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OIL PIPE LINE DIVORCEMENT BY LITIGATION AND LEGISLATION

FORREST R. BLACK

One of the strangest chapters in any comprehensive history of the struggle for government regulation of business in America must be reserved to relate the successful strategy of the major oil companies in escaping or thwarting federal regulation of their interstate oil pipe line carriers. In resumé, that story might be stated as follows. Oil pipe line carriers escaped federal regulation in the Interstate Commerce Act of 1887¹ and in the Elkins Act of 1903.² Both of these statutes were limited to *rail* or *rail and water* carriers only and sought to prevent discriminations and rebates. The next great wave of common carrier reform culminated in the enactment of the Hepburn Act of 1906.³ Here again oil pipe lines scored a victory by escaping the Commodities Clause section of that act, but appeared to suffer a defeat by having impressed upon them the common carrier status in the so-called Pipe Line Amendment of the act. But later developments have demonstrated that the Hepburn Act, in its entirety, must be characterized as a Pyrrhic victory for the public insofar as oil pipe lines are concerned.

More than a quarter century elapsed, and on April 3, 1933, President Franklin D. Roosevelt in an open letter to the Governors of seventeen oil producing states said:

“The Report of the Independent Petroleum Association Opposed to Monopoly recommends ‘the enactment of emergency legislation by Congress divorcing oil pipe lines engaged in interstate commerce from other branches of the oil industry.’ I am of the opinion that this is a reasonable request and that such legislation should be enacted at as early a date as possible.”

More than six years later, Senators Borah and Gillette, on April 17, 1939, introduced in the Senate of the United States a bill (S. 2181) to prohibit interstate common carrier pipe lines from transporting commodities in which such carriers have any interest. It should also be noted that in the early days of the Roosevelt administration, Congress amended the National Industrial Recovery Act, authorizing, under certain circumstances, pipe line divorcement under Section 9, Clause (b), which provided that “the President is authorized to institute proceedings to divorce from any holding company any pipe line

¹24 STAT. 379 (1887), 49 U. S. C. A. §§ 1 *et seq.*

²32 STAT. 847 (1903), 49 U. S. C. A. §§ 41-43.

³34 STAT. 584 (1906), 49 U. S. C. A. §§ 1 *et seq.* For a general discussion of the legal status of oil pipe lines, see SCHARFMAN, 'THE INTERSTATE COMMERCE COMMISSION' (1931) vol. II, pp. 96-105.

company controlled by such holding company which pipe line by unfair practices or by exorbitant rates in the transportation of petroleum or its products, tends to create a monopoly." But no action was ever taken under this section.

To revert to a more detailed analysis of the earlier attempts at regulation, it should be noted that the Commodities Clause is important for the reason that it was the first legislative attempt to divorce production and transportation. On May 7, 1906, while the Hepburn Bill was before the Senate for consideration, Senator Elkins offered an amendment prohibiting any *common carrier* from engaging in the production, manufacture, buying, furnishing or selling of any commodity in competition with any shipper over its lines. As passed by the Congress, this section was amended so as to substitute for the words "common carrier" the words "railroad company." Senator Tillman, commenting on this change, said: "It simply means in plain English that the Standard Oil Company has got in its work. . . . We release the Standard Oil people entirely from the control of the provision which divorces the producers of commodities from the transportation of commodities."⁴

The Pipe Line Amendment of the Hepburn Act provided that "this Act shall apply to any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this Act." But in spite of the fact that the common carrier status of these pipe lines has been legislatively declared, administratively interpreted⁵ and judicially upheld,⁶ the uniform practice of the major pipe line companies, in the language of the Supreme Court of the United States, has been to carry "*all oil offered, if only the offerers will sell at their price, . . .*"⁷

Although the pipe line companies have been filing tariffs with the Interstate Commerce Commission ever since the decision in the *Pipe Line Cases* in 1914, because of the dominating position of the major oil companies who own 92% of the pipe line mileage and because of the passive attitude of the government, we have the strange result that the major pipe line companies have not in fact performed the primary function of a common carrier, *i.e.*, the transportation of other people's goods. And during this period of a quarter of a century, there has only been one formal complaint filed with the Interstate Commerce Commission by an independent oil producer who desired to take advantage of the common carrier facilities of a pipe line company. In *Brundred Brothers v.*

⁴40 CONG. REC. 9101 (1906).

⁵In the Matter of Pipe Lines, 24 I. C. C. 1 (1912).

⁶The Pipe Line Cases, 234 U. S. 548, 34 Sup. Ct. 956 (1914).

⁷*Id.* at 560. (Italics supplied.)

Prairie Pipe Line Co.,⁸ the prospective shipper complained of the rates and of the tender requirement of the pipe line company. The Interstate Commerce Commission held that the rates were reasonable, but that the minimum tender requirement of 100,000 barrels was unreasonable, and suggested 10,000 barrels as a reasonable minimum tender requirement. The aftermath of this partial victory of the only independent oil producer who has ever made a formal complaint before the Interstate Commerce Commission is interesting. The Prairie Pipe Line Company immediately cancelled the particular tariff between the two points in question: the prospective shipper's oil was not carried; no further complaint was filed and there the matter rests.

Dean Pound has stressed the distinction between "law in books" and "law in action,"⁹ and here indeed is a significant illustration. It is our thesis that the fundamental explanation of this anomaly¹⁰ lies in the fact (a) that the major oil producing companies, who control the pipe lines, are in a position to and do establish the market price for oil in the production field, and (b) that they control the market price at the point of destination, and (c) that the differential between the two prices is not sufficient to cover the cost of transportation in conformity with the tariffs filed with the Interstate Commerce Commission. As we see it, the most vulnerable point in the pipe line set-up today grows out of the fact that the major pipe lines are acting in the dual and inconsistent roles of *carriers* and *owners* (dealers) of the commodity transported, and that they are using the pipe line charges as a driving wedge to prevent others from marketing oil lawfully produced, and in order to consummate that objective they are deviating from the published tariffs required by law and are attempting to assume the loss as a "dealer" rather than as a "carrier." If this charge can be established by evidence it is our contention that there is a possibility of partial relief by *litigation* under existing statutes, but this relief will not be as effective as divorcement by *legislation*.

Before attempting to explore the possibilities of litigation under existing statutes, one point by way of background must be emphasized. If the pipe line is owned and controlled by the oil producer and thus occupies the dual and inconsistent roles of public *carrier* and private *dealer*, then under these circumstances (1) the so-called reasonableness or unreasonableness of the transportation rate is immaterial insofar as the producer-owner of the pipe line is concerned, for the reason that his profits are determined by the differential between the *selling price* and the *production cost* (which includes refining and marketing costs) plus the *transportation cost*, and not plus the

⁸68 I. C. C. 458 (1922).

⁹See Pound, *Law in Books and Law in Action* (1910) 44 AM. L. REV. 12.

¹⁰Other contributing factors may be tender requirements, storage facilities, etc.

transportation rate. The transportation rate is a matter of bookkeeping only. But (2) the reasonableness or unreasonableness of the established transportation rate is pertinent to other shippers, and in a monopolistic market the amount of the transportation rate may constitute the driving wedge which will place the independent producer in a position where he cannot afford to take advantage of the common carrier status of the pipe line to market his oil which has been lawfully produced. By force of circumstances, he is compelled to sell his oil at the pipe line at a dictated price.

As early as 1891, the Interstate Commerce Commission, in a case involving the coal-railroads, made this point very clear in *Coxe Brothers & Company v. Lehigh Valley R. R.*,¹¹ but the most succinct statement of the proposition was made by the Commission in 1911 in the case of *Meeker & Co. v. Lehigh Valley R. R.*, when it said:¹²

" . . . The record shows that the only line of demarcation between the Lehigh Valley Railroad Company and the Lehigh Valley Coal Company is one of bookkeeping. Assuming for purposes of illustration that the cost of mining anthracite coal is \$2 per ton and the cost of carrying it to tidewater is \$1 per ton, it follows that the cost of coal at tidewater would be \$3 per ton; and if the published rate were \$1 the independent operator and the railroad coal company would be on a fair competitive basis so far as the cost of mining and transportation are concerned. But as between the railroad company and its coal company it matters not whether the profit comes from mining or transporting the coal. So, therefore, if, instead of the \$1 rate above mentioned, the railroad company were to establish a rate of \$1.50 per ton, the railroad and its coal company could still sell coal at tidewater for \$3 per ton, standing a deficit of 50 cents per ton in the mining price and making an equal profit in the transportation price. But the independent operator cannot recoup himself in this manner, and the best price that he could make at tidewater would necessarily be the mining price of \$2, plus the carrying charge of \$1.50, or \$3.50; and he would enter the market at a disadvantage of 50 cents per ton as compared with the railroad and its coal company. *It is obvious that such an advantage would enable the railroad company and its alter ego, the coal company, to monopolize the field of production and the selling market.*" (Italics supplied.)

