great excitement in Wall Street, and not only led to an avalanche of "short" selling of the virtually "cornered" stock, but brought on, two days later, the memorable Northern Pacific panic.

CHAPTER XII

NORTHERN PACIFIC PANIC

THE contest for control of the Burlington, which ultimately developed into a struggle for possession of the Northern Pacific, ended, so far as the competing interests were concerned, on the afternoon of Tuesday, May 7th. Each of the contending parties then believed that it had won a victory over the other. Harriman and Schiff were sure that they owned a majority of all the Northern Pacific stock, taking common and preferred shares together, while Morgan and Hill were equally confident that they had a safe majority of the common, which would enable them to retire the preferred and thus leave the Union Pacific with only a minority holding in the capital that would then remain. Both sides, therefore, ceased buying. Their purchases, however, had given a great impetus to speculation in Northern Pacific common. Nobody knew, with certainty, who was accumulating this stock, or why it had risen from 112 to 149¾ in less than a week; but more than half of the public believed that the common shares were selling far above their intrinsic value and that they must soon fall to something like their normal

level. Scores of speculators, therefore, sold them "short," with the expectation of being able to buy them for delivery, a few days later, at much lower figures.[1] In this expectation, however, they were grievously disappointed. Northern Pacific common instead of declining, made a further advance of more than fifty points, simply because everybody wanted it while few brokers had any of it for sale. When, therefore, the "shorts" were called upon to deliver, they found it almost impossible to buy or borrow shares enough to meet their urgent needs. Prices continued to advance; money was scarce and hard to get, and, in order to escape involuntary bankruptcy, scores of brokers were forced to sell their other stocks, at ruinous prices, and use the proceeds in buying Northern Pacific. This, of course, depressed the

[1] For the benefit of readers who are not familiar with Wall Street operations, it may perhaps be well to explain that when a dealer sells stock "short," he sells what he does not own, with the expectation of buying it later at a lower price. By the rules of the Stock Exchange he must make delivery to the purchaser on the next day after the sale, or be declared insolvent. If, however, the stock that he has sold does not fall low enough so that he can "cover" at a profit, he borrows it from a dealer who happens to have it, paying the latter a specified sum for the accommodation. With this borrowed stock he makes delivery to the purchaser, and then, until he decides to buy the stock of which he is "short," he continues borrowing it from day to day at whatever rates may be current. It sometimes happens that the whole marketable supply of a particular security has been bought by one or two persons, or groups, who hold it, either for speculative purposes or for control. In the technical language of the Street such a stock is said to be "cornered," and dealers who must buy or borrow it may be compelled to pay for it almost any price that the owners may choose to demand.

general market, unsettled confidence, and eventually brought on one of the worst panics that Wall Street had ever known.

As early as Wednesday noon it became apparent that trouble was impending, and on Thursday, May 9th, when the storm finally broke, Northern Pacific common sold up to $1000 a share, while other standard securities were offered at half their intrinsic value. United States Steel, for example, declined from 46 to 24; Atchison, Topeka & Santa Fé from 76 to 43, and Delaware & Hudson from 163 to 105. Call money, meanwhile, was bid up to 60 per cent, and little could be had even at that exorbitant rate. Before noon on Thursday nearly half the brokerage houses in Wall Street were technically insolvent, simply because they could neither buy nor borrow the Northern Pacific shares that they had sold short.

Such a state of affairs threatened general ruin, and all the conservative, constructive forces in the financial district were set in motion to support the market and reëstablish confidence. At the suggestion of Frederick T. Tappan, fifteen prominent banks formed a "pool," or temporary syndicate, to relieve the money market by loaning about $20,000,000, and at the same time several other banks, including Morgan & Co. and Kuhn, Loeb & Co., agreed not to call for the delivery of short-sold shares of Northern

Pacific stock that day. A little later, Mr. Schiff, with the approval of Mr. Harriman, made a proposition to Robert Bacon, of J. P. Morgan & Co., that the "shorts" be permitted to settle with both firms at $150 a share for all the Northern Pacific common that they had sold to these firms. Mr. Bacon, fearing that if he "let up" on the "shorts" he might lose a considerable part of the stock that was coming to Morgan & Co., seemed, at first, a little reluctant to acquiesce in this proposition; but he finally saw the wisdom of it and agreed to it. As a large part of the short stock had been sold to one firm or the other, and as $150 a share was a very reasonable price for it at that time, the proposal was gladly accepted by the "shorts," and did much to relieve the tension and quiet the excitement.

