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In the Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 116 118.

THE UNITED STATES OF AMERICA, APPELLANT, v. THE AMERICAN TOBACCO COMPANY AND OTHERS.

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ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

ORAL ARGUMENT OF THE ATTORNEY-GENERAL ON BEHALF OF THE UNITED STATES, IN REPLY TO DEFENDANTS.

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ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

ORAL ARGUMENT OF THE ATTORNEY-GENERAL ON BEHALF OF THE UNITED STATES, IN REPLY TO DEFENDANTS.

May it please the court: Prior to the year 1890 there were five concerns engaged in the business of manufacturing and selling cigarettes—a Virginia corporation, a North Carolina corporation, a New York corporation, and two partnerships. They were in active competition with each other. It was stated here in argument yesterday, and is shown in the record, that during the year 1889 one concern alone had expended upward of $800,000 in advertising. We are not left in any doubt as to the nature of the business which they were engaged in conducting; because, apart from the other evidence in the case, all of the defendants save the Imperial Company united in a stipulation of facts which your honors will find as Government's Exhibit 8, in volume 5 of the tran-

script of record. It was offered in evidence. The Imperial Company did not concur, but allowed it to be read, subject to any correction of any errors that might appear in the stipulation during the progress of the case.

On pages 2 and 3 of that stipulation, the nature of the business which these concerns were conducting was briefly and succinctly set forth; and it was that these five concerns—one in North Carolina, one in Virginia, one in New York City, one in Rochester, N. Y., and a partnership in New York City—were all "engaged in the manufacture of cigarettes and smoking tobaccos, in which each had established a successful business, and each, through its own agents, purchased its supplies where the requisite types grew, and advertised its products."

I read the next paragraph of the stipulation:

"That each of said concerns sold its products through its own traveling salesmen in States and countries other than those in which its said factory was located, by having said traveling salesmen take orders therefor, which, when approved, were filled by the goods being delivered to a common carrier where the factory was located, duly consigned to the purchaser, title passing to said purchaser on such delivery."

In the year 1890—the beginning of the year 1890—the dominant individuals in control of those five businesses, as the result of much negotiation, brought them together in one common holding, under the ægis of a New Jersey corporation organized for the purpose, and taking property with tangible assets of the value of about $3,500,000, capitalized the aggregate businesses at $25,000,000, distributed preferred and common stocks pro rata to those interested in the constituent concerns, and conveyed to this New Jersey corporation all the property and businesses of these concerns, thereby immediately, as appears by the evidence, acquiring 96 per cent of the entire business of the United States in cigarettes, and a considerable portion of the business in smoking tobacco. When the Sherman Anti-trust Act of 1890 was passed it found this combination, with those who had formed it and who controlled it and were then operating it, combined and conspired to effectuate what they had begun—the complete monopoly of the cigarette business of the United States of America.

From this comparatively small beginning, which my friend, Mr. Nicoll, says was a "simple, typical case" (and I accept his description, because it is accurate)—such simple, typical cases being repeated again and again during a period of almost twenty years—you have now before the bar of this court a combination which controls 80 per cent of the entire production of the United States in little cigars, 74 per cent of cigarettes, 70 per cent of smoking tobacco, 87 per cent

of plug and twist tobacco, 80 per cent of fine cut, 95 per cent of snuff, and about 14½ per cent of cigars; besides 95 per cent of the entire business of the United States in the manufacture of licorice paste, an indispensable ingredient in the manufacture of certain classes of the products of tobacco; and you have also a control over such incidental products, almost equally essential, as tin foil, boxes, containers, holders, etc., and you have a control, through the ownership of two-thirds of the capital stock, of the entire export business, substantially the entire export business in tobacco products from the United States to countries other than the government monopoly countries and Great Britain, in the hands of a corporation organized for the purpose under contracts made in Great Britain.

Moreover, this combination during the year 1907 purchased about 45 per cent of the entire crop of leaf tobacco grown in the United States of all kinds, and of certain types, such as the flue-cured tobacco of Virginia, North Carolina, and South Carolina, it purchased nearly 60 per cent of the whole amount produced, of burley tobacco, nearly 72 per cent of the whole amount produced, and of sun-cured tobacco about 90 per cent of the amount produced.

The statement of the growth of this combination is perhaps as well set forth in the answer of most of the defendants themselves, printed in the first volume of the record at page 259, as in any other place. It is there said:

"The American Tobacco Company has been a successful and growing corporation engaged in the tobacco business; its officers and employees have been practical tobacco men; investors in its securities have had confidence in its management. These officers and employees have kept in touch with the tobacco trade and have given study to the tobacco business; they have made investments of the money of the security holders of the company from time to time in tobacco brands, not with a view of lessening the competition against the brands already in existence, and not with a view of monopolizing the business, but because the tobacco business was the business in which they were engaged, the business which they were best capable of running, and the business of whose value they were best able to form a judgment when about to make an investment"——

They go on with a description, setting forth the essential facts, and putting upon them the color which from their standpoint would naturally be expected.

The total income of this combination for the year 1907 was $36,000,000. So that you have before this court now one of the greatest combinations of capital; one of the greatest aggregations dominating a great industry of the country that has ever been brought to the bar of this court under the Sherman Act.

A question for this court to consider, and which I approach with all the seriousness which the subject demands, is whether such a

combination can be maintained in the face of the express prohibition in the act of Congress, or whether that act of Congress is competent to reach and to control and to split up that monopoly.

Judge Coxe, in the court below, in his opinion described this combination in the following language:

"The Tobacco trust, so called, consists of over 60 corporations, which, since January, 1890, have been united into a gigantic combination which controls a greatly preponderating proportion of the tobacco business in the United States in each and all its branches, in some branches the volume being as high as 95 per cent. Prior to their absorption many of these corporations have been active competitors in interstate and foreign commerce. They competed in purchasing raw materials, in manufacturing, in jobbing, and in selling to the consumer. To-day those plants which have not been closed are, with one or two exceptions, under the absolute domination of the supreme central authority. Everything directly or indirectly connected with the manufacture and sale of tobacco products, including the ingredients, the packages, the bags, and boxes, are largely controlled by it. Should a party with a moderate capital desire to enter the field it would be difficult to do so against the opposition of this combination. That many of the associated corporations were not coerced into joining the combination but entered of their own volition is quite true, but in many other instances it is evident that if not actually compelled to join they preferred to do so rather than face an unequal trade war in which the odds were all against them and in which success could only be achieved by a ruinous expenditure of time and money. * * * Since 1900 this vast interstate and foreign trade, which was formerly carried on by this large number of competing companies and individuals, is now carried on by one combination. The free interchange of commerce has been interfered with, hampered, diverted, and in some instances destroyed. Though it may be greater in volume, it does not flow through the old channels; it is not free and unrestrained."

Judge Noyes in his opinion makes a statement which is an equally striking deduction from the evidence in the case. He says, at page 316 of Volume I of the record:

"The hold of the defendants upon the tobacco industry of the country has steadily increased since the formation of the combination. There is only one branch of the industry which they do not have within their grasp—the cigar branch; but their predominating interest in all of the other branches is not lessened by the fact that they have not, as yet, obtained control of this branch."

And again:

"Subject to the economic limit that prices can not be fixed so low as to deprive the grower of inducement to raise future crops, the extent of the defendants' purchases of tobacco leaf necessarily gives them large power to fix the prices to be paid for the types which they require. Prices may be regulated, as the defendants assert, by the

law of supply and demand, but the difficulty here is that the demand for many types comes, practically, from only one source. To whom, for example, can the growers of Burley or Virginia sun-cured tobacco sell their crops if they refuse the prices offered by the defendants?

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

"Moreover, the defendants possess an even greater power over the prices of raw materials and finished products than the statistics which we have noted indicate. It is apparent from the record that they are the dominating factors in the tobacco industry. Other producers are scattered and do not act together. They are not in a position to initiate price making. They must follow the action of the defendants."

Now, the defendants challenge the accuracy of these statements, and deny the justice of the decree rendered. The court below, as has been pointed out, adjudged that the American Tobacco Company and its principal subsidiary companies, those controlling these great lines of separate tobacco product industries, such as snuff and chewing tobacco and plug and twist, and licorice paste, were each of them, in and of itself, combinations in restraint of trade, and it enjoined them from participating in interstate commerce until they should restore reasonable competitive conditions. It, moreover, enjoined the American Tobacco Company from the beneficial ownership of, or from participating in, the control of the great mass of corporations whose stocks it had acquired in the manner set forth in the bill.

The defendants challenge the accuracy of that decree, or the justice of those characterizations upon substantially these grounds, as I understand them: They say first that the business which is complained of here was not interstate commerce, and on that point they plant themselves on the Knight case; and they say that they have not and do not constitute a monopoly. The court below did not adjudge that they were within the second section of the act. The court below chose to put its judgment exclusively upon the provisions of the first section of the Sherman Act; and finding them to be severally combinations in restraint of trade, said it was not necessary to consider the full effect of the second section and to adjudge the defendants guilty of monopolizing or attempting to monopolize interstate commerce. The defendants say that what they have done has been simply to purchase property from time to time, protecting themselves by restrictive covenants such as this court and other courts have held to be entirely proper to secure to themselves the beneficial effects of that

which they paid for; and that, buttressed by the laws of the States under which they have been organized and under whose laws they have acquired title to this property, they can defy the federal law; because they are not, within the purview of the things of which complaint is made, conducting interstate commerce.