I. DIVORCEMENT BY LITIGATION

Although, in the literature dealing with the problem of the divorcement of the production from the transportation of oil, it is generally assumed that this is a matter exclusively within the province of *legislation*, it is our contention that a partial relief can be secured by *litigation*. The analysis that follows is predicated upon an assumed state of facts outlined *supra*. Two possibilities

¹¹4 I. C. C. 535, 569, 571, 572 (1890).

¹²21 I. C. C. 129, 154 (1911).

of divorcement by litigation will be considered: (A) the "rebate-device" sections of the Interstate Commerce Act and (B) the Sherman Act.

A. LITIGATION BASED ON THE "REBATE-DEVICE" SECTIONS OF THE INTERSTATE COMMERCE ACT

(1) *Statutory Provisions*

Section 2 of the Interstate Commerce Act (49 U. S. C. A. § 2) provides:

"Sec. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers, or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

Section 1 of the Elkins Act¹³ [49 U. S. C. A. § 41 (1)] provides:

"Sec. 1. . . . It shall be unlawful for any person, persons, or corporations to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said chapter, or whereby any other advantage is given or discrimination is practiced. . . ."

(2) *The New Haven Doctrine*

The most apposite decision that can be utilized as a basis for divorcement by litigation under the Interstate Commerce Act is *New York, New Haven and Hartford R. R. v. Interstate Commerce Commission*.¹⁴ The *New Haven* decision antedated the Hepburn Act.¹⁵ It applied to railroads, but the effect of the Pipe Line Amendment of the Hepburn Act¹⁶ makes the doctrine

¹³Section 3 of the Elkins Act as amended, which was part of the Hepburn Act of 1906, provides that, in addition to other penalties provided by the act, any person, *etc.*, who shall knowingly receive any rebates, direct or indirect, shall *forfeit* to the United States a sum of money *three times* the amount of money so received or accepted.

¹⁴200 U. S. 361, 26 Sup. Ct. 272 (1906).

¹⁵The *New Haven* decision was handed down on February 19, 1906, and the Hepburn Act was approved on June 29, 1906; 34 STAT. 584 (1906), 49 U. S. C. A. §§ 1 *et seq.*

¹⁶The Pipe Line Amendment provides "that the provisions of this Act shall apply to any person or persons engaged in the *transportation of oil* or other commodity, except water and except natural or artificial gas, *by means of pipe lines* or partly by pipe lines and partly by railroad, or partly by pipe line and partly by water, who shall be considered and

of the case applicable to oil pipe lines. The question of statutory construction of the Pipe Line Amendment immediately arose. Did the concluding clause of that amendment confine the Commission's jurisdiction to pipe lines that were technically common carriers by virtue of their own conduct (*i.e.*, a holding out as such), or did it impress upon all pipe lines engaged in interstate transportation the status of common carriers and subject them to control? In *the Matter of Pipe Lines*,¹⁷ the Interstate Commerce Commission held that, regardless of their previous status, the obligations of common carriers were impressed upon them, even though they were built over privately acquired rights of way and even though, by resorting to the policy of refusing to carry oil unless it was first sold to them, they were apparently engaged in transporting only their own oil. This broad construction of the Pipe Line Amendment was affirmed by the Commerce Court in the case of *Prairie Oil and Gas Co. v. United States*, where the court held:¹⁸

"The concluding phrase is not a limitation or restriction, but, on the contrary, was plainly inserted for the purpose of fixing the legal status of the persons and corporations included in precise terms in the preceding description, to the end that they should be regarded and treated as common carriers subject to the act. . . . So far as the debates in Congress when this amendment was pending may be resorted to for any purpose, they tend strongly to confirm the conclusion above expressed."

The Supreme Court of the United States was in entire agreement with both the Commission and the Commerce Court on the point of statutory construction. In *The Pipe Line Cases*, which is the leading authority construing the provisions of the Hepburn Act applicable to oil pipe lines, Mr. Justice Holmes repudiated the Pogue¹⁹ and Splawn²⁰ contentions that pipe lines were "plant facilities" and said:²¹

"The provisions of the act are to apply to any person engaged in the transportation of oil by means of pipe lines. The words 'who shall be considered and held to be common carriers within the meaning and purpose of this act' obviously are not intended to cut down the generality of the

held to be common carriers within the meaning and purpose of this Act." (Italics supplied.)

¹⁷24 I. C. C. 1 (1912).

¹⁸204 Fed. 798, 805, 806 (Commerce Ct. 1913).

¹⁹POGUE, ECONOMICS OF PIPE LINE TRANSPORTATION IN THE PETROLEUM INDUSTRY (1932).

²⁰The Walter M. W. Splawn Report on Pipe Lines, H. R. REP. NO. 2192, 72d Cong., 2d Sess. (1933) Part I, page lxviii. A recent *ex parte* report by Examiner E. Paul Kelly of the Interstate Commerce Commission submitted to the Commission Feb. 1, 1940, entitled *Reduced Pipe Line Rates and Gathering Charges*, has revived the Splawn "plant facility" thesis in spite of the holdings of the Interstate Commerce Commission [In the Matter of Pipe Lines, 24 I. C. C. 1 (1912)] and the Supreme Court of the United States [The Pipe Line Cases, 234 U. S. 548, 34 Sup. Ct. 956 (1914)].

²¹234 U. S. 548, 559, 561, 34 Sup. Ct. 956 (1914).

previous declaration to the meaning that only those shall be held common carriers within the act who were common carriers in a technical sense, but an injunction that those in control of pipe lines and engaged in the transportation of oil shall be dealt with as such. If the Standard Oil Co. and its cooperating companies were not so engaged, no one was. It not only would be a sacrifice of fact to form, but would empty the act if the carriage to the seaboard of nearly all the oil east of California were held not to be transportation within its meaning, because by the exercise of their power the carriers imposed as a condition to the carriage a sale to themselves. As applied to them, while the amendment does not compel them to continue in operation it does require them not to continue except as common carriers. . . . Its evident purpose was to bring within its scope pipe lines that although not technically common carriers yet *were carrying all oil offered, if only the offerers would sell at their price. . . . Those lines that we are considering are common carriers now in everything but form. They carry everybody's oil to market, although they compel outsiders to sell it before taking it into their pipes.*" (Italics supplied.)

In the *New Haven* case, the Chesapeake & Ohio Railroad made a contract with the New Haven Railroad to sell to the latter during a period of years a specified amount of coal at the price of \$2.75 per ton. The Chesapeake & Ohio bought this coal for \$2.47 per ton, leaving a balance of \$.28 per ton for transportation costs. The published tariff on these shipments was \$1.45 per ton. The question for decision as formulated by the Court was stated as follows: "Has a carrier, engaged in interstate commerce, the power to contract to sell and transport in completion of the contract the commodities sold, when the price stipulated in the contract does not pay the cost of purchase, the cost of delivery and the published freight rates?"

The Chesapeake & Ohio claimed that it could assume the loss, *i.e.*, the difference between \$1.45 and \$.28 (as a dealer and not as a carrier), and thus evade the requirement of the statute relating to the conformity to the published rates. The Court said:²²

"In view of the positive command of the second section of the act, that no departure from the published rate shall be made, 'directly or indirectly,' how can it in reason be held that a carrier may take itself from out of the statute in every case by simply electing to be a dealer and transport a commodity in that character? For, of course, if a carrier has a right to disregard the published rates by resorting to a particular form of dealing, it must follow that there is no obligation on the part of a carrier to adhere to the rates, because doing so is merely voluntary."