Morgan & Co., as well as Harriman and Schiff, "had done what they could," and each side believed itself sure of victory. But the fact that the market was bare of Northern Pacific, while buyers were still eager to get it, sent prices rocketing. Many shareholders in the West and South sold their shares, but could not deliver immediately. Speculators who sold short saw the price jump, point after point, but could not furnish the stock to stop their losses. But it was not what was ordinarily called a "corner." Nobody was trying to force prices up that he might

sell at a profit. "How could we sell at any price?" said Mr. Hill; "we were investors, not speculators, I never bought or sold a share of stock for gambling purposes in my life, and I don't want to earn money wrung from people by a 'corner.'" [1]

Mr. Hill, however, was unjust to Mr. Harriman — perhaps inadvertently so — in saying that Union Pacific interests "bid Northern Pacific up until there was the largest stock 'corner' ever known." [2] This is an error. Harriman and Kuhn, Loeb & Co. did not "bid Northern Pacific up" until they created a "corner." They made no purchases after Friday, May 3d, and the "corner" was not established until four days later. If anybody created it, Morgan & Co. did so by buying 150,000 shares after Harriman and Schiff had gone out of the market. It was Robert Bacon, not Kuhn, Loeb & Co., who bid the stock up from 112 to 149¾ in the attempt to get control of it.

As a matter of fact the "corner," as the "Commercial & Financial Chronicle" said at the time, was largely if not wholly accidental, and was the result of wild and irrational speculation on the part of the general public.[3] Mr. Hill compared it to an Indian

[1] Pyle's *Life of James J. Hill*, vol. II, p. 151.
[2] Public statement made by Mr. Hill at the time of the formation of the Northern Securities Company.
[3] *Commercial & Financial Chronicle*, May 18, 1901.

"ghost dance." In an interview published in the New York newspapers of Thursday afternoon, May 9th, he was quoted as saying:

> All I can do is to liken it to a ghost dance. The Indians begin their dance and don't know why they are doing it. They whirl about until they are almost crazy. It is so when these Wall Street people get the speculative fever. Perhaps they imagine they have a motive in that they see two sets of powerful interests which may be said to be clashing. Then these outsiders, without rhyme or reason, rush in on one side or the other. They could not tell you why they make their choice, but in they go, and the result is such as has been seen here for the past few days.

Mr. Harriman's description of the situation, and particularly his own relation to it, was given in the following words:

> Our holdings [of Northern Pacific stock] were all acquired prior to the supposed contest between Morgan & Co. and ourselves. During the days of the panic we did not buy any Northern Pacific stock, nor give orders for any. Many of our shares had been bought in Germany, Holland, or England, for delivery in New York, and the certificates were on their way to their destination. Meanwhile the agents of the foreign sellers were making their deliveries by using stock borrowed from other people. Then, when the supposed contest took place and other parties bought Northern Pacific at very high prices and demanded immediate delivery, the agents of these European sellers had great difficulty in getting stock to fill their contracts. But, in every case, we gave them all the time they needed. We were not in the supposed contest and had no hand in it.[1]

On the day after the panic, brokers in Wall Street were in a state of complete nervous prostration from the strain of anxiety and apprehension; but there were few failures, money soon became comparatively easy again, and the stock market returned to something like its normal state. Millions had been made and lost, and scores of firms had been threatened with ruin; but the panic was local, rather than general, and the country at large was little affected.

So far as possession of the Northern Pacific was concerned, the situation remained substantially unchanged. Hill and Morgan held a majority of the common shares, while Harriman and the Union Pacific owned a majority of the preferred, as well as of both classes of stock taken together. Owing, however, to certain peculiar conditions, neither of the contending parties could regard its hold of the property as absolutely secure. The plan of Morgan and Hill was to retire the preferred shares on the 1st of the next January and thus leave Harriman and the Union Pacific with only a minority holding in the common.[2] There was a question, however, whether

[1] As related by Mr. Harriman to G. W. Batson.

