INVESTIGATION OF RAILROADS, HOLDING COMPANIES AND AFFILIATED COMPANIES

WEDNESDAY, DECEMBER 8, 1937

UNITED STATES SENATE,
SUBCOMMITTEE OF THE COMMITTEE
ON INTERSTATE COMMERCE,
Washington, D. C.

The subcommittee met at 10 o'clock a. m., pursuant to adjournment on yesterday, in room 412, Senate Office Building, Senator Harry S. Truman presiding.

Present: Senator Truman.

Present also: Max Lowenthal, counsel to the committee, George Rosier, assistant counsel to the committee and Lawrence Brown, executive assistant to the committee.

Senator TRUMAN (presiding). The subcommittee will come to order. Mr. Callaway, will you and Mr. Sunderland come forward and take seats at the committee table opposite the committee reporter?

TESTIMONY OF MERREL P. CALLAWAY, VICE PRESIDENT, GUARANTY TRUST CO., NEW YORK CITY, AND STATEMENT OF EDWIN S. S. SUNDERLAND, MEMBER OF THE LAW FIRM OF DAVIS POLK WARDWELL GARDINER & REED, NEW YORK CITY—Resumed

Senator TRUMAN. You may proceed, Mr. Lowenthal.

Mr. CALLAWAY. Mr. Chairman, before we get started on the testimony this morning may I add a word to the statement I made here yesterday? [1]

Senator TRUMAN. Surely.

Mr. CALLAWAY. Mr. Lowenthal asked me with reference to that fee of $25,000, which was paid to me, whether I took that up with the board of directors, and I said, "No". What I meant was that I did not. Now, whether Mr. Sabin or Mr. Potter took it up, I do not know, because, you see, at that time we had a bonus system that depended somewhat upon earnings, and that bonus system as I recall it—and I am sorry to say it has not operated now for some years and therefore it is not clear in my mind—but my recollection is that there were certain types of earnings, outside of directors' fees, that either had to be turned in or accounted for. For instance, I would say that membership on a committee, or salaries that were paid for acting on a board of directors or as chairman of the executive committee, or something of that kind or other, as a routine fee, either had to be paid in or ac-

[1] See supra, p. 6876.

counted for. So when this matter came up I conferred with the head of our bank, and to the best of my recollection Mr. Potter, and the matter was referred to counsel, as to whether or not the Guaranty Trust Co. had any claim of any sort by reason of that fee received, or whether it affected the bonus, and counsel said not, that the Guaranty Trust Co. had its compensation, and the other was for service rendered by me.

I overlooked giving you that information yesterday, and I thank you for this opportunity now to give it.

Mr. LOWENTHAL. Mr. Sunderland, from the point of view either of counsel or of trustees, that we discussed yesterday, of the fees and the reasons for them, would you say that the labors of the trustees and of their counsel, in the St. Paul Railroad receivership of 1925–28 were rather more arduous than is usual in such a proceeding?

Mr. SUNDERLAND. Yes, I would. The labor in that proceeding, by virtue of the extent and kind of property, that was back of the mortgage, and there were some 11,000 miles of railroad, and by virtue of the fact that the indenture supporting the matter secured four debenture issues, and by virtue of the lien of that mortgage on other properties, and the question as to whether there was a lien on this and that, and the character of the lien.

You see, from the beginning of this mortgage, in 1913, the company was extending its property, and much of that property was not contiguous to the property which was specifically mentioned, either in the original indenture or in the many supplemental indentures, and I believe there were some 15 or 20 supplemental indentures; and I believe as indicative of the great amount of labor that the trustees and the individual trustee had to perform it is significant that there were some hundred-odd releases and, since I recall it, somewhere between 100 and 150; and there were very important questions of policy dealing with the administration of the property. The trustees, and Mr. Callaway particularly, dealt with questions affecting certain substantial property, such as a property which was not contiguous to the property specifically covered by the mortgage, that property running from Idaho into Washington, and the Metaline Falls Line, which, as a result of our effort, was found to be property subject to our mortgage. That involved an expenditure sometime after the mortgage was made of something like $6,000,000.

Now, the circumstances under which the money was provided, and so forth, and the fact that the property was not contiguous, meant that it was a very important question to determine whether we should go to the expense and trouble of investigating and of making the necessary effort to find out.

There were other properties, such as the Des Moines Union Terminal; and as a result of all that activity I do say, and of course of a great many other circumstances—and, you see, the record here from the 13th of June 1925, with a very active trust, the largest trust of this character, did result in unusual activity on the part of the corporate and the individual trustee and its counsel.

Mr. LOWENTHAL. Mr. Sunderland, in the court proceedings themselves were the labors of counsel for the trustee more arduous than is customary in a receivership even of this size?

Mr. SUNDERLAND. Yes; I think they were.

Mr. LOWENTHAL. Could you briefly indicate them?

Mr. SUNDERLAND. I will. Judge Wilkerson at the very beginning of the foreclosure proceeding, shortly after it was started, said that he felt a great responsibility and wanted the advice and counsel, not only of his three receivers but of those who had a substantial investment in the property—and that investment was represented by the trustees of the mortgage—and he felt that where it was necessary in a proceeding of this kind to advise with the operating officers and the board of directors, which in view of the situation was not available, that some method should be employed whereby the owners or representatives of the owners of the property could be brought into council with him and the receivers. And——

Mr. LOWENTHAL (interposing). Let me ask you——

Mr. SUNDERLAND (continuing). And he therefore arranged to have, during the administration of the property, frequent meetings, to which these trustees or their counsel were invited.

