry of the many that are dominated by the labor unions and the wrongs and abuses disclosed in that industry are a mere negligible fraction of those that exist in other trades.

There is not one of the many abuses that has been disclosed in organized labor that the unions could not eliminate if they chose to do so, with eventual profit to themselves and their members. They admit the abuses and the injuries thereby inflicted upon innocent people. They do not deny that these abuses gravely interfere with individual liberty of action within the law and that they result in grievous wrongs for which there is now no remedy. Nor do they deny that it is within the power of the unions to correct these abuses and that they have promised to do so but have defiantly repudiated or refused to keep those promises. "Might is right" is their boastful slogan.

In the same breath that these admissions are made, they denounce and threaten to resist the effort to bring those abuses within the condemnation and redress of the law. Their only excuse for this lawless defiant attitude is that the courts are so biased against the principles and policies of organized labor that if permitted to intervene to relieve this oppression by the unions, they fear that the oppression practiced by the courts against the unions in granting this relief will result in still greater oppression against the unions.

There is and can be no basis for such a contention. Most of the rules, regulations and practices sought to be abated are confessedly unjust and oppressive. The national and international governing bodies of the local unions confess that they would eliminate them if they had the power but they say that their organizations are so put together that, however greatly they may deplore these conditions, they have no jurisdiction to correct them. On that ground and on that ground alone the public is to be left to await the sweet will of the labor bodies that are practicing these oppressions before they can be relaxed. Truly a fine state of society when the great labor leaders, who include among their number the best intellects in the land, are driven to resort to such "arguments"!

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It is fortunate for the cause of labor that it has friends outside its ranks who have no fear of its displeasure or reprisals when it is in the wrong, and who have the courage to come to its rescue by taking issue with fallacious and dangerous doctrines. I, for one, emphatically protest against the view that the many admitted abuses in the policies and practices of the labor unions should be patiently permitted to continue unrestrained, uncorrected, and unabated until the labor movement has reached the point in its gradual process of evolution where those who are practicing and profiting by these abuses see fit voluntarily to exterminate them, no matter how revolting they may be to one's sense of justice, or how dangerously they may infringe upon personal rights and freedom, or how great may be the injury to the public. It is an impossible and intolerable doctrine, repugnant to the natural sense of justice and inconsistent with our conception of freedom. It offends against the fundamental principles of organized government and society.

A few illustrations taken at random from the testimony before the Lockwood Committee will clarify my meaning and show where unionism is doing grave injustice, even to its own cause. The constitutions and by-laws of most of the labor unions not only permit but provide for (1) Limitation upon membership; (2) Expulsion of members; (3) Limitation upon the number of apprentices who shall be permitted in a given trade; (4) Enforced trial and disciplining of employers whose business existence depends upon the goodwill of the unions, without the right to them of appeal or review from the fiat of the union, however arbitrary and unjust it may be; (5) Interference with the employers' right of freedom of contract which does not affect the unions and with which they have no concern. And there are innumerable other equally indefensible rules and practices.

A few instances of such acts, taken from the books of minutes of various unions and from the testimony of their officers, as appearing from the proceedings of the Lockwood Committee, may be cited for use as a basis for the present discussion, but let it be clearly understood that these particular instances are limited to rules and practices of the unions connected with the building trades and that they cover a mere negligible fraction of those that were exposed in that industry.

The following is taken from the by-laws, rules and regulations in the Plasterers' and Cement Finishers' Union:

(1) Employers are compelled to appear before the executive board of the union and are fined if they fail to obey the union's mandate to appear.

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(2) They are fined for inferior work done by the union men and are compelled to have the work done over again at their own expense whilst no penalty whatever is imposed upon the members by whom the work was done.

(3) They are fined for making cornices in union shops instead of doing the work on the premises at increased expense to them.

(4) Employers are fined for permitting members of the union, with the consent of the men, to work overtime at the rates of extra pay prescribed by the union if done without a special permit in each instance from the union officials.

(5) An owner or builder is prohibited from employing a new contractor to finish a job when the previous contractor has failed or abandoned the work. In such cases the union requires that it shall supervise the completion of the job and that it be done by days work and not by a new contract and under a union foreman designated by it; and all this although the previous contractor has paid the union men in full for their work and they have no claim whatever against the owner, the builder, or the property.

(6) The owner or builder is required to run casts, plates, and molds on the job instead of attaching them and to take down the casts if so attached, the purpose of the regulation being to give more work to the men and thereby add to the expense of the job because of the additional time it would require to do this work on the job rather than in the shop.

(7) No owner or contractor is permitted to use what is known as a stock model from which plaster casts are made for more than one job, the purpose being that the models cannot be sold or again used, thus stimulating and adding to the work of the modellers who are members of the Plasterers' Union and to the cost of building construction.

(8) Contractors engaged in plastering are forbidden to sublet any part of their work or contract.

(9) The mixing of Plaster-of-Paris with Keene cement in the manufacture of mantels is forbidden because of the lesser work involved for the plasterers in attaching mantels so made to the building. As an illustration of this, it appeared that in the recent construction of the Hotel Ambassador in this city, there were 150 of such mantels made in a union shop, none of which were permitted to be used because Keene cement had been used. The owner had to suffer the loss of all these mantels and have them made over again as directed by the union officials.

(10) On the same job in the Ambassador Hotel, it appears from the uncontradicted evidence verified by the union officials that the

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architect of that building, who is one of the most distinguished men in America in his profession, finished the walls of the dining-room in a form of plaster to conform in color and design to the Travatine marble pillars in that room to create an artistic effect that they were anxious to provide. The union delegate, whose artistic taste was offended by the coloring, required that the walls be taken down, which had to be done in order to complete the building. In both of the instances last cited the local union officers refused to heed the advice and direction of the head official of the International Union from which it held its charter, who had come on from Chicago, examined the work, protested against the action of the union officials and urged them to withdraw these absurd and arrogant demands. The delegate in question gleefully announced from the witness stand his hatred of all employers and that he "would stick the harpoon" into all of them (as he termed it) whenever he had the chance. That delegate is still the controlling factor in that union.

(11) An employer was compelled to pay his men a quarter of a day's pay for having required them to wait ten minutes beyond paytime for their wages on a single occasion.

(12) Employers are required to finish ceilings in wire lath instead of lime and plaster, as specified and as required by the public authorities.

(13) Employers were fined for making affidavits in judicial proceedings against the union. These fines are imposed pursuant to a provision in the constitution of the International Union.

(14) Members of the union who were Germans and Swedes were fined for working on St. Patrick's Day.

(15) The foreman on a job who is supposed to be the representative of the owner is required to be a member of the union.

(16) A foreman was suspended for one year for working with tools.

(17) Membership is limited and the books are closed against the admission of new members.

(18) The age and number of apprentices are strictly limited.

(19) The amount of work a member may do in a given day is limited and specified.

One of the by-laws of the Cement Makers' Union requires that where there are two men on a job, one must be a foreman; and that where there are four or more men employed, the foreman must do no work. Another prevents members from doing an "unreasonable amount of work." Still another places in the hands of the delegate or business agent the decision of whether an employer is justified in

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discharging one of his men who has been selected by the union as shop steward, but who is paid by the employer as one of his workers.

The Metallic Lathers' Union requires that there must be a foreman on every job and if only one man is employed he must receive a foreman's wage. The most extraordinary of its requirements, however, is that wherever reinforced concrete is fabricated at the factory, where it can be done more cheaply than on the job, and is brought to the job, the employer must pay to the union a bonus for that "privilege" which goes into its sick benefit fund. This bonus is fixed at $6 a ton for cut steel and $18 per ton for fabricated steel. The manifest purpose, of course, is to prevent the employer from fabricating the reinforced concrete in the union shop where it requires less work. Employers are compelled to be members of the union in order to secure labor. The exactions to which they must submit are beyond belief.

The local union in New York has had its books closed against new members since November, 1920, but in active times it has a permit system by which non-union men are allowed to do the surplus work on the receipt of a permit card on the payment of a given sum per week.

In the Electrical Workers' Union there is a closed membership of 3,800 men. There are about 12,000 electrical workers in New York, but this is the only local union. None other could be recognized. In times of great activity it issues permit-cards to non-members at a charge of $2.50 per week. About $150,000 was collected in cash in this way, of which about one-half was stolen. No books were kept and there were no regulations requiring the keeping of books or any form of accounting to the members by the officers.

In the Bricklayers' Union no builder can contract for laying brick unless the sub-contractor is also given the contract to furnish the materials, thus adding to the cost of building and encouraging inferior work. No stone or marble that is cut outside the state can be set. It must be cut by the local yards recognized by the local union.

There are hundreds of abuses of this kind and worse, but it would take too long to go through the list.

I have in mind a case that has been recently brought to my attention involving the existing relations between the employing Jewish bakers and the journeymen Jewish Bakers' Union in the Greater City of New York. The story is an extraordinary one. It is too long to tell here in all its details but sufficient of it can be sketched to indicate the intolerable and impossible conditions that now exist in that industry, the result of which has already been to reduce the number of employers from eight hundred to three hundred within the past few

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years and which, if continued, threatens to eliminate the employing class among the Jewish bakers.

The city is divided by the unions into zones. There are separate unions in each zone that contains a considerable Jewish population, although they are banded together by a sort of general go-between or administrator. The unions have, however, forbidden the employers to band together into a single organization. They make their contracts by collective bargaining on their part but refuse to recognize collective bargaining on the part of the employers. The union insists on dealing separately with each employer and on requiring him to make a separate contract with his union. The contracts are at varying wage-scales for different employers and they expire at different times. The journeymen are assured fifty-one weeks in the year of steady employment, which includes ten Jewish holidays, enumerated in the contract, for which full pay is required to be given. The minimum weekly wage varies from $66 upward, but the prevailing wage is between $70 and $90 per week for an average of five hours' work per day. In addition to this wage, each journeyman gets a certain amount of bread or other product of the bakery, said to be worth from $5 to $8 per week.

These local unions are affiliated with the American Federation of Labor but they have no connection with the Christian Bakers' Unions except indirectly through this general affiliation.

The weekly wage among the Christian unions is $37 for an eight-hour day so that the Jewish bakers get considerably more than double the pay of the Christian bakers although the skill and character of the work are precisely the same. The members of the Jewish unions are not allowed to join the Christian unions and by arrangement between them the latter are not permitted to join the former, nor is the Jewish employing baker allowed to employ any men from the Christian unions. There are many other provisions in these contracts equally oppressive.

There is no despotism on earth, so far as I am aware, comparable with that practiced by these Jewish bakers' unions and apparently there is no relief. If the employers were permitted to take their men from any of the bakers' unions they could sell bread for three cents a loaf cheaper than it is now being sold and would be glad to do so for they could greatly enlarge their business and still further reduce the price of bread. Even as it it, with wages among the Christian bakers of less than one-half of those among the Jewish bakers, the latter now sell bread at one cent per loaf less, measured by the pound as bread is measured among wholesalers.

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Here there is a flat refusal to the employers of the right of collective bargaining—that sacred right for which the unions are contending in other directions and for which much precious human blood has already been shed. How can such a veritable "Reign of Terror" be excused? Will it be possible for organized labor to maintain itself in the face of such conditions? And yet there is no redress or hope of relief except through the law.

It must be manifest that this situation cannot continue. Since the national and international federations from which these local unions hold their charters find it impossible to get from the local unions sufficient delegation of power to enable them to control of the local union or are unwilling to ask for that power, the public is forced to turn elsewhere for relief. The people can no more permit these evils to continue unredressed than they could safely allow trusts and other combinations of capital to maintain prices and restrict output that have done so much to increase and maintain the high cost of living. The latter should be and will be destroyed. On the other hand, it is, in my judgment, in the public interest that the integrity of the labor unions should be preserved and their legitimate powers strengthened.

As has been heretofore stated, many of the unions in the building trades, if not all, and many in other trades, place a limitation upon membership. Practically all of them have the power to expel members and at their discretion to impose fines that may be made so heavy as to amount to expulsion and which have frequently had that effect. The expulsion of a journeyman or laborer from his union may, and often does, mean that every avenue of employment in that trade is closed to him. He and his family are literally sentenced to starvation; his doom was characterized by Mr. Gompers as "capital punishment," which it is in so far as concerns the ability of that man to secure employment.

If, as is generally the case, the local union from which he is expelled is a member of a national or an international union, that means expulsion from all the unions throughout the country in that trade. We have had instance after instance of men who have been hounded from city to city, driven from place to place, and everywhere denied employment because they cannot produce a union card, or who, after having secured employment, are forced out upon notice from the International Union that the person in question is no longer a union member.

The same result follows from the refusal to admit a qualified journeyman to a union. This prohibition is constantly being enforced. There is no monopoly on the face of the earth comparable

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in power and destructiveness to the labor union that places a limitation upon membership so as to keep down the supply in that particular industry, for the purpose, of course, of maintaining its despotic power to dictate terms of employment.

It is these and like practices that furnish to the advocates of the fraudulent "Open Shop" their chief ammunition. Nobody believes that the latter do not discriminate against union labor and use every devious device to destroy it. We have proved that overwhelmingly in the testimony before the Lockwood Committee in our attacks upon the steel manufacturers who are banded together in the National Iron Erectors' Association.

Nothing quite so incongruous, illogical, inconsistent or indefensible could well be conceived as a limitation upon membership in a labor union, except, possibly, the instance above recited of the denial by the Jewish bakers' unions of the right of collective bargaining to their employers.

A non-union man is branded as a "scab" and whenever the union is strong enough the members of the union refuse to work with him in any place where he is employed. Some of them go so far as to refuse to handle the merchandise made by non-union hands. From their point of view all these measure are defensible as being essential to their self-preservation. But by what process of reasoning can the members of a union refuse to work with a non-union man and at the same time refuse to permit him to join the union?

It is of the very essence of unionism that all men who desire to follow a given craft shall join the union of that craft and that each man shall thereby to that extent surrender his independence for the benefit of his fellow members who in turn surrender theirs for his benefit. The demand that a man shall not work at a trade unless he is a member of a union and the refusal at the same time to admit him to the union are truly equivalent to a sentence of capital punishment against him from living by his trade. If that be true of all the unions, he is excluded from earning a living by any trade.

On the labor unions' theory expulsion from a union for any cause is equally unthinkable. A labor union is not supposed to be a social function where men meet on an equality of station. It is an instrumentality for mutual protection against the unjust encroachments of the employer upon the rights of the laborer. By it he rightly seeks to convert his individual weakness into the collective strength of all the members of his calling and thus be able to bargain on equal terms against the financial strength of the employers.

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Even then, when the clash comes, the struggle is at best an unequal one for labor. No man with a just appreciation can fail to be aroused by the inequality of the struggle or fail to have his sympathies enlisted on the side of labor where its demands are within reason. But the despotism, cruelty and inconsistency that, whilst perhaps rightly arrayed against those who refuse to enter the fold, would close the gates on those who are clamoring for admission or who, having entered, have lost that right and want to re-enter, are incomprehensible and indefensible.

I differ from the leaders of organized labor who insist upon retaining provisions in the by-laws and regulations of the unions arbitrarily limiting the number of qualified apprentices who may be admitted to a union. In the Painters' Local Union, for instance, there can be no more than one apprentice for each ten members and not more than five apprentices in any shop even if there are a hundred or two hundred journeymen employed. In the Lathers' Union there may be only one apprentice for every fifty members. There must be no such limitation and the law must see to it that there is none. Again I remind my friends of organized labor that our unions are not social functions in which there should be any discretion whatever in admitting others to participation. Brothers and sons of members, who are frequently placed in a favored class in that respect, are no more entitled to learn a trade and make a living by it than others who are not so fortunately situated. Such artificial barriers must be destroyed in return for the very proper exemption of labor unions from the anti-trust laws. They must assume corresponding obligations.

We cannot afford to permit the opportunities of the rising generation to be thus crippled. If the unions are to realize their cherished ambition that the time will soon come when all labor will be unified in one great brotherhood, as I hope and believe it will if labor will pursue its ends by lawful means and be patient and dominated by the spirit of brotherhood and self-restraint and will live and let live, a limitation on apprenticeship will be equivalent to a restriction upon the lives, liberties, and pursuit of happiness of the coming generation. It will amount to a sentence of outlawry against the young men who are ambitious to become useful and self-respecting citizens, by depriving them of the opportunity to work.

Labor, and especially skilled labor, will thus become a hated and intolerable autocracy that will array against itself the patriotism, intelligence, sense of justice, and self-respect of all that is best in the community and will lose all that it has gained by these generations of struggle. The tables will be turned upon it and instead of con-

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tinuing to be the oppressor it will again be the oppressed. It will be even worse, for capital is growing steadily stronger, better organized, more concentrated, less manageable, and more grasping; the struggle for wealth is growing fiercer and when labor shall have thus "hoisted itself by its own petard" we shall be confronted with a class war, the bitterness of which is terrible to contemplate.

Is labor prepared to bring such havoc and suffering upon itself when, by a spirit of justice and moderation, it may grow stronger and stronger until the time comes (which I hope to live to see) when it will be able to enforce a just distribution of the wealth that it creates?

The abuses of which complaint may be justly made are weakening the cause of organized labor just as the excesses of capital—its trusts, its price-fixing combinations, its unconscionable gambling in the necessaries of life, its artificial maintenance of the high cost of living—are bound to result in hampering and restrictive legislation that may at times go beyond the point that is just or necessary to correct the particular evil sought to be eradicated, in order to be sure to strike at the root of that evil.

There are many labor unions, among them the more prosperous, that are under the guiding hand of men of vision, and that are free from grave abuses. They would not be affected by regulatory legislation. The others must be regulated to save them from themselves. Organized labor should champion moderate regulatory measures. If it fails to do so the abuses will keep pace with its increasing power. No man or body of men has yet been discovered that is so far above the temptations that are incident to human frailty as to be able to be a law unto themselves without abusing that power and eventually bringing down upon themselves the wrath of the community resulting in the most rigorous kind of restrictive laws.

When I say "no body of men" I should except that anomaly in the law, the New York Stock Exchange, which is still operating above and beyond the law and has thus far, to our humiliation be it said, remained immune from legal restraint. It is making desperate efforts to correct the evils within its own organization but it has not succeeded and will not succeed in converting itself from a gambling-den into the world's great security market which it should be, until compelled to do so. Its day of reckoning is near at hand.

My conception of labor union regulation has none of the terrors that are involved in the word "regulation" as seen from the point of view of the labor leaders. It does not even involve enforced incorporation of the unions, although if these gentlemen understood the

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limitations that may be placed upon incorporation they would see no harm in that character of regulation. But since that conveys to them an unwelcome, however unjustified, fear of restriction upon their activities, it is not necessary to consider it.

The form of regulation that I have in mind would expressly reserve all the present rights of the unions to strike and all other rights now secured to them by the law that do not conflict with public policy and public safety and prosperity. They would be in the first instance purely administrative and would involve:

(1) The submission by each union of its constitution and by-laws for approval to a state commission and the granting to it of a license, if an unincorporated association, if they contain nothing that is contrary to public policy.

(2) The right of a member of the union to review any determination of his union that he believes to be unjust to him.

(3) The right of any person feeling aggrieved by the action of the union to a like review.

(4) The right to any complainant having a just grievance against the rules, practices, and regulations of a union to have such abuses abated, being in this respect somewhat analagous to the present authority of the Federal Trade Commission to prevent unfair business practices among corporations engaged in interstate business.

(5) The privilege to either party to a controversy before the commission to appeal to the courts from its decision.

Such a regulatory body would be given no power to enforce arbitration between the unions and their employers or to intrude into any of the controversies over wages, hours of labor, or any other matters that are the legitimate subject of contract or of barter between the employer and the union. Its jurisdiction would be confined to the correction of unfair regulations and practices.

The only effect of that limited form of regulation would be to conform the rules and practices of the labor unions that are now discrediting the cause to those that already prevail in the unions of more enlightened management. In that way the outlaw unions will be deprived of their power through their oppressive and indefensible methods to weaken the legitimate unions and thus will the cause of organized labor be greatly strengthened and its enemies disarmed.

That, in brief, is my plan for strengthening the cause of the labor unions and confounding its enemies, whose entire stock-in-trade is based upon those abuses whereby they hope to obscure and have already well-nigh succeeded in obscuring the fundamental justice and merits of the principles on which organized labor is founded.

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HOW WE AMERICANS MUDDLE AND BLUNDER ALONG

AN ADDRESS

BEFORE THE ROTARY CLUB
AT WEST PALM BEACH, FLA.,
Tuesday, March 11, 1924

BY

MR. SAMUEL UNTERMYER
NEW YORK

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HOW WE AMERICANS MUDDLE AND BLUNDER ALONG.

ADDRESS BY MR. SAMUEL UNTERMYER, NEW YORK, BEFORE THE ROTARY CLUB AT WEST PALM BEACH, FLA., TUESDAY, MARCH 11, 1924.

These are trying times, in which it behooves us to retain our perspective and not to be swept off our feet by reckless, wholesale denunciation of our public men. It requires a calm and discriminating mind to separate the wheat from the chaff—the sheep from the goats. If we pull down our idols and tear them to pieces at the slightest breath of suspicion and without a hearing, it is going to be more difficult than ever to get the right kind of men to accept public office. Our duty to ourselves is to stand loyally by them until they are proven unworthy.

The value and importance of recent and pending developments at Washington cannot yet be justly appraised. The surface has as yet barely been scratched. The paltry sums claimed to have been paid or loaned to Fall by Doheny and Sinclair are, in my opinion, mere chicken-feed as against what lies underneath. The crux of the revelations, if they are ever permitted to be made, will be found in the colossal stock dealings. That is where the big money was made. At one time it looked as though these transactions might be uncovered by the grace of the Governors of the Stock Exchange. Such is the helplessness of the people against this entrenched gambling institution, which is subject to no law, that without the voluntary aid of the Exchange the Committee will have to halt at the most important part of the inquiry. We shall soon know whether the failure of the Committee to

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exploit this crucial angle of the inquiry is due to the fear of besmirching too many of our public men or to the failure of the Stock Exchange to permit them to get the rock-bottom facts. It will require the very best sort of expert aid to dig underneath the surface of the lists that will be 'handed' to the Committee.

Whilst there can be little doubt from the evidence thus far adduced that there has been official corruption and treachery in high places, we must exercise discrimination in fixing the responsibility. Proper perspective, that time alone can supply, is still lacking. There are far too much hysteria and exaggeration as to the importance of certain of the disclosures and too much danger of confusing the innocent with the guilty. This danger will be emphasized if the Committee permits itself to be led into side issues or if it departs from the wholesome and the only just rule of confining itself to evidence that is accepted in a court of law. Nothing has done so much to discredit Legislative investigations as the acceptance of hearsay testimony. The value of the life insurance, Money Trust and Lockwood Housing investigations was due largely to the restraint that the investigators and their counsel imposed upon themselves in strictly limiting the testimony to legal evidence in the face of many temptations to depart from that wise rule.

The Committee has done valuable work under the guidance of Senator Walsh who is an exceptionally able lawyer. But it seems to me that it has gone far afield in certain directions, although it may be that in following the leads unexpectedly opened up from time to time this was inevitable, especially in view of the manifest reckless swearing that it encountered.

It makes, for instance, little difference in appraising the inequity of this humiliating business whether the oil leases were valid or invalid, wise or unwise, if the discretion vested in the Secretary of the Interior was corruptly exercised. The bribers and the bribed are equally guilty in either event. It is no excuse for the corruptionists to

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argue that it was a good deal for the Government and it was a mistake for the Committee to permit itself to be diverted by any such false issues. However that may be, the point I want to emphasize with you now with respect to this inquiry and the public reaction to the startling testimony that has been presented is that the public must not reach precipitate conclusions.

These hasty judgments are far-reaching in their unfortunate results. They emphasize to the men we most need in public life the perils of public office. It will greatly improve our chances of good government if we can but learn to suspend judgment until all the facts are before us and until we have reverted to a reasoning frame of mind.

The revelations have, however, already gone far enough to confirm the deep-seated conviction that ours is a democracy in name only and that we are ruled by a secret super-government of men of Big Business and great corporate interests that are money-mad, without patriotism and none too scrupulous, and that these malign interests dominate the important activities of our Government.

That is true in my own State, where most of "the interests" are concentrated, to a far greater extent than in Congress and where men in exalted office, posing as champions of the people and generally acclaimed as such by our easily deluded masses, are merely secret pliant tools of those interests.

Our most difficult problem is, as it has been for the past generation, how to drag these enemies of government into the lime-light and drive them from their seats of power so as to bring our Government back to the people. When the curtain has been drawn upon the various scenes of these malign public activities it will be found that the men who have been in a position to know whereof they speak and who have been for decades "crying in the wilderness" against this peril to our institutions, were not mere wild radicals and character-assassins, as they have

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been represented, but that they have been, on the contrary, true prophets, warning against real dangers.

As this is not the Fourth of July or Washington's or Lincoln's Birthday, I have not come here to extol the greatness of our country. I think we should have these days of mutual admiration and felicitation but I believe also that it is equally important for our welfare that we establish another holiday to be devoted to looking our problems, and especially our shortcomings and the defects of our Government, squarely in the face. This day might appropriately be christened "Knockers' Day". We may not get as much gratification out of it as out of our holidays for self-glorification, nor will it feed our vanity, but we will get quite as much real benefit.

If, therefore, I convert this opportunity into a "Knockers' Day", please do not imagine that I am lacking in reverence and admiration for our institutions or am oblivious of what we have accomplished. That would not be true. I bow to no man in my pride in our greatness. But our very bigness and prosperity, the rapidity of our growth, the stupendous problems that are being thrust upon us, with many of which it has been impossible to cope, are responsible for much of the weaknesses of our political structure. I believe it would be a distinct public service to keep those defects in our institutions actively before us with the purpose of hacking at them until they are remedied, instead of blinding ourselves and checking progress by the absurd notion that "all that is, is right."

Time will permit only a brief reference to a few of the most important of these weaknesses:

1. Our form of government is not democratic in the sense of being quickly responsive to the people's will as in the governments of other countries under constitutional rule. In Great Britain, for instance, if a new issue of national importance arises, as frequently happens overnight in all countries, Parliament can be immediately

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dissolved and the question taken directly to the people and decided by the election, within thirty days, of a new Parliament commissioned to carry out the will of the people as expressed at the polls. What a contrast in popular government to our system!

We select our members of the House of Representatives in November of one year not to take office until December of the following year. By the time they begin to function the issues on which they were elected have, as a rule, disappeared, and yet, there they sit for two years from the date of their election, voting on fundamental questions on which they were not elected. Worse still, these "lame ducks" continue to legislate for more than a year after they have been repudiated. This is not representative government. In the case of Senators, who are elected for six years, the evil is still more pronounced. The effort to correct this situation is still a-borning.

The Referendum and Recall are the only practicable ways of restoring the legislative branch of the Government to the people, but it should not apply to the President or the judiciary.

We are still indulging the fond hope that the President will be made ineligible to reelection, at least for successive terms and thus do away with the political "wire-pulling" that characterizes so large a part of the first term of every President and detracts so greatly from his political independence and the dignity and usefulness of the office.

The Recall, as applied to the judiciary, which has long been agitated, would in my judgment be disastrous. It would subject our judges to the perils of public clamor against which they should be assured.

2. WE HAVE NO CONSISTENT, CONTINUOUS FOREIGN POLICY AS IN OTHER COUNTRIES. Changes of administration should not involve alterations either of our foreign policies or in the personnel of our envoys. In making our foreign policies the football of party politics, we are frittering away valuable advantages. How can we, how-

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ever, be expected to develop any real influence when our ambassadors, besides having no education or experience in diplomacy, barely get the chance to become acquainted with the conditions in the countries to which they are accredited before they are supplanted? From the very nature of our diplomatic system they never get so much as a look-in behind the scenes and are at a hopeless disadvantage, notwithstanding the great prestige to which our powerful position in world affairs entitles us.

For generations we have been vainly trying to establish a genuine diplomatic service that will eliminate the intolerable and humiliating practice of auctioning off the the great posts as rewards for party service or contributions. We are to-day without real influence at foreign Courts, as is best evidenced by the scant consideration that is accorded our complaints of the infringement of the rights of American citizens as compared with those of a British subject.

There is a further reason why our foreign envoys have almost no influence and will have even less in the future than in the past—they deserve none. They have abused the hospitality of the countries that sheltered them. Those of our ambassadors who came home and wrote "Memoirs" disclosing the secrets of the Courts to which they were accredited should not have been permitted to publish them. It will be a long time before our envoys can regain the confidence of foreign countries. That is a form of exploit that should be forbidden.

3. NO COUNTRY CAN BE SAID TO BE A DEMOCRACY IN WHICH THE FRANCHISE IS EXERCISED BY NOT MORE THAN ONE-THIRD OF THOSE ENTITLED TO VOTE. The most distressing part of that story is that the "slackers" are among the most intelligent and prosperous of the electorate—those who have been most favored by the protection of their country and who owe it most and have the biggest stake in good government. So poor is their type of citizenship that it is not unusual for these men to sacrifice their precious franchise for the superior attractions of a game of golf.

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Our government will not be truly democratic until the exercise of the franchise is made a duty as well as a privilege. For twenty years I have been contending that voting should be made compulsory, under a heavy penalty for violation. The voter must be forced to the polls even though he or she deposits only a blank ballot. Then and then only will the control of government be shifted from the hands of the professional politician, where it now rests, to the shoulders of the people, where it belongs.

4. If you want a striking illustration of our hopeless slovenliness and inefficiency, gaze upon THE SPECTACLE OF OUR DIVORCE LAWS, which are justly the butt of ridicule of every civilized community to such an extent that they are made the jesting theme of the stage and literature, as evidence of our incapacity for self-government. As a result of the differing laws and policies of the various states, a man may have almost as many lawful wives and be almost as many times a bigamist as there are states in the Union. The concubine of one state may be recognized as the wife in another, and vice versa. A man and woman traveling over the country, starting as supposed lawful husband and wife, may both be criminals under the Mann Act in states through which they pass.

5. OUR SYSTEM OF FEDERAL TAXATION IS ANOTHER ILLUSTRATION OF GOVERNMENTAL INEFFICIENCY. We were more than a quarter of a century behind other nations in discovering that the taxation of incomes is the most equitable form of taxation. Having finally made that discovery, it required another quarter of a century to overcome the opposition of the Big Interests. And now we have a law that is a monument of inequality and stupidity and that is in such a state of confusion as to be unenforcible and "more observed in the breach than in the observance." The administrative machinery is so inadequate that it has literally broken down. At a liberal estimate less than one-third of those subject to taxation under it are making returns or paying taxes. A fraction

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of the community are bearing the burdens of those who should bear them. That situation is due to the cowardice of our legislators. The law should be amended so as to compel every person over twenty-one years of age and the guardian for every minor to file a return under the most severe penalties, regardless of whether he or she will be found subject to taxation. The decision of those who are and those who are not exempt should rest with the authorities. In no other way can the tax dodgers ever be reached in a country with 110,000,000 inhabitants.

