IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 118 (FORMERLY 316).

THE UNITED STATES OF AMERICA,

Appellant,

v.

THE AMERICAN TOBACCO COMPANY AND OTHERS.

No. 119 (FORMERLY 317).

THE AMERICAN TOBACCO COMPANY AND OTHERS,

Appellants,

v.

THE UNITED STATES OF AMERICA.

ORAL ARGUMENT

OF

DR. LANCEY NICOLL (p. 1),
JOHN G. JOHNSON (p. 87),
JUNIUS PARKER (p. 105),

FOR THE AMERICAN TOBACCO COMPANY AND OTHERS; AND OF

SOL. M. STROOCK (p. 131),

FOR UNITED CIGAR STORES COMPANY,

On January 9, 10 and 11, 1911.

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

Oral Argument of De Lancey Nicoll, Esq., January 9, 1911.

Mr. Nicoll: If your Honors please:

Before I proceed to discuss the evidence from the viewpoint of the defendants, I will call your attention to certain paramount considerations in this Record which I believe will go far to dispel any unfavorable impressions which may have been made by the argument of the learned Assistant Attorney-General.

Paramount Considerations.

The petition in this case gives a history of the life of the defendants from the beginning, and almost their every act is brought into question. It was prepared upon the theory that the existence of the American Tobacco Company, and the other defendants, is prejudicial to the producers of tobacco, to the manufactnrers of tobacco, and to the consumers of tobacco.

The case below was tried at great length. The Court listened to argument for four whole days. For two whole days the learned Assistant Attorney-General, with that eloquence and ingenuity which characterize all his addresses, endeavored to persuade the Court that many, if not all, of our acts were oppressive, coercive and generally injurious.

What was the result of that discussion? It has not appeared thus far in the argument; but the fact is that the Court below acquitted us of all the methods of which the Attorney-General now accuses us.

Judge Lacombe said:

> "The record in this case does not indicate that there has been any increase in the price

> of tobacco products to the consumer. There is an absence of persuasive evidence that by unfair competition or improper practices independent dealers have been dragooned into giving up their individual enterprises and selling out to the principal defendant. . . .
>
> "During the existence of the American Tobacco Company new enterprises have been started—some with small capital in competition with it and have thriven. The price of leaf tobacco—the raw material—except for one brief period of abnormal conditions, has steadily increased until it has nearly doubled, while at the same time 150,000 additional acres have been devoted to tobacco crops and the consumption of the leaf has greatly increased."

Judge Noyes agreed with Judge Lacombe that this Record is "remarkably free from instances of coercion and oppression"; and he added:

> "It may be that now, in applying the second section of the statute, performance, as well as power of performance, should be considered—that the elements of oppression and coercion should be shown to exist—to establish an unlawful monopoly. And if these elements are to be considered, they are not sufficiently presented upon this record. It is not shown that the defendants have reduced prices to growers, nor that they have raised prices to consumers. The instances of coercion which are shown appear rather as incidental to the development of a great business than as indicative of a policy of oppression."

Judge Ward, who wrote the dissenting opinion in the Court below, agreed with his brethren upon this subject, and said:

> "A perusal of the record satisfied me that their purposes and conduct were not illegal or oppressive, but that they strove, as every business man strives, to increase their busi-

> ness and that their great success is a natural growth resulting from industry, intelligence and economy."

We come before this Court, therefore, acquitted of the very charges which the Assistant Attorney-General now repeats. We stand before your Honors with clean hands.

Another extraordinary fact about this Record which differentiates it from many cases is that these defendants have no control whatever over the supply of the raw material. They own no tobacco lands in the United States. There are unlimited lands upon which tobacco may be grown in addition to the land upon which it is grown at present. In fact, tobacco grows all over the world, and the United States does not produce much more than a third of the annual crop. This circumstance puts these defendants in a very different position from those industries which include in their assets such natural resources as coal or iron or oil or lumber or copper or other minerals.

Not only that; but the defendants have never purchased, in any one year, half of the tobacco crop of the United States. Exhibit No. 76 of the Record shows the total production of tobacco leaf and the amount used by the defendants, as compared with the total production in the years 1903, 1904 and 1905.

The Chief Justice: Mr. Nicoll, may I interrupt you just a moment? Your argument is following the line of your brief, is it not?

Mr. Nicoll: Somewhat; not here, however—not on this point.

The Chief Justice: I wanted to take some memoranda if it was not. That is why I asked.

Mr. Nicoll: Not here; but of course a great many of these facts are to be found in the brief.

The Chief Justice: Yes.

Mr. Nicoll: These facts that I am stating now will be found in the briefs, your Honor.

The Chief Justice: I beg pardon. Go on.

Mr. Nicoll: Also a discussion of some difference which has arisen between the Attorney-General and ourselves as to these facts. I am quoting them from the record, and I am quoting them from Exhibit No. 76.

This exhibit shows that in 1903 the total crop was 998,000,000 pounds. The total purchased by the defendants was 391,000,000 pounds. In 1904 the total crop was 842,000,000 pounds. The total purchased by the defendants was 329,000,000 pounds. In 1905 the total crop was 921,000,000 pounds. The total purchased by the defendants was 418,000,000 pounds. And we agreed that the crop of 1906 would show substantially the same proportions.

There is still another great fact: The defendants have never produced half of the manufactured output of tobacco. Measured in dollars and cents, the annual output of manufactured tobacco is $565,000,000. The defendants produce $212,000,000, or something less than thirty-eight per cent. of the annual crop. Of course in making this statement I am treating the tobacco business as a whole, including cigars.

There is another extraordinary fact about this record which differentiates it from many other cases: There is no charge here of rebating, or that the defendants owe their growth or prosperity to any advantage over their competitors in transportation. This fact is generally relied upon in Government prosecutions as an evidence of an intention to monopolize; and the charge is often made that many of the great industrial corporations of the United States have flourished by it, if, indeed, their prosperity has not actually been built up upon it. But however that may be in other instances, I take some satisfaction in saying to your Honors that the de-

fendants in this case have never enjoyed any such advantage over their competitors.

There is still another fact of peculiar importance. The charge in this petition is that these defendants have combined and conspired to injure the producers of tobacco. And yet the fact is that not a single producer of tobacco in the United States is here to complain. There are at least half a million men in the United States engaged in growing tobacco, and yet there is not one of them who is a complainant before this Court.

Another charge is that these defendants have combined and conspired to injure the manufactnrers of tobacco. But not a single independent manufacturer was called by the Government to sustaiu that charge. The only independent manufacturers in this case who were called were called by the defendants. They were called by us to prove the fairness and justice of our methods. We called the largest independent manufacturer of plug tobacco, the largest independent manufacturer of scrap tobacco, the largest independent cigarette manufacturer; and all of them agreed that the methods of the defendants had been fair and just, and the avenues of distribution kept free and open.

The charge is also made in the petition that these defendants have combined and conspired to injure the consumers of tobacco in the United States. Yet out of the millions and millions of men who use tobacco products in the United States, no one came to complain.

But that is not all. The Assistant Attorney-General has told you of the frequent purchases made of plants and brands from competitors. And he made to-day the very general charge that these vendors had been coerced to sell. The charge in the petition is this:

"The defendants have driven out opponents, deterred others from entering, and now unreasonably

hinder, restrain and monopolize interstate and foreign trade and commerce in leaf tobacco and articles fabricated therefrom or necessary therein. They have already driven out most opponents, and have attained such power in combination that the few established competitors must conduct their business in the well-grounded fear of swift destruction."

What proof was there to sustain this charge? This proceeding certainly offered an opportunity to all men in the United States who had been coerced or dragooned to come forward and tell the story of their wrongs. If, indeed, these defendants had coerced others to sell, here was the opportunity at last to tell the tale. Yet but one witness (Mr. Puryear, of the Nashville Tobacco Works) made any such complaint. I will explain that transaction as I proceed. And no manufacturer was called to prove that he conducted his business in fear of swift destruction, or in any fear at all on the account of the defendants.

There is still another paramount fact about this Record. Notwithstanding the claim that these defendants have restrained trade in tobacco leaf and in the products manufactured therefrom, from their organization in 1890 down to the year 1907, it appears that in that period there has been a great increase in the number of tobacco factories and in the number of cigar and cigarette factories. In 1890 the number of tobacco manufactories in the United States (by which I mean smoking and plug tobacco) was 1,021. In 1907 it was 3,600. In other words, during the period of the birth and growth of the American Tobacco Company, the tobacco plants in the United States more than trebled. During the same period the cigar and cigarette manufacturers have increased from 23,000 to 26,000. I am speaking now of the growth of the independents, not the

growth of any factories controlled by the American Tobacco Company. And in this connection I ought to call your Honors' attention to another fact which appears in the Record; and that is that in certain branches of the tobacco business our percentage has constantly decreased instead of increasing. If the theory of the Government is true that we possess such enormous power over the trade, why should not our percentage have increased from year to year?

Yet what are the facts? We started, it is true, in 1890 in the cigarette business with ninety-seven per cent. The very next year it fell to eighty-nine per cent. It has been constantly falling ever since, until in the year 1907 it reached seventy-three per cent., or twenty-four per cent. less than when we started.

Mr. Justice Hughes: What was the difference in the total consumption of cigarettes during that time?

Mr. Nicoll: Say about a billion more a year, Mr. Parker tells me. Now, as to cigars: We started the cigar business in 1902 with a percentage of sixteen per cent. That fell by 1907 to fourteen per cent.

I have brought forward these various considerations in advance of a more detailed discussion of the evidence, in order to show your Honors that after all the Record in this case has not the dark and somber colors in which the learned Assistant Attorney-General has endeavored to paint it.

I will now proceed with an account of the birth and growth of the American Tobacco Company. Here our contention with the Government begins.

Government Charges.

The Government charges that the main purpose and intention of the defendants from the beginning was to restrain trade by suppressing competition;

and that that is shown by the circumstances of our several consolidations and incorporations, by our frequent acquisitions, by the covenants taken from venders to refrain from trade, by our methods of leaf-buying, by our stock-holding in other companies, and by our methods of competition.

We reply that the story of the birth and growth of the American Tobacco Company is the story of the natural, orderly, legal and logical evolution of what has gradually become a great business; that our constant purpose was to foster and increase our trade; that we had no other purpose or intention; and that if by our acquisitions competition was lessened, that was incidental to the main and paramount object which we always had in view.

American Tobacco Company.

The date with which we start is the latter part of the year 1889, or the beginning of the year 1890. At that time there were five concerns engaged in the manufacture of cigarettes from Virginia tobacco—W. Duke Sons & Company, at Durham, North Carolina, a corporation; Allen & Ginter, at Richmond, a corporation; the Kinney Tobacco Company at New York, a corporation; Goodwin & Company, in Brooklyn, a partnership; and W. S. Kimball & Company, in Rochester, a partnership. The business of making Virginia cigarettes was at that time a comparatively new industry. It had been going on for only a few years; and the individuals controlling these three corporations and two partnerships agreed to form a corporation under the laws of the State of New York, and to convey to it their respective properties by actual deeds, taking in exchange the shares of the New Jersey corporation in agreed proportions.

There was no purpose in this consolidation to increase the price of tobacco products to the con-

sumer; and no increase in price was made. There was no purpose to diminish the price of tobacco leaf to the farmer. That increased on account of the expansion of the business. The sole purpose was to increase the business by having a more complete organization for managing it and to effect economies in conducting it; because the expenses of advertising had increased to an enormous extent, amounting in the case of W. Duke & Sons to as much as $800,000 a year, or nearly twenty per cent. of the whole business. The advertising expenses of the others were equally large. These concerns were wound up, and their plants and businesses taken over by the American Tobacco Company; and the business was carried on by the new organization in the same factories, except where it was found more economical or convenient to manufacture at some other point. Then the factories were sold, but the manufactnre of the brand was continued. The New Jersey corporation received the actual properties, with their live assets and good will, and paid for them in its stock.

The Assistant Attorney-General in the course of his remarks commented upon the fact that, according to an estimate made by the Bureau of Corporations of the Department of Commerce and Labor in the year 1908, two years after the trial of this case was over (see Reply Brief, p. 10), the value of the tangible assets of the factories and the plants and the stock on hand and bills receivable that went over to the New Jersey corporation was only $3,500,000. And he makes the charge that here was an instance of gross overcapitalization. But, of course, he ignores in that statement what is the only thing of real value in the tobacco business, and that is the brands. The brand of "Bull Durham," of which your Honors will hear as I proceed, was one sold at auction for $4,000,000—one brand of tobacco alone.

The Government discovers in this organization of the American Tobacco Company in 1890 the germ of an intention on our part to restrain trade. This, it is said, was the beginning. But we reply that it was nothing but a consolidation of concerns by men who believed that their business could be more effectively managed by a corporation. It was really nothing more than a new partnership. If you say that there was a termination of the competition which had previously existed between these various concerns, the result would have been the same in case a partnership had been formed. What if the gentlemen composing these two partnerships and three corporations had formed a new partnership, we will say of fifteen members, believing that such an organization would be more effective in the management of their business? Could that be condemned because of the incidental suppression of competition? The result would have been just the same.

The Attorney-General upon the last hearing of this case said that this transaction showed that the American Tobacco Company was "conceived in sin and born in iniquity." But I ask him, Was there anything illegal or immoral about it? No State law forbade it, and the laws of many States encouraged it. As a matter of fact, as we all know, it was a typical case which went on all over the United States, and which has been going on ever since, until to-day a very large part of our industrial structure is built up on these lines.

The American Tobacco Company was a cigarette company; it had only a small smoking business. It soon became apparent to the experienced men who had charge of the company that it was necessary to acquire properties in other branches of the trade; for they had constantly in mind one of the peculiarities of the tobacco business—that the popular taste constantly changes, and that what is profit-

able and successful to-day may not be profitable and successful to-morrow. They had issued securities of $25,000,000—$10,000,000 of preferred and $15,000,000 of common stock; and in order to broaden the basis upon which the securities were issued, and to give permanent value to them, they proceeded to purchase some plants in other lines of business. The Government here sees our next offense after our iniquitous organization. Yet it seems to me to have been the most eminently conservative and reasonable thing that they could have done. Indeed, it was more than conservative; it was necessary if the American Tobacco Company was to continue in business; for just what they expected to happen did happen. Popular taste did change, and in a very short time the business of making Virginia cigarettes became comparatively insiguificant compared with its size when the American Tobacco Company was organized.

Let us see what they did. They bought a plug concern, the National Tobacco Works, at Louisville; the smoking business of Marburg in Baltimore; the smoking and snuff business of Gail & Ax, in Baltimore; Whitlock's business in cheroots; from Hernsheim, of New Orleans, a machine for making cigarettes without paste; and on account of the prejudice which had arisen against paper cigarettes, they bought three concerns in Baltimore which were making all-tobacco cigarettes, viz.: Herman Ellis, Hall, and the Consolidated Cigarette Company.

Mr. Justice Holmes: Is that what is meant by "Little Cigars?"

Mr. Nicoll: Yes, that is what is meant by "Little Cigars."

None of these concerns was in competition with the American Tobacco Company at all. They were in different lines of business. Each was bought for cash, although in two instances they gave cash and

a little stock; and they took from the vendors deeds of the property which they bought. If it was a corporation, they did not buy the stock and issue their stock in exchange; they bought the actual property and paid for it in cash, having no other purpose in view than the purpose which I have just stated—of broadening the basis upon which the business was organized, and of giving permanence and value to their securities.

Continental Tobacco Company.

What was the next step? We have not reached the year 1895, or six years after the organization of the American Tobacco Company. By that time it had become quite a prosperous concern. It had its cigarette business, with which it started; it had its old smoking business and a little more; it had some plug business; it had the business of little cigars which it had acquired from the Baltimore houses; and it was going on making money when its success attracted the attention of the powerful plug manufacturers of the United States. They at once commenced to make war upon it. The Drummond Company in St. Louis proceeded to sell at a reduced price one of its brands in the City of Philadelphia in competition with a brand of the American Tobacco Company. Naturally the American Tobacco Company retaliated; and that brought on what is known in this Record as the "Plug" or "Battle-ax War."

My learned friend on the other side would have you believe that this was begun by the American Tobacco Company for the purpose of bringing into submission the great plug manufacturers. But that is not the fact. If there is one thing that is clearly shown by this Record, it is that that war was forced upon us. It was not of our seeking. Of course, we were anxious to end it. He quotes a resolution of

our Board of Directors instructing the officers of the Company to endeavor to end it. Undoubtedly we were anxious to end it, for the losses were piling up. No business transaction of that sort can be conducted without loss. And so we made an attempt to end it; but that failed, and the war went on from the year 1895 to the year 1898, when two gentlemen named Ray and Hughes, who were promoters, having obtained options upon some of these plug concerns in the Middle West, came to us and offered to sell them to us. We declined to buy. That put the matter over for some time, when these same gentlemen, Ray and Hughes, undertook to organize a plug concern, and came to us and asked us to sell our plug business to their concern. We agreed to do it—to take $20,000,000 of stock out of a total capitalization of $75,000,000; in other words, to sell our business for less than a third of the total capital stock. That plan failed. Nothing was done. In the meanwhile we bought the Drummond Company from the heirs of its founder; we bought the Brown Company, another one of these plug concerns, because of the unusual success and popularity of its brand; and then when Ray and Hughes renewed their proposals we actually did sell our plug business to the Continental Tobacco Company for a little over a third, but less than a half, of its capital stock.

We are accused by the Government of having made repeated purchases; and yet the first great transaction that we come across in this history is a sale, and not a purchase, of some of our business.

We sold our plug business to a company in which we had a minority interest; and we never did have control or anything more than a minority interest in the stock of the Continental Tobacco Company.

Mr. Justice Lurton: Did you sell for cash or for stock?

Mr. Nicoll: We sold for stock.

Mr. Justice Lurton: For what proportion of the whole stock?

Mr. Nicoll: I say, we received $30,000,000 out of $75,000,000.

Mr. Justice Van Devanter: Did those proportions continue?

Mr. Nicoll: No; the capital of the Continental Tobacco Company was afterwards increased to $100,000,000, but we still held $30,000,000 or $37,000,000. I will come along presently to the account of the merger.

A great deal is made out of the fact that Mr. Duke became the President of the Continental Tobacco Company. But that was not in the contemplation of the parties when the company was organized; and he became president only on account of the disputes which arose between the other candidates.

Here, then, was the Continental Tobacco Company doing a plug business, and the American Tobacco Company doing a smoking and a cigarette business; and they were not competing concerns. There is no competition between plug on the one hand and cigarettes and smoking tobacco on the other. They are made from different kinds of tobacco, by different processes, sold in a different way, and have an entirely different class of consumers. But naturally the securities of the two companies drifted into the same hands. Men who had stock in the American Tobacco Company were naturally attracted toward the shares of the Continental Tobacco Company; so that in a few years a large amount of these stocks were found in the same hands.

That brings us to the year 1899.

In 1899 the American Tobacco Company purchased the Union Tobacco Company, which was a

new concern organized by a group of financiers who had acquired a considerable business in smoking tobacco and cigarettes; one motive being, as stated by Mr. Duke, to bring about an association with powerful financial interests who might prove of aid in the further development of the business.

Consolidated Tobacco Company.

In 1901 the American Tobacco Company decided to extend its lines by going into the cigar business. That required additional capital. At the same time difficulties had arisen about the development of the trade in foreign countries, particularly in England; and more capital was necessary for that purpose. Various plans of raising money were proposed—either by issuing bonds or by increasing the stock—but noue of them was found to be practicable. So there was formed in 1901 the Consolidated Tobacco Company, with a cash capital of $30,000,000 (afterwards increased to $40,000,000 in cash); and the Consolidated Tobacco Company then made an offer to the common stockholders of the American Tobacco Company and the Continental Tobacco Company. They offered to buy their shares with the four per cent. bouds of the Consolidated Tobacco Company. Tbey offered the stockholders of the American Tobacco Company two for one—that is, $200 in bonds for $100 in stock. To the shareholders of the Continental Tobacco Company they offered $100 in bonds for $100 in stock. So that the shareholder of the American Tobacco Company who had been getting six per cent., if he accepted this offer, got eight per cent.; and the shareholder in the Continental Tobacco Company, who had never received a dividend, got four per cent.

It is not surprising that a very large number of the stockholders of the Continental and the American Tobacco Companies accepted this offer; while

the men who put up the $40,000,000 pledged their money as security for the payment of the bonds and the interest upon them.

Merger in 1904.

So we have the Consolidated Tobacco Company formed in 1901. That was not a company conducting a manufacturing business. It held the common stocks of the American Tobacco Company and the Continental Tobacco Company. But, as I have just pointed out, they were not competing concerns. One was doing a plug business, and the other a smoking and cigarette business. That went on until 1904, when it was determined to form a new corporation on account of the confusion which existed about the securities upon the exchange, and in order to effect some additional economies in the business. At this time this was the condition of the securities:

The American Tobacco Company had out its preferred stock and a small remnant of its common stock. The Continental Tobacco Company had out its preferred stock and a small remnant of its common stock. The Consolidated Tobacco Company had out $150,000,000 of these four per cent. bonds which it had issued for the purpose of purchasing these common stocks. The Consolidated Tobacco Company had also its common stock. And in order to be rid of that confusion about the securities, it was agreed to merge these three companies—the Consolidated, the Continental, and the American—into a new company, called the American Tobacco Company, under the laws of the State of New Jersey.

An equitable distribution of the securities was arranged. The preferred stockholders of the American and of the Continental Companies got the first lien upon the property, viz.: The bonds. The bondholders of the Consolidated Company had their choice: They were either to receive bonds in

the new company, or, at their election, some preferred stock; while the common stockholders of the Consolidated Company received the common stock of the American Tobacco Company. Of course a transaction of that sort could not be executed without some differences of opinion. Litigation arose in the State of New Jersey; and the whole matter was considered and thrashed out in its courts, and finally decided in favor of the legality of the merger.

Such, in brief, is the history of the American Tobacco Company from 1890 to 1904.

Mr. Justice Lurton: Was there an opinion in the merger case that you speak of?

Mr. Nicoll: Yes, your Honor. It is referred to, I think, in the brief.[1]

The American Tobacco Company.

The American Tobacco Company, formed in this way, is not a holding company. It has factories for the manufacture of its products in New York, in Baltimore, in Richmond, in Durham, in Danville, Louisville, in St. Louis, in Cincinnati, in Chicago, in Middletown (Ohio), and in other places. It manufactures in its own factories the greater part of its output. Out of a total output of all concerns in which it had an interest of 3,900,000,000 cigarettes in 1906, it manufactured 3,200,000,000. It manufactured in its own factories 942,000,000 little cigars, as against 12,000,000 manufactured in the factories in which it held stock. It manufactured 98,000,000 pounds of plug tobacco in its factories, as against 68,000,000 pounds manufactured in the factories in which it held stock. And the only branch of the tobacco business in which the com-

[1]Ikelheimer v. Consolidated Tobacco Co., 59 Atl. Rep., 363; not in N. J. Court Reports. Complainants never took the case to the Court of Errors and Appeals, so a few days later an order was entered dismissing it.

panies in which it holds stock manufacture more than is manufactured in the factories of the American Tobacco Company is in the case of the smoking tobacco, for reasons which will appear as I proceed.