Mr. LOWENTHAL. Were those public meetings?

Mr. SUNDERLAND. They were in some instances in the courtroom and in some instances in his chambers, and elsewhere, and——

Mr. LOWENTHAL (interposing). Were all parties to the proceeding given notice?

Mr. SUNDERLAND. No specific written notice, but it was generally understood they were invited to appear.

Mr. LOWENTHAL. As to the representatives of the bondholders' committee, were they given notice of those conferences?

Mr. SUNDERLAND. I cannot say, but I think they must have known they were going on.

Mr. LOWENTHAL. Were they present?

Mr. SUNDERLAND. I do not know that they were ever present, except I rather think that in March 1926, when they were there in connection with the intervention proceeding—yes, I rather think Mr. Gerald Henderson was invited into the meeting. But I am not sure about that.

Mr. LOWENTHAL. Was there a stenographer present to make a minute and record of what was said in those conferences?

Mr. SUNDERLAND. I do not know whether there was or not. I think there was no stenographer present other than the judge's own stenographer. Whether or not he dictated conclusions or not, I cannot say.

Mr. LOWENTHAL. You did not get any copies of the proceedings for your firm?

Mr. SUNDERLAND. No; I did not.

Mr. LOWENTHAL. And you would have gotten copies if there had been a regular official reporter present to take minutes, I take it?

Mr. SUNDERLAND. Yes; I would have.

GUARANTY TRUST CO.'S ACTIVITIES AS CORPORATE TRUSTEE—EXTENT OF PARTIALITY IN REPRESENTING BONDHOLDERS IN VIEW OF DIVERSE INTERESTS

Mr. LOWENTHAL. Mr. Sunderland, were there some contests in that receivership proceeding between bondholders' groups or stockholders' groups, on the one hand, and other groups in the proceeding, on the other hand?

Mr. SUNDERLAND. What do you mean by "contests"?

Mr. LOWENTHAL. Well, issues as to which there were opposing sides.

Mr. SUNDERLAND. Oh, yes.

Mr. LOWENTHAL. The Guaranty Trust Co. and Mr. Callaway as trustees were formally parties to the proceeding?

Mr. SUNDERLAND. That is correct.

Mr. LOWENTHAL. And therefore as parties were entitled to have notice from all other parties of any proceeding they might want to bring before the judge?

Mr. SUNDERLAND. Yes.

Mr. LOWENTHAL. And as parties to the proceeding were entitled themselves to make motions?

Mr. SUNDERLAND. That is correct.

Mr. LOWENTHAL. And to offer evidence?

Mr. SUNDERLAND. That is correct.

Mr. LOWENTHAL. And to appeal from any order of the court which the trustees might deem prejudicial to them as trustees?

Mr. SUNDERLAND. Yes; in their capacity as trustees or otherwise.

Mr. LOWENTHAL. And any bondholders' or stockholders' group which might seek to be put on the same plane with the Guaranty Trust Co. and Mr. Callaway, as trustees, as parties in the proceeding, would first have to ask the judge to permit them to intervene as parties in that proceeding?

Mr. SUNDERLAND. That is correct.

Mr. LOWENTHAL. And if they were not permitted to intervene they would not have the same status in the proceeding as the trustees under this mortgage, the Guaranty Trust Co. and Mr. Callaway?

Mr. SUNDERLAND. They were the complainants in the proceedings and the trustees of the mortgage, which it was the purpose of the proceeding to foreclose.

Mr. LOWENTHAL. Could I trouble you to tell me if any objecting group of bondholders was not permitted to intervene, whether they would be on the same plane and have the same status as parties which was enjoyed by the Guaranty Trust Co. and Mr. Callaway as trustees?

Mr. SUNDERLAND. I do not get your question. Could the committee reporter read it?

Mr. LOWENTHAL. The committee reporter will please read it to you.

(Thereupon the last foregoing question was read by the committee reporter.)

Mr. SUNDERLAND. So far as right of appeal was concerned, they would not have the same status.

Mr. LOWENTHAL. Mr. Sunderland, I hand you copy of an exhibit heretofore introduced at the hearing before this subcommittee, I believe on November 18 of this year, headed:[1]

Participation by life insurance companies active in Missouri Pacific System reorganization, in committees and groups engaged in receivership and reorganization of other railroads listed.

I hand it to you so that you may have it before you, and I believe it includes some twenty-odd railroads that are in receivership or bankruptcy. Will you be good enough to look at the list and tell me if your law firm are participating in any of those receiverships or bankruptcies and if so, which of them?

Mr. SUNDERLAND. Yes; I will be glad to do so. Shall I take them up in their order as shown here?

[1] See Hearings, Part XV, "Exhibit No. 1873", appendix, p. 6709.

Mr. LOWENTHAL. I do not know whether the Missouri Pacific is on that list. Is it?

Mr. SUNDERLAND. Yes; the Missouri Pacific System is. Shall I take them up in order?

Mr. LOWENTHAL. You may take them up in any order you like.

