

ADDRESS OF THE PRESIDENT.

HON. WILLIAM HOWARD TAFT,
OF CONNECTICUT.

Our last meeting was held on foreign soil at Montreal. Everyone who attended, I am sure, felt that it was a marked success. Montreal is a great and beautiful city, which has a peculiar character, due to its two peoples of French and English origin that are united in a common citizenship. All felt that the spirit shown by our Association in making Montreal its meeting place, and the courteous and enthusiastic hospitality which was the response of the Canadian Bar, strengthened the bond between the two countries and made us nearer neighbors. There was then nothing in the world's horizon to trouble the friends of international peace. The beautiful address of Lord Chancellor Haldane, in which he dwelt upon the effect of what he called "Sittlichkeit," or "Good form," between groups of nations as a growing influence in favor of peace, seemed to be quite in accord with the conditions that then prevailed. Little did anyone think, in listening to his words, and in approving without reserve their sweet reasonableness and encouraging tone, that when next we met, practically all Europe would be at war, fighting battles with lines hundreds of miles in extent, with millions of men on one side contending with millions of men on the other; that European industry and commerce would be struck down, and that each half of the European world would be rejoicing at the enormous losses, reaching to hundreds of thousands, of the other half.

Such a human catastrophe, such a cataclysm in history beggars a vocabulary in adequate description and throws gloom over the entire world. It makes the peaceful administration of justice, and a discussion of plans for its improvement, prosaic and uninteresting. While we stand aghast at this awful welter of blood, destructive of the happiness of Europe, we are profoundly grate-

ful for our splendid isolation and the freedom from entangling alliances which Washington enjoined upon the American people. This saves us from sharing in the suffering and sorrow of the belligerents, but it does not save us from burden. In the Napoleonic campaigns, which alone approximate in their all-embracing character the present conflict, our ancestors were so far removed from Europe, and were so independent in their living and business, that they were not then affected as we are now. The war has brought home to us, as nothing else could, the closer union between the nations and the interdependence in business and finance which we have reached in the progress of a century. The overwhelming importance to us of keeping out of the struggle has led President Wilson to warn the American people, in their public expressions and actions, to maintain, as far as possible, an impartial attitude, and in this appeal he should have the warmest approval and the sincerest co-operation of all of us.

Most of us do not understand how much significance European peoples give to hostile expressions of our press and of prominent men, which they are quite inclined to regard as either inspired or at least acquiesced in by our government and as embodying the views of the entire people. They do not appreciate the comparatively little weight in judging our national attitude that ought to be given to editorial expressions, or hastily prepared communications, based on current reports necessarily inaccurate or biased. The language of the President, in which he declined to be drawn into a decision or the expression of an opinion on the complaints of belligerents, was most admirable and showed to the world what we must show, that we do not intend to be drawn into this controversy in any way; that while we are willing to assist as much as possible in bringing about peace, our attitude as judges cannot be invoked until we are given formal authority, with a stipulated condition to abide the judgment.

We are the principal nation of the Christian world not so related to the struggle that both sides may really regard us as disinterested friends. It is our highest duty, and the President makes plain his earnest appreciation of this, not to sacrifice and

destroy this great leverage for successful mediation when the opportunity arises, by ill-advised and premature judgment upon the merits. The sensitiveness of the struggling participants to every view friendly or hostile is most acute. Many of us can remember how we felt when similarly placed. We must hold our tongues to be useful to mankind.

Meantime, in the sound of battle, peace treaties are being made between us and many other countries including some of the belligerents, by which we agree to a period of one year as a *locus penitentiae* before a declaration of war. This does not seem a large step, but it is something and might prove to be valuable under circumstances that one can imagine. The present war, however, has been used by the opponents of arbitration to prove that treaties are of no avail and that if a nation wishes to go to war no treaty will prevent it. No one who has advocated treaties of arbitration as a means of avoiding armed conflict has ever contended that they are an absolute insurance against war. Nobody has contended that treaties are not broken. Is it a reason that some are broken that we should give up making them? Is it a reason for thinking that treaties of arbitration furnish no means of settling international difficulties that there are instances where they have failed?

One of the few hopeful things about the present war is the appeal that each side makes to the public of the United States, as the most important part of the world left out of the fight, to justify its course in going to war. The belligerents are thus showing deference to international good form, to the "Sittlichkeit" of Lord Haldane. It is, of course, too early to prophesy what the result of this war may be. It is not too early to hope that the exhaustion which it is certain to bring to both sides may sink deep into the minds of their respective peoples the absurdity of maintaining hereafter the policy of immense and bankrupting armaments and the wisdom of a reduction in these by agreement, so that in assuming the burdens that are sure to follow this destructive visitation, they may not have to add to the cost of recuperation billions for additional defense.

And now that we are discussing compliance with treaties and the effect of treaties of arbitration and of peace upon the chances of war, is it not a good time for us to clean our own house and put ourselves in a position where we can fulfill to the letter every treaty that we have entered into? We have made many treaties of friendship and peace—indeed treaties with all the world—in which we have assured to aliens, subjects, or citizens of the other party to the treaty resident within our borders due process of law in protection of life, liberty, and property. Nevertheless, we now withhold from the same authority that makes the treaty the power to fulfill its obligation. A statute of a dozen lines would put it in the power of the President to institute judicial proceedings, civil and criminal, in courts of the United States, to punish a violation of the treaty rights of aliens and enable him to use the civil and military executive arm of the government to protect against their threatened invasion. In our past experience we must realize that mob violence committed through race prejudice against aliens will never be punished by state authority, and there is nothing that a high-strung people—and it is peoples now who largely control the matter of war and peace—resent so much as the mistreatment of their fellow-countrymen living under the flag of a foreign government which has stipulated and pledged its honor to give them protection. The real opposition to this reform finds its source in the factional determination of people in localities to exclude lawful immigrants. They look to illegal force to maintain their purpose, and they fear the effectiveness of the national arm in restraining it.

