No. 398.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

STANDARD OIL COMPANY OF NEW JERSEY ET AL.,
APPELLANTS,

v.

UNITED STATES OF AMERICA, APPELLEE.

ORAL ARGUMENT OF THE ATTORNEY GENERAL ON BEHALF OF THE UNITED STATES.

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STANDARD OIL COMPANY OF NEW JERSEY ET AL., appellants,
v.
UNITED STATES OF AMERICA, APPELLEE.
} No. 398.

ARGUMENT OF HON. GEORGE W. WICKERSHAM, ATTORNEY GENERAL OF THE UNITED STATES, ON BEHALF OF THE UNITED STATES.

Mr. WICKERSHAM. May it please the court, it is somewhat gratifying to infer from what Mr. Watson has said that this decree is so drawn that the defendants will find difficulty in evading it if it be affirmed.

What the petition charged the defendants with doing was with having combined and conspired to restrain interstate and foreign commerce in petroleum and its products, and in the transportation of petroleum, and with having monopolized or attempted to monopolize the same. The sum of the allegations of the petition amounts to that charge. The prayer was that the court adjudge the combination described in the bill to be unlawful and in violation of the Sherman Act, and that it enjoin the defendants and every one of them, their agents, and so on, from doing any act in pursuance of or for the purpose of carrying out the same.

The decree to which Mr. Watson has referred, in the first section, adjudged:

That prior to the year 1899 there were twenty corporations, organized in various States, engaged in various branches of the petroleum business; and that since the year 1890 the defendants named in section 2 of the decree have entered into and are carrying out a combination or conspiracy, in pursuance whereof about the year 1899 they caused the capital stock of the Standard Oil Co. of New Jersey to be increased from $10,000,000 to $110,000,000, and the in-

creased stock to be exchanged for the stocks of the various corporations named in the second section of the decree as subsidiary corporations, and caused the power to control those subsidiary corporations and to manage their trade and to control the corporations which they controlled and to manage their trade to be vested in the Standard company in exchange for its stock, and so on, and caused the Standard company ever since to control these corporations and to manage their trade; and that this combination or conspiracy is in violation of the Sherman Act.

So that what the court specifically adjudged was that there was a combination or conspiracy, in pursuance of which the stocks of the nineteen subsidiary companies were vested in the twentieth company.

In the principal opinion of the court below—because the court was a unit, the four judges concurred—the court ran over, briefly, the history of the acts of the various defendants prior to this transaction of 1899. They said that those acts did not violate the antitrust act of 1890, because it was not then in existence. Judge Sanborn says:

> Whether or not their transactions constituted a violation of the common law is a question much discussed which it is unnecessary to determine in this case. However that may be, the acts of the defendants and the effect of their transactions in the conduct of the oil trade prior to July 2, 1890, which, if done thereafter, would have constituted a violation of the law of that date, are competent and material evidence of the dominant purpose and the probable effect of their similar transactions in that business since that date and for that purpose they may be considered.
>
> Laying out of view the acts of the defendants prior to July 2, 1890, except as evidence of their purpose, of their continuing conduct and of its effect, do the stockholding trust of 1899, and its continuing operation constitute an illegal restraint of interstate or international commerce in violation of the antitrust act of 1890?

The principal point of the appellants, upon which they rest their case in the last analysis, is that because in 1899, when the transaction which is the dominant one condemned by the court was had, these twenty corporations were owned by substantially the same men or by actually and entirely the same men (that is to say, that the same men were stockholders in each of the twenty companies), the transfer of that ownership to the New Jersey company was not and could not be a violation of the Sherman Act. Therefore it is pertinent to look back for a moment at the history of the parties and to see where they stood, what their previous history was, and what the dominant purpose running through the minds of those who cooperated in this scheme was in the year 1899, when it was carried out.

The evidence very clearly, and in very great volume, establishes the fact that beginning in the early seventies two or three men went into the oil business; they gradually added to their number; they

expanded their business; they took in others; by various methods that have been described here they waxed great; and, finally, in the year 1879, thirty-seven individuals had got control absolutely of all the oil business of the country of that day. They had it all. Their aggregate property had increased from the small beginning of two refineries to the enormous sum of $55,000,000. It was represented by some thirty separate corporations. And when it had gotten to that volume they began to be troubled as to the disposition of it. How could they hold together this enormous volume of business which they had thus acquired? And they then hit upon what is called the trust agreement of 1879, a copy of which is annexed to the brief as Exhibit A. The property was all represented by shares of stock in different corporations, with the exception of two concerns, as I recollect it, which were not incorporated. Those they transferred to three trustees in trust, in form to distribute when it should be convenient. They divided the ownership into parts approximately representing the shares which some of them had in the Standard Oil Co. of Ohio, one of these corporations—that is, into 35,000 equal parts—the capital stock of the Standard Oil Co. of Ohio being $3,500,000.

As these properties had been accumulated they had been put in trust with somebody for the benefit of the stockholders of the Standard Oil Co. of Ohio. It seems to have been the law of Ohio that the Ohio corporation could not itself take these properties and hold them; and it seems that most of the people who formed this group (although, as I recall the evidence, it is not conclusive on that point) were bolders of the stock of the Standard Oil Co. of Ohio. At all events, they got together and divided it up into the same number of equal parts which the stock of the Standard Oil Co. of Ohio was divided into, viz, 35,000.

Under that trust these three trustees—three lawyers, representing some of these parties in interest—held these properties for three years. There is no evidence that they ever attempted to distribute. There is no evidence that anybody ever expected them to distribute. Indeed, every inference is to the contrary.

In 1882 they had matured their plans a little more definitely. They had strengthened their position a little more. They had the whole trade. They had relations with railroad companies that gave them advantages that no human being had ever enjoyed before in the history of any country. Their wealth was increasing with great rapidity. Mr. Rockefeller testified that in that year they took an appraisement of the properties held in this trust and it aggregated something like $56,000,000, according to their own estimate; and it can be taken as *prima facie* correct.

Then they executed a trust agreement by which they turned over all of their properties to nine trustees. By this time they had added other properties to the original thirty. They had forty corporations by this time. Six of those trustees, the only surviving six of them, are defendants in this bill, and constitute six of the seven individual defendants named in the bill.

The property was turned over to them to hold in trust during their lives and the life of the survivor, and 21 years thereafter. The trustees were clothed with all the powers that could be given. They were to manage all these corporations. They were to appoint the directors. They might name themselves as directors. They were to issue certificates of ownership. Taking this $56,000,000 of assets, they capitalized it, so to speak, for the purposes of this trust, at $70,000,000. They issued certificates to the amount of $70,000,000 to represent the beneficial ownership in all of these various corporations. And then these trustees proceeded (it was the old-fashioned trust, which became famous shortly afterwards) to manage all of these companies.

