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In the Supreme Court of the United States.

OCTOBER TERM, 1903.

NORTHERN SECURITIES COMPANY, GREAT Northern Railway Company, Northern Pacific Railway Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker, and Daniel S. Lamont, appellants,

v.

THE UNITED STATES OF AMERICA, appellee.

No. 277.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

BRIEF FOR THE UNITED STATES.

SYNOPSIS OF THE BRIEF.

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The bill in this case was filed by the United States to restrain the violation of the provisions of an act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (26 Stat. L., 209), commonly known as the Anti-trust Act. The case was heard before a circuit court composed of the four circuit judges of the eighth circuit, in accordance with an act of Congress

approved February 11, 1903 (32 Stat. L., 823), which provides that such cases shall be heard before not less than three of the circuit judges (if there be that many) of the circuit where the suit is brought, and that appeals therein shall lie only to the Supreme Court. The circuit court rendered a decree against the defendants, who thereupon took this appeal.

STATEMENT OF THE CASE.

The facts of this case naturally group themselves under three heads: First, those which are descriptive of the parties; second, those which show the competitive nature of the relation between the defendant railways, the Great Northern and Northern Pacific; and, third, those which show what the Government charges to be a combination of the defendant railways and a consequent monopoly of a part of interstate transportation.

I.

THE PARTIES.

This suit was brought in the name of the United States, under direction of the Attorney-General, in pursuance of section 4 of the Anti-trust Act.

The defendant, the Northern Securities Company (hereinafter called the Securities Company) is a corporation organized under the general incorporation laws of the State of New Jersey. The following are its objects and essential features, as

set forth in the certificate of incorporation (record, p. 17 a):

> Third. The objects for which the corporation is formed are:
>
> (1) To acquire, by purchase, subscription, or otherwise, and to hold as investment any bonds or other securities or evidences of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory, or country.
>
> (2) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of any bonds or other securities or evidences of indebtedness created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory, or country, and while owner thereof to exercise all rights, powers, and privileges of ownership.
>
> (3) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of shares of the capital stock of any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory, or country, and while owner of such stock to exercise all the rights, powers, and privileges of ownership, including the right to vote thereon.
>
> (4) To aid in any manner any corporation or association of which any bonds or other securities or evidences of indebtedness or

stock are held by the corporation, and to do any acts or things designed to protect, preserve, improve, or enhance the value of any such bonds or other securities or evidences of indebtedness or stock.

* * * * *

Fourth. The total authorized capital stock of the corporation is four hundred million dollars ($400,000,000), divided into four million (4,000,000) shares of the par value of one hundred dollars ($100) each. The amount of the capital stock with which the corporation will commence business is thirty thousand dollars.

* * * * *

Sixth. The duration of the corporation shall be perpetual.

* * * * *

Seventh. The board of directors, by the affirmative vote of a majority of the whole board, may appoint from the directors an executive committee, of which a majority shall constitute a quorum; and to such extent as shall be provided in the by-laws such committee shall have and may exercise all or any of the powers of board of directors, including power to cause the seal of the corporation to be affixed to all papers that may require it.

The defendants, the Great Northern and Northern Pacific Railway Companies, are common carriers engaged in freight and passenger traffic among the several States and with foreign nations.

The Great Northern Railway Company was chartered by the State of Minnesota, and its system extends from Superior, Wis., and Duluth and St. Paul, Minn., through Spokane, Wash., to Everett and Seattle in the same State, and thence to Portland, Oreg., with a branch line to Helena, Mont., crossing in its course from east to west the States of Minnesota, North Dakota, Montana, Idaho, and Washington.

The Northern Pacific Railway Company was chartered by the State of Wisconsin, and its system extends from Ashland, Wis., and Duluth and St. Paul, Minn., through Helena, Mont., and Spokane, Wash., to Seattle and Tacoma, in the same State, and thence to Portland, Oreg., crossing in its course from east to west the States of Minnesota, North Dakota, Montana, Idaho, and Washington. Prior to the year 1893 the Northern Pacific System was controlled and operated by the Northern Pacific *Railroad Company*, a corporation organized under certain acts and resolutions of Congress. During that year, the company having become insolvent, its property was placed in charge of receivers. Later, in 1896, the system was reorganized under the aforesaid charter granted by the State of Wisconsin to the Northern Pacific *Railway Company*. Pursuant to the plan of reorganization, the franchise granted by Congress to the Northern Pacific Railroad Company, as well as its tangible property, was sold under foreclosure pro-

ceedings to the new Wisconsin company, which thereby succeeded to the old company and became the beneficiary of enormous land grants made to it by Congress. The present Northern Pacific Railway Company operates its line, therefore, under a Federal franchise, and in taking over that franchise it not only became invested with the rights and privileges incident to it, but it became charged with the duties, obligations, and conditions which Congress attached to the granting of it. In this connection the language used by this court in referring to a similar franchise granted to the Union Pacific Railroad Company is instructive:

> In this view it must be held that by this reservation of authority to alter, amend, or repeal the acts in question whenever it chose so to do, Congress * * * intended to keep within its control the entire subject of railroad and telegraphic communication between the Missouri River and the Pacific Ocean through the agency of corporations created by it or that had accepted the bounty of the Government. (*United States* v. *Union Pacific R. Co.*, 160 U. S., 36, 37.)

Furthermore, the Northern Pacific Railroad Company, to which the defendant, the Northern Pacific Railway Company, succeeded, was not only chartered and subsidized by Congress, but it was the object of that body's constant concern and solicitude, as may be seen from the following acts and resolutions, in addition to the act of July 2,

1864, granting the charter franchise and a large subsidy of public lands, to wit:

Resolution of May 7, 1866, extending time for the completion of the road;

Act of June 25, 1868, relative to filing reports;

Joint resolution of July 1, 1868, extending time for the completion of the road;

Joint resolution of March 1, 1869, granting consent of Congress to the issuing of bonds;

Joint resolution of April 10, 1869, granting right of way from Portland, Oreg., to Washington Territory;

Resolution of May 31, 1870, authorizing the company to issue bonds in aid of the completion of its road;

Act of September 29, 1890, forfeiting certain lands granted the company;

Act of February 26, 1895, providing for the classification of mineral lands in Mon tana and Idaho;

Act of July 1, 1898, granting lands in lieu of those taken by settlers.

The defendants, James J. Hill, William P. Clough, D. Willis James, and John S. Kennedy, were, prior to November 13, 1901, large and influential holders of the stock of the defendant, the Great Northern Railway Company, and they were also shareholders in the Northern Pacific Railway Company.

The defendants, J. Pierpont Morgan and Robert Bacon (members of the firm of J. P. Morgan

& Co., bankers, of New York City), George F. Baker, and Daniel S. Lamont, were, prior to November 13, 1901, large and influential holders of the stock of the defendant, the Northern Pacific Railway Company, and some of them, at least, were shareholders in the Great Northern, and the defendant Morgan, or his firm, is the fiscal agent or financial manager of the defendant, the Northern Pacific Railway Company.

II.

THE LINES OF RAILWAY OPERATED BY THE DEFENDANTS, THE GREAT NORTHERN RAILWAY COMPANY AND THE NORTHERN PACIFIC RAILWAY COMPANY, ARE PARALLEL AND COMPETING.

Inspection of the maps in evidence will show that the two roads are practically parallel for almost their entire length. That they are competing may be presumed from the facts that each system runs east and west through the States of Minnesota, North Dakota, Montana, Idaho, and Washington; that each touches at Duluth, West Superior, and St. Paul, and numerous other points in the State of Minnesota, at Fargo and other points in North Dakota, at Helena and other points in Montana, at Sandy Point and other points in Idaho, and at Spokane and Seattle and other points in Washington; and that each connects with steamers on Lake Superior running to Buffalo and other Eastern cities, and at Seattle with lines of steamships engaged in trade with the

Orient. The court below found as a conclusion of fact that, "These roads *are*, and in public estimation have ever been regarded as, parallel and competing lines." (Pp. 2 and 3 of the opinion.)

The testimony in the case, furthermore, establishes unequivocally that the Great Northern and Northern Pacific railways are competing lines. Charles S. Mellen, president of the Northern Pacific Railway Company, testified as follows (record, pp. 152, 153):

> Q. Are those lines of the Northern Pacific and the lines of the Great Northern, for a large part of the territory through which they run and to many of the points which they reach, parallel and competing lines?
>
> A. They are.
>
> Q. And with reference to the State of Minnesota, Mr. Mellen, are not the Northern Pacific and Great Northern lines almost generally parallel and competing lines?
>
> Mr. KELLOGG. Do you mean all of the lines?
>
> Mr. LANCASTER. Practically all of them.
>
> A. Many of the lines are parallel and competing.
>
> Q. As to a very large percentage of the wheat shipments from the West to Duluth and West Superior and to Minneapolis and St. Paul, are not the Northern Pacific and the Great Northern parallel and competing lines?
>
> A. In the transportation of wheat?
>
> Q. Yes.

A. Yes; they are.

Q. But as definite as you can make it would be to say that to a very large proportion of it those lines are competing lines for that traffic?

A. There is very active competition for a large portion of the traffic, if that is what you mean.

Q. More than half of it?

A. I wouldn't care to state a percentage.

Q. It is true, Mr. Mellen, as to a very large percentage of the wheat traffic in North Dakota and Manitoba and in Minnesota?

A. I would state that as to North Dakota and Minnesota. I would not state it as to Manitoba, for I don't think there is any competition.

Q. So far as North Dakota and Minnesota are concerned, the Northern Pacific and Great Northern are, and always have been, as far as you know, competing lines?

A. Yes.

Q. And how is it, Mr. Mellon, as to general traffic from the western coast eastward, and from the east westward?

A. There is active competition between the two lines for the business.

Q. And always has been?

A. Always has been, so far as I know.

And Mr. Hill, even, concedes that in regard to approximately 10 per cent of their interstate traffic the roads are competitors. (See his cross-examination, Record, pp. 714, 715.) Mr. Morgan, too,

testified that the two roads were in active competition with each other. (Record, p. 322.) Counsel for defendants also admitted as much in their briefs filed in the circuit court. (Mr. Young's brief, p. 7; Mr. Griggs's brief, p. 44.)

In the face of this clear testimony and the admissions of counsel, it seems a waste of time to refer to Colonel Clough's lame attempt to show that the Great Northern and Northern Pacific are competitors in respect of less than 3 per cent of their interstate traffic. His theory seems to be that in respect of traffic in excess of that amount, the Great Northern and Northern Pacific are not competitors themselves, because there are still other roads competing for the same traffic. But even if the two roads did compete with each other for only 3 per cent of their interstate business, this would still be sufficient to stamp them with the character of competing interstate carriers, since 3 per cent of such traffic would amount to something like $800,000 in round numbers.

In point of fact, however, the question whether or not these two roads are competitors for traffic is not an open one, since this Court judicially determined in the case of *Pearsall* v. *Great Northern Railway* (161 U. S., 646) that they *are* parallel and competing lines. The question in that case was whether the acquisition by the Great Northern of a majority of the stock of the Northern Pacific was a consolidation of "*parallel and competing*" lines of

railway in violation of the constitution of Minnesota prohibiting such consolidations. This court held that it was.

III.

WHAT THE GOVERNMENT ALLEGES AS CONSTITUTING A COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE AND A MONOPOLY OF A PART THEREOF.

The gist of the Government's charge as contained in the petition is:

> * * * The defendant, James J. Hill, and his associate stockholders of the defendant, the Great Northern Railway Company, owning or controlling a majority of the stock of that corporation, and the defendant J. Pierpont Morgan, and his associate stockholders of the defendant, the Northern Pacific Railway Company, owning or controlling a majority of the stock of that corporation, acting for themselves as such stockholders and on behalf of the said railway companies in which they owned or held a controlling interest, on and prior to the 13th day of November, 1901, contriving and intending unlawfully to restrain the trade or commerce among the several States and between said States and foreign countries carried on by the Northern Pacific and Great Northern systems, and contriving and intending unlawfully to monopolize or attempt to monopolize such trade or commerce, and contriving and intending unlawfully to restrain and prevent competition among said railway systems in respect to such

interstate and foreign trade or commerce, and contriving and intending unlawfully to deprive the public of the facilities and advantages in the carrying on of such interstate and foreign trade or commerce theretofore enjoyed through the independent competition of said railway systems, entered into an unlawful combination or conspiracy to effect a virtual consolidation of the Northern Pacific and Great Northern systems, and to place restraint upon all competitive interstate and foreign trade or commerce carried on by them, and to monopolize or attempt to monopolize the same, and to suppress the competition theretofore existing between said railway systems in said interstate and foreign trade or commerce, through the instrumentality and by the means following, to wit: A holding corporation, to be called the Northern Securities Company, was to be formed under the laws of New Jersey, with a capital stock of $400,000,000, to which, in exchange for its own capital stock upon a certain basis and at a certain rate, was to be turned over and transferred the capital stock, or a controlling interest in the capital stock, of each of the defendant railway companies, with power in the holding corporation to vote such stock and in all respects to act as the owner thereof, and to do whatever it might deem necessary to aid in any manner such railway companies or enhance the value of their stocks. In this manner, the individual stockholders of these two independent and

competing railway companies were to be elimated and a single common stockholder, the Northern Securities Company, was to to be substituted; the interest of the individual stockholders in the property and franchises of the two railway companies was to terminate, being thus converted into an interest in the property and franchises of the Northern Securities Company. The individual stockholders of the Northern Pacific Railway Company were no longer to hold an interest in the property or draw their dividends from the earnings of the Northern Pacific system, and the individual stockholders of the Great Northern Railway Company were no longer to hold an interest in the property or draw their dividends from the earnings of the Great Northern system, but having ceased to be stockholders in the railway companies and having become stockholders in the holding corporation, both were to draw their dividends from the earnings of both systems collected and distributed by the holding corporation. In this manner, by making the stockholders of each system jointly interested in both systems and by practically pooling the earnings of both systems for the benefit of the former stockholders of each, and by vesting the selection of the directors and officers of each sytem in a common body, to wit, the holding corporation, with not only the power but the duty to pursue a policy which would promote the interests, not of one system at the expense

> of the other, but of both at the expense of the public, all inducement for competition between the two systems was to be removed, a virtual consolidation effected, and a monopoly of the interstate and foreign commerce formerly carried on by the two systems as independent competitors established. (Record, pp. 7a and 8a.)

It requires but a glance at the history of the Great Northern and Northern Pacific during the past few years to see that it has been the ever-present aim of those who dominate the policies of those two roads to bring about a "community of interest," or some closer form of union between them, to the end that the motive from which competition springs might be extinguished. And, without going into the detail of this history, we purpose to comment on several leading facts thereof which throw much light on this last attempt at combination or union.

It is conceded that James J. Hill and J. Pierpont Morgan, have been for years the ruling spirits, respectively, of the Great Northern and Northern Pacific. Mr. Hill and the men he calls his associates, chief among whom are the defendants, William P. Clough, John S. Kennedy, and D. Willis James, have admittedly directed the policy of the Great Northern for a number of years past. They claim to have done this, however, not through the ownership of a majority of the stock—although they acknowledge that their holdings are extensive—but by reason of the implicit confidence

which the great body of shareholders reposed in Mr. Hill, whose policies "had always been distinguished for their ability and remarkable success," (using the words of counsel). Mr. Morgan and a few associates, principal among whom are the defendants, Bacon, Baker, and Lamont, have perhaps in still greater degree controlled the destinies of the Northern Pacific. The reorganization of that system was planned and executed by the firm of J. P. Morgan & Co., of which Mr. Morgan is the head and front, and the latter was empowered to name and did name the members of the voting trust, which managed the property until January 1, 1901. Moreover, Mr. Morgan, or his firm and associates, always held or controlled very large amounts of Northern Pacific stock.

Now, on at least three different occasions before the present, Mr. Hill and Mr. Morgan and their associates acted together in concert or combination in transactions affecting the Great Northern and Northern Pacific.

First. When the Northern Pacific was being reorganized in 1896, Mr. Morgan, who had charge of that undertaking, arranged with Mr. Hill and his associates, who controlled the Great Northern, to transfer half the capital stock of the reorganized company to the shareholders of the Great Northern, in consideration for which the Great Northern Company was to guarantee the bonds of the new Northern Pacific Company. This was

clearly an attempt by the Hill and Morgan interests to combine or consolidate the Great Northern and Northern Pacific by an indirect process, designed to evade the law of Minnesota against the consolidation of parallel and competing lines of railway. The attempt was frustrated, however, by this court, which cast aside the technical defenses interposed and held that the proposed arrangement would accomplish a virtual consolidation of the two roads, and that therefore it was a violation of the law of Minnesota. (*Pearsall* v. *Great Northern Railway*, 161 U. S., 646.) That this arrangement was practically the joint work of Mr. Morgan and Mr. Hill is admitted by the former in his testimony (Record, p. 347). And it is further borne out by the fact that after the arrangement was thwarted by this court Mr. Hill and his associates at once acquired from Mr. Morgan $26,000,000 of the stock of the reorganized Northern Pacific Company.

Second. The purchase of the Burlington. In the spring of 1901 the Great Northern and Northern Pacific united in the purchase of substantially all the capital stock of the Chicago, Burlington and Quincy Railroad Company, commonly known as the Burlington system, at $200 a share, and in payment therefor issued their joint 4 per cent bonds to the amount of $222,400,000. In this transaction, again, the Great Northern was represented by Mr. Hill and the Northern Pacific by

Mr. Morgan. It should be stated at this point that the Union Pacific, fearing that much of its traffic would be diverted to its northern rivals if they got exclusive control of the Burlington, applied to be admitted to an interest in the purchase, but its request was promptly denied. By thus becoming the joint owners of the extensive Burlington system, comprising about 8,000 miles of road and connecting the vast region between Chicago and St. Paul in the east and Kansas City, Denver, Cheyenne, and Billings in the west, the Great Northern and Northern Pacific were, of course, drawn still nearer together. Their relations, in fact, became of the most intimate character, and it is easy to see that, more than ever thereafter, Mr. Hill and Mr. Morgan would be moved to put the "community of interest" already existing between the two roads on a more permanent, stable, and enduring basis.

Third. In the events leading up to the great stock-market panic of the 9th of May, 1901 (when Northern Pacific common stock, which shortly before had been selling at par, went up to $1,000 a share), and in the events succeeding that panic and leading up to the organization of the Securities Company, Mr. Morgan and Mr. Hill and their associates, respectively, stood shoulder to shoulder.

After the refusal to admit the Union Pacific to an interest in the purchase of the Chicago, Burlington and Quincy Railroad, the controlling spirits of the Union Pacific system proceeded in the open

market and otherwise to secure by purchase a controlling interest in the Northern Pacific Railway Company. They succeeded in acquiring considerably more than half of the Northern Pacific preferred and somewhat less than half of the Northern Pacific common stock. In all they acquired more than $78,000,000 of the total capital stock, which consisted of $75,000,000 preferred and $80,000,000 common, each class of stock having a par value of $100, and each share of stock being entitled to one vote at corporate meetings.

Not until about May 1, 1901, did Mr. Morgan and Mr. Hill and their associates learn that the Union Pacific interests were attempting to obtain the control of the Northern Pacific Company through the purchase of its stock. As soon as they did learn of the attempt they reached an understanding to oppose it in concert. Thus Mr. Hill testified (record, pp. 46–49):

> Q. Later on, in the spring of 1901, you did learn that large holdings of Northern Pacific stock were held by what is known as the Union Pacific interests, did you not?
>
> A. Yes; they told me that they had bought a substantial control.
>
> Q. About what time, Mr. Hill, did you learn of the large holdings of the Union Pacific or the Oregon Short Line?
>
> A. Early in May, is my best recollection.
>
> * * * * *
>
> Q. On or about the 1st of May, 1901, can you give us approximately the amount of

stock which you and your associates held of the preferred stock of the Northern Pacific?

A. I couldn't give the amount of preferred, because I never charged my mind with the amount of preferred. It was stock that could be redeemed, and in a matter of the control of the railroad it wasn't considered as essential to the control as the common stock was.

* * * * *

Q. And subsequent to that time, May 7, and before May 9, did J. Pierpont Morgan & Co., or *did you and your associates, acquire further Northern Pacific common?*

A. *The members of the firm asked me if myself and friends would hold the stock and not sell out. I told them we would, and they went into the market and bought some fifteen or sixteen millions.* I think they bought it. My recollection is on Saturday and Monday prior to the 9th of May. On the 9th of May there was a good-sized panic in New York, and I think they bought it on Saturday and Monday prior to that time—bought it in London and New York.

* * * * *

Q. Mr. Hill, shortly before—say between the 5th of May and the morning of the 9th of May—had you learned that what we may call the Union Pacific interests had acquired about seventy-eight millions of the common and preferred stock of the Northern Pacific?

A. I understood on authority that I thought should know, that they had acquired something over sixty; somewhere in the neighborhood of sixty or sixty-five millions.

Q. How was that divided?

A. I don't know.

Q. Did you subsequently learn that Mr. Harriman, representing the Union Pacific interests, had acquired about seventy-eight millions—not confining you to those dates, did you subsequently learn that—seventy-eight millions of the common and preferred?

A. I understand Kuhn, Loeb & Co. had acquired it.

Q. Did Kuhn, Loeb & Co. represent Mr. Harriman?

A. That I don't know.

Q. Did you understand that Kuhn, Loeb & Co. represented the Union Pacific interests?

A. I understood afterwards that they represented the Oregon Short Line.

Q. Well, as a matter of fact, the Oregon Short Line is owned and controlled by the Union Pacific?

A. I think so.

Q. And was at that time, Mr. Hill?

A. I think so, and so understood.

After the additional purchases of common stock made by Morgan & Co., as Mr. Hill testifies, on the Saturday and Monday prior to May 9, 1901, the combined holdings of Morgan, Hill, and their respective associates in Northern Pacific constituted a clear majority of the common shares; but the Union Pacific still held a majority of the total capital stock of the Northern Pacific, common and preferred combined.

It would seem, therefore, at first sight that the Union Pacific or Harriman interests had succeeded in wresting control of the Northern Pacific from Messrs. Morgan, Hill, and their associates. But Mr. Morgan controlled the then existing board of directors of the Northern Pacific Railway Company and that board had the power, under the charter of the company, to retire all the preferred stock on any first of January prior to 1917. So when the Union Pacific interests set up the claim that they were in control of the Northern Pacific, Mr. Morgan immediately answered: It is true you have a majority of all the shares, common and preferred taken together, but I will have the board of directors which I appointed retire the preferred shares, and you will then be in the minority, while my associates and myself, who hold a majority of the common shares, will control the road.

