The Appeal to the Circuit Court of Appeals was from an Interlocutory Decree of the Circuit Court for the District of New Jersey, filed August 18, 1904, ordering :

" That a writ of special injunction do issue out of and under the seal of this court, directed to the Northern Securities Company, restraining it, its Directors, officers, agents, and employes, until the final determination of the suit, or until further order of this court, from in any manner transferring, assigning, distributing, or otherwise disposing of, or parting with three hundred and seventy thousand, two hundred and thirty (370,230.) shares of the common stock of the Northern Pacific Railway Company, alleged in the Bill to have been received by the Northern Securities Company from the complainants, Edward H. Harriman and Winslow S. Pierce, on or about the 18th day of November, 1901, or any part thereof ; *and from transferring, assigning, distributing or otherwise disposing of or parting with three hundred and forty-seven thousand and ninety (347,090) shares of the common stock of the Northern Pacific Railway Company, received by the Northern Securities Company from the Northern Pacific Railway Company, on or about the 27th day of December, 1901 ;* and from transferring, assigning, distributing, or otherwise disposing of or parting with the certificates representing said stock, or any of them or any part thereof." (R. 423, f. 30.)

I.

The authorities agree that under some showings the granting or refusing of a special injunction is, in a measure, discretionary.

But the right to grant an injunction is always dominated by the nature of the case disclosed by the motion papers. It is elementary law that a plaintiff cannot have a special injunction where, on the face of the motion papers, it appears he will not succeed in finally establishing the claim he asserts.

High on Inj. 3rd Ed., Vol. 1, § 7.

Under such a state of the record, the injunction must be denied. In the discretion of the court, the bill may also be dismissed.

Stated in general terms, the authorities also agree that, on appeal from an order granting a special injunction, the province of the appellate court is merely to determine whether the "*judicial*" discretion of the court below has been properly exercised. But discretion could neither be "judicial" nor properly exercised, which should tie up property of great value to await the distant outcome of a suit, when the motion papers show that plaintiff's case must fail on final hearing.

If, nevertheless, the injunction be granted on such a showing, and be appealed from, not only is it the duty of the appellate court to vacate the injunction, but it may properly include in its mandate to the lower courts a direction to dismiss the bill. The appellate court is charged with doing what the court below should have done in the first instance. These propositions are now fully established in the federal appellate courts.

Knoxville vs. Africa, 47 U. S. App. 74, 77. Fed. Rep. 501, C. C. A., Sixth Circuit.

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This was a controversy growing out of a grant of right to occupy streets in Knoxville with surface railways.

Referring to Bissell Carpet Sweeper Co. vs. Goshen Carpet Sweeper Co., 43 U. S. C. C. A., 47, the court said :—

" We there said touching appeals from preliminary injunctions, that where a preliminary injunction is allowed on a *prima facie* showing, and without determination of the merits, this court will, on an appeal, consider only the question whether, on the *prima facie case* made, there has been an abuse of discretion. Such preliminary injunctions are ordinarily intended to operate *pendente lite*, or until a hearing on the merits can be had. They are granted upon a mere summary showing upon affidavits. Their issuance is not a matter of right, and rests in the sound discretion of the judge. In the same opinion we also said, in regard to the same class of appeals, that quite another question would arise, if, on appeal from such an order, this court upon the record should conclude, not only that no case was exhibited for preliminary injunction, but also that the bill could not be entertained for any purpose. In such a situation, shall it refuse to determine the case on the merits, and refuse to direct the lower court to dismiss the bill? *Must it confine itself to a mere expression of opinion, that the discretion of the court has been erroneously exercised, and permit a fruitless suit to be prosecuted to a final decree, ultimately to end in dismissal? Clearly, the court ought not to sit idly, and merely advise the counsel and the lower court, but should, if it has jurisdiction, and if it has before it a sufficient record to enable it to do justice, pronounce a judgment upon the merits, and direct the inferior court to do what it originally ought to have done.*

The appeal now under consideration presents one or more questions of law going to the root of the complainant's right of way upon the street in controversy. These questions arise upon the face of the ordinance of 1876, and involve not only its validity, but its meaning, and the duration of the right thereby granted. They were considered by the court below, and an elaborate opinion filed, construing and determining the validity, scope and duration of the street rights attempted to be conferred. The same questions are presented fully in the records of this court. Why shall we refuse to consider or decide them? What good is to be accomplished by confining ourselves to the shell of the case, and refusing to decide a question of law, because it is one of grave character, and goes to the foundation of a litigation? The practice of refusing to determine grave questions of law upon a mere motion to dissolve an injunction, or upon an application for a preliminary injunction, is discussed by Chancellor Cooper in *Owen*

vs. Briers, 2 Tenn. Ch. 295, 297. The rule of practice there considered is only for the government of *nisi prius* courts, and not one of universal obligation. The practice, upon such motions, as very clearly stated by Chancellor Cooper in the case cited was, 'upon motion to dissolve an injunction, it is neither necessary nor proper for the court to undertake to decide the case upon its merits, for there is no mode, under our system, of correcting his errors, if he should make any, in the conclusion arrived at. No appeal can be made from such ruling, and, in the meantime, irreparable injury may be done. If the court can see that there is a substantial question to be decided, it should preserve the property until such question can be regularly disposed of.' * * *

"Upon the other hand, such an injunction ought not to be granted unless the plaintiff's right seems very clear, and the injunction will not operate with more hardship upon the defendant than its disallowance upon the plaintiff.

Shinkle vs. Louisville & N. R. Co., 62 Fed. Rep. 690, 692.

It is manifest that these rules of practice have no operation upon an appeal to this court, where the legal questions are presented by the record in such a manner that justice can be done the litigants, and fruitless delay and a second appeal avoided. Though this court will not feel itself compelled to consider and decide such appeals upon the merits, yet it will do so when the circumstances seem to require it, and the record is sufficient. This practice has the high sanction of the Circuit Court of Appeals for the Fourth Circuit, in the case of *Green vs. Mills*, 25 U. S. App., 383, where the opinion was by Chief Justice FULLER.

The order granting the injunction was dismissed, and the case remanded with order to dismiss the bill.

This case was fully approved on this point by this court in *Mast vs. Storer*, 177 U. S., 485, 494-5."

By its appeal from the ruling of the Circuit Court, the Securities Company necessarily undertook the satisfy the appellate court, that the state of the showing here is like that in *Knoxville vs. Africa;* that the motion papers exhibit Plaintiffs' case in full; that every essential transaction and fact composing it is now on the record, in all amplitude; and, consequently, that the duty of the appellate court was merely to apply to the established facts the principles of law

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governing the ultimate rights of the parties; in other words, to dispose of the application for an injunction on the merits of the case. In the Circuit Court, the Securities Company opposed an injunction solely on the ground that the plaintiffs were shown to have no case. Questions of procedure were not mooted.

Although, in the state of the Record, the Circuit Court of Appeals would have been justified in ordering dismissal of this bill, it was not bound to do so; and counsel for Defendant do not suggest the omission to so order as an error.

Manifestly, the principle underlying *Knoxville vs. Africa*, and the point on which it turned in the Circuit Court of Appeals, and was approved by this court, was not that the want of equity appeared upon the face of one particular sort of document instead of another, or that the bill was ordered to be dismissed as well as the injunction to be vacated; but rather that when the record on an appeal from an injunction order discloses absence of a cause of action in the plaintiff, the appellate court will dispose of the matter on a consideration of the merits, and not uselessly prolong the defendants' distress by allowing the injunction to stand until the case can be brought up on appeal from a final decree. That this is the basic rule of that case, unmistakably appears from the italicized passage of the opinion, quoted, Ante, p. 4.

If the record shows a want of equity in plaintiff, how could the particular part or parts, in which the disclosure is made, be of consequence?

In this Record, certainty of Plaintiffs' inability to finally succeed, pervades the whole.

Defendant's counsel submit that the Bill itself fails to state a case; but, in view of the remainder of the Record; especially in view of the extracts from corporate minutes, and the numerous sworn admissions of the managing Plaintiff, which it contains, any importance that otherwise might be claimed for the Bill disappears for the purpose of this hearing.

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Even where a bill states a case; and is positively verified by one having knowledge; a plaintiff does not thereby acquire right to an injunction, if the bill be disproved by the plaintiff's own testimony, and by documents admitted or presumed to be true.

Otherwise special injunctions would be the rewards of mere good art in pleading.

II.

The opinion of the learned judge granting the special injunction discloses much misapprehension and misunderstanding of the facts appearing upon the papers.

It can be gathered from his opinion, that, in granting the application, he was moved by *three* considerations, viz.:—

1. Supposed material and important questions of fact to be settled;

2. Assumed material and important questions of law to be decided;

3. The statutory right of appeal from an order granting an injunction, but the absence of such right from an order refusing one.

The opinion filed with the order allowing the injunction contains the following passages, which may fairly be regarded as the kernel of the whole:

"The defense controverts material allegations in the bill, some of which embody averments of fact, and others averments of law. With respect to some of the alleged facts, important in their bearing upon the equities of the case, the affidavits and exhibits are conflicting on substantial points. On the face of the bill it is evident that the final decision necessarily will involve the consideration of grave, novel and delicate questions of law. * * * Regard should be had to nature of the controversy, the object for which the injunction is sought, and the comparative hardship or inconvenience to the respective parties involved in the awarding of denial of the injunction."

(R. 409)

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"An appeal does not lie from any interlocutory decree of this court, denying a preliminary injunction. While this consideration is entitled to no weight where, on an application for an injunction, it clearly appears that the complainant cannot prevail in the final hearing, it is often of controlling importance where, on such application, there is room for reasonable doubt as to the ultimate result. Under the circumstances, this court would not be justified in refusing the injunction sought."

(R. 421)

The second and third of the above-enumerated grounds were non-existent in the Circuit Court of Appeals.

The plaintiffs were heard there with like effect as if the appeal had been their own. They had the benefit of a full consideration of their case, and a judgment of their rights, by the Court to which alone an appeal therein could be taken from a final decree of the Circuit Court.

The opportunity of obtaining the opinion of the court, which was strongly pressed for by plaintiffs in the circuit court, both orally and on all their printed briefs, and preserved for them by the order of the latter court, has been accorded them.

No authority recognizes difficult or doubtful questions of law as alone forming sufficient ground for tying up property for a lengthy period. Every exigency arising from the existence of law questions, however difficult or doubtful, is fully and fairly covered by the preservation of the *status quo* merely long enough to allow fair preparation for argument, and reasonable advisement afterwards by the court. Such questions might be, although no case has been found where they actually have been, regarded sufficient reason for an *ex parte* injunction running until parties could obtain a fair hearing, and the court could reasonably consider the case; but no longer. Any and every right of preparation to which these plaintiffs could be entitled, under the utmost stretch of favor, was certainly exhausted in the Circuit Court.

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On April 20, 1904, an *ex parte* injunction, in the form of a stay order, was issued.

(R. p. 195)

This order remained in force until superseded by the order appealed from.

The motion came on for argument on May 20, and the hearing occupied three days. Lengthy original and reply briefs were submitted on both sides. The plaintiffs amended their bill twice; the case now rests on the Second Amended bill. The oral argument terminated on May 23. The case was held under advisement until July 20, when the decision and opinion of the circuit court were filed.

Any and all right which plaintiffs originally might have had, of opportunity for preparation, argument, and decision of the law questions in the case had by that time been exhausted, and no further delay on the ground of the existence of such questions could rightfully be imposed on the Securities Company. Nevertheless, it was imposed; and the opportunity for preparation was again extended from July 20 to the date of argument in the Circuit Court of Appeals. Plaintiffs cannot urge the existence of difficult law questions as a ground for still further retaining the injunction.

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III.

In the Circuit Court of Appeals, therefore, the whole case for an injunction, *pendente lite*, was thrown back upon the first ground of the Circuit Court, viz., "grave and difficult" questions of fact, for ultimate determination.

If no such questions remained, but all essential facts in the controversy could, with reasonable clearness, be ascertained from the present record, it became the duty of the appellate

court to ascertain them; and, having done this, unhesitatingly to apply the law to the facts, and determine the question of granting or refusing the injunction in view of the ultimate rights of the parties.

The documents in this record necessary to be considered in ascertaining the facts of the case are of the following classes:

The Bill of Complaint in this suit.

The pleadings and decree in the suit of *The United States vs. Northern Securities Company and Others*, in the Circuit and Supreme Courts of the United States.

The *ex parte* affidavits of sundry individuals, including those verifying the Bill of Complaint, taken in the present suit.

Deposition of Mr. E. H. Harriman, taken before the Interstate Commerce Commission, at Chicago, in January, 1902.

Deposition of same taken in the suit of *The State of Minnesota vs. Northern Securities Company, and Others*, in December, 1902.

Extracts from the official minutes of proceedings of the Board of Directors of the Northern Pacific Railway Company, and of the Executive Committee and Board of Directors of the Northern Securities Company.

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The above-mentioned depositions were both read in evidence by the Government, in the suit, United States vs. Northern Securities Co., and appear in the printed Record of this Court therein, on pages 598–653, 899–909.

On the question of injunction the papers must be examined in light of the following principles:—

Statements of the Bill are not to be considered true, except in so far as they are supported by documents themselves imparting verity, or by the oath of some on having personal knowledge of the matters stated; it not appearing here that

any such person is sick, absent, or unwilling to make affidavit.

An *ex parte* affidavit, being commonly the language of the draftsman, rather than that of the affiant, must yield to a regular deposition of the same witness, taken orally on question and answer, and with opportunity of cross-examination and re-examination, on points wherein affidavit and deposition differ.

Minutes of corporate proceedings made contemporaneously with the event recorded, and therefore free from the infirmity of human memory, are evidence of the highest quality as to the facts stated by them. The corporate minutes appearing in these motion papers have the additional element of credit, that they were all made while Mr. Harriman was a member of the board or committee making them. In the usual course of business, the minutes of each meeting were read at the following one and submitted for approval or correction; so that if any statement in them was contrary to the fact, or short of the fact, Mr. Harriman was always in position to make it conform to the fact.

The truthfulness of these minutes is therefore to be taken as conceded by Mr. Harriman.

Besides, both as to Mr. Harriman's depositions, and the corporate minutes, Plaintiffs had full opportunity to deny, explain, or contradict any part of them, in rebutting affidavits or other documents filed in this application.

They have not done so in any particular.

Hence, on the question whether an injunction should issue, the depositions and minutes must be deemed to have been accepted by plaintiffs as correct.

Furthermore, the statements of Mr. Harriman are not those of a mere witness, knowing the facts, but unauthorized to bind the parties in interest. The Northern Pacific shares transferred by Harriman and Pierce to the Securities Company were acquired and held by them in their personal names; Mr. Harriman in person conducted all negotiations for the

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sale of those shares to the Securities Company; the Northern Securities shares used in part payment for the Northern Pacific shares were issued, and ever since have been held, by Harriman and Pierce in their personal names. Harriman and Pierce have continuously been trustees and managers of all the interests of the Oregon Short Line Company in the Northern Pacific shares and in the Northern Securities shares which passed between the parties in course of the dealings that figure in this suit.

The statements and expressed or implied admissions of Mr. Harriman about the transaction here involved are therefore the admissions of a party, as well as the testimony of a witness.

IV.

The injunction order discloses the general nature of Plaintiffs' claims. There are two:

1. For $37,023,000. common stock of the Northern Pacific Railway Company, at one time held by Harriman and Pierce and by them transferred to the Northern Securities Company, on November 18, 1901.

2. For $34,709,000. more, of the same kind of stock, acquired by the Securities Company directly from the Northern Pacific Railway Company, on December 27, 1901.

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The last named lot of stock has never been in possession of any of Plaintiffs. It has never existed in the hands of any one save the company that issued it and the company that ever since issuance has held it.

Plaintiffs therefore are here prosecuting two separate causes of action, for two distinct parcels of property; and the question at once occurs, whether both could be established by the same set of facts and reasons. The absolute solution of this question would not be so controlling on the question of injunction as it might become at a final hearing; but it can never be left out of view at any stage of the case.

The substance of the grounds on which Plaintiffs claim the $37,023,000. lot of Northern Pacific stock which Harriman and Pierce once held appears in the following passages from the Second Amended bill.