It is idle to urge that the granting of such a power to the Executive is contrary to the Constitution, because the Supreme Court has already said specifically that Congress has the authority. It is true that a majority of a committee of this Association 20 years ago reported that the existence of this power was doubtful, but I venture to think that no committee could be appointed to-day from the Association that would make such a report. I hope that this question will be referred at this annual meeting to the proper committee for another consideration of it, a report as to the needed legislation, and a vote by the Association in favor of its enactment.

The most noteworthy national legislation of the year, from the standpoint of the administration of justice, is contained in the Trade Commission Act and the so-called Clayton Act. Together they affect two general subjects matter. They supplement existing statutes and general law as to illegal trusts and monopolies in interstate commerce, and they deal with the application of the anti-trust act to labor associations, the issuing of injunctions in labor disputes in federal courts, and the procedure for the punishment of contempts in a certain class of cases.

Both measures in the most painstaking way make clear that nothing in them is to vary the meaning of the three important sections of the Sherman Act which have been so fully considered and clearly construed by the Supreme Court in the light of, and by the rule of, reason. We may, therefore, in beginning the consideration of this new legislation, rejoice that in spite of the exuberant criticism of the Supreme Court decisions in the Standard Oil and Tobacco cases when announced, and the threats of legislation to dethrone reason in judicial construction as applied to the anti-trust laws, we may still use in a normal way those mental processes with which nature has endowed us in attempting to find out what Congress means in these new acts.

The first part of this legislation adds new and elaborate machinery for the enforcement of the anti-trust acts. Second, it appears to create new offenses in that field of the law. Third, it imposes, after two years, certain restrictions upon what have been called interlocking directorates in banks and railroads, evidently with a view to prevent temptation to, and opportunity for, a suppression of competition and monopoly. Fourth, it brings into the federal criminal jurisdiction embezzlements and other breaches of trust by directors, officers, and agents of interstate carriers, and provides other restrictions to secure their fidelity.

An analogy more or less complete is established between the regulation of common carriers under the interstate commerce law and that of industrial concerns engaged in interstate trade. As the commerce law declares undue discrimination and unreasonable rates unlawful, so this trade law declares "unfair

methods of competition" unlawful. As the former creates a commission to determine what rates are unduly discriminating or unreasonable, so the latter creates one to determine what are unfair methods of competition. Similar process and hearings are provided in case of probable violations of the law upon the complaint of anyone, or of the commission's own motion. Equally inquisitorial powers are conferred on the two commissions. The Trade Commission is to find the facts after any hearing; and, if sufficient, make an order against the defendant, to be enforced in case of refusal by application to the Court of Appeals of the proper circuit. The court is to take the finding of fact as conclusive; if based on any evidence, to decide the questions of law, and reverse, modify, or affirm the order; and, if sustaining it in any part, to enforce it. The commission is to act as Master in Chancery in assisting the court in formulating orders and decrees for the proper adjustment of the affairs of a corporation found guilty of violating the anti-trust law, and, in general, it takes over the investigating and statistical duties of the Bureau of Corporations.

In so far as the field of general interstate trade is within the practical range of supervision and regulation, the machinery here adopted, it seems to me, is as effective as any could be. The question whether the existing anti-trust law, with its twenty years of construction by the Supreme Court, was not sufficient, and the economic policy of adopting this close supervision and these inquisitorial methods in general business not charged with a public use, it is not my purpose here to discuss. I am only now concerned with the meaning of the new law and its effect upon the declaration of substantive law in the anti-trust acts.

The first new term that confronts us in the Trade Commission Act is "unfair methods of competition." What does it mean? It does not appear in the Clayton Act at all, and yet the two acts are *in pari materia*.

It is hard to reach any other conclusion, after consideration of the old legislation and the new, than that unfair methods of competition thus denounced only include those methods and practices in interstate trade the effect and intent of which would bring

them within the scope and condemnation of the first, second, and third sections of the Sherman Act. The same thing is true of several specific offenses denounced in Secs. 2, 3, and 7 of the Clayton Act. These are:

1. Discriminations in price as between purchasers in sales of goods;
2. A sale or lease of goods patented or unpatented on condition that the vendee shall not deal in or use the goods of a competitor;
3. Acquisition of stock by one trading corporation in another;
4. Acquisition of stock by one corporation in two other trading corporations;

when the effect of any one of these four acts may be substantially to lessen competition, restrain interstate commerce, or tend to create monopoly.