[2] In the reorganization of the Northern Pacific Company in 1896, the right was reserved "to retire this [the preferred] stock, in whole or in part, at par, from time to time, upon any 1st day of January during the next twenty years."

the board of directors then existing (in May, 1901) would have power to do this. If not, Harriman would be able to prevent it, because, at the annual meeting of stockholders on the first Tuesday in October, he, holding a majority of the whole capital stock, could elect directors enough to give him control of the board, and then this newly constituted board would refuse to retire the preferred shares. In order to avoid this contingency, Morgan and Hill proposed to have the annual meeting of stockholders postponed until after January 1, 1902, so as to prevent Harriman from electing any new directors friendly to the Union Pacific, until after the preferred stock had been retired. There was grave doubt, however, whether the board of directors then existing (in May, 1901) would have legal authority either to retire the preferred stock, or to postpone the annual meeting so as to prolong the term of its own existence. Mr. Harriman consulted five eminent legal authorities in different parts of the United States and they all unanimously agreed that the existing board could not lawfully retire the preferred stock, nor, without the consent of a majority of the shareholders, postpone the annual meeting to another year. If this opinion proved to be sound, Harriman, having a majority of the whole capital stock, could elect in October a board of directors friendly to the Union Pacific,

and thus prevent Morgan and Hill from getting control through the retirement of the preferred stock.

In order, however, to avoid further controversy, Harriman and Schiff finally decided that if they could bring about a compromise which would safeguard the interests of the Union Pacific by giving that company adequate representation on the Northern Pacific and Burlington boards, it would be better to do this than to keep the affairs of three companies unsettled pending the outcome of long litigation. As Mr. Hill's biographer has said:

> Nothing was to be gained for either side by fighting. Both might have continued to tear up Wall Street and injure large property interests including their own. They could have engaged in endless litigation, which would have cost a lot of money without materially altering anything. They might have maintained their divided ownership and kept up a tug-of-war until the rope broke. The end of that would be two pieces of rope and two parties covered with bruises from severe falls. After all their animosities, and with all that they had done or left undone, it has to be remembered that on both sides there were big men. They were big not only by the measurement of achievement, but also because they were not actuated by a blind, vindictive desire just to crush and kill. They had already accepted, not merely as a theory, but as a conviction, the necessity of community of interest to a certain extent. Recent events had broadened and instructed their view. Things being as they were, they were ready for agreement.[1]

[1] Pyle's *Life of James J. Hill*, vol. II, pp. 153–54. Mr. Harriman

The fact that there never had been any personal animosity between Hill and Harriman made it easier to bring about a compromise than it would have been if they had hated each other. Working, as they did, in practically the same general field, it was almost inevitable that their business interests should clash; but throughout their controversies their personal relations were those of mutual respect and esteem. In a talk with the well-known journalist, Frederick Palmer, soon after the Northern Pacific contest, Mr. Harriman expressed the belief that Hill was not personally hostile to him. "Anyhow," he said, "he calls me 'Ed.'" Eight years later, when Mr. Harriman died, Mr. Hill, in paying a tribute of respect to his character, said:

His properties are in fine shape, but his place at the head of them will be hard to fill. I have done a good deal of business with him, and some of it was pretty strenuous at times, but we were good personal friends throughout. I had a very high regard for Mr. Harriman personally.[1]

never doubted that he had lawful control of the Northern Pacific Company and that if he had fought the case through the courts he would practically have obtained possession of the company. As Mr. Otto H. Kahn has said: "He held, beyond any question of doubt, the winning hand; but instead of boldly playing it, he contented himself with a drawn battle, and with terms of peace which gave to the other side the appearance of victory. The course that he pursued, however, showed his wisdom, foresight, and self-restraint, and his practice of never using any greater force than was necessary for the substantial accompslihment of his object." (*Edward Henry Harriman*, by Otto H. Kahn, in New York, 1911, pp. 32–33.)

[1] *New York Sun*, September 10, 1909.

Throughout the early part of May, 1901, conferences were held, either at Mr. Harriman's office or the office of Morgan & Co., and late in that month Kuhn, Loeb & Co. authorized publication of the following statement.

