IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1903.

No. 277.

NORTHERN SECURITIES COMPANY ET AL.

v.

THE UNITED STATES.

ORAL ARGUMENT OF THE ATTORNEY-GENERAL FOR THE UNITED STATES.

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NORTHERN SECURITIES COMPANY ET AL.

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THE UNITED STATES.

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

ORAL ARGUMENT OF THE ATTORNEY-GENERAL FOR THE UNITED STATES.

This suit was instituted "to prevent and restrain violations of the Act of Congress to protect trade and commerce against unlawful restraints and monopolies" accomplished by defendants through a combination vesting the absolute control of two parallel and competing inter-state railroads in the hands of the Northern Securities Company, an instrumentality created by defendants for that purpose. Specifically, the suit was instituted to determine whether the particular de-

vice employed by defendants to restrain and monopolize interstate commerce by merging the interests and controlling the operations of the Northern Pacific and Great Northern Railways, two parallel and competing lines, will prevail against a law declaring all devices to that end illegal.

The Government's attitude towards this case is one of grave concern, based upon its conviction that a mischievous evasion of the law has been attempted, as well as upon its especial interest in and relations to one of the properties affected; and in order that your Honors may understand the reasons for this concern, I shall undertake to pass in review before the court the principal facts connected with the organization and subsequent history of the Northern Pacific Company, its relations to the Great Northern Railroad, and other facts out of which the questions in this case arise, without comment thereon other than such as may be necessary to make prominent these relevant and significant ones:

1st. That the Northern Pacific Railroad was built under the authority of the United States and in the main with capital furnished by the United States, and that the United States intended, and attached such a condition to its con-

tribution, that the railroad should be a great *independent* national highway and specified that the object of its construction was "to promote the public interests."

2d. That by different devices employed during the past ten years, the defendants, or some of them, have endeavored to destroy the independence of the Northern Pacific Company and bring it under the domination of the Great Northern Company.

3d. That the Northern Securities Company is an instrumentality devised by defendants to acquire, hold, and exercise control over these two parallel and competing lines of railroad, to destroy competition between them, to create a monopoly of transportation in the section served by them, and to defeat the condition attached by the United States to the franchise and land grants of the Northern Pacific Company.

Upon these facts the Government proposes,

1st. That the arrangement effected by defendants is a combination in restraint of inter-state commerce and is illegal under the first section of the Act of July 2, 1890.

2d. That it constitutes a monopoly under the second section of that Act.

3d. That the court has the power to prevent, restrain or otherwise prohibit it.

The Northern Pacific Railroad Co. was chartered under the provisions of an Act of Congress approved July 2, 1864.

By the first section of the Act it is provided that "the stockholders shall constitute said body politic and corporate." The corporation was authorized to construct a railroad which by the eleventh section of the Act "Shall be a post route and military road, subject to the use of the United States, for postal, military, naval, and all other government service."

Section three says the grant of alternate sections of land is "for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway", and section twenty provides "that the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, Congress may * * * add to, alter, amend, or repeal this act."

Of a similar reservation of power over the charter of the Union Pacific Company, this court said, in United States *vs* Union Pacific Railway Company (160 U. S., 1, 36):

> In this view, it must be held that by its reservation of authority to add to, alter, amend, or repeal the acts in question, whenever it chose to do so, 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.

The charter of the Northern Pacific Company places the control, management, and operation of this railroad in its directors, who are to be elected by its stockholders and who are to manage it for the benefit of the corporation and the government; and in order that the stockholders, the directors, and the corporation may not escape the obligation to keep and operate this national enterprise independently by its alienation in any way, it is provided by Section 10 that no mortgage or lien of any kind shall be made upon the road without the consent of Congress.

The relations of the new national road to the other railroads of the country are specifically pro-

vided for in Section 5, wherein, after the most minute specification as to the character of the work upon the highway and its equipment, it is provided that the rails shall be of the best quality and of American make, that a uniform gauge shall be established throughout the entire length of the work, and that any other railroad which shall be authorized to be built by the United States or any State or Territory shall have running connections with it upon fair and equitable terms.

The charter of the Northern Pacific Company (section 3) expressly authorizes that Company to consolidate with or absorb lines of any other railroad company holding land grants from the government conflicting with those of the Northern Pacific Railroad, but this power of consolidation does not extend beyond the cases specified.

The government scheme, though simple, was complete in all its details, and to secure its execution 12,800 acres of land to the mile of track were granted to the company in the States of Minnesota and Oregon. and 25,600 acres to the mile of track in the intermediate Territories.

The re-organization committee of the Northern Pacific Company in 1895 reported to its stock and security holders (Record, page 1647): "It is estimated that under the grant the company is

entitled to receive about forty-three million acres."

When the United States created the Northern Pacific Company and authorized it to construct a railroad, and for that purpose endowed it with 43,000,000 acres of the public domain, it was "to secure to the Government at all times the use and benefits of the same for postal, military, and other purposes." It is therefore obvious that the United States intended that the use and benefits of the road for Government purposes and service should be a use and benefit unhampered and free from the blighting influences of a combination whereby the control of the property would pass from the hands of those in whom it was lodged by the law to the hands of others whose greater interests might be subserved by the suppression of its development.

In other words, Congress gave the people's land to the Northern Pacific Company, and to no other company, and the United States is directly interested in seeing to it that the Northern Pacific Company shall maintain an undiminished ability to render the service which was the consideration of the grant, unaffected by the domination of other interests.

THE DEVICES EMPLOYED TO GAIN CONTROL OF THE NORTHERN PACIFIC RAILROAD.

The first attempt to gain control of the Northern Pacific Company came about in the following manner:

The Northern Pacific Company being bankrupt in 1895, the Great Northern Company entered into an agreement with the holders of the bonds secured by the second and third general mortgages and the consolidated mortgage of the Northern Pacific Company, by the terms of which agreement these mortgages were to be foreclosed and all the property and franchises of the Northern Pacific Company, including its land grants, were to be bought in by its bondholders.

The agreement further provided that the purchasing bondholders were to re-organize the franchises and property of the Northern Pacific Company, so to be purchased, and issue $100,000,000 of bonds, which were to be guaranteed by the Great Northern Company, and $100,000,000 of stock, of which stock one-half part was to be transferred to the stockholders of the Great Northern Company or a trustee for their use.

That is to say, the second and third general mortgage bonds and the consolidated mortgage

bonds were to be displaced bonds and for $100,000,000 issued instead; and for a guarantee of these bonds, primarily payable by the Northern Pacific Company and secured by a mortgage on its franchises and property, the liability upon which guarantee was limited to $6,200,000 per year, the stockholders of the Great Northern Company were to take over one-half of the total capital, which, as this court said, gave the Great Northern Company control of the Northern Pacific Company. I have often wondered why Pearsall, a Great Northern stockholder, challenged this transaction.

This Court held the arrangement invalid, because, as the Court said (161 U. S., 672):

> We think the proposed arrangement is a plain violation of the acts of the State Legislature * * * prohibiting railroad corporations from consolidating with, leasing or purchasing, or in any other way becoming the owner of, or controlling any other railroad corporation, or the stock, franchises or rights of property thereof, having a parallel or competing line.

The Court also said (p. 677):

> The consolidation of these two great corporations will unavoidedly 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 trans-continental traffic north of the line of the Union Pacific, against which public regulations will be but a feeble protection.

Thus ended the first effort to gain control of the Northern Pacific Company in the interests of the Great Northern Company, and to establish a monopoly of transportation facilities in the northwest.

Mr. Morgan knew of this attempt, sympathized with it, and assured Mr. Hill if he failed they could work the two railroads in harmony. (Record, p. 347.)

Let us next see what steps were taken to get the Northern Pacific property in such situation as would enable Mr. Morgan to make good his assurance to Mr. Hill that if he failed to acquire the Northern Pacific stock in the manner just described they could work in harmouy.

The decision of this Court defeating Mr. Hill's attempt to secure the Northern Pacific Company by the means described, was rendered March 30, 1896. The case had been submitted to the court December 16, 1895.

Three months after the case was submitted to the court and two weeks before its decision, a

plan was promulgated, addressed to the security holders of the Northern Pacific Company, which provided a means of securing the harmony so much to be desired in case the law interfered with Mr. Hill's arrangement to exchange a carefully limited measure of credit of his road for one-half the stock of the other road.

Under this plan and agreement the reorganization was effected, and a new company organized under the laws of Wisconsin with power so to do, took over the property and franchises of the Northern Pacific Company.

By the reorganization agreement J. P. Morgan & Co. were made "managers" of the reorganization. No creditor, stockholder, or bondholder was to be entitled to any benefit under the reorganization who did not "sell, assign, and transfer to J. P. Morgan & Co., the managers, each and every share of stock, bond, security, or obligation, vesting in the managers" "all the rights and powers of owners," in respect thereto.

At this time the common and preferred stock of the Company were valueless.

The annual fixed charges against the property were $10,905,690 and the average net income of the road applicable thereto for five years preceding was but $7,801,645. (Record, p. 1645.)

The preferred stockholders under the plan gave up their valueless shares and paid $15.00 in cash per share for the new preferred stock, and the common stockholders gave up their stock and paid $10.00 in cash per share for the new common stock. (Record, p. 1650.)

These stocks represented nothing but the control of the property, and by the terms of the reorganization they were locked up in a voting trust for five years, J. P. Morgan being the head of the trust. (Record, p. 1654.)