The words "with the effect substantially to lessen competition" are to be construed in the light of their association with the words that follow them in order to secure some guide to the meaning of "substantially." It certainly does not mean any lessening of competition, however small, because its ordinary signification prevents that. More than that, the union of two trading corporations by a holding company or otherwise must always lessen competition somewhat. The only reasonable solution would seem to be to hold that it means such substantial suppression of competition as to constitute a real restraint of trade and a tendency to monopolize. Now it is possible to point out decisions of the Supreme Court on the anti-trust law in which each act here specifically denounced is held to be within the Sherman law. The condemnation of the so-called tying provision in the sale of patented articles is the only one of the acts described that can be regarded as a slight widening of the effect of that law. It may lessen somewhat the scope of the legal monopoly under the patent law as declared by the Supreme Court. With this small possible exception, however, so far as I can see, the field of illegal and criminal effort in respect to restraints of interstate commerce or monopolies of it is not enlarged under the new acts. Indeed, it is difficult to see how it could be, in view of the sweeping language of Chief Justice White in construing the Sherman law in the

Standard Oil and Tobacco cases. These three sections, therefore, merely specify certain phases of violations of the Sherman law which can be prosecuted under separate indictments.

In many other respects, these two new laws are only declaratory of existing law. Thus one section of the Clayton Act provides that if a corporation shall violate the law, any director, officer, or agent authorizing such violation shall also be deemed guilty of misdemeanor and punished by fine or imprisonment, or both. This section is intended to carry out the famous policy, advanced as a new departure, that guilt is personal. It is certainly a wise provision, but it can hardly be called a new one, for it has always been the law since there were crimes at the common law, and rules punishing aiders and abettors. The section suggests that line of Holmes to the "Katydid":

Thou sayest an undisputed thing in such a solemn way.

Such a provision cannot, of course, dispense with indictment and trial of the director, officer, or agent, and will not prevent the jury doing what it did in the Tobacco Trust case, when it convicted the corporation and acquitted the president, who was jointly indicted with the corporation, and who did the illegal acts for which the corporation was convicted.

The analogy between the functions of the Commerce Commission and the Trade Commission is not complete. The consideration of the question of unreasonableness and undue discrimination as to rates would seem to vest in the Commerce Commission a much wider discretion and range of judgment, free from examination and review by the courts, than the Trade Commission has in finding the facts and making the restraining order as to "unfair methods of competition." In the former case the Commerce Commission is not only finding the facts, but is exercising in detail the legislative function of Congress of rate regulation, which, with general limitations, has to be delegated to the commission in order that it can be effectively exercised at all. All that the court does in review of action by the Commerce Commission is to see that it is within the scope and limitations of the general delegation of power, and that it does not deprive the carrier of his property and its use without due process of the law, *i. e.*, that it

is not a confiscation. The function of the Trade Commission is to find the facts also, but when it comes to decide the question of unfair competition upon those facts, it would seem to be, as I have before said, only a question of law under the Sherman Act. The Trade Commission, therefore, is merely to apply the law to the facts as a Master in Chancery would do. This is to use the very analogy by which the duties of the Trade Commission under another section are described. So when the court comes to consider the Trade Commission's action on review it takes its findings and order and treats them as it would the report of a Master in Chancery, with the exception that it cannot reexamine a finding of fact unless there is no legal evidence to support it. It may remand the case for additional evidence for further finding and report. Proper equity practice requires that the Chancellor should not set aside the finding of a Master on the facts unless plainly contrary to the weight of the evidence. The difference between this and treating the finding of fact as conclusive is, so far as I can see, the only difference between the function of the court in dealing with the Trade Commission's order and that which it performs in dealing with the report of its Master in Chancery as to the facts and the proper order or decree to be entered upon them in an equity cause.

It is not germane to my purpose to discuss the effect of the prohibition of interlocking directorates and the denunciation as federal crimes of breaches of trust of those having control of interstate commerce carriers, except to say that the inconvenience they may cause to law-abiding business men of scrupulous honesty will be much more than offset by the substantial good they will do in protection of the public from illegal combinations and in the protection of confiding stockholders from being plundered.

In the last quarter of a century we have witnessed the enormous growth of power in bodies of men, secured by the combinations of capital on the one hand and of labor on the other. The necessity for the combination of capital, in order to increase the effectiveness of production and manufacture and to reduce its cost, has been fully recognized by all persons at all familiar with business conditions and economic principles. The equal necessity

for the combination of labor, in order to exact from capital its fair share of the value of the joint product, consistent with the normal operation of economic law, has also been recognized by sane students of economic and social science. The enormous power which these combinations have, has proved to be subject to great abuses.

The combinations of capital too frequently strengthened their control by the use of money in politics and through the instrumentality of the political boss and the machine. After the country had sobered down from the intoxication of its enormous business expansion and prosperity, the scales fell from the eyes of the people, they saw the danger of plutocracy, and throughout the length and breadth of the land they attempted, by their representatives in the legislatures and in Congress, to curb this power of combined capital and to restrain it within legitimate limits, and so we had the interstate commerce law, the anti-trust law, and the amendments to those laws, and the struggle in the courts, until now both laws have received authoritative construction and have become reasonably effective for the purpose for which they were enacted.