All went well. Money poured in. That went on until about the year 1890, when the attorney general of the State of Ohio got after them. He filed a bill, about which something has been said, and which plays a very important part in this proceeding, to my mind. He filed a petition of *quo warranto* against the Standard Oil Co. of Ohio, charging that by the execution of this trust agreement by all of its stockholders and all of its officers it had in effect become a party to the agreement; that it was in violation of its corporate powers, and that it was void as tending to a monopoly. And he added to the petition a distinct allegation that, in fact, by means of the trust agreement the trustees were enabled to monopolize and control at will the mining and production of oil, and that in the exercise of those powers they had controlled and regulated the production of oil, and had monopolized, etc.

Mr. Justice HOLMES. I suppose the issue was whether or not the corporation had exceeded its charter powers?

Mr. WICKERSHAM. I would say there were two things——

Mr. Justice HOLMES. That was the only issue that could have been raised, was it not?

Mr. WICKERSHAM. No; if your honor please. In the first petition, the original petition for *quo warranto*, he alleged two things: He alleged the excess of the corporate power. I do not mean to say he ought to have done it. Scientifically, of course, he should not.

Mr. Justice HOLMES. That is what I said. I did not mean what he alleged; but I say that is the only issue that the court could have tried.

Mr. WICKERSHAM. I assume so, of course; but I am only telling you what he did allege.

Mr. Justice HOLMES. I understand.

Mr. WICKERSHAM. Thereupon they answered that petition, taking issue on the monopoly part. Then the attorney general, being better advised of the proper compass of the petition for writ of *quo warranto*, filed an amended petition. In his amended petition he went a little more specifically into what had been done with respect to this trust agreement. He averred that this trust agreement had been executed by all the parties; that the stocks of all the corporations had been turned over to the trustees under it——

Mr. Justice DAY. Now you are talking about the amended petition?

Mr. WICKERSHAM. I am speaking now of the amended petition; yes, your honor. He averred that the trustees had qualified and were performing the duties vested in them and conferred upon them by the agreement; that they were collecting and receiving dividends from all these various corporations and distributing them to and among the holders of the trust certificates which they had issued. And thereupon he prayed for relief—that the defendant be found to have forfeited its charter and its franchise and that it be ousted.

The CHIEF JUSTICE. That was the Standard Oil Co. of Ohio?

Mr. WICKERSHAM. That was the Standard Oil Co. of Ohio. That was answered by the defendant——

Mr. MILBURN. It was demurred to.

Mr. WICKERSHAM. No; it was first answered by the defendant, and the attorney general demurred to the answer, and the defendant's answer practically took issue merely with the conclusion that the corporation had executed the agreement by becoming a party to it by virtue of the acts of its stockholders and officers. The court sustained the demurrer filed by the State to the answer and adjudged that the defendant—

has as alleged in the petition exercised the power, franchise and privilege of executing and performing the agreements set forth in the petition contrary to and without the authority of the laws of the State of Ohio, and in violation of the law of its incorporation. (Rec., vol. 22, pp. 29, 30.)

Mr. Justice DAY. Under that kind of a petition, why could not the court inquire whether it was within the corporate power of the company to carry out its agreement?

Mr. WICKERSHAM. If your honor will pardon me just a moment——

Mr. Justice DAY. It has been said here that it could not be done in that kind of a proceeding. I want to know why, if that agreement was made a part of the petition brought before the court, the court might not inquire whether it was within the corporate power of the corporation to exercise the privileges set up in that bill?

Mr. WICKERSHAM. They proceeded to do that very thing. There is no earthly reason why they should not, of course. That is what they did, and that is the basis of the reasoning of the court.

The adjudication is:

That the said corporation be and the same is hereby ousted from the power, franchise, and privilege of making or entering into such agreements, or from performing the same directly or indirectly, that is to say, from the power, franchise or privilege of recognizing the transfers of its capital stock made upon its stock books by the owners thereof to the trustees provided for in the original agreement set forth in the petition dated January 2, 1882, and from the power, franchise or privilege of making like transfers in the future; also from the power, franchise or privilege of paying dividends to said trustees instead of the real owners of said shares; and also, from the power, franchise or privilege of permitting the said trustees instead of the real owners of said shares to vote the same at any election of the directors of said corporation or any of its officers; and from the power, franchise or privilege of permitting said trustees to control in any way the affairs of said corporation. (Rec., vol. 22, p. 32.)

And it is rather interesting to note that this decree, in the form of a decree of ouster in a *quo warranto* proceeding, is in effect an injunction of the same general nature as the injunction granted by the Circuit Court in the case at bar.

Mr. Justice DAY. In other words, it did not oust the corporation from all its corporate powers?

Mr. WICKERSHAM. No; but it ousted it from recognizing the trustees as the owners of the stock.

Mr. Justice DAY. It ousted it from the powers charged in the petition as being beyond the corporate powers. That is what the court did.

Mr. WICKERSHAM. Certainly; absolutely; and they held it to be unlawful for the trustees under that trust to exercise the right of the owner of the stock by voting on the stock, or by collecting dividends; and they in effect enjoined the corporation from recognizing the trustees as the owners of the stock, either for the purpose of voting or for the purpose of the reception of dividends.

Mr. Justice DAY. They did not undertake to end the corporate existence of the Standard Oil Co. of Ohio.

Mr. WICKERSHAM. Not at all. They simply ousted it in that way. In other words, it was in effect precisely what has been done in the decree here. It was, in effect, the enjoining of one of the subsidiary companies from recognizing the trustees as the owners of the stock in the subsidiary company, that ownership having resulted from a transfer of the stock under the trust agreement.

What basis did they put it on? The opinion of the court will be found in the forty-ninth volume of the Ohio State Reports. It held, first, that the answer admitted the averments of the petition;

that all of the owners and holders of its capital stock, including all the officers and directors of the said defendant company, signed said agreements; that that answer must be taken as admitting that the corporation itself had signed the agreement: Second, that the nature of the agreement was such as to preclude the defendant from becoming a party to it; that the law required a corporation to be controlled by its own directors, in the interests of its own stockholders, and conformable to the purpose for which it was created by the State; that by this agreement (indirectly, it is true, but none the less effectually), the defendant was controlled and managed by the Standard Oil Trust, an association with its principal place of business in New York City, and organized for a purpose contrary to the policy of the laws of the State of Ohio; that its object was to establish a virtual monopoly of the business of producing petroleum and of manufacturing, refining, and dealing in it and its products throughout the entire country, by which it might not merely control the production, but the price, at its pleasure; that all such associations were contrary to the policy of the State of Ohio, and were void.

In other words, the court——

Mr. Justice HOLMES. Let me see if I have that right. Do I understand that under a *quo warranto* the court of Ohio, instead of dealing with the franchise of the corporation, forbade the continued recognition of a voting trust?