Therefore the first consideration is whether the facts alleged and proved here show that these defendants were or were not engaged in interstate commerce with respect to those things which are embraced in the petition, and which were the subject of the decree below.

On that point we are again not left to conjecture, because in the same stipulation to which I referred a few moments ago, Government's Exhibit 8, at page 31 of the fifth volume of the record is the following stipulation:

"We admit that all the vendors and corporation defendants mentioned in the petition as engaged in the manufacture and sale of tobacco products"——

And that is practically all of them——

"Except Imperial Tobacco Company (Limited), purchased or now purchases some or all of the requisite raw material in States or countries other than those in which the factories were or are located, and had or has it transported thence through the medium of common carriers to said factories, and employed or employ traveling salesmen who solicited or solicit in States or countries other than those in which the factory was or is located, orders for the tobacco products which by them were or are transmitted to said factory or other chief office of the manufacturer, and, if approved, they are filled by the delivery of the goods to a common carrier where the factory was or is located, duly consigned to the purchaser, title passing to said purchaser on said delivery to the common carrier."

My learned friends on the other side ascribe great weight to the clause in the stipulation to the effect that the title to the goods, orders for which are solicited in this way in foreign States and countries, for the sale of the manufactured products of tobacco brought from 20 different States to 20 other different States, passed to the purchaser on delivery to the carrier at the particular place of manufacture, to sustain the contention that they are not within the field of interstate commerce.

On this point Judge Coxe in the court below made this pertinent observation. He says:

"It may be true that there are individual members of this combination not engaged in interstate commerce—manufacturing companies merely—and, therefore, not engaged in commerce within the rule enunciated in United States *v.* E. C. Knight Company (156 U. S., 1). But here the complaint is made, not against the individual conspirators separately, but against the combination as a whole. Has it monopolized or restrained any part of interstate or foreign

commerce? If so, it would seem that it is liable under the act. To illustrate: A is a manufacturer of tobacco in New York; B is a buyer of raw material in Kentucky; C is a jobber in Pennsylvania; and D is a retailer in Boston. B sends the leaf tobacco from Louisville to New York. A manufactures it into smoking and chewing tobacco, and sends it to C at Philadelphia, who in turn ships it to D at Boston, who sells it to the public. Should A, B, C, and D enter into a copartnership to do as a firm what they have hitherto done as individuals, can there be a doubt that the firm would be engaged in interstate commerce."

Judge Coxe then referred to the admission which I have just read to your honors in the stipulation, and said:

"If the contention of the defendants, that this does not constitute interstate commerce be correct, then it would seem to follow that no one can be engaged in such commerce unless he be a carrier, common or private, between the States * * *. In other words, although the so-called 'Tobacco trust' is buying raw material and selling its completed products in the markets of the world, it is not engaged in 'trade or commerce among the several States or with foreign nations,' because carriers are employed to convey the goods from State to State and to foreign countries. I can not but think that this is too narrow a construction * * * ."

Judge Noyes, in the court below, after rehearsing the facts, said:

"They clearly show traffic between citizens of different States and the purchase, sale, and exchange of commodities across state lines to show that the defendants are directly engaged in commerce among the States and the subject to the federal antitrust statute. * * * A point is made that this combination did not engage in interstate commerce in respect of sales made by traveling salesmen, because the title to the goods sold passed to the consignee when delivery was made to the common carrier in the place of manufacture. But the defendants engaged in interstate commerce when they sent their salesmen into different States and accepted and filled the orders obtained."

This selling business is a little more fully described by Mr. Hill, vice-president of the American Tobacco Company, in the testimony in the second volume of the record. At page 103, in the first place, Mr. Yuille says that they have a committee, and that the execution of what they conclude to do in the southern field in the purchase of leaf is intrusted to him, and that he is a member of the committee. He says:

"We give our buyers an idea of about what average we want to pay for a certain grade of tobacco. We instruct them to buy a certain grade of tobacco at about an average price;"

and that the American Tobacco Company has a representative purchasing tobacco in substantially every tobacco market in the United States.

Mr. Hill says, at page 204, that there are four selling departments, in charge of two men, who, in their turn, have their salesmen under

them. He is speaking now of the general selling of everything but plug tobacco and its product. He says, at page 203:

"The four departments are Duke's Mixture department, the long-cut and little cigar department, the plug-cut department, and the cigarette department. And each one of these is in charge of two men, one of whom is supposed to be in New York constantly and the other out among the salesmen, alternating their positions from time to time, and these two men formulate schemes and plans and devise methods of advertising the different brands and employ salesmen to look after the products under their control throughout the country.

"Q. Have these men under them salaried agents who are either traveling or stationed in all the cities or States of the Union?

"A. Well, for instance, you take the long cut and the little cigar department, they would not have men in all the States of the Union, for the reason that that class of goods is not sold in every State.

"Q. But in most of them I presume it is?

"A. The country is scattered over with salesmen representing either one or more of these departments.

"Q. In every State or important locality?

"A. Yes, sir.

"Q. And you either have salaried agents or men traveling in all these places?

"A. Yes, sir; the men in the ordinary course of business solicit orders and secure orders and send them in for the goods.

"Q. And do those orders come to your department?

"A. They come to those departments I have mentioned, but not directly to me."

Mr. Dula, the vice-president in charge of the plug business, testified in the same volume, at page 465. He was asked how many men there were in his plug department, directly employed by the American Tobacco Company, and he said that they nsually ran from 250 to 330 or 340.

"Q. And those men are scattered about through the different States of the Union doing the character of business about which you have told us?

"A. Yes.

"Q. What, generally speaking, is your method of distributing your plug tobacco? Do you go directly to the retailer or do you distribute it to the wholesaler?

"A. Our policy is to sell through the wholesaler, but there are exceptions. In some places we sell the retail trade direct because there are so few jobbers to distribute it.

"Q. Have you a uniform price for the sale of your plug products throughout the United States?

"A. We have, excepting a divisional line between the West, where the freight is so much higher; we add more out there.

"Q. Do you sell these goods at the same price, excluding for the present this freight consideration, to all parties, to all the jobbers to whom you sell at all, in all the States of the Union?

"A. We have a different discount. Our general discount on plug at the present and for some time has been 7 per cent from the face

of the bill, but in the New England States it has been 8 per cent from the face of the bill and 2 per cent for cash. That 2 per cent for cash applies everywhere.

"Q. Is it your rule to bill these goods freight paid up to the point of destination?

"A. Yes, sir.

"Q. Where are they shipped from?

"A. They are usually shipped from the factory where they are made.

"Q. These men in the field who are taking orders send them to the jobbers, or the jobbers otherwise obtain them and then the orders for the goods are sent in to your department at 111 Fifth avenue, New York, are they not?

"A. Not these particular orders; but the jobbers send their orders in to us for goods.

"Q. That is what I mean. The jobbers send their orders to 111 Fifth avenue, and then the goods, through the department at the general office, are ordered shipped out from wherever they happen to be manufactured?

"A. Orders are issued on the factory where they are made usually.

"Q. And those factories are located at perhaps a dozen places throughout the United States?

"A. There are several places."

Without entering into an enumeration of all the authorities which are recited in the respective briefs bearing upon the definition of what constitutes interstate commerce, which Mr. Justice Peckham (in the Hopkins case, 171 U. S. 578–597) said was a definition not easily given so that it would clearly define the full meaning of the term; it is sufficient to point out, as Mr. Justice Holmes said in the Swift case (196 U. S. 375, 398), that—

"Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business."

The case of United States *v.* E. C. Knight Company (156 U. S. 1) is the great bulwark of the defendants, under which they, in effect make their last stand.

Mr. Johnson's first point was that this case is ruled by the Knight case, which he characterized as "the bulwark of state control of state matters."

Therefore it becomes necessary to enter upon a rather nice analysis of the Knight case, to see how far, if at all, it does apply to this controversy.

The petition filed in that case attacked certain contracts made by one Searles on behalf of the American Sugar Refining Company for the purchase of four separate refineries in the city of Philadelphia. It is almost an impertinence to rehearse to this court the facts or the doctrine of that case; but the fact is that the scope of that bill was so narrow, and the averment of facts restricted to such a small compass, that it presented, as the majority of the court found, simply

this question: Whether or not, under the Sherman Act, the Government could maintain a bill for a rescission of contracts of sale and purchase of four manufactories in the city of Philadelphia, because by the acquisition of those manufactories the purchaser secured 96 per cent of all the manufactories of sugar in the United States. Judge Butler, in dismissing the bill in the circuit court, said:

"The contracts and acts of defendants relate exclusively to the acquisition of sugar refineries and the business of sugar refining in Pennsylvania. They have no reference to and bear no relation to commerce between the States or with foreign nations * * *. It is the stream of commerce flowing across the States and between them and foreign nations that Congress is authorized to regulate. To prevent direct interference with or disturbance of this flow was the power granted to the Federal Government."