But the momentum that such a popular movement acquires prevents its stopping at the median line, and we are in danger of excessive regulation which will really interfere with that freedom of trade and unrestricted initiative which has helped so much the material progress of the country heretofore. Party leaders and parties, in the imaginative and efflorescent style of party platforms and stump deliverances, have denounced the slow judicial process of remedying evils and establishing justice, and have called for cross-cut methods, direct and summary remedies, and the suppression of evil and the upholding of the good by executive action in which those acting were not to be bothered by precedent but were to decide everything upon the merits of the particular case. Legislatures have sought to meet this demand by creating commissions with large powers to enforce laws. In so far as these commissions have rendered more effective the exercise of what is really an executive function, they have been good things and often they have relieved courts of quasi-executive duties that

have not only burdened the courts, but also exposed them to unnecessary prejudice and attack, because the matters acted on had a political, economic, or social phase. Many have been disposed to view this delegation of powers to commissions as derogating from the authority of courts and as tending to deprive the citizen of a real judicial hearing in defense of his right to liberty and property and the pursuit of happiness. Whatever the early effect, I do not think we need fear such an ultimate result. The natural spirit engendered in every one who has blended with all his conceptions of social and political life the principles of Anglo-Saxon justice will prompt limitations in such legislative enactments and in rules of practice for their execution, and preserve the same due process of law for the party litigant that the barons at Runnymede wrested from King John for the freemen of England. The eminently judicial Court of Chancery was evolved from the wide, unlimited, and apparently arbitrary discretion that the King vested in his Chancellor to remedy individual instances of injustice done by the King's own courts of common law. The natural conservative tendency even of radical reformers when confronted with the difficult duty of drafting practical legislation is well illustrated in the provisions of these two statutes, which are far less drastic and revolutionary than we had been led to expect when there was so much thundering in the index.

While the abuses of combinations of capital have aroused public alarm and evoked the most stringent laws to suppress them, the abuses growing out of the enormous power of combinations of labor, which have been also manifest, have not evoked the same regulative legislative tendency. Persons subjected to illegal invasion of their rights by labor combinations have sought to protect themselves in their business and property by invoking the ordinary procedure in courts of justice; and in many instances this has been effective. Litigation of this kind has not always resulted in right decision. Courts are a human instrument, and they sometimes err. A very few instances of error or injustice against trades-unions have been a sufficient basis to arouse great and disproportionate complaint and to bring to bear the most

weighty political influence upon legislatures to pass laws to prevent their recurrence, even if those laws are calculated to create a special class of litigants and to render them immune from the ordinary remedial process in court to which every other citizen is subject.

Along with this there has been a strong movement, and a most beneficial one, to give equality of opportunity to wage-earners in their struggle for a livelihood and their pursuit of happiness, and this movement has been greatly promoted by the direct efforts of labor combinations and their political influence. Without such combinations, we may well doubt whether the present condition of the wage-earner would be near so good as it is today. The history of the common law shows beyond question that its principles were framed in the interest of the employer, and that in the mutual relations of master and servant the servant was at a disadvantage. The power of combination among wage-earners, which if not condemned was at least frowned upon at common law, has created now an equality of resources in the inevitable and continuing contest between employers and employees that has greatly made for the improvement of the latter. The Interstate Commerce Employers' Liability Act abolished the narrowing and unfair fellow-servant rule of the federal jurisdiction. The pending Workmen's Compensation Act, which proceeds on the theory that society should bear the risks of the dangers of employment to the wage-earner, is a measure which, while it doubtless needs perfecting as it is tested by experience, is of the highest value from a social standpoint, and will, I believe, prove to be of equal benefit from the business standpoint of the employer. This act will ultimately, too, relieve the courts of a heavy volume of litigation. The hours-of-labor statutes, child-labor statutes, the tenement-housing statutes, the statutes requiring wholesome surroundings for labor, are legislation paternal but useful.

In all these provisions for the benefit of the wage-earner, however, there has been no special legislation looking to the enforcement of his correspondent duty as a law-abiding citizen, or to the effective restriction of the power of combined labor to commit abuses, as there has been against combinations of capital.

This is not necessarily an unjust discrimination. The abuses of one class of offenders against law and justice may be of such a character as to require more elaborate machinery to prevent and punish them than that of another, and in a certain sense this is a true distinction between combined capital and combined labor. The control of capital is concentrated in the hands of comparatively few. That is what the combination of capital necessarily involves. The capital and profits may and do belong to a very large number, but the real improvement in business methods has come from the amassing of the earnings of the many into funds which, by the genius of the comparatively few managers, are made vastly more productive than if they remained for the separate investment and control of each owner. Such managers, when they wish to resort to abuses of their power, can hide the truth and clothe their proceedings with a cloak that makes the discovery of illegal method and its punishment difficult. With the combinations of labor it is somewhat different. The co-operation of great numbers is essential when they resort to methods of oppression and tyranny, and their lawlessness is generally the lawlessness of the assault and crimes of open violence, for the punishment of which the usual statute of crimes and misdemeanors and the ordinary machinery for the enforcement of such laws should be sufficient. The ineffectiveness of the machinery in such cases is not due to inadequacy of the law so much as to the inertia or political timidity of the officers of the law or the prejudice of voters and juries growing out of sympathy with the cause, in supposed furtherance of which, such offenses are committed.

The great political power that labor combinations are believed to exercise has enabled them successfully to press upon legislatures the idea that they are politically a privileged class, that the interest of the community lies in making them so, and that their cause is so important that the ordinary means of enforcing the law against their violations of it should be weakened rather than strengthened. To yield to this view it seems to me is unwise. Between the machinations of the lawless manipulator of capital and the aggressions of the lawless leader or agents of combined

labor, there is a forgotten man, sometimes described as the "public," for whom government and society chiefly exist, who in the clashes between capital and labor finds himself ground between the upper and the nether millstone.