Mr. WICKERSHAM. Yes; in effect. That is, they held that it was in excess of the exercise of its due corporate power to enter into such an agreement, because the agreement was contrary to the policy of its laws, and void; that it substituted for the control of the directors of the corporation an irresponsible body.

Mr. Justice HOLMES. I was only thinking that it was rather a queer proceeding, I should have thought, to reach that result.

Mr. WICKERSHAM. At all events, I assume that it was within the scope of their procedure, because this is a decree of the Supreme Court of the State.

Mr. Justice DAY. You will find many cases in Ohio where the inquiry has been whether the corporation was undertaking to exercise powers not given to it by its creation as a corporation; and if so, to oust it from the attempt to exercise such excessive power. The practice may be confined to that State; nevertheless, it is in vogue there.

Mr. WICKERSHAM. That is what the court said there. In other words, it distinctly adjudicated——

Mr. Justice DAY. That is the practice in that State.

Mr. WICKERSHAM. It distinctly adjudicated that it was unlawful, under the laws of Ohio, for a trust, a body of trustees, to be vested with the title to stocks in an Ohio corporation and in a lot of others engaged in the same business, which put them in control of all these

corporations and enabled them to take the revenues from all and distribute them, not to the stockholders of the Ohio corporation, but to the holders of the trust certificates issued under this trust agreement —thus creating a combination or pool which tended to monoply.

Mr. Milburn criticized that decree, saying there was no issue in the case as to restraint of trade, and that the court of Ohio had adjudged this to be an illegal organization without any evidence, when the evidence was furnished by the agreements themselves and by the admitted facts as to what had been done pursuant to the agreement. And the court, with that evidence before it, said: "Such an agreement is void as tending to a monopoly."

Immediately following that decree the trustees met for the purpose of determining what to do. They had a sorrowful meeting, but it was not without hope, because the ingenious counsel for the trustees, who had framed this original trust agreement, had devised a scheme for evading the effects of the decree. At the moment when this decree was rendered there were eighty-four different corporations whose stocks were held by the trustees under this agreement of 1882. They took the stocks in sixty-four of them and distributed them around among the other twenty, putting them, no doubt, where they thought they could be lodged with the best results to those interested in the combination. They then had a meeting, and Mr. Dodd, who is generally credited with being entitled to the distinction of having invented these trust agreements, addressed the meeting.

Mr. Justice HARLAN. Who was that?

Mr. WICKERSHAM. Mr. S. C. T. Dodd, who was a very promineat attorney, well known as the author of these trust agreements. Mr. Dodd spoke in favor of a resolution that the trust be dissolved. He said:

> Something over ten years ago a few individuals owning stocks in a number of corporations, engaged in transporting and refining oil, entered into an agreement by which their stocks were placed in the hands of trustees, and certificates were issued by said trustees showing the amount of each owner's equitable interest in the stocks so held in trust. This was not done in order to vest the voting power in the hands of a few persons, because the persons chosen as trustees then held, and always have held the voting power by virtue of their absolute ownership of a majority of the stocks. It was not done to reduce competition, because the companies whose stocks were placed in trust were not competing companies—

Here is the dawn of the idea which comes forward at the present time from the defendants as the basis for their defense here:

> and could not be so long as their stocks were owned by these few persons. It was not done to limit production or to increase prices, but on the contrary was done to increase production, cheapen cost of manufacture, and to lower prices, and it has been successful in that object far beyond the anticipations of those who originated the plan.

Having erected his monument to the past, he proceeds:

Whether these allegations be true or false, it is true that a trust is now defined to be a combination to suppress competition, and to reduce production, and to increase prices. Public opinion has not unwisely been aroused against combinations for such purposes, and legislation of more or less severity and rather more than less peculiarity has been directed against them in seventeen or eighteen states of the Union. All such arrangements are now miscalled trusts, and all trusts are popularly supposed to partake of the same nature. For this reason, if for no other, it should be seriously considered whether this trust should not be terminated. So long as it exists, misconception of its purposes will exist. (Rec., vol. 22, pp. 65–66.)

Then he adverted to another reason which was perhaps equally cogent, viz: That the supreme court of Ohio in this *quo warranto* proceeding had held this to be illegal—a minor reason, but still one calling for some passing consideration. And thereupon he outlined the plan that had been agreed upon. He said, in effect: You have here so many corporations and so much stock, and there are so many people. Now, we propose to assign to each one of you your share in all the stocks which are held by the trustees. You will not get your stock in one company or two companies or three companies, but you will get your proportionate interest in all. Of course, before you do that you will ratify what has been done by the trustees in changing the form of some of these corporations. You will understand that some change has taken place and is taking place in the capitalization of various companies in order to facilitate the distribution of their stock.

The shares finally distributed will not represent so large a number of companies as has been represented in the trust, but they will represent the entire interest held by the trustees. (Rec., vol. 22, p. 67.)

I do not know how many individuals were present; but the meeting then quite joyfully ratified what had been done, and agreed upon what was proposed; and the assignments were executed.

There was executed and delivered to everybody an assignment of so many nine hundred and seventy-two thousand five hundred equal parts. I neglected to say that during the interval between 1882 and 1892 the trustees had acquired some additional properties, in payment for which they had issued certificates to the amount of about $12,000,000. They had also declared a sort of stock dividend, a distribution of certificates, doubtless to represent the augmented values of the properties, to the amount of $15,000,000 more. That made in all, at the date if this meeting, certificates outstanding to the amount of 972,500. So they issued to each of these gentlemen an assignment of his share in all of the stocks held by the company, representing so many nine hundred and seventy-two thousand five hundredths. The form of one of these certificates, being the one issued to Mr. Rockefeller, is printed in the brief.

The two Messrs. Rockefeller, Mr. Flagler, Mr. Brewster, John D. Archbold, Henry H. Rogers, Wesley H. Tilford, Oliver B. Jennings, Oliver H. Payne, the estate of Charles Pratt, Charles W. Harkness, and six members of the family of O. B. Jennings took their assignments and had issued to them stocks of the various companies, so that they became stockholders of record of each of the companies whose stock was held by the trustees. They experienced no difficulty in this situation that Mr. Milburn has so movingly depicted, in getting fractional shares. They received, and there are in evidence here, certificates of fractional interests in shares that were issued to them. In that way those gentlemen together had a trifle over 52 per cent of stock of each of these twenty corporations. That was 1892. And from that time until 1899 the affairs of all of those corporations were managed by those gentlemen precisely as though they had been trustees under the preexisting trust agreement.