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

On the 31st of May, at a final conference held in the Metropolitan Club, the "understanding" above referred to was embodied in a written memorandum which was signed by Kuhn, Loeb & Co., Morgan, Harriman, and Hill. By the terms of this memorandum Mr. Morgan was empowered to select directors to fill vacancies on the NorthernPacific board with William K. Vanderbilt as referee in case of further disagreement. Mr. Harriman and a number of gentlemen friendly, or at least not hostile, to him were to become directors of both the Northern Pacific and the Burlington, and the Union Pacific was to have certain trackage rights over the Northern

Pacific between Portland and Seattle. So far as competition between the Union Pacific and the Hill roads was concerned, the Burlington was to remain neutral, and it was not to embark in any new enterprise in the West — such as building through to the Pacific — without the consent and approval of Harriman and the Union Pacific Company.

On the 17th of July, Mr. Morgan, in the following letter to Hill, Harriman, and Schiff, gave the names of the gentlemen whom he had selected to fill vacancies in the Northern Pacific board:

New York, July 17, 1901

GENTLEMEN:

In accordance with a memorandum signed by you under date of May 31, 1901, under which the composition of the Board of Directors of the Northern Pacific Railway Company was to be left in my hands, I beg to advise you of my conclusion as follows:

I nominate the following gentlemen as the new members of the Board to fill the vacancies to be created:

Mr. James J. Hill, President of the Great Northern Railway Company;

Mr. E. H. Harriman, Chairman of the Executive Committee of the Union Pacific Railway Company;

Mr. William Rockefeller, Director of the Chicago, Milwaukee & St. Paul Railway Company;

Mr. H. McK. Twombley, Director of the Chicago & Northwestern Railway Company;

Mr. Samuel Rea, Vice-President of the Pennsylvania Railway Company;

and I would suggest that the attention of the Board be called to the advisability of arranging for these gentlemen to assume their duties as Directors of the Company as soon as possible, without awaiting the annual election.

It is my opinion that a Board thus constituted will contain within itself the elements best adapted for the formulation of the plan referred to in said memorandum, in connection with Mr. William K. Vanderbilt named therein as Referee. Every important interest will have its representative, who will be brought into close touch with the situation as a whole, and there should be no difficulty in reaching a conclusion that will be fair and just to all concerned and tend to the establishment of permanent harmony among the different lines. To this end I shall be very glad to coöperate in such manner as will seem desirable.

I am, Gentlemen
Very truly yours
J. PIERPONT MORGAN

Of the gentlemen thus chosen, Rockefeller and Twombley were friendly to the Union Pacific Company, while only Mr. Hill was certainly hostile to it.

In this final settlement of the contest, Mr. Harriman did not gain all that he had hoped for, because the two roads that he wanted remained in the possession of his adversaries. Inasmuch, however, as he himself secured a seat in the directing board of each, he guarded himself against secret, aggressive action on the part of either, and thus made the interests of the Union Pacific reasonably safe.[1]

[1] Mr. Harriman became not only a director on the board of the Northern Pacific, but also a member of its executive committee.

The nearly successful attempt of Mr. Harriman to secure control of the Northern Pacific startled and alarmed not only J. Pierpont Morgan, who was the person most interested in that corporation, but also Mr. Hill and the little group of men who had coöperated with him in the building of the Great Northern. They regarded themselves as responsible for the future of the systems that they had created or reorganized; they had a natural feeling of pride in them, and they wished to have carried out, even after their own retirement or death, the plans they had formed for their future management and operation. They determined, therefore, to bind them together in such a safe and permanent way as to ensure unified control and, at the same time, prevent them from falling into the hands of rival corporations or alien interests. Mr. Hill was the first to think of and suggest the idea of forming a holding company, to be known as the Northern Securities Company, which should acquire the stock of both the Great Northern and Northern Pacific and issue in lieu thereof stock certificates of its own. Such a company would have including the stock of the recently acquired Burlington, a capitalization of three or four hundred million dollars, and would be so large and strong that, in all probability, no alien or hostile corporation could ever get control of it by purchasing a majority of its shares.