Upon this finding of fact, the bill was dismissed, and on appeal a majority of this court approved of the action of the trial judge, and treating the whole question to be whether, conceding that the execution of these contracts, and the conveyance to the American Sugar Refining Company pursuant thereto of the four refineries embraced therein, would give the sugar company a monopoly in manufacture, held, that such monopoly could not be directly suppressed under the act of Congress, in the mode attempted by the bill; because, while the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, this is a secondary, and not the primary, sense, for although the exercise of that power might result in bringing the operation of commerce into play, it did not control it, and affected it only incidentally and indirectly.

"There was nothing in the proofs," said the Chief Justice, in writing the opinion of the court, "to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be directly affected was not enough to entitle complainants to a decree. The subject-matter of the sale was shares of manufacturing stock, and the relief sought was the surrender of property which had already passed, and the suppression of the alleged monopoly in manufacture by the restoration of the *status quo* before the transfers; * * *" (156 U. S. at p. 17.)

The decision in that case, as is seen, turned upon a pure question of fact. Of course, a decision upon a question of fact binds neither the court nor anyone else in any subsequent case arising out of different facts. *The proposition of law involved* was that the States were left by the Constitution to the exercise by them of their police power over persons and property within their borders, while the Constitution gave to Congress the exclusive power to regulate commerce among the States. The Chief Justice drew the distinction very carefully.

"The regulation of commerce," he said,

"applies to the subjects of commerce and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce.

"There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be directly affected was not enough to entitle complainants to a decree."

That was the pith of the whole decision; and on the findings of fact, assuming the correctness of these findings of fact, no other conclusion could have been reached.

Mr. Justice Harlan dissented, drawing a different inference from the same facts. His inference was that a broader conclusion was required and that the acts of the defendants should be regarded as indicating a distinct intention to monopolize interstate trade and commerce in sugar. That view of the Knight case has been taken wherever it is spoken of in any of the subsequent decisions of this court.

Thus, Mr. Justice Peckham, in the very next case that came up, the Trans-Missouri case (166 U. S., 290), said:

"We have held that the trust act did not apply to a company engaged in one State in the refining of sugar under the circumstances detailed in the case of United States *v.* E. C. Knight Company (154 U. S., 1), because the refining of sugar under those circumstances bore no distinct relation to commerce between the States or with foreign nations."

And in the Addyston Pipe case (175 U. S., 211, 240), the same justice said:

"The direct purpose of the combination in the Knight case was the control of the manufacture of sugar. There was no combination or agreement, in terms, regarding the future disposition of the manufactured article; nothing looking to a transaction in the nature of interstate commerce. The probable intention on the part of the manufacturer of the sugar"——

did not supply that needed proof.

In the Northern Securities case (193 U. S., 197), Mr. Justice Harlan, writing the prevailing opinion, said of the Knight case:

"That the agreement or arrangement there involved had reference only to the manufacture or production of sugar by those engaged in the alleged combination, but if it had directly embraced interstate or international commerce it would then have been covered by the antitrust act and would have been illegal."

And Mr. Justice White, in his dissenting opinion, referred to it in this language:

"Take the Knight case; there, as the contract merely concerned the purchase of the stock in the refineries, and contained no condition relating to the movement in interstate commerce of the goods to be manufactured by the refining companies, the court held, as the right to acquire was not within the commerce clause, the fact that the owners of the manufactured product might thereafter so act concerning the product as to burden commerce there was no direct burden resulting from the mere acquisition and ownership."

In the Swift case (196 U. S., 375) Mr. Justice Holmes referred to the Knight case and said that the case at bar was not like the Knight case—

"where the subject-matter of the combination was manufacture and the direct object, monopoly of manufacture within a State. However likely monopoly of commerce among the States in the article manufactured was to follow from the agreement, it was not a necessary consequence nor a primary end. Here the subject-matter is sales, and the very point of the combination is to restrain and monopolize commerce among the States in respect of such sales."

In Loewe *v.* Lawler (208 U. S., 274) this court said:

"We do not pause to comment on the cases such as United States *v.* Knight" [and two or three others] "in which the undisputed facts showed that the purpose of the agreement was not to obstruct or restrain interstate commerce."

The nearest case that I know of in the books, in its facts, to the Knight case, is the decision of the circuit court of appeals in the sixth circuit, in which his honor Mr. Justice Lurton wrote one of the opinions—the case of Bigelow *v.* Calumet and Hecla Mining Co. (167 Fed. R., 721). There suit was brought by a stockholder of a mining company of Michigan to restrain another mining company of the same State from voting on the stock of the first-mentioned company held by the second, and by a separate bill to question the legality of a purchase by the defendant mining company of additional copper-producing lands in Michigan, claiming that the purchase of the stock and lands was void as a restraint of trade and an attempt to monopolize, contrary to the antitrust law. The bill was dismissed at circuit, and that action was affirmed in the circuit court of appeals, upon the ground that the acquisition challenged in each case was not interstate commerce, and did not directly, immediately, or necessarily operate as a restraint of commerce among the States.

"The Knight case, in its last analysis," said Judge Lurton in writing the opinion of the court, "is but a striking illustration of the rule that the monopoly or agreement to come within the act must directly and immediately affect interstate commerce. Confining the case to its facts, it establishes the proposition that a mere combination between manufacturers only, by which a monopoly of product results,

is not, without other special circumstances, sufficient to justify an active intervention under the act to undo a contract by which such monopoly has been brought about. That the product thus monopolized by such combination of mere manufacturers may ultimately find itself into the stream of interstate commerce is there held not to be such a special circumstance as to constitute the direct and immediate effect upon commerce among the States as to bring the agreement within the act."

The court reviewed the facts in the case, and said:

"When all is said that the facts justify, the acquisition of the voting power of a majority of the capital shares of the Oceola Consolidated Mining Company and its proposed exercise by the selection of a board, a majority of which to be composed of the members of the board of the Calumet and Hecla Company, is the main fact upon which the complainant must invoke the prohibition of the act of Congress. That fact is not enough. That the two companies are in a sense competitors, and that the product of their mines will ultimately go into interstate commerce, is far from making out a case of direct or necessary and immediate interference with that kind of commerce. They do not show that even a monopoly of the product will ever probably ensue, to say nothing of the utter absence of any material evidence indicating that such a monopoly in the product of two contiguous mining companies would directly or necessarily affect commerce among the States. No express matter is shown by which anything is to be done or left undone from which an unlawful restraint must, or will, probably happen."

After pointing out that the power of stock control which the defendant had acquired was not enough to bring the case within the act, he added:

"On the other hand, that power may be a mere preparation for the doing of acts which will directly and necessarily interfere with the freedom of that kind of commerce which it is the purpose of Congress to protect. When this unlawful use of the power shall result in an unlawful restraint, or further steps shall point to results directly affecting such commerce, there may be interference by the courts."

Now, in the Knight case, Chief Justice Fuller said:

"The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed or whenever the transaction is itself a monopoly of commerce."

In the Northern Securities case, the court said (at pages 337–342, 352):

"The strong arm of the National Government may be put forth to brush away all obstructions to the freedom of interstate commerce. * * * The means employed in respect of the combinations forbidden by the antitrust act, and which Congress deemed germane to the end to be accomplished, was to prescribe as a rule for

interstate and international commerce that it should not be vexed by * * * monopolies which restrain commerce by destroying or restricting competition * * * and all, we take it, will agree, as established firmly by the decisions of this court, that the power of Congress over commerce extends * * * to every device that may be employed to interfere with the freedom of commerce. * * * We need only say that Congress has authority to declare and by the language of its act, as interpreted in prior cases, has in effect declared that the freedom of interstate and international commerce shall not be obstructed or disturbed."

In subsequent cases care was taken to point out that the act was violated and commerce would be treated as restrained wherever a combination was found to exist which had *the power* to suppress competition and restrain trade.

In the Northern Securities case, among the propositions which Justice Harlan, in the prevailing opinion, states could be plainly deduced from the former decisions of the court, was this:

"That to vitiate a combination, such as the act of Congress condemns, it need not he shown that the combination, in fact, results or will result in a total suppression of trade or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition." (p. 332.)

It was the power of the combination to restrain trade and stifle competition which led to its condemnation in the Northern Securities case. In the Harriman case (197 U. S. 244), the chief justice said, with respect to that Northern Securities case:

"Some of our number thought that as the Securities Company owned the stock the relief sought could not be granted, but the conclusion was that the possession of the power, which, if exercised, would prevent competition, brought the case within the statute, no matter what the tenure of title was."

