IN THE

Supreme Court of the United States.

118.

THE UNITED STATES OF AMERICA,

Petitioner-Appellant,

against

THE AMERICAN TOBACCO COMPANY AND OTHERS,

Defendants-Appellees.

119.

THE AMERICAN TOBACCO COMPANY AND OTHERS,

Appellants,

against

THE UNITED STATES OF AMERICA,

Appellee.

CROSS APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

ORAL ARGUMENT OF JOHN C. JOHNSON, ESQ., FOR THE DEFENDANT THE AMERICAN TOBACCO COMPANY AND CERTAIN OTHER DEFENDANTS-APPELLEES IN THE FIRST OF SAID APPEALS AND APPELLANTS IN THE SECOND.

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Law

ent. May 27, 1913

IN THE

Supreme Court of the United States.

THE UNITED STATES OF AMERICA, Petitioner-Appellant, AGAINST THE AMERICAN TOBACCO COMPANY and others, Defendants-Appellees,	No. 316
THE AMERICAN TOBACCO COMPANY and others, Appellants, AGAINST THE UNITED STATES OF AMERICA, Appellee.	No. 317

Oral Argument of John G. Johnson, Esq., for the Defendant The American Tobacco Company and Certain Other Defendants—Appellees in the First of said Appeals and Appellants in the Second.

Mr. JOHNSON said: The American Tobacco Company was organized before the Sherman Act for the manufacture of smoking tobacco, cigarettes,

and other matters of tobacco. It was organized originally by the merger of five corporations. That took place antecedently to the Sherman Act; and antecedently to that Act it was in the possession of a percentage of the cigarette manufacturing industry considerably larger than it now possesses. It is a purely manufacturing company, selling its manufactured product. It does not engage in selling generally. From time to time it has enlarged its operations, for reasons stated in the proof and uncontradicted by proof, in order that it may manufacture more economically and more largely, and be able to sell a more largely produced product. It is not a holding company in the sense in which some of the decisions speak of a company holding merely for the purpose of holding. From time to time it acquired additional properties, always manufacturing properties, and always for purposes of its own enlargement. There is no proof whatever—on the contrary, the proof is directly opposed—that there was any acquisition at any time of any property other than for the furtherance of its own business ends.

As the business of the American Tobacco Company enlarged, as a manufacturing company, it has done precisely what every great manufacturer is obliged to do. In hunting for economies it has acquired the control of some of the materials—never the raw material, the leaf tobacco—but of some of the materials, and of the purchase of some of the materials. It has to some extent, but not to a large extent, endeavored to increase the facilities for the distribution of its goods. It has insured its own product. It has done, in fact, all those things which a greatly enlarged business enables a manufacturer to do in such business for the furtherance of its ends.

The question is whether that company, thus organized, thus enlarged, thus conducting its busi-

ness, is doing an illegal business? And in order that we may know exactly where we stand in the reasons which the government assigns for its business being illegal, let us take them upon their own wording, and see what they say:

"We do not maintain that restraint of commerce is denounced by the Sherman Act unless it is direct and material, either in tendency or effect; and, of course, do not insist that every contract or arrangement which causes the elimination of a competitor in interstate trade is necessarily unlawful. The statute was intended to foster, not destroy, business operations universally regarded as promotive of the public welfare.

"Accordingly, we do not avouch and will not attempt to support the extreme construction of the Act adopted by the Presiding Judge below under which he declared, in substance, that it would be unlawful for any two individuals driving rival express wagons between villages in contiguous States to combine forces by forming a partnership, or otherwise, and operate a single line; or by contract 'to deprive the country of the services of any number of independent dealers, however small.'

"Contracts, conspiracies or combinations which give power to restrain commerce or necessarily tend to monopoly are unlawful without more. The essential purpose of the statute is to prevent injury—not merely to reverse a course of conduct. The evidence, however, clearly shows that acting in concert the defendants have exercised coercion and duress and have practiced unfair, oppressive and wicked trade methods" (Brief, pp. 28-9).

I do not propose to cover the ground which my colleague covered so thoroughly yesterday, and review those things. That question of whether there are such acts—which we utterly deny—must de-

pend upon the effect of the oral argument, and upon the reading of the careful paper books which have been prepared on both sides of this controversy. What concerns me is that in that statement of the law we have inserted many things which we do not find in the statute, and we have the non-insertion of some things which we think should be there. For instance, let us take it up a little and see what it means:

"We do not maintain that restraint of commerce is denounced by the Sherman Act unless it is direct."

And yet, stating that principle that the Sherman Act only denounces restraint of commerce that is direct, we have within the compass of half a page the statement of directly destructive and antagonistic doctrine of this kind: That contracts, conspiracies, or combinations which give power to restrain commerce or transportation are condemned by the Act.

Those two things cannot stand together. It cannot be that the Sherman Act condemns only that which is a direct restraint of trade, and yet condemns that which is not a direct restraint of trade, but condemns that which may, by the possession of power, which may or may not be of illegal acquisition, have the indirect effect of restraining trade. And again—because when your adversaries attempt to state a proposition, and when that proposition is untenable, there is some inference to be drawn from it that it is difficult for them to state anything upon which they can rely with confidence—had they stated: "We stand upon the Sherman Act as it was written," we would know exactly where they stand. But when they say, in the first place, in one breath, that it must be a direct restraint, and say in the next that whether direct or indirect, if there is

the possession of the power which may result in the restraint it is condemned, I fail to see the consistency of the doctrine.