Mr. SUNDERLAND. The Guaranty Trust Co. of New York is trustee of——

Mr. LOWENTHAL (interposing). I am just speaking of your law firm, in any capacity and for any client.

Mr. SUNDERLAND. The first is the Central of Georgia Railway Co., and by virtue of the fact that our regular client, the Guaranty Trust Co. of New York, is the trustee of one of the mortgages of that railway company, we are counsel for the Guaranty Trust Co. in connection with the foreclosure proceedings, which have been pending for some time.

Similarly with respect to the Chicago & Eastern Illinois Railway Co. When I say "similarly" I mean by virtue of the trusteeship being held by the Guaranty Trust Co. of New York.

Similarly with respect to the Chicago, Indianapolis & Louisville Railway Co.

Then comes the Chicago, Milwaukee, St. Paul & Pacific Railroad Co.

Then next is the Chicago & North Western Railway Co. and similarly with respect thereto.

In respect of the Chicago, Rock Island & Pacific Railway Co., my firm is counsel for a committee, of which Mr. Philip Benson, who was then president of the National Association of Mutual Savings Banks, was chairman, to protect the equipment trust obligations. That matter resulted in a refunding of those obligations, so that the activities of the committee are now practically over.

Referring to the relationship that I previously mentioned, my firm is counsel for the Guaranty Trust Co. as trustee in one of the Denver mortgages, and——

Mr. LOWENTHAL (interposing). That is, do you mean the Denver & Rio Grande?

Mr. SUNDERLAND. I mean the Denver & Rio Grande Western Railroad Co. My firm is also counsel for the Guaranty Trust Co. of New York, complainant trustee in the foreclosure proceeding against the Minneapolis & St. Louis Railroad Co.

My firm has acted, but I am not particularly familiar with that matter, for a committee in the case of the Florida East Coast——

Mr. LOWENTHAL (interposing). For a committee, did you say?

Mr. SUNDERLAND. For a committee, yes. The Guaranty Trust Co. of New York was trustee of a Missouri Pacific Railroad issue. It resigned from that, but during the time it was active as trustee my firm was counsel.

Mr. LOWENTHAL. Your firm does not represent any committee in that matter, does it?

Mr. SUNDERLAND. It does not to my knowledge.

Mr. LOWENTHAL. Does it represent J. P. Morgan & Co. in connection with that reorganization proceeding?

Mr. SUNDERLAND. Well, it has from time to time advised members of the firm in that connection. But I am not familiar with that aspect of the matter.

Mr. LOWENTHAL. J. P. Morgan & Co. are still interested in that reorganization, are they not?

Mr. SUNDERLAND. I cannot say as to that.

Mr. LOWENTHAL. I think the record so shows.

Mr. SUNDERLAND. Now, I have a recollection—no, I cannot say as to the Mobile & Ohio Railroad Co.

Mr. LOWENTHAL. You can supply that later if you will. We just want to get some general idea of that situation.

Mr. SUNDERLAND. In this New York, New Haven & Hartford Railroad Co. matter, my firm is acting for a group of insurance companies, acting in their own interest as investors in the bonds of that company, in a pending bankruptcy proceeding.

We have no connection with the New York, Ontario & Western Railway Co. that I know of.

In the case of the Norfolk Southern Railroad Co., the Guaranty Trust Co. of New York is trustee of a mortgage, and we are acting for the trustee in a pending foreclosure proceeding.

In the case of the St. Louis-San Francisco Railway Co. proceeding, we are acting for a committee that was organized some time ago to protect the interests of the Kansas City & Fort Scott bonds.

I do not think we have anything to do with the Savannah & Atlanta Railway Co.

One of the system mortgages of the Seaboard Air Line is held by the Guaranty Trust Co. of New York as trustee, and we are its counsel.

We have nothing to do with the Spokane International, nor the Wabash Railway Co., nor the Western Pacific Railroad Co., nor the Wisconsin Central Railway Co. that I know of.

Mr. LOWENTHAL. I thank you.

Mr. SUNDERLAND. I think that practically covers our activities.

Mr. LOWENTHAL. All right.

Mr. SUNDERLAND. You asked me yesterday to supply anything additional. Is this sufficient? If not, if I find any other railroad I will be glad to report it to you.

Mr. LOWENTHAL. Yes; or if you want to make any additions or corrections you will be permitted to do so.[1]

Mr CALLAWAY. I could tell you now about the Mobile & Ohio if you would like to have it on the record.

Mr. LOWENTHAL. All right.

Mr. CALLAWAY. They are not representing us in that matter. We had one of the trusteeships, but by reason of the fact that their firm had at one time represented the Southern Railway Co., which was interested in the Mobile & Ohio, they could not represent us here, and we employed other counsel. If you will recall, Mr. Sunderland, your firm has no connection with the Mobile & Ohio litigation except as counsel for the Southern Railway Co.

Mr. LOWENTHAL. I have made a notation opposite the names on this list as you went along, and it seems that somewhere around 12, 13, or 14 railroads you are interested in in that way, and in that event it bears out and explains the impression that your law firm was

[1] Mr. Sunderland subsequently informed the committee that his firm was active in the sec. 77 proceedings of the St. Louis, Southwestern Ry. Co. as counsel to Guaranty Trust Co., trustee of First Terminal and Unifying Mortgage and of the Chicago, Great Western R. R. Co., as counsel to a committee representing holders of first-mortgage bonds.

engaged in activities in connection with railroad reorganizations of more roads than is shown to be the case of other law firms.