Of course they were terribly troubled about these poor holders of small amounts. They were terribly troubled about them. And the way they provided for them was by declaring a dividend of a character that would enable them to give these people just as much as they got themselves, ratably, out of the earnings of the various companies. So, for example, on September 15, 1897, dividends of this kind were paid:

> Buckeye Pipe Line Co., 40 per cent.
> Eureka Pipe Line Co., 12 per cent.
> Northern Pipe Line Co., 23¼ per cent.
> Northwestern Ohio Natural Gas Co., 1½ per cent. (Gov. brief, vol. 1, p. 71.)

The sum of the dividends received by the trustees on the shares which they still held in these four companies amounted to $2,389,033.35. They immediately paid out to the trust-certificate holders the sum of $5 per share, amounting to $2,389,400, which a trifle more than just used up the sum of those dividends—a few dollars over. The balance of the dividends of these four companies, declared at the same time, of course went directly to Mr. Rockefeller and the other individuals who had converted their certificates into stock of the other companies, so that they got the same return that they would have gotten if they had retained their trust certificates.

This was the scheme adopted through all the period of liquidation, Mr. Rockefeller says.

Mr. Justice HOLMES. That is to say (if I understand you) one of the holders of the old trust certificates getting a dividend, say, of $5 is told that it represents a dividend of such a proportion in Company A, such in Company B, and such in Company C?

Mr. WICKERSHAM. I do not think he was told anything about it.

Mr. Justice HOLMES. But that is the theory?

Mr. WICKERSHAM. That is the theory; yes. I think he was not told anything about it. The liquidation trustees, according to the record here, upon this being reported to them (that these dividends had been declared), resolved that $5 per share be distributed on the stock represented by the assignments. And in that way, Mr. Milburn says, with some criticism, it is said that this was so dissolved as to preserve the common control. Of course it was, he says; and of course it was. The court below said in its opinion that the mode of dissolution or distribution adopted tended to preserve the common control. He says that of course it did; and obviously that is what it was adopted for. And obviously during this period of seven years this group of half a dozen gentlemen just as completely controlled the affairs of these thirty-seven corporations as the trustees had done under the agreement of 1882; and the affairs of those corporations were conducted in the same relation, with the same exclusion of outside competition, and the same complete combination among themselves, as they had been prior to 1892.

Then all went very well, until by and by the attorney general of Ohio "got busy" again. On November 8, 1897, he filed a petition for contempt against the Standard Oil Co. of Ohio, claiming that it had not complied, *bona fide*, with the decree of 1892, and that these liquidation proceedings were purely illusory; and that as a matter of fact that company was still in a combination with all these other companies, precisely as it had been prior to the dissolution.

An answer was filed, and interrogatories were addressed to Mr. John D. Rockefeller, which were answered, and which elicited certain information that is very important in both cases, though much more important in this case than in that. The thing ran along for nearly three years. At the end of that time there was a change of administration in Ohio. Finally these gentlemen succeeded in persuading the court that they had not violated its decree; and there was an order entered finding that they were not in contempt.

In the meantime another suit was brought in Ohio by the attorney general of the State against the Buckeye Pipe-Line Co., the Solar Refining Co., the Ohio Oil Co., and the Standard Oil Co. of Ohio, based on what was known as the Valentine Act. That was the anti-trust act of July 1, 1898. That suit went to the Supreme Court of the State on demurrer, and the question of the constitutionality of the act was raised, and the act was upheld. The decision rendered by the Supreme Court of Ohio is reported in Fifty-sixth Northeastern Reporter. That decision, rendered on January 30, 1900, upheld that act. But by that time, or about that time, these gentlemen had begun to feel decidedly uneasy. Trusts were becoming unpopular. Almost every State in the Union had had these trusts up. Almost every Supreme Court, certainly those of all the leading States, had

condemned them. The general principle underlying them was condemned. It was pointed out that there was substituted for the control provided by law (that of trustees or directors elected by the stockholders of the company) the control of an irresponsible body, managing a group of corporations; that they were engines for monopoly, etc., etc. And they saw that this particular form of control would not do.

So, then, the question was, What should they do? They had this enormous aggregation. By this time it had grown to millions more—$116,000,000 of assets. They had those assets and the control of the business. They were not going to give them up—not so long as there was any inventiveness left in legal minds. There had been some question as to whether one corporation could hold stock in another. But the State of New Jersey saw a new source of revenue here. Its corporate laws were amended; ample facilities were extended; an invitation was held out cordially to gentlemen desiring to form combinations, and a large source of revenue was created there. And so, in the early part of the year 1899, they hit upon what Mr. Archbold said they thought was a legal means of holding together this combination.

At that moment, what was the situation? There were still twenty companies—twenty different corporations; and those twenty held the stocks in sixty-four more. Each one of them held stock in each of the others. Then there was a body of about 3,000 men who had held the trust certificates issued under the trust agreement of 1882, who at that moment held the assignments executed to them by the trustees under the agreement of 1882, assigning to them so many nine hundred and seventy-two thousand five-hundredths in each of a great list of stocks of these twenty corporations.

If they had stood just there and done nothing more, when any one of these men who had taken their stocks had died, his estate might have sold his stock, and it would have been scattered. The stock in company A might have gone one way; the stock in company B another; the stock in company C another. Any one of the gentlemen holding this assignment of so many parts in the whole pile of securities might have gone and taken his share and been content even with these fractional certificates, which were probably not wholly without value—certainly not if the fact as to their earnings had been made known; and the control over this whole aggregation would have been rent apart.

Their problem was to so put it together that it never could be rent apart. And when my friend here says, and when these gentlemen contend to your honors that their position immediately after they had turned over this stock to the New Jersey company was the same as it was before, they tell you what is an offense to common sense.

Of course it was not the same as it was before. It was not designed to be the same as it was before. It had just that one simple intention. It was to rivet the control of the one hand over the twenty; to put it in mortmain, so that neither death nor taxes nor financial ruin should ever tear them apart. That was the whole purpose of it. There is no mystery about it. I can not conceive how counsel can face this court and contend that there was no difference in the position, either practically or legally, after the transfer was made.

The CHIEF JUSTICE. To illustrate it, let us say that here is Corporation A, which is owned by twenty stockholders. They took the interests of those stockholders and gave those stockholders certificates of stock in another corporation. They transferred that stock to another corporation and gave those stockholders certificates of stock in the other corporation. How did they in that way rivet forever in any one hand the control?

Mr. WICKERSHAM. Why, if your honor please, we will say a man to-day has twenty different certificates, each one representing, if you please, one-twentieth of the stock.

The CHIEF JUSTICE. You are considering the aggregate?

Mr. WICKERSHAM. Suppose he sells to John Smith his stock A. Suppose he sells to John Jones his stock B.

The CHIEF JUSTICE. Yes; I understand. You are speaking of the aggregate control?

Mr. WICKERSHAM. Precisely.

The CHIEF JUSTICE. I misconceived your argument. I understand you now.

Mr. WICKERSHAM. I say the whole purpose of it was to prevent these corporations from ever coming into competition with each other. The question was, how could they prevent it?

