Circuit Court of the United States

For the Eastern Division of the Eastern District of Missouri.

UNITED STATES OF AMERICA

vs.

STANDARD OIL COMPANY AND OTHERS.

Brief of the Law on Behalf of Defendants Standard Oil Company and others.

JOHN G. JOHNSON,
JOHN G. MILBURN,
Of Counsel.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

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FOR THE EASTERN DIVISION OF THE EASTERN DISTRICT OF MISSOURI.

UNITED STATES OF AMERICA

vs.

STANDARD OIL COMPANY and others.

BRIEF FOR STANDARD OIL COMPANY AND OTHERS.

The Theory of the Bill.

The gravamen of the bill is an alleged conspiracy to restrain and monopolize the trade and commerce in petroleum and its products among the States and Territories of the United States, the District of Columbia, and foreign nations, in which Mr. John D. Rockefeller, Mr. William Rockefeller, Mr. Henry M. Flagler and others

have been engaged since the year 1870. The operations of the conspiracy are divided into three periods: one extending from 1870 to 1882; another from 1882 to 1899; and the last from 1899 to the present time. The characteristic ascribed to the first period is the purchase and acquisition of interests in concerns engaged in different branches of the oil business for the purpose of fixing the price of crude and refined oil, limiting their production, and controlling their transportation. The characteristic ascribed to the second period is the formation of what is known as "The Standard Oil Trust", by which various *independent* firms, corporations, limited partnerships and individuals engaged in the oil business turned over the management of their businesses to nine trustees. The characteristic ascribed to the third period is the vesting of this control and management in the Standard Oil Company (of New Jersey) as a holding company. The bill then proceeds to treat each of these periods in detail.

First Period, 1870 to 1882.

This period begins with the organization of the Standard Oil Company of Ohio in the year

1870 with a capital stock of $1,000,000, to take over the businesses of Rockefeller & Andrews, William Rockefeller & Company and Rockefeller & Company, located at Cleveland, Ohio, and New York City. This company, so it is alleged, acquired during the years 1871, 1872 and 1873 all the competing refineries in Cleveland, Ohio, excepting three or four, the owners of which were forced to sell by their inability to compete with it owing to the rebates and preferential rates which it obtained from the railroad companies. (p. 13).

The names of a large number of companies, partnerships and individuals engaged in the oil business at various times during this period are given, and it is alleged that they and others formed associations and entered into agreements, combinations and conspiracies between themselves, to fix the price of crude oil, and limit its production, to fix the price of the products of crude oil and limit their production, and to suppress competition and monopolize the trade. The only specific instance mentioned is an agreement of December 19th, 1872, between two associations, one known as the Petroleum Producers Association

and the other the Petroleum Refiners Association (p. 18). This agreement is Exhibit 1. (pp. 195–197).

It is alleged that the individuals engaged in the conspiracy acquired during this period by the sale of stock interests in the Standard Oil Company of Ohio interests in the stocks and businesses of many of the concerns previously mentioned, and through these interests and agreements with other refiners controlled in the latter part of the period more than 90 per cent. of the oil business, and were enabled to do so and crush and limit competition by means of rebates and preferential rates obtained from railroads, particularly the Pennsylvania Railroad, the New York Central and Hudson River Railroad, with its connection the Lake Shore and Michigan Southern Railroad, the Erie Railway, with its connection the Atlantic and Great Western Railway, the Jersey Central Railroad, the Reading, and the Baltimore and Ohio. (pp. 19, 20, 21).

Then follows a specification of various contracts with railroad companies which are alleged to have had this effect, as follows :

(*a*) The organization of the South Improve-

ment Company in January, 1872, and the contract between it and various railroad companies. (pp. 21–25. Contract Exhibit 2, pp. 198–207).

(*b*) Leases or agreements between 1874 and 1877 for the control of the terminal facilities of the various railroad companies for unloading, storing and handling oil at Jersey City, New York, Baltimore and Philadelphia. (pp. 25–28; contracts with the Erie Railway, Exhibits 3 and 4, pp. 208–216; contract with the N. Y. C. & H. R. R. Co. and the Lake Shore Company, pp. 217–219).

(*c*) A pooling contract between the railway companies of October 1, 1874, with its provision for drawbacks to refiners of crude oil and shippers of crude oil to the seaboard. (pp. 28–30; agreement Exhibit 6, pp. 220–226).

(*d*) A contract of October 17, 1877, between the Pennsylvania Companies and the Standard Oil Company whereby the Standard Oil Company agreed to arrange its shipments by the various railroads to maintain their proportions of the traffic as fixed by an agreement between the railroad companies, and to guarantee a minimum of oil traffic, for which it was to receive a commission of ten per cent. of the rates on its

own shipments. It is alleged that there was a similar contract with the New York Central and Erie Companies. (pp. 31, 32; Exhibit 7, pp. 227–229).

(*e*) Contracts between the American Transfer Company, a pipe line company, and the New York Central, Erie and Pennsylvania Companies, whereby the railroad companies agreed to pay to the Transfer Company twenty cents a barrel on all crude oil carried by the railroads. (pp. 33, 34; contract with Pennsylvania Company, Exhibit 8, pp. 231–233; contract with the Erie Railway Company, Exhibit 9, pp. 234, 235).

(*f*) An allowance by the railroad companies during the years 1877 and 1878 of an additional fifteen cents per barrel on shipments of crude oil by the Standard Oil Company and its allied interests. (p. 35).

It is further alleged that in 1879 separate suits were brought by the State of Pennsylvania against the Pennsylvania Railroad Company and other railroad companies, and against the United Pipe Lines Company, to oust them from their franchises in Pennsylvania because of these contracts or some of them; which suits were adjusted by a contract between the Standard

Oil Companies and the Independent Petroleum Producers' Union, and a contract between the Union and the Pennsylvania Railroad Company. (pp. 36–38; Exhibit 10, pp. 236–241).

It is further alleged that the parties to the conspiracy acquired during this period in the name of the Standard Oil Company the ownership and control of the principal pipe lines extending from the oil regions of Pennsylvania to the various railroads over which oil was transported to the refineries at Philadelphia, New York, Cleveland and other points, and consolidated them first into the American Transfer Company and the United Pipe Lines, and later, in the year 1881, into the National Transit Company; and that they were thereby enabled to fix the price of crude oil and the price for its transportation by pipe lines and railways, resulting in rate discriminations against their competitors. (pp. 38, 39).

Period, 1882 to 1899.

The formation of the so-called Standard Oil trust is alleged, including the trust agreement of January 2d, 1882, and the supplemental agreement of January 4th, 1882. (p. 39).

Referring to the corporations and limited partnerships named in the trust agreement it is charged as follows (pp. 54, 55):

> "And that each and all of said corporations and limited partnerships were at the time of the signing of said agreement, and for a long time prior thereto, so engaged separately in said business as such corporations and limited partnerships; and that by the said trust agreement and the placing of said stock interests in the hands of said trustees, as by the said agreement provided, all competition among the said corporations, limited partnerships and individuals was suppressed and destroyed, and the aforesaid trade and commerce among the several states and territories of the United States, the District of Columbia, and both foreign nations, as above described, was restrained and monopolized."

The trustees organized as a body; adopted by-laws; and proceeded pursuant to the trust agreement to organize the Standard Oil Company of New Jersey and the Standard Oil Company of New York. (pp. 55, 56).

It is further alleged as follows (pp. 56, 57):

> "Your petitioner further alleges that pursuant to said trust agreement the said trustees caused to be transferred to themselves

the stocks of all corporations and limited partnerships named in said trust agreement, and caused various of the individuals and co-partnerships who owned independent refineries and other properties employed in the business of refining and transporting and selling oil in and among the said various states and territories of the United States as aforesaid, to transfer their property situated in said several states to the respective Standard Oil Companies of said States of New York, New Jersey, Pennsylvania and Ohio, and other corporations organized or acquired by said trustees from time to time."

The trust certificates were in the following form (p. 57):

"No. Shares $100 each. Shares

STANDARD OIL TRUST.

"This is to certify that
is entitled to shares *in the equity to the property* held by the trustees of the Standard Oil trust, transferable only on the books of said trustees on surrender of this certificate. This certificate is issued upon condition that the holder or any transferee thereof shall be subject to all the provisions of the agreement creating said trust and of the by-laws adopted in pursuance of said trust agreement as fully as if he had signed the said trust agreement."

The individuals to whom these certificates were issued at the time of the formation of the trust are given on pages 58 and 59.

It is alleged that from time to time during this period other properties belonging to concerns engaged in various branches of the oil business in competition with the trust were acquired, and their property or stocks transferred to corporations owned or controlled by the trustees or to the trustees. (p. 59).

A list of the corporations whose stocks were in whole or in part held by the trustees in the year 1888 is given (pp. 60, 61). Between that time and 1892 these various interests by transfers of properties and stocks were vested in twenty companies, which are named on page 62.

It is alleged that (p. 63) :

> " the individual defendants herein, being at all times a majority of and in control of said board of trustees, . . . controlled all of said separate corporations through said stock ownership, and elected boards of directors and officers in the said various corporations from time to time, and managed them all in harmony."

As a result of the judgment in a suit in the Supreme Court of the State of Ohio, entitled

State of Ohio, *ex rel.* Attorney General vs. Standard Oil Company (of Ohio) (49 Ohio St., 137), a meeting of the trust certificate holders was held on March 21, 1892, and a resolution adopted terminating the trust agreement of January 2d, 1882, and providing for the winding up of the trust. (pp. 63, 64; resolution, pp. 64, 65).

The trust certificates issued at the time of the formation of the trust amounted to $70,000,000. At the time of the dissolution they amounted to $97,250,000; the additional certificates having been issued for stock dividends and in payment of properties acquired. The plan of dissolution provided for issuing to each certificate holder on the surrender of his certificates an assignment of an interest in the stocks held by the trustees in the proportion of the number of his certificates to the total outstanding certificates. (p. 66; Assignment, p. 67).

Holders of more than a majority of the outstanding certificates surrendered their certificates, obtained their assignments of legal interest, and converted them into shares of the twenty companies. It is alleged that the individual defendants so surrendered their certificates; that the mass of certificate holders retained their

certificates down to the acquisition of the shares of the twenty companies by the Standard Oil Company (of New Jersey) in 1899; and that thereby the "individual defendants in this action, who were the liquidating trustees, did continue to manage the affairs of all said separate corporations so engaged in said business in the same manner as they had theretofore under and by virtue of the terms of said trust agreement". (p. 69).

Period, 1899 to the present time.

In January, 1899, the charter of the Standard Oil Company (of New Jersey) was amended, and its capital stock increased from ten million dollars to one hundred and ten millions, of which the outstanding ten millions were declared to be preferred stock and the remaining one hundred millions common stock. Of the shares of common stock $97,250,000 were then issued in exchange for the shares of the companies and limited partnerships which had been held by the trustees of the trust (including the preferred stock of the Standard Oil Company of New Jersey), and represented by the $97,250,000 of trust certificates outstanding at the time of the dissolution in 1892. This, it is

charged, was done by the individual defendants for the purpose of further carrying out the conspiracy and effecting a monopoly of the oil business. (pp. 70–74).

The names of sixty-nine companies are given as the companies now controlled by the defendants (pp. 75, 76). Some of these companies are described as engaged in refining; others in transporting crude oil through pipe lines; others as owners of tank cars and steamships for the transportation of oil; and others as engaged in the marketing of oil throughout the United States. (pp. 79–84). Then follows a general allegation that from 1882 to 1899 the Standard Oil Trust, and since 1899, the Standard Oil Company and its subsidiary corporations, have refined and sold more than ninety per cent. of the petroleum products manufactured and consumed in the United States and shipped to foreign countries, and have monopolized the commerce, traffic, transportation, refining and sale of oil, in the United States and foreign countries, thereby restraining such commerce, regulating the production and supply of the products, and fixing the price thereof. (pp. 84–86).

The remainder of the bill is devoted to a statement of the various means by which this monopolization has been effected. The headings of the various subdivisions sufficiently indicate for our present purpose what those means as so set forth are, and we give them in their order as follows: (1) agreements with Tidewater Companies (pp. 86–89; Exhibit 13, pp. 251–260); (2) contract with Pennsylvania Railroad Company of August 22, 1884 (pp. 89–92; Exhibit 14, pp. 262–268); (3) restraint and monopolization by control of pipe lines (pp. 92–95; Exhibit 15, pp. 269–271); (4) unfair practices against competing pipe lines (pp. 97–101); (5) certain contracts in restraint of trade (pp. 101–108; Exhibit 16, pp. 272, 273; Exhibit 17, pp. 274–276); (6) railroad discriminations, instances of which are given as follows: (*a*) in southern states (pp. 110–124); (*b*) in southwestern territory (pp. 124–129); (*c*) rates from Kansas points (pp. 130–133); (*d*) failure to pro-rate on shipments to Pacific Coast (pp. 133–134); (*e*) failure to pro-rate on shipments to North-West (pp. 125–137); (*f*) discriminations in New York and New England (pp. 134–147); (*g*) discriminations between

Parkersburg and Marietta (pp. 147–149); (*h*) discriminations in California (pp. 149–153); and (*i*) discriminations in Central States (pp. 153–161); (7) general system of discrimination; control of railroads (pp. 162–167); (8) monopoly of sale of lubricating oil to railroads (pp. 167–172); (9) unfair methods of competition consisting of (*a*) local price cutting (pp. 173–176); (*b*) reports of competitors' shipments (pp. 176–178); (*c*) operation of bogus independent companies (pp. 178–181), and (*d*) payment of rebates on oil prices (pp. 181–182); and (10) division of territory (p. 185).

The bill closes with the allegation that by reason of the control of the oil business by the Standard Oil Trust and the Standard Oil Company (of New Jersey) the profits since January 1st, 1882, have been exorbitant (pp. 182–184).

This is the case made by the bill. Its essential features are:

(1) A conspiracy entered into by certain individuals to restrain and monopolize the oil business, dating back to 1870;

(2) A combination of competitive plants and properties in execution of the conspiracy;

(3) The employment of certain means and agencies after the acquisition of the properties to effect the monopoly; and

(4) The actual present monopolization of the business by those means and agencies.

Summary of facts bearing on the alleged combination or conspiracy in restraint of trade.

(1) In 1865 Mr. John D. Rockefeller became the owner of a refinery in Cleveland, with which he had been connected for three or four years, and organized the firm of Rockefeller & Andrews to continue its business. Rockefeller & Andrews in 1866 associated themselves with Mr. William Rockefeller in the formation of the firm of William Rockefeller & Company, which built another refinery on property adjacent to the refinery of Rockefeller & Andrews. In the same year Mr. John D. Rockefeller, Mr. Andrews and Mr. William Rockefeller organized the firm of Rockefeller & Company, with headquarters at New York City, "to develop the sale of oil from that point and to save for our business the expenses of commission men; and by doing our own warehouse business to reduce, if possible, to the minimum

of cost the handling of the oil which we exported" (Vol. 16, p. 3054). The properties of these firms were in 1867 taken over by the new firm of Rockefeller, Andrews & Flagler. Additional capital was brought in by Mr. Flagler who at that time became a member of the firm. This firm had two refineries at Cleveland where the manufacturing was done; a domestic trade from Cleveland; and an export trade from New York.

The Standard Oil Company of Ohio was organized in 1870 by the members of this firm to take over its property and business. Its capital was $1,000,000, represented mainly by the property and business thus acquired. The balance was new capital contributed by capitalists in Cleveland and New York City.

Mr. John D. Rockefeller, Mr. Andrews, Mr. William Rockefeller and Mr. Flagler were young, vigorous and able men. Mr. Andrews was a practical refiner and devoted himself particularly to the manufacturing branch of the business. The Messrs. Rockefeller and Mr. Flagler devoted themselves particularly to its commercial and financial interests. The firm of Rockefeller, Andrews & Flagler had by its enterprise, methods, zeal

and business capacity won for itself position, standing and credit. The organization of the Standard Oil Company of Ohio, with its in those days large capital of one million dollars, enabled it with the credit and confidence it commanded to provide itself with the means of conducting its business on the most advanced, effective and economical lines. It was no doubt at that time one of the concerns in the business best equipped to cope with the widespread demoralization which prevailed.

(2) The result of the discovery of petroleum in the northwestern part of Pennsylvania, of a successful method of mining it, of the application of methods of refining it into kerosene, and of the usefulness of the product for illuminating, heating and lubricating purposes was, during the '60's, the multiplication of refineries of all sorts and kinds, and a vast excess of refining capacity both with respect to the production of the crude oil and the demand for its products. Chaotic conditions prevailed in every branch of the industry;—production, manufacturing and transportation. There was a continual war of conflicting interests and a maximum of instability.

(*a*) The period of substantial production began in 1860 with a volume of 500,000 barrels, which had increased in 1865 to 2,500,000, and in 1870 to over 5,000,000 barrels. A vast number of people were drawn to the oil fields, the earliest of which were in Venango County, Pa., extending from the south-east corner of Warren County to Franklin. Wells were sunk in great numbers and a wild spirit of adventure prevailed. At the close of the war there was a rush from the disbanding armies to the oil fields. Many of the wells that were sunk turned out dry, others would produce large quantities for a short time, and others had a longer life. Many who sank wells had but little capital and were compelled by their necessities to sell their production at whatever they could get for it. The facilities for storage and transportation were to the last degree meagre. These conditions, intensified by the spirit of speculation which they inevitably engendered, produced during those years wild fluctuations in the prices of crude oil,—prices which ranged from $20 to 10 cents a barrel. The following table shows the average price of crude oil during the years

from 1860 to 1869 compiled from Government documents :

1860	$9.59	per barrel
1861	.49	" "
1862	1.05	" "
1863	3.15	" "
1864	8.06	" "
1865	6.59	" "
1866	3.74	" "
1867	2.41	" "
1868	3.62½	" "
1869	5.63¾	" "

These are yearly averages showing only the differences year by year, and not the much wider fluctuations from month to month, and even from day to day. In 1860, for example, the range was from $20.00 to $2.00; in 1862 from $2.50 to 10c; and in 1864 from $14.00 to $3.75.

A manufacturing business cannot be established on a sound basis when its raw material is subject to such abnormal fluctuations.

(*b*) The crude oil had at first to be transported to the railroads by wagon. Later short pipe lines were laid to gather the oil at the wells,

which were connected by other lines with the branch extensions of the various railroads as they were built. There was the same disregard of practical conditions in laying these pipe lines that characterized the sinking of wells. There was an unnecessary multiplication of lines to every locality where oil was being found, and a struggle to get the business at any price. Lines were laid with insufficient capital behind them; many of them became useless soon after they were built through the exhaustion of the wells; and under such conditions there could be neither remunerative nor uniform rates.

(*c*) The same conditions prevailed in the refining branch of the industry. At first there was a mushroom development of insignificant refineries at Oil City, Titusville, other points along the Allegheny River, Erie, Pittsburgh, Cleveland, and the Atlantic seaboard. War taxation crushed out many of these. The conditions in other branches of the industry which have been described were fatal to others. Improvements in methods were beyond the means of those who had little or no capital. Those who could find capital enlarged and improved their refineries and established themselves on a

firmer basis. The removal of war taxation in 1868 again stimulated construction, as did the continually increasing volume of the crude production. The result was a great excess of refining capacity. In "Derricks Hand-Book of Petroleum," Vol. 1, page 780, the daily refining capacity in 1873 of all the refineries is stated to be 47,000 barrels, which was more than twice the amount of crude produced. The testimony shows that the excess of refining capacity was much greater before that time. Moreover the crude production was greater than the demand for the manufactured products. This is shown by the fact that the stocks of crude oil increased between 1871 and 1873 at the rate of 500,000 barrels a year, and in 1874 the increase was two millions of barrels. Obviously, as the same authority observes, "Many of the refineries had to shut down part of the time, or else not operated to their full capacity."

