In the Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 118.

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THURSDAY, JANUARY 12, 1911.

Mr. WICKERSHAM. May it please the court: In the Danbury hat case (the case of *Loewe* v. *Lawlor*), the court stated that its conclusion in that case

"rests on many judgments of this court to the effect that the act prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the States, or restricts in that regard the liberty of a trader to engage in business."

As I conceive this case, the first consideration to which the attention of counsel should be addressed is whether or not the facts of this record bring it within the principle enunciated in that case.

In the fifth volume of the record there is an exhibit (Exhibit 87) which, in a brief and comprehensive way, shows the combination of the corporations which are the defendants in this suit. There are 64 corporations in number; and they are all directly or indirectly controlled by the American Tobacco Company, with the single exception of the Imperial Tobacco Company of Great Britain.

There are 25 individual defendants who were dismissed from the suit by the court below, who together controlled very much more than one-half of the common stock (which has the voting right) of the

American Tobacco Company, 8 of whom, as it appears, themselves control and have controlled, certainly since the date of the consolidation in 1894 (or whatever the date was), the voting stock of that combination.

Annexed to the petition are four agreements, which have been the subject of considerable discussion here, which on the one hand are contended by the defendants to constitute nothing but simple sales of property, buttressed by the customary covenants against injury by vendors, and on the other hand are contended by the Government to be evidence of the character of the combination, to constitute in themselves a parceling out (so far as the defendants in this case were able to do it) of the business of the world in tobacco and products of tobacco into three equal parts, and (so far as was within the capacity of the defendants in this suit and of the officers and directors of the companies which were the principal parties to those agreements) effectually and forever restrained any competition whatever between the concerns dealing in England and the concerns dealing in the United States, and apportioned among themselves the commerce with the rest of the world, except so far as the governments of different countries in the world had themselves, by governmental monopoly, appropriated to themselves the business of those countries.

The financial statement of the American Tobacco Company, which is the fifty-first exhibit in the record, in the fifth volume, shows that at the date when this case was being tried the assets of the American Tobacco Company and its constituent subsidiary companies, excluding the Imperial, amounted to about $400,000,000, according to book values. The table in the record shows that their net earnings for the year 1907 amounted to about $36,000,000. And it was stated yesterday by Mr. Nicoll in the argument that after paying interest on the bonds and the agreed 7 per cent or 6 per cent on the preferred stock, dividends of 20 per cent had been declared on the common stock. It appears, moreover, that for the year 1906 the companies defendant, exclusive always of the Imperial Tobacco Company, had transacted the following percentages of all the business of the United States in these products of tobacco:

Of manufactured tobacco, plug and smoking, 77 per cent.

Of snuff, 96 per cent.

Of cigarettes, 77 per cent.

Of little cigars, 91 per cent.

Of cigars, stogies, etc., according to the table, upward of 10 per cent. And I believe the evidence elsewhere shows it more accurately as nearer 14 per cent.

It appears, moreover, from Government Exhibit 76, in the fifth volume of the record, that in the year 1905 these companies purchased about 45 per cent of the entire crop of American leaf tobacco of all

kinds; about 60 per cent of the flue-cured tobacco of Virgina, North Carolina, and South Carolina; about 90 per cent of the Virginia sun-cured tobacco; nearly 72 per cent of the burley tobacco, and 60 per cent of the Green River tobacco.

The defendants maintain that their trade for the year 1906 amounted to only about 37½ per cent of the total output of all manufactures of tobacco in the United States; and in reaching that result they include the trade in cigars, of which admittedly they do not control more than 14 per cent.

Taking their own figures and eliminating the cigar business, their business for the year 1906 amounted to $159,878,934, out of a total output for the United States of $207,935,822, or upward of 76 per cent.

The contention of the defendants is that they are not in violation of the statute because they are merely manufacturing companies, owning their respective properties, having grown, expanded, and prospered through sound business methods in the ordinary course of successful trade, and not pursuant to a design to suppress competition or to accomplish monopoly. They lay much stress upon the contention that the American Tobacco Company is not a holding company, which Mr. Johnson defines to be not one which acquires property or shares for the purpose of issuing the same in the promotion of its trade; but it is a corporation which, having no trade, acquires shares (for it can not acquire property) for the purpose of holding them for something not involved in the transaction of its business.

Mr. Johnson's contention amounts to this: That if in this case a number of different corporations competing with each other enter into an agreement restricting output, regulating prices, and engaging not to compete, they violate the law; but if, instead of entering into such an agreement, one of them acquires the stocks of all the others, or if they be merged or consolidated into one corporation under the authority of law so that they unify their management and control under a form of organization permitted by State law, they do not violate the Sherman Act, even though the necessary effect of their combination is to terminate an active competition which theretofore existed between them, and to give them so large a proportion of the trade and commerce of the United States in the article dealt in as to enable them to fix prices and exclude competition.

He concedes that the words of the statute forbidding combinations in the form of trust or otherwise give a pretty large limit or scope. But he says, as to the words "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 of property by any man in a legitimate way?"

Before answering this question, it is pertinent to inquire whether or not the control in this case which followed the acquisition by the American Tobacco Company of the stocks of the very many companies and of the properties and businesses of the concerns absorbed by it is to be considered an acquisition of property in a legitimate way, such as might have been the case with any acquisition of property by any individual; or whether the case does not present very different elements, such as attend the making of contracts in restraint of trade and efforts at monopoly.

All four of the circuit judges in the court below wrote opinions in this case. My learned friends have referred a number of times to the "opiuion of the court," and have read from the "opinion of the court." That opinion was the opinion of the presiding judge of the court, whose view of the law was not concurred in by any of his associates. Judge Coxe, in his opinion, described the combination among the defendants in the following language (I read from pages 295 and 296 of volume 1 of the record):

"The Tobacco Trust, so called, consists of over 60 corporations, which, since January, 1890, have been united into a gigantic combination which controls a greatly preponderating proportion of the tobacco business in the United States in each and all its branches, in some branches the volume being as high as 95 per cent. Prior to their absorption many of these corporations had been active competitors in interstate and foreign commerce. They competed in purchasing raw materials, in manufacturing, in jobbing, and in selling to the consumer. To-day those plants which have not been closed are, with one or two exceptions, under the absolute domination of the supreme central authority. Everything directly or indirectly connected with the manufacture and sale of tobacco products, including the ingredients, the packages, the bags and boxes, are largely controlled by it. Should a party with moderate capital desire to enter the field, it would be difficult to do so against the opposition of this combination. That many of the associated corporations were not coerced into joining the combination, but entered of their own volition, is quite true, but in many other instances it is evident that if not actually compelled to join they preferred to do so rather than face an unequal trade war in which the odds were all against them and in which success could only be achieved by a ruinous expenditure of time and money.

"The power to destroy a too formidable rival, assuming that the allied companies see fit to exercise it, can hardly be denied.

"We are not dealing with these companies as they existed prior to 1890, but with the consolidated unit controlling a preponderating proportion of the tobacco business in its most minute details. Prior to that date the manufacturing companies, the purchasers, the distributors, and the selling companies were each and all operating independently, and tobacco products were being transported back and forth to every State of the Union and to foreign countries. Since 1890 this vast interstate and foreign trade which was formerly carried on by this large number of competing companies and individuals

is now carried on by one combination. The free interchange of commerce has been interfered with, hampered, diverted, and, in some instances, destroyed. Though it may be greater in volume, it does not flow through the old channels. It is not free and unrestrained."

Judge Noyes said:

"The testimony discloses that the business of the defendants has three broad phases:

"(1) The purchase of the raw materials and supplies.

"(2) The manufacture of the product.

"(3) The disposition of the product.

"While the second phase—that of manufacture—does not involve interstate commerce, the other two phases seem clearly to directly involve it. And it also seems clear that the three phases are of equal importance. Unlike a mere manufacturing combination, this combination relates quite as much to the purchase of materials and the disposition of the product as to manufacture."

This combination had its origin in the year 1890, as has been stated here on the argument before; and in considering this problem I think it is important to bear in mind precisely how it was brought about.

There were five independent competing concerns. They were in different States. Three of them were corporations, and two of them were partnerships. They did an interstate business. The facts are conceded. They are embodied in the stipulation, in which are found most of the material facts regarding the structure of the combination, and not having regard to the questions of intent and purpose and action.

They were in fierce competition with each other. During the last year before the combination they had expended a very large amount of money and had lost a large amount of money in maintaining that competition. They came together in the month of January, 1890, and at once, by force of that combination, extinguished the preexisting competition between them, and at once secured 96 per cent of the entire business of the United States in cigarettes.

The dominant purpose of that combination may be misrepresented, but it can not be mistaken. Dictated, of course, by counsels of prudence (because the members of the combination undoubtedly considered that it was more to their interest to terminate a destructive competition than to fight it out), the purpose of the combination was undoubtedly to end that competition; and the purpose undoubtedly was by taking into the combination all of those who were engaged in the business to secure a monopoly of the business. And the purpose was carried out.

In their brief the defendants lay great stress upon the contention that these gentlemen did not go into this combination for the purpose of creating a monopoly or restraining trade, but that they went in simply to protect themselves against competition. It seems to me that by that very contention they admit themselves out of court;

because they characterize their acts by precisely the intent and pur pose which this court in construing the Sherman Act has many time said in its decisions was an unlawful purpose. When the Sherma Act was passed six months later it found this combination in th possession of the entire cigarette business of the United States because the 3 or 4 per cent was a negligible quantity. All competition was terminated. The only difference between that and any other combination was that it was held together through the form of a New Jersey charter, instead of by an agreement *inter partes*. And if any evidence is required as to the purpose with which they entered into the combination, it is furnished by the evidence of their continued acts.

They proceeded from that beginning to go out into other lines of the tobacco business. They went into the plug-tobacco business. They lay much stress upon the fact that they never had control of the Continental Tobacco Company, which was the great plug-tobacco company. But that becomes wholly immaterial; for within a very few years after this beginning it was admittedly merged by a process of law with the American and the Consolidated Tobacco companies; and if they had no control before, they all became part of a unit then.