In a letter to a friend written in May, 1901, soon after the Northern Pacific contest, Mr. Hill outlined his plan as follows:

> The cost of administering the affairs of a holding company would be practically *nil*, as it would only draw dividends on the shares held by it and divide the money so received by check to its own shareholders. You will see how strong the holding company would be. It would control the Great Northern and Northern Pacific, and those two roads would control by ownership the Chicago, Burlington & Quincy. The holding company could also, if at any time it seemed best, hold the shares of coal or other companies which, while of value in themselves and of value to the railway company for the traffic they would afford, the charters of the railway companies are not broad enough to enable them to hold with safety. I think the completion of the plan of which the above is a fair outline would greatly enhance and insure the value of every share we hold in the railway companies. For myself, I feel that the future would be secure, and we would have a certainty in the situation, and the control of those properties safe. Unless we do something of this kind, we will always be subject to attacks like the recent one to secure control of one or other of our properties.[1]

In a somewhat later statement, Mr. Hill said:

> We were particularly anxious to put a majority of that stock [the Northern Pacific] where it could not be raided again as it had been. We wanted to put it in a corporation that was not a railroad company — a company that would hold it as an investment — and the

[1] Pyle's *Life of James J. Hill*, vol. II, p. 166.

larger the company the more difficult it would be to secure a majority of it. . . . We were advised that it would be safer with the shares held by an investment company, the stock of which could only be held by individuals, or by corporations that were not railroad companies, and to that extent we would be more free from such raids by interests that were anxious to destroy or restrict the growth of the country — such raids as had been made by the Union Pacific interests so-called.[1]

In saying that the Union Pacific interests were anxious to "destroy or restrict the growth of the country," Mr. Hill was not quite fair to Mr. Harriman. The latter had no intention of destroying or restricting. He tried to secure control of the Northern Pacific, primarily, as a means of getting the share in the Burlington which Mr. Hill had refused to give him; but he had no thought of injuring the Northern Pacific, or of restricting the growth of the country tributary to it. On the contrary; his aims were, first, to get a share in the Burlington, and, second, to make the Northern Pacific stronger and more useful than it ever had been before. If he had succeeded, he would have done with the Northern Pacific precisely what he was already doing with the Union Pacific and the Southern Pacific; that is, he would have spent tens of millions of dollars in improving it and making it better able to serve the country through which it ran. When he testified as

[1] Pyle's *Life of James J. Hill*, vol. II, pp. 164–65.

a witness before the Interstate Commerce Commission in 1907 he said:

If we had not had the power to buy the Southern Pacific with the credit of the Union Pacific, the country tributary to the Southern Pacific would have been ten years behind what it is now. If we had acquired the Northern Pacific, the Northern Pacific territory would have been ten years ahead of what it is now.[1]

Mr. Harriman's genius was essentially and fundamentally constructive, and no railroad that he ever acquired suffered injury from his management or control. Eight years after his death, when the securities of all railroads had been depressed by hostile legislation and the restrictions of an incompetent Commission, the shares of the Southern Pacific and the Union Pacific were selling respectively at 115 and 122, while the shares of the Northern Pacific and the Great Northern were offered at 86 and 85. Traffic statistics, moreover, show that the country served by the Hill system certainly did not develop more rapidly than the country served by the Harriman lines. Mr. Harriman planned and built with the future of the country constantly in mind, and the prices of his stocks, as well as the prosperity of his territory, show how sagacious and far-seeing

[1] Hearings before the Interstate Commerce Commission in the matter of "Consolidation and Combination of Carriers," February 25–27, 1907, p. 163.

his plans were and how enduring his influence has been.

The plan of the Northern Securities Company, although suggested and advocated by Mr. Hill, was practically put in shape by John S. Kennedy (representing the Dutch committee of bondholders); George F. Baker (a friend and associate of Mr. Hill); Willis D. James; W. P. Clough; Samuel Thorne and G. W. Perkins (of the firm of J. P. Morgan & Co.).