(*d*) The railway situation was equally complicated. The three trunk lines which competed for oil traffic were the Pennsylvania to the south of the oil fields; the Erie, with its connection the Atlantic and Great Western, and the New York Central with its connection the Lake

Shore and Michigan Southern Railroad, to the north. The Pennsylvania Railroad had the most advantageous position. Its haul to the seaboard from the points where it received the crude and refined oil was shorter than that of the other lines, and as the oil fields extended southerly into Clarion and Butler Counties from 1869 on it became shorter and shorter. This is apparent from the fact that the distance from Pittsburgh to Philadelphia is about 400 miles, whilst the haul on the Erie and its connection from Oil City to New York was 550 miles, and the haul on the Lake Shore and New York Central Railroads from Cleveland to New York was 740 miles. In the later 60's and the early 70's the struggle of these railway systems for traffic as they were extended westward is a matter of history. It affected every kind of traffic. Agreements were made from time to time to maintain rates, but were short-lived. Every railroad company protected the industries on its own line with special rates, and special efforts were made for particular kinds of traffic of growing importance. It was an era of each road getting all the business it could by offering the rates that would get it. The oil

traffic was no exception. The Pennsylvania Railroad naturally felt itself entitled to the major part of the traffic because of its proximity to most of the refining points and its shorter line to the seaboard. The New York Central and Erie were bound to get all they could and took whatever measures were necessary to that end. The effort of the Pennsylvania was to control the transportation of crude oil from the oil regions, and the refined oil from the refineries in that locality and Pittsburg. In the language of the day, " Cleveland was to be wiped out as a refining centre." The effort of the New York Central was to protect and develop Cleveland as a refining center. The effort of the Erie was to get a fair share of the business from the oil fields and the refineries in the oil regions. The situation was further complicated by the fact of water transportation to New York via Lake Erie and the Erie Canal.

(*e*) These were the conditions which existed during the period mentioned. There was demoralization in every branch of the business; in production, in refining, in local pipe line transportation, and in railroad transportation. Every branch of the business was in an abnormal state.

There was no certainty or stability in any part of it. There was a deadly struggle at every point, and the oil business was threatened with ruin.

(3) Farseeing and conservative men sought for a cure for this disastrous condition of affairs. Those who would naturally lead the way were the railroad companies and the larger refiners. The plan of the South Improvement Company was evolved for this purpose late in 1871 and the beginning of 1872. Its object was to co-ordinate the various branches of the industry; to bring together the producer, the refiner and the railroad; to adjust their relations so as to secure for the producer a fair and adequate remuneration for his product, to assure the refiner his supply at a reasonable and normal price and equal railroad rates, and to secure for the railroads fair and remunerative rates for the transportation of the oil. It originated with the railroads and some of the leading refiners in Pittsburgh and Philadelphia. The Standard Oil Company had no faith in its practicability, but gave its passive support that it might not be charged with blocking an effort to ameliorate

the conditions of the business. The plan failed and never went into operation. It is not necessary here to discuss it more in detail. Its history has been written from different points of view, as will be seen by a reference to Miss Tarbell's book and "The History of the South Improvement Company," by Dr. Leonard Woolsey Bacon. The version of the parties who promoted it is found in the circular which was issued at the time (Vol. 6, p. 2619). Mr. John D. Rockefeller's version of it and of the relations to it of the Standard Oil Company is found in Vol. 16, pp. 3068–3071. That the relation of the Standard Oil Company to it was a passive one is also shown by the testimony of Mr. Flagler before a Committee of the House of Representatives in the year 1888. (Report of Committee on Manufactures of the House of Representatives, 1888, p. 289).

(4) It is apparent that in the early seventies the position of the Standard Oil Company of Ohio and the other refiners at Cleveland was a serious one. There was not only the general demoralization of the business and the excess of refining capacity at that and every other refining

point, but the adverse attitude of the Pennsylvania Railroad to Cleveland as a refining centre and its relative disadvantage with reference to the crude oil production as the oil fields extended south into Marion and Butler counties, and to the export business because of its distance from the Atlantic seaboard. Moreover in the excitement aroused by the South Improvement Company a boycott was maintained against the Standard Oil Company to deprive it of its supply of crude oil. The facts in its favor were that it was then a large and important concern of the most modern type, equipped with the best appliances, and owned and managed by able men in good credit, who had faith in the business and the courage of their faith. They felt that to maintain their ground it was necessary to increase and expand their business, as their strength and power of self preservation would grow with its volume. Therefore in the latter part of 1871 negotiations took place between them and various refiners in Cleveland, which were then and during the year 1872 consummated by the purchase of their refineries. The capital stock of the Standard Oil Company of Ohio

was increased from one to two millions and a half of dollars. The purchases were made for cash or with the stock of the Company as the vendors might elect. The transactions were entirely voluntary, and the charge that the sale of these refineries was coerced in any way, or that their owners were driven out of the business, is unsupported by any evidence. On the contrary many of them were glad to convert their investments into cash because of the prevailing conditions. Others who took stock in payment lost their confidence and sold it. On the other hand so far from being a conspiracy to monopolize the oil trade it was actually and obviously a measure of self-preservation. The object of the Standard Oil Company was to fortify itself by an increase of its business. Had it not done so it is very questionable whether Cleveland could have continued a refining centre, as it was generally recognized that the entire investment in the oil business there was at stake.

Having by these acquisitions increased its refining capacity the next step was to increase its markets and marketing facilities. This it did with respect to the export business by the purchase in 1873 of the plant of the Long Island

Refining Company in New York harbor, which furnished it with extensive dock and warehouseing facilities, and the purchase of the business of the DeVoe Manufacturing Company, which had a large trade in Europe and the Orient in the sale of refined oils in cans, besides being a mannfacturer of the cans. To extend its domestic trade it purchased at the same time an interest in the firm of Chess, Carley & Co. of Louisville, Kentucky, which had a large marketing business in the south and southwest.

(5) Even at this distance of time it is not difficult to reconstruct what was bound to be the normal development of the oil business in view of the existing conditions. First and foremost the development of the use of petroleum products in this and foreign countries was necessary. That involved a continuous extension and multiplication of marketing facilities. Refining was a progressive art, having as its end and aim the perfection of the products, economy in methods and processes, and the utilization of the waste material in by-products. The multiplication of refining points was necessary to reach the different parts of the country with a minimum of unnecessary

transportation. The seaboard was the natural locality to refine for export purposes, and different regions of the country could be supplied from particular interior refining points with the minimum of transportation. It was necessary for a regular and adequate supply of crude oil at normal prices that there should be adequate systems of pipe lines to gather it at the wells and carry it to the various railroad points, and tankage systems for the storage of the oil whenever the production exceeded the demands of the trade. And it was only a matter of time when the railroad and ocean transportation of oil in barrels would be superseded by a special kind of car and a special kind of vessel, such as the tank car and tank steamer of later times.

The development of the industry along these lines would inevitably substitute organization for chaos in each of its branches, and favor the survival of the fittest. The tendency would be from instability to stability. That was the natural order of things and there was no escape from it. Without concentration there was only the promise of destruction. The progressive refiner must enlarge his sphere of operations; reduce the costs of his business to the lowest point;

extend his markets in every direction; and co-operate with other interests to establish normal conditions. This would require intelligence, enterprise, courage and capital. It meant, too, that the man or men incapable of such an effort for whatever reason must fall behind, or out of the race altogether. Organization is the basis of all success in the struggle for existence in the industrial world, and particularly when there are inter-dependent branches of an industry which are only fruitful in co-operation. If to organize, extend and develop an industry is a criminal conspiracy then all great enterprises are conspiracies in their conception and origin. Such a view of the matter is purely artificial, and unworthy of serious consideration. We may therefore assume that the men who constituted the Standard Oil Co. of Ohio early saw that organization, expansion and development were essential to the existence and progress of the Company and its business; that they moved in that direction as their means permitted and the opportunity offered; and that to do so was a natural course and not a conspiracy.

(6) In 1872, as we have seen, the Company was established on a large scale as a refiner in Cleveland and had extended its marketing facilities in various directions. The next step for its owners was to establish themselves as refiners in the oil regions for the obvious advantages of that situation. It was the vicinity of the crude oil production, and if, in the turn of events, it excelled as a refining locality to the point of supremacy they would be there for the protection of their interests and business. Early in 1874 they acquired the Imperial Oil Refinery, at Oil City, a large modern refinery situated on the Allegheny River. In the latter part of 1874 or the beginning of 1875, to establish themselves at other points which had special advantages, they acquired refineries at Philadelphia, including the refinery of the Atlantic Refining Company, and refineries at Pittsburgh, including the refinery of the Standard Oil Company of Pittsburgh, a separate and distinct concern. About the same time they purchased the refinery and business of Charles Pratt & Company on the Brooklyn side of the East River, and thereby acquired additional refining facilities at the seaboard, increased dock properties and ware-

housing facilities, and a large domestic and Oriental trade. It was at this time, and no doubt to enable them to make the purchase of the Charles Pratt & Company, Philadelphia and Pittsburgh properties, that the capital stock of the Standard Oil Company of Ohio was increased from two millions and a half to three millions and a half of dollars—its last increase. The value of the property obtained through these acquisitions was three millions of dollars (Vol. 16, p. 3082).

In 1875 the refineries of Porter, Moreland & Co. and Bennett, Warner & Co. at Titusville were acquired to strengthen their position as refiners in the oil regions. In 1876 and 1877 they acquired a majority interest in the refinery and business of J. N. Camden & Co. at Parkersburg, West Virginia, which were vested in the Camden Consolidated Oil Co., organized by them for that purpose; a number of refineries in Baltimore, which were vested in the Baltimore United Oil Co., organized by them for that purpose; and a refinery on a small scale in Boston, Mass., with a New England trade which they organized as the Maverick Oil Co. In 1877, they acquired from the Producers Consolidated Land and Petroleum Co. a small refinery at Bayonne,

New Jersey, and some land at Communipaw on which they shortly after constructed the refinery known as the Eagle Works.

(7) Between 1870, when the Standard Oil Co. of Ohio was organized, and 1877 the production of crude oil had increased from 5,000,000 barrels to 13,000,000, the yearly product being as follows, in round figures: in 1870, 5,200,000; 1871, 5,200,000; 1872, 6,300,000; 1873, 9,900,000; 1874, 10,000,000; 1875, 8,800,000; 1876, 9,000,000; and 1877, 13,000,000. (Deft.'s Ex. 265, Vol. 19, p. 624.) During the same years the stocks of crude oil in storage had increased from 537,000 barrels to 3,127,000 barrels, as follows, in round figures: 1870, 537,000 barrels; 1871, 532,000; 1872, 1,084,000; 1873, 1,625,000; 1874, 3,705,000; 1875, 3,550,000; 1876, 2,551,000; 1877, 3,127,000 barrels. It is clear, therefore, comparing the yearly production during these years with the yearly stocks, that though there was a great increase in the manufactured products it was not equal to the supply of crude oil, and that the great need was an increase of the consumption and more markets. This was theparticular direc-

tion that the efforts of the Standard Oil Co. took during these years. It extended its own marketing stations through various States, among them Indiana, Illinois, Michigan, Wisconsin and Minnesota. The men interested in it organized The Consolidated Tank Line which took over and extended the marketing business of Alexander-McDonald & Co. in the southern part of Ohio, Indiana and Illinois, and west of the Mississippi, with headquarters at Cincinnati, their interest in the Company being a half. They also acquired an interest in the Waters-Pierce Oil Co. which had a marketing business in Missouri and the southwest. They organized the Beacon Oil Company, which took over the marketing business of Kidder, Vaughan & Co. in New England, and acquired a large interest in the marketing business of the Portland Kerosene Oil Company, located at Portland, Maine.

They extended their operations to the manufacture and sale of lubricating oils in 1877 and 1878 by acquiring the lubricating plants of the American Lubricating Oil Co. in Cleveland, of the Mica Axle Grease Co. in Pittsburgh, of the Payne, Ablett Co. near Pittsburgh, of the Eclipse Lubricating Oil Co. at Franklin, and an

interest in the Galena Oil Works and Signal Oil Works, which were associated enterprises engaged in the manufacture of lubricating oils at Franklin, Pa. This extension of their business enabled them not only to extend the market for lubricating oils, but to utilize the residuum at their various refineries remaining after the production of refined oil for illuminating purposes, as it is that residuum which is used in the manufacture of lubricating oil. By these various acquisitions they increased not only their refining capacity to meet the increase in the production of crude oil, but also the markets for the various manufactured products.

(8) These, with the exception of the purchase from the Empire Transportation Co. to be mentioned later, are the principal refinery and marketing acquisitions in the years from 1872 to 1879. They were all separate, distinct and independent transactions occurring at different times over this period of years. Each purchase was the result of a voluntary negotiation between the particular vendor and vendee. There was no combination between the several vendors, or any relation of any kind between the different

transactions. Every feature is lacking of a combined mass of transfers, in which the consummation of each would have been dependent upon the consummation of all. There was no scheme for these acquisitions as a whole, and no coercion.

It is probable that the purchase price of the Charles Pratt & Co. business and the Pittsburgh and Philadelphia refineries acquired at the beginning of 1875, was paid in shares of the Standard Oil Co. of Ohio, because at that time occurred the last increase of its capital stock from two millions and a half to three millions and a half of dollars. In the other instances the purchase price was largely paid in cash. The usual course was either to pay in cash or to organize a corporation to take over the property purchased, such of the vendors as wished to be paid in stock of the purchasing company taking its stock, and such of them as wished to be paid in cash receiving it from the proceeds of the shares of the new company subscribed and paid for by persons interested in the Standard Oil Co. of Ohio, and acting for the stockholders of that Company, for that purpose and to provide the necessary additional capital. It may be mentioned here that there is no evidence that any of the vendors

were in any way restricted from engaging or employing their capital in the business in the future, or of any restrictions of any kind being placed upon them in that or any other regard.

(9) Pipe line acquisitions.

The conditions which prevailed in the earliest years have already been mentioned in a general way. The first stage was the building of gathering lines by many different people without regard to whether there were already sufficient pipe line facilities or not. Wherever oil was discovered and wells sunk more lines were laid than were necessary. This was followed by rate-cutting, loss, general demoralization and, in many instances, insolvency. But a prompt, adequate and orderly service was indispensable both to producers and refiners. It was also essential that the business should be remunerative to attract capital to provide adequate service and facilities for new oil territories as they were discovered, and to provide tankage for the storage of the surplus when the production exceeded the demand. The pipe line situation must obviously have been a matter of deep concern to a large refiner as it affected the supply of the raw material of his business. This was brought

home to the Standard Oil Company in 1872 by the embargo placed on its supply as an incident of the excitement over the South Improvement Company. It could not remain subject to similar movements that might be inaugurated at any time. The producers numbered many thousands, and they were an unwieldy, excitable mass, who never could nor did maintain steady measures for the conservation of their business. There was no reason why they should not have organized an adequate pipe line and storage service, but they never did so. It was absolutely necessary that the Company should establish such a relation with pipe lines that its supply would be assured. There was therefore acquired in the year 1873 a third interest in the firm of Vandergrift & Forman, which then owned certain lines known as the United Pipe Lines, and the capital stock of the American Transfer Company, which owned another system of lines. Referring to Petitioner's Exhibit 770 (Vol. 10, p. 1817) it appears that on September 4th, 1874, there were at any rate nine of those pipe line systems. The recital in that exhibit clearly reveals the conditions which had existed. It is as follows:

"WHEREAS the pipe lines owned and controlled by the parties hereto have a joint capacity for transportation more than twice as great as the total volume of petroleum produced in the district traversed by said lines; and whereas the separate and discordant relations now prevailing among the parties hereto lead to a needless multiplication of extensions, branches and other matters involving a heavy cost, which ultimately becomes in some shape a charge upon the business transported, and also leads to the offering of open or secret inducements of an illegitimate nature, such as rebates, special rates, selling oil for less than it costs and full pipeage rates, and in other ways thereby to attract an under (? "undue") share of traffic to the respective lines represented herein; and whereas it is believed to be desirable both for the interests of the parties hereto and those of the public whom they serve that all needless expenditure and all illegitimate inducements should cease; now therefore for those purposes and for other valuable considerations mutually moving the parties hereto they do each respectively agree with each other as follows:"

This exhibit is a pooling agreement, common at that time with transportation companies, fixing a uniform rate of pipeage, providing for the payment of the earnings of the various systems

into a common fund, and fixing the proportion of the fund to which each system should be entitled. It appears from the 10th article that the United Pipe Lines above mentioned were to be entitled to 29½ per cent. of the common fund, and the American Transfer Company 7 per cent., which shows the extent of the Standard's pipe line interests at that time.

In 1877 the United Pipe Lines and some of the other systems mentioned in Exhibit 770 were organized into a corporation, named the United Pipe Lines, and a part of the lines of the American Transfer Company were transfered to it, to vest the gathering systems in the new company, and the longer lines, more in the nature of trunk lines, connecting the gathering systems with the railroads, in the American Transfer Company. In that year the pipe lines of the Empire Transportation Company were acquired in the interest of the owners of the Standard Oil Company through the transaction to be mentioned later, and became a part of the United Pipe Line system, thereby increasing their interest in that company. In 1881, the National Transit Company was organized by the men interested in the Standard and others to take over all the lines of the United Pipe Lines

and the American Transfer Company, including the trunk lines from the oil regions to Cleveland, to Buffalo and to the seaboard, which were in process of construction. In 1882 the gathering lines of the National Transit Company amounted to 2,468 miles and the trunk lines to 1,062 miles, a total of 3,530 miles. In 1908 the total mileage of the Standard's gathering lines was 45,227 miles and its trunk lines 9,388 miles, a total of 54,615 miles, the difference, with the exception of less than a thousand miles representing construction by the company, or its subsidiary companies at its instance and with the capital it provided. (Archbold, Vol. 17, p. 3232; Defts. Ex. 261, Vol. 19, p. 621).

A glance at Defendant's Exhibit 265 (Vol. 19, P. 624) shows what the demand for capital outlay in the construction of pipe lines and storage facilities must have been between 1874 and 1882. The production increased from 10,000,000 barrels in 1874 to 30,000,000 in 1882, or to treble the amount; and during that time it extended into Vest Virginia. The volume of Industrial Statistics for 1892 issued by the Secretary of Internal Affairs of the State of Pennsylvania, shows that the stocks of crude oil increased from

3,700,000 barrels in 1874 to 34,596,000 in 1882. The tankage to store this vast increase was enormous in its quantity and had to be provided. It was the ability to provide by the outlay of many millions of dollars all this necessary new construction of pipe lines and tankage which accounts for the expansion of the Standard's pipe line interests during those years, as no other interest cared to run the risks of such an investment.

It is scarcely necessary at this day to elaborate the fact that the ownership of an adequate pipe line system, with its necessary storage facilities, is an indispensable adjunct to refining on a large scale. It is the pipes that are in contact with the wells, and by their means only is the refiner enabled to provide his supply at the wells and regulate its storage and transportation according to the needs of his refineries. To be dependent upon others for that storage and transportation would introduce an element of uncertainty entirely incompatible with the successful prosecution of the business. This was demonstrated by the early conditions in the history of the business, and all subsequent experience has confirmed it. It

is established beyond dispute by the fact that all the present large and important refining interests, which have no connection with the Standard Oil Company, such as the Pure Oil Company, the Gulf Refining Company, the Texas Company, the National Refining Company of Cleveland and the Union Oil Company of California have found it necessary to have their pipe line systems (Report of Commissioner of Corporations on Petroleum Industry, August 5, 1907, Part 2, p. 637). This is also true of Crew, Levick & Co. (Rec., vol. 20, p. 107.) For the same reasons the owners of the Standard Oil Co. acquired their pipe line interests between 1873 and 1881. Since that time, as has already been stated, the expansion of the system with the exception of less than a thousand miles, has been due to new construction to reach the new oil fields in Ohio, Indiana, Illinois, Kansas, Missouri, Indian Territory and Oklahoma as they were discovered and provide the necessary storage facilities.

(9) Reference has been made to the Empire Transportation Company in connection with the acquisition of refineries and pipe lines, and we will now take up that transaction. The Penn-

sylvania Railroad always felt that it had a prior claim on the transportation of oil because of its proximity to the oil fields. It was the first company to give special attention to it by organizing the Empire Transportation Company to furnish with its tank cars a service exclusively devoted to the transportation of oil. At an early day the Empire Company, to further control the traffic, acquired and established pipe line systems of its own. Its next step was to acquire and operate refineries and engage in the business of refining oil. It acquired the ownership or control of the Sone & Fleming Refinery at Brooklyn; built a refinery at Philadelphia; and through a subsidiary company, the National Storage Company, acquired property for the same purpose at Communipaw, New Jersey. This connection of the Pennsylvania Railroad with the business of refining oil aroused great antagonism in the latter part of 1876 and the beginning of 1877, particularly on the part of its rivals, the New York Central and Erie companies, though the Standard Oil Company joined in it. It was charged that through this alliance of the Railroad Company with the pipe line systems and refining interests of the Empire Transportation

Company it could control not only the transportation of oil as against rival railroads, but also the refining of oil as against rival refiners, by merging its transportation charges in the refining profits. This led to a bitter war between the railroads, in which the Standard Oil Company participated. It withdrew its oil traffic from the Pennsylvania Railroad; both pipe line and railroad rates were cut; and every incident of such a war was in full play for some time. This state of affairs continued during most of the year 1877. Finally the demoralization became so extreme that an adjustment was reached whereby the Empire Transportation Company sold its refineries and pipe lines to the Standard interests and its tank cars to the Pennsylvania Railroad. This war is fully described both by Mr. Rockefeller in his testimony and by Mr. Cassatt in testimony which he gave in a case in 1879, and which the Petitioner has made a part of the record. It was in this way that the Standard interests came to acquire in October, 1877, the Sone & Fleming refinery at Brooklyn and the Philadelphia refinery of the Empire Transportation Company, and its pipe line system which was transferred either to the United Pipe Lines or

the American Transfer Company. It was a separate transaction with its own features and conditions, and followed as a consequence of the Pennsylvania Railroad Company participating in the business of refining oil to the detriment of the other railroads and the refining interests.