They lay much stress upon the fact that they never had control of the American Snuff Company. But that is a matter of very little importance; because the record shows that directly or through the ownership of the Lorillard Tobacco Company they had about 40 per cent of the stock of the American Snuff Company. Four of the directors of the American Tobacco Company were stockholders of record of an additional amount sufficient to bring that ownership up to 45½ per cent. And the record shows that they have always operated in perfect harmony with each other.

But they say this with respect to the acquisition of future companies—which, by the way, went on as a continued process as it widened out, taking in new lines, following a very intelligent and a very scientific method. With every purchase they would get not only the business which they particularly sought in making the purchase, but the little nucleus of new business. Having gotten the cigarette business, there came with it a certain amount of plug-tobacco business; and so they proceeded to buy other plug-tobacco companies. Then they created a corporation to do the plug-tobacco business, and they put into that corporation all of the companies dealing especially in plug tobacco. With that they got a little of the snuff business. Then they created a company which brought together all the snuff manufacturers. And so it went, widening out, over and over.

They say there is no competition between the different forms of tobacco—between the different kinds of commerce in tobacco. But that is obviously not so. There is competition. You can not go into

one kind of tobacco, as this whole record shows, without going into another. The only form of tobacco product that they have not yet succeeded in absorbing to themselves is the cigar business; and that is because the manufacture of cigars does not lend itself to factory methods. Anybody may buy leaf tobacco and make cigars with the dexterity of his fingers. And with all of their efforts they have never been able to get more than 14 per cent of the entire business of the United States in cigars.

Of course, they control the business in Cuba. But the average American citizen does not smoke Habana cigars to any great extent. Therefore the cheap cigar which is made out of American leaf is made by so many other people, and may be made by so many other people, that they have been unable to get control of that business.

In this process of getting control of companies they refer (and I will only pause to speak of one or two instances) to the case of the R. J. Reynolds Tobacco Company as a typical instance of the class of cases in which some one of the defendant corporations owns stock in some other. In this instance Reynolds and his associates owned one-third, and the other two-thirds were taken by the Continental Tobacco Company, now the American Tobacco Company. The evidence shows that the American Tobacco Company had acquired an interest in the Reynolds Tobacco Company, of Bristol, Tenn. P. S. Hill, one of the vice presidents of the American Tobacco Company, negotiated the purchase with Dulaney, representing the Reynolds Company. The connection of the American Tobacco Company with the Reynolds Company was not made public. Hill testified that "it was a very trivial transaction and a very foolish one." Perhaps this is why the defendants in their brief are so anxious to demonstrate that it was a typical instance.

Its capital stock was only $7,500,000. It owned two brands, known as May Queen and Bristol Club. A series of letters that passed between Dulaney and Hill (which were produced on Hill's direct examination and are found in the second volume of the record, from page 316 to page 319) show just how the American Tobacco Company went about using secretly acquired and secretly controlled companies for the purpose of advancing their own ends and destroying their competitors.

Dulaney's letter to Hill of September 21, 1903——

Mr. McREYNOLDS. Pardon me; there are two Reynolds companies. The R. J. Reynolds Company is the one with seven and a half million dollars of capital. The other was a smaller company.

Mr. WICKERSHAM. I am much obliged for your calling my attention to it.

Dulaney's letter to Hill of September 21, 1903, is found on page 319 of volume 2, and that I read on the previous argument of this

case. It shows his condition of mind when he finally realized the plight into which he had been put by becoming the secret agent of this undisclosed principal. I read it on the previous argument, and I think it will bear rereading now.

He says:

"Until the receipt of your letter of the 16th instant I had refused to entertain any suggestion to the effect that you have not been treating our company fairly, and I still regret very much to be forced to believe it.

"You complain of not being able to see me, when you certainly know that when I was in New York, a week or so ago, I visited your office three days consecutively, and on one day waited all the forenoon, without being able to see you; and there was no fact in connection with our sale to you more clearly set out than that I could not and would not give this business any considerable part of my time. And yet I have been forced to give it much more thought and attention than ever before; and if I understand your position now toward us, we are simply in the attitude of a prisoner in chains with mock instructions to do the impossible.

"You promised to buy our leaf and furnish it to us at the same price you do to the A. T. Co.—at cost and carriage. But the two shipments made us have been of such quality and price as to offer no encouragement.

"You promised us an open market for our product—that you would remove all opposition to our brands by your salesmen and the distributing houses with whom you had influence; but you have not done this.

"In Greater New York and New Jersey we had a good business, which has been taken away from us by the argument that May Queen had been bought by the trust and would soon be taken off the market.

"In Baltimore and Washington your salesmen have not ceased to intimidate the distributors, and have run us out by threats that 'houses which handled May Queen could not get the benefit of the trust's trade discounts,' and this same method has been practiced at many other places.

"Such tactics are like abusing a prisoner and would not be tolerated by the military regulations of any civilized country."

Hill's only comment on that letter was:

"Mr. Dulaney, not being very much in touch with the business, got reports which were absolutely unfounded, and which he has always admitted since were incorrect."

On cross-examination, however, it was shown that Dulaney was very much in touch with the business.

On page 387 of volume 2 Mr. Hill was asked:

"Q. During this time, Mr. Hill, that the Reynolds Company were running under separate management, what was the nature in general of your correspondence with them—I mean, what was the extent of it; was it information, advice, direction, etc.?

"A. I was advised as to their output, the quantity and the results of their operations each month, and Mr. Dulaney would call and discuss generally the details about the business; sometimes write and

call attention to some things that he wanted done, and I had no connection with it other than that I was entirely willing to do anything I could for them."

And he goes on to show how finally he and Mr. Dulaney got pretty well discouraged; and eventually they made a bargain with Dulaney, representing the minority stockholders, by which they sold out the tangible assets and agreed to pay the stockholders a royalty on the brands. Since that time, he says, there has been no concealment as to who is the manufacturer of May Queen.

Not only did that sort of thing occur in their control of the various forms of business with which they were brought in contact from time to time as they progressed and as they prospered and as they got more and more control of the market in different lines, but they got control of the entire business in licorice, they got control of the entire business in tin foil, they went into all of the various forms of collateral business to which your attention has been called. Every one of those acquisitions terminated a competition theretofore existing in the particular commodity between all of the companies which had been taken into the American Tobacco Company fold. The acquisitions were made for the purpose of terminating that competition, and of enabling them to get the product dealt in by that particular company at the lowest possible price.

This was no simple, normal growth of business by direct acquisition of property, as has been depicted here. It was the progress of a combination operating through various forms of corporate organization and intercorporate stock and bond holdings, all designed to secure (and accomplishing that design) the control of a great business, and to destroy all competition, by purchase, consolidation, or merger.

Their growth was accomplished by different methods—some direct and aboveboard; others indirect, subtle, and in some cases such as would scarcely pass muster. It was an aggregation of competing plants. It was precisely such an aggregation as every public man who ever advocated the passage of the Sherman law, and every legislator who voted for it, had in mind when the act was passed. It operated for the pnrpose of removing all competition, and it achieved this purpose by different methods.

Mr. Duke's idea of the way to destroy competition is shown in a letter written by P. S. Hill to J. B. Cobb (the president of the American Cigar Company), printed on page 257 of the second volume of the record. Mr. Duke was the dominant factor in the combination, and his ideas had the force of law.

As written by Mr. Hill, the vice president of the American Tobacco Company:

"Mr. Duke's idea is to make a confidential arrangement with the Messrs. Park & Tilford and Acker, Merrall & Condit by which they

will sell Habana cigars both to the consumer and the retailer at present cost, so that the retailer will be paying exactly the same price as the consumer. Of course it will be necessary to keep this matter entirely confidential. The result will be a demoralization of the business for such length of time as may be deemed desirable to continue on this basis. The final upshot will be that the importers will be forced into an arrangement by which they will maintain prices agreed upon. This plan is considered the more desirable at this time for the reason that if we try to regulate the profit at the present time it would mean an advance in our goods to both wholesaler and retailer, which would give a decided advantage to independent factories in securing business, but we feel that when our goods are sold to the consumer at present cost there will be no opportunity to get much business for independent factories."

In every purchase they made (I think I speak within bounds), except the original combination, which they call "a purchase," they took from the vendors (not simply from the corporate vendor, but from the individuals who were its principal officers and shareholders), not simply covenants to protect the business sold, but covenants against engaging in the tobacco business throughout the United States, with perhaps the State of Nevada eliminated. It was their settled policy. When they came to make the combination in England, they took the most comprehensive covenants from all the individuals who had composed the various concerns that went into the Imperial Company—a number of people by the name of Wills, who had an old-established business there, and everybody else concerned. And all of the gentlemen who dominated the company here—those who were the owners, and had been from the start in control of the corporation—gave their individual covenants not to in any way engage in the tobacco business in competition with the covenantee.

Another method resorted to many times was to acquire the control of supposedly independent companies, and through them to cut prices and demoralize the market.

Twenty of these secretly controlled companies were developed in the evidence, and their names appear in the record. The effect of the discovery that a supposedly independent company was really one of the tentacles of the "trust" is graphically described in a letter of John Middleton, of the Nall & Williams Company, to C. C. Dula, printed on page 556 of the second volume of the record. He says:

"My Dear Sir: The inclosed letter will explain itself. I don't know this gentleman, but presume it is all right."

The inference from the letter would be that somebody had been sent with a letter of instructions to be permitted to examine the books and accounts.

"I have written him that the books were ready whenever he was. I am anxious to have the books examined and Mr. West is even more anxious than I am, but it comes at rather an unfortunate time for this

reason. The whole outfit is like a swarm of bees, and you can beat the tin pan all you please and you can not settle them, from the office force to the traveling men, and the hands in the factory, there is not one of them who does not believe that this establishment is going to be closed up. This is not to be surprised at, as they all know that in the past when the A. T. Company purchased a plant, it was closed, hence there is unrest through the entire establishment. I would like this examination to be done as quickly as possible when it is once started, for the examination will again cause a panic. I mailed you a clipping from the Austin Post regarding the recent law in Texas."