Worse still, through the tax-exempt securities the law is rapidly creating two classes, which constitutes an ever-increasing peril. On the one hand are the rich, who should above all others bear their share of the burdens of the government that protects their wealth, whereas they are daily becoming more and more free from taxation through the holdings of these securities; on the other hand are the bone and sinew of the land, upon whom we must depend for our prosperity and protection, who are bearing the rich men's share of the burden, as they have ever done under our iniquitous system of taxation.

Notwithstanding assertions to the contrary, I insist that under the broad terms of the Constitutional amendment giving to Congress the right to tax incomes "from whatever source derived," no further Constitutional amendment is required to correct this intolerable situation. It can be accomplished by a provision in the pending Tax Reduction Bill. But when that amendment was put to a vote in the House a few days ago, it was lost. None of our representatives who voted against that amendment took the trouble to explain why the flood of state and municipal bonds with which the country is being deluged, to the ultimate ruin of their communities, should continue exempt, whilst the income on the bonds of the Federal Government are subject to taxation,—another evidence of political cowardice that is not only condoned, but short-sightedly applauded because it enables the states and communities to borrow at an interest rate at

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perhaps one percent less than they would otherwise have to pay. This is not scientific government; it is selfish, unjust and unpatriotic, and its baneful effects are far-reaching and are bound to react disastrously.

6. OUR EXISTING IMMIGRATION LAW and the Bill that is now under consideration by Congress in substitution of the existing law furnish further lamentable proof of our haphazard, inefficient methods. Assuming that the restriction of immigation is not a mere political concession to organized labor and to assist it in fastening a labor monopoly upon the country, and that it is justified as an economic measure (which is a debatable question on which I express no opinion and that I will not discuss), our method of accomplishing that result must appeal to every intelligent man as deplorable.

I will not dwell upon the brutality of the existing law which invites immigration and then turns back the immigrant because the quota for the month, of which he knows nothing and can learn nothing, happens to be filled when he reaches our shores. That cruel, stupid regulation is, I hope, about to be repealed and our Consular officers abroad, most of whom have precious little to keep them busy, will probably be charged with duty of passing upon the qualifications of the immigrant and furnishing him with a certificate that will entitle him to land. But if we are going to restrict immigration, why not institute selective immigration instead of proceeding on the principle of "first come, first served"? We can pick and choose and get the very best of the youth of foreign nations here by an intelligent law, and we can afford to take a very much larger proportion of them than under the proposed Bill.

7. Of all the branches of our Government the most important and the one in worst confusion is OUR SYSTEM OF ADMINISTERING JUSTICE; it is outgrown and does not function to meet changed conditions.

(a) We should get rid of the Constitutional immunity now enjoyed by offenders against the law.

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It was a necessary safeguard to the liberty of the subject in olden days. Now it is a bulwark against the detection and punishment of crime. The defendant, instead of being permitted to hold his peace, should be subject to examination in open court; but, on the other hand, no alleged confession made by him privately when under arrest should be receivable in evidence against him. In other words, he should not be subject to the "third degree". But no good reason can be advanced why the prosecution should not be permitted to place him upon the witness stand. It is this ancient immunity that protects crimes of cunning.

(b) Grand Juries should be abolished. They, too, served their useful purpose in the days of oppression. To-day they are an instrument of cruel oppression. They are the *vermiform appendix* of the criminal law. Men's reputations are blasted without a hearing. They have practically been done away with in Great Britain. No man should be charged with a crime except in open court. The Government should be required to make out a prima facie case with the right to the defendant, if he so elects, to state his defense. From there the case should go to trial. There is no occasion for the interposition of a Grand Jury and no proper place for it in the modern administration of justice.

(c) The intolerable laws'-delays that prevail all over our country to-day amount to a denial of justice. It takes years to reach a case for trial in the densely populated cities of our country. These delays are an invitation to litigation, for the sake of delay. It is cheaper for the man who owes money to pay 6% for the privilege of delay than to pay his debt, and so the laws'-delays beget further delays. In other countries the average case is brought to trial within sixty days; and if there is an appeal there is a final determination within another sixty days. There the unsuccessful litigant is taxed with all the costs and charges of the litigation; whilst with us the successful litigant is penalized by having to pay his own costs, as those awarded by the law are purely nominal.

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(d) The manner of enforcement—or non-enforcement of the PROHIBITION LAW is a fair illustration of the way justice is administered in this country. It has not bred a contempt for the law, for that has long existed, but it has confirmed it in the minds of the people and has made a deep impression upon them. I am not discussing the wisdom of the law, but it must have been known when it was passed what its non-enforcement would mean. Even the most ardent prohibitionist must feel that the Canadian law is preferable to this statute the administration of which is disgracing us in the eyes of the world.

(e) The obligation of an oath is utterly disregarded. Perjury is rampant in the Courts and goes unpunished. It can and must be checked if our administration is to survive. Every Judge and Jury should be required to certify as part of the verdict or decision whether there has been perjury on either side, and if so, on which side, and the public prosecutor should thereupon be required to act or to explain why he fails to do so.

8. Perhaps the most flagrant and persistent instance of non-administration—or maladministration—is that of THE ANTI-TRUST LAWS. Here we are again confronted by a grave situation. To those who, like myself, believe that the welfare of the country demands the protection of our industries against foreign competition, especially in these times when we would have to contend against the pauper and half-starved labor of Europe, it is imperative that, whilst we are rightly according that protection, we should keep free the channels of home competition. This involves the suppression of the trusts and trade combinations that now infest the land. It is these combinations that are responsible for the largest share of the constantly increasing cost of living. And yet these criminal conspiracies are brazenly operating in the light of day, in almost every industry affecting the cost of living. They could be exterminated within two years by same legislation followed by aggressive criminal prosecution. Noth-

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ing drastic in the way of legislation would be required. It would be necessary only to (1) require all trade associations engaged in interstate commerce and their members, where they include actual competitors, to take out a Federal license and to come under the jurisdiction of the Federal Trade Commission whose powers, that have been largely taken from them by the Courts, should be enlarged. This will give the public authorities access to their books and records, which is the only way of reaching them and of destroying their absurd immunity against self-incrimination. (2) Place upon the Federal Trade Commission, with its own staff of investigators and prosecutors, the power and responsibility of enforcing the criminal law against the offenders.

The only thing that stands in the way of such legislation is the overshadowing power of the rich men who are offenders against the law. Therein lies the menace to our institutions—this peril which President Roosevelt so aptly described as "invisible government". It is well-nigh impossible to land in jail a member of this "criminal rich" class and quite impossible to keep him there for any considerable part of his sentence. And yet, when we exclude crimes of violence there are dozens of this class of perpetrators or crimes of cunning to every one among the masses of the people. Making due allowance for those who escape because of the complexity of the facts required to be established and of the shield of constitutional immunity that protects their transactions from inspection, there remains the still larger proportion who are protected through "influence".

This discussion brings me to the consideration of another scandalous situation that could be instantly corrected if the people could shake off the strangle-hold of these socially powerful men over legislation. I refer now to the hundreds of millions of dollars that are annually stolen from the people through the persistent refusal of Congress and of the New York State legislature to license and supervise the operations of stock brokers, stock promoters and stock exchanges. The constant pleas

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of public prosecutors and others for this protection continues to fall upon deaf ears, whilst the orgy of swindling not only goes on unabated, but is actually increasing in intensity and boldness.

All that is required is legislation that will, here again, through a licensing system give public officials the same access to the books that they now have to those of banks and insurance companies. Bank failures that were, prior to regulation, many and fraudulent, are now almost unknown, whilst stock brokers and stock promoters are daily swindling the public with comparative impunity.

I might go on indefinitely reciting instances of how and why we are badly governed, if time permitted, but will close with one more illustration of the malign potency of the big financial interests.

The Federal Reserve Act, which in its original form, under the impetus of the public indignation due to the revelations of the Pujo or Money Trust investigation, was the finest piece of constructive legislation in our history, has been so juggled and emasculated by amendments and administrative regulations contrary to the spirit of the original Act, through the power of the great banks and bankers, that it is now hardly recognizable to its framers. We can never secure effective constructive legislation and mighty little of justice in the Courts against these powerful interests except on the rare occasions when the people are aroused to a high pitch of public excitement. When that excitement dies down we relapse into the selfish lethargy from which we have been momentarily aroused and the foes of decent government are again secure.

Our press prints mainly sensations—and libels against which there is no redress, for we have no real libel laws. There is no protection for reputation. But after all, the press is not at fault. It is furnishing the people the brand of news that the public wants.

Whenever we are ready to protect ourselves and to pay the price by eternal vigilance, we shall get better government but not until then.

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REFLECTIONS ON

ARMISTICE DAY

ADDRESS

OF

MR. SAMUEL UNTERMYER

AT TEMPLE RODEPH SHOLOM

63rd STREET AND LEXINGTON AVENUE
NEW YORK

ARMISTICE DAY
NOVEMBER 11, 1924

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REFLECTIONS ON

"ARMISTICE DAY"

Address of Mr. Samuel Untermyer

At Temple Rodeph Sholom,
63rd Street and Lexington Avenue, New York
NOVEMBER 11th, 1924

I have hesitated to address you today for reasons that have been explained to Dr. Grossman, but finally yielded to his importunities upon his assurance that I might, without offense, speak freely what is in my mind, and am hoping that you will receive what I have to say in that spirit.

The commemoration of the day when this unprecedented, barbaric world-slaughter came to an end is in itself a commendable celebration. If its purpose were to commemorate a peace with honor to ourselves or to any of the other nations concerned it would indeed be an occasion for grateful remembrance. The tragedy of it all is that we are today celebrating not only the betrayal of the vanquished but of America. The day should be to us one of sackcloth and ashes, of fasting and atonement rather than of joy and thanksgiving.

Our martyred President (for he was as surely a martyr to his faith in the Allies as though he had been struck down on the battle-field) induced the Central Powers to lay down their arms in reliance upon a peace based upon the 14 points of which he was the author and to which the Allies gave their full and formal assent (with two exceptions affecting the freedom of the seas and reparations with which we are not here concerned) and that the Armistice Terms would in all other respects adhere to the spirit of that agreement.

Again, when he was literally forced to agree to the terms of the Armistice by the state of helplessness to which the prostrate foe had been reduced by their surrender in reliance upon the acceptance of the 14 points by the Allies, although contrary to the terms of capitula-

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tion, he still had the right to believe that the formal Treaties of Peace would at least follow the cruel conditions of the Armistice. At each step his confidence was violated.

When the agreement for the League of Nations, which was to crown the one great ambition of his life and to have been the instrument to restore peace and good will on earth—to which he had dedicated all that was in him—was formulated it was found to be an agreement to perpetuate, by the combined force of arms of the great Nations of the earth, the most brutal, despotic and war-breeding 'peace' in the annals of time. Then and then only did we learn that our dear country which, under the guise of 'a peace without victory' that was to make the world forever thereafter 'safe for democracy', had been made the pawn in the most treacherous game ever played in history. We, whose participation had changed defeat into success for the Allies, were repaid by a Treaty that violated every promise made by us and which cannot but perpetuate hatreds for generations to come.

The fundamental particulars in which these three documents differ from one another, the oppressive and destructive exactions that were added from step to step, have been so frequently analyzed and discussed that the outstanding facts are now well known to all students of the subject. Prefacing them by a brief chronological table, they may be summarized as follows:

NEGOTIATIONS PRECEDING THE ARMISTICE

Oct. 5, 1918. German Note to the President, accepting the 14 Points laid down in his Address to Congress of Jan. 8, 1918.

Oct. 8, 1918. President asks if he was to understand definitely that the German Government accepted the terms laid down in the 14 points and his subsequent Addresses and that nothing would be left except to discuss the practical details of their application.

Oct. 12, 1918. The German Government returned an unconditional affirmative to this question.

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Oct. 14, 1918. Further communications from the President concerning submarine warfare and guarantees of the representative character of the German Government.

Oct. 20, 1918. Such assurances were given in the German Note of that date.

Oct. 23, 1918. The President announced that having received the solemn and explicit assurance of the German Government that it unreservedly accepts the terms of peace laid down in his address of January 8, 1918 and the principles of settlement announced in his subsequent addresses, particularly in the address of September 27, 1918, he has communicated the correspondence to the Allied Powers with the suggestion that they ask their military advisers to draw up Armistice Terms.

Nov. 5, 1918. The President transmitted to the German Government the reply of the Allied Governments declaring their willingness to make peace on the terms laid down in the President's address of January 8, 1918 and the principles of settlement enunciated in his subsequent addresses—with two qualifications,—the one concerning the freedom of the seas and the other relating to reparations.

The peace agreed to by Austria-Hungary with General Diaz in Padua was based on the same terms and principles contained in President Wilson's Addresses above referred to.

IN WHAT RESPECTS THESE TERMS WERE VIOLATED.

Time will permit of only the briefest summary:

1. The first of the 14 Points relates to "Open Covenants, Openly Arrived at and Open Diplomacy".

This was violated by the Treaty of Trianon concluded with Hungary. The allotment of territory to Roumania, including all of Transylvania and a large piece of territory across the River Tisza with over 5,000,000 inhabitants, was based on the secret Treaty between the Quintuple Entente—that is, France, Great Britain, Italy, Rus-

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sia and Roumania, concluded in August, 1916. The allotments to Serbia and Czecho-Slovakia were based on the secret pacts of Corfu, Cleveland and Pittsburgh respectively.

2. The 3rd point concerns the "Removal of Economic Barriers and the assurances of Equality of Trade". This was violated in every particular.

Germany and her Allies were required to obligate themselves by the Treaties of Versailles, St. Germain-en Laye and Trianon both with respect to imports and exports and as regards tariffs, regulations and prohibitions for five years to accord "most favored nations" treatment to the Allies and their associated states, without reciprocity; for five years Alsace-Lorraine was made free to export into Germany without payment of customs duties—up to the average amount that had been sent into Germany from 1911 to 1913. No such treatment was accorded German exports into Alsace-Lorraine. For three years Polish exports to Germany and for five years Luxembourg's exports to Germany were given similar treatment under the Treaty, without reciprocity. Luxembourg was permanently excluded from the German Customs Union. For six months after the Treaty came into force Germany was prohibited and again without reciprocity, from imposing duties on many imports from the Allies and associated states higher than the "most favored nation" duties prevailing before the war.

This prohibition was continued for a further period of two and one-half years beyond the six months on such commodities as wines, vegetable oils, artificial silk and washed or scoured wools, which means that Germany is threatened by the Treaty with a deluge of articles of luxury or semi-luxury from Allied countries that will exhaust or diminish her small supply of foreign exchange.

The Allies also reserved special treatment on the left bank of the Rhine, under cover of which the French have tried to establish an independent Republic under French clerical auspices.

The provisions relating to railways as affecting goods shipped from Allied countries into Germany and in tran-

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sit through Germany stipulate a one-sided and "most favored nation" treatment in respect to rail freight-rates, etc.

The Treaty has given over the administration of the Elbe, the Oder, the Danube and the Rhine to International commissions. There were similar one-sided stipulations in the Treaties of Trianon and St. Germain en Laye.

3. "Reduction of Armaments Guaranteed."

This covenant has likewise been flagrantly violated by the Treaties. Germany, Austria-Hungary and Bulgaria have been disarmed and left to the "tender mercies" of the Allies whilst the states of the Allied Powers have greatly increased their armaments.

On November 1st, 1918, Czechia (which at that time had not been allowed to annex Slovakia) had 70,000 men under arms, Yugoslavia 60,000 and Roumania 127,000. Today, about five years after the peace, their actual military forces are at least twice as large as at the time of the Armistice.

The Hungarian army, on the other hand, has been converted into a voluntary body and limited to 35,000, consisting of about 7 mixed battalions. Czecho-Slovakia's military force has 12 Infantry Corps, 3 Cavalry and 4 Artillery battalions and 2 Mountain batteries. Yugoslavia's army includes 16 Infantry Corps, 2 Cavalry Corps and 8 heavy artillery regiments. Roumania commands 14 Infantry Corps, 2 Corps de chasseurs, 1 mountain corps, 3 chasseur battalions, 2 battalions of guards and 7 mounted, 7 sanitary and 7 reserve corps.

The 3½ Hungarian Corps are in the proportion of 1 to 17 compared to the 59 Corps of the Little Entente. Hungary's 525 machine guns are faced by 3200 of Czecho-Slovakia and 560 of Yugoslavia and the 4870 of Roumania. This means that Czecho-Slovakia possesses 6 times as many machine guns as Hungary, and Roumania 9 times as many. As to cannon, Czecho-Slovakia has 800 pieces of ordnance, Yugoslavia 722 and Roumania 1822, while 105 is the total of Hungary. Thus Czecho-Slovakia

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has 8 times, Yugoslavia 7 times and Roumania 15 times more of these arms than Hungary.

The Hungarian army is prohibited from having any flying-machines, whilst Czecho-Slovakia is now in command of 1400 aeroplanes as a result of the completion of the 1922 program. Yugoslavia has 70 and Roumania has 80 flying machines.

Hungary is not allowed to mobilize. Czecho-Slovakia, according to the 1920 Army Act, recruits to a total of 2-3,000,000 men. Yugoslavia with her 32 categories accounts for 1,600,000. Roumania with her 27 categories represents a total of 2,500,000. That is a total of 6,400,000 men to be let loose on the comparatively defenseless population of Hungary.

The Allied countries are allowed compulsory military service whilst the former Central Powers are permitted only voluntary service.

As to the 5th Point, concerning the "Impartial adjustment of Colonial Claims". This was completely disregarded. All former German colonies have been taken without compensation. Austria-Hungary have lost their former settlements in China, without compensation.

4. The 9th Point, which assured the adjustment of Italy's boundaries according to nationality, was also flagrantly disregarded. Millions of Germans and Austrians have been included in the territory ceded to Italy by Austria (including Bozen), and without plebescites.

5. As to the 10th Point, promising autonomy to the people of Austria-Hungary: This, too, was violated in every particular. Instead of autonomy millions of people have been wrested from their mother country without a plebescite and against their will. Hungary lost about 14,000,000 out of a total of 21,000,000. With the exception of western Hungary no plebescite was held anywhere. Here the population voted almost 2 to 1 in favor of retaining Hungarian rule, although the inhabitants are chiefly of German origin.

The violation of this promise has caused untold misery and has been more arbitrary than anything in the history of the world. The plea of the Little Entente that

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there has been a self-determination is not true. In Hungary, the Magyar and non-Magyar population taken from Hungary was never asked whether they were willing to be transferred to alien rule. This includes more than 3,500,000 Magyars, over 2,000,000 Slovaks, 1,500,000 Germans and 500,000 Ruthenians who are being denationalized by the Czechs. It includes also the Slovaks who are to be transferred into Czechs or Czecho-Slovaks, although the Czechs are totally different from the Slovaks in language, custom, religion, history, etc.; 100,000 Bunyevacz, about 1,700,000 Crotians and about 100,000 Wends.

6. The 11th Point provided that Roumania, Serbia and Montenegro should be evacuated and the occupied territories restored.

Montenegro was swallowed up by Serbia and ceased to exist. Serbia, now known as Yugoslavia, has been enormously enlarged at the expense of Hungary, Bulgaria, Crotia and Bosnia. Historical allegiance and nationality were ruthlessly disregarded. This is true also as to Macedonia and Herzegovina—which latter province has never belonged to Serbia. Crotia never belonged to Serbia and wants to be autonomous.

7. The 13th Point, providing for an independent Polish state, has been disregarded in the partition of Upper Silesia, the cession of eastern Prussia to Poland and the establishment of Danczig as a free city.

Referring now to the principles laid down in President Wilson's Addresses: On February 11, 1918, he said:

> "There shall be no annexations, no contributions, no punitive damages."

Under the Peace Treaties there have been wholesale annexations. Leaving aside Alsace-Lorraine, which it was always understood would go to France, there were annexed Moresnet, Eupen and Malmedy by Belgium; part of Silesia by Czecho-Slovakia; Eastern and Western Prussia (partly) together with Posnania by Poland;

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Upper Silesia partly by Poland; North Schleswig by Denmark; all the colonies of Germany by the Allied Powers. All German territory west of the Rhine is to be occupied for at least 15 years. It remains to be seen how much longer this occupation or annexation will last.

Two-thirds of Hungary has been fraudulently taken by Czecho-Slovakia, Roumania and Yugoslavia; Fiume by Italy (leaving Hungary without a port or access to the sea); Macedonia by Serbia; the Dobrudja by Roumania; Bessarabia, Bucovina by Roumania; parts of Tyrol; Trieste, the Austrian seacoast and the Hungarian littoral by Italy.

The American Delegate to the Peace Conference, Mr. John Foster Dulles, vigorously protested against contributions and punitive damages from Germany. He particularly objected to the payment of military pensions, which is the biggest item of the reparations payment. Mr. Thomas W. Lamont, another American delegate, declared that not one legal expert of the American Delegation advised the inclusion of pensions in the reparations.

In the Address of February 11, 1918, above referred to, the President also declared:

> "Self-determination is not a mere phrase. It is an imperative principle of action which statesmen will henceforth ignore at their peril * * * Every territorial settlement involved in this War must be made in the interest and for the benefit of the populations concerned and not as a part of any mere adjustment or compromise of claims of rival states."

Except in Eastern Prussia, Upper Silesia and Western Hungary there was no plebescite and no self-determination. The peoples have simply been transferred to alien rule without being consulted.

The dominating influence of France in bringing about the consummation of this crime of the ages and the final act of fettering the helpless enemy by conditions that must have been known to all to have been impossible of performance, leave little room for doubt that the real purpose of France was to bankrupt and dismember the German Empire as the proud Austro-Hungarian Empire

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had been shattered and destroyed. But for the cry of rage and shame that went up from the entire civilized world, when the first step was attempted by the further occupation of the Rhineland, upon the most flimsy of pretexts, this purpose would have been fully accomplished. France simply dared not carry through this outrage to the extent contemplated and face the moral ostracism of the world. In making the attempt it had no more regard for the letter or spirit of the terms of the abominable Treaty that it had forced upon the Central Powers than it is now evidencing for its obligation to repay to the United States the billions of money we advanced her to save her from destruction. In all these years it has not even made a gesture toward paying so much as an installment on account of the interest.

If the War had terminated in the defeat and surrender of the armies of the Central Powers the Allies might well have claimed that under the ancient brutal rules of war whereby "to the victors belong the spoils" they were entitled to absolutely dictate the terms of peace, however destructive to the future peace of the world. But this war was not supposed to have been so terminated. Each side (except the United States) was almost as near the point of exhaustion and enforced surrender as was the other. Hostilities were suspended by common consent and upon assurances that were flagrantly violated at every step. The dismemberment of Austro-Hungary and the taking of a vast part of the territory of Russia, the former ally of the Allies, were accomplished because their resistance-power was exhausted.

The revolting procedure connected with the formulation and execution of the Treaties was characteristic and in every way worthy of the studied, callous indifference to the promises on which peace was secured. The Central Powers were excluded from all participation. They were not even permitted to know the terms until they were called in to sign "on the dotted line". Some were graciously allowed to file written objections, which were for the most part disregarded. The case had been determined before the hearing.

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Hungary, which was being stripped of two-thirds of its people and territory, was granted a few hours oral hearing to voice its vain protest. The German delegates were made virtual prisoners in the quarters to which they were assigned on their arrival in Paris, until they were brought forth and forced to sign. And to crown the shame and ignominy of it all, these delegates and the great country they represented were subjected to the unspeakable humiliation of being compelled, over their signatures, to admit the criminal responsibility of Germany for the War, which they have continued stoutly to deny. There is nothing in world history to equal the barbarity of this performance.

The time is near at hand when the responsibility for the War will be calmly investigated and judicially determined. Meanwhile there is nothing reliable on which to base a judgment. I believe there already has been a violent reaction, brought about largely by the cruel injustices that have been perpetrated by the Allies connected with the Peace Treaty and that we Americans, who have an inherent hatred of injustice and worship fair play, are ready to suspend judgment on this question of responsibility for the War until the historians have placed the facts and documents before us.

It matters not, however, what may be the finding, the popular revulsion against the methods by which the signatures to these Treaties were secured has been, I believe, in itself sufficient to produce in every fair mind a violent reaction against the carrying out of the bargain brought about in that way.

France is today almost as much the military master of the new states, Poland, Czecho-Slovakia and Yugoslavia, that were taken largely from her ally, Russia, and from Austro-Hungary, as though they were her territory. We have substituted French militarism for German militarism, but in a more aggravated form.

The League of Nations, that was to correct past wrongs and aggressions and to perpetuate a just peace has proved an iridescent dream. It was beautiful in its abstract conception but was wrecked and converted into a weapon of injustice and oppression before it took

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form. The treacherous and obnoxious character of the peace that it was finally pledged to assure, more even than the requirements of Articles X and XII of the Covenant, made it impossible for America to become a party to that iniquitous bargain.

Every venture that we make into the realm of diplomacy proves anew that we are mere children in that art. The play upon our idealism is as easy as taking candy from children. It is the indoor sport of European statesmen. A trade with the United States is an easy diversion in which we are sure to come off in the rear. In the Spanish War, after having easily beaten the poor, weak, impoverished enemy with its antiquated navy, we paid $20,000,000 for the privilege of winning the war and of relieving Spain of a liability that had hung like a millstone around her neck and assumed the role of colonial development of subject peoples for which we are not fitted, which is foreign to our conceptions of free government and into which we have poured and will continue for generations to pour untold wealth.

In the World War the result is far worse. Here we have succeeded in sowing the seeds of future wars by our impotent, amateur diplomacy, whilst the Allies have bagged the spoils in power, territory and reparations. Our role has been that of the Lady Bountiful who after supplying man-power, armaments, and the billions of money that made victory possible, found ourselves at the end without indemnity for our sacrifices and without real participation or influence to make good our promises, based upon the assurances made by the Allies to us, in the carrying out of the terms of peace on which we induced the enemy to lay down their arms.

Our Diplomats are mainly untried men drawn haphazard from the ranks of successful lawyers, bankers and Big Business, without training in diplomacy—men who have been so busy with their private concerns that they go to their posts painfully ignorant of the conditions that confront them.

What we need above all things in our foreign affairs is a school of diplomacy where the histories of the inner affairs of nations can be studied supplemented by a

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system of promotions in the service that will assure these men a career and will give us a consistent continuous foreign policy unhampered by political changes in our home administration of affairs.

The latter has in recent years been assured to a limited extent in the minor posts but the positions of great honor, power and prestige are still doled out as rewards for political service. The worst feature of that system, unlike other countries, is that by the time a man has learned his way about and begun to gather friends and accumulate influence in the country to which he is accredited he is replaced by a new administration. So long as these conditions prevail we shall continue without real knowledge and influence at the head of our diplomatic affairs.

We have in our brilliant Secretary of State probably the most superb, all-round, intellectual machine in America. But he, like most of our other high public officials, assumed that great office entirely devoid of experience in the subtle art of diplomacy.

Our attitude toward the recognition of Russia is an apt illustration of the incoherent infantile brand of diplomacy in which we are engaged. For seven years the present Russian Government has maintained itself and gradually grown in strength in the face of incredible obstacles until it has literally forced recognition from other great countries.

We recognized the Czarist regime, which was the most cruel and despotic form of government of modern times, surpassing even the Kingdom of Siam and other countries that might be named, whose accredited representatives are members of our Diplomatic Corps at Washington. We have recognized Central and South American governments with their kaleidoscopic changes, brought about by internal revolutions that were so rapid that by the time we had recognized an existing government another had taken its place through bloody revolution.

The internal social and economic policies of a great nation are none of our business. If we were only to associate in friendly relations with those countries whose forms of government appealed to us we should have been living in isolation for the past century.

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If our reason for refusing to recognize Russia is based upon her repudiation of the debts of the Czarist regime, we should at least be consistent. Has Czecho-Slovakia, or Yugoslavia recognized the outstanding obligations of the countries they have absorbed, or any portion of them? They have even repudiated their Treaty obligations to the Nationals whom the Allies forced under their rule in indirect violation of the express terms of the Treaties by confiscating the property of these Nationals as soon as they had been brought under their jurisdiction under which they received these vast grants of territory.

Has Germany or Austria-Hungary assumed liability for the outstanding internal or external debts of those countries held in foreign lands? Does not the Treaty in fact prevent them from doing so, by placing the Reparations payments ahead of all such things?

Russia's substance was poured out in the defense of the Allies on the Eastern Front. She lost millions of men and billions of treasure in that effort. When her government collapsed as a result of this intolerable drain the Allies, in whose cause it had been thus destroyed, calmly proceeded to carve out her territory. Such pretexts for the non-recognition of Russia are the veriest hypocrisy.

If we had a real sense of humor we would "tread rather lightly" in celebrating Armistice Day, beyond congratulating ourselves that we are out of the mess and vowing to forget all about the mortifying spectacle that we must present in the eyes of the trained diplomats of Europe.

If America wants a real Armistice Day that shall be a source of pride rather than of shame and mortification, we should at least make an effort to correct or modify these wrongs, for which we are at least partly responsible, insofar as possible. As the first step in that direction, let us ask the forthcoming Disarmament Conference to include in its Agenda the discussion of Treaty revision. It would be a difficult task, but if it can be only partly accomplished it will open the way for us to become a party to a League of Nations to preserve a peace which we need not be ashamed to defend.

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WHO IS ENTITLED TO THE CREDIT FOR THE FEDERAL RESERVE ACT?

AN ANSWER TO SENATOR CARTER GLASS

By

SAMUEL UNTERMYER

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W/18/27

Carol Award Dec 1913

FOREWORD

During the past Winter, whilst the undersigned was absent from this country on a world tour, the New York Evening Post published a series of articles by Senator Carter Glass of Virginia, who was Chairman of a Sub-Committee of the House of Representatives at the time of the framing of the Federal Reserve Act. These articles have now been embodied by him in a book entitled "Adventures in Constructive Finance". The manifest purpose was to picture Senator Glass in the role of the sole author of that historic piece of legislation and all others as at best assistants or supernumeries.

In order to accomplish that purpose and to emphasize his importance in the results achieved, Senator Glass saw fit not only to bitterly assail the integrity of Colonel House and to belittle and grossly misrepresent the work of the undersigned, but to minimize the important part played by Mr. McAdoo, to ignore the influence of Colonel Bryan and above all to take from Senator Robert L. Owen of Oklahoma the credit to which he more than any other man is entitled of being in effect the true author and draftsman of the present Bill, and by far the chief and overshadowing figure of all of us who had the good fortune to be identified with that historic accomplishment.