The American Tobacco Company has become a corporation whose shares are widely distributed. My learned adversary talks about this business being in the control of six or eight men. Of course this corporation is not unlike many corporations where quite a small number of men own a large proportion of the stock. But as the tobacco company has grown, the stock has been widely distributed.

We are not dealing here with any question of six or eight men. We are dealing with thousands and thousands and thousands of innocent holders of these securities, who have followed the modern habit of investing their savings, not in lands as formerly, but in the securities of well-established companies, in whose management they feel confidence, and whose prosperity they feel to be assured.

At the end of the year 1907 there were 109 holders of preferred stock holding at least 1,000 shares, and 4,745 holders of preferred stock holding less than 1,000 shares; 48 holders of common stock holding at least 1,000 shares, and 584 holders of common stock holding less than 1,000 shares. The bonds, which amount to $50,000,000 of one issue and $60,000,000 of another, or $110,000,000 in all, are very widely distributed, and are held by institutions and individuals in all parts of the United States.

American Snuff Company.

We come now to the American Snuff Company. One would think from listening to the argument of the learned Assistant Attorney-General that the persons in control of the American Tobacco Company had deliberately set out to buy all the snuff con-

cerns in the United States. But no such thing as that is shown by this Record. The Snuff Company is another instance of a sale by the American Tobacco Company, and not a purchase. It came about in this way:

I have already told your Honors that in 1891 we bought in Baltimore a smoking and snuff business conducted by Gail & Ax. We did not buy the snuff business because we wanted the snuff business, but because we wanted the smoking tobacco business. But, as very often happens in these factories, the smoking tobacco business had associated with it a little snuff business. And in that way we came into possession of a small amount of snuff business.

Again, at its organization in 1898 the Continental Tobacco Company had acquired the Lorillard business, which had quite a large snuff business. But neither the American Tobacco Company nor the Continental Tobacco Company had any snuff organization. The snuff business is an entirely different business from the tobacco business —that is, the smoking business or the plug business. Snuff is made out of different materials. It is manufactured by different processes. It is sold on different selling plans, and it goes to an entirely different class of consumers. In order to conduct it properly, it requires a separate organization; and we had none.

That was the situation in the year 1900. About a year and a half or two years before that, certain snuff manufacturers entirely independent of us had organized the Atlantic Snuff Company. They had acquired the business of several large snuff concerns, but they did not acquire the business of the American Tobacco Company nor of the Lorillard Company. They went on with their snuff business for a while until 1900. Then, only in order that we might have some effective organization for the management of our snuff business, we co-operated

with them to form the American Snuff Company. They turned over the business of the Atlantic Snuff Company, and we turned over to the American Snuff Company our business. They received $7,500,000 worth of the preferred stock and $2,500,000 of the common stock. We received $2,500,000 of the common stock and $7,500,000 of the preferred stock. At the same time the American Snuff Company purchased the business of Mr. Helme of Philadelphia, for $2,000,000 of preferred stock and $1,000,000 of the common stock.

By this transaction the American Tobacco Company acquired no control of the Snuff Company; for the preferred and common shares had an equal voting power. It has never had any control of the Snuff Company. It has never had anything more than an investment in the Snuff Company of about forty per cent. The first President of the Snuff Company was Mr. Helme, of Philadelphia. He was succeeded by Mr. Condon. Neither of them was or had ever been in any way connected with the American Tobacco Company. It has its own buying organization, its own selling organization; and the relation of the American Tobacco Company to it is nothing more than that of a holder of its securities in consideration of a sale of its property.

A great deal is said about the large percentage which the Snuff Company has acquired of the snuff trade. How has such a percentage grown up? It appears that this percentage has come about, not by acquiring the business of competitors, but on account of the business which the American Snuff Company itself has developed. When it was formed it did a business of 9,000,000 pounds out of 13,000,000 pounds. It is true it bought some businesses. It bought De Voe's business; it bought the Standard Snuff Company's business; it bought Weyman's business. But most of those purchases were insignificant. By those purchases it acquired

an additional business of only 2,000,000 pounds. But it has now achieved a business of 22,000,000 pounds. So that if you add the 2,000,000 pounds which it acquired to the 9,000,000 which it had when it was organized, we find that by the unusual activity and intelligence of its management it has doubled its own business.

American Cigar Company.

The Assistant Attorney-General makes a great criticism upon our going into the cigar business. He said that having acquired the snuff business we had branched out to get control of the cigar business. Well, if we did we have certainly been very unsuccessful; because, as I have said, we never had more than sixteen per cent. of the cigar business, and that has decreased to fourteen per cent. But why should we not have gone into the cigar business? If we had succeeded in other branches of trade, why should not some of our surplus be expended in expanding our trade in the direction of the cigar business? The cigar business is an immense one. There are seven thousand millions of cigars produced annually in the United States, the value of the output being $350,000,000; and all that we have ever done of it is $50,000,000.

We went into the cigar business in order to expand our trade. Having no organization for the manufacture of cigars, and having a cheroot business of our own which we had acquired in 1891, the American and the Continental companies in 1901 co-operated with Powell, Smith & Company (a large cigar manufacturing concern) to form The American Cigar Company with a capital of $10,000,000. Afterwards it acquired some manufacturers in Florida——

Mr. Justice Lurton: What was that year, Mr. Nicoll? I did not catch it.

Mr. Nicoll: The year? 1901.

Afterwards it acquired some manufactories which manufactured cigars of a different grade in Florida. Then it acquired some factories in Cuba and Porto Rico. But it has never done half of the business that is done in Cuba either in cigars or in cigarettes; and not over twenty-five per cent. of the Cuban cigars which it manufactures come to the United States.

American Stogie Company.

It was found from experience that tbe cigar business required some subdivision in order to be efficiently managed. Therefore we formed in 1903 the Stogie Company, which is a concern organized to manufacture the cheapest kinds of rolls of tobacco, called stogies and tobies, a kind of cigar that is sold for about one cent apiece. We have never had more than fourteen or fifteen per cent. of the stogie business.

The stogie business was organized for the same purpose as the cigar company—in order that we might have a more effective organization for this part of our manufactured product. All of these companies—the American Snuff Company, the American Cigar Company, and the American Stogie Company—have separate leaf-buying establishments. They buy in competition so far as they are of similar grades, and have different selling organizations and different selling plans.

English Contracts and Companies.

That brings me to tbe foreign business. It was a very natnral thing, I suppose, that the American Tobacco Company should endeavor to extend its trade to foreign countries. At least, we have always looked upon it as a proper, and, indeed, a patriotic performance, until now. We extended our trade abroad as best we could, and among other places to Great Britain. The tariff laws of Great

Britain differentiated against us, so that it became impossible for us to sell any manufactured American tobacco in Great Britain without buying a factory there. Therefore we bought Ogdens, Limited, and paid for it $5,500,000 in cash. The English people, alarmed by the American invasion, organized the Imperial Tobacco Company by uniting a large number of the tobacco manufacturing plants in Great Britain. A trade war, begun by the Imperial Company, followed, which existed for some time at a considerable loss. Finally, the conflict was ended in this way:

We sold Ogdens, Limited, to the Imperial Tobacco Company, for stock of the Imperial Tobacco Company, most of which we have since sold. At the time when this case was heard we had left only five per cent. of the Imperial Tobacco Company's stock.

Much is said about the fact that we bought Ogdens, Limited, for $5,500,000 and sold it for $13,000,000. But my learned friend evidently forgets the millions of dollars that we spent on Ogdens from the time of our purchase until the time of the settlement. At all events, we made the best trade we could with the Englishmen.

The Imperial Tobacco Company, in turn, sold us their business in the United States. Of course, it did not amount to as much as our business in Great Britain, because our tariff was so high that no English manufacturer could do much business in this country. But still, they had some. We sold our business, and they sold their business. When we sold the actual properties, we sold what was of much more value than the actual properties: We sold to the Englishmen and the Imperial Company the right to use our brands in England, and they sold to us the right to use their brands in the United States. It was a transfer of great and valuable properties. And as an incident to the sale, in either case a covenant was entered into not to com-

pete with or use in competition the properties so sold.

I ask my learned friend, Of what value would have been our brands to the Imperial Company if we had left ourselves at liberty, without a covenant, to proceed and manufacture in Great Britain notwithstanding the sale of the brands? Of what value would their brands have been to us unless we had taken from them a covenant not to compete with us in the United States and not to use in the United States the brands we sold them?

That is all there is to the English transaction, except the export business. Both of these companies had an export business—that is, a business foreign to the United States and foreign to England. Both sold that business, with the brands, to the British-American Company. The American Tobacco Company conveyed its export business and its factories to the British-American Tobacco Company, and took cash for the transfer. The Imperial Tobacco Company did the same. And the British-American Company has from that time on conducted the export business which formerly belonged to these two concerns, with enormous additions made by its own activities, and has been in no sense a holding Company.

It has been one of the most valuable things ever done for growers of tobacco in the United States. Since its organization seven years ago the British-American Company has increased the use of American leaf in manufacturing here for export purposes from twenty million pounds a year to over thirty million pounds a year.

Supply Companies.

Now as to our supply companies: On this subject the learned Assistant Attorney-General indulged in such generalizations as would induce your Honors to believe that we had extended our

activities to other branches of business besides the tobacco business. Such is not the fact. All there is to that matter is this: For the efficient and economical management of a great business it is necessary that there should be reliable sources of supply of those materials which are used in the manufacture of tobacco, such as tin-foil, boxes, bags, licorice, sugar and what not. No great manufacturing company can afford to depend upon chance for its supply of such materials. It must have them always on hand or must cease manufacturing. Take tin-foil, for instance: A constant supply of that is necessary for our business. Therefore, we bought an interest in the business of Mr. John Conley, leaving him in the management, and owning a third of the business. Then we acquired the Johnson Tin-foil Company, so that in case one factory was destroyed we should have another. The Conley Company sells the greater part of its tin-foil to us, but it sells to all the other manufacturers at the same price. The other manufacturers may buy their goods of the Conley Company; or, if they do not, and they so choose, they can buy of Lehmaier, Schwartz and Company, which is a combination of independent manufacturers representing the owners of at least four different plants. We also acquired an interest in a concern for the manufacture of bags and small containers, of which we use a great quantity.

January 10, 1911.

Mr. Nicoll: If your Honors please, when the Court took an adjournment yesterday I was speaking of the supply companies, and had discussed the case of the Conley Tin Foil Company, in which the American Tobacco Company had an interest. We also acquired an interest in a concern for the manufacture of bags and small containers, of which we use a great quantity.

These are the little packages in which smoking tobacco is packed. That concern—the Golden Belt Manufacturing Company—sells to us the greater part of its product, but it also sells to independent manufacturers at the same price. The same is true of the Mengel Box Company—the Company which makes the boxes in which the tobacco comes; and the same is true of the Licorice Company, and all of these articles, the cotton containers, boxes and licorice are sold by us to independent manufacturers, who can also if they choose, procure the same articles through others.

McAndrews & Forbes—The Licorice Company.

So much was said about the Licorice Company—the McAndrews & Forbes Company—and so much was sought to be made of the fact that some years ago the Government undertook a prosecution of the Licorice Company and its officers that I desire to say a few words upon that subject.

During the first five months of the year 1906 the grand jury of the Circuit Court of the United States for the Southern District of New York made an exhaustive examination of the American Tobacco Company and its subsidiary companies. All of their transactions were minutely investigated, but the only one which was made the subject of a charge was the one which I am about to discuss.

Licorice paste is a necessary ingredient in the manufacture of plug tobacco. When the Continental Tobacco Company in the year 1899 acquired the Liggett & Meyers Company, in St. Louis, they found that the Liggett & Meyers Company were manufacturing their own licorice paste a greater cost than the price of the licorice paste to the Continental Tobacco Company. This convinced the president of the Continental Tobacco Company that the profit to manufacturers of licorice was inadequate and of the necessity of securing a per-

manent supply of licorice paste at a reasonable price. The Continental Tobacco Company thereupon bought in Philadelphia a concern called Meller & Rittenhouse, and enlarged its factory, keeping the matter secret from rival manufaturers of licorice paste for fear they would refuse to sell it. That brought about a consolidation between Meller & Rittenhouse and the McAndrews & Forbes Company, which was the oldest concern engaged in the manufacture of licorice paste in the United States. It had been in business for many years, and made the most popular paste in the market. The officials of the American and Continental Companies made up their minds that if they could unite that concern with their own, they would then have what they deemed necessary for their business—a permanent supply of licorice paste at a reasonable price.

Soon after this the president of the Continental Company became convinced of the necessity of having always on hand a two-years' supply of licorice root—not licorice paste, but the root from which the paste is made. This licorice root grows in Russia, in Syria and in other parts of Asia, and the gathering of it is attended with great difficulty. It grows wild, and its collection is interrupted by the disturbances which are constantly occurring in those countries. These became aggravated at the time of the Japanese-Russian War, and the fear was entertained that a two years' supply of licorice root could not be secured except at a prohibitive price. It was therefore decided to acquire an interest in the Young Company, a concern manufacturing licorice paste at Baltimore, and to enter into a trade contract with Lewis, another concern manufacturing licorice paste at Providence, in Rhode Island. The object in making these contracts was not to control the supply of licorice paste, but to prevent Young and Lewis from interfering with

the plan of procuring in Asia the two-years' supply of licorice root which was deemed necessary for the protection of the business. These transactions were expressed in contracts, and were abandoned several years before this suit was brought, and before the indictment. The Government seized upon these abandoned transactions and obtained an indictment against the McAndrews & Forbes Company, the Young Company, and included in the indictment Mr. Jungbluth, the President of the McAndrews & Forbes Company, and Mr. Young, the President of the Young Company. They were all indicted for a violation of the Sherman law. Upon that trial we showed the jury just what we have showed the Circuit Court here—all our business transactions and methods, so far as they related to licorice paste; and while the jury, under the instruction of the Court, found the companies guilty, because of the terms of the written contracts long abandoned, they acquitted the individuals who had actnally made the contracts, because they were able to see what everyone connected with the case, except the Government, was able to see, that there was no intention on our part to harass or oppress our competitors, and that the violation of law, if it existed at all, was purely a technical one.

Now, from that time on the situation with regard to licorice paste has been this:

There are other manufacturers of licorice paste besides the McAndrews & Forbes Company. One is Lewis, of whom I have just told you, now altogether indepedenent of us. Another is Weaver & Sterry, of New York. Another is the Pharmaceutical Works, in Jersey City. But the McAndrews & Forbes Company is the largest, and it sells the greater part of its products to the American Tobacco Company for the manufacture of its plug tobacco. It also sells to such independent manufacturers as desire it. There is nothing in the world to

prevent any independent manufacturer from making licorice paste himself, and some of them have done it—notably Mr. Larus of Richmond—but the McAndrews & Forbes Company has such an established reputation, and its conduct is so fair, that the independents prefer to use it rather than to go into the business on their own account. Therefore we sell it to them at exactly the same price as it is sold to the American Tobacco Company. In other words, we offer the independents a ten-year contract at eight cents a pound—the same contract as is made with the American Tobacco Company. If they do not want to enter into a ten-year contract, but want a contract from year to year, we sell it to them for one cent a pound more—nine cents a pound. So that the situation of the independent maunfacturers with regard to licorice paste is this:

They can have a ten-year contract at the same price as the American Tobacco Company; or they can have a contract from year to year at nine cents a pound; or they can buy of the independent manufacturers of licorice paste whom I have just mentioned; or, if they choose, they can go into the manufacture of licorice paste themselves. It seems to us that this conduct is so eminently fair that no just criticism can be made of it. Certainly no one can spell out of it any attempt on our part to restrain trade in licorice paste.

Nature of Transactions Shown by Record.

I have now gone over briefly the history of the birth and growth of the American Tobacco Company.

What are the transactions shown? The only ones that are impugned by the Government fall within the four following classes:

(1) Consolidation of competing manufacturing interests through the formation of a corporation,

and the transfer to it of the respective properties of the competitors in exchange for stock of the vendee corporation, or for cash;

(2) The purchase by a corporation of the property of a competitor directly, or the purchase by such corporation of the whole or part of the capital stock of such competitor, generally for cash, but in one or two instances in exchange for the shares of the capital stock of the purchasing corporation;

(3) The purchase by a tobacco manufacturing company for cash of all or a part of the capital stock of a corporation engaged in the manufacture of materials used by the vendee company, such as wooden boxes, cloth bags, licorice paste, &c.

(4) The purchase by a tobacco manufacturing company for cash of all or a part of the capital stock of a mercantile corporation engaged in selling at wholesale or retail manufactured tobacco, or the products of tobacco.

Now, the judgment below did not condemn the two last transactions—which we may call the two minor transactions—but it did condemn the two major transactions, on the sole ground that competition in either case had been suppressed, and that any suppression of competition, no matter how brought about, and even by the purchase of a competitor, was a violation of the Sherman Act.

Different Products of Tobacco Not Competitive.

Your Honors must not assume from the general statement of the character of the transactions shown that each consolidation and each purchase in this Record was a consolidation or purchase of competitors. The peculiarities of the tobacco business really put it in a class by itself. There are so many varieties of tobacco, so many different grades of the same general variety, such differences

in the processes of manufacture, and such extrordinary and fundamental differences in the tastes of the consumers, that it cannot be said that the various products compete with each other in the same way or to the same extent as with other staple goods.

Even if yon consolidate several plants making cigarettes from a crop like the flue-cured tobacco, of Virginia, you have not joined together things which are necessarily competitive, for a consumer's attachment to one brand of cigarettes does not easily change to another, and he may give up smoking cigarettes altogether if he cannot find the brand to which he has been accustomed. It canot strictly be said that Havana cigars compete with domestic cigars, for the smoker of one rarely uses the other. And when we come to the great divisions of the tobacco trade, it is clear enough that there is very little, if any, competition among them. Cigarettes do not compete with plug tobacco. Snuff does not compete with cigars. Smoking tobacco does not compete with cheroots; all-tobacco cigarettes do not compete with paper cigarettes. Cigarettes made from Virginia tobacco do not compete to any extent with cigarettes made from Turkish tobacco. Dry snuff does not compete with wet snuff at all; and the snuff which is used by the Swedes in the northwest is in no competition with the wintergreen or other flavored snuffs which are consnmed by the factory girls of New England.

Mr. Justice Holmes: I was wondering who it was that consumed snuff. You hardly ever see anybody take it.

Mr. Nicoll: It is consumed in the factories, I think.

Mr. Justice Holmes: It is consumed in the factories?

Mr. Nicoll: Yes. The theory of the Government throughout has been that every consolidation was

a consolidation of competitors, and that every purchase was a purchase of competitors.

Mr. Justice McKenna: Will you repeat that?

Mr. Nicoll: I say, the theory of the Government throughout has been that every consolidation was a consolidation of competitors, and that every purchase was a purchase of competitors. But I say that a careful examination of this Record will show, for the reasons which I have stated, that even in the original organization of the American Tobacco Company and the subsequent organization of the Continental and Snuff Companies, there was much less elimination of competition than would naturally be supposed; while the additional plants and brands purchased were often not in competition at all with the business to which they were added.

The American Tobacco Company, as it stands today, is not an aggregation of competing plants. It is rather an association in one company of the different non-competitive departments of the tobacco trade.

No Transaction Shown Violates First Section.

Coming now to the transactions shown, and without discussing whether or not these transactions relate directly to commerce, or whether they relate to anything but the instrumentalities of production as distinguished from the instrumentalities of commerce, we contend that these transactions are not contracts, combinations, or conspiracies within the meaning of the anti-trust law. It is a matter of history that after the Trans-Missouri case, the business interests of this country became greatly alarmed, and sought to obtain in the Joint Traffic case a modification of that decision. While the Court adhered to its former judgment, the late lamented Mr. Justice Peckham, who rendered the opinion of the Court, took occasion to say certain

things reassuring to the business interests of the country. Your Honors are familiar with his language. He wrote in part, as I recall it, that the formation of corporations for business purposes and the purchase of a competitor or the withdrawal from trade of a competitor had never been regarded as a violation of the Sherman law, notwithstanding the incidental suppression of competition. There is no manner of doubt that, after the decision of this Court in the Knight case, and the reassuring language of the Court in the Joint Traffic case, that the entire legal profession and all manufacturing interests believed that these transactions were lawful and did not offend the Sherman law.

I suppose the Court will take judicial notice of the fact that after these two decisions the era of consolidation in this country began. Seventeen States passed laws authorizing mergers, the organization of merged companies, and the holding of stock in one company by another. Is it possible that all lawyers and all laymen have made a mistake on this subject? You cannot say that all men intended to violate the law. It will not do to bring an indictment against all the business interests of the country. No! All men did not intend to violate the law. If the law was violated, then a mistake were made, and if all men were mistaken it is certainly one of the most unfortunate mistakes that has ever been made in the history of our affairs.

Now, all of this was fairly presented to the Court below. We relied on these cases, and we pointed out to the Court that the decision of the Court in the Northern Securities case had no application here. That was a case relating to railroads and this is a case of manufacturers. We contended that that was a case relating to the instrumentalities of commerce, and that this was a case which relates to the instrnmentalities of production—not commerce, but the forerunner of commerce. We pointed out to the

Court that in the Northern Securities case the railroads were under the legal duty of competition, and the duty of continued existence in competition, while no such duty rests upon manufacturers, who may wind up their business and retire from trade at any time. We pointed out to the Court the language of the first section of the Anti-Trust Act, which condemned combinations in the form of trust or otherwise, and argued that this Court had decided that the formation of the Northern Securities Company was little different from the formation of a trust which had existed at the time of the passage of the Anti-Trust Act. For the Court held that the Northern Securities Company was but a custodian or trustee, and practically that the shares of stock of the Northern Securities Company were equivalent to the certificates of interest, which in the former trust had been issued by the trustees who held the stocks of competing companies.

All this, I say, we argued; but the Government contended in the Court below that the suppression of competition, whether by the formation of a corporation, or whether by the purchase of a competitor, constituted a violation of the Sherman law; and the Court so held, even going to the extent of saying that the formation of a partnership by two expressmen who were conducting a small trade across State lines was a violation of the Act.

Government's Changed Position.

I am not at all surprised that upon this argument the Government has beat a swift retreat, or that it stands aghast at the consequences of its own contention. But the fact remains that the decision of the Court below was brought about because of the insistence of the learned Assistant Attorney-General that this Court had established the rule of competition in all cases, even for manufacturers.

Now, the Government has changed its position. The main brief, which bears the signature of the Attorney-General and the learned Assistant Attorney-General, repudiates the decision of the Court below altogether, and seeks to maintain the decree upon different gronnds. They say (pp. 52-3 of their brief):

"Of course we do not insist that *every* contract or arrangement which causes the elimination of a competitor in interstate trade is necessarily unlawful. The statute was intended to foster, not destroy, business operations, universally regarded as promotive of the public welfare.

"Accordingly, we do not avouch, and will not attempt to snpport the extreme construction of the Act adopted by the presiding judge below under which he declared, in substance, that it would be unlawful for any two individuals driving rival express wagons between villages in contiguous States to combine forces by forming a partnership," and so forth, as I have quoted it.

And in another part of the brief, at page 99, we find this statement of the Government's present position: That even a concentration of competing businesses, resulting in power to control prices or stifle competition, is not within the Act, provided the concentration occurs as an incident to the orderly growth and development of one of them.