All these gentlemen had their eyes out for the antitrust law.

"But as you were out of the city I don't know whether you saw it or not. This has had the effect of upsetting our force in Texas. I am not surprised at the uneasiness it has caused with our force. They are like new recruits; they have never known or even suspected that they were in any way connected with the A. T. Company, and when they found where they were at, that caused confusion and alarm, and the Texas law on top of that has almost caused a panic in their ranks, and it is no easy matter to get them straightened out. The little old craft in the past three or four months has had sufficient shocks to shake her from stem to stern. I hope to get her back into smooth sailing, but whether I can or not remains to be seen. I inclose you this letter, because I have always received my instructions from you, and I trust that this will always be the case, and I would thank you to let me know if it is all right."

Of course that is the sort of evidence which speaks more potently, with more truth, and which carries a great deal more weight than all the testimony of witnesses as to what they intended or what they did not intend; that they were growing in a legitimate, orderly way; and that they never had any idea of suppressing competition. These men go on the stand one after the other, and "with devout mien and pious visage they do sugar o'er the devil himself;" so that you would think the last thing that any one of these gentlemen ever entertained in his mind was the idea of excluding a competitor or of acquiring any such predominance in the business as to subject him to the offense of being a monopolist. The true situation is to be gathered only from letters of this kind, found in the files of this company itself, telling these plain, unvarnished tales between men who had to communicate with each other because they were dealing with each other—letters such as this one, from this harassed gentleman, with his force like a swarm of bees about his ears because they were afraid that their factory would be closed up. For the result of all their observation was that when the American Tobacco Company acquired a competitor of the kind they were, the probability was that they were going to be thrown out of employment.

The record is full of these instances. Perhaps in passing I might dwell for just a second upon the matter of the American Cigar Stores Company.

After the American Tobacco Company got control of the United Cigar Stores Company, people began to get an idea that the American Tobacco Company was back of it. It had not been made known. Mr. Estabrook, of Boston, seems to have had some disquiet of mind on the subject; and he wrote to Mr. Hill, the vice president of the American Tobacco Company, to know whether or not the American Company was back of the United Cigar Stores Company. And Mr. Estabrook writes:

"Of course all rumors to the effect that our company is back of the United Cigar Stores Company are entirely without foundation, as we have no financial interest whatever in that company."

At the very time of writing that letter, as Hill well knew, nearly all of the stock of the United Cigar Stores Company was owned by the Blackwell's Durham Company, every share of the capital stock of which was owned by the American Tobacco Company. He tries to explain that by saying that in the first place he was not under any obligation to tell, and in the second place he was not technically telling an untruth, because it was not the American Company, but the Blackwell's Durham Company, that was back of it.

Instances of the methods by which competition was destroyed throughout the country through these secret companies might be multiplied indefinitely if I had time. I only refer to these one or two specific instances for the purpose of challenging and controverting the contention that was put forward by counsel for the Tobacco Company of the sweet, placid, dreamlike growth that they have depicted to this court, free from all idea of any undue or improper conduct. According to them we have here a record barren of any instances of oppression or of fraud; the absence of any witnesses to testify to improper dealings; nothing but the most idyllic condition of business growth.

I say it seems to me that counsel for the Government very wisely refrained (and I can say so, because I had nothing to do with the taking of the testimony and no responsibility for it at the time) from going out into the trial of all those many collateral matters, which might have prolonged this trial indefinitely, and might have resulted in a record like this which is before you in the Standard Oil case, but which the circumstances of that case made it essential to have there. I believe you will find enough in the five volumes of this record to clearly demonstrate to your minds the character of this organization, the methods by which it grew, the way in which it did exercise its powers, and the way in which it might at all times exercise its powers—from which, as I contend, you must infer a growth stamped by all those characteristics which, in every authority with which I am familiar, mark an interference with the free flow of commerce and constitute an attempt at monopolizing.

Mr. Justice LURTON. But, Mr. Attorney General, before you pass away from these instances, let me suggest that the other side has contended very earnestly that the instances you have cited are sporadic; that they are not at all characteristic of the methods by which these organizations have been brought about and their business conducted.

Mr. WICKERSHAM. Of course it is impossible in the time at my disposal to go through the record, but I cite them for the purpose of showing, and I do contend, that they are characteristic of the methods which they resorted to whenever it was necessary to resort to them to attain the end which they had in view; and that the end which they had in view was the end which is obvious—the end which they have reached in every avenue of the trade save one—the acquisition of the entire trade and commerce of the United States in tobacco and its products and the control of all the export trade.

Mr. Justice MCKENNA. You say "the methods they resorted to whenever it was necessary"?

Mr. WICKERSHAM. Yes; whenever it was necessary.

Mr. Justice MCKENNA. That is a qualification. How often did they find it necessary?

Mr. WICKERSHAM. There are a number of instances shown in the record when they seemed to think it was necessary. As an example, there are 20 corporations which they acquired and controlled secretly, which they used for the purpose of acquiring a more complete control over the market—which they used for the purpose of destroying brands, for example. Let me go a step farther——

Mr. Justice LURTON. Have you anywhere set out those secretly controlled corporations? There is no brief anywhere in which you collect those instances of secretly controlled corporations, is there?

Mr. WICKERSHAM. Yes; they are all summarized in the Government's brief. They are enumerated and references given to the record.

The defendants contend that the tobacco business is one of brands, that no competition in brands is of any value, and that the only effect of an effort to introduce a new brand for the purpose of driving out of business an established brand is to increase the demand for the former.

The CHIEF JUSTICE. Mr. Wickersham, if it does not disturb you, I should like to ask you a question that is running in my mind.

Mr. WICKERSHAM. Certainly.

The CHIEF JUSTICE. I wish to put two subjects before you. Do not answer in regard to them now, but in your own order:

You opened your argument by stating that before this first agreement was made these people were engaged in a ruinous competition.

Mr. WICKERSHAM. Yes, sir.

The CHIEF JUSTICE. The effect of this agreement being to stop that ruinous competition. Is it your conception that the statute compels the continuance of a ruinous competition?

That is the first question. Just answer it whenever it is convenient.

Then in another part of your argument you said that the record developed the fact that the tobacco trade is of such a character that a man who goes into one branch of it is obliged to go into all.

Mr. WICKERSHAM. Substantially.

The CHIEF JUSTICE. That being so, at some time in your argument I should like to hear from you as to how far that fact goes to justify the going into all and removes the criticism which might otherwise result from going into all.

Mr. WICKERSHAM. Let me answer your honor's second question right now, because that is a question of fact.

I do not criticize their going into another business. My only criticism is that they are going into that business for the purpose of absorbing it all. My criticism is that they are going into it as a means of gradually getting the control of the whole business, and that the mere fact that when a man deals in one kind of tobacco he insensibly and almost from the necessity of the case gets into some collateral kinds of tobacco business does not justify his going after and attempting to bag the whole. Otherwise, if that is not the case, the fact that a man has started a cigar stand will justify his gradually forming a combination to buy up the whole tobacco business of the United States and exclude everybody else from it.

I say the defendants contend that the business is one of brands and that no competition in brands is of any value. But the evidence absolutely disproves any such claim as that. There are countless instances in the record of a determined, successful effort on the part of the representatives of the different companies in this combination to drive out of business a well-established brand sold by independent dealers. The method pursued was to procure a secret control of a company supposed to be independent. In the case of companies selling with a union label they devised a brand to be made by one of their companies in close imitation of a brand manufactured by an actually independent company which was selling well in that territory, and by the expenditure of large amounts in advertising and selling their product at exceptionally favorable rates they endeavored to run out of the market the independent brand, often succeeding in doing so.

A typical instance of this is afforded by the case of the Nall & Williams Company, a Kentucky corporation, whose stock was acquired by the American Tobacco Company. The concern of H. N. Martin & Company, of Louisville, was a competitor of the American Tobacco Company—an independent company which manufactured

and sold a brand know as Martin's Navy. Representatives of this combination concocted a brand to be sold in competition with it by the Nall & Williams Company, the secretly controlled company, which should be represented to be the work of an independent competitor. The brand was submitted to C. C. Dula, the vice president of the American Tobacco Company, who wrote to the vice president of the Nall & Williams Company on March 11, 1903, a letter which is found on pages 507–508 of volume 2 of the record:

"Samples of Arrow Head referred to in your favor of the 8th instant came to hand this morning. I have examined them very carefully and am much pleased both with the appearance and the chew. The filler and sweet certainly both show up well. It is a tough, pleasant chew, and if the people really want a good piece of anti-trust, union-made tobacco, I certainly think you have it. I think you should direct your efforts particularly in the territories where the Detroit and other Louisville manufacturers have some business. A 3 by 12 five-space piece as good as Arrow Head should knock Martin's Navy in St. Louis into a cocked hat."

It may be said that that is forensic. It may be said that it is sporadic. As a matter of fact, that is a selection of a typical instance of the way in which they went after the independent brands. It shows that the conception of the officers of this company, who were writing letters to the managers of the secretly controlled companies, was very different from the contention of counsel here with respect to the possibility of destroying by competition an existing well-selling brand.

Testimony as to secret efforts is found in Dula's testimony, particularly in the second volume, and among other things there is a letter written by Dula to Middleton, a bogus independent, who was a member of the association of independent dealers. They even had their representatives of these secretly controlled companies serving on the committees of the independent dealers, so that through that tentacle they were enabled to keep in touch with exactly what the independent dealers were doing, and to use that information as it suited them in their business.

Dula, the vice president of the American Tobacco Company, writes to Middleton in July, 1903, as follows:

"As regards profits, while I would like you to show as much as possible, my idea is that you should not make money at the expense of trade, providing, of course, that you are getting this business from certain people."

That is to say, "keep up this destructive competition against our rival just as far as you have to in order to get his business, but don't waste any money beyond that point."

And there is some more of that.