V. * * * * Although incorporated and organized in form according to, and nominally for objects authorized by, the laws of the State of New Jersey, in reality said Northern Securities Company was incorporated and organized in pursuance of a combination in restraint of trade and commerce among the several states, and for objects prohibited by the act of Congress entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, and as an instrument and agency to effectuate and accomplish the objects of said combination, that is to say: Prior to November 13, 1901, James J. Hill, J. Pierpont Morgan, William P. Clough, D. Willis James, John S. Kennedy, Robert Bacon, George F. Baker and Daniel S. Lamont, and their associates, owning or controlling a majority of the capital stock of the Great Northern Railway Company, and a majority of the common capital stock of the Northern Pacific Railway Company, agreed to organize a holding company under the laws of the State of New Jersey, and that said holding company should acquire and permanently hold a majority of the shares of the capital stock of said Great Northern and Northern Pacific companies and control the operation and management thereof in perpetuity, and that the then existing holders of such railway shares should deposit the same with said holding company and receive in lieu thereof share certificates of the said holding company upon the basis of $180 par value of its stock for each share of Great Northern stock and $115 par value of its stock for each share of Northern Pacific stock, and that said holding company should act as custodian, depositary, or trustee of said railway shares on behalf of the existing stockholders of said railway companies and their assigns. * * *

VII. Your orators further show that prior to the incorporation of said Northern Securities Company your orator Oregon Short Line Railroad Company had acquired, and at the time of the incorporation and organization of said Securities Company owned, $37,023,000 par value of the common stock and $41,085,000 par value of the preferred stock of the defendant Northern Pacific Railway Company represented by certificates issued to and registered in the name of your orators Harriman and Pierce; and that after the incorporation of the said Northern Securities Company had been resolved upon as aforesaid, your orators Harriman, Pierce and Oregon Short

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Line Railroad Company agreed with the promoters and incorporators of said Northern Securities Company to transfer to and deposit with said Northern Securities Company, under the terms and conditions aforesaid, the said shares of said Northern Pacific Railway Company of the aggregate par value of $78,108,000 owned by said Oregon Short Line Railroad Company as aforesaid, and to receive in exchange therefor certificates of said Northern Securities Company representing an interest therein of $82,491,871 par value and $8,915,629 in cash, and in pursuance of said agreement your orators Harriman and Pierce, acting for your orator Oregon Short Line Railroad Company, did, on or about the 18th day of November, 1901, transfer and deliver to said Northern Securities Company certificates for $37,023,000 par value of the common stock and $41,085,000 par value of the preferred stock of said Northern Pacific Railway Company owned by your said orator as aforesaid and received in exchange therefor certificates of said Northern Securities Company representing an interest of $82,491,871 par value and said cash. * * *

XIII. Your orators are advised by counsel and, therefore, aver that the effect of said decree of April 9, 1903, as affirmed by the Supreme Court of the United States, was to adjudge that the Northern Securities Company was not a purchaser or owner but simply a custodian of the shares of stock of said railway companies acquired and held by it as aforesaid, that it acquired and held possession thereof in violation of said Anti-Trust Act, that it acquired no title thereto and cannot transfer any rights in respect thereof, and that the legal and equitable owners of said shares of the stock of said railway companies were and are the several parties who originally exchanged the same for stock of the Northern Securities Company or their assigns.

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The $34,709,000 lot of stock, which Plaintiffs have never held, appears to be claimed here by them on the same general grounds as the $37,023,000 lot, with the additional ground appearing from the following clauses of the bill:

IX. Your orators further aver that at the time of such exchange, on said 18th of November, 1901, it was agreed between said Harriman and Pierce and said defendant Northern Securities Company that the said $41,085,000 par value of said preferred stock of the said Northern Pacific Railway Company should be converted into common stock of the said Northern Pacific Railway Company; that said preferred stock was subsequently and in or about the month of December, 1901, converted by said defendant Northern Securities Company into common stock of said Northern Pacific Railway

Company of the same par value; that certificates for $34,709,000 par value of such common stock registered in its name on the books of said railway company were substituted in lieu and place of certificates for said preferred stock; that said Northern Securities Company caused said original common stock to be transferred into its name upon the books of said railway company, and that said Northern Securities Company now holds within the jurisdiction of this court certificates registered in its name on the books of the Northern Pacific Company for said common stock so originally received from your orators Harriman and Pierce, and for said common stock into which said preferred stock was so converted and certificates substituted as aforesaid.

This is a fitting place at which to point out a surprising omission from this injunction Bill. It has not been verified by any one having or claiming personal knowledge of the things asserted. The verifiers are MR. WM. D. CORNISH and MR. WINSLOW S. PIERCE. Where was MR. HARRIMAN?

The verifications appear on pp. 16–17 of the Record.

Mr. Cornish is an officer of the Oregon Short Line Railroad Company, and verifies merely formally, as such. He was not a participant in any transaction with the Securities Company. There is no claim that his corporation ever even communicated with the Securities Company, prior to the stockholders' meeting of April 21, 1904, assembled to act on the questions of reducing capital and distributing surplus, when a protest was filed in its name.

While Mr. Pierce was from the beginning of these matters a joint holder or trustee with Mr. Harriman, he was not, and does not claim to have been, present when any of the things alleged by the Bill to have been done by, for, or with the Securities Company, was done, except on two occasions, viz., one on an unremembered date prior to the formation of the Securities Company when he attended a meeting of counsel to consider the form and substance which the then future company's Certificate of Incorporation should have (R. pp. 232–233), and the other on November 19, 1901, when, at the offices of the Securities Company, the mutual transfers of stock and cash were made. First Sup. R. p. 1, par. III.

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But Plaintiffs' claims have not been placed upon the attendance by Mr. Pierce at that meeting of counsel, and the occurrences in course of the making of the mutual transfers are not only undisputed, but relied on, by Defendant. To every intent, therefore, the Bill is a mere unverified pleading. At no stage of the application for a special injunction has it, under the well settled rules governing such proceedings, been entitled to any greater weight than belongs to such a pleading.

As the claim for the $34,079,000 lot will admittedly fail if that for the $37,023,000 lot fails, the common general grounds of both claims may conveniently be discussed together.

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V.

Plaintiffs apparently aim to propound *two* alternative and contradictory theories :

1. That the transfer of the Northern Pacific stock to the Securities Company was a mere *bailment*, and consequently terminable at the pleasure of the *bailors*.
2. That the transfer was meant by the parties to be in the nature of a sale ; conditioned, however, that the stock should permanently be kept and used by the vendee for the special purpose of restraining the trade of the two railways ; and that, upon its ceasing to be so used, it must be restored to Plaintiffs on their demand.

Either theory necessarily denies that complete title to the Northern Pacific stock has ever vested in the Securities Company. The first theory assumes that the beneficial title has always remained with Plaintiffs ; the second, that at least a right to enforce a condition, and forfeiture by the Securities Company for breach thereof, has always been theirs.

Under either theory, whatever rights in the Northern Pacific stock Plaintiffs may now have are purely rights at law; they could have no equitable foundation. Plaintiffs must be assumed to have brought their suit on the equity, instead of on the law side of the court, solely because the stock for which they sue stands on the books of the issuing company in the name of the Securities Company.

In other words, this suit would be best described as one in *equitable replevin*. Plaintiffs must establish title under rules of law, or fail.

VI.

The facts constituting title to the stock in controversy necessarily consist of, and are limited to, the things said and done, and mutually intended by Harriman and Pierce, on the one part, and the Securities Company, on the other.

If all material facts in regard to those sayings, doings and mutual intentions appear in this Record, the entire case, on both sides, relating to title, must be here.

On these points the Record is complete. It contains all. Nothing more could be supplied. The sources of information have been exhausted. Also, every material fact needed for correct interpretation of these sayings and doings is here.

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In the spring of the year 1901, at the instance, and with money furnished by the Union Pacific Railway Company, there were purchased, of the preferred stock of the Northern Pacific Railway Company, $41,085,000 out of $75,000,000, and of the common stock of that company $37,023,000 out of $80,000,000; thus a majority of the total $155,000,000 of capital stock of the Northern Pacific Company.

Mr. Harriman's deposition before the Interstate Commerce Commission discloses the connection of the Union Pacific with this purchase.

"MR. DAY: What is the total capital stock of the Oregon Short Line?

MR. HARRIMAN: I think between twenty-seven and twenty-eight millions.

MR. DAY: It purchased how much stock of the Northern Pacific?

MR. HARRIMAN: Seventy-eight millions.

MR. DAY: How did it pay for that stock?

MR. HARRIMAN: Some in cash and some by issuing its own obligations against that stock.

MR. DAY: How much cash did it pay approximately?

MR. HARRIMAN: Fifteen or twenty million dollars.

MR. DAY: That came out of its own treasury.

MR. HARRIMAN: Yes, sir.

MR. DAY: How was the money raised by the Oregon Short Line to acquire the balance of $60,000,000?

MR. HARRIMAN: By issuing its own certificates of indebtedness.

MR. DAY: Who did it issue the certificates to? What I want—

MR. HARRIMAN: What you want is to find out if the Union Pacific had any interest in that purchase.

MR. DAY: Yes, sir.

MR. HARRIMAN: I want to be frank about it. The Union Pacific helped the Oregon Short Line to finance it and purchased from the Oregon Short Line the certificates of indebtedness, the money for which it was used paying for the Northern Pacific stock.

MR. DAY: *The sixty-one millions of that purchase money came out of the Union Pacific treasury, practically?*

MR. HARRIMAN: *Yes, sir.*

MR. DAY: *Directly or indirectly?*

MR. HARRIMAN: *Yes, sir*" (R., pp. 243, 244).

It was further disclosed by Mr. Harriman, in the same examination, that the Union Pacific Railway Company is owner of practically the entire capital stock of the Oregon Short Line Railroad Company (R., p. 242), and that this latter company is in turn owner of practically the entire capital stock of the Oregon Railway and Navigation Company (R., p. 247).

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The railways of the Union Pacific Railway Company, the Oregon Short Line Railroad Company, and the Oregon Railroad and Navigation Company, comprise the Union Pacific Railway System, which extends from the Missouri River westward, through the states of Nebraska, Wyoming, Colorado, Utah, Montana, Idaho, Washington and Oregon, to the Pacific coast, at Portland, and is a close competitor of the Northern Pacific Railway Company not only for both the east and west bound transcontinental traffic, but also for that local to a great territory comprising a large section of each of the four states last named.

These facts are of dominating consequence in this suit. They characterize the purchase of the Northern Pacific stock, by the Union Pacific system, as a scheme to secure control of a powerful competitor in the interstate trade. The record here discloses no trace of a purpose to abandon that plan. This suit is manifestly a mere step in realizing it.

While acquisition by the Union Pacific system of $71,732,062 of Northern Pacific stock would not give that system a majority of the entire capital stock of the Northern Pacific Company, yet for every practical purpose it would give control of the Northern Pacific Company. Corporations are controlled by stockholders' meetings; and the stock which makes the action of the company is not the totality of stock outstanding, but merely that part of the whole which attends the meetings.

Experience shows that only in rarest instances is the whole body of any stock represented at any meeting.

Under the Northern Pacific charter, a majority of all the shares is required for a quorum; but the majority of any quorum suffices to determine the action of the meeting.

The amount of Northern Pacific stock which plaintiffs here ask the court to take from the Securities Company, and hand over to the control of Union Pacific, forms almost exactly 46 3/10 per cent. of the entire capital stock of the Northern

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Pacific Company. It would be a majority at every stockholders' meeting where not more than 92 1/2 per cent. of the total should be present. But no one with experience in such matters would expect so large a percentage of the stock of a great corporation to assemble in any meeting. To all practical certainty, the Union Pacific holdings of Northern Pacific stock would be a majority of all stock represented at any meeting; and whenever the question is of the effect of aggregating a large body of corporate stock in a single hand, experience must be the guide.

In the *Pearsall* case, the Court considered that acquisition by a railway company of a proportion of the stock of a competitor, less than a majority, would be inimical to a State statute forbidding one railway corporation to obtain control over another owning, or otherwise controlling, a parallel or competing line.

161 *U. S.*, 646.

PLAINTIFFS THEREFORE COME HERE IN EFFECT ASKING THE COURT TO PLACE CONTROL OF THE NORTHERN PACIFIC SYSTEM OF RAILWAYS IN THE HANDS OF THE UNION PACIFIC RAILROAD COMPANY.

Of the relative geographical positions of the Union Pacific and the Northern Pacific Railway systems, and of the public laws of the several states on the subject of railway combinations, as well as of the federal laws on the same subject, the court will take notice without proofs.

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On the other hand, the distribution of the railway stocks proposed by the Securities Company will scatter the holdings of them so widely, that but a small fraction of the total will concentrate in a single interest. The individual defendants in the suit of the United States against the Securities Company and others, and all other persons referred to in the evidence in that case as having been consulted about the formation of the

Securities Company, hold altogether but 996,016 shares of the stock of the Securities Company out of a total of 3,954,000 shares. A ratable distribution of the railway stocks would vest in all those defendants and consulted persons, individually, an aggregate of 378,224 shares, or 24-9/10 per cent. of the total Northern Pacific stock, and 297,493 shares, or 23-8/10 per cent. of the total Great Northern stock.

The Union Pacific interests would get in one lump 320,706 shares or 20-69/100 per cent. of the stock of the Northern Pacific, and 246,389 shares, or 19-71/100 per cent. of the stock of the Great Northern (Record p. 324). The residue of the stock of each railway company, comprising more than a clear majority of each, would be scattered among nearly 3,000 separate holders, not originally concerned in the formation of the Securities Company, and having no relations to each other.

The plan of distribution of the Securities Company is therefore to utterly dissolve the combination condemned in the Government suit, and to diffuse the ownership and control of the railway stocks among thousands of separate holders, while Plaintiffs' plan would merely substitute another combination, still more dangerous and offensive than the original one.

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The fact that ratable distribution of the Northern Pacific stock among all stockholders of the Securities Company will leave a majority of the total Northern Pacific stock in the ownership of those who will at the same time become distributees of a majority of the Great Northern stock, forms no legal objection to the *pro rata* plan. After *pro rata* distribution has been effected, the stocks of both railway companies will be held separately by the individuals who have thereby received them.

This Court has expressly held, in two prominent cases, that the stockholders of a railway company may rightfully acquire and hold, as individuals, the entire capital stock of a competing

company. No law, either State or Federal, has ever forbidden such acquisitions.

Pearsall vs. Great Northern Ry. Co., 161 *U. S.*, 646.

State of Kentucky vs. Louisville & Nashville Ry. Co., 161 U. S., 676.

In the Pearsall case this Court said:

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

(p. 671).

In the Louisville & Nashville case it said:

"It is true, as was observed in Pearsall vs. Great Northern Railway Company, that the stockholders of the Louisville & Nashville Rd. Co. may individually become the purchasers of the Chesapeake Co., at a judicial sale, and may organize a new corporation, but it would still be a corporation separate and distinct from that of the Louisville & Nashville Company. The inhibition of the Constitution is not against the sale to individuals, though they may chance to be stockholders in a competing line; but against the acquisition by a railway, in any form, of a parallel and competing line."

(p. 693).

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Upon the purchase for the Union Pacific Company of the Northern Pacific stock, all of it was transferred on the Northern Pacific books into the personal names of Mr. Harriman, then a Director and the Chairman of the Executive Committee, now also the President, of the Union Pacific Railroad Company, and of Mr. Pierce, a Director, and then also General Counsel, of that Company. It remained in their personal names until transferred out of them to the Securities Company, on November 18, 1901.

Plaintiff Harriman also became a director of the Northern Pacific Company in the summer of 1901; and was re-elected

such by the stockholders, at the beginning of October of that year. He has since remained a director.

The preferred stock of the Northern Pacific Railway Company was issued subject to retirement by the company, at par, for cash, on the 1st of any January prior to 1917. This right of the company was expressed on the face of every certificate, whether for preferred or common stock issued by it.

At a meeting of the Board of Directors of that company, held on October 13, 1901, in which Mr. Harriman participated as a director, resolutions were adopted, declaring that the entire issue—$75,000,000—of preferred stock should be retired, at par, for cash, from and after December 31, 1902, and providing means to accomplish the retirement. These means consisted of an issue of bonds by the company to the total amount of $75,000,000, convertible into a like amount of new common stock to be issued for the special purpose; so that, upon the completion of the retirement of the preferred stock, the total stock of the company would remain at $155,000,000, but would all be one kind. Each holder of the original common stock was given a preemption right running to December 31, 1901, to purchase at par, for cash only, an amount of the convertible bonds equal to 75/80ths of his holdings of common stock.

(Record, pp. 347-353.)

This action taken by the Northern Pacific Board with Mr. Harriman's concurrence as a director, and its effect on the preferred and common stock then held by Harriman and Pierce, are important to be kept in view; as showing precisely what they could sell, on November 18, 1901, and the resulting probable intent, on the part of both sellers and buyer, with which that sale was made, and also as showing the origin of the title to the $34,709,062 Northern Pacific stock which

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Plaintiffs have never held, but which they now seek to obtain.

On November 13, 1901, the Northern Securities Company was incorporated under the laws of New Jersey. Its certificate of incorporation appears in the record on pp. 18-22. Its Board of Directors comprised fifteen members. On November 14, 1901, one share of its stock that had been paid for in cash was transferred to Mr. Harriman, and one each to Mr. Jacob H. Schiff and Mr. James Stillman, also then and ever since directors of the Union Pacific Railway Company.