Mr. Justice Lurton: From what page do you get that?

Mr. Nicoll: From page 99 of the brief for the United States. These are important concessions which, in my judgment, ought to result in a reversal of the judgment and dismissal of the Government's bill. The new contentions which the Government now puts forth, as we understand them, are equally untenable. At all events, we unite with the Government in a repudiation of the opinion of the Court below. We join with them in stating that the elimi-

nation of competition is not the test of violation of the Sherman law. We unite with the Government now in saying to this Court that every contract or arrangement which causes the elimination of a competitor is not necessarily unlawful, and that a concentration of competing businesses occurring as an incident to orderly growth and development with its resulting power over prices does not offend the Act, even if competition previously existing is terminated. And we say, as I have just endeavored to point out to you in giving the story of the birth and growth of the American Tobacco Company, that the history of the development of this Company is the history of the lawful and orderly growth and development of a great business.

You will search in vain to find in this Record any of the transactions which this Court has condemned in many decided cases. There is nothing here such as was denounced in the Addyston Pipe & Foundry case, or in Montague *vs.* Lowry, or in the Continental Wall Paper case, or in many of the decisions in the Federal courts where contracts between independent manufacturers not to compete or to maintain price, or to divide territory, have been condemned. There is certainly no evidence in this Record of a plan or scheme to restrain trade such as Mr. Justice Holmes pointed out in the Swift case, or such as Mr. Justice McKenna pointed out in the Shawnee case.

Government's Present Position.

What, now, are the contentions of the Government? I confess that I have found some difficulty in comprehending them. The best we are able to do with regard to the first section is this. Our view of the present attitude of the Government with respect to the first section is as follows:

First. Although competition may be eliminated by the purchase of competitors, and although there

may be a concentration of competing businesses brought about by orderly development without violating the Act, yet the Record in this case shows an actual intention to restrain trade.

Second. Such actual intention to restrain trade is, however, not very material; and if the evidence of such actual intention can not be found in this Record, nevertheless, the Act is violated because the necessary effect of the defendants' business operations is to directly impose material restraint upon interstate commerce by the suppression of free competition in what is called its broad and general sense.

Your Honors interrogated the learned Assistant Attorney-General yesterday about his position. I have spelled out the present position of the Government relying upon quotations from the brief, and have put it in those two propositions. Now, let us take them up in order.

The Chief Justice: Just read the propositions again.

Mr. Nicoll: The two propositions?

The Chief Justice: Yes.

Mr. Justice McKenna: Are these propositions stated as you are now stating them in your brief?

Mr. Nicoll: Are they in my brief?

Mr. Justice McKenna: Yes.

Mr. Nicoll: No; they are not in my brief. This is my argument, after reading the Attorney-General's brief.

The Chief Justice: That is what I am trying to get at. I ask you to restate them.

Mr. Nicoll: I will state them. Your Honors understand that this is our interpretation of the Government's present position?

Mr. Justice McKenna: Yes.

Mr. Nicoll: We may be wrong as to that; but, of

course, if we are the Attorney-General will say so. These are the two propositions:

First. Although competition may be eliminated by the purchase of competitors, and although there may be a concentration of competing businesses brought about by orderly development without violating the Act, yet the Record in this case shows an actual intention to restrain trade.

Second. Such actual intention to restrain trade is, however, not very material; and if the evidence of such actual intention is not to be found in the Record, nevertheless, the Act is violated because the necessary effect of the defendant's business operations is to directly impose material restraints upon interstate commerce by the suppression of free competition in what is called its broad and general sense.

No Intention to Restrain Trade.

Now, let us take them up in order. Where does the Government discover in this Record any such actual intention to restrain trade? You certainly cannot discover it in the history of the organization of the American Tobacco Company in 1890—a lawful consolidation at the time—a lawful consolidation brought about for the purpose of fostering the trade of the parties interested. You certainly cannot discover it in the fact that afterwards it made purchases which were really necessary to preserve the existence of the Company, such as plug, smoking tobacco and little cigars, to meet the prejudice which had arisen against paper cigarettes. You certainly cannot discover it in the sale of our plug business to the Continental Tobacco Company, or in the sale of our snuff business to the Snuff Company, or in the sale of our cheroot business to the Cigar Company.

We never bought to suppress competition.

Mr. Justice McKenna: That is another proposi-

tion—to say that you did not. Does that destroy the argument of the other side?

Mr. Nicoll: The other side said that we did, and that that is where they discovered it; but I say there is nothing to their argument. We never bought to suppress competition. Take the very first purchases. We had no cheroot business, and we bought a cheroot factory. We had no plug business, and we bought a plug factory. We had no business in little cigars, and we bought three factories engaged in their manufacture. None of these were competing businesses. And afterward, every brand and every factory that we bought we bought as an investment. We bought for cash or the equivalent of cash. Every single investment that we have made has been in a brand out of which we thought we could make money, and in most instances we have not been disappointed.

Most of the purchases were made from 1890 to 1901, but there were periods of months and years when no purchases were made at all.

For every purchase there were good and sufficient reasons, fully stated in the clear and convincing testimony of Mr. Duke, the President of the American Tobacco Company, which I trust your Honors will read. Sometimes a purchase was made because the factory manufactured a kind of product entirely different from anything manufactured by the American Tobacco Company or the Continental Tobacco Company; sometimes because we saw in a dormant brand great possibilities of development; sometimes because a brand had achieved a sudden popularity without pushing; sometimes because we needed the large supply of tobacco leaf which a factory happened to have on hand; sometimes because the factory had an exceptionally good location; sometimes because the business was conducted upon a different selling plan; and sometimes be-

cause there was an opportunity to purchase on account of death or a desire to withdraw from business. But always it was for reasons which would appeal to business men who were anxious and able to develop and expand along lines with which they were familiar.

Now, if you cannot discover evidences of actual intent in these purchases and original consolidation, where do you discover it?

The Covenants.

The learned Attorney General says:

> "We discover it in the covenants which you took from the vendors. You took in almost every instance from the vendors a covenant, upon the sale of the business, or the brand, not to engage in business within a certain territory for a certain time; and the fact that you took so many of those covenants is evidence of your intention to restrain trade."

The facts in regard to the covenants were these: There were no covenants taken from the original manufacturers who transferred their business to the American Tobacco Company; but experience soon showed that if the value of the business and brand transferred was to be preserved covenants were necessary.

Mr. Justice McKenna: Will you repeat that, please?

Mr. Nicoll: I say, there were no covenants taken from the original manufacturers who transferred their business to the American Tobacco Company; but experience soon showed that these covenants were necessary if we were to preserve the value of the business. The covenants required the covenantor not to engage in business in competition with the property transferred for a given period of time, and practically throughout the United States.

Were they reasonable covenants? Certainly the time was reasonable, the period being from one to fifteen years. Was the space reasonable? The evidence in this case shows that the brands are sold all over the United States; that Virginia tobacco is popular in New England; that the tobacco manufactured in the Carolinas has its greatest sale on the Pacific Coast. So that to preserve the brands the covenants must be extensive. But more important than that, as bearing on the question whether or not these covenants were taken for the purpose of restraining trade, is the fact that no covenants were taken from men who were skilled in the tobacco business. We took covenants from the owners of the business, whose names were often identified with the trade-mark, such as "Blackwell's Durham tobacco," "Spaulding & Merrick's tobacco," "Anargyros' Cigarettes," and other instances of that sort. Many manufacturers of tobacco use their own names, and make it a part of the trade-mark. So, of course, we took the covenants from the owners of the business, but not from the men who were actually capable of manufacturing the tobacco. At all stages of our growth and development there existed, and there exists to-day in the United States, thousands and thousands of men who were brought up in the tobacco business, and who are able to go into it whenever the occasion serves.

This practice of taking covenants was the result of a bitter experience on our part. In 1890 we bought from the J. Wright Company, of Richmond, all its brands, including one entitled "Winner," one called "Pride of Virginia," and one called "Master Workman." The gentlemen in the J. Wright Company took our money and immediately organized the United States Tobacco Company, and put out an advertisement that they were manufacturing a brand called "Central Union," which they claimed was precisely the same thing as the brand called

"Winner," which they had sold to us; that their brand "Pride of the East" was the same thing as "Pride of Virginia" which they had sold to us; and that their brand "U. S. Plug" was the same as "Master Workman" which they had sold to us (Vol. II, pp. 705-6).

We had still another experience: After we bought Liggett & Myers, Mr. Moses C. Wetmore, who had been the president of that company, and who had received part of the proceeds which we had paid, organized the Wetmore Tobacco Company, and announced to the public that, notwithstanding the fact that he had sold to us the "Star" brand, which was the great brand of Liggett & Myers, that he had preserved the formula, and that he was now proposing to manufacture the same brand under the same formula with the same employees that had been employed by Liggett & Myers (Vol. IV, pp. 446-7).

We had still another experience in the case of the Scotten-Dillon Tobacco Company. Upon the organization of the Continental Tobacco Company in 1898, Mr. Daniel Scotten had transferred the property of this company to the Cotinental Tobacco Company. We took from him a covenant for a year or a year and a half. At the expiration of that time he came to the American Tobacco Company and bought the factory of the old company in Detroit. We had ceased to use it, manufacturing the brands, for economical purposes, elsewhere. We actually sold him the factory to go into business, a very generous act on the part of these conspirators against trade and commerce. We sold him the factory, and he proceeded to go into the manufacture of plug and smoking tobacco, and announced to the trade that he was prepared to manufacture a full line of tobaccos precisely of the same quality as

those manufactured by the company that he had sold to us, he saying:

> "Dealers and consumers throughout the United States are acquainted with the quality of the goods manufactured for twenty years by the Daniel Scotten Company, and as nearly the entire force of employes of former years will be with us, our consequent aim will be to place upon the market a superior line of goods" (Vols. II, p. 708, IV, p. 448).

It seems to us that experiences of this sort furnish a complete justification for taking the covenants which we afterwards took for the protection of our property.

Leaf Buying.

The Government says:

> "We discover an evidence of your actual intention to restrain trade in your methods of buying leaf."

To this we reply that there has been no substantial lessening of competition in the purchase of tobacco leaf; that tobacco leaf is bought now, as it always has been, in competition; and that, on account of the conditions peculiar to the growth of tobacco leaf it is immaterial whether it is bought in competition or whether there is only one buyer. It appears that there are four great crops of tobacco in the United States. There are six minor crops. There is the Virginia flue-cured crop—a very large one, amounting to about 200,000,000 pounds a year. Then there is the dark western crop, grown for the most part in Tennessee. Then there is the well-known burley crop, and then the great seed leaf crop, from which cigars are made, which grows in Connecticut, Pennsylvania, New York, Ohio, and Wisconsin. The claim is now made——

Mr. Justice Harlan: Does it not grow in some other States—the hurley tobacco?

Mr. Nicoll: Burley grows now in some other States. A great deal grows now in Virginia—almost as much as in Kentucky. The claim is now made that before the organization of the American Tobacco Company there was great competition in the purchase of leaf tobacco, which has been suppressed as a result of its organization. But I say that the record in this case shows that all these tobaccos are sold in competition.

Mr. Justice Lurton: Is there anything in this Record concerning an organization of the tobacco planters in the black tobacco district, or the burley district, to maintain the price of tobacco?

Mr. Nicoll: Not a word.

Mr. Justice Lurton (continuing). By reason of the effect of these organizations and combinations?

Mr. Nicoll: There is nothing of that kind in the Record.

Mr. Justice Lurton: Is there anything here that indicates those great organizations of night riders which are on foot for the alleged purpose of compelling the planters to adhere to their contracts by which their crops are put in the hands of committees for the purpose of selling them? Is there anything in this Record about that?

Mr. Nicoll: There is not a word. There is a letter (Vol. IV, p. 432) here from Mr. Duke, the president of the American Tobacco Company, written many years ago, refusing to enter into any combination or any organization of the planters; but there is nothing on the subject that your Honor speaks of.

Now, I was saying that in the flue-cured district of Virginia much of the tobacco is sold at auction. It is brought to the markets in wagons by the farmers. It is then thrown in loose piles, inspected

by buyers, and put up at auction to the highest bidder. The farmer reserves the right to withdraw his contribution unless he is satisfied with the price. In the burley and dark western district there is a different method of selling it. There the tobacco is packed in hogsheads which are brought to the market. Samples are then taken, and it is sold at auction by sample. These markets are called "breaks," a term that your Honors will find in the Record, which has arisen from the breaking of the original package.

In later years a practice has grown up of buying from the farmer direct, but only a small portion of the tobacco is bought in that way.

Now, I say that practically all of this tobacco is sold to the highest bidder, and these are the competitors: The first competitor is the American Tobacco Company; then the companies in which the American Tobacco Company is interested, but which have a separate buying organization of their own, such as the Snuff Company, manufacturing entirely different kinds of goods from that manufactured by the American Tobacco Company. Then the Cigar Company; the Stogie Company; then the representatives of foreign governments—France, Austria, Italy, Spain, Portugal, and Japan, all of whom have buyers upon the markets. They are known as the Regie buyers, and they purchase a very large amount of the crop, probably 100,000,000 pounds a year. Then there are the speculators in tobacco, who are a very numerous class; and then the Imperial Tobacco Company, here represented by Mr. Hornblower, which purchases annually 54,000,000 pounds. In addition to these there are all the independent manufacturers in every branch of the tobacco trade. So that I feel myself entirely justified in saying that the Record in this case proves beyond all question that tobacco is bought in competition.

If there is one fact which stands out in this record above all the rest, it is this: That the prices of tobacco leaf have been constantly increasing ever since the organization of the American Tobacco Company. In some instances the price has increased one hundred per cent.

The Chief Justice: You are stating now that there has been an increase of the price. Do you get at the increased price by the average price of tobacco, or how do you get at it?

Mr. Nicoll: We take a series of years, and find out what it has sold at per pound in each year.

The Chief Justice: In each year? Do you mean the average during the year?

Mr. Nicoll: Yes.

The Chief Justice: You are not taking certain periods of the year?

Mr. Nicoll: No, sir; I am taking the average.

The Chief Justice: Now, has the effect of this competition been to lower the prices when the American Tobacco Company was buying and thereby acquiring the production of the producer, and then to raise the prices? That might be done ruthlessly, and yet the average might not show it.

Mr. Nicoll: There is nothing of that sort in the Record, your Honor.

The Chief Justice: You have not anything as to the fluctuation of the prices?

Mr. Nicoll: We have a great deal. We have tables here, to be found in Volume 5 as one of the exhibits in the case, dealing with the annual crop and purchases.

Mr. Justice Lurton: Do they deal with the different types of tobacco?

Mr. Nicoll: Yes; they deal with the different types of tobacco. All of the different types are dealt with in this table.

Mr. Justice Lurton: A great part of the tobacco of Ohio is burley.

Mr. Nicoll: That has greatly increased in price.

The Chief Justice: Do I understand you to say that you are making a statement of fact now?

Mr. Nicoll: Yes.

The Chief Justice: It is very important to get the facts accurately, and not to gloss them. Do I understand you to say that this Record establishes that at the marketing season, the general season when the producer of tobacco would be expected to market his crop, that there has been a general increase in the price of tobacco?

Mr. Nicoll: I certainly do mean to say just that (see Vol. II, pp. 126, 184; Vol. III, pp. 228-9; Vol. IV, pp. 266-272, 421, 522).

Mr. Justice Lamar: Have you any table that shows how that advance compares with the general advance in prices?

Mr. Nicoll: You will find a table in the Record; but the Government has furnished your Honors with a table, Appendix C, to its brief, from the Year Book of the Department of Agriculture. For my own part, I do not commend that table to the Court, because in my reply brief (p. 12 and its appendix) I show that those figures are not satisfactory at all, but extremely inaccurate; but the Record itself contains all these facts.

The Chief Justice: I do not want to interrupt you. I wanted to know the meaning of the terms you were using. That was all.

Mr. Nicoll: I am glad to be interrupted. I was just about saying that there has never been a time in the history of the country when the price of tobacco leaf has been as high as in the last few years, and that is shown by the Record. The Government says that the American Tobacco Company is not entitled to any credit for this. It is true that we do not claim that we have tried to increase the price of tobacco. All we claim is that

we have enormously increased the demand for tobacco; and that we have not interfered at all with the natural law of supply and demand, upon which, in the last analysis, the price depends. Your Honors must keep in minds that the lands where tobacco is grown are also available for other crops. The farmer may grow tobacco or cotton or hemp or grass, or he may use his land for grazing. So that tobacco is in competition with all these other products. Unless a farmer can get an adequate price for tobacco he will put his land in cotton or grass; but the users of tobacco, the manufacturers, must have it, or their factories must close; and they must pay the farmer a fair price for it as compared with the price which he can get for other crops or he will not grow it at all.

The Chief Justice: Is not that a generalization? Is that established in the Record?

Mr. Nicoll: That is established beyond a reasonable doubt (see Vol. II, pp. 124-5, 187; Vol. IV, pp. 421-2, 522-3).

The Chief Justice: I merely put you that question. You spoke of the facts, and I put you that question. I have a country in my mind where a farmer, a very honest and straightforward farmer, told me that in consequence of operations—I do not say how, or why, or whether it came from the price of tobacco—he had practically been ruined; because whilst it was very profitable to use his land for tobacco it was not possible for him to make a living out of his land using it for grain or for grass; that his was essentially a tobacco country, and that if you deprived him of the right to grow his tobacco it meant ruin to that section. He may have been mistaken; and so I ask you, does the proof establish this generalization?

Mr. Nicoll: That must have been a very exceptional instance.

The Chief Justice: What is that?

Mr. Nicoll: That must have been a very exceptional instance.

The Chief Justice: I do not mean to say that it was an accurate one.

Mr. Nicoll: Take, for instance, land in Kentucky, in the Blue Grass region. There could not be any question about the ability there——

Mr. Justice Harlan: There is a very small portion of that State that is embraced in the Blue Grass region.

The Chief Justice: The country between Winchester, practically, and the Ohio River, is called the Blue Grass region.

Mr. Justice Harlan: The Blue Grass region is practically in the center of the State, and does not embrace more than fifteen per cent. of the whole territory of the State.

The Chief Justice: I do not want to interrupt you, Mr. Nicoll.

Mr. Nicoll: I am glad to have yon interrupt me. I feel so confident on this thing about the Record that I am glad to have your Honors ask me any questions with regard to it.

Methods of Competition.

Now, after all, the main contention of the learned Attorney-General is that the evidence of our intention to restrain trade is to be found in our methods of competition, which the petition charges, in general terms, to have been unfair, oppressive and coercive.

Only nine witnesses were called by the Government to make any complaint of our methods of competition. I consider this a most surprising circumstance. When you consider the enormous powers of investigation conferred upon the Government as the result of the decision in the case of Hale *vs.* Henkel, the enormous amount of money which

has been appropriated by Congress for this purpose, and the great number of able and distinguished lawyers who have been retained for the purpose of making these investigations, this beggarly showing becomes all the more surprising. At the time when this case was tried the American Tobacco Company had been engaged in business for eighteen years. During that period millions of men had come in contact with it as growers, manufacturers and consumers of tobacco; during that period it bought many plants, some of which had been in competition with it; it introduced new methods of doing business; it put in operation many economies; it wrought changes in the method of conducting the tobacco trade; it discharged many employes. If it is true, as charged in this petition, that its growth and prosperity were due to unfair methods of competition which have injured competitors, driven some persons out of the trade and deterred others from entering it, it is almost incredible that the Government should have been unable to produce some direct and weighty evidence tending to prove the charge. Yet, as I say, only nine witnesses were produced, and for the most part their testimony is so weak and uncertain as to be little more than trivial. What a beggarly showing when we compare it with the extravagant language of this petition!

Now, who were the nine? There was one speculator in tobacco; two jobbers; one retailer; four salesmen, and one manufacturer.

The speculator was Mr. Dunkerson, of Louisville, Kentucky. His only complaint was that he was unable to continue in business because the American Tobacco Company paid more to the farmer than he could afford to pay and make his profit (Vol. IV, p. 103).

Mr. Justice Harlan: What farmer do you refer to?

Mr. Nicoll: Mr. Dunkerson was buying from the farmers as a speculator, and when the American Tobacco Company increased the price to the farmer, he felt that that was more than he could pay and make a profit, so he went out of business and turned his attention to the export tobacco trade in which he has greatly prospered.

Mr. Justice Harlan: Do you mean to be understood as saying that the American Tobacco Company pay the Kentucky farmers more than other people?

Mr. Nicoll: No; they paid more than Mr. Dunkerson was willing to pay. One jobber was Mr. Hillman, of New York. If what he said can be construed into a complaint, it amounts to this: That the American Tobacco Company sold all its goods through one jobber in New York City, namely, the Metropolitan Tobacco Company, a jobbing concern formed by the consolidation of many large jobbers, and that prior to its organization a large number of tobacco jobbers had done a prosperous trade. This, no doubt, was true, but can fault be found with the American Tobacco Company because it chose to sell its goods through one large jobber in a given territory? So far as Mr. Hillman was concerned, his examination showed that his business had increased from year to year, although he refused to handle the goods of the American Tobacco Company, confining his distribution to the goods of the independents, while the Metropolitan Tobacco Company, a concern in which the American Tobacco Company never had an interest, handled the goods of the American Tobacco Company and of the independents alike.

The other jobber was Mr. Mathews, of Nashville, a wholesale grocer. He had handled the plug brands of the American Tobacco Company, but gave them up and confined his attention to those of the independents, because the American Tobacco Com-

pany would not fix the price for its goods and guarantee its maintenance, while some of the independents guaranteed the maintenance of the price and a profit of ten per cent. He continued, however, to handle our smoking brands. In a short time he found that he could make better sales of other goods by handling the American Tobacco Company's plug brands, whereupon he resumed their distribution (Vol. IV, p. 192).

The only retailer who made any complaint was Mr. Schulte, of New York, and he proved himself to be a past master in the ways of competition, and had devoloped a very large and constantly increasing business. I leave his case for the consideration of Mr. Stroock.

The four salesmen were Mr. Harrington, of the Larus Company, of Richmond, a successful manufacturer; Mr. Choate, of the Byfield Snuff Company; Mr. Stone, of the Richardson Company; and Mr. Fowler, of the United States Tobacco Company. The complaints of Harrington and Fowler were confined to the New England and Philadelphia deal of 1904, when, at the instance of the jobbers, the American Tobacco Company made, for a short time, an arrangement for the exclusive handling of their goods in those localities. Both of them testified that before and since then the business of their employers had steadily increased, and that even in that year it had suffered no substantial decline, because of their ability to secure distribution through other jobbers and retailers. I will discuss the testimony of Mr. Choate and Mr. Stone as I proceed.

The only manufacturer who made complaint was Mr. Puryear, of the Nashville Tobacco Works, referred to by Mr. McReynolds yesterday.

Alleged Instances of Unfair Competition.

Now, let us consider the instances of unfair competition to which the Government points as an evidence of our actual intention to restrain trade.