(10) Stress is laid on the relations between the Standard Oil Company and the railroads between 1872 and 1880; and to the alleged special rates and favors it received from them is attributed its power to destroy the business of its competitors and acquire their properties. This is charged even with respect to the acquisition of the Cleveland refineries in 1871 and 1872, but, as we have already said, without any foundation. But certain later contracts between it and the railroads are annexed to the bill, and this operation and effect is claimed for them. There is no basis for this claim.

Whatever was done is to be judged by the standards, conditions and law of those days and not by the standards, conditions and law of the present time. It was a time of intense struggle between the trunk lines for every kind of traffic, with alternating short periods of agreed rates or pooling. Schedule rates were merely nominal.

Special contracts with shippers who could command even a small volume of any particular kind of traffic were the custom. Shippers went from railroad to railroad for the best terms they could get, and railroads offered the inducements of special rates or rebates to get the business. The shipper who commanded a large and steady volume of traffic insisted that he was entitled to lower rates because of that fact. There was legal authority justifying him in making that claim. (See Nicholson vs. Great Western Ry. Co., 4 C. B. (N. S.) 366; Cleveland &c. R. R. Co. vs. Closser, 126 Ind., 348; Oxlade vs. N. E. Ry. Co., 1 Ry. & Can. Traf. Cases, 72; Root vs. L. I. R. R. Co., 114 N. Y., 300.) In other words, it was recognized that a wholesale shipper was entitled to a lower rate than a retail shipper; that a refiner who could deliver to the railroad a train-load of oil every day or every other day was justified in insisting upon a lower rate than a refiner who delivered smaller quantities at irregular times which had to be transported in trains made up of different species of traffic. Indeed the contrary rule which prevails now is an arbitrary protection of the smaller shipper, and not founded on any principle of reason or business.

Whether the Standard Oil Company in the earliest period obtained better rates than its competitors there is no evidence to show. There could be none because every shipper was making his own contracts for rates and keeping them to himself. It is fair to assume that in the main it got as low rates as anybody, and lower than some because of the volume of its business; but that was an incident of the business and not an advantage forged as a weapon of assault.

We turn now to the specific contracts during this period which are annexed to the bill.

(*a*) Exhibits 3, 4 and 5 are contracts made with the Erie and New York Central roads in 1874 and 1875, relating in the main to the operation of oil terminals, in the one case at Weehawken, New Jersey, and in the other, at Hunters Point, Long Island, and on the Hudson River at or about Sixty-fifth Street, and they were necessary and justifiable. The oil traffic was a special traffic which required special handling and facilities in warehouses on its arrival at destination. The damage to the barrels in course of transportation required cooperage or refilling in

new barrels before being reloaded on lighters to be taken to the various docks where they were again unloaded for shipment by vessel. The entire service was a distinctly special service and the Standard Oil Company was most interested in its proper performance because of the volume of its traffic. That was the reason for these contracts whereby it assumed to operate the terminals, consisting of warehouses, and to make uniform charges to all parties who used them or for whom services were performed as low as any other oil yard affording facilities "for the transfer, storage, preparation and shipment of the oil at the terminus of any railway, or other line competing with the Erie Railway, at or adjacent to the port of New York, and generally so to manage the premises as to give all patrons of the road fair and equal facilities for their oil business at uniform cost" (Bill, p. 210).

In the case of the New York Central the Oil Company agreed to provide at Hunters Point and on the Hudson River (Bill, p. 217)

> "large and commodious warehouses, wharves and piers, amply provided with tankage and all the necessary appliances for the receipt from the boats, barges and cars of the party

of the second part (the railroad company) of crude petroleum or the products of crude petroleum; the cooperage, warehousing and delivery of the same to consignees in a prompt and efficient manner, and to receive upon the side tracks adjacent to its said property at the foot of 65th Street all crude petroleum which may be consigned to that point and unload the same and deliver the same to consignees on demand, doing and performing in respect thereto all such other things as the party of the second part may be bound to do; also to receive upon the wharves of the party of the first part at Hunters Point aforesaid all the products of crude petroleum in packages, which may be consigned to that point, and deliver the same to consignees upon demand, doing and performing in respect thereto all such other things as the party of the second part may be bound to do."

The terminals at Hunter's Point and at 65th street on the Hudson River were owned by the Standard Oil Company, and the Railroad Company was relieved by this arrangement from providing at its own expense other terminals for shippers other than the Standard.

These contracts originated in a practical necessity which justified them, and there is no evidence that they operated injuriously to other shippers or refiners.

It is to be observed that the contract of April 17, 1874, is an instance of a special contract for rates. (Bill, p. 208). The Railroad company was to furnish the cars and haul them to its Weehawken yards in full trains whenever practicable. The rates of freight were to be made by the President of the Atlantic and Great Western Railroad Company, the Erie's western connection, and the Oil Company, to the satisfaction of the former, and were not to be higher than the rates paid by competitors of the Oil Company from competiting western refineries to New York. The Oil Company was not to ship more than 50 per cent. of the product of its refineries by any other lines eastward; it assumed all risks of losses by fire, natural leakage or breakage; and it was itself to load the trains at the place of shipment and unload them at the place of destination. Thus it did its own loading and unloading, assumed unusual risks, and its traffic moved in trainloads.

(*b*) Exhibit 6, dated October 1st, 1874, is an agreement between the Pennsylvania, New York Central and Erie Companies pooling the oil traffic from the oil regions to New York via the three trunk lines, and to Philadelphia and Balti-

more via the Pennsylvania Railroad. The New York proportion was fixed at 62.46 per cent. of the total, in which each of the companies was to share equally. The Philadelphia and Baltimore proportion was fixed at 37.54 per cent., to all of which the Pennsylvania Railroad was entitled. The rates on refined oil from Cleveland, Pittsburg and the oil regions to New York, Philadelphia, Baltimore and Boston, and the rates on crude oil to the same points were prescribed. Particular exception is taken to the following provision (Bill, p. 222):

> "The roads transporting the refined oil shall refund to the refiners as a drawback the charges paid by them upon the crude oil reaching their refineries by rail; and the roads transporting through crude oil to the eastern seaboard shall refund to the shippers 22 cents per barrel; both of said drawbacks to be paid only on oil reaching the initial points of rail shipment through pipes the owners of which maintain agreed rates of pipeage, it being understood that the said rates of pipeage shall be equitably adjusted as between the several railroads, and that they shall set forth in a contract to be entered into between each pipe line and the trunk lines parties hereto; said agreed rates

of pipeage being of importance to the parties hereto and constituting a valuable consideration to them."

Upon which we observe :

(1) That the provision to refund to the refiner the freight on the crude oil was to make "a group rate" for refined oil from Cleveland, Pittsburg and the oil regions to the seaboard, placing them all on an equality, which was a usual and established practice with respect to many similar kinds of traffic. The objection made to this provision could be made to every "group rate" that has ever been established.

(2) The provision for the refund of 22 cents a barrel on the crude oil transported to the seaboard was to place the seaboard refineries on an equality with the inland refineries. Thus the rate on refined oil from Cleveland to New York was, according to the contract, $1.90 per barrel, less the crude rate of 35 cents per barrel from the oil regions to Cleveland. As a barrel of refined was the equivalent of one and one-third barrels of crude the amount to be deducted would be 35 cents plus one-third of 35 cents, or 11.666 cents, making a total of 46.666 or 47 cents. Deducting that sum from the rate on refined oil

would make the rate to New York $1.43. Refunding to the seaboard refiner 22 cents a barrel his rate of $1.65 for crude oil would be reduced to $1.43. Thus the rate on a barrel of refined oil from Cleveland to the seaboard was made the same as the rate on a barrel of crude oil from the oil regions to the seaboard, and thereby the refiners at Cleveland and the refiners at New York were put on an equal basis.

(3) The last clause of the provision respecting the drawbacks being paid only on oil reaching the initial points of rail shipment through pipes the owners of which maintained agreed rates of pipeage was necessary for two reasons; first, to maintain uniform pipeage rates, and second, to guard against the drawbacks being used as a fund for rebates between the pipe line companies and the shippers at the expense of the railroad companies. Petitioner's Exhibit 770 (Vol. 10, p. 1817) shows that the sum of 22 cents mentioned in this agreement was the charge for pipe line transportation, and it was manifestly absorbed in the railroad rates prescribed by the agreement. Necessarily it should only be re-

funded when it had been paid, and it would only be paid if the agreed pipeage rates were maintained.

(*c*) The agreement between the Standard Oil Company and the Pennsylvania Railroad of October 17, 1877 (Bill, p 227); in connection with which it is averred that there were similar contracts with the New York Central and Erie Companies (Bill, pp. 31 and 32). These contracts were what is known as "evener" contracts and were common in the railroad practice of that time. One of the methods then in vogue to avoid the enormous losses from rate wars among the railroads was an agreement apportioning the heaviest kinds of traffic, such as grain, cattle and oil, between them in fixed proportions; and to make such an agreement effective one or more of the heaviest shippers were selected to so arrange their business and apportion their shipments as to maintain the proportions fixed. For that service they were paid a commission. The Standard Oil Company as the heaviest shipper of oil was made the "evener" in connection with the pooling agreement between the railroads of October, 1877, and that was the purpose of this agreement, Exhibit 7, and the agreements of

similar tenor with the other trunk lines. Dr. Leonard Bacon has said of this method:

> "The delegating of this task of *evener* to the largest of the concerns engaged in shipping by the competing lines seemed by common consent, at that stage in the evolution of the railroad system, to be a necessary expedient for the operating of a "pool" for the ending of destructive railroad wars. In the livestock pool between the trunk lines from Chicago to New York in 1875, the allowance to the heavy Chicago house that undertook the task of *evener* was to be $15 for each carload by whomsoever shipped. It was a crude method liable to serious objections, and yet, to the railroad men of that day it had this in its favor, that no better way had then been devised for avoiding the evils and abuses far more damaging to all the interests concerned, including the public interest, than this method of the *pool* and the *evener*."

(*d*) The contracts between the American Transfer Company and the Pennsylvania Company and other trunk lines respecting the payment of first, 20 cents, and then 22½ cents, a barrel on all crude oil transported by the railroads (Bill, pp. 33, 34; Exhibit 8, p. 231; Exhibit 9, p. 234).

It is to be observed that this is a contract between transportation companies. The American

Transfer Company had pipe lines of its own and represented the lines of the United Pipe Lines. It gathered and bought oil at the wells, transported it to the railroad junction points, and largely controlled the line of its railroad transportation. It built lines and provided facilities at the instance, and for the benefit, of the various railroads. (See statements in both contracts.) The transportation of crude oil from the wells to the point of destination was thus a joint service of the Railroad companies and the American Transfer Company and the pipe lines it controlled, and the burden of providing the facilities to make the necessary railroad connections fell upon the Transfer Company. The Transfer Company evidently deemed that it was entitled to the compensation provided by these contracts for its share in the joint service, in obtaining and furnishing the traffic, and in providing the facilities, and there is nothing in the record to impeach at this distance of time the fairness of its claim or the measuring of the compensation by the total crude shipments, all, or practically all, of which it would seem were received by the railroads through the lines of the Transfer Company.

(*e*) It is charged that at this time an additional 15 cents per barrel on shipments of crude oil was allowed to the Standard Oil Company as a further rebate. (Bill, p. 35). Mr. Cassatt in his testimony given in March, 1879, explains that this reduction of the rate was made at a conference of railroad presidents in July, 1878, to meet a rate that had been made via Buffalo and the Erie Canal; that it was only in force until the closing of the canal in December of that year; and that it was not made exclusively to the Standard Oil Company but to any shippers who were not shipping over the line via Buffalo and the canal. (Vol. 20, pp. 12, 13, 19, 30, 31).

(*f*) There is no substantial evidence that these contracts, rates, reductions and allowances which we have reviewed had any relation to the acquisitions of refining and pipe line properties by the Standard Oil interests during these years. They certainly did not induce the sale of the Cleveland refineries, of the Charles Pratt & Company refinery, of the Atlantic Refining Company's refinery, and the other refineries at Pittsburg and Philadelphia represented by Warden, Frew & Company, the Imperial Refinery at Oil City, the refineries of Porter, More-

land & Company and Bennett, Warner & Company, at Titusville, the refineries and pipe lines of the Empire Transportation Company, the refinery of the American Lubricating Oil Company, the refineries at Parkersburg and Baltimore, or the interest in the Galena and Signal Companies; and these constitute the great bulk of the acquisitions during those years. The owners of those establishments were not forced to sell because the Standard obtained better railroad rates than they could get, or under compulsion of any kind. Doubtless various small refineries at different points, particularly in the oil regions, that were not equipped to compete successfully, and the owners of which could not find the capital to make the improvements necessitated by the progress of the business, or for other reasons of that kind, were desirous of selling, and did sell, were purchased not for their refining capacity but because they had a certain amount of trade, and the physical property could be utilized in connection with other refineries. This was all the dismantling there has ever been of independent refineries. These have been called purchases "to put them out of business," and it is deemed to be evi-

dence enough of that motive that some of them were dismantled; but the fact is just as we have stated it.

Excepting some very general and vague statements there is no evidence in the record showing or tending to show any causal connection between the railroad rates which the Standard obtained between 1870 and 1882 and its acquisitions during that period.

(11) The period of these acquisitions extended from 1871 to 1879. The Cleveland refineries were acquired by, and conveyed to, the Standard Oil Company of Ohio. All the other properties were acquired for the stockholders of that company. The earnings of the Company over and above a moderate annual dividend, representing the margin between a legitimate manufacturing profit in a business of that hazardous character and such a dividend, instead of being paid out in dividends to the stockholders were used to acquire these properties for their benefit. When physical properties were acquired they were conveyed to individuals in their behalf. When stocks of corporations were acquired, or stocks of new com-

panies organized to take over properties were subscribed and paid for, they were taken in the names of individuals for the same purpose. In 1879 the title to these properties and stocks, *all held in such undivided common ownership*, was vested in three trustees by an instrument which is found in the record (Deft.'s Ex. 257, Vol. 19, pp. 618–620). It is known as the Vilas, Keith and Chester agreement. It was an executed transfer of all these properties and stocks by the individuals who held them on behalf of the stockholders of the Standard Oil Company of Ohio to Vilas, Keith and Chester as trustees in trust, to hold, control and manage them for the exclusive use and benefit of the persons named in the agreement, and in the proportions therein stated, and to divide and distribute them as soon as it could conveniently be done between the beneficiaries in the proportions stated. The beneficiaries were the stockholders of the Standard Oil Company of Ohio, and their respective proportions were the proportions in which they owned the stock of that company. It thus appears that the individuals who were the stockholders of the Standard Oil

Company of Ohio owned these properties and stocks from the time of the several acquisitions in an undivided common ownership. Hence the concerns and businesses acquired were not after their acquisition independent or competitive concerns.

(12) In January, 1882, the so-called Standard Oil trust was constituted (Bill, pp. 40–51). The parties to that agreement are embraced in three classes. The second class is made up of certain named individuals, who were the stockholders of the Standard Oil Company of Ohio and the owners of the corporations named in the first class in their entirety, and of a part of the shares of the corporations named in the third class, and, with a few exceptions, of the major part. *It was not an agreement bringing together independent competing concerns separately owned, but an agreement between common owners of various properties for the purposes therein expressed.* It did not affect the relations of the properties to each other or unite them in any different ownership than had existed before. After the agreement was executed the same ownership interests in all the properties were represented by trustees'

certificates as they had previously been represented by shares of the Standard Oil Company of Ohio and the Vilas, Keith and Chester trust. It was purely an arrangement between the common owners of various properties and stocks concerning the form in which the legal title to the properties and stocks should be held and the interest of the real owners be evidenced, as distinguished from a combination of different competing properties and businesses separately and independently owned.

(13) At this time these properties in common ownership consisted of refineries at Cleveland, Oil City, Titusville, Buffalo (acquired in 1882), Pittsburg, Philadelphia, Parkersburg, Baltimore and the Atlantic seaboard in and about New York harbor; of the pipe line system which has been described, and of marketing organizations in various parts of the country. Naturally after the acquisition of these properties the main process was one of their unification and integration into a single business to secure efficiency and economy. The acquisitions after this time were of minor importance and have no material bearing on the questions in-

volved in this case. The structure of the organization was not affected by them one way or the other, and its history would have been the same without them as with them. But there was constant internal expansion and development as markets were established all over the world and the use of the products increased. Existing refineries were enlarged and new refineries were built at places best adapted for the economical distribution of the products. As new oil fields were discovered the pipe line systems were extended to supply their needs; and marketing stations, consisting of tanks for the storage of oil and tank wagons for its distribution, were established all over the country. Tank steamers were provided for the transportation of the products to countries in every quarter of the globe, and marketing stations were established there for its storage and distribution. The development along all these lines has been the result of growth and expansion, and not of combination or acquisition. The period of acquisition substantially stopped as early as 1879,—*thirty years ago.*

The most marked feature of this development during the past fifteen years has been the marketing of the oil all over this country by the Company itself. Previous to that time it had relatively few marketing stations and sold principally to jobbers who dealt with the retailers. The jobber made his own prices and the retailer was at his mercy. After the new system was inaugurated, and the Company dealt directly with the retailer by multiplying its marketing stations and expanding its system of tank wagon deliveries, the jobber was necessarily eliminated from the trade as a middleman whereever the system reached. These jobbers had plants consisting of storage tanks and delivery wagons, and customers along the routes which were traversed by their wagons. They retired from the business to a very large extent as the Company established its own marketing stations and the middleman's profit disappeared, and their plants and the good-will of their routes were for sale, and the Company bought them. Such acquisitions were numerous all over the country, but they were a natural incident in the inevitable development of the business and not

the result of an unnecessary movement simply to displace the jobber as a competitor.

How complete the structure of the Standard Oil organization was in 1882 is apparent from its structure at the present time. The Bayonne works and the Eagle works at Cummunipaw, the two principal refineries of the Standard Oil Co. of New Jersey, date back to 1877. Its works at Parkersburg and its Baltimore works date back to the same time, and its Atlas works at Buffalo to 1882. The chief works of the Standard Oil Co. of New York are the Pratt works in Brooklyn, the Queens County works, the Sone & Fleming refinery, and the Long Island works, which all date back to the period between 1872 and 1877. The refineries of the Standard Oil Co. of Ohio at Cleveland date back to 1870 and the period between that year and 1877. The refineries of the Atlantic Refining Co. at Philadelphia and at Pittsburgh and its Eclipse works at Franklin date back to the same years. The Vacuum Oil Works at Rochester and Olean date back to 1879 or thereabouts. The interest in the Galena Signal Oil Works dates back to 1879.

The remaining refineries, being those at Whiting, Ind., at Sugar Creek in Missouri, and Wood River in Illinois, of the Standard Oil Co. of Indiana; the refinery at Neodesha, Kan. of the Standard Oil Co. of Kansas; the refinery at Lima, O. of the Solar Refining Co., and the refinery at Richmond Cal. of the Standard Oil Co. of California, are all creations of the Standard organization since 1882.

The pipe line system so far as any of it was acquired, with the exception of less than a thousand miles, dates back to the period between 1873 and 1881; and the foundations of the marketing system in the various regions of this country were laid during the same period.

The organization is in all the main features of its structure a creation of the period between 1870 and 1881; and, in the main, prior to 1879.