(Record p. 378).

Shortly afterward, and on the same day, Messrs. Schiff, Stillman and Harriman were elected directors of the Northern Securities Company.

(Record pp. 379, 380).

They have since remained directors; and therefore TRUSTEES for the remaining stockholders whom they here attack.

The same day, Mr. Harriman was elected a member of the Executive Committee of the company (Record, p. 382). He has since remained a member.

The Securities Company, being admittedly a corporation, none could contract for it, or bind it, unless properly authorized thereto in conformity with the Certificate of Incorporation constituting its charter.

By the laws of the State of New Jersey, and by the Certificate of Incorporation, the Board of Directors is the source of all authority to act for and bind the company. Without authority from the Board, the company could not be bound. Hence, when the question concerns acquisition of property by the Company, a vote of the Board must be looked for as the basis of the transaction.

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Looking into the minutes of Securities Company, it appears that, on November 13, 1901, the Board adopted a resolution, general in terms, authorizing the president of the Company to "purchase any shares of the common capital stock of the "Northern Pacific Railway Company * * * at a price "not exceeding $115 for each share * * * to be payable "in the fully paid-up stock of this company, at par * * *," (Record, p. 376); that, on November 14, 1901, the board passed another resolution, also general in terms, authorizing the president to purchase any shares of the Great Northern Railway Company at $180 per share, payable in the stock of the Securities Company at par (Record, p. 377).

The series of acts of the parties constituting the acquisition by the Securities Company from Harriman and Pierce of the preferred and common stock of the Northern Pacific Railway Company, began with a special resolution of the Board of Directors of the Securities Company, passed at a meeting thereof held on November 15, 1901, as follows:

Resolved, That the President be, and hereby is authorized in behalf of this Company, to purchase said stock—namely, $37,023,000 par value of the common stock, and $41,085,000 par value of the preferred stock of the Northern Pacific Railway Company, at an aggregate price of $91,407,500, payable as to $82,491,971 thereof in the fully paid-up and non-assessable shares of the capital stock of this Company at par, and as to $8,915,629 in cash; and that the officers of this Company be, and hereby they are, authorized to issue fully paid-up and non-assessable shares of the stock of this Company to the amount of $82,491,871, and to pay $8,915,629 in cash, in consideration of such $37,023,000 of the common stock and $41,085,000 of the preferred stock of the Northern Pacific Railway Company.

(Record p. 383)

It appears from the record that this resolution was passed with blanks left for insertion of the amount of Northern Pacific stock to be acquired by the Securities Company, and

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the amount of its own stock and cash to be delivered to Harriman and Pierce in payment therefor; that these amounts were afterwards made definite and inserted in the minutes of the resolution, between the time of its passage, and the holding of the next meeting of the Board, which was on November 19; and that, an this latter meeting, the minutes of the next former meeting, containing the resolution in its completed form, were read to, and approved by the Board.

(Record, pp. 297–299, 384)

Mr. Harriman was present at, and participated in this meeting of November 19.

(Record p. 384)

No authority to acquire Northern Pacific stock, for or on behalf of the Securities Company, has ever been conferred by the Board of that company other than by the resolutions of Novembr 13, 14, and 15, 1901.

Affidavit of Jas. J. Hill, President of Securities Company (R. pp. 331–333). Plaintiffs have not contracted, or sought in any way to modify the statements of this affidavit. Those statements stand in the record unchallenged. Contradicted

It is conceded that, on November 18, 1901, the Plaintiffs, Harriman and Pierce, in person, took to the office of the Securities Company, in the City of New York, the certificates for the Northern Pacific preferred and common stock, described in the resolution of the 15th, with proper assignments of the stock to the Securities Company, in usual form, endorsed thereon, and delivered the same to the Securities Company; that thereupon, the Securities Company received the certificates for the Northern Pacific stock, and executed and delivered to Harriman and Pierce certificates running to them in their personal names, for the number of shares of its own stock mentioned in the resolution, together with a check on its bankers for the sum of cash mentioned

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in the resolution; that almost immediately afterwards, the Securities Company surrendered to the Northern Pacific Railway Company the certificates for the $37,023,000 common stock, and caused all the stock covered thereby to be transferred into its own name on the books of the Northern Pacific Railway Company, and received from the latter new certificates for the same, running to itself. It is conceded that, on demand of Harriman and Pierce, they received from the bankers the $8,915,029, cash, and have since retained the same; also, that they have ever since retained, in their personal names, the $82,491,871 stock of the Securities Company, mentioned in the resolution.

The Record does not show, and it is not claimed by Plaintiffs, that any other transaction or negotiation relating to the Northern Pacific stock which they are claiming, or to the Northern Securities stock and cash transferred to Harriman and Pierce, has ever occurred between Harriman and Pierce, or the Oregon Short Line Railroad Company, on the one hand, and the Securities Company, or any one authorized to speak for it, on the other. The record does show, that in the fall of 1901, negotiations between J. P. Morgan & Co., in their own behalf, on the one hand, and Harriman and Pierce on the other, took place, in the course of which a general understanding was reached that J. P. Morgan & Co. should acquire from Harriman and Pierce their Northern Pacific stock, and should give in payment, part cash and part stock of a corporation to be thereafter organized, which should acquire Northern Pacific stock at a price not to exceed $115 per share, and Great Northern stock at a price not to exceed $180 per share, payable in the stock of the purchasing corporation. Definite figures however were not reached by the negotiators until after the formation of the Securities Company; and not until November 15, 1901, when, for a specified price, in cash, and in the stock of the Securities Company, Harriman and Pierce agreed to sell to J. P. Morgan

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& Co. a their holdings of the Northern Pacific preferred and common stock. J. P. Morgan & Co. immediately offered to assign the negotiated purchase to the Northern Securities Company; but the President of that company declined to accept it. Thereupon negotiations were renewed by Morgan & Co. and Harriman and Pierce, with the result, that a sale to the Securities Company was concluded on terms set forth in the resolution of the Securities Board of November 15th, as completed by the filling of the blanks.

These negotiations are related at length, and in great detail, in the Record, by members of the firm of J. P. Morgan Co., as well as by Mr. Harriman. The witnesses do not disagree upon any essential point. (Record pp. 194, 200, 201, 207, 209, 255, 256, 265, 266, 267, 288, 289, 290.)

It is not claimed that in these negotiations J. P. Morgan & Co. acted for the Securities Company, or had any authority to do so; nor that any understanding between J. P. Morgan & Co. on the one part, and Harriman and Pierce on the other, ever existed, that would in any respect modify the transaction between the latter and the Securities Company, as the same appears upon its face, viz., as an absolute sale of Northern Pacific stock, for a price paid down; nor that, if any such understanding existed, it was assumed by the Securities Company, in any manner or to any extent, or even brought to its notice.

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VII.

Whoever asserts that a transaction, and particularly one evidenced, as this is, by contemporaneous written memoranda, is different from what on its face it purports to be, necessarily assumes the burden of proving the modification. It can only be proved by showing the things said, or the acts done, pro-

ducing the modification. *No such proof is tendered here by these Plaintiffs. They do not even offer to make any at some future time.*

The intention of the parties that the sale of the Northern Pacific stock should be absolute and unconditioned, appears not alone from the form of the transfers. It appears as well from the precedent, attendant, and subsequent circumstances; from the nature of the property transferred; and lastly, from the repeated assertions under oath, of Mr. Harriman himself.

It has been Mr. Harriman's favorite theory, that the sale of the Northern Pacific stock was made to J. P. Morgan & Co., and that the Securities Company merely stepped into the bankers' shoes by assent of the sellers. This assertion was repeated many times in his depositions contained in the Record. Practically the same assertion is again repeated in his affidavit filed in this suit. Can it be imagined that either J. P. Morgan & Co. or Harriman and Pierce ever had any purpose of dealing about a bailment of the Northern Pacific stock? about an arrangement by which J. P. Morgan & Co. should become "custodian" of that stock, for the separate benefit of Harriman and Pierce? or about a transfer of it in some way conditioned or defeasible upon the happening of future events? Impossible. Yet no fact is shown, or even claim made, that upon entry into the negotiation by the Securities Company a change was made in the nature of the title to be given by the sellers and accepted by the purchaser.

Whatever form of title was meant to be given J. P. Morgan & Co., in event of a purchase of the Northern Pacific shares being made by them, must also have been meant to be given to the Securities Company.

Again, before the negotiations for the sale of the Northern Pacific stock had been concluded, and from November 13,

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1901, by the action of the Northern Pacific board taken with Mr. Harriman's cooperation, a limit had been set to the life of the preferred stock, comprising more than half the total number of shares forming the subject of the sale. The preferred stock would go out of existence on Dec. 31, 1901, or within a period of six or seven weeks from the conclusion of the negotiations. Can it be imagined that Harriman and Pierce were arranging for a "custodian" of these preferred shares? Did they feel themselves incapable of collecting from the Northern Pacific Company, and afterwards safely keeping, the money which so very shortly would take the place of these shares? And yet, what is there to indicate any thought of Harriman and Pierce that they would give, or were arranging to give, to the purchasers of their Northern Pacific stock, any different title in the common from that they would give in the preferred?

It is not imaginable that J. P. Morgan & Co., or the Securities Company, would receive from Harriman and Pierce the Northern Pacific stock on bailment, or under any other sort of conditional, and therefore defeasible title, and in turn hand over to the bailors an absolute title to $82,491,000 in stock of the Securities Company, and $8,915,629 in cash.

The same sort of title would naturally pass both ways. Yet, for nearly two and one-half years after the closing of the sale, the Securities stock was treated as the indefeasible property of the Oregon Short Line Railroad Company.

The record shows that the suit of the Government against the Securities Company was begun March 10, 1902.

(Record p. 79)

With full knowledge of the pendency of that suit, the Oregon Short Line Railroad Company on July 17th, following, made an unequivocal and deliberate assertion of its absolute ownership of the consideration it had received from the Securities Company, by pledging all the Securities Company's

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stock forming part of it, to secure an issue of its own bonds to an equal amount.

(Record pp. 31--75)

The Trust Indenture making this pledge contains, in Article VII., the following clause.

"The deposit and pledge hereunder of said shares of stock, or of any securities, which shall become subject to this indenture, shall not prevent the consolidation, union or merger with any other corporation, of the Securities Company, or of any other corporation by which said securities shall have been issued.

"Or the sale of its property *or the distribution of its assets.*

"*In any such case the Trustee shall receive such amounts of stock, bonds or other securities, or money, or of either or all of them, as the holders of the pledged shares of stock of the Securities Company or other pledged securities, as the case may be, shall be entitled to receive, and upon receipt thereof shall surrender the deposited stock certificates or other securities.*"

(Record pp. 50-51)

They agree to receive any substitutions of securities adopted by a majority of the stock holders of the Sec. Co.

The making of the pledge, and the terms of the instrument making it, are cited as circumstantial proof of the kind of titles Harriman and Pierce thought they were giving and receiving, in their transaction with the Securities Company. They are also cited as proof of deliberate election by Plaintiffs in regard the nature of the titles mutually passed, under full knowledge of circumstances which might unfavorably affect the value to them of what they had received from the Securities Company.

This deliberate election once made became final, and would not now be subject to retraction, even if Plaintiffs were otherwise permitted to assume a different position.

Of Mr. Harriman's numerous sworn assertions about the nature of the titles mutually intended to be passed, the citation here of but a few will be necessary.

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The following are quotations from his deposition before the Railroad Commission:

Q. Did you attach to your negotiation for the sale of Northern Pacific stock, any other condition than the one of the money price?

A. No, sir.

Q. No other conditions?

A. No other conditions that I remember.

Q. No other conditions except the one of the money price?

A. I do not remember any condition of the Union Pacific or Oregon Short Line, in any way (R. 259)

MR. DAY: You told Commissioner Prouty, in reply to a question propounded by Commissioner Prouty respecting your reasons for the sale of this seventy-eight millions of stock so shortly after you purchased it, that the Union Pacific had accomplished its object in the purchase. What was that object, or how did you accomplish that object? What assurance have you that you accomplished it, if that was the only object? What assurances were given you by any one respecting the future conduct of the Northern Pacific or those avenues of communication between it and the Oregon Short Line or the Union Pacific?

MR. HARRIMAN: I do not presume that it would be possible for any individual or any combination to give any promise that would be a security to any one else in the affairs of operation of any railroad, that Northern Pacific or any other. *For instance, these people who purchased the Northern Pacific might sell the stock to-morrow or before the next election, and still whatever assurances there were would be of no avail.*

MR. DAY: Were there any assurances?

MR. HARRIMAN: No, sir.

MR. DAY: None at all.

MR. HARRIMAN: No, sir.

MR. DAY: Directly or indirectly, controlling the operation of the Northern Pacific?

MR. HARRIMAN: That covers a good deal of ground. We had many conferences as to what the movement by various lines would be, and, considering the whole question, the Union Pacific management determined that it was no longer necessary, as it was believed that it would be to the interest of the Northern Pacific to use the avenues open over the Northern Pacific as it had before, notwithstanding it had purchased the Burlington.

MR. DAY: Were any assurances given you regarding the future relations of the Burlington road with the Union Pacific?

MR. HARRIMAN: No, sir.

MR. DAY: Nothing said in respect to that, as to how it should be conducted and used?

MR. HARRIMAN: The Burlington touches the Union Pacific lines at a great many points.

MR. HARRIMAN: I should think it did.

MR. DAY: You asked no assurances regarding that and received none?

MR. HARRIMAN: No, sir.

MR. DAY: Was any inducement held out to you to enter the Northern Securities Company or to take any interest in that?

MR. HARRIMAN: No, sir.

MR. Day: By any of these gentlemen?

MR. HARRIMAN: No, sir.

R., 246, 247.

MR. DAY: And the Oregon Short Line purchased seventy-eight millions of the common and preferred stock of the Northern Pacific Railroad Company last spring?

MR. HARRIMAN: That is about right.

MR. DAY: How is that stock held?

MR. HARRIMAN: In the Oregon Short Line Railroad.

MR. DAY: In the name of that company?

MR. HARRIMAN: It is held for that company.

MR. DAY: In whose name?

MR. HARRIMAN: Harriman and Pierce.

MR. DAY: As trustees?

MR. HARRIMAN: No; I think in their names (R. 247, F. 20).

* * * * * * *

MR. DAY: Well, proceed and tell the whole history of that transaction.

MR. HARRIMAN: The Northern Pacific stock has been sold.

MR. DAY: All of it?

MR. HARRIMAN: All of it.

MR. DAY: I thought you wanted to go ahead and tell the whole story.

MR. HARRIMAN: Well, that is all you asked. There is no more story to tell.

MR. DAY: To whom was it sold?

MR. HARRIMAN: To individuals.

MR. DAY: Who are the individuals?

MR. HARRIMAN: I do not remember.

MR. DAY: When was the sale effected?

MR. HARRIMAN: Sometime during the summer, I think, the last of August or September. It has been sold since July September, or October, or August.

MR. DAY: How long before the meeting of the board of directors of the Northern Pacific Company was it sold?

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MR. HARRIMAN: Oh, sometime—I do not remember—thirty or sixty days, perhaps.

MR. DAY: Who negotiated for the sale of that stock?

MR. HARRIMAN: I did, principally (R. 248, F. 10).

MR. DAY: Were you authorized to make the sale by a vote of the board of directors of the Short line?

MR. HARRIMAN: No, sir.

MR. DAY: Your action was without consultation with your codirectors?

MR. HARRIMAN: We had many talks.

MR. DAY: What were the terms of sale—what was the agreement respecting the sale?

MR. HARRIMAN: I do not mean for you to understand that there was no action by the board of directors of the Oregon Short Line but the final transaction; the Oregon Short Line authorized the sale to be made on the terms that were reported to it. In this instance it took no action as to authorizing negotiations.

MR. DAY: What were the terms reported to it?

MR. HARRIMAN: The sale of the stock.

MR. DAY: What were the terms of it?

MR. HARRIMAN: You mean what price we got?

MR. DAY: No; I do not care about the price, but the terms, —the conditions of the sale?

MR. HARRIMAN: No conditions.

MR. DAY: A price was named?

MR. HARRIMAN: Yes, sir.

MR. DAY: You did not know who the purchasers were?

MR. HARRIMAN: I know to whom the stock was delivered. There were other people. I do not think it was all purchased by one house or one person.

MR. DAY: Do you know who it was purchased for?

MR. HARRIMAN: No, sir (R. 248, F. 40; R. 249).

* * * * * * *

MR. DAY: Did you attach to your negotiations for the sale of Northern Pacific stock any other conditions than the one of the money price?