The accompanying letters between the undersigned and Senator Owen (who was Chairman of the U. S. Senate Committee on Currency and Finance when the Federal Reserve Act was under consideration and passed), and the attached exhibits, are largely self-explanatory.

It is believed that they fully establish:

(1) That the Federal Reserve Act is the direct outcome of the disclosures of the dangerous concentration of the control of money and credits by the Pujo Investigating Committee of the House of Representatives of the 1912-13 Congress, for which the undersigned had the honor of acting as Counsel and investigator, and that proved the existence of a vast Money Trust which it was the design of the Federal Reserve Act to destroy.

(2) That Senator Glass is not the chief author of the Federal Reserve Act, nor is he justly entitled to the main credit for its enactment, but that on the contrary that credit belongs to Senator Owen who had deeply studied the subject and equipped himself for the difficult task over a long period of years.

(3) That the references of Senator Glass to the part of the undersigned in the preparation of the so-called Treasury Bureau Bill or in the efforts to have it substituted for the Federal Reserve Act are fiction pure and simple from beginning to end; that the

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undersigned (a) at no time knew or heard of any such Bill until the appearance of Senator Glass' interesting work of imagination; (b) that the entire record of the undersigned and his writings and speeches on currency legislation are diametrically opposed to every principle of this Treasury Bureau Bill and were at all times in support of the plan and principles of the Federal Reserve Act, which was in line with all that he ardently and openly supported at every stage; (c) that he actively collaborated with Senator Owen in the Federal Reserve Act in substantially the form as passed and had consistently opposed everything for which the Treasury Bureau Bill stood, the authorship and championship of which are baselessly sought to be attributed to him by Senator Glass.

(4) That Senator Glass' fable of a scheme on the part of Colonel House and Mr. McAdoo or anyone else to have the undersigned slipped into the White House at night to argue with the President in favor of the Treasury Bureau Bill should not have imposed upon the credulity of a new-born babe and should certainly not have been swallowed by Senator Glass as the undersigned had access to the White House whenever he so chose.

(5) That it was upon the urgent insistence of the undersigned that Colonel William Jennings Bryan went to the President and demanded that the fundmental policies that were finally retained in the Federal Reserve Act, after a struggle to the death with the powerful banking interests for (1) Regional Banks as against a Central Bank; (2) Government money as against Bank money; and (3) Government control of the system as against banking control, be so retained.

(6) That Mr. McAdoo, so far from having advocated this so-called Treasury Bureau Bill does not appear ever to have seen or heard of it—that at least is what he has told Senator Owen; and that Mr. Tumulty has no record or recollection of any such incident as that referred to by Senator Glass.

(7) That in his credulity and carelessness in accepting rumor and hearsay, Senator Glass was manifestly imposed upon as was the President, in attributing to the undersigned either the paternity, championship or knowledge of this Treasury Bureau Bill which he had never seen or heard of, but that when confronted with the facts Senator Glass has lacked the courage to confess and correct his error. And so he has now, after due warning, deliberately chosen to put forth over his name a work of fiction in the guise of an historical survey of a great event in the history of our country.

That attitude seems quite consistent with the other parts of his book in which he by indirection and implication undertakes to filch from Senator Owen and others and to take unto himself credit for accomplishments to which he is not entitled and which history will not accord him. He had an honorable and creditable part in the legislation within the limitations of his powers, but by reason of want of familiarity with the many details connected with the complicated subject of currency reform and his consequent necessity for reliance upon others, he had a decidedly subsidiary part and if left to his own devices would

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unintentionally have wrecked this Great Adventure in constructive legislation.

Whether or not it was the revelations by the Pujo Committee of the stranglehold of the great banks and financiers (which had stirred the nation to its very depths, as had no other disclosures in a generation) that made possible the Federal Reserve Act against the wild protests and warnings of financial disaster by the leading bankers of the country, must be left to others to say. There can however be no doubt that next to President Wilson, Senator Owen primarily and then Mr. McAdoo are mainly responsible for the structure of the Federal Reserve Act.

President Wilson deserves the everlasting gratitude of the Country for the resolute manner in which he put all the power of his Administration behind the Currency Reform and for his wise decisions, first in supporting Senator Owen in giving the Government control of the System through a Reserve Board consisting exclusively of Government officials; second, in having the money furnished the Reserve Banks consist of United States Treasury Notes, secured by Commercial bills with gold redemption.

SAMUEL UNTERMYER.

GREYSTONE, YONKERS, N. Y.

JUNE 18TH, 1927.

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May 10, 1927.

Hon. Robert L. Owen,
Washington Investment Building,
Washington, D. C.

My dear Senator:

On my return within the past few weeks from a tour of the world my attention is called to a book by Senator Carter Glass entitled "Adventures in Constructive Finance", published by Doubleday, Page & Co., which I have read with amazement. Not only with respect to the offensive and untruthful statements concerning me but as well to those concerning you and your connection with the Federal Reserve Act.

When the first or second of these articles was published during my absence (I was in Japan at the time), my son was so incensed at their tone that he sent me a cable reading as follows:

> "In serial article in today's Evening Post Carter Glass asserts you sponsored currency plan which he derisively refers to as Central-Bank-greenback scheme in opposition to Federal Reserve Act Intimates that Wilson was urged permit you be slipped into White House by House and McAdoo to advocate scheme."

Having always held Senator Glass in high esteem and knowing that these statements concerning me were all pure fiction from beginning to end I was at a loss to understand upon what justification he wrote and published these articles. I cabled my son, in reply, as follows:

> "Glass is either dreaming or senile—probably the latter. The story published by him in January 18th and 19th issues of the New York Evening Post is utterly ridiculous as Senator Owen, McAdoo and others, as well as my own public utterances at the time, will prove. In this connection I particularly call attention to the article written by me that appeared in the October, 1913, issue of the North American Review, entitled "WHY THE PENDING BILL SHOULD PASS." A mere reading of that article, in which I ardently advocated the enactment of the Federal Reserve Act as against the Central Bank idea contemplated by the Aldrich Bill and insisted upon by the bankers, will prove conclusively to anyone who will take the trouble to read it the absurdity of the claims that are now being advanced by Senator Glass. The Federal Reserve Act was the direct outcome of the Pujo investigation which exposed the then existing dangerous money concentration. Its purpose was decentralization through regional banks utilizing Government money and under Government control as against the demands of the bankers for a central bank with banking money and under banking control. The bankers, with their usual vision, predicted disaster if our Bill passed. Within two years they were hailing it as the country's deliverance. On learning of Glass's

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first proposed measure providing for banking money and banking control I immediately visited Wilson with Bryan who announced to Wilson his determination to defeat Glass's first scheme. As a result it never saw the light of day. Senator Owen knows the facts and I believe has a copy of Glass's first draft. Glass's story about House and me is pure fiction. I never saw House in any way in connection with the subject. At that time Glass knew nothing about Banking. Willis Parker drew his bill. Senator Owen and McAdoo deserve the chief credit for the legislation,"

which I now confirm.

It appears that when this cable was published, Senator Glass gave out for publication an interview reading as follows:

"Those who have followed my narrative of Federal Reserve legislation being printed in the New York Evening Post will know that I have in my possession indubitable documentary proof of my statement concerning the proposal of Colonel House to slip Mr. Untermyer in the White House for a secret interview with President Wilson in behalf of a substitute currency plan. It is in the nature of a letter form Colonel House to Mr. Wilson, dated May 20, 1913, embodying textually that exact proposition.

As for Mr. Untermyer's rash assertion that 'Glass's story about House and me is pure fiction', and his statement that he 'never saw House in any way in connection with the subject', when he gets back from Japan he will find that I have been engaged in stripping and not inventing fiction; and if he shall still think he 'never saw House' or talked with him on the currency question, the two may jointly debate the issue of veracity thus projected, with Professor Charles Seymour acting as judge of the discussion. The decision will not in the remotest degree affect the absolute verity of my Federal Reserve narrative.

Finally, it may develop that when Mr. Untermyer returns to America he will curse his luck in having been provoked into spending a good round sum in cable tolls to revive the fact that he wrote an article in The North American Review for October, 1913, in favor of the Federal Reserve bill, whereas in my narrative in the Evening Post I had already credited him with having written me a vigorous letter to the same effect as early as August, 1913. Neither incident alters the fact that in May, 1913, Colonel House was trying to have Mr. Untermyer secretly slipped into the White House to advocate a different scheme. Before Mr. Untermyer does any more cabling he would better have a talk with Colonel House, or at least find out what it is all about.

Allow me to say, in conclusion, that I do not relish this turning aside to knock down chips while my Federal Reserve narrative is in process of being printed. When publication of it is ended, if anybody wants to assail its historical accuracy, I shall cheerfully meet any point of controversy."

It is my intention, at the earliest possible date, to "set the record straight", and to that end I ask in common fairness both to yourself

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and me that you will be good enough to furnish me with a statement of your connection with the Federal Reserve Act and of mine—so far as you personally knew of it.

I am familiar with your great record of public service in the domain of Currency Reform, both before and after you entered the United States Senate. I happen also, as you know, to be very familiar with the herculean task you performed in the framing of the present Federal Reserve Act, as a result of your years of study and months of negotiation, and other work connected with the present law, for I was with you during many of those phases.

It is important that this matter, from the view-point of history, shall be set straight and that the men who strove incessantly and successfully to place that great piece of legislation on the statute books should get the credit that is their due.

Reading Senator Glass's book one would imagine that he was the architect of that epoch-making piece of legislation—which would be far from the fact. The tenacity with which he seeks to magnify his altogether creditable part in that great work by belittling the share of others like yourself and Mr. McAdoo is most surprising and disappointing. Still, if at the time of sending my cable from Japan I had been advised of the full text of his articles I would not have been so offensively outspoken in my comments although there is not a grain of truth in his references to me. At no time did I prepare, see or even hear of any such proposed Bill as that to which he refers. Not until I read his book was I aware of any such suggestion. It was diametrically opposed in principle to everything for which I consistently stood and fought.

I am now disposed to believe that both President Wilson and Senator Glass were cruelly imposed upon by someone who thought that by connecting my name with this proposed legislation he could, by reason of my known progressive views and my connection with the Pujo Investigation, then just concluded, effectually divert suspicion from the real authors and advocates of the Bill. That is the only possible explanation that occurs to me.

Please let me hear from you.

With kind regards,

Sincerely yours,

SAMUEL UNTERMYER.

SU-R

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MAY 14, 1927.

SAMUEL UNTERMYER, ESQUIRE,
120 Broadway,
New York City.

MY DEAR MR. UNTERMYER:

Your letter of May 10th referring to the statements published in a book by Senator Carter Glass, entitled, "An Adventure in Constructive Finance", is received.

I note the cable sent you by your son, and your cabled reply. I am utterly at a loss to understand how Mr. Glass could have been so misled, unless perhaps, he overlooked the fact, that after demolishing Col. House as a witness against himself, with my help, he could not, in common fairness, use the annihilated Colonel as a witness to discredit me or you either.

You express your desire of setting the record straight, and in answer to your request that I furnish you with a statement of my connection with the Federal Reserve Act and of your association with the matter as far as I personally knew of it, I gladly comply.

I have just read the chapter in Mr. Glass' book, Chapter 6, entitled "A Threatening Flank Movement—An Intrigue to Wreck the Measure —President Wilson Puts an End to it", in which Colonel House appears to have sent and supported a bill to create a Bureau Bank in the United States Treasury with all the elements of a central bank involving a tremendous issue of Treasury notes to supersede outstanding greenbacks and gold certificates, and seeming to contemplate a seizure of the gold in trust behind the certificate.

George M. Reynolds, of Chicago, is quoted as referring to this measure as a bill sponsored by the people in the Treasury Department, with a basis of "fiat" money.

Mr. Glass describes Colonel House as tiptoeing on the scene as an advocate of this "central-bank-greenback scheme", and pressing the President for a personal interview for you, in order that this scheme might be presented "in all its alluring aspects", "and the Federal Reserve Bill ditched", etc. He states that Mr. McAdoo insisted on this Treasury Bureau plan and said it had the endorsement of eminent bankers and urged its substitution for a bill Mr. Glass favored. Mr. Glass recites that Mr. McAdoo told him that I thoroughly approved this so-called Treasury Bill. Mr. Glass says he could readily believe this because of expressions akin to it which he had heard me use.

I never heard of the bill as far as I know. My files show no record of it. My then secretary, Mr. James W. Beller, advises me that he never heard of it. The proposal of a central bank and fiat money flatly contradict everything that I have believed in. I was always consistently opposed to a central bank and to fiat money.

In reading this chapter, I think the impression would be left on the mind of the ordinary reader that you, Mr. McAdoo, Colonel House and myself were then engaged in an intrigue to ditch the Bill Mr. Glass favored; that the President did not seem especially impressed, but conceivably had given tacit permission for the experimental attempt at the rival plan.

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Mr. Glass narrates that on his protest against the House bill the President gave his decision against it, and Mr. McAdoo graciously acquiesced.

The imputation that I ever at any time favored a central bank, or that I ever at any time favored fiat money or greenbacks or unsecured bank notes for money has no foundation whatever, and from what I knew of your views, it is inconceivable to me that you could have done so.

My own connection with the banking acts of the United States began in 1890 when I sought and obtained an amendment to the National Bank Act extending its provisions to the Indian territory. I thereupon organized the first national bank in Indian territory, the largest bank in then Eastern Oklahoma. I was president of it ten years, have been a director of it for thirty-seven years, have directed its policies; conducting its policies successfully through several panics. It has never failed to pay its dividends with perfect regularity, and is a model now. I had had practical banking experience for over twenty years before entering the Senate.

I studied the principles of banking with the direct object of mastering them. I demanded a plank in the Democratic platform at Chicago in 1896 for emergency currency, and was assisted by Honorable Charles S. Thomas of Colorado, William J. Bryan and Allan Thurman.

In 1898 I went to Europe and visited the Governor of the Bank of England, the Governor and Directors of the Bank of France, and the officials of the Reichbank of Berlin, and studied their methods for stabilizing credit and preventing panics.

In 1899 I wrote a series of articles explaining how these principles worked out by these European banks could be applied to the National Bank system in the United States.

Some of these articles, published in 1899, can be seen in the Congressional Record of February 25th, 1908 (p. 2453) advocating an elastic currency adequately secured by collateral.

On February 6th, 1900, (Cong. Rec. 1534) Hon. Jas. K. Jones, then Democratic leader of the U. S. Senate, offered an amendment to the Aldrich bill proposing an emergency currency, adequately secured, with automatic contraction provisions to prevent inflation. These notes were U. S. Treasury notes. I drew the amendment.

On February 25, 1908, (Cong. Rec. 2429) within about two months after my admission to the United States Senate, I put into the Record a letter of Hon. Jas. K. Jones, acknowledging my authorship of this amendment, a copy of the amendment itself, and the article written in 1899 above referred to.

On this day in a three hour speech (Cong. Rec. 2427), I discussed the Aldrich bill for currency associations then pending and made many constructive suggestions. For example,

1st: That the volume of such emergency elastic currency should not be limited except by the actual requirements of our commerce. (p. 2435) This was accomplished by the Federal Reserve Act.

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2nd: That this currency should not be National Bank notes but United States Treasury notes based upon collateral security and the credit of the banks, and supported by the taxing power of the people of the United States. This was accomplished by the Federal Reserve Act.

3rd: The retirement of the bond secured National Bank notes and the issuance in lieu thereof Treasury notes above referred to payable in gold (p. 2436). This plan was written into the Federal Reserve Act.

4th: The issuance of Treasury notes (p. 2436) as such elastic currency using gold as cover of the new currency together with the other securities. This has been accomplished in the Federal Reserve Act.

5th: The Readjustment of Cash Reserves (p. 2444) so that they would be real reserves and actually available. This was done in the Federal Reserve Act.

6th: I stated at that time the fundamental principles which should govern the Statutes on Banking and that the objects of vital importance to be attained were:

> "The prevention of panic,
> the protection of our commerce,
> the stability of business conditions,
> and the maintenance in active operation
> of the productive energies of the Nation."

7th: I pointed out that the vital defect of the Vreeland Aldrich Bill was in putting the currency system in the control of the banks and making the currency difficult of access and expensive. These errors were all corrected in the Federal Reserve Act.

The Vreeland Aldrich Act, upon my demand made on the floor of the U. S. Senate, March 25th, 1908, p. 3874, and accepted by Senator Aldrich provided for the National Monetary Commission. The Commission sat for four years, collected a library of 2500 volumes, made a report of 33 volumes, and brought in a bill in 1912 proposing to repeat many of the errors I had pointed out, such as Bank control, bank notes for currency, a central bank, etc. and to which I was unalterably opposed.

The objections I had pointed out February 25th, 1908 (pp. 2433 and 2435) on the issuance of currency, that the limitations of Sections 1 and 3 and 5 of the Vreeland Aldrich Act were unwise, proved to be very real indeed, and on Friday, July 31, 1914, when the European War broke out, I drew and offered an amendment suspending limitations imposed. On Wednesday, August 4th, both Houses had agreed on the bill and in the meantime over $300,000,000 of Emergency Currency was shipped to New York and a dangerous war panic prevented by the suspension of the limitations of Sections 1, 3 and 5 *against which I had protested February 25th, 1908.*

In this action Mr. Glass and Mr. McAdoo cooperated and Frank A. Vanderlip and Charles C. Glover were very active advocates.

When the National Monetary Commission drew up its bill in 1912 to establish a central bank under bank control with bank notes for money, a propaganda was put on to secure public approval. The Democrats resisted this plan and opposed the so-called "Money Trust".

The House of Representatives under Resolutions 405, 429 and 504 authorized an investigation (Sixty-second Cong., 2nd Sess.) to

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ascertain the facts to enable the Congress to determine what legislation was needed. On May 16th, 1912, the sub-committee of which Mr. Pujo, of Louisiana, then Chairman of the Committee on Banking and Currency, was chairman, met to consider the subject of the "money trust".

You conducted this inquiry, and in my judgment you were the best qualified man in America to do it.

The hearings continued to February 26, 1913. The Record makes 2226 pages and your report on the "Money Trust" made a profound impression on Congress and on the country. It did you great credit and contributed in the most important way to crystalize public opinion in support of the Wilson Administration in passing the Federal Reserve Act. I certainly felt grateful to you for this valuable and patriotic service, and for that reason, knowing your progressive and liberal views, I sought your advice frequently in working on the Currency Bill. You were certainly generous in the extreme. At your home you made various engagements for me to meet severally Frank A. Vanderlip, A. Barton Hepburn, Paul Warburg and others whose intimate views I desired in framing the Federal Reserve Act.

When the Democratic Senate met in March 1913, I took part in organizing the more progressive Democrats in order to select a more sympathetic chairman of the Democratic Conference and thus control the Committee on Committees, of which I became a member.

The Committee on Committees on my request divided the Finance Committee and gave its jurisdiction on Banking and Currency to a new Committee called "The Committee on Banking and Currency". My associates selected me as its chairman on the sole ground of qualifications, already established on the floor of the Senate, and in spite of my representing a new state of comparatively small population and wealth.

I had entered the Senate with this end in view and in the hope I might be of real service to my country in improving the Banking Laws whose deficiencies as a practical banker I had had many concrete reasons to keenly appreciate.

Immediately, and to the exclusion of everything else, I devoted myself to this Bill and gave it my entire time until it was signed December 23, 1913.

I framed a Bill in March and April and had a Committee print made of it the 27th of May, 1913 (copy enclosed) providing in Section 2 for eight reserve banks, with corporate powers, capital to be provided by national banks as member banks, with six directors representing the member banks and three directors appointed by the President on the suggestion of a Governing Board. The banks were distributed from Boston to San Francisco and from Chicago to New Orleans.

Section 6 provided for a Board of Governors of seven persons, including the Secretary of the Treasury and Comptroller of the Currency but all of them government officials, with general supervisory power over the Reserve System.

Section 13 provided for a note circulation consisting of U. S. Treasury notes issued to the Reserve Bank, redeemable on demand in gold and secured by a first lien "upon all the assets" of the Reserve

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Bank and further protected by "Prime commercial paper as collateral security" for the return of such notes to the U. S. Treasury. "Prime commercial paper" was defined in Article 1 as "a commercial bill, payable within four months, signed by at least two persons, either of whom shall be good for such bill and one of whom shall be a member bank, such commercial bill to be based upon an actual commercial transaction and not to be based upon a permanent investment."

These principles of sections 2, 6 and 13 for regional banks, a government controlled Board and Treasury notes secured by collateral became the law.

When this draft was written I was chairman of the U. S. Senate Committee on Banking and Currency and had the Committee prints made about *May first,* 1913, for the use of the Committee members and to submit to various citizens qualified to make useful suggestions. I had no reason to change my views on these fundamental principles and did not do so.

About *June first,* 1913, W. Parker Willis, of New York, brought to my residence at Leroy Place, in Washington, D. C., the draft made by him under the direction of Mr. Carter Glass, then, or about to be made, chairman of the Banking and Currency Committee of the House of Representatives.

Mr. Glass did not become Chairman of the Banking Committee until June 3, 1913, seven days after the Government Printing Office had printed my bill.

I was advised that this bill had been submitted to President Wilson and Secretary McAdoo and that it met their general approval in principle. When I examined the Willis draft I was disturbed to find that while the bill provided for twenty reserve cities and twenty reserve banks it put them all under one controlling directory of forty-three members, forty of whom were to be elected by the Directors of the twenty Federal Reserve Banks and only three ex-officio members representing the United States, thus putting the effective control of the Credit System in the hands of a central banking board of private persons. (Section 10).

An Executive Board was proposed to consist of nine members, three practical bankers, three named for long terms by the President and three ex-officio members, the Secretary of the Treasury, the Comptroller of the Currency and the Secretary of Agriculture.

The Executive Committee to be under the by-laws and subject to two-third vote of the full board. (Section 11).

I did not regard this plan as a compliance with the Democratic National Platform which had declared against "the establishment of a central bank" and I insisted on the plan I had drawn of a Board consisting exclusively of government officials. Being unable to induce Mr. Glass to concur with my views, we submitted the matter to Mr. Wilson at the White House in June 1913. We had a conference of about two hours in the Cabinet Room and Mr. Wilson decided to support my views. The bankers violently protested and Mr. Glass gives an account of their protest in his book "An Adventure in Constructive Finance", in Chapter 7, entitled "The Bankers Excluded".

The Willis draft, also Section 23, provided that the Federal Reserve notes should be bank notes instead of Treasury notes and pro-

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posed "Said notes shall be in all respects similar to existing National Bank notes except that they shall not bear any legend or superscription indicating that they are secured by United States or other bonds", and these notes were to be printed and delivered to any National Reserve Bank in an amount not to exceed "a sum equal in the aggregate to double the face value of the capital stock of such bank."

This provision was not acceptable to me because:

1st: Making the money of the country mere bank notes did not make it sufficiently secure.

2nd: It gave the National banks control of the money of the country.

3rd: It expanded their power over the Credit System.

4th: It put an unnecessary restriction on the issue.

5th: They were not secured by commercial bills or collateral.

6th: It was contrary to democratic doctrine and the Party Platforms.

The platform of 1908, for example, declared that the "Currency should be issued and controlled by the federal government and loaned on adequate security to National and State banks."

My own draft had followed the National Platform and what I conceived to be the better policy. You will recall how tenaciously I defended this position in a six hour conference with Paul Warburg at Greystone in your presence where he took the opposing positions.

I immediately called on Wm. J. Bryan at Calumet Place and obtained his cooperation to correct this grave error on the currency of the Willis draft. He assisted me and Joseph P. Tumulty, then Secretary to the President, cooperated and my views prevailed.

These fundamentals being reconciled, Mr. Glass and myself on June 26th, 1913, introduced identical bills as a basis for discussion in Congress.

On September 17, 1913, the House passed the bill.

On Tuesday, September 2nd, 1913, as chairman, I called the Banking and Currency Committee of the Senate to begin hearings on the Senate Bill, concluding the hearings on October 27, 1913, taking testimony of 3100 pages. I presided at these hearings.

On October 25th, 1913, the hearings before the Senate Committee which consisted of 7 Democrats and 5 Republicans, closed and were followed by various executive sessions which demonstrated that it was impossible to obtain a committee report in the usual manner, because Mr. Hitchcock of Nebraska, joined the Republicans against his Democratic colleagues, dividing the Committee in 6 and 6. I then endeavored to get the six Democratic members together but was only able to obtain the sympathetic cooperation of three of them, two of them not fully approving my views.

These three authorized me however, to frame the bill, which I did, with constant collaboration with them. When we had finished this task, the other two Democratic members consented to join the four members referred to and I made various concessions in order to get a bill which we could present to the Democratic conference, reserving the right, however, to bring up in conference any point upon which we had disagreed. Thereupon, the Democratic members of the Senate, excepting

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Senator Hitchcock, met daily and for three weeks I defended the bill in conferences frequently extending all day. The result was a bill with which I was completely satisfied, and which was acceptable to the Democratic conference and was put through the Senate of the United States as a Democratic Party measure.

The original bill upon which Mr. Glass and myself tentatively agreed and introduced June 26th, passed the House with some modifications, but the changes in the Senate were so numerous when we had finished this work, that I moved to strike out the House bill and substitute the Senate bill which I had prepared and worked out in the Democratic conference.

Senator Hitchcock who took the pains to examine into it, said on November 25th, 1913 (Congressional Record p. 6783) that only 40% of the House bill remained. I think this is quite unimportant as the fundamental principles upon which Senator Glass and myself had agreed on June 26th remained in the bill, except that I recall I insisted on having the United States Treasury retain its independence in making deposits.

On December 19, 1913, *my substitute for the House bill was agreed to,* yeas 54, nays 34. I found it expedient to have nine conferees appointed on behalf of the Senate in order that I could control as a party matter the conferees. This I did by having four out of the six Democrats, in active sympathy with me, and having the conference report treated as a Democratic party measure in which we did not permit the Republican members to divide the Democrats and thus block or change the legislation. This explains why the conference report was signed only by Democrats.

On December 20th the House appointed its three conferees. The conference report was agreed to in the House by 298 to 60, and in the Senate at 2:30 P. M. on December 23rd 1913 by 43 yeas and 25 nays.

The House conferees struck out two items I thought of special value, one on domestic acceptances which was written into the bill subsequently September 7th, 1916, and one providing for exchange of Reserve notes for gold. This latter provision was subsequently accepted by Congress and proved useful.

That same afternoon, December 23rd, the President signed the bill and presented me with one of the gold pens with which he signed the bill and a letter of appreciation for my services in which he was gracious enough to say:

> "The whole country owes you a debt of gratitude and admiration. It has been a pleasure to have been associated with you in so great a piece of constructive legislation."

I was presented with a copy of the act on vellum, identical in form with the bill which the President signed, and containing the signatures of the officers of the United States Senate and of the House of Representatives and of the President, also a full set of the first Federal Reserve notes properly framed.

I thought Mr. McAdoo entitled to great credit in the matter. The action of President Wilson in making it an Administration measure throwing his full strength behnd it, settling disputes between parties to the legislation was splendid and vital to success.

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I wrote a reminiscence of my personal connection with the Federal Reserve Act in 1919, after it had proved its worth, a copy of which I enclose. You will find in this little book that I gladly gave Mr. Glass full credit for his services as Chairman of the House Committee, and that I also recognized the work done by the Committee members of both the House and the Senate and of the great bankers, business men and counselors who helped perfect this measure.

It would be extremely distasteful to me to engage in any controversy with Mr. Glass as to who rendered the greater service. He did his utmost to be of service and so did I. Under the circumstances, since it was your wonderful work in conducting the Pujo investigation that exposed the money trust, and since I personally framed and had printed, as Chairman of the Committee on Banking and Currency of the United States Senate, the Federal Reserve Bill, whose fundamental principles were afterwards written into the act, *and did this before Mr. Willis ever presented his first draft which I rejected, and which was never printed,* it seems somewhat ungracious for my life-time friend, Mr. Glass, to portray me as approving an intrigue to wreck the measure, or to belittle, in any way, either you or me, in his narrative. I still retain in a vault the original Willis Bill with Mr. Glass' notes on it, in his own handwriting, as a part of my voluminous records of this interesting legislative experience.

Mr. Willis did a perfectly natural thing in following the National Monetary Commission bill in making his preliminary draft and Mr. Glass did a natural thing in supporting his expert, for whom he had great respect, in yielding something to the bankers' views in order to reconcile them to enter the New System. We were all feeling our way with a patriotic end in view.

There is enough credit in the whole performance to do honor to all the leading participants without questioning the loyalty or in any way discrediting any who tried to help.

I sympathized, however, with Mr. Glass' displeasure with Colonel House's very unfair references to him and gave him a letter which he used in his book to discredit Colonel House, as a witness against him. Naturally, I do not relish this witness then being used by him to discredit me, or to discredit you.

I know of my own knowledge that your views were substantially the same as mine, and the photograph of Mr. Wilson's memorandum referring to "Mr. Untermyer's paper" is not in the least convincing to me that the paper referred to in any way contradicts what I personally know of your attitude. Your patriotic services in this matter were very extraordinary and deserve the admiration of the country.

Yours very respectfully,

ROBT. L. OWEN.

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May 19, 1927

Hon. Robert L. Owen
Washington Investment Building
Washington, D. C.

My dear Senator,

I am greatly indebted to you for the masterly exposition of the history of your commanding part in the framing and the struggle for the enactment of the historic Federal Reserve Act and for your all-too-generous recognition of my share in that epoch-making legislation of Currency Reform, which enabled our country successfully to jump the financial hurdles and pitfalls of the World War, and has been largely responsible for the marvelous expansion and stability that we have ever since enjoyed.

As you rightly say

> "There is enough credit in the whole performance to do "honor to all the leading participants without questioning the "loyalty or in any way discrediting any who tried to help."

One might have wished that Senator Glass, for the sake of his own reputation, would have approached the writing of his book from that point of view.

As I review the facts, it was largely your firm and patriotic stand, in which I modestly co-operated to the extent of my limited opportunities, that circumvented the efforts and propaganda of the "Money Trust" to foist upon Senator Glass and Congress the Willis draft, misguidedly sponsored by Senator Glass, which provided (1) that the money of the country should be bank notes instead of Government money, which it happily now is; (2) that the National Banks should have control of our money; (3) that the domination of the system be entrusted to the tender mercies of the banks and bankers; (4) that the power of the banks over the credit system be expanded, and in short, it placed the banks instead of the Government in the saddle.

I doubt whether the people of the country realize the full extent of their debt of gratitude to you for your part in killing aborning that vicious piece of legislation.