The Court, in effect, accepted the contention made in the Brief for the Interstate Commerce Commission²³ "that the law will presume in such a factual

²²200 U. S. 361, 391, 26 Sup. Ct. 272 (1906).

²³Records and Briefs, U. S. Supreme Court, vol. 2, Oct. Term 1905, pp. 29-31.

situation that the resulting loss was sustained by the corporation in a capacity as carrier and not in its capacity as vendor-shipper; in other words, that the merchandise was transported for less than the published rates." The Interstate Commerce Commission Brief pointed out "that if the law did not raise this presumption from the facts recited, it would follow either (1) that it must be left entirely to the carrier to say whether the loss was sustained as carrier, and hence, whether the goods were transported for less than the published rates or whether the loss was sustained as vendor—which is to leave it to the carrier to decide whether it has violated the statute, or, (2) which is only a shade less absurd, the law must presume that the loss was sustained as vendor."

The Court said, at page 392:

"The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. . . . Indeed the inevitable result of the possession of such a right by a carrier would be to enable it, if it chose to exercise the power, to concentrate in its own hands the products which were held for shipment along its line, and to make it, therefore, the sole purchaser thereof and the sole seller at the place where the products were to be marketed; in other words, to create an absolute monopoly."

It is to be noted also that the Court took the *position that the statute, without a Commodities Clause, provided in effect for a divorce of production and transportation where the published rates were departed from in this type of case.* On this point the Court said, at page 399:

"It is urged that if the requirement of the act to regulate commerce as to the maintenance of published rates and the prohibitions of that act against undue preferences and discriminations be applied to a carrier when engaged in buying and selling a commodity which it transports, the substantial effect will be to prohibit the carrier from becoming a dealer when no such prohibition is expressed in the act to regulate commerce, and hence a prohibition will be implied which should only result from express action by Congress. Granting the premise, the deduction is unfounded. Because no express prohibition against a carrier who engages in interstate commerce becoming a dealer in commodities moving in such commerce is found in the act, it does not follow that the provisions which are expressed in that act should not be applied and be given their lawful effect. *Even, therefore, if the result of applying the provisions as we have interpreted them will be practically to render it difficult, if not impossible, for a carrier to deal in commodities, this affords no ground for relieving us of the plain duty of enforcing the provisions of the statute as they exist.*" (Italics supplied.)

In the later case of *United States v. Delaware & Hudson Co.*,²⁴ which was the first case construing the Commodities Clause, the Court comments on the *New Haven* case and corroborates the point that in that type of case the Interstate Commerce Act meant identically the same thing without the Commodities Clause as with it. The Court said, at page 410:

"In that case [New York, New Haven and Hartford R.R. v. Interstate Commerce Commission, *supra*] after much consideration, it was held that *the prohibitions of the Interstate Commerce Act as to uniformity of rates and against rebates operated to prevent a carrier engaged in interstate commerce from buying and selling a commodity which it carried in such a way as to frustrate the provisions of the act, even if the effect of applying the act would be substantially to render buying and selling by an interstate carrier of a commodity which it transported practically impossible.*" (Italics supplied.)

Let us recapitulate the significance of the *New Haven* case in supporting our thesis that it is possible to divorce production and transportation of petroleum and its products by litigation under existing statutes.

- (1) The *New Haven* case antedated the Hepburn Act.
- (2) The Congressional legislation in force at the time of the *New Haven* decision applied only to rail and rail and water carriers.
- (3) The effect of the Pipe Line Amendment to the Hepburn Act clothed interstate pipe lines with a common carrier status and subjected them to the same statutory regulations as interstate carriers by rail and rail and water. (In the Matter of Pipe Lines, The Pipe Line Cases, *supra*.)
- (4) This common carrier status impressed upon the pipe lines a public obligation "as a public agent to give equal treatment to all." (New York, New Haven and Hartford R. R. v. Interstate Commerce Commission, *supra*).
- (5) The Commodities Clause, which constituted the first Congressional attempt to divorce production and transportation in the railroad field, was a section of the Hepburn Act.
- (6) There was no Commodities Clause involved in the *New Haven* case as applied to railroads, and the Congress has refused in the Hepburn Act and in later legislation to make the Commodities Clause applicable to oil pipe lines.
- (7) The *New Haven* case dealt with a situation wherein the railroad was acting in a dual capacity as *carrier* and as *owner* (dealer) of the commodity transported, and wherein the selling price of the commodity

²⁴213 U. S. 366, 29 Sup. Ct. 527 (1909).

in question, stipulated in the contract, was not sufficient to pay the cost of purchase plus the cost of delivery in conformity with the published freight rates. The Court held that the railroad could not evade the requirements of the statute relating to conformity to the published rates by assuming the loss as a *dealer* rather than as a *carrier*.

(8) The effect of the Pipe Line Amendment as construed in *The Pipe Line Cases* is to extend the *New Haven* doctrine to similar situations wherein the pipe line companies are acting in a dual capacity as *carriers* and as *owners* (dealers) of the commodities transported. It follows that in a case wherein the pipe line company acts in the dual capacity of *carrier* and *dealer* and the published rates are departed from, the statute, in the absence of a Commodities Clause, will be construed in effect so as to provide for a divorce of production and transportation. (New York, New Haven and Hartford R. R. v. Interstate Commerce Commission, *United States v. Delaware & Hudson Co.*, *supra*.)

(9) Under the assumed state of facts, the pipe line companies run afoul of the statutes by reason of the practice of *deviating from the published transportation tariffs*. The *New Haven* case prohibits the subterfuge of assuming the losses as *dealers* rather than as *carriers*.

(10) If the major oil companies are taking advantage of their relationship with the pipe line carriers so as to dictate the market price at both ends of the pipe lines and, having thus created an artificial price structure, are using the pipe line charges as a driving wedge to prevent others from marketing oil lawfully produced by them either in the field or at the point of destination, unless it is sold to the major companies at a dictated price, then under these conditions the doctrine of the *New Haven* case is applicable and may be utilized to prevent the further destruction of competition on the part of the independent producers.

(3). *The broad mandate of the Elkins Act is to ensure like treatment for all shippers and every conceivable device that frustrates that mandate is outlawed by the statute.*

The words "rebate" and "device" are not words of art having a precise and definite legal meaning and the forms of "rebate," "drawback," "concession," "discrimination" or "other device" by means of which "an advantage is given or discrimination is practiced" are so varied that it is impossible to classify them into distinct types. The result in each case is predicated on the peculiar facts established therein, which have the purpose and effect of *deviating from the published rate* and violating the mandate *that all shippers be treated alike*.²⁵

²⁵Some of the leading cases that have given this broad construction to the Elkins Act are: *Armour Packing Company v. United States*, 209 U. S. 56, 28 Sup. Ct. 486 (1908);

In *Louisville & Nashville R. R. v. Mottley*²⁶ the Court characterized the broad purpose of the Elkins Act "to cut up by the roots every form of discrimination, favoritism and inequality," and the Interstate Commerce Commission has declared that it was the purpose of Congress "to strike through all pretense, all ingenious device, to the substance of the transaction."²⁷ In *United States v. Hocking Valley R. R.*,²⁸ the court pointed out that:

"Of course, it is not practicable for Congress to set a limit on human ingenuity in the devising of schemes obnoxious to the act to regulate commerce by attempting a description of all possible methods. The act accomplishes its end by directly and unmistakably condemning results, wherefore every devisable plan to produce the objectionable conditions is under its ban. Surely our jurisprudence is not so inept and feeble that a statute exhibiting a definite purpose to meet palpable mischiefs must be construed so narrowly as to oblige Congress from time to time to amend it that its provisions may be kept, at the best, only in the immediate rear of a procession of new methods born of the fertility of human invention and designed to circumvent that legislative will which it attempts by each amplifying amendment to express."