We must recognize, however, that the movement to make combinations of labor a privileged class before the law has had considerable success. In England the legalizing of secondary or compound boycotts in a trade dispute by wage-earners is complete even against unconcerned outsiders. In our last Sundry Civil Bill, Congress has expressly limited the use of the money specifically appropriated for the Department of Justice to enforce the anti-trust law so that it cannot be used in prosecutions of wage-earners and farmers charged with its violation. Farmers were here included not because they asked it, but in order to enlist their political aid in maintaining the exemption. In some of the states, laws have been passed to permit wage-earners and farmers to do things which are illegal when done by others. During the current year the Massachusetts Legislature has passed a law limiting injunctions in labor disputes which is nearly as radical as the English statute, and which seems to me to go much further than the limitations of the Clayton Act. One feels in respect to such an enactment by the conservative, law-abiding Old Bay State, which loves equality and properly prides itself as a government of laws and not men, as the author of the Biglow Papers did with reference to her attitude in the Mexican War, when he said:

Massachusetts, God forgive her, is a-kneelin' with the rest.

We are living in an age of what I may call factionalism, an age in which classes are disposed to think that the happiness of each class is more important than the general sum of happiness of the entire community, and that the members of each class, denied what they wish, may properly violate the law, destroy property and even lives in order to secure it. Such a spirit is dangerous. It is an evidence of a lack of that self-restraint without which the bonds of society will necessarily be loosed. We see it in the wild ravings and action of the militant suffragettes in England. We see it in the resistance to lawful authority in Idaho and Colorado by the Western Federation of Miners. We see it in

the dynamite plots of the bridge workers and the iron workers at Los Angeles and at Indianapolis. We see it in opposition to federal legislation to protect aliens' treaty rights. Such a spirit flouts the law, does not regard order and peace as essential to social and political happiness, but exalts the supreme selfishness of a class and is willing to pull down the structures of society in order to secure the granting of its particular demands. The struggle to put legislation of the kind I have mentioned on the national statute book has been long and earnest. And now those who have led in the movement claim to have accomplished their purpose in the legislation of the sitting Congress which I am now examining. Let us see how far they have been successful.

Section 6 of the Clayton Act reads as follows:

“That the labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations instituted for the purposes of mutual help and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof, nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under anti-trust laws.”

There is language in this section, especially the last clause, which, standing alone and without explanation, might seem to show congressional intention to exempt such associations and their members altogether from the operation of the anti-trust acts. But such is evidently not the proper construction. The representatives of organized labor applied to Congress for this provision, on the ground that they were afraid that voluntary associations for increasing wages and bettering terms of employment, where the employment was in interstate commerce, might be considered, *per se*, illegal restraints of that commerce and so subject them to dissolution. They, therefore, wished them declared legal. That it was not intended to make members of such associations a privileged class and free from the operation of general laws is clearly shown by the careful language of Congress, which authorizes the existence and operation of such associations and forbids the restraint of their members when “lawfully carry-

ing out the legitimate objects thereof." The words following, "nor shall such organizations or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under the anti-trust laws," which are introduced by a semicolon and the conjunction "nor," necessarily carry forward in the word "such" the same condition of the exemption, to wit, that the corporations and the members shall be "lawfully carrying out the legitimate objects thereof." Courts would naturally and properly indulge the presumption against a class privilege based on membership in such voluntary organizations, unless the purpose of Congress to confer it were clear. When, however, there is here express language expressly rebutting such a purpose, the intention of Congress becomes manifest to make this Sec. 6 a mere declaratory statement of existing law in order to remove the unfounded fears of those petitioning for such a statement.

The procedure prescribed in Secs. 17, 18, and 19 of the Clayton Act as to the issuing of preliminary restraining orders without notice and of preliminary injunctions in federal courts is admirable. It is in accordance with the best equity practice and will doubtless tend to prevent any ill-advised orders without notice and hearing.

Sec. 20 of the Clayton Act is the principal section of the act for the limitation of injunctive relief in labor disputes. It forbids the issuing of restraining orders and injunctions in all cases:

" 1. Between an employer and employees;

" 2. Between employers and employees;

" 3. Between employees;

" 4. Between persons employed and those seeking employment;

" when it involves or grows out of a dispute concerning terms or conditions of employment unless it is necessary to prevent irreparable injury to property or to a property right for which there is no adequate remedy at law; and such property or property right must be described with particularity.

" And no such restraining order is to prohibit any person or persons from:

" 1. Terminating any relation of employment;

" 2. Ceasing to perform any work or labor;

" 3. Recommending, advising, or persuading others by peaceful means so to do;

“ 4. Attending at any place where any such person may lawfully be for the purpose of peacefully obtaining or communicating information ;

“ 5. From peacefully persuading any person to work or to abstain from working ;

“ 6. From ceasing to patronize or to employ any party to such dispute ;

“ 7. From recommending, advising, or persuading others by peaceful and lawful means so to do ;

“ 8. From paying or giving to or withholding from any person engaged in such dispute any strike benefits or other moneys or things of value ;

“ 9. From peaceably assembling in a lawful manner and for lawful purposes ;

“ 10. From doing any act or thing which might lawfully be done in the absence of dispute by any party thereto.

“ And none of such acts shall be held to be violations of any law of the United States.”

The limitation in this act in terms affects injunctions in equity and not suits at law, but the acts which it forbids the courts to restrain they are also forbidden to treat as violations of any law of the United States. How far this would prevent a suit at law based on diverse citizenship in the federal court for injury from an act like one described in the section not affecting interstate trade is a question I have not time to discuss.