In like manner, the fact that the defendants have been permitted to consolidate or merge corporations under state laws has no bearing whatever, and can not be erected as a barrier against the power of the National Government under the act of Congress to say that they shall not use that tenure of title for the purpose of maintaining or creating a restraint of trade. Their tenure is not challenged. The validity of their incorporation, of their consolidation, of their merger, is not questioned. The ownership of their property is not sought to be interfered with; but the Government says that by these things, valid in themselves, they have created a combination amounting to a monopoly, which interferes with the free and unrestrained course of commerce among the States or with foreign countries, and that it must be stopped.

The real question, as was said by the chief justice in the Knight case, is, therefore, whether or not the contract or combination attacked tends to deprive the public of the advantages which flow from free competition; for, it makes no difference, as has been decided by this court, how the obstruction is created, or what the nature of the obstruction is—whether it be, as Attorney General Knox said in the Northern Securities case, "a mob, a sand bar, or a monopoly." In whatever form it arises; when your honors find an obstruction to the free flow of commerce and trade among the States, whether in the nature of a contract, combination, conspiracy, or monopoly, it is the duty of the court to strike it down.

The conclusion reached in Loewe v. Lawlor, —— the Danbury Hat case, was put by the chief justice upon "many judgments of this court to the effect that the act prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the States, or restricts, in that regard, the liberty of a trader to engage in business."

What the Government attacks, and what the court below decreed to be illegal in the case at bar, was not the mere acquisition by one manufacturing company of other manufactories within a State; but it is a combination, composed of sixty-odd separate corporate entities, and a great number of individuals, spreading its tentacles to the remote parts of the United States and its possessions, and into foreign countries; purchasing raw material in a dozen States, shipping that material into other States where it is made up into various commercial products which are then sent for distribution to different distributing agencies in various States, pursuant to orders obtained by its many agents in every State and Territory of the Union. It is the control of *this* business; the domination of trade and commerce in the products of tobacco amounting to millions of dollars in value and to enormous proportions of the entire commerce of the country in such articles, which gives to this combination the absolute control of the business, and a power, which may be exercised or not at the will of those in control of the combination, which constitutes a restraint of commerce among the States, and demonstrates the fact that the defendants are monopolizing or attempting to monopolize the entire trade and commerce of the United States between the States and with various countries in tobacco and its manufactured products.

Take, for example, as instances of the way in which this combination actually does operate, two letters in Volume II of the record. At page 256 there is a letter addressed by Vice-President Hill of the American Tobacco Company to a Mr. Cobb, who was the president of the American Cigar Company:

"My Dear Mr. Cobb: At Mr. Duke's suggestion"——

Mr. Duke was the president. Mr. Duke is the great guiding intelligence of the whole combination. He was touchingly referred to yesterday as a second Warren Hastings, because, like Warren Hastings, he is amazed at his own moderation, when he thinks of the extent of his power, and what he really might have done.

Now, what is Mr. Duke's suggestion?

"At Mr. Duke's suggestion I write you to the effect that a plan has about been decided upon which differs from the one that was being considered before you left, and, as in carrying out this plan it will be undesirable to give control of any brands to individuals in any part of the country, Mr. Duke requests me to write you explaining it, so that in case any of our customers go to Habana you will not promise them control of any special brand. Mr. Rothschild, of the Waldorf-Astoria, will go to Habana to-morrow, Saturday, and we understand he will try to make arrangements to secure other Habana cigars than ours."

Rash Mr. Rothschild!

"Mr. Duke's idea is to make a confidential arrangement with the Messrs. Park & Tilford and Acker Merrall & Condit by which they will sell Habana cigars both to the consumer and the retailer at present cost, so that the retailer will be paying exactly the same price as the consumer. Of course, it will be necessary to keep this matter entirely confidential. The result will be a demoralization of the business for such length of time as may be deemed desirable to continue on this basis."

This is another one of these "typical transactions."

"The final upshot will be that the importers will be forced into an arrangement by which they will maintain prices agreed upon. This plan is considered the more desirable at this time for the reason that if we try to regulate the profit at the present time it would mean an advance in our goods to both wholesaler and retailer, which would give a decided advantage to independent factories in securing business, but we feel that when our goods are sold to the consumer at present cost there will be no opportunity to get much business for independent factories. Mr. Duke expects to have an interview with Messrs. Park & Tilford to-day to ascertain if this plan will be carried out by them. Will you kindly extend my regards to Mrs. Cobb and your daughter, and remember me to all of our folks in Habana, and, with sincere regards for yourself, believe me,

"Yours, very truly, Percival S. Hill."

Now, one other letter from Mr. Dula, which will be found at page 549. He is another of these vice-presidents, these inconsiderate people arising sometimes to the dignity of vice-presidents, to whom one of counsel referred in his opening.

At Page 549 of the record Mr. Dula writes to "Dear Middleton." "Dear Middleton" was in charge of one of their enterprises.

"Dear Middleton: I notice from the reports of our salesmen in Kentucky that both 'Index' and 'Dipper' are making some head-

way in the 'Star' or sweet goods sections, which is due, I think, to the fact that the jobbers are charging a pretty high price for 'Star,' while the manufacturers of the two brands named are offering very liberal inducements to the retailers to push their brands. There is a wide difference therefore in the cost to the retailer between 'Star' and the other brands which doubtless is causing them to discriminate in favor of the opposition. It has occurred to me that it would be well for you to put on an extraordinary deal on 'Uncle Sam' in Kentucky and put two or three good salesmen out after the business. I understand 'Dipper' is sold with a gratis of 2 pounds free in 12 pounds, and if you go in to make a fight I think you should do at least as well. I know your feeling about making money, but should you enter into a campaign of this kind and thereby somewhat reduce your profits the cause will be well known at this end of the line and there could not possibly be any criticism. Anyway, I would be willing to bear the brunt of that. As you know, we are making a pretty vigorous campaign both on plug and 'Scrapno' in the scrap territory, viz, Michigan, Indiana, Ohio, and Pennsylvania"——

These local manufacturing concerns, which come within the four corners of the Knight case——

"and the results thus far obtained are very gratifying. Just recently Scotten has become very active on 'Yankee Girl' plug 3 by 12, 20 ounces, 4 space, which he sells at 26 cents per pound, less 10 per cent and 2 per cent, with varying deals. This brand seems to be doing very well, and I think is helping our fight against scrap tobacco. While I am glad to have help in the fight against scrap, I would very much prefer to see the result of that help going to brands in which we have a larger interest than we have in Scotten's, and therefore I would suggest that you consider getting out a similar piece of tobacco and jump into the fight just a little bit stronger than Scotten is doing."

There is some more of that. Those are read simply for the purpose of illustrating the methods adopted by the defendants and the means which are open to them to carry them out on a large scale.

Now, in my view, the whole argument of the defendants is based upon a misinterpretation of the evidence in the case. It gives to that evidence a construction which is not warranted. It seeks to confine the controversy to a consideration of the purchase of the property of one manufacturing company by another. It argues, what is not disputed, that under the laws of the different States referred to, power is given for the formation of corporations for the purposes of manufacture, to acquire property, and to consolidate and merge corporations. All of this is perfectly true, but it does not answer the case made by the Government upon the evidence presented. What the Government points to is a combination effecting its purpose under a variety of forms, reaching out and controlling the entire trade and commerce in tobacco throughout the United States, and effecting this control by divers and sundry methods, all shrewdly

selected as appropriate to the main purpose, which, despite disclaimer, eloquently proclaims itself throughout the entire history of this great combination—namely, to secure a monopoly of the tobacco business in the United States and between the United States and foreign countries.

The five concerns which were organized in 1890 were admittedly in competition. I say "admitfedly" because the *facts* are admitted, and the conclusion is irresistible that they were in competition, with each other, in interstate and foreign commerce. When they were combined they were an unlawful combination. The Sherman Act came into existence and found that unlawful combination. That combination has been extending from that time on, acquiring first one and then another competing business; reaching out its control, ever widening, widening, widening its sphere of operations, until it has secured absolute control of this enormous industry.

What have they done? They cite cases supporting, as the cases undoubtedly do support, the perfect legality of selling property with a covenant by the vender not to destroy the value of the property which he sells; but they have bought companies when they have not taken a covenant from the vender at all. They take an extreme covenant from every member of the board of directors, and from the principal stockholders besides. This record shows a systematic tendency, a repeated system of acquiring competitors, buying their properties, buying their stock, buying anything that they can get in order to secure their control.

The fact of the acquisition of control is admitted, and the motive alone is denied. Let us see about the motive. It speaks for itself eloquently. Take, as an example, two pieces of evidences in volume II, at page 316:

"'DEAR MR. HILL'"——

This was Mr. Hill, the vice-president——

"'DEAR MR. HILL: Your favor of the 16th instant recd., with inclosure, which I return herewith. I have just returned from a little western trip looking after our tobacco interests. We have put our forces to work in St. Louis again and think we can get some more of the business of "Orphan Boy." I am sending you a list of jobbers who must be made to feel, in some proper way, that it is not offensive to you to handle M. Q. You will know best how to do this.'"