This put Morgan in control of the Northern Pacific Railroad for five years and assured for that period the harmony he promised, in the event of Hill's failure to get the stock of the Northern Pacific Company under the scheme defeated by Pearsall.

The public put no value on the common stock beyond the new cash paid in, and Mr. Hill and Lord Mount Stephen, a large stockholder of Great Northern stock and a coadjutor of Mr. Hill, immediately began to accummulate it.

There was issued under the reorganization scheme seventy-five millions of preferred and eighty millions of common stock at par, and while both classes of stock were entitled to vote at corporate elections, while outstanding, there was a

provision that the preferred could be retired. This made the common stock the controlling issue.

Of this common stock as early as February, 1897, Mr. Hill and Lord Mount Stephen had acquired 258,341 shares at $16.00 per share, or $25,834,000 of par value, for $4,133,456. (Record, p. 317.) Some idea of the commercial value of a monopoly of transportation to the participants may be had when it is considered that this stock, which cost $16 per share in 1897 was put into the Securities Co. in 1901 at $115 per share, netting the owners $25,000,000 of profit.

What is known as "harmony" now prevailed between the two roads and continued as such until 1901, when the two roads made a joint purchase of the Chicago, Burlington and Quincy Railroad.

This partnership in the ownership of the Burlington was almost immediately followed by the merger of which the Government complains.

I now ask your Honors' attention to—

THE BURLINGTON PURCHASE.

Early in 1901 the Northern Pacific and Great Northern railway companies, for the purpose of promoting their joint interests, and, as the Gov-

ernment claims, in contemplation of ultimately placing the Northern Pacific and Great Northern systems under a common control, united in the purchase of the total capital stock of the Chicago, Burlington and Quincy Railroad Company.

The Burlington system was about 8,000 miles in length, and connected the vast region between Chicago and St. Paul on the east, and Kansas City, Denver, Cheyenne, and Billings on the west, and prior to such purchase was gradually pushing its rails northwesterly into the territory occupied by the purchasers, and westwardly toward the Pacific Ocean. It connected with the Great Northern at St. Paul, and with the Northern Pacific at St. Paul, Minnesota, and Billings, Montana, and was in part parallel to and in competition with the Union Pacific Railway system.

Some time during the year 1900 the controlling financial interests of the Union Pacific Railroad Company had endeavored in the open market to purchase a controlling interest in the stock of the Chicago, Burlington and Quincy Railroad Company and had failed.

Shortly thereafter the dominating factors in the Northern Pacific and Great Northern Railway Companies met, and agreed that, acting ultimately for these two companies, they would, if it could

be brought about, purchase a controlling interest in the Burlington Company. Through negotiations with the directors of the Burlington Company, they obtained a practical option on a majority of its stock at two hundred dollars for each one hundred dollar share, which was much in excess of its market value at that time.

The Great Northern and Northern Pacific shareowners accepted this option in April, 1901, and to meet the payments required therefor, issued joint bonds of the Great Northern and Northern Pacific Companies for two hundred millions of dollars, secured by pledge of the stock acquired.

About the time the general public was informed of the consummation of this purchase, one of the financial agents of the Union Pacific Railroad Company asked Mr. Hill, President of the Great Northern Railway Company, who had conducted the negotiations for the purchase of the Burlington system, to admit the Union Pacific interests to a share in that purchase. This request Mr. Hill refused, and the Union Pacific interests accepted this refusal as final.

After the refusal to admit the Union Pacific to an interest in the Burlington property the controlling spirits of the Union Pacific system under-

took to secure by purchase a controlling interest in the Northern Pacific 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 out of $155,000,000 total capital stock, divided into $75,000,000 preferred and $80,000,000 common, which was more than half of the total capital. These stocks had equal voting privileges.

The proposition which now confronted Morgan and Hill was how to take the control of the Northern Pacific Railroad away from the people who owned it.

They both admit in their answers and testimony that they suddenly realized in the spring of 1901 that the property *was* owned by the Union Pacific people. There is a note of boasting in both their answers in describing the strength of their adversary's position. Morgan said that their holdings, referring to the Union Pacific, constituted an absolute majority of the total capital stock of the Northern Pacific Company (Record, p. 342) and Hill's language is that they had a "clear majority of the entire capital stock." (Record, p. 53.)

Mr. Morgan states he was "apprehensive;" he was alarmed.

He feared the owners of the "absolute majority of the total capital stock of the Northern Pacific Company" might have acquired their stock, as he puts it in his answer, "for the purpose of securing control of the direction of the Northern Pacific Company and thus managing it, not for what said firm (of J. P. Morgan & Co.) conceived to be the best interest of the company, but for some ulterior purpose of which said firm was not informed." (Morgan's Answer, Record, p. 90*a*.) At this time Morgan's holdings amounted to only about $6,000,000, and the combined holdings of Morgan, Hill, and their respective associates in the Northern Pacific were only about $26,000,000 of a total of $155,000,000. They then by purchase and otherwise brought to their combination about $15,000,000 more common stock, which gave them a majority of the common shares.

It was this struggle for the shares of the Northern Pacific Railway that caused the extraordinary spectacle of the ninth of May, 1901, when the common stock of that company, which shortly before had been selling at par, on that day sold on the stock exchange at one thousand dol-

lars per share; and that carried in its train disaster to so many who had no relations whatever to either of the companies or any of the parties who were directly engaged in that struggle.

In November, 1900, the voting trustees of the Northern Pacific Company had declared that the time had arrived for the dissolution of the trust, and that the restoration of the certificates of stock to the owners thereof should *begin* January 1, 1901, when in ordinary course the share owners would elect the successors to the directors who had been appointed by the voting trust. So that at the time of the struggle for control of the Northern Pacific property in the spring of 1901, the directors then in actual possession of the property were those who had been appointed by Mr. Morgan and his associate trustees.

The action that led up to the formation of the Northern Securities Company was now rapid and interesting.

The results of the May contest were that the Union Pacific interests had $78,000,000 of the preferred and common stock, which constituted a majority of the total capital of the company, and the Hill and Morgan alliance had $41,000,000 of the common stock of the Northern Pacific Railway

Company, and it was claimed by the former that they would secure the control of the property at the annual election to be held in the autumn of 1901. To this the Hill-Morgan interests replied that there was a provision in the plan of reorganization which enabled the company on any first of January until 1917 to retire the preferred stock, which when done would reduce the Union Pacific holdings to a minority interest in the common stock, and that the existing board of directors would take that action. To this it was in effect said that the existing board was the creation of Mr. Morgan and his associates, and was by reason of the dissolution of the voting trust a moribund board, and would become extinct in October, 1901, when the Union Pacific interests having a majority of the stock would elect a board that would rescind any action of that kind that Mr. Morgan's board of directors might take; and this would checkmate the Hill-Morgan plan, as, even under the provision for retiring the preferred stock its owners could not be required to accept the redemption of it before January 1, 1902, and by that time the board elected by the shareowners would be in control. The Hill-Morgan alliance then made final reply that if necessary the annual election of directors for 1901 would be postponed until after Jan-

uary 1, 1902, when the preferred stock would be retired.

This conflict produced the greatest consternation and a stock market panic resulted, and it was feared a financial and commercial panic would follow.

The organization of a holding company had at this time been determined upon between Hill & Morgan, and, acting in its behalf, J. P. Morgan & Co. entered into negotiations for the purchase of the Union Pacific holding of the Northern Pacific stock. Those negotiations resulted in the withdrawal of the Union Pacific opposition to the retirement of the Northern Pacific preferred stock, and the surrender to Morgan & Co. of its holdings of Northern Pacific stock, which had been held by Harriman and Pierce, trustees. A part of the consideration therefor was the payment of $8,915,629 in cash and the acceptance by the Union Pacific of the balance ($82,491,871) in the stock of the Northern Securities Company, *to be organized.* (Record, p. 657.)

In this state of affairs a meeting was held at the office of Mr. Harriman, at which representatives of the controlling owners of the shares of the Great Northern, Northern Pacific, and Union Pacific Railway Companies were present, when

it was agreed that their contests should cease; that the existing board of directors should resign, and that Mr. Morgan should name a new board of directors for the Northern Pacific Company in which the theretofore conflicting interests should be represented, and a new and greater corporation should be formed to take over the Great Northern and Northern Pacific Railway Companies and through them the Burlington Railway system, in which corporation the former conflicting interests should be represented; and through this community of interests, harmony between the three great trans-continental lines of railway would be assured.

A paper was prepared by these representatives which set out as much of the results of this conference as they deemed best to publish to the world, and it was by them sent to a newspaper called the "Wall Street Summary," and was published in the issue of that paper of June 1, 1901, and is 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. P. Morgan. Certain names have already been suggested, not now to be made

> public, which will especially be recognized as representative of the *common interests.* It is asserted that *complete* and *permanent harmony will result* under the plan adopted *between all interests involved.* (Record, p. 341.)

Mr. Morgan defined "community of interest" to mean that there was to be no more fighting of each other by the various interests involved. And again:

> The community of interests is that principle that a certain number of men who own property can do what they like with it. (Record, p. 343.)

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 Northern Pacific being voted for them. That board then voted to retire the preferred stock, the means for which was 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.