Again:

"We do not maintain that restraint of commerce is denounced by the Sherman Act unless it is direct and material, either in tendency or effect."

Your Honors decided, after a great legal controversy, conducted by the greatest legal minds or among the greatest that have adorned the bar of America, that you could not write into that statute, in connection with the word "restraint," the word "reasonable." And yet the government say that they will write into that statute the word "material," although you see nothing at all of that sort anywhere in it.

Again:

"Contracts, conspiracies, or combinations which give power to restrain commerce or necessarily tend to monopoly are unlawful, without more."

You have there the suggestion of something which has not the sbadow of foundation in any wording of that statute—that combinations that have the tendency or that have the power to restrain commerce are unlawful. The statute condemns the combination in restraint of trade.

Having seen their position, and having seen that they depend in the support of that position upon material acts, and that having been argued before you and standing upon its bottom, let us see where we stand upon the consideration of this subject upon general grounds. And I will state seven propositions:

The first is that this case is ruled by the Knight decision.

The second is that the actual acquisition of property not charged with public use is not a combination, contract, or conspiracy in restraint of trade within the meaning of the Act.

The next proposition is that in the present case the fact is that the acquisition of property was not for the purpose of destroying or restraining trade, but to increase that of the acquisitors. This purpose was accomplished, and trade generally was increased.

The next proposition is that there is no duty on the part of trading or manufacturing corporations to compete. The prohibition is against their agreeing not to compete. And therefore, if non-competition is the result of acquisition, the Act is not violated.

The fifth proposition is to state the difference in the principles involved in the case of public service corporations and in that of private corporations.

The next is that the attempt to monopolize which is condemned is one which involves more than ownership or acquisition, however extensive. It involves the idea of exclusion of others from trade through the instrumentality of some illegal act or action.

And the last proposition is that the remedy decreed in this case is one which defeats the object intended to be accomplished by the Act. The failure to prescribe a remedy which does not involve such defeating is a demonstration of the lack of intent to prohibit anything which can only thus be remedied.

Let us now take the first of those propositions; and that is that this case is ruled by the Knight decision.

There is no use, in hunting for the reason of great judicial acts, to hunt for little shreds of words here and there. In determining what is decided,

nothing is more blinding and deceptive than to hunt for occasional words. Let us face the thing which is done by the decision, and then see whether that thing by that decision done is or is not like another thing which is maintained to be legal on one side and asserted to be illegal on the other.

What was the Knight case? There a sugar refining company, which by reason of mergers and consolidations and acquisitions was in the possession of about sixty-six per cent. of the refining trade of the United States, acquired, paying for the acquisition in its own shares, the shares of stock of companies manufacturing about thirty-two per cent. of the residuum of the refining trade; and after that acquisition of the shares of stock of those companies the American Sugar Refining Company was the refiner of ninety-eight per cent. of the refining product of the country. It, of course, bought its raw sugar in foreign or internal commerce. Sugar was not raised in Pennsylvania. At the same time, as appeared by the averments of the bill and appeared by the proofs, its business consisted to an exceedingly large extent in the distribution through the channels of interstate commerce of the sugar that the selling companies refined. You therefore had the case of manufacturing corporations which could not manufacture until they had, by interstate trade, obtained the raw material; of corporations which depended for their financial prosperity upon the putting through the whole of the country, in interstate commerce, of what they held. And you held in that case that the acquisition of those shares of stock could not be the subject of any animadversion by Federal law, because it was a matter entirely within the control of the State.

In this case we have a corporation which buys its raw product in other States; which distributes, after it is manufactured, the manufactured prod-

uct in interstate commerce; but which does its business and manufacturing in various States under the laws of those States. It has acquired some of the property which it holds by reason of the giving of shares of stock. It has acquired a very considerable if not the considerable quantity of the property and shares it holds by cash payments. It is engaged in manufacturing; and the shares of stock which it has acquired are of companies whose product becomes a part of one of their departments in the avenues of business. Of course it does, as the Sugar Refining Company did, a vast amount of interstate commerce business after it has produced its product.

Can the ingenuity of man, including lawyers, define a tenable or real distinction between that case and this? It has been inveighed against. Certain of the judges of the lower courts have said that this Court has reversed itself, or has in effect destroyed its ruling. But that case, as I understand, wherever it has been referred to by a justice of this Court, after a decision has been announced, has always been stated as one which stands as the law of the land. It rests upon the firm foundation of recognizing that while the Federal right is great in its way, the right of the State is great also, and is to be respected. It rests upon no small or mean distinction. It rests upon the great principle which the Constitution of the United States was partly framed to support—the preservation of State rights, and their destruction only to the extent that it was necessary and the power was conferred to destroy the State rights in the interest of the Federal government.

Attorney General after Attorney General of the United States, from that time on, has stated that that Act does not apply to manufacturing companies, and that they are not within its control. Millions, millions of property have been acquired upon

the faith of that decision, which, as I say, has always been recognized. We have heard the voicing of discontent in other courts and in other places at that decision, and at the conferring of power upon the States, or recognizing its existence. But, long ago as that decision was rendered, there has come from the Congress of the United States no suggestion of amendment or alteration of the law.