In this connection, due credit should also be given to the memory of our dear friend, William Jennings Bryan, who was an important factor in bringing about the defeat of that scheme. He warned President Wilson that if the features of the bill drafted by Mr. Willis for Senator Glass, and urged upon the President, to which you refer, were introduced, he would use all his influence (he was then Secretary of State and his influence was great) with the members of Congress and throughout the country to accomplish its defeat. This is not conjecture or hearsay. I know it, for it was upon my urgent request that he went with me to the White House, as the result of a special "hurry-call" visit made by me to Washington for the purpose, upon being informed by telephone of what was im-

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pending. You recall that the Bill, of which you have a copy with the original notes of Senator Glass upon it, never saw the light of day. That, and your objection, were the reasons.

How Senator Glass could have been so gullible as to permit himself to be imposed upon to the extent of believing that you or I would or could, in the face of our records to the contrary, tolerate or fail to oppose, much less champion or support the so-called Treasury Bureau Bank scheme, to which he refers, is past understanding. That he should have allowed himself to be so deceived does far greater credit to his credulity than to his judgment. He admits having read your and my articles in the October 1913 North American Review, in which we vigorously combated every proposal now said to have been embodied in this so-called Bureau Bank Bill, of which I am supposed to have been the author, but which I have never yet seen and of the existence of which I never even heard until Senator Glass wrote his interesting work of fiction.

It is not unlikely that whoever sought to impose this product of the "Money Trust" on President Wilson thought he could best disguise and mislead the President as to its source by imputing it to me because of the known antagonism to me as the author of their woes and because of my exposure of the "Money Trust" in the investigation that was responsible for the Currency legislation. It was an exceedingly stupid piece of misrepresentation that was bound to have been disclosed if the Bill had ever reached the light of day.

The sole purpose of the Money Trust investigation was to expose the centralization of the control of money and credit and to correct it by **de-centralizing** such control through a regional system, with Government money and under Government domination.

The President was apparently for the moment deceived, but Senator Glass, writing 14 years later what he believed to be history, should have taken the ordinary precaution expected of the historian of verifying his hearsay information, which he could readily have done. If his work is discredited, he has only himself to blame. As an old newspaper man, he should have known enough to differentiate between the looseness that necessarily characterizes newspaper gossip and the accuracy required in writing history.

It is unnecessary to enlarge upon Senator Glass's inaccuracies and unbelievable unfairness in dealing with and trying to belittle your dominating part in order to magnify his own importance, for your dignified, analytical and illuminating letter demonstrates how preeminently you are qualified to take care of yourself.

For my own part, I am satisfied to close the discussion by again emphatically denying (1) that I ever discussed Currency legislation with Colonel House, either directly or indirectly by word, correspondence or otherwise or had any occasion to know or suspect that he was interested therein; or (2) that there was any basis or excuse for the letter said to have been written by Colonel House to the President which was a pure myth insofar as I am concerned; or (3) that I ever saw, knew or heard of the so-called Treasury Bill to which Senator Glass refers or of any such suggested legislation; or (4)

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had ever been concerned in, supported or encouraged any project other than the Bill which culminated in the Federal Reserve Act.

Does it not seem queer that Senator Glass, after again and again discrediting and denouncing Colonel House (who apparently used my name with the President without authority or excuse and thus apparently misled Senator Glass, and for whom I accordingly hold no brief) and assailing Colonel House's integrity and credulity at every point, should turn about and use Colonel House's statements in his letter to President Wilson as evidence to discredit me as he elsewhere does the same thing to discredit or belittle your efforts.

I rest upon my consistent known record on this subject, often publicly expressed, as conclusively disproving the childish story which Senator Glass apparently swallowed hook, line and sinker, presumably because it suited his insatiable ego to permit himself to be taken in by it and upon it to build his "house of cards".

Strangely enough, Senator Glass, you and I who were brought together in this business, were all born and raised in the little town of Lynchburg, Va., where Senator Glass has continued to live, and this controversy is therefore doubly unpleasant to me as I know it is to you. But I could see no way with justice to myself or to you or others that I could avoid it.

I last heard from Senator Glass (it was through the newspapers) in answer to my cable from Japan. He then promised the country that upon my return he would confront me with "documentary evidence" and that "when publication of it (his articles in the Post) is ended, if anybody wants to assail its historical accuracy, I shall cheerfully meet any point of controversy". Here I am and here is Senator Owen challenging the historical accuracy of his narrative and demanding he either make good or retract and apologize. It remains to be seen whether he will have the courage and manhood to do the latter.

With thanks and best wishes,

Sincerely yours,

SAMUEL UNTERMYER.

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[This is the Willis draft referred to in Sen. Owen's letter that was rejected and never printed. Sen. Owen has the draft with Sen. Glass's original notes.]

63RD CONGRESS
FIRST SESSION.

H. R.

In the House of Representatives

1913

Mr. Glass of Virginia introduced the following bill which was referred to the Banking and Currency Committee and ordered to be printed.

A BILL

To provide an elastic currency, furnish means of rediscounting commercial paper, protect the creditors of National Banking Associations, and establish a more effective supervision of banking in the United States.

Be in enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

SECTION 1. That the act of May 30, 1908, entitled "An Act to amend the National Banking Law," be and the same is hereby repealed.

SECTION 2. That within sixty days after the passage of this act, the Secretary of the Treasury, the Comptroller of the Currency and the Attorney-General of the United States acting as a "Reserve Bank Organization Committee" shall prepare and publish a list of twenty reserve cities chosen from those now authorized by law and shall divide the continental United States into twenty districts, each district to contain one of the said reserve cities; Provided, That the districts shall be apportioned with due regard to the convenience and customary course of business and not necessarily in harmony with the area of the several States. The districts may be readjusted and new districts may from time to time be created by the Board hereinafter created, acting upon a joint application made by not less than ten National Banks situated within one of the existing districts. The districts thus constituted shall be known as "National Reserve Districts" and shall be designated by number according to the pleasure of the Reserve Bank Organization Committee hereinafter referred to as the Organization Committee. The said Organization Committee shall, in accordance with regulations to be established by themselves proceed to organize in each of the reserve cities aforesaid a National Reserve Bank. Such National Reserve Banks shall be known by the number and district to which they belong;—as "National Reserve Bank; First District"—and so forth. Every National Bank located within a given district shall be required to subscribe to the capital of the National Reserve Bank of that district a sum equal to 20 per centum of its own paid up and unimpaired capital, one half of such subscription to be paid in under the terms and conditions prescribed by the National Banking Act with reference to subscriptions to the stock of National Banking Associations. The remainder of the subscriptions or any part thereof shall become a liability of the subscribers, subject to call and payment thereof whenever necessary to meet the obligations of the National Reserve Bank under such terms and in accordance with such regulations as the Board of Directors of said National Reserve Bank may prescribed: Provided, That no National Reserve Bank shall be organized with a paid up and unimpaired capital at the time of beginning business less in amount than $5,000,000. The Organization Committee hereinbefore provided for shall have power to appoint such assistants and incur such expenses in carrying out the provisions of this act as it shall

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deem necessary; and such expenses shall be payable by the Treasury of the United States upon voucher approved by the Secretary of the Treasury, not to exceed in the aggregate $50,000.

SECTION 3. That the capital stock of each National Reserve Bank shall be divided into shares of $100. The outstanding capital stock may be increased from time to time as subscribing banks increase their capital or as additional banks become subscribers, or may be decreased as subscribing banks reduce their capital or leave the organization by liquidation. Each National Reserve Bank may establish branch offices at a point within the National Reserve district in which it is located approved by the Federal Reserve Board, after selection by the Board of Directors of said banking corporation; Provided, That the total number of such branches shall not exceed one for each $500,000 of the capital stock of said National Reserve Bank.

SECTION 4. That upon duly making and filing with the Comptroller of the currency a certificate in the form required and described in sections 5134, 5135, and 5136, R. S., U. S., the National Banking Associations uniting to form a National Reserve Bank shall become a body corporate and as such and in the name designated in the organization certificate shall have power to perform all those acts and to enjoy all those privileges and to exercise all those powers described in section 5136 Revised Statutes; save insofar as the same shall be limited or extended as the case may be, by the provisions of this act.

Every National Reserve Bank shall be organized and conducted under the oversight and control of a Board of Directors, whose powers shall be the same as those conferred upon the boards of directors of National Banking Associations under existing law, except insofar as expressly provided to the contrary in this act. Such Board of Directors shall be constituted and elected as hereinafter specified and shall consist of fifteen members holding office for five years and divided into three classes designated as Class A, B and C.

Class A shall consist of five members who shall be chosen by and be representative of the stockholding banks.

Class B shall consist of five members who shall be chosen by and be representative of the stockholders of the National Banks holding shares in the National Reserve Bank.

Class C shall consist of five members four of whom shall be chosen by the directors of classes A and B with approval of the Federal Reserve Board hereinafter created and one of whom shall be designated by the Federal Reserve Board. Directors of class C shall be regarded as representative of general public interest.

Directors of class A shall be chosen in the following manner:

It shall be the duty of the Chairman of the Board of Directors of the National Reserve Bank of the district in which each such bank is situated to classify the banks of the said district who are stockholders in the said National Reserve Bank into five general groups or divisions. Each such group shall contain as nearly as may be one fifth of the aggregate banking capital of the banks holding stock in the National Reserve Bank of the said district and shall consist of banks belonging as nearly as may be to the same general classes of capitalization. The said groups shall be designated by number at the pleasure of the Chairman of the National Reserve Bank.

At a regularly called directors' meeting of each National bank in the National Reserve district aforesaid; the Board of Directors of such National Bank shall elect by ballot one of its own members as a District Reserve Elector and shall certify his name to the Chairman of the Board of Directors of the National Reserve Bank of the district. The said chairman shall establish complete lists of the District Reserve Electors, class A, thus named by banks in each of the aforesaid five groups and shall transmit one complete list to each such elector in each group. Every elector shall within fifteen days of the receipt of the said list, select and certify to the said Chairman from among the names on the list pertaining to his group, transmitted to him by the Chairman, one name as representing his choice for National Reserve Director, class A. The name receiving the greatest number of votes, not less than a majority, shall be designated by said chairman as National Reserve Director, for the group to which he belongs. In case no candidate shall receive a majority of all votes cast in

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any district, the chairman aforesaid shall establish an eligible list, including the three names receiving the greatest number of votes on the first ballot, and shall transmit said list to the electors in each of the groups of banks established by him. Each elector shall at once select and certify to the said chairman from among the three names submitted to him his choice for National Reserve Director class A, and the name receiving the greatest number of such votes shall be designated by the chairman as National Reserve Director class A.

Directors of class B shall be chosen in the following manner:

At an annual election of officers of each National Bank the stockholders of said bank, if there be a vacancy among directors of class B in the group to which said bank may belong, shall choose one of their own number who shall not be either an officer or director of any bank as a District Reserve Elector class B. The name of said District Reserve Elector shall be certified to the chairman of the board of directors of the National Reserve Bank of the district in which such National bank is located. It shall thereupon be the duty of said chairman to establish lists and to secure the selection of one director representing each of the five groups into which the banks of the district are divided from among the District Reserve Electors of class B, after the manner hereinbefore prescribed for the choice of directors of class A.

Directors of class C shall be chosen in the following manner:

On the first day of July in each year when there shall be a vacancy among directors of class C, the directors of classes A and B of each National Reserve Bank shall, at a meeting called for that purpose select one or more additional directors not to exceed four in number. Such additional directors shall be residents of the National Reserve district in which they are chosen and shall be fairly representative of the agricultural, industrial, and commercial interest of said district. None of such directors shall be during his term of office an officer or director of any other bank or banking corporation. Eight votes shall be necessary to the choice of each such director and before he shall be declared elected he shall be certified to the Secretary of the Trasury who with the advice and consent of the Federal Reserve Board hereinafter created may accept or reject any or all such directors of Class C.

A fifth director belonging to Class C shall be chosen directly by the Federal Reserve Board hereinafter created, under such regulations as it may prescribe. The said director shall be chairman of the Board of Directors of the National Reserve Bank of the district to which he is appointed and shall be designated as "Federal Reserve Agent". In addition to his duties as chairman of the board of directors of the National Reserve Bank of the district to which he is appointed, he shall be required to maintain under regulations to be established by the Federal Reserve Board, a local office of said Board which shall be situated on the premises of the National Reserve Bank of the District. He shall make regular reports to the Federal Reserve Board, and shall act as its official representative for the performance of the functions conferred upon it by this act. He shall be paid an annual compensation to be fixed by the Federal Reserve Board and to be paid him monthly by the National Reserve Bank to which he is designated.

The Reserve Organization Committee hereinbefore created may in organizing National Reserve banks for the first time, call such meetings of bank directors or stockholders in the several districts as may be necessary to carry out the purposes of this act and may exercise the functions herein conferred upon the chairman of the board of directors of each National Reserve Bank, pending the complete organization of such bank.

At the first meeting of the full board of directors of each National Reserve Bank subsequent to the organization of such bank it shall be the duty of each of the three classes of directors hereinbefore created to designate by such method as shall be prescribed by the Federal Reserve Board one of its members whose term of office shall expire at the end of one year from the first of January nearest the date of such meeting, one whose term of office shall expire at the end of two years from said date, one whose term of office shall expire at the end of three years from said date, one whose term of office shall expire at the end of four years from said date, and one whose term of office shall expire at the end of five years from said date. Thereafter every director of a National Reserve Bank chosen as hereinbefore provided shall hold office for a term of five years. Provided, that the chairman of the board of directors of each

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National Reserve Bank, designated by the Federal Reserve Board as hereinbefore described shall be removable at the pleasure of the said board without notice, and his successors shall hold office during the unexpired term of the director in whose place he was appointed.

SECTION 5. That shares of the capital stock of National Reserve Banks shall not be transferable, and under no circumstances shall they be hypothecated, nor shall they be owned otherwise than by subscribing banks, nor shall they be owned by any bank other than in the proportion herein provided. In case a subscribing bank increases its capital, it shall thereupon subscribe for an additional amount of capital of the National Reserve Bank equal to twenty per centum of the Bank's increase of capital, paying therefor its then book value as shown by the last published statement of said bank. A bank applying for stock in a National Reserve Bank at any time after the formation of the latter must subscribe for an amount of the capital of said Reserve Bank equal to twenty per centum of the capital of said subscribing bank, paying therefor its then book value as shown by the last published statement of said Reserve Bank. When the capital of any National Reserve Bank has been increased either on account of the increase of capital of the banks holding stock therein or on account of the increase in the number of stockholding banks, the board of directors shall make and execute a certificate showing said increase in capital, the amount paid in and by whom paid. This certificate shall be filed in the office of the Comptroller of the Currency. In case a subscribing bank reduces its capital it shall surrender a proportionate amount of its holdings in the capital of said National Reserve Bank, and if a bank goes into voluntary liquidation it shall surrender all of its holdings of the capital of said National Reserve Bank. In either case the shares surrendered shall be cancelled and the bank shall receive in payment therefor a sum equal to their then book value as shown by the last published statement of said National Reserve Bank.

SECTION 6. That if any shareholder of a National Reserve Bank shall become insolvent and a receiver be appointed, the stock held by it in said National Reserve Bank shall be cancelled, and the balance after paying all debts due by such insolvent bank to said National Reserve Bank shall be paid to the receiver of the insolvent bank. Whenever the capital stock of a National Reserve Bank is reduced, either on account of a reduction in capital of the banks holding its stock or of the liquidation or insolvency of any such bank holding stock therein, the board of directors shall make and execute a certificate showing such reduction of capital stock and the amount repaid to each bank. This certificate shall be filed in the office of the Comptroller of the Currency.

SECTION 7. That any National Banking Association heretofore organized may at any time within one year from the passage of this Act, and with the approval of the Comptroller of the Currency, be granted, as herein provided, all the rights, and be subject to all the liabilities, of National Banking Associations organized subsequent to the passage of this Act; *Provided*, That such action on the part of such Associations shall be authorized by the consent in writing of shareholders owning not less than two-thirds of the capital stock of the Association. Any National Bank Association now organized which shall not, within one year after the passage of this act, become a National Banking Association under the provisions hereinbefore stated, and which shall not place in the hands of the Treasurer of the United States the sums by law provided for the redemption of its circulating notes, or which shall fail to comply with any other provision of this act shall be dissolved; but such dissolution shall not take away or impair any remedy against such corporation, its stockholders or officers, for any liability or penalty which shall have previously been incurred.

SECTION 8. That any bank or banking association incorporated by special law of any State, or organized under the general laws of any State, and having a paid up unimpaired capital sufficient to entitle it to become a National banking association under the provisions of this act, may, by the consent in writing of the shareholders owning not less than two-thirds of the capital stock of such bank or banking association, and with the approval of the Comptroller of the Currency, become a National banking association under its former name or by any name approved by the Comptroller. The directors thereof may continue

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to be the directors of the association so organized until others are elected or appointed in accordance with the provisions of the law. When the Comptroller has given to such bank or banking association a certificate that the provisions of this act have been complied with, such bank or banking association, and all its stockholders, officers and employees, shall have the same powers and privileges, and shall be subject to the same duties, liabilities, and regulations, in all respects, as shall have been prescribed for associations originally organized as National Banking associations under this act.

SECTION 9. That it shall be lawful for any National Banking association having a capital of not less than $1,000,000 to establish branches under such rules and regulations as may be prescribed by the Comptroller of the Currency, with the approval of the Secretary of the Treasury; Provided, That the number of such branches shall not exceed one for each $500,000 of capital stock issued by the parent institution.

SECTION 10. That there shall be created a Federal Reserve Board. That said Board shall consist of three classes of members, hereinafter designated as classes A, B and C.

Class A shall consist of National Reserve Representatives equal in number to the number of National Reserve Banks, and including one member representing each such bank.

Class B shall consist of National Reserve Delegates equal in number to the number of National Reserve districts, and including one member from each such district.

Class C shall consist of Government Reserve Officers, three in number, and including the Secretary of the Treasury, the Comptroller of the Currency and the Attorney-General of the United States.

National Reserve Representatives (class A) shall be selected by ballot by the directors of National Reserve Banks, one to each bank, who shall himself be a member of the directorate of said National Reserve Bank. The Chairman of the Board of Directors of each National Reserve Bank shall be ineligible for election as a member of the Federal Reserve Board.

It is proposed to alter this by providing that the Federal Reserve Board shall be selected by the directors of the National Reserve Banks.

C. G.

National Reserve Delegates (class B) shall be chosen from among the stockholders of the National Banks organized in the several National Reserve districts in the following manner: At a regularly called stockholders' meeting it shall be the duty of said stockholders voting under the regulations prescribed for the choice of bank officers to elect one of their own number as a candidate for appointment as "National Reserve Delegate." The name of the National Reserve Delegate so chosen shall be certified to the Comptroller of the Currency by the President of the Bank whose stockholders have elected said Delegate. It shall be the duty of the Comptroller to establish a complete list of all candidates for National Reserve Delegate so chosen within each National Reserve district and to forward a copy of the same to each National Bank stockholder in said district. Each such stockholder receiving such list shall select from the list thus established one candidate for National Reserve Delegate and shall indicate his choice to the Comptroller in manner as the latter may require. The name receiving the greatest number of votes after the manner aforesaid shall be designated by the Comptroller as National Reserve Delegate for the district in which he is chosen, unless the said number shall be less than a majority of all votes cast. If no candidate shall receive a majority of all votes cast at such election it shall be the duty of the Comptroller aforesaid to establish an eligible list consisting of the five names receiving the largest number of votes on the first ballot and to forward a copy of the same to each National bank stockholder in said district. Each such stockholder receiving such list of five names shall select from the list one candidate for National Reserve Delegate and shall indicate his choice to the Comptroller in such manner as the latter may require. The name receiving the greatest number of votes, not less than a majority, after the manner aforesaid shall be designated by the Comptroller as National Reserve

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Delegate for the district in which he is chosen. If no such candidate shall receive a majority of votes the Secretary of the Treasury shall nominate from among the five candidates one who shall act as National Reserve Delegate for the ensuing term and he shall be so designated by the Comptroller; Provided, That no bank stockholder in selecting a National Reserve Delegate from the list established by the Comptroller shall cast more than one ballot; and provided further that no person who at the time is an officer or director of a National bank shall be eligible to the office of National Reserve Delegate. Subsequent acceptance of office as officer or director of a National Bank shall automatically cancel the appointment of a National Reserve Delegate.

Every member of the Federal Reserve Board shall receive a salary of $2,500 per annum.

Each member of the Federal Reserve Board shall be chosen for a term of six years or for the unexpired portion of such term, Provided, That the first members of the Federal Reserve Board in classes A and B shall hold office for a term of six years dating from the first of January next succeeding the election at which they are chosen, except as hereinafter otherwise provided, and all members of the Federal Reserve Board belonging to classes A and B, first chosen under this act shall take office immediately upon their election and shall continue to hold the same until the first of January next succeeding such election and thereafter as herein provided.

Upon assembling for the first time the members of the Federal Reserve Board belonging to classes A and B shall separate into two groups under such regulations as the Board may lay down for effecting the said grouping. One such group shall hold office for three years, dating from the first of January next succeeding the election of members, the other for six years next succeeding such election. Each group shall include one half the total number of members of the two classes, drawn in equal numbers from each. Thereafter every member of the said Board belonging to classes A and B shall hold office for a term of six years. Vacancies in classes A and B shall be filled as they may occur, in the manner prescribed for the original choice of members belonging to the class in which such vacancies may occur.

SECTION 11. That the first meeting of the Federal Reserve Board shall be held on July 1, 1913 and upon convening for the first time, the Federal Reserve Board shall separate by classes. Class A meeting separately, shall choose from among its own number by ballot two members who shall be known as Federal Reserve Officers. Class B shall in like manner select from among its own number two Federal Reserve Officers. The four Federal Reserve Officers thus chosen shall, with the ex officio members constituting class C of the Federal Reserve Board, constitute an executive committee of the Federal Reserve Board of seven members, and shall be known as the Federal Reserve Committee. The Secretary of the Treasury shall be ex officio Chairman of the Federal Reserve Board and Chairman of the Federal Reserve Committee. He shall designate at his pleasure, one of the four Federal Reserve Officers chosen by classes A and B of the Federal Reserve Board as President of said Board; and shall designate two others from among the aforesaid four as first and second Vice-Presidents. The remaining member included in the four Federal Reserve Officers aforesaid shall be designated as Secretary of the Federal Reserve Board. The powers and duties of the President, Vice-Presidents and Secretary shall be established in by law to be adopted by the Federal Reserve Board. After being thus designated by the Secretary of the Treasury Federal Reserve Officers shall continue to hold office in the positions to which they are designated until the expiration of their terms as members of the Federal Reserve Board, current at the time when they were so designated.

It is proposed to alter this so as to provide that the Executive Board shall contain 9 members—3 practical bankers; 3 members named for long terms by the President and 3 ex officio members, Sect'y Treasury, Comptroller of Currency and Sect'y Agriculture.

C. G.

The powers and functions hereinafter conferred upon the Federal Reserve Board may be exercised by the Executive Committee of said Board in accordance

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with by laws to be established by said Board. But said Committee must fully report its action on each and every matter of business falling within its jurisdiction to a general meeting of said Board to be convened not less frequently than once each month. And every member of said Board may at his discretion attend meetings of the Executive Committee, although he shall have no vote at such meetings.

Any member of the Federal Reserve Board may at the monthly meeting hereinbefore specified propose a motion reversing or modifying any action of the Executive Committee already taken, and such motion shall be voted upon promptly under rules of procedure to be adopted by said Board; Provided, that no such motion shall be binding upon the Executive Committee or shall be deemed to cancel or reverse its action unless it receives two-thirds of all votes cast at the meeting of the Federal Reserve Board at which it shall be proposed.

SECTION 12. That on the nomination of the President of the Federal Reserve Board, the Executive Committee shall appoint all officers and employes of the Board, except those otherwise provided for in this act, determine their remuneration, tenure of office, and duties.

The Executive Committee shall have full control, subject to the Board, of the detailed management of said Board. For this purpose it shall meet regularly once a week at the office of the Board or at such other places as may be designated by the Chairman of the Board. Special meetings may be called by the Chairman or by any three members.

The Federal Reserve Board shall appoint a Board of Examiners consisting of three members, to report at any time upon the conditions of credit, the kind of business done, and the proper conduct of the discounts at each National Reserve Bank or of any individual bank; and said Board may authorize the employment of suitable assistance, if needed, for this work of examination.

The Secretary of the Treasury as Chairman of the Federal Reserve Board and Chairman of the Executive Committee shall be responsible for the discipline of the Executive Staff of the Board, determine the duties of the various persons concerned, secure the preparation of the reports to be made to the Executive Committee and the members of the Board, and perform all other duties pertaining to his office. All of his acts shall be subject to the review of the Executive Committee and its decision in all matters pertaining to his duties shall be final unless reversed by the Board. In the absence or illness of the Secretary of the Treasury, his duties shall devolve upon the Comptroller of the Currency acting as Vice-Chairman.

The expenses of the Federal Reserve Board shall be paid by the National Reserve Banks out of their gross receipts in such a manner and at such times as the Board shall direct. Each Reserve Bank shall pay such a portion of said expenses as its capital and surplus bear to the aggregate capital and surplus of all.

At all meetings of the Board a quorum shall consist of two-thirds its total number of members. A majority of those present shall be required to pass any resolution. Each member shall be reimbursed for his reasonable travelling and other necessary expenses for attendance on each meeting, on vouchers approved by the Executive Committee.

SECTION 13. That the Federal Reserve Board hereinbefore established shall be authorized and empowered

(a) To examine once each month the accounts and books of each National Reserve Bank.

(b) To determine the apportionment of Federal deposits among the National Reserve Banks.

(c) To require a National Reserve Bank to rediscount the paper of any other National Reserve Bank.

(d) To ascertain once each month the character of the paper held by each National Reserve Bank and to require at its discretion the suspension of further issues for a designated period.

(e) To establish each week or as much oftener as required a rate of discount which shall be mandatory upon each National Reserve Bank and for each class of paper; provided, that said rate of discount need not be uniform for all Reserve Banks.

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(f) To suspend for a period not exceeding thirty days (and to renew such suspension for periods of not to exceed fifteen days) any and every reserve requirement specified in this act.

SECTION 14. That any National Reserve Bank may receive from any bank or banking institution or trust company duly organized under Federal or State law deposits of current funds in lawful money, national bank notes, Federal reserve notes or checks, drafts and other claims upon solvent banks domestic and foreign.

Upon the endorsement of any bank having a deposit with it any National Reserve Bank may discount notes and bills of exchange arising out of commercial transactions; that is notes and bills of exchange issued or drawn for agricultural, industrial or commercial purposes, and not including notes or bills issued or drawn for the purpose of carrying stocks, bonds or other investment securities. Such notes and bills must have a maturity of not more than thirty days.

Upon the endorsement of any bank having a deposit with it, any National Reserve Bank may discount paper of the classes hereinbefore described having a maturity of more than sixty and not more than 120 days, provided that its own cash reserve exceeds 50 per cent of its total outstanding demand liabilities and provided further that not more than 50 per centum of the total paper so discounted for any depositing bank shall have a maturity of more than sixty days.

Upon the endorsement of any bank having a deposit with it, any National Reserve Bank may discount acceptances of depositing banks which are based on the exportation or importation of goods or on travellers credits and which mature in not more than 90 days and bear the signature of at least one bank in addition to that of the acceptor. The amount so re-discounted shall at no time exceed the capital of the bank for which the rediscounts are made. The aggregate of such notes and bills bearing the signature or endorsement of any one person, company, firm or corporation, rediscounted for any one bank, shall at no time exceed ten per centum of the unimpaired capital and surplus of said bank.

Any National Bank may at its discretion accept drafts or bills of exchange drawn upon it having not more than four months to run and growing out of transactions involving the importation or exportation of goods or the issue of travellers letters of credit. Provided that no bank shall accept such bills to an amount equal in the aggregate to more than one half the face value of its paid up and unimpaired capital.

SECTION 15. Whenever in the opinion of the Federal Reserve Committee upon application jointly and directly made to the Secretary of the Treasury by not less than ten National Banks in one district the public interest so requires, the Federal Reserve Committee may authorize the Reserve Bank of the District to discount the direct obligations of depositing banks secured by the pledge and deposit with it of satisfactory securities; but in no case shall the amount so loaned by a National Reserve Bank exceed three-fourths of the actual value of the securities so pledged, or one half the amount of its own paid up and unimpaired capital.

SECTION 16. That every National Reserve Bank shall have power, both at home and abroad, to deal in gold coin or bullion, to make loans thereon, and to contract for loans of gold coin or bullion, giving therefor, when necessary, acceptable security, including the hypothecation of its holdings if any of United States bonds.

SECTION 17. That any National Reserve Bank may invest in United States bonds; also in obligations having not more than one year to run, of the United States or its dependencies, or of any State, or of foreign governments.

SECTION 18. That every National Reserve Bank shall have power to purchase from depositing banks and to sell with or without its endorsement, checks, or bills of exchange, arising out of commercial transactions as hereinbefore defined, payable in such foreign countries as the Board of Directors of such National Reserve Bank may determine. These bills of exchange must have not exceeding ninety days to run and must bear the signature of two or more responsible parties, of which the last one shall be that of a subscribing bank.

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SECTION 19. That any National Reserve Bank may with the consent of the Federal Reserve Board open and maintain banking accounts in foreign countries and establish agencies in such countries wheresoever it may deem best for the purpose of purchasing, selling and collecting foreign bills of exchange, and it shall have authority to buy and sell with or without its endorsement through such correspondents or agencies, checks or prime foreign bills of exchange arising out of commercial transactions, which have not exceeding ninety days to run, and which bear the signature of two or more responsible parties.

SECTION 20. That the Government of the United States and banks depositing in the National Reserve Banks formed under this act as hereinafter indicated shall be the only depositors in said Reserve Banks. All domestic transactions of the National Reserve Banks shall be confined to the Government and the depositing banks, with the exception of the purchase or sale of Government or State securities or securities of foreign governments or of gold coin or bullion.

SECTION 21. That all moneys now held in the general fund of the Treasury shall within six months from the passage of this act be deposited in National Reserve Banks; and thereafter the revenues of the Government shall be regularly deposited in such banks and disbursements shall be made by check drawn against such deposits. It shall be the duty of the Federal Reserve Board herein established to apportion the funds of the Government among the said National Reserve Banks and to fix from month to month a rate of interest which shall be regularly paid by the banks holding such deposits; Provided, that no National Reserve Bank shall be required to receive Government deposits when in the judgment of its directors the condition of business does not warrant the payment of the rate of interest fixed by the Federal Reserve Board.

SECTION 22. That no National Reserve Bank shall pay interest on deposits; except those of the Government of the United States; and no National Banking Association shall pay interest on funds of other banks deposited with it.