In a signed statement published in the St. Paul "Globe" in December, Mr. Hill explained the purposes of the company in detail as follows:

> Several of the gentlemen who have long been interested in the Great Northern Railway and its predecessor, the St. Paul, Minneapolis & Manitoba Company, and who have always been among its largest shareholders, but not the holders of a majority of its stock, whose ages are from seventy to eighty-six years, have desired to combine their individual holdings in corporate form, and in that way secure permanent protection for their interests and a continuation of the policy and management which had done so much for the development of the Northwest and the enhancement of their own property in the Northwest and elsewhere. Out of this desire has grown the Northern Securities Company.
>
> It became necessary (in order to prevent the Northern Pacific from passing under the control of the Union Pacific interests and with it the joint control of the Burlington) to pay off the seventy-five millions of Northern Pacific preferred. The enormous amount of cash required for this purpose, from a comparatively small number of men, made it necessary for them to act together in a large and permanent manner through the medium of a corporation; and the Northern Securities Company afforded them the means of accomplishing this object without the necessity of creating a separate company to finance the transaction for the Northern Pacific. . . . The Northern Securities Company is organized to deal in high-class securities; to hold the same for the benefit of its shareholders, and to advance the interests of the corporations whose securities it owns. Its powers do not include the operation of railways, banking, or mining, nor the buying and selling of securities or properties of others on commission; it is purely an investment company; and the object of its creation was simply to enable those who hold its stock to continue their respective interests in association together; to prevent such interests from being scattered by death or otherwise, and to provide against such attacks as had been made upon the Northern Pacific by a rival and competing interest.[1]

Although the Northern Securities Company was suggested by Mr. Hill in the spring of 1901, and a plan for its organization drawn up by him and his associates a few months later, it did not actually come into existence until late in the fall. On the 12th of November, 1901, it was duly incorporated under the laws of the State of New Jersey with a capital of $400,000,000.

Its first board of directors consisted of fifteen members, six of whom represented the Northern

[1] St. Paul *Globe*, December 22, 1901.

Pacific, four the Great Northern, three (including Mr. Harriman) the Union Pacific, and two not representative of any specific interest. Mr. Hill was unanimously chosen president of the new corporation, and all holders of Great Northern and Northern Pacific stock (including the Union Pacific) were invited to exchange their shares for the stock of the Securities Company on the basis of $180 for every $100 surrendered (in the case of the Great Northern) and $115 for every $100 (in the case of the Northern Pacific). About 76 per cent of the Great Northern stockholders and 96 per cent of the Northern Pacific stockholders turned in their shares for exchange. Mr. Harriman surrendered all the Northern Pacific stock that he had acquired in his attempt to get control of that road, and received in lieu thereof about $82,500,000 in the shares of the new corporation.

If there had been no interference from outside, the three companies would probably have worked together more or less harmoniously under the terms of the Metropolitan Club agreement and the charter of the Northern Securities Company. Unfortunately however, the latter was almost immediately attacked in the courts, on the ground that it was an attempt to restrain trade in violation of the Sherman Anti-Trust Law. Owing partly to popular ignorance

or prejudice and partly to political demagogism, the public mind at that time, particularly in the Northwest, was obsessed with the idea that combinations and agreements among railroad companies were made for the sole purpose of advancing or maintaining rates, and that the only remedy for this alleged evil was to enforce unrestricted competition in every case where one railroad ran parallel to another. The formation of the Northern Securities Company was generally regarded as a covert scheme to extort more money from the people by restricting or preventing competition among the Hill and Harriman lines.[1] As we now know, the creation of the holding company was not related in any way either to competition or to rates. It had its origin in a perfectly legitimate attempt, on the part of a number of large shareholders, to keep their associated interests together in the event of their retirement or death, and to prevent seizure or control of their properties by outside corporations, or groups, through the secret purchase of stock. The State authorities of Minnesota, how-

[1] "As a matter of fact, the Great Northern and Northern Pacific did not compete, to an appreciable extent, with each other, and still less with the Union Pacific. Only three per cent of the total interstate traffic was subject to control by them individually in the making of rates. There was competition, of course, for the Oriental trade, but it did not affect at all the people in the Northwest, where only an inappreciable portion of the total interstate traffic was strictly competitive." (*History of the Northern Securities Case*, by B. H. Meyer, University of Wisconsin Bulletin, p. 247.)

ever, as well as the general public, disregarded or disbelieved this explanation of the reasons for combination, and on the 7th of January, 1902, the State of Minnesota began suit against the Securities Company in the United States Circuit Court at St. Paul, on the alleged ground that it was an illegal combination in restraint of trade. A few weeks later, the Attorney-General of the United States advised President Roosevelt that, in his opinion, the so-called "merger" of the Northern Pacific and the Great Northern violated the provisions of the Sherman Act of 1890; and on the 10th of March, 1902, the Federal Government brought suit against the Northern Securities Company, the Northern Pacific, and the Great Northern in the Circuit Court of Appeals, a tribunal consisting of four Circuit Court judges sitting as a trial court under a special Act of Congress.