You have a statute which, when these companies enter into the domain of Federal or interstate commerce punishes in a frightfully severe way the doing of anything violative of that Act. Why and how is it now necessary to reverse a decision upon which property rights have been acquired, and which is one of the bulwarks of the State control of State matters?

The control of the States over matters of manufacturing within their limits has always been absolute. That is not merely the result of the Knight decision, but is held by the decisions which were cited sustaining the principle. If you destroy that, where are you to stop in the encroachment? The owner of a manufactory in a State subject to the State law may do in his manufacturing as he pleases. He may manufacture; he may refuse to manufacture. As far as the Federal government is concerned, the manufacturers in the States may agree that they will not manufacture; they may agree that they will not compete; but they are not to be punished. When they are engaged in a business which is preliminary to the production of a manufactured product which, by what is done with it, becomes a subject of Federal control, they are not amenable to any law or to any objection.

In the Knight case you laid down no such doctrine as that if it was restraint of commerce it was denounced by the Sherman Act if it was direct and material; or that combinations which give the power to restrain commerce or necessarily tend

to monopoly are unlawful. You allowed the matter to stand where it was, upon the theory that until something was done which brought the manufacturers within the Federal domain they could not be controlled; that if they possessed or acquired, by reason of their manufacturing, the power to do or not to do, that was a matter that was not and could not be punished by the Sherman Act.

Cotton is almost exclusively a product which goes into interstate commerce. Suppose to-day the owners of all the cotton lands in the United States agree among themselves that they will not plant cotton. The result will be destruction of an enormous interstate commerce. But would not the United States be powerless to punish them for that agreement? They might or might not be punished by the State in which they were located. That is a matter for the State. But so far as the United States is concerned, although you would absolutely destroy, root and branch and totally, all interstate commerce in cotton, would there be any right to interfere with them? And if the right existed, would it be a salutary right? But whether salutary or not, would there be any right to interfere in any possible way with them?

The properties are acquired. The various companies, located here and there in different States, acquire tobacco manufactories. They may simply not manufacture at all. Who is going to punish them? They may agree that they will not manufacture. Can you punish them under the Federal law? If they do not manufacture, all interstate commerce trade in tobacco will be destroyed; but you have not yet brought them to a position where you can subject them to Federal jurisdiction. What they do in that respect is something which can be done absolutely without regard to any animadversion that may be passed upon it by any

Federal statute. The moment that they put into the stream of interstate commerce a pound of that tobacco, in all that is thereafter done they are subject to the Federal law; and if they violate any of its provisions they are condemned by that law. Until they put it into that stream, they have the absolute and complete control of whether they will or will not.

Of course, if your Honors are with us on the first proposition, none others are necessary for us to maintain.

The next proposition is that the actual acquisition of property not charged with a public use is not a combination, contract, or conspiracy in restraint of trade within the meaning of the Federal Act.

We are not dealing in this proposition with public service corporations. We are dealing exclusively with private corporations. And concerning those corporations (and now I am away from the point I have been making, narrowing this Act as not applicable to this transaction), even though they are subject to the Federal jurisdiction in acquiring the property of competitors, no matter to what extent that acquisition may go as long as it is a *bona fide* acquisition, it is not punished by anything that is expressed in this Act.

Let us bear in mind in construing this statute—a statute which the government is only willing to construe by inserting some words and expunging others—that we are dealing with a highly penal statute. The offense is punishable by a great pecuniary fine, and is punishable by imprisonment. The person who is guilty of the offense must pay triple damages to any person that alleges and proves them. For a dollar of injury he is to receive three dollars of damages. This being a highly penal statute, the fundamental rule of interpretation of criminal statutes (which you

voiced so well in United States *vs.* Brewer (137 U. S. 278), and have several times repeated) is that they must clearly express the offense. You cannot punish men by any planting of statutes so high that they cannot be read. You cannot punish them by statutes expressed in language which cannot be understood. You must clearly express the offense which is made a crime.

Under this head I want to consider first what constitutes actual acquisition. Then I want, under the second subdivision, to consider that there is nothing in this statute, in what it penalizes, that carries with it a suggestion of any actual acquisition of property.

In defining actual acquisition in this case, I am not dealing (because the exigencies of this case do not require it) with the status of a holding corporation. A holding corporation, as I understand it, is not one which acquires property or shares for the purpose of using the same in the promoting of its trade; but it is a corporation which, having no trade, acquires shares (for it cannot acquire property) for the purpose of holding them for something not involved in the transaction of any business. And that is an act which may be good or bad, under your decisions, according to the motive and the intent.

Of course, this is not any mere holding company. This is a company which has not acquired a penny's worth of property or a dollar's worth of shares except for the purpose of putting it into its own business, and which has in every instance, under the proofs in this case, when it has acquired property, used it for the purpose of promoting its business. It it buys a manufactory for the purpose of promoting its business, and does not see fit to use that manufactory, it is not amenable to any law under the Knight decision or under the Fed-

eral statute. The Federal statutes do not compel a manufacturer to manufacture.