One charge is that the American Snuff Company endeavored to crush the Byfield Snuff Company, which was engaged in manufacturing a brand of Wintergreen snuff in the New England district, by introducing a brand called Checkerberry in competition with Red Top of the Byfield Company. The owner of the Byfield Company was Mr. Pearson, but Mr. Pearson did not come forward as a witness to make any complaint. Instead he sent his salesman, Mr. Choate, who complained that Checkerberry had been sold at less than cost for the purpose of driving out Red Top. It appeared, however, that during the very period when the Checkerberry snuff was competing in this district with the Red Top the business of the Byfield Snuff Company nearly doubled.

In 1903, when the competition commenced, the Byfield Company sold 110,000 pounds; in 1904, 125,000 pounds; in 1905, 130,000 pounds; in 1906, 140,000 pounds; and in 1907, 152,000 pounds. The Byfield Snuff Company started in the year 1804. Up to the year 1900 it had accumulated a business of 60,000 pounds a year. After four years of competition with the American Snuff Company its business had grown to 152,000 pounds, and not a pound, according to Mr. Choate, did it sell below cost (Vol. IV, pp. 313, 317-20, 511-2). Certainly there is nothing in this transaction to justify the charge that any injury was done to the Byfield Company by the introduction of Checkerberry. In fact it illustrates one of the peculiarities of the tobacco trade, that all brands grow by competition.

The next complaint was made by Mr. Stone, a salesman for R. P. Richardson & Company, and related to a time when he was in the employ of the

American Tobacco Company. He testified that in 1904, in the State of Mississippi, he sold for the American Tobacco Company a cigar called Lisco, together with Bull Durham tobacco, and with each pound of Bull Durham the Company gave away free another pound. The inference is that this was intended to crush Old North State tobacco, a brand selling in Mississippi and belonging to Mr. Stone's present employer, the R. P. Richardson, Jr., Company, Incorporated. He did not testify that any injury had been done to the Old North State. As a matter of fact, he evidently misunderstood the whole transaction, for it appeared from the testimony of Mr. Hill, of the American Tobacco Company, who was called to explain it, that the matter had nothing to do with the tobacco business at all, but that the Bull Durham was given to facilitate the sale of a brand of cigars known as the Lisco cigars, and that the expense involved in this Bull Durham gratis was charged, not to the Bull Durham brand, but to the Lisco cigar.

In this connection it is to be noted that while Stone was put forward by Richardson, the principal himself did not come to the witness stand. In the year 1903, the American Tobacco Company bought a majority of the stock of R. P. Richardson & Company, and before the present suit was begun the minority holders of the stock brought suit to set aside the contract under which the American Tobacco Company acquired the stock. The Richardson Company was made a defendant in the present suit and, as the minority stockholders are in control of its affairs, they were given an opportunity to exploit, for the benefit of the Government, all the charges it desired to make against the American Tobacco Company. The answer of the Richardson Company, which contains many charges against the American Tobacco Company, appears in the Record. Of course, its answer is not proof.

It is not even verified, and no testimony was brought to support any of its accusations, except the trivial evidence of Mr. Stone.

In this connection I desire to call your Honors' attention to the brief which you have before you, filed by the Richardson Company. I make very severe criticism of that brief for the reason that the brief is based upon facts contained in an unverified answer, and which were not supported or attempted to be supported upon the trial of this case by any witness.

Now, another charge is that the American Tobacco Company, for the purpose of freezing out and coercing into a willingness to sell, other manufacturers of scrap tobacco, early in 1906, advanced the price of the raw material and at the same time reduced the price of the manufactured scrap goods, so that no scrap manufacturer could exist. The manufacture of scrap tobacco is a comparatively new business. The product is made from cigar clippings, and also from leaf not suitable for the manufacture of cigars. The American Tobacco Company had not engaged in this line of business until they bought, in 1899, the business of Luhrman & Wellman, in Cincinnati. Their ownership of that business being known, a combination was made against them by the labor unions and independents in the City of Cincinnati, and great difficulty was experienced in selling their goods. In order to meet this situation a new company was organized and its ownership kept secret. The price for cigar clippings was advanced, but only because it was necessary for the business. All this is explained by Mr. Duke, who, complaining that the American Tobacco Company was not getting its fair share of the scrap business, was met with the statement that sufficient clippings could not be procured. He advised the managers of the business to increase the price until they could get enough.

The Government says that the victim of this movement was Mr. Friedlander, who at that time was one of the leading independent scrap manufacturers, and it put him on the stand. He testified that he was not at all surprised at an advance in the clippings, because of the difficulty in securing them; that although he did not expect they would go higher than seventeen or eighteen cents, as a matter of fact they had advanced to twenty-two cents a pound. But during all this entire period of competition, during the scrap war, his business increased until he was making over $60,000 a year. And this had nothing to do with his selling out (Vol. IV, pp. 79-80).

Mr. Bloch, the leading manufacturer of scrap tobacco, always independent of the American Tobacco Company and in direct competition with it, testified that he started in the scrap business in 1889, and that his business had grown both in volume and in profits since that time, and that during the years of this scrap war his business had constantly increased. Although the Government insists that this scrap war was an instance of unfair competition on the part of the American Tobacco Company, the notable fact is that no witness was called to complain about it. None of the manufacturers who, it is said, were coerced, made any complaint. In fact, no one of them was called, save Mr. Friedlander, who testified that he had done a profitable business throughout.

Mr. Puryear, of the Nashville Tobacco Works, enjoys the unique distinction of being the only manufacturer who was called by the Government to support the charge of coercion to sell on account of the competitive methods of the American Tobacco Company.

The Nashville Tobacco Works in the year 1904 had a brand known as Old Statesman, which was selling in the Southern States. The business was

owned by Mr. Puryear and two others. Mr. Puryear testified that he was in part induced to make the sale of his business to the American Tobacco Company in 1906 because his firm was losing business on the brand of Old Statesman to a similar brand called Bull's Head, marketed in his section by the American Tobacco Company. He also testified that he believed Bull's Head was being marketed at 16 cents a pound, that he got his information from grocers' salesmen, and that that price, in his judgment, was less than the tobacco could be made and sold for.

In further support of its charge, the Government quotes a letter written to Nall & Williams, another corporation in which the American Tobacco Company had an interest, advising Nall & Williams to get out a brand in competition with one of the brands of the Nashville Tobacco Works. This letter was written by Mr. Dula, the Vice-President of the American Tobacco Company. But no such brand was put upon the market, and Mr. Puryear, when called to the witness-stand, made no complaint whatever of the competition of Nall & Williams, although he testified for the Government, after the counsel for the Government had in his possession the Nall & Williams' letter. He confined his complaint entirely to the competition of the brand of the American Tobacco Company called Bull's Head. As a matter of fact, Bull's Head was not sold at 16 cents a pound, but, after taking into account all trade discounts and rebates, it netted to the manufacturer thirty cents a pound (Vol. IV, pp. 570-1). Mr. Moore, of Nashville, who was a part owner with Mr. Puryear in the Nashville Tobacco Works and its President, did not corroborate Mr. Puryear, but testified that whatever damage had been done to the business of the Nashville Tobacco Works was due, not to Bull's Head, but to bad management (Vol. IV, pp. 186-7).

Other evidence showed that a nephew of Mr. Puryear's had gotten out a brand called Country Lad, in competition with his uncle's brand, and advertised it as being the same as Old Statesman. It also appeared that Mr. Strater, another independent manufacturer, was making a similar brand in the same market. Both of these were sold at the same price as Bull's Head.

Reference was made by the Assistant Attorney-General in the course of his argument yesterday to a letter written by Mr. Hill, the Vice-President of the American Tobacco Company, on July 11, 1903, to Stewart, at Rochester, N. Y., in reference to the shipment of Sovereign little cigars and cigarettes, and it was cited as an instance of spying on competitors. This letter was in the possession of the Government when it called as a witness Mr. George P. Butler, of the Butler-Butler, Incorporated, a corporation which manufactured these Sovereign cigars and cigarettes. Mr. Butler made no complaint of spying on the part of the American Tobacco Company, or other unfair conduct on its part, although he had been for many years a competitor; and he made no reference to the Sovereign cigars or cigarettes at all.

While Mr. Butler was on the stand he was asked this question (I am reading from the Record, Vol. III, pp. 576-7):

> "Q. In the tobacco business does there exist at present, or has there existed, from your recent experience with Butler-Butler and your previous experiences, a situation which would prevent an independent manufacturer of tobacco who knew how to make good goods, knew how to pack them so as to hit the public taste and fancy, with sufficient working capital, is there such a condition that such a manufacturer cannot exist and prosper in the tobacco business?
>
> "A. I should say that there was not any such condition but what a man with proper

talent, working capital and the luck of attractively package his goods would succeed.

"Q. Do you say that after your experience with Butler-Butler, Inc.?

"A. Yes.

"Q. Were you in any way connected with or informed as to the affairs of the Universal Tobacco Co.?

"A. Well, I knew a great deal of them.

"Q. They didn't succeed in business, did they?

"A. No, sir.

"Q. Was that because of the machinations and competition of the American Tobacco Co.?

"A. No, sir."

Secretly Controlled Companies.

A great deal is said by the Government about secretly controlled companies. One would suppose from these observations that these secretly controlled companies had something to do with the growth or development of the American Tobacco Company, or at least had substantially increased its trade. These companies had their greatest vogue in 1903 and 1904. There were none of them in 1907. There was no remarkable increase in the business of the American Tobacco Company in 1903 and 1904, and there was no diminution in 1907. Not only that, but there is not one scrap of evidence in this case that any damage was ever done to a competitor by a secretly controlled company.

I suppose that when a person buys stock in a company, there is no reason in law or in morals which requires him to make it public. But, as we proceed we will see that the American Tobacco Company had good and justifiable reasons for keeping their interest or ownership secret in certain cases.

There is spread through this record some correspondence between the officers of the American

Tobacco Company and some of these secretly controlled companies, and correspondence relating to other matters. As this correspondence seems to be the chief reliance of the Government in this case, and as it finds in it some intention on the part of the American Tobacco Company to restrain or monopolize trade, it is important to consider it. The Government in this case required the defendants to exhibit all of the correspondence conducted by the officers of the company in its several departments from the date of its organization down to the time of the bringing of the suit. There is no suggestion that any correspondence was withheld or destroyed. In this way the Government came into possession of at least 25,000 letters, written in the daily course of business either by the officers of the American Tobacco Company or addressed to them by others. Out of these 25,000 letters the Government has put in evidence in this case only 216 letters or parts of letters. Out of these 216 letters or parts of letters it has put in the brief thirty-seven letters or parts of letters. It is a reasonable inference that the remaining 24,784 letters which were examined by the Government contained nothing which would serve its purposes. So that our offending, if any, disclosed by the letters, is inconsequential.

The question naturally arises, why was the ownership in these companies kept secret for a time? Was it for the reasons assigned by the Government, to coerce and crush competitors? If so, what evidence is there that any competitor was so coerced? The only one who makes any claim of coercion is Mr. Puryear, of the Nashville Tobacco Works, and he makes no reference whatever to the operations of a secretly controlled company.

As a matter of fact, the reason for maintaining secrecy was entirely different. It was a matter not of aggression, but of self-defense. The independent

manufacturers, during this period of secret ownership, were endeavoring to extend their trade by creating prejudice against the American Tobacco Company on the ground that it was a trust, and they found it profitable to advertise their goods as anti-trust goods. At the same time they undertook to utilize to their advantage the differences of opiniou between the labor unions and the American Tobacco Company with respect to the open shop. That difference was this: The American Tobacco Company has never objected to any person because he was a union man, and it has never prevented any of its employes from joining the union; but at the same time it has been unwilling that the labor organizations should unionize its shops, fix the rate of wages and the hours of labor, and other matters of that sort.

Meeting on the common ground of opposition to the American Tobacco Company, although for different reasons, some of the independent manufacturers and the labor unions entered into a combination or conspiracy to boycott the goods of the American Tobacco Company, and by this illegal means to prevent the sale of its products. It was a very powerful and effective combination; especially in the sections where the labor unions were strong. In the case of Friedlander, of Cincinnati, it was powerful enough to destroy seventy-five per cent. of his business over night (Vol. IV, pp. 84-6). The combination was at its best during the years 1903 and 1904. On one occasion during that period the Globe Tobacco Company of Detroit, a party to the conspiracy, issued this circular:

> "Organized Labor, Greeting: Beware of trusts. Why Patronize the Tobacco Trust? Eternal vigilance is the price of liberty" (Vol. II, p. 697).

Mr. Wetmore, of St. Louis, from whom we bought the Liggett & Meyers Company, and who afterwards

organized the Wetmore Company, made a speech which was printed on a card and which enjoyed a very great circulation in his section of the country, expressing the following sentiment:

> "The people are not going to stand idly by, to see their rights, privileges and living swept away. Chew Wetmore's best, union-made" (Vol. II, p. 698).

In Cincinnati, where the American Tobacco Company had an interest in a certain scrap business which had been kept secret for a time, as soon as the real ownership was discovered circulars were provided by the independents and distributed by the labor unions with the words on them: "Death to the users," and marked with skull and crossbones. The whole City of Cincinnati was flooded with these circulars. That was the occasion when, as I say, Mr. Friedlander's business was destroyed over night (Vol. IV, pp. 84-6).

During all this period the American Tobacco Company was not so much interested in keeping this secret as the minority stockholders in the companies in which they had acquired an interest. A typical instance is Mr. Pinkerton, of the Pinkerton Tobacco Company. An examination of his testimony reveals the reasons which induced him to persuade the American Tobacco Company to maintain secrecy. When it bought one of these concerns, it was a very natural thing for the men who were left in charge and who knew their own environments to say, "Well, we think your interest had better not be known on account of the prejudice which exists in this community against trust-made goods or on account of the hostility of the labor organizations."

I am not here to make any apologies for these secretly controlled companies. I contend that the maintenance of secrecy was justifiable under the circumstances and that it was made necessary on

account of the illegal and tyrannical acts of the combination betweeu the independent manufacturers and the labor unions—a combination strong, powerful and unscrupulous, as well as illegal under the Danbury Hat case.

In this counection I will make reply to an instance referred to by the Assistant Attorney-General of a secretly controlled company. The Assistant Attorney-General says that we organized in New Orleans the Craft Tobacco Company and kept our relation to it secret in order to compete with the People's Tobacco Company. It is true that the People's Tobacco Company had started in competition with us, and had gotten up boycotts against our goods among the labor unions, and had successfully excluded us from a great part of the trade. We could not get it otherwise, so we cooperated with Mr. Craft in the organization of this Craft Company. What was the result? Before this suit was brought the People's Tobacco Company absolutely crushed the Craft Company. The American Tobacco Company disposed of its entire interest; and pending this suit the rout of the Craft Tobacco Company was completed, and it went out of business (Vol. II, pp. 646-8).

Generally speaking, these are the evidences of the actual intent to restrain trade with which we are charged by the Government—the volume of our output, our purchases of other plants, covenants with respect to vendors, suppression of competition in purchasing leaf, and the methods of competition which I have just been discussing. Out of all these the Government spells a purpose or intention to restrain trade. But if these fail to establish its contention—if, as a matter of fact, the history of the birth and growth of the American Tobacco Company, which I have just been discussing does not disclose the actual intention to restrain trade, then the contention is that, nevertheless, the neces-

sary effect or result of its existence and the appropriation of so large an amount of the tobacco business is, in itself, a restraint of trade because of the suppression of competition incidental to its development.

To this we reply, upon the authority of many cases, never overruled by this Court, that if the chief result of a combination formed to engage in or conduct interstate trade is to foster the trade and to increase the business of those who make and operate it, it does not fall under the ban of this law even if its necessary effect is to incidentally and indirectly restrain competition. The act does not condemn all restraints of trade, but only those which are brought about by contracts, combinations or conspiracies which directly and immediately affect interstate commerce. Such restraints as are incidental or collateral were never intended.

How, then, has the freedom of trading been restrained by the operations of the American Tobacco Company? Certainly not by any diminution in the volume of trade, for all the evidence shows that that has been immensely increased; not by raising the prices of the manufactured products, or by diminishing the price of the raw material, for the price of the first has not increased, nor the latter diminished. All the evidence in the case points the other way. Not by agreements with competitors not to compete, or by agreements to act in concert with respect to prices; not by agreements to limit production or to divide territory; not by contracts for exclusive handling, for the one instance of that was induced by the jobbers themselves and was abandoned many years before this suit was brought. If the covenants taken from vendors required them to refrain from trade for a limited period of time, such covenants cannot be deemed restraints, because they were really a part of the good will of the business which was sold. If competition has been terminated

it was only by lawful consolidation or by the purchase of competitors for the legitimate purpose of business expansion. The methods of competition practiced by the defendants, as we shall see, have not driven out or deterred others from entering the tobacco trade. What burdens, then, have been put upon the free flow of commerce? How has it been restrained?

Monopolizing.

The Government, however, charges that we have monopolized or have attempted to monopolize part of the trade and commerce of the United States. This contention was not considered by the Court below, which based its decision upon the first section of the Act, and made no decision under the second section.

In discussing the meaning of the second section, the views of the Government and our own are far apart. Although the word "monopoly" is not used in the second section, the Government injects the word and claims that it was directed against monopoly as a status. It defines monopoly as any such dominant control over a branch of industry by unification of management as will enable the owner to control prices and output, or which tends to enable him so to do.

Of course this definition makes no distinction between an individual and a corporation; for it is evident that an individual by an acquisition of property might reach the degree of control which the Government describes as a monopoly. This construction of the Government is entirely at variance with the views recently expressed by the present Chief Executive of the United States, who is not only a great lawyer, but a great judge, and whose judgment in the Addystone Pipe & Foundry case was one of the most important contributions to the interpretation of the Sherman law,

adorned as it is with sound reasoning and great force and elegance of expression. It is as follows:

> "I conceive that it ('monopoly' under the Sherman Law) is not sufficiently defined by saying that it is the combination of a large part of the plants in the country engaged in the manufacture of a particular product in one corporation. There must be something more than the mere union of capital and plants before the law is violated. There must be some use by the company of the comparatively great size of its capital and plant and extent of its output, either to coerce persons to buy of it, rather than of a competitor, or to coerce those who would compete with it to give up their business. There must, in other words, be an element of duress in the conduct of its business towards the customers in the trade and its competitors before a mere aggregation of plants becomes an unlawful monopoly."

The second section, in our view, refers not to a status at all, but to activities. As I have said, the noun "monopoly" is not used at all. The section uses the verb "monopolize." Our contention is that concentration of capital is not monopolizing; business on a large scale is not monopolizing; an aggregation of plants is not monopolizing; unification of management and control do not constitute monopolizing. In enacting this law, Congress must be presumed to have had the common law in mind, and we may well turn to the common law definition to see whether or not that does not throw some light upon the meaning of the word as used by Congress. Monopoly at common law was "a license or privilege allowed by the King for the sole buying and selling, making, working, or using of anything whatsoever whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before." The word "monopolize" carries with it, therefore, the idea

of some activity resulting in exclusion or restraint. Our contention is that whatever the magnitude of the concern may be, however great the volume of business that may be in its hands, it is not guilty of the crime of monopolizing or attempting to monopolize unless it has done or is doing something by which there is either accomplished or attempted this result, namely, that the subjects in general—persons not connected with the concern—are restrained from that liberty of trading which they had before.

This interpretation of the Act makes the second section understandable and supplements the first section. The second section condemns as criminal not only every person who monopolizes trade or commerce, but also any part of such trade or commerce. If by monopolizing is meant a mere unification of ownership, to what extent must that proceed before the offending party shall have monopolized any part of trade or commerce? Is it ten per cent., twenty-five per cent., fifty per cent., or what? If the tendency towards monopoly is the criterion, to what extent must the tendency proceed before the line is crossed and criminality begins? Is it twenty-five, or fifty, or fifty-five or sixty per cent.? And does the rule fluctuate with different industries? Is not a tendency of forty per cent. in a branch of trade where the supply of raw material is limited more injurious than a tendency of eighty per cent. in a branch where there is no limit to the supply of the raw material? The second section of the Act is not directed against those who are conducting business on a large scale. It applies as well to either an individual or a combination, or aggregations of individuals, who have acquired only a part of the trade in some locality. It is directed against the individual or combination of individuals, wherever they are, whose course of conduct or whose unfair practices in any part of

trade prevents others from enjoying that liberty of trading which they had before. It condemns, in a word, those activities which exclude, or attempt to exclude, others from their constitutional right to engage in any branch of industry which they may see fit to select. And the course of conduct which is condemned is the course of conduct not allowable in competition at common law, and which is punishable either by indictment or suit for damages.

The great purpose of the Act was to protect the freedom of trading, and not to bring on an economic revolution. The first section is what we may call the contract section, because, after all, a combination or conspiracy is founded upon a contract. The first section of the Act declares, therefore, that the freedom of trading shall not be restrained by contract. And lest there should be some other way of preventing freedom of trading, the second section declares that the freedom of trading shall not be restrained by conduct—that is, by such conduct as will prevent the subject at large from enjoying that liberty of trading which he had before.

If this is the correct interpretation of the statute, let us examine the conduct of the defendants to see whether or not they are guilty of monopolizing or attempting to monopolize. Our view is that no combination or individual can be charged with monopolizing under this Act unless he excludes others or attempts to exclude others in certain ways, because only these ways are adequate to produce such a result:

The first is by preventing others from getting their fair requirements of the raw material.

Secondly, by preventing them from getting their fair requirements of machinery or other facilities necessary to produce a given commodity.

Third, by preventing them from the equal use of transportation facilities for the purpose of bringing raw material to the factory, or the manufactured product to the market.

And fourth, by preventing others from enjoying the free use of the machinery of distribution—in the tobacco trade, jobbers and retailers.

Let us test the conduct of these defendants with respect to these things. Certainly there is nothing in this evidence to show that these defendants have ever attempted to prevent any of their competitors from obtaining any of the raw material. They own no tobacco lands in the United States, and, as I have said, they purchase less than half the crop. There are thousands and thousands of acres of land in the United States which are available for tobacco. Every pound they purchased, they purchased in competition with others, and they purchased it only for their own needs. There is no instance to be found where any purchase of raw material was made for the purpose of depriving a competitor of his share of the raw material.

The next is: By preventing others from obtaining their fair requirements of machinery or other facilities.

There is no such contention as that in this case. It appears that before the American Tobacco Company was formed cigarettes were made by machinery. There is nothing to show that anybody who desired to manufacture cigarettes might not have obtained a license. Certainly the patents on cigarette machinery have expired long ago. The American Cigar Company owns a machine for the manufacture of cigars, but it has never been successful. Companies controlled by the defendants furnish their competitors with other materials necessary for manufacture, such as foil, bags, boxes and licorice, *et cetera,* at the same price as to them, and all of these materials can be procured from others.

As I have said several times in the course of my argument, the defendants have never prevented others from the equal use of transportation facilities. They have never enjoyed an advantage of this sort over their competitors.

This brings me to the last proposition: The defendants have never prevented others from enjoying the free use of the machinery of distribution in the tobacco business—jobbers and retailers.

I suppose that if your Honors, in looking through this Record, could see that these defendants have practically made it impossible for anybody to go into the tobacco business in the United States by reason of their conduct in obstructing the avenues of distribution, you would find some way to condemn us under the second section, because of our monopolizing conduct, by enjoining the continuance of such operations; but what I say is that it is proved in this Record, not only beyond a reasonable doubt, but to a demonstration, that the avenues of distribution for tobacco products have always been free and open, and are so to-day. So that any man with the smallest capital can go into the tobacco business in the United States.