MR. HARRIMAN: No, sir.

MR. DAY: No other conditions?

MR. HARRIMAN: No other conditions that I remember.

MR. DAY: No other consideration except the one of the money price?

MR. HARRIMAN: I do not remember any condition of the Union Pacific or Oregon Short Line in any way.

MR. DAY: Or the gentlemen who held the stock, yourself or your co-trustee, or your attorneys—Mr. Schiff or any member of the firm of Kuhn, Loeb & Co.?

MR. HARRIMAN: None other than I have stated.

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MR. DAY: Of the various interests?
MR. HARRIMAN: No, sir (R. 259, F. 20-40).

In the light of this testimony what becomes of the allegation of paragraph VII. of the second amended bill, as follows:

> " * * * Harriman, Pierce and Oregon Short Line Railroad Company agreed with the promoters and incorporators of said Northern Securities Company to transfer to and deposit with said Northern Securities Company, under the terms and conditions aforesaid, the said shares of said Northern Pacific Railway Company * * * " (as set forth in paragraphs V. and VI. of the bill, of which complainants admit they had knowledge) (R. 5, F. 6).

MR. DAY: Pending the negotiations for the sale of the $78,000,000 of Northern Pacific stock, which has been referred to, and the questions which arose respecting it from time to time among your associates, who acted as your legal counsel?
MR. HARRIMAN: Mr. Pierce.
MR. DAY: On what basis was such portion of the $78,000,000 as was taken in exchange or exchanged for Northern Securities stock based or taken? What was the basis of the exchange?
MR. HARRIMAN: We made no exchange.
MR. DAY: I thought you said—
MR. HARRIMAN: No. We had no transaction whatever. I think you have got a wrong impression. We had no transaction whatever with the Northern Securities Company (R. 265, F. 10).
MR. DAY: I understood you to say that you took some Northern Securities in part payment.
MR. HARRIMAN: Yes, sir, in lieu of cash. We did not make any exchange.
MR. DAY: You did not subscribe?
MR. HARRIMAN: No, sir, we had no transactions with them (R. 265, F. 30).

* * * * * * *

MR. DAY: Then I asked if you did rely upon the statement that a Securities Company was to be formed?
MR. HARRIMAN: In making the sale?
MR. DAY: Yes, sir.
MR. HARRIMAN: No.
MR. DAY: I do not mean that that was the moving consideration. Would you feel that you had a cause of complaint against the gentlemen you were negotiating with if that stock had not been put into the Northern Securities Company?

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MR. HARRIMAN: I do not think we would; I do not know any reason why we should (R. 266, F. 20–30).

* * * * * * *

THE CHAIRMAN: As I understand Mr. Harriman, he said he negotiated the sale of this Northern Pacific stock when his company decided that it was best to sell it. He reported the terms to his company and they ratified the arrangement.

MR. HARRIMAN: Yes, sir.

THE CHAIRMAN: That arrangement fixed a price, and part of it was to be paid in money and the balance in securities, and included in those securities was an agreement on your part to take a certain amount of the securities of the Northern Securities Company if organized on a certain basis?

MR. HARRIMAN: Yes, sir.

THE CHAIRMAN: Subsequently it was organized on that basis?

MR. HARRIMAN: And the stock was delivered and received.

THE CHAIRMAN: And you took the stock of the Northern Securities Company in payment of the Northern Pacific stock that you sold?

MR. HARRIMAN: Yes, sir (R. 267, F. 30–40).

* * * * * * *

COM. CLEMENTS: When did you first seriously consider taking any stock in that company yourself or for the corporations you represent?

MR. HARRIMAN: Only when we sold the Northern Pacific stock (R. 268, F. 13).

This deposition was given January 25, 1902; consequently just 66 days after the completion of the transactions therein related, and while the recollection of them must have remained unimpaired in the mind of the witness. Mr. Harriman's deposition in the Minnesota case was taken Dec. 1, 1902, (R. p. 287) and in it he constantly treated the transfer of the Northern Pacific Stock to the Securities Company as a *sale*, and not as a bailment, as the following extracts abundantly show:—

Q. Did J. P. Morgan & Company, or any member of that firm, open negotiations with you looking to the purchase or acquisition of such holdings during the fall of 1901?

A. Does it make any difference whether I opened the negotiations with them or they with me? I don't remember. It was either one or the other. The negotiations were opened. Or they may have been opened by some intermediate party. I don't remember just how it was.

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Q. At what time were those negotiations opened ?

A. It would be difficult for me to state within a month. It was September or October, I should think.

Q. It was either during the month of September or October, 1901 ?

A. I should think so.

Q. How long did those negotiations continue before they were finally consummated ?

A. I should think about a month or six weeks, possibly two months.

Q. With whom did you have your first dealings in those negotiations, if you remember ?

A. I couldn't remember.

Q. Was it with Mr. Bacon of J. P. Morgan & Company ?

A. I had many talks with Mr. Bacon. I had talks with nearly every member of the firm.

Q. In these negotiations were they acting for themselves or acting with the understanding that these securities or this stock was to be turned over to some holding company when organized ?

A. They never disclosed to me whether they were acting for themselves or somebody else.

Q. Before the negotiations were finally closed was it understood that you were to take some stock in a company to which this stock was to be transferred ?

A. That is my recollection.

Q. And was that the Northern Securities Company ?

A. It was never designated by any name.

Q. You didn't learn what company was to take it until you received the stock of that company in exchange ?

A. Practically at that time.

Q. Did you understand, from the beginning of these negotiations, that this stock was ultimately to be turned over to some holding company which was to be organized ?

A. No, I can't say there was any understanding at the beginning of the negotiations for a settlement of whatever differences we might have in regard to that stock, whether it was to be taken by them or by a holding company, or how it was to be paid for. It was only towards the end, when the thing crystallized, that the suggestion was made that payment should be made partly in cash and partly in a holding company stock. I think it was just towards the end of the negotiations when we were considering whether we would break away or get together on it.

Q. Well, did you understand at any time that they were acting for themselves in the matter and expected to take the stock themselves ?

A. I had no understanding upon that subject.

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Q. They were simply trying to secure this stock on some basis, then?

A. That is the substance of it.

Q. And it was not until toward the end of the negotiations that you learned they were acting for some holding company?

A. I didn't say I understood they were acting for a holding company. They didn't disclose to me that they were acting for anybody else at all during the negotiations.

Q. Well, you finally learned that the stock was in fact to be turned over to a holding company?

A. There never was anything on their part, it seems to me, that would lead me to infer that they were to turn that stock over to a holding company. Towards the end, when the matter crystallized, and when we were very nearly at the end of our tether, they offered to pay for these shares in the stock of a holding company so much, and so much in cash. Now, there was nothing said as to whether they would turn this stock over to a holding company, or whether they would hold it themselves; but they would give us that holding company's stock in part payment.

Q. When did you learn that? How long before you actually delivered the stock?

A. Before we delivered our shares?

Q. Yes.

A. It was several days. I don't remember just when. Perhaps two or three days. It may have been within three or four days, or perhaps two days. I have a great deal to do, Mr. Munn, and since our talk the other day I have been trying to refresh my memory on this very thing; but I was pretty busy in other matters at that time, and have been since.

Q. When you found that you were to take the stock of some other company in part payment for this stock, of course you knew then that they were acting for a holding company, did you not?

A. I don't see how I could know.

Q. Well, did you, Mr. Harriman?

A. No, I don't see how I could.

Q. When did you first learn that this stock was to be delivered to the Northern Securities Company?

A. When it was delivered.

Q. That was the first you knew about that?

A. That is my recollection. The first I knew was when it was delivered to that company.

Q. When did they first make a proposition to you to make payment for this, or part payment for it, in the stock of some other company?

A. I think that was towards the end of our various conferences and negotiations, as I said; within a few days, perhaps, of the time the thing was absolutely closed.

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Q. Now, during these various conferences you had when these negotiations were pending what was the talk about payment for your stock? Was it to be paid for in cash, or how were they to pay for it?

A. I don't recollect that there was anything said as to just how it was to be paid for until towards the end.

Q. What did these negotiations relate to then? Whether you would surrender your stock or give it up?

A. Whether we would do anything with our stock except to stand where we were on the basis of holding preferred and common stock (R. 288–290, F. 20).

* * * * * * *

Q. Did Mr. Morgan, or any of the representatives of J. P. Morgan & Company, with whom you negotiated, state to you that they intended to do that?

A. I imagine they did. I don't remember just what.

Q. Well, that was one of the principal inducements that led you to finally surrender your holdings, was it not?

A. Practically (R. 292).

* * * * * * *

Q. At the time you finally consented to accept in part payment for your holdings stock in a holding company, did you insist upon any basis on which any other stock of the Northern Pacific Railway Company should be acquired by that holding company?

A. No, sir.

Q. You finally agreed to turn in your holdings and receive from the Northern Securities Company upwards of 82 millions in stock of this company?

A. Yes, sir.

Did you know at that time on what basis this holding company was to take in any other Northern Pacific or Great Northern stock?

A. Yes, sir.

Q. On what basis.

A. $115.

Q. For the Northern Pacific?

A. Yes.

Q. And what for the Great Northern?

A. $180.

Q. Did you make any request or demand that they should not take any of the stock of either one of these companies at a higher rate than that?

A. No, sir (R. 292, F. 20-40).

* * * * * * *

Q. Did they represent to you that that was the basis on which they were going to take in the stock?

A. The statement was made to me that they would put this Northern Pacific stock into a holding company and give us—

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not this Northern Pacific stock—but that they would give us in part payment a holding company's stock on the basis of $115 for Northern Pacific, and, if Great Northern were taken in, on the basis of $180 for Great Northern. They didn't state how much they were going to take in, or how little they were going to take in. Nor did I ask them to stipulate that they would not take any more than a certain amount or to agree to take a minimum amount. The statement was simply made that they were going to form a holding company, or had formed a holding company, and would pay us in this stock, and that those were the terms on which it was to be bought (R. 293, F. 10).

* * * * * * *

Q. Did you finally consent to surrender your holdings on the basis on which you did because you had made up your mind they would carry out the determination you had heard expressed, to retire the preferred stock, and thus take away from you the controlling interest in the stock of the Northern Pacific?

A. I think I recollect pretty clearly that from our standpoint we thought it was better for us to accept that price for our stock than to go into a legal contest (R. 295, F. 10).

* * * * * * *

Q. And they never disclosed to you for whom they were acting until the transaction was ready to be closed?

A. Do you mean Morgan?

Q. Yes.

A. Do you mean the exact company?

Q. Yes.

A. My recollection is that he did not. In fact, I don't think this transaction was closed until practically the very minute the payment was made. I think there was considerable discussion and dispute as to the final payment, and about—I don't remember now whether it was the amount to be paid or whether it was the amount of stock to be delivered; I think it was the amount of stock to be delivered. They supposed we had somewhat more stock than we really had (R. 296, F. 10-20).

Plaintiffs cannot dispute what the record shows to have been in fact the doings and intentions of all the parties concerned. Neither can they claim that anything done or intended by the parties is not fully shown by the record; nor that any different light would be thrown on any material act or purpose by additional evidence. The actualities are now all before the court.

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Whence could come any utility from retaining the injunction, and subjecting the case to the process of evidence-taking and a formal final hearing? The sole answer suggested by Plaintiffs' counsel is, that opportunity would thereby be afforded for cross-examining witnesses. What witnesses? Counsel do not say. Certainly not Mr. Hill or Mr. Harriman, the actors, for their respective sides, in the business here being considered; for both have been repeatedly examined, cross-examined, and re-examined on every minute point and detail, and their testimony put into these motion papers. On what subject? Counsel do not say. It could not be upon what the parties actually did; for that matter has many times been gone over, and now appears at length in this Record. Nor could it be upon the intent with which the things were done; for that subject also has been fully threshed out, and the results all embodied in the Record. It could not be for showing that the purchase by the Securities Company, of the Northern Pacific shares, was made for the purpose of enabling it to restrain trade; for that point has already been decided in the Government suit. Absolutely nothing could be added to the facts, by the most prolonged taking of testimony. The case would finally have to go to hearing on exactly what this court has before it now.

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VIII.

But plaintiffs in effect say, whatever Harriman and Pierce on the one hand, and the Securities Company on the other hand, may in fact have done and intended, their transaction was illegal, and has been so adjudged; therefore, what actually was intended has never, in law, been accomplished.

Assertion in Plaintiffs' papers here that the sale of Northern Pacific stock to the Securities Company was intended by

the parties not to be one, or if intended to be a sale at all, to be so only upon conditions, appears solely in the Bill; and only in those passages of the Bill which, for purposes of an injunction motion, are to be taken as unverified. Plaintiffs have so far been unable to find any one willing to take the risk of swearing that such a thing is actually known by him.

Record, pp. 232, 233.

Practically plaintiffs rely on what they claim has been adjudicated in the suit of the Government against the Securities Company, and sundry individual defendants. Their real position is, that the Securities Company is now merely custodian, or at best conditional owner, of the Northern Pacific shares, not because the parties have so actually agreed or intended, but rather in spite of their intentions, and solely because the courts have so decided. They were not themselves named parties to that suit; but, nevertheless, they claim the right to have treated as conclusively established in their favor whatever has been determined in it; because they say they were represented in the suit by the Northern Securities Company, whose stock they hold; or, if not by the corporation itself, then by the eight individual defendants who like themselves were stockholders in it.

Plaintiffs claim that the proceedings in the suit have adjudicated:—

1. That the Securities Company has not become owner of the Northern Pacific preferred and common stock it acquired from Harriman and Pierce, but has become a mere "custodian" of the same, for the special purpose of enabling it to commit a series of illegal acts; necessarily, therefore, that the Securities Company has become a mere bailee, and not a purchaser of the stock.

2. That even if the interest vested in the Securities Company by its acquisition of the stock exceeds that of mere custodian, and has the nature of title, nevertheless, such title is not absolute, but is accompanied by an agreement on the part

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of the Securities Company to use the stock for accomplishing a specified purpose; that such an agreement has the effect of a condition, for the breach of which the Securities Company's title may be terminated by plaintiffs; that such condition has been rendered impossible of performance by the decree of the courts, and further performance of it been expressly renounced by the Securities Company, and, consequently, that plaintiffs may now retake the property at their pleasure.

Authorities upon the doctrine of implied representation of one party by another in judicial proceedings are plentiful; but none has been found—even the great diligence of Plaintiffs' counsel has not enabled them to cite one—where a party has been held to represent another in respect of any matter regarding which their claims and interests were conflicting. Implied representation is limited to matters in which the interests of the party represented and those of the party representing are common and concurrent.

In the Government suit, the Securities Company may be deemed to have represented all its absent stockholders, in matters wherein their common interests as stockholders, in proportion to their respective holdings, were concerned.

But what Plaintiffs demand here is not some ratable interest in the property or business of the company, common to all stockholders. On the contrary, the sole object of this suit is to claim something adversely to the corporation, and to every other holder of its stock, and to exclude each and all of them from any interest therein.

In any suit involving the determination of such a claim, the Securities Company could not represent Plaintiffs.

Part of the relief asked by the Government was a command to the Securities Company to return the railway stocks to those from whom they had been received. Did the Court have jurisdiction to make such a decree against absent sellers of shares to the Securities Company? The Court which originally made the decree thought not. (Supplementary Record, p. 8).

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Suppose the views of the Court had been different, and it had proceeded to make a decretal order of that nature. It would necessarily have been required to take up and determine the exact rights of each stockholder of the Securities Company separately. In the case of the Harriman and Pierce stock, that would have involved examination and decision of the very questions now being litigated in this suit.

Would any such determination have been binding on Harriman and Pierce? Suppose in making one the court had taken a view of their rights different from their own; would they have been compelled to submit, without opportunity to be heard? They certainly would, if represented in the suit on such questions by any party to the record.

But no party to the record represented them in regard to any such matter. This proposition includes all the individual defendants as well as the Securities Company. Plaintiffs are strangers to the decree in the Government suit, save in so far as it determines matters common to all the stockholders of the Securities Company. As to all other matters they may use it only as other strangers could.

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IX.

The decree itself is not what plaintiffs rely on to establish their theory of custodianship. For that they rely on some words of an opinion of an honorable Justice of this Court, announced in behalf of himself, and three associates, apparently concurring with a fifth on but a single proposition, viz., that the decree of the Circuit Court should be affirmed. Plaintiffs do not point out anything that Harriman and Pierce on the one side, and the Securities Company on the other, ever actually said or did expressing a mutual

purpose to create the relation of bailor and bailee, or *cestui que trust* and trustee, in relation to that property. They merely insist that Mr. Justice HARLAN'S opinion has adjudicated that parties who unquestionably considered themselves buyers and sellers, in reality were not so; and, consequently, that neither of them remains free to now dispute that relation.