SECTION 23. That any National Reserve Bank may at its discretion, subject to the provisions of this act, make application to the Federal Reserve Board for Federal Reserve notes. Said notes shall be in all respects similar to existing National bank notes except that they shall not bear any legend or superscription indicating that they are secured by United States or other bonds. But no National Reserve Bank shall receive in the aggregate notes exceeding a sum equal to the face value of the capital stock of such Bank plus the stockholders' individual liability, or in the aggregate a sum double the face value of the capital stock of such bank. Upon receiving an application for notes from any National Reserve Bank, the Federal Reserve Board shall immediately issue said notes to the Bank making said application. Any National Reserve Bank desiring to reduce its circulation may do so, upon the same conditions now prescribed for the retirement of National bank notes; Provided, that nothing in the statutes of the United States shall prevent a National Reserve Bank from retiring its outstanding notes as rapidly as its officers and directors may deem best.

It shall be the duty of every National Reserve Bank to receive on deposit at par the notes of every other National Reserve Bank and of every National Banking Association. Every National Reserve Bank shall provide for the redemption of its own notes on demand in gold at least one point in every reserve district throughtout the United States. The method of such redemption and the provisions under which it shall be carried on shall be subject to control by the Federal Reserve Board, and it shall be the duty of said Board to establish such rules and regulations that all notes issued by National Reserve Banks shall be maintained convertible into gold at par without exchange through the United States.

SECTION 24. That no National Banking Association shall be entitled to receive from the Comptroller of the Currency, or to issue, circulating notes in excess of the total amount of such notes which such bank may have outstanding at the passage of this act. Provided that no National Banking Association which may in future reduce its outstanding circulating notes in the manner prescribed by law shall hereafter be entitled to receive from the Comptroller of

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the Currency, or to issue, circulating notes in excess of the sum to which its outstanding notes shall have been reduced by such withdrawals.

SECTION 25. That so much of the provisions of section 5159 of the Revised Statutes of the United States and section 4 of the Act of June 20th, 1874, and section 8 of the Act of July 12th, 1882, as provide that before any National Banking Association shall be authorized to commence banking business it shall transfer and deliver to the Treasurer of the United States, United States registered bonds, to an amount, where the capital is $150,000 or less, not less than one-fourth of its capital stock, and $50,000 where the capital is in excess of $150,000, be and the same is hereby repealed.

SECTION 26. Upon application, the Secretary of the Treasury shall exchange the two per centum bonds of the United States bearing the circulation privilege, theretofore deposited by any National Banking Association with the Treasurer of the United as security for circulating notes, for three per centum bonds of the United States without the circulation privilege, payable after twenty years from date of issue. When and in proportion as the outstanding two per centum bonds deposited by them with the Treasurer shall be thus exchanged or refunded, the power of National Banks to issue circulating notes secured by United States bonds shall cease and be determined. Every National Bank may continue to apply for and receive from the Comptroller of the Currency circulating notes under the conditions provided by this act, but no National Bank shall be permitted to issue circulating notes of any description or to issue or to make use of any substitute for such circulating notes in the form of Clearing House certificates, cashier's check, or other obligation not specifically provided for under this act; Provided, That no National Bank shall in any one year present two per centum bonds for exchange in the manner hereinbefore provided to an amount exceeding ten per centum of the total amount of bonds deposited with the Treasurer by said Bank at the time of the passage of this act; Provided further that at the expiration of ten years from the passage of this act every holder of United States two per centum bonds shall receive in exchange three per centum bonds of like denomination payable twenty years from date of issue. Each National Reserve Bank may receive from the Federal Reserve Board and issue at its own discretion subject to the provisions of this act, in addition to the notes provided for by Sec. 23 of this act, a sum in notes equal to the par value two per centum bonds of the United States surrendered by its own stockholding banks to the Treasurer of the United States in exchange for three per centum bonds.

SECTION 27. That within sixty days from and after the date when the Secretary of the Treasury shall have officially announced, in such manner as he may select, to National Banks situated in the several National Reserve districts, the fact that a National Reserve Bank has been established in the district within which they are situated, every such National Banking Association wherever situated within the said district shall establish with the National Reserve Bank of the district a credit balance on the books of the latter institution equal to not less than five per centum of the total outstanding demand liabilities of the National Bank establishing the same. Such balance may at any time be increased but shall at no time be allowed to fall below a figure equal to the five per cent of total outstanding demand liabilities aforesaid. From and after a date twelve months subsequent to the expiration of the sixty days after the organization of the National Reserve Bank of the district as aforesaid, it shall be the duty of every National Banking Association wherever situated within the National Reserve district to which it belongs to establish with the National Reserve Bank of the district an additional balance equal to not less than five per centum of the total outstanding demand liabilities of the National Bank establishing the same. Thereafter it shall be the duty of every such National Banking Association to maintain a credit balance on the books of the National Reserve Bank of the district within which it is situated which shall at all times be at least equal to ten per centum of the total outstanding demand liabilities of the National Bank establishing and maintaining the same.

From and after the passage of this act it shall be the duty of every National Banking Association wherever situated to maintain constantly on hand in its own vaults a sum in lawful money equal to not less than five per centum of its total outstanding demand liabilities.

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From and after the passage of this act for a period of thirteen months it shall be the duty of every National Banking Association situated outside of a Reserve City or Central Reserve City, in addition to the requirements hereinbefore set forth to maintain at all times either:

(a) An additional credit balance on the books of the National Reserve Bank of the district equal to five per centum of the total outstanding demand liabilities of the National Banking Association establishing the same; or

(b) An additional credit balance on the books of another National Banking Association situated in a Reserve City or Central Reserve City equal to five per centtim of the total outstanding demand liabilities of the National Bank Association establishing the same; or

(c) A sum constantly on hand in its own vaults, in lawful money, equal to not less than five per centum of its total outstanding demand liabilities.

From and after the passage of this act, it shall be the duty of every National Banking Association situated in a Reserve City but not in a Central Reserve City, in addition to the requirements hereinbefore set forth for all National Banks, to maintain at all times either:

(a) An additional credit balance on the books of the National Reserve Bank of the district equal to ten per centum of the total outstanding demand liabilities of the National Banking Association establishing the same; or

(b) An additional credit balance on the books of another National Banking Association situated in a Central Reserve City equal to ten per centum of the total outstanding demand liabilities of the National Banking Association establishing the same; or

(c) A sum constantly on hand in its own vaults in lawful money equal to not less than ten per centum of its total outstanding demand liabilities; Provided, That from and after a date twelve months subsequent to the date upon which National Banking Associations situated in Reserve Cities shall have first opened an account and established a credit balance with the National Reserve Bank of the district in which they are situated, thev shall be required to maintain in addition to the ten per cent balance on the books of the National Reserve Bank hereinbefore required and in addition to the sum of five per cent of outstanding liabilities in cash in their own vaults, a sum not exceeding five per cent of such total outstanding liabilities either in their own vaults or as a credit balance on the books of the National Reserve Association or as a credit balance on the books of a National Banking Association situated in a Central Reserve City, and shall be subject to no other requirement.

From and after the passage of this act and until a date twelve months subsequent to the date upon which National Banking Associations in Central Reserve Cities shall have first opened an account and established a credit balance with the National Reserve Bank of the district in which they are located, they shall be required to maintain in addition to the requirements hereinbefore set forth either:

(a) An additional credit balance on the books of the National Reserve Bank of the district equal to fifteen per centum of the total outstanding demand liabilities of the National Banking Association establishing the same; or

(b) A sum constantly on hand in their own vaults in lawful money equal to not less than fifteen per centum of their total outstanding demand liabilities.

Subsequent to the date hereinbefore specified every National Banking Association situated in a Central Reserve City shall have at all times on hand in its own vaults a sum equal to five per centum of its total outstanding demand liabilities or shall maintain on the books of the National Reserve Bank of the district a credit balance equal to five per cent of its total outstanding demand liabilities, such sum or balance to be in addition to the requirements hereinbefore set forth for all National Banking Associations; Provided, That nothing in this act contained shall prevent a National Banking Association from increasing its

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balance either with the National Reserve Bank of its district or with other National Banks beyond the minimum limits specified in this section. Provided, That no National Banking Association or National Reserve Bank shall count or report any of its own notes or of the notes of any other National Bank or of any National Reserve Bank as a part of its cash assets.

That so much of sections 5191 and 5192 Revised Statutes and so much of Sec. 2 of the act of June 20, 1874, relating to the maintenance of reserves in Central Reserve cities, and so much of the said acts as requires or dispenses with the maintenance of specified reserves against liabilities, as is inconsistent with this section shall be and the same is hereby repealed.

SECTION 28. That so much of section 3 of the Act of June 20th, 1874, entitled "An Act fixing the amount of United States notes, providing for a redistribution of the National Bank Currency, and for other purposes," as provides that the fund deposited by any National Banking Association with the Treasurer of the United States for the redemption of its notes shall be counted as a part of its lawful reserve as provided in the act aforesaid be, and the same is hereby repealed. And from and after the passage of this act, such fund of five per centum shall in no case be counted by any National Banking Association as a part of its lawful reserve.

SECTION 29. That no National Reserve Bank shall discount for, or purchase from, any state or private bank or trust company, or from any banking institution whatsoever incorporated or authorized to transact business in the United States or in any state or territory therein, any of the kinds of paper hereinbefore described and specified except upon the following conditions to wit:

Every state or private bank or trust company or other banking institution formed or incorporated under state or national law shall at the time it presents paper for rediscount to the National Reserve Bank of the district in which it is located have an open deposit account equal in amount to that required by section 24 of this act to be maintained by a similarly situated National Bank and shall thereafter maintain such balance. Every such bank shall submit to such inspection and shall make and render such reports as may be required by the Federal Reserve Board under the terms of this act of similarly located National Banks.

Any National Reserve Bank may at any time refuse to discount or purchase paper of the kinds herein described, for a bank belonging to any one of the classes herein described, because of the failure of such institution to comply with the requirements of this section; Provided, that upon ascertaining that such institution no longer complies with the requirements of this section it shall at once certify such fact to the Chairman of the Federal Reserve Committee.

SECTION 30. That every National Reserve Bank shall at all times have on hand in its own vaults in gold or the equivalent thereof a sum equal to not less than 25 per centum of its outstanding circulating notes. It shall at all times have on hand in its own vaults live commercial paper having not more than 30 days to run to an amount equal to 50 per centum of its outstanding demand liabilities which shall at the same time be not less than 75 per centum of its outstanding circulating notes.

SECTION 31. That the Federal Reserve Board shall as often as it deems best, and in any case not less frequently than once each month, order an examination of National Banking Associations in reserve cities. Such examination shall show in detail the total amount of loans made by each bank on demand, on time and the different classes of collateral held to protect the various loans. And the Federal Reserve Board shall have power when in its judgment the result of such examination requires, to order that for a period of thirty days next following the demand deposits carried by other banks with any one or more of the associations so specially examined shall not be counted as a part of the required reserve of the depositing institution.

SECTION 32. That every National Reserve Bank shall pay, on or before the last day of every month, to the Treasurer of the United States a duty

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imposed at the rate of two per centum per annum upon the average daily amount of its circulating notes outstanding in excess of 100 per centum of its capital stock, and not in excess of 150 per centum of such capital stock, and a duty imposed at the rate of six percentum per annum upon the average daily amount of such notes outstanding in excess of 150 per centum of its capital stock. Circulating notes of any National Reserve Bank shall be deemed and held to be outstanding whenever they shall have been supplied by the Federal Reserve Board to such bank, in blank, registered and countersigned according to law, and shall not have been returned to the Board for cancellation or covered by an equal amount of lawful money deposited with the Treasurer of the United States for the retirement of such notes.

SECTION 33. That in order to enable the said Treasurer to assess the duties imposed by the preceding section, the Chairman of the Federal Reserve Committee shall, within five days from the first day of each calendar month, make a return to the Treasurer of the United States, in such form as he may prescribe, of the average daily amount of circulating notes of each National Reserve Bank outstanding during the calendar month next preceding. And every National Reserve Bank shall be notified by said Treasurer of the United States within ten days from the first day of each calendar month of the amount of the duties upon its circulating notes due from it to the United States, under this act, and every such Association shall, before the last day of such calendar month, pay to the said Treasurer in lawful money the full amount of such tax; and whenever any Association fails to pay the duties imposed by this Act, the sum due may be collected in the manner provided for the collection of taxes; and while such default continues no further amount of circulating notes shall be issued to such defaulting Reserve Bank.

SECTION 34. That every National Banking Association shall pay into the Treasury of the United States each half year, in the months of January and July, on or before the thirteenth day thereof, a duty of one-eighth of one per centum upon the value of its franchise as measured by the aggregate amount of its capital, surplus, and undivided profits, upon the last day of the calendar month next preceding. Sections 5213, 5215, and 5216 and 5217 of the Revised Statutes of the United States are hereby repealed. But nothing in this section contained shall be so construed as in any manner to release any National Banking Association from any liability for taxes or penalties incurred prior to the passage of this Act.

SECTION 35. That from and after the passage of this act the stockholders of every National Banking Association shall be held individually responsible for all contracts, debts, and engagements of such Association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. The stockholders in any National Banking Association who shall have transferred their shares, or registered the transfer thereof, within sixty days next before the date of the failure of such Association to meet its obligations, shall be liable to the same extent as if they had made no such transfer; but this provision shall not be construed to affect in any way any resources which such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure.

SECTION 36. That section 324 of the Revised Statutes of the United States be amended so as to read as follows: "There shall be in the Department of the Treasury a Bureau charged, except as in this act otherwise provided, with the execution of all laws passed by Congress relating to the issue and regulation of currency issued by National Banking Associations, the chief officer of which Bureau shall be called the Comptroller of the Currency, and shall perform his duties under the general direction of the Secretary of the Treasury, acting as the Chairman of the Federal Reserve Board."

SECTION 37. That the examination of the affairs of every National Banking Association authorized by existing law, shall take place at least twice in each calendar year, and as much oftener as the Comptroller of the

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Currency shall consider necessary in order to furnish a full and complete knowledge of its condition; and the person making such examination shall have power to call together a quorum of the directors of such Association, who shall, under oath, state to such examiner the character and circumstances of such of its loans and discounts as he may designate; and from and after the passage of this act all bank examiners shall receive fixed salaries, the amount whereof shall be determined by the Secretary of the Treasury and shall be annually reported to Congress. But the expense of the examinations herein provided for shall be assessed by the Comptroller of the Currency upon the Association examined. The Comptroller of the Currency shall so arrange the duties of National Bank examiners that no two successive examinations of any Association shall be made by the same examiner.

In addition to the examination made and conducted by the Comptroller of the Currency, every National Reserve Bank shall with the approval of the Federal Reserve Board arrange for periodical examinations of the banks within its district. Such examinations shall be so conducted as to inform the National Reserve Bank under whose auspices it is conducted of the condition of its member or stockholding banks and of the lines of credit which are being granted by them. Every National Reserve Bank shall at all times be bound to furnish to the Federal Reserve Board such information as may be demanded by the latter concerning the condition of any National Bank organized within the district in which the said National Reserve Bank is located, and it shall have power at all times to order special examinations without notice of the condition of its member of stockholding banks.

SECTION 38. That no Association shall hereafter make any loans or grant any gratuity to any examiner of such Association. Any Association offending against this provision shall be deemed guilty of a misdemeanor, and shall be fined not more than $1,000 and a further sum equal to the money so loaned or guaranty given; and the officer or officers of such Association making such loan or granting such gratuity shall be likewise deemed guilty of a misdemeanor, and shall be fined not to exceed $500. Any examiner accepting a loan or gratuity from any Association examined by him shall be deemed guilty of a misdemeanor, and shall be fined not more than $500, and a further sum equal to the money so loaned or gratuity given.

SECTION 39. That any National Banking Association not situated in a Reserve City of Central Reserve City may make loans secured by improved and unencumbered farm land, and so much of section , Revised Statutes, as prohibits the making of such loans by banks so situated shall be and the same is hereby repealed, provided, that no such loan shall be made to an amount exceeding 50 per centum of the actual value of the property offered as security, and such properties shall be situated within the National Reserve district in which the said bank is located; and provided further that the aggregate amount of such loans made by any one bank shall not exceed a sum equal to 25 per cent of the capital and surplus, unimpaired, of such bank.

SECTION 40. That the Comptroller of the Currency, in addition to the reports provided for by existing law, shall have authority to call for such other reports, regular or special, as he may deem advisable; and such reports shall be rendered in such form as the Comptroller may prescribe; and each Association making such report shall cause a copy thereof to be conspicuously displayed in a public place in its banking house for the period of thirty days from the date of such report; but nothing herein contained shall be construed to require the publication of such additional reports by each Association in the manner prescribed for other reports now rendered.

SECTION 41. That banking corporations for carrying on the business of banking in foreign countries and in aid of the Commerce of the United States with foreign countries and to act when required as fiscal agents of the United States in such countries may be formed by any number of persons, not less in any case than five, who shall enter into articles of association which shall specify in general terms the object for which the banking corporation is formed, and may contain any other provisions not inconsistent with the provisions of this

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section which the banking corporation may see fit to adopt for the regulation and conduct of its business and affairs, which said regulations shall be signed, in duplicate, by the persons uniting to form the banking corporation, and one copy thereof shall be forwarded to the Comptroller of the Currency and the other to the Secretary of State, to be filed and preserved in their offices.

That the persons uniting to form such banking corporation shall, under their hands, make an organization certificate which shall specify, first, the name assumed by such banking corporation, which name shall be subject to approval by the Comptroller; second, the foreign country or countries or the dependencies of the United States where its banking operations are to be carried on; third, the place in the United States where its home office shall be located; fourth, the amount of its capital stock and the number of shares into which the same shall be divided; fifth, the names and places of residence of the shareholders and the number of shares held by each of them; and sixth, a declaration that said certificate is made to enable such persons to avail themselves of the advantages of this section.

That no banking corporation shall be organized under the provisions of this section with a less capital than two million dollars, which shall be fully paid in before the banking corporation shall be authorized to commence business, and the fact of said payment shall be certified by the Comptroller of the Currency, and a copy of his certificate to this effect shall be filed with the Secretary of State; *Provided,* That the capital stock of any such bank may be increased at any time by a vote of two-thirds of its shareholders, with the approval of the Comptroller of the Currency, and that the capital stock of any such bank which exceeds two million dollars may be reduced at any time to the sum of two million dollars by the vote of the shareholders owning two-thirds of the capital.

That every banking corporation formed pursuant to the provisions of this section shall for a period of twenty years from the date of the execution of its organization certificate be a body corporate, but shall not be authorized to receive the deposits in the United States nor transact any domestic business not necessarily related to the business being done in foreign countries or in the dependencies of the United States. Such banking corporations shall have authority to make acceptances, buy and sell bills of exchange or other commercial paper relating to foreign business, and to purchase and sell securities, including securities of the United States or of any State in the Union. Each banking corporation organized under the provisions of this section shall have power to establish and maintain for the transaction of its business a branch or branches in foreign countries, their dependencies, or the dependencies of the United States at such places and under such regulations as its board of directors may deem expedient.

A majority of the shares of the capital stock of such banking corporation shall be held and owned by citizens of the United States or corporations chartered under the laws of the United States or of any State of the Union, and a majority of the members of the board of directors of such banking corporations shall be citizens of the United States. Each director shall own in his own right at least one hundred shares of the capital stock of the banking corporation of which he is a director.

Whenever the Comptroller shall become satisfied of the insolvency of any such banking corporation he may appoint a receiver, who shall proceed to close up such corporation in the same manner in which he would close a national bank, the disposition of the assets of the branches to be subject to any special provisions of the laws of the country under whose jurisdiction such assets are located.

The annual meeting of every such banking corporation shall be held at its home office in the United States, and every such banking corporation shall keep at its home office books containing the names of all stockholders of such banking corporation and members of its board of directors, together with copies of the reports furnished by it to the Comptroller of the Currency exhibiting in detail and under appropriate heads the resources and liabilities of the banking corporation. Every such banking corporation shall make reports to the Comptroller of the Currency at such times as he may require, and shall be subject to examinations when deemed necessary by the Comptroller of the Currency through examiners appointed by him; the compensation of such examinations to be fixed by the Comptroller of the Currency.

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Any such banking corporation may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock.

Any bank doing business in the United States being the owner of stock in any National Reserve Bank may subscribe to the stock of any banking corporation organized under the provisions of this section, but the aggregate of such stock held by any one bank shall not exceed ten per centum of the capital stock of the subscribing bank.

SECTION 42. That nothing contained in this Act shall be construed to alter or affect any vested rights of property or contract, or any penalty incurred before the taking effect of this Act or any part of it, and all provisions of law inconsistent with or superseded by any of the provisions of this Act be and the same are hereby repealed.

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(CONFIDENTIAL—COMMITTEE PRINT.)

63D CONGRESS,
1ST SESSION. S.

In the Senate of the United States

May , 1913.

Mr. introduced the following bill; which was read twice and referred to the Committee on Banking and Currency.

A BILL

To establish associations of national and other banks and trust companies, to be known as reserve banks, under the supervision of a National Currency Board, to mobilize reserves, to provide additional circulation when required for national commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

DEFINITIONS.

That the term "reserve bank," as used in this Act, means a reserve bank incorporated in accordance with the terms hereof;

"Member bank" means one of the subscribing banks of a reserve bank;

"Reserve district" means one of the districts within which a reserve bank is located under the authority of this Act;

"Prime commercial paper" means a commercial bill, payable within four months, signed by at least two persons, either of whom shall be good for such bill and one of whom shall be a member bank, such commercial bill to be based upon an actual commercial transaction and not to be based upon a permanent investment;

"Treasury gold note" means a note issued by the United States Treasury, based on the credit of the United States and printed in the form to be prescribed by the National Currency Board, payable on demand at any reserve bank or at the Treasury of the United States;

"The National Currency Board" shall mean the board of governors of the national currency, as described in this Act.

SECTION 2. That the New England Reserve Bank, the Eastern Reserve Bank, the Southeastern Reserve Bank, the Southern Reserve Bank, the Central States Reserve Bank, the Rocky Mountain Reserve Bank, the Southwestern Reserve Bank, and the Pacific Reserve Bank be, and are hereby, created and established for a term of thirty years from the date of filing with the Comptroller of the Currency a certificate of paid-in capital stock as hereinafter provided.

The head office of the New England Reserve Bank shall be located in Boston, of the Eastern Reserve Bank in New York, of the Southeastern Reserve Bank in Atlanta, of the Southern Reserve Bank in New Orleans, of the Central States Reserve Bank in Chicago, of the Southwestern Reserve Bank in Kansas City, of the Rocky Mountain Reserve Bank in Denver, and of the Pacific Reserve Bank in San Francisco.

TERMS OF SUBSCRIPTIONS.

SECTION 3. That within six months from the date of the passage of this Act every national bank shall subscribe to the capital of the reserve bank of its district, to an amount equal to twenty per centum of the paid-in and unimpaired and surplus capital of the subscribing bank, and not more nor less.

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Fifty per centum of the subscriptions to the capital stock of the reserve bank shall be fully paid in within six months at the time and places fixed by the National Currency Board, and the remainder of the subscriptions, or any part thereof, shall become a liability of the subscribers, subject to call and payment thereof, whenever necessary to meet the obligations of the reserve bank, under such terms and in accordance with such regulations as the board of directors of the reserve bank may prescribe.

Any bank or trust company incorporated under the laws of any State or of the District of Columbia may subscribe to the capital of the reserve bank of its district according to the same terms and proportions as a national bank if it complies with the following conditions:

First. That (a) it shall have a paid-in and unimpaired capital of not less than that required for a national bank in the same locality; and, (b) if a trust company, it shall have an unimpaired capital and surplus of fifty per centum more than the amount of capital required for a national bank in the same locality.

Second. Keep a like reserve as required of the national banks in their own vaults and with the reserve bank.

Third. Agree to proper examinations as may be required by the National Currency Board.

Fourth. That it shall agree to comply with all other requirements and conditions imposed by this Act and regulations made in conformity therewith.

No member bank shall serve as an intermediary by which any bank or trust company, not a stockholder of a reserve bank, shall receive the benefits arising under the provisions of this Act.

No member bank shall pay interest upon the funds of other banks or trust companies deposited with it.

THE ORGANIZATION COMMITTEE.

SECTION 4. That the Secretary of the Treasury, the Attorney General, and the Comptroller of the Currency are hereby designated a committee to effect the organization of the reserve banks. They shall divide the entire country into eight districts, which shall be apportioned with due regard to the convenient and customary course of business and not necessarily along State lines, and within sixty days after the passage of this Act they shall provide for the opening of books for subscriptions to the capital stock of the reserve banks. The necessary expenses of this committee shall be paid out of the Treasury upon vouchers approved by the members of said committee, and the Treasury shall be reimbursed by the reserve banks to the full amount paid out therefor.

The subscribing banks uniting to form a reserve bank shall make and file with the Comptroller of the Currency an organization certificate in the form and manner described in sections fifty-one hundred and thirty-four, fifty-one hundred and thirty-five, and fifty-one hundred and thirty-six, Revised Statutes of the United States, signed by their authorized representatives, and they shall then become a body corporate, and, as such, shall have power to perform all those acts, enjoy all those privileges, and exercise all those powers described in section fifty-one hundred and thirty-six, Revised Statutes, save in so far as the same shall be limited or extended by the provisions of this Act.

THE BOARDS AND OFFICERS OF THE RESERVE BANKS.

SECTION 5. That each reserve bank shall be organized and conducted under the oversight and control of a board of directors, whose powers shall be the same as those conferred upon the boards of directors of national banking associations under existing law, except as otherwise provided in this Act. Such boards shall consist of nine members holding office for six years, to be chosen in the following manner:

Six directors shall be elected by the several subscribing banks, each bank having one unit of voting power for each million or fraction thereof of its capital. Each unit of voting power shall have as many votes as there are directors to be elected, and these votes may be given in favor of any or all of the candidates for election. Three directors shall be appointed by the President of the United States from a list furnished by the National Currency Board to be hereafter provided for, and shall fairly represent the agricultural, commercial, manufacturing, and other interests of the district.

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The manager of the reserve bank shall be elected by the board of directors of the bank and shall thereafter be ex officio presiding officer of that board, but shall have no vote unless the board be equally divided. Unitl the organization of the National Currency Board and the appointments of its representatives upon the board of a reserve bank the elected members of such board shall have full power to act.

No director of a reserve bank shall be, while serving, an officer or a director of any bank or trust company.

At the first meeting of the full board of directors of each reserve bank the members of the board shall be divided into three classes, whose terms of office shall expire at intervals of two, four, and six years, respectively, estimated from the first day of January, nineteen hundred and fourteen. Two of the directors chosen by the member banks and one of the directors appointed by the President shall belong to each class. Thereafter all directors chosen as hereinbefore provided shall be chosen for terms of six years.

BOARD OF GOVERNORS OF THE NATIONAL CURRENCY.

SECTION 6. That there shall be created a board of governors of the national currency, to consist of seven members, including the Secretary of the Treasury, the Secretary of Agriculture, and the Comptroller of the Currency, ex officio, and four governors, to be appointed by the President of the United States, and to serve subject to his will, one of whom shall be distinguished for his practical knowledge of the commerce of the United States, one for his practical knowledge of the manufacturing business, one for his practical knowledge of transportation, and one who shall be distinguished for his knowledge of banking and credit. The Secretary of the Treasury shall be ex officio chairman, but the board of governors may select its own chairman pro tempore. All expenses of the board, including the cost of necessary offices and the salaries of its members, shall be apportioned among and paid by the reserve banks in proportion to their capital. The salaries of the members of the board shall be determined by a majority of the reserve banks, each bank having one vote, and no salary shall be reduced during the term of an appointment.

The National Currency Board shall have authority to make by-laws not inconsistent with law, which shall prescribe the manner in which the duties of the board shall be fulfilled and the privileges granted to it by law exercised and enjoyed.

CAPITAL OF THE RESERVE BANKS.

SECTION 7. That each reserve bank shall have an authorized capital equal in amount to twenty per centum of the paid-in and unimpaired capital and surplus of all banks eligible for membership in the said reserve bank. Such reserve bank shall be authorized to commence business upon the approval of the National Currency Board and a certificate of the Comptroller of the Currency.

The capital stock of the reserve bank shall be divided into shares of $100 each. These shares shall not be transferable, and under no circumstances shall they be hypothecated, nor shall they be owned otherwise than by member banks, nor shall they be owned by any such bank other than in the proportions herein provided. In case a member bank increases its capital it shall thereupon subscribe for an additional amount of the capital of its reserve bank, equal to twenty per centum of the member bank's increase of capital, paying therefor the then book value as shown by the last published statement of said reserve bank.

A bank applying for membership in a reserve bank at any time after its formation must subscribe for an amount of the capital of said reserve bank equal to twenty per centum of the capital and surplus of the subscribing bank, paying therefor its then book value as shown by the last published statement. In case a member bank reduces its capital it shall surrender a proportionate amount of its holdings in the capital of said reserve bank, and if a member bank goes into voluntary liquidation it shall surrender all of its holdings of the capital of said reserve bank. In either case the shares surrendered shall be canceled, and the member bank shall receive in payment therefor from the reserve bank a sum equal to the then book value of the reserve bank as shown by its last published statement, and the capital of the reserve bank shall be reduced correspondingly.

If any member bank shall become insolvent and a receiver be appointed, the

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stock held by it in said reserve bank shall be canceled, the insolvent bank credited with the value thereof, and the balance, after paying all debts due by such insolvent bank to said reserve bank (such debts being hereby declared to be a first lien upon the paid-in capital stock held by such member), shall be paid to the receiver of the insolvent bank.

Except as hereinbefore provided, no member bank may withdraw from membership in a reserve bank until after one year's notice of such intention to withdraw, and in such case the member bank shall receive from the reserve bank a sum equal to the book value of its stock on the date of withdrawal.

A certificate of all increases and decreases of the capital of each reserve bank shall be immediately filed with the Comptroller of the Currency. Each reserve bank shall cause to be kept at all times a full and correct list of the names of the banks owning its stock and the number of shares held by each. Such list shall be subject to inspection of all the shareholders of the Reserve bank, and a copy thereof shall be transmitted on the first of July of each year to the Comptroller of the Currency and at any other time required by the Comptroller of the Currency.

EARNINGS OF THE RESERVE BANKS.

SECTION 8. That the earnings of each reserve bank shall be disposed of in the following manner: After the payment of all expenses, including the expenses of the National Currency Board, the shareholders shall be entitled to receive an annual dividend of five per centum on the paid-in capital, which dividend shall be cumulative. Further annual net earnings shall be paid into the surplus fund of the reserve bank until that fund shall amount to twenty per centum of the paid-in capital, and thereafter all earnings in excess of five per centum per annum shall be paid to the United States.

The reserve bank shall be exempt from local and State taxation, except in respect to taxes upon real estate and from all Federal taxes except such as are provided by this Act.

FUNCTIONS OF THE RESERVE BANKS.