Whether or not Mr. Morgan could have carried out this plan if it had been opposed in the courts is a question not free from doubt; but at any rate there was a truce in the contest at this point, and two or three days after May 9, 1901, the day of the panic, the contestants met in the office of Mr. Harriman, amicably to adjust, if possible, their respective interests and those which they represented or controlled. It has been difficult to uncover what took place at this very significant conference, as the participants were evasive and

reluctant to testify concerning it. Mr. Hill's testimony on the subject is as follows (Record, p. 50 et seq.):

> Q. Was there a conference or meeting between you and J. Pierpont Morgan & Co. and Kuhn, Loeb & Co., or anybody representing them?
>
> A. There might have been more than one meeting. Possibly there were several meetings. There was a very strained financial condition; people were failing and the trouble was very great. Something had occured that had never happened in New York before—an attempt to buy a control of one hundred and fifty-five millions of stock on the market, and the high price caused people to sell stock they did not own. The bankers and financial men of every description were deeply interested, not only in New York, but in London, and in financial centers on the Continent, and the result was, I think, may be two or three meetings. I know certainly there was one between the bankers at that time. The Union Pacific people elaimed that they had control by the ownership of a majority of the stock of the Northern Pacific Railroad; that wasn't conceded by Messrs. Bacon and I think Mr. Steele—Mr. Robert Bacon and Mr. Steele—because they knew they held, as long as myself and friends held our stock, a majority of the common stock which would control the property. They made an agreement that as far as the election of the directors was concerned they would leave it to

Mr. Morgan to name the directors, and that was done.

Q. That is getting a little ahead, Mr. Hill.

A. Well, that is the meeting; maybe I have answered a little more.

Q. A little more, but that is all right.

A. It is a part of the whole truth.

Q. Now, Mr. Hill, the common and preferred stock was both voting stock, was it not, in the Northern Pacific?

A. Yes, sir.

Q. And since the preferred stock was outstanding it participated equally with the common stock in all stockholders' meetings?

A. Yes, sir.

Q. At the time of these conferences, or conference, that you speak of, did Mr. Harriman attend those meetings—one or more?

A. The one that I have particularly in mind—I have an impression there was more than one, possibly more than two—but the one I have particularly in mind occurred in Mr. Harriman's office.

* * * * *

Q. And at that meeting the agreement was reached that Mr. Morgan should name the board of directors of the Northern Pacific Railway Company?

A. Yes, sir.

Q. That is, the board to be elected at the next annual meeting?

A. Yes; it was expected, and I think notice had been given, that the board would be classified, and whether Mr. Morgan was to name the whole or a part I do not recall. I know that Mr. Morgan was to name the

board of directors, and I know that on his return from Europe he did.

Q. Was that agreement put in writing at that meeting?

A. I don't remember. I have a faint recollection of a typewritten memorandum—maybe it was shown to me somewhere else—just a memorandum of what was proposed.

Q. Well, did you for yourself, or acting for your associates in any way, execute or sign any agreement?

A. I don't recall any signed agreement. When you asked me if it was in writing I remembered something of seeing a proposition, maybe it was a telegram to be transmitted to Mr. Morgan; maybe that is what was in my mind.

Q. So far as your present recollection goes, Mr. Hill, do you wish to be understood as saying that you do not recollect whether there was any executed agreement; that is, any agreement that was signed by the respective parties?

A. I don't recall any.

Q. But you do recall some written proposition—that is, some typewritten agreement—that was drawn up; but whether it was executed or not you do not remember; was that it?

A. No; that is a little more than my recollection. My recollection is that either coming from some of the parties for consideration by the others or to be transmitted to Mr. Morgan, or a short statement covering

what was proposed. Now, whether that was a cable made for transmission or whether it was a memorandum that was in the office I could not say. Now, it might be both, and I could not say which.

Q. Mr. Hill, have you any present knowledge of having in your possession or under your control any memorandum or agreement that was reached that day?

A. No; I haven't.

Q. Do you recall having signed any memorandum of agreement?

A. I don't recall.

Q. Or any memorandum executed or unexecuted since that time?

A. I don't recall more than I have testified to. I have a recollection of seeing a memorandum. Whether it was a cable or whether it was a memorandum used locally, or both, I could not testify.

Q. But at that meeting, if there was any memorandum drawn up, nothing was said with reference to the respective holdings of either common or preferred by the Harriman or the Hill factions, so to speak?

A. My recollection is that there was no discussion as to the amount of stock held. I think Mr. Schiff said, "We control or own a majority of the Northern Pacific;" and I think Mr. Bacon said, "Mr. Schiff, we do not concede that, and before you are through you will find you don't."

* * * * *

Q. Before leaving this matter I will ask you to give me the names, as near as you

can recall them, and the full names of the parties present at that conference, which you say occurred two or three days after May 9.

A. The meeting might have been within two days, and my recollection is that Mr. Schiff and Mr. Harriman, Mr. Robert Bacon and Mr. Steele were present at Mr. Harriman's office when I was called in.

Q. Who represented Kuhn, Loeb & Co. at that meeting?

A. Mr. Schiff, a member of the firm—a senior member of the house, I think.

Q. Mr. Hill, Mr. Robert Bacon, and Mr. Steele were partners of J. Pierpont Morgan & Co.?

A. Yes, sir.

Q. Mr. Harriman you understood to represent the Union Pacific and Oregon Short Line?

A. Well, he might have represented himself. It is difficult for me to give any more than my understanding. He represented the Union Pacific interests, or those that were concerned in buying the control of the Northern Pacific. He represented the opposition to our plans.

Q. Then you know, Mr. Hill, of your own knowledge, that the board of directors which was elected at the annual meeting in October, 1901, was nominated or named by Mr. Morgan under that agreement?

A. I know that it was left at that meeting for him to nominate the directors of the Northern Pacific.

Q. You mean the conference shortly after May 9?

A. Yes; that meeting at Mr. Harriman's office.

Q. And do you know that that arrangement or agreement with reference to Mr. Morgan's naming the directors of the Northern Pacific was carried out in fact?

A. I do; I have the understanding that it was carried out. There was no other board elected.

Q. Was there at that conference, Mr. Hill, any agreement among the parties to it as to the Union Pacific being represented on the board of the Northern Pacific?

A. There was not.

Q. No understanding with reference to that?

A. None whatever. I remember some discussion—not as to the question of Union Pacific, but as to the suggestion of some names. Mr. Bacon said he would not consider it at all on any other basis than that Mr. Morgan shall nominate the board, and if you are willing that he shall nominate the board we will agree to it.

Q. When you say there was some suggestion made with reference to directors, do you mean to say that Mr. Harriman or Mr. Schiff insisted?

A. I think that they named, or gave some names, or suggested some names, and they were refused.

Q. And the final agreement then was that Mr. J. Pierpont Morgan should have

> the right and power to absolutely name the board of directors of the Northern Pacific?
>
> A. That was the understanding or the conclusion arrived at. It hardly took the form of a final agreement.
>
> Q. Well, you broke up with that understanding, didn't you?
>
> A. Yes, that is right; and I think it was practically carried out on that line, and the disturbance on the street adjusted itself very quickly.

At the conclusion of the conference, a paper setting forth as much of what took place as it was thought expedient to disclose was sent to a publication called the "Wall Street Summary," and was printed in its issue of June 1, 1901. It reads as follows:

> It is officially announced that an understanding has been reached between the Northern Pacific and Union Pacific interests under which the composition of the Northern Pacific board will be left in the hands of J. Pierpont Morgan. Certain names have already been suggested, not now to be made public, which will especially be recognized as representatives of the *common interests*. It is asserted that *complete and permanent harmony will result under the plan adopted between all interests involved.*

That this understanding or agreement contemplated something more far-reaching than a mere "community of interest," something more permanent and stable, something in the nature of a holding corporation (such as the Securities Com-

pany), is clearly shown by Mr. Morgan's own testimony. In answer to a question he said (Record, p. 347):

> I will not take the responsibility of going through anything of this kind again [meaning the struggle for control of the Northern Pacific and the resulting panic].

Continuing, he says, evidently referring to the vulnerable points of the "community of interest" scheme:

> If a man has got 10,000 shares of stock, and acts with you, and he is your friend, to-morrow somebody comes on and offers him 100 per cent profit, and he will sell his stock, and you will find yourself left in a box. The consequences are too serious. I said "*It can't go on that way.*"

Pursuant to the agreement reached by the conferees, Mr. Morgan named a new board of directors for the Northern Pacific Railway Company, composed of representatives of the Union Pacific, Northern Pacific, and Great Northern Railway interests, which board was unanimously elected, the Union Pacific holdings in the Northern Pacific being voted for them. That board then voted to retire the preferred stock, the means for which were to be raised by issuing bonds of the Northern Pacific Company, convertible at the will of the owner into common stock of that company, but subscriptions to such bonds were to be limited to owners of the then existing common stock of the Northern Pacific Company.

This brings the narrative down to a time shortly before the organization of the Securities Company. At the date of the organization of that company, the retirement of the preferred stock of the Northern Pacific Company having been ordered by its board of directors on the same date, to wit, November 13, 1901, Mr. Morgan and his associates and Mr. Hill and his associates, who held a majority of the Northern Pacific common stock, were in control of that railway (Mr. Morgan, indeed, testifies that he and his associates had a majority without Mr. Hill, record, p. 348), and on the same date Mr. Hill and his associates were in practical control of the Great Northern, but it does not appear that they held a majority of its stock, though they admit holding a very large amount—$35,000,000 or more. At the time in question, therefore, Mr. Morgan and Mr. Hill and their associates controlled both the Great Northern and Northern Pacific Railway companies.

In the light of the facts which have thus been brought out concerning the first attempt to amalgamate the Great Northern and Northern Pacific, which was defeated by the decision of this court in the Pearsall case (*supra*), and of those in connection with the purchase of the Burlington system and the consequent struggle for the control of the Northern Pacific, it will not be difficult to show, from the testimony given by the defendants themselves, that (1) the incorporation of the Securities Company and (2) its acquisition of a large major-

ity of the stock of the Great Northern and Northern Pacific companies were the designed results of a plan or understanding between Mr. Hill and Mr. Morgan and their associates, respectively, who are parties to this bill.

(1) That the Securities Company was discussed and planned by Mr. Hill and Mr. Morgan and their associates is freely admitted by the defendants. (Mr. Hill's testimony, record, p. 88; and Mr. Morgan's testimony, record, pp. 347 and 348.) The company was formally organized November 13, 1901, under the laws of the State of New Jersey, after diligent search had been made for an old charter of the Territory of Minnesota, which would be, as Colonel Clough expressed it in his testimony, "beyond the power of legislative amendment" (a clear admission that no stone was to be left unturned in the effort to place the Securities Company and the objects it was intended to accomplish as far as possible beyond the reach of the law). The capital stock of the company was fixed at $400,000,000, of which but $30,000 was to be paid in cash. Its capital stock was thus just sufficient to take over, at the exchange valuation agreed upon, the entire capital stock of the Great Northern and Northern Pacific. The formation of a holding company of the character of the Securities Company had long been in the minds of Mr. Hill and his associates in the Great Northern, while Mr. Morgan had considered it for a considerable length of time. It was not

the impulse of a moment; it was a well-matured scheme. Mr. Morgan's testimony discloses that very clearly (Record, pp. 344, 346 to 349, 351, 354 to 356):

> Q. By whom was the matter [i. e., the organization of a holding company] first brought to your attention?
>
> A. I think it was rather in my own mind, as far as the Northern Pacific was concerned.
>
> Q. Well, as far as the Great Northern was concerned, when was that first suggested?
>
> A. *I had heard it discussed for a year or two.*
>
> Q. *Had you talked with Mr. Hill generally about it?*
>
> A. *I think I had.* That is, not in any detail, with the exception of being to a certain extent a stockholder in the Great Northern. I talked to him on that subject.
>
> Q. And that was a separate holding company for the Great Northern?
>
> A. Yes, sir.
>
> Q. And then you had that in your own mind to have a holding company for the Northern Pacific?
>
> A. That came up after I came back. When we found ourselves in this position, with the danger, having escaped as I thought at that time from what I thought was a great danger, that is to say, our property being absorbed by a competing line without our knowledge or consent, it occurred to

me something ought to be done to prevent that; because, while we chose to defend the property, I did not want it to go on indefinitely, and I thought the best plan was to go to some trust company. My idea was first to go to some trust company to take the Northern Pacific stock and hold it.

Q. That is, to hold control?

A. Hold control of the stock. Just surrender it to them and take their receipt.

* * * * *

Q. So you and Mr. Hill discussed that question during the summer?

A. What?

Q. The question of the formation of a holding company?

A. No, no. Mr. Hill and I—*I think it was two years ago* Mr. Hill first talked to me about the Great Northern road, when I took stock, and that sort of thing—the little stock I had, 1,000 or 2,000, 5,000 shares—but it had nothing to do with the Northern Pacific road in any way, shape, or manner. Mr. Hill, I have no doubt, thought at one time he could buy up the Northern Pacific road and do something. I told him then if he could not we could work in harmony; but the law was against him, and he found that out afterwards and abandoned it, and that was settled years ago when the Supreme Court decided that case.

Q. In the Pearsall case?

A. Yes; that dismissed any question in my mind of that kind. Everything, so far as the Northern Pacific road is concerned,

and a holding company, all occurred to my mind subsequent to the 9th of May. My idea was, I can't live forever, and J. P. Morgan & Co. may be dissolved. *I wanted this effected, so that the policy we have incorporated and created shall be continued on that property if the stockholders chose to put the stock there.*

* * * * *

Q. What was the result of your talk with Mr. Hill?

A. *The result of it was that we decided that the Northern Pacific—so far as I was concerned as a stockholder in the Northern Pacific, I would put my stock in, provided that he would take everybody else's into this thing that he had proposed to arrange for the Great Northern.*

Q. That is the Northern Securities Company?

A. Yes.

Q. That is, provided he would go in himself?

A. Yes; of course. Well, I didn't care whether he went in or not. We had a majority without him. I wanted a majority of the Northern Pacific stock in that Securities Company. I didn't care who went in, provided there was enough there to protect the Northern Pacific.

* * * * *

Q. When was it first decided between you and Mr. Hill to put both stocks of these companies into one holding company?

A. Mr. Hill did not decide the Northern Pacific. I told him I thought if he was willing we would take it; and that was probably some time either just before or just after I returned from California.

Q. Then you agreed to do it?

A. No, sir; I told him that would be my decision if everything went smooth. We could not tell at that time if we were going to be able to get our charter.

Q. That was satisfactory to him?

A. It was satisfactory to me if it was to him.

Q. Did he say it was satisfactory to him?

A. Yes.

Q. And you both agreed to it?

A. We both agreed to it.

Q. If you could get your charter and all the legal formalities could be carried out?

A. He was acting for his stock and I for mine, with the condition that if the Northern Securities Company was organized the holders of the Northern Pacific stock should have the right to put in their stock the same as we did.

* * * * *

Q. You have explained that it was your idea that it would be a good plan to put the control of the Northern Pacific into a trust company or into a holding company, and Mr. Hill apparently held the same theory as to his stock.

A. Not at the same time.

Q. No; not at the same time; he had worked that out years ago in his mind.

You had both been working the same thing out. *Why was it agreed to put the stock of both of these companies in one holding company?*

A. *It seemed to me the better way of putting it.*

Q. But why?

A. Why, on the face of it, it did not make any difference to me.

Q. Why put the stocks of both of these companies into one holding company?

A. In the first place, *this holding company was simply a question of custodian,* because it had no other alliances.

Q. Can you tell me what special benefits accrued from putting them both in one company?

A. Because it seemed to me the best remedy. The company is so large. For instance, supposing I had gone to the United States Trust Company and they had issued to me some securities for the Northern Pacific (the persons who put their stock in a holding company would desire to have something for it—trust certificates or other securities). Supposing we had put our securities in the United States Trust Company and they had given me something or other. They have 2,000,000 of stock. *Somebody could get hold of that and do what they liked with it. I wanted to put it in a company with capital large enough that nobody could ever buy it,* and that is the only one I know of. It is the only investment or trust company that I knew of of that kind where the stock

> was large enough so that in all human probability I felt that if it was not safe there it was not safe anywhere.

(2) The understanding or agreement between Messrs. Hill, Morgan, and their associates in regard to the organization of the Securities Company further contemplated that that company should acquire at least a majority of the stock of the Great Northern and Northern Pacific companies, respectively. That is to say, they would transfer their own holdings (which in themselves constituted a majority of the Northern Pacific shares—see Mr. Morgan's testimony, Record, p. 348) and advise or otherwise persuade other shareholders to do the same until the Securities Company obtained at least a majority of the shares of each road. The answers of the defendants and the testimony given by them are particularly clear and full on this point.

The answer of J. P. Morgan et al. states that (Rec., p. 91a)—

> For some years the defendant Hill and others, who were interested in the Great Northern Company, but not including these defendants, had in contemplation the formation of a corporation for the purpose of purchasing their separate interests in that company, with the general object that said interests should be held together, and the policy and course of business of the Great Northern Company should be continuous in developing the company's system and the

territory served by it, and not subject to radical change and possible inconsistency from time to time. *In or about August, 1901, as this plan was approaching maturity, said parties for similar reasons determined that they would also sell to the new company, when formed, their interests in the Northern Pacific Company, which were considerable in amount, and that the capital of the new company should be made sufficiently large to enable it to purchase all shares of the Great Northern and Northern Pacific companies which the holders might desire to sell and any other shares which the new company might deem it advisable to acquire.*

* * * Thereupon and therefore, with the view and for the purpose of protecting the Northern Pacific Company and the holders of its common stock against the possible control of the direction of said company in an adverse interest, *these defendants determined and also advised their friends to sell their Northern Pacific stock to the new company.*

The answer of James J. Hill et al. shows that (record, p. 64a):

To protect the interests of the shareholders of the Northern Pacific Company, J. P. Morgan & Co. made additional purchases of Northern Pacific common stock which, with the holdings in said stock of Mr. Hill and other Great Northern shareholders who had discussed with him the plan of forming a holding company, constituted about forty-two million dollars ($42,000,000), being a

majority of the common stock. In view of the injury apprehended to both companies, and to their shareholders, and the better to protect their interests in the future, the Great Northern shareholders, holding North ern Pacific shares, deemed it advisable that the projected holding company should have power to purchase, not only their own Great Northern and Northern Pacific shares, but also the shares of such other Great Northern and Northern Pacific shareholders as might wish to sell their stock to said holding company, and the shares of companies already formed, and others that might be formed, for the purpose of aiding the traffic or operations of the Great Northern and Northern Pacific companies, respectively. At this time it was not expected by any of the persons concerned that any *Northern Pacific* shares except the said forty-two million dollars ($42,000,000) would be acquired by the proposed holding company. [But these shares controlled the road.]

Mr. Morgan testified as follows:

Q. When did the idea of putting the *control* of both these roads in one place come np; after your return?

A. I suggested to Mr. Hill "why not." I think I did at any rate. If it was not, it may have been by Mr. Steele. Whether I did it or J. P. Morgan & Co., I think we are responsible for having made that suggestion. (Record, p. 345.)

And again:

> Q. What was the result of your talk with Mr. Hill?
>
> A. The result of it was that we decided that the Northern Pacific, so far as I was concerned as a stockholder in the Northern Pacific, I would put my stock in provided that he would take everybody else's into the thing that he had proposed to arrange for the Great Northern. (Record, p. 348.)

Mr. Kennedy's testimony in this connection is particularly instructive (Record, pp. 195–197):

> Q. You wanted to have a majority of the stock of the Northern Pacific where you could absolutely control it?
>
> A. Yes, sir.
>
> Q. Under all circumstances?
>
> A. Under all circumstances.
>
> * * * * *
>
> Q. Mr. Kennedy, it was practically certain that Mr. Hill, yourself, and a few others controlled the Great Northern?
>
> A. I suppose we had enough stock to have controlled an election if there had been no combination against us.
>
> * * * * *
>
> Q. You were just as anxious to prevent an attempt to buy up a majority of the Great Northern by a rival interest as you were to prevent an attempt to buy up a majority of the Northern Pacific, weren't you?
>
> A. I didn't want an attack in either case.

Q. That is what I am getting at—that is, a purchase by a rival interest of a majority of the stock of either the Great Northern or the Northern Pacific was a thing which you were trying to prevent, was it not?

A. Yes, sir; that was our idea; at least, that was my idea. I speak for myself.

* * * * *

Q. Now, you gentlemen, Mr. Morgan, Mr. Hill and his associates, and yourself, at the time you conceived and agreed upon the plan organizing the Northern Securities Company, agreed among yourselves to turn in a majority of the stock of the Northern Pacific into the Securities Company, did you not?

A. I don't remember of any special agreement made on that subject. *I think it was understood they would turn it in.*

Q. So as to place a majority of the Northern Pacific absolutely in the Northern Securities Company?

A. *Yes, sir; that was my idea.*

Q. And so far as you know that was the idea of the other gentlemen associated with you?

A. I suppose it was. I have no information on that point.

* * * * *

Q. Was it the object or purpose of the Northern Securities Company, that is, was it talked over and agreed among you gentlemen, that the Northern Securities Company was to acquire other stocks besides the Great Northern and Northern Pacific?

A. That was spoken of as a possibility.

Q. But the primary object and purpose was to acquire the stocks of the Great Northern and Northern Pacific?

A. That was the first object.

At page 831 of the record will be found the following testimony of Colonel Clough:

> Q. I repeat the question: Before you reached the conclusion to take out a New Jersey charter, Mr. Morgan's interests and the Great Northern interests had agreed to place their holdings in a common corporation [Mr. Morgan's interests being the Northern Pacific]?
>
> A. Before that was done, as I have stated before, the gentlemen who were stockholders of the Great Northern and who also held stock of the Northern Pacific, and Mr. Morgan himself (the holdings of the Great Northern being, I think it was, about 33 millions, and of the Northern Pacific about 42 millions all together; somewhere in that neighborhood, about 40 or 42) had *decided that they would sell their stocks to the new company when created.* Now, it was after that *decision* relating to those stocks and, as I said, only a few days before the articles of incorporation were actually filed, that the conclusion was ultimately reached to incorporate under tho laws of the State of New Jersey.

Mr. Hill admitted point-blank that the plan contemplated the transfer to the Northern Securities

Company of a controlling interest in the stocks of both the Great Northern and Northern Pacific:

> Q. At the time when the Northern Securities Company was formed, *was it your expectation and desire that a majority of the common stock of the Northern Pacific Railway Company should be turned into the Northern Securities Company in exchange for the latter company's stock?*
>
> A. In November?
>
> Q. Yes, sir.
>
> A. *Yes.*
>
> Q. It was?
>
> A. Of the Northern Pacific?
>
> Q. Yes.
>
> A. *Yes, sir.*
>
> Q. *Was it your expectation and desire at the time of the organization of the Northern Securities Company that a majority of the stock of the Great Northern Railway Company should also be exchanged for Northern Securities Company stock?*
>
> A. *I think it was expected that a majority would be exchanged.* At the same time the market price was considerably higher than the price the Northern Securities Company purchased the Great Northern stock at. It was a matter that was left to the shareholders. (Mr. Hill's testimony; record, p. 115.)