Laying aside the question of how far expressions, merely *in arguendo* of an opinion are to be regarded as setling any point, or thereafter binding even the Judge who makes them, counsel for Defendant humbly submit, that the meaning plaintiffs attribute to that opinion is manifestly a misinterpretation of it. A single sentence here and there, two or three altogether, are torn by plaintiffs from the context, and held up as the fabric of what the court adjudged.

The following is one of them:

"That disclosed the actual nature of the transaction, which "was only to organize the Northern Securities Company as a "holding company, in whose hands, not as a real purchaser, "or absolute owner, but simply as custodian, were to be "placed the stock of the constituent companies—such custo- "dian to represent the combination formed between the share- "holders of the constituent companies; the direct and neces- "sary effect of such combination being, as already indicated, "to restrain and monopolize interstate commerce, by suppress- "ing or * * * smothering competition between the lines "of two railway carriers."

Opinions p.

Another reads:

"The decree, if executed, will destroy, not the property in- "terests of the original stockholders of the constituent com- "panies, but the power of the holding corporation, as the in- "strument of an illegal combination, of which it was the mas- "ter spirit, to do that which, if done, would restrain interstate "and national commerce."

Opinions p.

In this instance, the learned justice followed the established custom of commencing his opinion with a formal and

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specific finding of the facts, to which application of the law is intended to be made. These findings included the following:—

Prior to November 13, 1901 defendant Hill and associate stockholders of the Great Northern Railway Company, and defendant Morgan and associate stockholders of the Northern Pacific Railway Company, entered into a combination to form, under the laws of New Jersey, a *holding* corporation, to be called the Northern Securities Company, with a capital stock of $400,000,000, and to which company, in exchange for its own capital stock upon a certain basis and at a certain rate, was to be turned over the capital stock, or a controlling interest in the capital stock, of each of the constituent railway companies, with power in the holding corporation to vote such stock and in all respects to act as the owner thereof, and to do whatever it might deem necessary in aid of such railway companies or to enhance the value of their stock. * * * * * *

Opinions, p. 5.

In further pursuance of the combination, the Securities Company acquired additional stock of the defendant railway companies, issuing in lieu thereof its own stock upon the above basis, *and, at the time of the bringing of this suit, held, as owner and proprietor, substantially all the capital stock of the Northern Pacific Railway Company, and, it is alleged, a controlling interest in the stock of the Great Northern Railway Company,* "and is voting the same and is collecting the dividends thereon, and in all respects acting as the owner thereof, in the organization, management and operation of said railway companies and in the receipt and control of their earnings."

Opinions, p. 7.

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If the learned Justice was referring to the same thing in this passage from the findings and in those from his argument on which plaintiffs rely, it is hard to see how all could be reconciled. Applied to the same subject, both sets of expressions do not seem consistent.

But the frame of the opinion shows that the different expressions were meant to apply to different things.

The findings at the beginning of the opinion seem meant to describe the process by which the Securities Company had become possessed of the railroad stocks—in other words, the relations that had been established between the Company and those from whom it had acquired them.

On the other hand, the quoted expressions in the argumentative part seem to have had reference only to the Securities Company's title *as between itself and the Government.* That was a matter quite different from its title as between itself and the sellers of the stock.

A majority of the court, although by different and dissimilar processes of reasoning, decided that the purchases of the stocks by the Securities Company had been prohibited by a statute which the Government had made. The Securities Company had argued here, as it had done the Circuit Court, that to grant the decree asked for by the Government would in effect be to deprive it of property acquired under the laws of individual states having exclusive power to declare who may be its owners, and the mode of acquiring it. Mr. Justice HARLAN may well be supposed to have used the language upon which Plaintiffs rely merely in answer to that argument. It was as if he had said, the Securities Company having bought these stocks in violation of an Act of Congress, *as against the Government* it is barred from setting up title in them acquired under the laws of any individual state, and hence, *as against the Government,* is to be accorded the rights of a custodian merely.

Stated in this way, findings and argument harmonize.

But the question of the effect of the forbidden transaction, as between the parties to it, is totally different. As between them, it became and has remained completely effectual, under rules of laws perfectly defined and recognized in all courts of the country.

Another thing to be kept in mind while examining all the opinions, in both courts, is that their writers were speaking merely in general terms of the acquisition of the railway stocks as a body.

To the mind of Mr. Justice HARLAN, special features of the individual transaction by which any particular lot of railway

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stock was acquired, were of no consequence. He expressly says so :

> " However that company may have acquired for itself any stock in the Great Northern and Northern Pacific Railway Companies, no matter how it obtained the means to do so, all the stock it held or acquired in the constituent companies was acquired and held to be used in suppressing competition between those companies."
>
> Opinions p. 34.

Consequently, in the opinion of the learned Justice, all acquisitions of those stocks by the Securities Company were equally illegal, and defense of them under state laws and rights derived therefrom equally inadmissible. To his mind, for the purposes of the case there up for decision, the only thing of the least consequence to ascertain was the intent and purpose of the Securities Company, and of the men who caused it to be formed, in making the acquisition. All else would be impertinent.

The learned Justice and his concurring associates purposely omitted examination and consideration of the form and method of acquisition in specific instances. That was something out of order in the case before them.

The learned Justice did not undertake to say what had been the effect of the acquisitions as between the parties to the transfers. Especially he did not undertake to say, that an acquisition in which the parties used the forms of an absolute sale, with an undoubted purpose of making one, and in which one of them unconditionally paid to the other almost $9,000,000, in cash, was, as between themselves, nothing but the creation of a custodian, and therefore nothing but a bailment.

That to retract, or even to modify, in the argumentative part of the opinion, what had previously been asserted in the findings of fact therein, was far from the intentions of the learned Justice, the following additional passage, also from the argumentative part, amply shows :

The Circuit Court was undoubtedly right when it said—all the judges of that court concurring—that the combination

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referred to 'led inevitably to the following results: First, it placed the control of the two roads in the hands of a single person, to wit, the Securities Company, *by virtue of its ownership of a large majority of the stock of both companies;* second, it destroyed every motive for competition between two roads engaged in interstate traffic, which were natural competitors for business, by pooling the earnings of the two roads for the common benefit of the stockholders of both companies'.

The reference (Opinions, p. 34), by the learned Justice, to the testimony of Mr. Morgan, cannot be regarded as having been made to show the nature of the title, which, *as between the Securities Company and sellers to it of the railway stocks,* the former was intended to and did acquire; for if that had been the question, the following other passage from the testimony of the same witness undoubtedly would also have been quoted:

"Q. In referring to the Northern Securities Company, by way of illustration you have used the example United States Trust Company once or twice. *Are you to be understood that the Northern Securities Company held the several certificates in the nature of trustee or as owner?*"

"A. *As owner;* but what I meant is this; while the Northern Securities Company as such issued stock for this, a trust company would have issued a receipt; we have issued stock, consequently we could control it. I say, if I had put them in a company with $2,000,000. stock it could have been easily controlled; but in the Northern Securities Company, which is the only company I know of, up to this time, where the stock itself is represented, you cannot control that stock without buying a majority of $400,000,000. or more of stock."

Transcript of Record (Government Suit) p. 361.

The meaning of the decree, and its effect and scope as a judgment, must have remained precisely the same ever since the instant of its filing. Its meaning could not have undergone the slightest transformation through the process of affirmance by this court. Its meaning at the instant of affirmance must have been precisely what it had been the instant before, and the instant of its origin in the Circuit Court.

Therefore, the decree cannot now be put forward as having undergone some change, and as having acquired some new

force, in the process of passage through this Court, which it did not have as soon as filed by the learned judges of the Circuit Court.

The court that frames a decree should be considered at least as very high authority on the meaning of the language forming it. Hence, in this instance, the views of the Circuit Court for the Minnesota District, on this subject should seem entitled to great weight.

On April 2, 1904, three of the Petitioners herein, Edward H. Harriman, Winslow S. Pierce, and the Oregon Short Line Railroad Company filed in that Court their petition, asking leave to intervene in the Government suit; asserting that a distribution by Respondent here of its holdings of Northern Pacific and Great Northern shares would be in violation of their rights, and of the decree against the defendants in said suit; and praying for such orders of that court as should protect their interests in the premises. In other words, Harriman and Pierce, and the Oregon Short Line Company set up in the Minnesota court the same claims which they now assert in this suit. Upon the filing of the Minnesota petition, the petitioners gave notice of hearing upon it, for April 12, 1904; and, on that day, both parties appeared by counsel, who argued the matter at length; with the result that a few days afterward the Circuit Court, four judges sitting, filed its decision dismissing the petition, and holding that the *pro rata* method of distribution in no way violated the decree in the Government suit, and that it would restore to the markets of the world the railway stocks, which, in view of the decree, would otherwise remain worthless. The opinion of the court was by THAYER, Circuit Judge, and appears in the pamphlet of opinions herewith submitted, on pp. 109–115.

As appears by that opinion, "the Government was satisfied with the relief obtained, and expresses itself as satisfied at the present time;" the reference being to a formal declaration

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signed by the Attorney-General, and then filed in open Court by the District Attorney of the United States for the Minnesota District." The following passages from the opinion contain its most important substance:

"The decree was wholly prohibitory. It enjoined the doing of certain threatended acts, and so long as these acts are not it enforces itself, and no further action looking to its enforcement is deemed essential. In its bill of complaint the United States prayed, among other things, for a mandatory injunction against the Securities Company requiring it to recall and cancel the certificates of stock which it had issued and to surrender the stock of the two Railway Companies in exchange for which its stock had been issued. This prayer for relief was denied. The Court doubted its power to command stockholders of the Securities Company, who had not been served with process and were not before the Court otherwise than by representation (if indeed they were present by representation), to surrender stock which was in their possession and to take other stock in lieu thereof. It accordingly contented itself with an order which rendered the stock of the two Railway Companies, so long as it was in the hands of the Securities Company, valueless for the purpose of carrying out the objects of the unlawful combination in restraint of interstate trade. The Government was satisfied with the relief which it obtained and expresses itself as fully satisfied therewith at the present time.

"It is true that the decree contained a provision in substance that nothing therein contained should be construed as prohibiting the Securities Company from returning to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company and all shares of stock in either of said Railway Companies which the Northern Securities Company had acquired in exchange for its own stock, and that nothing therein contained should be construed as prohibiting the Securities Company from making such transfer of the stock aforesaid to such person or persons as had become the owners of its own stock originally issued in exchange for stock in the two Railway Companies. But this provision was merely permissive. It did not command that the stock should be returned or exclude other methods of disposing of it that in view of all the circumstances might appear to be more equitable. The fact that the directors of the Securities Company have proposed to its stockholders a plan of distributing the stock of the two Railway Companies in a manner somewhat different from that which was tentatively suggested by the decree but not commanded, cannot be regarded as a failure to obey the decree. It was said in argu-

ment that one purpose of the intervention is to have that clause of the decree which is now merely permissive, made mandatory. But this would be to modify the provisions of a decree which has now become final by affirmance, and make an order which we expressly and on full consideration declined to make when the decree was entered. This we must decline to do."

Opinions, pp. 111-112.

For sake of argument, conceding that the Government could treat the Securities Company as holding the stock subject to return, if so ordered by the Court at the suit of the Government, Harriman and Pierce could not so treat it.

Plaintiffs' custodianship theory therefore collapses.

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X.

Plaintiffs' alternate contradictory theory, that of a conditional sale for a special purpose, terminable by them when the Securities Company should cease to use the railway stocks for the alleged purpose, is equally fallacious. It likewise contradicts both facts and law.

It has to assume as facts :—

1. That part of the transaction between Harriman and Pierce on the one part and the Securities Company on the other was an agreement by the latter to use the railway stock for the purpose of suppressing competition between the railway companies.

2. That such use of it should be perpetual, or at least for some period lasting beyond the date of the decree in the Government suit which terminated the possibility of such a use.

This alternate theory presents the instance of a party to an illegal transfer of property seeking to rescind the transaction and to reclaim what he has transferred.

All the facts going to show the respective degrees of culpability of the respective sides in the transaction are here upon the record. The full and equal guilt of Harriman and Pierce is confessed on the face of the bill. It is more than confessed; it is asserted as a chief ground of recovery.

The concluding averment of paragraph VI. is as follows:

"Your orators are informed and verily believe, and therefore aver, that *all and singular the persons*, to whom the stock of the said Northern Securities Company was issued, whether for shares of either of said railway companies, or for cash, had full knowledge and information of the purposes for which said Northern Securities Company was organized, and of the fact that a majority of the capital stock of each of said railway companies was to be, or had been, deposited with said Securities Company, as custodian or depositary, in pursuance of said agreement."

Record, p. 4.

By their supporting affidavits, plaintiffs have fully established complete advance information of the conspiracy, on their own part.

In his affidavit, Mr. Harriman dates his first full knowledge some time prior to the formation of the Securities Company; as the following extract shows:—

"The first information we had of the plan was from Mr. Hill and J. P. Morgan & Co., to the effect that Mr. Hill and his associates had determined to organize a holding company, and that they intended to transfer to such holding company a majority of the capital stock of both the Northern Pacific and the Great Northern Companies. My conversations on the subject were with Mr. Morgan, Mr. Steele, Mr. Bacon and Mr. Perkins, members of the firm, but I cannot remember exactly what each said, and, at the present time can only recollect the substance and result of my conversations with them." Record, p. 199 par. VII.

One of several affidavits of Mr. Pierce, appearing in the Record, is as follows:—

"Referring to my affidavit, verified May 16, 1904, in this suit, my attention has been called to the fact that after the arrangement with Messrs. J. P. Morgan & Co. to accept shares of the holding company for the Northern Pacific stock held by

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the Oregon Short Line Company, as stated in Mr. Harriman's affidavit of May 16, 1904, and shortly before the organization of the Northern Securities Company (the exact date I do not recollect), I attended a meeting at which were present counsel representing Mr. Hill and his associates, counsel representing Messrs. J. P. Morgan & Co., and counsel representing the Oregon Short Line interests. At such meeting a form of certificate of incorporation of a holding company was submitted by counsel representing Mr. Hill and was discussed. The form thus submitted and discussed was to the best of my recollection substantially the same as that subsequently used in the incorporation of the Northern Securities Company. The formation of the holding company had been previously decided upon by interests other than our own and in the decision to form such a company I had no part." Record, pp. 232–233.

Of thousands of the holders of the stock of the Northern Securities Company the above quoted averment of the Bill is untrue. The record only shows it to be true of Plaintiffs here, and of the individual defendants in the Government suit; for, on a motion for an injunction, a mere general statement of the Bill unsupported either by the oath of one having personal knowledge, or by documents importing verity, is not to be considered true.

Stockholders are not chargeable with constructive notice of the acts of their corporation.

Pearsall v. W. U. Tel. Co., 124 N. Y. 256 (pp. 277-7).

Rice v. Peninsular Club, 52 Mich. 87.

But all, including Harriman and Pierce, of whom the averment is true, are offenders and equally guilty. There are no degrees in the crime of restraining or conspiring to restrain interstate trade.

Long premeditation is not essential to guilt of any offense. Where design is an ingredient, a minute's forethought is as effectual as a year's.

The very last seller of railway stock to the Securities Company, if he had the knowledge imputed to all sellers by the bill, as

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much became a participant in the conspiracy to restrain trade as did Mr. Hill and Mr. Morgan. If that be so, certainly the very first sellers with such knowledge, Harriman and Pierce, cannot escape the charge of participation; nor its consequences, either.

If guilty at all of participating in the offense committed, in the eye of the law, as well as in fact, they were guilty equally with the most guilty.

Of all legal principles which the courts are called upon to apply with considerable frequency, there is none over which they, or the text writers as well, are so thoroughly in accord as that concerning the respective rights of those who deliver and those who receive property transferred without permission of law, or in violation of it.

The large number of leading and typical cases, and of citations from text books, collected by Mr. Stetson, and printed for convenience of Judges and counsel in this litigation prove this.

To dispose of this case, however, trouble need not be taken to examine all these authorities. The law by which the rights of the parties in this Northern Pacific stock must be determined has been conclusively settled by a series of decisions of this court.

These cases have established the rule, that where there has been a transfer of property, illegal from any cause, and possession has been delivered to the person to whom the title under the transfer was intended ultimately to go, the transaction has become executed on the part of the transferor, and he cannot thereafter repudiate it and reclaim the property because of the illegality.

In the Federal courts, this rule governs all forms of illegality; whether in doing something which the laws positively prohibit, or something which they merely omit to allow. The

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rule governs equally where the violation is concerned with the commission of the most atrocious crime, and where it is merely concerned with use by a corporation of power not granted to it.