The section introduces an exception to the power of a federal court of equity to give injunctive relief under general principles of equity jurisprudence. The field of that exception is hedged about with limitations of a threefold character. Those who rely on the exception must bring themselves within all three limitations in order to take advantage of its exemption and privilege.

The first limitation is as to the character of the parties to the suit, which must be between employers and employees, between employees, or between employed and those seeking employment. This, of course, leaves the law as it is in suits brought by those who are not employers or employees or seeking employment against belligerents in a labor war for illegal injuries inflicted. Federal courts may, therefore, still, on the prayer of an outsider, enjoin a boycott against him to compel him to take part in the fight with which he has no concern. Thus the for-

gotten man who has no part in the fight is remembered and may still appeal to a court of equity as a neutral to be saved from the aggressions or coercion of either contestant.

The second limitation upon this exception is in the subject-matter of the action. To establish the exemption or privilege, the issue must be a dispute concerning terms or conditions of employment. This, too, excludes from the exception an injunction in favor of a third person not a party to the labor fight, who is sought to be drawn into it by boycott. Then further to justify the exemption, the irreparable injury complained of, for which there is no adequate remedy at law, must not be to property or to a property right of the employer or employee engaged in the labor dispute. Of course, the requirement that the injury shall be irreparable and one for which damages at law would be an inadequate remedy, is only declaratory of general equity practice. We come then to the question what the phrase "injury to property or to a property right" includes. In the bills presented by the labor organizations and in some legislation in the states such words have been followed by a proviso that injury to business of a plaintiff shall not be considered an injury "to property or a property right." The failure of Congress to add this proviso, though urged to do so, must be regarded as significant, and would seem to imply that it was the congressional intention to leave to the court to decide whether injury to a man's business of an irreparable character was not an injury to a property right. It would certainly be an injury to the good-will of such business. This, under the decisions of the Supreme Court of the United States, is a thing of money value incident to tangible property and peculiarly within equitable protection by injunction.

The third limitation of the exception is in the definition of acts that may not be enjoined in such cases as fulfill the previous requirements. These acts in controversies between employer and employees and between employers and between striking employees and those seeking employment have with one or two exceptions been held to be lawful, and are thus merely declaratory of existing law. No court has held that an employer could have an injunction against men leaving his employment, or ceasing to patronize him, or against picketing by strikers where it takes the peaceful form

described in the section. The general inhibition against injunctions forbidding an act which might be lawfully done in the absence of the dispute is also only a statement of the law as it always has been. An act mentioned in the statute which has sometimes been held to be restrainable in equity has been that of persuading others, *i. e.*, outsiders, from ceasing to patronize or employ the opponent in such a dispute. This seems to legalize not only the secondary boycott, so far as it is carried on by peaceful persuasion, but also the blacklist. I fear this will leave some cruel injuries without a remedy. The withholding of strike benefits or other things of value from deserters and the paying of them to recruits may be a modification of the existing rule as held by some courts, but not, I think, in the best-reasoned cases.

This Sec. 20, except for its studied apparent ambiguity in its use of the term "property or property right," seems to have the merit of laying down a broad practical distinction between what is allowed in a labor fight and what is not. It segregates the parties to the controversy from the rest of the community and says in effect that acts committed singly or in concert by the parties on either side against the other which do not amount to violence or crime or a threat of either, and which do not involve peaceful moral coercion of outsiders, are legal in the trade warfare and shall not be enjoined. Recommendation and persuasion of others to help either side in the warfare are declared to be legal, but not so moral coercion. The real and great danger from boycotts in such disputes is the use of them to drag into trade disputes against their will all classes of the community not normally related to the issue. It is the embarrassment and injury they would thus inflict upon the forgotten man, the entity called the "public," that creates the illegality. This was actionable before the new statute and remains so. Sec. 20 does not legalize it. In Sec. 7 it only forbids injunctions against "persuading others [*i. e.*, outsiders] by *peaceful and lawful* means" to cease to patronize or employ any parties to such disputes. It therefore follows that, in spite of Sec. 20, parties to a labor dispute on one side may have an injunction against the parties on the other side to prevent the latter from using as a weapon in the fight such a boycott of outsiders.

Mr. Justice Lamar, speaking for the court in the *Buck's Stove* case (221 U. S. 437), said :

" Courts differ as to what constitutes a boycott that may be enjoined. All hold that there must be a conspiracy causing irreparable damage to business or property of the complainant. Some hold that a boycott against the complainant by a combination not immediately connected with him in business can be restrained. *Others hold that the secondary boycott can be enjoined where the conspiracy extends not only to injuring the complainants but, secondarily, coerces or attempts to coerce his customers to refrain from dealing with him by threats that unless they do they themselves will be boycotted.* Others hold that no boycott can be enjoined unless there are acts of physical violence or intimidation caused by threats of physical violence."

In the case of *Loewe vs. Lawler* (208 U. S. 274) the Supreme Court took its position with courts in the second class, described by Mr. Justice Lamar, which I have italicized. The effect of that case is stated by the court in *Eastern Association vs. United States* (234 U. S. 600), as follows :

" In *Loewe vs. Lawler* (208 U. S. 274) this court held that a combination to boycott the hats of a manufacturer and deter dealers from buying them in order to coerce the manufacturer to a particular course of action with reference to labor organizations, the effect of the combination being to compel third parties and strangers not to engage in a course of trade except upon conditions which the combination imposed, was within the Sherman Act."

It follows that the new statute does not affect *Loewe vs. Lawler* at all.