The understanding, which the foregoing excerpts from the answers and the testimony plainly disclose, was carried out to the letter by the parties to it—by Messrs. Hill and Morgan and their

associates. That is, they transferred their holdings in the Great Northern and Northern Pacific (their holdings in the latter constituting, alone, a clear majority) to the Securities Company in exchange for the latter company's stock at par, the basis of exchange being $180 per share for Great Northern and $115 per share for Northern Pacific; and then they advised and procured other stockholders of the Great Northern to do the same until the Securities Company had a large majority of the Great Northern shares also. The fact that the defendants' scheme contemplated the transfer of a majority of the Great Northern (as well as Northern Pacific) shares to the Securities Company, as testified by Mr. Hill and others, (*supra*, page 44), taken in connection with the further fact that such a majority was actually transferred, and at a valuation much less than the market price, too (record, p. 116), is abundant evidence that the shares necessary—in addition to those transferred by the defendants themselves—to make up the majority desired were transferred at the procurement of the defendants, and so the court below found. There is also other evidence on this point. Immediately after its organization the Securities Company sent a circular (record, p. 918), over the signature of Mr. Hill, to all of the Great Northern stockholders offering to purchase their stock at $180 a share, its own stock to be given in payment. Right on the heels of this followed a personal letter from Mr. Hill (record,

p. 920) to the Great Northern shareholders "explaining" the offer of the Securities Company and stating, among other things, that—

> The writer (Mr. Hill) is of opinion that the offer of the Securities Company is one that Great Northern shareholders can accept with profit and advantage to themselves.

And it was testified to by several witnesses, including Mr. Hill himself, that the great body of Great Northern shareholders were very loyal to Mr. Hill and would generally be guided by his opinion.

> I suppose that at any time we want any action of the Great Northern Railway Company the stockholders will be ready to do as they have in the past [i. e., follow Mr. Hill]. Generally I have felt they were a very loyal set of people. (Mr. Hill's testimony, record, p. 114.)

Now, if there be any doubt as to the real nature of Mr. Hill's "opinion" in this transaction—that is to say, if there be any doubt that his "opinion," that "the offer of the Securities Company is one that Great Northern shareholders can accept with profit and advantage to themselves," amounted to procurement—it surely ought to be dissipated by the fact that within a month after the organization of the Securities Company the holders of nearly a million of the Great Northern shares (the total number being only 1,230,000) had agreed to sell their holdings to that company at

from $15 to $20 a share less than the market price! (Record, p. 89.) A pretty severe test, by the way, of the "loyalty" of the Great Northern shareholders.

While it is thus clear that these additional Great Northern shares were transferred at the procurement of the defendants, we do not think that it was necessary to show this, it being enough to show, first, that the defendants designed to secure the transfer of a majority of Great Northern as well as Northern Pacific shares; and, second, that a majority was in point of fact transferred. In support of this view, let us suppose a case. Suppose the holders of these additional Great Northern shares necessary to make up a majority, hearing of the scheme of Mr. Hill and Mr. Morgan and their associates, had come forward, without request, persuasion, or procurement, and volunteered to transfer their holdings to the Securities Company—would that have in any way changed the essential character of the scheme? Would it have made it any less a combination in restraint of interstate transportation? Plainly not.

To sum up the result of the aforementioned exchanges of Great Northern and Northern Pacific stock for the stock of the Securities Company, the latter company, on December 11, 1901, had acquired and paid for 990,000 shares (in round figures) of Great Northern stock, the total capital stock of that company consisting of 1,250,000 shares, of which 1,230,000 have been issued

(Colonel Clough's testimony, record, pp. 244–247, 845); and by January 1, 1902, the Securities Company had acquired virtually all of the common stock of the Northern Pacific (the preferred stock was retired on that date, the resolution to retire it having been passed in the preceding November), its answer to the bill (record, p. 44a) admitting that it held 1,500,000 Northern Pacific shares out of a total of 1,550,000.

The final result of these transactions was that one and the same set of men—Mr. Hill and Mr. Morgan and their associates being the ruling spirits among them—acting together under a charter agreement and through the agency of a corporate organization, became vested with absolute power of control over two parallel and competing systems of interstate railway. In place of the two distinct sets of stockholders with rival and competing interests, namely, the stockholders of the Great Northern and Northern Pacific, there has been substituted (by means of the interchange of stocks described) the one set of stockholders with common and noncompetitive interests, namely, the stockholders of the Securities Company. Thus identically the same persons who controlled the Great Northern and Northern Pacific before the Securities Company came into possession of a majority of their shares control them now, only, now, these persons have a common interest—"a community of interest"—in the earnings of both

roads, while formerly the interests of the two sets of persons—the two sets of stockholders—were, in most respects, divergent and competitive. It borders on absurdity to say that two railway corporations which, under normal conditions, are naturally competitors for traffic, will continue to compete in any real sense after both become subject to the same source of control. It is not in the interest of the stockholders of the Securities Company that one of these railways should prosper at the expense of the other. They have a common interest in both; they receive their dividends from a fund created by pooling the earnings of both. A more effective method for combining competitive interests—for suppressing competition between rival and naturally competing business corporations—it would hardly be possible to conceive.

The preceding statement of facts may be recapitulated in the words of Thayer, J., who delivered the opinion of the court below:

> From admissions made by the pleadings, as well as from much oral testimony, we reach the following conclusions as respects matters of fact: Two of the defendants, namely, the Northern Pacific Railway Company and the Great Northern Railway Company, are the owners, respectively, of lines of railroad which extend from the cities of Duluth, St. Paul, and Minneapolis, in the State of Minnesota, thence across the

continent to Puget Sound. These roads *are*, and in public estimation have ever been, regarded as parallel and competing lines. For some years, at least, after they were built they competed with each other actively for transcontinental and interstate traffic. In the spring of the year 1901 they united in purchasing about 98 per cent of the entire capital stock of the Chicago, Burlington and Quincy Railway Company and became joint sureties for the payment of bonds of the last-named company, whereby the purchase was accomplished, which were to run twenty years and bear 4 per cent interest per annum. The amount of stock so acquired was of the par value of about $107,000,000, and as it was purchased at the rate of $200 per share the bonded indebtedness of the two companies was thus increased to the extent of $200,000,000.

Subsequent to the acquisition of the stock of the Burlington Company and in the summer of the year 1901 certain large and influential stockholders of the Northern Pacific and Great Northern companies, who had practical control of the two roads and who have been made parties defendant to the present bill, acting in concert with each other, conceived the design of placing a very large majority of the stock of both of the last-named companies in the hands of a single owner. To this end these stockholders arranged and agreed with each other to procure and cause the formation of a corporation under the laws of the State of New

Jersey, which latter company, when organized, should buy all or at least the greater part of the stock of the Northern Pacific and Great Northern companies.

The individuals who conceived and promoted this plan agreed with each other to exchange their respective holdings of stock in the last-named railroad companies for the stock of the New Jersey Company, when the same should be fully organized, and to use their influence to induce other stockholders in their respective companies to do likewise, to the end that the New Jersey Company might become the sole owner of the whole or at least a major portion of the stock of both railroad companies. In accordance with this plan the defendant, the Northern Securities Company (hereafter termed the Securities Company), was organized under the laws of the State of New Jersey on November 13, 1901, with a capital stock of $400,000,000, that sum being the exact amount required to purchase the total stock of the two railroad companies at the price agreed to be paid therefor. When the Securities Company was organized it assented to and became a party to the scheme that had been devised by its promoters before it became a legal entity. Very shortly after its organization the Securities Company acquired a large majority of all the stock of the Northern Pacific Company at the rate of $115 per share, paying therefor in its own stock at par. At the same time it acquired about 300,000 shares of the stock of

the Great Northern Company from those stockholders of that company who had been instrumental in organizing the Securities Company, paying therefor at the rate of $180 per share and using its own stock at par to make the purchase. The Securities Company subsequently made further purchases of stock of the Great Northern Company at the same rate, and in about three months had acquired stock of the latter company amounting at par to about $95,000,000, using for that purpose its own stock to the amount of about $171,000,000. The Securities Company was enabled to make the subsequent purchase of stock from stockholders of the Great Northern Company not immediately concerned in the organization of the Securities Company by the advice, procurement, and persuasion of those stockholders of the Great Northern Company who had been instrumental in organizing the Securities Company and had exchanged their own stock for stock in that company shortly after its organization.

At the present time the Securities Company is the owner of about 96 per cent of all the stock of the Northern Pacific Company and the owner of about 76 per cent of all the stock of the Great Northern Company. The scheme which was thus devised and consummated led inevitably to the following results: First, it placed the control of the two roads in the hands of a single person, towit, the Securities Company, by virtue of its ownership of a large majority

of the stock of both companies; second, it destroyed every motive for competition between two roads engaged in interstate traffic which were natural competitors for business by pooling the earnings of the two roads for the common benefit of the stockholders of both companies; and, according to the familiar rule that everyone is presumed to intend what is the necessary consequence of his own acts, when done willfully and deliberately, we must conclude that those who conceived and executed the plan aforesaid intended, among other things, to accomplish those objects. (Record, pp. 1703–1705.)

THE ISSUES OF LAW.

The questions of law growing out of the foregoing statement of facts are:

1. Has a combination been accomplished by means of the Securities Company in violation of section 1 of an act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," hereafter called the Anti-trust Act?

2. Have the defendants monopolized or attempted to monopolize *any* part of the interstate or foreign commerce of the United States, in violation of section 2 of the Anti-trust Act?

3. Was the relief granted by the circuit court authorized by law?

The Government maintains that each of these questions should be answered in the affirmative, and in that behalf submits the following brief of an argument. But if it is shown that *either* of the first two questions and the third question should be answered in the affirmative, the decree of the circuit court must be affirmed.

THE ARGUMENT.

I.

PURPOSE, SCOPE, AND INTERPRETATION OF THE ANTI-TRUST ACT.

1. The Anti-trust Act not primarily a criminal statute.

It has been said that the Anti-trust Act is a criminal statute, and that view was urged upon this

court by eminent counsel in the case of the *United States* v. *Joint Traffic Association* (171 U. S., 505). The court, however, did not consider the contention to have any material bearing in the decision of that case, and it is equally immaterial in the case at bar. But it may not be out of place here to point out that the primary aim—the motive—of Congress in passing the Anti-trust Act was not to create any new offenses against Federal law, but to pronounce and declare a rule of public policy to cover a field wherein the jurisdiction of the Federal Government is supreme and exclusive. The United States, having no common law, contracts in restraint of trade would not be repugnant to any law or rule of policy of the United States in the absence of a statute, and the controlling purpose of the Anti-trust Act was to declare that the public policy of the nation forbade contracts, combinations, conspiracies, and monopolies in restraint of interstate and international trade and commerce, and the jurisdiction conferred upon courts of equity to restrain violations of the act was intended as a means to uphold and enforce the principle of public policy therein asserted, not as a means to prevent the commission of crimes. As this court has said, "the civil remedy by injunction and the liability to punishment under the criminal provisions of the act are entirely distinct. * * *" (*United States* v. *Trans-Mo. Fr. Asso.*, 166 U. S., 342.)

But what if the Anti-trust Act is a criminal

statute; it is also in the highest degree a remedial statute, and it is as such that it is invoked in the case at bar. And in its remedial aspect it ought to be construed liberally and given the widest effect consistent with the language employed. It ought not to be frittered away by the refinements of criticism.

In Broom's Legal Maxim's, 5th Am. ed. (3d London ed.), 80, it is said:

> Again, in construing an act of Parliament, it is a settled rule of construction that cases out of the letter of the statute, yet within the same mischief or cause of the making, thereafter shall be within the remedy thereby provided; and accordingly, it is laid down that for the sure and true interpretation of all statutes (be they penal or beneficial, restrictive or enlarging of the common laws), four things must be considered:
>
> (1) What was the common law before the making of the act; (2) What was the mischief for which the common [in this case Federal] law did not provide; (3) What remedy has been appointed by the legislature for such mischief; and (4) the true reason for the remedy. And then the duty of the judges is to put such a construction upon the statutes as shall suppress the mischief and advance the remedy, to suppress the subtle inventions and evasions for continuing the mischief *pro privato commodo*, and to add force and life to the cure and remedy according to the true intent of the makers of the act, *pro bono publico*. In expounding

> remedial laws, then, the courts will extend the remedy so far as the words will admit.

In Potter's Dwarris on Statutes and Constitutions, page 234, the principle is laid down that—

> A statute made *pro bono publico* shall be construed in such manner that it may, as far as possible, *attain the end proposed.* (And Pierce and Hopper, Str. 253, is referred to.)

And in the same work it is said in a note, at page 231, that—

> In construing a remedial statute which has for its end the promotion of important and beneficial *public objects* a *large construction* is to be given, when it can be done without doing violence to its terms.

It is perhaps unnecessary to cite these rules for the interpretation of statutes, for the words of the Anti-trust Act are plain and comprehensive; but in the maze of sophistry employed to evade the force of this great remedial statute these rules are referred to "lest we forget."

And it makes no difference in the application of these rules that the statute have a penal as well as a remedial side.

> "Chancery will aid remedial laws," said Lord Keeper Wright, "*though they are called penal*, not by making them more penal, but by letting them have their course." (Ch. Prac., 215; Dwarris on Statutes, 653.) Also quoted in Sedgwick on Construction of Statutory and Constitutional Law (2d ed.), page 309.

> A statute may be penal in one part and remedial in another part. But in the same act a strict construction may be put on a penal clause and a liberal construction on a remedial clause. (Sedgwick on Construction of Statutory and Constitutional Law (2d ed.), p. 310; Dwarris on Statutes, 655; Hyde v. Cogan, 2 Douglass, 702.)

In the latter case Buller, J., said at page 705:

> The statute is so penned that the words might possibly admit of two constructions, and therefore it is material to consider, whether it is penal or remedial, because there is a well-known difference in the rule of construction as applied to laws of the one sort and of the other. Where they are remedial the interpretation is to be liberal, so as best to apply to the end. But a law may certainly be penal in one part and remedial in another, and that is the case here. There is no danger of the liberal construction of the remedial part being extended afterwards to the penal. The distinction has been too long established for any apprehension of that sort. If the clause upon which this case arises is remedial, which I think it is, the most extensive sense must prevail.

2. The Anti-trust Act purposely framed in broad and general language in order to defeat subterfuges designed to evade it.

Probably the first feature of the Anti-trust Act to strike the mind is the sweeping and comprehensive language in which it is framed.

Section 1 of the act provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 2 provides:

> 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 a fine not exceeding five thousand dollars or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Every combination, regardless of its form or structure, in restraint of trade or commerce among the several States or with foreign nations, and every person, natural or artificial, monopolizing, attempting to monopolize, or combining with any other person to monopolize any part of such trade or commerce, come squarely within the sweeping

condemnation of the act. The form or framework of the combination is *wholly* immaterial. It may be cast in the form of a trust—the form that stood out most prominently when the Anti-trust Act was passed, and which it denounces in terms—or in any other form. It matters not how subtle and cunningly conceived be the disguise—it may be a holding company. But if beneath the forms and the fictions there is found what in truth and substance amounts to a combination or monopoly, the act has been violated, and no veil can hide that fact. Congress, no doubt, anticipated that attempts would be made to defeat its will through the "contrivances of powerful and ingenious minds," and to meet theso it used the broad and all-embracing language found in the act; and it is in this light that that language is to be construed.

> Every contract, combination, or conspiracy in restraint of interstate or foreign commerce is illegal. The method adopted in bringing about the combination is immaterial; and *the device of a holding corporation for the purpose of circumventing the law can be no more effectual than any other means.* (Noyes on Intercorporate Relations, sec. 393.)

3. Some fundamental questions relating to the interpretation of the Anti-trust Act which this Court has decided.

It has been decided by this court that—

(*a*) The Anti-trust Act applies to and covers

common carriers by railroad as well as all other persons, natural or artificial. (*United States* v. *Trans-Missouri Freight Asso.*, 166 U. S., 290.) In that case the pleadings raised the issue of applicability as to both sections 1 and 2 of the act; and the court, in deciding the question, made no distinction between the two, but held that "the act," "the statute," as a whole, covered, and was intended to cover, common carriers by railroad.

(*b*) The words, "in restraint of trade or commerce," as used in the Anti-trust Act, are not confined to unreasonable or total restraints only, but extend to *any* and *all* direct restraints of trade or commerce, even if reasonable or only partial. (*United States* v. *Trans-Missouri Freight Asso.*, 166 U. S., 290; *United States* v. *Joint Traffic Asso.*, 171 U. S., 505.) And while this rule applies with equal force to restraints upon individuals, private corporations, and quasi-public corporations, such as railroads, there is a peculiar reason for its application to restraints upon the latter, as this court pointed out in the following passages from its opinion in the case of *United States* v. *Trans-Missouri Freight Asso.* (*supra*)—

> The business which the railroads do is of a public nature, closely affecting almost all classes in the community—the farmer, the artisan, the manufacturer, and the trader. It is of such a public nature that it may well be doubted, to say the least, whether *any contract* which imposes *any restraint*

> upon its business would not be prejudicial to the public interest (p. 333).
>
> * * * * * * * * while, in the absence of a statute prohibiting them, contracts of private individuals or corporations touching upon restraints in trade must be unreasonable in their nature to be held void, different considerations obtain in the case of public corporations like those of railroads, where it well may be that *any restraint* upon a business of that character, as affecting its rates of transportation, must thereby be prejudicial to the public interests (p. 334).

(*c*) In exercising the powers over commerce vested in the Federal Government, Congress may to some extent limit the right of private contract, the right to buy and sell property, without violating the fifth amendment. It may declare that no contract, combination, or monopoly which restrains trade or commerce by shutting out the operation of the general law of competition shall be legal. (*United States* v. *Joint Traffic Asso.*, *supra*; *Addyston Pipe and Steel Co.* v. *United States*, 175 U. S., 211.)

The foregoing propositions are too well settled to require discussion; to state them is sufficient.

4. The tests to determine whether a combination or monopoly exists within the meaning of the anti-trust act.

(*a*) Combinations. When the natural effect of an agreement or combination is to stifle, smother,

destroy, prevent, or shut out competition, the agreement or combination is in restraint of trade or commerce and illegal under section 1 of the the Anti-trust Act. Any combination "for the purpose of avoiding the effects of competition"—using the words of the opinion in the case of the *United States* v. *Trans-Missouri Freight Asso.* (*supra*)—in interstate or international trade or commerce is within the prohibition of the act. The decisions of this court are conclusive on this point. Thus in *United States* v. *Trans-Missouri Freight Asso.* (*supra*) it was said, adopting the language of the dissenting opinion of Shiras, J., in the circuit court of appeals:

> There are benefits and there are evils which result from the operation of the law of free competition between railway companies. The time may come when the companies will be relieved from the operation of this law, but they can not, *by combinations and agreements among themselves*, bring about this change. The fact that the provisions of the Interstate Commerce Act may have changed in many respects the conduct of the companies in the carrying on of the public business they are engaged in does not show that it was the intent of Congress, in the enactment of that statute, to clothe railway companies with the right to combine together *for the purpose of avoiding the effects of competition* on the subject of rates. (P. 337.)

Again, in *United States* v. *Joint Traffic Asso.* (*supra*), it was argued by the eminent counsel who appeared for the defendants that the combination there in question was not in restraint of trade or commerce even though it did prevent competition to some extent. But this court held to the contrary. Said Mr. Justice Peckham, who delivered the opinion of the court:

> Upon the point that the agreement is not in fact one in restraint of trade, *even though it did prevent competition*, it must be admitted that the former argument has now been much enlarged and amplified, and a general and most masterly review of that question has been presented by counsel for the respondents. That this agreement does in fact prevent competition, and that it must have been so intended, we have already attempted to show. Whether stifling competition tends directly to restrain commerce in the case of naturally competing railroads, is a question upon which counsel have argued with very great ability.
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> * * * * *
>
> The natural, direct, and immediate effect of competition is, however, to lower rates, and to thereby increase the demand for commodities the supplying of which increases commerce, and *an agreement whose first and direct effect is to prevent this play of competition restrains instead of promoting trade and commerce.* * * * (Pp. 575 and 577.)

In several other places in the same opinion this court expressed the view that to prevent or shut off competition is to restrain trade and commerce. Thus, at page 559:

> Has not Congress with regard to interstate commerce and in the course of regulating it, in the case of railroad corporations, the power to say that no contract or combination shall be legal which shall *restrain trade and commerce by shutting out the operation of the general law of competition?* We think it has.

And again, at page 570:

> Where the grantees of this public franchise are competing railroad companies for interstate commerce, we think Congress is competent to forbid any agreement or combination among them by means of which *competition is to be* smothered.

In the case of the *Addyston Pipe Co.* v. *United States* (175 U. S., 211, 244), this court once more held that a contract, agreement, or combination which prevents or destroys competition is in restraint of trade:

> We have no doubt that where the direct and immediate effect of a contract or combination among particular dealers in a commodity is *to destroy competition* between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or com-

> bination *amounts to a restraint of trade* in the commodity, even though contracts to buy such commodity at the enhanced price are continually being made. Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade.

This court and other courts when discussing this subject constantly use words of the same import as those above quoted. "To prevent or suppress competition" and "to restrain trade" are, in fact, often used by judges as convertible terms to express one and the same thought.

The decision of the House of Lords in the case of the *Mogul S. S. Co.* v. *McGregor* (L. R. App. Cas. (1892), 25) is sometimes cited, by courts as well as by counsel, in support of the contention that an agreement or combination between a number of traders to put an end to competition in their business is not an agreement or combination in restraint of trade and is therefore valid. This is a mistaken view of that decision, and inasmuch as the case is rightly regarded as a leading authority and is constantly cited on behalf of defendants in proceedings under anti-trust laws, it may not be amiss to point out precisely just what was decided.

In the first place, the case was decided upon common-law principles, there being no statute, such as the Federal Anti-trust Act, making it unlawful and criminal to enter into agreements or combinations in restraint of trade. The defend-

ants, who were shipowners, in order to secure a carrying trade exclusively for themselves and at profitable rates, formed an association and agreed that the number of ships to be sent by members of the association to the loading port, the division of cargoes, and the freights to be demanded, should be the subject of regulation; that a rebate of 5 per cent on the freights should be allowed to all shippers who shipped only with members of the association; and that agents of members should be prohibited on pain of dismissal from acting in the interest of competing shipowners, any member to be at liberty to withdraw on giving certain notices. The plaintiffs, also shipowners, who were not members of the association, having been refused admission thereto, sued for the injury they claimed to have been done to them by reason of the defendants' association, which was alleged to be an unlawful conspiracy—unlawful because in restraint of trade. Both the court of appeal and House of Lords held that the action could not be mintained, *not, however, because the agreement in controversy was not in restraint of trade*, but because, even if it were in restraint of trade, it still remained as a stumbling block to the action that an agreement in restrain of trade was not unlawful at common law in the sense that it furnished cause for a civil action by one damaged by it, but only in the sense that it was void and unenforceable if sued upon. That this was the point which the case really decided, and that it *did not* decide

that the agreement or combination in question was not an agreement or combination in restraint of trade, is unmistakably shown by the language of the judgments read both in the House of Lords and the court of appeal.