Undoubtedly, in some respects, there must be difference between the legal effect of a transfer made for the purpose of inducing or facilitating the commission of a crime, and one merely lacking permission in the law for making it. A promise, either expressed or implied, to commit an offense, could not form a legal condition or consideration for any sort of an undertaking. Such a condition or consideration would simply be inoperative and void.

For instance, if money be paid as an inducement to commit murder, the promise to commit it would hardly be a consideration, the failure of which would entitle the payor to recover the money.

The same reasoning must apply to all crimes, whether *malum in se*, or merely *malum prohibitum*. On what principle could classification of crimes for such a purpose proceed? The requirements of public policy must operate equally in respect to all classes; and it is these requirements out of which the rule arises. On the other hand, where absence of legal permission to make it is the sole impediment to a valid transfer, non-performance by the transferee of the conditions of the transfer, in other words, repudiation of the arrangement by him, is commonly recognized as giving the transferor a right of recission and reclamation.

The citation herein of all the cases in this Court which assert this rule would be unnecessary.

Only the following need be noticed here, because they sum up the whole matter. They have been selected from the class of cases decided by this Court where a corporation created for the performance of service to the public has, without permission of the legislature creating it, transferred its instrumentalities and franchises to another.

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The utter invalidity of such transactions, was declared in *Thomas vs. R. R. Co.*, 101 U. S., 71 in the following words:

"The principle is, that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be extended for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantee of the burden it imposes, *is a violation of the contract with the state, and is void as against public policy.*"

p. 83.

It was the view of the court that in such cases something more than mere absence of legal power operates to produce the invalidity. Another element is equally, if not more active—Public Policy. Such unauthorized transfers are direct breaches of duty toward the public and the state. Others than the immediate parties are concerned in them. As ground for invalidating what parties have done, or agreed upon, the unauthorized transfer of a public duty is equally effective as a crime.

St. Louis, Vandalia and Terre Haute R. R. Co., vs. Terre Haute & Indianapolis R. R. Co., 145 U. S., 393, was a suit by the maker of an unauthorized lease of a railway and franchises against the lessee to enforce an attempted repudiation of the lease by the former, on the ground of the illegality. The lease was for 999 years, of which but a few had elapsed at the date of the attempted rescission; and was on the covenant of the lessee to retain 65 per cent. of the gross revenues for its own use; to employ not exceeding 35 per cent. in payment of interest on the lessor's obligations; and to pay over any resulting surplus to the lessor.

Interest is added to the case by the fact that the lessor's counsel, mindful of what the court had said in *Thomas vs. R. R. Co.* justified repudiation, not only on the ground of

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legal right to do so, but also on that of the lessor's duty toward the public and state. Counsel argued:

"The lease being void, it was right as well as the duty of complainant to recover its property, and thus place itself again in a position to discharge its public duties."

p. 399

The illegality of the lease, and the consequent breach of public duty, were manifest; but the court denied a right in the lessor to repudiate it on that ground; at least while the lessee should continue to observe it.

The opinion of the court, announced by Mr. Justice GRAY, contained the following language, which sums up the views of the court:

"It may therefore be assumed, as contended by the plaintiff, that the contract in question is *ultra vires* of the defendant, and therefore did not bind either party, and neither party could have maintained a suit on it, at law or in equity, against the other."

p. 406.

"The general rule in equity as at law is, *in pari delicto potior est conditio defendentis;* and therefore neither party to an illegal contract will be aided by the court, *whether to enforce it, or set it aside.*

If the contract is illegal, affirmative relief against it will not be granted at law or in equity, or unless the parties are considered not in equal fault, as where the law violated is intended for a coercion of one party, and the protection of the other, or where there has been fraud or oppression on the part of the defendant. *Thomas vs. Richmond*, 12 Wall. 349, 455; *Spring Co. vs. Knowlton*, 103 U. S. 49; *Story Eq. Jur.* 298."

* * * * * * *

"*When the parties are in pari delicto*, AND THE CONTRACT HAS BEEN FULLY EXECUTED ON THE PART OF THE PLAINTIFF, BY THE CONVEYANCE OF PROPERTY OR THE PAYMENT OF MONEY, AND HAS NOT BEEN REPUDIATED BY THE DEFENDANT, *it is now equally well settled, that neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed, or money paid under the contract. Thomas vs. Richmond*, above cited; *Ayerest vs. Jenkins*, L. R. 16 Eq. 275, 284.

"The plaintiff stood in the position of alienating the powers which it had received from the state, and the duties which it owed to the public, to another corporation, which it knew had

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no lawful capacity to exercise these powers, or to perform those duties. If, as the plaintiff contends, the contract was beyond its own corporate powers, it is certainly in no better position. In either aspect of the case, the plaintiff was in *pari delicto* with the defendant. The invalidity of the contract, in view of the laws to which both parties were bound to take notice, was apparent on its face. *The contract had been fully executed on the part of the plaintiff by the actual transfer of its railroad and franchise to the defendant*, and the defendant has held the property, and paid the stipulated consideration, from time to time, for seventeen years, and has taken no steps to rescind or repudiate the contract."

"Upon this state of facts, for the reasons above stated, the plaintiff, considered as a party to the unlawful contract, has no right to invoke the assistance of a court of equity to set it aside. And so far as the plaintiff corporation can be considered as representing the stockholders, and seeking to protect their interests, it and they are barred by laches. * * * The case is not like those in which the defendant, having abandoned or refused to perform the unlawful contract, has been held liable to the plaintiff, as upon an implied contract, for the value of what it had received from him, and had no right to retain. *Spring vs. Knowlton*, 103 U. S. 49; *Logan County Bank vs. Townsend*, 139 U. S. 67, and cases there cited.

"But the case is one which, in the words of Mr. Justice MILLER, in a case after cited in this opinion, the court will not disturb the possession of the property that was passed under the contract, but will refuse to interfere as the matter stands. *Pennsylvania Railroad vs. St. Louis, Alton & Terre Haute Railroad*, 118 U. S. 290, 316, 317."

pp. 408, 409.

As against the state which had incorporated the lessor, the lease was void, and probably at its suit rescission might have been insisted on and enforced. As against the state, the lessee might rightfully have been deemed a mere custodian of the railway and franchises, subject to restore the same to the lessor, on the state's demand. But, as between lessor and lessee, the transaction had effect according to the intent of the parties; and would remain effective while observed by the lessee. The state chose not to intervene and assert its prerogative; the lessor could not repudiate what it had done.

But a short time previously this court had decided *Central Transportation Co. vs. Pullman Palace Car Co.*, 139

U. S., 24. The opinion in this latter case had also been announced by Mr. Justice Gray. It was a suit to recover an installment of rental on a lease made by the Central Transportation Co. of its entire assets, business and franchises. The defense was invalidity of the lease from want of power to make it, and was sustained.

The following expresses the substance of the opinion :

"A contract of a corporation which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation, as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

* * * * * * *

"A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action on the unlawful contract, have always striven to do justice between the parties, as far as could be done consistently, with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation made for it. In such case, however, the action is not maintained on the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or failing to do that, to make compensation for, property or money which it had no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract. The ground and the limits of the rule concerning the remedy, in case of a contract *ultra vires*, which has been partly performed, and under which property has passed, can hardly be summed up better than they were by Mr. Justice MILLER in a passage already quoted, where he said that the rule 'stands on the broad ground that the contract itself is void, and that nothing which has been done under it, nor the action of the court, can impose any vitality into it' and that 'where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court requires if relief can be given independently of the contract, or whether it will refuse to interfere, as the matter stands.' *Penn. R. R. vs. St. Louis R. R.*, 118 U. S. 317."

pp. 60–61.

Afterward the controversy between the Central Transportation Co. and the Pullman Co., was given a new phase, by an effort of the former to recover from the latter the leased property and business. The Central Transportation Company asserted its claim in the form of a cross bill, in an equity suit against it by the Pullman Co. already pending, and the court seems to have attributed equity jurisdiction over the claim, solely to the fact that such a jurisdiction had already been established over the matters involved, by the voluntary act of the Pullman Company itself in entering the equity side of the court. But for that fact the Central Co. must have resorted to the law side, as its claim was strictly legal in nature.

The demand for reclamation was sustained; and the opinion of this Court—this time by Mr. Justice PECKHAM—included a repetition, in substance, of what has been above quoted from Mr. Justice GRAY's opinion in the original case. On both appeals, the court in substance said, that a claim such as that made by the Central Co. in the second case was not one founded upon the illegal contract, but one founded upon a repudiation of it.

By this, the court did not mean to declare that repudiation of an illegal contract by one party only suffices to give the repudiator a right of rescission. The court was speaking in a case where repudiation had been mutual; where repudiation by the lessor had merely followed, and been occasioned by, repudiation on the part of the lessee. The court meant no more than to say that illegality of a contract is no defense in the mouth of its repudiator, against a demand for restoration of property or money which he has received under it. Mr. Justice PECKHAM went no farther in 171 U. S., than in effect to repeat what Mr. Justice GRAY had previously said in 139 U. S.; and Mr. Justice GRAY could not have meant in the VANDALIA case, to overrule what he had previously said in the sleeping car case, for he cites the latter as supporting the former.

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The Vandalia case and the Sleeping Car cases established these propositions:

1. A transfer of property or money, made contrary to law and public policy, is irrevocable by the transferor, after execution by him, as long as the promises made by the transferee in consideration of the transfer are kept by him.

2. An illegal contract of transfer is executed within the meaning of the foregoing rule, when the transferor has delivered possession of the subject of the contract to the transferee, *i. e.*, to the party to whom the title is ultimately intended to go, regardless of whether, under the contract, anything remains to be done by the latter.

In other words, although the illegal contract remains wholly executory on the part of the transferee, the transferor is bound from the time of execution on his part, and remains bound until repudiation by the transferee.

3. None of the executory features of an illegal contract are enforceable in the courts, in favor of either party.

The court will be much assisted in disposing of the present case by a recent one in the United States Circuit Court of Appeals for the 7th Circuit:

Gilbert vs. American Surety Co., 121 *Fed. Rep.* p. *Oct.* 7, 1902.

JENKINS AND BAKER C. Judges. BUNN D. J.

In 1888 Bishop was owner of a preserves factory, and a stock of preserves goods in Chicago. In July of that year, a combination of the leading preserves manufacturers of the country was effected. To that end, a corporation was organized under the laws of West Virginia, called the "American Preservers' Company", and a trust was formed by written contract, to take the active management of the combination, under the name of the "American Preservers' Trust". Bishop joined the combination, and put his factory and stock into it. To do so, he conveyed to the American Preservers' Company

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his factory and stock by a formal bill of sale—the property all being personal—in which the consideration was stated to be 331 shares of the vendee's stock. These shares were issued to him. No other consideration was agreed to be paid, or was in fact paid.

Shortly after the receipt of the stock, Bishop transferred it to the Trustees in the American Preservers' Trust, and received back 662 trust certificates, entitling the holder to participate in the profits and proceeds of the Trust, in proportion as his Trust certificates should bear to all outstanding.

Bishop never in fact turned over to any one the actual possession of the things covered by his bill of sale, and always retained it himself; but, on delivering his bill of sale, he was employed by the American Preservers' Company at a salary to conduct the business he had sold, and he consented to act, and did act, as its agent for that purpose; insured the property in the name of that company; and made to it regular reports of the business done.

In December, 1888, and again in March, 1891, Bishop, considering the combination illegal, offered to return the trust certificates, and demanded return of the property covered by his bill of sale; but was refused. Nevertheless, he continued to draw his salary as trust agent, and to report the business to the trust, until March, 1891, when he ceased making reports, on the alleged ground of the illegality of the arrangement.

Thereupon, the American Preservers' Company began suit, in a state court of Illinois, in replevin, to recover possession of the property covered by the bill of sale it held. Bishop defended, on the ground of the illegality of the combination.

The case reached the Supreme Court of the State of Illinois, and is reported in 157 Ill., 284. A judgment of the lower court in favor of the company, was reversed, and a new trial granted, chiefly on the question of admissibility of

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certain evidence; but, in the course of its opinion, the court expressed itself as follows:—

"But if it be assumed, that appellant executed the bill of sale, and submitted himself to the control of the trustees, or of appellee, voluntarily, and of his own free will, then it follows that he was *particeps criminis* with them in the unlawful venture. He, as well as appellee, was a party to the unlawful contract evidenced by the bill of sale. If appellee had been an individual, instead of a corporation, and appellant had executed the bill of sale for the purpose of defrauding his creditors, it will not be contended that the bill of sale could be relied on as a basis of recovery by either party."

p. 315.

The retrial granted by the Supreme Court never took place, and the case having been dismissed, suit in the federal court was brought on the replevin bond. Under a statute of Illinois permitting it, the defense of title in the defendant was set up and tried. The Circuit Court, and afterwards the Circuit Court of Appeals, held that, as against Bishop, what had occurred had vested the title to the property covered by the bill of sale in the American Preservers' Company, and that Bishop could not, against the company, dispute his agency or its title.

In the course of its opinion, the Circuit Court of Appeals said:—

"Assuming that the agreement pursuant to which Bishop executed his bill of sale was, as held by the Supreme Court of Illinois, in Bishop vs. American Preservers' Company, and within the principle laid down in Addyston Pipe & Steel Co., 175 U. S. 211, void as against public policy, and in restraint of trade, and that therefore the court will not lend its aid to either party to such unlawful agreement, it is to be remarked that the supposed unlawful agreement had, in fact, been executed by the parties thereto. Bishop had made his bill of sale, and given possession of his property to the Preservers' Company, in execution of the unlawful agreement. Such possession as he afterwards had, of that property, was not in his own right as owner, but as agent of the Preservers' Company; a trust character was assumed by him. We doubt if such illegal transacsion can be made the subject of defense, in an action at law, unless the suit be brought upon the illegal contract itself. We doubt if it can thus be attacked collaterally. * * *

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In the case at bar, Bishop had sold his property to the American Preservers' Company, and parted with his title to it. He had delivered possession to that company. The illegal agreement between him and the promoter of the trust was executed. He therefore was in possession of the property by virtue of his employment as agent of the company. He occupied a position of trust, holding the property, and dealing with it, for the company, for a stipulated compensation, which he promptly received. He may not after years of service under that arrangement, hold as his own the property which he had sold, and for which he had obtained the agreed price."

pp. 502–3.

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XI.

If, as must be claimed by plaintiffs under their conditional sale theory, the Northern Pacific stock was transferred to the Securities Company upon condition that it should be used to restrain interstate commerce, it was done under agreement to commit a crime, and for the express purpose of both inducing and making possible the commission; for when transferred, the stock formed a clear majority of all the stock of the Northern Pacific Company.

The claim of plaintiffs under their second theory is that the stock has reverted to them, because the Securities Company is now unwilling and unable to continue using it for commission of a crime.

But it is not true, and has not been adjudicated, that the transfer was made upon any such condition, or upon any condition, whatever, relating to the use of the stock by the Securities Company, or otherwise.

It is not claimed that, since the transfer of the Northern Pacific stock, on November 18, 1901, any agreement between

the vendors, and the Securities Company relating to the stock had been made. It is not claimed that, since the transfer, the Securities Company has suffered or done anything to defeat, or even to decrease, any right in the stock, which the transfer may have conferred upon it, unless it be, firstly, the restraint imposed by the decree in the Government suit, and, secondly, the determination by the Securities Company to distribute the stock. All the facts relating both to the decree and the proposed distribution are upon this record, and are undisputed. Those features of the case, therefore, stand here for determination as mere legal questions on an undisputed state of the facts.

The questions whether of its own force the decree has affixed to the transfer a status unquestionable between these parties, and if it has done so, the exact nature of such status, are also pure questions of law.

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XII.

The decree in the Government suit, by adjudging that the railway stocks, including, of course, the Northern Pacific stock here sued for, had all been acquired by virtue of a conspiracy to restrain interstate trade, necessarily adjudged that a criminal conspiracy had been entered into ; but it refrains from stating details of the crime. It does not even say that the conspiracy was one described in any of the pleadings.

Likely it compels the inference, that the object of the conspiracy was to invest the Securities Company with power to vote upon the stocks of both railway companies, and to collect and itself indirectly distribute the revenues accruing thereon.

The decree does not describe the method by which the corporation planned to, or did, invest the Securities Company with that power. It contains nothing compelling or even justifying any specific inference in regard thereto.

Furthermore, the decree is silent about the period of duration in the hands of the Securities Company, which the conspirators planned to give to the power. The decree affords no ground for even inference upon that subject. For all the decree contains, it might have been for a year, a decade, a century, or in perpetuity. The decree, therefore, is perfectly consistent with any one of the numerous different modes, by which an unlawful power of that nature could be conferred. It is perfectly consistent with the creation thereof by means of a proxy and a dividend order for a limited period; a transfer upon an expressed trust in favor of the transferor; or an absolute and unconditional sale, outright, intended by both seller and buyer to vest indefeasable ownership in the latter.