I go much further than admitting that there is any balance of evidence on this branch of the case. I am satisfied that when I am through with my statement, one thing that every member of the Court will be satisfied with—whatever the Court may think about anything else—is that the avenues of distribution have never been obstructed by these defendants, but have always been open and free, and that any man can go into the tobacco trade tomorrow, and if he has the luck or skill to make a brand which will attract consumers, and he manages his business economically and skillfully, he can achieve success.

The Government, however, takes issue with us

on this contention, and insists that the avenues of distribution have not been free and open, by reason of our conduct, and they give three reasons. The first is that we own a few retail stores and one jobber. The second is because in 1904 we made a temporary arrangement for exclusive handling with some jobbers in New England and Philadelphia. The third is because we have paid commissions to a small number of jobbers.

Let us take these claims up in order. The first is that we own some retail stores and one jobber. There are in the United States 600,000 retailers of tobacco. We have an interest in 409. There are 599,591 stores in which we have no interest at all. There are over 5,000 jobbers of tobacco. The American Tobacco Company controls one and the American Cigar Company controls six.

Now, let us consider the New England and Philadelphia deal of 1904. The charge is made that by making an agreement for exclusive handling with jobbers in New England and Philadelphia all the goods of independent manufacturers were thrown out summarily, and that their business was interfered with. To begin with, this transaction for exclusive handling was not proposed by the American Tobacco Company, but by certain jobbers for their own benefit. As a result of that proposal the American Tobacco Company agreed with certain jobbers of New England and Philadelphia that if they would confine their sales to the products of the American Tobacco Company they would receive a special commission of six per cent. on their sales. This, however, was only a part of a general proposition made to those jobbers, the whole being that they should buy goods at a list price with two per cent. commission if they maintained the list, and then six per cent. additional for such ex-

clusive handling, giving to those who accepted the proposition eight per cent. The jobber who did not desire to handle their goods exclusively could still make a two per cent. profit, because his more favored competitor who received six per cent. was prevented from cutting the price. Now, in the first place, this method was definitely and finally abandoned in November, 1904, nearly three years before the institution of this litigation. It lasted only a few months. The American Tobacco Company tried the plan at the request of the jobber, not expecting to monopolize the trade, but expecting that a proportion of the jobbers would accept the proposition and make a profit on their goods, and refrain from handling the goods of competitors; whereas another proportion of the jobbers would not accept the proposition, but would devote their energies to selling the goods of competitors. No such plan as this could give any monopoly, because tobacco jobbers are not a privileged class created by patent. The jobber handling tobacco to-day may refrain from handling it to-morrow. The retailer of to-day is the jobber of to-morrow. As a matter of fact, the independents made such distribution during all this time as they desired through other jobbers and retailers.

Again, it is said that the avenues of distribution are obstructed because certain jobbers received a special commission from some of the defendants. It appears that the smoking department of the American Tobacco Company sells to 5,000 jobbers, and of these 5,000 jobbers it pays a special commission to 253. The purpose of this payment is to stimulate the efforts of the jobbers in the distribution of the products of the American Tobacco Company. But it is shown that the payment of such commissions is a customary thing in the tobacco trade and in other trades, and that independent competing manufacturers also pay com-

missions, and indeed, pay commissions for the same purpose to the same jobbers. The receipt of such a commission from one manufacturer entails no duty upon the jobber not to receive the same sort of special commission for the same sort of special service from any other manufacturer.

Now, all of the officers of the American Tobacco Company called by the Government upon their cross-examination clearly established that the avenues for the distribution of tobacco products had always been and are now open. But their testimony constitutes only a small part of the evidence upon this branch of the case. Other witnesses called by the Government and wholly independent of, or even hostile to the American Tobacco Company, testified to the same effect.

Testimony of Competitors and Jobbers.

Mr. Beudheim, President of the Metropolitan Tobacco Company, declares that his company was the sole customer of the American Tobacco Company in New York and received a five per cent. commission from it, but handled the tobacco and cigarettes of a large number of independent concerns, makes no report to the American Tobacco Company, and receives commissions from such independents.

Mr. Henry M. Stone, to whom I have referred before, a witness for the Government, salesman for Mr. Richardson, testified that in the Southwest, where he sells the tobacco of his present employer, he had no difficulty in making free distribution of his products.

Mr. Addison Fowler, a salesman for the United States Tobacco Company, called as a witness for the Government, said that since the fall of 1904 (that is, the occasion of the New England and Philadelphia deal) there had been no difficulty in securing the distribution of the products of his

company through all the jobbers through whom they desired to distribute them from the Atlantic to the Pacific coast.

Now, the defendants called in this case eleven of the great tobacco jobbers, doing business in all sections of the United States, with annual sales of $50,000,000. All of them testified in corroboration of the Government witnesses whom we have mentioned, that there was no restraint upon the distribution of tobacco by the American Tobacco Company or by companies in which it was interested, and that the avenues of distribution were free and open. They came from all parts of the United States.

There was Mr. Letts, from the North and Middle West, doing an annual business of $16,000,000.

There was Mr. McCord, from the Middle Southwest, doing a business of $12,000,000.

There was Nathan Eckstein, from the Pacific Coast; Mr. Brewster, the owner of a large house in Rochester; Mr. Wilson, one of the large New England jobbers at Hartford; Mr. Savage, of Bangor, Maine; Mr. Furst, of Charleston, S. C.; Mr. Jenkins, of Pittsburg; Mr. Deiches, of Baltimore; Mr. Johnson, of Utica; Mr. Sheppey, of Toledo, and Mr. Lee, of Detroit.

They all testified that the jobber could be of aid to the manufacturer in furthering the distribution of his goods; that that aid consisted in calling especially to the attention of the retailer, through drummers, particular brands, but that, after all, the success of particular brands could only be achieved by the manufacturer by the creation of a consumer's demand; that the giving of special commissions by manufacturers to distributers to stimulate their efforts had always been done by tobacco manufacturers other than the American Tobacco Company, and by manufacturers of other products than tobacco; that none of the defend-

ants had directly or indirectly required or asked them not to handle competing goods; and that all of them did handle competing goods to the extent desired by their customers. All of them, with two exceptions, however, testified that they did not, and did not want to handle the cigars made by the American Tobacco Company, preferring to handle the other independent brands of cigars. And that is a very significant circumstance when we come to consider the question of power.

In addition to all this proof, three of the great independent manufacturers of the United States—Mr. Bloch, the leading scrap manufacturer; Mr. Peper, the leading plug manufacturer, and Schinasi Brothers, the leading independent cigarette manufacturers—all testified that in marketing their products they have never found the channels of trade obstructed and have never had any difficulty in securing jobbers or retailers to handle their goods.

Now, for further proof that the defendants have not attempted to monopolize this trade, I say: First.—They have not sought to prevent their competitors from securing leaf tobacco. There is not a line of testimony in the record showing the purchase of a pound for any other purpose than to supply the requirements of the defendants.

Second.—The supply companies owned by the defendants, producing licorice paste, boxes, foil and bags, sell to competing manufacturers on substantially the same basis as to the defendants themselves.

Third.—The stores owned by the defendant tobacco manufacturers sell products of the competing tobacco manufacturers.

Fourth.—The jobbers who receive special allow-

ances from defendant manufacturers handle the goods of competing manufacturers.

Fifth.—The only two occasions when the Company adopted trade plans by which its customers were not at liberty to buy competing goods were occasions when such plans were suggested by the customers themselves, and were abandoned as poor business policy long before this suit was brought.

Sixth.—The American Tobacco Company, or its predecessor, the Continental Tobacco Company, sold a tobacco manufacturing plant to Scotten-Dillon Company with the knowledge that it was to be used as a competing factory.

Seventh.—No effort has been made to buy the large manufacturing establishments of Bloch Brothers, Peper, the Globe Tobacco Company, and Schinasi, all great, successful and aggressive competitors of the defendants.

Eighth.—A large part of the customers of the defendant, the American Tobacco Company, do not deal in the cigars of the American Cigar Company, although they know of the interest of the American Tobacco Company in the Cigar Company. This applies to those who receive special commissions.

Ninth.—The defendants have not taken from their employees, who are in possession of the secrets of manufacture, covenants not to engage in the tobacco business.

Tenth.—The defendants have never sought advantage over their competitors in transportation.

If this great array of facts and circumstances is not enough to prove that there has been no monopolizing or attempts to monopolize on the part of the defendants, we have two other great and overshadowing facts which I have reserved to the last, to show that the operations of these defendants have in no way interfered with the prosperity of their competitors in the tobacco trade. And, what is more important, that during the period of their prosper-

ity, and in strict competition with them, other great tobacco businesses have been built up.

The Success of Our Competitors.

The Record here shows beyond a doubt that all businesses—such as Bloch in the scrap business and Peper in the plug business, and many others—have continued to flourish duriug the entire growth of these defendants. But it shows, however, something even more important than that; and that is, that some of the most remarkable successes in the tobacco trade have occurred during this very period. I will mention three of them. The first is the case of the Scotten-Dillon Company, of Detroit.

I have already mentioned Mr. Scotten in discussing covenants. He had sold his business, the Daniel Scotten Company, of Detroit, to the Continental Tobacco Company, in 1899, giving a covenant not to re-engage in business for a short time. When his contract expired he bought from the Continental Tobacco Company the Detroit factory and organized the Scotten-Dillon Tobacco Company, with the very funds which its promoters had received three years before from the sale of its former business to the Continental Tobacco Company. He went into competition and has been in competition with the American Tobacco Company for the last ten or twelve years; and during that period he has built up a business in smoking and plug tobacco of from ten to twelve million pounds a year. His stock is worth two and a half times its par value, and it declares large and regular dividends.

Another case is that of the United States Tobacco Company, a concern which started in 1899 with the funds which its promoters had secured upon the sale of a former business to the Continental Tobacco Company. The evidence in this case is that the business of the United States Tobacco Company

has grown from year to year, and extends all over the United States, from ocean to ocean.

But the most remarkable of all is the case of Schinasi Brothers. They have been in the United States less than fifteen years; neither of them can quite speak the English language; they went into the cigarette business in the City of New York in competition with the American Tobacco Company, manufacturing certaiu brands of cigarettes out of blends of grades of Turkish tobacco. They are today the largest independent cigarette manufacturers in the United States. The United Cigar Stores Company handles almost as many of their cigarettes as of the American Tobacco Company. They are in the enjoyment from their business of a great income.

Now, this evidence is so overwhelming that it seems absolutely to dispose of the Government's contention that the defendants have monopolized or have attempted to monopolize the tobacco trade or any part of it.

Power or Tendency.

Confronted with these facts, the Government changes its position and argues that the Act is violated because the defendants have such a dominant position in the trade that they tend to a monopoly, or that they have the power to monopolize even if they have not exercised it.

In the Government's brief it is argued (I quote the words) at page 99:

> "Trade and commerce in any commodity are monopolized whenever, as the result of concentration of competing businesses—not occurring as an incident to the orderly growth and development of one of them—one or a few corporations (or persons) acting in concert practically acquire power to control prices and smother competition."

According to this view, a concentration of competing businesses, possessing power to control prices and smother competition, becomes a monopoly only when it does not occur as an incident of orderly growth and development. If its growth and development have been orderly it does not violate the Act, although its power over prices and competition may be the same. Yet how can the manner of its growth make any difference, if this is the correct test? The power would be the same in either case. A concentration of competing businesses brought about by disorderly or illegal means would have only the same power—no less and no more—than its virtuous counterpart whose growth had been orderly and legal throughout. How, then, can power over prices or competition be said to be the test?

The Act itself says nothing about tendency or power. These are not the things which are condemned by this criminal statute, which renders its violators liable to fine and imprisonment. Can men be convicted because they have acquired a large business which, on account of its size, tends to give them, for the time being, a greater control than others less fortunate? Shall men suffer because they have a power which they have never exercised? Are we to leave it to a jury to say, under this Act, when such a concern tends in the wrong direction? Such a construction of the statute would lead to intolerable oppression and injustice, and turn the administration of criminal law into a farce. A criminal statute ought at least to plainly point out the things which are forbidden.

But, as a matter of fact, the Record in this case shows that the defendants have no such power as is assigned to them by the Government, and that the only power which they possess is the power which large wealth, united with experience, gives to any great concern. The defendants certainly

have no power over the raw material. On the contrary, they are in the power of the producers of tobacco, who may grow it or not, as they please, and can only be tempted to produce a quantity sufficient for the defendants' needs by an attractive price. The farmer who produces tobacco is under no obligation to grow that crop. How can he be said to be in the power of the defendants? On the other hand, the defendants must have tobacco or their manufactories must close. As between the grower and the manufacturer of tobacco, who, then, has the ultimate power?

Certainly the defendants have no power over the facilities of transporting either the raw material or the raw product. They possess no exclusive processes of manufacture, except such as they may have invented or discovered for themselves, and they have no power over the avenues of distribution. With 5,000 jobbers and 600,000 retailers in the United States; with every retailer willing to become a jobber if the opportunity offers; with nothing to prevent any man, even with small capital, from becoming either a retailer or a jobber—how can it be said that the defendants have any power over the avenues of distribution? The only power they have over prices is in common with all other traders, to fix the prices of their own manufactured goods. They have no power to fix the prices of the raw material. Owing to another peculiarity of the tobacco business, even the prices of the manufactured goods cannot be easily changed without great risk. This is so serious that although the price of the raw material has steadily advanced from year to year, there has been no corresponding increase in the price of the manufactured product to the consumer. It must be remembered also that the American Tobacco Company has always had, and now has, actual competitors in every branch of the trade, and that it is always

confronted with a potential competition consisting of an almost unlimited amount of unemployed capital which is ready for investment in any field where prices are advanced to a point where they are abnormal or oppressive.

There are certain things in the Record which illustrate this want of power on the part of the defendants, and curiously enough one of them is this very New England and Philadelphia deal upon which so much stress has been laid by the Government.

Early in 1904, as we have seen, the defendants put on in New England and Philadelphia a plan for selling goods under which the jobber was guaranteed in his profit, and was to receive a better profit in consideration of confining his business to the goods of the defendants.

Recess.

Mr. Nicoll: If your Honors please: Before recess I was proceeding to call the Court's attention to some things in the record which seemed to me to indicate a lack of the power which is ascribed to us by the Government. One of them was this very New England and Philadelphia deal upon which so much stress has been laid. Your Honors will remember that in 1904 the defendants put into operation in New England and Philadelphia a plan for selling goods under which the jobber was guaranteed in his profits. He was to receive a better profit in consideration of confining his business to the goods of the defendants.

It is said that the effectiveness of this plan illustrates the power of the defendants. But there were two or three jobbers left in Philadelphia to handle the so-called independent goods, and two or three jobbers gave sufficient distribution. The plan did not affect the retailers at all, and the retailers were able to get all the goods they wanted

from the two or three jobbers who did not accept the plan. These defendants have but one jobber in New York City, and he handles everybody's goods —the American Tobacco Company's goods and those of the independents alike.

Finally the plan was abandoned, only a few months after it was tried—not because of its illegality, but because it was a poor trade scheme, and resulted in their geting less of the business and their competitors more of the business in the localities in which it was tried than they have obtained under the conditions which now prevail.

There is still another thing in the record which shows a want of power on the part of the defendants to exclude others from the trade; and that is, the conduct of the wholesalers who received special commissions from the American Tobacco Company on smoking tobacco, but who handled only a few of the cigars made by the American Cigar Company, in which the American Tobacco Company has a large interest. Why did not the Tobacco Company use the power which it is alleged to possess from the payment of this inside commission to force upon these jobbers the cigars of the American Cigar Company? The answer is easy. There did not exist the power to force upon the trade the kind of cigars, or brand that the consumers did not want. The defendants would have been foolish to have attempted to use any power that they had over the jobbers in that direction. The jobbers would have resented and successfully resisted any such attempt to use such power.

The truth is that in the tobacco business only two have the ultimate power—the farmer who will not grow, and the consumer who will not buy. Like the farmer, the consumer is an autocrat. In every store, side by side with every brand manufactured by these defendants, there are brands of independent manufacturers. The consumer takes his choice. The brand that he desires will be fur-

nished him by the retailer, because of the risk of losing the customer's business. The brand that the retailer wants will be furnished by the jobber because of the risk of losing the retailer's trade.

So, after all, there exists no power on the part of these defendants to oppress the tobacco-consuming public. They may fix the prices, to be sure, but only of their own product. And, if the consumer feels that he is being imposed upon, that his attachment for a particular brand is being presumed upon, that its quality is going down or its price going up, he has the remedy in his own hands.

The only power that these defendants possess is the power that is inherent in wealth. Are they to be banished from trade on that account? This theory of the Government would exclude a moderately rich man from any participation in a trade the volume of which is small, and a very rich man from any trade at all.

Of course, these defendants could be of injury to competing manufacturers by committing the folly of spending their surplus in the purchase, at exorbitant prices, of all tobacco leaf. And in the same way they could injure the manufacturer of cotton by buying all the cotton. And in just the same way—if they are as wealthy as they are reputed to be—Mr. Rockefeller or Mr. Carnegie could do the same thing as regards the manufacture of either cotton or tobacco.

Are the rich, on account of this inherent power, to be forbidden to exist?—rich corporations to be dissolved? These defendants could possibly do a great injury to the business of Scotten-Dillon and other competing manufacturers, by making the same sort of goods and giving them away. But their power is sufficient to do even greater injury to the manufacturer of cotton goods, or woolen goods, or steel, by using their money in making and giving away these articles.

I say they could do a greater injury to the cot-

ton or woolen or steel business than to the tobacco business; because, if there is one thing that is shown in this record, it is that the tobacco business is not created by the simple expenditure of money, and cannot be destroyed by the simple expenditure of money. A cut of one cent in the price of sugar might drive out small manufacturers, but a cut in the price of tobacco could have no such effect. Tobacco is a luxury, and men buy what they like, and they like what they are used to.

The manufacturer, for instance, who attempted to displace Bull Durham might spend millions of dollars, and find, after he had expended it, that Bull Durham was stronger than ever before. A man who smokes Bull Durham pays but five cents a package. It is exactly what he wants, he has been smoking it constantly, and he prefers to go right on getting the size package he is used to, of the identical goods he is used to, and paying the same price he is used to paying. So that the argument, unreasonable as it is, that these defendants ought to be condemned because of their wealth and the volume of their business, has less application to the tobacco business than to any other conceivable business.

There is still one thing shown by this Record which seems to me of extraordinary importance, and that is, that during the seventeen years which have elapsed since the organization of the American Tobacco Company, everyone connected with the tobacco business has prospered. The producers of tobacco have been getting more for their crops; every independent manufacturer has increased his business; new manufacturers have entered the field and made fortunes; jobbers and retailers have increased their sales; labor has been steadily employed at increased wages; and the consumers of tobacco now have a greater variety of better products at less prices. This extraordinary result, for extraordinary it is, has been brought about by the activi-

ties of the defendants. The enormous increase in the use and consumption of tobacco in the United States is due to them. Of course they have had the largest share of the return, because in certain lines theirs is the largest business; but all others have shared the general prosperity, each in his own proportion.

The Government makes much of the fact that profits have been made by the American Tobacco Company and dividends paid almost since its organization in 1889, the inference being that these were due to restraints put upon trade by occupying the market to the unlawful exclusion of others. No doubt the American Tobacco Company has been a successful concern; but is that any ground for condemning it? The question is not whether its profits have been large, but whether they have been obtained by improper or immoral advantages over their competitors. That large profits have been made is due to the unusual foresight, intelligence and activity of the defendants—the very qualities which the law approves. The field was open to all; but they were the first in this country to see the great possibilities of the brands which they acquired. Their success is the result of economical management, of business skill and the generous employment of methods calculated to create a constantly increasing demand among consumers for all kinds of tobacco products.

It appeared in the course of the statement of the learned Assistant Attorney-General that in 1905 or 1906 the total assets of the American Tobacco Company were $274,000,000. It also appears that on this capitalization the American Tobacco Company, during the year 1906, made, in addition to the amounts necessary to pay interest on the outstanding bonds, six per cent. upon the preferred stock and twenty-two and a half per cent. on the common

stock, the amount of $6,700,000, which was added to surplus. Adding the amount necessary to pay the interest on bonds and the dividends paid on the preferred and common stock, we find that there was a total earning by the American Tobacco Company during that year of $26,084,000 (some hundreds and some cents), or substantially less than ten per cent. on its assets.

The explanation of the fact of the large dividend paid on the common stock is that the business has been so conducted as to merit the confidence of the investing public, so that much the larger part of the investment is on a four or six per cent. basis. But without reference to that I think it may be safely assumed that profits of ten per cent. on the amount invested in an enterprise are only reasonable profits, whether the concern is large or small.

The history of the American Tobacco Company is the history of the expansion of trade—not of its restraint. The business structure which this Company has erected is a triumph of American intelligence and industry. It is the Government's largest taxpayer. The great patronage which its products have attests its popularity with the public. It has no enemies but competitors who would rise to fortune, or politicians who would rise to fame, upon its ruins. What more preposterous proposal was ever made to this Court than that it should lend its aid to destroy this great business, to raze to the ground this fabric of an American industry, to drive buyers from the markets until the tobacco rots upon the fields, to withdraw this pioneer of commerce from foreign marts, to injure producers, embarrass merchants, annoy consumers, and destroy the slowly-returning confidence of the financial and business world?

I cannot believe that any such proposal will find favor in this august tribunal, where common-sense prevails, where reason reigns, and where prejudice and passion play no part.

Oral Argument of John G. Johnson, Esq., January 10, 1911.

Mr. Johnson: May it please the Court:

It is hardly necessary to discuss the Wilson Act. That deals simply with importations and with combinations of importers. I refer to it only because of the very extraordinary new rule of interpretation which the learned Assistant Attorney-General invoked. He says: "I quote the Wilson Act, which comes years after the Sherman Act, because it has broader words of prohibition in it; and therefore you must read the first Act by the light of the later Act, which includes those words, in order to get at the legislative intent."

I always supposed that the rule of interpretation was this: That if I found the embodiment of the legislative will in certain words which meant one thing, and later found that there was a different and a later statute which embodied an entirely different and broader thing, the presumption to be drawn therefrom was that the original Act did not cover what was later put in the last Act. In the Wilson Act you find, boldly inserted, words which the learned Assistant Attorney-General infers from the other statute, which contains nothing of the sort. It uses the word "competition"; and it is leveled at combinations intended to operate in restraint of lawful trade, or to increase the market price, in the United States of imported articles.

If that was the legislative will, why, when the Sherman Act was passed, were not words like that inserted? Why should a man be punished by an Act which must be interpreted, according to this new code of interpretation, by the light of a later manifested legislative will, manifested by other Acts?

Decree of Circuit Court Anomalous and Unauthorized.

This case, as it comes before the Court, presents a most anomalous state of affairs. Under a statute designated to promote trade we have a decree which utterly forbids the entering into interstate commerce of the American Tobacco Company and its allied or owned companies and properties. With an output of $212,000,000 in 1906 of tobacco by those companies, a very considerable portion of which was put into interstate commerce, you have a decree that that Company is forbidden from transacting any business in interstate commerce; and of necessity the traders outside of that corporation, who furnish perhaps one-fourth of the tobacco product, are to do all the business.