Mr. SWAINE. May I make a correction of my testimony in the light of what Mr. Sunderland has just said?

Mr. LOWENTHAL. Yes.

Mr. SWAINE. Having run over my list I find we also represent a committee in the Minneapolis & St. Louis Railroad, and that I did not mention that the other day.[1]

Mr. LOWENTHAL. Mr. Sunderland, your firm, acting for the Guaranty Trust Co. of New York and Mr. Callaway in the St. Paul receivership, appeared both in the district court in Chicago and before the circuit court of appeals in various matters in connection with that receivership, did you not?

Mr. SUNDERLAND. Yes; we did, and in other courts.

Mr. LOWENTHAL. And also before the Interstate Commerce Commission?

Mr. SUNDERLAND. Yes.

Mr. LOWENTHAL. In that proceeding the so-called Iselin committee sought to obtain the right to intervene and to become a party to that receivership proceeding, did it not?

Mr. SUNDERLAND. That is correct.

Mr. LOWENTHAL. And that application by the Iselin committee was opposed in court by Mr. Tenney in an oral argument. Do you remember that?

Mr. SUNDERLAND. Yes; I remember that hearing. Mr. Tenney participated in the hearing.

Mr. LOWENTHAL. And he opposed the application of the Iselin committee to intervene?

Mr. SUNDERLAND. Yes.

Mr. LOWENTHAL. And to become a party to it?

Mr. SUNDERLAND. Yes.

Mr. LOWENTHAL. Mr. Tenney was a Chicago attorney, the Chicago attorney for the Guaranty Trust Co. and Mr. Callaway?

Mr. SUNDERLAND. That is correct. He was associated with us.

Mr. LOWENTHAL. Were you at that hearing?

Mr. SUNDERLAND. Yes, I was.

Mr. LOWENTHAL. Did you approve of Mr. Tenney's action in opposing the application made by the Iselin committee?

Mr. SUNDERLAND. Yes; we collaborated in the matter.

Mr. LOWENTHAL. And there was a committee headed by Mr. Jameson in that proceeding which took part in some portions of that proceeding?

Mr. SUNDERLAND. In the St. Paul proceeding?

Mr. LOWENTHAL. Yes.

Mr. SUNDERLAND. Yes.

Mr. LOWENTHAL. That committee styled itself the Bondholders' Defense Committee, did it not?

Mr. SUNDERLAND. I believe so.

Mr. LOWENTHAL. They represented bonds?

Mr. SUNDERLAND. Yes; they represented bonds and stock, too, I believe.

Mr. LOWENTHAL. They asked to intervene?

[1] Supra, p. 6785.

Mr. SUNDERLAND. They did.

Mr. LOWENTHAL. In the way of representing bonds?

Mr. SUNDERLAND. In representation of bonds, I believe.

Mr. LOWENTHAL. And the Iselin committee asked to intervene in the way of representing stock?

Mr. SUNDERLAND. Of stock.

Mr. LOWENTHAL. The Iselin committee was referred to here a day or two ago as having been associated with the so-called Roosevelt committee. That was a bondholders' committee?

Mr. SUNDERLAND. The Roosevelt committee? I believe so.

Mr. LOWENTHAL. Kuhn, Loeb & Co. and the National City Co. as reorganization managers did not apply to the court for permission to intervene and become parties to the receivership proceeding so far as you know, did they?

Mr. SUNDERLAND. So far as I know, they did not.

Mr. LOWENTHAL. So far as you know, neither of those two banking institutions applied in any capacity for permission to intervene and become a party in that proceeding, did they?

Mr. SUNDERLAND. Well, now——

Mr. LOWENTHAL (continuing). I mean as far as you can remember.

Mr. SUNDERLAND. My recollection is this: You see, under the decree machinery was created whereby if the property was bid in by anyone acting under a reorganization plan, on the hearing on the confirmation of the bid—of which hearing notice was given to everyone—those acting under the reorganization plan were to appear in that proceeding through their representatives. I think the bidders were required to file their appearances in the proceedings somewhat before this hearing. You will recall, Mr. Lowenthal, that in the issues before the court there was the proceeding to foreclose the mortgage and proofs made therein; and that the decree, which was entered on those proofs, contained the requirement that if anyone bid in behalf of a plan that was not published, there was to be a special notice as to the time and purpose of the hearing and in order to permit everyone to come in—that is if a bid pursuant to a plan should be made; and on the hearing I think only Kuhn, Loeb & Co. and National City Co., as managers, through their representatives, whether as bidders or committees, did appear. Of course, the bidders appeared and filed their plan with the court. Now, earlier, when the decree, which was to progress the matter to a final decree—subject to certain other action, to wit, fixing an upset price and date of sale, both of which might require other testimony—and in order to expedite a finding on that application there was a request that that application be brought on, I think by some representatives under the plan or committees under the plan, and——

Mr. LOWENTHAL (interposing). Mr. Sunderland, it would facilitate our hearing very much if you could possibly give categorical answers to the questions I propound to you. If the committee reporter will just repeat that question to you now I wish you would give a categorical answer.

Mr. SUNDERLAND. I am trying to do it.