Shortly thereafter the Northern Securities Company was organized by Mr. Hill and his associates for the purpose of taking over the control of both the Great Northern and Northern Pacific Companies through the transfer to it of their capital stock, respectively. Of its capital stock of $400,000,000, but $30,000 was to be paid in cash. The remainder, represented in its unassessable shares, was to be exchanged for Northern Pacific stock on the basis of $115 of Northern Securities stock for each share of Northern Pacific stock, and $180 Securities stock for each share of Great Northern stock.

The capital stock of the Securities Company when all was issued was just sufficient to take over, at the exchange valuation stated, the entire capital stock of the two railway companies, which was $122,000,000 in excess of their par value.

The former individual stockholders of the railroad companies were thus eliminated and the Northern Securities Company was substituted. The individual shareholders of the Northern Pacific Railway Company were no longer to draw their dividends from the earnings of that company; and the individual shareowners in the

Great Northern Railway Company were no longer to draw their dividends from the earnings of that company, but instead, both were to draw their dividends from the earnings of both systems. The former Northern Pacific shareowners by this combination became as deeply interested in the Great Northern and its economies and earning power as they formerly had been in those of its rival, the Northern Pacific Railway.

In this manner share-owners of each railway became jointly interested in both railways, and the earnings of both were pooled for the benefit of the former shareowners of each; and there was vested in the Securities Company the selection of the directors and managing officers of each railway and the power and duty to do all "acts or things designed to protect, preserve, improve, or enhance the value of the" stock of such railway companies. Of the stocks of the two railroads, the Securities Company had received, when the testimony was taken in this case, $95,000,000 of the $125,000,000 of Great Northern stock, and $151,000,000 of the total of $155,000,000 of the Northern Pacific stock.

I have detailed somewhat at length the facts out of which the Northern Securities Company was evolved. They clearly establish that it is an

instrumentality created to control the Northern Pacific and Great Northern railroads, and through their ownership of the Burlington to control that road likewise. It is also an instrumentality devised to carry out an arrangement between these properties and the Union Pacific Company, which held the majority of the stock issue of the Northern Pacific Company, by which the Union Pacific surrendered its potential ability to control and operate the Northern Pacific as a competitor to the Great Northern.

It is therefore a combination in restraint of commerce among the States, and was intended so to be, and with or without a proven intention it is illegal, as by virtue of the combination it is guilty of the mischief which the law is designed to prevent, namely, it brings transportation and trade throughout a vast section of country under the controlling influence of a single body and destroys any possible advantages the public might have through any competition between the two lines.

Let us determine first what this arrangement is, as a fact.

What end does it in fact accomplish?

Is that end violative of the law or has the

ingenuity of the defendants devised a scheme which is a successful evasion of the law?

WHAT AS A FACT HAS BEEN DONE.

The majority of the stockholders of two corporations have put their stock into the hands of a third person and have taken from that third person its certificates designating their respective interests in the deposited stock. They have merely exchanged an interest in one company for an interest in two.

By this arrangement two competing interstate railroads have been brought into such relations that their independence as competitive factors in interstate commerce is destroyed.

By this arrangement the legal incident of control which the law wisely vested in the holders of a majority of the stock of the Northern Pacific Company is now lodged in a trustee who likewise controls its greatest competitor.

The real mischief accomplished by this arrangement has been to bring transportation and trade throughout a vast section of country under the controlling influence of a single body.

The thing that has been done was declared illegal when brought about by the methods pursued in the Joint Traffic and Trans-Missouri cases.

The Trans-Missouri and Joint Traffic cases were cases of contracts or agreements between independent and competing lines of railroad for the regulation of traffic charges. The government charged that these agreements restrained interstate commerce, and this court sustained that contention.

The court heard the cases patiently, and the arguments thrice presented by the railroads failed to disturb the court's conclusions that the contracts or agreements in question violated the law.

The exigencies of the cases rendered necessary a complete interpretation of the statute. The power of Congress to enact the law, the application of the law to common carriers, and specifically its application to contracts or agreements regulating rates, were all denied. Dark forebodings of resultant commercial disaster, should the government's contention prevail, were solemnly and forcefully impressed upon the court by gentlemen of eminent personal and professional standing. These considerations invited and secured patient and full consideration of the cases and exhaustive analysis and interpretation of the statute in the judgment.

After making it perfectly clear that the court was not to be dissuaded from giving effect by its

judgment to a public policy declared by a constitutional statute, the court stated what that public policy is and wherein it was infringed by the challenged agreements. This exposition of the law is now the Government's reliance, as it should have been the defendants admonition. The court's decision was not followed by disaster, but by years of abundant prosperity, undisturbed until new devices were put into operation to accomplish again the destruction of competition and to thwart the wise policy of the law. It is not the observance of the law or its enforcement that creates panics or distress. It is willful violations of its wholesome provisions, or defiance of the laws of economic health. It is not my intention to reargue any of the propositions settled by those cases, but to do what I can to show their application to the facts of this case.

The great questions settled by the court in the Trans-Missouri and Joint Traffic cases are these:

First. That to shut out the operation of the general law of competition between competing interstate railroads is to restrain interstate commerce.

Second. That to bring the operations of two or more competing interstate railroads under the control of a single body shuts out the opera-

tion of the general law of competition and constitutes a restraint upon interstate commerce.

Third. That Congress is competent to forbid any agreement or combination among companies competing for interstate commerce which retrains commerce among the states by shutting out the operation of the general law of competition.

Fourth. That in order to maintain a suit the government is not obliged to show an intent to restrain commerce, if such restraint is the natural and necessary effect of the arrangement.

It would seem, therefore, that the government's case can be put in this sentence: Is there a combination—does it restrain commerce among the States?

The Joint Traffic and Trans-Missouri cases dealt with traffic agreements or contracts. The law not only inhibits all *contracts*, but all *combinations* in restraint of interstate trade.

There is a difference between a contract and a combination for such a purpose. A contract depends for its cohesion upon the will of the parties. True, its breach may be compensated by damages, or in case of decree for specific performance, by punishment for failure to perform; yet in the end it is a matter of personal volition with the parties

whether or not they abide by the terms of their contracts.

A combination upon the other hand is usually an arrangement whereby the power to defeat the purpose for which the combination is formed is withdrawn from the constituent units.

The language of the law is "combination in the form of trust or *otherwise;*" that is, combinations in any other form. Combinations in the form of trusts were well understood at the time of the enactment of this law. They were invariably formed by transferring the stocks or property of the constitutent units to a holding trustee, whose will was thus dominantly enthroned over the whole; and against the stocks or property so transferred, the holding trustee issued certificates to the transferrors, representing their respective proportions of the whole. This form of combination was evolved from the experience that a "gentlemen's agreement" to control competition works better when the collateral is up.

Any combination that has these features is a combination in the form of trust and is specifically invalidated by the statute.

Mr. Noyes, in his work on Intercorporate Relations (sec. 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 several companies.

The validity of this form of combination has been passed upon by many courts. The language of the Supreme Court of Illinois in *Harding* vs. *American Glucose Company*, (182 Illinois, 551, 615), concisely expresses the principle running through them all.

It is there stated that:

> 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.

The essential idea of a combination in the form of trust, it will be seen, is that it is a holding company whose position is similar to that of a trustee holding the legal title to properties, the equitable interest in which belongs to others.

The Northern Securities Company is a combination in the form of trust as just described. It is such a holding company. It is so described by the men who are responsible for its existence. The answers and the testimony of Messrs. Morgan and Hill, Kennedy, Steele, and Clough make this clear and certain.

Let me quote from the record what these gentlemen say.

And while I read from their testimony, I ask the court to note not only the form of this combination, but what power over the two railroad systems these gentlemen understood that the Securities Company was to have.

First, from the testimony of Mr. Morgan:

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 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 it in your own mind to have a holding company for the Northern Pacific?

A. * * * 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.* (Record, pp. 344, 345.)

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. (Record, pp. 347, 348.)

Your honors will observe that throughout this case the word "protect," as used by the witnesses, means to protect their control.

* * * * * *

Q. 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. (Record, pp. 355, 356.)

NOTE.—What did Mr. Morgan say was the reason he did not use the United States Trust Company? It was because whoever got control of *it*, got control of the stocks which it held. Why is it he made the capital of the Securities Company so large? To prevent a change of control of the railroads that would follow a change of ownership in the majority of the holding company.

Mr. Charles Steele, a member of the firm of J. P. Morgan & Co. also said upon this subject:

> Upon Mr. Morgan's return from Europe, about mid-summer of 1901, the question of transferring the Northern Pacific stock to the Northern Securities Company was discussed. *The question of forming some sort of a holding corporation to hold the Northern Pacific stock, which we had bought and which was held by our friends at that time, was discussed about then* (Record, pp. 289–290).

Not only was a holding company agreed upon but its control of both railroads was provided for.

The answer of J. P. Morgan et al. states that (Record, p. 91*a*):

> 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 con-*

siderable 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.*

Mr. Morgan says:

I heard in Aix, where I was, about the 1st of April or 1st of May, 1901, that the Union Pacific interests had acquired control of the Northern Pacific. (Record, p. 337.) And when I got this news I felt that something must have happened; somebody must have sold. I knew where certain stocks were and I figured it up. So I made up my mind that it would be desirable to buy 150,000 shares of stock, which we proceeded to do, and with that I KNEW *we had a majority of the common stock, and I knew* THAT ACTUALLY GAVE US THE CONTROL *and they couldn't take the minority and have it sacrificed to the Union Pacific interests.* (Record, p. 338.)