Thus Lord Halsbury, L. C., said in the House of Lords (pp. 36 and 39):

> Now it is not denied, and can not be even argued, that prima facie a trader in a free country in all matters "not contrary to law may regulate his own mode of carrying on his trade according to his own discretion and choice." This is the language of Baron Alderson in delivering the judgment of the Exchequer Chamber (in *Hilton* v. *Eckersley*, 6 E. and B., 74, 75), and no authority, indeed no argument, has been directed to qualify that leading proposition. It is necessary, therefore, for the appellants here to show that what I have described as the course pursued by the associated traders is a "matter contrary to law."
>
> * * * * *
>
> A totally separate head of unlawfulness has, however, been introduced by the suggestion that the thing is unlawful because in restraint of trade. There are two senses in which the word "unlawful" is not uncommonly, though I think somewhat inaccurately, used. There are some contracts to which the law will not give effect; and therefore, although the parties may enter into what, but for the element which the law condemns would be perfect contracts,

> the law would not allow them to operate as contracts, notwithstanding that, in point of form, the parties have agreed. Some such contracts may be void on the ground of immorality; some on the ground that they are contrary to public policy; as, for example, in restraint of trade; and contracts so tainted the law will not lend its aid to enforce. It treats them as if they had not been made at all. But the more accurate use of the word "unlawful," which would bring the contract within the qualification which I have quoted from the judgment of the Exchequer Chamber, namely, as *contrary to law*, is not applicable to such contracts.
>
> It has never been held that a contract in restraint of trade is contrary to law in the sense that I have indicated. * * * [Not contrary to the *common* law, the lord chancellor means, of course.]

In the court of appeal, judgments were read by both Bowen, L. J. and Fry, L. J., who constituted the majority of the court, which was sustained by the House of Lords. The remaining judge who sat in the court of appeal, Lord Esher, M. R., dissented from the majority, he being of the opinion not only that the agreement or combination was in restraint of trade, but that as such it was indictable and therefore actionable.

Said Bowen, L. J., in the course of his judgment (L. R. 23 Q. B. D., 619, 620):

> Lastly, we are asked to hold the defendants' conference or association illegal, as

being in restraint of trade. The term "illegal" here is a misleading one. Contracts, as they are called, in restraint of trade are not, in my opinion, illegal in any sense, except that the law will not enforce them. It does not prohibit the making of such contracts; it merely declines, after they have been made, to recognize their validity. The law considers the disadvantage so imposed upon the contract a sufficient shelter to the public. The language of Crompton, J., in *Hilton* v. *Eckersley* (6 E. and B. 47) is, I think, not to be supported. *No action at common law will lie or ever has lain against any individual or individuals for entering into a contract merely because it is in restraint of trade.* * * * If peaceable and honest combinations of capital for purposes of trade competition are to be struck at, it must, I think, be by legislation, for I do not see that they are under the ban of the common law.

The language of Fry, L. J., also shows that it was assumed, at least arguendo, that the agreement in question *was* in restraint of trade. He said at page 626:

> It is said that such an agreement is in restraint of trade, and therefore illegal. *Be it so.* But in what sense is the word 'illegal' used in such a proposition? In my opinion it means that the agreement is one upon which no action can be sustained and no relief obtained at law or in equity, but it does not mean that the entering into the agreement is either indictable or actionable.

The foregoing passages from the judgments of the House of Lords and the court of appeal show very clearly, as we have already said, that what the Mogul Steamship case actually decided was that, admitting the plaintiffs' contention that the agreement or combination out of which their action grew was in restraint of trade, they still had no case, because such an agreement or combination was not indictable or actionable at common law. So far, indeed, from it having been decided that the agreement or combination in controversy was not in restraint of trade, Lord Bramwell and Lord Hannen, two of the most learned of the law lords who sat in the case and who fully concurred with their associates, the judgment of the House of Lords being unanimous, expressed the opinion that *it was in restraint of trade*. L. R. App. Cas. (1892), 46 and 58. Lord Hannen was particularly clear on this point. He said, at page 58:

> It was contended that the agreement between the defendants to act in combination, which was proved to exist, was illegal as being in restraint of trade. *I think that it was so*, in the sense that it was void, and could not have been enforced against any of the defendants who might have violated it: *Hilton* v. *Eckersley*. But it does not follow that the entering into such an agreement would, as contended, subject the persons doing so to an indictment for conspiracy, and I think that the opinion to that effect expressed by Crompton, J., in *Hilton* v. *Eckersley* is erroneous.

Lord Esher, Master of the Rolls, was also, as already noted, of the opinion that the agreement or combination in question was in restraint of trade.

It is hardly necessary to say that the Government does not contend that ordinary corporations and partnerships, formed in good faith in the usual course of business, come within the prohibition of the Anti-trust Act because, incidentally, they may restrict competition to some extent. In such cases the restriction of competition, if any, is only ancillary and collateral to the main object. But there is a vast difference between corporations and partnerships of this class and associations of persons, in the form of corporation, partnership, or otherwise, formed *for the purpose of combining competing businesses* by bringing them under a common controlling body; and this difference has been recognized by this court and practically every other court which has had to deal with the subject, as the adjudicated cases hereinafter referred to show.

(*b*) Monopolies. The act embraces not only monopolies which have been consummated, but attempts to monopolize as well. As used in the act the word "monopoly" is not confined to its common-law meaning of an exclusive grant to one or a few to do that which before had been free and open to all in common. (*United States* v. *Trans-Missouri Freight Asso.*, *supra*.) The term, as used by modern legislators and judges, signifies

the combining or bringing together in the hands of one person or set of persons the control, or the *power* of control, over a particular business or employment, so that competition therein may be suppressed. Thus the supreme court of Illinois said in *People* v. *Chicago Gas Trust Company* (130 Ill., 294):

> The *control* of the four companies by the appellee, an outside and independent corporation, suppresses competition between them and destroys their diversity of interest and all motive for competition. There is thus built up *a virtual monopoly* in the manufacture and sale of gas.

And in *People* v. *North River Sugar Refining Company* (54 Hun (N. Y.), 377), a monopoly was defined by Barrett, J., as follows:

> Any combination the tendency of which is to prevent competition in its broad and general sense and to control and thus at will enhance prices to the detriment of the public is a legal monopoly.

And this court said in *E. C. Knight Co.* v. *United States* (156 U. S., 1):

> Again, all the authorities agree that, in order to vitiate a contract or combination, it is not essential that its results 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.

So far as the present case is concerned, however, it is unnecessary to consider further what constitutes a monopoly within the meaning of the Anti-trust Act, as the Supreme Court has expressly decided that a combination or consolidation of two competing railroads—the very roads, by the way, now at the bar of this court—brought about by transferring to one road a majority of the stock of the other, is such a monopoly. In *Pearsall* v. *Great Northern Railway* (161 U. S., 646, 677), it was held that—

> The consolidation of these two great corporations will unavoidably result in giving to the defendant *a monopoly* of all traffic in the northern half of the State of Minnesota, as well as of all transcontinental traffic north of the line of the Union Pacific, against which public regulations will be but a feeble protection.

A similar ruling was made by the Supreme Court in *Louisville and Nashville Railroad Co.* v. *Kentucky* (161 U. S., 677).

(*c*) To prove that a combination or monopoly exists within the meaning of the act it is not necessary to show that the immediate effect of the acts complained of is to suppress competition or to create a complete monopoly. It is sufficient to show that they *tend* to bring about those results. As the court said in *People* v. *North River Sugar Refining Co.* (*supra*):

> Any combination the *tendency* of which is to prevent competition * * * is a legal monopoly.

And, to repeat the language used by Mr. Chief Justice Fuller in the *Knight case* (*supra*)—

> * * * 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.

The same rule was laid down and the above language of the Chief Justice quoted in support thereof in the *Addyston Pipe case* (175 U. S., 211, 237).

And in *Salt Co.* v. *Guthrie* (35 Ohio St., 672), the Supreme Court of Ohio stated the rule as follows:

> The clear *tendency* of such an agreement is to establish a monopoly and destroy competition in trade. It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the *inevitable tendency* of such contracts is injurious to the public.

(*d*) It is not essential to show that the person or persons charged with monopolizing or combining have actually raised prices or suppressed competition, or restrained or monopolized trade or commerce in order to bring them within the condemnation of the act. It is enough that the necessary effect of the combination or monopoly is to give them the power to do those things. The decisive question is whether the power exists, not whether it has been exercised. The persons charged with combining or monopolizing may, indeed, have exercised their power to aid and promote commerce for the time being; they may lower prices; but notwithstanding this, if they have, in combining or monopolizing, acquired the *power* to suppress competition, to restrain or monopolize trade or commerce, they have brought themselves within the purview of the act. It is the *power* to suppress competition, the *power* to raise prices, the *power* to restrain or monopolize commerce, which constitutes the vice, and it was that which Congress aimed to reach. This court has spoken frequently to this effect. In each of the three leading cases in which the Anti-trust Act has been enforced, *United States* v. *Trans-Missouri Freight Asso.*, *United States* v. *Joint Traffic Asso.*, and *Addyston Pipe Co.* v. *United States* (*supra*), it was urged in defense that no violation of the act had been shown because it had not been shown that competition had been actually suppressed or trade actually restrained, the same argument that counsel

for the defendants make in this case and to which they seem to attach great importance. But in each of those cases this court held that it was immaterial that trade or commerce had not actually been restrained—that it made no difference, even, that rates and prices had been lowered; it being enough to bring the combination within the condemnation of the act that it had the *power* to restrain trade or commerce. The very existence of the *power*, under these rulings, constitutes a restraint.

In *United States* v. *Joint Traffic Asso.* (*supra*), after denying the right of railroads to combine for the purpose of stifling competition, the court, through Mr. Justice Peckham, continued as follows (p. 571):

> And this is so, even though the rates provided for in the agreement may for the time be not more than are reasonable. They *may* easily and at any time be increased. *It is the combination of these large and powerful corporations*, covering vast sections of territory and influencing trade throughout the whole extent thereof, and acting as one body in all matters over which the combination extends, *that constitutes the alleged evil*, and in regard to which, so far as the combination operates upon and restrains interstate commerce, Congress has power to legislate and prohibit.

Furthermore, in that case, the terms of the agreement in question left each road free to enter into competition with the others whenever it chose

to do so, and it was argued with great emphasis by counsel that this fact showed that the agreement did not impose any restraint upon competition, but this court held the fact to be immaterial because the managers of the association had the "*power* to enforce the uniformity of rates" (p. 563).

Again, in *United States* v. *Trans-Missouri Freight Asso.* (*supra*), in replying to the argument that the association had not raised rates, this court said, at page 324:

> 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. * * *

And in the *Addyston Pipe case* (*supra*), the court held that it was immaterial whether or not the combination had raised prices. It was enough that—

> Its tendency was to give the defendants *power* to charge unreasonable prices had they chosen to do so (p. 238).

So in *Pearsall* v. *Great Northern Railway* (*supra*), this court, through Mr. Justice Brown, said, at page 676:

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

(*e*) It is not necessary in order to bring a combination or conspiracy within the operation of the act that the members *bind* themselves each with the other to do the acts alleged to be in restraint of trade. It would certainly be attempting to introduce a novel principle into the law of combinations and conspiracies to contend that in order to form a combination or conspiracy those combining or conspiring must agree or contract with each other to do the illegal things in view. It has always been held to be enough that they act together in pursuance of a common object, and while, of course, this presupposes agreement between them in a broad sense, an agreement or contract in the technical sense is not at all essential. Said Coleridge, J., in *Reg.* v. *Murphy* (8 C. & P., 397):

> * * * Although the common design is the root of the charge, it is not necessary to prove that these two parties came together and actually *agreed* in terms to have this common design, and to pursue it by common means, and so carry it into execution. This is not necessary, because in many cases of the most clearly established conspiracies there are no means of proving any such thing, and neither law nor common sense requires that it should be proved. If you find that these two persons pursued by their *acts* the same object, often by the same means, one performing one part of an act, and the other another part of the same act, so as to complete it, with a view to the

> attainment of the object which they were pursuing, you will be at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object. The question you have to ask yourselves is, "Had they this common design, and did they pursue it by these common means—the design being unlawful?"

If the law were not as thus stated, evasion of the Anti-trust Act would be an easy matter, for when competing corporations combine, as they generally do now, through the agency of a purchasing corporation, or a holding corporation, or a consolidation, they do not formally agree or contract with each other to maintain a certain scale of prices, or to restrict production, or otherwise to restrain trade or commerce.

Mr. James C. Carter, in his argument for the Joint Traffic Association, recognized that it was acts, not necessarily contracts, in restraint of trade which the Anti-trust Law aimed at. Thus he said:

> It is a uniting together for a common purpose—a combination—or, when thought to be of an objectionable character, a conspiracy. Such unions always suppose agreement, but it need not be in writing; where it is in writing it is often called an agreement or contract, but in giving it this name we should not lose sight of its *real character*. *In reality it is simply an act*, and innocent or guilty according as the law may be inclined to regard it. (*United States* v. *Joint Traffic Asso.*, 171 U. S., 516.)

It therefore follows that it is sufficient to constitute a violation of the Anti-trust Act that a concert, combination, or conspiracy be entered into, and that it have the *power* to shut out competition in interstate commerce and thereby restrain it: it is not necessary that the component members of the combination or conspiracy bind themselves not to enter into competition with each other. This was, in fact, expressly decided in the case of the *United States* v. *Joint Traffic Association* (*supra*). The agreement between the railroads composing the Joint Traffic Association purported to leave any one of them free to charge different rates from those fixed in the schedule, and therefore free to compete for traffic with the others, if it chose to do so, and it was strongly insisted by counsel that this fact saved the association from illegality. But this court held that it did not.

(*f*) If it be shown that a combination or a monopoly has been formed the necessary effect of which is to restrain trade or commerce, a violation of the Anti-trust Act has been established, and the aim, motive, intention, or design with which the combination is entered into or the monopoly created is wholly immaterial and outside the question. It may have been to aid and further commerce rather than to restrain it; but if in point of law the effect or the tendency of the combination is to restrain trade or commerce the combination is unlawful, and the motive behind it,

however beneficent, does not alter that fact in the slightest degree. The question was squarely before this court in *United States* v. *Trans-Missouri Freight Asso.* (*supra*), where Mr. Justice Peckham, speaking for the court, said, at pages 341 and 342:

> In the view we have taken of the question, the intent alleged by the Government is not necessary to be proved. The question is one of law in regard to the meaning and effect of the agreement itself, namely: Does the agreement restrain trade or commerce in any way so as to be a violation of the act? * * *
>
> For these reasons *the suit of the Government can be maintained without proof of the allegation that the agreement was entered into for the purpose of restraining trade* or commerce or for maintaining rates above what was reasonable. The necessary effect of the agreement is to restrain trade or commerce, *no matter what the intent was on the part of those who signed it.*

In the *Addyston Pipe case* (*supra*) this court again laid down the same rule (p. 234):

> If the necessary, direct, and immediate effect of the contract be to violate an act of Congress and also to restrain and regulate interstate commerce, *it is manifestly immaterial whether the design to so regulate was or was not in existence when the contract was entered into.* In such case the design does not constitute the material thing. The fact

> of a direct and substantial regulation is the important part of the contract, and that regulation existing, *it is unimportant* that it was not designed.

And in the case of the *C. & O. Fuel Co.* v. *United States* (115 Fed. Rep., 623), Day, circuit judge, said:

> It is to be remembered in this connection that it is the *effect* of the contract upon interstate commerce, *not the intention* of the parties in entering into it, which determines whether it falls within the prohibition of the statute. (The *Trans-Missouri case*, 166 U. S., 341; the *Addyston case*, 175 U. S., 234.) It is, moreover, contended that the effect of this agreement has been the reduction of prices to the consumer. In determining whether a combination restrains interstate commerce, it is not only the effect upon consumers which is to be considered, but, as well, the effect upon others in the business, who, from choice or necessity, are left outside of the organization.

To sum up what has been said under (4), a combination or monopoly is within the prohibitions of the Anti-trust Act if its effect or tendency is to suppress competition, or if it have the power to suppress competition, though not exercising it; and it is not essential that the members of the combination bind themselves to do the acts alleged to be in restraint of trade, it being sufficient that they unite or act together in pursuance of the illegal object; and, finally, the intention with

which the combination or monopoly is formed is immaterial.

Having stated and discussed the foregoing general principles which bear more or less directly upon the case at bar, I shall now take up the main argument under the following heads:

II.

A COMBINATION OR MONOPOLY OF COMPETING LINES OF INTERSTATE RAILWAY—OF COMPETING INSTRUMENTALITIES OF INTERSTATE COMMERCE—IS A COMBINATION OR MONOPOLY IN RESTRAINT OF INTERSTATE COMMERCE WITHIN THE PROHIBITION OF THE ANTI-TRUST ACT; FOR—

1. This court has so often ruled that the transportation of persons and things is commerce that the principle has become a legal commonplace. And if a combination or monopoly of such transportation is a combination or monopoly in restraint of commerce within the Anti-trust Act, and hence illegal, as this court held in *United States* v. *Trans-Missouri Freight Association* and *United States* v. *Joint Traffic Association* (*supra*), then it follows as a corollary that a combination or monopoly of the means or instrumentalities of transportation is likewise a combination or monopoly in restraint of commerce, because a monopoly of the means of transportation leads directly and inevitably to a monopoly of transportation itself. The relationship between the two is indeed so close and inseparable that it may be said, with the nicest regard for the meaning of words, that a monopoly of the means of transportation *is* a monopoly of

transportation itself; for one in possession or control of all the means and instrumentalities for carrying on a particular business has, unquestionably, a monopoly of that business.

Viewing the subject in another light, a monopoly of the *means* of transportation puts it in the *power* of the monopolist to stifle competition in the *business* of transportation, and this court decided in the cases of the *United States* v. *Trans-Missouri Freight Association* and *United States* v. *Joint Traffic Association* (*supra*), that a combination or monopoly which had the *power* to stifle competition in the *business* of transportation among the States was in restraint of interstate commerce and therefore illegal.

Looking at the question from still another standpoint, it is unquestioned that Congress may prohibit, and has prohibited, combinations and monopolies in the *business* of interstate and international transportation. (*United States* v. *Trans-Missouri Freight Asso.* and *United States* v. *Joint Traffic Asso.*, *supra*.) But what does this power amount to if Congress may not also prohibit monopolies of the *means and instrumentalities* of such transportation—of the roads themselves? Virtually nothing; for he who has a monopoly of the means of transportation has a monopoly of transportation itself. How can I carry on the business of transportation if another controls all the means and instrumentalities for conducting that business? Clearly I can not. Does it not

plainly follow, then, that a grant of the power to prohibit combinations and monopolies in interstate and foreign transportation necessarily includes and carries with it the power to prohibit combinations and monopolies of the means and instrumentalities whereby such transportation is carried on? Unless this be so the grant is meaningless, worthless.

This subject really presents no difficulty if it be kept clearly in mind that the fundamental question—the decisive question—is not so much whether the combination or monopoly is a combination or monopoly of commerce (meaning thereby the businesses and transactions which come within the definition of that term) or of the instrumentalities of commerce, as it is, as this court stated it in the *Addyston Pipe case* (*supra*), "Whether *the necessary effect of the combination* is to restrain interstate commerce." It matters not, according to this rule, whether the combination or monopoly is one of commerce or of the instrumentalities of commerce, provided the *effect* of the combination or monopoly is directly to restrain commerce. If the *effect* of the combination is to restrain commerce, the law makes no further inquiry. The combination is illegal. What is the effect of the combination? That is the test which this court has prescribed. Now will any deny that the *effect*, or at least the tendency,—and, as heretofore shown, the law makes no distinction between the

effect and the tendency of a combination—of combining two competing instrumentalities of interstate commerce—two competing lines of interstate railway, such as the Great Northern and Northern Pacific,—will be to suppress competition and thereby restrain trade and commerce? This court said in *Pearsall* v. *Great Northern Railway* (*supra*), that this would be the effect of such a combination.

2. The Anti-trust Act prohibiting combinations and monopolies in restraint of interstate and foreign commerce is an exercise of the power granted to Congress to regulate commerce (*Champion* v. *Ames*, decided by this court February 23, 1903), and the term "commerce" as used in that grant embraces the instrumentalities by which commerce is or may be carried on.

In *Railroad Co.* v. *Fuller* (17 Wall., 560, 568) Mr. Justice Swayne defined commerce in these words:

> Commerce is traffic, but it is much more. It embraces also transportation by land and water and all the *means and appliances* necessarily employed in carrying it on.

In *Welton* v. *Missouri* (91 U. S., 275, 280), Mr. Justice Field stated the rule, as follows:

> Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens

> of our country and the citizens or subjects of other countries, and between the citizens of different States. The power to regulate it embraces all the *instruments* by which such commerce may be conducted.

Again, in the well-known language of Chief Justice Waite, *Pensacola Tel. Co.* v. *Western Union Tel. Co.* (96 U. S., 1):

> The powers thus granted [referring to the commerce clause] are not confined to the instrumentalities of commerce, or the postal service known or in use when the Coustitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate at all times and under all circumstances.

In *Gloucester Ferry Co.* v. *Pennsylvania* (114 U. S., 196, 203) Mr. Justice Field again defined the scope of the term:

> Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of

> public waters for that purpose, as well as the purchase, sale, and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed; that is, the conditions upon which it shall be conducted, to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the *instrumentalities* by which that commerce may be carried on, and the *means* by which it may be aided and encouraged. The subjects, therefore, upon which the power may be exerted are of infinite variety.

It is thus seen that "commerce," as that term has been construed by this court, embraces the instrumentalities employed in carrying it on—embraces railways as one class of such instrumentalities; and this being so, it necessarily follows that the prohibitions in the Anti-trust Act against combinations and monopolies in restraint of interstate commerce include combinations and monopolies of the instrumentalities of interstate commerce—include combinations and monopolies of interstate railways.

III.

IT IS NO VIOLATION OF THE RESERVED RIGHTS OF THE STATES, BUT, ON THE CONTRARY, IS CLEARLY WITHIN THE FEDERAL POWER FOR CONGRESS TO ENACT THAT NO PERSONS, NATURAL OR ARTIFICIAL, SHALL FORM A COMBINATION OF THE INSTRUMENTALITIES OF ANY PART OF INTERSTATE COMMERCE THE EFFECT OR TENDENCY OF WHICH WOULD BE TO RESTRAIN INTERSTATE TRADE OR COMMERCE, AND THAT NO PERSON OR PERSONS, NATURAL OR ARTIFICIAL, SHALL ACQUIRE A MONOPOLY OF SUCH INSTRUMENTALITIES.

This is a natural and logical deduction from the supreme, plenary, and exclusive nature of the power of the Federal Government over foreign and interstate commerce, in the exercise of which Congress may descend to the most minute directions. The "penetrating and all-embracing" nature of this power has been stated, explained, and emphasized so often by this court that any extended reference to it at this late day would be a trespass upon the time of the court. It is enough to refer to one or two of the leading decisions. In the first great case under the commerce clause, *Gibbons* v. *Ogden* (9 Wheat., 1), Chief Justice Marshall said, at page 197:

> We are now arrived at the inquiry—what is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. These

> are expressed in plain terms, and do not affect the questions which arise in this case or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress *as absolutely as it would be in a single government*, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States.