Mr. LOWENTHAL. I will appreciate it very much if you would give as brief answers as possible for our record. It would help us to get along this morning, which we are trying to do.

Mr. SUNDERLAND. I hope you will understand that this was a long time ago and I haven't had time to review these things.

Mr. LOWENTHAL. If you do not know, you may just say it and we will appreciate it; and you can furnish it later.

Mr. SUNDERLAND. I will endeavor wherever possible to give categorical answers.

Mr. LOWENTHAL. I mean now that I would like to have a categorical answer to the last question asked you, and which I have requested the committee reporter to read to you.

The COMMITTEE REPORTER. I have been watching for an opportunity when you gentlemen would pause so that I would have time to read the question.

Mr. LOWENTHAL. I beg pardon. I did not realize that we were keeping you from reading it.

(The following question was then read by the committee reporter:)

Mr. LOWENTHAL. So far as you know, neither of those two banking institutions applied in any capacity for permission to intervene and become a party in that proceeding, did they?

Mr. SUNDERLAND. I have explained in respect of this plan, in which they did participate in the proceedings.

Mr. LOWENTHAL. Was either Kuhn, Loeb & Co. or——

Mr. SUNDERLAND (interposing). If your question is whether these two companies——

Mr. LOWENTHAL (interposing). Either of them.

Mr. SUNDERLAND. Or either of them filed an application to intervene, my answer is "No."

Mr. LOWENTHAL. And when the bidders appeared—by the way, who were the bidders, do you remember?

Mr. SUNDERLAND. I think Mr. Swatland was one.

Mr. LOWENTHAL. Was Mr. Swaine the other?

Mr. SUNDERLAND. I do not think so but I cannot recall.

Mr. LOWENTHAL. Perhaps Mr. Swaine can enlighten us about that.

Mr. SWAINE. Yes.

Mr. LOWENTHAL. And both Mr. Swatland and Mr. Swaine were of the law firm representing the reorganization managers in that proceeding?

Mr. SUNDERLAND. They were.

Mr. LOWENTHAL. Kuhn, Loeb & Co. itself did not bid in its own name or as reorganization managers at the sale of the property?

Mr. SUNDERLAND. I think not.

Mr. LOWENTHAL. Nor did the National City Co.?

Mr. SUNDERLAND. I think not.

Mr. LOWENTHAL. Now, Mr. Sunderland, your law firm, either through you or through anyone else in that firm, conferred on a number of occasions with the attorneys for the reorganization managers in connection with various matters pending before the district court and the appellate court with respect to this St. Paul receivership; is that correct?

Mr. SUNDERLAND. Oh, yes.

Mr. LOWENTHAL. And those conferences were quite numerous, were they not?

Mr. SUNDERLAND. Well, yes—well, I would not say numerous, but there were very frequent conferences. Of course, we, knowing of the pendency of this matter, started to search our files and prepared various papers, and the original bill of complaint; and we knew of the existence of these large holdings, and we conferred not only with them but with all representatives of bondholders that we knew of.

Mr. LOWENTHAL. Wouldn't you say that your conferences were far and away more numerous with attorneys for reorganization managers than with attorneys for any other parties or interests in that situation?

Mr. SUNDERLAND. Oh, no.

Mr. LOWENTHAL. Do you mean you conferred as much with other attorneys, and if so what other attorneys?

Mr. SUNDERLAND. Well, we conferred with Messrs. Stewart & Shearer and other attorneys acting for other trustees in regard to debenture issues.

Mr. LOWENTHAL. As frequently as you conferred with any attorneys for the reorganization managers?

Mr. SUNDERLAND. Oh, yes; more frequently.

Mr. LOWENTHAL. Let me ask you this question: Among the disputed issues in that proceeding was the question of the time at which the court should hold a public hearing on the fairness and soundness of the Kuhn, Loeb & Co.-National City Co. reorganization plan, is that correct?

Mr. SUNDERLAND. Well, if you mean the hearing which set in motion that hearing, or I mean the hearing that set it in motion, was the coming in of the special master's report——

Mr. LOWENTHAL (interposing). Mr. Sunderland, I mean this: The Jameson committee, and before the Jameson committee the Iselin committee, did urge on the court, did they not, both of them, that the court ought to have a hearing on the fairness and the soundness or equitableness of the Kuhn, Loeb & Co.-National City Co. reorganization plan at a time much earlier than your firm, representing the Guaranty Trust Co. of New York and Mr. Callaway, thought the court should have such a hearing, is that correct?

Mr. SUNDERLAND. Yes; I think that is correct.

Mr. LOWENTHAL. And is it also correct that——

Mr. SUNDERLAND (continuing). I do not want to burden the record, but I think my answer might be more enlightening to you if I explained the circumstances.

Mr. LOWENTHAL. We will come to that. I am trying to expedite this matter because the subcommittee has other matters we wish to take up this morning.

Mr. SUNDERLAND. All right.

Mr. LOWENTHAL. Is it also true that there was a difference of opinion in the court proceeding between your firm, representing the Guaranty Trust Co. of New York, and Mr. Callaway, as trustees, and the bondholders' defense committee, on the subject as to when the property should be sold? If you can give us a "yes" or "no" answer to that question I would appreciate it.

Mr. SUNDERLAND. No.

Mr. LOWENTHAL. It was not?