In determining whether a thing is or is not an actual acquisition, it is immaterial whether the company buys the property and pays for it in shares, or whether it buys the property and pays for it in cash. I am not now dealing with a mere holding company. I am dealing with a manufacturing company which buys the shares in the course of its business, for its business ends. Just now, as ever, there are different ways of paying for property acquired. A payment for property in shares of stock is just as much a payment as a payment for it in cash. If you have a mere holding company, the manner of the payment may have some bearing upon the whole subject in determining intent, etc. But where you are dealing with a company which is engaged in manufacturing, and that company is buying manufacturing properties, it matters not how it pays for them. It may be the ordinary method of payment when men contract a partnership. A, B and C are conducting separate manufacturing businesses. For some reason or other they think it well to combine their efforts, to own jointly all their properties, and to conduct them under one head. There is no payment of cash at all. The three partners, if there are three, make their respective contributions; and each takes an interest in the aggregate for an interest in the segregated thing which he puts into the aggregate. And if there can be no condemnation of the acquisition for an illegal purpose, that is precisely so where the corporation acquires what is a partnership, with immunity against personal liability beyond the contribution. There are no words in this Act which punish anything like the acquisition of ownership, even though it be the acquisition of ownership of a competitor.

The Sherman Act practically made no new of-

fense, excepting that under your decisions it wrote out immunity of "reasonable" in connection with "restraint of trade." It but made part of the criminal law of the United States the common law upon the subject. And in reaching our conclusions we are aided by that light in determining what the meaning of the statute is.

At the time this statute was made there were several things being done which help us to the understanding of the meaning of it. There were acquisitions of property. Individuals grew rich, and acquired large properties. Corporations grew prosperous, and acquired enlarged properties. No one condemned that, or put into the act or can be supposed to have put into the act the condemnation of that thing which was being universally done, by condemning combinations, contracts, and conspiracies in restraint of trade.

There were other things which were being done at that time. There were contracts entered into by the owners of different corporations—usually, and perhaps always, competitive corporations—by which one competitive company agreed with the other competitive company for a restriction upon the extent to which it would do business. It agreed to a restriction of prices. It agreed to a restriction of output. It agreed to not compete. By agreeing not to compete, it directly entered into a contract in restraint of trade. The manner in which it was done in other cases was that the controlling shares of stocks of different corporations were not changed in ownership actually, but they were vested in a person who was not the owner, who was constituted a trustee; and by reason of the vesting of the title of these shares in the different companies, this trustee was able to control the operations of all. That was the trust arrangement, and that was the combination in the nature of a trust which was practically the one

known throughout America. There were mergers and consolidations under the statutes of the different States. Those statutes began fifty years ago. It has been the policy of very many of the States of the Union to increase the capital of the great corporations, to enable them to do that larger amount of business which the experience of the modern world has shown requires more capital. They have been enabled, by mergers and consolidations, to join Companies A, B, C and D into Company X, if you please. That was as well-known as this trust combination. Will you suppose that it was the intention to render penal either the acquisition of property by its purchase, whether by shares or by stock, or the consolidation of properties under the merger and consolidation laws of the different States, by a statute which, dealing with a condemnation that the common law had put upon such things, condemned all contracts, combinations, and conspiracies in restraint of trade? Did anybody suppose, in 1890, when this statute was passed, that the corporations which had and would avail themselves of the merger and consolidation laws, whether they were competitive or not (because if they were not competitive there would be no motive to consolidate)—can anyone suppose that when this Act was passed it was intended, under these words, to condemn those things which were usually done and were the ordinary transactions of business? Is it not and was it not the duty of Congress, if they had in the recesses of their heads any such idea as that, to express it in language very different from this?

Of course, when you say "in the form of a trust or otherwise," you have a pretty large limit or scope by the word "otherwise." But it is a fair rule of interpretation that a general word following special words is to be construed somewhat in accordance with the scope of the preceding words.

"In the form of a trust"—of course it was not. "Or otherwise"—did not that mean in that form which put the properties of various corporations or individuals under a joint control or domination? And did it mean that control which followed the acquisition by any man of property in a legitimate way?

The right to buy and sell is a vested right; it is a property right of the highest importance. Destroy the right to sell, and the value of property goes to nothing. What was done by the corporations in this case, under the facts, certainly—and without the facts, so far as any evidence appears—was the exercise by this corporation of the right which it possessed to buy property; and what was done by the vendor was the exercise of the right which the vendor possessed to sell property.

Grant that Congress had the power to interfere with this most essential right of property, the right of buying and selling: Are you going to make this interference by judicial decision? Will you destroy this property right by interpretation, when Congress itself has not expressed, not merely not in clear but not in the most indistinct language, any intention to interfere with the doing of anything of that kind?

If they mean it, they will pass a statute. There seems to be no difficulty in passing statutes leveled at what are popular targets. But until the Congress takes the responsibility of interfering with the right to buy and to sell where the right is exercised for the purpose of enlargement of business, let no judicial legislation upon such subjects be enacted.