Every share of that stock I bought in the market. (Record, p. 338.)

Q. Did Mr. Hill act with you?
A. He generally did.
Q. In that matter?
A. Certainly; that is to say, his interests ere the same as ours. (Record, p. 340.)

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

> 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 support their interests in the future, the Great Northern shareholders holding Northern 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.

Mr. Hill testified,

> *Between May 7 and May 9, J. P. Morgan & Co. asked me if myself and friends*

would hold our stock and not sell out. I told them we would, and they went into the market and bought some $15,000,000 or $16,000,000.

Before myself and friends would agree to hold our Northern Pacific we had the promise of Morgan & Co. that the preferred stock would be retired. (Record, p. 65.)

Mr. Hill adds, that on the 9th of May there was a good-sized panic. I think Morgan & Co. bought the stock on Saturday or Monday prior to that time. (Record, pp. 47–48.)

By the morning of May 9, myself and friends and Morgan and his associates held between $41,000,000 and $42,000,000. By my associates I mean those who are interested with me in Great Northern matters, or those who were interested with me in the purchase of a large block of the Northern Pacific which I bought from the reorganization committee. (Record, p. 48.)

Subsequent to May 9, 1901, I understood that Kuhn, Loeb & Co., representing the Union Pacific interests, held about $41,000,000 of the preferred and about $37,000,000 of the common stock. (Record, p. 49.)

There was a meeting of those representing the Union Pacific, and myself and Mr. Bacon and Mr. Steele. The Union Pacific people claimed that they had the control by the ownership of a majority of all the stock, while Mr. Bacon and Mr. Steele insisted

that they held, as long as myself and friends held our stock, a majority of the common stock, which would control the property. (Record, p. 50.)

I think, after consulting with two or three of the shareholders, I fixed the rate upon which each, the Northern Pacific and the Great Northern, would be taken or purchased by the holding company when such holding company was organized. (Record, p. 86.)

The value of the Northern Pacific common was fixed with reference to the value of the property taken as a whole, its capacity to earn money, its land grant, the situation in the country, and so on. The same thing was true of the Great Northern. (Record, p. 89.)

Mr. Morgan testified as follows:

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

(And remember it is the putting of control of competing roads in one place that is the mischief the law was designed to remedy).

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.)

I deem it unnecessary to quote the testimony of the other witnesses to the same effect.

The testimony shows conclusively, I think, that as a matter of fact and law the thing which these gentlemen did was to create a combination in the form of trust, the form specifically prohibited by the act of Congress, if it restrained interstate commerce; and also that the Northern Securities Company was formed for the *purpose* of taking over the control of the Great Northern and Northern Pacific Railroads, and actually took over that control, and with that control absolute power over both roads, the thing which your Honors have said constitutes such restraint under circumstances substantially the same as those of this case.

While the purpose of an act is ordinarily determined by its effect and operation, in this case the purpose is clearly avowed by the defendants to have been the control of these two properties.

I have shown by the testimony of Messrs. Hill and Morgan that their purpose and intent during the period of the formation of the Securities Company was to get into its hands enough of the stocks of the two roads to control them. Now let me read to you what Mr. Hill says in his

answer of the *effect* of the consummation of their plans. (Record, p. 67*a*.)

> 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 the defendant railway companies.

That is, by the Securities Company having control of both, no one else can control either or both.

Morgan's idea was that when they got together they would be big enough to be safe. That is, safe and unassailable in their control of both roads.

The men who know the purpose of the organization of the Northern Securities Company, the history of the events that preceded and led up to its formation and the purposes designed to be accomplished, are James J. Hill and J. P. Morgan, and I have told the court their story in their own language.

I have endeavored to show that *in form* their combination belongs to the class specifically prohibited by the law—that it is a combination in the form of trust.

But the law likewise prohibits combinations otherwise formed. That is to say, the law distinctly and plainly provides that its policy shall

never be defeated by the exercise of any ingenuity in the devising of forms. The object of the law once clearly determined, all difficulty ceases if it is established that that object is defeated through contracts, combinations in the form of trust or otherwise, or by conspiracies.

To deny that the Northern Securities Company is a combination in the form of trust is to deny what seems clear to a demonstration.

To deny it is a combination at all is to challenge common intelligence.

To deny that it restrains commerce by shutting out the natural law of competition is to deny the authority of this court.

I have endeavored thus far to show what this combination is as a fact.

THE END ACCOMPLISHED.

I shall now invite your consideration to the end that the Securities Company accomplishes.

The device resorted to in this case, if sustained, defeats the policy of the law, as it accomplishes all and *more* in the way of effectual destruction of competition than was accomplished in the Trans-Missouri and Joint Traffic cases.

It should be noted how much more complete and absolute the control of the Securities Com-

pany is over these roads than the control vested in the managers of the Trans-Missouri and Joint Traffic cases.

The one secures permanent, absolute control and power to administer every feature of management and operation of the properties, while the others were but temporary arrangements which related to the single feature of rates, and depended for their duration upon the will of the parties.

Because it includes more, it can not be less lawless.

Because the arrangement is incorporated does not change its essential character, as you can not make wrong right by incorporating it. No State can construct a creature and endow it with immunity to defy the supreme law of the land.

If the Joint Traffic pool had been incorporated, would the decision of the court have been different?

Suppose you incorporate a company to fix rates on all lines, or

Suppose you were to incorporate a company *to control* all the railroad companies of the United States?

What difference in law would there be between the two in their effect upon competition? None!

The fixing of rates is an incident of control and

it is wholly immaterial in its effect upon commerce whether the power to fix rates depends upon the control of the roads by a combination effected through the holding of their stock, or depends upon the delegation of power for that purpose by the railroad companies.

In the Trans-Missouri case the railroads delegated the power to fix rates, and agreed to be bound by them when fixed.

The court in the Joint Traffic case demonstrates the relative unimportance of the binding force of the contract, as such, compared with the power existing in the combination, by its mere existence, effectually to prevent competition between the different roads.

In the present combination the power over the two railroads is complete and requires no agreement between them to make it effective. The Securities Company, the custodian of the power, absolutely dominates the whole situation.

There is more reason for striking down a combination by which perpetual power is established over competition than for striking down a contract to control competition which may be terminated at the *will of the parties.*

In this case the power to fix rates is established by the formation of a combination possessing that

and all other powers over the action of the two roads, and with power to enforce its will upon the properties in respect to all of their relations to the public, without the necessity of any contract upon the subject.

Surely, a combination which controls all the acts, operations, and policies of competing railroads is more obnoxious to the spirit and reason of the law than a contract under which control is limited to a single function.

While it is true that the Trans-Missouri and Joint Traffic cases had to do with *agreements* for the establishment of rates, yet the court met the full situation and said that Congress in regard to interstate commerce and in the course of regulating it in the case of railroad corporations has 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.

The prohibition of the act extends to combinations as well as to contracts. The Trans-Missouri and Joint Traffic cases were cases of contracts which shut out the operation of the general law of competition. This is a combination which accomplishes the same result.

It is the arrangement, whatever it may be,

vesting control, however the control may be exercised, which is illegal, if that arrangement restrains interstate commerce.

You may call it a merger, a combination, a pool, a conspiracy, a consolidation, a contract, a *securities company*, or what you like. The thing it accomplishes is not varied by a variation in name or manner of bringing it about.

Congress meant that the government should have the right to prevent the exercise of the power to restrain interstate commerce by preventing its acquisition through contracts, combinations, conspiracies, or monopolies; and it is the contracts, combinations, and conspiracies by which the restraint is brought about that the act declares illegal.

The *great* object of Congress was to declare a policy against which no arrangement could stand by which the parties fully equip themselves with the power to defeat its purpose.

THE POWER TO SUPPRESS COMPETITION HAS BEEN EXERCISED.

It has been suggested that though this arrangement vests the power in the Northern Securities Company to suppress competition between these two railroads, the law is not violated until that

power is exercised. Of course, all know this court has determined otherwise.

In the case of the *United States* v *The Joint Traffic Association,* the court said (171 U S., 570):

> We do not think, when the grantees of this public franchise are competing railroads seeking the business of transportation of men and goods from one State to another, that ordinary freedom of contract in the use and management of their property requires the right to combine as one consolidated and powerful organization for the purpose of stifling competition among themselves, and of thus keeping their rates and charges higher than they might , otherwise be under the laws of competition. And this is so, even though the rates provided for in the agreement may for the time being be not more than are reasonable. THEY MAY EASILY AND AT ANY TIME BE INCREASED.

So again, in *Pearsall* v. *The Great Northern Co.* (161 U. S., 676) the court said:

> Whether the consolidation of competing lines will necessarily result in the 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.

And in *The Trans-Missouri* case (166 U. S., 341): The question of intent, said the court, with which the act was done, even when charged in the bill, is immaterial, and need not be shown by the Government, if the necessary consequences of the act is to restrain commerce. *To stifle competition is of itself to restrain commerce.*

Take the act as a whole, and it clearly appears that it was never intended to cast upon the Government the almost impossible burden of following the countless ramifications of railroad operations, to discover if, under a combination which unifies the interests of two parallel and competing railroads, and thereby empowers it to impose all manner of restraints upon commerce, such restraints are being manifested by particular acts.