In *Chicago & Alton R. R. v. United States*,²⁹ the court said that "under the Elkins Act the standard of comparison is the published rate. It is only necessary to prove that the favored shipper has had his property transported at a less rate than that published and filed." In *Vandalia R. R. v. United States*,³⁰ the court stressed the "subtle disguises" under which rebates have been enjoyed. "That the full tariff rate is collected at the time of transportation does not negative the possibility of a rebate in respect thereto. The rebate may be in a lump cash sum in advance (*United States v. Union Stockyards*, 226 U. S. 286, 33 S. Ct. 83, 57 L. Ed. 226) or by later or earlier indirect payments (*G. R. & I. Ry. Co. v. United States*, 212 Fed. 577, 129 C. C. A. 113)." In *Armour Packing Company v. United States*,³¹ the Court gave a liberal interpretation of the word "device," saying:

"And we find the word device disassociated from any such words as fraudulent conduct, scheme or contrivance, but the act seems to reach all

United States v. Union Stockyards, 226 U. S. 286, 33 Sup. Ct. 83 (1912); *United States v. Michigan Portland Cement Co.*, 270 U. S. 521, 46 Sup. Ct. 395 (1926); and see *American Express Co. v. United States*, 212 U. S. 522, 29 Sup. Ct. 315 (1909); *United States v. Standard Oil Co.*, 148 Fed. 719 (N. D. Ill. 1907).

²⁶219 U. S. 467, 31 Sup. Ct. 265 (1911).

²⁷*Association of Bituminous Operators of Central Pennsylvania v. Pennsylvania R. R.*, 10 I. C. C. 385, 402 (1904).

²⁸194 Fed. 234, 251 (N. D. Ohio 1911), *aff'd*, 210 Fed. 735 (C. C. A. 6th 1914), *cert. denied*, 234 U. S. 757, 34 Sup. Ct. 675 (1914).

²⁹156 Fed. 558, 562 (C. C. A. 7th 1907), *aff'g*, 148 Fed. 646 (N. D. Ill. 1906), *aff'd w.o.op. by divided court*, 212 U. S. 563, 29 Sup. Ct. 689 (1908).

³⁰226 Fed. 713, 716 (C. C. A. 7th 1915).

³¹209 U. S. 56, 71, 28 Sup. Ct. 428 (1907).

means and methods by which the unlawful preference of rebate, concession or discrimination is offered, granted, given or received. . . . A device need not be necessarily fraudulent; the term includes anything which is a plan or contrivance."

(4). *Devices, although legal per se, are outlawed when they constitute integral parts of a plan that violates the statute.*

We have seen how the *New Haven* case establishes the proposition that a carrier may not evade the prohibitions against rebating by becoming a dealer in a commodity which it transports, *even though there is no express statutory prohibition against this sort of dealer-shipper relationship as such.* So the legality of the following ingenious devices, considered separately, is unquestioned: (a) *Stock ownership* of the pipe line company by the major oil producing companies, (b) with its alleged insulation of liability by virtue of the creation of a *separate corporate entity* and (c) the right of the directors of the pipe line company to declare *dividends* out of profits. But when the devices of stock ownership, corporate entity and the "kick-back" in the form of dividends are parts of a plan whereby the owner of the pipe lines is permitted to ship at *cost*, while all others must pay the published transportation *rate*, then we have a continuing violation of the "rebate-device" sections of the Elkins Act which is inherent in the very nature of the pipe line set-up.

That this ingenious scheme is not entirely novel is established by several cases. In *Colonial Salt Company v. Michigan, Indiana and Illinois Line*,³² a boat line, incorporated as a common carrier, was owned and operated in the interest of a salt company; it published no rates except upon salt in cargo lots, and it used as terminal facilities the docks and warehouses of the salt company by whose agents and employees all shipments had to be handled. It was held that the boat line was a mere device to defraud the law, and payments made to it by connecting rail carriers in the guise of divisions were rebates.

An examination of findings of the Interstate Commerce Commission in the *Colonial Salt* case establishes a striking similarity between that case and the case of the pipe lines controlled by the major oil companies. Harlan, Commissioner, pointed out (1) the relatively small amount of money originally invested in the boat line, (2) the tremendous profits accruing from its operation, (3) that the boat line and its dock facilities were the private facilities of the Salt Company that owned the boat line and were not public facilities, (4) that the general offices of the boat line were also the general offices of the Salt Company, and (5) that the Salt Company and the boat line constituted one investment in the same general interest. Commenting on the above analysis, Harlan, Commissioner, at page 363, said:

³²23 I. C. C. 358 (1912).

"It is clear from this statement of facts that by turning its facilities over to an incorporated transportation company which handles substantially nothing *but its own salt, the salt company has received extraordinary returns, which give it extraordinary advantages over its competitors. The situation resolves itself into another of the growing number of instances where a large industry, by the mere taking out of a charter under the loose laws of some state, gives to its private facilities the appearance of being a public carrier and then uses them as a device under the guise of which it may receive and complaisant railroad companies may pay, rebates to the industry, and also as a club by means of which hesitating and reluctant lines may be forced into the same unlawful relation with the industry under the threat of a large traffic that may be lost by their refusal to meet its demands.*" (Italics supplied.)

In the *Matter of Division of Joint Rates to Terminal Railroads*,³³ it was shown that the International Harvester Company owned the Illinois Northern Railroad and that connecting lines paid an exorbitant charge to the railroad for switching service. The Commission said, at page 401:

"It is urged that all this is simply an arrangement between two connecting railroads; that there is no negotiation with the shipper, and no payment to the shipper. This is a mere play upon words. The Illinois Northern Railroad Company and the International Harvester Company are one and the same thing. *It is entirely immaterial whether this money goes in the first instance into the treasury of the International Harvester Company or that of its creature, the Illinois Northern Railroad Company.* That subterfuges of this sort cannot avail has been often decided, and was affirmed within the year by the Supreme Court of the United States in *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 49 L. ed. 860, 24 Sup. Ct. Rep. 563, in which it was held that it made no difference whether certain contracts were entered into with a railroad company itself or with a coal company the stock of which was entirely owned by the railroad company." (Italics supplied.)

In *Freight Forwarding Investigation*,³⁴ the Interstate Commerce Commission held that:

³³10 I. C. C. 385 (1904).

³⁴229 I. C. C. 201, 293 (1938). Other cases wherein an unsuccessful attempt has been made by the defendant to utilize the corporate entity theory to evade the prohibitions of a statute are: *The Commodities Clause, U. S. v. Lehigh Valley R. R.*, 220 U. S. 257, 31 Sup. Ct. 387 (1910); *U. S. v. Delaware, Lackawanna and Western R. R.*, 238 U. S. 516, 35 Sup. Ct. 873 (1914); *U. S. v. Reading Co.*, 253 U. S. 26, 40 Sup. Ct. 425 (1919); *The Elkins Act, U. S. v. Milwaukee Refrigerator Transit Co.*, 142 Fed. 247 (C. C. Wis. 1905); *U. S. v. Cleveland C. C. & St. L. R. R.*, 234 Fed. 178 (N. D. Ill. 1915); *The Interstate Commerce Act, In The Matter of Alleged Unlawful Rates of the Chicago Great Western and Other Railroads*, 7 I. C. C. 33 (1897). Other leading cases for disregarding the corporate entity are *Southern Pacific Terminal Co. v. I. C. C.*, 219 U. S. 498, 31 Sup. Ct. 279 (1910); *C. M. & St. P. R. R. v. Minneapolis Civic Ass'n*, 247 U. S. 490, 38 Sup. Ct. 553 (1917); *Electric Bond & Share Co. v. S. E. C.*, 303 U. S. 419, 58 Sup. Ct. 678 (1938).

“There can be no doubt but that the object of the New York Central in acquiring stock control of the Universal was to use the latter to serve the purposes of the former as a forwarder, and this record is convincing that that purpose has been and is being carried out to the point where the Universal must be regarded as a mere instrumentality or department of the New York Central. *Obviously, a common carrier by railroad may not be permitted to establish a separate corporation for the purpose of granting concessions or discriminations or of granting rebates from the lawful tariff rates, all of which would be in derogation of the statute if practiced by the carrier in its own name.*” (Italics supplied.)