Does it not challenge our attention when we find a decree is made under a statute intended to promote commerce that by necessity must absolutely prevent it? Does it not make us challenge the correctness of an interpretation of the statute which brings about any such result?

"Oh, but," they suggest, "the reason that decree is entered is not that interstate commerce to the extent of three-fourths shall be prevented; but if such a decree is entered, then these defendants, by reason of the destruction of the value of their property which ensues, will necessarily be driven to sell their property." But does not that amount to a punishment? Does not that amouut to a decree by the Court that they shall be punished to such an extent by the deprivation of the use of their property that perforce they will do something which it is not within the power of the Court to compel them to do, and suffer a punishment which this Act, which is very specific in what it does by way of punishment, says nothing about?

Government's Vague and Strained Interpretation.

The trouble with the Government's interpretation is that it fails to disclose with sufficient clearness the offense condemned, and it requires the insertion of words to save the interpretation from self-destruction. And under that I have this to say:

This is a criminal statute. It is of the very essence of the criminal law that before a man can be condemned as a criminal, there shall be clearly defined by the body which enacts the law the offense which, if he be guilty of it, shall inflict upon him the punishment. In this case the Government is obliged (I will quote from their brief in a few moments) to use words which are not in the Act, in order in the first place to give it the meaning that they claim; and in the next place, in order to save it from the results of that meaning.

This very able brief is the result of a contemplation of the deficiencies, perhaps, of the earlier brief. It is the last effort to express something that will meet with judicial commendation. And this is what they say concerning this subject on page 22 of their brief:

"In order to satisfy the requirements of a reasonable necessity, there must be a certain nearness of relationship between what the statute directly strikes and interstate or foreign commerce which is probably not susceptible of rigorous definition. Mere indirect, incidental or remote effect on commerce is not sufficient; but whatever, as a natural and probable consequence, will occasion material hindrance to the efficacious operation of the lawful will of Congress in reference thereto is near enough."

On page 31 they try again:

> "We submit that under the power granted by the commerce clause, Congress may prohibit whatever"——

The mind must be rigorously directed in order to keep up with this—

> "May prohibit whatever as an efficient cause will probably occasion, as a natural and reasonable consequence, material obstruction or hindrance to efficacious operation of its lawful will."

Few are safe if crime is to be so complex in its definition.

> "In the law of torts long experience has compelled the doctrine that liability flows from the efficient cause and is not confined to that nearest to the injury. A similar imperious necessity requires acceptance of the principle now advocated."

Again, on page 32:

> "This reasoning * * * only asserts power to debar those engaged in production or manufacture from acts or transactions the direct and necessary consequences of which would be to nullify rules for the conduct of interstate commerce admittedly within the power of Congress to prescribe."

And still further, in order better to let the person who is not to sin nnawares know what he must not do, on page 52, they say:

> "We do not maintain that *every* sort of restraint of interstate or foreign commerce is denounced by the Sherman Act; and certaiuly no such doctrine is essential to the relief asked."

But they do not contend (and of course they cannot, under the interpretation they put upon the Act) that every sort of restraint upon interstate or foreign commerce is denounced. And yet when we read the Act, we find these words:

> "*Every* contract, combination in the form of trust or otherwise * * * is hereby declared to be illegal."

Should we not pause when we find an interpretation put upon the statute by the Government which, because of the interpretation, obliges them as a necessary consequence to say that they do not claim that *every* restraint is illegal, when we find that statute without a word of exception, in the clearest possible language, providing that *every* restraint and combination and conspiracy in restraint of trade is illegal?

Again, on page 99, as a head-line, we find inserted this qualification:

> "Trade and commerce in any commodity are monopolized whenever as the result of the concentration of competing businesses—not occurring as an incident to the orderly growth and development of one of them"—so and so occurs.

Our construction of this statute is one which puts upon every word of the statute a meaning, and which does not excise from the statnte a word that is put in with a most intense expression of force—to wit, the word "every." And where do they find in the statute the authority for the insertion of the word "material"? Some of the greatest legal intellects that have ever figured at the American bar, and graced it by their learning, struggled in this Court to induce it to reach a conclusion that it must insert before the word "restraint" the word "reasonable," and make those unexcepting words read according to what they said was a reasonable qualification—"a reasonable restraint." This Court said: "No! the statute says that every restraint of trade is illegal, and we are not permitted to remake the statute, or to insert anything else." And if they would not permit the insertion of the word "reasonable," upon what power can we rest the exclusion from the statute in this case of the word "every"?

In the statute there are no such words as "ma-

jor portion." There are no such words as "the necessary consequence will be a material hindrance." Necessarily any words that make the condemnation of the statute rest upon the Act according to its after-consequences, as to whether the Act does thereafter materially restrain or not, must be wrong; because whatever is forbidden is forbidden regardless of its consequences.

The Knight Case Rules This Case.

Therefore, having called your attention to the construction and the qualification of the construction resting upon nothing, let us proceed with a further consideration of the Act. And the next matter that I wish to discuss is that the Knight case rules the present case.

What was the Knight case? There was a sugar-refining company which was in possession of refineries and of sixty per cent. of the refining and trade in refined sugar in the United States. It acquired the shares of stock (paying for the same in its own shares of stock) of concerns representing thirty-six per cent. more of the refined sugar product in the United States. And it, therefore, was in the possession, by virtue of its acquisition of those shares, of ninety-six per cent. of the business. It was engaged in buying the raw sugar, and it was also engaged in selling its product in other States. The American Tobacco Company, or the original Company, formed before the Sherman Act, was a Company which at the time of the passage of the Sherman Act was in the possession of nearly ninety-seven per cent. of the cigarette manufacturing industry in the United States. From time to time it acquired very largely properties, occasionally shares of stock, so that it is now in the possession of cigarette manufacturing to an extent of about seventy-three per cent. as against ninety-seven per cent. that it originally owned, and we

may say roughly seventy-five per cent. of the manufacturing of other products of tobacco, excepting cigars.

It buys the leaf in other States, and it sells the raw product in other States. Therefore, in connection with its manufacturing, it does an interstate commerce business in the purchasing of its raw materials, and does an interstate commerce business in the shape of selling its products. In what respect does this Company differ from the other? It is very much more in itself a manufacturing company, because it manufactures a very large percentage of the product which is sold by it and by its allied companies.

I have seen somewhere the suggestion made that it did not appear in the Knight case that that company bought its raw sugar outside of Pennsylvania and that it sold its product in other States. But I suppose that unless a man had behind him the power of the Government, he would be rather careful in suggesting to this Court that at the time of the decision of that case it was not thoroughly aware of the fact that raw sugar was not raised in the State of Pennsylvania, and that the refined sugar was sold all through the country.

That case laid down no new doctrine. It was not a new evolution of the will of this Court. It quoted the antecedent cases upon which it rested which made the broad dividing line between the manufacturing of a product and the sale of that product in interstate commerce.

There is necessarily a well-defined distinction between the manufacturing of a product and the dealing with it in interstate commerce. No citizen of a State is obliged to cross the border. No citizen of a State is obliged to sell his product in interstate trade. He may be the owner of cotton land. He may be the owner of wheat land. He may be

the owner of a mine. As long as he is within that State, and his title to those things depends simply upon his ownership within the State and the State in which he is located, it is entirely within his power to agree with another man that he will not produce wheat or cotton. It is entirely within his power, so far as any Federal power to punish goes, to burn his factories. He has the absolute control of the production. All that is forbidden him is that if he does put his product into the channel of interstate commerce, he must violate none of its laws. But there is left with him the absolute discretion of whether he will so put it or not.

That is what the Knight case decided. And that case has stood since the decision (a period of over fifteen years) without any suggestion by any new legislative enactment amending it that the interpretation by this Court inadequately expressed the intention of the legislature; and it has been acted upon in all particulars since.

If a river runs through a State, no citizen of that State can put an obstruction in the channel of that river. But if he has on the banks any quantity of a product which might be put into interstate commerce, he is not obliged to put a penny's worth of that product into the stream of commerce. He is not obliged to dig channels for commerce. All that is forbidden him is that he shall not obstruct it. And the Knight case, as we take it, holds that to any extent he may within his State bargain for manufactories and for manufacturing, whatever may be the subsequent thing that is done with it, with no compulsion upon him to do that thing. There is no offense done by him in that which prevents him doing it.

Restraint of Trade Used in no New or Enlarged Sense.

The next proposition is that the Act discloses no intent to enlarge the meaning of the words "restraint of trade," or to create any new offense.

At common law there was a very large class of contracts that, because they were against public policy, were not enforcible. There would be at common law conspiracies which would be punishable because they got into the domain of crime. There was no Federal criminal common law. The purpose of this statute was to apply within the domain of the United States, to the extent it had jurisdiction over interstate commerce, the principles of the common law; to make those contracts which were not enforcible at common law illegal, and to make the conspiracies which existed at common law illegal. But bear in mind the situation when this Act was passed:

Congress was necessarily aware of the fact that in all the States there were being developed statutes authorizing a great increase in the capital which any corporations might indulge in. It was thoroughly aware of the fact that consolidations of those capitals were being made under the laws of the States. It was thoroughly aware of the fact that property was being bought and was being sold. It manifested in no way any disposition to deal with those things, but, on the contrary, confined itself to the words "combinations in restraint of trade."

There were at that time contracts which it made illegal by which a man restrained himself from the exercise of his own industry; by which men undertook by combination or contract to control prices and to regulate output. There were agreements in which in various ways they did that which was improper, and which was now penalized. But they used the words with which the common law was

familiar. They used the words which to every mind had a meaning to it, the words "restraint of trade." And therefore to hold that under that appellation they meant in any way to deal with a transaction of buying and selling, or to deal with anything that never before had come within the category of restraint of trade, is to give to them a meaning not justified by any language which they have used.

It is said that trusts were expressly prohibited by that Act, which is perfectly true. A combination in the form of trust was made illegal. But what was that combination in the form of trust? It was where separate ownerships, still maintained as separate ownerships, were attempted to be merged, not in the title but in the management, so that independent persons were controlled by the arrangement that was made, and restricted in doing their business at their own will.

They say: "If you can introduce in place of that a combination which you call a holding company, that is doing precisely the same thing as was done by these trusts." But it is not. The trust never dealt with the title. The holding company changes the title. In the case of the trust there were separate interests, and each will was coerced by the combination. In the case of the holding company you have a union of the interests; and the man who holds in that company is interested in the company itself doing the best it can in order to promote its interests and its trade.

But you have in this case no holding company. It is not necessary for us, for any purposes involved here, to have the holding company defined. This is a company which buys the properties, which to an enormous percentage manufactures itself and deals in trade. And you are asked to say that under a statute which uses no other words than "restraint of trade," a criminal restraint of trade

is brought about by a company, because it has a large amount of property, buying the property of others.

Acquisitions Not Forbidden.

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

What, in the first place, constitutes an acquisition? And in the second place, are there any words in the Act looking to its prohibition?

In this case we really acquire the property; and that property consists, to a very large extent, of brands, trade-marks. The value—the very great value, perhaps—of the holdings of this Company is in that thing which is purely built up as the good will of the man who holds the brand and sells it. And why may he not deal with that?

There are no words in the Act that look to the punishment of acquisition. How easy would it have been for Congress, if it meant to forbid that, to have said so! And why should they have used words which had in common parlance an entirely different meaning?

Acqnisition was not condemned. If it was, this state of affairs would result: Competition is said to be the rule of trade. The necessary result of competition is destruction. The very purpose of competitors is that each competitor is desiring to take way from the other, and carry to himself (of course he must do it by legitimate means) the property of the other. But as the result of that competition one may go to the wall; and as the result of that going to the wall the other may be left in possession of the whole trade. Or, as the result of that competition, one of the men may find it no longer profitable to carry on his business. Or a

man who is in trade may become too old, or he may die, or he may become tired of his trade. And if you forbid acquisition, the inevitable result is that you punish two people: You punish the acquisitor by preventing him from acquiring; but you also punish the man who has a right of property (which includes within it the right to sell) by refusing to permit him to sell. Or you may have a man who, in order to build up a business to compete in foreign trade, may find that unless he does a business of a certain magnitude he will not be able to introduce the economies that will enable him successfully to compete. If he cannot acquire those properties, you necessarily prevent him, not from the competition within his own country, but from a better competition in the country beyond—the foreign country.

No Duty of Competition on Private Traders.

The next proposition is that there is no duty on the part of private trading companies or manufacturing companies to compete—no prohibition against their agreement not to compete. If there is no competition, as the result of acquisition, the Act is not violated.

The legislature cannot compel a man to compete. He may transact his business according to his own notions without being obliged to compete with anyone else. If he has a business which belongs to him (as many of these businesses belonged to the people who sold), and it is not to his interest to compete, you cannot compel him to do it. If he finds that he wishes to sell his business, and if the result of his selling the business is that there is no longer a competition between the two persons who formerly were independent, what is that but the necessary result of the acquisition of the property? If there is no

duty on the part of A and B to compete, then if A buys B or B buys A there is no violation of any law because the result of the purchase is that there is no competition, because there was no duty upon which that competition should rest.

No Acquisition Here to Restrain Trade.

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

My colleague has illustrated that and proven it by his argument. The petition that was filed in this case was full of averments of the doing of all sorts of illegal acts. When the Government came to prove those averments, they proved none of them. The Court below finds that they did not prove them. But we are told by the learned Assistant Attorney-General: "It was not necessary for me to prove those things. I did not want to injure people by calling them to testify in that matter." But where an averment of fact is made, where a man is accused of guilt, and it is said that there are persons who might prove that guilt, it will not do for him to say: "I will not call the persons out of regard for their feelings." Nor will it do to say, as was said here, that they did not prove it because the witnesses that they called did not tell the truth. There was no contradiction of the testimony of those witnesses; and there being no contradiction of their testimony, and there being no proof offered concerning the truthfulness of these averments, they necessarily failed.

The Northern Securities Case.

Then I wish to call the attention of the Court to the difference between this and the Northern Secur-

ities case. In the Northern Securities case, in the first instance, we were dealing with a public service corporation which had a duty to compete, and which by putting itself beyond the power of competing was denying the discharge of a public duty. There being no duty to compete on the part of private corporations, no such consequences can result from their non-competition. Besides that, what was done in that case was illegal under the Minnesota law, in which the courts were located. There was, therefore, no intrastate trade interfered with, because the intrastate trade could not be done in violation of the Minnesota law. And in addition to that, there was the mere holding, as was held, as a custodian for the purpose of accomplishing an illegal purpose.

Monopolizing.

The section of the Act which this Court has not dealt with is the second section, the monopolizing clause; and the proposition is that the monopolizing or attempt to monopolize which is condemned is one which includes more than acquisition, however extensive—that is, the exclusion of others from trade by means of the doing of an illegal act.

Ordinarily the chatter of legislative debates by those who intrude themselves in it merely for the purpose of demonstrating their existence may not help us much. But in this case we have a very exceptional position. This statute was introduced by Mr. Sherman, and very soon it was developed that there were several constitutional slip-knots in the statute as he drafted it. After a very considerable amount of debate, in which a very considerable amount of acumen and intelligence was displayed, it was finally turned over to the late Senator Hoar to draft the Act. He drafted the Act which, after a great many amendments that were offered in one

House and the other and accepted in conference meetings, was finally made to stand as the legislative will upon that subject—made to stand without any amendment at all. Under those circumstances, where the Act is the emanation from the mind of one person, we may get some information concerning its intent. And during the whole of the debates Senator Edmunds was the one who stood by to explain the meaning of the Act.

Senator Edmunds said, when asked the meaning of the word "monopolizing":

> "'Monopolizing' has a meaning which indicates some attempt by the monopolist to impede competition, to prevent others from having an equal opportunity with himself to engage in the particular business sought to be monopolized."

And Senator Hoar said:

"The sole engrossing to a man's self by means which prevent others from engaging in fair competition with him"—such monopoly was punishable at common law.

You have both those definitions including the words "excluding others from carrying on their trade." Let us see whether it is necessary to carry out that construction.

In the first place, the second section is to be read in connection with the first section, and one to a certain extent illustrates the meaning of the other. The monopolizing clause is not one of the greatest importance in the Act, because in the first place it is not made applicable to territories; and in the next place because the punishment for the transportation of the product of the illegal combination by seizure of the property in course of transportation is not applied to it. The thing aimed at is the same whether it is applicable to an indi-

vidual or a corporation. It is prohibited to any person to monopolize or to attempt to monopolize. And the Act has in it its own dictionary, by which it expresses that the word "person" is meant to include "person or corporation"; and, therefore, whatever this monopolizing which is illegal is, it is something which is just as bad in the case of a person or of a corporation.

It is not the securing of a big part of the production which is forbidden by the Act. It may be ever so large. There is no word used in connection with largeness. But a word is used which, as in the first section, throws the greatest light upon the subject—to wit, the word "every" before "restraint." The words used here are, "*any* attempt to monopolize."

Necessarily if there is a statute which forbids the monopolization of *any* part of the trade, and if that means the securing of *any* part of competitive trade, you have excluded every person from making a transaction which will secure any part of the competitive trade. Any man who buys a piece of goods to that extent monopolizes some part of the trade. We, therefore, must, in dealing with that statute which forbids the attempt to monopolize any part of it, reach some construction which carries with it the idea of the word "exclusion"; because otherwise no competitor could purchase another, and there could be no consolidation of any sort.

That drives us back to the common-law definition. The common-law definition carries with it the idea of exclusion. It means to punish, and necessarily must mean to punish, an activity—as, for instance, the doing of something which is made illegal because it gives to the person who has property, by excluding others from the enjoyment of their property, an advantage which he otherwise

would not possess. Therefore, if he builds up his trade by rebates, or if in any way he monopolizes, or if in any way he interferes with others in the proper conduct of their trade—if he does any illegal act, for that he is punished.

The Remedy Applied Destroys the Object of the Act.

Then the remedy which is accorded, being the only one which can be applied, destroys the object accomplished by the Act. And therefore the failure to prescribe a remedy which does not induce such destruction is a demonstration of the lack of intent so to punish.

We have shown the effect of the relief granted by the Court below. The Act prescribes its punishment. It prescribes an indictment; it prescribes an injunction; it prescribes a three-fold damage. The Court has prescribed an additional punishment —to wit, the destruction of the value of the property.

If, therefore, when you come to apply the remedy, you find that the only remedy which you can apply is one that is necessarily destructive of the purpose of the Act, does it not require us to challenge the correctness of the interpretation by which that remedy alone could apply?

In these cases it is not the fact of the great combinations which menaces trade. It is the abuses which may be occasioned by them; and it is those abuses which are intended to be punished by the word "monopolizing."

These great combinations are necessary. They are the economic necessity of the age. By means of them the cost of production is cheapened. Prices, by reason of these great combinations, as in the present case, do not advance *pari passu* with the

advance of prices of the raw product. If they are punished where they interfere by monopolizing, by unlawfully excluding others from trade, you can do that; and that is not a work of destruction, but a work of supervision.

In this case, therefore, we have this situation of affairs presented: The Government makes a definition of the Act which leads to a remedy that is destructive of the purpose of the Act. It makes a definition of the Act which is not to be gathered from it. It makes a definition which restricts the application of the Act. And, therefore, we submit that all that is punished, and all that is meant to be punished, by this Act, is that sort of restraint of trade which is known to the common law; and that the monopolizing which is punished is the excluding of others from the use of their property by unlawful means.

Mr. Justice McKenna: Mr. Johnson, I have forgotten—have you on your first brief a reference to the debate from which you read in your argument?

Mr. Johnson: Yes; it is in one of the briefs.

Mr. Wickersham: You will find it in the printed argument of the Attorney-General.

Oral Argument of Junius Parker, Esq., January 11, 1911.

Mr. Parker: May it please your Honors, as stated by the Attorney-General, yesterday afternoon Mr. Johnson was prevented by a sudden, though, I am glad to say, slight and temporary indisposition, from completing his argument. I am not here to fill up the defendants' time, but Mr. Johnson not being able on that account to be present in court to-day has asked me, with the permission of the Court, to present for him to the Court the further views that he was thus unable to present. I am glad to be able to call to the Court's attention the fact that these defendants filed after the first argument of this case, last January, a stenographic report of Mr. Johnson's argument made at that time, aud that the Court will find that argument still in the Record.

Now, if your Honors please, Professor Clark of Columbia, a distinguished writer ou economics, has said:

> "There are three things which the people in their thought and speech jumble together, and even attack without any discrimination. They are, first, capital as such; secondly, centralization; and, thirdly, monopoly."

The confusion in the public mind which Professor Clark thus reprobates is altogether illustrated in the attitude of the Government, both in its brief and in the oral argument of the Assistant Attorney-General. They not only confuse effective and economical centralization of production with monopolizing, but they have confnsed the power that is inherent in all wealth with the power that monopolies exercise, and so "jumble together" simple capital and its use, and monopolizing.

This confusion of thought with respect to

monopolizing, it seems to us, has come largely from the indiscriminating use of the word "power." In some judicial utterances, as well as in books written by economic and social writers, monopoly has been condemned even before it has been abused, because of the power that thus existed for the exploitation and oppression of the public.

Now, the Government, taking hold of these expressions, argues in this case in effect this: "Let us admit that these defendants have not excluded or attempted to exclude others from the field of manufacturing and selling tobacco and its products; let us admit that their conduct has been as moderate and praiseworthy as they claim, or as the Court below found; admit this," they say, "and still they are to be condemned and forbidden longer to pursue business activities—because they have succeeded and are succeeding; because they have tremendous resources and capital compared with their competitors, and have the power to crush these competitors by the use of that capital and those resources."

Mr. Justice McKenna: Is that from their brief?

Mr. Parker: No; this is my construction of their contention. I think it is a fair construction.

The Chief Justice: You speak of capital.

Mr. Parker: I speak of capital as power.

The Chief Justice: Capital as power. Define what you mean by "capital."

Mr. Parker: I mean money; I mean wealth; I mean resources.

The Chief Justice: Now, let me ask you this question: Suppose a man had a hundred millions of dollars in money. He would be wealthy, having one hundred millions of dollars?

Mr. Parker: Yes, sir.

The Chief Justice: And suppose he would take that wealth and invest ten millions of it in A, ten millions of it in B, a different thing; ten millions of it in C, another thing; ten millions of it in another

thing; and so on until these investments had put him in a position where he controlled. Would you say that was the potentiality of money or the exercise of that potentiality?

Mr. Parker: I should say that, up to that point, it is the mere potentiality of money.

The Chief Justice: Of course that proposition, then, you must maintain in order to maintain the premise that you laid down in your argument when you started.

Mr. Parker: I maintain that that, so far as your Honor has stated it, is the mere potentiality of money—a potentiality that was inherent in the very money itself.

The Chief Justice: A man may have money in a strong-box; but I am putting to you a case where he has gone into that strong-box. He has taken the box out of the safe-deposit vault, where he had the money, the conserved power—what we may call the energy—and then he has gone out and put a portion of that energy here, and he has taken a portion of that energy and put it there, and has taken a portion of that energy and put it there, where the inevitable deduction and result of placing it in those things was to bring about a result wholly different and more effective upon the rights of parties than that which would have existed had the money remained in the strong-box. Your proposition is that that is mere power?