(14) In 1892 the so-called Standard Oil Trust was dissolved as a result of the decision of the Supreme Court in the State of Ohio vs. The Standard Oil Company (49 Ohio St., 137). No change of ownership followed from this step. The real owners of the properties before the dissolution were the certificate holders, who were

originally the stockholders of the Standard Oil Company of Ohio. The plan of dissolution was for the trustees to assign to the certificate holders their proportionate shares of all the property and stocks held by the trustees. A part of the certificate holders at once surrendered their certificates and received assignments of their respective proportionate shares, and on their surrender to the various companies of these assignments received the shares of stock of each to which they were entitled. The shares of those who did not surrender their certificates continued to be held for them by the trustees. There was no change of the common ownership except as one person might be substituted for another on a transfer of certificates. There was no separation of the ownership of the shares of the different companies either by those who surrendered their certificates or those who continued to hold them. As separate shares they were unmarketable, because each company was simply a part or member of an organism though a distinct legal entity with its own officers to manage its affairs. Those who had exchanged their assignments from the trustees for shares

continued to hold their shares in a mass, just as the shares of those who did not surrender their certificates continued to be held by the trustees for them in a mass. There was no change in the conduct of the business as a unit. The function in the business as a whole, say of the Standard Oil Company of New York, continued just the same after the dissolution as before, and the same is true of all the other companies. Every owner, whether in possession of shares of the respective companies or in possession of trustees' certificates, was after as before the dissolution the owner of a fixed proportionate part of all the companies and properties.

(15) This was the situation in 1899 when the capital stock of the Standard Oil Company (of New Jersey) was increased. All the owners then owned precisely the same proportion of the shares of the Standard Oil Company (of New Jersey) that they did of the shares of each of the other companies. In 1899 they transferred all their shares in the various companies to the Standard Oil Company of New Jersey, and received for the proportion of the shares which had been represented by a trust

certificate a share of the common stock of the Standard Oil Company (of New Jersey). In other words, the owners of the shares of these various companies, all of which were owned by the same owners in the same proportions, transferred their shares to one of the companies in the common ownership, and received for them its shares in precisely the same proportion. No other change was effected than that, and that was not a change in the real ownership of the companies, but merely in the form of its evidence. Each share of the Standard Oil Company's stock represented what a trustee's certificate had represented, and after the transfer was made the individual instead of holding a trustee's certificate held a share of the Company. After the transfer the stockholders of the Standard Oil Company (of New Jersey) owned all these properties which before that they had owned as holders of trustee's certificates, and, before the formation of the trust, as stockholders of the Standard Oil Company of Ohio. The business of the companies and their relations to each other were absolutely unchanged. There was

therefore in this step no combination of previously independent competing companies. There has been the same common ownership since the acquisition of the separate concerns in the seventies; the changes have only been in the form of the evidence of that ownership.

Summary of Facts Bearing on Monopoly.

(1) There has not been at any time, with possibly one or two trivial exceptions, any exclusion of the capital or energies of others from participation in the business by restrictive agreements in connection with the acquisition of plants and properties, or otherwise. The whole domain of the business, from the production of the crude oil to the marketing of the manufactured products, has always been open to everybody.

(2) The Standard has never owned or controlled more than a small part of the production of crude oil in the various oil fields. It was not engaged in production at all until the year 1889. Since and including that year the following

figures show its percentage of the whole production year by year:

Year.	Per Cent.	Year.	Per Cent.
1889	15.90	1898	33.50
1890	24.05	1899	31.68
1891	26.22	1900	31.27
1892	24.12	1901	27.13
1893	28.84	1902	20.10
1894	28.17	1903	17.24
1895	30.12	1904	14.44
1896	28.76	1905	11.24
1897	28.71	1906	11.11

Deft.'s Ex. 266, Vol. 19.

In 1907, out of a total of 170,717,593 barrels, its production was 17,896,141, or 10½ per cent. These figures show that for years there has been a steady decrease in its proportion.

(3) The wide distribution of the oil fields has furnished the amplest opportunity for participation in the business, both with respect to the location of refineries and pipe line construction. Oil is produced in considerable quantities in fourteen or fifteen States. Defendant's Exhibit 265 (Vol. 19, p. 624), compiled from a Government publication, shows the locations of

the oil fields. Down to 1876 production was confined to Pennsylvania and New York. The Lima-Indiana, Mid-Continent, Texas, California and Illinois fields have been discovered from time to time in subsequent years. The production of Pennsylvania, New York, West Virginia, Kentucky, Tennessee, Kansas, Indian Territory, Oklahoma and Illinois, though varying in quality, is refinable by the ordinary processes, while a considerable proportion of the production of California, Ohio, Indiana, Texas and Louisiana is only refinable by special processes. This is a very different situation from a limited and confined area of production favoring concentration of refining points and pipe line facilities. Actual experience has demonstrated that there has been no obstacle to the establishment of refineries with access to the various oil fields, with or without their own pipe line facilities, or to the employment of capital in the construction of pipe lines by any one who cared to engage in the business.

(4) The increase in the production of crude oil is a marvelous record and one quite fatal to the allegations of monopoly. At the time of the organization of the Standard Oil Co. of Ohio in

1870 the total production had for the first time reached 5,000,000 barrels in one year. The 10,000,000 barrel mark was reached in the year 1874; the 20,000,000 in 1880; the 30,000,000 (permanently) in 1889; the 40,000,000 in 1890; the 50,000,000 in 1891; the 60,000,000 in 1896; the 70,000,000 in 1901; the 80,000,000 in 1902; the 100,000,000 in 1903; the 120,000,000 in 1904; the 130,000,000 in 1905; the 170,000,000 in 1907, and the 180,000,000 in 1908.

The increase is further emphasized by the table No. 266, entitled "Statistical Record of the Progress of the United States, 1800 to 1907," found in the Statistical Abstract of the United States for the year 1907, issued by the Department of Commerce and Labor, under the heading "Production of Principal Commodities." In that table petroleum is given year by year, and the following figures are taken from it:—

Year	Gallons
1870	220,951,290
1873	415,539,012
1882	1,281,454,860
1899	2,396,975,700
1906	5,312,745,312

The figures for 1908 also show the wide distribution of the oil producing fields. They are :—

Field.	Barrels (42 Gallons)
Pennsylvania (including New York and part of Ohio)	25,053,810
Lima (part of Ohio, Indiana)	10,005,547
Mid-continent (Kansas, Oklahoma)	48,488,432
Illinois	34,019,708
Gulf Coast (Texas and Louisiana)	16,906,850
California	48,306,737
Other production	400,000
Total	183,181,084

With such an increasing and widely distributed output of the raw material the coercive monopolization of its products is almost inconceivable.

(5) The enormous internal growth and expansion of the Standard since 1882 through the building of new works, the enlargement of existing ones, the new construction of pipe lines, and the expansion of its markets and marketing facilities, account for the size and extent of its business, and not the acquisition of competitive plants.

It was not until the year 1872 that the production of crude oil reached 5,000,000 barrels. Between that time and 1882 it increased to about 25,000,000 barrels, and all of its principal acquisitions of refineries and pipe lines were before 1882. It is true that the production in 1882 was 30,000,000 barrels, but it fell again in the succeeding years to less than 25,000,000. Even this production exceeded the consumption as it appears by the volume of Industrial Statistics for 1892 issued by the Secretary of Internal Affairs of the State of Pennsylvania that the stocks of crude oil increased from 1,084,423 in 1872 to 34,596,612 in 1882, largely because of the enormous production in the years 1880, 1881 and 1882. In 1882 the Standard, in addition to its refineries at Cleveland, had established itself as a refiner at Philadelphia, Pittsburgh, Titusville, Oil City, Franklin, Parkersburg, Buffalo, Olean, and on the Atlantic Seaboard around New York harbor and at Baltimore. At that time the value of its refineries and manufacturing properties was $17,000,000, and its consumption was, as appears by Defendant's Exhibit 268, 16,592,593 barrels. From time to time after 1882 it enlarged its ex-

isting works, and built new refineries at Marcus Hook, Lima, Ohio, San Francisco, Whiting, Ind., Sugar Creek, Mo., and Neodesha, Kan., and in 1906 the total value of its refining plants had increased to $57,689,560 (Deft.'s Ex. 269, Vol. 19, page 627), and its consumption to 65,000,000 barrels (Deft.'s Ex. 268).

The situation in California may be cited as a striking illustration of this internal expansion. In 1900 the Pacific Coast Oil Co. had about fifty-six acres of land which were supposed to be good for producing purposes; a small refinery at Alameda; a small pipe line about forty miles long; and a small bulk steamer. The capacity of the refinery was about 260 barrels of crude oil a day. The pipe line ran from the oil producing field to the coast at Ventura, about two or three hundred miles from the refinery at Alameda. The Company's stock and property were purchased by the Standard in that year for $760,000. It then constructed a refinery at Richmond, Cal., utilizing as much of the material of the Alameda refinery as it could, which has a capacity of 28,000 to 30,000 barrels of crude oil a day. A pipe line 350 to 400 miles in length was built in the years 1902 and 1903

to the refinery from the oil fields which had been recently discovered in an entirely different region of California from that tapped by the short pipe line of the Pacific Coast Oil Co. In 1900 the total production of crude oil in California was 4,329,950 barrels, and in 1907 it was over 40,000,000 barrels. California crude could not in 1900 be refined into a marketable article, and its product was only saleable by mixing it with eastern refined oil in the proportion of 30 per cent. of California refined to 70 per cent. of eastern oil. The Standard, through its chemists, invented a process for the successful refining of the native oil into a merchantable article, and now, through its efforts, all the Pacific Coast trade and a large Oriental trade are supplied with oil manufactured from California crude. The domestic trade amounted in 1902 to 40,259 barrels; in 1903 to 161,889; in 1904 to 243,471; in 1905 to 359,337; in 1906 to 346,390; and in 1907 to 440,856 barrels. The export trade was in the year 1904, when it began, 61,342 barrels; in 1905, 271,900 barrels; in 1906, 878,874 barrels, and in 1907, 1,161,162 barrels.

The Pacific Coast Oil Co., as we have said, was purchased in 1900 for $761,000.00 After-

wards its name was changed to the Standard Oil Company of California. Its net assets on December 31st, 1906, were $21,329,952.00. The authorized capital of the Company is now $25,000,000.00, of which $17,000,000.00 have been issued, the whole of which was paid for in cash at par by the Standard Oil Co. (of New Jersey). In other words, the Standard Oil Company (of New Jersey), has contributed the original purchase price and $17,000,000.00 of additional money in the development of the business in California. (Tilford, Vol. 17, pp. 3488, 3496, 3522 and 3523). The California Company has only paid dividends in the years 1906, 1907 and 1908; in 1906 and 1097 at the rate of 6 per cent., and in 1908, at the rate of 10 per cent.

Defendant's Exhibit 284, Vol. 19, page 683, shows that in 1902 the Standard Oil purchased in California 3,000,000 barrels out of a total production of 14,000,000; in 1903, 6,000,000 out of a total of 24,000,000; in 1904, 9,500,000 out of a total of 29,700,000; in 1905, 9,500,000 out of a total of 34,000,000; in 1906, 9,500,000 out of a total of 32,500,000, and in 1907, 9,000,000 out of a total of 40,000,000; and that its own production was in 1902 113,778 barrels;

in 1903, 91,133; in 1904, 121,994; in 1905, 97,205; in 1906, 59,556, and in 1907, 624,000 barrels.

What it has accomplished there by the size of its own undertaking could have been accomplished by any one with the same energy and enterprise and willing to take the risks of such an investment; and others are now actually following in its wake, notably the California Petroleum Refineries, Ltd., with its refinery with a capacity of 2,500,000 barrels of crude per year.

In 1882 the total Standard pipe line mileage was 3,531 miles, divided between gathering lines 2,468, and trunk lines 1,062.95. In 1899 its total mileage had increased to 14,653, of which 10,749 miles were gathering lines and 3,904 trunk lines. In 1908 the total mileage was 54,616, of which 45,227 were gathering lines and 9,388 were trunk lines. Less than a thousand miles of this increase were acquired by purchase from others. The balance was all new construction of its own. After 1882 the trunk lines were completed to the seaboard at Bayonne, New York, Philadelphia and Baltimore; gather-

ing lines were built for the Lima-Indiana and Illinois fields, with a trunk line to Chicago; for the great Mid-continent field, with a trunk line to Whiting, and for the California field. (Deft.'s Exhibit 262, Volume 19, following page 621, graphically illustrates the increase of the pipe line mileage during the period stated).

The increase in the marketing stations is shown by Defendant's Exhibits 263 and 264 (Vol. 19). A marketing station consists of tanks for the storage of oil, with tank wagons for the distribution of the oil to retailers. Exhibits 263 shows that in 1888 there were 313 such stations and their location. Exhibit 264 shows that in 1906 there were 3,573, and their location.

The efforts of the company have been unceasing in the development of the markets of the world. As Mr. Archbold testified (Vol. 19, p. 3290)—

> "Our trade is pretty nearly world-wide. There is scarcely a civilized part of the globe that the Standard Oil Co. does not reach in one way or another with American oil. Q. And has it been a slow building-up process? A. It has been a process since the organization began. The effort began at once with the expansion of trade. The

effort of the Standard Oil Co. from its very inception has been the development of the resources of this country and the extension of its commerce throughout the world. Q. In the Orient and in Europe is it your endeavor to reach the consumer direct in the same way you do here? A. It is. We are as rapidly as possible putting the same plan of distribution into operation in all those countries that we have here, so as to, with the greatest possible economy, reach the consumer."

Defendant's Exhibit 276, Vol. 19, p. 660, shows the relative volumes of the Standard's export and domestic trade in illuminating oil, as follows:

Year.	Exports.	Domestic.
1891	57.10 Per Cent.	42.90 Per Cent.
1892	57.28 "	42.72 "
1893	61.72 "	38.28 "
1894	62.44 "	37.56 "
1895	60.15 "	39.85 "
1896	63.61 "	36.39 "
1897	64.25 "	35.75 "
1898	62.17 "	37.83 "
1899	60.21 "	39.79 "
1900	61.84 "	38.16 "
1901	63.39 "	36.61 "
1902	59.92 "	40.08 "
1903	55.37 "	44.63 "
1904	60.14 "	39.56 "
1905	62.86 "	37.14 "
1906	63.00 "	37.00 "

The development of the business is remarkably illustrated by the table on page 525, Volume III, of the Brief on the Facts, which shows the attention that has been continuously given to the utilization of the by-products of the Standard refineries, their manufacture into useful articles, and the creation

and expansion of the demand for them. The table is as follows:

CRUDE OIL CONSUMED—CRUDE OIL YIELD, AND THE DIVISIONS AS BETWEEN REFINED OIL AND ALL OTHER PRODUCTS BY S. O. CO. REFINERIES.

Year	Total Crude Oil Consumed (Gallons)	Total Yield all products (Gallons)	Total Refined Oil (Gallons)
1895	1,712,431,056	1,630,234,365	990,084,070
1900	1,872,159,702	1,774,807,397	1,098,236,795.5
1904	2,345,797,146	2,207,629,694	1,112,495,658
1906	2,728,248,642	2,571,919,995	1,209,441,341

Year	Percentage Refined Oil Of Total	Total By-Products (Gallons)	Percentage By-Products of Total
1895	60.73	640,150,295	39.27
1900	61.88	676,570,601.5	38.12
1904	50.39	1,095,134,036	49.61
1906	47.02	1,362,478,654	52.98

Year	Refined Oil. Inc. over 1895 Gallons	Per Cent.	By-Products. Inc. over 1895 Gallons	Per Cent.
1900	108,152,725.5	10.92	36,420,306.5	5.69
1904	122,411,588	12.36	454,983,741	71.07
1906	219,357,271	22.14	722,328,359	112.84

Thus the total amount of illuminating oil for foreign and domestic trade had come to be in the year 1906 less than one-half of the total product of the Standard refineries, the remainder consisting of the by-products enumerated by Mr. Archbold (Vol. 17, p. 3255).

In the same brief it is shown that in the year 1906 bulk for bulk the illuminating oil sold in the United States by the Standard concerns formed only 17.39%, or about one-sixth, of the total products of the refineries, and yet the brunt of the charge against it is that it is a monopoly by virtue of its control of the illuminating oil trade (Brief on the Facts, Vol. III, p. 528).

The same brief (pp. 530, 531), shows that the largest estimate of the profits earned on the de-

fendants' domestic trade in illuminating oil in 1906 was from $14,000,000 to about $18,000,000. If it should be objected that it does not appear that the profits on the foreign and domestic trade were on an equality attention is called to the following figures which show that the average export prices have been uniformly higher than the average domestic refinery prices for the same kind of oil.

Year.	Pet. Ex. 1041 Export W. W. Prices.	Def. Ex. 293–B, Average Refinery Prices W. W. Oil.
1895	5.84	5.24
1896	5.77	4.93
1897	4.68	4.02
1898	4.97	4.26
1899	6.29	5.25
1900	6.96	5.44
1901	5.60	4.96
1902	5.71	5.45
1903	7.39	6.85
1904	6.81	6.76
1905	5.68	5.42
1906	6.14	5.38

The foreign companies, to whose profits reference was made on the oral argument, are mar-

keting companies only; so that the fact that they have apparently made a lower percentage of profits than the domestic companies has no significance. Most of the domestic companies, especially those whose profits have been largest, are both refining and marketing companies. Naturally their profits would be very much larger than those of mere marketing companies. The comparison between export prices, which include the refining profit, and the average domestic refinery prices, is the proper test, and it establishes an approximate equality between the export and domestic trade in refined oil as to profits.

(6) There have always been numerous refineries in this country, owned by other parties, engaged in the production and sale of oil here and in foreign countries. In the report of the Commissioner of Corporations concerning the oil industry, dated May 2nd, 1906, there is given (on page 59) a list of 65 so-called independent refineries which is headed "Principal Independent Refineries in the United States by States, 1904." That list shows refineries at various points in Pennsylvania, New York, New Jersey, Ohio, Kansas, Texas and California. In a foot note on page 58 the Commissioner adds six others, which

" began operations in 1905 and 1906 in the Kansas territory." Referring to the oil regions in Pennsylvania he states (R., p. 84) that " there are two independent refineries at Bradford, ten at Warren, Struthers and Clarendon, three at Titusville, three at Coraopolis, six at Oil City, and others at scattered locations, making altogether more than thirty such establishments in this vicinity."

Mr. Emery, in his testimony in this case, named 52 independent refineries as active works, and among them such important concerns as the Pure Oil Co. with its refinery at Marcus Hook, Pa., the National Refining Co. with refineries at Cleveland and other points, the Gulf Refining Co., and the Texas Co. His list with two or three exceptions is confined to Ohio and east of Ohio.

The witnesses Westgate and Boltz in their testimony named 36 refineries which have formed an association known as the National Petroleum Association for the advancement of their interests (Vol. 6, p. 2926; Vol. 5, p. 2054).

Defendants' Exhibit 277 (Vol. 19, pp. 662 and 663) gives a list of 123 competitive refineries.

This subject is exhaustively treated in the Brief on the Facts, Vol. I., p. 231.

In the report of the Commissioner of Corporations on the oil industry of August 5th, 1907, it is said at page 651 :

> "The largest independent concern in 1904 scarcely produced more than 200,000 barrels of illuminating oil. Since that time, however, two or three independent concerns have enlarged their refineries or built new ones which approach more nearly to the size of the Standard plants. Thus, the plant of the Pure Oil Co. at Philadelphia has a capacity of about 700,000 barrels (of 42 gallons) of crude per year, and can produce on the basis of the prevailing yield from Pennsylvania crude between 300,000 and 400,000 barrels (of 50 gallons) of illuminating oil per year. The Gulf Refining Co.'s plant at Port Arthur, Tex. has a crude capacity of more than 4,000,000 barrels per year. This is by far the largest independent refinery now in operation, but on account of the small proportion of illuminating oil obtained from Texas crude its output of that product is much less than that of many of the Standard plants, probably in the neighborhood of 500,000 barrels per year. A new independent concern in California, the California Petroleum Refineries, Ltd., has a plant nearing completion which will have

a capacity of about 2,500,000 barrels of crude per year, which is not very much less than the capacity of the Standard's California plant, which in 1904 handled about 3,017,000 barrels."

And on pages 636 and 637 :

" Many independent concerns have gone a good way in the direction of integration. Thus many of the small refiners of Western Pennsylvania and Ohio are interested in crude-oil production, and supply part of the oil which they refine. A considerable number of them have small pipe lines or are part owners of pipe lines for supplying their refineries with crude. A large proportion of them have facilities for selling their products directly to retail dealers or are interested in marketing concerns which have such facilities. The great majority of the refiners, it is true, have not carried integration nearly so so far as the Standard. But some of them, such as the Pure Oil Co., the Gulf Refining Co. (in conjunction with the J. M. Guffey Petroleum Co., which is owned by the same interests), the National Refining Co. of Cleveland, and the Union Oil Co. of California, have developed the system of integration to a degree approaching that of the Standard itself. All of these concerns have pipe lines, refineries and local marketing facilities. All of them carry the

> elaboration of by-products to substantially the most complete point permitted by the character of the crude which they use. All except the National Refining Co. are large producers of crude oil. All of them own tank cars and all, except the National Refining Co., own tank vessels. Probably none of these concerns manufactures the accessory materials of refining, packages, etc., to any such extent as the Standard does, but otherwise their system of integration is nearly as complete as that of the Standard. The difference between them and the Standard is rather in the volume of business than in its comprehensiveness."