(5) *The scope of injunctive relief under the Interstate Commerce Act.*

The possibility of divorcement through the exercise of the equity powers of the court will be discussed in greater detail in the portion of this study dealing with the Sherman Act. However, it should be noted that in the *New Haven* case under the Interstate Commerce Act (a) the Chesapeake and Ohio was perpetually enjoined “from taking less than the rates fixed in the published tariff of freight rates, by means of dealing in the purchase and sale of coal”; (b) the Court emphasized one of the weaknesses of divorcement by litigation as contrasted with divorcement by legislation when it denied the contention “that whenever a carrier has been adjudged to have violated the Act to regulate commerce in any particular it is the duty of the court, not only to enjoin the carrier from further like violations of the act, but to command it in general terms not to violate the act in the future in any particular”; and (c) the Court took the position that on the question of the scope of equity powers, a Sherman Act case [*Swift and Company v. United States*, 196 U. S. 375, 25 Sup. Ct. 276 (1905)] could be relied on as a precedent in a case under the Interstate Commerce Act.

B. THE SHERMAN ACT AS A BASIS FOR LITIGATION

(1) The pertinent sections of the Sherman Act to be utilized as a basis for litigation are Section 2 and Section 4.

Section 2 reads as follows:

“Every person who *shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.*” (Italics supplied.)

Section 4 reads as follows:

“The several district courts of the United States are invested with

jurisdiction to *prevent and restrain violations of sections 1 to 7 . . . and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations.*" (Italics supplied.)

(2) The second section is broader than the first, for it inhibits monopoly accomplished by some other means than the particular restraints named in the first section, to wit, "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . ." Chief Justice White speaking for the Court in *Standard Oil Co. v. United States*, held that the second section was "*intended to supplement the first and to make sure that by no possible guise could the public policy embodied in the first section be frustrated or evaded.*"³⁵ In developing this point, he said:

"Undoubtedly, the words 'to monopolize' and 'monopolize' as used in the section reach every act bringing about the prohibited results. . . . In other words, having by the first section forbidden all means of monopolizing trade, that is, unduly restraining it by means of every contract, combination, etc., *the second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the first section.*" (Italics supplied.)

(3) Under the assumed state of facts, the major oil companies through their domination of the pipe line companies, are controlling the transportation of oil in the areas served by their lines and are "monopolizing" or "attempting to monopolize" the production and distribution of oil in violation of Section 2 of the Sherman Act.

(a) *The essential elements constituting monopoly.*

" . . . 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 . . . 'the motive of exclusiveness or unity'; in other words, the suppression of competition by the unification of interest or management, or it may be through agreement and concert of action."³⁶

"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."³⁷

³⁵221 U. S. 1, 61, 62, 31 Sup. Ct. 502 (1911). (Italics supplied.)

³⁶National Cotton Oil Co. v. Texas, 197 U. S. 115, 129, 25 Sup. Ct. 379 (1904).

³⁷United States v. Trans-Missouri Freight Association, 58 Fed. 58, 82 (C. C. A. 8th 1893).

(b) *Section 2 outlaws the monopolization or attempt to monopolize "any part" of the trade or commerce among the several states.*

In *Standard Oil Co. v. United States*³⁸ the Court said: "The commerce referred to by the words 'any part' construed in the light of the manifest purpose of the statute has both a geographical and a distributive significance, that is, it includes any portion the United States and any one of the classes of things forming a part of interstate or foreign commerce."

In *O'Halloran v. American Sea Green Slate Co.*,³⁹ the court said:

" . . . [To constitute a violation of the statute] it is not necessary to show that a complete and United States wide monopoly has been actually created, or that the entire trade or business and production of an article has been brought within the control of the combination, or ever will be. It is no defense for such a combination to show that there is still some competition and some competitors, and that the acts of the combination do not wholly and entirely control interstate commerce in the article, or absolutely fetter it. If the combination be one in restraint of trade or commerce among the several states to any substantial degree, it is within the condemnation of the statute."

In *United States v. E. C. Knight Co.*,⁴⁰ the Court said:

" . . . all the authorities agree that in order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition."

(c) *The process of integration as practiced by the major oil companies contains the germ of monopoly and is not a "normal method of industrial development" which would be permitted by the Sherman Act.*

The fusion of the functions of production, transportation, refining and marketing of petroleum and its products in each of the major oil companies is inherently monopolistic and the resulting concentration and control constitutes a potential weapon for fostering further restraints on trade and commerce in violation of the Sherman Anti-Trust Act. The old Standard Oil Company, which was dissolved in 1911,⁴¹ had only carried the process of integration into the fields of transportation, refining and marketing. Today the twenty-two major oil companies, which transact more than 85% of the total business of the industry (with the exception of the Standard Oil Company of Kentucky, which is a marketing set-up), have extended the process of integration into all four branches of the industry.⁴²

³⁸221 U. S. 1, 61, 31 Sup. Ct. 502 (1911).

³⁹207 Fed. 187, 191 (N. D. N. Y. 1913).

⁴⁰156 U. S. 1, 16, 15 Sup. Ct. 249 (1895).

⁴¹Standard Oil Co. v. United States, 221 U. S. 1, 31 Sup. Ct. 402 (1911).

⁴²This fact was brought to light in the hearings before the Temporary National Economic Committee which report now appears only in mimeographed form.

However, the control of the pipe line, or transportation branch, is the ultimate keystone in the arch of monopoly. The unusual susceptibility of the petroleum industry to monopolistic mastery lies in the fact that control of refineries means control of the entire industry, for the fundamental reason that crude petroleum has no consumer value⁴³ and *refining is controlled ultimately by the control of transportation facilities*. John D. Rockefeller, Sr. recognized this fact and acquired this control of refining through railroad rebates. By this device, in the decade from 1867 to 1877 he increased his control of the refining business from 10% to 90% of the entire industry. Since railroad rebates have been outlawed, the new device to obtain this control is the pipe line.⁴⁴ Today the twenty-two major oil companies control 85% of the crude pipe line mileage and seventeen of these companies control 96% of the gasoline pipe line mileage.⁴⁵

Although the Sherman Act does not prohibit a "normal case of integration of industry"⁴⁶ or a "normal method of industrial development,"⁴⁷ it does forbid a practice whereby the pipe line companies controlled by the major oil producing companies are virtually the sole purchasers and sellers of all oil produced in the area which they serve.

The Supreme Court, in upholding a decree which dissolved, under the Sherman Act, the holding company in *Standard Oil Co. v. United States*, emphasized in the following words the distinction between "normal methods of industrial development" (which were permitted by the statute) and "new means of combination" which made for monopoly:⁴⁸

"Because the unification of power and control over petroleum and its products which was the inevitable result of the combining in the New Jersey corporation by the increase of its stock and the transfer to it of the stocks of so many other corporations, aggregating so vast a capital, gives rise, in and of itself, in the absence of countervailing circumstances, to say the least, to the *prima facie* presumption of intent and purpose to maintain the dominancy over the oil industry, *not as a result of normal methods of industrial development, but by new means of combination which were resorted to in order that greater power might be added than would otherwise have arisen had normal methods been followed*, the whole with the purpose of excluding others from the trade and thus centralizing in the combination a perpetual control of the movements of petroleum and

⁴³Kemnitzer, *The Monopoly Problem in the Petroleum Industry of the United States* (an address delivered Oct. 25, 1938, at the Morrison Hotel, Chicago, Illinois, before the National Oil Marketers Association. The thesis is developed more in detail in his book, *THE REBIRTH OF MONOPOLY* [1938]).

⁴⁴TARBELL, *THE HISTORY OF THE STANDARD OIL COMPANY* (1904) cc. 3, 5.

⁴⁵These estimates have been prepared by the Department of Justice based largely on Interstate Commerce Commission reports.

⁴⁶*United States v. Winslow*, 227 U. S. 202, 33 Sup. Ct. 253 (1913).

⁴⁷*United States v. Joint Traffic Association*, 171 U. S. 505, 507, 19 Sup. Ct. 25 (1898).

⁴⁸221 U. S. 1, 75, 31 Sup. Ct. 502 (1911).

its products in the channels of interstate commerce." (Italics supplied.)