If he did not, nobody did!

"'When you see Mr. Neudecker of Baltimore, please explain to him not to make the impression upon his trade that the R. T. Co.'"——

That is, the Reynolds Tobacco Company——

"'belongs to the trust.

"'Yours very truly, B. L. DULANEY.'"

Now, that is Mr. Hill.

Again, at page 319. This is a longer letter, a letter addressed to Mr. Hill by Mr. B. L. Dulaney, from Bristol, Tenn.:

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

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

There never was a better description on earth of the plight of these so-called controlled companies, full and complete evidence of which you will find in this record, that they were in the plight of prisoners in chains, with mock instructions to do the impossible. That is the competition they were instructed to carry out.

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

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

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

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

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

"In the West we have fought your battles as well as our own in appreciation of the 2-cent bonus you give us, fully believing that you appreciated and understood that in such a fight we could not expect to come out even.

"Now, as to the new brand, 'Union Lad.' Everything in connection with it has been done under your direction, even to the matter of furnishing us $500 second-hand machinery at $2,500.

"I don't want to think you are trifling with us, and yet I can not understand why you verbally order something done, and when it is done then write to know why it was done.

"Now, Mr. Hill, let us deal frankly with each other; and if it is your intention to put our company out of business, let us do so amicably and save every dollar possible to the stockholders.

"But if you want us to go on and succeed, break the shackles and give us a fair show, for the young men in charge are faithful and competent and will succeed if you will let them.

"Yours very truly,

"B. L. DULANEY."

I do not care whether Mr. Dulaney's complaint was true or not. I do not care whether what he said was true or not. I read it not as proof of the fact, but as proof by illustration of the power in the hands of this combination, and of the method by which they might exercise that power. I say if they did not exercise it it was only because, like that Warren Hastings, of whom Mr. Johnson says Mr. Duke is an example, they were amazing themselves with their own moderation.

Now, let us take up the question of the purchase of raw materials. Something has been said about that, and perhaps a word on that subject will illustrate the situation, and then it will not be necessary to spend any more time in this oral argument in a description of the methods pursued by the defendants.

At page 131 of the Government's brief there are printed some facts on that subject. In the answer of the defendants they say:

"The presence or absence of any given amount of competition in the purchase of leaf tobacco can have no permanent effect on the prices paid for such leaf tobacco. If there were an absolute monopoly in the purchase of leaf tobacco, a fair price would have to be paid or the land would go into these other crops; and if by many competitors bidding for leaf tobacco or otherwise, more than a fair price should be paid, there would result the growth of an oversupply of tobacco, which oversupply could only be stopped by a reduction in the price. Therefore, the American Tobacco Company has never had the slightest interest in eliminating competition in the purchase of leaf tobacco, and in those cases where it has bought for other manufacturers, or had other manufacturers buy for it, it has been actuated only by a desire to make more efficient and economical the organization for buying, and not at all the withdrawal of competition."

That is the position taken in their answer. And what are the facts shown in evidence?

Mr. Yuille (volume II, record page 103), whom I referred to in passing a few moments ago, was the vice-president of the company, and he was one of the committee who had to deal with the purchase of leaf tobacco; and this is the way the committee performed its functions.

He testified:

"I might say that the committee has charge of the entire operating end of the business.

"Q. And the execution of what they conclude to do in the southern field in the purchase of leaf is entrusted to you?

"A. Yes."

Again:

"Q. The season is about to begin, and you are to determine how much tobacco you want and how much you are going to buy; how is that arrived at?

"A. In August we have a pretty good idea of the size of the crop.

"Q. How do you get it?

"A. From our people in the field, and we go on weather conditions and planting. We keep up with it from the time it is planted and we have a very good idea of what the crop will yield. Then we take into consideration the amount of tobacco that is available in the markets and our own stock, how much supply there is behind us, and the possible supply in front of us, and then determine what we shall do.

"Q. How about the price that you are going to pay?

"A. We give our buyers an idea of about what average we want to pay for a certain grade of tobacco—there are many grades. We don't say how much tobacco; we have to give the instructions by grades.

"Q. Do you know, for instance, that your company needs so many pounds of Virginia sun-cured tobacco?

"A. Yes.

"Q. Now, you instruct your buyers in that field that you want so many million pounds of tobacco and want to pay, on an average price, about how much?

"A. Well, we don't instruct them how much we want.

"Q. What do you instruct them about, quantity?

"A. We instruct them to buy a certain grade of tobacco at about an average price of, say, about 11 cents, and we start buying at that average. If we see we are not getting our supply, we make a move to get more, and that is generally done by putting up the price.

"Q. If you are getting too much?

"A. If we get too much we make a move to put it down.

"Q. That is, put the price down?

"A. So far as our purchases are concerned.

"Q. Does that same general policy prevail throughout all the tobacco districts of the United States where you are in the market?

"A. Well, the whole thing is regulated on supply and demand, and I suppose so.

"Q. I am trying to get at practically how you work. Is the way you describe the way the purchases of leaf tobacco are made?

"A. Pretty much the same way.

"Q. Both in the southern and western field?

"A. I am not familiar with the system in all these sections.

"Q. But this committee gets together, determining its needs, having statistics from all over the country, and then it decides what it is going to pay on an average for each grade and then instructs its buyers to go in the field and get it; is that right?

"A. That is right, but they don't determine each price. I said about an average for each grade.

"Q. I know. You can not tell from that whether it is 6 or 7, but something in the neighborhood of 7 or 8 cents?

"A. Yes; we have to have some figure to go by.

"Q. You give them a margin on either side of the central figure?

"A. Yes, sir.

"Q. Has the American Tobacco Company a representative purchasing tobacco in substantially every tobacco market of the United States?

"A. In every market where they use that type.

"Q. Don't you use some of substantially every type grown in the United States?

"A. We use some, yes; but very little of some types."

Now, that is the control, and you can imagine, with a buyer in every tobacco market in the United States, representing a concern that uses up to 97 per cent of the entire product of certain kinds of tobacco, and with a limit of price fixed by a committee in that way—you can imagine what active, aggressive competition there is, and what an open market, when the farmers gather in the way depicted here so movingly yesterday, and how much scope and range there is for the creation of a price independently of this combination.

In a recent decision by the circuit court, four judges concurring, in the eighth circuit, in the case of the United States *v.* The Standard Oil Company—which has been docketed in this court, and which will come on for hearing, I hope, shortly—Judge Sanborn, writing the opinion, concurred in by all the judges, uses this language, which I cite because I think it is a very accurate statement of the law:

"The test of the legality of a contract or combination under this act is its direct and necessary effect upon competition in interstate or international commerce. If the necessary effect of a contract, combination, or conspiracy is to stifle, or directly and substantially restrict, free competition in commerce among the States or with foreign nations, it is a contract, combination, or conspiracy in restraint of that trade and it violates this law. The parties to it are presumed to intend the inevitable result of their acts, and neither their actual intent nor the reasonableness of the restraint imposed may withdraw it from the denunciation of the statute."

But, the defendants say, that language was used by the court in considering the Northern Securities case, which was the case of a holding corporation; and they say we have here no such thing as a holding corporation.

Mr. Johnson undertook to define a holding corporation, and that is a help in meeting his arguments, because the definition of terms is always a prime essential to successful debate. He says (I took down his language as well as I could; he spoke somewhat rapidly):

"A holding company is not one which acquires shares of stock for the promotion of its trade, but one that acquires shares for something not involved in its actual business."

I do not care whether that is a holding company or not, and I do not think the discussion is apposite. It is not a question of whether this is a holding company. There is no statute against

holding companies. The question is whether by holding the stock of sixty-odd corporations under one common control there has been created a combination or a conspiracy in restraint of interstate trade and commerce which brings it within the prohibition and denunciation of the Sherman Act. All that was held in the Northern Securities case was that putting into the hands of a corporation created for that purpose of the control of the capital stock of competing railroads brought about a control of those two railroads which enabled the corporation holding that control to restrain the otherwise free and unfettered commerce between those roads. So here, the putting of the business of these respective corporations engaged in the manufacture and sale of different products of tobacco, into the hands of the American Tobacco Company, makes it a complete combination in restraint of trade, whether the American Tobacco Company itself manufactures, or itself does not manufacture. It makes no difference whatever that the American Tobacco Company began, itself, as a monopoly of one single product. It did begin as a monopoly of one single product. It makes no difference that its direct restriction of trade was confined to one single line. It was conceived in sin and born in iniquity. The whole purpose of its organizers in getting together was to stifle the active competition that existed at that time in the manufacture of cigarettes in the United States. It accomplished that purpose and then, expanding, reaching out, going into new fields, using other agencies, it created separate corporations; here one, there one, and there another. It conveyed certain lines of its business and property to them. Itself blazed out the way, perhaps, starting a little business, getting an opening. It hung its hat on the nail, and then sat down in the house, and by and by it called in some of its family and established them there. And so the monopoly grew, and so the combination expanded, and so the conspiracy was effected, and so by all these methods it brought about this great comprehensive control of all these lines of industry, which the record in this case demonstrates.