The testimony shows that these concerns are as a rule prosperous and growing. As an illustration of that fact, Petitioner's Exhibit 371, Vol. 8, Page 899, shows that the crude oil receipts of the Producers' and Refiners' Oil Co., associated with the Pure Oil Co., increased from 1,321,572 barrels in 1900 to 2,771,384 barrels in 1906; that the crude oil delivered by the United States Pipe Line Co., associated with the Pure Oil Co., to the refinery of the latter Company at Marcus Hook which began operations in 1904 increased from 223,000 barrels in that year to 733,000 barrels in 1906; and that the refined oil delivered by the United States Pipe Line Co. from interior

refineries to Marcus Hook increased from 400,000 barrels in 1901 to 800,000 barrels in 1906. Mr. Tarbell, who is connected with those Companies, testified that their business had been "a growing, developing and expanding business" (Vol. 3, p. 1451), and further as follows (*Idem*, p. 1460):

> "Q. Mr. Tarbell, for a number of years you have lived alongside of the Standard Oil Co., have you not, in many different localities in the transaction of your business? A. We are in a number of points where they are doing business; yes, sir. Q. At many points? A. Yes, sir. Q. In Europe and in this country? A. Yes, sir. Q. And your business is growing? A. Yes, sir. Q. And you have made money? A. Yes, sir. Q. And you are a prosperous concern? A. Well, I think we are. Q. And you are expanding and developing the whole time? A. It is necessary to do so if we stay in the oil business.

These conditions are utterly inconsistent with the theory of a monopoly. They demonstrate that the field is not only open to competitors, but is occupied by them. The extent to which they participate in it is measured only by their efforts and capital. It is true that the Standard

has done a large percentage of the business, but that is because of its long life, its comprehensive efforts, its energy, and the capital it has employed and risked. That percentage has been, however, continually decreasing in later years as others have engaged in the business on a larger and more comprehensive scale. What is true of to-day was equally applicable to past times if the same efforts and capital had been employed, and the same intelligence shown in adapting those efforts to modern conditions. The percentage of the total business done by the Standard will doubtless continue to decrease, and the causes of that decrease had just the same opportunity of operation in the past as in the present. The volume of the business which any concern obtains for itself is dependent upon its activities and means. That is true now, and always has been true. It is true of the volume of business that has been done by the Standard and by its competitors. It was the most intelligent, the most active, the best equipped, and in the highest credit, and the greatest share of the business fell to it. But that is not monopoly, and that it is not so is demonstrated by the fact

that as others have approached it in efficiency, capacity and means they have shared in the business correspondingly, and are constantly sharing in it to a greater and greater extent.

(7) To show the volume of the Standard's business is the object of Petitioner's Exhibits 376, 377 and 378 (Vol. 8, Page 904). Exhibit 376 shows that the runs from the Standard, Tide-Water and Manhattan pipe lines, compared with the total production of crude oil in the Pennsylvania field, were in the year 1900, 92.9 per cent.; in 1901, 92.9 per cent.; in 1902, 90.7 per cent.; in 1903, 89.5 per cent.; in 1904, 88.7 per cent.; in 1905, 87.3 per cent., and in 1906, 83.2 per cent., which is a decrease of nearly 10 per cent. in seven years; and that the percentages with respect to the Lima-Indiana field were in 1900, 92.9 per cent.; in 1901, 93.0 per cent.; in 1902, 92.5 per cent.; in 1903, 92.4 per cent.; in 1904, 93.5 per cent.; in 1905, 92.9 per cent., and in 1906, 89.6 per cent. It is to be observed as to the Lima-Indiana field that it has been largely left to the Standard for the reason that its production, excepting to a small extent, is not refinable by the ordinary processes; and that the Standard at great expense developed and patented a successful process for its utilization.

Exhibit 378 shows that the proportions of the total pipe line deliveries to the Atlantic sea-board of the Standard and Tide-Water Pipe Lines from 1900 to the year 1906, were as follows :

Year.	Per cent.	Year.	Per cent.
1900	97.1	1904	95.7
1901	97.5	1905	95.5
1902	96.6	1906	95.1
1903	96.0		

These figures simply show that during the years they cover the Standard and Tide-Water Companies refined 95 per cent. of the crude oil refined at the Atlantic sea-board if the amount of crude exported and the amount reaching the seaboard by railroad be disregarded. There was no reason why others should not have refined at the sea-board as the Pure Oil Company does.

Exhibit 377 shows during the same years the proportion of the exports of illuminating oil by the Standard compared with the total exports, as follows :

Year.	Per cent.	Year.	Per cent.
1900	90.8	1904	86.9
1901	90.5	1905	87.9
1902	89.3	1906	86.3
1903	86.2		

Here again we have a decreasing proportion.

The use of naphtha or gasoline has greatly increased during the last ten years, so that, as appears from the statistics of 1904, it was a little over one-half of the quantity of illuminating oil that was marketed. It is a more valuable product than illuminating oil as it brings a much higher price. This trade is another instance of the increase in the volume of the business of competitors during recent years as it has grown from eight per cent. of the whole in 1897 to 13 per cent. in 1906. (Brief on Facts, Vol. III., p. 535).

Another instance of the same kind is furnished by Defendant's Exhibit 108 (Vol. 18, p. 274), which shows the number of tank cars in use in this country in the transportation of petroleum and its products on the first day of January of each year of the years 1899, 1905 and 1908, by the Union Tank Line Company and the Waters-Pierce Oil Co. (Standard Companies), and by other companies and railroads. It appears that in 1899 the Standard's cars were 62 per cent. of the whole; in 1905 they had decreased to 52 per cent.; and in 1908 they had further decreased to 51 per cent.; whilst during the same period the

tank cars of other companies, including those owned by the railroads which are used by them, had increased from 38 per cent. of the whole to 49 per cent. To express the matter in another way the Standard's tank cars between 1899 and 1908 had increased 171 per cent., whilst those in use by others had increased 263 per cent.; or the tank cars used by the Standard Companies in 1899 were 60 per cent. more than those in use by others while in 1908 they were only four per cent. (Brief on Facts, Vol. II., p. 251).

But whatever may be the volume of the Standard's business it is due to the size and capacity of its refineries, their geographical distribution, and the marketing facilities that it has provided in every section of this country and throughout the world. It is *not* due to any restriction of the employment of the energies and capital of others in the business, or to any system of exclusive selling to the trade. There is no evidence that the dealers in oil have ever been required to buy exclusively from the Standard, or been placed under any restrictive contracts or arrangements respecting the source of their supply. There has been no effort at any time to control

the market by any such means. That formidable weapon has never been used to secure an advantage over competitors, and had the Standard men ever been engaged in a conspiracy to "crush" competition by excluding competitors from the trade it would have been used because of its potency.

It is claimed that the extent of the Standard's pipe line system has conduced to a monopolistic control of the business. That charge we have already answered. Its pipe line systems have been extended from time to time as new oil fields were discovered to meet its own needs and provide its refineries with a regular and adequate supply of crude oil. It was a necessary step, and as legitimate as it was necessary. Wherever these lines could be private lines that was and is their character, because they were built for its own purposes. For instance, when the mid-continent field showed promise of great development the Prairie Oil and Gas Co., organized by the Standard, by an expenditure of many millions of dollars built its own private line to reach those fields and acquire the oil for the Standard's refineries. The production of those fields has far exceeded the consumption, but

tankage has been provided at a cost of many more millions that the producers might have an immediate cash market for their oil. But the United States Pipe Line Company, controlled by the Pure Oil Co., also has its pipe line to the Atlantic sea-board, and has extended its trunk line and its gathering systems into Ohio, and West Virginia to reach the oil in those fields. The Texas and Gulf Co.s have their pipe lines running from the mid-continent field to the Gulf. What those Companies did, and have done, others could equally well have done wherever oil is produced by finding capital and putting it to that use.

In the States where it was necessary by local laws or for other reasons that the pipe lines should be common carriers the relation of any one desiring transportation has been the same as the relation of shippers to any other common carrier. They could demand reasonable rates and enjoin unreasonable rates. Since July, 1906, they have been able, under the Interstate Commerce Act, to apply to the Interstate Commerce Commission to fix the rates of any of the common carrier lines engaged in interstate transportation, but no one has done so.

The claim that the ownership of the pipe line systems has been used coercively with a monopolistic effect is without any foundation. The fact is that from an early day pipe lines have been, as they now are, an absolutely necessary adjunct to the refining business on a large scale, and they have been provided by the Standard to meet its own needs for a sure, regular and adequate supply of oil for its refineries, and not as a weapon of coercion or control.

(8) It is further charged that the volume of the Standard's business has been due to railroad rebates, particular contracts in restraint of trade, and unfair competitive practices. Those subjects are dealt with at length in the Brief on the Facts.

(9) It is also charged that the course of prices furnishes evidence tending to show a monopoly. That charge is effectively answered in the Brief on the Facts (Vol. 3, pp. 539 *et seq.*) where it is shown that during the period under examination the Standard's prices rose less than the average rise in general comodities, and that, measured by the purchasing value of money, they did not practically rise at all. Moreover the constant fluctuation in the prices from year

to year is the strongest evidence that they were governed by economic conditions and not fixed by arbitrary will. It is to be borne in mind that there may be a natural and legitimate influence or power over prices due to the magnitude of a business, and that inferences may not be drawn from prices in favor of monopoly when the other evidence shows that the magnitude of the business is due to legitimate acquisition, growth and development, and not to the exclusion of others from the business by restrictive contracts or unlawful or coercive methods. Obviously the controlling and fundamental matter is whether that magnitude is a growth and development along lawful and legitimate lines: because if it is so the course of prices is quite immaterial.

(10) What has been said about the course of prices covers the charge that the profits of the Company have been excessive. In the first place the profits have not been excessive considering the nature and hazards of the business; and in the next place if the evidence, apart from profits, fails to show that the magnitude of the business is monopolistic the fact of unusual profits, if it existed, does not convert it into a monopoly.

These summaries are not exhaustive, and do not pretend to be more than a fair statement of the more material facts bearing on the subjects they cover.

POINTS.

(1) The common ownership of the Standard properties was not an illegal combination or conspiracy at the time the Act of 1890 went into effect.

(2) The Act of 1890 did not by its terms or reasonable construction convert that common ownership into an illegal and criminal combination in restraint of trade.

(3) Congress could not constitutionally convert the ownership of the properties and the use to which they were put into an illegal and criminal combination or conspiracy.

(4) Even if the acquisitions of the Standard properties and their common ownership had occurred since the Act of 1890 went into effect they would not constitute an illegal and criminal combination or conspiracy within the Act.

(5) The acquisition by the Standard Oil Co. (of New Jersey) from the common owners of their shares in the so-called subsidiary companies was not an illegal and criminal contract, combination or conspiracy within the Act of 1890.

(6) There is no monopolization or attempt to monopolize.

(7) The only relief, if any, that can be granted is to enjoin specific acts, contracts, or methods in restraint of interstate trade or tending to its monopolization if any such are found to exist.

(8) There is no basis in the proofs for a degree affecting the international trade of the Defendants.

(9) There is no basis in the proofs for a decree severing the ownership of the stocks of the pipe line companies.

(10) There is no basis in the proofs for a decree affecting the Defendants engaged in the natural gas business, or the ownership of their stocks by the Standard Oil Co. (of New Jersey).

POINT I.

The common ownership of the Standard properties was not an illegal combination or conspiracy at the time the Act of 1890 went into effect.

(1) The right freely to buy and sell property is a fundamental civil right and a part of the liberty of the individual guarded and protected by the constitutional guaranties, both national and state. It is indispensable to the existence and progress of civilization. The utmost freedom in its exercise as an element of the broader principle of liberty of contract is inherent in our social and industrial system. It has never been limited by any policy of encouraging or protecting competition. There has never been one rule with respect to its exercise for competitors in business and another for non-competitors. No such classification is recognized by the common law. The right to buy from or sell to a competitor is no different from the right to buy from or sell to a non-competitor. The common law furnishes no precedent placing any restriction upon the right of competitors to buy from and sell to each other their businesses and plants.

As recently as Cincinnati Packet Co. vs. Bay (200 U. S., 179) the validity of a sale was recognized though, as the Court said, "All there was to sell besides certain instruments of competition was the competition itself."

In Trenton Potteries Co. vs. Oliphant, 58 N. J. Eq. 507,524, combinations by independent and unconnected traders to regulate prices or production are distinguished from purchases of the businesses of competitors, and in regard to the latter the Court said:—

> "A person engaged in any manufacture or trade, having the right to acquire and possess property, and to do with it what he chooses, may lawfully buy the business of any of his competitors. His first purchase would at once diminish competition. If he continued to purchase, each succeeding transaction would remove another competitor. If his capital was large enough to enable him to buy the business of all competitors, the last purchase would completely exclude competition, at least for a time. But in the absence of legislative restrictions (if such could be imposed) upon the acquisition of such property and its use when so acquired, courts could impose no limitation. They would be obliged to enforce such contracts, notwithstanding the effect was to diminish or even to exclude competition.

But appellant is a corporation and not an individual. Corporations, however, may lawfully do any acts within the corporate powers conferred on them by legislative grant. Under our liberal corporation laws, corporate authority may be acquired by aggregations of individuals organized as prescribed to engage in and carry on almost every conceivable manufacture or trade. Such corporations are empowered to purchase, hold, and use property appropriate to their business. They may also purchase and hold the stock of other corporations. Under such powers it is obvious that a corporation may purchase the plant and business of competing individuals and concerns. The legislature might have withheld such powers or imposed limitations upon their use. In the absence of prohibition or limitation on their powers in this respect, it is impossible for the courts to pronounce acts done under legislative grant to be inimical to public policy. The grant of the legislature authorizing and permitting such acts must fix for the courts the character and limit of public policy in this regard. It follows that a corporation empowered to carry on a particular business may lawfully purchase the plant and business of competitors, although such purchases may diminish or, for a time at least, destroy competition. Contracts for such purchases cannot be refused enforcement."

In Diamond Match Co. vs. Roeber, 106 N. Y., 483, it was said:

> " We are not aware of any rule of law which makes the motive of the covenantee the test of the validity of such a contract. On the contrary, we suppose a party may legally purchase the trade and business of another for the very purpose of preventing competition, and the validity of the contract, if supported by a consideration, will depend upon its reasonableness as between the parties. Combinations between producers to limit production and to enhance prices, are or may be unlawful, but they stand on a different footing."

See, also,

In re Greene, 52 Fed., 104.

In re Corning, 51 Fed., 210, 211.

(2) The common law doctrine respecting contracts and combinations in restraint of trade does not circumscribe the right to buy and sell; it concerns only executory contracts or arrangements restricting the liberty of individuals in the pursuit or conduct of their businesses. Its underlying conception was that such restrictions could be carried to the point of contravening a sound publie policy with respect to the freedom of the individual to employ

his energy and capital in trade, and the freedom of trade. It has no concern with compulsory competition or the right of the individual to retire from a trade in which he is engaged and sell the business and the property employed in it to a competitor. It leaves competitors free to form partnerships and thereby combine their energies, resources and capital. It leaves them free to form corporations and unite their energies, resources and capital in that mode of organization. It does not deny to the competitor who wishes to retire from business, or who from lack of ability, ingenuity or enterprise, is falling behind in the competitive race, or who for any other reason wishes to sell, the only market for his business by prohibiting him from selling it to those engaged in the same business. It has never sought to place a limit on the expansion of the business of the individual or the corporation either by employing additional capital in enlarging existing plants, or building new ones, or by acquiring existing plants from others. In leaving free the right to buy and sell the common law merely expresses the faith and belief of men and society in the free play of individual

effort and the supreme necessity of the right to industrial progress.

> "The truth is," said Lord Justice BOWEN in the Mogul Steamship Case, L. R., 23 Q. B., 617, "that the combination of capital for purposes of trade and competition, is a very different thing from such a combination of several persons against one, with a view to harm him, as falls under the head of an indictable conspiracy. There is no just cause or excuse in the latter class of cases. There is such a just cause or excuse in the former. There are cases in which the very fact of a combination is evidence of a design to do that which is hurtful, without just cause,—is evidence—to use a technical expression—of malice. But it is perfectly legitimate, as it seems to me, to combine capital for all the mere purposes of trade for which capital may, apart from combination, be legitimately used in trade. To limit combinations of capital, when used for purposes of competition, in the manner proposed by the argument of the plaintiffs, would, in the present day, be impossible—would be only another method of attempting to set boundaries to the tides."

(3) The scope and limits of the common law doctrine are clearly shown and fixed by the cases habitually cited. These cases have been frequently analyzed by the courts,

particularly in the opinions of HARLAN, J., in U. S. vs. E. C. Knight Co. (156 U. S., p. 25 *et seq.*) and in Northern Securities Co. vs. U. S. (193 U. S., pp. 339–342); and in the opinion of TAFT, J., in U. S. vs. Addystone Pipe and Steel Co. (84 Fed., pp. 288–292).

The leading cases are Hilton vs. Eckersley (6 El. & Bl., 47) in England; and in this country Morris Run Coal Co. vs. Barclay Coal Co. (68 Pa. St., 173); Salt Co. vs. Guthrie (35 Ohio St., 666); Arnot vs. Pittston & Elmira Coal Co. (68 N. Y., 558); Craft vs. McConoughy (79 Ill., 346); India Bagging Association vs. Kock (14 La. Ann., 168); Vulcan Powder Co. vs. Hercules Powder Co. (96 Cal., 510); Oil Co. vs. Adoue (83 Tex., 650); and Chapin vs. Brown (83 Iowa, 156). Many other cases might be cited, but these are typical of them all, and a reference to them will sufficiently indicate the nature of the combinations which have been held to be in restraint of trade or contrary to public policy and show that they do not include purchases of competitive properties.

Hilton vs. Eckersley (6 El. & Bl., 47) was brought upon a bond signed by eighteen Lancashire cotton spinners binding them severally to

carry on their businesses with respect to the wages they would pay, hours of labor and other matters, according to the regulations of the majority. The Court of Exchequer Chamber held that the bond was void, because in restraint of trade, for the reason that "each man's power of carrying on his trade according to his discretion for his own best advantage" was restrained. (See Stephens' History of the Criminal Law of England, pp. 219, 220).

Morris Run Coal Co. vs. Barclay Coal Co. (68 Pa. St., 173), was an agreement between five independent coal companies, controlling the production of the Blossburg and Barclay mining regions in Pennsylvania, empowering a committee to fix prices and each company's proportion of sales.

Arnot vs. Pittston and Elmira Coal Co. (68 N. Y., 558), was an agreement between two independent coal companies whereby one of them, which had a coal depot at Elmira which was the chief market for coal in western New York, purchased a portion of the product of the other and bound it not to sell coal to any other party to come north of the state line between New York State and Pennsylvania. It also appeared that

the purchasing company had similar contracts with all the other mining proprietors in the same coal region.

Salt Co. vs. Guthrie (35 Ohio St., 666), involved an agreement between independent manufacturers in a salt producing territory in Ohio providing for a committee to fix the prices at which all of them should sell their product.

Craft vs. McConoughy (79 Ill., 346), involved an agreement between five independent grain dealers in Rochelle, Illinois, to conduct their business as if independent of each other, but fixing the prices at which they would sell and dividing the profits of the business as a whole between them in fixed proportions.

India Bagging Association vs. Kock (14 La. Ann., 168) was based on an agreement between eight independent commercial firms in New Orleans which held a large quantity of cotton bagging providing that no member should sell for three months excepting by vote of the majority.

Vulcan Powder Co. vs. Hercules Powder Co. (96 Cal., 510) involved an agreement between four independent powder companies of California providing that each should sell at

prices to be fixed by a committee of their representatives, and pay over to the others the profits on any excess of sales over a fixed proportion of the total sales.

Oil Co. vs. Adoue (83 Tex., 650) was based on an agreement between five independent owners of cottonseed oil mills in Texas that they would not sell at less than certain agreed prices, and whereby one of them guaranteed to the other four profits to a stated amount.