The remaining provisions of the act, in Secs. 21 to 25, inclusive, prescribe the procedure in certain cases of contempt of the judgments, orders, and decrees of a federal court. They apply only to cases where the act of disobedience is an offense against the criminal laws of the United States or of the state wherein it is committed, and not then when it is committed in the presence of the court or so near thereto as to interfere with the administration of justice, or when the suit is one brought by the United States.

Its chief feature is contained in the following words :

" In all cases within the purview of this act such trial may be by the court or, upon demand of the accused, by a jury, in which

latter event the court may impanel a jury from the jurors then in attendance on the court, or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for a misdemeanor."

Opportunity for review of judgments of conviction in such cases is given.

It has been contended that the use of the word "may" leaves the question of ordering a jury in such a case to the discretion of the court. I agree that the expression is unfortunately ambiguous and that it would have been greatly better to have used the stronger word, if it was intended to make the provision as to a jury mandatory. It enables those who contend that discretion to refuse a jury trial is still vested in the court to argue that this provision, like so much of the rest of this legislation, was merely intended to be declaratory of what was already the best equity practice. Still it should be said in answer that "may" often is construed to mean "must" or "shall," and I think it should be so construed here. The use of the words "upon demand of the accused" rebuts the idea that he is asking something which the court in its discretion may withhold. Moreover Sec. 24 of the act indicates that it was intended by this procedure to change existing equity procedure, because it specifically provides that all other cases of contempt not affected by this language "may be punished in conformity to the usages of law and equity now prevailing."

The procedure by jury and appellate review in contempts is thus limited to a narrow class of cases. Were Debs to do the things he did in 1894, his contempt would not come within this statute for the order he disobeyed was made in a suit by the United States. He could still be tried without a jury, therefore, and sentenced to six months in jail for contempt of a restraining order of the federal court without direct review or repeal. In the great body of litigation by private persons, in which the disobedience of a judgment, order, or decree is not a crime or misdemeanor under state or federal law, the power of the courts to maintain their authority and enforce their judgments is also unaffected. In times past we heard much in party platforms and in stump

oratory of government by injunction and the outrage of having courts formulate offenses that were not crimes by statute and then punish the committing of them without a jury. Those of us who never thought that this was anything but buncombe seem to be vindicated by the failure of the present statute to remedy this much-heralded and so-called abuse of judicial power.

All these provisions have been called the charter of liberty of labor. We have seen that the changes from existing law they make are not broadly radical and that most of them are declaratory merely of what would be law without the statute. This is a useful statute in definitely regulating procedure in injunctions and in express definition of what may be done in labor disputes. But what I fear is that when the statute is construed by the courts it will keep the promise of the labor leaders to the ear and break it to the hope of the ranks of labor. This will be an additional reason for blaming and attacking the courts. It is really a shifting of responsibility from Congress to the judicial branch of the government that has had to bear so many of such burdens conceived in political timidity of legislators. However this may be, I think we should be profoundly grateful that the impairment of the authority of our federal courts has been but small when compared with the very drastic and dangerous changes which were pressed and proclaimed as certain.

This Association four years ago appointed a Special Committee to Oppose the Judicial Recall, and that committee has done great work. Its present chairman, Mr. Rome G. Brown, of the Minneapolis Bar, has delivered effective addresses to many State Bar Associations throughout the country, and has encouraged legislative opposition in many states to the embodiment of these heresies in statutes. The report of the committee shows that there has been a distinct falling off in the support of these fundamentally unwise and dangerous proposals. They were incorporated in the platform of the Progressive party, and the leader of that party has felt called upon to declare that they were the rock upon which it was founded, and were essential to the efficacy of every other one of the reforms which the platform of the party set forth and advocated. It would appear that the party which

fathered these proposals now finds that instead of being the rock on which it is founded, it is, to change the metaphor, the rock on which it founders. Certainly it seems wise to its leaders to ignore this part of their original propaganda which indicates that it has ceased to be vote-getting and, indeed, has become a burden to any party that assumes to press it. I do not mean to say that the denunciation of the courts has not continued to be a favorite theme in the mouths of a certain class of orators, but the originators of this preposterous nostrum of recall of decisions are engaged in scaling it down into changes in our judicial system which are not to be commended but which are much less radical and objectionable. In New York the Progressive party has abandoned its platform altogether and confined its appeal to the voters to a declaration against boss rule, while its candidate for Governor has rejected the recall. In Massachusetts, too, such methods of reforming the judiciary are not made the subject of discussion at all by the Progressive party, and its evident effort is to induce the voters to ignore them. The demon rum has there been substituted as the object of attack, instead of "the divine right of fossilized judges," and of this change, whatever our views of prohibition, we can express our unqualified approval. The only state in which the recall of judicial decisions has been adopted is the State of Colorado, and the present condition of that state with reference to governmental authority is not such as to commend those who have formulated its policies in the recent past.

I regret to say that the earnest efforts of Mr. Shelton and his Committee on Uniform Procedure to secure the passage of a bill entrusting the Supreme Court with the power to make rules for the procedure in common law cases in the federal court have not thus far been successful. The Judiciary Committee of the House reported the bill favorably, as it has nearly all of the American Bar Association bills. But the pressure upon Congress for other measures, thought by the leaders to be more important, has prevented the passage of the bill. Of course we must not be discouraged by this delay. We must continue to urge the reform. With deference to a different opinion of many in this Association, my own judgment about the Shelton Bill is that it is not quite radical

enough. I think it ought to provide that all suits in the federal court should be brought in one form of civil action, thus uniting cases in law and equity, and that then the Supreme Court should be authorized and directed to provide a simple procedure by rules of court, in analogy to the method that now prevails in the High Court of Justice in England.