The second section of the act creating the offense of monopolizing or attempting to monopolize interstate commerce says nothing about the offense depending upon the fact of actual restraint of commerce following from the monopolization. From this it can be fairly inferred Congress assumed that to monopolize interstate commerce was to restrain it, just as your Honors have said,

"to stifle competition is of itself to restrain commerce."

I therefore state the rule to be, as laid down by this court in the *Trans-Missouri Case*, the *Joint Traffic Case*, and the *Addyston Pipe Case*, that where the necessary effect of a combination is to give the combination the *power* to restrain interstate commerce, that combination is a violation of the Anti-trust Act, regardless of the intention with which the combination was formed. Counsel have denied that this is the rule laid down in those cases. They say that the agreements in the *Trans-Missouri Case* and the *Joint Traffic Case* were, on their faces, agreements which accomplished an *actual* restraint of trade. But this is contrary to the fact. The agreement in the *Joint Traffic Case* at least, certainly did not, on its face, look to the *actual* restraint of trade or commerce by raising transportation charges or suppressing competition between the railroads which were parties to it or otherwise. On the contrary, the agreement provided that the rates to be charged should be those already on file with the Interstate Commerce Commission and which had received at least the tacit approval of the Commission as to their reasonableness; and, furthermore, it was stipulated that the Traffic

Association should co-operate with the Commission in the enforcement of the laws. Moreover—and this is a very significant point—the agreement left each road free to depart from the schedule of rates and enter into active competition with any or all of the other members of the association if it chose to do so. It is very clear, therefore, that the agreement in the *Joint Traffic Case* did not stipulate for the doing of any acts that would *actually* restrain trade or commerce by shutting out competition or otherwise. This court, however, held the association to be illegal under the Anti-trust Act because it had the *power* to suppress competition and thereby restrain trade, even if it did not on its face prevent competition. (See pages 563 and 571 of the report.)

But let us meet the defendants on their own ground, and acccpt, arguendo, the proposition that in its application to this case, that actual suppression of competition must be shown. The Government claims the power has been exercised and competition between these two railroads has been destroyed.

Morgan and Hill had the power to suppress competition between these two roads when they held the control of the majority of the stock of

the two roads. They executed that power and actually suppressed and destroyed competition between them the moment they parted with the legal title to their segregated holdings and vested it in the Northern Securities Company, with the power in that company, as its charter specifies, "to exercise all the rights of ownership, including the right to vote thereon."

This actually destroyed competition between the two roads.

To be competition there must be competitors in different interests.

Any act which eliminates the competitors or unifies the interests destroys competition.

There is no competition where the net results of operation go into a common purse.

There may be rivalry between the different departments or agencies as to which will contribute the most to the common fund or as to which is the most economically administered or operated, but so long as all are interested in the operations of each by sharing a fixed proportion of a common fund, unaffected by the proportion contributed by each, there is no competition.

A stockholder of the Northern Pacific Company who surrendered 1,000 shares of his stock and took shares of the Northern Securities Com-

pany in lieu thereof, gets no less dividend upon his shares if every ton of freight is moved over the Great Northern Lines, and the stockholder of the Great Northern Road gets no more under similar circumstances.

Neither does it make any difference to the Northern Securities Company. What it loses out of its right hand it accumulates with its left. No one is foolish enough to contend that if two concerns agree to pool their earnings in the hands of a third person and divide them upon a fixed basis having no relation to the results of their respective operations, that they are competing.

Such arrangements have been determined by the courts over and over again to be *ipso facto* destructive of competition.

The object of business is gain, and when the gains of competitive enterprises are combined and arbitrarily divided, competition is destroyed.

The arrangement defeated by Pearsall was but the transfer of the *control* of a railroad to its competitor *through the ownership* of its stock, and this court said "the *effect* of this arrangement 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 com-*

petition between the two lines." Domination and competition do not coexist.

It is said by the court in the Joint Traffic case, "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 the matters over which the combination extends, that constitutes the alleged evil." (171 U. S., 571.)

If a combination is formed for the purpose of control and has control, it is idle to say it is not exercising control. It is exercising control at all times. It may be exercising it beneficently, nevertheless what it is doing it is doing because it wills to do it and has the power to do it. This court has said if the combination gives the power to suppress competition, it is obnoxious to the law.

My contention in this case is, that this sort of a combination *does* suppress competition and restrain commerce the instant it is completed, for the reasons which I have undertaken to state.

Upon the question of the power of a majority holding and its effect upon a railroad property when in a competitor's hands, the Government and defendants seem to agree. It remained for Mr. Hill, in the hands of his attorney, Mr. Young, to develop the full scope of such a situation.

Let me read Mr. Young's question and Mr. Hill's answer (Record, p. 742):

> Q. You have been questioned as to what effect or what injury the acquisition of the Northern Pacific stock by interests hostile to the Great Northern or hostile to the development of this Northwestern country, would have on the Great Northern Company. Now, I want to ask you what effect would such an acquisition of the majority or of the control of the Northern Pacific by a corporation which had greater interests in other directions than it had in developing the country traversed by the Northern Pacific, and making that property valuable—what effect would that have on the minority stockholders of that company, including yourself—on their property, their stock?
>
> A. The value of the property would be destroyed. Its growth would be restricted. It would be controlled in the interests of another property or body for the reason that it would be restricted or might be restricted so as not to interfere with the growth of the other property.

What more striking and concise statement could be made showing the nature of the power that goes with the control.

Restraint of commerce does not mean alone the fixing of rates, whether they be high or low. That is probably the least harmful of the many

evils that flow from a combination of competing lines. It means also getting the commerce which was conducted by many into the hands of the few. In this case it means combining the railroad facilities of a section into one control.

In this case it means that the 8,600 miles of the Burlington system, the 5,400 miles of the Great Northern system and the 5,500 miles of the Northern Pacific system now constitute the 19,500 miles of the Northern Securities system, being in round numbers one-tenth of all the railroad trackage of the United States.

It means that forever the normal workings of the law of competition in the Northwest are checked by the dead hand. That the extension and expansion of railroad facilities no longer depends upon the legitimate demand therefor, growing out of the necessities of increasing commerce by which they are naturally governed, but depends upon the will of the master, who dominates the whole situation. It means that new lines can be brought into existence to meet new needs only if the combination wills it so, or as the result of successful effort against the fearful odds of intrenched monopoly.

It means, in the language of Mr. Hill, restriction of the growth of one property in the interest

of another; the subordination of the interests of one section to advance the interests of another section.

These are some and a very few of the reasons for the American policy of free and unrestrained competition in the business of transportation declared in the statutes of Congress and the constitutions or laws of almost every State, and these are the things which this combination in fact accomplishes.

DEFENDANTS HAVE MONOPOLIZED A PART OF INTERSTATE COMMERCE.

The Government contends that not only have defendants violated the first section of the act of July 2, 1890, by combining in restraint of interstate commerce, but that they have violated the second section of the law by attempting to monopolize and by monopolizing a part of interstate commerce.

It is undesirable to review again the facts of the case for the purpose of sustaining this proposition. The combination created, as I have described, constitutes the monopoly. The monopoly is a monopoly in the hands of the Securities Company of the means of transporta-

tion formerly conducted competitively by the Great Northern and Northern Pacific roads.

The scheme of the so-called Anti-trust law is apparently this: By its first section "every contract, combination, or conspiracy in restraint of trade or commerce among the several States is hereby declared to be illegal." The thing declared by the act to be illegal is the contract, combination, or conspiracy. Now contracts, combinations, and conspiracies are the results of joint action. It is necessary that two or more persons should be parties to them. The law plainly says in the first section that combinations in restraint of commerce among the States are "hereby declared to be illegal," and this without regard to whether the restraint is reasonable or unreasonable. So that to make out a case under the first section of the act all that it is necessary to establish is that there is a contract, combination, or conspiracy and that it effects the prohibited restraint.

Under the second section of the act the offense is monopolizing or attempting to monopolize any part of the trade or commerce among the several States, and every person is forbidden so to do, whether by his individual act or by combination or conspiracy with other persons.

Whether the acts of defendants, which constitute a violation of the first section of the law, come also within the prohibition of the second section, depends upon the meaning of the words "monopolize" or "attempt to monopolize" in their application to the facts of this case; that is, it depends upon a determination of what constitutes "monopolizing" interstate transportation.

While authority upon this subject is abundant, I shall content myself now with but one reference, and that is to the case decided by this court, which involved the consideration of the legal effect of the unification of these same railroads through the control by the Great Northern road of the stock of the Northern Pacific road.

The court in that case said:

> 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 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*. (161 U. S., 677.)

Monopolizing, or attempting to monopolize in-

terstate transportation, *which is interstate commerce*, is getting or attempting to get under single control the business of interstate transportation which had been carried on competitively by different companies.

It is well to recall, in connection with this argument of defendants, viz: that the Government is powerless to interfere with their combination until it is able to show some concrete act of restraint, that at another time defendants have earnestly pressed the point that the Government has come into court too late to secure relief under the act, because its petition should have been filed before the combination was actually effected.

How could it have been possible for the Government then to have shown that which defendants in this connection assert to be essential to its case, that the combination was actually restraining trade? Surely these positions are inconsistent, as the combination could not actually be doing *anything* until after it was brought into existence.

I have endeavored thus far to show to your Honors that as a fact this merger is a combination in the form of trust, or otherwise.