So much for that. It is impossible to go into it at greater length. I think I have cited enough instances to show what I conceive to be the characteristics of the business as conducted whenever it was to their interest to conduct it in that way, and of the power which they had acquired, which was exercised or not at their own discretion, to accomplish their scheme.

Mr. Justice McKenna. Have you cited all the instances?

Mr. Wickersham. I have not attempted to cite all the instances. I have cited a few instances that I found as I ran through the record, which I thought would best illustrate the point I am trying to make.

The evidence is conclusive that by eliminating competition, by means of the combination attacked, the defendants have secured the absolute control of the market in leaf tobacco of the kinds in which they deal.

Judge Noyes, in the court below, says on this point:

"Subject to the economic limit that prices can not be fixed so low as to deprive the grower of inducement to raise future crops, the extent of the defendants' purchase of tobacco leaf necessarily gives them large power to fix the prices to be paid for the types which they require. Prices may be regulated, as the defendants assert, by the law of supply and demand, but the difficulty here is that the demand for many types comes, practically, from only one source. To whom, for example, can the growers of Burley or Virginia sun-cured tobacco sell their crop if they refuse the prices offered by the defendants?

"Similarly, the production by the defendants of by far the greater part of the tobacco used in this country gives the power to control the prices of the manufactured article, subject to the economic limit that if placed too high the consumer will give up the use of tobacco. It is not a question of going to another producer. No other producer could supply the amount required. Where will the users of snuff obtain it if they are unwilling to pay the prices charged by the defendants?"

Mr. Nicoll says that the price paid for the leaf tobacco has not decreased; and he instances that, and stress is laid upon it by Mr. Parker as showing that this combination, although it now has this vast control over the market for leaf tobacco, has not and, perhaps, he argues, can not control its price. Mr. Nicoll contends that these people are between the upper and the nether millstone, and that the prices are controlled by the farmer and the ultimate consumer.

Well, now, let us see. There is a significant table printed as an appendix to the Government's brief (Appendix G) which is taken from the reports of the Department of Agriculture for the year 1908. It shows that the acreage of tobacco production in the United States in the year 1900 was 1,046,427, and that there was a steady diminution of the amount put under cultivation until in the year 1907 (when this testimony was taken) there were only 820,800 acres

under cultivation, and in the year 1908, 875,425. So it is no wonder that there has been no reduction, but on the contrary some increase in the price, because with this constantly increasing use of tobacco and with the constantly increasing demand for the raw material we have an actual reduction in the acreage under cultivation from 1,046,427 to 875,425.

Mr. Justice Lurton. The average price in the fifth column of that table includes every variety, grade, and type of tobacco, does it?

Mr. Wickersham. I suppose it does; yes, it must. That is the average farm price of every grade and kind. Of course, this is a table which has value for certain purposes and none for others. It is valuable in this connection as showing the total amount of acreage under cultivation and the total production in the years 1900–1908. It shows that whereas in the year 1900 there was a total production of 814,345,341 pounds, in the year 1907 there was only 698,126,000, and in the year 1908 only 718,061,380.

Mr. Justice Hughes. There seems to be a discrepancy, Mr. Attorney General, between Government Exhibit No. 76, in volume 5, and this table, Appendix C in the brief, as to the total production.

Mr. Wickersham. Yes; there is, your honor, and I do not undertake to reconcile them. But it is sufficiently great, I think, to——

Mr. McReynolds. One is their estimate.

Mr. Wickersham. One is their estimate, the other is an official estimate, taken from the report of the Department of Agriculture.

Mr. Justice Hughes. There is a difference of one hundred and seventy-odd million.

Mr. McReynolds. One is the Government's estimate and the other is theirs.

Mr. Parker. You do not mean it is an estimate offered by the prosecution. One was introduced in evidence and the other was not.

Mr. McReynolds. One is the estimate of the Bureau of Statistics, and the other is the defendants' estimate.

Mr. Justice Lurton. While you are on that table, let me inquire how you account for the apparent increase in the average price of tobacco?

Mr. Wickersham. How do I account for it? Of course it is not in evidence; but I account for it, as a matter of public history, as being the result of the control of the amount of raw tobacco produced in the South through the operations of the Society of Equity.

Mr. Justice Lurton. The operations of those great societies of planters pooling their tobacco in order to get a better price, which you say are not shown up in the record?

Mr. Wickersham. Yes. In other words, I take it that the natural consequence of a combination of this kind must always be to throw producers into like combinations. Of course it is very hard to get the

farmers into a combination and get them to stick. But, considering the matter from an economic standpoint, what would you do if you were a farmer in a certain region of the country, and if you were confronted with an aggregation of all the buyers, who had you absolutely at their mercy, and could dictate terms to you? It is all very well to say, "You can put your land in cotton." But you can not. You can not always grow cotton on land where tobacco will grow. Besides, the man who all his life has grown tobacco does not know anything about cotton; and it is pretty hard for him to turn around and learn to raise a commodity the production of which requires a special skill.

What is his natural instinct? It is to get his neighbors together at the corner store and talk over the matter, and agree upon some method of protecting themselves. One of the vices—one of the very things which, as I conceive, this law strikes against—is the result to society of great combinations of this kind. It naturally tends to throw the whole economic world into two great organizations. It produces organizations of laborers, organizations of producers, organizations of middle men; and it results in society dealing, not through its ordinarily constituted agencies of government, but through a series of unofficial organizations of people animated by a sense of their own peculiar interest in that particular case.

The CHIEF JUSTICE. But society economically does not deal through the agencies of government. The Government has nothing to do with the dealings of people. That would be paternalism, pure and simple.

Mr. WICKERSHAM. Precisely; but the Government has to come in and protect society, as it has sought to do through the Sherman law. We are now getting off into the domain of political economy; and perhaps we had better stick to law.

The CHIEF JUSTICE. It seems to me that if that explanation is true—that the result of a combination on one side is to produce a combination on the other, which makes the product sell higher than it ever sold before—you are describing a very benign result.

Mr. WICKERSHAM. It is benign to the producer of the raw material. Whether or not it is benign to the ultimate consumer is another matter. He might object. And after all, it is the ultimate consumer who, under those circumstances, gets into a condition where I do not think he regards it as especially benign.

However, it appears from the testimony of Mr. Harris, the chairman of the board of the British-American Company, that the American Tobacco Company buys substantially all the tobacco grown in America for the British-American Tobacco Company. Prior to the agreements of September, 1902, the various British companies purchased leaf tobacco in America, exported it to Great Britain, and

there manufactured it and shipped it to countries other than Great Britain and the United States. The agreements of September, 1907, put all of the business which had theretofore been done by these English companies, buying in competition in the leaf market in this country, into the hands of the British-American Company. The British-American Company put the purchasing in the hands of the American Tobacco Company. So one of the results of this combination has been that all of the leaf tobacco purchased in the American market for export for Great Britain, there to be manufactured and exported to other countries, is purchased by the American Tobacco Company, and the competition in such purchases theretofore existing (existing before these agreements) in the leaf-tobacco market has been eliminated and destroyed.

Mr. Johnson contends (and if I understood Mr. Parker he repeated the contention) that the acquisition of property not charged with a public use can not be a combination in restraint of trade, contrary to the Sherman Act.

Here, as throughout his argument, he confuses the acquisition of the stock of one corporation by another with the ordinary case of the purchase of property. He seeks to confine the controversy to a consideration of the purchase of the property of one manufacturing company by another and the technical merger or consolidation of two or more corporations under the laws of the States of their creation. We do not for a moment dispute the fact that under the laws of the different States referred to power is given for the formation of corporations for the purpose of manufacture, to acquire property, and to consolidate and merge corporations, any more than it was contended in the Northern Securities case that power was not given to the Northern Securities Company by the laws of New Jersey to acquire and own capital stock in other corporations organized under the laws of other States. What the Government attacks, and what the court below decreed to be illegal in the case at bar, is a combination composed of sixty-odd separate corporate entities and a great number of individuals spreading its branches to remote parts of the United States and its possessions and into foreign countries, purchasing raw material in many States and shipping that material into other States, where it is made up into commercial products, which are then sent for distribution by different distributing agents in many States, pursuant to orders obtained by its many agents in various States and Territories of the Union, as well as to foreign countries. It is the control of *this* business, the domination of trade and commerce in the products of tobacco, amounting to millions of dollars in value and an enormous proportion of the entire commerce of the country in such articles, that gives to this combination the absolnte control of the business—a power which may be exercised or not at

the will of the few men in control of the combination which constitutes a restraint of trade and commerce in tobacco and its products among the several States and with foreign countries, and demonstrates that the defendants are monopolizing or attempting to monopolize the entire trade and commerce in such commodities among the States and with foreign countries.

As illustrative of that thought, in the contracts made in England the parties themselves have given a construction to the business that they are doing, by defining in Exhibit 2 what they mean when they sell and transfer by these agreements the export business. When the American Tobacco Company and the Imperial Company sell and transfer their export business to the British-American Company under these agreements, they define "export business." And what do they define it to be?

They say, on page 125 of volume 1:

"The words 'export business' mean the manufacture of and dealing in tobacco and its products in any country or place outside the United Kingdom and the United States and the manufacture of and dealing in tobacco and its products within the United Kingdom for export to any other country except the United States, and the manufacture of and dealing in tobacco and its products in the United States (except in Cuba, Porto Rico, the Hawaiian Islands, and the Philippine Islands) for the purpose of export to any other country except the United Kingdom, and the manufacture and selling in the United Kingdom and the United States, respectively, of tobacco to be supplied to ships in port for the purposes of ships' stores."

That was their export business. They are dealing throughout with the control of a *business*, in which all of these were various factors. They bought the raw material; they transported it to the place where it was manufactured into a finished product; orders were taken from various parts of the country and transmitted to headquarters; orders were given from headquarters to ship it from convenient places of storage to the ultimate purchaser; and it was the control of that business which was the subject of this combination.

The Government does not challenge the power of the defendants to incorporate or to consolidate or to merge corporations under State laws. But it does contend that such powers can not be used for the purpose of maintaining or creating a restraint of trade or commerce, or accomplishing a monopoly, in violation of the act of Congress.