But if it be the fact that this statute condemns the acquisition of the property of a competitor, where are you going to find the right to insert the word "material"? If there be a wrong in the acquisition of property, it is a wrong whether the ac-

quisition be large or small. There is no measuring stick put into this Act for the purpose of measuring how great the acquisition must be. The government, when it says it must be "material," does not tell us whether it shall be a third, or a fourth, or a half, or what. If the acquisition by a corporation competing with another of the competitor's property is a combination in restraint of trade, it is such combination, whether the acquisition be big or little. And Judge Lacombe has brought almost to the position of an absurdity the interpretation which would bring about such results by simply enforcing the interpretation according to its necessary and natural effect. He says:

"This statute condemns any contracts in restraint of competition; and therefore, wherever a competitor acquires his property, thereafter the owner is not going to compete, and you have restrained competition." And I submit that it is only because of the frightful consequences that would ensue from endeavoring to procure from this Court an affirmance of a principle which I am told was contended for by the Government in the Court below—it is only when, in cold blood, they see staring them in the face, in black print, the statement of a principle which would make illegal every acquisition of property by one competitor of another—that they shelter themselves by re-enacting the law, and putting in the words "material" and "having a tendency to confer power."

The next proposition I state is that in the present case the fact is that the acquisition of property was not for the purpose of destroying or restraining trade, but to increase that of the acquisitors. This purpose was accomplished, and the trade generally was enlarged and increased.

This petition is reeking with accusations of fraudulent motive and fraudulent conduct. It discloses the fact that in the mind of the very learned

and very able gentleman who drafted that petition, he did not think that standing upon the law alone he could succeed, and that he had to put around the law this bitter coating of coercion and fraudulent and undue and illegal acts. We took him at his word. The Government in this case had that extraordinary privilege which no suitor under the sun but the Government possesses, or a State sovereignty—the opportunity to go through every book, paper and letter that had accumulated during the years of the operation of this company for the purpose of examining and seeing whether it could find among its private papers something with which to condemn it. We would have thought that in a petition of this sort, making these grave and most damning unproven accusations, the Government would have sought to strengthen itself by the proof of some parties, some human beings, who upon their oaths would swear to the things which they accused this company of perpetrating. Why, if this company had done the things that are charged in this petition, if its course had been one course of destruction of the interests of others, if it had ruined the properties of others and then coerced them into selling, if it had driven them out of trade and made their trade impossible, what a cloud of witnesses could have been summoned by the Government to prove that fact!

Tell me that if it had done these things innumerable, there would not have been one witness, at least, produced who would have sworn to the fact! The very fact of that failure, the very fact of the inability to produce the witnesses who must have existed in swarms if the fact existed, is the best thing that can be said in favor of this Company, and shows why it was that in the Court below, disposed as that Court was (properly disposed, of course) to rule against this Company, it found no strengthening in the facts. It always must be a

satisfaction, when any great result is reached in the way of condemnation, if, to the condemnation upon technical points of law, the learned Judge who delivers the opinion can add the moral and the legal condemnation of facts.

There was no such thing. But, delving among the letters of the corporation (a corporation engaged in active business), and finding among the letters of those who were the salesmen of the corporation (some of them occupying the positions of vice-presidents of the corporation)—finding in that hustle of business certain things, they come here, unable to produce a human being who will show any harm that was done, and say: "By those letters we have established certain facts."

I should like to see the corporation guilty of violating the laws governing interstate commerce, or innocent as a babe in the matter, whose private salesmen's letters could be exhumed through a period of years, and you would not find something. But do not say, when you find two or three letters that you can read with gloss and make them bad, that you produce some "typical" letters. Say what is the fact—that having made these charges, and having failed to establish them by a single human being, you rely upon the letters. With your ability, and with your knowledge of the case, you may be sure that you would regard it as your duty to your client (and would so discharge it) to produce every letter that sustained your charges. And in this case the mountain has labored and has produced a mouse!

Oh, but we have this theory of possession of power! You acquire a large ownership, and you have the power! Power to do what? Does not anybody who is familiar with the operations of business know that the great trouble with a corporation which produces a large percentage of the business is that it has got to carry in its business

the corporation which produces a little? It cannot afford, by reason of the great destruction that will ensue to it by reason of its large product, to reduce its price for the purpose of reducing the price of its adversary. They say: "Why, you cut prices on certain occasions." Of course we did. The man in the business world who, when he is smitten on one cheek, meekly turns and requests his adversary to please smite him on the other, is an almost unknown quantity. And you may be very sure that if their business was attempted to be taken away from them by cutting prices, they would respond with a cut. But can one side cut and be good, and the other side cut and be criminal?

This idea of cutting and reducing prices is one of the ridiculous features of modern argument. Why, we are taught that competition is the life of trade. Nothing may be done that will interfere with competition. What is competition? It is a war between two producers of the same commodity. It is a war to the death, if it can be. They cannot agree that they will not compete in the most bitter way. Are you going to penalize them if they are carrying out what you say they must do, competing without restriction, because in the competition one is ruined? All business life is a survival of the fittest. That is the very beginning and end and object and purpose of this competition which this Court has said so much to favor. And now they come and say: "You must compete"; and then they say: "You are guilty sinners because you compete by endeavoring to prevent the other person from walking away with your business."

It is said that in this case the others cannot compete. No human being has been produced to say that he could not. There is that most extraordinary fact—that during the course of the operations of this company, of latter times there is a

constantly decreasing percentage of the business done by it. How on earth are you going to maintain, before a court of men of the world as well as men of the law, the proposition that you cannot compete, that we have got the possession of the power which destroys the competition of others, when the fact is that the independent operators are producing increasingly each year a larger amount of product?