That the end it accomplishes is to bring under one control the Northern Pacific and Great Northern railroads in such a way as to destroy

competition between them and to create a monopoly of transportation in the section served by them.

That this end was the deliberate purpose of the parties defendant who conceived and carried out the combination.

That such a combination is in restraint of trade, as your Honors have repeatedly decided, and therefore violates the act of Congress.

To all of this defendants make vigorous objection, much of which is wholly irrelevant.

I hardly think it necessary to call the court's attention to the fact that all the counsel who opened for the appellants said about the Anti-trust Act being essentially a criminal statute, and all that he said about the object of the Securities Company being to promote, enlarge, and build up commerce, and to protect it from destruction by its enemies, was said by himself and others, *mutatis mutandis*, in the *Joint Traffic Case*, where the fallacy or irrelevancy of the argument was so clearly exposed by this court that it is a little surprising it should now be repeated.

I shall not deny the fact of a tendency to combination throughout the land nor discuss its economic value.

I presume that fact accounts for the existence of laws designed to regulate the tendency along

the lines of its manifestation, where necessary to protect the rights and interests of the people.

I have not the slightest doubt about it, however, that this particular manifestation of that tendency has no economie merit. It is bad enough to bring the entire railroad facilities of an important section of the country under monopolistic control, but when to the power to fix charges for transportation you add the creation of scores of millions of *fiat* stock upon which those charges are expected to pay dividends, you impose an unjustifiable burden upon the people and exact too high a price for a successful evasion of the law.

While it may be true that the recapitalization of these companies was based upon existing market values for their stock, yet existing market values rested at that time upon total forgetfulness of the fact that the progress of material prosperity is not continuous, and that those values were lifted upon the wings of an optimism that had converted into stock and stock values all the prosperity in sight, as well as all hopes and expectations of many future years.

This thing was done when men who have been regarded as wise men and safe men lost their hold upon their judgment and failed to withstand the

temptation to gather for their instant personal advantage the fruits which, conserved, would have lasted many years and benefited many people.

It is not to considerations such as these, however, that I shall address myself, but to such objections by defendants to the Government's case as will be considered by the court.

These, so far as they have not been covered by what I have said, may be fairly said to come under these heads:

First. Assuming there has been a combination to obtain the control of these two railroads and that it has the control and is exercising the control, the effect upon interstate commerce is only remote and indirect and it is only direct restraint that is prohibited by the law.

Second. The Great Northern and Northern Pacific shares held by the Securities Company were acquired in the ordinary course of business, and there is nothing unlawful in one corporation investing in the stocks of other corporations when it is authorized to do so by the law of its creation.

Third. While admitting that the act of 1890 applies to combinations in the business of transportation, that is, the business done by railroads, it is contended that it can not be construed to apply to the railroads themselves, that is, the

instrumentalities of transportation, and that if so construed, it is an invasion of rights reserved to the States.

THE DOCTRINE OF DIRECT AND IMMEDIATE EFFECT UPON INTERSTATE COMMERCE.

It is argued that it is only such contracts and combinations as directly and immediately affect interstate commerce that are declared illegal by the statute.

This is true, but the Northern Securities arrangement *operates directly* upon commerce, because its certain effect is to control every act, policy and operation of two gigantic systems of railroads by which commerce is carried on.

"Transporting commodities is commerce, and if from one State to or through another it is interstate commerce." (*United States* vs. *Freight Association*, 166 U. S., 325.)

Nowhere does it appear by suggestion even, that the purpose of organizing the Northern Securities Company was other than to secure the control of these two roads.

The case of *United States* vs. *Knight*, contains nothing that the government need distinguish or explain in this case.

There the combination was of the instrumen-

talities of production, and production is not commerce.

Here, the combination is of the instrumentalities of transportation, and transportation is commerce.

There, the restraint upon commerce was indirect, because it only operated upon commerce through its effect upon production, i. e., by monopolizing production it restrained production, and that, in its turn, had an indirect effect upon commerce.

But here, it being a monopoly of instrumentalities of commerce. the effect upon commerce is direct, immediate, and necessary.

A monopoly of manufacturing in that case was held not to violate the law, because the business of manufacturing is not commerce.

A monopoly of railroads, however, does violate the law because the business of railroads is commerce.

"Railroads are the instrumentalities of commerce and their business is commerce."

The character of the business carried on by the use of the instrumentalities affected by the combination is the test as to whether the effect is direct or indirect.

It was not held in the Knight case that the

States or individuals have the legal right to affect interstate commerce directly or indirectly. It can not be successfully contended that a State may control or authorize others to control in a certain way what Congress is given previous power to control and has legislated to control in a different way, whether the States proceed directly or indirectly. The notion that the law is content to be defeated if indirectly defeated is a new one, which this court had no thought of sanctioning in the Knight case. It is a restraint upon *commerce* that the law prohibits, and the Knight case decided that a restraint upon production, under the facts of that case, as presented by the pleadings and proofs, did not violate the law, because its effect upon commerce was indirect or remote.

The subject to which the act of 1890 relates is interstate commerce, a subject under the exclusive control of Congress. The thing prohibited is combinations in restraint thereof, and if interstate commerce *is* restrained and is restrained by a *combination*, it is immaterial who are the parties to the combination, or how directly or indirectly the agencies they employ are connected with the subject. If the thing that is restrained is interstate commerce, the law is violated.

What possible difference does it make whether

the restraint is brought about by the action of the officers of the two railroads, as in the Trans-Missouri and Joint Traffic cases, or by their stockholders? The effect upon commerce is the same, and it is commerce that the law protects.

THE CLAIM THAT THE COMBINATION IS MERELY AN INVESTOR.

It is also argued that the Northern Securities Company is simply an investor; that the transactions complained of by the Government are simply sales of shares of stock which the vendors had the right to sell and the Securities Company the right to purchase; and that to condemn such sales of property as illegal would violate the right of private 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 the policies of the Great Northern and Northern Pacific railways by virtue of its ownership of a majority of their shares, is defeated by the evidence furnished by the defendants themselves. Nearly every excerpt I have made from the pleadings and the testimony contains evidence that the object of those who planned and accomplished the organization of the Securities Company was

to control the Great Northern and Northern Pacific railways. The evidence is overwhelming that the alleged sales and purchases of stock here in question were made in concert, in combination. Now, it is well settled that, because a person has the right to purchase stock in the ordinary course of business, it does not follow that stockholders of two or more competing corporations can combine among themselves and with such person, natural or artificial, to sell him or it 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. I have collected the authorities on this point in my brief and will refer to but one of them now. In the case of *Penna. R. R. Co.* v. *Com.* (7 Atl. Rep., 373), it is said:

> During the argument counsel invoked the aid of the undoubted general principle that the ownership of shares of stock, as of other property, carries with it the legal 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 purchaser 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 indi-

> vidual 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.

I do not deny the very spirited contention that the construction we put upon the law in question interferes with the power of people to do what they will with their property.

That was the very object of the law, and it was certainly contemplated that the rights of purchase, sale, and contract would be controlled, so far as necessary, to prevent those rights from being exercised to defeat the law.

I can not imagine a combination coming into existence without more or less redistribution of property between individuals through purchases, sales, or contracts. Combinations are never bestowed upon us ready made.

THE ALLEGED INVASION OF STATE RIGHTS.

Coming to defendants' next proposition, Does legislation by Congress for the protection of commerce, which affects or regulates the *instrumentalities* of commerce incorporated by the States, infringe upon the authority of the States?

The act of 1890 is an exercise of the power

granted to Congress to regulate commerce (*Champion* v. *Ames*, 188 U. S., 321), and the term "commerce," as used in that grant, embraces the *instrumentalities* by which commerce is 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.

And 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. 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.

It is thus seen that "commerce," as that term has been construed by the court, embraces the instrumentalities employed in carrying it on—embraces railroad corporations 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 railroad corporations.

When it comes to legislating for the protection of commerce, there is no difference between the power of the Federal Government over the instrumentalities of interstate commerce and its power over the persons engaged therein.

There is no difference between its power over persons and corporations engaged therein in favor of the corporations.

As the power extends to citizens of the United States and of the several States, so it extends to corporations of the United States, the several States, and foreign countries. The power covers the subject and all things by which the subject is affected.

It can never be a question as to whether parties to a combination in restraint of trade are in-

dividuals or corporations; it is always a question as to the nature, effect, and operation of the combination.

Of course a State has certain powers over the instrumentalities of commerce which it creates, as it has over the individuals by whom commerce is conducted. But a State has no power over either instrumentalities or individuals that can be interposed between them and the obligations imposed by a Federal statute regulating interstate commerce.

Where the subject is national in its character the Federal power is exclusive of the State power. (*Welton* vs. *Missouri*, 91 U. S., 280.)

Congress has power to regulate commerce among the States, and when in the exercise of that power it becomes necessary to legislate respecting the instrumentalities of commerce, it may do so, irrespective of the question as to how or by what authority those instrumentalities were created.

And if regulation of the control of these instrumentalities is essential to prevent the subversion of a policy of Congress it may regulate that control.

The power to regulate commerce among the several States includes the power to prevent restraint upon such commerce.

To restrain commerce is to regulate it.

Therefore any law of any State which restrains interstate commerce is invalid; and any contract between individuals or corporations, or any combination in any form which restrains such commerce is invalid.

The supreme power extends to the whole subject.