Chapin vs. Brown (83 Ia., 156) involved an agreement between the grocery men in a town not to buy or sell any butter so as to throw the business into the hands of one man who dealt exclusively in butter.

There are other cases concerning agreements between independent companies or parties engaged in a quasi-public employment fixing prices and dividing or pooling the business. (Gibbs vs. Gas Co., 130 U. S., 396; Hooker vs. Vandewater, 4 Denio, 349; Stanton vs. Allen, 5 Denio, 434; West Va. Transportation Co. vs. Ohio River Pipe Line Co., 22 W. Va., 600.)

These cases sufficiently illustrate the doctrine of the common law although in some of them there was a local statute denouncing con-

spiracies "to commit any act injurious to trade or commerce." In each case there was a combination of *independent competitive* manufacturers or dealers in the form of an *executory* agreement regulating prices, production, or the conduct of the business of each in other particulars. The essence of such combinations is that the parties to it are independent competitive manufacturers or dealers, and that restraint is placed upon the freedom of each to conduct his own business with respect only to his own interests and judgment. Unless these essential elements appear the doctrine of these cases has no application. Purchases of property, though affecting competition in uniting properties employed in the same business which had been previously separately owned, were not involved, and are neither within the letter or the spirit of the principle of these cases.

(4) It is not necessary to analyze the rule of public policy on which these cases are based. "Public policy," said Lord BROUGHAM, in Egerton vs. Brownlow (4 H. L. Cas., 196) "is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the

public good." "If," said Sir GEORGE JESSEL, in Printing Co. vs. Sampson (19 L. R. Eq. Cas., 462) "there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts, when entered into freely and voluntarily, shall be held good and shall be enforced by Courts of Justice". Whenever contracts or transactions are questioned as injurious to the public there is a balancing of the considerations bearing on liberty of contract on the one hand and on the public good on the other, out of which have grown certain fixed and definite rules or determinations. Amongst them is this rule that combinations or contracts between independent manufacturers or dealers regulating their businesses and restricting each in the conduct of his own separately owned business may establish such a control of the market as to be injurious to the public and, therefore, the courts will not enforce them. But when purchases are made of competing concerns there is no continuance of the previous separate ownership and no restriction upon the conduct of businesses separately owned. The purchaser

has increased his productive capacity to the extent of his acquisitions, but neither he nor anyone else is thereby under the ban of any restrictions. The distinction between the two situations is obvious and fundamental, and it is the reason why the rule with respect to combinations does not apply to the ownership of various properties through their acquisition and purchase though they were previously employed in competition. The title to property thus acquired passes, and with it the complex mass of rights called ownership, among which is the right to use it for the purposes for which it is adapted. There is no authority at common law for invalidating, limiting or impairing rights of ownership in property so acquired.

(5) But it will no doubt be argued that if acquisitions originate in a scheme to acquire practically all the properties or plants used in a business with a view to restraining trade or controlling the market it is an illegal combination at common law. The proposition, which it will be insisted is sustained by certain cases, has been thus formulated: "An agreement between competitors to surrender control over their properties, and transfer them to one and

the same corporation or organization, where each transfer is conditional upon a similar transfer by each of the other competitors and parties to the arrangement, and where the consideration for each transfer is the acquirement of an interest by the seller in the new organization which will have control of all the former competitors, is an illegal combination." Whether this is a sound common law doctrine we need not stop to discuss, because the facts of this case do not bring it within its range. But a reference to the cases will be useful in accentuating the precise facts which were involved and the scope of the rule they apply.

These cases are, Richardson vs. Buhl, 77 Mich., 632; People vs. North River Sugar Refining Co., 54 Hun, 354; State vs. Standard Oil Co., 49 Ohio St., 137; State vs. Distillery Co., 29 Neb., 700; Distilling Co. vs. People, 156 Ill., 448.

In Richardson vs. Buhl (77 Mich., 632), it was held that the Diamond Match Company which had been incorporated for the purpose of manufacturing and dealing in friction matches, and acquiring as far as possible all the plants in the United States, was an unlawful body. The only

authorities cited are cases involving contracts between, or combinations of, independent producers regulating prices or production. It is not a reasoned determination of the matter, and, the question was imported into the case by the Court on its own motion, in connection with the determination of a collateral matter between individuals, and without its being raised or discussed by counsel, or the presence of the company itself. The case stands by itself and is in direct conflict with Trenton Potteries Co. vs. Oliphant, 58 N. J. Eq., 507; Oakdale Co. vs. Garst, 18 R. I., 484; State vs. Continental Tobacco Co., 177 Mo., 1; *In re* Greene, 52 Fed., 104; *In re* Corning, 51 Fed., 210, 211.

The People vs. North River Sugar Refining Co., 54 Hun, 354, was a case of a combination of separately owned and competing manufacturing concerns in the form of a trust. It was held that the transfer of the shares of the company by the stockholders to the trustees of the trnst was an *ultra vires* and unlawful act on the part of the corporation warranting its dissolution, and that the trust in tending to monopoly was an illegal combination. This was not a case of sale, but a pure combination be-

tween independent concerns for the management and control of their separate businesses as a whole by a body of trustees. The Court of Appeals sustained the judgment on the former ground and did not pass on the question of the combination as a monopoly. (121 N. Y., 582).

State vs. Standard Oil Co. (49 Ohio State, 137), was determined on the pleadings consisting of the amended petition, the answer thereto, and the demurrer of the State to the answer. These pleadings are given in the report of the case. There is no averment or claim in the amended petition that the trust agreement was a combination in restraint of trade or tending to a monopoly, or in any way raising such an issue. What was claimed is shown by the final averment, which is that "by reason of defendant's stockholders, directors and officers signing and entering into such trust agreements and carrying out their provisions and surrendering their stock in defendant and accepting in lieu thereof certificates issued by the nine trustees aforesaid and permitting the corporate powers, business and property of the defendant to be exercised, conducted and controlled by said trustees in manner aforesaid, and by reason of

the acts and omissions of the defendant herein before recited, said defendant has forfeited its corporate rights, privileges powers and franchises." It is, however, significant that the issue of a combination in restraint of trade and tending to a monopoly was tendered by the original petition filed, but that petition was, after the denials of the original answer, superseded by the amended petition, which withdrew such issue from the case, and there was no such issue in the case as it was presented to the Court. The case is only authority for the proposition that the execution of the trust agreement by all of the stockholders and officers of the Standard Oil Co. of Ohio was a corporate act on its part, and as such *ultra vires* and an abuse of its corporate powers. The case did not at all involve the legality of purchases or acquisitions of property on the theory that they constituted a combination.

In The State vs. Nebraska Distillery Company (29 Neb., 700), there was under consideration the combination of independent distillers known as the Whiskey Trust.

In The Distilling and Cattle Feeding Co. vs. The People (156 Ill., 448), it was held that this

combination of independent distillers known as the Whiskey Trust was a combination in restraint of trade and tending to create a monopoly, and that the organization of the defendant corporation to acquire the plants of the parties to the trust in exchange for its stock as the result of an agreement among them that the corporation should be organized for that purpose did not purge the combination of its illegality.

Eliminating People vs. North River Sugar Refinery (54 Hun, 354), and State vs. Distilling Company (29 Neb., 700), because they involved combinations of separate and independent concerns for the management of their businesses as a whole by an outside body of trustees, and State vs. Standard Oil Co. (49 Ohio St., 137), for the reasons above stated, only Richardson vs. Buhl (77 Mich., 632), and Distilling Company vs. People (156 Ill., 448), remain, and of these it is the doctrine and authority of the latter case with which we have to deal.

(6) The ruling of that case precisely stated is, that if a number of independent manufacturers, representing the major part of an industry,

combine to form a trust which is held to be an illegal combination in restraint of trade, and thereupon acting together they organize a corporation to take over their respective properties in exchange for its stock as part of one and the same scheme, the combination is continued in the corporation, there having been merely a change of form. It is not necessary for us to question this doctrine as it has no application to the facts presented by the record in this case. We are content to say that it will bear a good deal of examination before it is finally accepted. It is a new departure as there is a real distinction between a combination of independent concerns, each continuing its separate ownership, restricting the freedom of each in the conduct of its business, and the obliteration of that ownership in the transfer of the separate concerns to a new corporation with its own stockholders and their common ownership of the whole enterprise, considering that in the one case there is a restraint upon the separately owned concerns and their management and operation, whilst in the other there is a single ownership and no restraint of any kind. The rule of public policy respecting combinations was never intended to restrict the

right of sale or compel the continued ownership of property by an individual or a corporation.

There are one or two cases of the same character as the Illinois case, but it is not necessary to treat them separately.

The Northern Securities case (U. S. vs. Northern Securities Co., 193 U. S., 197) is also urged in support of the broad proposition that the acquisition of competitive plants is a combination in restraint of trade at common law.

The Northern Pacific and Great Northern Railroad Companies were competitive trans-continental railroads, each with its own stock holders and board of directors. Neither had the legal power or authority to acquire the other; in fact, such an acquisition was prohibited. Each was bound, so far as the other and the public were concerned, to maintain its separate competitive existence. To bring them under what would be practically a common control and management certain leading stockholders of each company combined together to organize the Northern Securities Company under the laws of the State of New Jersey and to exchange its shares at fixed ratios for the shares of the two companies. This was held to be a combination in

restraint of trade; the organization of the company being treated as a mere device for the harmonious operation of both roads and the elimination of competition between them. Mr. Justice HARLAN said (p. 346). "The Securities Company is itself a part of the present combination, its head and front; its trustee." Mr. Justice BREWER said (p. 362):

> "The transfer of stock to the Securities Companies was a mere incident of the manner in which the combination to destroy competition and thus unlawfully restrain trade was carried out."

There is a fundamental difference between such a combination for the purpose of bringing these competing railroad companies under the same control and management through the medium of a holding company, and a purchase of competing manufacturing concerns. There is perhaps some analogy between such a combination and the facts involved in the Illinois case, if the vital difference between a manufacturing or trading company and a public service corporation is disregarded. There was in each case an agreement to bring independent concerns under the same management through

the medium of a corporation organized for that express purpose; but that is radically different from the acquisition by an existing concern through separate transactions of other concerns in the same business to extend the sphere of its operations or to secure a greater degree of necessary independence in vital relations of the industry, such as a regular and adequate supply of the raw material. On this difference we stand.

The same distinction applies to U. S. vs. American Tobacco Co. (164 Fed., 700), as it involved numerous mergers and consolidations of separate and independent companies, of an entirely different character and nature from the transactions involved in this case.

(7) The result of this examination and review of the authorities is to establish the proposition which we have formulated as our first point. The preceding summary of facts conclusively shows that there was no common-law combination or conspiracy, but a separate purchase and acquisition of plants and businesses, for a consideration fixed in each case by the parties to the transaction in the main paid in cash, but, in some instances, in whole or in part, in shares of stock, either of the

Standard Oil Co. of Ohio or of the company organized to take over the business acquired. In some instances the physical property was bought and transferred; in others it was acquired through the transfer of the stock of the company which owned it. The transaction was substantially the same whichever course was taken, because what was being acquired was the property and business of the selling concern. The transactions extended over a period of years. They had their specific objects or purposes; some to refine at points most favorable for particular territories; others to acquire warehouse and dock facilities; others to diversify products; others to reach new markets; others to assure an adequate supply of raw material, and so on. It was a development step by step of a successful institution as the means at its command enabled it to extend its operations; and not a scheme or plot to absorb a growing and boundless industry. It is a pure figment of the imagination that three or four young men as far back as 1870, in the origins of the industry, when all of its conditions were in a state of demoralization, conceived the idea of appropriating it as their own domain, and saw

in their dreams what has come to pass in the vast increase in space and quantity of the oil production and the world-wide use of the innumerable products of petroleum. The antiquity of the alleged conspiracy is alone fatal to its serious consideration. The sensible view is that these men were able, alert, intelligent, courageous and prudent; that by unremitting industry and thorough organization they made the most of every situation, forecast the opportunities of the industry, and rapidly adapted their efforts to changing conditions; and that the growth and expansion of the Standard were the inevitable results of their genius and enterprise. No doubt, in some instances, men who were also successful in the business, to advance their own interests, sold to them and united with them. There was no law preventing them from doing so, as once a competitor always a competitor has never been, and is not now, a maxim of legal compulsion. In many instances, no doubt, men were desirous of selling because they saw that to conduct the business successfully, with the changes in conditions from time to time, required much more capital than they could command, and that it was in their best interest to sell. It would, too, be

folly to ignore the fact that in a business characterized by its peculiar conditions and hazards concentration is the law of its development. It is along these lines that the growth and expansion of the Standard Oil Co. finds its explanation, and not in the theory of a combination or conspiracy that is iterated and reiterated on almost every page of the bill in this case.

POINT II.

The Act of 1890 did not by its terms or reasonable construction convert that common ownership into an illegal and criminal combination in restraint of trade under Section 1 of the Act.

(1) In July, 1890, when the Act went into effect, the situation was that the Standard Oil properties were held in an undivided common ownership. The owners had previously transferred the legal title to their respective interests to nine trustees, who then held it in trust for them; but they were the real owners. It is true that later that particular trust was held

to be illegal, partly on a point of corporation law and partly, though the question was not in the case, on the ground that the trust was an illegal combination because composed of separate concerns and, therefore, but for the trust, competitive, which was not the fact. The dissolution of the trust would simply eliminate it without disturbing the common ownership. The common ownership in 1882 and 1890 is not disputable. In 1890 the properties consisted of refineries employed in the manufacture of a great many different products, but principally illuminating oil; of private pipe lines to gather the necessary supply of crude oil at the various oil fields and carry it to the refineries; of certain public pipe lines open to the use of producers and refiners generally, but not, for the reasons which have been stated, used by them; and marketing facilities in various parts of this and foreign countries. The properties were operated as a single, unified business and an organic whole. Their product was sold partly in intrastate and partly in interstate and foreign trade.

The ownership of the refining properties and the manufacturing of the products were not subject to the jurisdiction of Congress (U. S. vs. E. C. Knight Co., 156 U. S., 1). The intrastate trade was not subject to its jurisdiction (Addystone Pipe Co. vs. U. S., 211). The same is true of the private pipe lines. Only the interstate and foreign trade and the interstate transportation of the common carrier pipe lines, to the extent that there was any, were subject to its jurisdiction, and the parts of the business on which the Act of 1890 bore. There was no existing combination with respect to those parts as they were merely an incident of the ownership of the manufacturing properties and a part of the pipe line properties. If there were then any outstanding contracts with other parties restraining interstate or foreign trade the operation of the Act would be to denounce them and make their further performance illegal. But the common ownership of the properties and their operation for the purposes to which they were adapted as a unit was a legal situation which was not affected by the Act.

(2) Even if Congress had the power, it did not seek or attempt by the first section of the

Act to denounce as illegal previous acquisitions of competitive properties or disturb existing titles or rights of ownership. Had it sought to do so appropriate and explicit language would have been used. There is no such language. The phrases "contract, combination or conspiracy in restraint of trade" are not appropriate for that purpose. Those phrases were well known and had a settled legal significance. They were contracts or combinations of an executory nature restricting the liberty of the parties or others in the conduct of their businesses to the injury of the public. They did not, in any way, involve executed transfers of property or their incidental rights of ownership. It was against such executory contracts, combinations and conspiracies that the Act of 1890 was directed. This is borne out by the conditions out of which the legislation grew. The period of ten years or so prior to the passage of the Act had been marked by combinations of independent competitive concerns; some of them on a very large scale. These combinations took different forms. There were agreements creating a selling agency or a central committee to regulate production and fix prices. There were associations

of independent and competing manufacturers and merchants to maintain prices by means of the commercial boycott. Boards of trustees were created to hold the legal title of the stocks of independent and competing corporations to secure co-operation as to production and prices. Speaking generally it may be said that every method for combining competitive concerns for the regulation of production and prices was adopted that human ingenuity could devise. These combinations were deemed to be injurious to the public, and the purpose of the first section of the Act was to denounce and prohibit them. That purpose was accomplished without any interference with executed transfers of property or existing rights of ownership.

(3) The case nearest in its facts to this case arose in 1892 and was the occasion of a profound consideration of the Act of 1890 by the late Mr. Justice JACKSON, then a Circuit Judge. We refer to *In Re* Greene (52 Fed., 104). It grew out of an indictment in Massachusetts of a number of individuals who were the principal persons connected with the Distilling & Cattle Feeding Co., organized in the year February 11, 1890, under the laws of Illinois. It was averred that the Com-

pany had as it appears prior to the passage of the Act obtained control by purchase, renting and leasing of 70 distilleries within the United States used for the manufacture of distillery products; that each of the distilleries was when acquired a separate and competing concern; and that by means of this ownership and control the Company manufactured 75% of the distillery products and monopolized the interstate trade and commerce therein. It was further averred that the Company, to maintain its monopoly, had agreed with various dealers in Massachusetts to pay rebates on condition that they bought exclusively from the Company. The Defendant, who was held under a warrant awaiting an order for his removal to the district of Massachusetts to answer the indictment, applied for a writ of *habeas corpus*, which application Judge JACKSON granted, holding that the Act of 1890 did not intend to declare that the acquisition and ownership of these properties with the control of the trade that it gave was an offence under the Act. The pertinent portions of the opinion are quoted under a later head of this brief. This case has been frequently cited, and we are not aware that its doctrine has been authoritatively disapproved or its author-

ity impaired. It is claimed that the decision in the Northern Securities case has that effect, but the fundamental differences which distinguish them rebut that contention as we have already shown.

(4) An analysis of the decisions of the Supreme Court of the United States under the Act of 1890 confirms our position under this point.

(*a*) United States vs. E. C. Knight Co. (156 U. S., 1) held that an acquisition of sugar refineries in the State of Pennsylvania by the American Sugar Refining Co., which owned a large majority of the sugar refineries in the United States giving it a practical control of the business, was not within the Act of 1890; that it bore no direct relation to commerce between the States though the intention was to sell the product throughout the States; that manufacturing is not commerce; and that it did not follow that an "attempt to monopolize, or the actual monopoly of the manufacture, was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product the instrumentality of commerce was necessarily invoked."

(*b*) United States vs. Trans-Missouri Association (166 U. S., 290) and United States vs. Joint Traffic Association (171 U. S., 505) held that a combination between a large number of railroad companies creating a body or committee to fix rates was a combination in restraint of trade within the meaning of the Act. The agreement between the companies restricted their power of fixing their own rates by its delegation in a measurable degree to an outside body, and it was a restriction vitally affecting the interests of the public.

(*c*) Hopkins vs. United States (171 U. S., 578) and Anderson vs. United States (171 U. S., 604) held that the restrictive rules of certain live stock exchanges related to a business that only incidentally affected interstate commerce; and that the Act only applies to agreements and combinations directly restraining such commerce.

(*d*) Addystone Pipe & Steel Co. vs. United States (175 U. S., 211) was a combination between independent competing manufacturers providing machinery and methods for fixing prices in such a way as to enhance them in a very aggravated form.

(*e*) Montague vs. Lowry (193 U. S., 38) was a combination of manufacturers and dealers in tiles, mantels and grates for the purpose of regulating the trade in those articles in California in various particulars, including prices, and establishing a commercial boycott on manufacturers and dealers who did not become members of the association and submit to its regulations.

(*f*) Northern Securities vs. United States (193 U. S., 197) was a combination of the principal stockholders of two parallel and competing transcontinental railway systems to establish a common control and eliminate competition by means of a holding company.

(*g*) Swift vs. United States (196 U. S., 375) involved a combination of independent concerns for the conduct of the business of each in certain specified particulars calculated and intended to monopolize the trade. The injunction which issued was based on the bill, as the defendants stood on their demurrer which was overruled.

(*h*) Cincinnati Packet Co. vs. Bay (200 U. S., 179) held that a covenant not to engage in the shipping business between certain points for a period of five years, and to maintain rates be-

yond one of the points, in connection with a sale of vessels, was not a violation of the Act.

(*i*) Loewe vs. Lawler (208 U. S., 274) held that a combination of labor organizations to boycott the interstate trade of a manufacturer was a conspiracy in restraint of trade within the Act.

To these cases may be added *In Re* Debs (158 U. S., 564), which practically held that the physical obstruction of interstate transportation by labor associations was a conspiracy in restraint of trade within the Act.

All these cases, in which the Act was held to be applicable, involved combinations in the common law sense affecting interstate commerce; some by restrictions imposed on the members of the combination; others by restrictions or acts limiting or destroying the activities of parties outside of the combination; and they declare no doctrine which denounces such an acquisition and ownership of previously competing properties as appears in this case. If that acquisition and ownership are to be brought within the Act it will be only by a radically new interpretation and application.

