Mr. O'Leary: As I submitted to you earlier, the individual trader can do many things in the way of price-cutting and restricting supply, as is evidenced in sections 3 and 4 of the Act.

The danger of ascertaining legal rights by reference to words such as "reasonable" or "fair" (which this Bill proposes to add to the Act) was stressed by the Supreme Court of the United States in 1896, in a long judgment convicting twenty railroad companies of breaches of the Sherman Anti-Trust Act. They point out the impossibility of deciding upon what is "reasonable" in the following words:—

> If only that kind of contract which is in unreasonable restraint of trade be within the meaning of the statute, and declared therein to be illegal, it is at once apparent that the subject of what is a reasonable rate is attended *with great uncertainty*. What is a proper standard by which to judge the fact of reasonable rates? Must the rate be so high as to enable the return for the whole business done to amount to a sum sufficient to afford the shareholder a fair and reasonable profit upon his investment? If so, what is a fair and reasonable profit? That depends sometimes upon the risk incurred, and the rate itself differs in different localities: which is the one to which reference is to be made as the standard? Or is the reasonableness of the profit to be limited to a fair return upon the capital that would have been sufficient to build and equip the road, if honestly expended? Or is still another standard to be created, and the reasonableness of the charges tried by the cost of the carriage of the article and a reasonable profit allowed on that? And in such case would contribution to a sinking fund to make repairs upon the roadbed and renewal of cars, &c., be assumed as a proper item? Or is the reasonableness of the charge to be tested by reference to the charges for the transportation of the same kind of property made by other roads similarly situated? If the latter, a combination among such roads as to rates would, of course, furnish no means of answering the question. It is quite apparent, therefore, that it is exceedingly difficult to formulate even the terms of the rule itself which should govern in the matter of determining what would be reasonable rates for transportation. While even after the standard should be determined there is such an infinite variety of facts entering into the question of what is a reasonable rate, no matter what standard is adopted, that any individual shipper would in most cases be apt to abandon the effort to show the unreasonable character of a charge, sooner than hazard the great expense in time and money necessary to prove the fact, and at the same time incur the ill-will of the road itself in all his future dealings with it. To say, therefore, that the Act excludes agreements which are not in unreasonable restraint of trade, and which tends simply to keep up reasonable rates for transportation, is substantially to leave the question of reasonableness to the companies themselves.

Mr. O'Leary: If the Bill becomes law, Judges would have to follow the common law and endeavour to interpret what is fair and detrimental to the public welfare, and it is submitted that that would have very serious consequences. To summarize the matter, the common-law conception of public interest, fairness, public welfare, and public policy is far too unsatisfactory and uncertain to make the interpretation of the Commercial Trusts Act depend upon it. The flour combine in 1927 escaped liability under section 5 because of these very words "contrary to public interest," and in the present Bill the same difficulties would arise with the words that I have mentioned—"fair" and so on.

The next point I make is that the Privy Council, in deciding in favour of the flour combine in the Crown Millers' case (1927), pointed out that the New Zealand Act does not define "contrary to public interest," but has left the matter to be ascertained by the Courts, and stated that "It is not for this tribunal, nor for any tribunal, to adjudicate between conflicting theories of political economy." It is submitted that this is what may happen too if the Bill is amended in the way suggested—the matter being left to the Courts to interpret—and, after all, Judges are only human, and although making decisions on the evidence produced, these decisions may not be fair.

Judge Sim, when deciding the flour case in the New Zealand Supreme Court (and he was later upheld in the Privy Council), made the statement that—

> The price secured by means of a monopoly may be higher than would have been obtained under free competition, but that does not make the monopoly contrary to the public interest.

Now, I would like to deal for a moment with "price-cutting," and I refer to a statement that appeared in the press that the Act shields price-cutting. This is erroneous. The Act does not prevent an individual manufacturer or wholesaler from refusing to sell to any trader who will not observe a fixed resale price. A list of at least fifty articles is available upon which the retail price is permanently fixed. (That statement appeared in the *Evening Post* on the 24th August, 1935.)

What the Act does prevent is a combination of manufacturers or wholesalers forming an association to bring pressure to bear upon independent traders to fix prices, by refusing supplies unless the prices fixed are observed.

[Mr. O'Leary read extract from *Evening Post* mentioned above:]

> This was an extreme and far-reaching prohibition to place on price, &c. [See page 3 hereof.]

This Bill would, it is submitted, allow monopoly in the worst sense and would encourage trusts, coercion, threats, intimidation, boycotts, blacklists, and refusal of supplies to independent traders. The facts in the prosecution of the Merchants' Association of New Zealand in 1912 on the sugar monopoly speak for themselves.

In regard to combinations, I shall quote for you an extract in regard to a case *United States* v. *Trans-Missouri Freight Association* ((1896) 166 U.S. 290, at 339). It is to the public interest that there should be a free flow of trade and free competition. Combinations will stifle competition and artificially raise prices. The following very important observations were made by the Supreme Court of the United States in that case in convicting twenty railroad companies of violating the Sherman Anti-Trust Act:—

> The claim that the company has the right to charge reasonable rates, and that, therefore, it has the right to enter into a combination with competing roads to maintain such rates cannot be admitted. The conclusion does not follow from an admission of the premise. What one company may do in the way of charging reasonable rates is radically different from entering into an agreement with other and competing roads to keep up the rates to that point. If there be any competition, the extent of the charge for the service will be seriously affected by that fact. Competition will itself bring charges down to what may be reasonable, while in the case of an agreement to keep prices up competition is allowed no play; it is shut out, and the rate is practically fixed by the companies themselves by virtue of the agreement, so long as they abide by it.