SECTION 9. That the reserve banks shall be the fiscal agents of the United States. All moneys now held in the general fund of the Treasury shall, within six months from the passage of this Act, be deposited in the reserve banks, and thereafter the revenues of the Government shall be deposited in such banks and disbursements shall be made by check drawn against such deposits. It shall be the duty of the National Currency Board herein established to apportion the funds and revenues of the Government among the several reserve banks.

The Government of the United States, reserve banks owning stock in a reserve bank, and the officers of the United States shall be the only depositors in such banks. All domestic transactions of the reserve banks shall be confined to the Government, the officers of the United States, member banks and other reserve banks, with the exception of the purchase or sale of Government or State securities or securities of foreign governments, or of gold coin or bullion.

No reserve bank shall pay interest on deposits.

A reserve bank may discount, purchase, and sell notes, bills of exchange, and acceptances issued or drawn for agricultural, industrial, or commercial purposes, provided, first, that they have no more than three months to run, and, second, that they bear the indorsement of one or more of its member banks. The amount so discounted for any subscriber shall at no time exceed the capital and surplus of the subscribing bank. The aggregate of such notes, bills, and acceptances made by any one person, company, firm, or corporation discounted for any one bank shall at no time exceed ten per centum of the unimpaired capital and surplus of said banks.

A reserve bank may discount and purchase notes, bills, and acceptances of the character above described from another reserve bank, provided that they bear the indorsement of said reserve bank.

A reserve bank may, with the specific approval of the National Currency Board, discount the direct obligation of one of its member banks: Provided, That the application is secured by the pledge and deposit with it of satisfactory securities, which shall be held by the reserve bank. In no case shall the amount loaned by the reserve bank exceed three-fourths of the value of the security so

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pledged, and in case the value of such security should depreciate, the reserve bank may require additional collateral to the extent of such depreciation.

A reserve bank may invest in United States bonds, also in obligations having not more than one year to run of the United States or its dependencies, or of any State, or of foreign governments.

A reserve bank may, with the consent of the National Currency Board, open and maintain banking accounts in foreign countries and establish agencies in such countries for the purpose of purchasing, selling, and collecting foreign bills of exchange and foreign government obligations of the kinds named in this Act, and it shall have authority to buy and sell, with or without its indorsement, checks or bills of exchange, payable in foreign countries, arising out of commercial transactions which have not exceeding ninety days to run and which bear the signature of two or more responsible parties.

A reserve bank may purchase, acquire, hold, and convey real estate for the same purposes and under the same restrictions as are described in section fifty-one hundred and thirty-seven, Revised Statutes of the United States, for the national banks.

The reserve banks shall have power to lend to and borrow from each other, to deal in gold coin or bullion, to make loans thereon, and to contract for loans of gold coin or bullion, giving therefor, when necessary, acceptable security.

A reserve bank shall, upon request, transfer any part of the deposit balance of any depositor to the credit of any other depositor in any reserve bank. The regulations under which such transfer shall be made and the transfer charges shall be fixed by the National Currency Board.

FUNCTIONS OF THE BOARD OF GOVERNORS OF THE NATIONAL CURRENCY.

SECTION 10. That the National Currency Board shall be authorized and empowered—

First. To exercise general supervision over the reserve banks and to examine at will the accounts and books of national banks and of all reserve banks.

Second. To determine the apportionment of Treasury deposits and revenues among the national reserve banks.

Third. To readjust the boundaries of the districts of the reserve banks and to authorize the establishment of agencies within these districts whenever in their opinion the business of the country requires.

Fourth. To provide regulations and to establish charges for the transfer of deposits from accounts kept with one reserve bank to accounts kept with another.

Fifth. To supervise the issue of national currency as provided by this Act.

Sixth. To suspend for a period not exceeding thirty days (and to renew such suspension for a period not to exceed fifteen days) any and every reserve requirement specified in this Act.

RESERVES OF MEMBER BANKS.

SECTION 11. That within two years from the date when the Secretary of the Treasury shall have officially announced that a reserve bank has been established within a given district, and as rapidly as practicable, every member bank within the said district shall establish and thereafter maintain a reserve of cash in its own vaults, or of balance with the reserve bank, equal to not less than fifteen per centum of its total outstanding demand liabilities, and of this reserve no less than one-half shall be kept as a balance with the reserve bank. All liabilities maturing within thirty days shall be construed to be demand liabilities within the meaning of this Act. All Acts or parts of Acts requiring the maintenance of other reserves in national banks against demand liabilities are hereby repealed.

RESERVES OF THE RESERVE BANKS.

SECTION 12. That all demand liabilities of a reserve bank shall be covered to the extent of fifty per centum by a reserve of gold (including gold bullion and foreign gold coin) or other legal tender money of the United States: Provided, That Whenever and so long as such reserve shall fall and remain below fifty per centum the reserve bank shall pay for the first month or fraction thereof a special tax at the rate of five per centum per annum

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upon the deficiency of the reserve, and thereafter an additional tax of one per centum per annum for each month until a tax of ten per centum per annum is reached, and thereafter such tax of ten per cent per annum upon the average amount of such notes. Whenever and so long as such a deficiency in the reserve exists the minimum discount rate with the reserve banks shall be maintained at not less than the rate of the tax.

NOTE CIRCULATION.

SECTION 13. That the Comptroller of the Currency is hereby authorized, with the approval and under regulations to be prescribed by the National Currency Board, to issue United States Treasury gold notes to the reserve banks, said notes to be redeemable in gold on presentation at any reserve bank, or at the office of the Treasurer of the United States. The United States shall have a paramount lien upon all of the assets of the reserve bank to which said notes are issued to the extent of such notes retained by said reserve bank, and until such notes or an equal amount of lawful money are returned to the Treasury of the United States. Any reserve bank receiving such notes shall be required to redeem them on demand, in gold, and shall set apart in its own vaults prime commercial paper as collateral security for the return of such notes, or an equivalent in lawful money, to the Treasurer of the United States.

Such Treasury gold notes shall be issued in a form to be prescribed by the National Currency Board.

A reserve bank to which such Treasury gold notes are issued shall pay during the first four months during which such notes are held and retained at the rate of three per centum per annum for the use of such notes, and at the rate of one per centum per annum for each additional month or fraction thereof until a tax of ten per centum per annum is reached, and thereafter a tax of ten per centum per annum upon the average amount of such notes until they are returned to the Treasury.

MEMORANDUM.

NOTE.—The security of these notes is first, a first lien on the assets of the reserve bank; second, prime commercial paper of like amount collateral in the hands of the bank; third, the credit of the United States.

The banks will have abundant gold in their hands to keep these notes at par. Any person desiring gold can easily get gold on the thousands of millions of outstanding gold certificates. These notes for commercial purposes intended to be used as a means of discounting prime commercial paper and furnishing a prompt and open market for prime commercial paper would be distributed to the local banks desiring currency for moving the crops, etc.

The United States Government might, if it were deemed worth while at all, acquire a small gold deposit to cover any of these notes offered for redemption in gold at the Treasury.

The Subtreasury should be abolished and the Government deposits placed with the reserve banks. The currency board should have authority to require the reserve banks to keep an open account with the Treasurer of the United States and each of them.

REPORTS AND EXAMINATIONS.

SECTION 14. That the reserve banks shall make reports showing the principal items of their balance sheets to the Comptroller of the Currency once a week, which reports shall be made public. In addition, full reports shall be made to the Comptroller of the Currency by the reserve bank and coincident with the five reports called for each year from the national banks.

The National Currency Board shall, as often as deemed necessary or proper, directly or through representatives, examine the affairs of the reserve banks.

All member banks shall, under regulations to be prescribed by the National Currency Board, report monthly, or oftener, if required, to their reserve banks, showing the principal items of their balance sheets.

It shall be the duty of a reserve bank to examine the condition of all

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member banks at such times and under such regulations as the National Currency Board may determine. The reserve bank may, however, accept for this purpose copies of the reports of the national-bank examiners of member national banks and also copies of the reports of State bank examiners for member State banks and trust companies in States where the furnishing of such information is not contrary to law.

A reserve bank may make such payments to national and State examiners for such services required of them as the directors may consider just and equitable. All reports of national-bank examiners in regard to the condition of banks shall hereafter be made in duplicate, and one copy shall be filed with the appropriate reserve bank for the confidential use of its executive officers. The reports of all examinations conducted by or for the reserve banks shall be held strictly confidential and for the exclusive use of the executive officers of the reserve bank.

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"THE MOST URGENT ECONOMIC AND POLITICAL ISSUE OF THE DAY"

"Shall the Water Power of the State be developed by Private Enterprise under State Supervision or by the State through a Water Power Authority?"

ARGUMENT IN FAVOR OF

STATE DEVELOPMENT

BEFORE THE ANNUAL CONVENTION OF THE

ERIE COUNTY LEAGUE OF WOMEN VOTERS

AT BUFFALO, N. Y.

OCTOBER 28, 1927

BY

SAMUEL UNTERMYER

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"THE MOST URGENT ECONOMIC AND POLITICAL ISSUE OF THE DAY"

"Shall the Water Power of the State be developed by Private Enterprise under State Supervision or by the State through a Water Power Authority?"

DEBATE BETWEEN HON. SAMUEL UNTERMYER OF NEW YORK AND HON. WILLIAM H. SARGENT OF SYRACUSE BEFORE THE ERIE COUNTY LEAGUE OF WOMEN VOTERS AT BUFFALO, OCTOBER 28, 1927.

MR. UNTERMYER'S OPENING ARGUMENT.

Mrs. Chairman, Ladies and Gentlemen: The immediate development of the great waterpower resources of the State through the building of dams and generators and its transmission in hydro-electric power is the most important problem of the day. Not only in the State but in the Nation it is one that should arrest the attention of the country and should be accorded the right of way in priority to every other question before the people until it is solved.

The Federal Government has been bending its energies to a solution which whilst it does not do justice to the people is distinctly less disturbing than the situation in this State.

In point of fact, the two proposals are as far apart as the poles, as will be hereafter shown, but neither is just to the people, who are now on the eve of being deprived of their greatest remaining natural resource, under legal forms and plausible pretexts, as they have had filched from

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them all their other fabulous billions of natural wealth which, if conserved, would have more than paid the present staggering National Debt.

The State policy, against which the Governor has been struggling for over five years, has been and is dictated by selfish, powerful, sinister private interests.

I shall deal to-night, in the main, only with our vast remaining State water-power, part of which we have already had taken from us and exploited for private gain. As a result of the obstructions that have been placed in the path of the State in the development of its water power we continue to transport millions upon millions of tons of coal yearly from great distances, at enormous expense, especially to our congested centers of population and industry, in order to generate light, heat and power, whilst untold millions of cubic feet of water are daily running to waste.

The history of our dealings with the natural resources of the State and Nation is one long story of waste, ignorance, neglect and private exploitation, breeding and spreading corruption and concentrating fabulous predatory wealth in a handful of men at the public expense, to say nothing of the contamination of the entire body politic.

Nature has been so prodigal to us and our resources until lately have seemed so inexhaustible that we have been blind spendthrifts, throwing our rich patrimony into the laps of the greedy exploiters. We have now reached the stage at which our water power, which is the last remains of our natural inheritance that has not been filched from us is about to be taken if we do not awaken in time to the peril of our situation and look sharply to our protection.

Our history is strewn with wreckages of legalized robbery of the people through individual and corporate exploitation of our natural resources. These priceless heritages in the Nation and State, instead of being wisely safeguarded, have been literally squandered in the past to

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create the cornerstone of some of the most colossal of our private fortunes. It was an incredibly short-sighted policy and it is high time for us to salvage the little that is left us.

The following statement, issued three days ago (October 25th) by Mr. O. C. Merrill, Executive Secretary of the Federal Power Commission, fairly summarizes the situation:

> "This country originally had enormous resources in its minerals, fuels, its forests and its waters; and they were publicly owned. The early efforts of the Government were primarily directed toward getting these resources as rapidly as possible out of public into private ownership on the hypothesis that such a policy would be most conducive to development.
>
> In fact, it resulted in an era of reckless exploitation. Our resources in coal, oil, gas, and timber were used, wasted and destroyed as if the supply were inexhaustible. When we finally came to our senses the larger part of our remaining fuels and timber had passed out of public ownership and control; and the only reasons that the greater part of our water-powers still remained in such ownership or control was because the art of the engineer had not yet advanced to the point where they could be profitably put to use.
>
> We have at last come to realize that all our natural resources are very definitely limited in amount; and legislation, both State and Federal, has sought to salvage as much as possible from the wreck, and to provide that the developments of the future shall be carried out without avoidable waste and in the general public interest.
>
> If we are to accomplish this, certain steps must be taken and certain principles must be established by the State, or by the Nation, or preferably by both. That this be done is of far more importance than who shall do it. It is much better that the authority of the State and Nation should overlap than that there should be any zone within which neither has authority.
>
> One principle that should be established and maintained is that values inherent in a public re-

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source developed and used in the performance of an essential public service by an agency created by law for that purpose shall not be capitalized for purposes of sale, of establishment of rates, or of issuance of securities in an amount in excess of actual reasonable cost.

One way in which this principle can be maintained with certainty is for the public to retain in perpetuity the ownership of these resources to which it has title, and to retain it through that public agency which has the title. It happens that the title to power sites having potentialities of scores of millions of horsepower is in the Federal Government. It alone has the means for retaining these sites in public ownership, and it has, through the Federal Water Power Act, evidenced the intention to retain them perpetually.

A similar situation exists where the States hold title to the beds and banks of streams or to other lands or properties necessary to make a water-power development. Adequate protection of the public interest requires that the States likewise forever retain the title to such properties."

In the face of the unsuccessful struggles of the past to retain these resources for the much-needed protection of the public health and for the prosperity of posterity, we must now build our walls against further depredation so high and strong that not even the trained army of the financial and industrial acrobats of Special Privilege can scale them.

If the waters of the lower Niagara Falls and the St. Lawrence River had been from the outset held inviolate and utilized in the public protection instead of having already been partly given away to private interests, and had been developed and wisely administered, they would now be yielding and would continue for generations unborn to yield such rich returns that the burden of State taxation would have been appreciably relieved and the cost of power and current to the consumer and to industry greatly lightened. Such an experience would also

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have been valuable as demonstrating how small a fraction of what we now pay it really costs to generate and distribute light, heat and power, and to what extent we are being gouged by private monopolies under cover of an avalanche of juggled figures against which the State has neither the money, the persistence, the continuity of policy nor the talent to adequately safeguard itself.

The necessity for the preservation of the Adirondack lakes and forests was not recognized until so large a part of it had been given away that the State has ever since been repurchasing it from the private interests that were the beneficiaries of that foolhardy policy.

The droughts and freshets along the rivers and throughout the lowlands are the result of stripping the forests for lumbering purposes without even requiring the owners to replant the vast deforested areas. That precious watershed will be sadly needed in the near future to supply our rapidly increasing population.

It was not until we had wasted the bulk of that inheritance and until much of the irreparable harm had been done that we partially awakened to our peril. Our first step was to create the Adirondack Forest Reserve which private interests had already heavily invaded. To secure more and more of it on one pretext or another, they, year after year, maintained at Albany one of the most powerful, insidious and persistent of the lobbies that infest that City during the legislative sessions. Are we now about to repeat that blunder? We are well on the road.

Every student of world economics and government must agree that the fabulous natural resources of this country have been squandered by Congress and State Legislatures by gifts to private individuals, on the theory that the people are not able to safeguard or develop their wealth.

If our vast Western public lands and our oil, gas, timber and mineral resources and water powers had been safeguarded as they should have been, and as they have been in other countries, the revenues from leasing them

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would in themselves have been wellnigh sufficient to defray all the expenses of government, National and State, without in the least retarding the development of those resources.

If, for instance, we had dealt with our undeveloped mining lands in the enlightened way in which the South African Republic has handled that situation we would, for the past one hundred years and more, have been and would still be in the receipt of royalties the annual yield of which would have been staggering and the aggregate beyond conception. The royalty policy of South Africa has not in the least retarded the development of its mineral wealth. It wellnigh repays the entire cost of government and will probably continue to do so in an increasing ratio for generations to come.

If when we gave away whole principalities of land, we had retained the oil, gas, coal and mineral rights below the surface, no income tax would be necessary to support the Government.

If, instead of literally throwing away these concessions, we had dealt with them with the same intelligence with which the Department of the Interior has safeguarded the oil lands included in the Indian reservations, we would have from that source alone an annual income almost equal to our customs duties. The fact that the Indian tribes are now and have been receiving royalties on these Indian lands to the extent of one-eighth and in some instances one-sixth of the entire production of oil has not had the effect of interfering with the development of those lands.

So, too, with our water powers. It was not and is not necessary virtually to give them away in the form of licenses on ridiculously inadequate terms in order to secure development.

I respectfully take issue with Mr. Hughes in his statement as to the preservation of our water-shed in the Adirondacks. Whilst that is not directly involved in the present controversy and whilst most of "that water has already

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gone over the dam," it may as well be said here that there is not the remotest analogy, such as he seeks to draw, between the Federal Water Power Act and the New York State Conservation Law, or for his claim that the State law is, as he characterizes it, "in substance a complement to the Federal Statute." The latter was passed to open up and encourage the development of our water-power resources, largely for irrigation purposes and, principally in the Western and Southern States, to conserve the waters that are going to waste and to permit of their development upon a basis of adequate compensation for their use. That law assures compensation and a genuine right of recapture by the Government.

In the plan that would have been "put over" by the State Water Power Commission (fortunately now defunct) against the earnest protests of the Governor and within three weeks of the time it was legislated out of office at the end of last year but for the timely interference of the Governor, we would have lost that precious remnant of our patrimony. The "recapture" provisions are more of a snare than a farce, and a little of each. Later on I will discuss that subject more in detail.

This is not the first time in the history of the State or the Nation, and it will not be the last, that predatory High Finance has made a drive to filch our natural resources from us upon specious and plausible pleas, none of which could have succeeded if the people had understood what was being taken from them, or if the legislation had been subjected to the scrutiny that its overshadowing importance required.

A review of the history of our blind folly leaves one almost to doubt whether Democracy is not a failure. At every step the greedy hand of the exploiter is thrust forth in the dark to take from the people their property. The process, instead of being carried on by brute force with the daring of the old-fashioned brigand, is accomplished behind cunningly devised laws that are put upon the stat-

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ute books, such as the Act of 1921, which is to-day the stumbling block in the way of the development by the people of the St. Lawrence water power, as it has been the cover under which the land and waters of the Adirondack Forest Reserve have been taken from the people.

And all this in the teeth of Section 7 of Article VII of the Constitution of 1894, the opening paragraph of which reads as follows:

> "FOREST RESERVE. Section 7. The lands of the State now owned or hereafter acquired constituting the Forest Reserve as now fixed by law shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed. * * *"

It will be noted that when the people finally came to realize their danger, they were so watchful and jealous of their remaining rights that the power to deal with these lands and water rights was expressly withdrawn from the Legislature by this Constitutional provision.

Subsequently, the following was added to Section 7 of Article VII of the Constitution:

> "The Legislature may by general laws provide for the use of not exceeding 3 per centum of such lands for the construction and maintenance of reservoirs, for municipal water supply, for the canals of the State and to regulate the flow of streams. Such reservoirs shall be constructed, owned and controlled by the State, but such work shall not be undertaken until after the boundary and high-flow lines thereof shall have been accurately surveyed and fixed and until after public notice and hearing and determination that such lands are required for public use. The expense of any such improvement shall be apportioned on the public and private property and municipalities to the extent of the benefits received."

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Note with what care this reservation seeks to maintain the exclusive control of the Forest Reserve and its water rights in the keeping of the State. Even in order to prevent water waste not more than 3 per cent. may be used and then only for specific purposes. Nowhere is there the suggestion that they may be diverted to private exploitation.

In 1921, whilst Mr. Edward Machold, the now President and one of the guiding geniuses of the Electric and Water Power Trust, was Speaker of the Assembly and in virtual control of legislation, the Machold Act was passed. From the following parallel columns the changes made by the Machold Act will be apparent:

OLD LAW	NEW LAW
IN EFFECT MAY 18, 1916 (p. 277).	IN EFFECT MAY 9, 1921 (p. 354).
"SEC. 460. Operation and Maintenance charges: * * * If lands in the forest preserve have been used such estimate shall include in addition a reasonable return to the State upon the value of the rights and property of the State used and services of the State rendered."	"SEC. 460. Operation and Maintenance charges: * * * If lands in the forest preserve have been used such estimate shall include in addition a reasonable return to the State upon the value of the rights and property of the State used and services of the State rendered. *A reasonable return to the State upon the value of the rights and property of the State used shall be construed to mean six per centum upon the value of the lands flowed.* * * * The value of the service of the State rendered shall be construed to mean the actual cost thereof."

The "joker" in this amendment permits the taking of the land that is to be inundated and overflowed in order to make the reservoir, at the value of the lands overflowed, *which is about nil.* These forest lands, *as such,* are not worth more than $10 per acre. The "joker" allows noth-

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ing for the vast water rights acquired through the building and maintenance of the reservoir on the overflowed lands, which is the real item of value. The manifest purpose of the amendment was to virtually give away the land of the State.

As illustrating the extent to which these priceless rights were taken under the "joker" to which I have referred, it was proven in the Salmon River-Adirondack project (which was one of the smallest of the projects), before the Board of Water Control, that the proposed reservoirs would increase the primary horsepower 120,000 h.p.; that the Power Company interests would benefit by that project alone to the extent of $287,000 per year net profit as a maximum and $158,000 per year as a minimum. The State would contribute 1,290 acres of land in the Forest Reserve, which would be paid for as *wild land* at not to exceed $10 per acre, or a total of $12,900, on which the State would receive annually, at 6 per cent., the "munificent" sum of $774, or about 6½ cents per horsepower per year, as against the annual rental proposed for the St. Lawrence development under the Ottinger-Finch plan, reference to which will hereafter be made, of $2.25 per horsepower per year, or about thirty-five times as much per horsepower. Five dollars per horsepower or about $60,000 per year, instead of $774, would have been about right.

The great network of corporations that have made fabulous fortunes through the generation of water power that the State has foolishly thrown into the hands of the franchise grabbers are year by year stretching forth their tenacles to capture what remains to the State.

It is admitted on all sides that there should be prompt action to prevent waste of water power, but the question at issue is whether the State shall now adopt the policy of developing its own resources, by the construction of dams, generators and transmission lines, over which the power shall be distributed to and sold by private corpora-

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tions throughout the State, at prices fixed by the State by contract, or whether it shall persist in the foolhardy policy that has already deprived it of part of its water power in the Adirondack Forest Preserve and hand over the remains of this priceless heritage to private exploitation and thus repeat the sad experiences of the past.

One-half of this Niagara Falls-St. Lawrence River power belongs to the Province of Ontario. The obvious course is to develop the entire water power in conjunction with that Province. They are not so rich over there nor such hopeless spendthrifts as we are, and besides, they are not in the habit, on the Canadian side of the border, of building up private fortunes by the gift of public wealth. They also believe, over there, that their Government is quite as well able to employ expert talent to develop their own resources for their own benefit as to throw them at the heads of private exploiters. And so the Province of Ontario is not so foolhardy as to think of releasing its holdings upon the St. Lawrence water that belong to it. Under public ownership and operation, their average rate to the consumer for domestic purposes is about 2 cents per kilowatt hour, against about 8 cents in New York State. In the prices for power the disparity is vastly greater.

The only two arguments I have ever heard advanced in favor of licensing these fabulously valuable rights to private enterprise are

(1) that the State is unfit to conduct an enterprise of this magnitude and must therefore perforce hand it over to the tender mercies of private capital, and

(2) that it would involve such a large capital expenditure to build the dams and generators and transmit the power, that the State could not afford to risk the experiment.

The validity of both of these assumptions is challenged. Neither pretext has any force or substance.

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It is said that the State has neither the organization, machinery nor experience for conducting so colossal an enterprise. This is amusing in view of the fact that, although the old Water Power Commission had virtually approved the license to private enterprise, the identity of the licensee and his, her or its ability to command the instrumentalities that are claimed to be lacking in the State remained a profound secret, though it was generally "unofficially" understood that Mr. Mellon's Aluminum Company and the DuPonts would be the recipients of this much-coveted prize.

Why it should be insisted that because one corporation is equipped to manufacture powder and the other to manufacture aluminum and have the machinery for such purposes, they are necessarily equipped with the organization, machinery and experience for one of the greatest engineering undertakings ever attempted in a totally different and new field of activity and on a scale far greater than either company or any other company has ever attempted, is wrapped in mystery.

It is hardly necessary to say that in entering upon an enterprise of this character a special technical and expert organization must be put together, special machinery must be made adapted to the purpose and that the experience of a corporation whose name connotes no more than that of a building enterprise or a cement or steel manufacturer is not of any particular value.

In point of fact, the State, with Col. Greene, who is widely recognized as one of the leading engineers of the country, at the head of its Engineering Department, and an exceptionally able State Architect, with his trained organization, at the head of the Department of Architecture, have far more of an organization and are in every way better equipped at the outset than would be these corporations. Whoever undertakes this job, mounting into the hundreds of millions of dollars, must, of course, gather together for the purpose a trained organization with machinery adapted to the purpose.

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The men in the employ of the Federal Government have had a wider and more varied experience in this character of work than all the private corporations in the country combined.

All the brains and talent of the country are not yet concentrated in the corporations that have made most money by monopolizing their particular lines of industry in violation of the anti-monopoly laws of the land.

The promoters, capitalists, bankers and hordes of parasites who would feed and grow rich upon this enterprise have no technical or scientific knowledge that would add anything to the enterprise. The State is quite as well able as they are to employ the most eminent and expert talent in the world for that purpose. The Government is finding no difficulty in that direction in its development of the Boulder Canyon Dam, which is a more important and complicated enterprise than this will be. It expects to find no more difficulty in dealing with Muscle Shoals and it found none in the construction of the great Elephant-Butte or Roosevelt Dams, as compared with any of which this would be a small undertaking.

The Government has no difficulty in operating the Post Office Department, which is a bigger enterprise than any private business in the land. It was the exposure of the notorious "Star Route frauds" in the carrying of the mails by private contractors that led an outraged public to force the Government to undertake the business of carrying the mails, that used to be contracted to private individuals. I venture to say that no private enterprise is more complicated or conducted with greater skill, honesty and economy than the great and ever-increasing business of the Post Office Department in this country; or the Department of the Interior, or any one of a dozen other public enterprises.

The Panama Canal, which under the guidance of private capital headed by DeLesseps, who was proclaimed the greatest engineer of his generation, was the most world-wide scandalously corrupt enterprise of all time, and re-

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sulted in disgrace and bankruptcy and the loss of hundreds of millions of dollars to the French investors, was taken hold of by our Government and resulted in the world's most brilliant achievement. Not only has it been a boon to all the nations of the earth and an unprecedented contribution by us to civilization, but its construction and administration by our Government are an object lesson in the capacity of Government to accomplish by superb management and without graft or scandal what private capital has never been able to do.

And yet in the face of such accomplishments, the men who are seeking to wrest this great enterprise from the State have the temerity to urge that the Government is unfit to care for and develop its natural resources!

When the State wanted to build and operate its marvellous network of canals, it did not find it necessary to convert those great works into a means for the enrichment of private individuals.

The conduct of the U. S. Patent Office, requiring the ablest technical talent in the world, is a more complicated business than a hundred St. Lawrence water power enterprises.

Other countries know how to develop their public resources. Let us have an end to all this inspired buncombe about the incapacity of Government to care for and develop its property. The people have been too long terrorized into giving away what belongs to them and harvesting nothing but corruption and favoritism in return for its gifts to be humbugged any longer by that sort of talk.

So also the argument that was once so potent, that the State cannot afford to put its money and credit behind an enterprise that promises such rich rewards to private capital that it has been a constant struggle to keep the hands of these exploiters away from it, never had any legitimate basis. It was just another bugaboo to frighten the timid. It, too, has at last been exploded. The precedent of the Port Authority has established that it can be done

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without the pledge of a single dollar of the money or credit of the State, that the capital can be raised without State aid on far better terms than by any syndicate of private individuals and thus leave to the people of the State not only the profits of the enterprise that would go to private capital, but, far more important still, enforce the effective regulation by contract of the prices that shall be charged for the distribution of light, heat and power; thus saving for the people of the State untold hundreds of millions of dollars in what has become a veritable necessity of life and industry.

The legal and financial machinery for accomplishing this result is exceedingly simple and has, year after year, for the last five years, been set forth by Governor Smith in his annual messages to the Legislature in support of his many eloquent pleas for State development. True, the mighty powers that control that Legislature, functioning under the skilful guidance of the man who was Speaker of the Assembly and in response to his will, and largely because of his representations and their want of understanding of the subject, have thus far succeeded in blocking the plan. Meantime, hundreds of millions of dollars in value of water have "gone over the dam." Mr. Machold now heads the companies concerning which he was legislating whilst Speaker and they are persistently fighting under his banner to take this heritage from the people.

The plan of Governor Smith is to secure the necessary legislation incorporating a Water Power Authority on the general lines of the Port Authority that has proved so successful. The Water Power Authority would have no stock and no stockholders other than the State. Its directors would be named by the Governor—perhaps with the concurrence of the Senate, but preferably without such approval. The bonds that would be issued to pay for the work of construction and installation would be the obligations only of this corporate entity and would be secured upon the enterprise itself and upon that alone.

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There would be no legal or moral obligation of any kind on the part of the State, but the bonds would be so amply secured from the profits of the enterprise that they would be eagerly sought for by investors on a basis of not exceeding 4¼ per cent., and probably at a still lower interest rate—as against a probable 7 per cent. and more that it would cost private enterprise to secure the capital.

The promoters' profits that are cunningly sought to be injected into such private enterprises even under the watchful eye of the Federal Power Commission was recently well illustrated by the analysis of the Conowingo water project as set forth in the decision of that Commission at page 104 *et seq.* of its Sixth Annual Report. It there appears that the total estimated cost of the project was liberally estimated at $52,000,000. This cost was to be met by the issue of $36,000,000 5½ per cent. first mortgage bonds, $16,000,000 par value of 8 per cent. cumulative preferred stock and 94,200 shares of common stock of no par value, for which the company was to receive 53 cents per share, which would have been the cost of the shares to the promoters. The Commission found that the promoters would have floated these shares at $25 each, thus netting them at the very start a profit of $2,305,000 on an investment of $55,000.

But that would be only the beginning.

Under the Power Authority plan of dealing with the St. Lawrence water power the bonds would be tax exempt as the obligations of an agency of the State. That is the only advantage they would have as against the investment of private capital. That would be in the final analysis no advantage whatever inasmuch as the taxes to be paid by private corporations would in any event be charged into the cost of operation and taken out of the pockets of the consumers.