The decisions in the two lower courts were diametrically opposed to each other. In the State case it was held that the formation of the Northern Securities Company did not involve any act or contract in restraint of trade, while in the Federal case the judges decided that the "Securities Company accomplishes the object which Congress has declared illegal perhaps more effectually than other forms of combination generally known in 1890 when the Anti-

Trust Law was passed." The facts that the combination might have been inspired by "wholly laudable and unselfish motives," and that it was, perhaps, "the initial and necessary step in the accomplishment of great designs," were said to make no difference. If the combination *had power* to "suppress competition between two or more parallel and competing lines of railroad engaged in interstate commerce," no matter whether it had actually exercised that power or not, it was illegal. The Northern Securities Company was, therefore, enjoined from voting stock, acquiring additional stock, paying dividends, or exercising corporate control. The principal difference in the judgments of the two lower courts was this: one held that the mere purchase of a majority of the shares of the Great Northern and Northern Pacific by the Securities Company was illegal, because it gave the holding company *power* to restrict competition and thus restrain trade; the other declared that the mere possession of power does not warrant the assumption that the power will be criminally used.[1]

Both cases were carried by appeal to the United States Supreme Court in Washington, where they were argued by some of the ablest lawyers in the

[1] The records, briefs, and arguments in these cases made about eight thousand pages, or sixteen large octavo volumes.

country. On the 14th of March, 1904, after about two years of litigation, the State case was dismissed for lack of jurisdiction, while the Federal case was decided against the railroad companies by a divided court. Five justices regarded the combination as a violation of the Sherman Anti-Trust Law, while four, including the Chief Justice, could not see in it any contract, or conspiracy — much less any act — that restrained trade, or was intended to restrain trade. Justice Harlan, who read the opinion of the majority, said that Congress, "by the Anti-Trust Act, has prescribed the rule of free competition among those engaged in interstate commerce," and any combination which, by its necessary operation, restrains, or tends to restrain, such free competition is clearly illegal. "The Government charges," Justice Harlan said, "that if the combination is not held to be in violation of the Act of Congress, then all efforts of the National Government to preserve to the people the benefits of free competition among carriers engaged in interstate commerce will be wholly unavailing; and all transcontinental lines, indeed the entire railway systems of the country, may be absorbed, merged, and consolidated, thus placing the public at the absolute mercy of the holding corporation." The majority of the Court coincided in this view and affirmed the judgment of the Circuit Court of Appeals.

The decision of the Supreme Court, it will be observed, is based almost wholly on the assertion that "Congress, by the Anti-Trust Law, has prescribed the rule of *free competition* among those engaged in interstate commerce." It is a noteworthy fact, however, that Congress, in the Sherman Act, did not use the words "free competition," or "restraint of competition," or refer to "competition" in any way whatever. The thing that it forbade was "*restraint of trade or commerce,*" which may be, and generally is, a very different thing from "restraint of competition." The word "competition" is not to be found in any section of the Sherman Anti-Trust Act; it was read into that Act by the courts, on the assumption that "restraint of trade" and "restraint of competition" are synonymous expressions.

Justice Holmes, in a dissenting opinion, called attention to this wholly unwarranted assumption, and said that the words "restraint of competition" and "restraint of trade" do not have the same meaning. The latter, which has "a definite and well-established signification in the common law, means, and has always been understood to mean, a combination made by men engaged in a certain business for the purpose of keeping other men out of that business. . . . The objection to trusts was not the union of former competitors, but the sinister power exercised,

or supposed to be exercised, by the combination, in keeping rivals out of the business. . . . It was the ferocious extreme of competition with others, not the cessation of competition among the partners, which was the evil feared." "Much trouble is caused," Justice Holmes added, "by substituting other phrases, assumed to be equivalent, which are then argued from as if they were in the Act. The court below argued as if maintaining competition were the express purpose of the Act. The Act says nothing about competition."[1]