And Mr. Justice Johnson, in a separate but concurring opinion delivered in the same case, said:

> The "power to regulate commerce" here meant to be granted was the power to regulate commerce which previously existed in the States. But what was that power? The States were unquestionably supreme, and each possessed the power over commerce which is acknowledged to reside in every sovereign State. * * * The law of nations, regarding man as a social animal, pronounces all commerce legitimate in a state of peace until prohibited by positive law. The power of a sovereign State over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure. And since the power to prescribe the limits to its freedom necessarily implies the power to determine what shall remain unrestrained, it follows that

> the power must be exclusive; it can reside but in one potentate; and hence the grant of this power carries with it the whole subject, *leaving nothing for the State to act upon.*

The principles announced in this case have never been departed from, but have been reaffirmed time and again by this court, notably in *Brown* v. *Maryland* (12 Wheat., 419); the *Passenger cases* (7 How., 283); *In re Debs* (158 U. S., 564), and *Champion* v. *Ames*, decided February 23, 1903, the latest case on the subject.

In *Stockton* v. *Baltimore & N. Y. R. Co.* (32 Fed. Rep., 11, 16), Mr. Justice Bradley, at circuit, defined the Federal power over commerce in striking language:

> The power to regulate commerce among the several States is given by the Constitution in the most general and absolute terms. The "power to regulate," as applied to a government, has a most extensive application. With regard to commerce, it has been expressly held that it is not confined to commercial transactions, but extends to seamen, ships, navigation, and the appliances and facilities of commerce. And it must extend to these or it can not embrace the whole subject. * * *
>
> * * * We think that the power of Congress is supreme over the whole subject, unimpeded and unembarrassed by State lines or State laws; that in this matter the country is one and the work to be accomplished is national; and that State interests,

> State jealousies, and State prejudices do not require to be consulted. *In matters of foreign and interstate commerce there are no States.*

In the *Debs case* (*supra*) the court said, through Mr. Justice Brewer (pp. 578, 586, 590):

> What are the relations of the General Government to interstate commerce and the transportation of the mails? They are those of direct supervision, control, and management.
>
> * * * * *
>
> As said in *Gilman* v. *Philadelphia* (3 Wall., 713, 724): "The power to regulate commerce comprehends the *control* for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from obstruction to their navigation, interposed by the States or otherwise; to remove such obstructions when they exist, and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and the punishment of offenders. For these purposes Congress possesses all the powers which existed in the States before the adoption of the National Constitution, and which have always existed in the Parliament in England."

> Up to a recent date commerce, both interstate and international, was mainly by water, and it is not strange that both the legislation of Congress and the cases in the courts have been principally concerned therewith. The fact that in recent years interstate commerce has come to be carried on by railroads and over artificial highways has in no manner narrowed the scope of the constitutional provision or abridged the power of Congress over such commerce. *On the contrary, the same fulness of control exists in the one case as in the other*, and the same power to remove obstructions from the one as from the other.

Of course, it makes no difference whether the obstruction be physical or economic—whether it be a sand bar, a mob, or a monopoly—whether it result from the sinking of a vessel or the stifling of competition—the power of Congress to remove it is the same in each case. And the corollary of this, it may be remarked in passing (although the point is not before the court for decision in this case), is that no State has the power to obstruct or put restraints upon interstate commerce by authorizing combinations, consolidations, or monopolies of competing instrumentalities of interstate commerce—of competing lines of railway engaged in interstate transportation. In the *Debs case* (*supra*), Mr. Justice Brewer, speaking for the court, said:

> It is curious to note the fact that in a large proportion of the cases in respect to

> interstate commerce brought to this court the question presented was of the validity of State legislation in its bearing upon interstate commerce, and the uniform course of decision has been to declare that *it is not within the competency of a State to legislate in such a manner as to obstruct interstate commerce.* If a State, with its recognized power of sovereignty, is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?

And in the *Addyston Pipe case* (*supra*) Mr. Justice Peckham, speaking for the court, said at page 232:

> It is true, so far as we are informed, that no State legislature has heretofore authorized by affirmative legislation the making of contracts upon the matter of interstate commerce of the nature now under discussion. Nor has it, in terms, condemned them. The reason why no State legislation on the subject has been enacted has probably been because it was supposed to be *a subject over which State legislatures had no jurisdiction.*

The court of appeals of New York has gone still further and has admitted that Congress has the power, under the commerce clause of the Constitution, to regulate the consolidation of railroad corporations of several States (where, of course, the consolidations would form interstate lines), even where the roads proposed to be consolidated

are not parallel or competitive, but constitute one continuous line. Thus in *Boardman et al.* v. *Lake Shore and Michigan Southern Railway Co.* (84 N. Y., 157, 185), the defendant company was organized as a corporation under the statutes of several States to operate a continuous line of railroad running through those States, and which had previously been operated by the several corporations which were consolidated in the defendant company. It was contended that these statutes, so far as they authorized the consolidation in adjoining States, were repugnant to the provision of the Federal Constitution conferring upon Congress the power to regulate commerce with foreign nations and among the several States. But the court of appeals overruled this contention, saying:

> There is, we think, no force in the position that the acts of the legislatures of the several States through which the railroads run, so far as they relate to or authorize the consolidation in the adjoining States, are in violation of subdivision 3 of section 8 of the first article of the Constitution of the United States, which confers upon Congress the power to "regulate commerce with foreign nations and among the several States." It is not claimed that Congress has legislated in respect to the subject * * * The conclusion, therefore, is inevitable that *in the absence of such legislation by Congress*, the power exists in the State to legislate upon the subject.

The necessary implication from this language is that, in the opinion of the court, Congress has the power to legislate upon the subject of consolidations of railroad corporations when the consolidations form interstate lines; that in the absence of legislation by Congress, the power exists in the States to legislate upon the subject, but that in the presence of legislation by Congress the power of the States over the subject is excluded.

The same view is expressed by Mr. Noyes at section 19 of his work on Intercorporate Relations:

> State legislation authorizing the consolidation of railroad corporations of several States is not a regulation of interstate commerce in violation of the Constitution of the United States, *in the absence of action by Congress.*

There is only one inference to draw from these words, and that is this: That, in the opinion of the author, Congress has the power to legislate upon the subject of interstate railroad consolidations, and if it should so legislate, State legislation covering the same field would be in violation of the commerce clause of the Federal Constitution.

In support of his statement of the law Mr. Noyes cites, among other cases, that of *Louisville and Nashville R. Co.* v. *Ky.* (161 U. S., 701), which counsel for the defendants erroneously claim to have decided that the States possess *exclusive* power over the consolidation of railroad cor-

porations chartered by them, even where such corporations operate competing interstate lines.

Certainly the commerce powers of the Federal Government, as thus expounded, are broad and ample enough to prevent the restraint or *obstruction* of interstate commerce by combinations and monopolies of competing lines or instrumentalities of interstate transportation, bearing in mind, of course, that such instrumentalities come within the generic term "commerce." And if this were not so, how could the Federal power over commerce be "supreme," "complete," and "plenary," and "vested in Congress as absolutely as it would be in a single government," as this court has said it is? Again, could not the States before the adoption of the Constitution have prohibited such combinations and monopolies? Beyond the shadow of a doubt they could. And can not the English Parliament prohibit them? Undoubtedly it can. Then, says this court, Congress can. And it is peculiarly the duty of Congress to legislate against restraints, economic or otherwise, upon interstate commerce, for of the various reasons for investing the Federal Government with the power to regulate commerce among the several States, the one uppermost in the minds of the members of the Constitutional Convention was to keep the channels of such commerce open and free from obstructions and restraints. Said Chief Justice Waite in *Pensacola Tel. Co.* v. *Western Union Tel. Co.* (96 U. S., 1):

> As they [the commercial powers] were intrusted to the General Government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the States and the transmission of intelligence *are not obstructed or unnecessarily encumbered by State legislation.*

Again, it is to be borne in mind—and this is sometimes lost sight of—that the exclusive jurisdiction of the Federal Government over commerce with foreign nations and among the States, and over the instrumentalities of such commerce, includes the power of police, or, that which is its equivalent, over those subjects in all its undefined breadth and fullness. This police power of Congress, with reference to foreign and interstate commerce and the instrumentalities thereof, is just as full, complete, and far-reaching as is the police power of the State legislatures with reference to subjects within the exclusive jurisdiction of the States. In either case there are no limitations to its exercise, except the constitutional guaranties in favor of life, liberty, and property.

> It is not doubted that Congress has the power to go beyond the general regulations of commerce which it is accustomed to establish and to descend to the most minute directions, if it shall be deemed advisable; and that to whatever extent ground shall be covered by those directions, the exercise of State power is excluded. Congress may establish police regulations, as well as the

> States, confining their operation to the subjects over which it is given control by the Constitution. (Cooley, Const. Lim., 722, 723.)
>
> The vague and ill-considered notions that are widely entertained as to what is meant by the "police power," may be observed in certain misleading observations that have a considerable currency, e. g., that the Federal Government has no police power in the States; * * * As regards the affirmative power of the General Government, when it is remembered that certain entire topics are committed to it, for example, those of foreign relations, the taxing of imports, the post-office, the currency, bankruptcy, *the regulation of external and interstate commerce*, it is easy to see that much of what is understood by *the "police power" is wrapped up in these things;* * * * (Thayer's Cases on Const. Law, p. 742, note.)

The police power—or equivalent power—of the Federal Government over interstate and foreign commerce is not less plenary and complete because, as to those commercial subjects which are local and do not admit of uniform regulation, the States are permitted to exercise the power until Congress, by its legislation, covers the same field. As Judge Cooley says:

> * * * As the general police power can better be exercised under the supervision of the local authority, and mischiefs are not likely to spring therefrom so long as the power to arrest collision resides in the

> national courts, the regulations which are made by Congress do not often exclude the establishment of others by the State covering very many particulars. (Const. Lim., 723.)

Now—

> Laws against combinations for the purpose of restricting production, maintaining prices, or suppressing competition, have a relation to the end of all police regulations—the comfort, welfare, or safety of society. (Noyes on Intercorporate Relations, sec. 409.)

Anti-trust statutes, therefore, are enacted in the exercise of the police, or an analogous, power. (*State* v. *Firemen's Fund Ins. Co.*, 152 Mo., 46; *State* v. *Schlitz Brewing Co.*, 104 Tenn., 715; *Waters-Pierce Co.* v. *State*, 19 Tex. Civ. App., 1.)

If, then, Congress have the police power, or its equivalent, over foreign and interstate commerce and the instrumentalities thereof, it may, as a matter of course, in the exercise of that power, strike down restraints upon such commerce, whether they result from combinations and monopolies of the agencies of transportation or otherwise, just as a State could prohibit similar restraints upon intrastate commerce. To contend otherwise is to contend that the Federal power over interstate and foreign commerce is not supreme, but is in some respects subordinate to State authority; that the police powers or the reserved

powers of the States are, for some purposes, paramount to the powers of Congress in fields wherein the Federal Government has been invested by the Constitution with complete and supreme authority. This, of course, is not so. As Mr. Justice Harlan said in *New Orleans Gas Co.* v. *Louisiana Light Co.* (115 U. S., 650, 661):

> Definitions of the police power must * * * be taken subject to the condition that the State can not, in its exercise, for any purpose whatever, encroach upon the powers of the General Government. * * *

But counsel for the defendants claim that this court decided in the case of the *Louisville and Nashville Railroad Co.* v. *Kentucky* (161 U. S., 677, 702), that Congress has no power to prohibit the consolidation of competing interstate railroads, and in support of the claim they cite the following passage from the opinion of the court:

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

It was argued that this was conclusive to the effect that regulations concerning the consolidation of competing railroad corporations engaged in interstate commerce, being regulations of "the instruments of such commerce," are within the

State jurisdiction, and that Congress has nothing to do with the subject; that if it undertook to legislate with reference to it, it would invade the rights of the States. The quotation above, however, upon which defendants rely, is but one sentence of a paragraph in the opinion of Mr. Justice Brown, which paragraph must be read as a whole in order to comprehend what he really intended to say in reference to the powers of the States and the United States, respectively. The full paragraph is this:

> It has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to the instruments of such commerce, *so far as the legislation was within its ordinary police powers*. Nearly all the railways in the country have been constructed under State authority, and it can not be supposed that they intended to abandon their power over them as soon as they were finished. The power to construct them involves necessarily the power to impose *such regulations* upon their operation as a sound regard for the interests of the public may seem to render desirable. In the division of authority with respect to interstate railways Congress reserves to itself the superior right to control their commerce and forbid interference therewith; while to the States remains the power to create and to regulate the instruments of such commerce so far as necessary to the conservation of the public interests.

The words italicised by me indicate that Mr. Justice Brown had in his mind the distinction between legislation which affected interstate commerce generally and that which only affected it in respect to local matters. From this it will be seen that the court did not intend to give the words the effect contended for by the defendants. To give them that effect it would be necessary to insert the word "exclusive" before the word "power" in the second clause, so as to make it read, "while to the States remains the *exclusive* power to create and regulate the instruments of such commerce, etc." And surely this court did not mean that, for Congress has created "the instruments of such commerce," and it has passed regulations concerning them, and the power to do these things is now unquestioned. (*California* v. *Pacific Railway Co.*, 127 U. S., 1.)

What the court did mean, no doubt, was that in respect of matters of a local nature, which did not admit or require uniform regulation, the States may "regulate the instruments of such commerce" *until Congress legislates on the same subjects*, while in respect of matters of national importance, or which admit of uniform regulation, the power of the States is wholly excluded—a distinction explained and affirmed in a long line of decisions rendered by this court, and which has been regarded as a settled principle of constitutional construction, but which would lose its significance altogether if the above-quoted passage

from *Louisville and Nashville R. R.* v. *Kentucky* were construed as counsel for defendants contend. The distinction was aptly stated by Mr. Justice Field in *Welton* v. *Missouri* (91 U. S., 275):

> The power to regulate it [commerce] embraces all the instruments by which such commerce may be conducted. So far as some of these instruments are concerned, and some subjects which are local in their operation, it has been held that the States may provide regulations *until Congress acts with reference to them;* but where the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all State authority.

To the same effect are the following cases, among others: *Cooley* v. *Port Wardens of Phila.* (12 How., 299, 320); *Sherlock* v. *Elling* (93 U. S., 99, 104); *Morgan* v. *Louisiana* (118 U. S., 455, 463); *Smith* v. *Alabama* (124 U. S., 465); *Nashville, Chattanooga, etc., R. Co.* v. *Alabama* (128 U. S., 96); *Hennington* v. *Georgia* (163 U. S., 299); *N. Y., N. H. & Hartford R. R.* v. *New York* (165 U. S., 628, 631); *Missouri, Kansas & Texas Ry.* v. *Haber* (169 U. S., 613, 626).

The last three of these cases, it is to be noted, were decided after the case of the *Louisville and Nashville R. Co.* v. *Kentucky* (*supra*). There can be no doubt, therefore, that when in the latter case the court said that to the States remains the power to regulate the instruments of interstate commerce

it had in mind those regulations of a local character which the States are permitted to make *in the absence of Federal legislation covering the same subjects*, and did not intend to change any old principle or to enunciate any new principle of constitutional construction.

IV.

OWNERSHIP OF A MAJORITY OF ITS STOCK CONSTITUTES THE *CONTROL* OF A CORPORATION WHEN THE INQUIRY IS WHETHER A COMBINATION OR MONOPOLY HAS BEEN FORMED TO STIFLE COMPETITION BETWEEN TWO OR MORE RIVAL AND COMPETING RAILROADS.

This is reasonable and in the strictest accordance with the principles of law governing combinations. It has already been dwelt upon with some emphasis that the question whether the Federal law against combinations and monopolies has been violated in a given case is, in the last analysis, a question of power, or—to be precise—of the possession of power. That is to say, the decisive circumstance in such a case is whether the alleged combination or monopoly has the *power* to stifle competition—to restrain trade; not whether it is exercising the power. And therefore, by a parity of reasoning, the question of control, in connection with the formation of combinations, is likewise a question of *power*—of power to control. It is not whether the persons with whom control is alleged to lie, immediately, and in their own proper persons carry on, operate, and in all respects exercise direct control over the property

and business of the corporation. This may be done through the agency of the corporate entity—the trustee for the stockholders—and through officers and directors chosen by the latter. The material inquiry is, has a coterie of persons, by acquiring a majority of the shares of each of several rival corporations, obtained such *power* over them that they can cause competition between them to cease, and in that way, and to that extent, restrain trade or commerce? If so, such persons *control* the corporations.

This reasoning is not new. It was used by courts in reaching the conclusion that the "trust" form of combination is illegal. That form of combination was condemned because it centered in one body—the trustees—"the *control* of several corporations," usually competing corporations. Now what was the nature of this control? It was purely and simply the control incident to the legal ownership of a majority or more of the stock of the constituent corporations and the resulting right to choose their officers and directors. The trustees did not have the immediate and direct management and control of the property and affairs of the several corporations. The officers and directors of the constituent corporations retained that, just as they do when the attempted combination takes the form of a holding company.

But this proposition is not only in accord with reason; it is sustained by abundant authority.

In Noyes on Intercorporate Relations (sec. 294) it is said that—

> A corporation which owns a majority of the shares of the capital stock of another corporation *controls* it.

In the case of *Farmers' L. & T.* v. *N. Y., etc., R. Co.* (150 N. Y., 410, 424) the court of appeals of New York stated the rule that—

> * * * Where, as in this case, a majority of the stock is owned by a corporation or a combination of individuals, and it assumes the control of another company's business and affairs through its control of the officers and directors of the corporation, it would seem that for all practical purposes it becomes the corporation of which it holds a majority of stock. * * *

In the case of the *People* v. *Chicago Gas Trust Co.* (130 Ill., 268, 291) the question was before the supreme court of Illinois:

> "What results," the court inquired, "must necessarily follow from such ownership of a majority of the shares of stock of these four companies?
>
> "One result is that the Chicago Gas Trust Company can *control* the four other companies. The question is not whether it has attempted to exercise such control; the law looks to the general tendency of the power conferred. (Greenhood on Public Policy, p. 5; *Richardson* v. *Crandall*, 48 N. Y., 343; *Salt Co.* v. *Guthrie*, 35 Ohio Stat., 666). * * * It can not be denied that the appellee, as

> owner of the *majority of the shares* of stock of these four companies, can *control* them in the exercise of all their corporate powers through a board of managers of its own selection. In *Weilenger* v. *Spruance* (101 Ill., 278) this court, speaking through Mr. Justice Scholfield, said: 'The stockholders elect the directors, and through them carry into effect the corporate functions. Presumably, the directors act in obedience to the aggregate wishes of the stockholders, etc.' (*Milbank* v. *N. Y., L. E. & W. R. R. Co.*, 64 How., N. Y. Rep., 29.)"

In *Pearsall* v. *Great Northern Railway* (161 U. S., 646, 671), this court ruled that the transfer of one-half of the capital stock of the Northern Pacific Railway Company to the shareholders of the Great Northern would, with small additional acquisitions, give the latter company a "*controlling* interest" in—the "*mastership*" of—the former, in plain violation of the acts of the legislature of Minnesota prohibiting any railroad corporation from consolidating with, leasing or purchasing, or in any other way becoming the owner of, or *controlling* any other parallel and competing railroad corporation. Mr. Justice Brown, speaking for the court, said:

> But the fact that one-half of the capital stock of the reorganized company is to be turned over to the shareholders of the Great Northern, which is, in turn, to guarantee the payment of the reorganized bonds, is evidence of the most cogent character to

> show that nothing less than a purchase of a *controlling interest, and practically the absolute control*, of the Northern Pacific is contemplated by the arrangement. With half of its capital stock already in its hands, the purchase of enough to make a majority would follow almost as a matter of course, and the *mastership* of the Northern Pacific would be assured.

The decision in the Pearsall case, must be regarded as conclusive on this point.

Counsel for the defendants, however, insist that the ownership of the majority of the capital stock of a corporation does not constitute control thereof, and in that behalf they cite a remark made by Chief Justice Waite in the case of *Pullman Car Co.* v. *Mo. Pac. R. Co.* (115 U. S., 587), to wit:

> It [i. e., the company owning a majority of the stock of another corporation] has all the advantages of the control of the road, but that is not in law the control itself. Practically it may control the company, but the company alone controls its road. In a sense the stockholders of a corporation own its property, but they are not the managers of its business or in the immediate control of its affairs.

There is nothing in this language which contradicts the proposition that ownership of a majority of its stock constitutes the control of a corporation when the inquiry is whether the control of two competing railways engaged in inter-

state commerce has been concentrated in a single body in violation of the Anti-trust Act, for—

(1) It is sufficient, to constitute such control, that the majority stockholders "control the company," as the Chief Justice concedes they do; it is not essential that they should be "the managers of its [the company's] business or in the immediate control of its affairs." This has been fully shown.

(2) * * * "In that case (*Pullman Car Co.* v. *Mo. Pac. Co.*, *supra*) the meaning of the word *controlled*, as used in a private contract, was the point under consideration, and what was said on the subject can not be held applicable to cases arising under the Anti-trust Act when the point involved is whether the ownership of all of the stock of two competing and parallel railroads vests the owner thereof with the power to suppress competition between such roads." (From the opinion of Thayer, J., in the court below.)

But even though the remark of Chief Justice Waite in *Pullman Car Co.* v. *Mo. Pac. Co.* (*supra*) were susceptible of the construction that counsel for defendants put upon it, the case at bar would not be affected thereby, because if that remark can be construed to lay down the general rule that the ownership of the majority of its stock does not constitute the control of a corporation, it has been overruled by the decision in the case of *Pearsall* v.

Great Northern Railway (supra), where the question whether such ownership did constitute control was squarely before the court and was decided in the affirmative, as already noted. The language of Chief Justice Waite, on the other hand, was a dictum.

In *Pa. R. Co.* v. *Com.* (7 Atl. Rep., 368, 371), which was a case involving the construction of a provision of the constitution of Pennsylvania against the acquisition by one railroad corporation of the *control* of a competing company, the court held that the ownership of a majority of the stock constituted such *control*. Simonton, P. J., who, in the course of his decision, referred to the case of the *Pullman Car Co.* v. *Mo. Pac. Co.* (*supra*), which had then just been decided, said:

> * * * The case of *Pullman Palace Car Co.* v. *Mo. Pac. R. Co.* (6 Sup. Ct. Rep., 164), recently decided by the Supreme Court of the United States, is cited to sustain the proposition that the ownership of the stock of a corporation does not give control of the corporation. We have carefully considered the opinion delivered in that case, which, although not of binding authority upon the State courts, because not deciding a Federal question, is yet, in view of its source, entitled to the highest respect. *But we do not think it sustains the position contended for.* The decision of the question of control was not called for in the case, which was already decided on another and a fundamental point.

> But, waiving this, the point decided is merely that the ownership of the stock does not *necessarily* give control of the road. The Chief Justice says, speaking of the stock-holding company: "Practically, it may control the company, but the company alone controls its road." (6 Sup. Ct. Rep., 199.) This distinction seems very narrow, but it is certainly involved in the conclusion reached, which can not stand unless it is recognized; *for it is too plain to bear argument that the ownership of the stock of a corporation carries with it the control of the corporation.* Indeed, this is merely a different way of stating the truism that a corporation is controlled by its stockholders. That they do it through the agency of a board of directors and other officers does not alter the fact.