(d) *The major oil companies, through their control of the pipe lines are utilizing a technique in which the latter instrumentality places them in "a dual and inconsistent position of public carrier and private shipper."*

The characterization of "a dual and inconsistent position of public carrier and private shipper" was first used by the courts in the anthracite-railroad cases.⁴⁹ In the *New Haven* case the Court characterized the coal company-railroads as a set-up in which the railroads became "virtually the sole purchasers and sellers of all the coal produced along the line of its road." The analogy between the anthracite-railroads and the major oil-controlled pipe lines is emphasized by the characterization of Mr. Justice Holmes in *The Pipe Line Cases*. Although the Court in these cases held that the pipe lines were *common carriers in law*, it pointed out that *in fact* the uniform practice of the major pipe line companies has been to carry "all oil offered, if only the offerers will sell at their price."

In *United States v. Delaware, Lackawanna and Western R. R.*⁵⁰ the Court said, "The Commodities Clause of the Hepburn Act was intended to prevent railroads from occupying the *dual and inconsistent* positions of public carrier and private shipper." It is true that the Commodities Clause does not apply to pipe lines, but we have shown that the doctrine of the *New Haven* case, which antedated the Hepburn Act, has been extended by virtue of the Pipe Line Amendment of the Hepburn Act so as to be applicable to pipe lines, and the Supreme Court in the *Delaware & Hudson* case has intimated that the effect of the *New Haven* doctrine was to hold that the Interstate Commerce Act meant the same thing without the Commodities Clause as with it.

(e) *This dual and inconsistent position of public carrier and private shipper leads inevitably (1) to the imposition of excessive rates and (2) these excessive rates are used as a weapon of monopoly.*

This charge is not a theoretical one, but is substantiated by the practices of the anthracite coal-railroads and the major oil companies' controlled pipe lines. The best evidence that pipe line rates are excessive, is the well-recognized fact in the oil industry that over the years deficits in the divisions of production, refining or marketing have been liquidated by profits in the pipe line division. From 1927 to 1934, the pipe line division of the major oil companies, having only 7.1% of the industry's investment, produced 86% of the industry's total net profit.⁵¹

⁴⁹*United States v. Reading Co.*, 226 U. S. 324, 340, 341, 33 Sup. Ct. 90 (1912).

⁵⁰238 U. S. 516, 525, 35 Sup. Ct. 873 (1915) (Italics supplied.); see also *D. L. & W. R. R. v. United States*, 231 U. S. 363, 370, 34 Sup. Ct. 65 (1913).

⁵¹Ryan, *Can Marketing Produce More Profits?* WORLD PETROLEUM (Dec. 1937) 26.

The long struggle between the independent shippers and the anthracite-railroads over freight rates was discussed at length by Mr. Justice Lurton in the first *Reading* case. The effect of excessive rates in the building up of the railroad coal companies was stated as follows:⁵²

" . . . obviously, buyer and seller were not upon an equal plane. The former had control of freight rates and car service. The seller must pay the rate exacted and accept the car service supplied him by the buyer, or appeal to the remedies afforded by the law. If the rate of freight to tide-water was onerous and was imposed upon the coal produced by the defendants and their allied coal producers without discrimination against the coal of the independent shipper, it would nevertheless bear upon the latter oppressively, since the rate paid would find its way into the pocket of the defendants. *Therefore it was that the higher the freight rate, the greater the inducement to sell to the carrier companies.*" (Italics supplied.)

In the *Anthracite Rate Case* the Interstate Commerce Commission held:⁵³

"[The rates] were established at an excessive basis, and clearly it was so done for the purpose of eliminating the independent output as a factor of competition in the markets with the railroad interest's output. . . . Reviewing this whole series of transactions they seem merely parts of a plan to publish in tariff form rates which were excessive and which presented a barrier against successful shipping by the small shipper, the independent operator, and then, by methods which in effect were secret, to reduce those published rates on the shipments of the coal company that had railroad affiliations."

In this connection, the declaration of Mr. Justice Holmes, speaking for the Court in *Swift and Company v. United States*, should not be forgotten: "*It is obvious that no more powerful instrument of monopoly could be used than an advantage in the cost of transportation.*"⁵⁴

(f) *The contentions, if established, that the oil companies, through their control of the pipe lines (1) have had no evil intent and (2) have not thereby raised the price of the product are not valid to escape the prohibitions of the statute.*

The law is firmly settled that while a bad intent may render acts otherwise innocent illegal, a good intent can never afford legal justification for doing that which is prohibited. "If the necessary result is materially to restrain trade between the states, the intent with which the thing was done is of no consequence."⁵⁵ "It is too late in the day to assert against statutes which

Investment in production was 42.7%; in marketing 22.6% and in refining 27.6%. These figures are based on the cost studies of the United States Tariff Commission and of the Petroleum Administrative Board.

⁵²United States v. Reading Co., 226 U. S. 324, 359, 33 Sup. Ct. 90 (1912).

⁵³35 I. C. C. 220, 232, 242 (1915).

⁵⁴196 U. S. 375, 402, 25 Sup. Ct. 276 (1905). (Italics supplied.)

⁵⁵United States v. Reading Co., 226 U. S. 324, 370, 33 Sup. Ct. 90 (1912).

forbid combinations of competing companies that a particular combination was induced by good intentions and has had some good effect."⁵⁶

Specifically, the failure to raise prices, or even a lowering of prices, cannot justify a restraint or monopolization of trade. On this point the Court in *United States v. Trans-Missouri Freight Association*⁵⁷ said, "In this light it is not material that the price of an article may be lowered. It is in the power of the combination to raise it, . . ."

(4) Under the assumed state of facts, the most apposite decision that would tend to show that the major oil companies through their control of the pipe lines are violating Sections 2 and 4 of the Sherman Act is *United States v. Lehigh Valley R. R.*⁵⁸ In this case the Lehigh Valley Railroad Company, in combination with the Lehigh Valley Coal Company, a subsidiary created and operated as a mere agency or instrumentality of the Railroad Company, deliberately entered upon the policy of purchasing and leasing the anthracite coal lands in Pennsylvania tributary to its extensive railroad system, and of buying up the stocks of corporations owning such lands, for the purpose of controlling the mining, transportation and sale of the coal to be obtained therefrom and of preventing and suppressing competition, especially in the transportation and sale of such coal in interstate commerce. Mr. Justice Clarke said, at page 269:

" . . . this policy was continued after the passage of the Anti-Trust Act with increasing energy and tenacity of purpose, with the result that a *practical monopoly was attained of the transportation and sale of anthracite coal derived from such lands.*

"The area of the anthracite territory is so restricted that to thus obtain control of the supply of such coal on a great system of railway (the amount transported exceeded one-fifth of the entire production of the country for the year before this suit was commenced) by a combination of corporations, such as we have here, and by such methods as we have seen were employed, effected a restraint of trade or commerce among the several States and constituted an *attempt to monopolize* and an *actual monopolization* of a part of such trade or commerce in anthracite coal, clearly within the meaning of the first and second sections of the Anti-Trust Act as they have frequently been interpreted by this court." (Italics supplied.)

(5) The scope of injunctive relief under Section 4 of the Sherman Act.

(a) *The decree should be broad enough to make it effective.*

In *Northern Securities Co. v. United States*,⁵⁹ Mr. Justice Harlan said:

⁵⁶International Harvester Co. v. Missouri, 234 U. S. 199, 209, 34 Sup. Ct. 859 (1914).

⁵⁷166 U. S. 290, 324, 17 Sup. Ct. 540 (1897); see also *United States v. Joint Traffic Association*, 171 U. S. 505, 19 Sup. Ct. 25 (1898).

⁵⁸254 U. S. 255, 41 Sup. Ct. 104 (1920).

⁵⁹193 U. S. 197, 344, 24 Sup. Ct. 436 (1903).

"All will agree that if the Anti-Trust Act be constitutional, and if the combination in question be in violation of its provisions, the courts may enforce the provisions of the statute by such orders and decrees as are necessary or appropriate to that end and as may be consistent with the fundamental rules of legal procedure."