Mr. Justice BREWER. Mr. Attorney-General, may I ask you a question?

Mr. WICKERSHAM. Certainly.

Mr. Justice BREWER. Suppose that instead of there being different corporations and different individuals interested, one man had the capital in his own right, and had bought up all these properties and was carrying on all these various businesses that are carried on by these people. Would the fact that he had such an enormous holding of his own, which put into his hands of course the power, if he saw fit to exercise it, to affect the commerce of the country, be sufficient to say that his holding and his carrying on that individual business was in restraint of trade and interstate commerce?

Mr. WICKERSHAM. It is almost impossible to answer your honor's question directly, because it assumes a result that you can hardly imagine accomplishing, except by means of contracts which in themselves might prove to be in restraint of trade. I am not willing to say. I will be frank to your honor, and state that I am not willing to say that an individual extending his business by ordinary, legitimate means, buying additional properties himself, and extending his trade, and coming by that method into the possession of a large amount of property, or, if you please, of the trade in one particular line, would be violating the antitrust law. I am not willing to say that.

Mr. Justice BREWER. You say you think he would be?

Mr. WICKERSHAM. I say, I am not willing to state that he would be violating the antitrust law. It is not necessary to go that far here, and it is not necessary to test the act by an extreme illustration like that, because so much would depend upon the method by which he reached the state of control and exclusion to which your honor refers. But of course there is a great difference between such a case and the case of these mergers of corporations, and these series of acquisitions of competing concerns, rolling up finally into this great aggregation that we have before us at the present time. And while I know that my friends would like to accept the test to be that which your honor suggests, just as they put their case on the proposition that if a man has the right to buy one piece of property and to take a restrictive covenant from the vendor, in order to protect him in the exercise of the ownership which he may have acquired, that they have an equal right to buy 10,000 such properties and take 50,000 such covenants; yet I say that it does not follow that because what may be done in one instance and be perfectly legitimate and not offend against the act, there would not come a time, as a time has come here, when the acts of the defendants would constitute them a combination with potentiality so great over the trade and commerce of the United States in a given line as to make them fall directly within the prohibition of the law.

Now, Congress undoubtedly did not mean to legislate against the natural legitimate growth of business of an individual. Congress did mean to legislate against the creation of those great aggregations of capital and industry which dominate the commerce of the country in certain lines, and which tend to destroy the initiative of the individual citizen and make him what this man in the letter that I read here to-day described himself as being—a slave in chains. That was the theory of Congress.

It may be that that was all wrong. It may be that the principle upon which the statute was founded was erroneous; but nevertheless Congress was undoubtedly, in passing that act, expressing the mature, deliberate judgment of the people of these United States, that it was

far more important to them that all combinations of the character that we have here should be destroyed, than that our great foreign trade and commerce should expand as it has done, and that we should be as rich a nation as we are. In other words, they said there was something better than the mere acquisition of great wealth; there was the independence of competition between individual men, each one free under the law to pursue his own livelihood unfettered and unrestrained; and that that bred up a better nation of men than the mere serfs of a great industrial organization.

Mr. Justice DAY. Let me ask you a question in a little different form from that of Mr. Justice Brewer. Suppose that there are five States in the Union having each a tract of anthracite coal, and that a man not in the business, but who had a large capital, went in with the deliberate and evident purpose of acquiring the control in those five States of those bodies of coal which had been theretofore in independent hands, for the purpose of shipping it throughout the Union. Would that be a form of monopoly in coal?

Mr. WICKERSHAM. It would, very much so. I think a different element also would enter into that example, because I think there we have a commodity which is an absolute necessity to life, and I have always thought that such a commodity was charged with a public use, just as much, if not far more, than what is called public utility companies. I should not hesitate to say that there the public interest was so great that a different principle was in effect.

Mr. Justice WHITE. Let me ask you a question. I want to understand your argument. You have repeatedly said in your argument that it is not the acquisition of the property to which you address yourself—that that is not objectionable.

Mr. WICKERSHAM. Not the direct acquisition of property.

Mr. Justice WHITE. Not the direct acquisition of property. Then you eliminate the acquisition of the property by acquiring stock in the property so as to get control of it?

Mr. WICKERSHAM. No, sir; I do not. I think——

Mr. Justice WHITE. Then what do you mean by the words "not the acquisition of the property?"

Mr. WICKERSHAM. By the words "acquisition of property" I mean the direct ownership of property. I mean what your honor pointed out in the commodities-clause case. I mean the acquisition of property, as there it was the property to be transported, and not property in which there was a stock interest.

Mr. Justice WHITE. I simply want to get the distinction in my mind. I am not indicating in the slightest degree any impression. I want to get it in my mind. You say that you do not raise any objection to the acquisition of property?

Mr. WICKERSHAM. As such.

Mr. Justice WHITE. As such? I do not know exactly what "as such" means. You do not object to the acquisition of property. What, then, is the criterion here, if the acquisition of property is not objectionable, which you submit for the purpose of testing the validity of the law?

Mr. WICKERSHAM. It is the control of commerce; because a man might buy all the factories in the United States——

Mr. Justice WHITE. You admit that they can buy them, but you say that they can not use them, because in using them there is a restraint of commerce.

Mr. WICKERSHAM. It would be stifling interstate commerce.

Mr. Justice WHITE. Then you certainly do not admit the right to acquire property, if a man can buy a house and not live in it. You say that he has a right to buy the house, but can not live in it.

Mr. WICKERSHAM. Perhaps I had better make myself a little more clear. We live under a dual sovereignty. What would amount to ownership of property depends on the laws of the State where the property is situated. A man may buy it and sell it, but when he buys property which is the instrument of interstate commerce, or when he buys property which is a part of the business of interstate commerce, he buys subject to the regulation of interstate commerce by the Federal Government, does he not?

Mr. Justice WHITE. Yes.

Mr. WICKERSHAM. I have a right to buy a house.

Mr. Justice WHITE. Say, a grocery business.

Mr. WICKERSHAM. Well, a wholesale grocery business. But, if there are two competing wholesale grocery concerns, and they are engaged in interstate commerce, and are competing with each other, under this law, I may not buy the two businesses and terminate the competition which existed between them in interstate commerce.[a]

Mr. Justice WHITE. Then you attack the right to buy them. You say, as to the two wholesale groceries, both having a stock of goods, that he may buy; but if he does, he can not sell the goods. Therefore he can not buy.

Mr. WICKERSHAM. If your honor had applied that same ruling in the Knight case, we would have had a different decision.

Mr. Justice WHITE. I am not talking about that.

Mr. WICKERSHAM. Is there not a distinction there? I am not making a fanciful distinction. I am making the distinction that this court has established.

Mr. Justice WHITE. I am trying to get your distinction.

Mr. WICKERSHAM. I am standing on the distinction drawn by this court in the Knight case. You held there that it was perfectly

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[a] This proposition is stated too broadly. It is accurate if the facts of the given case show that the transaction is *intended* to restrain commerce, or that such would be its *necessary* effect.

competent; that the United States could not object to the purchase by the American Sugar Refining Company of the four refineries which gave it 32 per cent more of the manufacture and control of sugar in the United States than the 65 per cent it already owned, because it was merely acquiring the property in the State of Pennsylvania, and it did not appear that it had any effect upon the commerce in sugar.

I accept that, as I must, loyally, it being your decision, and I say therefore you have held that the mere acquisition of property alone does not violate the Sherman Act; but I say that we show here what was not shown in that case, that the purpose of this acquisition is to restrain trade, and that these properties are used in and constitute a part of the current commerce between the States.

Mr. Justice WHITE. As I understand your statement, then, you have said that there is a right to acquire, and that it is the use that you challenge. Your qualification now is, as I understand it, that the purpose for which he acquires it becomes the determining factor, if, as you say, these acquisitions and these things were done for a particular purpose. Is that the point?

Mr. WICKERSHAM. That is it.

Mr. Justice WHITE. I simply wanted to understand it.

Mr. WICKERSHAM. That is it. In the Northern Securities case the court did not challenge the right of the Northern Securities Company of New Jersey to acquire shares in the Northern Pacific and Great Northern railroads. You did not interfere with the title. You said that as they were using them as a means of controlling interstate commerce, you would enjoin the use, although you did not challenge the title. It seems to me that that is the proposition that this court has declared in these decisions. Therefore, I say I do not, of course, challenge the basis of the line of decisions of this court.

Mr. Justice HOLMES. Prayer 6, contained in your original petition, reads: "That the holding of stock by one of the defendant corporations in another under the circumstances shown be declared illegal and that each of them be enjoined from continuing to hold or own such shares in another and from exercising any right in connection therewith." So that I should think your bill, taking it from your brief, went rather further than you state it.