If the argument up to this stage has accomplished its aim it has shown that a combination or monopoly of competing lines of railway engaged in interstate transportation, such as the Great Northern and Northern Pacific Railways, is a combination or monopoly in restraint of interstate commerce within the prohibitions of the Anti-trust Act; and, further, that Congress may prohibit such combinations or monopolies of competing lines of interstate railway without invading any private or State rights; and, finally, that the ownership of a majority of the shares of capital stock of a corporation constitutes the control thereof

when the inquiry is whether a combination or monopoly has been created by concentrating in a single body the power to stifle competition between rival and competing railroads or other corporations.

With these propositions as a basis, the United States will undertake to show that—

V.

THE GREAT NORTHERN AND NORTHERN PACIFIC RAILWAY COMPANIES, COMPETING INTERSTATE CARRIERS, HAVE BEEN COMBINED IN VIOLATION OF SECTION 1 OF THE ANTI-TRUST ACT.

(1) The Great Northern and Northern Pacific Railway companies have been combined "in the form of trust;" that is to say, a majority of the stock of each road has been transferred to a common trustee, the Securities Company, which is thus vested with the power to control and direct both roads for the common benefit of the stockholders of each.

The Anti-trust Act condemns in express terms every "combination in the form of trust," which is in restraint of trade or commerce with foreign nations or among the several States. If, therefore, it can be shown that the Great Northern and Northern Pacific Railway companies have been combined "in the form of trust," a violation of the very letter of the statute has been proved.

There is no great difficulty in getting at what Congress meant by a "trust." The meaning of the term was well understood in the economic and industrial world at the time of the passage of the

Anti-trust Act, and is now. The word was first used to describe an arrangement whereby the business of several competing corporations is centralized and combined by causing at least a majority of the stock of the constituent corporations to be transferred to a trustee, who, in return, issues to the stockholders "trust certificates." The trustee holds the legal title to the shares and has the right to vote them, and in this way exercise complete control over the business of the combination. The trustee also receives the dividends on the shares, and out of these pays the former stockholders of the constituent corporations dividends on the "trust certificates." (Century Dictionary; A. & E. Ency. Law (2d ed.), title "Monopolies & Trusts;" *State* v. *Standard Oil Co.*, 49 Ohio St., 137.)

In Eddy on Combinations, section 582, "trusts" are defined to be—

> Combinations formed by creation of a trust, wherein the trustees or trustee body or *trustee corporation* hold the stock of the constituent corporations with power to vote the same, and so control the several corporations, issuing, as a rule, against the stock so held *certificates of stock of the* trustees, trustee body, or *trustee corporation.*

Mr. Noyes, at section 304 of his work on Intercorporate Relations, defines a "trust" as—

> A combination of competing corporations formed through the transfer by the stockholders of several corporations to a common

> trustee of *controlling* stock interests therein, in exchange for certificates issued by the trustee for each stockholder's proportional equitable interest in all the stock so transferred.

A definition often quoted is that of Mr. S. C. T. Dodd, the general solicitor and originator of the Standard Oil Trust—one of the first and perhaps the most perfect example of this type of industrial organization. In a pamphlet entitled "Combinations: Their Uses and Abuses," he describes a "trust" as—

> * * * An arrangement by which the stockholders of various corporations place their stocks in the hands of certain trustees, and take in lieu thereof certificates showing each stockholder's equitable interest in all the stock so held. The result is twofold: 1. The stockholders thereby become interested in all the corporations whose stocks are thus held. 2. The trustees elect the directors of the several corporations.

Does the case at bar come within these definitions? The pleadings and the evidence show, and the court below found as conclusions of fact, that Mr. Hill, Mr. Morgan, and the other individual defendants named in the bill, who were large and influential stockholders in the Great Northern and Northern Pacific Railway companies and who practically controlled their policies, conceived the plan of placing all or at least a majority of the stock of the two roads in the hands of a single

"custodian"—a holding corporation. The plan contemplated that these gentlemen would exchange their shares in the respective railroad companies for the shares of the holding corporation and use their influence to induce other stockholders in the railroad companies to do the same. (See statement of case *supra*, pp. 32–47.) The holding corporation was organized as planned, under the laws of New Jersey, with the corporate title, "Northern Securities Company." Thereupon, in pursuance of the preconceived design, stockholders of the Great Northern and Northern Pacific companies exchanged their respective holdings in the two railway companies for the stock of the new corporation—the Northern Securities Company—until the latter had acquired about 76 per cent of all the stock of the Great Northern and about 96 per cent of all the stock of the Northern Pacific. The Securities Company thus became clothed with the power to elect the officers and directors of the two railways, and thereby control absolutely their management and policy; while the formerly divergent interests of the stockholders of the respective roads were converted into a common interest in both roads.

The Government contends that these facts disclose all the essential elements of a "trust:"

(*a*) The trustee. The Securities Company holds, as trustee, a large majority of the shares of the Great Northern and Northern Pacific Railway

Companies—two competing corporations. Between a corporation and its stockholders there subsists the relation of a trust (using the term now in its strict and proper legal sense), the nature of which is declared in the charter or articles of incorporation. The corporation—the artificial entity—is the trustee; the stockholders are the cestuis que trustent. The former has the legal title to the corporate property; the latter have the equitable and beneficial interest therein, and the certificates of stock represent the proportionate equitable interests of the several stockholders. (Morawetz on Private Corporations, sec. 237, and cases there cited.) The Securities Company, therefore, is a trustee for its stockholders and its certificates of stock represent their proportionate equitable interests in the corporate property. Now the stockholders of the Securities Company are the former majority stockholders of the Great Northern and Northern Pacific companies, and the corporate property of the Securities Company consists of the Great Northern and Northern Pacific shares which these majority stockholders transferred to it. Whence it follows that the Securities Company holds a large majority of the shares of the Great Northern and Northern Pacific Railway companies as trustee for its stockholders, the former majority stockholders of the two railways (who thus continue to hold the equitable and beneficial interest in said shares), just as the "trustee," in the simplest form of "trust"

combination holds all or a majority of the shares of the constituent corporations in trust for the trust certificate holders. It makes no difference that the trustee in this case, the Securities Company, is a corporation. It is well settled that the trustee in a trust combination may be either a natural or an artificial person. (Beach on Monopolies and Industrial Trusts, sec. 159; Eddy on Combinations, sec. 582; *People* v. *Chicago Gas Trust Co.*, 130 Ill., 275.)

(*b*) The trust agreement. The terms of the trust are to be found in the charter or articles of incorporation of the Securities Company, the charter of a corporation being the unanimous agreement of its stockholders, declaring the nature and conditions of the trust relation between them and the corporate entity. (Morawetz on Private Corporations, sec. 237.) It is proper to say here that while a *written* trust agreement between the stockholders is a *usual* element of the trust form of combination, it is not an *essential* one. It is sufficient to show that the stockholders acted in pursuance of *any* understanding, plan, or scheme, written, verbal, or otherwise. This question was before the Supreme Court of Illinois in *Harding* v. *American Glucose Company* (182 Ill., 551), where it was held that—

> An agreement to form an illegal combination or trust need not be embodied in writing, but may rest upon a verbal understanding evidenced by the acts of the parties.

(*c*) The trust certificates. In return for the shares of the two railway companies the Securities Company issued its own certificates of stock. These correspond exactly to the "trust certificates." They fill the same office precisely; that is to say, like the latter, they represent the proportionate equitable interests which the holders thereof, respectively, have in all the stock held by the common trustee, which, in this case, is the Securities Company.

(*d*) The voting power. The Securities Company, the trustee, has the power to vote the stock of the constituent corporations, the Great Northern and Northern Pacific Railway companies, and thus elect the directors thereof, and in that way exercise control over their business, just as the "trustee" in the simplest form of trust combination controls the business of the several corporations composing the combination by voting at least a majority of their stock.

(*e*) The collection of dividends. The Securities Company, as trustee, collects the dividends accruing upon the stock of the constituent corporations—the Great Northern and Northern Pacific companies—and out of the fund thus realized it pays dividends on its own stock; just as the "trustee" in the simple "trust" collects the dividends on the stock of the several corporations in the combination and out of these pays dividends on his "trust certificates."

Again, judged by its results, the Securities Company comes squarely within Mr. Dodd's definition of a trust (*supra*). For, first, the stockholders thereof have become interested in *all* the corporations whose stocks are held in trust (thus removing every motive for competition); and, secondly, the trustee, the Securities Company, elects the directors of the several corporations—the Great Northern and Northern Pacific Railway companies.

The case at bar thus responds to every test by which the existence of a "trust" is determined.

In still another light the Northern Securities Company constitutes a "trust."

As the courts throughout the country held with practical unanimity that the class of "trusts" just described is illegal, a second class was invented. "*A second class of 'trusts' consists of corporations that have acquired control of other corporations by purchasing their stock.* This organization is of the same general character as the preceding, but the form is changed in order to escape the force of the decisions of the courts relating to corporate partnerships." (Beach on Monopolies and Industrial Trusts, sec. 159.) The Securities Company clearly comes within this second classification of "trusts." It is a corporation which has obtained control of other and competing corporations by acquiring their stock.

Mr. Noyes, in his work on Intercorporate Relations, section 310, describes a combination of this type in the following language:

> In pursuance of an agreement between persons interested in competing corporations, a holding corporation is organized, under the laws of a State permitting its corporators to acquire and hold the stock of other corporations, with a capital stock at least equal to the aggregate capital of the several corporations. This corporation issues its own shares, upon an agreed basis, in exchange for the shares of the several corporations, provided that it obtain at least a majority of the shares of each corporation. All the corporations continue in existence, and the subsidiary companies are controlled by the holding corporation, which derives its income from the dividends paid by them. In organizing *this form of corporate combination* the dealings are entirely between the holding corporation and the stockholders of the several companies.

The combination of the Great Northern and Northern Pacific companies through the Securities Company corresponds to this description down to the most minute detail. Some writers, including Mr. Noyes, call this form a "corporate combination" rather than a "trust," but the difference in name has no significance—does not alter the nature of the combination—because, as Mr. Noyes himself says in his next section (sec. 311), "the legality of a combination of corporations in any form—trust,

corporate combination, or simple association—is to be ascertained by the application of the same principles." In another place (sec. 285) Mr. Noyes refers to holding corporations as "having taken the place of the earlier 'trusts' in the formation of industrial combinations. They have also been employed," he continues, "to effect a practical consolidation of railroad companies." And as to their validity, under the Federal Anti-trust Act, when so employed, he says:

> While a corporation, in the legitimate exercise of power conferred, may purchase and hold the shares of other corporations, the formation of a holding corporation, *as a part of a scheme* to bring about a combination of competing railroad companies—a practical consolidation through the pooling of earnings and virtual pooling of stocks—in restraint of interstate or foreign commerce, seems clearly in violation of the provisions of the statute. (Sec. 393.)

Again the language of the author fits the Securities Company perfectly.

An adjudged case exactly in point is that of the *People* v. *Chicago Gas Trust Company* (130 Ill., 268). In all its general and leading features that case presents a perfect and complete parallel to the case at bar. The Chicago Gas Trust Company was incorporated under the general incorporation law of the State of Illinois for two purposes, as expressed in its articles of association: First, for the purpose

of erecting and operating gas works for the manufacture and sale of gas in Chicago and other places in the State of Illinois, and, second, "to purchase and hold or sell the capital stock, or purchase or lease or operate the property, plant, good will, rights, and franchises of any gas works or gas company or companies, or any electric company or companies in Chicago or elsewhere." The company did not exercise the powers granted under the first clause, but it did exercise those attempted to be granted under the second clause; that is to say, it bought a majority of the stock of each of the other gas companies in Chicago, and thereby obtained control of them. It will be noted that the powers thus claimed and exercised by the Chicago Gas Trust Company are of identically the same nature as those claimed and exercised by the Securities Company. The two cases present precisely the same question, namely, whether a combination formed by one corporation buying a controlling interest in the stock of two or more competing corporations is legal. Furthermore, the principles of law for determining the legality of such a combination are substantially the same in both cases. The Chicago Gas Trust Company case was decided on common-law principles (see pp. 294, 295 of the report), no statute against trusts and monopolies having been enacted by the legislature of Illinois up to that time; and the case at bar must be decided by the application of practically the same principles, for it is conceded that the Sher-

man Anti-trust Act, under which the case was brought, engrafts upon the Federal jurisprudence (with some modifications which extend rather than limit their operation) the common-law principles governing combinations and monopolies in restraint of trade and commerce. In view, therefore, of the complete analogy between the two cases, it will be instructive to note briefly the reasoning by which the supreme court of Illinois was led to the conclusion that the Chicago Gas Trust Company was an illegal trust or combination. Magruder, J., speaking for the court, said at pages 292 and 302:

> The control of the four companies by the appellee, an outside and independent corporation, *suppresses competition between them, and destroys their diversity of interest and all motive for competition.* There is thus built up *a virtual monopoly* in the manufacture and sale of gas.
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> * * * * *
>
> We held in *Chicago Gas Light Co.* v. *People's Gas Light Co.* (121 Ill., 530) that * * * a contract between two of these four companies, *the effect of which was to stifle competition* between them and necessitate an abandonment of their public duties, was against public policy and could not be enforced. *The attempt to consolidate the two companies, by placing the majority of their stock in the hands of the appellee, would accomplish the same unlawful result which was sought to be attained by the forbidden contract.*

Harding v. *American Glucose Co.* (182 Ill., 551) is another case in support of the contention that the Securities Company constitutes a "combination in the form of trust." The question there was whether "a trust is created where a majority of stockholders consolidate their interests by conveying their property to a corporation organized for the purpose of taking" it. The only distinction between the two cases, therefore, is that in one the *property* of the combining corporations is transferred to the new corporation, while in the other it is the *stock* which is so transferred. This distinction, of course, is formal rather than substantial. The supreme court of Illinois held that the facts in this case disclosed an illegal trust. Magruder, J., delivering the opinion of the court, said:

> A trust has usually appeared in the form of an agreement between stockholders in many corporations to place all their stock in the hands of trustees, and to receive trust certificates therefor from the trustees. But the question in the present case is whether a trust is created where a majority of stockholders consolidate their interests by conveying all their property to a corporation organized for the purpose of taking their property. Any combination of competing corporations for the purpose of controlling prices, or limiting production, or suppressing competition is contrary to public policy, and is void. (2 Cook on Corporations, 4th

> ed., sec. 503*a*). It makes no difference whether the combination is effected through the instrumentality of trustees and trust certificates or whether it is effected by creating a new corporation and conveying to it all the property of the competing corporations. *The test is whether the necessary consequence of the combination is the controlling of prices, or limiting of production, or suppressing of competition in such a way as thereby to create a monopoly.*

It is not essential, however, to show that the Great Northern and Northern Pacific Railway companies have been combined in the technical form of "trust," or "corporate combination," as some writers call it when the trustee is a holding corporation. Section 1 of the Anti-trust Act covers any and every form of combination. A violation of that section will have been established, therefore, if it is shown that—

(2) Mr. Hill, Mr. Morgan, and the other individual defendants, acting in concert or in pursuance of a previous understanding, have caused the title to a majority of the shares of the Great Northern and Northern Pacific companies to be vested in a single person—the Securities Company—thereby centering the *control* of the two roads in a single head and in that way effecting a *combination* of them, the effect or tendency of which is to suppress competition between them.

As already noted (see Statement of Case, *supra*, pp. 32–47), the evidence in this case shows, and

the court below found, that Mr. Hill, Mr. Morgan, and the other individual defendants, who were stockholders in the Great Northern and Northern Pacific and who practically controlled the two roads, acting in pursuance of a previous understanding, plan, or scheme, procured the organization of the Securities Company, and caused it to acquire a large majority of the stock of the Great Northern and Northern Pacific (giving its own stock in exchange), thus enabling it to control and direct the policies of the two roads by electing officers and directors who will obey its will. As a result of this arrangement the former majority stockholders of the two railways, including the individual defendants, became practically the whole stockholding body of the Securities Company. For the purposes of this proposition (2), it may be considered that there were three steps in the execution of the scheme. The first was the organization of the Securities Company. As just remarked, the evidence shows (see Statement of Case, *supra*, pp. 32–47) and the court below found, that the Securities Company was organized in accordance with a previous understanding between the individual defendants, or some of them. They were thus parties to the first step in the plan. The second step was the transfer to the Securities Company of the stock which the aforesaid defendants held in the Great Northern and Northern Pacific companies, respectively.

This also was done in pursuance of the same previous understanding among the defendants. (Record, p. 831, Clough's testimony.) The defendants, or some of them, were thus parties to the second step. The third and final step was the transfer to the Securities Company of the holdings of other shareholders in the Great Northern and Northern Pacific companies until the Securities Company had acquired a large majority of the stock of both roads. This, as the evidence shows (see Statement of Case, *supra*, pp. 38 to 47), was accomplished through the influence and procurement of those instrumental in the organization of the Securities Company, namely, the individual defendants, and in pursuance of the same previous understanding. The defendants, or some of them, were thus parties to the third step, and this step completed the scheme—completed what the Government charges to be an unlawful combination—by vesting in it the *power* to control the two railways and suppress competition between them (the rule being, as heretofore pointed out, that a combination is complete as soon as it has acquired the *power* to accomplish its aim). The defendants, or some of them, were, therefore, parties to the scheme at every stage of its evolution, from beginning to end, from initiation to culmination. And, as a matter of fact, they do not deny this; they do not deny that they were parties to the formation of the Securities Company and the transactions

whereby that company acquired the major portion of the stock of the Great Northern and Northern Pacific Railway companies. They simply attempt to justify these acts. This is clearly shown by a passage from the answer of Hill and others at page 67*a* of the record:

> The Securities Company, as now existing, became, and is, necessary, as a defensive measure, against attempts of rival interests to gain control of the direction of one or both of defendant railway companies.

(The formation of the combination is divided into three steps for the purposes of this proposition only, that is, proposition numbered 2, page 126, *supra*. While as stated, the evidence, direct and presumptive, establishes that the additional Great Northern shares necessary to give the Securities Company a majority of that stock were transferred to it through the advice and procurement of the defendants, or some of them, yet, as already pointed out (*supra*, p. 47), it is not necessary to show this, it being sufficient to show the two steps: (1) that the plan of the defendants contemplated the transfer of a majority of the stock of each railway to the Securities Company, and (2) that this plan was actually carried out—consummated.)

(3) By still another course of reasoning it can be shown that the acts charged in the bill constitute an illegal combination under section 1 of the Anti-trust Act.

It will be conceded, as the court below says, that "the defendants would have violated the Anti-trust Act if they had done, through the agency of natural persons, what they have accomplished through an artificial person of their own creation. That is to say, if the same individuals who promoted the Securities Company, in pursuance of a previous understanding or agreement so to do, had transferred their stock in the two railroad companies to a third party or parties, and had agreed to induce other shareholders to do likewise, until a majority of the stock of both companies had been vested in a single individual or association of individuals, and had empowered the holder or holders to vote the stock as their own, receive all the dividends thereon, and pro rate or divide them among all the shareholders of the two companies who had transferred their stock, the result would have been a combination in direct restraint of interstate commerce, because it would have placed in the hands of a small coterie of men, the power to suppress competition between two competing interstate carriers whose lines are practically parallel."

The question—the only question—in this view of the case is whether the intervention of this artificial agency—the Securities Company—has, by some magic process, purged the scheme of its illegality and changed the complexion of the defendants' acts from guilt to innocence? In other words, is the element of combination or conspiracy wiped out by the fact that the transfer of the

controlling stock interests in the Great Northern and Northern Pacific Railway companies was made to the Securities Company, which the individual defendants promoted and controlled, instead of to the individual defendants directly? Plainly, the answer to this question must be No; because it makes no difference in the eye of the law whether the illegal acts were done by the Securities Company or by the individuals defendants. The latter controlled and largely composed the Securities Company, and therefore the acts which it nominally did were in reality done by them. The so-called rule of law that a corporation is a juristic person, having an existence separate and apart from its members and acting for itself, is merely a legal fiction invented for the convenience of justice, and it will always be disregarded when it would obstruct rather than serve the ends of justice. (See the discussion of this point, *infra*, pp. 139–146, where the authorities are reviewed.)

So, for the present purpose, the fiction that the Securities Company is a being separate and apart from the individual defendants who largely compose it and control it will be ignored; and when this is done—when we "lift the roof off of the Northern Securities Company" and look in—what meets the eye as the result of the defendants' acts? Why one and the same set of men—the individual defendants being the ruling spirits among them—acting together under a charter agreement and

through the agency of a corporate organization—the Securities Company—in absolute control of two parallel and naturally competing systems of interstate railway. In place of the two distinct sets of stockholders, with rival and competing interests, namely, the stockholders of the Great Northern and Northern Pacific, there has been substituted (by means of the interchange of stocks heretofore described) the one set of stockholders with common and noncompetitive interests, namely, the stockholders of the Securities Company.

Thus, identically the same persons who controlled the Great Northern and Northern Pacific before the Securities Company came into possession of a majority of their shares control them now, only, now, these persons have a common interest—"a community of interest"—in the earnings of both roads, while formerly the interests of the two sets of persons—the two sets of stockholders—were, in most respects, divergent and competitive. It is absurd to say that two railway corporations, which under normal conditions are naturally competitors for traffic, will continue to compete in any real sense after both become subject to the same source of control. It is not in the interest of the stockholders of the Securities Company that one of these railways should prosper at the expense of the other. They have a common interest in both; they receive their dividends from a fund created by pooling the earnings of both. A

more effective method for combining competitive interests—for suppressing competition between rival and naturally competing business corporations—it would hardly be possible to conceive.

When thus analyzed the disguise by which the defendants sought to hide the fact of a combination of the Great Northern and Northern Pacific, and their connection therewith, appears so thin and transparent that it is a cause of wonder that they should ever have adopted it. As Vice-Chancellor Kindersley said in the case of the *Attorney-General* v. *The Great Northern Railway Company* (6 Jur. (N. S.), 1006; S. C. 1 Drew. & Smale, 159), "a more flimsy device, when the particulars are once known, it is impossible to imagine. It may succeed for a time in baffling persons who may have an interest in preventing its being done and has succeeded, but it was a mere crafty contrivance to evade the requisition of the law * * *."

The defendants, however, actually seem to have thought that they could procure the organization of a corporation and have it do what they could not lawfully do themselves or through the agency of natural persons, as if that which would have been illegal if done through the agency of a natural person would lose the stamp of illegality if done through the agency of a corporate organization; but—

> It must not be thought that courts are powerless to strip off disguises that are de-

> signed to thwart the purposes of the law. The mere suggestion of such a condition is an insult to the intelligence of the judiciary. Whenever such disguises are made apparent they can readily be disrobed. The difficulty is in showing the disguises, not in penetrating them when they appear. (*Stockton, Attorney-General*, v. *Central R. Co.*, 50 N. J. Eq., 52.)