Mr. Justice Holmes, in *Swift and Company v. United States*,⁶⁰ warned that "we . . . are bound by the first principles of justice not to sanction a decree so vague as to put the whole conduct of the defendant's business at the peril of a summons for contempt. We cannot issue a general injunction against all possible breaches of the law." But on the other hand he pointed out that "a bill in equity is not to be read and construed as an indictment would have been read and construed a hundred years ago, but it is to be taken to mean what it fairly conveys to a dispassionate reader by a fairly exact use of English speech. Thus read this bill seems to us intended to allege successive elements of a single connected scheme. * * * The defendants cannot be ordered to compete, but they properly can be forbidden to give directions or to make agreements not to compete."

(b) *The distinction between the scope of injunctive relief (1) in the case of a simple violation of the statute and (2) the creation of a condition which is not only a continued attempt to monopolize, but also a monopolization in violation of the statute.*

Ordinarily, where it is found that acts have been done in violation of the statute, an injunction restraining such acts in the future will be an adequate means of relief. However, this may not afford adequate relief. Thus, in *Standard Oil Co. v. United States*,⁶¹ the Supreme Court said:

"But in a case like this, where the condition which has been brought about in violation of the statute, in and of itself, is not only a continued attempt to monopolize, but also a monopolization *the duty to enforce the statute requires the application of broader and more controlling remedies.* As penalties which are not authorized by law may not be inflicted by judicial authority, it follows that to meet the situation with which we are confronted the application of remedies two-fold in character becomes essential: 1st. To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute. 2nd. The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about." (Italics supplied.)

⁶⁰196 U. S. 375, 396, 395, 400, 25 Sup. Ct. 276 (1905).

⁶¹221 U. S. 1, 77, 78, 31 Sup. Ct. 502 (1911).

(c) *Where there is a continuing monopolization in violation of the statute, dissolution of the illegal combination is a proper injunctive remedy.*

In the case of *Northern Securities Co. v. United States*,⁶² Mr. Justice Harlan, speaking for the Court said, "This it must be remembered is a suit in equity, instituted by authority of Congress 'to prevent and restrain violations of the act' (sec. 4); and the court in virtue of a well settled rule governing proceedings in equity, may mould its decree so as to accomplish practical results, such results as law and justice demand." It will be noted that in the *Northern Securities* case, the Court did not stop with enjoining the Securities Company from voting the shares of one of the two railroads, but enjoined it from voting the shares of both, thereby completely dissolving the combination.

In *United States v. E. I. Dupont de Nemours Co.*, Judge Lanning, after referring to the remedies adopted in the *Standard Oil* case, said, "Both of these remedies are as clearly demanded in the present case as they were in the *Standard Oil* Case. The existing combination in the explosives trade is one in restraint of interstate commerce. . . . It has also attempted to monopolize, and has monopolized, and is now in the possession of a monopoly of a large part of the explosives trade in the United States. Our decree must therefore be one which *will forbid future acts violative of the law and compel a dissolution of the combination existing in violation of the law.*"⁶³

In *United States v. American Tobacco Co.*,⁶⁴ the nature of the relief to be granted was again given consideration, and it was there concluded that the *only effectual remedy was to dissolve* the combination and the companies comprising it, and for that purpose the cause was remanded to the District Court to hear the parties and determine a method of dissolution and of recreating from the elements composing it "a new condition which shall be honestly in harmony with and not repugnant to the law."

The most succinct statement of the dissolution doctrine, which if applied to the oil companies would mean a *divorcement of the production and transportation activities* of that industry, is found in the case of *United States v. United States Steel Corporation*.⁶⁵

"It scarcely need be again said by us that where the evil effects of past undue restraint or monopoly continue to be effective and harmful when the proceeding is begun—that is, where '*the inherent nature of the contemplated acts*' is such as to bring about their continuance and repetition, or where, to use the expressive language of the Supreme Court in the *Standard Oil* Case, a 'perennial violation' of the act exists—the jurisdiction to restrain present and prevent future violations vests under this

⁶²193 U. S. 197, 360, 24 Sup. Ct. 436 (1904).

⁶³188 Fed. 127, 154 (C. C. Del. 1911). (Italics supplied.)

⁶⁴221 U. S. 106, 31 Sup. Ct. 632 (1911).

⁶⁵223 Fed. 55, 59 (D. N. J. 1915), *aff'd*, 251 U. S. 417, 40 Sup. Ct. 293 (1920).

section, and if, *to prevent continuance of such continuing wrongs a dissolution of the unlawful combination is necessary to make the relief effective, the original combination will be dissolved.*" (Italics supplied.)

II. DIVORCEMENT BY LEGISLATION

Judge Learned Hand has pointed out that *legislation* is to be preferred to *litigation* (under existing statutes) as an instrumentality for divorcement for the reason that the former "will obviate the difficulty of detecting actual offenders [who are departing from the published rates in cases where the facts are peculiarly within the carrier's knowledge and the differential between cost and sales price, which would cover transportation cost, is a mere matter of bookkeeping] by prohibiting a kind of business in which offenses are most likely to arise."⁶⁶ However, if an effective legislative divorcement of the production and the transportation aspects of the oil industry is to be achieved, it is our thesis that that consummation cannot be reached by what might appear to be the obvious method of amending the Commodities Clause of the Hepburn Act and inserting therein the words "pipe line carriers." In a series of veering interpretations⁶⁷ of the Commodities Clause (which is limited to railroads), the Supreme Court of the United States has whittled away its efficacy as an instrumentality of divorcement. In the latest case in the series,⁶⁸ Mr. Justice Stone, in a powerful dissent concurred in by Mr. Justice Brandeis and Mr. Justice Cardozo, said:

"If the Commodities Clause permits control such as is exhibited here, one is at a loss to say what scope remains for the operation of the statute. Whatever views may be entertained of the soundness and wisdom of the decision in *United States v. Delaware & Hudson Co.* [which was the first case construing the clause] it neither requires nor excuses our reduction of the Commodities Clause to a cipher in the calculations of those who control the railroads of the country."

Based on a review of the Commodities Clause cases, the legal staff of the Interstate Commerce Commission has reached the conclusion that the Commodities Clause, "falls far short of really divorcing transportation from production," in the following respects:⁶⁹

⁶⁶Hand, *The Commodities Clause and the Fifth Amendment* (1909) 22 HARV. L. REV. 250, 254.

⁶⁷*United States v. Delaware & Hudson Co.*, 213 U. S. 366, 29 Sup. Ct. 527 (1908); *United States v. Lehigh Valley R. R.*, 220 U. S. 257, 31 Sup. Ct. 387 (1911); *United States v. Delaware, Lackawanna and Western R. R.*, 238 U. S. 516, 35 Sup. Ct. 873 (1914); *United States v. Reading Co.*, 253 U. S. 26, 40 Sup. Ct. 425 (1919); *United States v. Elgin, Joliet & E. Ry.*, 298 U. S. 492, 56 Sup. Ct. 841 (1935).

⁶⁸*United States v. Elgin, Joliet & E. Ry.*, 298 U. S. 492, 512, 56 Sup. Ct. 841 (1935), criticized (1937) 22 CORNELL L. Q. 427.

⁶⁹Confidential memorandum of J. Stanley Payne, Assistant Chief Counsel, Interstate Commerce Commission, addressed to Chief Counsel, March 12, 1937, p. 19.

(a) "The Commodities Clause does not necessarily prevent a railroad company from holding some or even all of the stock of a manufacturing, mining, or producing company.

(b) "The Commodities Clause does not necessarily prevent a railroad company from transporting articles or commodities manufactured, mined, or produced by a company some or all of the stock of which is owned by the railroad company.

(c) "The Commodities Clause does not necessarily prevent a railroad company from owning and operating coal mines or other manufacturing, mining or producing companies.

(d) "The Commodities Clause does not prevent a holding company from owning some or all of the stock of a railroad company and also some or all of the stock of a producing company which ships over the subsidiary railroad company, so long as the holding company refrains from going too far in the exercise of its control over the railroad company."