Mr. WICKERSHAM. Of course when a bill is drawn the general scope of relief is as the pleader may at the time think it should be, and he usually frames it so as to invoke any relief that might possibly be granted. The decree which your honors will find at page 330 of the first volume of the record, finds that these defendants are combinations, and that the American Tobacco Company has acquired certain stock; and it enjoins what? It enjoins the American Tobacco

Company from perfecting this combination and from accomplishing this monopoly by causing the transfer from these companies, which it has acquired, from the company whose stock it has acquired, to itself for the purpose of cementing its control of these subjects of interstate commerce.

Mr. Justice DAY. I want to call your attention for a moment to the second section of the act. What do you say as to the contention that was put forward here yesterday as to "every person who shall monopolize or attempt to monopolize," etc.—that such monopolizing or attempt must be by means illegal in themselves? That argument was pressed with a good deal of force yesterday. I would like to hear you at the proper time in the course of your discussion on that question.

Mr. WICKERSHAM. Of course the original idea of monopoly was the old royal grant of exclusive right of sale, and it implied the acquisition by the highest means known to the law, namely, by the grace and power of the sovereign, of the right to exclude all others from the field embraced within the grant. Certainly there was no idea of an unlawful method of reaching this control there. That was monopoly in its original intendment; and a subject could have no stronger title, or no more legitimate means than the grant from his sovereign. Of course, as your honors pointed out in two or three of the decisions in this court, and particularly as his honor Mr. Justice McKenna has pointed out in the Cotton Oil case, the modern idea of monopoly is that it is the suppression of competition by the unification of cost and management. I think that is probably as good a definition as has been formulated by anybody—the suppression of competition by the unification of cost and management. That puts the combination which has suppressed competition and unified the management and got into a position where it has power to exclude others, in the position of being a monopoly. It answers, also, I think, Mr. Justice Day, your question. Somewhere along the line, to reach that point, it is almost inevitable that a contract or combination in restraint of trade should have been made; but I think the second section was passed in its present language for the very purpose of eliminating the necessity of inquiring into the origin, because you will observe that the prohibition there is against any person who shall monopolize or attempt to monopolize. It does not matter how he reaches that state, if the law finds him monopolizing or attempting to monopolize the trade or commerce between the States or with foreign countries, then it finds him contrary to the statute, does it not? You can hardly imagine his getting there without having done some act which is condemned by the first section; yet he may; and, as I understand it, it is not necessary to inquire how he got there if you find him there. It is like finding

a thief in your house. You do not stop to examine as to whether he came through the scuttle, or came in through the front window, or through an open door. If he is there, purloining your valuables, you put the hand of the law upon him.

Judge Noyes in his opinion gave a definition of "monopoly" which, I think, is a very good one. I do not think it has been much improved on. He has availed himself of the suggestion of Mr. Justice McKenna, made in his opinion to which I referred. Here is what Judge Noyes said:

"The authorities warrant the statement that a monopoly, in the modern sense, is created when, as a result of efforts to that end, previously competing businesses are so concentrated in the hands of a single person or corporation, or a few persons or corporations acting together, that they have power to practically control the prices of commodities and thus to practically suppress competition."

He cites authorities on that point.

You remember, in the case of the Shawnee Compress Company (209 U. S., 423–434), Mr. Justic McKenna in delivering the opinion of the court said there that it was not a case simply of the lease of one compress; it was not a case of challenging the right to make the lease, or the right of the compress company to make the lease; but he said, "It presents acts in aid of a scheme of monopoly," and therefore the State of Oklahoma had the right to strike it down without regard to the fifth amendment.

Now, just briefly a word about these foreign contracts. It is in evidence that the American Tobacco Company went to England and bought a factory, and was going into the business to compete there with the English company. It is also in evidence that it was the intention of the Imperial Company to come here and establish a factory. Under those circumstances, these great lords of industry met in the city of London and there, like the triumvirs of old, they parceled out the world among themselves. Like ancient Gaul they divided it into three equal parts, and each one of them——

Mr. HORNBLOWER. Probably you are not familiar with the evidence in the court below, and I desire to challenge your statement that there is any evidence in the record that the Imperial Company intended to start manufactories in this country.

Mr. WICKERSHAM. I read it in the record this morning. I can not turn to it immediately, because I neglected to make a note of it; but I accept the challenge, and I will furnish the court with the citation if it is desired. There is a reference to it in the record, which I read this very morning in running over it, and I meant to put it down, but did not.[a] I say they got together in the city of London to divide the business of the world. They did three things by their agreements, which

[a] The reference is to Vol. II of Record, pp. 210–11, 241–2, 245–6.

are in evidence. In the first place, the American Tobacco Company agreed that it would retire from Great Britain. In the next place, the English Company agreed that it would retire from the United States, except for the purchase of its leaf tobacco; and in the third place, they created a third corporation, two-thirds of the stock of which was owned by the American Company and one-third by the Imperial Company, and to that corporation they conveyed all their export business, which was the right to do business between the United States and all foreign countries except the Regie countries, and between Great Britain and all foreign countries but the Regie countries; and they buttressed that transfer with covenants, with protective covenants. They took covenants from each of the individuals, each of the directors of these companies.

They entered into covenants, each one that it would carry out the terms of the agreement, and that each one would not directly or indirectly go into business in the territory of the other; and from that time on all competition in the United States in the purchase of leaf tobacco which goes to any other country in the world but Great Britain has been practically in the hands of the American Tobacco Company, which purchases for the British-American Tobacco Company, two-thirds of whose stock it owns; and the Imperial Company, in which a certain amount of stock—not a large amount—is still owned by the American Tobacco Company, and on whose board the American Tobacco Company has three representatives, buys here its supply of leaf and raw tobacco.

I say that those contracts, in so far as they called for any action within the jurisdiction of the United States of America, and in so far as this record shows there has been any action within the United States of America, are absolutely void and in the teeth of the Sherman Act, and that they went to the city of London and executed them there for the purpose of avoiding the Sherman Act, and that they have not succeeded in doing it in so far as it affects any portion of the trade and business under the jurisdiction of the United States of America; and that the decree of the court below should have dealt with that subject and should have enjoined the carrying out of the acts of the defendants pursuant to that contract.

My friend, Mr. Hornblower, has referred to the decision in the Banana case (*American Banana Co.* v. *United Fruit Co.*, 213 U. S., 347) to sustain his contention that these defendants escaped the jurisdiction of the United States when they went to London. The Banana case was a suit for damages under section 7 of the act by a plaintiff claiming to have been injured by acts done hy the defendant contrary to the provisions of the Sherman Act, and was predicated entirely upon acts performed in a foreign country; and this court held that it had no jurisdiction to entertain such a claim; but

the case at bar is entirely within the principle of Waters-Pierce Oil Company *v.* Texas (212 U. S.), where it was held that although an agreement to violate the antitrust law of a State be made outside of that State, if the parties thereto or their agents execute it, or attempt so to do, within the State, they are under the jurisdiction of the State, and their conviction for such contracts is not without due process of law.

I do not know that I have anything to say about the United Cigar Stores Company, except this: Of course, of and by itself, the United Cigar Stores Company would be wholly outside of the scope of this bill or of the act of Congress, but as a tentacle of this main combination, growing in importance as is shown by this record, reaching out and attempting to monopolize the retail trade and commerce in the commodities dealt in by this combination, it has an importance which is wholly apart from its single, detached existence; and the naïveté of the suggestion that any concern, the large majority of whose stock is owned by the main corporation, the American Tobacco Company, with its necessary interest to advance the sale of its products, is being so administered as to advance the sale of the products of its competitors, is a strain upon the credulity which one would hardly imagine being indulged in.

It seems to me that if there ever was a case presenting in the most subtle, in the most extensive and in its most dangerous form, restraint of interstate trade and commerce; if there can be an industrial monopoly within the purview of the Sherman Act, the facts in this record present such a case. It may be that there is no such thing as a monopoly, but the framers of the Sherman Act took great pains not to plant their prohibition upon the assumption that there was, and your honors under your own decisions do not have to find the existence of a monopoly in order to affirm this decree. All you have to find is certain defendants monopolizing or attempting to monopolize the trade and commerce of the United States in a particular commodity between the States and with foreign nations; or to find that they have been making, and are before the bar of the court engaged in a combination, of whatever kind, which either restrains and controls the trade and commerce of the nation, or which puts them in a position where nothing but their own moderation stands between them and the complete domination and control of that trade and commerce. That is the evil, whether it be a fancied evil or a real evil, which the people of these United States had in mind when their Representatives in Congress assembled enacted the Sherman law; and it was to meet just this condition of things, wisely or unwisely, but certainly within the constitutional power of Congress, that this simple, comprehensive, far-reaching, and important statute was passed.

I thank the court.

If your honors please, may I have permission to file a memorandum with the court within four or five days?

The CHIEF JUSTICE. Yes.

Mr. NICOLL. Will your honor extend to us the same privilege?

The CHIEF JUSTICE. Yes.

Mr. HORNBLOWER. That applies to our counsel, also, I suppose?

The CHIEF JUSTICE. Yes.

In addition to the foregoing oral argument, which is printed for the use of the court, a word or two may be added upon certain points made by the defendants in their arguments.