From all opinions filed in favor of the decree, the omission of the decree to indicate the method by which the conspirators planned to vest the illegal power in the Securities Company appears not to have been accidental. It seems to have been intentional, and because all the learned judges favoring the decree considered the offense as lying in the creation and the mere existence of the power; and not all in its form, or in the length of its duration.

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But this record, outside the decree, shows conclusively what was the method planned by the conspirators for placing the unlawful power in the Securities Company, and, through sale of their Northern Pacific stock with knowledge of the plan, necessarily adopted and made their own by Harriman and Pierce. IT WAS TO MAKE THE SECURITIES COMPANY UNCONDITIONAL OWNER OF THE STOCK. That was the nature and aim of the conspiracy.

The petition for the Government in its suit against the Company so expressly described it, in the following words:—

"An unlawful combination or conspiracy to effect a virtual consolidation of the Northern Pacific and Great Northern systems, and to place restraint upon all competitive interstate and foreign trade or commerce carried on by them, and to monopolize the same, and to suppress the competition theretofore existing between said railway systems in said interstate and foreign trade or commerce, *through the instrumentality and by the means following, to wit:* A holding corporation, to be called the Northern Securities Company, was to be formed under the laws of New Jersey, with a capital stock of $400,000,000, to which, in exchange for its own capital stock, upon a certain basis, and at a certain rate, *was to be turned over and transferred the capital stock*, or a controlling interest in the capital stock of each of the defendant railway companies, with power in the holding corporation to vote such stock, *and in all respects to act as the owner thereof*, and to do whatever it might deem necessary to aid in any manner such railway companies to enhance the value of their stock. *In this manner the individual stockholders of these two independent and competing railway companies were to be eliminated, and a single common stockholder, the Northern Securities Company, was to be substituted;* THE INTEREST OF THE INDIVIDUAL STOCKHOLDERS IN THE PROPERTY AND FRANCHISES OF THE TWO RAILWAY COMPANIES WAS TO TERMINATE, BEING THUS CONVERTED INTO ONE INTEREST IN THE PROPERTY AND FRANCHISES OF THE NORTHERN SECURITIES COMPANY."

Record, pp. 85-86. par. VI. of petition.

The Circuit Court so expressly found, in the following passages from its opinion:—

"Certain large and influential stockholders of the Northern Pacific and Great Northern Companies, who had practical control of the two roads, and who have been made parties defendant to the present bill, acting in concert with each other, *conceived the design of placing a very large majority of the stock of both the last-named companies in the hands of a single owner.* To this end, these stockholders arranged and agreed with each other to procure and cause the formation of a corporation under the laws of the State of New Jersey, *which latter company, when organized, should buy all, or at least a great part, of the stock of the Northern Pacific and Great Northern companies.* The individuals who conceived and promoted this plan, agreed with each other to exchange their respective holdings of stock in the last-named railroad companies, for the stock of the New

Jersey Company, when the same should be fully organized, and to use their influence to induce stockholders in their respective companies to do likewise, *to the end that the New Jersey Company might become the sole owner of the whole, or at least a major portion, of the stock of both railroad companies.*

Opinions p. 92.

Finally, if any further citation were needed to prove that the conspiracy condemned by the decree in the Government suit, was one for the creation of a company to *buy* and *own*, and not merely to receive and become custodian of, the stocks of the two railway companies, Mr. Harriman's own affidavit filed in this proceeding would furnish it.

The following passages are clear both on the point of what the conspirators designed to accomplish generally and on the nature of the particular transaction between the Securities Company and Harriman and Pierce:

"The first information we had of the plan was from Mr. Hill and J. P. Morgan & Co., to the effect that Mr. Hill and his associates had determined to organize a holding company, and that they intended to transfer to such holding company a majority of the capital stock of both the Northern Pacific and Great Northern companies. My conversations on the subject were with Mr. Morgan, Mr. Steele, Mr. Bacon and Mr. Perkins, members of said firm, but I cannot remember exactly what each said, and at the present time (The affidavits sworn to on May 16, 1904) can only recollect the substance and result of my conversations with them."

* * * * * * *

"They further stated that *upon the organization of the proposed holding company they would be prepared* TO PURCHASE the holdings of the Northern Pacific owned by the Oregon Short Line, AND PAY THEREFOR in the stock of the holding company at the rate of 115 for all our stock, which would be the rate at which the holding company would take the common stock held by them and Mr. Hill and his associates, and all other parties, *and they thereupon offered me those terms.*

* * * * * * *

"It was therefore finally agreed with Messrs. J. P. Morgan & Co. that the Oregon Short Line Company would turn over its entire holding of Northern Pacific stock for $82,491,871. par value of the stock of the holding company and $8,915,629 in cash. Some time after the terms of the agreement had been settled, and in November 18, 1901, Messrs. J. P. Morgan

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& Co. notified me to deliver the Northern Pacific stock to the Northern Securities Company, *and informed me that such company would close the transaction and that we would receive from it* THE STOCK AND CASH PAYMENT AGREED UPON. In pursuance of such notification, I attended with Mr. Pierce at the office of the Northern Securities Company, on that day, *when the certificates for said shares of preferred and common stock of the Northern Pacific Company, standing in the name of myself and Mr. Pierce, namely, $78,108,000 par value, duly endorsed, were delivered to the Securities Company,* and Mr. Hill delivered to us certificates for $82,491,871, par value of stock of the Securities Company, in the joint names of Mr. Pierce and myself."

Record, pp. 199–200.

No pretence here of a conspiracy to make the Securities Company custodian of the railway stocks generally, or of the Harriman and Pierce Northern Pacific stock in particular.

Nor was any such pretence hinted in the depositions of Mr. Harriman, appearing in the Record.

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XIII.

When Harriman and Pierce had transferred the Northern Pacific shares to the Securities Company, and the latter had made payment of the price therefor by handing over to Harriman and Pierce the cash and the certificates for its own stock, coming to them, nothing remained executory between the parties save the implied mutual obligations resulting from the relation of corporation and stockholder, thus created.

The Securities Company has assumed no other form of obligation toward Harriman and Pierce, susceptible of repudiation by it.

The implied obligation from the Securities Company, to Harrison and Pierce, consisted only in this : That while the relation should continue, Harriman and Pierce should be per-

mitted to vote upon the stock, at stockholders' meetings; to receive dividends from the company's earnings on a parity with all the other stockholders; and to share ratably with all other stockholders in any distribution of the company's assets. This is the well-understood engagement of every stock company to its stockholders.

Proposal by a corporation to distribute part, or even the whole of its assets among its stockholders ratably, could not be refusal by it to recognize or to perform the implied contract between itself or any stockholder.

A ratable distribution, in which equality between all stockholders, in proportion to their respective holdings, is preserved, is recognition and performance by it of its obligation to them. Hence, the Securities Company, by proposing ratably to distribute these railway stocks among its own stockholders, including Harriman and Pierce, is not proposing to repudiate, nor to terminate, the contract with them, arising out of, and accompanying the act of making them stockholders.

On the contrary, it is an express and formal recognition, by the Securities Company, of the continued existence and binding force of that contract, and its performance of it.

Distribution among its stockholders of a portion, or of the body of its assets, could be repudiation, or termination of its contract with its stockholders, only when the distribution should be made upon some basis other than that of equal treatment for all.

Distribution on the plan proposed by Plaintiffs would be termination and repudiation by the Securities Company of its contract with its stockholders.

Had the company planned to give back to some other stockholder the exact amount and kind of railway stock bought from him, or from his predecessor in interest, and thereby to prevent ratable distribution among all the stockholders, Plaintiffs might have correctly claimed repudiation and termination of their contract as stockholders. As the only contract be-

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tween Harriman and Pierce, on the one part, and the Securities Company, on the other, remaining unexecuted, is still recognized by the latter as in full force, and is being faithfully performed by it, naturally, a claim that can find support only in voluntary termination and repudiation of the contract, must fail.

XIV.

The rights of any stockholder of the the Securities Company upon distribution of its assets, are not to be determined by the relative values of what was paid the Company for his stock, and what he will get back under the distribution. The relations between those values only determines the profit or loss in making the purchases of the Securities stock. The Company has not warranted any stockholder a profit. Failure to make one will not enable any—not even Messrs. Harriman and Pierce—to rescind his purchase of stock, and reclaim in kind the price he paid.

Consequently the considerable space taken by Plaintiffs' with computations to show that their ratable proportion of the two railway stocks would not now be worth as much in the market as the $71,000,000 of Northern Pacific they here claim, has not in the smallest degree advanced the solution of the sole question here at issue, viz., which of the parties, as between themselves, and not as between the Securities Company and the Government, is owner of the shares for which Plaintiffs sue.

Plaintiffs do not claim that, by reason of anything said or done in their dealing with the Securities Company, any *less* title to their stock passed to the latter, than passed to it in its other acquisitions. Admittedly the other stockholders would have at least as much right to recover the specific original consider-

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ation for their stock as would these Plaintiffs. On the other hand, every other stockholder has the right to insist, that if the legal effect of the purchase from Harriman and Pierce was to make the Securities Company owner of the stocks so acquired, such stocks shall not be turned back to the sellers, but be divided ratably among all the holders of Securities stock.

The Securities Company is a trustee for all its stockholders ; and the laws would compel it to treat all alike, even if such were not the purpose of its directors and officers.

As matter of fact, the Northern Pacific and Great Northern stocks accruing to Plaintiffs under the *pro rata* plans will be worth in the markets many million dollars more than were their Northern Pacific, preferred and common, on November 18, 1901.

Under the *pro rata* plan of distribution the sale to the Securities Company will have turned out an immensely profitable transaction for them, but whether Northern Pacific stock or Great Northern stock has advanced or declined in the markets, has no concern with any point here involved, and in no way diminishes or enlarges the duty of the Securities Company to defend and protect the rights of the whole body of its stockholders, in all its assets.

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XV.

Plaintiffs ask the court to set aside in this particular case, on the ground that restoration of the parties to their original status would be deterrent of similar transactions in future, the rule, so often asserted and applied by itself, that, as between wrongdoers, an executed transfer of property must stand.

But would the new rule be as deterrent as the old ?

Under the existing rule, those contemplating unlawful combinations have before them the certainity, that if the combination is overthrown, their unlawful purpose will be defeated, and the property contributed by them be lost to themselves, through dispersion of it among all their associates.

On the other hand, the new rule Plaintiffs seek to have adopted would remove all risk resulting from unlawful combinations. If the combination remains unmolested by Government, it will turn out the hoped-for success. If Government interferes, and as a result the enterprise fails, the consequences will be limited to mere restoration of the guilty participant to his original position.

Hence, encouragement of, instead of deterrence from unlawful combinations; for their promoters would run no risk of serious loss from any outcome.

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XVI.

From November 18, 1901, when the sale of their Northern Pacific stock was completed, to April 2, 1904, when Plaintiffs filed in the Minnesota Court their Intervention petition, they said no word and did no act, calling in question the absolute and unconditioned character of the transaction on both sides. On the contrary, their uniform and unbroken course of conduct with reference to what they had sold to the Securities Company, and what they had received from it in payment, confirmed their sale, and the resulting title of the Securities Company, as an absolute one. They kept and used, as their own property, the $8,915,629, cash, forming part of the price. They also kept and used as their own property the $82,491,871 stock of the Securities Company, forming the residue. The form for the certificates of this Northern Securities stock is

quoted in the opinion of the Circuit Court of Appeals, and need not be again quoted here. It asserts unconditioned ownership of the shares of stock of the Securities Company therein specified, by the holder.

On March 10, 1902, the Government filed its petition against the Securities Company. Record, pp. 79–102.

On May 5, 1902, the Securities Company filed its answer to the Petition. Record, pp. 107–127.

In most positive terms, this answer asserted absolute ownership by the Securities Company of all its holdings of the railway shares; necessarily including those acquired from Harriman and Pierce. One allegation of that nature was as follows:

"This defendant has not paid for all the stock of the Great Northern Company and of the Northern Pacific Company acquired by it in shares of its own stock, but, on the contrary, has expended upwards of forty million dollars ($40,000,000) cash in the making of such purchases. Every share of the Great Northern Company and the Northern Pacific Company acquired by this defendant has been, and so long as it remains the property of this defendant will continue to be, held and owned by it in its own right, and not under any agreement, promise, or understanding on its part, or on the part of its stockholders or officers, that the same shall be held, owned, or kept by it for any period of time whatever, or under any agreement that in any manner restricts its right and power immediately to sell or otherwise dispose of the same, or that restricts or controls to any extent any use of the same, which might lawfully be exercised by any other owner of said stocks."
Record, pp. 114–115.

This answer was necessarily a corporate act of the Securities Company. Mr. Harriman had been a director of the company, and a member of the Executive Committee, from the day it began business. He was attentive to his duties appertaining to these positions, and present at nearly all meetings of Board and Committee, as the copy of the minutes contained in the Record show. Record, pp. 377–394.

Every Director of the company, including Mr. Harriman, must be presumed to have known the contents of this important

document before it was made the Company's act by filing. The assertions quoted are not the statement of a mere legal conclusion, but one of pure matters of fact. These statements are, in effect, Mr. Harriman's own. Never, in any way, did he dissent from them, until he did so through the Petition for Intervention filed in the United States Circuit Court for the Minnesota district in April, 1904.

On July 7, 1902, thus a few days less than four months after commencement of the Government suit, and a few days more than two months after Mr. Harriman and his fellow directors had caused to be filed in the federal court these solemn assertions of ownership by the Securities Company of the Northern Pacific shares acquired from Harriman and Pierce, the Plaintiff, Oregon Short Line Railroad Company, by the hand of Mr. Harriman, its president, executed a formal Trust Indenture pledging to the Plaintiff, the Equitable Trust Company of New York, as trustee, all the shares of Securities stock that had been paid over to Harriman and Pierce, as the absolute property of the pledgor. Yet there would be no ground for contending that Harriman and Pierce got any better title to what they received, than they gave to what they parted with, in their transaction with the Securities Company. No hint, in this Trust Indenture, that the pledged shares were not real corporate stock, but mere receipts for a special deposit of other property with a "custodian". On the contrary, throughout the document, the pledged shares are described and transferred as being what they really were, stock.

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At the time of affirmance by this Court of the decree, in the Government suit, there had been issued, and was outstanding, of the stock of the Securities Company $395,400,000, par value. Practically all this amount, less the $82,491,871 paid to Harriman and Pierce, were issued after issuance of the latter stock, and consequently with cognizance and co-operation

of Mr. Harriman himself as a director. He never suggested that this vast mass of shares, purporting to be undivided interests in every item of property held by the Securities Company, was in reality nothing of the kind, but merely something in the nature of Pawn Tickets.

As directors of the Securities Company, Messrs. Harriman, Schiff and Stillman, all at the same time directors of the Union Pacific Railroad Company, expressly concurred in approval of sales made by the Securities Company, in the public markets, for cash, as corporate stock, of its shares aggregating $7,522,000; Record, pp. 391–393.

All these sales were for prices averaging considerably more than par.

If these cash shares are mere PAWN TICKETS, *what goods do they represent?*

If these shares are not entitled to a ratable proportion of all property held by the Company, how are they shares at all, and how are they to be dealt with?

Plaintiffs have never disputed power in the Securities Company to create valid stock, and to sell it. This unquestioned power must have been exercised in the case of these cash issues. Their status was not altered by the fact that the shares actually sold had previously been issued to Mr. Hill, and, in an interval between Board meetings had been borrowed from him, by the Company, for sale, in anticipation of replacement with new shares as soon as requisite Board action for issuing them could be had. The important and controlling fact is, that the Company put the shares upon the public market and sold them to the highest bidder for cash paid on delivery.

In any distribution of Company assets, the quality of corporate stock must vest these shares with undeniable right to a *pro rata* interest in the entire body of property held by the Company; including necessarily the Northern Pacific stock claimed by Plaintiffs.

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If that fact stood alone it would suffice to defeat Plaintiffs' claims; for it would make rescission impossible. The right of even part of the stockholders of Securities Company to insist that these Northern Pacific shares are assets, must stamp them with that character for all corporate purposes.

On November 19, 1901, the Board of Directors of the Securities Company, with concurrence of Messrs. Harriman, Schiff and Stillman as directors, appointed Transfer Agents and a Registrar of Transfers for the Company's stock. Record, p. 385.

On November 27, 1901, the Executive Committee, with concurrence of Mr. Harriman, as a member, adopted the form of stock certificate for the Company's stock, which form provides that the stock covered by the certificate will be "transferable "only on the books of the Company, by the holder thereof, in "person, or by duly authorized attorney, upon surrender of "this certificate." Record, p. 389.

Thus, at the outset, Messrs. Harriman, Schiff and Stillman united with the remaining directors of the Securities Company in providing means for freely dealing in the Company's stock.