Mr. SUNDERLAND. No.

Mr. LOWENTHAL. Did the bondholders' defense committee claim that you were taking a position antagonistic to them on that subject?

Mr. SUNDERLAND. On the subject as to the time of sale?

Mr. LOWENTHAL. Yes.

Mr. SUNDERLAND. I think they did.

Mr. LOWENTHAL. And you claimed you were not taking a position antagonistic to them?

Mr. SUNDERLAND. Most decidedly not.

Mr. LOWENTHAL. Did the bondholders' defense committee also claim that you were taking a position antagonistic to theirs on the subject of upset price?

Mr. SUNDERLAND. We took no position on the upset price, but——

Mr. LOWENTHAL (interposing). Did you——

Mr. SUNDERLAND (continuing). I am explaining my answer, and have to say "no" to that question.

Mr. LOWENTHAL. Did the bondholders' defense committee make the claim that you had so conducted yourself in those proceedings as to help Kuhn, Loeb & Co.-National City Co.'s group and to hurt or impede the position of the bondholders' defense committee—did they so claim?

Mr. SUNDERLAND. They made that claim, and that claim was dealt with by the court.

Mr. LOWENTHAL. Did you think their claim to that effect was wrong?

Mr. SUNDERLAND. I did, and the court so determined.

Mr. LOWENTHAL. By the way, had your firm used Mr. Tenney's law firm in receiverships prior to the *St. Paul Railroad case*?

Mr. SUNDERLAND. We had not.

Mr. LOWENTHAL. Had you used Mr. Tenney's law firm in other matters prior to this St. Paul Railroad receivership so far as you know?

Mr. SUNDERLAND. So far as I know, we had used them in some Chicago Elevated matters some years earlier.

Mr. LOWENTHAL. Was there any suggestion made to your firm with respect to Mr. Tenney's firm before they were selected by your firm to represent you in Chicago?

Mr. SUNDERLAND. Yes; there were several.

Mr. LOWENTHAL. From whom?

Mr. SUNDERLAND. We were canvassing the question, and we talked with several people. We first were considering the availability of being associated with us a Mr. Chapman, of the firm of Chapman, Cutler & Parker, and we discussed with Mr. Chapman, and we discussed with individuals in several other Chicago firms with whom we had had experience and with whom I was acquainted, with reference to sharing with us, or recommending to the trustees that they authorize association with us, of counsel in Chicago. And there were several people that I talked with in regard to his standing and also with clients that we had acted for who had used his firm.

Mr. LOWENTHAL. Did you discuss with anybody connected with the St. Paul receivership and reorganization the question of your selecting Mr. Tenney's firm, or that you were thinking of selecting that firm, prior to the actual selection?

Mr. SUNDERLAND. Yes; I think so.

Mr. LOWENTHAL. Could you tell us the name of any person, or names of any persons?

Mr. SUNDERLAND. Well, I am not quite sure that I could. There were several people that I talked with about the selection of Mr.

Tenney, and I think it very likely that I talked with Mr. Shaw about it in Chicago. He was acting for the receivers. I think it very likely that I announced to or spoke of the fact with counsel in New York who were acting for the trustees, and very likely I told Mr. Sanford, of Sherman & Sterling. I haven't any clear recollection about anyone I talked with, except that I think I talked with Mr. Shaw, as I have stated. And I think I talked with Mr. Mitchell Follansbee, and I think with Mr. Swaine about it.

Mr. LOWENTHAL. Who is Mr. Follansbee?

Mr. SUNDERLAND. Mr. Schupp is in that firm. It is the firm of Follansbee, somebody, and Schupp, and they were counsel for one of the trustees in this proceeding.

Mr. LOWENTHAL. Mr. Sunderland, excuse me for just a moment while I look for something.

Mr. SUNDERLAND. Certainly.

Mr. LOWENTHAL. Now, Mr. Sunderland, have you, or had you, ever heard that Mr. Tenney, whom you so selected, and Judge Wilkerson, prior to the time when Judge Wilkerson went on the bench, had been associated in the practice of law in any way whatsoever?

Mr. SUNDERLAND. Yes; I have heard that Judge Wilkerson started his practice in Mr. Tenney's office. I believe that is correct.

Mr. LOWENTHAL. In talking with Mr. Shaw about the possibility of taking on Mr. Tenney, did Mr. Shaw indicate whether he thought that would be advisable or inadvisable, good or bad? Or, did he express any opinion about it?

Mr. SUNDERLAND. He expressed the opinion, when I asked him about the qualifications of Mr. Tenney, as to his qualifications. But I am not sure that he said anything about the fact that Judge Wilkerson had been in his office. I do not know where I learned that.

Mr. LOWENTHAL. In the proceeding in which your firm and Mr. Tenney's firm opposed the application of the Iselin committee and the bondholders' defense committee to intervene and become parties in the receivership proceeding, you took the position and Mr. Tenney took the position that the Guaranty Trust Co. of New York was the proper institution to represent all bondholders, and that they ought not to come in as intervening parties, did you not?

Mr. SUNDERLAND. That is correct.

Mr. LOWENTHAL. And in so doing you took the position that the Guaranty Trust Co. of New York could impartially and fairly represent all bondholders?

Mr. SUNDERLAND. I did.