POINT III.

Congress could not constitutionally convert the ownership of the properties and the use to which they were put into an illegal and criminal combination or conspiracy.

The acquisitions of the properties violated no law when they occurred, and the title of the common owners was a valid, legal title. No principle of the common law invalidated titles or ownership even if acquired in connection with contracts or combinations in restraint of trade. The right to own the properties involved the right to use and enjoy them. " Congress has not the power or authority under the commerce clause, or any other provision of the Constitution, to limit and restrict the right of corporations created by the States or the citizens of the States in the acquisition, control and disposition of property " (*In re* Greene, 52 Fed., 104). The Chief Justice said in United States vs. E. C. Knight Co. (156 U. S., 1, p. 16) that " Congress did not attempt to make criminal the acts of persons in the acquisition and control of property

which the States of their residence or creation sanctioned or permitted," because "it was in the light of well settled principles that the Act of July 2d, 1890, was framed," plainly implying that it was beyond the power of Congress to make such acts criminal or declare them illegal. Judge JACKSON also said in the Greene case that "in construing and applying the provions of the Act to the specific offenses charged it must be assumed that Congress did not intend to make the enactment either retroactive or give it an *ex post facto* operation or effect," and the basis of such an assumption was the lack of power to do so as applied to the previous acquisition and ownership of distilleries in such number as to control the trade and eommerce in their products which appeared in that case. It is really too plain for argument that Congress was without the power to declare the acquisition and ownership of the properties in question unlawful or a criminal offense, and compel directly or indirectly the disintegration of that ownership. So, also, it is not within the power of Congress to disturb the ownership or prevent the use of manufacturing property simply because the product becomes the subject of

interstate or commerce. If, however, when the product becomes the subject of interstate trade or commerce acts are done, or agreements are made, with respect to it in that relation that are in restraint of trade, it is within the power of Congress to denounce those acts and agreements and empower the Courts to retrain them. That, we submit, is the power which it exercised in the passage of this Act.

POINT IV.

Even if the acquisitions of the Standard properties and their common ownership had occurred since the Act of 1890 went into effect they would not constitute an illegal and criminal combination or conspiracy within the Act.

The tendency of the cases is to sustain the position that the first section of the Act of 1890 is directed at combinations of independent concerns for the regulation of production and prices whatever their form, and no more sought to affect or restrict the right of purchase or acquisition than did the common law. This appears not only from what has been judicially

declared to be the object and purposes of the Act, but in what has been said as to transactions which are not within its scope.

In one of the earliest cases (1892), *In re* Corning (51 Fed., 205), RICKS, J., said (pp. 211-212):

> " From those debates (in Congress) it is evident that the Congress did not intend to limit the amount of capital a citizen should invest in any line of business or restrain his energy or enterprise in acquiring for himself all the trade possible in such business, provided in doing so he did not by illegal contracts or devices restrain others from pursuing the same business, or deprive the public from enjoying the advantages of a free use of capital, skill and experience of competitors."

In the exhaustive examination of the act by Mr. Justice JACKSON, not long after its passage, in *Re* Greene (52 Fed., 104), he said:

> " The enactment was manifestly aimed at the trust combinations and associations formed by individuals and corporations which the State Courts have in most instances declared illegal."

And further (pp. 66, 67):

> " Congress may place restrictions and limitations upon the right of corporations

created and organized under its authority to acquire, use and dispose of property. It may also impose such restrictions and limitations upon the citizen in respect to the exercise of a public privilege or franchise conferred by the United States. But Congress certainly has not the power or authority under the Commerce Clause or any other provision of the Constitution to limit and restrict the right of corporations created by the states or the citizens of the states in the acquisition, control and disposition of property. . . . It is equally clear that Congress has no jurisdiction over and cannot make criminal the aims, purposes and intentions of persons in the acquisition and control of property which the states of their residence or creation sanction and permit."

In U. S. vs. E. C. Knight Co. (156 U. S., 1) it was said (p. 16) :

" It was in the light of well settled principles that the act of July 2, 1890, was framed. Congress did not attempt to assert the power to deal with monopoly directly as such ; or to limit and restrict the rights of corporations created by the States or the citizens of the States in the acquisition, control, or disposition of property ; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold ; or to make criminal the

> acts of persons in the acquisition and control of property which the State of their residence or creation sanctioned or permitted. Aside from the provisions applicable where Congress might exercise municipal power, what the law struck at was combination, contracts, and conspiracies to monopolize trade and commerce among the several States or with foreign nations. . . . 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 ; yet the act of Congress only authorized the Circuit Courts to proceed by way of preventing and restraining violations of the act in respect of contracts, combinations, or conspiracies in restraint of interstate or international trade or commerce."

In U. S. vs. Trans-Missouri Freight Association (166 U- S., 290) it was said, in the opinion of the Court with reference to contracts specifically designated at common law, " contracts in restraint of trade " (p. 329) :

> " A contract which is the mere accompaniment of the sale of property and thus entered into for the purpose of enhancing

> the price at which the vendor sells it, which in effect is collateral to such sale and where the main purpose of the whole contract is accomplished by such sale, might not be included within the letter or spirit of the statute in question."

There is no intimation in this saving clause of the opinion that sales themselves of property employed in a business from one competitor to another are or may be in restraint of trade.

In U. S. vs. The Joint Traffic Association (171 U. S., 505), it was said (pp. 567–568) :

> " As examples of the kinds of contracts which are rendered illegal by this construction of the act, the learned counsel suggests all organizations of mechanics engaged in the same business for the purpose of limiting the number of persons employed in the business, or of maintaining wages; the formation of a corporation to carry on any particular line of business by those already engaged therein; a contract of partnership or of employment between two persons previously engaged in the same line of business; the appointment by two producers of the same person to sell their goods on commission; the purchase by one wholesale merchant of the product of two producers; the lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufac-

tory or shop; the withdrawal from business of any farmer, merchant or manufacturer; a sale of the goodwill of a business with an agreement not to destroy its value by engaging in similar business; and a covenant in a deed restricting the use of real estate. It is added that the effect of most business contracts or combinations is to restrain trade in some degree. This makes quite a formidable list. It will be observed, however, that no contract of the nature above described is now before the court, and and there is some embarrassment in assuming to decide herein just how far the Act goes in the direction claimed. Nevertheless, we might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade. We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop, or the withdrawal from business of any farmer, merchant or manufacturer, restrained commerce or trade within any legal definition of that term; and the sale of a

> good-will of a business with an accompanying agreement not to engage in a similar business was instanced in the Trans-Missouri case as a contract not within the meaning of the act; and it was said that such a contract was collateral to the main contract of sale and was entered into for the purpose of enhancing the price at which the vendor sells his business."

The view thus expressed excludes from the operation of the Act a vast mass of transactions which interfere with competition. "Interference with competition" and "restraint of trade" cannot therefore be convertible terms though they are too often assumed to be so. If a partnership is formed which combines the energies and resources of two or three or more competitors in the same business there is an interference with competition, but not, as the Court says, a restraint of trade. So, if a corporation is formed which acquires property and plants employed in a business which have been competitive there is an interference with competition, but again, not a restraint of trade. It would seem to be a necessary conclusion that confusion results from identifying too closely acts interfering with competition with acts re-

straining trade. This has led to all the current motions about competition being the one vital matter determining whether acts are in restraint of trade or not. What the phrase "combination in restraint of trade" really involves is a restriction of the freedom of action of the parties to the contract or combination or others in the control, management or conduct of their respective businesses. Combinations and agreements which do not involve such restrictions are not combinations or agreements in restraint of trade, although they may incidentally interfere with competition. This is borne out by the exclusion of transactions of the kind mentioned by Mr. Justice PECKHAM from the operation of the Act although they unquestionably interfere with competition.

In Robinson vs. Suburban Brick Co. (127 Fed., 804), and A. Booth & Co. vs. Davis (127 Fed., 875), a covenant in a contract for the sale of the property of a competitor restricting the vendor from engaging in the business was held to be valid.

In the case last cited it is said (p. 878):

> "The transaction by which the complainant acquired the title and interest for

which it seeks protection in this cause was an out and out purchase of the vendor corporation's property and good will, and of the ancillary agreement of its stockholders, the breach of which agreement is the gravamen of the complainant's case. That such a transaction is lawful seems clear. In U. S. v. Addyston Pipe & Steel Co. (85 Fed., 271–281) Judge TAFT considers the question here involved, and in a forcible opinion demonstrates that agreements by the seller of property or business not to compete with the buyer in such a way as to impair the business sold are perfectly valid."

In Cincinnati Packet Co. vs. Bay (200 U. S., 179 it was said:

" Presumably all there was to sell besides certain instruments of competition was the competition itself, and the purchasers did not want the vendors name."

In Smiley vs. Kansas (196 U. S., 447) it was said (p. 356):

" Undoubtedly there is a certain freedom of contract which cannot be destroyed by legislative enactment. In pursuance of that freedom parties may seek to further their business interests, and it may not be always easy to draw the line between those contracts which are beyond the reach of the police power and those which are subject to

prohibition or restraint. But a secret arrangement by which, under penalties, an apparently existing competition among all the dealers in a community is one of the necessaries of life is substantially destroyed, *without any merging of interests through partnership or incorporation*, is one to which the police power extends."

POINT V.

The acquisition by the Standard Oil Co. (of New Jersey) from the common owners of their shares in the so-called subsidiary companies was not an illegal and criminal contract, combination or conspiracy within the Act of 1890.

(1) There is no combination under the Act unless one is formed which restrains trade, that is, which restricts the freedom of competitors in carrying on their respective businesses. In 1899 all the Standard Oil properties were held in a common ownership, and that common ownership had existed from the time of the acquisition of every property acquired, and in all subsequent extensions, developments and

expansions as they occurred. All the properties were acquired for the individuals who were stockholders of the Standard Oil Company of Ohio. The stockholders of that company became the holders of the trustees' certificates, and the certificate holders, through the conversion of their certificates into the shares of the twenty companies and the exchange of those shares for the shares of the Standard Oil Company of New Jersey, one of their own corporations, became the stockholders of the Standard Oil Company of New Jersey, and as such, the owners in precisely the same proportion of all the properties as they had been as certificate holders and as stockholders of the Standard Oil Company of Ohio. There has never been any separate ownership of any of the properties since their acquisition. Every owner has all along been the owner of his same proportionate share in all the properties and companies corresponding first to his stock ownership in the Standard Oil Company of Ohio, then to his certificate ownership, and now to his stock ownership in the Standard Oil Company of New Jersey. When these properties and companies were owned by or held for the stockholders of the Standard Oil

Company of Ohio there was no competitive relation between them in the sense in which that term is used when there is under consideration whether a certain transaction or combination is in restraint of trade. Properties, plants and companies owned by the same persons in a common ownership are not independent or competitive from the point of view of the Act of 1890.

(2) When the so-called trust of 1882 was formed there was no union or fusion of competitive properties and companies. The trust was not formed for any reason or purpose having any relation to competition or the suppression of competition. Prior to its formation the managers of every separate concern were the appointees of the common owners, and the concerns were operated and managed in the interest of the common ownership. The owners, through the medium of the trust, selected nine of their number to act for them in selecting these officers and managers, which did not in any way change their ownership or affect the relations of the concerns to each other. The motive for the creation of the trust was that each owner might have in the trust certificates a convenient and usable evidence of his interest.

(3) When the trust was dissolved there was no change of ownership, and no change in the relation of the separate concerns to each other. The same owners selected the officers and managers of the concerns. When the shares were exchanged for shares of the Standard Oil Company (of New Jersey) there was again no change of ownership. If twenty men own a twentieth interest in each of twenty corporations represented by a twentieth of the shares in each corporation, no real change of ownership is worked by the transfer of all of their shares to one of the corporations in exchange for an equivalent number of its shares. As owners each of one-twentieth of the shares of the one company their ownership is just the same as when they each owned one-twentieth of the shares of each of the companies. The indisputable and controlling fact is that there was no competitive relation between the concerns after their original acquisition thirty years ago and more.

(4) Under these circumstances we submit that the transfer of the shares of the various companies for their equivalent in shares of the Standard Oil Company (of New Jersey), which represented precisely the pre-existing propor-

tionate interests in the common property, was not a combination in restraint of trade within the meaning of the Act of 1890.

POINT VI.

There is no monopolization or attempt to monopolize.

(1) On pages 84, 85, and 86 of the Bill it is alleged that the Standard Oil trust during the period from 1882 to 1899 and the Standard Oil Company since 1889, and their various subsidiary corporations and the individual defendants named, acting through both the trust and said corporations, have monopolized the oil business by means not only of the various al leged combinations constituting the acquisition of the properties, but by certain additional means, the allegations respecting which are set forth in the sub-divisions of the Bill from and including sub-division 6 to and including sub-division 28. We have so far dealt with the acquisition and ownership of the Standard properties and have shown that they did not con-

stitute a combination in restraint of trade. The common ownership itself, therefore, does not constitute a monopoly. We now proceed to consider the remaining allegations respecting the monopolization of the trade.

This proceeding was begun in December, 1906. It was instituted under Section 4 of the Act of 1890 which authorizes proceedings in equity "to prevent and restrain violations of this Act." There would be no existing violation of the Act to restrain unless the defendants, when the proceeding was begun, monopolized or were attempting to monopolize the oil business. Whether that condition existed is the subject matter of this point; and first we have to ascertain what is a monopoly or monopolization within the Act.

(2) There has as yet been no authoritative definition by the Supreme Court of what constitutes a monopoly within the meaning of the Act of 1890. There have been references to the term, but they do not furnish an authoritative definition. Though it has been prominent in public discussion in recent years it has generally seemed sufficient to use it without attaching any specific meaning to it, and more as a term of reproach

than as a specific legal or economic conception. It is not uncommon to hear size in and of itself treated as monopoly. According to that view there is a point at which growth and expansion, however legitimate, become illegal and criminal. However convenient that use of the term may be for popular purposes it is not its legal meaning or signification. At common law a monopoly had a precise definition; it was "a license or privilege allowed by the King for the sole buying and selling, making, working or using of anything whatsoever *whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before*" (Blackstone, Vol. 4, p. 160). It is said that in modern legislation and judicial usage it has a broader application than that of an exclusive right based on a grant. Just what it means in that broader use of the term is the point to be determined. A governmental grant, as in the case of a patent monopoly, it is said, is no longer necessary, and that may be assumed to be true. But monopoly still imports the idea of exclusiveness, and an exclusiveness existing by virtue of a restraint of the liberty of others. It may be a practical as distinguished from

a theoretical or complete exclusiveness, but that does not eliminate the restraint of others *as the essential element.* With the common law monopoly that restraint resulted from the grant of the exclusive right or privilege. There must be some substitute for the grant as a source of the restraint essential to the condition of exclusiveness which constitutes monopoly. Conceivable sources are contracts, combinations and conspiracies excluding individuals and capital on a comprehensive scale and in an effective degree from participation in a particular business. Whatever the magnitude of a single concern may be and whatever the volume of the business there may be in its hands, it is not, we submit, a monopoly unless "the subject in general is restrained from that liberty of manufacturing or trading which he had before", by definite and assignable restrictive contractual obligations, well known as contracts in restraint of trade, combinations affecting the liberty of their members or constraining that of outsiders, or conspiracies to injure, curtail or destroy the business of others of a criminal or tortious character at common law, or other unlawful or tortious acts having that effect. These very general observations are

offered as an introduction to what has been said on the subject in cases which have arisen under the Act of 1890.

(3) In American Biscuit & Manf'g Co. vs. Klotz, 44 Fed., p. 724, it was said *per Curiam:*

> "In construing the federal and state statutes, we exclude from consideration all monopolies which exist by legislative grant; for we think the word 'monopolize' cannot be intended to be used with reference to the acquisition of exclusive rights under government concession, but that the lawmaker has used the word to mean 'to aggregate' or 'concentrate' in the hands of few, practically, and, as a matter of fact, and according to the known results of human actions, to the exclusion of others; to accomplish this end by what, in popular language, is expressed in the word 'pooling', which may be defined to be an aggregation of property or capital belonging to different persons, with a view to common liabilities and profits. The expression in each law 'combination in the form of trusts' would seem to point to just what, in popular language, is meant by pooling. . . .

In *re* Corning (51 Fed., 205), RICKS, J., said:

> "It is not averred that, when defendants purchased their 70 distilleries, they ob-

ligated the vendors not to build other distilleries, or not to continue in the distillery business in the future. It is not averred that defendants attempted in any way to bind the vendors to withhold their capital or skill or experience in the business from the public in the future. There is no averment that the defendants in any manner, or at any time, attempted to control the business of the remaining one-fourth of the distilleries in the United States, or in any way attempted to limit their output, or by agreement with them control the price at which their product should be sold, or in any degree restrained their trade, or limit the territory over which their trade should extend. The full scope of the averments in this respect is that before this law was passed by Congress the defendants legally purchased with their own capital three-fourths of the distilleries in the United States, and that they produced 77,000,000 gallons of distillery products, and sold these products in the markets of the several states at the best possible prices; and that they continued so to own and operate said distilleries, and so to sell their products, after the passage of this Act. This they did without any attempt at any time, by contract, to control the production of the other distilleries, or the prices at which they should sell, or without any contract with such distillers in any way restraining trade. The indict-

ment, therefore, in my judgment, wholly fails to charge a crime, so far as the purchase of said distilleries or their manufacture of distilled products before the passage of the Act is concerned, or so far as they are charged with continuity to own and operate them with unlawful intent after the passage of the Act. * * * From these debates (in Congress) it is evident that the Congress did not intend to limit the amount of capital a citizen should invest in any line of business, or restrain his energy or enterprise in acquiring for himself all the trade possible in such business, provided in doing so he did not, by illegal contracts or devices, restrain others from pursuing the same business, or deprive the public from enjoying the advantages of the free use of capital, skill and experience of competitors."

In re Greene (52 Fed., 104) (1892), JACKSON, Circuit Judge, said (p. 115):

"It is not very clear what Congress meant by the second section of the Act of July 2, 1890, in declaring it a misdemeanor to 'monopolize,' or 'attempt to monopolize,' any part of the trade or commerce among the states or with foreign nations. It is very certain that Congress could not, and did not, by this enactment, attempt to prescribe limits to the

acquisition, either by the private citizen or state corporation, of property which might become the subject of interstate commerce, or declare that, when the accumulation or control of property by legitimate means and lawful methods reached such magnitude or proportions as enabled the owner or owners to control the traffic therein, or any part thereof, among the states, a criminal offense was committed by such owner or owners. All persons, individually or in corporate organizations, carrying on business avocations and enterprises involving the purchase, sale, or exchange of articles, or the production and manufacture of commodities, which form the subjects of commerce, will, in a popular sense, monopolize both state and interstate traffic in such articles or commodities just in proportion as the owner's business is increased, enlarged, and developed. But the magnitude of a party's business, production, or manufacture, with the incidental and indirect powers thereby acquired, and with the purpose of regulating prices and controlling interstate traffic in the articles or commodities forming the subject of such business, production, or manufacture, is not the monopoly, or attempt to monopolize, which the statute condemns.

" A ' monopoly,' in the prohibited sense, involves the element of an exclusive privilege or grant which restrained others from

the exercise of a right or liberty which they had before the monopoly was secured. In commercial law, it is the abuse of free commerce, by which one or more individuals have procured the advantage of selling alone or exclusively all of a particular kind of merchandise or commodity to the detriment of the public. As defined by Blackstone (4 Bl. Comm., 159), and by Lord COKE (3 Co. Inst., 181), it is a grant from the sovereign power of the state by commission, letters patent or otherwise, to any person or corporation, by which the exclusive right of buying, selling, making, working or using anything is given. When this section of the Act was under consideration in the Senate, distinguished members of the judiciary committee and lawyers of great ability explained what they understood the term 'monopoly' to mean; one of them saying: 'It is the sole engrossing to a man's self by means which prevent other men from engaging in fair competition with him.' Another senator defined the term in the language of Webster's dictionary: 'To engross or obtain, by any means, the exclusive right of, especially the right of trading, to any place or with any country, or district; as to monopolize the India or Levant trade.' It will be noticed that, in all the foregoing definitions of 'monopoly', there is embraced two leading elements, viz., an exclusive right or privi-

lege, on the one side, and a restriction or restraint on the other, which will operate to prevent the exercise of a right or liberty open to the public before the monopoly was secured. This being, as we think, the general meaning of the term, as employed in the second section of the statute, an 'attempt to monopolize' any part of the trade or commerce among the states must be an attempt to secure or acquire an exclusive right in such trade or commerce *by means which prevent or restrain others from engaging therein.* It was certainly not a 'monopoly', in the legal sense of the term, for the accused or the Distilling & Cattle Feeding Company to own 70 distilleries, and the products thereof, whether such products amounted to the whole or a large part of what was produced in the country. Their ownership and control of such products, as subjects of trade and commerce, is not what the statute condemns, but the monopoly or attempt to monopolize the interstate trade or commerce therein. In this acquisition and operation of the 70 distilleries, which enabled the accused or said Distilling & Cattle Feeding Company to manufacture and control the sale of 75 per cent. of the distillery products of the country, it does not appear, nor is it alleged, that the persons from whom said distilleries were acquired were placed under any restraint, by contract or otherwise, which prevented them

> from continuing or re-engaging in such business. All other persons who chose to engage therein were at liberty to do so. The effort to control the production and manufacture of distillery products, by the enlargemont and extension of business, was not an attempt to monopolize trade and commerce in such products within the meaning of the statute, and may therefore be left out of further consideration."