The vice of the Commodities Clause lies not in any lack of constitutional power but in its particular phraseology.⁷⁰ Starting in 1909, at least ten annual reports of the Attorney General of the United States⁷¹ have criticized in no uncertain terms the shortcomings and the "illusory prohibitions" of the Commodities Clause. However, the late Senator Borah, until the last Congress, was a convert to the belief that effective divorcement of the transportation and production aspects of the petroleum industry could be obtained by merely amending the Commodities Clause and inserting therein the words "pipe line carriers," and he introduced several bills⁷² to that effect. The author of this article, acting as legal advisor to the special subcommittee of the Senate Judiciary Committee in conjunction with Mr. Paul E. Hadlick, Secretary and Counsel of the National Oil Marketers Association, caused Senator Borah to abandon the attempt to amend the Commodities Clause, with the result that the Borah-Gillette bill introduced in the Senate of the United States on April 17, 1939⁷³ has "teeth" in it and is substantially identical with the long-forgotten Adamson Bill⁷⁴ introduced into the House of Representatives in 1917.

It is believed that the Borah-Gillette Bill will avoid the loopholes that have developed in the interpretation of the Commodities Clause of the Hepburn Act and will, if enacted, bring about a more effective divorcement in the oil industry

⁷⁰The following authorities discuss the deficiencies in the phraseology of the Commodities Clause and point out its weakness: RIPLEY, *RAILROADS; FINANCE AND ORGANIZATION* (1923) 453; KIBLER, *THE COMMODITIES CLAUSE* (1916) 137; Hand, *The Commodities Clause and the Fifth Amendment* (1909) 22 *HARV. L. REV.* 250, 264; *The Commodities Clause Decision* (1909) 9 *COL. L. REV.* 522, 533.

⁷¹REPS. ATT'Y GEN. (1909) 4; (1910) 7; (1911) 14, 15; (1912) 23-24; (1913) 25-26; (1914) 5-6; (1915) 7-8; (1916) 7-8; (1917) 7-8; (1927) 26, 27.

⁷²S. 573, 74th Cong., 1st Sess., Jan. 10, 1935; S. 1398, 75th Cong., 1st Sess., Feb. 8, 1937.

⁷³S. 2181, 76th Cong., 1st Sess. (1939).

⁷⁴H. R. 20470, 63d Cong., 3d Sess. (1917). This bill applied to railroads only.

than was ever accomplished by the former act in the railroad field. The Borah-Gillette Bill covers *four factual situations*: it makes it unlawful for an interstate pipe line common-carrier to transport any petroleum or the products thereof (a) produced, purchased, manufactured or refined; or (b) the control of which, or any interest in which, direct or indirect, shall have been thereafter acquired in any manner for the purpose of dealing therein; or (c) as to which there is at the time of transportation any contract, option, or understanding for the subsequent acquisition of control thereof or of any interest therein, direct or indirect; or (d) from lands which at the time of production were owned or controlled, directly or indirectly, wholly or in part; and all of these four factual situations are subject to the following *four controls*: (a) by such common-carrier; (b) by any person, firm or corporation subject to its control; (c) by any person, firm or corporation to whose control it is subject through stock ownership or otherwise; and (d) by any corporation or association which has the same controlling shareholders or members or that otherwise is subject to the same control. A further safeguard is found in the definition of the term "control" which means "actual or legal power or influence over another person, whether direct or indirect, arising through direct or indirect ownership of capital stock, interlocking directorates or officers, contractual relations, agency agreements, or leasing arrangements."

(1) *The Borah-Gillette Bill will plug the loopholes in the Commodities Clause exposed by the case of United States v. Delaware & Hudson Co.*⁷⁵

The Attorney General of the United States in his report for 1909⁷⁶ pointed out the loopholes in the *Delaware & Hudson* case in the following words:

"The court, while upholding the right of Congress in the exercise of its constitutional power to regulate interstate and foreign commerce, to absolutely prohibit a railroad company engaged in interstate commerce from carrying in competition with other shippers commodities in which it is personally interested at the time of such transportation, nevertheless decided that this prohibition did not apply to the transportation of commodities owned by another corporation, where the only interest which the carrier had therein at the time of such transportation arises out of its ownership of capital stock in the corporation owning the commodities so transported. The decision does not necessarily determine the application of the statute to cases where the commodities transported are owned by a corporation, *all*, or substantially all, of whose stock is owned by the carrier corporation at the time of transportation, and especially where the carrier shall have transferred all of its interest in such commodities to a corporation formed for the express purpose of evading the prohibition of the Commodities Clause, and all or substantially all of the stock in which is owned by the carrier."

⁷⁵213 U. S. 366, 29 Sup. Ct. 527 (1908).

⁷⁶Pp. 3, 4.

(2) *The Borah-Gillette Bill will plug the loopholes in the Commodities Clause exposed by the case of United States v. Delaware, Lackawanna and Western R. R.*⁷⁷

The Attorney General of the United States, in his report for 1917, said:⁷⁸

"I stated in a previous report that even should the government be successful in this case [the Lackawanna case] in the Supreme Court, the *commodities clause would still fall short of accomplishing its purpose—the divorce of transportation from production.* This is not less evident now that the case has, in fact, been determined in favor of the government, since railroads are still able to claim that the clause does not prohibit them from engaging in production along their lines, provided only that they sell the articles produced before transporting them.

"I therefore urge an amendment which will prohibit a railroad from transporting in interstate commerce articles which it manufactured or produced, or which were manufactured or produced by any corporation controlled by it or affiliated with it by having the same controlling stockholders, irrespective of whether such railroad or such controlled or affiliated corporation has an interest in the articles at the time of transportation. It is also necessary, if transportation and production are to be completely divorced, that Congress prohibit any railroad owned or controlled by a producing or trading corporation, and not operated merely as a plant facility, from transporting in interstate commerce articles produced or owned by such corporation.

"A bill to carry out this recommendation was introduced in the Sixty-third Congress, third session, by the Chairman of the House Committee on Interstate Commerce (H. R. 20470)."⁷⁹ (Italics supplied.)

(3) *The Borah-Gillette Bill will plug the loopholes in the Commodities Clause exposed by the case of United States v. Elgin, Joliet & E. Ry.*⁸⁰

In this case although the Court found that the United States Steel Corporation owned *all the shares* of the Elgin, Joliet & Eastern Railway and *all the shares* of the Illinois Steel Company and of the other subsidiary companies which ship over the Elgin, Joliet & Eastern, and *thus had the power to control both the railroad and the shipper corporations*, it nevertheless held that *the instances of the exercise of the control were not adequate* to support the claim that the Elgin, Joliet & Eastern must be regarded as the *alter ego* of its sole stockholder, and that there was no violation of the Commodities Clause. The court distinguished the *Reading* case upon which the government relied, and reverted to its earlier decisions in the *Delaware & Hudson* and *Lackawanna* cases to the effect that "the mere power of control, the possibility of initiating unlawful conditions, is not enough."

⁷⁷238 U. S. 516, 35 Sup. Ct. 873 (1915).

⁷⁸P. 8.

⁷⁹The Borah-Gillette pipe line bill is identical with H. R. 20407, *supra* note 74, which applied to railroads only.

⁸⁰298 U. S. 492, 56 Sup. Ct. 841 (1935).

It would appear that Attorney General Sargent in his report for 1927⁸¹ had in mind an *Elgin* type of case when he said:

"In recent years industrial and manufacturing corporations have acquired ownership or control of numerous railroads, comparatively small in size, but important, nevertheless, because of their strategic locations and the large volume of interstate traffic hauled by them. While operating as and enjoying all the privileges and powers of common carriers, generally speaking these roads are but mere departments of the industrial corporations which own or control them and whose traffic is transported by them. The statute does not forbid the ownership of the roads by corporations, yet the evils of discrimination and preference resulting from such ownership are equally detrimental as when the carrier owns the manufacturing or producing company.

"Amendment of the commodity clause was recommended in the annual reports for the years 1910 to 1917, and a *bill for this purpose was introduced before the Sixty-third Congress, third session (H. R. 20470).*"⁸² (Italics supplied.)

It is submitted that if the Borah-Gillette bill becomes a law, a repetition of the *Delaware & Hudson*, the *Lackawanna* and the *Elgin* doctrines will not occur.

⁸¹Pp. 26, 27.

⁸²See *supra* note 79.