Mr. Parker: That is mere power, yet; because, if your Honor please (and your Honor's question strongly illustrates it), if it is a valid and sound argument that the mere possession of wealth and the power that that gives is to operate to keep men from commerce, then the rich man cannot go into commerce but at his peril; then the rich man must leave his money uninvested, or distribute it in such a way that he controls nothing. If your Honor please, perhaps (though I do not admit it) Con-

gress could forbid any man worth more than a given amount of money from engaging in interstate commerce, Congress, perhaps (though I do not admit it), might forbid a corporation with a larger capital than a fixed maximum engaging in trade between the States; but Congress has not done so. Not only has Congress not attempted to limit the wealth of those engaged in interstate trade, but there is no tendency on the part of the States in that direction. With respect to the formation of corporations, the power of the States is plenary, and only four States fix a maximum limit of capital stock for manufacturing corporations formed under their laws. Every other than these four States, including some whose anti-trust laws are most drastic, permit the incorporation and trading, and active trading, of companies of unlimited millions with all the power that that wealth gives.

Now, if your Honor please, what is the power that the courts and economists have condemned as an incident of monopolies, if it is not in its last analysis the simple and inherent power of accumulated and active capital? It is, in our judgment, the power to exploit and oppress the public that belongs to him who has excluded others from the trade, or for whose benefit others have been excluded from the trade, and who may treat the consuming public as he likes, without fear to him, and without hope to the public, of competition—actual or potential.

Mr. Justice McKenna: Will you repeat that?

Mr. Parker: According to our conception, the power that has been denounced as incidental to monopolies is the power to exploit and oppress the public that belongs to him who has excluded others from the trade or for whose benefit others have been excluded from the trade, and who, therefore, may treat the consuming public as he likes, without fear to him, and without hope to the public, of

competition—actual or potential. Is that what your Honor desired me to repeat?

Mr. Justice McKenna: Yes. Then the exclusion of others is your essential definition of that power?

Mr. Parker: Yes, sir; and the exclusion must follow, or the attempt to exclude must follow before that power is inherently bad.

The Chief Justice: You started out with your first proposition, and then you immediately diverted from that by discussing the question of the State, and power, and what the legislation has been. I was asking you as an abstraction. Now, I ask you the question, if a man has one hundred millions of dollars, and he takes that one hundred millions of dollars and invests it in various things having a relation to each other, or a connection with each other, in such a way that no common sense human mind can look at that situation without saying that by the act of this man, in taking his money out of his strong box and putting it here and there and there, that all human competition is impossible—does not that bring it right into the position of potentiality which you state in the proposition that you have just announced?

Mr. Parker: I think not, your Honor. I think, if your Honor means that those acquisitions have had the intent and effect of making competition impossible——

The Chief Justice: I certainly say that in my question. I say "have the effect."

Mr. Parker: Then, I still do not believe so. The case your Honor speaks of is not our case, and while that state of facts is not in this Record, I would say that it involves, to my mind, a disregard of constitutional requirements. I do not believe that Congress has jurisdiction over, and can make criminal the aims, purposes, intentions or effect of persons in the acquisition and control of

property which the States of their residence permit.

The Chief Justice: Pardon me. My question was not intended to raise any question of constitutional power. That is another thing. You started out by making an economic proposition.

Mr. Parker: Yes.

The Chief Justice: Whether a particular thing accomplishes a particular result; and you stated a theoretical proposition. My question addresses itself to that. Now, you immediately turn to an argument of constitutional power. That is another thing. I was not considering any question of constitutional power. That is further along.

Mr. Parker: Then I still answer, from an economic standpoint, that still, so far as you have stated it, it is potential.

Mr. Justice Holmes: Would not that depend more on what the subject-matter of the purchase was? If a man purchased the only mine there was of a certain material in the world you would, perhaps, admit that he had a monopoly.

Mr. Parker: Yes.

Mr. Justice Holmes: Wait a minute. But you would say that if he purchased simply all the tobacco in the world, but left it open to other people, there being opportunities and he not interfering with those opportunities of other people to raise more if they were so minded—you would say, yet, that the monopoly was not achieved?

Mr. Parker: I would say so; and the reason I did not say it, if I may be permitted to say so, was that I thought the Chief Justice's question put out of consideration the consideration of the facts in the particular matter. I conceive, of course, that if a person uses his money to acquire all of the possible supply of a raw material, or a product, so that competition is impossible, of course there is an economic monopoly.

The Chief Justice: Then your theoretical definition with which you started would be wrong?

Mr. Parker: You go further in the question put by Mr. Justice Holmes. You have made that the exclusion of others by the very act of purchase.

The Chief Justice: That is the very question that I put you.

Mr. Parker: Then, if it goes to that extent, if it takes the form of the question frequently presented, about the purchase of all the coal mines, then I will say that it is monopolistic, and against the spirit of all anti-trust law.

The Chief Justice: That is the very question I asked you.

Mr. Justice McKenna: That is, so long as there is no wrong exclusion of anybody else?

Mr. Parker: There is a wrong exclusion. There is the exclusion in the very purchase.

Mr. Justice McKenna: Not exclusion, of course, if somebody else could not buy it. A man could go out and buy all the coal mines in the world, giving the price that is demanded, without excluding anybody else or using any wrong toward anybody else. Do you call that monopoly?

Mr. Parker: I call it monopoly as an economic condition, and against the spirit of the anti-trust laws, not because the man has at the time all the trade in the commodity, but because of the nature of the commodity his very purchase has excluded others. If we are to discuss questions of law and constitutional authority, I conceive that very different considerations apply; but so far as economic conditions are concerned, a man who, by his purchase, considering the nature of the commodity, excludes the possibility of competition, violates the spirit of the anti-trust laws, and violates the economic law against monopoly.

Now, if your Honors please, this Record shows no purchase of a monopolistic kind. This Record

shows no purchase having the effect, intent or purpose to exclude others. Therefore I say that in this case there is left out of the equation the consideration mentioned by the Chief Justice, and we have here simply the power that is inherent in any wealthy man or corporation engaged in the tobacco business.

Now, it seems to me that the difference between this power that I have mentioned as residing in the monopolies, the power to exploit the public, resulting from the fact that he has no fear and the public no hope of competition, is a very different thing from the power that these defendants have in the tobacco business. The fact, if your Honors please, that the possession of large wealth and the use of large wealth in business, brings the power and temptation to violate the law against monopolizing, brings the temptation and power to exclude others from the trade, may some time hereafter be an argument to the legislator who favors the law to limit the capital of a corporation or the wealth of an individual engaged in trade. In just the same way, the fact that carrying deadly weapons gave the power, and sometimes brought the temptation to commit murder, undoubtedly influenced the legislators to enact statutes forbidding the carrying of concealed weapons. Before the passage of such statute, though, it seems to me one would not be taken as serious who contended that because the possession of a deadly weapon gave power to commit murder such possession constituted itself the crime of murder, or any other crime.

Now, if your Honors please, we, representing the main defendant, have a conception of the meaning and effect of the Sherman anti-trust law that does not seem to us either startling or ingenious. Taking the statute as it is written, and taking the decisions of this Court as its only authoritative com-

mentary, this is our conception of the Sherman law. We conceive that the meaning and effect of the statute is to preserve to everyone opportunity and liberty to engage in interstate trade—to preserve such opportunity and liberty against the voluntary covenant or quasi-covenant of the trader, as well as against the improper conduct of other persons. In our conception that is the whole law.

The first section, in so far as it forbids contracts and combinations in restraint of trade, forbids any sort of arrangement whether it be by actual covenant or other combination or device between independent traders, whereby they directly or indirectly agree to limit their activity in interstate trading, or where the result of the arrangement is to take away the incentive to such activity in interstate trade. We conceive that under the first section, or the second section, it is as much against the law for two insignificant interstate traders to agree, or to come together by any other combination or device to suppress the liberty of trading which they had before, as if the agreement constituted ninety per cent. of the trade.

The first section, as we conceive, in forbidding the entering into a conspiracy in restraint of interstate trade protects the trader against outside interference. The crime of conspiracy in restraint of trade undoubtedly has its typical instance in the Danbury Hat case, where the interference was by those themselves not engaged in interstate trade at all. The second section, when it forbids the monopolizing or attempting to monopolize any part of interstate trade, forbids the excluding or attempting to exclude others from interstate trade. In our judgment, in order to violate this section, the exclusion, or the attempt to exclude, must be by means at least tortious, either at common law or by some other statute, in order to save this sec-

ond section from absolute invalidity on account of vagueness and uncertainty of meaning, as well as to prevent the statute from destroying the very competition it was intended to foster.

The Chief Justice: Will you read that again? I see you are following notes.

Mr. Parker: Which part do you mean?

The Chief Justice: That last proposition.

Mr. Parker: The second section, according to our conception, forbids the exclusion or the attempt to exclude others from interstate trade.

The Chief Justice: That is, monopolizing.

Mr. Parker: In our judgment, in order to violate this second section the exclusion or attempt to exclude must be by means at least tortious, whether criminal or not, either by common law or statute other than the Sherman law, in order to save this second section from absolute invalidity on account of vagueness and uncertainty of meaning.

Mr. Justice Holmes: Do you not take your contention too far there? It would not be tortious at common law for an immense concern to lower the prices for the purpose of driving another man out of business in the same community. Might not that very well be within the monopoly clause of the Sherman law?

Mr. Parker: I think it might very well be; I think it might most desirably be; but it is not there; and many authorities there are which hold that the lowering of prices with a purpose to drive out a competitor, is simply competition. Personally I am delighted that this record is lacking in evidence of such practices. But I do not conceive that the ordinary means of competition commended by the comomn law are prevented by the second section of the Sherman anti-trust law, because what measure are we to have as to the propriety of the competitive methods? If it is to forbid competition and at the same time foster competition, who is to

draw the line between weak, ineffective, non-injurious competition, and the severity of competition?

Mr. Justice McKenna: Will you give an illustration, if you can do so without diverting from your argument, of what you consider tortious?

Mr. Parker: Yes, sir. I conceive, if your Honors please, that a typical case of monopolizing under this second section is the attempt to corner all of the raw material, gone into for the purpose of or having the effect of thus excluding others.

Mr. Justice Hughes: Do you mean by that the mere purchase of all the raw material?

Mr. Parker: No, sir; I mean to say that when you come to this second section, in any attempt to monopolize, intent is an element; and it is the only section in which intent is an element. I think when a trader sets out with the intent to exclude a competitor by purchasing all the raw material, that there is an exclusion by engrossing, and engrossing is illegal at common law. Moreover, your Honors, I think any of the methods condemned by the common law, fraud, deceit, coercion, are violative of this second section. I believe, moreover—and it may be said more certainly than in the illustration given by Mr. Justice Holmes—I believe that a control of all of the avenues of distribution and the exercise of that control to exclude the product of competitors, is violative of this second section. I believe that the attempt to exclude competitors from means of distribution by securing illegal rates from common carriers, and the securing them, violating the Interstate Commerce Act, is violative of the second section of the Act. I believe that the dozen and one ways that, at common law or by other statute, are denounced as criminal or tortious, being resorted to for the purpose of excluding others, constitute an attempt to monopolize under the second section of this law.

Mr. Justice Lurton: It is your contention, then,

that there must be an intent manifested in some way, to constitute a monopoly under this section?

Mr. Parker: Pardon me?

Mr. Justice Lurton: That there must be an intent to exclude others made out in some way, to constitute monopoly?

Mr. Parker: I think there must be an intent as a precedent to an attempt; because I cannot conceive of an unconscious attempt; but I believe that if the effect of an illegal act is to exclude others from trade then, as in other crimes, intent will be presumed.

Mr. Justice Lurton: As a necessary result?

Mr. Parker: Yes, sir. It must be by illegal means, under any circumstances.

Mr. Justice Lurton: You do not mean that the acquisition must be by illegal means?

Mr. Parker: No, sir; I do not;[1] but I mean that his engrossing being itself illegal is illegal means under the second section, not because the acquisitor has all the trade at a given moment, but because from the nature of the matter and from the intent with which he acts, he has thereby excluded others from the trade.

The Chief Justice: I am going to give you an illustration that runs in my mind. I recollect once being present at a very acute discussion of the 16 to 1 question in the coinage of silver—the question of supply and demand. The question of supply and demand was largely discussed, and one of the gentlemen, in the discussion, said that the situation re-

[1]This answer presumed the word "acquisition" in the question meant engrossing, the cornering of the raw material, the only kind of acquisition mentioned. We cannot conceive that the acquisition of competing businesses (or their consolidation) to any extent is an attempt to monopolize, whatever the intent, because it leaves the field free to others. It is just this difference in the result that makes engrossing illegal and the other acquisitions favored at common law.

sulted in this: From the potentiality which arises from the fact that in every silver mine in the world there is a vast amount of ore which has been worked with the appliances which then existed, as he then described them, and it stands there now looking every man in the face in the whole world; that with the present means of extracting ore, that vast body of ore can be worked at a profit at such a price that at any moment when the price goes up that ore instead of being dormant will flow into the channels of money, and therefore it keeps the price down. Now, I put that by way of illustration. It seems to me that your statements have departed from your first proposition, but I will not discuss that. If a man, having vast sums of money, has so distributed that money by investment, so that the whole world may know it, as to absolutely exert the potentiality of excluding everybody else, and with the certainty to everybody else that he will be destroyed if he takes a step—would that be a monopoly in your definition of the word "monopoly," as you laid it down at the start?

Mr. Parker: Does your Honor's question call for an answer on the economic phase?

The Chief Justice: No; I mean under this law.

Mr. Parker: Under this law? No, your Honor.

The Chief Justice: You say no. Why? This Court held in the Northern Securities case that a situation infinitely less acute than that was a monopoly under this law.

Mr. Parker: I think that the Court in the Northern Securities case, or that a majority of this Court, conceived that there was no purchase at all in the Northern Securities case, but a mere custodianship created. I think that the point of sharp division in this Court was whether there was an actual investment by the Northern Securities Company or whether there was a mere custodianship

created as a part of a scheme for eliminating competition between those two roads.

The Chief Justice: Then your answer is that the question whether or not it creates a monopoly depends upon a matter of form, and not a matter of substance?

Mr. Parker: No, if your Honor please. Indeed, I trust I am not to be put in the position of trying to reconcile the conflicting views discussed in the Northern Securities case; but the Northern Securities decision was based upon the fact that there was, in fact, no investment, and that there was a mere custodianship created; and that the holding company was the mere corporate synonym of the old-fashioned trust, and that the stock certificates, so-called, were in essential respects, the old trustees certificates; and we conceive that in that way it was only a scheme. But your Honor has put to me a case where there has been an actual investment. I gathered from your Honor's question that actual investment only brought power to exclude others. In that condition, I say it is not violative of the second section of the Sherman law.

Mr. Justice McKenna: In other words, it is not power possessed, but power exercised.

Mr. Parker: It is the exercise of the power; it is the doing of the illegal thing or attempting to do it.

Now, if your Honors please, we conceive that this interpretation of the law keeps it from being radical or revolutionary, and makes it a development of, instead of a departure from, the orderly growth of economic legislation. It becomes an application to interstate commerce of the doctrine of the common law. Whether offenses against the Sherman law were criminal at common law or not, no contract, in our conception, or arrangement or conduct, has been condemned by this Court as

against the Sherman Act, which would have been favored at common law; no contract or quasi-contract has been condemned that would have been enforcible at common law.

We contend, then, that the Sherman law applies to interstate trade, and to contracts, arrangements and conduct directly affecting interstate trade, the principles of the common law—making criminal and subject to Federal prosecution—if direct in their effect on interstate trade—some things that were criminal at common law, and some things that were forbidden at common law only in the sense that contracts for the doing of them were unenforcible; giving to Federal Courts jurisdiction in equity to prevent the things from being done which if done would be criminal; and giving an easy and tempting action at law to those who are injured by these things.

Surely a statute which applies to interstate trade only the principles of the common law, already applicable to all intrastate or local trade, and for centuries believed sufficient to protect such trade against noxious combinations or restraints, ought not to be called radical or revolutionary.

Nor do we conceive that this conception of the law makes it insignificant. The statute has its origin not in any supposed inefficiency of the common law, but because it was doubtful whether these principles extended to interstate trade and there are no federal common law crimes; and, if your Honors please, almost all vital and well-considered statutes have their principal utility in the application of effective remedies to common law wrongs.

In our view there is no decision of this Court inconsistent with our conception of the common law; but under this law there have been decisions of this Court which prevented competing railway companies from agreeing upon rates to be charged

by them. There is the decision in the Northern Securities case, which prevented the elimination of competition between railway companies by a scheme of their respective stockholders entered into for the purpose of eliminating that competition. There was a decision which prevented an agreement among the manufacturers of iron pipes that their competition should be only ostensible and not real. There has been a decision which gave to the purchaser who had paid an excessive price for his iron pipes treble the damages that he recovered. There have been decisions which prevented men from conspiring with other men in their interstate trade, whether these other men belonged to labor unions or were competitors.

It seems to me that having achieved such salutary effects the law cannot be called insignificant.

Of course, if your Honors please, with respect to this, if this is the proper conception, the Knight case was correctly decided. There, there was a mere purchase of property, with not even the covenants not to re-engage in business given by the vendors, such as are usual in such transactions; and the Government is not yet ready to say that the mere acquisition of property is violative of this law.

The Trans-Missouri case, the Addyston Pipe and Foundry case, and the Swift case are all typical instances of contracts or quasi-contracts restraining competition among competing concerns.

The Northern Securities case, as I said before, as conceived by a majority in this Court, dealt with the fact that there was no real investment, but a mere scheme to eliminate competition between these roads. If the Northern Securities case had arisen at common law, in a suit at equity for specific performance of the contract of delivery by the stockholder, it would have been declared against the

policy of the common law under the conception of facts held by a majority of this Court.

So we contend that the preservation of the liberty and opportunity of trading, the preservation of the principles of the common law, and the provision of a remedy adequate for the violation of the principles of the common law was the purpose of this statute.

If your Honors please, if this conception is right, it seems to me that we come down to a very few questions:

First, have these defendants in combination with others, or acting alone, excluded others from the trade? To that question the Court below answers impressively and expressly, no; and it does seem to me, if that is wrong, that it is the part of the Government to lay its hand on such conduct as, being continued, will exclude others, and ask for an injunction against the continuance or repetition of those practices.

Have we entered into any contracts limiting anybody's freedom in trade? The only things that I can conceive of are the covenants taken from the vendors; and we say and argue with absolute confidence that every one was taken by a vendee company in reasonable protection of the good-will conveyed. If there are any that are unreasonable on this basis, it was the part of the Government to call attention to those covenants. The Court found none.

Has there been in the intercorporate relations of these defendants such a condition shown as eliminates all incentive to activity in interstate trade?

Now, if your Honors please, it seems to me that this brings us to a consideration of the holding company, as discussed in the Northern Securities case. Bowing, of course, cheerfully to the decision

of the majority of this Court in the Northern Securities case, it seems to me that the effect of that decision is to say that the holding company, in railroad matters at least, violates the law, and is, as I have said, the mere synonym, in corporate form, of the old-fashioned trust.

Assuming, but only for the sake of the argument, that the holding company in industrial affairs is thus condemned, it seems to me that you must go for your definition of a holding company to the decision in the Northern Securities case; and it seems to me that that definition is about this: It is where a company issues, as a part of a general scheme, its own shares in exchange for the shares of competing companies, thereby eliminating any incentive for activity on the part of the independent companies, and substituting only their interest in a mere holding company.

If your Honors please, if this is applied to this Record, there is no holding company developed. In the first place, every one of these principal defendants is largely an operating company.

In the second place, I should say that with respect to most of these companies, there is no natural competition at all. The American Tobacco Company is enjoined from voting the stock that it holds in the Mengel Box Company, the company manufacturing the boxes. What theory of the Northern Securities case is violated by that holding of stock and voting it? No trade activity is limited; and even if competition is the key-note of the Sherman law, there never would be competition between a box manufacturer and a tobacco manufacturer. Yet the great majority of the companies whom the main defendants are enjoined to continue in control of are not competing companies at all, but only related or non-competing companies.

With respect to competing companies, there is no scheme developed. Every concern in which any of these main defendants hold stock, but one, was acquired as to its stock, for cash or its equivalent; the P. Lorillard Company stands alone as the only company whose stock, held by any of these main defendants, was acquired by the issuance of stock of the owning company or any predecessor.

Now, if your Honors please, there has been a multitude of briefs, oral arguments and supplementary briefs filed in this case. I am requested by Mr. Johnson to say to the Court that the ideas which I have so inadequately presented are amplified in a supplemental brief filed a few days before the arguments began, bearing the signature of Mr. Johnson and associate counsel, and I ask the Court's special attention to it.

I desire only to say a word more, and that is induced by questions that were asked by the Chief Justice and Mr. Justice Lurton in connection with the leaf tobacco situation.

Mr. Justice Lurton asked Mr. Nicoll if there was anything in this case in regard to night riders, farmers' organizations, etc., in the black tobacco belt in Tennessee and Kentucky. Mr. Nicoll correctly told him that there was none; but I think it may be interesting to this Court to know the fact, and it is a fact shown by this Record, that the crop raised in 1903 in the black tobacco belt with respect to which Mr. Justice Lurton asked, is about 180,000,000 pounds, and that these defendants, in the aggregate, never bought but 27,000,000 pounds (Vol. V, Ex. 76, "Dark Western, including Hend. Dist."). The fact is, as shown by this Record, that almost all of that tobacco is bought by the Regie buyers—the Government monopoly buyers—of Italy, Austria, France and Spain; and there is not

a word of testimony in this Record, nor even is there an allegation in the bill that alleges, that there is, or ever has existed, any combination or concert of action, or any relation between the American Tobacco Company and its buyers and the buyers of these Government monopolies. Moreover——

The Chief Justice: Will you give me those figures again?

Mr. Parker: 184,000,000 pounds, against 27,000,000 pounds.

Moreover, if your Honors please, there is not in this Record anywhere one word of testimony showing the existence of any organization of farmers, the producers of leaf tobacco, except a letter written by the President of the American Tobacco Company to the President of the Burley Tobacco Association —the growers—in 1903.

Reference has been made by a member of the Court to the frequent references that have been made by counsel to Mr. Duke's testimony; the fact is that Mr. Duke is the only witness who gives a consecutive statement of the growth and development of this Company, and his testimony is not contradicted. Mr. Duke puts into this Record a letter (Vol. IV, p. 432) which be wrote to the Burley Tobacco Society growers' president in 1903, and testifies without contradiction that it correctly and accurately states the attitude of the American Tobacco Company toward the farmers and their organizations. Let me read one or two paragraphs to you. I commend the whole letter to your Honors for your consideration:

> "Now, as I understand, it is proposed that an association, embracing a great number of the producers of burley tobacco, shall be formed, which association shall have a corporate form, and which association is to be a

> middleman between the producers who form it and ourselves; so that hereafter, instead of our purchasing the tobacco we need direct from the farmers, we are to purchase it from this association, or corporation. So far, we have no objection to the plan, and have no right to object. If the farmers deem it to their interest to associate themselves into an organization, of whatever sort, it would be entirely satisfactory to us to deal with such organization as freely and under the same conditions as we would deal with any other person or corporation which had tobacco we desired to acquire; and we would desire that relations as frank and cordial should exist between us and that organization as we now desire between ourselves and the farmers themselves."