Mr. Justice Holmes. Mr. Attorney General, if I may interrupt you for a moment: It seems to me that you speak of actual interference, or the actual intent to interfere, and the mere power, as if they were identical things. I must say that I have been rather troubled (and I was during the former argument) in listening to Mr. McReynolds and in then listening to you, in making up my mind

as to what is the precise criterion that you adopt. I have looked at your brief and I see that you say:

"Trade and commerce * * * are monopolized whenever as the result of the concentration of competing businesses," with an exception, "one or a few corporations * * * practically acquire power to control prices."

Do I understand that your argument means to adopt the proposition that the simple possession of the power—in other words, simple size—may constitute monopoly?

Mr. WICKERSHAM. No; I do not maintain that. I think on the former argument, if I recollect correctly, I was asked that question, and made substantially the same answer.

Mr. Justice HOLMES. I wanted to be sure that it was not an oversight. I asked you the same question on the former argument; and I thought that was not your position.

Mr. WICKERSHAM. That is not, and never has been, my position. And perhaps I should turn to the question of monopoly at this stage.

Our contention has been that this combination of all these corporations in its operation has constituted, within the meaning of the decisions of this court, a restraint of trade; that the various agreements and combinations have constituted combinations and contracts in restraint of trade within the meaning of the first section; and the court below so held, with the exception of the English contracts and in their operation on the British-American and the Imperial companies. I never have been able—because the court did not go into any extensive reasoning on that point—to comprehend on what theory (assuming that the court was correct in its principal finding) it could have let out the British-American and the Imperial companies. But that is neither here nor there for the moment.

What the court below did not find, but what the Government has contended here and does contend here, is that the defendants are shown by the evidence in this case to be monopolizing or attempting to monopolize interstate and foreign trade and commerce, contrary to the provisions of section 2 of the Sherman Act.

Mr. Justice LURTON. You do not put the Government's case on that section alone?

Mr. WICKERSHAM. No; I do not put in on that section alone. I say that I think the evidence here discloses both the combinations which have been found by the court below, and the fact (which they refrained from finding) that they have been and are engaged in monopolizing or attempting to monopolize the trade and commerce of the United States, interstate and foreign, in tobacco and tobacco products. I think it is proper to answer here the question which Mr. Justice Day put yesterday, when he said that by this time the Govern-

ment should have some consistent theory about the question of monopolization. Therefore, speaking for myself, my own theory is this—and I should like to work it out as I have done for the purpose of illustrating the conclusion to which I have come:

In the debates on the passage of this bill Senator Hoar said that it was agreed in the committee which framed the bill in the form in which it was finally passed that—

"Monopoly" is a technical term known to the common law, and that it signifies—I do not mean to say that they stated what the signification was, but I became satisfied that they were right, and that the word "monopoly" is a merely technical term which has a clear and legal signification, and it is this: It is the sole engrossing to a man's self by means which prevent other men from engaging in fair competition with him. (Bills and Debates in Congress Relating to Trusts, p. 323.)

Now, turning to the English reports for a modification or contradiction of Senator Hoar's definition of a monopoly in the view of the common law: The great fund of learning on the subject is, of course, the great Case of The Monopolies (*The East India Company* v. *Sandys*, 10 Howell's State Trials). In that case Mr. Holt, afterwards lord chief justice, said:

A monopoly is an institution or allowance of the king, by his grant, commission, or otherwise, to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working, or using of anything; whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade * * * (p. 379).

"The nature of a monopoly," said Sir George Treby, "consists in restraining a common right; it appropriates to one, or a few, what others had the lawful use of before." (p. 386).

Mr. Pollexfen elaborated the thought a little more specifically. After reviewing the earlier decisions on the subject of monopoly he said:

"These, my lord, are the books; and thus they speak generally at the common law; and I offer it to your lordship as a further reason, that the common law is such, notwithstanding all their arguments, in regard that the common law, as far as it is against engrossing, is also against all sole trade. For, my lord, all sole trade is engrossing, as I take it, with submission; appropriating trade and merchandise to a particular person or persons or body politic, excluding others, is engrossing such trade. Now that engrossing is against the common law, and against the very fundamentals and principles of the common law; that, I think, I need not labor much to prove, nor shall I go about to cite many books to prove that. (Page 421.)

"But, then, my lord, to prove that sole trade is engrossing, that the nature of the thing must speak: For whosoever has the sole trade of buying and selling of such a sort of commodity, or whosoever has the sole trade to any particular country or place, has thereby the sole

engrossing and sole having of all the commodities of that place; so likewise has he the sole buying, and all the people that have to deal about the commodities that are to be vended and vented in that country or place are at his will and pleasure; and thereby he makes all those his own, and he makes what price he pleases and orders and disposes of them, both as to value and everything else, as his own. And thereby, my lord, I take, it must be engrossing; and every monopolizing of buying and selling, or of trade, is engrossing. But that only engrossing is by particular agreement and contracts between particular men, among one another, without the king's authority or help of his letters patent, but monopolizing is engrossing under color of authority, by help of those letters patent that create them, for the consequence of it must be that they would sell at their own prices and thereby exact upon the king's subjects, and their patent for the sole trade to the East Indies invests them in all the merchandises of these countries and engrosseth all in their hands. Then if engrossing by the common law be forbidden and it is unlawful to do it, all letters patent to authorize and help men to engross must needs be as void as that, which is the end of engrossing; and that is monopolizing." (Page 422.)

In other words, in the reign of James I, monopolizing was engrossing with the added protection of a royal patent. To-day monopolizing is engrossing with the added protection of a State charter, such as that granted to the American Tobacco Company by the State of New Jersey, by means of which the stocks of naturally competing corporations are held by another and competition prevented.

Engrossing is to-day, as in the seventeenth century, "appropriating trade and merchandise to a particular person or persons, or body politic, excluding others."

"The sole trade of any mechanical artifice," said Lord Coke in the case of The Monopolies (2 Coke's Reports 84b) "or any other monopoly, is not only a damage and prejudice to those who exercise the same trade, but also to all other subjects; for the end of all these monopolies is for the private gain of the patentees."

In the old case in Pickering of *Alger* v. *Thacher*, a bond conditioned that the obligor should not carry on the business of founding iron was held void as tending to a monopoly.

In *People* v. *Chicago Gas* (130th Illinois), the purchase of the stock of one gas company by another was held void as tending to establish a monopoly.

In *Salt Company* v. *Guthrie* (35 Ohio State Reports), an agreement among a number of salt manufacturers to regulate the price of salt was held void as tending to establish a monopoly.

In *Chapin* v. *Brown* (83d Iowa), where all the grocerymen in a town, in order to avoid a trade in butter which was burdensome, agreed not to buy except for use in their own families, so as to throw the trade to one person, it was held that the agreement was void as tending to create a monopoly.

In *Craft* v. *McConoughy* (79th Illinois), articles of agreement between four grain dealers in a town under which, while apparently carrying on their own separate businesses, they were really to pool their earnings and their expenses in agreed proportions, was held void as an attempt to monopolize the entire grain trade of the town and the surrounding country.

Through these things runs the principle explained by Pollexfen in the case of The Monopolies. The agreement or combination was void because it was an effort on the part of those concerned in it to engross and absorb to themselves all the trade of a given region, in a particular commodity, to the exclusion of others.

In the Addyston Pipe case, Judge Taft, in the circuit court, said:

"But in recent years even the fact that the contract is one for the sale of property or of business and good will, or for the making of a partnership or a corporation, has not saved it from invalidity if it could be shown that it was only part of a plan to acquire all the property used in a business by one management with a view to establishing a monopoly. Such cases go a step further than those already considered. In them the actual intent to monopolize must appear. It is not deemed enough that the mere tendency of the provisions of the contract should be to restrain competition. In such cases the restraint of competition ceases to be ancillary and becomes the main purpose of the contract, and the transfer of property and good will, or the partnership agreement, is merely ancillary and subordinate to that purpose."

Mr. Justice LAMAR. What would you say as to a combination of all these independent companies to meet the situation? Would that be a monopolization of trade as denounced by the second section?

Mr. WICKERSHAM. I think so. I think the mere form in which it is carried out is immaterial, if it is done with the intent of producing the forbidden result.

Mr. Justice HUGHES. Do you consider the intent or the effect as the criterion?

Mr. WICKERSHAM. There, if your honor please, you are anticipating what I am coming to, if you will pardon me.

Mr. Justice HUGHES. Certainly.

Mr. WICKERSHAM. In the Pearsall case, the State legislation which prevented the Great Northern Railway Company from acquiring a control of the capital stock of the Northern Pacific Railroad was sustained as a proper exercise of the police power to prevent the monopolization of the transcontinental traffic north of the Union Pacific Railroad, the court considering that the proposed acquisition would put it within the power of the consolidated corporation to increase rates, and, in short, would put the public at the mercy of the corporation.

So, as your honor the Chief Justice pointed out, in the Chesapeake & Ohio case, the power of the Chesapeake & Ohio Rail-

road or of any other railroad to carry commodities which it produced at a rate which (attributing the published tariff to the transaction) would leave as the cost of the commodity less than the cost of production, put in its hands a power which would tend, if unchecked, to enable it to monopolize all the traffic on its own line.

The CHIEF JUSTICE. But that was a case where they actually did it.

Mr. WICKERSHAM. True; but you pointed out the power that they would have to do it in other cases as tending to a monopoly.

In the Swift case Mr. Justice Holmes said, as to intent (and it is about as accurate a statement as I know of in the books on this subject)—

"Intent is almost essential to such a combination, and is essential to such an attempt" (to monopolize). "Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen." (196 U. S., 375–396.)

Perhaps the confusion of ideas on the subject arises more largely from the application of this rule than from any real difficulty in the principle. Intent is a question of fact, to be ascertained like other questions of fact. It is a deduction which must be made from the evidence by the court, or by the jury in a common-law case. Proof may be made of intention by direct evidence, or by the application of the rules of presumption to conceded or demonstrated facts. Thus, necessary consequences are presumed to be intended, and the direct, immediate, and necessary effect of acts can not be overcome by declarations of contrary intention.