The investing public has liberally availed itself of these facilities.

Ever since Securities stock began to be issued, it has been bought and sold, in private, and on the public markets, in great volumes. Up to April 18, 1904, approximately 16,000 separate transfers had been registered on the Company's books. Record, p. 326. Unregistered sales were also very numerous. Record, pp. 334–335, 337–338. All these dealings were on the supposition that the shares dealt in were actually corporate stock. Plaintiffs must at all times have been cognizant of these facts. They were matters of great notoriety. Mr. Harriman's official position with the company compelled him to take notice of them. But no objection, protest, or warning has come from any of these plaintiffs, or from Mr. Schiff or Mr. Stillman.

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Had the original acquisition by the Securities Company, of the Northern Pacific shares, been something other than of ownership, the unvaried course of Plaintiffs' conduct, through a period of two and a half years would, in equity, as between Plaintiffs and the remaining stockholders, have sufficed to make it ownership.

XVII.

As an additional reason why Plaintiffs' proposed method of distributing the railway stocks would now be inequitable, and that proposed by Defendant be the sole equitable one, Defendant asserted upon the hearing of the original application for an injunction, that the extensive dealings in Securities shares, carried on with Plaintiffs' knowledge and assent, had made impossible ascertainment at this time of the original consideration for shares represented by many stock certificates now outstanding; and on that point produced the affidavits of Mr. E. T. Nichols, Secretary and Treasurer of the Securities Company from the beginning, and of Messrs. F. B. Blinn and B. G. Mitchell; all of them men of large experience, and unquestioned skill in such matters. Record, pp. 326-329, 336-337, 339-340. In assumed opposition, plaintiffs produced the affidavits of Mr. Alexander Millar, Secretary of the Union Pacific Railway Company, Mr. Otto C. Kahn, Transfer Agent of that company, and Mr. William Mahl, Comptroller of the Oregon Short Line Railroad Company. Record, pp.

In reality, there is no important conflict of statement on the substantial question meant to be raised for the reason, among others, that affiants for Plaintiff confess ignorance of the facts. In any event, the point could not need determination, until and unless the question of title, on other grounds, should be resolved adversely to Defendant. On the question

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of a special injunction, difficulty, or impossibility, of tracing present stock certificates to their respective sources, in Northern Pacific stock, Great Northern stock, or cash, is of special importance in making clear the unfairness, and impracticability, of any but the *pro rata* plan of distribution.

XVIII.

In this court Plaintiffs advance a point wholly overlooked, or at least ignored, in both courts below, viz., that any *pro rata* distribution must be of cash, and not of property; hence, that an essential preparation for such a distribution must be a sale, and conversion into money, of all the Company's holdings of the railway shares. Plaintiffs' counsel cannot claim originality for this point. They were not its inventors. In the very first of the series of litigations begun to obstruct the carrying out of the *pro rata* plan, *Continental Securities Co. vs. Northern Securities Co.*, brought by Mr. C. H. Venner, in the name of the plaintiff corporation, in the Court of Chancery of the State of New Jersey, the identical point was urged with great persistence, argued at length, but overruled by the Vice Chancellor who heard the application for a special injunction. All this ante-dated the bringing of the present suit; yet while each of the extended series of Bills herein, seems in other respects closely modeled on that of Mr. Venner, (R. pp. 301–303), the draughtsman appears either to have overlooked or purposely omitted, those portions of it containing the allegations framed to cover this particular point. The Series of Bills in this suit was framed to cover totally different claims. Each Bill of the Series lacks the needful averments for asserting this claim.

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But assuming that this omission might be supplied by amendment; and that a Third Amended Bill, containing averments sufficient for raising the point, would be possible, there is nothing in it. How a corporation may distribute its assets among its stockholders, is manifestly a question to be determined by the laws of the incorporating state. Consequently, whether the Securities Company may distribute its railway shares in kind, or must first turn them into cash, and then distribute the latter, is strictly a question of New Jersey law. What that law upon this subject is, could not be better stated than Vice Chancellor BERGEN has done, in the following passage from his opinion in the Venner case:

"By the reduction of the capital stock of a corporation, not impaired by losses, there must necessarily occur a surplus of assets to the extent of the reduction, and unless the rights of creditors will be effected thereby, or the capital impaired, it becomes the duty of the directors to make an equitable distribution of such surplus, or of so much thereof as the carrying on of the business for the best interest of the stockholders, may not require. Strong vs. Brooklyn R. R. Co., 93 N. Y. 426. Williams vs. Western Union Tel. Co., 93 N. Y. 163. Morawetz on Corporations 443. The proposed distribution is not a dividend in the sense intended by the statute, but a division of surplus capital rendered useless for the purpose usually attributed to capital, because the issue of stock which it represented has been cancelled.

"The right to distribute the surplus having been determined, the question arises, can the directors distribute securities in which such surplus is invested, or must it be reduced to cash? In this case, the character of the assets make an equitable division easy to accomplish; each share of the stock to be assigned to a stockholder in the manner proposed has an equal market value; if there is a difference in value between the two classes, or the value of one is subject to greater fluctuations than the other, each shareholder gets an equal proportion of the fat and the lean; and in view of the possibility that a peremptory sale of this stock, amounting to over three hundred millions of dollars, would be attended with disastrous results to the stockholders of this company, it would seem that the best interests of the shareholders require that a division of the stock of the two Railway Companies be made between *them, unless prevented by some imperative legal rule; no such rule exists, on the contrary, the power of directors of a corporation to divide property other than money, among the share-*

holders, is sustained by abundant authority, 9 Amer. & Eng. Enc. of Law, 2 Ed. 695; Ehle vs. Chittenango Bank, 21 N. Y. 548; Leland vs. Hayden, 102 Mass. 542.

"Having determined that the stock of the two Railway Companies constitutes a part of the assets of the defendant company, in which, or in its proceeds, each shareholder has a vested interest to the extent of his holdings of the defendant company's stock; that when the capital stock of a corporation is reduced and a surplus of assets results, it becomes the duty of the directors to divide such surplus as is not required for the use of the company, among the stockholders; that a division of property, as distinguished from cash, is lawful; that each shareholder is entitled to his proportionate share of each class of property, so held for distribution, and that the proposed method of division is equitable, it is clear that the complainant has shown no equity upon which to base its claim for the restraining order of a Court of Equity." R. pp. 321-322.

When sale of these railway shares is suggested, the magnitude of such a financial operation must be considered.

At average market prices of the past few months, the $153,000,000 Northern Pacific stock represent values aggregating $230,000,000 and the $118,000,000 Great Northern stock values aggregating $260,000,000; both stocks together values aggregating around $500,000,000. An operation like the sale of these stocks would shake to the bottom the financial fabric of both America and Europe. Nothing comparing with it has ever been undertaken. Besides, who would be benefited by the operation? Certainly not the stockholders of the Securities Company. The proportion that any of those stockholders would realize in money would be a mere fraction of the value of the stock itself coming to him under distribution in kind; for, under forced sale of all these holdings, values would simply be slaughtered.

Nobody would be helped, save a few who thereby would be enabled to engross the entire holdings at prices little better than nominal.

It may be said that no one should be compelled to become a stockholder in a corporation against his will. That is true; but no more true than that no man should

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be compelled to take money against his will. It is not asserted in the Bill, and it is not true, that the holding of stock in either railway company involves assumption of any obligation by the stockholder; nor of any risk, save as to the soundness of the investment; which latter risk can always be terminated by selling out. For years, these railway stocks have passed from hand to hand, with almost as much freedom as the currency of the country. For purposes of distribution, they have the fitting quality of all being precisely alike in nature and value. Hence their distribution can be as fair and equal as would be possible with money.

Reduction of the capital stock of the Securities Company as has been determined by the Board and the stockholders, will necessarily produce a corresponding surplus in the Company's hands. The authorities cited in Vice Chancellor BERGEN'S opinion show that upon the creation of a surplus, a duty from the corporation to the stockholders will arise to distribute the same among them. The extent of the duty as to the mode of distribution, must necessarily be fairness and equality as between them. All must be treated alike; and if the form of the assets composing the surplus, at the time of its creation, is not such as to permit equality, they must be put into some other permitting it. If already in such form, and no statute directs differently, it must rest with the Board of Directors and stockholders themselves, to determine, as a matter of business judgment and discretion, whether the assets shall be distributed in present form, or first be changed into something else, permitting equality among distributees. Money has no special quality to make it the exclusive material for such purposes. The sole reason why corporate assets are commonly turned into money, for purposes of distribution among stockholders is, that ordinarily such assets are not in form capable of being equally distributed. The change of

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form is unavoidable. The use by Directors and majority of stockholders of the discretion manifestly belonging to them to determine whether, preparatory to distribution, corporate assets already susceptible of distribution with perfect equlaity, shall or shall not be changed into some other form, must necessarily be as conclusive and binding upon every individual stockholder, as the use of their discretion upon all other questions concerning the company's business policy; at least in absence of designed abuse of discretion; and no such thing is asserted here.

The Securities Company's Board, and almost three-fourths its stockholders, have declared, in the forms prescribed by the laws of the state of New Jersey, that distribution of the company's surplus about to be created will be effected with most advantage to stockholders, in kind; and such determination is as binding upon these plaintiffs as upon any other stockholder.

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XIX.

Plaintiffs' counsel suggest relief of the Securities Company's stockholders from the great loss and embarrassment unavoidably inflicted by the special injunction through the immediate partial distribution of the railway stocks. This is an astounding proposal to come from parties asserting a claim that not one share of these stocks is a company asset; but that, on the contrary, every share has remained the property of the original seller to the company, and of the assignees of his rights. Unless Plaintiffs can establish the proposition, that the Securities Company holds no share of either Northern Pacific or Great Northern Stock lawfully subject to distribution, they must fail. How, then, can they prescribe as a balsam for wounds of their own infliction, the handing over of one man's

property to another? It has a frightfully inconsistent look. The old Philistines could not have excelled that. No distribution of the railway shares among stockholders of the Securities Company could lawfully be made, save as surplus created by reduction of its capital stock. The statutes of New Jersey forbid all distribution of capital under other conditions. Such reductions must result from a proposal made by the Board, approved by a vote of the holders of at least two-thirds the total stock. Such proceedings were taken by the Securities Company for the reduction now in process of consummation. A part of the resolutions adopted by both Board and stockholders specifically ordered the distribution of the railway stocks as surplus, and to save any misunderstanding of the proposition submitted to stockholders, named the precise sum, in the stock of each railway company, to which, in the distribution, each share of Securities stock will be entitled. This provision of the resolutions therefore formed an essential part of the transaction, and a condition and consideration for surrender by the stockholder of his proportion of the stock to be retired. Consequently the distribution of the entire amount of railway stock specified in the resolutions, is an indispensable condition of the reduction of capital ordered by the pending proceedings. Each stockholder required to surrender his Securities stock can insist upon being paid the full amount in the railway stocks named in the resolutions.

Therefore, under the present proceedings, partial distribution is impracticable. They would have to be abandoned, and new ones started in their place. As under the New Jersey statutes a two-thirds vote of stockholders for a new plan would be indispensable, and as the holdings of Securities stock are scattered over two continents, separated by an ocean, considerable time would be required for assembling anything like a full meeting. But imagine these delays passed, and the meeting assembled; what would

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be the form of proposition submitted? If Plaintiffs are right, it should be one for the participating stockholders to surrender their Securities stock, in consideration of being handed property belonging to somebody else, and which must therefore be surrendered or paid for, to the true owner, on demand. Could a court of justice be expected to encourage such a proceeding, or to accord the possibility of its being taken the smallest weight, in determining how its discretion should be exercised in a given instance? Besides, the proposition could not be universal and uniform in its action upon stockholders. It would have to create a separate class, apart from the rest, in which at least Plaintiffs would be contained, and make for it provision not made for the residue. No such method of reducing capital stock and distributing resultant surplus is provided for or tolerated by New Jersey laws. In absence of express agreement otherwise, those laws provide only for methods universal and uniform in effect on all stock, where there is but a single class; and upon the entire stock of the class involved, where the whole is divided into classes.

But supposing it within the legal competency of these stockholders to especially set apart for Plaintiffs $71,000,000 Northern Pacific shares, even as a provisional arrangement and subject to the event of a law suit, and to authorize the immediate handing over of a ratable proportion of the residue to any stockholder willing to surrender a proportion of his Securities stock therefor; the title of the Securities Company to such residue being subject to like dispute as that to Plaintiffs' stock; can it be imagined that any considerable proportion would accept the terms? To do so would be contrary to human nature. Would any of the honorable Justices of this court accept them, if a stockholder?

Two methods for distribution of the railway shares are impossible. There can be no commencement of distribution until the possibility of lawfully completing it by the same method, has arisen.

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XX.

Even if Harriman and Pierce on the one part, and the Securities Company on the other, had at or prior to November 18, 1901, made an arrangement covering the Northern Pacific shares, which, from terms, or legal effect, might have been subject to rescission for any cause, it would not have remained capable of rescission by either party at any time since retirement by the Northern Pacific Company of its preferred stock; that is to say, not since January 1, 1902.

Partial rescission of a transaction in which property has passed, and particularly where property has passed both ways, is unknown to the law. Either the parties must be restored to the *status quo ante*, or both sides abide the situation they have voluntarily created. In the instance under view, what passed between the parties was undivided and unapportionable, on each side. Every share of Northern Securities stock, and every dollar of Northern Securities money, paid over to Harriman and Pierce, applied equally to every share of Northern Pacific common and preferred received from them, and *vice versa*. But when the transaction occurred, the $41,035,000 preferred had already been called for retirement, on the first day of the following year; and stood merely as the representative of that much money due at the date named. When January 1st arrived, the preferred was paid off, and converted into $41,085,000 cash, and thenceforth ceased to exist. To fill the vacancy in the body of the company's capital stock occasioned by extinguishment of the preferred, a totally new issue in equal amount, non-existent before January 1, 1902, was created. It was not a mere substitution for the preferred, but a new creation, occupying the same space.

Of this new stock, the Securities Company acquired $34,709,062, through previous acquisition of an equal

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amount of the special Northern Pacific bonds convertible into it. The bonds were bought by virtue of a preemption right acquired from Harriman and Pierce in the purchase from them of $37,023,000 old common. This right was a mere option ; not an obligation on the holder. The Securities Company might have waived it. Could Harriman and Pierce have objected? No statement backed by the oath of one claiming personal knowledge, appears in this record, to the effect that the Securities Company had incurred the smallest obligation to any of these Plaintiffs to exercise this right.

In his depositions read in the Goverment suit, Mr. Harriman many times repeated the assertion, that the sale of the Northern Pacific shares had utterly been without condition (*ante*, pp.). In his lengthy affidavit made in support of the application for injunction, the subject is dismissed with the following :

" At the time I agreed with Messrs. J. P. Morgan & Co. to turn over the stock of the Northern Pacific Company held by the Oregon Short Line Company, *it had been understood* between them and myself that *all* of the outstanding preferred stock of the Northern Pacific Company *would be* converted into common stock." (R., p. 201).

This statement does not relate to the preferred stock held by Harriman and Pierce in particular. It applies to the whole body of stock of that class ; what others held, as well as what they held. It does not assert a promise as to any part of the preferred, but merely an expression of mutual belief as to what would be likely to take place in future. A glance at the resolutions ordering the retirement would have shown both sides the impossibility of the new common coming back to holders of the preferred about to become defunct. Under the plan for retirement adopted with concurrence of Mr. Harriman, himself, as a Northern Pacific director, the preferred stock conferred upon the holder merely a right to be paid off in cash, and carefully excluded him from even the

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smallest interest in the new issue. Besides, the thing material here is not what was "understood" between Harriman and Pierce and J. P. Morgan & Co., at any time; but what was agreed between the former and the Securities Company at the time of the sale of the Northern Pacific stock, and as a condition thereof. It is not asserted that any understanding with J. P. Morgan & Co., relating to the treatment of either class of the Harriman and Pierce stock was ever even brought to the notice of the Securities Company; much less assumed by it.

No interest in the $34,709,002 new common, now claimed by Plaintiffs, has accrued to them from any contract, promise, or understanding to which Defendant was or became a party.

This new stock, therefore, could not be the subject of any rescission right arising in favor of Plaintiff, out of the sale of the Northern Pacific shares, whatever view is taken of the legal effect of that transaction.

If any right of rescission could exist at all, it would attach solely to that part of the property actually transferred to the Securities Company, now remaining in existence, viz., $37,023,000 of the old common stock; or at the very utmost to that, and the money collected from the railway company by the Securities Co., as the proceeds of the preferred. As the consideration received by Harriman and Pierce was indivisible, any right of rescission belonging to them, could be exercised only by returning the whole of it. No such offer appears in this Bill.

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