Mr. LOWENTHAL. And you took the position that the Guaranty Trust Co. of New York had no financial interest which in any way might conflict with its representing fully and impartially all bondholders?

Mr. SUNDERLAND. That is correct.

Mr. LOWENTHAL. I should like to hand you, Mr. Sunderland, and also will get a copy for Mr. Callaway, some excerpts from statements submitted by the Guaranty Trust Co. of New York and Mr. Callaway, as trustees in their behalf, in opposition to the bondholders' defense committee's application to intervene. And, Mr. Chairman, I should like to have all these excerpts included in the record, if that may be done?

Senator TRUMAN. That may be done.

(The excerpts referred to were marked "Exhibit No. 2035" and are included in the appendix on p. 7080.)

Mr. LOWENTHAL. You gentlemen will understand that these are introduced subject to any correction you may wish to make as to accuracy, or any additions you may want to make for the record, and which you may do hereafter.

Mr. SUNDERLAND. All right.

Mr. LOWENTHAL. I should like to call attention, Mr. Sunderland, to a passage in the first paragraph, on the second page of the paper just handed to you, in which you discussed in a brief to the court what a trustee should do and should not do. You will see in the last sentence of that paragraph as there written [reading from "Exhibit No. 2035"]:

> It must not have a financial interest adverse to that of the bondholders.

And you will see in a preceding sentence:

> It must be disinterested.

And then, dropping down to the next paragraph, the last sentence:

> The trustees are the only persons to speak and act for the bondholders as a class.

Then dropping down to the last sentence of the next paragraph:

> That being so—

Referring to the preceding discussion in the brief—

> they are alone entitled to represent the bondholders in these proceedings, and the intervention should be denied.

Mr. Sunderland, at the time when these briefs and affidavits were submitted the Guaranty Trust Co. of New York was the depositary for the Ecker bondholders' committee in the St. Paul Railroad reorganization proceeding, was it not?

Mr. SUNDERLAND. Yes; it was.

Mr. LOWENTHAL. Mr. Callaway, you testified yesterday that your recollection was that probably the amount mentioned as fees finally received by the depositary, Guaranty Trust Co. of New York, was in the neighborhood of the figure we mentioned. Was that $134,000?

Mr. CALLAWAY. That is my recollection.

Mr. LOWENTHAL. You also testified that the more bonds deposited and the more work you had, the larger your proper fee would be.

Mr. CALLAWAY. Yes.

Mr. LOWENTHAL. Mr. Sunderland, you and Mr. Tenney argued to Judge Wilkerson that the fact that you were depositary for one of the committees supporting the Kuhn, Loeb & Co.-National City Co. plan did not mean that you had any financial interest that would debar your representing impartially and fairly bondholders opposed to that reorganization plan, did you not?

Mr. SUNDERLAND. That is correct.

Mr. LOWENTHAL. Mr. Chairman, I should like to offer for the record copy of a letter, apparently from Mr. Shaw, the copy from which this was made having been received from the files of Winston, Strawn & Shaw, the letter being addressed to Mr. Swaine, and dated November 10, 1925.

Senator TRUMAN The letter will be received in evidence.

(The letter referred to was marked "Exhibit No. 2036" and is included in the appendix on p. 7081.)

Mr. LOWENTHAL. The letter reads as follows:

Referring to the possibility that some bondholder or bondholders may seek to intervene in the St. Paul case, I have this suggestion to make——

And I might say that the answering letter, which I will also offer a little later, indicates that the letter of November 10, 1925, was written by Mr. Shaw to Mr. Swaine.

Senator TRUMAN. All right.

Mr. LOWENTHAL. Mr. Sunderland, was it shortly after this, if you remember, that the bondholders' defense committee filed its first petition in the St. Paul receivership proceeding to intervene?

Mr. SUNDERLAND. Will you give me just a moment on that?

Mr. LOWENTHAL. Certainly.

Mr. SUNDERLAND. My recollection is that we filed our bill in June of 1925. This letter is dated November 10, 1925. Shortly after our bill was filed, I think——

Mr. LOWENTHAL (interposing). I am speaking of the Jameson committee now and not the Iselin committee.

Mr. SUNDERLAND. I cannot answer that question offhand.

Mr. LOWENTHAL. Our information is that it was shortly after November 10. If that is incorrect you may give us the correct information. [Continuing to read from "Exhibit No. 2036":]

Upon the argument of the pending intervention proceeding—

That was a petition by the Iselin committee to intervene; is that correct?

Mr. SUNDERLAND. Well, I do not want to trust my recollection, but I think that is correct.

Mr. LOWENTHAL. I will say that is our understanding on the subject, and we will let that stand subject to correction by you. That was a proceeding in which Mr. Tenney made application before Judge Wilkerson in opposition to the Iselin committee's petition.

Mr. SUNDERLAND. Yes.

Mr. LOWENTHAL. And Judge Wilkerson denied the petition of the Iselin committee.

Mr. SUNDERLAND. Yes. But you understand the basis of the opposition so far as Mr. Tenney and I were concerned, do you not?

Mr. LOWENTHAL. Well, we will come to that later, or you can add it for the record, for we have not the time to go into it this morning. And if you think you should present anything in addition you may do so, later.

Mr. SUNDERLAND. All right.

Mr. LOWENTHAL. Judge Wilkerson also denied the petition of the bondholders' defense committee, did he not?