There is a presumption that people intend to act in accordance with the ordinary rules which experience has shown control the action of men in given conditions. So, in the Northern Securities case, Justice Harlan, in his opinion, said:

"That the natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promotes trade and commerce * * *. It need not be shown that the combination * * * results * * * in a total suppression * * * or * * * monopoly, but it is only essential to show that, by its necessary operation, it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition." (193 U. S., 331–332.)

In the National Cotton Oil case, in discussing whether the anti-trust laws of Texas (which were sought to be enforced against the plaintiffs in that case) were repugnant to the fourteenth amendment of the Constitution, the court upheld the statute as a valid exercise of the police power of the State, upon the ground that "it is cer-

tainly the conception of a large body of public opinion that the control of prices through combinations tends to restraint of trade and to monopoly, and is evil."

Mr. Justice McKenna, in writing the opinion of the court, said that the court was not called upon to discuss the foundations of the belief, nor was it required to distinguish between the kinds of combinations or the degrees of monopoly. He said:

"It is enough to say that the idea of monopoly is not now confined to a grant of privileges. It is understood to include 'a condition produced by the acts of mere individuals.' Its dominant thought now is, to quote another, 'the notion of exclusiveness or unity;' in other words, the suppression of competition by the unification of interest or management, or it may be through agreement and concert of action. And the purpose is so definitely the control of prices that monopoly has been defined to be 'unified tactics with regard to prices.' It is the power to control prices which makes the inducement of combinations and their profit. It is such power that makes it the concern of the law to prohibit or limit them." (197 U. S., 129.)

Mr. Justice Lurton. What case are you reading that from?

Mr. Wickersham. I am reading from the case of *National Cotton Oil Company* v. *Texas* (197th U. S.). In that opinion he says—and what he says there is just as applicable to the case at bar as it was to the facts there—

"The argument, which is directed against the validity of the statutes, is drawn from extremes. It is difficult to present its elements in a concise way. Its ultimate foundation is the right of individuals and corporations as well, under the Constitution of the United States, to make contracts and combine in business enterprises; and, it is argued, to prohibit them from so doing 'in the ordinary way through the making of purchases and sales and the fixing of prices, is clearly to work a deprivation of property without due process of law and to impair the well-recognized liberty of contract, involved in the acquiring, using, and dealing with property,' assured by the Federal Constitution.

"To support the argument the usages and necessity of business are adduced, and partnerships and their effect are brought forward as illustrations. There are some things which counsel easily demonstrate."

Mr. Justice Day. Does the Judge say where that expression, "unified tactics," comes in?

Mr. Wickersham. He neglected to give the authority for that; but he attributed it to another.

Mr. Justice McKenna. He at least tried to give it the sanction of law.

Mr. Wickersham. I think your honor *has* given it the sanction of law.

Mr. Justice HOLMES. Is it not Mr. Ely's expression in his book on "Trusts?"

Mr. WICKERSHAM. Yes, sir; I think it was Mr. Ely who said that. [Continuing to read from Mr. Justice McKenna's opinion]:

"They easily demonstrate that some combination of 'capital, skill, or acts' is necessary to any business development, and that the result must inevitably be a cessation of competition. But this does not prove that all combinations are inviolable or that no restriction upon competition can be forbidden. To contend for these extremes is to overlook the difference in the effect of actions and to limit too much the function and power of government. By arguing from extremes almost every exercise of government can be shown to be a deprivation of individual liberty."

So it would appear to me that the views of this court as recently expressed, as in this case and in other cases cited, demonstrate that the old common-law notion of monopoly still obtains, except that to-day it is brought about as engrossing was of old—by the acts of individuals in endeavoring to engross to themselves all of the trade in a given commodity—and that that was what was struck at in the Sherman Act; that it becomes in any given case a question of intent, which must be inferred either from the direct evidence or by that presumption which is applied by the court to the proven facts; that it is no more uncertain than fraud is, which is an inference from the facts, and must be established either by direct evidence or by proof of such facts that the intent is necessarily implied by the court or by the jury from the evidence submitted.

Just as at common law the attempted grant of monopolies by the sovereign fell before the power of Parliament, so the attempted grant of power by a State legislature, or the attempted exercise of power under color of authority from a State legislature, falls before the paramount law of the United States, if under the exercise of that power there be accomplished restraint of interstate trade, or monopoly. And in determining whether or not the defendants are engaged in monopolizing or attempting to monopolize, while size is an undoubted element, it is not a conclusive one. This court has said again and again that it was entirely immaterial whether or not the effort to secure a desired control has been completely successful. In determining whether or not an acquisition of stock in one corporation by a competitor corporation is a restraint of trade or tends to a monopoly, this court has held that even the control of a majority of the stock of a corporation is not essential to the control of the corporation. In the Pearsall case the control which fell under the ban of the court was of exactly one-half of the capital stock. The court said that the purchase of enough to make a majority would follow almost as a matter of course, and the mastership of the Northern Pacific road would be assured.

Nor is it necessary that the methods adopted to acquire that control which would give monopoly should in themselves be illegal. In *Swift* v. *The United States* (196 U. S., 396) Mr. Justice Holmes pointed that out. He said there:

"It is suggested that the several acts charged are lawful, and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful."

So here, while no doubt singly most of these transactions (which were sales and purchases of factories or of property, buttressed by protecting covenants) might in themselves, standing alone, be a perfectly legitimate restraint within the well-settled rules as to covenants to protect the vendee in the possession of what he has purchased, yet, taken together as a part of a system showing an intent to exclude from competition in the business those who entered into the covenants, a very different aspect appears, and they then fall within the rule which your honors laid down in the case of *Grenada Lumber Company* v. *Mississippi*. (217 U. S.)

The CHIEF JUSTICE. You may suspend here.

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

Mr. WICKERSHAM. If the court please, reverting for a moment to the description of the essence of monopoly in the *National Cotton Oil Case* (197 U. S.), namely, the power to control prices, this court observed in the case of Pearsall that—

"Whether the consolidation of competing lines will necessarily result in an increase of rates, or whether such consolidation has generally resulted in a detriment to the public, is beside the question. Whether it has that effect or not, it certainly puts it in the power of the consolidated corporation to give it that effect—in short, puts the public at the mercy of the corporation." (161 U. S., 676.)

And in *Harriman* v. *Northern Securities Company* (197 U. S.), the Chief Justice, expressing the unanimous opinion of the court, referred to the decision in 193 U. S., in this language:

"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 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." (P. 291.)

But in the case at bar we need not rest merely on proof of the possession of power to control prices and exclude competition, for the

record, in our opinion, amply demonstrates the actual exercise of such power.

Assuming that proof that defendants are monopolizing, or attempting to monopolize, etc., is to be sought in the evidence that they have by means of this combination endeavored to engross and absorb to themselves the interstate and foreign trade and commerce of the United States in the products of tobacco, the Government maintains that the record not only demonstrates that the defendants have combined to control this commerce with the intention of monopolizing it, but that it is clear that they have actually, in large measure, accomplished that object; that they have suppressed competition by unification of interests and management, and that, through agreements and concert of action, they have not only acquired the power to control prices, but they have exercised and are now exercising that power.

Leaf tobacco is, of course, the foundation of the entire tobacco trade, and the control of the price of the leaf means the control of the price of the finished product. So long as the American Tobacco Company can control the price of leaf tobacco, it need fear no serious competition in marketing its manufactured product.

Mr. Yuille, one of the managers of the leaf department of the American Tobacco Company, testified to the arrangements by which the American Tobacco Company controls the market. That is to be found on pages 101 to 106, of the second volume of the record. He testified that the American Company had a representative purchasing tobacco in substantially every market in the United States. I mean every market of the kind of tobacco that they dealt in.

The method in which the orders are placed and the way in which the tobacco is dealt in, are described by Mr. Yuille in his direct examination at pages 107 and 119.

Mr. Carlton, who bought leaf tobacco for the Imperial Tobacco Company at prices fixed by a committee in England, as shown in the fourth volume of the record at page 297, testified that since 1903 the bright tobacco crop has gradually decreased until the current year. In 1908, when he testified, he said he thought there would be an increase, and that the demand for tobacco had gradually increased; that to some extent there had been an effort among the farmers by cooperation to advance the price of their tobacco, and the prices of western tobaccos had advanced.

Your honors will find that testimony at page 300 of the fourth volume of the record; and I refer to it here in order to answer a question which his honor, Mr. Justice Lurton, put on the argument yesterday with respect to evidence concerning cooperation among the producers.

Mr. Hill produced a letter addressed to him by Mr. Strotz, one of the directors of the American Tobacco Company, under date of

April 26, 1904, reading as follows (page 285 of the second volume of the record):

"I hand you herewith a newspaper clipping which will give you a general idea of the Burley situation. I do not think it well to put in a letter just how this situation was brought about. Its condition now is that we have requirements for all of our companies at an advance of about 2½ cents per pound over normal cost. Outside manufacturers have been caught very short, and as all old tobaccos and the new crop has been practically cleaned up, they are bidding against each other on what little there is left and paying fancy prices for what is still unsold, and the indications are that if they do get their requirements it will be at such a cost that they will be utterly unable to make any money for a year to come. Our own additional cost of leaf, we think, we can get out of the selling price of our goods."

Mr. Carlton, who has been in charge of the leaf-buying interest of the Imperial Tobacco Company in America since July 1, 1902, testified in the fourth volume of the record, at page 229, as to how completely the leaf market was under the control of the combination. In his letter to the secretary of his company, dated January 27, 1903, he says:

"The A. T. Co. are now contracting at 27½ cents for all their 1903 and 1904 requirements, and the arrangement with them is that they will put us exactly on the same terms as they themselves buy it. In the absence of definite information regarding quantities, it is unsatisfactory for us to fix quantities now, but from the nature of the A. T. Co.'s letter you will see that it is necessary to do so." (p. 246.)