Mr. Justice DAY. Let me ask you a question there, Mr. Attorney General, if it does not interrupt you. Were these twenty corporations in as many States?

Mr. WICKERSHAM. In many States. Several of them were in New Jersey; one of them was in Indiana; one in Pennsylvania; one in Kentucky—you have got a list of them all there. They were not all in the State of New Jersey.

Mr. Justice DAY. What became of these sixty-four that were subsidiary to the twenty?

Mr. WICKERSHAM. Those sixty-four were distributed around in this way. (I have a memorandum here.) The stocks of twenty-three of them were transferred to the Standard Oil Co. of New Jersey; of eleven of them to the Standard Oil Co. of New York; of eleven of them to the Anglo-American Oil Co., and the remaining nineteen were distributed to and among seven of the other companies.

The CHIEF JUSTICE. And then the stocks of those other companies to which these transfers were made were all passed to the Standard Oil Co. of New Jersey?

Mr. WICKERSHAM. Yes.

The CHIEF JUSTICE. And stock certificates issued?

Mr. WICKERSHAM. Yes, sir.

The twenty companies to which these sixty-four were distributed were these. (There is a list of them printed on page 57 of the first volume of our brief.) There is an English company, a Pennsylvania company, two Ohio companies, one of Pennsylvania, one of Indiana, another one of Pennsylvania, one of New York, another one of Pennsylvania, three of Ohio, two more of Pennsylvania, one of Indiana, one of Kentucky, one of New Jersey, one of New York, another of Ohio, and another of New Jersey.

Mr. Justice HARLAN. All more or less engaged in interstate commerce?

Mr. WICKERSHAM. All engaged in some form of interstate commerce, and all engaged in some branch of the business of transporting or refining crude oil and its products and distributing it in the ways of commerce among the States and with foreign countries, and together making up the control of substantially all the business in the United States (with some negligible exceptions) in petroleum and its products.

So that by this transaction of 1899 any chance of those companies ever getting into competition with each other was supposed to be forever terminated, and the whole purpose of the transaction was to accomplish that continued control, and to forever prevent that apprehended contingency.

But the defendants say their condition was no different after this transfer than before; that the same number of men controlled, the same number of people owned. But granting that, see the difference: Before, the agreement was purely voluntary—a combination continued by purely voluntary acts. Subsequently, it continued because they could not pull apart. They had substituted the one perpetual and immortal control for the temporary and voluntary control. Judge Sanborn, in his opinion, deals with that feature in language that it seems to me can not be improved upon. It will be found on pages 582–583. I will not stop to read it; but it is an admirable analysis of the transaction, and the result of it. And it certainly has not been answered in the arguments at this bar, and I doubt if it can be answered.

Mr. Watson says that there is no law to compel men to compete; that they were not competing; that to challenge this transaction is, in effect, to say that the Sherman law compels them to compete. Ah, but that is not the question! There is a law to compel them to refrain

from so tying their hands that they never can compete. No man is compelled to compete against his will. But the policy of the law of the United States, as declared in the Sherman Act, is that he shall not so arrange his affairs as to prevent competition in an article which is dealt in in interstate commerce.

I am now about to pass to another subject which, with your honors' permission, I will not enter upon until to-morrow.

The CHIEF JUSTICE. Very well; we will suspend here.

(The court thereupon adjourned until to-morrow, Tuesday, January 17, 1911, at 12 o'clock m.)

ARGUMENT OF HON. GEORGE W. WICKERSHAM—Continued.

Mr. WICKERSHAM. May it please the court, the appellants next contend that the Sherman Act has no application to the transfer of the stocks of the various manufacturing companies to the Standard Oil Co. of New Jersey, for the reason that such transfer was not an act of interstate or foreign commerce, nor direct or immediate in its effect upon such commerce. But this proposition limits the entire consideration of the case to the transfer of the stocks, whereas the Government's cause of action is based upon proof of a combination and conspiracy between the men who controlled the various companies engaged in the different branches of the oil trade to eliminate competition in that business as carried on among the States and obtain a monopoly of it, finally accomplished by the transfer to the New Jersey company of the stocks of thirty-odd corporations—refining companies, manufacturing companies, pipe-line and tank-line companies, marketing companies—all together carrying on and controlling a vast trade in the transportation, refining, manufacturing, distribution, and sale of petroleum and its products.

The circuit court adjudged in its decree that the defendants named in section 2 entered into a combination or conspiracy, which was described in that portion of the decree that I read yesterday, in pursuance of which they caused a majority of the stocks of the various companies to be vested in the New Jersey company, thereby clothing it with the power which was described.

In the Northern Securities case, Mr. Johnson argued substantially what is contended for by the appellants here. He said (reading from page 271 of the one hundred and ninety-third volume of the reports of the Supreme Court):

> The purchase by a person or corporation, of a majority of the shares of two competing railway companies, is not "a contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." The Sherman Act prohibits, not a contract *tending* to restrain trade, but one actually in restraint thereof.

The meaning of "restraint of trade" was well understood when the Sherman Act was passed.

The holding by a person or corporation as owner of a majority of the shares of two competing railway companies, is not "a contract or combination or conspiracy in restraint of trade," within the meaning of the act.

A corporation, though incorporated for the purpose of holding, and actually holding, a majority of the shares of two competing railway companies is not such a combination or conspiracy. (193 U. S., 271.)

But Mr. Justice Harlan, in writing the prevailing opinion of the court, said:

What the Government particularly complains of, indeed, all that it complains of here, is the existence of a combination among the stockholders of competing railroad companies which in violation of the act of Congress restrains interstate and international commerce through the agency of a common corporate trustee designated to act for both companies in repressing free competition between them. Independently of any question of the mere ownership of stock or of the organization of a state corporation, can it in reason be said that such a combination is not embraced by the very terms of the antitrust act?. (Page 335.)

After reviewing the authorities on the subject, Mr. Justice Harlan continued:

The means employed in respect of the combinations forbidden by the Anti-Trust Act, and which Congress deemed germane to the end to be accomplished, was to prescribe as *a rule* for *interstate and international* commerce (not for domestic commerce), that it should not be vexed by combinations, conspiracies, or monopolies which restrain commerce by destroying or restricting competition. (Page 337.)

Further reviewing the evidence in the case, he pointed out that—

There was no actual investment, in any substantial sense, by the Northern Securities Company in the stock of the two constituent companies. If it was, in *form*, such a transaction, it was not, in *fact*, one of that kind. However, that company may have acquired for itself any stock in the Great Northern and Northern Pacific Railway Companies, no matter how it obtained the means to do so, all the stock it held or acquired in the constituent companies was acquired and held to be used in suppressing competition between those companies. It came into existence only for that purpose. (Pages 353–354.)