Mr. Justice Holmes: What are you reading?

Mr. Parker: I am reading, as the only evidence in this Record of the existence of the organization of the farmers, a letter written by the President of the American Tobacco Company to the President of the Burley Tobacco Society, in 1903.

If your Honors please, I do not desire to read further from that letter, but I do earnestly commend it to your Honors' attention, as stating truly, accurately and fairly the relations of this company to the producers of tobacco.

The Chief Justice asked a question that I desire to answer. He asked whether the market quotations that are in evidence did not show the market from day to day, and if it were not, therefore, possible that the defendants acquired their tobacco when the market was low, and that the "high water" points were only nominal, not helping the farmers, and not hurting the Tobacco Company.

The Chief Justice: I asked that because I wanted to find out whether counsel might not be in error.

Mr. Parker: But the evidence in this Record is not the evidence of the market quotations. It is the evidence of what these defendants paid to the farmers; and this evidence shows, without any contradiction, that every grade of leaf tobacco of which these defendants are substantial purchasers, has advanced in value—some grades more than others, and some grades less than others—but there has been generally an almost constant advance of the price paid by the American Tobacco Company to the farmers; and there is not a syllable of proof that any farmer or any member of an organization of farmers even disbelieves that.

Mr. Justice Holmes: Is there any comparison of that increase in values with the general increase of the prices of other things?

Mr. Parker: No, sir; there are no such tables in this Record. The testimony with respect to the increase in the value of tobacco came from time to time into the Record as the men in charge of buying a particular grade were on the stand. For instance, the manager of our southern leaf department testifies with respect to the prices in Virginia, North Carolina and South Carolina, and that there have been advances in some grades to the extent of 100 per cent. (Vol. II, p. 126). There is the testimony of our western leaf buyer, with respect to the burley. He testifies that it increased in a few years from seven to eleven cents (Vol. II, p. 184). There is the testimony of the buyer of the Snuff Company, which company is the only one of these defendants that buys tobacco in the black tobacco belt at all, which shows that year by year the average cost to the Snuff Company has increased (Vol. III, pp. 228-9). There is the testimony of Mr. Carlton, the buyer of the Imperial Tobacco Company, as to their increase in prices (Vol. IV, pp. 266-270).

So that you have not in this Record tables of the market quotations, but you have the actual testimony of the cost to these defendants; and it is without qualification, without modification, without contention on the part of the Government so far as I have ever heard, that there has been an advance in every grade of leaf which these defendants use.

We did not go into the cigar leaf. Neither the Government nor ourselves thought that we cut sufficient figure in the cigar leaf trade, making only fourteen per cent. of the cigars, as to make that valuable; and I do not know what fluctuation there has been in that respect.

Recess.

Mr. Parker: If your Honors please: It has been stated in response to the question of Mr. Justice Lurton, that the counsel representing the American Tobacco Company and the other main defendants, represent also the British-American Tobacco Company. We do not disagree in any way with the counsel for the Imperial Tobacco Company in the conception that these contracts of 1902 are valid. But there is a consideration that I desire to express to the Court just as briefly as I can.

I conceive that contracts that only divide up territory are illegal; and I conceive, moreover, that these contracts contain covenants in restraint of trade. But the situation, as it seems to me, must be taken fully into account. The American Tobacco Company had a large and valuable and growing business in England, with vast property for which it paid several million dollars, and to which it had added several million dollars more. It had brands in England that had achieved great popu-

larity, until their consumption was to some extent diminished by the increasing differential between leaf tobacco on the one hand and manufactured goods on the other. It sold to the Imperial Tobacco Company these vast properties. Surely its covenant not to engage in business stands exactly as valid under the rulings of this Court as one of those contracts valid at common law, not invalidated by the Sherman Anti-Trust Law—the contract of a vendor in reasonable protection of the property and good-will conveyed.

I quite agree, if your Honors please, with the suggestion that the Imperial Tobacco Company, up to the time it entered into that contract, had full power to come to America and to establish factories and to compete with the American Tobacco Company in America just as the American Tobacco Company had with the Imperial Tobacco Company in Great Britain. So the American Tobacco Company, considered as a vendor, had a right to require a covenant from the Imperial Tobacco Company that the property it was conveying should not be used in competition with the business retained by it. In the very illuminating opinion by Circuit Judge Taft in the Addyston Pipe and Foundry case, that is mentioned as one of the five classes where contracts in restrain of trade were valid at common law and are valid under the Sherman law. It is the contract taken by a vendor from a vendee, when the vendor retains a large property, that the property conveyed to the vendee shall not be used in competition with the property of which the vendor retains possession.

Mr. Justice Lurton: That is, the restraints are not unreasonably wide?

Mr. Parker: That is the contention, if your

Honor please. I am leaving out of account, now, the fact that the Imperial Tobacco Company, with a comparatively small business, yet had brands of tremendous potentiality and popularity in America, which it conveyed to the American Tobacco Company. So I say that the covenant of the American Tobacco Company to the vendee is the ordinary covenant given by a vendor for the reasonable protection of the good-will conveyed.

Mr. Justice Lurton: Is it limited to the use of those brands?

Mr. Parker: No, sir; it is not. It is a covenant not to engage in business. But, if your Honor pleases, I do not conceive that any of the covenants not to re-engage in business given by a vendor upon the conveyance of good-will and property is limited to the particular property conveyed. I do not understand that in the case of Cincinnati Packet Company *vs.* Bay, there was a limitation that they should not use the boats conveyed. Indeed, I gather that there the main thing conveyed was the competition. So, as I say, the American Tobacco Company's covenant to the Imperial is justified on the ordinary and valid grounds of being a reasonable contract by the vendor to protect the vendee in the enjoyment of the property and good-will conveyed. I say that the covenant by the Imperial Tobacco Company not to come to America is sustainable on two grounds: First, there was a property conveyed by the Imperial Tobacco Company. In the second place, if there had not been, the Imperial was the vendee of a property; and the American Tobacco Company, as the vendor, had the right to require a covenant to protect what it retained.

What did they do? They united in the organ-

ization of the British-American Tobacco Company, and both companies transferred and conveyed to the British-American Tobacco Company immense properties, an immense business, and brands and good-will of immense value. I see nothing illegal in that. If two men can meet and go into a partnership, and put into it the whole of their businesses and property without violation of law, then two men or two corporations have a right to form a corporation and to convey to it part of their businesses and good-will and property.

Here were properties, not stocks, conveyed, of the value of millions of dollars; and these two companies as vendors executed covenants with the British-American Tobacco Company—the ordinary covenants to protect the property and good-will conveyed. There was not a contract; there was a sale, accompanied by the ordinary contracts in restraint of trade, but in reasonable and valid restraint of trade.

Oral Argument of Sol. M. Stroock on behalf of United Cigar Stores Company, January 11, 1911.

Mr. Stroock: If your Honors please: the United Cigar Stores Company comes before this Court as an appellee. The petition of the Government in this case, so far as the United Cigar Stores Company is concerned, was dismissed by the unanimous judgment of the judges of the Circuit Court.

Organization.

George J. Whelan and his brothers, commencing in 1883, became engaged in carrying on the business of retail tobacconists in a number of cities in New York State. They were successful. In the spring of 1901, Whelan came to New York City determined to go into the business of conducting a large number of retail cigar stores throughout the United States. With this end in view he caused the United Cigar Stores Company to be incorporated. Not having sufficient capital of his own to carry on the enterprise along the lines which he thought necessary, he went to every tobacco manufacturer, cigar manufacturer, leaf tobacco dealer and jobber whom he knew and laid his proposition before them. As the Record shows, he made to all of them flattering offers, but every one declined to take any interest in his enterprise.

Among the people to whom he submitted his proposition were some of the officers of The American Tobacco Company, but they, like all the others, turned the proposition down and refused to have anything to do with it.

Whelan and his associates thereupon went ahead on their own account. Their initial investment in the enterprise was $2,500. But that is not all; for by November, 1901, they had invested $50,000

of their own money, and had succeeded in making $2,000 upon their investment.

During the months that elapsed between the organization of the United Cigar Stores Company and November, 1901, Whelan, being convinced of the ultimate success of his enterprise, persistently kept at the officers of The American Tobacco Company, trying to induce them to invest. Finally, in November, 1901, he succeeded in convincing Mr. Duke and Mr. Hill that his enterprise could be made successful, and he then induced them, not to buy him out, but to invest $50,000 in the enterprise. So that the United Cigar Stores Company then had a capital of $100,000.

The Record shows that neither then nor at any other time was any contract entered into between the two companies. No agreement was had as to pushing the goods of The American Tobacco Company or hindering the sale of the goods of independents. Whelan had represented that the retail business as a business could be made to be profitable; and the Record shows that the investment of the American Tobacco Company was made with but one end in view, and that was to make money upon its investment.

For the next year or two the capital investment was not increased. But at the end of that time, Whelan, through his business ability, having demonstrated that the enterprise could be made successful, it was decided to increase the capital stock. Bonds and preferred stock were issued. Whelan and his associates were afforded the opportunity to buy one-half of the preferred stock and one-half of the bonds; but as they had charge of the enterprise, actively conducting it, they preferred to invest their moneys in the common stock, from which source the largest share of the profits was to be received. There was issued in all $750,000 of preferred stock, all of which was bought by the Amer-

ican Tobacco Company, and $900,000 in common stock. In this common stock Whelan and his brothers and their associates invested their entire fortunes, amounting to $300,000; the American Tobacco Company taking the balance of $600,000.

I do not understand it to be seriously urged that the investment by the American Tobacco Company in the bonds and stocks of the United Cigar Stores Company in any sense offended the Sherman Act. The American Tobacco Company and the United Cigar Stores Company were not and could not be competitors. The former manufactures and sells tobacco products at wholesale. The latter sells tobacco products at retail only over its own counters.

Government Charges.

But the Government charges that having acquired that interest, the American Tobacco Company made use of the United Cigar Stores Company as an instrument for three purposes:

First, to injure and cripple other manufacturers, and to prevent them from distributing their products.

Second, to injure and drive out of business jobbers in tobacco products.

And third, to injure, cripple, and drive out of business other retailers, and to attempt to monopolize the retail trade in tobacco products.

Conclusions of the Circuit Court.

Judge Coxe, in the Court below, exhaustively wrote the story of the United Cigar Stores Company in the opinion which is in the Record (Vol. I, pp. 302-3). He found that neither in its organization nor in its operations was there anything offensive to the Sherman Act committed or attempted. In this opinion all four of the judges below concurred. They found that not only should

no injunction be issued against this defendant, but also that there was nothing in the Record to justify the granting of an injunction against the American Tobacco Company to restrain it from controlling this defendant, nor from interfering with it in its development, because there was no evidence of such control or interference.

Conduct Toward Manufacturers and Distributors.

Of course the United Cigar Stores Company has promoted the sale of the products of the American Tobacco Company. But this has not been the result of any contract, agreement or understanding. The tobacco business, as the Court has been told, is a business of brands. In different parts of the country different brands are in demand, different kinds and qualities of tobacco, different sizes of cigars. The taste of the community in different parts of the country and even in different sections of the same city differs materially. What the public wants in New England is a drug on the market in Texas. The taste of the public must be catered to. The consumer is the boss of the tobacco business, because tobacco is a luxury; and any concern that attempts to foist upon any community a kind of tobacco or a kind of cigars that that community does not demand, must inevitably go into bankruptcy.

Every manufacturer who was called as a witness in this case testified to that fact; and nothing in the Record is more firmly established.

Accordingly, this Company has promoted the sale not only of the goods of the American Tobacco Company, but of the goods manufactured by independent dealers everywhere—whatever the public taste in each locality demanded. Not one manufacturer called by the Government testified that this defendant refused to handle his goods, or to treat them fairly, or that it hindered him in any way

whatsoever. Not a single jobber called by the Government testified that this defendant refused to deal with him, or, in dealing with him, had refused to treat his goods fairly. There is not a line in the Record which even inferentially supports such a charge.

But the Assistant Attorney-General now says: "It is true that you do handle independent goods, but you do that because you think it wise to get the profit and hold the customer." Of course that is true. Few men go into the tobacco business or into any other business for the pleasure of the thing. Their primary purpose is to make money; and they handle the goods that the public wants, in order that they may make money.

Because a large percentage of the stores of the United Cigar Stores Company (viz.: 163 out of a total of 409) are located in New York City, and because, therefore, such a large percentage of the total volume of its business is in New York City, Mr. Hillman, an independent jobber of New York City, was called by the Government as a witness. He testified that he would not handle or deal in the goods manufactured by the American Tobacco Company and its associates—not because they would not sell their goods to him, but because he refused to handle their products, preferring to handle only goods manufactured by independent manufacturers. And then he testified, at Volume 3, page 499:

> "Q. Is the United Cigar Stores Company a customer of yours?
>
> "A. It can be so considered, yes; I think we sell them goods.
>
> "Q. Well, extensively, do you not?
>
> "A. Rather, yes, yes.
>
> "Q. These various goods that you have enumerated, the different brands of cigarettes and smoking tobaccos, quantities of

them are purchased from you by the United Cigar Stores Company?

"A. With a few exceptions, with a few goods—in a few cases they buy generally from us."

Mr. Hillman further testified (pp. 500, 602) that the United Cigar Stores Company purchased on credit from him between $60,000 and $70,000 worth of merchandise in each year, and that this did not include the purchases made by that company from him for spot cash, of which he kept no record; that the largest amount of business which his concern ever did in any one year was $325,000; so that this company alone purchased twenty-five per cent. of his total output.

Mr. Whelan, the president of the United Cigar Stores Company, was called by the Government at a witness. Of course his testimony is that of an interested witness, but it is absolutely uncontradicted. And this is what he testified to at Volume 3, page 115 of the Record:

"No one ever told me what goods to buy. Mr. Duke always told me to buy wherever I could buy the cheapest.

"Q. To buy your goods anywheres?

"A. Wherever we could buy the cheapest.

"Q. What have you done?

"A. That bas been our action.

"Q. You handle the goods manufactured by other manufacturers in your stores?

"A. We sell everyone's goods that has a demand.

* * * *

"Q. Now as far as pushing the goods of manufacturers other than the American Tobacco Co. and its allied companies, have the sales of the other manufacturers increased in your stores?

"A. Well, such goods as increased generally with other people showed a greater increase in our stores than they did in outside people's stores."

Both of the members of the firm of Schinasi Brothers, large independent cigarette manufacturers, were called as witnesses, not by the Government but by the American Tobacco Company. Solomon Schinasi testified, at Volume 4, page 665:

> "Q. Is the United Cigar Stores Co. a large customer of yours?
>
> "A. Next to the Metropolitan comes the United Cigar Stores as a retailer, certainly.
>
> * * * * * * *
>
> "Q. Have you had any reason to complaint, Mr. Schinasi, that the Metropolitan or the United Cigar Stores were treating your goods unfairly?
>
> "A. No. We never find out anything like that.
>
> "Q. The truth of the matter is retailers have to handle what the consumers call for, do they not?
>
> "A. I think so."

How can it be said that this company has been used to cripple other manufacturers and distributors of tobacco with a view of driving them out, destroying competition, and preventing others from entering, when the Record shows affirmatively that the United Cigar Stores Company is and always has been a large distributor of the goods mannfactured and dealt in by concerns in no way connected with the American Tobacco Company?

Mr. Justice Holmes: Do the United Cigar Stores Company's stores sell domestic cigars as well as imported Havana cigars?

Mr. Stroock: Certainly, sir.

Mr. Justice Holmes: I did not remember as to that.

Mr. Stroock: Certainly.

Conduct Toward Retailers.

We now come to the consideration of the third branch of this case; and that is the charge that this

Company has been used by the American Tobacco Company as an instrument to acquire a monopoly of the retail trade in tobacco products, to drive out of business other retailers, and to prevent others from entering the field. That is the charge.

Again we respectfully call the attention of the Court to the unanimous opinion of the Court below, to the effect that such charge is not only entirely without foundation and without any evidence whatsoever to sustain it, but the Record abounds with evidence showing quite the contrary. And I will read you a brief extract from the opinion of Judge Coxe on that point. It is found in Volume 1 of the Record, page 303-4:

> "The proof fails to establish unfair or unlawful methods in acquiring and conducting the business of the Cigar Stores * * * No special privileges are accorded by the Tobacco Company to the Cigar Stores Company over other purchasers. Their business is conducted in their own way, without dictation from the Tobacco Company."

The Assistant Attorney-General in his argument said:

> "Through the United Cigar Stores Company they are, one by one, displacing all the important cigar retailers throughout the important cities of the United States. The thing has grown almost like Jonah's gourd."

The Record shows that there are 600,000 places in the United States in which tobacco products are sold at retail. Of these, the United Cigar Stores Company owns and operates 409. It is significant that of all the 599,591 retailers in the United States, in no way connected with any of the defendants, not one testified that any unfair competition had been indulged in by this Company, or that, either alone or in combination with the other defendants, it had injured him in any way in his business.

One retailer was called. But before we examine his testimony, attention is called to certain pertinent facts shown by the Record. They are these:

1. That in New York City, where 163 stores of the United Cigar Stores Company are located, there are to-day more retailers actively engaged in business than there were before the United Cigar Stores Company came into the field.

2. Including the stores operated by its sub-companies, this company operates 409 out of 600,000 cigar stores and stands. So that during the time that it has been in business, and after the exercise of these tremendous influences with which it has been charged, it has managed to acquire one-sixth of one per cent. of the total number of cigar stores in the United States.

"But," says the Assistant Atorney-General, "it is true that the number of its stores is insignificant compared with the whole; but look at the volume of its sales! They are enormous."

Let us assume, for the purpose of argument, that a corporation or individual which succeeded in building up a large business—so large, indeed, that the volume of its sales is a large percentage of the total business—in some way offends the provisions of the Sherman Act. If we examine the Record in this case, we find that the perceutage of the retail business in the United States carried on by this Company is small indeed. According to the best computation available (see Main Brief of The American Tobacco Company, page 140), we find from the Record that in the year 1906 the total amount of the sales at retail of tobacco products in the United States, manufactured and produced by cigar and tobacco manufacturers (including not only the defendants bnt all manufacturers generally), was $565,000,000. The sales at retail by the

United Cigar Stores Company during the year 1907, were, at the time of the taking of the testimony in November, 1907, estimated to be $15,000,000. So that during the year 1907 the business of the United Cigar Stores Company amounted to about three per cent. of the whole retail business in tobacco products.

Based upon these figures, and assuming that the sales of tobacco will continue to be stationary, that every other retailer in the United States will be gradually driven out of business, and that the United Cigar Stores Company will alone remain, it will take about three centuries, if the United Cigar Stores Company continues the same vigorous efforts which the Government has charged, to acquire anything like a monopoly in the retail trade of tobacco products.

We come now to an examination of the testimony of the only retailer whom the Government called as a witness—Mr. Schulte.

It is true that Mr. Schulte on his direct-examination testified that the average dealer will be less successful, and that a great many dealers will be forced ont of business, if the general policy of this company is continued during the next five years. But upon cross-examination Mr. Schulte could not name a single retailer who had been forced to retire from business, or who had been injured. He conceded that he himself had been in the retail business for fifteen years; that he had prospered; that he had five stores when the United Cigar Stores Company commenced to operate in New York City, but at the time he was examined he had twelve, and that he was about to open a number of others, not only in New York but in other cities. And he testified (Vol. III, pp. 472-3).

"Q. Your business has been a very profitable one, hasn't it, Mr. Schulte?

"A. Yes.

* * * * * *

"Q. How about Mr. Lane; has he more stores to-day than he had five years ago in New York City?

"A. I think he has more stands. More places for the sale of cigars and cigarettes at retail.

"Q. How about Godfrey Mahn; has Godfrey Mahn more stores in New York City to-day than he had five years ago?

"A. Yes."

A time-worn misrepresentation concerning the Company is to the effect that it has leased locations in which competitors had carried on successful retail establishments, and thereby had forced the retirement of such competitors. Again, not a single witness testified that his location had been leased over his head, with the exception of Mr. Schulte. And he testified, in answer to the Assistant Attorney-General: "Yes; I have been driven out of two locations by the United Cigar Stores Company" (Vol. III, p. 465).

On cross-examination it developed that concerning both of these locations these were the facts:

The United Cigar Stores Company had gone in there originally and had established cigar stores in both of them—a business that had not been carried on before in either of those locations. The locations then obtained a good-will. Schulte, as a splendid successful competitive merchant, came along, bid higher rent (in one case increasing the rent from $9,500 to $16,500 a year) and got the leases away; and at the termination of his leases we got them back again (Vol. III, pp. 474-6). That is the only evidence in this entire Record of any retailer having a location taken away from him.

The Government further charges that this Company has bought out the business of a number of retailers, and in that way has forced their retirement. Again we refer to the Record.

Of the 409 stores operated by the United Cigar

Stores Company, almost every one was opened by it as a cigar store for the first time. Only a small number of these stores were purchased from other retailers; and of these, except in three or four instances, reference to which will be made in a moment, every one was at liberty to go right back into the retail business and in competition with this defendant—and the Record shows that most of them did. It further shows that they continued to be successful in that competition.

In the three or four instances in which this company bought out the business of other retailers, and took from them covenants for a limited period and for a limited territory not to engage in the retail cigar business, the man whose business was purchased not only entered into the employment of the company but became an active director and manager of its business in that particular territory; and, as the evidence shows, he shared in the general prosperity of the company.

The taking of this covenant was but an incident of the purchase of the good-will of the business, part of the sale of the business, and in no sense a device to control commerce. It was one of the conventional inducements of the purchase.

Conduct Toward the Consumer.

How has the public been affected by the operations of the United Cigar Stores Company? The Record does not suggest, even by inference, that the prices to the consumer were at any time raised, nor that the consumer was in any way hindered in procuring a supply of tobacco products. There is no suggestion of any agreement on prices—that is, with regard to the prices at which the goods should be bought by the United Cigar Stores Company, nor in regard to the prices at which they should be sold. There is no evidence in the Record of the cutting of prices to oppress other dealers. In fact,

every element of oppression is absent from the Record.

We submit that the tobacco business is such that no man nor any combination of men can monopolize or attempt to monopolize any part of it. The power inherent in all wealth is not sufficient for this purpose; and this is especially true of the retail business. The necessary or direct effect of any combination between the defendants was not to restrain commerce. The Record shows that no strangers to the combination were excluded from the trade; and it fails to show any attempt to exclude strangers. No means were adopted or used, or attempted to be used, which prevented or restrained others from engaging in the business. The Record fails to show that any effort was made to force a single retailer to sell out or to go out of business, or to interfere with any one in engaging or attempting to engage in business. Not only did the Government fail to produce one man whose business had been interfered with or injured, but it also failed to produce one man who had been driven out of business or prevented from entering it.

The Record shows that other retailers have profited by the example of this Company. They have kept their stores clean; they have dressed their windows attractively. They have given the public the goods which the public demanded; and as a result many of them have built up splendid businesses in competition with the Company. Their stores have come even to look like the stores of this Company and are often mistaken for them.

I submit that upon the Record, and upon the Record alone, the judgment of the Court below, so far as this defendant is concerned, should be affirmed.