In answer to the contention put forward by the defendants that it is only executory contracts, etc., which have been declared unlawful under the Sherman law, it may be said that the tobacco combination is always executory. It is in active state to-day of attempting to monopolize a large part of the trade and commerce among the States and with foreign nations in the products of tobacco; it is to-day existing just as the Northern Securities Company was existing when the petition of the Government was filed against it as a combination in restraint of trade. Its *title* to the various properties which it has purchased or otherwise acquired under state laws is not assailed; the *validity* of its incorporation or of the mergers, or of the *consolidations* made between different companies is not questioned. *What is attacked* is the restraint put upon interstate and international commerce by its activities as a combination, and in its attempted monopolization of interstate and international trade. The course of interstate commerce is vexed by this monopoly and, therefore, within the decisions of this court, it was proper that the process of injunction should remove such obstruction. This also answers the argument that an owner or corporation *actually engaged in interstate commerce can not be excluded from such commerce under the Sherman Act without depriving him or it of property in violation of the fifth amendment.* It is true that the right to engage in interstate commerce is not conferred by the Constitution but antedates it; but it is also true that by the Constitution the power to regulate such commerce was vested in Congress, and that the enjoyment of the right to engage therein is subject to such regulations as Congress may choose to impose.

In *Hale* v. *Henkel* (201 U. S., 43) Mr. Justice Brown, in delivering the opinion of the court, said:

"It is true that the corporation in this case was chartered under the laws of New Jersey, and that it receives its franchise from the

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

It is also held by this court that the very conferring of the power to regulate commerce was in effect the declaration of a rule that no State or individual should interfere with the free flow of commerce among the States, but that the power of Congress over that subject was exclusive of all others. Congress, therefore, having this power, has seen fit to declare the conditions under which interstate commerce may be carried on, and in effect, that no one shall carry on such commerce except in conformity with the rules which it has prescribed. Defendant's property is not invaded when a court of equity finding that it has violated a congressional rule enjoins it from the further participation in interstate commerce until it shall bring itself into harmony with the law.

Moreover, a corporation created by the laws of a State has no power to exist outside of that State except as permitted by the comity of the other States into which it may enter, and is wholly subject to such rules and regulations as such States may respectively impose; and it can have no right to enter upon interstate commerce, the regulation of which is confined exclusively to Congress, unless Congress shall permit it; and then not otherwise than upon the terms prescribed by Congress. *The case of Monongahela Navigation Company* v. *United States* (148 U. S., 312), cited by the defendants did not decide that corporations stood on the same basis with individuals or had any rights in interstate commerce, except subject to such rules and regulations as Congress might see fit to prescribe. It appeared there that the Navigation Company organized under the laws of the State of Pennsylvania in conformity with those laws, and pursuant to the express authority of an act of Congress, had erected a dam in a navigable stream for the purpose of assisting in the development of that stream, and that it had the right under the state and national law to collect tolls for the use of its locks and dam. It was held that these rights or franchises constituted property which could not be taken by Congress in the exercise of its discretion to improve the navigability of the stream except upon making compensation to the defendant company for the value thereof.

It is true that up to the present time as stated in *L. & N. R. R. Co.* v. *Kentucky* (161 U. S., 677, 702):

"In the division of authority with respect to interstate railways Congress reserves to itself the superior right to control their commerce and forbids interference therewith; while to the States remains the power to create and to regulate the instrument of such commerce so far as necessary to the conservation of the public interests."

But this is merely because Congress has so chosen, and its power to take from the States the creation or regulation of the instruments of such commerce can not well be doubted.

In the *Lottery case* the right to prohibit the carriage of articles from State to State when, in the opinion of Congress, such carriage was injurious to the public health or morals, was affirmed, and it was declared to be no part of anyone's liberty as recognized by the supreme law of the land that he shall be allowed to introduce into commerce in the States an element that will be confessedly injurious to the public morals (188 U. S., 357). "We should hesitate long," said Mr. Justice Harlan, in delivering the opinion in that case—

"before adjudging that an evil of such appalling character, carried on through interstate commerce, can not be met and crushed by the only power competent to that end. We say competent to that end, because Congress alone has the power to occupy, by legislation, the whole field of interstate commerce."

And he cited what was said by the court *in re Rahrer*, 140 U. S., 545–562:

"The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject-matter specifically committed to its charge."

He further pointed out other instances in which the regulation of commerce had sometimes properly assumed the form of prohibition; such as the case of transportation of diseased cattle from one State to another, and then referred to the Sherman Act where, in order to regulate commerce among the States, the legislation took the form of prohibition, Congress declaring certain contracts to be illegal.

"That act," he says, "in effect prohibited the doing of certain things, and its prohibitory clauses have been sustained in several cases as valid under the power of Congress to regulate interstate commerce."

So in the *Commodities Clause case* (213 U. S., 366), a congressional prohibition of carriers from transporting commodities which they own at the time of transportation was sustained. Defendants' counsel argue that a special reason existed for prohibiting that particular class of property owners from carrying goods in interstate commerce. But an equally potent reason exists in the present case, where the prohibition is enacted for the purpose of protecting the great and fundamental principle of freedom of interstate and for-

eign commerce. Congress has in effect empowered the courts to exclude those from the privilege of engaging in it who violate the rules prescribed for its exercise. The defendants by the decree of the circuit court were enjoined from engaging in interstate commerce because they have been adjudged guilty of a deliberate violation of the rules prescribed by Congress for the guidance of parties engaged in interstate commerce, and in order to preserve it from restraint, control, and monopolization. If defendants are aggrieved by this prohibition, they have only to conform with the provisions of the decree by "the restoration of reasonably competitive conditions," and then they may apply to the court for a modification, suspension, or dissolution of the injunction granted against them (Record, Vol. I, p. 332).

The fact is that the decree of the Circuit Court did not go far enough. The individual defendants who are shown to dominate and control the activities of this great combination should have been comprehended in the decree and enjoined from continuing or carrying into effect the combination adjudged to be illegal, and from entering into or performing any like combination, the effect of which is or will be to restrain tobacco or its products among the States, or in the Territories or among foreign nations, or to prolong the unlawful monopoly of such commerce obtained and possessed by the defendants; and the British-American and the Imperial Companies should respectively have been enjoined from carrying on business within the jurisdiction of the United States in violation of its laws.

The nature and effect of the contracts between the American and Imperial Tobacco Companies, Government's Exhibits 1 to 4, inclusive (Rec., Vol I, pp. 111–138), are set forth in the Government's brief, pages 116, 117, and pages 166–168.

They fall precisely within that class of agreements which in the case of *Brooklyn Distilling Company* v. *Standard Distilling Company* (120 N. Y. A. D., 237), referred to in the brief of the Imperial Tobacco Company at page 30, are described as the class of agreements to prohibit which the New York antimonopoly statute was enacted, namely, agreements by the controllers of property entering into combinations to regulate production and maintain prices for their mutual benefit, according to their respective interests. The proposition that certain minor contracts in partial restraint of trade, made incidentally to and for the purpose of effectuating other legal contracts, are not unlawful, either at common law or under the Sherman Act, is not disputed, but the proposition that this modern, industrial triumvirate can parcel out the business of the world into three parts and escape the jurisdiction of the United States because they make their agreements in Great Britain, while novel and audacious, derives no encouragement from either the Sherman Act or

from any decisions of this court construing that act. The theory that no decree can be made in this suit against the Imperial Tobacco Company, because it would thereby be robbed of the fruits of the agreement which it has entered into, and that unless it could be put back in possession of the consideration which it paid for the purchase of Ogden's Limited, on the faith of the covenants of the American company, the Government must allow it to continue to violate its laws, has the merit of the same audacity which characterizes its other contentions.

But this proceeding is not an action by one of the parties to the contract for a rescission, to which the theory of doing equity before equity can be granted to it applies. Here the Government of the United States, finding an alien corporation engaged in combination with its own citizens and with corporations created by States of the Union, in violation of federal law, asks the federal court to enjoin it from abusing the right of conducting commerce in and with the United States and to restrain it from using such avenues of commerce, so long as it does so for the purpose of effectuating an illegal combination.

Finally, with respect to the operation of the contracts, while it is true that three possible evils aimed at by the Sherman Anti-Trust Act are (1) raising the price of a commodity to consumers, (2) the lowering of prices of raw material to producers, (3) the crushing out of competitors—these are only incidents to the main evil at which the act is directed, which is interference with the free and unfettered course of interstate and foreign commerce.

Finding that the defendants are carrying out a scheme entered into in direct violation of a United States statute, it is submitted that the court will not be astute to weigh and measure the precise amount of damage done or of interference with the free flow of commerce thus far accomplished, but will consider the powers placed in the hands of the conspirators by their unlawful combination, and finding them engaged within our borders in carrying out this unlawful scheme, will interpose the power of the United States to prevent the further accomplishment of their unlawful design.

GEORGE W. WICKERSHAM,
Attorney-General.

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