In U. S. vs. Trans-Missouri Freight Association (58 Fed., 58), SANBORN, Circuit Judge, said (p. 82) ?

> " A monopoly of trade embraces two essential elements : (1) The acquisition of an exclusive right to, or the exclusive control of, that trade ; and (2) The exclusion of all others from that right and control."

In Northern Securities Co. vs. The United States (193 U. S., 197), Mr. Justice HOLMES in his opinion said (p. 409) :

> " I repeat, that in my opinion, there is no attempt to monopolize, and what, as I have said, in my judgment amounts to the same thing, that there is no combination in restraint of trade, until something is done with the intent to exclude strangers to the combination from competing with it in some part of the business which it carries on."

In Whitwell vs. Continental Tobacco Co. (125 Fed., 454), it was said, by SANBORN, Circuit Judge (p. 462):

> "The Supreme Court has declared that the true construction of the first section is that no contract, combination, or conspiracy is denounced by it unless its necessary effect is to directly and substantially restrict competition in commerce among the states. By a parity of reasoning, the correct interpretation of the second section must be that no attempt to monopolize a part of commerce among the states is made illegal or punishable by the provisions of that section unless the necessary effect of that attempt is to directly and substantially restrict commerce among the states. The acts of the defendants had no such effect. They evidenced nothing but the legitimate efforts of traders to secure for themselves as large a part of interstate trade as possible, while they left their competitors free to do the same. It was not—it could not have been—the purpose or the effect of the second section of this law to prohibit or to punish the customary and universal attempts of all manufacturers, merchants and traders engaged in interstate commerce to monopolize a fair share of it in the necessary conduct and desired enlargement of their trade, while their attempts leave their competitors free to make successful endeavors of the same kind."

In National Cotton Oil Co. v. Texas (197 U. S., 115), the constitutionality of certain anti-trust acts of the State of Texas was involved. In the course of his opinion, Mr. Justice McKENNA said (p. 129):

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

(4) We will not attempt by a minute comparison of these various definitions to reconcile them. Some of them are obscured by the use of general phrases which are only pertinent when they are related to particular conditions. A concern may by legitimate growth and expansion and by entirely legitimate means acquire

such a preponderance of a particular trade as to be a dominating factor in that trade, but it cannot be said to be a monopoly in a legal sense. Therefore, "dominating a trade" as a phrase is only applicable in connection with other conditions. The same is true of the phrase "the control of the market." There may be a perfectly legitimate control of the market for the time being, and it is, therefore, not in and of itself controlling. This is true of the power to fix prices, as it is a power which inheres in every producer to the extent of his trade limited only by economic considerations. "Unification of interest or management" may result from entirely legal transactions as well as illegal, and it is valueless for the purposes of definition without the necessary qualification. It follows that these various conditions are not in and of themselves controlling. There must be some element or condition out of which they spring, or associated with them, which imparts to them the quality of a monoply in a legal sense. The clew to that element is found in the statement of Judge JACKSON that it is an exclusive control resulting from restrictions and restraints which "operate to prevent the exercise

of a right or liberty open to the public before the monopoly was secured," and the statement of Judge SANBORN that it is "an exclusive right to or the exclusive control of that trade" embracing "the exclusion of all others from that right and control." But the question still arises what constitutes "the exclusion of all others" or "a restriction or restraint" which operates "to prevent the exercise of a right or liberty open to the public before the monopoly was secured." The solution in part at least is found in the first section of the Act; that is an exclusion resulting from contracts, combinations or conspiracies in restraint of trade such as are therein mentioned, in such volume and to such a degree as to constitute practically an exclusive control, is monopolization or an attempt to monopolize. There are specific contracts, combinations or conspiracies which do not reach the point of monopolization. There may be such contracts, combinations and conspiracies which in their effect reach that point. Apart from such contracts, combinations and conspiracies there may be other acts contemplated by the Act as constituting the act of monopolization, but we cannot conceive of any such acts being so contemplated unless they are

in themselves unlawful or tortious. Hence we submit that monopolization within the Act is the exclusive control of a trade which is the natural effect and result of a comprehensive system of such contracts, combinations or conspiracies, or other unlawful or tortious acts. In other words, to monopolize or attempt to monopolize a trade means the control of it, or the attempt to control it, through the exclusion of others generally from it by the means and agencies which are prohibited and declared to be illegal by Section 1 of the Act or by other means and acts which are in and of themselves unlawful or tortious. It is the presence of such means or agencies of exclusion that constitutes a monopolistic domination or control of a trade, and in their absence, size, domination, and control of the market or prices, are not a monopoly in a legal sense. It is not, therefore, a final test what properties and plants a concern owns, or how extensive their capacity and product are, or how great the volume of its business is in relation to the whole of the business or the business of anybody else.

It is to be borne in mind that as this is a criminal statute it is to be assumed in its con-

struction that the Legislature was not creating an offense without indicating with a fair degree of definiteness what acts should constitute it. To make monopolizing a criminal offense without any standard for judging the means by which the exclusion of others is effected, which is essential to monopolizing, would be an intolerable situation. The conduct of a trade consists of a multitude of acts varying in their ethical quality. Competition is a state of war. One man may push it to the extreme limits, whilst another may draw the boundary line clear inside of them. Price cutting and rebating, collecting information of the trade of competitors, the operation of companies under other names to obviate prejudice or secure an advantage, or for whatever reason, are all methods of competition. Who knows where the line is that separates "fairness" in these methods from "unfairness?" What legal standard determines what is "fair" and what is "unfair?" Lord MORRIS said in the Mogul case ([1892] App. Cas., p. 51) that the question of "fairness" is one that would be determined by the "idiosyncrasies of individual judges," and that he could see no limit to competition ex-

cept the invasion of the legal rights of another. Yet competition is one of the principal means whereby one man gets the better of his fellows in the struggle for trade, and appropriates to himself an ever increasing share of it, even extending to such a dominating share of it as to constitute what is called control. What legal rules or standards has a man to guide him in determining when his methods cross an imaginary line between fair and unfair, so that his success thereby becomes a criminal offense? Those who stand upon an Act which encourages competition cannot complain of the extermination which competition involves.

It is unnecessary to multiply instances. We say that it could not have been the intention of the legislature to constitute such matters elements in the criminal offense of monopolizing a trade. Contracts in restraint of trade are governed and defined by fixed legal standards, as are combinations and conspiracies in restraint of trade. There is no uncertainty in denouncing the control of a business which results from such contracts, combinations and conspiracies as a criminal offense, because a man would then know whether his acts and transactions constituted the offense

prescribed by the Act. The same is true of any other unlawful or tortious acts of exclusion. But unfair methods of competition such as have been indicated, and other similar methods of business, present moral rather than legal problems in the solution of which judges and juries would differ, and no man could know whether his methods of business were threatening him with criminal consequences or not. This is what we mean by saying that the Act should be construed to constitute an offense consisting of elements governed by legal standards, which is the case if the monopolization which is denounced is the control of business accomplished by the means declared to be illegal by the first section of the Act or by means otherwise unlawful, and that it should not be construed to constitute the offense of elements that are outside of the domain of legal standards, and so vague, indefinite and uncertain that whether a crime had been committed or not would depend upon the idiosyncrasies of judges and juries.

The case of Swift vs. U. S. (196 U. S., 375) is pertinent in connection with this phase of the case. The defendants named in the bill were a number of corporations, firms and indi-

viduals engaged in the business of buying live stock, slaughtering it, and converting it into fresh meats, and selling the fresh meats through the United States, controlling nearly the whole trade. It was alleged that they had combined to monopolize the business. It was not charged or contended that the extent of the business of the defendants was in and of itself a monopoly. It was charged that monopolization or an attempt to monopolize resulted from certain specific acts or courses of conduct of the combination, such as refraining from bidding against each other in purchasing cattle except perfunctorily; bidding up prices for a few days higher than the state of the trade would warrant to induce stock owners in other States to make large shipments; the arbitrary raising and lowering of prices from time to time; the collusive restriction of the shipments of meat; the imposition of penalties upon their customers for deviations from certain rules; the keeping of a black list of customers who departed from those rules; and obtaining rebates from railroad companies. The case in its monopoly aspect turned on the combination for those purposes, and it was the use of the specific means alleged which was enjoined, and not the combination for any other purposes.

We therefore insist that to monopolize, or attempt to monopolize, under the Act of 1890, is not established by showing that a concern controls the manufacture and sale of the bulk of any particular article, or that it dominates the trade in that article, or controls the price thereof in so far as it deals in the article, in the absence of an exclusive control of the character indicated.

(4) Having attempted to define a monopoly it is now to be remarked that monopolization within the Act is confined to the monopolization of interstate and foreign commerce by its express terms, and by the fact that production and manufacture are not interstate commerce or within the jurisdiction of congress. Interstate commerce does not begin until there is some interstate transaction of sale or interstate movement for purposes of sale. In the Swift case (196 U. S., p. 397) it was said:

> " Therefore the case is not like United States v. E. C. Knight Co., 156 U. S., 1, 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. The two cases are near to each other, as sooner or later always must happen where lines are to be drawn, but the line between them is distinct."

The distinction is between a monopoly in the manufacture of an article and a monopoly in its sale. The extent to which a corporation or combination is engaged in the production and manufacture of an article is one thing; its interstate commerce is an entirely different thing. It may be a producing and manufacturing monopoly and yet not be a monopoly with respect to interstate commerce within the meaning of the Act of 1890. It is its conduct with respect to interstate commerce that determines whether it is monopolizing within the Act. It is only when it markets its product throughout the states that it comes within the province of that Act, and therefore the question must always be, in determining whether there is monopolizing within the Act, not the extent of its manufacturing capacity and production, but whether in marketing its

products throughout the states it is monopolizing or attempting to monopolize that trade. If competitors generally are not excluded from the trade by contracts, combinations or conspiracies in restraint of trade or other unlawful acts having that as their purpose and effective in its accomplishment there is no monopolization. The question here is therefore whether by such means refiners and dealers generally are now being excluded from the markets of the various states or foreign countries.

(5) We have specified the means which are charged as the means by which the alleged monopolization is effected. They may be condensed as follows :

(1) Agreement with Tide-Water Company, dated October 9th, 1883; (2) contracts with Pennsylvania Railroad Co. of August 22nd, 1884; (3) control of pipe lines and unfair practices against competing lines; (4) particular contracts in restraint of trade; (5) combination with railroads to obtain discriminations; (6) methods of selling lubricating oils to railroads; (7) unfair methods of competition; (8) and division of territory.

All of these matters are covered by the Brief on the Facts and the Summary of Facts contained in this brief, to which we refer to avoid repetition, simply insisting here that it is established that there is no monopolization or attempt to monopolize.

VII.

The only relief, if any, that can be granted is to enjoin specific acts or methods in restraint of interstate trade, or tending to its monopolization if any such are found to exist.

(1) We have already shown that it is not the intent of the Act, or within the power of Congress, to limit the manufacturing properties or plants that a corporation or individual may acquire or create; and that therefore, the common ownership and use of the Standard properties may not be directly or indirectly disturbed. We have also shown that the intrastate sale and marketing of the products is not within the Act or the jurisdiction of Congress. The only subject within the Act is interstate and foreign com-

merce; that is, the interstate and international marketing and sale of the products. If it should be found by the Court that the Defendants, by the employment of any particular means, are monopolizing or attempting to monopolize that particular trade then, following the precedent of *Swift vs. the United States* (196 U. S., 375), the proper relief is to enjoin those means. There were alleged in that case certain acts or courses of conduct intended to monopolize the trade. The injunction granted by the Circuit Court restrained the defendants from combining to restrain interstate trade by doing any of the acts or pursuing any of the courses of conduct *specifically alleged*, "*or by any other method or device*", and also from combining together to monopolize or attempting to monopolize the interstate trade by means of rebates from railroad companies. The Court said as to the nature of the action (p. 394):

> "To sum up the bill more shortly, the charge is, a combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against each other in the live stock markets of the different States; to bid up prices for a few

> days in order to induce the cattlemen to send their stock to the stock yards; to fix prices at which they will sell, and to that end to restrict shipments of meat when necessary; to establish a uniform rule of credit to dealers, and to keep a black-list; to make uniform and improper charges for cartage, and finally, to get less than lawful rates from the railroads to the exclusion of competitors."

After considering the reasons for holding the scheme as a whole to be within the reach of the Act of 1890 the Court said (p. 398);

> "For the foregoing reasons, we are of opinion that the carrying out of the scheme alleged, *by the means set forth*, properly may be enjoined, and that the bill cannot be dismissed."

The Court then reviewed those means separately and held that each of them as a part of a connected scheme was sufficiently brought by the allegations within the provisions of the Act of 1890 to be specifically enjoined; but the general words of the injunction "*or by any other method or device the purpose and effect of which is to restrain commerce as aforesaid*" were stricken out, the Court saying (P. 401):

> " The defendants ought to be informed as accurately as the case permits what they are forbidden to do. Specific devices are mentioned in the bill, and they stand prohibited. The words quoted are a sweeping injunction to obey the law, and are open to the objection which we stated at the beginning, that it was our duty to avoid, to the same end of definiteness so far as obtainable, the words " as charged in the bill" should be inserted between " dealers in such meats " and " the effect of which rules," and two lines lower, as to charges for cartage, the same words should be inserted between " dealers and consumers " and " the effect of which."

Further, the Court said (p. 402):

> " It only remains to add that the foregoing question does not apply to the earlier sections which charge direct restraints of trade within the decisions of the Court, and that criticism of the decree, as if it ran generally against combinations in restraint of trade, or to monopolize trade, ceases to have any force when the clause against " any other method or device " is stricken out. *So modified, it restrains such combinations only to the extent of certain specified devices, which the defendants are alleged to have used and intend to continue to use.*"

In Addytone Pipe & Steel Co. vs. U. S. (175 U. S., 211), the Court said (p. 247):

"The views above expressed lead generally to an affirmance of the judgment of the Court of Appeals. In one aspect, however, that judgment is too broad in its terms —the injunction is too absolute in its directions . . . as it may be construed as applying equally to commerce wholly within a State as well as to that which is interstate or international only. This was probably an inadvertence merely. Although the jurisdiction of Congress over commerce among the States is full and complete, it is not questioned that it has none over that which is wholly within a State, and, therefore, none over combinations or agreements so far as they relate to a restraint of such trade or commerce. It does not acquire any jurisdiction over that part of a combination or agreement which relates to commerce wholly within a State, by reason of the fact that the combination also covers and regulates commerce which is interstate. The latter it can regulate, while the former is subject alone to the jurisdiction of the State. . . . To the extent that the present decree includes in its scope the enjoining of defendants thus situated from combining in regard to contracts for selling pipe in their own State, it is modified and limited to that portion of the combination or agreement which is interstate in its character."

The paragraph of the opinion immediately preceding the quotation we have just given is as follows (p. 246):

> "It is almost needless to add that we do not hold that every private enterprise which may be carried on chiefly or in part by means of interstate shipments is, therefore, to be regarded as so related to interstate commerce as to come within the regulating power of Congress. Such enterprises may be of the same nature as the manufacturing of refined sugar in the Knight case,—that is, the parties may be engaged as manufacturers of a commodity which they thereafter intend at some time to sell, and possibly to sell in another State; but such sale we have already held is an incident to and not the direct result of the manufacture, and so is not a regulation of, or an illegal interference with, interstate commerce. That principle is not affected by anything herein decided."

(2) These cases clearly furnish the principle which should govern in the disposition of this case. A combination is alleged, followed by the allegation of specific acts and courses of conduct which it is alleged restrain and monopolize interstate commerce in oil. The only questions that can be raised are therefore (1) Is there a scheme to monopolize interstate trade

in oil by the specific means alleged; (2) are the means adequate; and (3) if the scheme exists, which of the particular means alleged are now being employed? If any of those means are found in use the relief to be given is to enjoin the monopolization or attempt to monopolize the interstate commerce in oil by those specific means. The jurisdiction of the Court extends that far and no further. It does not extend to the ownership of the refineries because under the Knight case production is not within the Act or subject to the jurisdiction of Congress. It does not extend to the intra-state disposition of the product because that is domestic commerce not within the Act or subject to the jurisdiction of Congress. And under the Swift case, even if a combination exists which is a monopolization of or an attempt to monopolize a particular trade, it cannot be generally enjoined, but only the acts and devices to effect the monopolization which are specifically alleged, as they are in the bill before the Court, can be enjoined. The case is precisely within and governed by the principle of the Swift case as to the relief that can be administered.

In this regard the case is entirely different from the Northern Securities case. That was a combination for the control of two interstate railway systems engaged in interstate transportation. Their business was exclusively transportation, and was therefore exclusively commerce as distinguished from production. The dominating element of their business was interstate transportation, therefore interstate commerce. The control of the combination was reached by the prohibition of the voting power of the holding company. The control was the *only* device alleged as the means whereby interstate transportation was restrained, and the decree necessarily was directed at that control.

POINT VIII.

There is no basis in the proofs for any decree affecting the international trade of the Defendants.

It appears from the proofs that the Standard Oil Co. (of New Jersey) owns the shares in whole or in part of many different foreign com-

panies operating exclusively in foreign countries, none of which, with a single exception, is a party to this proceeding. The only exception is the Anglo-American Oil Co., Ltd., and nothing is shown as to its business or as to the business of the other foreign companies. All that does appear is that about 60% of the refined oil is marketed in foreign countries. The markets in foreign countries are free and open to everyone. No refiner in this country is restricted in any way, or by any means, from selling all the oil in those countries which he can manufacture, and intercourse with those countries is just as open to them as to the Standard. There is no evidence that they are by any devices or acts of the Standard prevented or restricted from access to those markets. The competition there is with all the foreign production, and the conditions which exist there govern the business which is done. We fail to see any ground for disturbing the marketing facilities which have been established throughout the world by means of the foreign companies. It has been a work of enormous labor and expense to establish those facilities and they secure

for this country a vast trade it would not otherwise have to its great advantage and that of the people.

POINT IX.

There is no basis in the proofs for any decree severing the ownership of the pipe line companies.

As we have already said, these companies fall into two classes. There are the companies which were organized by the owners of the Standard properties to provide purely private pipe lines for the purposes of their own business. They were built to reach the oil fields and provide a regular and adequate supply of crude for the refineries. There is no principle upon which their ownership should be severed, particularly as they are an indispensable adjunct of the refineries. No one would dream now of building a refinery on a large scale without a pipe line system to reach the oil fields for the crude supply. To separate them in any such case would be to amputate an essential part of the refining plants.

The other class consists of the common carrier pipe lines. There is no evidence or principle justifying their severance. They are, in fact, by the nature of the business only nominally common carrier lines. The development of the business has been along the line of every refinery having its own associated pipe line system, and that has become an unalterable condition of the business. That is why the Standard's pipe lines are not in fact common carrier lines, why they are not used as such. In the absence of any demand or need for their use by others there is absolutely no basis for a severance of their ownership from that of the refineries.

No question is or can be raised as to the corporate power of the Standard Oil Company (of New Jersey) to own and hold the stocks of these companies.

X.

There is no basis in the proofs for any decree respecting the defendants engaged in the natural gas business or the ownership of the stocks or any of them by the Standard Oil Co. (of New Jersey).

There is no evidence affecting these companies whatsoever. They are not engaged in the oil business, and it is only the oil business which is involved in this proceeding either by the allegations of the bill or the proofs. They are engaged in a separate and distinct business, which is the supply of natural gas to particular communities. The Standard Oil Co. (of New Jersey), in so far as it owns the stocks of any of them, is authorized by its charter to do so, and its right to hold them is not challenged by any evidence in the case.

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