He said that on the testimony of Mr. Morgan himself, the actual nature of the transaction was disclosed to be that the Northern Securities Co. should be organized as a holding company—

in whose hands, not as a real purchaser or absolute owner, but simply as custodian, were to be placed the stocks of the constituent companies—such custodian to represent the combination formed between the shareholders of the constituent companies, the direct and necessary effect of such combination being, as already indicated, to restrain and monopolize interstate commerce by suppressing or (to

use the words of this court in *United States* v. *Joint Traffic Association*) "smothering" competition between the lines of two railway carriers. (Page 354.)

Mr. Justice Brewer, in his concurring opinion, made a distinction between the right which a single individual might have who possessed a majority of the stock in one company to invest his surplus wealth in the stock of a competing company, and the case presented at the bar, which he said was—

> a combination by several individuals separately owning stock in two competing railroad companies to place the control of both in a single corporation. The purpose to combine and by combination destroy competition existed before the organization of the corporation, the securities company. (Page 362.)

That corporation, he said, was a mere artificial person created as "a mere instrumentality by which separate railroad properties were combined under one control." He said:

> That combination is as direct a restraint of trade by destroying competition as the appointment of a committee to regulate rates. The prohibition of such a combination is not at all inconsistent with the right of an individual to purchase stock. The transfer of stock to the securities company was a mere incident, of the manner in which the combination to destroy competition and thus unlawfully restrain trade was carried out. (Page 362.)

The circumstance that some of the stockholders of the Northern Pacific were not stockholders in the Great Northern, and *vice versa*, cut no figure in the ultimate conclusion reached by the court. The answer admitted that Messrs. Hill, Morgan, James, and Kennedy—the dominant parties in bringing about the combination—were large owners of stock in both companies. (Page 221, 193 U. S. Reports.)

In the case at bar, the Standard Oil Co. of New Jersey was adopted as a more convenient instrument for effecting a control of the nineteen other companies, which should forever prevent the possibility of competition arising between them or between any of them and the sixty-four other companies controlled through the holding of stock in the New Jersey company. The case can be accurately stated, in my opinion, by a slight paraphrase of Justice Harlan's summary in the Northern Securities case, as follows:

> Summarizing the principal facts, it is indisputable upon this record that under the leadership of the defendants, John D. Rockefeller, William Rockefeller, Henry H. Rogers, Henry M. Flagler, John D. Archbold, Oliver H. Payne, and Charles M. Pratt, the stockholders of twenty separate and distinct corporations, which, through stockholding, controlled sixty-four others, all engaged in the transportation or refining of crude oil and the sale of the products of oil throughout the United States and with foreign countries, combined and conceived the scheme of reorganizing one of those corporations under the laws of New Jersey by enormously increasing its

capital stock, which corporation should hold the shares of stock of the nineteen other constituent companies, such holders of shares in such constituent companies to receive, upon an agreed basis of value, shares in the holding corporation; that pursuant to such combination, the Standard Oil Co. of New Jersey was adopted as the holding corporation through which the scheme should be executed; and under that scheme such holding corporation has become the holder—more properly speaking, the custodian—of substantially all of the capital stock of those twenty corporations, the stockholders of such companies who delivered their stock receiving upon the agreed basis shares of stock in the holding corporation. The stockholders of these constituent companies disappeared, as such, for the moment, but immediately reappeared as stockholders of the holding company which was thereafter to guard the interests of all such stockholders as a unit, and to manage, or cause to be managed, all properties as if held *in one ownership*.

Necessarily by this combination or arrangement the holding company in the fullest sense dominates the situation in the interest of those who were stockholders of the constituent companies; as much so, for every practical purpose, as if it had been itself a manufacturing, transporting, and marketing corporation which had built, owned, and operated the various refineries and distributing agencies for the exclusive benefit of its stockholders. Necessarily, also, the possibility of the constituent companies under such a combination coming into active competition with each other for trade and commerce along their respective lines was terminated, and they have become, practically, one powerful corporation, by the name of a holding corporation, the principal, if not the sole, object for the formation of which was to carry out the purpose of the original combination under which competition between the constituent companies would be prevented * * *. The result of the combination is that all the earnings of the constituent companies make a common fund in the hands of the Standard Oil Co. of New Jersey, to be distributed, not upon the basis of earnings of the respective constituent companies, each acting exclusively in its own interests, but upon the basis of the certificates of stock issued by the holding company. No scheme or device could more certainly come within the words of the act—"combination in the form of trust or otherwise * * * in restraint of commerce among the several States or with foreign nations"—or could more effectively and certainly suppress free competition between the constituent companies. This combination is, within the meaning of the act, a "trust"; but if not, it is a *combination in restraint of interstate and international commerce;* and that is enough to bring it under the condemnation of the law. The mere existence of such a combination and the power acquired by the holding company as its trustee constitute a menace to and a restraint upon that freedom of commerce which Congress intended to recognize and protect and which the public is entitled to have protected.

Up to this point I have attempted a paraphrase of so much of Mr. Justice Harlan's opinion as is found on pages 326 and 327 of the report in 193d United States.

The meaning of the decision in the Northern Securities case was expounded in the later case of *Harriman* v. *The Northern Securities*

Company (197 U. S., 244), in the language of the Chief Justice which has been so often quoted here, but which perhaps will bear repetition at this place.

It was sought in that case to give to the language of Justice Harlan in the earlier case, which I have just referred to, a technical as well as a figurative meaning; to hold that his decision was that the Northern Securities Co. was, technically as well as figuratively, the mere custodian of the stock of the constituent companies transferred to it. But the Chief Justice, writing the unanimous opinion of the court, said:

> We do not think that the opinion of Mr. Justice Harlan is open to the construction put upon it. In speaking of the situation as between the Government and the defendants, the Securities Company is sometimes referred to as the custodian of the shares and sometimes as the absolute owner, but in the sense that in either view the combination was illegal. For the purposes of that suit it was enough that in any capacity the Securities Company had the power to vote the railway shares and to receive the dividends thereon. The objection was that the exercise of its powers, whether those of owner or of trustee, would tend to prevent competition, and thus to restrain commerce.
>
> Some of our number thought that as the Securities Company owned the stock, the relief sought could not be granted, but the conclusion was that the possession of the power, which, if exercised, would prevent competition, brought the case within the statute, no matter what the tenure of title was. (Page 291.)

So, in the present case, for the purposes of this suit, it is enough that the Standard Oil Co. of New Jersey has the power to vote the shares of the many corporations held by it and to receive the dividends on those shares. The objection is that the exercise of these powers tends to prevent competition, and thus to restrain commerce. The principle of the Northern Securities case is, therefore, directly applicable, and the conclusion must be that as through the Standard Oil Co. of New Jersey the defendants possess a power which, if exercised, would prevent competition, and *a fortiori*, when such power *has been exercised* to prevent competition, the case is brought within the statute, no matter what the tenure of title may be.