I am aware, of course, that there is language in the decisions of the Supreme Court of the United States from which many have inferred that such an act as I propose would be contrary to the Constitution. The terms in which the judicial power is extended to the United States to include all cases in law and equity arising under the Constitution and laws of the United States, and the Seventh Amendment prescribing a jury trial in all suits at common law involving more than \$20 and forbidding any reexamination of the verdict of the jury except according to the rules of the common law, are supposed to fix forever upon federal courts an antiquated procedure. But no case has ever been decided by the Supreme Court in which this point is adjudged. Every case which has arisen has been under statutes of the United States which have expressly established two separate courts, one of equity and one of law.

The requirement that in suits at common law a jury trial must be had and that its result shall be reexamined only according to common law usage has recently been considered by the Supreme Court in passing on the validity of a practice intended to expedite procedure. *Slocum vs. New York Life Ins. Co.*, 228 U. S. 364. I regret to say that the majority of the court took what with deference would have seemed to me before the decision a somewhat technical view of that amendment. The argument of the minority of Justices appeals strongly to the enthusiast for simplification of procedure.

But there is nothing in the *Slocum* case which holds that we may not have under the Federal Constitution a union of a suit at law and an equitable defense in one form of action. Such a union would not in any way destroy the rights or opportunities of the parties to have the common law remedy of trial by jury and its restricted review where the issue of fact is of such a nature that

a jury would be required in a suit at common law. We are not limited in the establishment of this proposition to mere theoretical statement or reasoning. Every code state since the Field Code was made the law in New York, has shown by actual experience the possibility of uniting in one form of action all the cases arising in law and equity between litigants without impairing the right of jury trial at common law and without creating the slightest confusion. No litigant has a vested right in mere delay in procedure. It does not prejudice the plaintiff in the suit at law who is seeking to try his issue before a jury that his opponent by pleading his equitable defense and varying the issues is able to defeat his purpose in the same case instead of incurring the delay and expense of securing an injunction to stay the case at law and making the equitable issue in another court.

I do not intend to take up your time to-day in a detailed discussion of the best methods of reforming judicial procedure, but there is one means of facilitating the dispatch of business in courts of justice that might well be applied in our federal courts. We have in our federal system 32 circuit judges and 94 district judges. The district judges are apportioned, one, two, or three, or even more, to a state with its judicial districts, and the states make up the nine circuits. Originally the district judges and the circuit judges of each circuit could be used to help along the business in all the districts of that circuit, and in the business of its Court of Appeals. Now the Chief Justice can send district judges in a limited class of cases from one circuit to another circuit. This system works well so far as it has been applied, but I think a much greater advantage could be derived from it if it were amplified to its logical development. Now that litigation has increased in parts of the country so that its mass is overwhelming, we must approach the problems of its disposition in the same way that the head of a great industrial establishment approaches the question of the manufacture of the amount that he will need, to meet the demand for the goods which he makes. This is done by estimate of the work to be done and an assignment each year of a competent force to do it. In other words, the time has come to introduce into the dispatch of judicial

work something of the executive method that great expansion has forced in other fields of human activity.

In the judicial business of the United States we should devise a system by which the whole judicial force of circuit and district judges could be distributed to dispose of the entire mass of business promptly. Some judges have too much and a greater number could do more. Let us equalize their burdens and give them a maximum of effectiveness. It seems to me that either the Supreme Court or the Chief Justice should be given an adequate executive force of competent subordinates to keep close and current watch upon the business awaiting dispatch in all the districts and circuits of the United States, and likely to arise during the ensuing year, to make periodical estimate of the number of judges needed in the various districts to dispose of such business, and to assign the adequate number of judges to the districts where needed. Then the Supreme Court by making the rules of procedure and by distributing the judicial force could greatly facilitate the proper disposition of all the legal business in the country and in a sense become responsible for its dispatch. If it is found that there are not judges enough, then we should hear from the Supreme Court as a competent authority, not influenced by political or personal considerations, how many judges are needed and where, and the judicial force could be increased to meet the real exigency. On a small scale this system has been worked in the Municipal Court in Chicago and in some other municipal courts, and the possibility of thus getting rid of an enormous mass of litigation has been demonstrated.

Of course, it will be said that this is imposing a great burden on a court that is already weighed down with too much work. I do not ignore the justice of this criticism, but it can certainly be partially, or perhaps wholly, met by taking away from the Supreme Court all questions which do not involve, as a genuine issue, the construction of the Constitution, and by limiting the duty of the court to hear any other cases to those which upon a writ of *certiorari* the court in its discretion draws to its jurisdiction.

The agitation with reference to the courts, the general attacks

upon them, the grotesque remedies proposed of recall of judges and recall of judicial decisions, and the resort of demagogues to the unpopularity of courts as a means of promoting their own political fortunes, all impose upon us, members of the Bar and upon judges of the courts and legislatures, the duty to remove, as far as possible, grounds for just criticism of our judicial system. The federal system extends into every state. It is under the control of one legislature and subordinate to one Supreme Court. Here is the opportunity to furnish to the country a model which shall inspire state legislatures and state Supreme Courts to similar efforts to make their courts the handmaid of prompt justice.