Under this plenary power Congress has supervised interstate commerce from the granting of franchises to engage therein, to the most minute directions as to its operation. For this purpose it "possesses all powers which existed in the States before the adoption of the National Constitution, and which have always existed in the Parliament of England." (*In re Debs*, 158 U. S., 586; *Gilman* v. *Philadelphia*, 3 Wall., 725.)

ALL STATE LEGISLATION IS SUBJECT TO THIS PARAMOUNT AUTHORITY.

A State has a right to tax the occupations of people within its borders, and particularly the occupations of its own people. A State has a right to tax bills of lading and other commercial paper used in carrying on business within the State. A State has a right to tax the gross receipts of a telegraph company, received from

business done within the State; and so a State has a right to charter corporations and give them such powers as it may see fit. But this court has held that a State cannot tax the occupation of an importer; that it cannot tax a bill of lading of an export shipment of gold; and that it cannot tax the gross receipts upon business done within the State of a telegraph company, without excepting from the tax the receipts from messages going to or coming from other States. The State's right to give powers to corporations is no more clear and unquestioned than its general rights and powers of taxation in the three other instances mentioned. But it cannot, in giving powers to corporations, meddle with, or empower corporations to meddle with, the freedom of interstate commerce. And to say that it cannot is no more to deny its right to form and empower corporations, than its powers to regulate occupations, tax commercial paper, and tax the gross receipts of telegraph companies were denied by this court in the other cases.

In *Philadelphia Steamship Co.* v. *Pennsylvania* (122 U. S. 326, 345) this court said:

> The corporate franchises, the property, the business, the income of corporations created by a state may undoubtedly be taxed

> by the state; but in imposing such taxes care should be taken not to interfere with or hamper, *directly or by indirection*, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the Federal Government. This is a principle so often announced by the courts, and especially by this court, that it may be received as an axiom of our constitutional jurisprudence.

In *Crutcher* v. *Kentucky* (141 U. S. 47, 61, 62) this court said:

> The character of police regulation, claimed for the requirements of the statute in question, is certainly not such as to give them a controlling force over the regulations of interstate commerce which may have been expressly or impliedly adopted by Congress, or such as to exempt them from nullity when repugnant to the exclusive power given to Congress in relation to that commerce. This is abundantly shown by the decisions to which we have already referred, which are clear to the effect that neither licenses nor indirect taxation of any kind, nor any system of State regulation, can be imposed upon interstate any more than upon foreign commerce; and that all acts of legislation producing any such result are, to that extent, unconstitutional and void.

The question in this case is not whether Congress can regulate and has regulated State corpo-

rations or the ownership of their capital stock. The question is, can the owners of such capital stock regulate interstate commerce?

It is settled law that interstate commerce can not be regulated by State constitutions, nor by State legislatures existing under State constitutions, nor by corporations created by State legislatures acting through their directors, as attempted in the Trans-Missouri and Joint Traffic cases.

Whence comes such power, then, to stockholders, if the sources of all *their* rights and powers are impotent to defeat the law of Congress?

It is certainly not an incident to the ownership of capital stock of a State corporation that it is licensed to defy a law to which all the sources of its being must bow.

The United States is not undertaking in this case to deprive the owners of railroad shares of any rights incident to their ownership under any law of any State. What is denied here is the right of stockholders of competing railroads to combine their holdings in such a way as to center controlling stock interests in the two roads in a single person or coterie of persons, thereby effecting a restraint upon commerce in violation not only of the express prohibition ot the Federal

Anti-trust Act, but of the policy of the States creating the corporations as well.

But put the proposition as it is put by appellants: Can Congress regulate the ownership of interstate railroads under its power to regulate commerce among the States, and has it done so by this act of 1890?

Most certainly, yes. Congress can regulate anything and everything in the sense that it can prohibit and prevent its use in a way that will defeat a law that Congress may constitutionally enact. For this purpose, the supreme power operates upon everything, upon every one.

No device of State or individual creation can be interposed as a shield between the Federal authority and those who attempt to subvert it. No rules of law which govern the relations which individuals have created *inter sese*, or which have been assumed between themselves and a State, are to be considered in an issue between them and the United States to defeat the ends of a constitutional law. The Federal power would not be supreme if the operation of its laws could be defeated, embarrassed, or impeded by any means whatsoever.

For the purpose of showing that the act of 1890 is unconstitutional, it has been suggested

that if the Northern Securities Company effected a virtual consolidation of the Northern Pacific and Great Northern railroads, it infringed the authority of the States, as the control over the consolidation of railroad companies is exclusively a State power and function.

Curiously enough, in the case of the State of Minnesota against the Northern Securities Company, where the State charged that the merger effected a consolidation of the two railroads and therefore violated the statutes of the State prohibiting consolidations effected in any way, the defendants succeeded in satisfying the circuit court that such a contention was erroneous.

It appears to me, however, that it is not necessary for the purposes of this case to maintain either that this arrangement was or was not a consolidation of these two railroads. The Government's contention is, that a combination was effected between the stockholders of the Great Northern and Northern Pacific railroads through the instrumentality of the Northern Securities Company, which combination restrains interstate commerce by destroying the operation of the general law of competition between these two roads by bringing transportation and trade throughout a vast section of country under the con-

trolling influence of a single body. If it were necessary to meet the question in this case, I should not hesitate to state that in my opinion it is not material whether the arrangement effects a consolidation or not. If the arrangement accomplishes that which the law prohibits, through the means which the law prohibits, it is certainly within the prohibition of the law, and if this *were* a consolidation under State *authority* INSTEAD of being a combination which effects that which defies the law of every foot of land which these railroads occupy, I should not hesitate to say that it violated the Federal statute, if it accomplished a restraint upon interstate commerce. To hold otherwise would be to read into the law a proviso to the effect that the act should not apply when the combination took the form of a railroad consolidation under authority of State legislation.

In the *License Cases*, 5 How., 600, Mr. Justice Catron, speaking for the court upon the subject of the relations between State and Federal power, says:

> And here is the limit between the sovereign power of the State and the Federal power. That is to say, that which does not belong to commerce is within the jurisdiction

> of the police power of the State; and that which does belong to commerce is within the jurisdiction of the United States.

Do not railroads belong to commerce? Your Honors have said they are the instrumentalities of commerce; that their business is commerce, and that the power to regulate commerce includes the power to regulate its instrumentalities.

The States have no more power to bring about a consolidation of the highways of interstate transportation, which restrains interstate commerce, than they have to define what shall be the subjects of interstate commerce. Of an undertaking to do the latter, this court said (*In re Rahrer*, 140 U. S., 558):

> If this be the true construction of the constitutional provision, then the paramount power of Congress to regulate commerce is subject to a very material limitation; for it takes from Congress, and leaves with the States, the power to determine the commodities, or articles of property, which are the subjects of lawful commerce. Congress may regulate, but the States determine what shall or shall not be regulated. Upon this theory, the power to regulate commerce, instead of being paramount over the subject, would become subordinate to the State police power; for it is obvious that the power to determine the articles which may be the sub-

> jects of commerce, and thus to circumscribe its scope and operation, is, in effect, the controlling one.

What effect can be given to the decision of this court that the power to regulate commerce includes the power "to prescribe the conditions under which commerce shall be conducted," if the power to govern the fundamental condition of free and uninterrupted intercourse between the States rests exclusively with the States? If it is possible to bring about under State authority the unification of all of the railroad interests of the United States, then it is within the power of the States and not of Congress "to prescribe the conditions under which commerce shall be conducted."

The act of 1866 authorizes every railroad company in the United States to connect with roads of other States and to carry passengers and property from State to State. That is, continuous lines may be formed throughout the length and breadth of the land over which persons and goods may be continuously transported, without power in the States to prevent or burden the transportation. Thus a condition is prescribed by Congress under which interstate commerce may be conducted.

The act of 1890 provides for another condition, to-wit: a condition of freedom from restraint, a condition where the normal laws of competition have full sway, which it is beyond the power of States or individuals to defeat.

We are not dealing here with a consolidation of railroads under State authority.

We are dealing with a combination that restrains interstate commerce, and I again quote the decision of this court, that "so far as the combination operates upon and restrains interstate commerce, Congress has power to legislate and to prohibit." (*Joint Traffic Case*, 171 U. S., 571.)

THE THEORY OF SEPARATE CORPORATE ENTITY.

Notwithstanding Messrs. Morgan's and Hill's admissions that the Securities Company was a mere device, a creature to carry out their plans of control over these properties, it is now solemnly argued that it is a substantive thing with rights and a status of its own unaffected by the illegality of the purpose it was called into being to accomplish; and unaffected by the fact that the thing challenged in this case is the thing that the Securities Company was created to do, and which it did in blind obedience to the will of the individuals who are the beneficiaries of its acts.

This is a gross perversion of a useful fiction adopted for the convenience of persons doing a lawful business in a lawful way. This is the entity theory of corporate rights pushed to an untenable point. No question is involved here as to corporate dealings with third persons and the rights and obligations incident thereto, nor as to corporate obligations incurred in the course of the performance of a legitimate corporate function in a usual way. The thing challenged is the corporation's dealings with the men who projected it and those who became parties to their schemes for the purpose of executing their own illegal will through the use of an incorporated instrumentality.