The minority of the Court, however, did not base its dissent wholly, or even mainly, on this unwarranted substitution of the words "restraint of competition" for the words "restraint of trade." It took the broader ground that the question in the case was "not the power of Congress to regulate *commerce*, but whether that power extends to the regulation of *ownership of stock in railroads*, which is not commerce at all." In the opinion of the minority, "The acquisition and ownership of stock in competing railroads, organized under State law by several persons, or by corporations, is not interstate commerce and therefore not subject to the control of Congress." [2]

In commenting, some years later, on the origin

[1] Senate Documents, vol. 6, 58th Congress, 2d Session.

[2] Dissenting opinion of Justice White, in which the Chief Justice and Justices Peckham and Holmes concurred.

and history of the Northern Securities Company, Dr. B. H. Meyer (afterward a member of the Interstate Commerce Commission) rightly said that its causes were "partly personal and partly economic." The personal cause was the desire of a number of aged stockholders to keep their holdings together after their retirement or death, and to prevent their properties from being seized or controlled by alien or rival interests. The largest economic cause was a desire to secure a permanent basis for the interchange of commodities between great producing sections of the United States and of the Orient.[1] Neither of these causes had anything whatever to do with interstate commerce, or with the rates to be imposed on such commerce. They related to entirely different matters.

Harriman and Hill were both deeply interested in the through traffic to and from the Orient. Harriman already had a trans-Pacific steamship line, while Hill was building on the northwestern coast two of the largest steamers in the world for the Oriental trade. Both wanted the Burlington system, because it would give them access, over a line of their own, to the cotton, provisions, and manufactures of the South and Middle West, which they hoped to exchange for tea, silks, and other products of China

[1] *A History of the Northern Securities Case*, by B. H. Meyer; University of Wisconsin Bulletin, pp. 226–27.

and Japan. The United States, at that time, had only about one-fourteenth part of the total Chinese trade. If, by providing better transportation facilities, the Pacific roads could give American producers cheaper and easier access to this great market, they certainly would not be restraining trade — they would be promoting and extending it. But they could not safely make plans for increasing America's exports to the Orient without forming a combination that would ensure certainty of supply and stability of rates. It was this, and not a desire to suppress local competition, that led Hill and Harriman to struggle for control of the Burlington, and later (by way of compromise) to join in the organization of the Northern Securities Company.

In view of the fact that, for many years, Congress and the people of the United States have made a sort of fetish of railroad competition, it may be well to repeat here that Mr. Harriman, with his synthetic and constructive mind, always favored coöperation and combination, as more advantageous both to the railroads and to the public than unrestricted competition. Indeed, in the last decade of his business career he came to be regarded as the foremost exponent of the policy of combination and consolidation. His motives were then misrepresented and his methods were described as autocratic and monopolistic;

demonstrated the soundness of his [illegible] The world is coming at last to see that, in the words of the first chairman of the Interstate Commerce Commission, "the more completely the whole railway system can be created as a unit, as if it were all one management, the greater will be the benefit of its service to the public and the less the liability to unfair exactions."[1]

Dr. Meyer, in his "History of the Northern Securities Case," is perfectly right in saying:

> Competition, as a regulative principle of railways, and as a force which will maintain proper relations between the railways themselves, and between the railways and the public, has failed in every country of the world where it has been given a trial. . . . I regard the application to the railways of the Sherman Anti-Trust Law of 1890 as one of the gravest errors in our legislative history. . . . If railways had been permitted to cooperate with one another, under the supervision of competent public authority, and if the Trans-Missouri and Joint-Traffic cases had never been decided, the railway situation in the United States to-day would be appreciably better than it is. . . . The undiscriminating opposition to all forms of open concerted action on the part of railways is, in my mind, the greatest single blunder in our public policy toward railways. . . . We should have cast away, more than fifty years ago, the impossible doctrine of protection of the public by railway competition.[2]

[1] Opinion of Judge Thomas M. Cooley in the Board of Trade case.

[2] *History of the Northern Securities Case*, by B. H. Meyer; University of Wisconsin Bulletin, pp. 253, 305.