That is, perhaps, largely owing to the peculiarity of this business. You have been told by both sides that it is a business of brands. A man who indulges in the pleasure of chewing tobacco has a brand which he will chew, and you cannot tempt him to chew another. You might put his price up a few cents on each ball of tobacco, and you might put it down, and an angel from heaven could not persuade him to chew the cheaper product and eschew the more expensive one. And that may be the reason for this. But be the reason what it may, the independent operators, despite this assertion that they cannot compete, are growing in volume and importance, and some of them are growing excessively rich.

What was the reason of this acquisition? You have the testimony of Mr. Duke. Mr. Duke testifies on that subject, without cross-examination breaking him. There is none. Our learned opponent was wise in that. Some men you cross-examine, and some men you do not. The man whom you know to be telling the truth, and the man who is not able to be beaten out of his statements of the truth by cross-examination, is let go if the cross-examining counsel is an intelligent as my learned opponent. But he tells you, taking up one by one the history of these acquisitions (and there is no countervailing proof), that of course they wanted to increase their business; of course they wanted to make their business as great as it could

be. Is that a crime? Let it be once known that the man who succeeds by reason of his success becomes a criminal, and you have written the death-warrant of the success of American industry.

Of course they wanted to succeed. They had more brands, and they grew. They had more money. We have not yet reached that degree of socialism in which the possession of wealth is to be condemned as a crime. There are many punishments that can be inflicted upon a man who gets wealth illegally; but the mere acquisition of wealth gives him the advantage that goes with wealth.

The purchase of these things broadened the business. When they feared one business was declining, they took another; they added to it. If they could not make their living making smoking tobacco, they would acquire some plug tobacco manufactories. They are not in any way in competition. A man may have ever so many industries. The fact that he is broadening them out does not do it. Does he broaden them out for any illicit or unlawful purpose, or for a real one? That is the test. You have been told here: "Why, everything was acquired." If a few factories were not operated, it was because they could make the brand which they had acquired by virtue of the purchase more economically at another place. They greatly diminished their expenses; and they were able, by reason of that, of course, to have a certain amount of power. American products, which are now shipped in enormous quantities to foreign countries, would have not one iota of a chance of acceptance there if it were not for the economies that have been worked by the holders and operators upon a large scale. The very purpose and tendency of modern business, the very necessity of modern business, is to enable the manufacturing to be done most economically; and it can only be so done by manufacturing upon such a large

scale that to-day the profits coming to those who operate are solely the result of their economies.

They made the test of this thing. It is said, "You bought this thing for a purpose." If the thing that we did was not of itself illegal, then there was no intendment against us. The wrong motive must be proven. It will not do for me, if I enter into a contract not to compete, to say that my motive was laudable. I have violated the law by entering into a contract in restraint of trade. But if I am doing a thing which may be good or may be bad according to my motive, then it is for the Government which attacks my motive to prove it. In this case there is no proof to sustain the attack; and all the proof is upon the side of this corporation.

The next proposition is that there is no duty on the part of a trading or manufacturing corporation to compete. The prohibition is against their agreeing not to compete. If, therefore, non-competition is the result of acquisition, the Act is not violated.

It does not lie in the power of Congress to compel a manufacturing or trading corporation to compete. It lies within its power to prevent it from competing. It may search with a microscope for the motives of the thing; and when it establishes the motives, it may ask for the condemnation. But if the non-competition is the result of an indisposition to compete, the whole thing is powerless. And it is that which is the basis of one of the leading points of argument in this case—that there is no duty on the part of trading corporations to compete. They may manufacture or not, they may compete or not, as long as the non-competition is not the result of an agreement.

What is the deduction from that proposition? If they are not obliged to compete, there can be no illegality in the sale by one competitor to an-

other, because the resultant is that the purchasing competitor will no longer have it to his interest to compete. You cannot add three nothings together and make the addition anything more than nothing. You cannot add three manufacturers together, neither of whom is under any duty to compete, and, because of a *bona fide* acquisition by one of the property of the three, because thereafter he does not or will not or has not the interest to compete, say that the acquisition itself was criminal. He is doing nothing which destroys a right.

The vendor sells because the equivalent which he receives in cash or shares is more important to him than the thing he sells. The vendee buys because the thing he gets is more important than the thing that he parts with. And therefore the purchase by a competitior under those circumstances cannot by earthly possibility be enlarged into the idea of a contract or combination in restraint of trade. He is exercising an inherent property right for a legitimate and proper purpose.

Regarding this idea of the possession of power: We are not dealing with public service corporations. What does it boot? A, B, C and D are not obliged to do a certain thing. A, B, C and D sell their property to X; and X does not find it to his interest to compete with himself. He possesses the power not to compete. Why, of course, he does. He but acquires, by that transfer of property, the right which existed in the transferror. And this act, in some of the decisions (not the decisions of this honorable Court), is read as if it was an act to prevent the stifling of competition. There is no word "competition" anywhere in the Act. You have said that to agree not to compete is a restraint of trade; but you have not said that it is the duty of people to compete. You

have not said that if, in the ordinary course of business, something happens by which (if you choose to use an approbrious name, "stifling") you have a stifling of competition, if that stifling of competition is the result of a property right, you have violated any statute.

That brings me to the consideration of the differences between private corporations and public service corporations. There are three. It is not for counsel to question any decision of this honorable Court. That would be about the worst tactics and the poorest thing he could do. The duty of counsel is to accept loyally—whether he does or not matters not, but it is his duty to accept loyally—every decision of this Court, and not to rise and challenge it. And my purpose now is to show the vast difference between the Northern Securities case and this case.