That the defendants should have thus attempted to evade the law by a contrivance so easily seen through becomes still more astonishing, however, when it is recalled that devices of exactly the same character had already been repudiated by courts of high standing. For example, the case of *Ford* v. *Chicago Milk Shippers' Association* (155 Ill., 166, 178, 179, 180) is a case of a combination of precisely the same nature, in all material respects, as the combination attempted through the Securities Company. The facts in that case were briefly as follows: The shippers of milk in and around Chicago, desiring to control the market for that product, formed themselves into a corporation, which had general powers to regulate the milk trade in Chicago, and in particular to fix and determine the price of milk. Competition between the various producers and shippers of milk was in this way suppressed. The Chicago Milk Shippers' Association was thus an attempt to convert various rival and competitive interests in the milk trade into one common interest, just as the Securities Company was an attempt to convert

rival and competitive interests in railroad transportation into one common interest. In each case the result was to center the power of control over competitive enterprises in a single corporate head, thus removing every motive for competition. In neither case was there any agreement between the stockholders except the articles of incorporation of their respective corporations; and it was contended in the Illinois case, as it is contended in the case at bar, that a person—a corporation—can not contract, combine, or conspire with himself. The two cases are, therefore, practically identical. The supreme court of Illinois held that the Chicago Milk Shippers' Association was an illegal combination or trust, and the reasoning by which it sustained that conclusion is so forcible and so clearly applicable to the case at bar that I shall quote at some length from the opinion of the court (pp. 179, 180):

> The purposes attempted to be accomplished through the corporation were illegal. *To carry out such purposes it stands as the active business agent of the members, who are stockholders, contracting with it to carry out the purposes of the organization.* It is a combination in violation of the statute and in restraint of trade. * * *
>
> It is urged that the corporation can not alone enter into a trust or combination that would be a violation of this statute. While it is true, as a general proposition, that a corporation may be created and constituted

a legal entity, existing separate and apart from the natural persons composing it, yet it can not act independently, or against the will, or abstain from complying with the direction, of the natural persons who constitute the corporate body. A corporation is, in fact, an association of persons united in one body, having perpetual succession, vested with political rights conferred upon it by the authority creating it. (Morawetz on Corp., sec. 227; 1 Kyd on Corp., 13.) *Such being the nature of the corporate body, acts done by it are the acts of the associated persons*, as corporators or as individuals, and in which capacity the act is done must be determined from the nature and character of the act and the purpose for which the corporation was organized. (*State ex rel.* v. *Standard Oil Co.*, 49 Ohio, 137.) * * * And where, in the organization of the corporate body or the control exercised by the stockholders in determining the agencies selected for managing its business, the business as thus conducted, managed, and controlled is against public policy or in contravention of a statute of the State, such acts of the corporate body and of the individual shareholders are the combined acts of all, and courts are not so powerless that they may not prevent the success of ingenious schemes to evade or violate the law. There can be no immunity for evasion of the policy of the State by its creations. *The corporation, as an entity, may not be able to create a trust or combina-*

> *tion with itself, but its individual shareholders may, in controlling it, together with it, create such trust or combination that will constitute it, with them, alike guilty.*

Again, in the case of the *Distilling and Cattle Feeding Co.* v. *The People* (156 Ill., 448, 490, 491) the supreme court of Illinois had to deal with a scheme of this sort, designed to evade the anti-trust laws of that State. A combination of distilling corporations which had been effected through a "trust" having been declared illegal by the courts, it was sought to accomplish the same purpose by the organization of a "holding corporation," which would take over the property of the constituent corporations; and the question was whether this "holding corporation" was also illegal. Said the court:

> But the defendant (the appellee) contends that * * * *the change in organization from an unincorporated association to a corporation* and the change in the mode of holding the distillery properties of the various corporations formerly belonging to the trust * * * have purged the combination of its illegality. It must be admitted that these changes, so far as they have any effect upon the rights or interests of the former stockholders in those corporations or of the public, are formal rather than substantial. The same interests are controlled in substantially the same way and by the same agencies as before. * * * The

> conveyance and transfer of the properties of the constituent companies to the new corporation was merely a transfer by the trustees to themselves, though in a slightly different capacity, and the former stockholders in the constituent companies simply exchanged their trust certificates, share for share, for stock in the new corporation. That corporation thus succeeds to the trust, and its operations are to be carried on in the same way, for the same purposes, and by the same agencies, as before. The trust, then, being repugnant to public policy and illegal, it is impossible to see why the same is not true of the corporation which succeeds to it and takes its place. The control exercised over the distillery business of the country—over production and prices—and the virtual monopoly formerly held by the trust, are in no degree changed or relaxed, but the methods and purposes of the trust are perpetuated and carried out with the same persistence and vigor as before the organization of the corporation. *There is no magic in a corporate organization which can purge the trust scheme of its illegality*, and it remains as essentially opposed to the principles of sound public policy as when the trust was in existence. It was illegal before and is illegal still, and for the same reasons.

But the defendants insist that it is immaterial—that it has no bearing on the case—that a combination can be discovered by going behind the fiction that the Securities Company is a juristic

person with an existence separate and apart from its members, because, as they say, the law will not allow that fiction to be disregarded or contradicted—will not allow the acts of the corporate entity to be treated as the acts of the natural persons who compose it. The defendants thus seek to defeat the ends of the law by a fiction invented to promote them. They say that the acts complained of were done by the Securities Company acting in its own right as an artificial person; that the individual defendants—stockholders of the Securities Company—had nothing to do with these acts; and that inasmuch as a person, natural or artificial, can not contract, combine, or conspire with himself, the acts complained of are not in violation of section 1 of the Anti-trust Act. As the court of appeals of New York said in the case of the *People* v. *North River Sugar Refining Co.* (121 N. Y., 582, 615), in reply to a similar contention:

> The reasoning leading to that result is so severely technical as to have suggested a justification almost reminding one of an apology. We are called upon to sever the corporation, the abstract legal entity, from the living and acting corporators; as it were, to separate in our thought the soul from the body, and, admitting the sins of the latter, to adjudge that the former remains pure.

Fictions of law, invented to promote justice, can never be invoked to accomplish its defeat. "*In*

fictione juris semper æquitas existit," the maxim reads. And in *Mostyn* v. *Fabriges* (Cowper, 177), Lord Mansfield said that—

> It is a certain rule that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, *but for every other purpose it may be contradicted.*

In *Morris* v. *Pugh* (3 Burr., 1243), Lord Mansfield again laid down the rule that—

> Fictions of law hold only in respect of the ends and purposes for which they were invented; *when they are urged to an intent and purpose not within the reason and policy of the fiction, the other party may show the truth.*

Now, following the rule applicable to fictions in general, it is well settled that when it is in the interest of the administration of justice to do so, courts may and will ignore the fiction that a corporation is a legal being apart from the stockholders, and will consider its acts as the acts of its constituent members; and this is emphatically the case when the State—the sovereign authority—is the complaining party. This proposition is supported by reason and precedent.

Mr. Morawetz in his work on Private Corporations, says, at section 1:

> While a corporation may, from one point of view, be considered as an entity without regard to the corporators who compose it, the fact remains self-evident that a corporation *is not* in reality a person or a thing

distinct from its constituent parts. The word "corporation" is but a collective name for the corporators or members who compose an incorporated association; and where it is said that a corporation is itself a person or being or creature, this may be understood in a figurative sense only.

* * * It is essential to a clear understanding of many important branches of the law on corporations to bear in mind distinctly that *the existence of a corporation independently of its shareholders is a fiction, and that the rights and duties of an incorporated association are in reality the rights and duties of the persons who compose it, and not of an imaginary being.*

In another place (sec. 227) the same author says:

The statement that a corporation is an artificial person, or entity, apart from its members, is merely a description, in figurative language, of a corporation viewed as a collective body; a corporation is really an association of persons, and no judicial dictum or legislative enactment can alter this fact. It is true that the courts of law, *as distinguished from the courts of equity*, do not, as a rule, look beyond the fiction of a separate corporate entity.

In Taylor on Private Corporations, it is said (sec. 50):

The shareholders, then, vested with the corporate powers, are the body corporate, corporation, or company. It is their acts,

> when done in the manner prescribed in the constitution of the corporation, that are, properly speaking, acts of the corporation.

The principle is stated in the following language in Clark and Marshall on Private Corporations (pp. 17 and 22):

> While a corporation is a legal entity distinct from its members for the purpose of suing and being sued, and for the purpose of contracting and taking, holding, and conveying property, etc., it is so by a mere fiction of the law only, and merely for the purpose of convenience in the transaction of its business. In reality, a corporation is a collection or association of individuals, and *the fiction must be disregarded and the fact recognized by the courts whenever the fiction is urged to an intent and purpose which is not within its reason and policy.*

In *People* v. *North River Sugar Refining Co.* (121 N. Y., 582, 621, 622) the court of appeals of New York was confronted with this question. Finch, J., speaking for the court, said:

> The abstract idea of a corporation, the legal entity, the impalpable and intangible creation of human thought, is itself a fiction, and has been appropriately described as a figure of speech. It serves very well to designate in our minds the collective action and agency of many individuals as permitted by the law; and the substantial inquiry always is what in a given case has been that collective action and agency. As

> between the corporation and those with whom it deals, the manner of its exercise usually is material, *but as between it and the State, the substantial inquiry is only what that collective action and agency has done, what it has, in fact, accomplished, what is seen to be its effective work, what has been its conduct.* It ought not to be otherwise.

In the case of the *State* v. *Standard Oil Co.* (49 Ohio St., 137) the stockholders of the Standard Oil Company had transferred their stocks to trustees under an agreement which was in violation of the anti-trust laws of the State of Ohio. The State brought a proceeding against the corporation—the Standard Oil Company—to forfeit its charter. One of the defenses was that the trust agreement was the act of the shareholders as individuals, and not the act of the corporation—the legal entity. The supreme court of Ohio overruled this defense, however, saying:

> The general proposition that a corporation is to be regarded as a legal entity, existing separate and apart from the natural persons composing it, is not disputed; but that the statement is a mere fiction, existing only in idea, is well understood, and not controverted by anyone who pretends to accurate knowledge on the subject. It has been introduced for the convenience of the company in making contracts, in acquiring property for corporate purposes, in suing and being sued, and to preserve the limited liability of the stockholders by distinguish-

ing between the corporate debts and property of the company, and of the stockholders in their capacity as individuals. All fictions of law have been introduced for the purpose of convenience and to subserve the ends of justice. It is in this sense that the maxim *in fictione juris subsistit æquitas* is used, and the doctrine of fictions applied. But when they are urged to an intent and purpose not within the reason and policy of the fiction they have always been disregarded by the courts. * * *

* * * So that the idea that a corporation may be a separate entity, in the sense that it can act independently of the natural persons composing it, or abstain from acting where it is their will it shall, has no foundation in reason or authority, is contrary to the fact, and to base an argument upon it, where the question is as to whether a certain act was the act of the corporation, or of its stockholders, can not be decisive of the question, and is therefore illogical; for it may as likely lead to a false as to a true result.

Now, so long as a proper use is made of the fiction that a corporation is an entity apart from its shareholders, it is harmless, and, because convenient, should not be called in question; but where it is urged to an end subversive of its policy, or such is the issue, the fiction must be ignored, * * *

In *Ford* v. *Chicago Milk Shippers' Association* (*supra*) this question was squarely before the

supreme court of Illinois, which held that "the acts done by it [the corporation] are [were] the acts of the associated persons." See the passage from the opinion in this case quoted supra. The following cases also bear on the general question: *Attorney-General* v. *Great Northern Ry. Co.* (6 Jur. (N. S.) 1006, S. C., 1 Drew & Smale, 157); *Pa. R. Co. et al.* v. *Com.* (7 Atl. Rep., 368); *Stockton, Attorney-General,* v. *Central R. Co.* (50 N. J. Eq., 52).

This concludes the argument under section 1 of the Anti-trust Act.

VI.

THE NORTHERN SECURITIES COMPANY, IN VIOLATION OF SECTION 2 OF THE ANTI-TRUST ACT, HAS MONOPOLIZED A PART OF INTERSTATE COMMERCE BY ACQUIRING A LARGE MAJORITY OF THE SHARES OF THE CAPITAL STOCK OF THE GREAT NORTHERN AND NORTHERN PACIFIC RAILWAY COMPANIES—TWO PARALLEL AND COMPETING LINES ENGAGED IN INTERSTATE COMMERCE; AND THE NORTHERN SECURITIES COMPANY AND THE INDIVIDUAL DEFENDANTS, OR TWO OR MORE OF THEM, HAVE COMBINED, EACH WITH THE OTHER, SO TO MONOPOLIZE A PART OF INTERSTATE COMMERCE.

It has been shown (pp. 72–74, *supra*) that in the modern sense of the term—the sense in which it is used in the Anti-trust Act (*E. C. Knight Co.* v. *United States*, *supra*; *United States* v. *Trans-Missouri Freight Asso.*, *supra*)—"to monopolize signifies the combining or bringing together in the hands of one person or set of persons of the control of, or the power to control, several rival and competing businesses, to the end that competi-

tion between them may be suppressed. And, as this court has said (in the case of the *E. C. Knight Co.* v. *United States*, *supra*), in order to vitiate an attempt or effort to monopolize "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."

It has also been shown (pp. 84 et seq., *supra*) that a monopoly of the means and instrumentalities of transportation immediately leads to, in fact is, a monopoly of transportation, and that a monopoly of a part of interstate transportation is a monopoly of a part of interstate commerce.

And, finally, it has been shown (p. 106 et seq., *supra*) that, for the purpose of determining whether two or more competing corporations have been combined or their business monopolized, the ownership of a majority of its stock constitutes the *control* of a corporation.

From these premises the conclusion follows that by acquiring a majority of the shares of the Great Northern and Northern Pacific the Securities Company has obtained the control of, and, therefore, the power to suppress competition between, two rival and competing lines of railway engaged in interstate commerce, and in that way has monopolized a part of interstate commerce.

This conclusion is sustained by the judgment of this court in the case of *Pearsall* v. *Great Northern Railway* (161 U. S., 646), where the

question, what constitutes a monopoly of interstate railways, was determined with particular reference to the defendant railways themselves. In that case the court held that to concentrate a majority of the stock of the Great Northern and Northern Pacific companies in the hands of one person or body of persons "would be to practically consolidate the two systems," and that such a consolidation would "unavoidably result in * * * a *monopoly* of all traffic in the northern half of the State of Minnesota, as well as of all transcontinental traffic north of the line of the Union Pacific." To go a little further into the particulars of that case, it was there proposed to transfer half the capital stock of the Northern Pacific Railway to the shareholders of the Great Northern Railway, in consideration for which the latter company was to guarantee the bonds of the former, which was being reorganized. Touching the effect of such a transaction, the court said, through Mr. Justice Brown (p. 670):

> As the Northern Pacific road also controls, by its own construction and by the purchase of stock, other roads extending from the Mississippi River to the Pacific Ocean, and operates as a single system an aggregate mileage of 4,500 miles, most of which is parallel to the Great Northern system, *the effect of this arrangement* [i. e., the acquisition by the shareholders of the Great Northern of half the capital stock of the Northern Pacific, as aforesaid] *would be to practically consolidate the two systems*, to

operate 9,000 miles of railway under a single management, and to destroy any possible advantages the public might have through a competition between the two lines.

* * * But the fact that one-half of the capital stock of the reorganized company is to be turned over to the shareholders of the Great Northern, which is, in turn, to guarantee the payment of the reorganized bonds, is evidence of the most cogent character to show that nothing less than a purchase of a controlling interest, and practically the absolute control, of the Northern Pacific is contemplated by the arrangement. With half of its capital stock already in its hands, the purchase of enough to make a majority would follow almost as a matter of course, and the *mastership* of the Northern Pacific would be assured.

* * * * *

The consolidation of these two great corporations will unavoidably result in giving to the defendant a monopoly of all traffic in the northern half of the State of Minnesota, as well as of all transcontinental traffic north of the line of the Union Pacific, against which public regulations will be but a feeble protection. The acts of the Minnesota legislature of 1874 and 1881 undoubtedly reflected the general sentiment of the public, that their best security is in competition.

The Pearsall case is thus conclusive of the case at bar, since it establishes the principle that to vest, designedly, in one person or set of persons a

majority of the stock of two competing lines of interstate railway is to monopolize a part of interstate railroad traffic.

The *People* v. *Chicago Gas Trust Co.* (130 Ill., 268, 292, 297), heretofore referred to in other connections, also presents an instance of a monopoly precisely similar to the one now in issue. In that case the defendant company, which was organized with power to purchase the stocks of other gas companies, acquired a majority of the shares of stock of the four gas companies operating in Chicago. The supreme court of Illinois held that the Chicago Gas Trust Company thereby acquired a monopoly which was illegal. In delivering the opinion of the court, Magruder, J., said:

> It can not be denied that the appellee, as owner of the majority of the shares of stock of these four companies, can control them, in the exercise of all their corporate powers, * * *
>
> The control of the four companies by the appellee—an outside and independent corporation—suppresses competition between them, and destroys their diversity of interest and all motive for competition. There is thus built up *a virtual monopoly* in the manufacture and sale of gas.
>
> * * * * *
>
> That the exercise of the power attempted to be conferred upon the appellee company must result in the creation of *a monopoly*, results from the very nature of the power itself.

It seems hardly worth while to notice the argument, or rather the assertion, which has been made in and outside this case, that the Securities Company has not monopolized any part of interstate commerce, in violation of section 2 of the Anti-trust Act, because if a natural person with sufficient means had done the things that the Securities Company did—that is, had obtained control of the Great Northern and Northern Pacific by purchasing a majority of their respective shares—the transaction would not have been unlawful, would not have come within the prohibition of the Federal law against monopolies. What has been said in support of the Government's contention that the Securities Company has obtained an unlawful monopoly of a part of interstate commerce would apply with just as much force if the monopoly had been acquired by a natural person by any means prohibited by law. In the exercise of its regulative and police powers over interstate commerce, Congress may suppress monopolies in restraint thereof, by whomsoever created, notwithstanding that in doing so it restrict the right of private contract to some extent. (*U. S.* v. *Joint Traffic Asso.*, *supra*; *Addyston Pipe & Steel Co.* v. *U. S.*, *supra*.) The only material inquiry is, Has a monopoly been created? Not Who or what manner of man created it? It was monopoly that Congress aimed to prevent and which it had a right to prevent, as shown in another place; and in this light it is wholly imma-

terial and irrelevant to inquire whether the monopolist be a natural or an artificial person. The creation of the monopoly constitutes the offense.

But even if a natural person could lawfully have done what the Securities Company has done, that would be no argument to prove that the Securities Company, in so doing, has not violated the law against monpolies. For, as Finch, J., said (at p. 625), in the case of the *People* v. *North River Sugar Refining Company*, *supra:*

> It is not a sufficient answer to say that similar results may be lawfully accomplished; *that an individual having the necessary wealth might have bought all these refineries*, manned them with his own chosen agents, and managed them as a group at his sovereign will; for it is one thing for the State to respect the rights of ownership and protect them out of regard to the business freedom of the citizen, and quite another thing to add to that possibility a further extension of those consequences by creating artificial persons to aid in producing such aggregations. * * * What it *may* bear is one thing; what it should cause and create is quite another.

Moreover, it must constantly be kept in mind in the discussion under this head that the monopoly complained of is a monopoly of railway traffic resulting from centering in a single body controlling stock interests in two competing railways, and whatever may be the power of Congress or State

legislatures over monopolies in general, they may unquestionably, in the exercise of their broad regulative powers over quasi-public corporations, prohibit any monopoly of railway transportation within their respective spheres of action.

If it has been established that the Securities Company has thus monopolized a part of interstate commerce, then, a priori, the Securities Company and Mr. Hill, Mr. Morgan, and the other individual defendants, have combined, each with the other, to monopolize a part of interstate commerce, because, as the evidence and pleadings show, they were all parties to the plan by which the monopoly charged by the Government was accomplished; that is to say, the individual defendants had a common agreement or understanding among themselves for the organization of a holding company, which would take over their stock in the Great Northern and Northern Pacific and that of as many other stockholders as could be persuaded to exchange their shares; and the Securities Company, after its organization, became a party to this plan—that is, became the holding corporation, the agency for carrying the plan into effect.

In opposition to the Government's contentions, as stated in the foregoing propositions numbered

V and VI, it is argued that the Securities Company is simply an investing stockholder; that the transactions complained of are simply sales of shares of stock which the vendors had the right to sell and the Securities Company the right and the charter power to purchase; that to stamp such sales of property as illegal would be an unwarranted infringement upon the right of contract. But the argument that the Securities Company is a mere investor, and that it was never intended that it should take any active part in controlling or shaping the policies of the Great Northern and Northern Pacific railways by virtue of its ownership of a majority of their respective shares, is defeated, and its insincerity is exposed, by the answers and the testimony of the defendants themselves. Nearly every quotation from those sources, made in the statement of the case, supra, contains evidence that the object of the promoters of the Securities Company was to perpetuate certain policies of railroad economy. One or two additional passages in the testimony will be referred to here, however. At pages 82 and 83 of the Record will be found the following testimony of Mr. Hill:

> A. The Northern Securities Company, or a company of that character, has been considered by the large shareholders of the Great Northern Railway Company for several years.
>
> Q. And for what purpose, Mr. Hill?

A. *For the purpose of combining their interest in the property.*

Q. And what was the object or purpose of the combination?

A. Some of them were very old men and they had always acted together and in harmony, and *they desired to perpetuate that action.*

* * * * *

Q. And was that the purpose and object, Mr. Hill, of your organizing the Northern Securities Company?

A. That was the purpose.

* * * * *

Q. And for the same purpose?

A. For the same purpose, *so that we would all act together, and no one would sell out or leave the others. We would all act together.*

Q. For the purpose of unifying the interests that you had in the two roads?

A. *Yes, sir; for the purpose of unifying the interests in each road*, because when the Burlington was transferred or sold to the Northern Pacific and the Great Northern jointly, our owning an equal share in the company, it was a matter of great consequence to the Great Northern as to who would *own the stock of the Northern Pacific or control the Northern Pacific*, and some of our shareholders—some of them are 86 years old, others are more than 80, and so on—they might have concluded that they would sell their stock, *and it might have made a difference as to the majority of the common stock.*

And again, at page 706 of the Record, the same witness testified as follows regarding the object of the Securities Company:

> Q. It was to protect and continue that policy?
>
> A. Yes, sir.
>
> Q. And that meant to protect and continue the control which had carried out that policy; that is what you meant by it?
>
> A. Well, *it was to protect the policy* and to——

Mr. Morgan's testimony was to the same effect:

> Q. For the purpose of keeping control in one place?
>
> A. No; not *alone* to keep it in one place, but to keep it *so that the policy of the company* upon which its future depended *could be continued.* * * * What I wanted to accomplish was to put that stock so that it could be protected—to maintain the policy of the company as it then existed.
>
> Q. Held in one hand, in other words? [Still referring to the object of the Securities Company.]
>
> A. No; not in one hand, because it could be held in third hands. * * * I wanted the Northern Pacific stock put where nothing could interfere with the policy I had inaugurated and for the carrying out of which we were perfectly satisfied and morally responsible. (Record, p. 345.)

And again, at page 355 of the record, Mr. Morgan, referring to the Securities Company, said

that "this holding company was simply a question of *custodian*."

The leading actors in the transaction thus bear witness to the fact that the Securities Company was not a mere investor, but was the designed instrument for directing and controlling the policies of competing lines of transcontinental railway.