The appellants further argue that in 1906, when this suit was brought, the business of the Standard Oil Co. of New Jersey, by means of its own instrumentalities and the instrumentalities of the companies whose stocks it owned, was and had been for years a unit; that it was not in combination with any other interest engaged in the oil business; in other words, that because it had got control through the stockholdings of the corporations transferred to it before the suit was brought, of an enormous percentage of the business in the refining and transportation and marketing of oil and its products, it can defy prosecution.

Again, in the Northern Securities case it was argued that the alleged combination had accomplished its object before the commencement of the suit, and therefore that no effective relief could be granted to the Government. Mr. Justice Harlan said:

This same view was pressed upon the circuit court and was rejected. It was completely answered by that court when it said: "Concerning the second contention, we observe that it would be a novel, not to say absurd, interpretation of the Anti-Trust Act to hold that after an unlawful combination is formed and has acquired the power which it had no right to acquire, namely, to restrain commerce by suppressing competition, and is proceeding to use it and execute the purpose for which the combination was formed, it must be left in possession of the power that it has acquired, with full freedom to exercise it. Obviously the act, when fairly interpreted, will bear no such construction. Congress aimed to destroy the power to place any direct restraint on interstate trade or commerce, when by any combination or conspiracy, formed by either natural or artificial persons, such a power had been acquired; and the Government may intervene and demand relief as well after the combination is fully organized as while it is in process of formation." (192 U. S., 357.)

Substantially the same ruling was had in the Trans-Missouri Traffic case, and in the case of *Waters-Pierce Oil Company* v. *Texas* (212 U. S.) the same principle was applied.

The appellants further contend that they have not offended against the second section of the Sherman Act, because they have not monopolized or conspired to monopolize interstate or foreign commerce in petroleum products; and they say that the element of monopoly involves the restraint or exclusion of others from engaging in the business by the coercion of illegal acts.

It would seem unnecessary, in view of the full discussion had in the case against the tobacco company, to consume the time of the court with much further consideration of the law of monopoly. The records of debates in Congress make it clear that Congress, in passing the Sherman Act, meant to reach and prohibit precisely such a combination as that now at the bar of this court. At the time of the passage of the act great public alarm had arisen over the growth of these vast combinations of corporations held together under single control. The form of such control generally adopted at that time was the technical "trust," such as the Standard Oil Trust of 1882. That there is a certain potency in numbers (to quote an opinion of this court) had been fully demonstrated by the rapid growth of these combinations, and the exclusion by them of the small traders. All over the country there was growing alarm at the strength and possibilities presented by such combinations.

Senator Sherman, speaking in the Senate on March 18, 1890, said:

Unlawful combinations, unlawful at common law, now extend to all the States and interfere with our foreign and domestic commerce

and with the importation and sale of goods subject to duty under the laws of the United States, against which only the General Government can secure relief. They not only affect our commerce with foreign nations, but trade and transportation among the several States. The purpose of this bill is to enable the courts of the United States to apply the same remedies against combinations which injuriously affect the interests of the United States that have been applied in the several States to protect local interests. (Bills and Debates in Congress Relative to Trusts, p. 92.)

He described the character and effect of these combinations, and referred, as illustrating the evils resulting from them, specifically, among other things, to a case where the United States court was called upon to pass upon the acts of the Standard Oil Co. in dictating terms to a receiver of the United States court, and under threat of building a pipe line and taking from him all the business in transporting oil that was shipped over his road, requiring him to raise the rate on the transportation of oil shipped by a man named Rice, a competitor, from 10 to 35 cents, and to pay the Standard Oil Co. 25 cents out of the 35-cent rate as a condition of continuing to hold and transport the business of the Standard Oil Co. He referred also to testimony given by the vice president of the Pennsylvania Railroad Co. (Mr. Cassatt) to the effect that at the time when he testified, in the year 1879, he was then paying to the Standard Oil Co. not only large rebates, but also a commission on the shipment of every competitor of the Standard Oil Co. over its lines.

The evidence very clearly demonstrates the truth of the popular belief that the enormous growth of the Standard Oil combination between 1875 and 1882 was the result of the unprecedented advantages they enjoyed during those years in rates of railroad transportation of their product. Conceding, for the sake of argument, Mr. Milburn's proposition that in those days it was the custom, recognized by everybody, to "shop around" among the railroads and get the best rate a shipper could, and that, logically speaking, the man who can ship a trainload of oil is entitled to a better rate of transportation that the man who ships a carload, still, even in those days, even when people were perfectly familiar with the preferential rates and practices in transportation, the conscience of the public was utterly and completely shocked by the discovery of a system unknown anywhere in the world before, whereby this great dominant monopoly dictated terms which required every competitor to pay tribute to it through the drawbacks paid to it by the railroad company on the shipment of every competitor. No standard of morality—not that prevailing in 1870 and in 1880 nor at any other time—would ever justify such a condition of things as that. And yet it was upon just such practices as that, by virtue of just such extraordinary extortion, that this combination acquired the monopoly which they have ever since more or less preserved. And it was in consideration of these

conditions, elaborately discussed in Congress, that the act of July 2, 1890, was passed. It was framed specifically to reach manufacturing and trading companies. There was some doubt, until the decision of this court in the Trans-Missouri case, as to whether or not railroad corporations were within its purview. There never was any doubt that it applied to ordinary manufacturing and trading companies.

Mr. Kellogg has so comprehensively reviewed the evidence on the subject of the practices of this combination in the past that it is unnecessary for me to do more than say that it is clearly established by the record in this case that from some time in the seventies to the present time, the individual defendants and those associated with them have been engaged in an attempt to monopolize the trade and commerce of the United States and with foreign countries in petroleum and its products; that for the purpose of accomplishing this monopoly they gathered together a great number of competing concerns which, in 1879, they turned into the trust of that year, at that very moment and by that very combination effecting a monopoly of the business; that they have maintained that monopoly through the various devices of the trust of 1882, the pretended liquidation of 1892, the resulting joint control between 1892 and 1899, and finally by the stock-holding trust of 1899; that they have through these means realized excessive and monopolistic profits; that they have controlled prices; that they do to-day absolutely control the price both of the crude oil and of the refined product; and that they absolutely control the rates of transportation by the pipe lines.

When the testimony in this case was taken, they had accumulated assets of a book value of nearly $360,000,000, distributed among upward of one hundred corporations. In each of the years 1905 and 1906, they distributed nearly $40,000,000 in dividends. The evidence further shows that in the year 1904, these defendants manufactured 83.8 per cent of all the crude oil, 87.3 per cent of all the refined illuminating oil, and 82.9 per cent of all the naphtha produced in the United States; that of the crude oil refined in the United States they employed in their business 79.3 per cent; that they controlled from five-sixths to nine-tenths of all the marketing of refined oil in North America; that they sell from 95 to 97½ per cent of all the lubricating oil sold to steam railroads in the United States; and that they exported in 1906 86.3 per cent of the entire export business in illuminating oil produced in the United States.