The first difference is this: In the Northern Securities case you were dealing with public corporations, charged with a duty to the public. The Great Northern and the Northern Pacific Railway Companies had availed themselves of a grant of a franchise. That franchise had enabled them to exercise the right of eminent domain. It could only have been granted because they undertook a public duty. Therefore, whenever anything was done by two corporations, each charged with a public duty to compete, which interfered with their competition, they brought themselves within the range of an act which interfered with or restrained trade or competition. On the one hand is a private corporation, with no duty to compete. On the other hand is a public corporation with a duty to compete. One violates its duty by giving the control of two properties in any way to one; and the other does not violate any such duty.

The next difference is that the Northern Securi-

ties Company was a holding company pure and simple. There was no trade or transportation purpose to be accomplished by the Northern Securities Company. It had no railroads; it did not operate any railroads. It was organized merely for the purpose of acquiring the shares of stock of corporations. You held that that belonged to a class of holding corporations. It was, in the language of the learned Justice who delivered your opinion, a custodian of those shares. This Court found that it was assimilated in some respects to the old trust, where the trustee acquired the title to shares of the stock of various corporations, and in that way controlled the whole. And in that case, finding that that corporation was going to discharge no duty which made it necessary for it to acquire the shares or property, that it had no transportation duties, and, under the statement of some of the witnesses, that they were desirous of having all the shares under one ownership, you held that that was an assimilation (because of the lack of a *bona fide* purpose of acquisition) to the old trust. And in that case there was this peculiarity: By the Minnesota law the corporations were forbidden in any way, shape or form to consolidate or to destroy competition. Therefore their intra-state business was not necessary to be protected by any decree of this Court. All that this Court need deal with was the interstate commerce. In dealing with the interstate commerce, it could not interfere with the intra-state commerce, because the intra-state commerce was protected by a similar Minnesota law. And therefore you held, among other things, in that case, that where the interstate business was the only one that could be affected, the other not being affected by this thing, you could do what cannot be done with a manufacturing corporation which, even though you do not apply the doctrine of the Knight

case, was a corporation which, at any rate, had property in the State, and did do an intra-state business which is affected by anything that you do.

The attempt to monopolize which is condemned is not the mere acquisition or ownership of a large portion of the property. If a large portion, how large? The word is not "monopoly"; the word is "monopolizing or attempting to monopolize." And in doing that you are dealing with something that is not satisfied by merely saying: "By the acquisition of a large part of the property you are doing that which violates the Act." And you must bear in mind that in applying the law in this case you must deal with an individual precisely as you would deal with a corporation. The learned Assistant Attorney-General says: "We do not pretend to interfere with the act of an individual in such matters"—at least, I so understood him—"but we say that a corporation cannot do this thing." But there is no differentiating. It is "any person who shall monopolize or attempt to monopolize"; and the lexicography of the Act is that "person" means "person or corporation." Therefore whatever the corporation cannot do, the individual cannot do. And therefore, if their interpretation is to apply, neither individual nor corporation can acquire and hold a large part of any article, manufactured or otherwise, or any appliance for manufacturing.

In interpreting that Act you have enormous help from the words "any part." The Act says, "Any person who shall monopolize or attempt to monopolize the whole or any part of the trade," etc. You have got to find some meaning for that that does not bring you to this: That any person who gets the whole or the larger part of any part of the trade is guilty of a monopoly, or of monopolizing within the meaning of that Act. I may be dealing with the smallest part of the trade. If I buy from my com-

petitor the smallest part of the trade, or if I acquire from a person who is not a competitor the smallest part of the trade, I have acquired "any part"; I have acquired some part. And therefore, in order to give all the words of the statute a meaning, we have got to put a meaning upon the statute which takes into consideration the existence of the words "any part"; and they cannot mean the acquisition or the holding or the ownership of a larger part of any part, or the whole of any part.

We are helped by the old definition. I do not intend to put it to your Honors. It has been put to all of you tens of times. But the idea of a monopoly originally included an exclusion. It was not merely the thing, but the exclusion of the thing. And in all that has since been done, that idea of exclusion runs through the whole thing. And therefore we must consider, in connection with the words "to monopolize or to attempt to monopolize," the words "any part"; and in order to consider that we must consider an idea of exclusion. And my definition of "monopolizing or attempting to monopolize" is the acquiring of the property, and excluding, not by legal means—because by my acquiring I necessarily exclude—the acquiring accompanied by excluding others from their rights by illegal acts.

The part of the Act which prescribes that offense is peculiarly put. In the first place, it does not seem to be a vital part of the Act, because it is not made applicable to the Territories. That clause is omitted in that connection. They do not penalize it by allowing you to seize the property in course of transportation. It was a round-up of the Act. The first section dealt with two or more; it was a contract, combination or conspiracy, which required more than one. The next part of the Act deals with one—"any person who shall monopolize or attempt to monopolize"; and it

makes this an offense. What? If he acquires it in the ordinary exercise of a right of purchase which has not in any part of the Act been attacked, that is well enough. But if he acquires it by illegally excluding others, then he has violated the Act. Now, how may he illegally exclude others?