On August 14, 1903, he wrote to the secretary of his company (to be found in the fourth volume of the record, at pages 250-251)——

Mr. HORNBLOWER. Do you say that is Mr. Carlton?

Mr. WICKERSHAM. Mr. Carlton, yes. On August 14, 1903, he wrote to the secretary of his company:

"The markets in South Carolina and eastern North Carolina have been opened, and the primings"——

Mr. HORNBLOWER. You are wrong about that.

Mr. WICKERSHAM. That is at pages 250 and 251. Mr. Hornblower thinks that I am mistaken in the name of the writer.

Mr. HORNBLOWER. That was before Mr. Carlton's day.

Mr. WICKERSHAM (after examining record). It was James Macdonald; but it does not make any difference whether it was Mr. Carlton or any other person. It was the representative of the Imperial Company; and this is what he wrote, on August 14, 1903:

"Dear Sir: * * * The markets in South Carolina"——

It was James Macdonald; not Carlton——

"The markets in South Carolina and eastern North Carolina have been opened, and the primings, which are mean and sandy, have sold at exceedingly low prices. Our buyers have not touched them, and the feeling amongst farmers against the A. T. Co. is most bitter. We

are just beginning to buy a few of our grades, and indications are that prices will be low and quality fairly good. The color seems to be better than was anticipated. At our present limits C. D. should be put down in England at 6¾ to 7d. per pound, and C. F. at 5¾ to 6d."

Now, skipping a sentence:

"It is impossible to say whether present prices will continue during the season, but as speculators generally seem to be afraid to operate it looks as if prices will be determined practically by A. T. Co. and ourselves. So far A. T. Co. are acting most conservatively."

Later in the year he wrote to the secretary, and the letter appears on page 251 of the same volume. This is from Mr. Macdonald, again, to the secretary of the Imperial Company. He writes as follows:

"DEAR SIR: It seems that a few markets, particularly in South Carolina, some speculators have been buying some cheap low-grade semis, at very low prices, of primings. When sampled these may look, owing to the colory nature of the crop, very attractive and the faults may not be so evident until the bulk is examined. It is a grade of tobacco which we thought better to leave alone, and, with the exception of the speculators referred to, it has been bought practically by the A. T. Co. It occurs to us that some of our branches, not knowing what we are going to send forward, might, in the event of being shown these tobaccos, be tempted to buy them. It is clearly against the interest of our company that anything of this kind be done, as it would only encourage the speculators to continue shipping and so raise an opposition to ourselves on the market. We understand it is distinctly arranged that no branch has power to purchase any tobacco without the consent of the executive committee. If this is so there is no need to trouble further in the matter, but we think it right to call the committee's attention to the present circumstances."

On September 7, 1903, he wrote, reporting a conversation between Mr. Reed, of the Imperial, and Mr. Glenn, head buyer of the American Cigar Company (which letter is to be found on page 252 of the record), saying:

"Mr. Glenn expressed a strong desire that any of our branches requiring Wisconsin, York State, Connecticut, or any other States cigar seed leaf, would place their orders with the American Cigar Company, giving full particulars and samples. He promised to supply them on same terms as their own branches. They practically already control the trade, and expect our branches will not support any independent shippers to their disadvantage."

The letter of James Macdonald, again the same writer, to the secretary of the Imperial Tobacco Company, dated January 26, 1903, which is found at pages 243 to 246 of the record, volume 4, shows clearly the close arrangements between the American and the Imperial companies for the control of the market in leaf tobacco. Reed's letter to Yuille, fonnd on page 256 of the same volume, shows a distinct agreement with respect to purchases. Evidently Yuille had complained that the Imperial was exceeding its proportion

of the leaf which it was to buy, and Reed had looked the matter up and was writing to Yuille explaining that:

"As a matter of fact the purchase of this mark at Wilson last week were only 2,000 pounds, and total purchases of all our strip grades only 122,000 pounds. This, as you will see, is considerably below 40 per cent of the total sales, which is what we regard as our share of Wilson tobacco. I think, had you been in Wilson yourself, you would have taken a different view of the state of affairs there, but we are anxious to avoid any possible friction and are quite willing to meet your views in this direction as nearly as we can."

Macdonald's letter, again, to the secretary, dated September 10, 1903, and found at pages 253–254 of the same volume, clearly indicates a complete understanding between the two companies with respect to the entire market:

"Both the A. T. Co. and ourselves, we think," said Macdonald, "ought to act for the present very conservatively so as to insure our being able to remain on the markets until the end of the season, because if one or the other were to get their requirements filled up before the end of the season the result on the market would be disastrous. Our hope is that both of us will be able to remain steadily on the market and if it is thought, toward the end of the season, advisable to raise limits so as to encourage farmers for the ensuing season, this could be done. If, on the other hand, by any chance prices toward the end of the season were lowered, the effect on farmers would be distinctly prejudicial to next year's growing."

In other words, the limit on the power of the monopoly was the amount of discouragement of the farmers against raising a sufficient crop to meet their needs. As Judge Noyes aptly put it in his opinion:

"Subject to the economic limit that prices can not be fixed so low as to deprive the grower of inducement to raise future crops, the extent of the defendants' purchase of tobacco leaf necessarily gives them large power to fix the prices to be paid for the types which they require. Prices may be regulated, as the defendants assert, by the law of supply and demand, but the difficulty here is that the demand for many types comes, practically, from only one source." (Rec. 1, 317.)

The general volume of evidence as to what was done speaks with a far more convincing voice than the protests of the officers of the defendant companies. No express agreement or explicit orders were required to regulate the action of men who were agents of companies in such complete combination with each other as the defendant corporations here. As Yuille testified, referring to the committee of the board of directors of the American Tobacco Company upon the purchase of leaf tobacco:

"I can't say that the committee ever gave me any orders. We all understand each other." (Rec. 2, 102.)

This was the committee which Yuille testified had charge of the entire operating end of the business, and which he said:

"gets together determining its needs, having statistics from all over the country, and then it decides what it is going to pay on an average for each grade and then instructs its buyers to go in the field and get it." (P. 104.)

Now, a word as to the control of the manufactured product. C. C. Dula testified that the company sold its products in all the States of the Union; that it had a corps of retail salesmen traveling through the different States soliciting orders from the jobbing trade, the policy being to do business through jobbers. The salesmen report directly to the headquarters of the company in New York. They report, among other things, the brands that they find selling in the territory in which they are working. The sale of brands of the defendant companies is stimulated by allowing special cash discounts, and also by what is called gratis tobacco—that is, by adding 1 pound gratis with each 20 or 25 pounds sold—a good many million pounds being distributed gratis in this way. Just consider what chance any independent whom this combination desired to crush would have against such methods pursued by a corporation with $400,000,000 of capital.

Now, with respect to the purchase of supplies, one word in passing.

The Amsterdam Supply Company is one of the organizations through which the combination eliminates the competition in buying supplies for the various corporations in the combination which had theretofore existed. The defendants contend that the primary purpose of the Supply Company is not to effect a withdrawal of competition, and they refer in their brief to certain testimony given by Mr. Reed, the president of the Supply Company, to that effect; but the stock of the Supply Company is owned by the American Tobacco Company and 17 others of the defendant corporations in that combination; and each of these stockholders is in agreement with the Supply Company to buy either directly through it, or, if they buy otherwise than through it, to pay a commission on the purchase to the Supply Company.

The annual purchases of the Supply Company for its various customers amount to about $24,000,000 per annum, of which only about $150,000 to $200,000 is for customers other than those connected with the American Tobacco Company.

Mr. Justice Lurton. What is the character of the supplies bought?

Mr. Wickersham. Everything, I think, that they use, except such things as licorice and boxes and bags and containers. It is the general supplies—stationery, I understand, and paper, and sugar—everything that they use, that they would not get through some one of

the companies in the combination, like the Licorice Company and the Box Company.

Mr. NICOLL. Not leaf tobacco.

Mr. WICKERSHAM. No; not leaf tobacco, of course; but everything else that they use is purchased through this Supply Company, and their agreement is that every one of these 18 principal corporations—stockholders in the Supply Company—must purchase through the Supply Company, or else pay to the Supply Company a commission upon every purchase it makes outside of the Supply Company on all articles dealt in by the Supply Company; and the point is that instead of having 18 competitors in the market for those supplies, there is but one purchaser.

The defendants say, however, that the only power of monopolizing that they have is the power which is inherent in wealth, whether that wealth be held by an individual or by a corporation; but the power possessed by these defendants could only have been acquired by the use of the various corporate organizations under the laws of the various States. But for the exercise of that power, under which one corporation acquires and holds stock in many other corporations, it would have been impossible for this combination to have ever come within a million miles of the control which they now have and exercise over the trade and commerce in which they participate.

Mr. Cochran, in the very able and interesting brief that he has filed here, contends that an industrial corporation can not at the same time expand trade and restrain it; and he argues, as my learned friends have argued, that inasmuch as the great volume of business in tobacco products has grown, it is impossible that any of these agreements with this combination should have restrained the trade; but it is clear that the concentration of this vast volume of trade into a few hands tends to discourage production and to embarrass exchange, and that it is not an answer to the charge of restraining trade to say that these defendants have not restrained the total volume of the trade—that they have only absorbed it into their own hands.

In the Northern Securities case——

Mr. Justice MCKENNA. Is it your contention that no matter how much the volume of business has increased and no matter how much the production has increased, the number of competitors and traders has decreased?

Mr. WICKERSHAM. Certainly. The answer does not meet the case when it is said: "Well, we have not restrained trade, because we have it all, and there is no less than there was when we began. On the contrary, we have more than we had." Your honors have answered that in the Northern Securities case, where Mr. Justice Harlan said:

"The combination here in question may have been for the pecuniary benefit of those who formed or caused it to be formed. But

the interests of private persons and corporations can not be made paramount to the interests of the general public." (193 U. S., 352.)