Mr. Hill, in giving his testimony, dropped one or two other remarks, not previously referred to, which are very significant of the purpose of those who transferred their shares to the Securities Company, and which show very clearly that the prime object of the parties to the transfers was not, on the one hand, actually and in good faith to dispose of property, nor, on the other, to acquire it as an investment, but that what they had in mind was entirely foreign to this. For example, Mr. Hill testified that Great Northern was "never an active stock"—"never a stock that has been dealt in in large amounts" (record, p. 117). Yet the Securities Company within a few months after its organization had purchased about 75 per cent of the Great Northern stock. What is the explanation of this suddenly developed activity; of these enormous sales to the Securities Company of a stock which had never been "active?" Not the high price offered by the Securities Company, for, as Mr. Hill testified (record, p. 115), "the market price at that time was considerably higher than the price the Northern Securities Company purchased the Great Northern stock

at." There must, therefore, be some other explanation; and is it not a fair inference that the true explanation is, that these majority stockholders of the Great Northern, who sold their shares at such a sacrifice, did so in pursuance of some understanding, plan, or concert that they had previously formed? Is not the fact that they sold their shares at considerably less than the market price evidence of the most cogent character to show that the sales in question were not made to a mere investor in the ordinary course of business, but were in pursuance of an ulterior object? Otherwise, what would be the motive for the great sacrifice involved? (Mr. Hill testified, Record, p. 89, that Great Northern shares were selling in the market at 200, twenty points higher than these shareholders sold out for.) And the inference is further borne out by a passage in the letter which Mr. Hill addressed to the Great Northern shareholders (Record, p. 920), a passage already quoted in another connection, but which will bear repetition:

> The writer is of opinion that the offer of the Securities Company is one that Great Northern shareholders can accept with *profit and advantage* to themselves.

This is a very significant admission. In what way could it be to the "profit and advantage" of Great Northern shareholders to accept the offer of the Securities Company when the market price of Great Northern stock was "considerably

higher"—twenty points higher—than that tendered by the Securities Company? Certainly, in the ordinary sense, there could be no "profit" or "advantage" in such a transaction. It is evident, therefore, that Mr. Hill had in mind some future or contingent "profit and advantage" which he expected to result from the fusion which the Securities Company would bring about between the stockholders of the Great Northern and Northern Pacific.

But in the face of these plain, unqualified admissions by the defendants that the Securities Company was organized for the express purpose of combining their interests in the Great Northern and Northern Pacific railways, and that it is not a mere investor, their counsel cite the following passage from Mr. Justice Brown's opinion in the *Pearsall case* (161 U. S., 671) in support of the contention that the transactions complained of by the Government are not unlawful:

> Doubtless these stockholders could lawfully acquire by individual purchases a majority, or even the whole of the stock of the reorganized company, and thus possibly obtain its ultimate control; but the companies would still remain separate corporations with no interests, as such, in common.

This language, however, manifestly and in terms refers to purchases and sales by individual stockholders on their individual account, without any thought or design of acting in concert with

others to create a combination or monopoly but, with the expectation of again selling in the due course of business. This is shown by the words of the Justice immediately following those above quoted, to wit:

> In a few years the two companies might by sales of the stock, so acquired, become completely dissevered, and the interests of the stockholders of each company thus become antagonistic.

But very different is the case at bar. As already pointed out, the purpose of the defendants, according to their own testimony, was to combine their interests in the two railways (*supra*, pp. 154–157), and to that end they made provision for a *perpetual* unity of ownership through the organization of the Securities Company, the admitted object of that company being to insure *permanent* community, not antagonism, of interest between the stockholders of the Great Northern and Northern Pacific and to continue unbroken the former policies of the two roads, as molded by the defendants. It is thus clear, from the subsequent language of Mr. Justice Brown himself, that when he put the hypothetical case first above quoted he had in mind a very different state of facts from that disclosed by the present case, and the distinction between the two classes of cases is remarked upon by Mr. Noyes in his work on Intercorporate Relations (sec. 36, n. 1, p. 62):

> The distinction between the ownership of controlling interests in competing railroad companies by individuals acting together in temporary harmony and the ownership of such interests by a single corporation is apparent. * * *

And as an illustration of the distinction he proceeds to cite the very language of Mr. Justice Brown in the Pearsall case quoted above and which counsel for defendants rely upon to establish their contention that there is no such distinction.

Again, it is well settled that because a person has the right to purchase stock it does not follow that stockholders of two or more competing corporations can combine among themselves and with such person to sell him their stock and induce others to do the same, so as to center the controlling stock interests of the several corporations in a single head, in violation of statutes against combinations, consolidations, and monopolies. (Noyes on Intercorporate Relations, sec. 36; *Penna. R. Co.* v. *Com.*, 7 Atl. Rep., 373.) In the latter case it was said:

> During the argument counsel invoked the aid of the undoubted general principle that the ownership of shares of stock carries with it the right to sell, and contended that the owners of the shares of the South Pennsylvania Railroad Company could not legally be restrained from so doing, and that an injunction against the purchase would

> have this effect. We do not think the principle applies to this case. We are not called upon to express any opinion as to the right of individual shareholders to sell their several shares bona fide in the open market. This, so far as they are concerned, is an intended *sale in combination* * * *

And the sale was consequently enjoined.

The failure to observe this distinction—that is, the distinction between an actual, bona fide sale, and what is nominally a sale but in reality only a cloak under which to accomplish a combination of corporate properties or interests—has sometimes led to confusion of language, if not of thought, in the discussion of trade combinations. Thus, in *Trenton Potteries Co.* v. *Olyphant* (58 N. J. Eq., 507), the supreme court of New Jersey said:

> Contracts by independent and unconnected manufacturers or traders looking to the control of the prices of their commodities, either by limitation of production, or by restriction on distribution, or by express agreement to maintain specified prices, are without doubt opposed to public policy. * * * Corporations, however, may lawfully do any acts within the corporate powers conferred on them by legislative grant. * * * Under such powers it is obvious that a corporation may purchase the plant and business of competing individuals and concerns. * * * 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 can not be refused enforcement.

This may be true where the sales are actual sales—where there is an evident, bona fide intention to part with property on one hand and to acquire it on the other; but it is certainly not true where the sales are merely nominal and there is no real change in ownership, the object being to effect a combination of interests. As Mr. Noyes remarks, referring to the above language of the supreme court of New Jersey:

> These conclusions may be well founded in their application to an *actual* sale in the transaction of business, as distinguished from a combination in the form of a sale. A corporation having general power to dispose of its property may, like an individual, in good faith, sell to a competing corporation without violating the rule of public policy. There is no *combination* in such a purchase. But if the sale is for the purpose of forming a corporate combination, in which the vendor corporation participates, the same rule of public policy is applicable as in the case of any combination of corporations. As already stated, the object of a combination, or the necessary or natural consequence of its operation, determines its legality. The form—trust, corporate combination, or association—will not serve as a cloak for conspiracy nor prevent the application of the rule of public policy.

> Corporate power to purchase no more authorizes the exercise of such power for purposes opposed to public policy, than a general power to make contracts authorizes the execution of agreements conflicting with the public interests. (Intercorporate Relations, sec. 354.)

In further reply to the Government's charge that in doing the acts alleged the defendants created a combination and monopoly in restraint of interstate commerce, as set out in propositions V and VI, *supra*, counsel for the defendant, the Securities Company, contends that "acquiesence by the Government for more than eleven years in the actual merger and consolidation of many important parallel and competing lines of railroads and steamships engaged in interstate and international commerce has given a practical construction to the act of July 2, 1890, to the effect that it was not intended to forbid and does not forbid the natural processes of unification which are brought about under modern methods of lease, consolidation, merger, community of interest, or ownership of stock."

This argument, which, by the way, is not altogether without humor when its source is considered, has no force except to show that the defendants really planned and intended to accomplish a consolidation or merger of the Great Northern and Northern Pacific railways through the Securities Company, and that their denials to

the contrary were not sincere. The court below evidently deemed the argument too flimsy to answer, as Thayer, J., in delivering the opinion of the court, did not even refer to it. The answer, however, is evident and may as well be given:

1. The question whether the acquisition of control of competing lines of interstate railway by a holding corporation, formed for that purpose, constitutes a combination of such railways, is a new one; in fact, it arose for the first time out of the facts presented by the case at bar. (Noyes on Intercorporate Relations, sec. 36.)

2. Not until the decision of the cases of the *U. S.* v. *Trans-Mo. Freight Asso.* and the *U. S.* v. *Joint Traffic Asso.* (*supra*), the latter having been decided in October, 1898, were the constitutionality of the Anti-trust Act and its applicability to railroads finally settled.

3. But even if it were true that the Government had acquiesced for eleven years in the creation of combinations like the one now in issue, it would not thereby be estopped from prosecuting the case at bar, nor could its inaction for that period be considered a contemporaneous or practical construction of the act; for the question whether the State—the Government—shall proceed against any alleged combination or monopoly under the Anti-trust Act is wholly within the executive discretion, the exercise of which in a given case must necessarily be governed by various and often conflicting considerations of public policy. Therefore,

under these circumstances, to construe executive inaction into an admission of a lack of power to act might seriously embarrass the executive authority and unnecessarily hamper the operations of government. This very question was raised in *Louisville & Nashville R. R.* v. *Ky.* (161 U. S. 677, 689, 690). Said Mr. Justice Brown, speaking for the court in that case:

> Defendant, however, further urges in support of its assumed rights under the third section of the charter of 1856, a contemporaneous construction by the parties in interest, under which several lines were purchased which ran parallel to some of its own branches. * * *
>
> While the doctrine of contemporaneous construction is doubtless of great value in determining the intentions of parties to an instrument ambiguous upon its face, yet to justify its application to a particular case, such contemporaneous construction must be shown to have been as broad as the exigencies of the case require. In this view we can not say that a contemporaneous construction of this charter, which ratified the purchase of a few short local lines, was sufficient to justify the company in consolidating with a parallel and competing line between its two principal termini, with a view of controlling the through traffic from the lower Mississippi to Cincinnati, and destroying the competition which had previously existed between the two lines. It is possible that the Commonwealth might, *if it*

> *had seen fit to do so*, have enjoined the acquisition of some of these parallel lines, and the fact that it did not deem such purchases to be in contravention of public policy ought not to estop it from setting up an opposition to another purchase, which, in its view, is detrimental to the public interests. As said by Mr. Justice Cooley, in his Constitutional Limitations (6th ed.), page 85: "A power is frequently yielded to merely because it is claimed, and it may be exercised for a long period in violation of the constitutional prohibition without the mischief which the Constitution was designed to guard against appearing, or without anyone being sufficiently interested in the subject to raise the question; *but these circumstances can not be allowed to sanction a clear infraction of the Constitution.*"

As a still further answer to the Government's contention that the facts in this case disclose an unlawful combination and monopoly, counsel for defendants set up a man of straw and then triumphantly knock it down. That is, they say that it is nothing less than an overturning of all settled rules upon the subject to say that the power of Congress extends to determining in what corporations stock may be held by citizens of the States and what shall be the qualifications of stockholders. Now, this simply tends to confuse the real issue. The Government does not claim—it has not even suggested—that Congress has any such general power. All that is necessary to the success of this

case is that Congress has the power to prevent a combination of the stock of two competing interstate railways whereby both are brought under a common controlling body, which thus becomes possessed of the power to stifle competition in interstate transportation, and in that way and to that extent restrain interstate commerce. Furthermore, it has already been shown (*supra*, pp. 153-163) that it is the merest fiction to say that the Securities Company owns the Great Northern and Northern Pacific shares in any real or substantial sense, and that, according to the defendants' own admissions, the Securities Company was simply the instrumentality by which they combined their interests in the two roads, Mr. Morgan himself testifying that it was simply a "custodian." In any possible view of the case, therefore, the issue which defendants' counsel have thus attempted to raise is foreign and irrelevant.

VII.

THE COMBINATION AND MONOPOLY CHARGED BY THE UNITED STATES IN THE FOREGOING PROPOSITIONS, NUMBERED V AND VI, OPERATE DIRECTLY ON INTERSTATE COMMERCE, AND DO NOT AFFECT IT ONLY INDIRECTLY, INCIDENTALLY, OR REMOTELY.

This proposition need not be argued: the bare statement of it is sufficient. And this for the reason that the facts in the case at bar disclose either a combination of competing interstate carriers or a monoply of interstate railway traffic, or

both; or they disclose no combination or monopoly at all—no case at all. And that a combination or monopoly of competing interstate carriers affects interstate commerce directly, and not incidentally or remotely, is universally conceded. Noyes on Intercorporate Relations, section 392, and authorities there cited.

The question in this case, let it be borne in mind, is not whether the means by which the power of the combination is brought into play are direct or indirect, but whether the combination itself, whenever its power has been brought into play—it matters not how indirect may have been the means employed in bringing it into play—operates directly on interstate or international commerce. The failure of the defendants' counsel to bear this in mind has led them to make very elaborate arguments to show that the combination charged by the Government affects interstate commerce only indirectly and remotely.

In reply to the contention of the defendants' counsel on this point, the court below said at page 15 of its opinion:

> We fail to find in either of these cases (*United States* v. *E. C. Knight Company*, 156 U. S., 1; *Hopkins* v. *United States*, 171 U. S., 578; *Anderson* v. *United States*, 171 U. S., 604), which counsel for defendants relied upon to support their contention that the combination or monopoly, if there really were one, affected interstate commerce only

indirectly, any suggestion that a combination, such as the one in hand, the object and necessary effect of which is to give to a single person or to a coterie of persons full control of all the means of transportation owned by two competing and parallel lines of road engaged in interstate commerce, as well as the power to fix the rate for the transportation of persons and property, does not directly and immediately affect interstate commerce. *No combination, as it would seem, could more immediately affect it.*

VIII.

THE RELIEF GRANTED BY THE CIRCUIT COURT IS AUTHORIZED BY SECTION 4 OF THE ANTI-TRUST ACT.

Section 4 provides that—

> The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; 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. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may

> at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

The gist of the Government's charge is, (1) that a combination of the Great Northern and Northern Pacific Railway companies has been formed by centering the title to a majority of their respective shares in the Securities Company; (2) that the Securities Company, by obtaining a majority of the stock of the two roads, has acquired a monopoly—all in violation of the Anti-trust Act. Now this unlawful combination and monopoly exists solely by virtue of the Securities Company's ownership of a majority of the stock of the two railways. That being the case, the logical and most direct way to destroy the combination and monopoly and prevent the continued violation of the statute is to strip such ownership, which was acquired in pursuance of an illegal object, of its powers and incidents—to disarm it of its power to violate the law. And this is what the circuit court did. Its decree, in substance, enjoined the Securities Company from voting its holdings of Great Northern and Northern Pacific stock and from otherwise exercising any control over the two roads by virtue of such holdings, and enjoined the two roads from paying any dividends to the Securities Company. Clearly this decree violates no rights of property which the Securities Company or any of the other defendants is entitled to claim. All it does is to say to the Securities

Company, You have been vested with certain powers in pursuance of an illegal object, to which you were privy, namely, a combination and monopoly in restraint of trade. When you are allowed to exercise those powers, that illegal object is accomplished. We will, therefore, enjoin you from exercising them, because the statute charges us with the duty of preventing, by injunction, restraining order, or otherwise, the accomplishment of such objects.

But it is urged that the relief should not have been granted because the combination had been executed—had accomplished its purpose, to wit, the organization of the Securities Company and the lodgment in its hands of a majority of the stock of the two railways—before this bill was filed. Or, to use the exact language of counsel: "The Government is not entitled to maintain this proceeding under sections 1 and 4 of the Anti-trust Act, nor has the court jurisdiction of it under those sections, for the conspiracy or combination relied on by the Government, if it ever existed, had done all it was formed to do and had come to an end before the proceeding was instituted." (See p. 92 of Mr. Young's brief filed in the Cir. Ct.)

It will be noticed, in the first place, that this argument is only directed to sections 1 and 4 of the Anti-trust Act. Therefore, even if there were any force in it it would not affect the case under sections 2 and 4. But the contention is groundless in any light. The conclusive answer

to it is that the combination had not "accomplished its purpose," had not "done all it was formed to do," had not "come to an end," "before the proceeding was instituted." The combination charged by the Government is a combination of the Great Northern and Northern Pacific railways, formed by concentrating in the Securities Company (through the concerted action of that company and the individual defendants) the power to control both roads. This combination did not "come to an end," did not "accomplish its purpose," with the organization of the Securities Company, and therefore the violation of the Anti-trust Act did not "come to an end" there, but continued on without interruption. The organization of that company was but a step—an important step, it is true—in the formation of the combination. The combination itself continued in existence so long as the Securities Company possessed the power to control the two railways by voting a majority of their stock, and every moment of its existence was a violation of the Anti-trust Act, and the Federal courts are expressly authorized to prevent such violations. Section 4 invests the circuit courts with full jurisdiction "to prevent and restrain," "to enjoin *or otherwise prohibit*," violations of the act, whenever they are shown to exist, by any means consistent with the Constitution, and unhampered by any refined distinction between things executory and things executed, other than that which may be

implied in the words "prevent," "restrain," and "prohibit." It makes no attempt to limit the exercise of the jurisdiction by enumerating the methods by which violations may be prevented or prohibited. On the contrary, the circuit courts are left free to frame their remedial process to meet the exigencies of any case that may arise under the act, and, as courts of equity, they enjoy the same wide latitude in formulating relief in cases of this class that they enjoy in any other class of cases within the jurisdiction of equity.

> "Equity," says Mr. Pomeroy, "* * * has * * * never placed any limits to the remedies which it can grant, either with respect to their substance, their form, or their extent; but has always preserved the elements of flexibility and expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition, in which new primary rights and duties are constantly arising, and new kinds of wrongs are constantly committed." (Pomeroy on Equity Jurisprudence, 2d ed., sec. 111, p. 115.)
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> "It is absolutely impossible," says the same author at another place, "to enumerate all the special kinds of relief which may be granted, or to place any bounds to the power of the courts in shaping the relief in accordance with the circumstances of particular cases." (Ibid., sec. 170, p. 192.)

And equally strong is the language of equity judges. In *Taylor* v. *Simon* (4 Mylne & Craig, 141), Lord Chancellor Cottenham said that a court of equity has the power and it is its duty to—

> * * * adapt its practice and course of procedure, as far as possible, to the existing state of society, and to apply its jurisdiction to all those new cases, which, from the progress daily taking place in the affairs of men, must continually arise, and not from too strict an adherence to the forms and rules established under very different circumstances, decline to administer justice and to enforce rights for which there is no other remedy.

And in *Chicago, Rock Island and Pacific Ry.* v. *Union Pacific Ry.* (47 Fed. Rep., 15), Brewer, circuit judge, in reply to an argument that there was no precedent for a decree for the specific performance of a contract which was to run for 999 years, said, at page 26:

> * * * I believe most thoronghly that the powers of a court of equity are as vast, and its processes and procedure as elastic, as all the changing emergencies of increasingly complex business relations and the protection of rights can demand. * * * The powers and processes of a court of equity are equal to any and every emergency. They are potent to protect the humblest individual from the oppression of the mightiest corporation; to protect every corporation from the destroying greed of

> the public; to stop state or nation from spoliating or destroying private rights; to grasp with strong hand every corporation and compel it to perform its contracts of every nature, and do justice to every individual.

It is not open to doubt, therefore, that the court below, as a court of equity, had ample power to decree the relief it did and in the form it did.

It has been suggested that the decree of the circuit court is too broad, admitting the existence of a combination in violation of the Anti-trust Act. That is, it is said that the decree ought not to have enjoined the Securities Company from voting its majority holdings of the stock of the two railways, but that it ought only to "have enjoined the Northern Securities Company from doing what would have been (according to the decision) a violation of the act, namely, using its control or influence in such a way as to suppress competition in so much of the traffic of the two railways as was carried on between different States." It has already been shown that the power to vote the majority stock of the Great Northern and Northern Pacific companies was vested in the Securities Company in pursuance of an illegal object, and that in enjoining said company from voting such stock and receiving dividends thereon the court simply enjoined the use of the means by which, alone, the illegal object could be accomplished. A further answer to the contention, however, is that, under

the rulings of this court (see *supra*, pp. 75–78), the *power* to restrain commerce, when held by a combination, is of itself a restraint, and in this case the *power* to restrain *is* the Securities Company's *power* to vote the majority of the stock of the two interstate railways so as to elect officers and directors who will obey its will. Therefore, in enjoining the Securities Company from exercising this voting power, the circuit court did no more than to enjoin a restraint upon interstate commerce.

IX.

THERE IS NO DEFECT OF PARTIES: ALL INTERESTS MATERIALLY AFFECTED BY THE DECREE OF THE CIRCUIT COURT ARE REPRESENTED BY THE PARTIES BEFORE THE COURT.

The bill prayed, among other things, "That the individual defendants named, and their associate stockholders, and each and every stockholder of either of said railway companies who has exchanged his stock therein for the stock of the Northern Securities Company, be each, respectively, perpetually enjoined from in any manner holding, voting, or acting as the owner of any of the stock of the Northern Securities Company, issued in exchange for the stock of either of the said railway companies, unless authorized by this court." And it was contended that, inasmuch as all the persons—over 1,300 in number—who exchanged stock of the two railway companies for stock of the Securities Company were not made

defendants, there was a defect of necessary parties. (Answer of Northern Securities Co., record, p. 49a.)

Now, this contention would have been untenable even if this particular part of the relief prayed for had been embodied in the decree of the circuit court, because the interests of the absent parties, being of like character as the interests of the parties before the court, were represented by the latter, and therefore the case comes within the universally accepted rule of equity pleading, stated in the following language by this court in the case of *Smith et al.* v. *Swormstedt et al.*, 16 Howard, 288, 302:

> Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interests of all will be properly protected and maintained.

> The case in hand illustrates the propriety and fitness of the rule. There are some fifteen hundred persons represented by the complainants, and over double that number by the defendants. It is manifest that to require all the parties to be brought upon the record, as is required in a suit at law, would amount to a denial of justice. The right might be defeated by objections to parties, from the difficulty of ascertaining them, from the changes constantly occurring by death or otherwise.

But any question as to a defect of parties which might have existed has been removed from the case by the form of the decree entered by the circuit court. That decree simply adjudges that the parties defendant have entered into an unlawful combination and conspiracy in restraint of interstate commerce, and then proceeds to enjoin the defendants, the Securities Company, the Great Northern Railway, and the Northern Pacific Railway, from doing the things which alone give life and force to the combination. The decree thus operates only on the parties to the bill and materially affects only their interests. The defendant corporations, the Securities Company, the Great Northern Railway, and the Northern Pacific Railway, stand for the interests of their respective stockholders. (*Sanger* v. *Upton*, 91 U. S., 59; *Hawkins* v. *Glenn*, 131 U. S., 329; *Minnesota* v. *Northern Securities Co.*, 184 U. S., 199.)

As a matter of fact, however, argument upon the question, whether there is a defect of parties in this case, is entirely unnecessary in view of the decision of this court in the case of *Minnesota* v. *Northern Securities Co.*, supra. In that case the same interests were involved as are here, and in substantially the same way; and it was there held, in effect, that all such interests would have been represented if the Securities Company and the Great Northern and Northern Pacific Railway companies had all been parties to that suit, as they are to this.

In conclusion, it is respectfully submitted that the decree of the circuit court should be affirmed.

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