He may do it by corralling the means of transportation. He may do it by coaxing away employes. He may do it by a hundred different ways, illegal ways. And if, therefore, he monopolizes —that is, he acquires by excluding illegally—he may do this thing. It cannot mean anything that has not a great limitation upon it; because otherwise the competitor who is beaten in the fight for trade cannot sell out his property; a man who has become too old to carry it on cannot do it; the heirs of a man who dies cannot do it. You cannot prevent the acquisition of the business of a man who does not care any longer to go into trade, because in doing that you do more harm than you do good. But you can prevent the acquisition by illegal means, by excluding others, by some act that you have no right to perpetrate, from the enjoyment of their rights.

A man may start a new industry. He is the only man who understands the industry; and he builds up a large trade. There is no other. One does it in the country. He has a monopoly. You do not mean to say that that man is intended to be punished as a criminal because he has the whole of the trade. For some reason or other, competitors may find their business failing them, and they may go out of business; or the manufactories of rivals may be destroyed, not by the competitor himself, and there will be left in business only the carrying on of that thing. You cannot monopolize manufacturing in any other sense. As

fast as one manufactory is carried into the corporation which acquires it, if it is a profitable business, you will find, with the immense amount of capital seeking investment in this country, plenty of other people ready to follow and put more manufactories in. But if you acquire and in some way exclude others, then you do what the exclusive grant in old times worked.

The remedy decreed is one which defeats the object sought to be accomplished by the Act. The failure to prescribe a remedy which does not involve such defeating demonstrates the lack of intent to prohibit anything which can only thus be remedied.

The purpose of this Act is to prevent a restraint of trade. Manufacturing corporations have acquired manufactories and shares of stock of other corporations, and they manufacture. Up to that point nobody can interfere with them. But this decree says: "You shall not put that manufactured product into interstate commerce." Suppose it was within the power of Congress to say that anybody who, in the States, had indulged in the evil act of acquiring what they thought were too many manufactories, could not get any advantage of that act done under the State law by putting the product into interstate commerce. Suppose it was in the power of Congress to draw a hard and fast line barring the putting into interstate commerce of the product of manufactories under State law. Would you not require them to say that, before anything so drastic and so revolutionary would be attempted? Would you not require the legislature to say, in the plainest possible words, that thing? But it has not said it, nor has it said anything of the kind. It has given no remedy of that sort. But the Court says: "You, who may have manufactured under the

State law, and manufactured as much as you pleased, you have got manufactories: You shall not put that product into interstate commerce, and we forbid you to do it." Does not that emphasize the dividing line? Does not that show the product, until it reaches a certain point (to wit, the puting it into the stream of commerce) is under the State law? If you are putting out that product, the legislature not having said that you shall be debarred from interstate commerce by reason of having so manufactured it, to what extent can you be interfered with? To any other extent than to such an extent as will prevent you from deriving any value from your property by putting it into interstate commerce? Does not that work the direct antipodes of the purpose of the Act? There being no other remedy which the learned Court thought possible, can it be that this Act was leveled at the thing which has been condemned in this case, when the only thing you can do nnder a law which has been passed to prevent restraint of trade is to prevent it altogether to the extent of nearly three-fourths of the tobacco product of the country outside of cigars? You can gather the meaning of a legislature, sometimes, by the failure to give the remedy for such a thing as you interpret to be covered by the Act.

This corporation might simply stop; it might manufacture, and not put a pound of its manufacture into interstate commerce. Wherein could you interfere with it then? Or it might manufacture, and it might sell *bona fide* and deliver in the States to a third person its product. You could not interfere with it then. I am giving you those illustrations to show that by reason of failing to provide a remedy, the legislature did not have in contemplation the thing which is condemned.

Now, with regard to monopolization: What is your remedy there? They have said, "appoint a receiver." How are you going to appoint a receiver for the manufacturing companies in the various States? "Appoint a receiver," they say, "for the purpose of distributing your properties." How are you going to distribute the properties by reason of that receiver? Another suggestion is, "Appoint a receiver for the purpose of running these properties." Why, even in cases of specific performance the courts have declined the jurisdiction because of the impossibility of carrying it out. Are the courts going to appoint receivers for the purpose of running all the corporations which the government may find amenable to this law? Is it possible that there shall be any such remedy as that? And because there is no such remedy, do we not draw some inferences as to what is the meaning of the Act? The suggestion is made: "Prevent them from receiving dividends." That might do in the case of a public service corporation; but by what right do you prevent this corporation from receiving dividends accruing from the manufacturing of these manufacturing plants?

We have shown the remedy for punishing any monopolizing which consists in the doing of an illegal act. It is very plain; the punishment is pretty severe; it is not very likely, with the awakened attention that has been given to these things, that that will be done. If any corporation, by reason of its possession of the power, is found to abuse it in an illegal way, that is directly amenable to the Act.

In these days in America, as in India in the past times, there are men who are denounced as the Warren Hastings of trade. It may be; the pathway of great achievement is not always strewn with roses. But if you destroy the work that these men

have done, who will foretell the result? They have planted our commercial flag in every part of the world, upon inaccessible and most remote heights as well as in valleys. You are not going to benefit the laboring classes by doing that which will deprive them of the employment that they have been given, and that they would get in no other way. The struggle for the trade of the world is between nations. And who will say, with any assurance, that you can safely substitute for the herculean work of the financial giants the puny efforts of the pygmies that will be left in trade?