In the case of the *People of the State of New York* vs. *The North River Sugar Refining Company*, Justice Finch of the court of appeals of that State 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. The State gave the franchise, the charter, not to the impalpable, intangible and almost nebulous fiction of our thought, but to the corporators, the individuals, the active and living men, to be used by them, to redound to their benefit, to strengthen their hands and add energy to their capital. If it is taken away, it is taken from them as individuals and corporators, and the legal fiction disappears. The benefit is theirs, the punishment is theirs, and both must attend and depend upon their conduct; and when they all act, collectively, as an aggregate body, without the least exception, and so acting, reach results and accomplish purposes clearly corporate in their character, and affecting the vitality, the independence, the utility, of the corporation itself, we can not hesitate to conclude that there has been corporate conduct which the State may review, and not be defeated by the assumed innocence of a convenient fiction. (121 N. Y., 621,622.)

All of which is but an elaboration of the thought of Mr. Justice Wilson, who more than

one hundred years ago said in the great case of *Chisholm, Exr.* vs. *Georgia:*

> In all our contemplations, however, concerning this feigned and artificial person, we should never forget, that, in truth and nature, those who think and speak, and act, are men. (2 Dall., 455, 456.)

The stockholders of a corporation *are* the corporation for all *purposes of responsibility for its observance of the law.*

This is so because in the majority the law has vested the control of corporate action and that majority cannot by the sum of their individual acts accomplish that which the law prohibits them to do in their corporate capacity.

If a majority of the stockholders of two or more railroads could not by themselves or through their agents, the directors, temporarily vest in a third person the power to regulate the traffic of the roads by a naked delegation of power, *a fortiori* they could not make such an arrangement permanent by surrendering the voting power of their stock, or the stock itself.

A duty of corporate management rests upon stockholders of which they cannot divest themselves by surrendering its performance to another; neither can they divide it with others. They are

the trustees of the power lodged in them by the law and can no more shift the responsibility of performance than any other trustee.

THE THEORY OF MINORITY POWER TO COMPEL OBSERVANCE OF THE LAW.

A theory has been advanced upon behalf of defendants that these two railroads are bound to refrain from restraining commerce, because to restrain commerce is to violate the law, and notwithstanding the overwhelming majority the Securities Company has of the stocks of the two roads and the power that is vested in that majority, there is a minority interest in both roads which can compel their competitive operation as if no such control existed.

I say this is a theory advanced upon behalf of defendants. I fully acquit defendants themselves of entertaining any such fanciful notions of the power of a minority.

What was the struggle of May, 1901, about? It was to gain control of the Northern Pacific road through the ownership of the majority of its stock.

What was Mr. Morgan's conception of the extent of that power as against the minority? His words are, "I knew we had a majority of the

common stock, and I knew *that* actually gave us the control." (Record, p. 338.)

What was Mr. Kennedy's notion of the power of the majority? He says (Record, p. 195), "We wanted to have a majority of the stock of the Northern Pacific where we could *absolutely control it* under all circumstances."

What was Mr. Hill's notion of his position if he had been left in the minority? He says, "We would not have held the Great Northern a day longer than we could have sold it." (Record, p. 84.)

Observe the significance of Mr. Hill's statement, that if the Union Pacific people obtained the control of the Northern Pacific, the Great Northern road "would not have been held a day longer than we could have sold it". This is equivalent to saying that by the ownership of the majority of the Northern Pacific stock the Union Pacific people could have operated the Northern Pacific road as a competitor of the Great Northern, and it is likewise equivalent to saying that so important was it to the Great Northern to prevent the Northern Pacific from being operated as a competitor, that the Great Northern would have been for immediate sale if it had failed in its effort to secure the Northern Pacific itself.

But there is an answer to the suggestiou that the minority might compel the majority owners to observe the law of Congress which goes deeper. It is this: That the enforcement of a governmental policy can not be made to depend upon the desire and ability of minority stockholders. As the suppression of competition is usually a great financial advantage to the stockholders of a railroad, it is not likely that a minority would be disposed to compel obedience to the law to their financial detriment. The practical impotence of a minority was well known to the parties to this transaction, and their contempt for minority power is disclosed by the facts in the case.

It is suggested that the minorities might be assisted under the laws of Minnesota and Wisconsin. With all respect to the laws of those great States and the high minded tribunals in which they are administered, I suggest that the United States is not relegated to them for the enforcement of its own laws.

THE REMEDY.

The act gives the court power to *prevent*, restrain, or otherwise prohibit violations of the law.

The power to enforce the policy declared by the statute was conferred in terms broad euough

to be adequate to any situation. As the law is not to be defeated by any degree of ingenuity in the devising of forms of combinations, neither is the jurisdiction of the courts to be frittered away by casuistry or resort to mediæval precedents.

The decree of the court below was molded to prevent and enjoin restraint upon interstate commerce by stripping the Securities Company of its power of control over the two railroads, through the very obvious method of preventing it from exercising the power lodged in it by the defendants for the purpose of control. Care was taken that no hardship should come to any one by reason of the decree, since the full powers of ownership may be exercised by the beneficial owners through a restoration of the stocks to their original and lawful relations to the two roads respectively.

If it be asked what right the circuit court had to enjoin the voting of the stock of *both* roads, I reply that if this combination is illegal under Federal law, then the Securities Company, the means by which the combination was accomplished, is illegal—is an outlaw; and if it had committed a similar violation of the law of New Jersey the courts of that State could have caused its dissolution and the forfeiture of its property. But,

the existence of the Securities Company is not less illegal because it is the instrumentality whereby a Federal rather than a State law is violated. Certainly, therefore, it can not be heard to complain of the decree of the circuit court in this case, because that decree by no means goes the length which the courts of New Jersey might have gone if the Securities Company had violated the law and public policy of that State to the extent that it has violated the law and public policy of the United States. Or, to put it in another way, if it were not for technical difficulties growing out of the dual nature of our Government, the Securities Company would be liable to the penalty of corporate death and forfeiture of its property. Has it any ground for complaint, therefore, because the process of the circuit court is *less* drastic than a judgment in *quo warranto*?

As I said in opening this argument, specifically this suit was instituted to determine whether this device, which defendants employed to restrain interstate commerce by monopolizing the business of transportation, will prevail against a law making all devices to that end illegal. It is this particular device that is before the court and no other. In considering it, I have directed your Honors'

attention only to its legal aspects, and I agree that it must be judged upon these alone. The possible effects of such a judgment upon other devices alleged to have been employed to the same end, is not for present consideration.

The possibilities of a securities-holding company of this kind as a financial machine for manipulating railroad and other properties and concentrating their control in the hands of a powerful clique are, however, legitimate considerations, and I am safe in sayiug they are simply enormous. It has again and again been pointed out, since the organization of the Northern Securities Company, that in its simplest form it is possible for a group of men, by incorporating themselves as a securities-holding company, to control two railroad companies upon the holding of half the amount of stock that would be required in the hands of individuals. Individuals would need to hold 51 per cent of the stock of both railroads in order to control them, but if a particular group of men had the control of a securities-holding company that held 51 per cent of the stock of both roads, they would control both roads upon a holding of 51 per cent of the shares of the holding company, or practically one-fourth of the combined capital of the

two roads. This does violence to a simple rule of vulgar fractions, because it works out that a half of a half is equal to a half of a whole. Of course, it is a simple proposition to bring in a number of railroads under the same control without increasing the stock of the securities-holding company or without increasing the stock of the holders of the control of the securities-holding company, by employing the device resorted to by the defendants in the purchase of the Burlington road, namely, by having one of the railroads controlled by the Securities Company acquire the stock and pay for it with its own obligations secured by a pledge of the stock acquired. All the roads west of the Missouri River which were brought into temporary harmony under the Trans-Missouri arrangement could easily be brought into permanent harmony, without physical consolidation, under the arrangement I have described.

I can not think that a combination held together by a rope of sand comes within the prohibition of the law, and that one which is bound by links of steel may defy its wisdom and its power.

To prevent such a dangerous concentration of power, dangerous to commerce and a menace to our freedom, the people have done all that it is

possible for them to do under our system of government. They have legislated against it. If this law can be construed so as not to cover the situation, or if the court says yea to the proposition asserted in the last paragraph of Mr. Morgan's answer, namely, that Congress has no power to prevent such combinations, then indeed the Government's grave concern as to this litigation may be easily understood.

As we all know, the necessity for uniformity of commercial regulations throughout the States is the corner stone upon which the present structure of our Government was constructed. Although many high-minded and far-seeing patriots realized immediately upon the successful issue of the war of the Revolution that a more perfect union between the States was essential for many reasons and for some reasons possibly more necessary than those pertaining to the trade and commerce of the people, yet the call for the Annapolis convention limited its *expressed* purpose to the consideration of a proposition to vest in Congress the power to establish uniform commercial regulations. The Constitution, when adopted, lodged that power in Congress.

When the court first considered this delegation of power from the people of the United States to

the Federal Congress it explored its entire scope and purpose. This court's very first exposition of the power proclaimed that "the power is complete in itself, may be exercised to its *utmost* extent, and acknowledges no limitations other than are prescribed in the Constitution."

The complexities of modern commercial conditions have not developed any modification of this conception of the regulative power of Congress, although at times they have presented serious problems as to its application.

My contention that Congressional power extends to this device carries with it the proposition that in the exercise of the power Congress is at all times accountable to the people from whom it came.

The defendants' contention that no such power exists asserts their absolute unaccountability and is a request to your Honors to affirm their doctrine that men who own property may do with it as they like, notwithstanding its nature or the interests of the public.

O