Mr. Watson falls into an error when he states, on page 350 of his brief:

In 1894 the Standard sold of the domestic trade 62.44 per cent of refined oil, but in 1906 only 37 per cent.

If this means that of the domestic trade in refined oil the Standard only sold 62.44 per cent in 1894, it is entirely inaccurate. In 1906

the percentage done by the Standard of the marketing of refined oil in this country was 84.8 per cent.

The evidence further shows that the combination purchased at least twenty-six refineries between 1882 and 1902 (twenty-two during the period when Mr. Watson, in his brief, at page 337, says only four were purchased) and, in addition, three lubricating plants and three other plants the nature of which is not disclosed by the evidence. Of these plants they dismantled twenty-two refineries and one lubricating plant.

To show that the monopoly achieved by the defendants is not so great as the Government contends, Mr. Watson prints in his brief, at page 348, a list of so-called independent refineries. As we show in our reply brief, on page 60, there is no evidence whatever to sustain this list. Mr. Archbold testified that he had no personal knowledge on the subject. The list contains every little refinery and lubricating works, many duplications, and is utterly without foundation. It is not made up from any substantial testimony. We give in our brief, at page 139 to page 150 of volume 1, an accurate statement of the percentages of the business done by the Standard and by the independents.

This result, this enormous control over a great industry, marks the accomplishment of efforts at monopolization, and is in nowise comparable to the mere normal growth of the wealth and prosperity of individual effort. In the language of Mr. Justice Barrett, in the North River Sugar Refining Company case—

> It is the case of great capitalists uniting their enormous wealth in mighty corporations, and utilizing the franchises granted to them by the people to oppress the people. (54 Hun., 354.)

In *Finck* v. *Schneider Granite Company* (85 SW. Rep., 213), the Supreme Court of Missouri held that no one can hold any vested rights which can be held to be exempted from the lawful exercise by the State of its police powers; that everyone holds his property rights subject to such lawful exercise; that whether or not the agreement there under consideration was valid under common law, it was invalid by the law of the State of Missouri; and that, although that statute, passed after the execution of the agreement, had not a retroactive effect, yet it operated on the contract, which was a continuing contract, and that the continuation of the agreement after it had become illegal became a violation of the act.

The same principle is applicable with respect to continuing contracts and combinations which affect interstate commerce. When Congress passes laws regulating interstate commerce, they immediately operate on existing conditions; and contracts and combinations which may not have been prohibited when made are, *ipso facto*, invalidated if they pass under the ban of Congress, constitutionally asserted.

The grant of corporate franchises to them, respectively, by the State of their incorporation, can confer no immunity upon corporations to violate the Federal antitrust law.

Indeed, it was broadly held—as said by Justice Brown in *Louisville & Nashville Railroad Company* v. *Kentucky*—

that the grant of a corporate franchise is necessarily subject to the condition that the privileges and franchises conferred shall not be abused, or employed to defeat the ends for which they were conferred; and that, when abused or misemployed, they may be withdrawn by proceedings consistent with law. (161 U. S., 677–697.)

In *Crutcher* v. *Kentucky* (141 U. S.), it was said:

To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, can not have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject. (Page 57.)

The plenary power of Congress over the subject is undisputed. In *Hale* v. *Henkel* (201 U. S.), Mr. Justice Brown, in delivering the opinion of the court, said:

It is true that the corporation in this case was chartered under the laws of New Jersey and that it receives its franchise from the legislature of that State; but such franchises, so far as they involve questions of interstate commerce, must also be exercised in subordination to the power of Congress to regulate such commerce, and in respect to this the General Government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner, with a due regard to its own laws. Being subject to this dual sovereignty, the General Government possesses the same right to see that its own laws are respected as the State would have with respect to the special franchises vested in it by the laws of the State. The powers of the General Government in this particular in the vindication of its own laws are the same as if the corporation had been created by an act of Congress. (Page 75.)

It was held by this court that the grant to Congress of the power to regulate commerce was, in effect, a declaration of the rule that no State or individual should interfere with the free flow of commerce among the States, and that the power of Congress over that subject was exclusive of all others. Congress, therefore, having this power, has seen fit to declare the conditions under which commerce among the States, and with foreign nations, may be carried on, and, in effect, that no one shall carry on such commerce except in conformity with the rules which it has provided. It is not a taking of property if the Federal courts, by appropriate decrees, prevent the exercise of franchises and powers derived from State authority which would conflict with the rules for the regulation of interstate and foreign commerce laid down by Congress.

I shall not take the time of the court by referring to the decisions in the lottery case and the commodities clause case and to other cases in which this principle has been put into practical application. But as construed in the light of those authorities, the provisions of the antitrust law are inherently within the power of Congress to enact as a regulation of commerce.

Finally, a word may be said upon the subject of the decree. The argument in support of the decree as rendered below will be found in the third point of the Government's brief. The injunction embodied in the fifth section is similar to that granted by the Supreme Court of Ohio with respect to the control of the Standard Oil Co. of Ohio by the trustees under the trust of 1882. The provisions of section 6 are designed to prevent the evasion of the injunction in section 5 by acts similar to those which were committed by the parties after the decree of the Ohio court in 1892. They are based upon the equitable principle of preventing a multiplicity of suits. The provisions in section 7 are designed to effectuate the dissolution of the combination, pursuant to sections 5 and 6. Congress having established the rule that all commerce among the States shall be free and unrestrained, and the defendants having signally violated that rule, and being, as adjudicated, engaged in deliberate and open violation, the court enjoins them from carrying on any commerce among the States until they shall have put themselves in conformity with the rules governing the same.

The effect of the decree, then, is to say to these gentlemen: "You must go back to the position you occupied before you put all these stocks into the New Jersey company in 1899. You have chosen to put together under one final control all of the twenty corporations and those that you have since added unto them, making thirty-seven in all. You must tear apart that ligament and let each of these creatures walk as it will, by itself, unrestrained, and uncontrolled by any artificial extraneous bond which hampers and forever prevents competition arising between them."

The only additional step taken by the decree is to anticipate that in the future these gentlemen might do as they have done in the past, and to enjoin them from taking similar steps which should evade the injunctive features of the decree in some such manner as they had attempted before. The decree is nothing revolutionary. It confiscates nobody's property. It breaks up the existing combination. It does not say to them: "You must enter into an active competition with each other." But it does say: "You must conform with the policy of the laws of the land, and you must break asunder the bonds that now prevent you from ever engaging in any trade dispute."

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