From my experience in the financial world, supplemented by inquiries that have been made, I undertake to say that the entire capital necessary for this development can be had on the basis of not exceeding 4¼ per cent., and that within ninety days after the State engineers have pre-

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pared their plans and received the approval of the Water Power Authority a binding contract will be made to supply all this capital—probably on better terms than the maximum above indicated. That is the rate at which the Port Authority is now borrowing for bridge construction and other purposes, which has nothing like the same popular appeal or security behind it.

The first series of $20,000,000 Port Authority bonds was issued through the National City Company in March, 1926, on a 4½ per cent. coupon. That money cost 4.77. The second series of $25,000,000 cost about 4¼ per cent. in December, 1926. The Port Authority can to-day borrow at 4¼ per cent. on its own unsecured note. The Water Power Authority bonds would have a better and easier market as they will have contracted for power and can demonstrate their earning capacity.

There is still another point of view from which you will be able to gather some idea of the wide divergence between the rates at which the State could afford to sell power and those that a private company would be permitted to charge under rate regulation by the State. The U. S. Supreme Court has decided that rates are confiscatory that do not permit of a 7 per cent. return on invested capital calculated on *reconstruction* cost and including "good will" or "going-concern" value as an asset. It is quite usual on this basis for the promoters to secure the necessary capital on bonds and preferred stock and to issue to themselves no-par-value common stock to represent their profit. It appeared from a recent investigation by the Federal Trade Commission held under a resolution of Senator Walsh of Montana that *these insiders have been earning dividends of from 30 per cent. to 250 per cent. per annum on this stock that cost them virtually nothing,* and have been upheld in their right to these earnings under State regulation. They borrow the cost of the enterprise at low interest rates and the difference between these charges and the 7 per cent. permitted by law constitutes the basis of their stock profits, all of which are reflected in the rates the public must pay.

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Under State development 4 per cent. would constitute the charge. That difference in financing would in itself almost cut the rates in half. And there are many others behind which rates are built up and profits hidden. If the public can be made to realize the importance to them of this issue it will soon be solved by driving the private exploiters from the field.

The practice of Public Service Commissions of fixing rates based on reconstruction cost instead of on original cost is another important factor. Here is a basic distinction between this law and the Federal Water Power Act of 1920 which expressly requires that rate making be on the basis of net investment cost. Again, there is here no provision for the recapture of excess earnings accumulated from rates higher than necessary, the result of which is that where surpluses are accumulated in that way and reinvested in the business the consumers must pay upon the capital they have themselves contributed, in the form of excessive rates.

Let us now examine the best proposition that private capital has ever been willing to make to the State and which the old Water Power Commission was about to accept against the wide public protest of the Governor within three weeks of the expiration of its term of office and by which the State would have been bound but for the timely intervention of our great Governor, who single-handed prevented it, for which the people of the State should be eternally grateful to him.

That proposal was in the form of a so-called "Determination," prepared and approved by the Attorney General as a member of the old Commission and as the legal adviser of the State, and which the Commission announced its intention of accepting, which set forth all the terms and conditions of the proposed franchise or license. It was nominally to be for fifty years after the completion of the work, but with rights of extension that made it well-nigh perpetual. As a bait to the State, it contained one

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of those fake recapture clauses of which we have of late heard so much.

That license or "Determination" is said to have been the result of many months of "negotiation" (if it can be so dignified) between the Water Power Commission, advised by the Attorney General on the one hand and the most powerful corporate interests in the land on the other.

You can imagine what chance the State had in such a contest of wits. On analysis, the license proved to be largely a "gold brick" that was being handed the State in return for its alienation of property rights of inestimable value. Whilst the contract purported to absolutely bind the licensee and whilst that was the only kind of license that the iniquitous statute of 1921 (which should be repealed without further delay) authorized the Water Power Commission to grant, it did nothing of the kind. It bound the State hand and foot, but bound the licensee to nothing.

I have a copy of that precious document here. It is an interesting study in the number of "jokers" that would have been "put over" on the State if its vicious provisions had gone into effect, of which the following are fair samples:

1. It purported to bind the lessee for the term of the license, but it did nothing of the kind. That was the principal reason why it was possible to stop it in time by threatening litigation. What it in effect did was to obligate the State and it alone. The undisclosed licensee was not obligated. It "hung up" the project for three years by giving the licensee a three-year option, and as much longer as the Commission saw fit to give, in which to determine whether he, she or it (whichever it proved to be) would or would not eventually become obligated to accept this license. All they had to pay for that inestimable privilege of speculating with the option was the paltry sum of $75,000 per year toward the legal and supervisory expenses of the State during that period in a transaction involving hundreds of millions.

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The tricky phraseology of Article III of the License was worded to accomplish that purpose under cover. Omitting the immaterial parts, it reads as follows:

> "The Licensee shall obtain all requisite consents, approvals or permits from such other governmental authorities as may be necessary * * * and commence the construction of the project within 3 years from the date of this license.
>
> The failure to obtain such consents * * * or to commence the construction within such time *shall terminate and render null and void this license* and all rights of the licensee thereunder; provided that * * * *the Commission may further extend the time to obtain such approvals or commence the construction.*"

From this language it will be noted that the only effect of the failure of the licensee to ensure the necessary approvals, after toying with the license three years, and for as much longer as the Commission should see fit to grant, was to terminate the license. That left the entire situation in the hollow of the hand of the licensee and placed the licensee in a position to dictate any new or different conditions it chose, whilst during all these years the water would continue going to waste and the State prevented from otherwise dealing with the project.

It was because of this "joker" of taking an option instead of making a contract, which not even the Act dared permit them to do, that the Governor was advised that these gentlemen had in their inordinate greed, fortunately for the State, overreached themselves and that the granting of a three-year option of a license by the Commission whose term was to expire within a few weeks could be enjoined in the courts.

2. If the Federal, international and other governmental authorities

> "in the lawful exercise of the jurisdiction over navigation insist upon any condition or construction for the maintenance, improvement or protection of

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> navigation inconsistent with any provision of the License relating to navigation *then the licensee shall be relieved from the performance of such inconsistent provision contained herein* and the balance of the license shall remain in full force and effect."

In other words, the State could not retire from the contract. It would have to perform and to assume those burdens and leave the license in the hands of the licensee relieved of the burdens.

3. Although the rates to be charged and the interest of the State in the project would be based on the cost of construction, the State had no voice in what these construction costs should be until after they had been incurred. The contracts were not required to be submitted to it or to the Commission before execution; the State was not even entitled to notice of what they would be. It was only "after the horse had escaped that the stable door might be locked."

From time to time the licensee was required to file with the Public Service Commission a statement—not of what the project or parts of the project *would* cost, but what it had cost. Even then the power of the Public Service Commission was limited. It

> "shall have the power to determine whether any part of the expenditure has been *wasted* or *in disregard* of the terms of the license or *in bad faith*."

If, for instance, in the course of the financial jugglery, in an enterprise costing so vast a sum of money, the financiers who were supplying the money thought that 7, 8 or 10 per cent. interest was right, the (licensee) corporation had the power to contract and the charges thus ascertained would form the basis on which profits would be figured and rates fixed.

4. Under Article XV, the licensee, not content with the right to contract for the sale and delivery of power during

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the fifty years of the contract, required a provision to the effect that—

> "Any contract for the sale and delivery of power for a period *extending beyond the term of the license may be entered into* with the approval of the Public Service Commission."

It might thus on the eve of termination or recapture tie up the venture with any number of inconceivable or impossible contracts for long or indefinite periods (conceivably with its own subsidiaries) and the State would be without redress.

5. But the so-called "recapture" provisions, embodied in Article XVI, cap the climax:

(a) The licensee has three years and as much longer as the Commission may choose to give it to decide whether it will make any contract whatever;

(b) Then it has five years, and as much longer as the Commission may choose to give, to complete the construction; and then there is reserved to the *State* this extraordinary option of recapture. (But, mind you, *it cannot recapture the transmission lines.* Those are presumably to be constructed and operated by another corporate entity and be made the sieve through which another "rake-off" is to be made possible.) Its right of recapture is limited to

> "the secondary side of the transformers where the transmission lines take off."

And then it must pay the cost

> "including the allowances made for organization and development expenses, as approved by the Commission, plus 15%."

6. If the State revokes the license

> "for failure of the corporation to commence operations or complete the work"

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(mind you—*for the default of the licensee!*) the State must pay

> "the amount of the enhancement in value of the State property covered by the licensee arising from any improvement of the same effected by the licensee not exceeding the *reconstruction* cost."

In other words, if the licensee deliberately abandons the contract, after having had an option for three years or more and having finally agreed to undertake the work of construction, the State, in order to get back its property, must pay not only the actual cost thus far incurred by the licensee, but *all enhancement of value* up to and including the total *reconstruction* cost which may be many times the original cost to the defaulting licensee.

7. Under Article XX the rates to be fixed for light, heat and power cannot be changed for the first five years, and thereafter they cannot be altered except at periods of ten years each. So that no matter what might be the economic changes during these ten-year periods, the rates, however high, must continue and neither the Public Service Commission nor any other public authority would have power to reduce them meantime. And that is what is called rigid public supervision of rates!

The insignificant minimum annual charge does not begin until construction work is completed, no matter how long it is delayed with the consent of the Commission. If the power rates are reduced the Public Service Commission is *required* to decrease the license charge and relieve the licensee from its obligation in whole or in part of making payments to the amortization reserve, no matter how heavy may be the profits under the reduced power rates.

8. Here is another neat little "joker" for the relief of the licensee from the obligation of its contract: Reductions of rates may be the result of new inventions or methods or lower wages, or what not. But they may not result in reduction of profits. And yet, if by such reduc-

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tion of the rates the amortization charges are reduced, that is not all that happens to the State. If through that process the original cost of the entire project is not retired at the time of such reduction, the State may take back the property

> "upon the payment of a sum of money equal to that portion of the *reconstruction* cost of the projected works which had not been completely amortized at that time. Or it may extend the license for a time sufficient to completely amortize the *reconstruction* cost."

So that if the amortization does not pay back the cost of the total investment by the time the lease expires and the State wants to avail itself of the right of recapture at that time, it must not only pay back the original cost of construction, but the *"reconstruction cost,"* which may then be many times that amount—or it must go on extending the lease.

These amortization reserves, under subdivision (b) of Article XXII, may be

> "in such amounts as are deemed proper by it (the licensee), so that the cost of the projected works as determined by the Commission will be amortized by the expiration of the term of the license."

The next most remarkable of all the remarkable features of this disgraceful contract which was attempted to be foisted upon the State, and would have been but for the eleventh-hour vigilance of the Governor, is that there is not a word as to the maintenance or depreciation that would be charged against the enterprise. Apparently that also is left to the tender mercies of the licensee.

Here, then, we have the contrast between State development and private exploitation under pretended State control as finally agreed to by a "vigilant" Commission and an equally vigilant Attorney General of the State.

What excuse is there for the State to become enmeshed in such a labyrinth of scandalous overreaching of the pub-

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lic authorities by private exploiters? What chance have the people in such a contest? Here is an object lesson of the grossly unfair and unequal terms on which they start. With such a start where is the State likely to land?

On the other hand, we have a plain, straight road, unhampered by the twists, crooks and turns of contracts of this character. Have we not had enough dealings between the public authorities and private corporations to know that there has never been an instance in which the public has not been overreached to warn us against unnecessarily again thrusting our heads into the lion's mouth or exposing ourselves to the tiger's claws?

Apart from all the above considerations, there are two overshadowing reasons for the State development of our water power:

(1) It enables the State to plainly and definitely fix the contract price for the distribution of light, heat and power throughout the State and to change the prices from time to time as occasion demands. It would, of course, establish uniform prices. It would "play no favorites." There would be no "parent company" generating the power, that could filter part of the profits through an intermediate transmission company, and no transmission company that would take another rake-off on the distribution. There would be no opportunity for giving more or better service to the distribution companies controlled by it or its "insiders" than to the outsiders, or for discouraging new competition, or using the generating or transmission companies to get control of the distributing companies in various sections of the State, or to develop one section for manufacturing purposes at the expense of another.

The opportunities for favoritism under private operation are manifold. The power to definitely fix by contract from time to time to meet changing conditions, the rates to be charged and the profits to be permitted on the distribution of light, heat and power in the various sections

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of the State is inestimable in the interests of the people and must override almost every other consideration.

(2) The regulation of rates by the Public Service Commission of the State has been, to say the least, disappointing and unsatisfactory. Whether rightly or wrongly, the State Commission is generally regarded as little more than a "rubber stamp" for the corporation that it is supposed to regulate.

In about seven cases out of ten the Commissioners are directly or indirectly the nominees of the corporations they are expected to regulate. In about two of the three remaining cases they are not appointed unless they have been labelled either "friendly" or "not unfriendly" by those interests. If the public is fortunate, the tenth man is independent of corporate leanings or affiliations.

The Federal Trade Commission, which was set up to curb the Trusts and Combinations in Trade, started out with high ideals and with an exceptional equipment of outstanding, independent men. Every member of that Commission who had independent leanings has been eliminated from the Commission and its usefulness has been wellnigh destroyed. The only prominent Federal regulating body, so far as I know, that has managed to retain its independence and extend its usefulness is the Interstate Commerce Commission.

Again and again we have witnessed the farcical spectacle of these corporations going into the courts and setting aside rates as "confiscatory" whilst at almost the same time paying large cash and stock dividends, year by year, and literally coining money on the rates that they have had the courts declare "confiscatory."

These experiences, that are of almost monthly occurrence, have brought the Public Service Commissions in this and other states into disrepute and have destroyed confidence in them. These grotesque results cannot be said to be due to corruption or favoritism. They result mainly from inadequate and inefficient supervision, which is worse

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than no supervision at all, and from inability to cope with the clever bookkeeping and other methods of the corporations. The latter manage to pile subsidiary upon subsidiary with something in the way of profit dribbling through beyond the grasp of the Commission, at each step, until it is literally impossible to get a true conception of their earnings or assets stripped of the confusion in which they have wrapped their maze-like activities and accounts.

When they get into court they have at their service the leading lawyers, mechanical experts and engineers of the country—lawyers whose compensation in a single case, at times, amounts to more than the salary of the State's counsel who are opposed to them during a lifetime of service. The cities, especially the smaller communities, and even in the City of New York, have an unequal fight from the beginning. Even if they were disposed to pay the same compensation to lawyers, experts and accountants and secure men of the same reputation, they are not to be had, for they are all too frequently retained by the other side. Then again there is no continuity of representation on the part of the State in these long drawn-out and complicated controversies. Changes of administration bring new counsel, new experts unfamiliar with the intricacies of the litigation and often changes in policy. At every turn the State is at a disadvantage.

Have you ever stopped to consider what a blessing State development of our water power would be to the workers? It would relieve more care and spread more sunshine than any one thing the Government could ever expect to accomplish.

I believe that electric current generated by water power could be sold by the State at a fair profit to the private distributing companies at less than two cents per kilowatt hour to the consumers in New York City, and that the householders could do their cooking and light and heat their homes for less than one-third of the present cost of coal. And think of the cleanliness and saving of labor and the leisure that would result from this peaceful revolution in the home.

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I am not a dreamer and this is no "idle dream." It is a reality and one that would soon come true under State development of our water power. It cannot, however, be accomplished unless the transmission lines as well as the dams and generating plants are in the hands of the Water Power Authority, so that it can effectually lay down to the distributors, by written contract, and rigidly enforce the law as to rates and control their charges, which would allow a fair profit to the distributing companies on the investment.

Those who profess to believe that they could do as well by the continued use of coal, oil or gas should not be interfered with in going merrily on their way, but they should not be permitted to charge more than the State distributors and users of current and power.

Have you any idea of the extent of the growth of these light, heating and power companies in the past few years or the fabulous fortunes their promoters have piled up by pyramiding the securities of these companies at the expense of the people under public "supervision"? There has been no channel of industry comparable to it and it is still going on at a feverish rate, but the public are getting none of the benefits.

In order to make assurance doubly sure that the State and the great cities, where the distributing lines are underground, will not be "held up" by the refusal of the present companies to take current from the Water Power Authority, and only to provide against such a contingency, the latter should have authority, whenever necessary, to organize sub-companies to install its own distributing systems and sell directly to the consumer, but I do not favor having the State go into the business of distributing current except as a *dernier* resort. Let me, however, repeat that the only way of avoiding the overreaching of the public would involve the ownership and operation by the State of the transmission lines to the point at which the current is delivered to the distributing companies.

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I am reminded at this point of my omission to call your attention to the fact that it is not so long since private companies furnished the water supply to most of the cities of the country. Some cities and towns (of which I happen to recall Palm Beach as one, because of my property interests there) are still supplied by that means, at an expense many times greater and by a service in every way less satisfactory than through municipal ownership and operation.

This would be a potent argument in favor of going a long step further than is contemplated, since we are not here urging the distribution of light, heat and power by the State but only its generation and transmission to the private distributing companies.

At the last session of the Legislature a bill was introduced by the advocates of private development, which was promptly and properly vetoed by the Governor, providing for an investigation and report on the question that we are debating to-night. Strangely, this is now urged as a solution of the problem that was offered by the Republican Party and rejected by Governor Smith as evidence in favor of the position of the advocates of private development. I fail to see the point or the logic of that contention.

In the first place, we are not here to determine whether there should be further investigation, or whether the Governor was right or wrong in rejecting the bill. The question for us here is as between State development and private development—not whether the two diametrically opposite methods should be further investigated, but as to which is right and which is wrong.

But there is another conclusive answer, and that is that the fundamental question of policy here involved has been investigated and reinvestigated from every conceivable point of view and to the limit by the Federal Government and its agencies and by the State Government and its various Commissions, until there cannot be anything left

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to investigate. The bill was a mere gesture and pretext—concocted in bad faith. It was not offered to secure further light, but to obstruct, delay and eventually to defeat State development. There is no conceivable aspect of the subject on which further facts may be made available. It was just one other effort to tire out the advocates of State development and to tide over the time when Governor Smith, as the outstanding champion of State development, would have passed from the scene and in the hope that his successor would favor private development and mould legislation to that end. The gesture was transparent.

Meantime, this vast fortune in water power is steadily going to waste, and so it will continue so long as the obstructive tactics of the advocates of private ownership are countenanced. We shall get no relief until the people are educated to the overshadowing importance of this issue and sweep down in their wrath upon the powerful coterie of men who stand behind the effort to wrest from us this last vestige of our natural resources.

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RESOLVED,
THAT CAPITAL PUNISHMENT BE ABOLISHED.

OPENING ARGUMENT

OF

MR. SAMUEL UNTERMYER

DEBATE BEFORE THE ROEBLING UNIT, STEUBEN SOCIETY,
UNIVERSITY CLUB, BROOKLYN,
JANUARY 14, 1928.

For the Affirmative: MR. UNTERMYER.
For the Negative: SENATOR LOVE.

Distributed by
THE LEAGUE TO ABOLISH CAPITAL PUNISHMENT
104 FIFTH AVENUE
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OPENING ARGUMENT

OF

MR. SAMUEL UNTERMYER

IN THE DEBATE BEFORE THE ROEBLING UNIT, STEUBEN SOCIETY, UNIVERSITY CLUB, 109 LAFAYETTE AVENUE, BROOKLYN, N. Y., SATURDAY EVENING, JANUARY 14, 1928.

Subject:

Resolved, That Capital Punishment Be Abolished.

For the Affirmative: MR. UNTERMYER.
For the Negative: SENATOR LOVE.

"I shall ask for the abolition of the Penalty of Death until I have the infallibility of human judgment demonstrated to me."—Lafayette.

Before beginning the debate, I would like the privilege of explaining, in justice to myself, my adversary and those who arranged this function, that the fact that it happens to be held at this time, following the infliction of the death penalty in a recent sensational case,* is a mere coincidence. It has been under consideration for many months and this case was not in the minds of any of us when the date for the debate was fixed.

Whilst the reverberations of that gruesome experience are still ringing in the public's ears is not the most favorable atmosphere for this discussion. Though the reaction might be said to be in favor of my side of the controversy, I hope it will not influence your judgment on the merits. If there ever was a sordid, cold-blooded murder without a redeeming feature, that justly aroused the fury of all

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* The Snyder-Gray case.

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decent people, it was that case. The woman had made repeated previous attempts to murder her kind, unoffending husband.

And, yet, even there, where there was no room for sympathy, a glamour has been thrown about the heinous crime of those two human fiends by the character of the penalty inflicted that has well-nigh destroyed the salutary effect of the punishment inflicted. They have been converted into a sublimated hero and heroine in the minds of the unbalanced emotionalists. Decent, hysterical women have offered to forfeit their lives in place of the woman. The victim of their foul murder has been completely forgotten. No sympathy is being wasted on him. All is reserved for the self-confessed murderers. It is simply another evidence of the popular revolt against inflicting the death penalty on a woman.

And yet there is no novelty in that incident. She is the eighth woman to be executed in this State, including one who was innocent.

Had this man and woman been shipped off to life-long penal servitude immediately after their conviction they would have been forgotten and we would have been spared the nauseating and demoralizing exhibition of the past few months.

It may be that our grotesque legal procedure excused the granting by the Court of a stay of execution in this case, which was fortunately vacated in time to permit the execution of the sentence, and no criticism of the Court is to be implied from what I have to say, although the law seemed to some of us to clearly prohibit such action. But what a travesty upon our judicial procedure that such things should be possible!

The pretext on which the stay was applied for, that the testimony of this woman was required in a civil suit by her daughter for insurance money, was about as absurd and dishonest as could well have been conceived. If such testimony was required, which I doubt, it could have been

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taken at any time during the months that have elapsed since the conviction.

For weeks the newspapers had carried hints that this trick would be "pulled" at the last moment. One newspaper scare-line read as follows: "Odds are now 9 to 5 Ruth will fry." It should not be possible to impede or confuse the processes of the law in that way.

Heywood Broun says:

> "The fact that only a few are physically present in the death chamber is a quibble.
>
> By no means is the circuit closed when the poor criminal is killed. That current surges on through many bodies. In millions there is a tingle of queer horror which is kin to a most unpleasant joy."

It is just such antics, perpetrated in the name of the law, backed by the popular revolt against the brutal spectacle of putting a woman to death in this manner, that brings the administration of justice into contempt. If this object-lesson should fortunately stimulate the passage of the pending bill abolishing the death penalty, it will be worth what it has cost us in loss of self-respect. If, at this time, it accomplishes nothing more than to place in the keeping of the Court or jury the option between death and imprisonment, as in the case of thirty-two other States in the Union (apart from the eight States in which the death penalty has been abolished), it will be at least a beginning.

When public executions were found to be harmful, the wrong remedy was adopted. They abolished the publicity instead of abolishing the *execution*. Very much, says Mr. Osborne, the same as if an invalid who found the taking of a certain drug that came in a red box was harmful, should continue to take the same drug provided it came in a blue box. It is the drug that is harmful and not the color of the box. It is the execution that is harmful and not the degree of publicity.

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If the facts surrounding the life and doings of the condemned are not made available to the press that is engaged in this traffic they will be manufactured for the consumption of those who are hungry for these sensations. Where there is such an avid market, somehow or other it is bound to be supplied. This is especially true in a press-ridden, press-governed country such as ours and of a community living on its nerves and always famishing for blood-curdling sensations.

It was reported some months ago that at a recent execution there were people listening with their ears against the walls of the prison, so as to hear the sound of the falling body. Under such circumstances the imposition of the death penalty with its dramatic surroundings is an encouragement rather than a deterrent.

So much has been said and written on this perplexing problem and so little has been left unsaid that when first confronted with the request to debate I declined, because it seemed to me that there was nothing really worth saying that had not already been said far better than I could express it. I finally consented, however, to engage in this debate because of the possible effect of the renewed public agitation of the subject at this time on the fate of the bill that is now before the Legislature.

There are so many counts in my indictment of the law of this State compelling the death penalty as the sole punishment for murder in the first degree that one cannot hope to do much more than state the outlines of his case within the brief limits of a debate such as this. And yet no discussion is worthy of the name that does not deal with history, human psychology and such statistics as there are, none of which is possible. It would take hours on each side; besides which the statistics are so confused and conflicting that they are unsafe as a guide.

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I indict the law of this State, among other reasons,

(1) Because besides being immoral and brutalizing in its effect on the community, it is no deterrent, but rather an incentive to the weak-minded and emotional.

> If it were a deterrent, murder would have increased in the states and countries that have already abolished the death penalty. In most of these states and countries, as will hereafter be shown, murder has decreased. In no abolition state or country has there been an increase.

(2) Because it is irrevocable and places beyond correction the many miscarriages of justice of which we know and the many times more of which we cannot know.

> Out of 409 men and 6 women committed to Sing Sing for execution, 261, including 1 woman, were executed. The convictions of 53 men and 2 women were reversed by the Court of Appeals, which is the court of last resort in New York State; 30 of these were acquitted and 18 afterwards convicted of a lesser degree of crrime.
>
> It thus appears that the juries and judges erred in 11% of the original convictions for murder in the first degree, and that more than one-half of these persons were acquitted on retrial as not guilty.

(3) Because of the revolt against Capital Punishment the guilty escape. There is a far higher percentage of convictions where the death penalty has been abolished.

(4) Because of the demoralizing effect of the publicity given to the morbid, dramatic details of executions, on prison officials and prison inmates, as well as on the community in general. It is opposed by most of the prison wardens of the United States.

> In New York State the prison wardens of the past ten years, Messrs. Thomas Mott Osborne, Dr. Kirchwey and Mr. Lawes, are earnest and untiring advocates of the abolition of the death penalty.

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(5) Because the death penalty has been proven unworkable in other countries.

> It has been abolished in Norway, Sweden, Denmark, Finland, Belgium, Austria, Holland, Portugal, Russia, Italy (except as to attempts on the lives of the King and the Prime Minister, where it has recently been re-enacted), Roumania, Latvia, Lithuania, Esthonia, fifteen cantons of Switzerland, New South Wales, Brazil, Venezuela, Argentine, Costa Rica, Colombia, Honduras and in three states of Mexico. Also in eight of our states: Maine, Rhode Island, Michigan, Kansas, Wisconsin, North and South Dakota, Minnesota. In all the remaining thirty-two states of the Union, except eight states, the judge and jury may determine between death and imprisonment—and in an overwhelming number of cases they determine against the death penalty.

Let it be understood at the outset that my argument does not rest primarily upon humanitarian or sentimental considerations, although they need not necessarily be ignored. Whilst not subscribing to the doctrine of revenge or reprisal, I realize that society is entitled to protect the sanctity of human life by every means in its power. If, therefore, it can be shown that punishment by death for premeditated murder or for the incidental and unintentional taking of human life whilst the offender is engaged in the commission of a felony, is a more certain protection for society than life-long penal servitude, the chief point of the case in favor of Capital Punishment is proven, however brutal and barbarous it may be.

This concession does not mean that the deliberate taking of human life by the State, whether by way of protection or reprisal, is not brutalizing and an incentive to murder to those erotic and unbalanced minds with the craving for notoriety at any price. Statistics prove that it is an incentive to murder, especially when accompanied, as it is, by pandering to the morbid and emotional instincts of such people.

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The present pretended substitution of secrecy for the former method of public hanging is a convincing admission that that punishment is not regarded as a deterrent. In that respect the old method was at least logical. If the horror of the punishment is believed to deter others, the example of public hanging, however gruesome, revolting and brutalizing, would best serve the purpose. It appeals to the same animal instinct for blood that retains the prize-fight in America, permitted the bull-fights in Spain and the gladiatorial contests in ancient Rome.

This deterrent effect is, however, so far from being true, that whereas in former times all sorts of petty offenses, at one time 240 in number, including petty theft and pocket-picking, were punishable in England, and over 100 in this country, including witchcraft, by death by public hanging, all have been abandoned except murder in the first degree, save in a few States, where for arson, rape and robbery, and in one State horse-stealing, the death penalty is still possible. The death penalty was imposed for petty theft and other minor offenses long before it was applied for murder.

During the reign of Henry VIII as many as 72,000 persons were put to death for all sorts of minor offenses. In twelve of our states, from 1912 to 1917, there were 20,000 homicides with 336 executions. In New York, from 1912 to 1918, there were 1,245 homicides and 117 executions. In England and other countries, as here, the States that inflict the death penalty have the most crime, including those for which the death penalty is prescribed. History records that thieves and pickpockets regarded these occasions as their happiest opportunities to ply their trade more industriously than at any other times, because, as said by Barrington, the moment when the strangled man was swinging above them they shrewdly argued that "everybody's eyes were on one person and they were all looking up."

History proves that the abolition of the death penalty for these innumerable petty offenses was not so much due

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to advanced civilization as to the fact that convictions became impossible, crime went unpunished and increased. It was not a deterrent but an incentive, because the criminal became immune.

As late as 1839 a boy was put to death in this country for stealing a sheep. In Massachusetts twenty witches were executed in eight months. Connecticut made blasphemy and the cursing of its parent by a child over sixteen a capital crime.

The evil effect of public executions was slowly but finally recognized and they are now generally carried out within prison walls and presumably privately, but not so in fact. Nowadays, from the moment the convict enters the death cell until his execution, the law is supposed to have taken every precaution to enforce secrecy, but it has not turned out that way. On the contrary, the more atrocious and sordid the crime, the greater the probability that the entire prison life of the wretched creature thus condemned is recorded day by day in the public press. By the time the convict is put to death he is converted from the miscreant that he usually is, into a sublimated hero—by the attitude of the press and the hysterical, slushy element of the community that feeds upon these sensations. Unfortunately, that element constitutes a larger part of the community than is generally realized.

By the time the murderer is put to death the revolting aspects of the crime and the sympathy that should go out to the victim and his family have been completely lost sight of and a certain maudlin sentiment has been created for the criminal, as a result of which a part of the public has transferred its allegiance to the culprit. If the criminal happens to be a woman, she has become a heroine in the eyes of that element of the people who lead drab, uneventful lives and satisfy their cravings for emotion by devouring this stuff.

There is no more prospect of abating this evil by the passage of more stringent laws enforcing secrecy than there is of abolishing drink by Prohibition.

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If the fear of death is a deterrent, why do men openly commit murder in prison, where there is no prospect of escape and the chances of detection are thousands to one? And why were there so many more crimes per capita of all sorts, other than murder, whilst the death penalty for them existed, than after it was repealed?

Michigan was the first state to abolish the death penalty—in 1847 (except for treason, and there never have been any executions for that offense); Rhode Island following in 1852; Wisconsin in 1853; Kansas in 1872; Maine in 1877.

Colorado abolished it in 1872, but restored it in 1878. It was again abolished in 1897, but was restored in 1901, following an outbreak of lynching, but did not abate murders or lynchings in that state, so far as can be learned.

In 1911 Minnesota abolished the death penalty, followed by Washington in 1913, then Oregon, North Dakota, South Dakota, Arizona and Missouri. In Tennessee it was abolished from 1912 to 1917.