Now, coming to the question of the action of the court below in dismissing the bill against the British-American Tobacco Company (Limited) and the Imperial Tobacco Company: These companies were clearly shown to be parties to the unlawful combination, and, although they came into it through contracts made and executed in England, yet it was also shown that they were carrying out those contracts within the dominion of the United States. The evidence shows that prior to September, 1902, the various English companies which afterwards combined into the Imperial Tobacco Company (Limited) bought about 6,000,000 pounds of American leaf tobacco annually in the United States, imported it into Great Britain, where it was manufactured into finished products without the payment of duty and then exported and sold it in the markets of the world in competition with the American Tobacco Company; that the American Tobacco Company bought Ogden's (Limited) in England and embarked on an effort to capture the English business. This led, first, to the combination of the English companies in one large corporation known as the Imperial Tobacco Company (Limited), and, after spending much money and engaging in the most active competition, the concurrence of all parties in the making of the agreements annexed to the petition, whereby all of the business of Great Britain and Ireland was turned over to the Imperial Company, in which the American Tobacco Company was to have a large amount of stock and three directors on the board; all of the American business, including that of the United States, Cuba, Porto Rico, and the Philippine Islands, was turned over to the American Tobacco Company; and all of the export business of the world outside of the United States and its dependencies, including Cuba and Great Britain and Ireland, was turned over to the British-American Company, a corporation organized for the purpose, two-thirds of whose stock was to be held by the American Tobacco Company and one-third by the Imperial Tobacco Company.

Since the execution of those agreements all of the leaf tobacco which is used in the export business, including that which was formerly purchased for that purpose by the Imperial Tobacco Company and the various companies which were consolidated into it, has been bought by the American Tobacco Company, and all competition in such purchases has been thereby eliminated.

One of the effects of this agreement not to compete embodied in these contracts, is shown in the case of the Kentucky Tobacco Product Company. It appears that in 1901 or 1902 the American Tobacco Company entered into a contract with the Kentucky Tobacco Product Company, whereby the former agreed to furnish the latter with

stems and dust produced at Durham, N. C., for a period of ten years at certain prices.

Mr. Justice HOLMES. Who was that contract between?

Mr. WICKERSHAM. Between the American Tobacco Company and the Kentucky Tobacco Product Company. After the English contracts were made in the fall of 1902, that contract was taken over by the British-American Company—since when the latter company sells all its stems to the Kentucky Company.

Mr. Justice HOLMES. The British-American Company is the one in which the American Tobacco Company owns two-thirds and the English company owns one-third?

Mr. WICKERSHAM. Yes; that is the British-American Company. The American Tobacco Company, which is the principal stockholder in the Kentucky Tobacco Product Company, is also under contract to sell all burley stems to the Kentucky Tobacco Product Company. On August 8, 1904, Mr. Harris wrote to the Imperial Company, acknowledging receipt of a previous letter addressed to Mr. Duke, in which the Imperial Company evidently complained of shipments being made in violation of this contract. The letter shows that a concern in New York, in which the American Tobacco Company was interested, undertook to ship some stems or offal out of the country, but the shipments were stopped, "notwithstanding some protests from the minority holders," said Mr. Harris. This, said Mr. Harris, caused the people in the American Company to realize that from time to time any one of the many subsidiary companies in which the American or the Continental was interested might make shipments without the parent company being cognizant of it. To preclude the possibility of any such action in the future, Mr. Harris requested counsel to prepare something in the shape of a letter or clause to cover the point, giving the British-American Company the benefit of an accounting from the American company every half year of whatever proportion it was entitled to of the net profits arising out of exportations into its territory. He suggested that the British-American Company should send such a letter to all parties in the agreement of September 27, 1902, for their acceptance.

"To revert to the matter of offal proper," he added, "I would state that the situation at this end is in good shape, for we can either adopt the plan suggested by you, that is, of allowing the Kentucky Tobacco Product Company to continue its business as at present, and an accounting made to the British-American of the amount accruing to it from the export field, or subdivide the present Kentucky Tobacco Products Company into two, namely, a domestic concern, and an export concern—the B. A. T. Co. being interested only in the export company, of course. * * *

"The question of the disposition of the offal product from the Imperial Company," he adds, "will be an important matter for the B. A. T. Company, since so much more stems will find their way into England than heretofore." (Rec. 3, p. 438–439.)

In other words, these corporations were mere pawns, moved about the board. As suggested, if they wanted to divide one of them into two, they split it in half, and set it on its way.

He advised that some such scheme as Mr. Ogden had suggested should be gotten up, and suggested that it would be wise for the president of the Kentucky Company to visit England and consider that matter with the Imperial Company, adding:

"It certainly is to the interest of all concerned to see that no competition is allowed to exist in the marketing of the finished product in the various countries abroad between the product of the English factories and those of the Kentucky Tobacco Product Company and this is easily accomplished by concentrating the stems into one channel." (Rec. 3, p. 439.)

The same ease of accomplishment with which they had stifled all competition between all other companies could, of course, in like manner, be easily accomplished by concentrating this comparatively minor part of the business into one channel.

Further letters on the subject appear on the following pages of the record (volume 3, pages 438, 439). It is perfectly obvious from this correspondence that some of the provisions of the agreements made in England were being carried out in the United States; that all competition between any of the companies controlled by the combination with respect to the purchase in and export from the United States of leaf tobacco, including stems and offal, had been eliminated, and the entire business turned over to the British-American Company.

Now, on page 441 of third volume of the record there is a letter stating the terms under which the American Company assents to the British-American Company soliciting orders in the Philippine Islands for consumption in those islands of all the brands of cigarettes and tobacco marketed by the British-American Company in export territory by whomsoever manufactured.

Out of their grace and favor they permitted the British-American Company, in which they owned two-thirds of the stock, to go into the Philippine Islands and sell there certain of the goods they dealt in, and which under these exclusive contracts nobody else but the American Company had a right to deal in.

The export business of the five original concerns merged into the original American Tobacco Company in 1890 amounted to about 1,000,000 pounds of tobacco. Practically no one outside of those five companies exported tobacco. Prior to September, 1902, the English companies were in competition with the American Tobacco Company in the purchase of leaf tobacco in the United States and in its exportation into England and in the sale of the manufactured products throughout the world. Since the agreements, Mr. Harris testified, the American Company has not been selling in England except through the Imperial, nor the Imperial in the United States except

through the American, and neither has been selling in the export field except through the British-American.

Mr. Hornblower admits that the object of the combination was to put an end to a ruinous competition; but he limits it to a ruinous competition which was being carried on in Great Britain alone, and would have you infer from the evidence that the whole purpose of these agreements was to end the competition existing between Ogden's Limited and the Imperial Company. But it is perfectly obvious from an examination of this record and from the contracts, that that was the least of the considerations that these gentlemen had at that time. Their views were not circumscribed by that tight little island. They had the imperial vision, and the whole world was their field; and the purpose of these agreements was to parcel it out among themselves; and in the execution of that agreement they have not only controlled and regulated trade and commerce in tobacco leaf between Great Britain and the United States, but they have absolutely come in the United States and regulated the purchase of leaf tobacco. The British-American Tobacco Company has acquired control of the stock of two Virginia corporations, and is carrying on certain operations in the United States by means of the exercise of the ownership of that stock.

His honor the Chief Justice, asked me, yesterday, at some time during my argument to answer the question whether or not the defendants were obliged to continue in a destructive competition, or whether they were justified in stopping destructive competition.

Mr. Justice McKenna. Ruinous competition?

Mr. Wickersham. Yes; ruinous competition. It seems to me that the answer is given by Judge Taft, in writing the opinion in the Addyston pipe case, where he says:

"We can have no doubt that the association of the defendants, however reasonable the prices they fixed, however great the competition they had to encounter, and however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill-advised competition, was void at common law because in restraint of trade and tending to a monopoly." (85 Fed., 291.)

Is there not another consideration? Parties are not obliged to go into destructive competition. It is nothing but excessive greed that leads them into destructive competition; and if a conclusive answer to the charge of entering into an agreement to restrain interstate trade contrary to the Sherman Act is found in the fact that the parties had to do it in order to terminate the destructive competition which excessive greed of one or more of them had led them into, and that is to be sufficient, the Sherman Act had better be blotted from the books, because you could scarcely conceive of any condition in which the destructive competition might not grow up if the result

was to be followed by complete success in extinguishing all competition through combination or otherwise.

Mr. Justice HOLMES. Do I understand that you may extinguish it the other way?

Mr. WICKERSHAM. By stopping.

Mr. Justice HOLMES. You may extinguish it the other way by killing one of them.

Mr. WICKERSHAM. There are laws against unfair trade, laws against homicide, and laws against suicide; and it may be dealt with, it seems to me, in various ways. Take the original competition of the five companies that formed the American Tobacco Company. They were engaged in bitter competition. They expended a large amount of money during the last year before they came together in advertising which they saved the moment they got together, and they, every one, profited. No one of them was near the auction block.

The CHIEF JUSTICE. You say "bitter" now. The other day you said "ruinous."

Mr. WICKERSHAM. I say "bitter." It would have been ruinous if they had gone on, perhaps. But it was ruinous. Any competition that involves the expenditure of an amount of money which is excessive in comparison with the returns would be destructive, and if continued long enough somebody would be destroyed.

Mr. Justice HOLMES. If one of those people as the result of the competition had gone out of business, would that have been a result achieved in contravention of the Sherman Act?

Mr. WICKERSHAM. I should not like to say so, unless there was something more than the ordinary, legitimate pushing of wares, their quality, advertising their excellence, and appealing more widely to the consumers.

Now, upon all the considerations which we have submitted to the court it seems to the Government that the case is fully made out both under the first and under the second sections of the act. I have not time to discuss, nor would it seem to be necessary to discuss, the question whether or not the defendants are engaged in interstate commerce, because the course of trade, as the evidence discloses here, is within all the decisions of this court a course of interstate commerce; and whatever effect the combination and agreements before the conrt here has had, it has an effect upon commerce among the States and with foreign countries in the article dealt in; and the proposition that the Knight case is controlling, and that these companies must be treated, for the purpose of interstate commerce, as though they were simply manufacturers, and that this was a compact of simple manufacturers, is one that I take it need not be seriously considered at this late day.