In 1918 Capital Punishment had been abolished in twelve states. Whilst retained in thirty-six states, there were only twelve in which it was arbitrarily imposed, as in New York. In all the other twenty-four states (now thirty-two) the jury or the Court had the choice between imposing death and life imprisonment, but has very generally chosen life imprisonment.

Bills to abolish the death penalty failed in Illinois, Pennsylvania, Colorado, Utah, Virginia, Massachusetts and Indiana, due to war psychology.

It has been restored since 1918 in four of the states that had abolished Capital Punishment, also due, as I claim, to the brutalizing effects of the War.

The advocates of the death penalty point to the restoration of Capital Punishment in these four states as evidence of its necessity, but there is no evidence that there was an increase of crime in any one of these states that could be attributed to the abolition of the death penalty and it

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was only conditionally restored. The Court or jury has the option of imprisonment.

In Arizona it was restored in 1918, and in Missouri, after a two-year period of abolition, where the temporary increase in crime was falsely attributed to the abolition of the law, it was repealed on July 8, 1919.

As a result of a series of murders that aroused public indignation, Capital Punishment was restored in Washington in 1919, and in Oregon in 1920, but without appreciable effect.

As against this showing, attention is called to the fact that there are now only eight states, rather than twelve as in 1918, in which the death penalty is mandatory, and that there is now a choice on the part of the Court and jury between death and life imprisonment in thirty-two rather than in twenty-four states.

I contend that such statistics as exist (and they are all agreed by writers on criminology to be unreliable) sustain the proposition that the trend is strongly and steadily against the death penalty.

If it is a deterrent, the logical result would be to make it as public and brutal as possible, and as an object-lesson we should restore the old forms of death by torture, such as burning, drawing and quartering, breaking on the wheel, crucifixion, suffocation, stoning, sawing-asunder, flaying alive, burying alive, impaling, the drinking of melted lead, and other methods, which should be not only for murder, but if really effective as a deterrent, should be extended to such crimes as robbery and theft.

If the sole remaining excuse for this brutalizing and inhuman punishment that is a relic of the torture chamber in a time when public executions were festive occasions, like bull-fights and the ancient contests of gladiators, is as a deterrent against the taking of human life, why are not these wretched creatures afforded the opportunity to end their own lives in the privacy of their cells? Why are they jealously guarded every moment of the day and night and

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after all hope has fled, lest they cheat the law of its revenge? If it is retained solely for the reason assigned, then the murderer, from the day of his ultimate conviction, should be furnished the means of ending his own life, and thus save his innocent family from the disgrace that will brand his children and his children's children "even unto the third generation."

Since we want to preserve the fiction of privacy, why not permit the murderer to pay the penalty of his deed face to face with his Creator, and save the community the disgrace, demoralization and brutalizing effect of his gruesome public execution?

It is in fact just as much public as when men dangled from the scaffold in the sight of their fellow-men, and far more so, for here the pictures are drawn in indelible form so that the millions of people who run may read.

The attitude of the State proves that behind all our virtuous protestations and pretended revulsion there lies the subconscious, brutal instinct of the Colonial Puritan who within the space of less than two centuries danced about the stake at which women and children were being burned alive for petty offenses. Stripped of all fine-spun theories, the punishment is, in truth, based upon the cruel doctrine of the Old Scriptures of "An eye for an eye and a tooth for a tooth," and that of "Whoso sheddeth man's blood, by man shall his blood be shed." In answer to these quotations from the Old Testament and the Law of Moses, to which my adversary is so fond of referring with approval, I appeal to the New Testament and the teachings of Christ.

The ancients had a higher regard for the dignity of manhood. In ancient Greece and Rome the citizen who was condemned to die was permitted to open his veins and bleed to death in his home.

So long as our civilization continues to be disgraced by these judicial murders, I would, if I had my way, permit every man sentenced to die by the hand of the law, to take

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his own life with the same freedom that he may now do so before conviction. Why not, when they have no option about coming into the world cursed and branded with hereditary predisposition to crime, that is ofttimes too strong for their weak powers of resistance? They do not select the environment in which they were reared. Perhaps the crime was a mere misstep, due to the overpowering strength of their temptation and the weakness of their natures. If the injustice and burden have become intolerable, why not allow them to escape their earthly travail instead of exacting the last ounce of flesh in human anguish and misery, and dooming those near and dear to them, as most of them are doomed, after the culprits have expiated their crimes, to be semi-outcasts for the balance of their lives?

Arson has been known to increase where the death penalty is imposed, following an execution for that offense. The same is true of murder. In one case a man killed his wife with great cruelty and on the day of his execution another man nearby murdered his wife in exactly the same manner, apparently as a result of the suggestion from the first.

Reports from local Board of Health and the Division of Vital Statistics of the Bureau of the Census show that notwithstanding the prevalence of the death penalty in this country the homicide death-rate has increased from 5.1 per 100,000 in 1900 to 11.0 per 100,000 in 1925.

There is no doubt that murder is many times more prevalent in this country than in England and elsewhere.

The average rate in the registration area for the period of 1911-1921 in the United States was 7.2, whilst in England and Wales, for the same period, it was .76; Scotland .40; Ontario .53, and Quebec .54. It cannot be argued from these figures that the difference is due to the fact that these European countries have Capital Punishment, because:

Holland, where the death penalty does not exist and was abolished in 1890, had from 1911 to 1918 but .31 murders.

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Only two executions had taken place in the twenty years prior to its abolition; Norway, from 1910 to 1918, had but .82. Over a forty-year period, ending in 1920, the homicide rate in the Swiss cantons which had abolished Capital Punishment were slightly lower than in the fifteen that had retained it.

In so far as can be determined from the statistics, the homicide rates are, on the whole, lower in the states where Capital Punishment has been abolished.

The Southern States, which have retained Capital Punishment, would have shown a much higher rate if included in the table, but the comparison is not fair because of the negro population, which tends to raise the rate.

Maine, which has abolished the death penalty, has a lower rate than its neighbor, Vermont, which has retained it.

Whilst Rhode Island has a higher rate than Massachusetts, it is lower per capita than Connecticut, and very much lower than New Jersey, Pennsylvania and New York, where the death penalty exists.

Dr. Hoffman presents figures for seventy-seven cities in the United States for 1925, showing an increase from 3,096 in 1924 to 3,208 in 1925. *Six cities of over 100,000 population, which includes all the cities of that size where the death penalty is abolished, with the exception of Kansas City, have an average homicide rate of 5.9 as compared with 8.6 in the other sixty-eight cities with Capital Punishment.*

In Chicago homicide increased from 509 in 1924 to 563 in 1925, and in Detroit from 211 to 243; in Cleveland from 97 to 127; in New Orleans from 135 to 154; in Philadelphia from 149 to 192, and yet we have had in that city the most spectacular effort at law-enforcement on record.

In Cleveland, where the Crimes Commission has been at work for several years, the rate has increased from 10.7 in 1924 to 13.8 for 1925.

There are now approximately 11,000 to 12,000 murders per year in this country. Our intolerable law's delays, a

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clumsy and imperfect legal procedure and the unrestricted sale of firearms, has much to do with this high rate.

Dr. Carl Torp, Professor of Penal Law at the University of Copenhagen, says:

> "All the members of the Commission were unanimous in accepting the proposal for the abolition of Capital Punishment,"

due primarily to the fact that in Denmark, as in a number of other countries, its abolition has not in any way contributed to the increase in the number of such crimes as were formerly punished by death.

Between 1866 and 1892 (which was the date of the last execution in Denmark) there were only four persons executed.

The death penalty has not been abolished in France, but not over 5% of the persons convicted have been sentenced to death and only a small fraction of those thus sentenced have been executed.

For instance:

In 1919	391	were	convicted,	17	sentenced	and 5	executed
1920	744	"	"	56	"	" 13	"
1921	713	"	"	64	"	" 20	"
1922	571	"	"	42	"	" 16	"
	2419			179		54	

Capital Punishment has degenerated into a class punishment. I know of no record of a millionaire having suffered the death penalty.

Whilst the murders are numbered by thousands, those who go to the chair or scaffold are numbered by tens.

The same uncertainty prevails abroad. In England and Wales there were 2,500 homicides with 125 executions.

In France, in four years, nearly 6,000 homicides with 48 executions.

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"The only certain thing about Capital Punishment is the uncertainty with which it is inflicted."

In Greece the killer was exiled, but could avoid exile by making a settlement with the deceased's relations. This practice followed throughout Europe and gave rise to the phrase "blood money."

There is no time to analyze at length the causes of murder, but the result of scientific study leads to the conclusion that the death penalty is inconsistent with modern criminology.

A few decades ago Lombroso stressed the importance of hereditary physical traits. If we accept determinism as replacing free will, criminology has a scientific basis showing that social conditions of poverty, ignorance, misery, bad living conditions, home environment, social example and political situations have a relation to crime.

The abuse of the pardoning power and the danger that with life imprisonment the convict loses nothing for taking the life of guards and keepers are stressed, but statistics show that prisoners on life terms are amongst the best behaved. Every warden, without exception, testifies to that effect. Murderers are rarely professional criminals. The overwhelming majority of them are first offenders. When released they have never, except in three cases out of hundreds, broken their paroles.

Inasmuch as the life prisoner has nothing to lose by committing murder, he should be punished by solitary confinement, on the ground that the safety of the guards, keepers and other prisoners demands it.

Bye gives an account of a young negro murderer who, just before his death, joked with the Sheriff, and asked that a good job be made of the execution and, on the scaffold, promised that if he failed to get a good "write-up" in the newspapers he would "haunt" them that night.

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Does Homicide Increase After the Death Penalty Is Abolished?

In Washington the rate was 7.2 in 1912. When the death penalty was abolished in 1913 the rate was 6.5. True, it rose to 10.0 the following year, but it averaged only 6.2 during the next four years of the abolition period and rose to 7.5 when the death penalty was restored in 1919.

In Minnesota in 1910 the rate was 3.3, and while it rose to 3.9 when the death penalty was abolished in 1912, it was only 2.8 the succeeding year.

In twenty-three of the states retaining Capital Punishment during the eight years from 1912 to 1919, there were 722 sentenced to death, of whom 512 were executed, while 29.08 escaped the penalty. Some of the states executed no more than 30 or 40 per cent. of those sentenced to death.

Mr. Upton of the Chicago Tribune has collected statistics of the number of executions from 1911 to 1917, inclusive, showing that there are only about one hundred persons executed annually in the United States: He says:

> "Figuring the number of homicides (as based on U. S. mortality statistics) at 7 per 100,000 inhabitants, and taking the population in that year as 100,000,000, there must have been about 7,000 homicides in the United States in 1917, which means that only one man in 80 who commits a homicide suffers death. For about every 70 homicides one person is hung or electrocuted. If not more than one-half of these homicides were deliberate murders, one murderer out of every 35 or 40 suffers death."

Data on executions collected by Warden Lawes from wardens of the various prisons shows that over the eight years from 1912 to 1919 there was an average of 3,710 homicides per year and 43 executions, showing that about one out of every 85 suffers the penalty; from all of which it would appear that the death penalty is, as Bye says,

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"nothing but an arbitrary discrimination against an occasional victim." The frequency of homicide has no bearing on the abolition of Capital Punishment. The infrequency and uncertainty of the penalty destroy whatever effect might otherwise be attributed to it.

The evidence before the British Royal Commission in 1866 showed that *of the 167 persons under sentence of death in Bristol, no less than 164 had been present at public executions.*

The execution of the notorious Kemmler at Auburn Prison some years ago was followed by 24 murders in New York, 10 in New Jersey and 10 in Pittsburgh, all within thirty days.

The night the gunmen died at Sing Sing the gangsters of the East Side came to Sing Sing until it was necessary for the Warden to place armed keepers on guard outside the prison walls. They were there so as to be able afterwards to say, for their own glorification, that they stood beyond the walls when their heroes were put to death.

As to the Effect of Abolition on Lynching.

Strange to say, and contrary to my impression, according to statistics, lynchings occur with greater frequency where Capital Punishment is retained than in states where it has been abolished.

Alabama, Arkansas, Georgia, Louisiana, Mississippi and Texas each had over 200 lynchings in the period from 1890 to 1917. During that period there were five states without Capital Punishment, of which Rhode Island had no lynchings, Michigan 4, Wisconsin 2, Maine none and Kansas 20. From which it would appear that the abolition of Capital Punishment has not prevented a decline in the frequency of lynchings and that they are fewer in number where the death penalty is abolished than where it is retained. True, the rate of Kansas is high, but no higher than its neighbors that have retained Capital Punishment.

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Colorado had 23 lynchings in twenty-eight years, Nebraska 14, Oklahoma 62 and Missouri 65. All these states have smaller populations than Kansas.

The question is one of *race,* as is apparent from the fact that three-fourths of all those lynched are negroes. Many of the crimes for which men are lynched were of a minor character.

The following is a table prepared by Dr. Kirkpatrick showing the states that have executed the largest number of criminals over a period of twenty-eight years:

Georgia	264	Mississippi	148
Pennsylvania	246	Louisiana	133
New York	221	South Carolina	126
Texas	214	California	117
Alabama	176	Missouri	109
Virginia	167	Tennessee	101
Arkansas	153	North Carolina	94
		Kentucky	87

In some of the seven states in which the death penalty is mandatory, it includes rape, robbery, arson and horse-theft.

With the exception of Florida, the list includes the ten states having the largest number of lynchings. With few exceptions they are Southern States. The death penalty seems to have increased rather than to have prevented lynchings. This lynching problm is solving itself and ought not to have any bearing on the abolition of the death penalty.

Michigan abolished Capital Punishment in 1846. Michigan has a record of only two lynchings since then.

Total Miscarriages of Justice Due to Public Sentiment.

I have always regarded the irrevocability of the punishment as one of the most weighty arguments against the death penalty. Under the most ideal conditions of administering the law, to err is human; human justice is but

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human and often errs, far more frequently than we are willing to admit.

To say that our system is as yet the best that we can or should devise is to fly in the face of all experience. We know that innocent men have been and are occasionally convicted and executed. For every such instance that happens to reach the light of day, how many have gone undisclosed we do not know, but those of us who have had experience in the courts can well conjecture and we stand aghast at what is happening in our midst, especially to the poor and friendless.

The thought that the law has put these cases beyond the reach of correction is abhorrent to our sense of justice and humanity.

So long as the convicted man is with us the agitation for the correction of injustice is kept alive, but when he is gone that stimulus disappears.

The recent Sacco-Vanzetti case, that stirred and justly held our faulty judicial system up to the ridicule of the world, is a fair illustration of the conclusive effect of death on the efforts to correct injustice.

In our State there is at least an Appellate Court charged by law with the compulsory mandate of reviewing every conviction carrying the death penalty. In Massachusetts the Appellate Court is prohibited from reviewing the facts. The verdict of the jury, however erroneous, is final—except where corrected by the Justice presiding at the trial, and then only on the ground of newly discovered evidence. There is no review.

If innocent men are placed on trial in a time of passion, prejudice and excitement against their abhorrent political views, the chances of conviction when the prosecution is in the hands of an able prosecutor and a prejudiced judge are more than even.

I do not mean to assert that these men were innocent, but my review of the evidence left me in such grave doubt of their guilt that if I had sat upon that jury I would have felt bound to acquit them. Their trial was grossly

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unfair. The legal procedure in that State is so cruel and such an invitation to the miscarriage of justice that the Governor of the State, who, to my mind, unwisely refused to commute their sentences, is now urging the Legislature to change the law.

Our system is too faulty and there are too many miscarriages of justice to justify us in irrevocably closing the door to the correction of error. The atmosphere of the court room is frequently prejudicial to the man on trial. If he is poor the scales of justice are as unequal against him as they are unequal in his favor if he happens to be rich and powerful.

The prosecutors of the present day are sometimes persecutors, and occasionally unconscionable, more bent on gratifying political ambition and achieving reputation based on convictions than in vindicating the majesty of the law. The prisoner must, on the other hand, be content with such counsel as he can afford or as the State assigns. He is under lock and key and cannot go about hunting for witnesses, whilst the prosecutor is surrounded by a staff of trained assistants and experts.

For more than twenty years I have been urging that there should be a Public Defender with an organization quite as effective as that of the Public Prosecutor; for it is quite as much the duty of the State to vindicate the innocent as to punish the guilty.

About forty years ago a man by the name of Fitzpatrick was hanged at Sandwich, Michigan, convicted of the murder of a girl. Two years later a man named Sellers confessed on his death-bed that he was the murderer.

Michigan has had many miscarriages of justice that would have been rendered irrevocable if it had not fortunately abolished Capital Punishment.

W. H. Thacker, of Benzonia, Michigan, bought poison at a drug store, explaining that he was going to kill rats. A few weeks later his wife died under suspicious circumstances. An examination by an expert chemist disclosed enough poison in her system to have killed several persons.

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After Thacker's conviction and whilst he was serving a sentence of life imprisonment, there was found whilst cleaning the house where he lived, a letter written by Mrs. Thacker, declaring that she was in ill-health, was tired of life and intended to commit suicide by taking some of her husband's rat poison.

About thirty years ago a terrible case of miscarriage of justice came to light in Michigan:

A sailor named Barry was working on a Lake vessel. The first mate was hated by the crew because he was always beating them. One night the mate was killed. A reward of $500 was offered. One of the sailors won the reward by charging the crime against Barry, who was a poor, friendless stranger. He was convicted, and for seven years was kept in solitary confinement. His mind gave way and he became a harmless imbecile. Thirty years after he entered the prison the sailor who made the charge confessed on his death-bed that he had killed the mate. He said that he needed the $500 reward!

Another unusual case developed in Detroit in 1892. A small coal dealer named Knack, who was a nervous, irritable man, and in constant feud with the boys in the neighborhood, was killed. A group of boys were playing in the street near his coal yard. One of them threw a stone against his door. Knack rushed out and seized a young man named Schultheis by the throat, with one hand, and hammered him in the face with his fist. At that instant a man named Bossenberger, a huge teamster, rushed to the rescue of the boy, who was an invalid, and seizing Knack by the collar and throwing him aside he helped the boy into the house. Knack ran toward his house and there fell dead on the front porch. A post-mortem examination disclosed that he had bled to death from a small puncture of the radial artery of his left arm. Bossenberger was tried for murder. He protested his innocence and declared that he carried no knife of any sort. Bossenberger seemed about to be acquitted, but at that point a

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young man offered testimony that he saw Bossenberger take a knife from his pocket as he ran and that he stabbed Knack with it; that Bossenberger threw the knife into the gutter and that he (the witness) went across the street and picked it up. A few months later the Schultheis boy, then dying of tuberculosis, confessed that he had a small jack-knife in his hand when Knack seized him by the throat and that he cut his assailant in the arm, not believing that he might inflict a fatal wound. Bossenberger was released as an innocent man.

Warden Lawes says that since 1889, when electrocutions were established in New York, 409 men and 6 women have been committed for execution; 201, including 1 woman, were electrocuted. The convictions of 53 men and 2 women were reversed by the Court of Appeals. Of these, 30 were acquitted.

In the same period, 1889 to 1927, there were 589 commitments for murder in the second degree and 1986 for manslaughter, making a total of 2,990 commitments for what is commonly known as murder.

Of the 261 who were executed, how many besides the 30 persons who were finally acquitted after having been sentenced to death and the 18 others convicted of a lower degree after having been convicted of murder, might not have received new trials and been acquitted, or convicted of a lower degree, if they had had money or friends to engage able counsel?

Of the eight women executed in this State, one, at least, Mrs. Houghtaling, is known to have been innocent. Another, who was convicted with her mother, the latter having been executed, was found after eight years of service to have been innocent and was pardoned.

If judges and juries may be mistaken in one case, is it not possible that there have been other mistakes that cannot now be corrected? They erred in 11% of the original convictions and 54%, or more than half, of those persons were acquitted on retrial.

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The War taught us that in times of passion and public excitement all things are possible, with inflamed public sentiment and the spirit of revenge in the air. I attribute much that is evil and savage and little that is worth while in us to "war psychology"; but it at least taught us how cruel can be man to man when influenced by passion.

Is not the percentage of probable error too high to warrant an irrevocable penalty?

There are literally hundreds of such cases recorded. We can only conjecture how many more went undiscovered. Time will permit of only a few more illustrations.

Many of us doubtless recall the case of Leo Frank in 1915 in Georgia, convicted of outraging and murdering a young girl. He was sentenced to death. Impartial investigators concluded that he was innocent and that the guilt lay with a negro named Conly, connected with the establishment of which Frank was at the head. Governor Slaton, in the face of a wide public demand for Frank's execution, aroused by the yellow press, bravely commuted the sentence, because satisfied of Frank's innocence, of which there was no doubt. The mob broke into the jail and lynched Frank.

The *Mooney* case is another illustration of how public opinion defeats justice. That was the case of the Chicago bomb outrage resulting in the death of ten persons. Mooney was a well-known radical labor leader and there was great popular indignation, but it is generally conceded to-day that Oxman, who swore away Mooney's life, was a perjuror. An effort to get a new trial was defeated. His sentence was commuted to life imprisonment.

Convictions Due to the Zeal and Ambition of Prosecuting Lawyers and to Perjury and Errors of Identification.

Many recall the story of the case of Martin Church and James Mackley at the end of the Eighteenth Century, who were hanged for the murder of Sydney Fryer on the testimony of an eye-witness who swore that they were the

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assailants. Later, Burton Wood and Timmins separately confessed to having committed the murder for which these innocent men had suffered death.

In 1884 three men were hanged in Alabama for arson on the testimony of the wife of the owner of the house. In 1886 it was proven, through the confession of a man then in prison and who was taken sick, that he did the deed.

Mr. Osborne asserts that of the thirty-nine men who were executed during the two years that he was warden at Sing Sing, he *knows* that four were innocent and probably more.

He cites a case where a man came three times within twenty-four hours of execution and was reprieved; finally it was discovered that he was innocent. The guilty man confessed and the Governor pardoned the innocent man.

Al Jennings, in his work "Through the Shadows with O. Henry," cites a case not long ago where a life prisoner in Pennsylvania, after being in prison for twenty years, was found innocent and pardoned.

Mr. Osborne says that many innocent men are executed, but we don't learn about their cases because there is not enough incentive to agitate the cause after the man is dead.

In 1873 Bud Brooks and Wade Henderson were convicted of rape. Brooks was hanged and Henderson was sentenced to the chain gang for life. It was later proven that the woman who made the accusation was immoral and had had sex relations with both men.

A similar case was that of the Rev. John Boyle, a Catholic priest of Raleigh, N. C., who in 1899 was accused by a girl of carrying her into a room adjoining the church and there raping her. He was sentenced to be hanged, but before the date set for the execution he was exonerated and acquittd.

Rev. Marion Capps of Arkansas was sentenced to death for setting his house on fire in an attempt to destroy his

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three children, on the testimony of his daughter, who subsequently admitted that she had sworn falsely.

Charles H. Franklin was convicted of first degree murder mainly on the testimony of a man named Knight and two negroes. Knight at his death left a written confession that he had killed Bryant and had succeeded in fastening the guilt on Franklin, who had once been reprieved as he stood on the scaffold with the rope around his neck and had subsequently served twenty years in prison for the crime he had never committed.

There have been many cases of lying confessions, of which the case of the Boorn brothers in Vermont is an illustration. They were confronted with evidence so overwhelming that they confessed murdering their brother-in-law, who had disappeared, hoping thereby to lessen the severity of the sentence. The supposedly murdered man proved to be alive and appeared in time to save the life of the eldest brother who had been condemned to death.

Mr. Osborne cites also the case of an innocent victim who preferred the death penalty rather than expose the guilt of another. He was a boy named Thomas Bambrick, who knew the real murderer, but refused to "squeal," and went to the electric chair.

Circumstantial Evidence.

This is one of the most common causes of error, so common that when Colorado restored the death penalty the law provided that it should never be used where the accused was convicted on purely circumstantial evidence.

Mrs. Maud Ballington Booth relates an incident of a man who was sentenced to life imprisonment for murder on circumstantial evidence supported by the testimony of one witness. Through friends who believed in him he was saved from hanging, but he served sixteen and a half years until 1903, when the woman who had been the witness, believing herself to be dying, confessed perjury to her priest, whereupon the prisoner was liberated.

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About May, 1905, in Northern California, four men were convicted of murder and hanged. Later it was definitely ascertained that only one of them was concerned in the murder.

The case of Dr. Hamilton is often quoted. Dr. Saunderson was murdered and Dr. Hamilton's pistols were found near the body. He was convicted and executed. A few months later two robbers confessed on the gallows that they had stolen the pistols and had themselves committed the murder and that Dr. Hamilton had nothing to do with it.

The New York Legislative Report of 1841 cites a number of cases of miscarriage of justice in capital cases, among them that of a young man named Boynton who had been staying at a tavern in Louisiana and had been frequently seen in the company of a fellow-boarder who was murdered shortly thereafter. Boynton was convicted and hanged. Before he was finally hanged he jumped from the gallows into the crowd, protesting his innocence. Shortly thereafter the keeper of the tavern, believing that he was about to die, confessed to the murder and that he had fastened the crime on Boynton.

In answer to the argument that life imprisonment would lose its terrors because of the frequency with which the sentence is remitted: In abolishing the death penalty it would be well to provide that the prisoner must have served at least twenty years of his sentence before he can receive a pardon or commutation, unless the highest court of the State should find upon new evidence submitted that there was a reasonable doubt of his guilt.

Summarizing the above considerations: I think it may be fairly said to be established that there is no basis for the argument that the death penalty is a necessary deterrent.

There is no evidence that murders are more frequent where Capital Punishment has been abolished, nor that it gives rise to any greater number of lynchings. The proof is to the contrary.

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Even in England, where punishment for crime is far more swift and certain than in this country, their statistics (which are more nearly accurate than ours) show that less than 5% of homicidal crimes result in the death penalty.

Assuming that Capital Punishment might deter if it were enforced, it can never be enforced until there is a radical change in humankind. There are human elements that cannot be overcome.

Say what you will, I do not believe that the contemplation of death is as terrible as that of life imprisonment or a greater deterrent to crime. No one can know by what considerations men are deterred from committing murder. Public executions were supposed to have that effect, but this has apparently not been the result of experience, otherwise we would not execute men in supposed secrecy.

This is confirmed by Warden Lawes, who says:

> "It is my experience, based upon the observation of over 500 murderers, that life imprisonment is a greater punishment and is dreaded more than death in the electric chair."

And where is the Church all this time, with its sacred mission of Good Will on Earth, with sect fighting sect over questions of mere dogma when it should be spreading and insisting upon the teachings of Christ?

Every great writer and preacher who has written or spoken on the subject, from Victor Hugo, Dickens, Macauley, and Henry Ward Beecher, down to the present time, has urged the abolition of the death penalty.

Henry Ward Beecher said:

> "In our age and with the resources which Christian civilization has placed within the reach of civil governments, there is no need of the death penalty, and every consideration of reason and humanity pleads for its abolition. It does not answer well the needs of justice and often defeats it. It is the rude justice of the barbarian."

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Lord Buckmaster, one of the most eminent men of his time in England, quotes Hazlitt as saying:

> "It was possible for men, women and children to be hung for stealing five shillings from a shop or 40 shillings from a dwelling. Men found armed in rabbit-burrows or fishing in other people's waters were not only liable to be hung but actually were hung."

Sir William Harcourt so well said, in the Parliamentary debate of 1877:

> "If the punishment of death did not prevent men from stealing horses, why was it more likely to prevent them from committing murder?"

Bacon said:

> "There is no passion in the mind of man so weak but it mates and masters the fear of death. Revenge triumphs over it, love slights it, honor aspireth to it, and grief fleeth to it."

Samuel Rogers, the poet, tells how he once met

> "a cart-load of young girls, in dresses of various colors, on their way to be executed at Tyburn."

His friend, Greville, who was present at a trial where several boys, "to their own excessive amazement, were sentenced to be hung," remarked with great naiveté:

> "Never did I see boys cry so."

In 1831, a boy of 13, John Bell, was hanged at Maidstone. Two years later, a boy of 9, Nicholas White, pushed a stick through a broken glass in a London shop window and raked out a few pieces of children's colors, valued at "tup-pence." He was sentenced at the Old Bailey to be hanged by the neck until he was dead.

In 1832 Capital Punishment was repealed in England for cattle, horse and sheep-stealing; for housebreaking in

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1833; for stealing of letters by the post-office servants in 1835; stealing from dwelling houses in 1837.

Thackeray says:

> "I pray Almighty God to cause this disgraceful sin to pass from us and to cleanse our land from blood."

Victor Hugo says:

> "In the early ages, the social edifice rested on three columns, Superstition, Tyranny, Cruelty. To those who regret Superstition we say, 'God remains for us!' To those who regret Tyranny we say, 'Our country remains.' But to those who could regret the Executioner we can say nothing.
>
> Reason is on our side, feeling is on our side, and experience is on our side. In those states where punishment by death is abolished, the mass of capital crime has yearly a progressive decrease. Let this fact have its weight."

Romilly says:

> "Cruel punishments have an inevitable tendency to produce cruelty in the people."

Jeremy Bentham says:

> "Error is possible in all judgments. In every other case of judicial error, compensation can be made to the injured person. Death admits of no compensation."

Charles Dickens says:

> "The very advocates of the punishment of Death who contend, in the teeth of all the facts and figures, that it does prevent crime, contend in the same breath against its abolition because it does not! 'There are so many bad murders,' say they, 'and they follow in such quick succession that the punishment must not be repealed.' Why is not this a reason, among others, *for* repealing it? Does it not show that it is ineffective as an example; that

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it fails to prevent crime; and that it is wholly inefficient to stay that imitation or contagion, call it what you please, which brings one murder on the heels of another."

Longfellow says:

"I am, and have been for many years, an opponent of Capital Punishment."

Whittier says:

"I have given the subject of Capital Punishment much consideration, and have no hesitation in saying that I do not regard the Death Penalty as essential to the security and well-being of society; on the contrary, I believe its total abolition, and the greater certainty of conviction which would follow, would tend to diminish rather than to increase the crimes it is intended to prevent."

Beccaria said:

"A less punishment which is certain, will do more good than a greater punishment which is not certain."

Dickens also says:

"If we are still to inflict Capital Punishment because of the Mosaic Law, it would be equally reasonable to establish the lawfulness of a plurality of wives on the same authority."

Dymond said:

"All verdicts are founded upon probabilities—probabilities which, though they sometimes approach to certainty, never attain it. Surely it is a serious thing for one man to destroy another upon grounds short of absolute certainty of his guilt."

It may be that there are men in the Halls of Fame of this and other countries or who should be there who have championed the death penalty, but I do not know of any. Every practical and humane consideration cries out for its abolition.

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