Mr. SUNDERLAND. He did.

Mr. LOWENTHAL. Continuing to read from this letter [reading from "Exhibit No. 2036"]:

Upon the argument of the pending intervention proceeding, the only act or acts which Rosenthal suggested in court as being an excuse for a bondholder to intervene—

Rosenthal is a Chicago lawyer also, is he not, Mr. Sunderland?

Mr. SUNDERLAND. Yes.

Mr. LOWENTHAL. He was attorney for the Iselin committee, or one of the attorneys?

Mr. SUNDERLAND. I think that is correct. I think he is Mr. S. E. Rosenthal, but I am not sure.

Mr. LOWENTHAL. Were they also associated with the Roosevelt committee, or was it all one group?

Mr. SUNDERLAND. I cannot say as to that.

Mr. LOWENTHAL (reading further):

the only act or acts which Rosenthal suggested in court as being an excuse for a bondholder to intervene was the fact that some of the trustees foreclosing the mortgages were also depositaries under the Kuhn, Loeb plan.

By the way, Mr. Sunderland, some of the other New York banks that were trustees for mortgages in the St. Paul receivership were also depositaries under the Kuhn, Loeb & Co. plan?

Mr. SUNDERLAND. Oh, yes. I think they all were, that had issued any bonds.

Mr. LOWENTHAL. You were the principal trustee foreclosing, I mean Guaranty Trust Co. of New York and Mr. Callaway?

Mr. SUNDERLAND. Yes; on the basis of lien and amount of debt.

Mr. LOWENTHAL. Continuing to read from this letter [reading from "Exhibit No. 2036"]:

His argument was that this placed the depositaries in a dual position and he called attention to the rule which provides that bondholders may intervene in a foreclosure proceeding when trustees are acting in a dual or antagonistic capacity.

Now, I am not prepared to say that there is anything inconsistent with the action of the trustees in foreclosing, and at the same time acting as depositaries under a plan which some bondholders desire and other bondholders do not desire.

By the way, that was an indication that at least a few bondholders did not want the Kuhn, Loeb & Co. plan.

Mr. SUNDERLAND. They wanted modifications in it.

Mr. LOWENTHAL. They did not want the Kuhn, Loeb & Co. plan as it stood.

Mr. SUNDERLAND. I think that is a fair statement.

Mr. LOWENTHAL. And the Jameson committee or bondholders' defense committee did not want the Kuhn, Loeb & Co. plan as modified, although that came later.

Mr. SUNDERLAND. Yes; that came later.

Mr. LOWENTHAL. Continuing to read from this letter [reading from "Exhibit No. 2036"]:

But don't you think it might be desirable, if the same could conveniently be done, to have some other depositary selected under the plan and thus eliminate the possibility of this charge being made? I merely suggest this to you in order that you may have it in mind.

Mr. Chairman, I now offer for the record—but, unfortunately, I only have this one copy, but will hand it to Mr. Sunderland as soon as I read it so that he may see it in case he wants to make any comments—a copy of the answer written by Mr. Swaine to Mr. Shaw, under date of November 11, 1925, the next day.

Senator TRUMAN. It will be received in evidence.

(The letter referred to was marked "Exhibit No. 2037" and is included in the appendix on p. 7082.)

Mr. LOWENTHAL. I read:

Your letter of November 10 has been received. As you know, depositaries under the reorganization plan are mere custodians of securities and are not called upon to exercise any discretion in any matter. The situation is no different than it would be if the committee had a bank deposit with one of the trustees. It

strikes me that this is so elemental that the court will see the fallacy of any contrary argument. In view of the large amounts of securities—

And by that time large amounts had been deposited with the Guaranty Trust Co. of New York as depositary?

Mr. CALLAWAY. I assume it to be true from that statement in his letter.

Mr. LOWENTHAL (Continuing reading):

it would not be practicable at this time to change the depositaries.

Would you like to look at this letter, Mr. Sunderland?

Mr. SUNDERLAND. No.

Mr. LOWENTHAL. Mr. Sunderland, you agree with the view expressed by Mr. Swaine in the letter I have just read, do you?

Mr. SUNDERLAND. Yes; and I would amplify my answer if you would care to have me do so.

Mr. LOWENTHAL. If you will do that in the record later we will be very glad to have you amplify it.

Mr. SUNDERLAND. All right.

RELATIONS BETWEEN COUNSEL FOR RECEIVERS AND COUNSEL FOR BANKERS—THE LETTER OF OCTOBER 29, 1925, FROM MR. CRAVATH TO MR. SHAW

Mr. LOWENTHAL. Mr. Sunderland, have you known of a large receivership in the past in which counsel for the receivers were writing to counsel for the reorganization managers making suggestions to the latter with a view to making less possible the success of an application by an opposing bondholders' committee for permission to intervene in such receivership proceeding?

Mr. SUNDERLAND. Well, now——

Mr. LOWENTHAL. Would you like to have that question reread to you?

Mr. SUNDERLAND. You are limiting it to this particular subject?

Mr. LOWENTHAL. The committee reporter will read it to you.

(Thereupon the committee reporter read the last foregoing question to the witness.)

Mr. SUNDERLAND. I cannot recall any.

Mr. LOWENTHAL. You have had a great deal of experience in receivership and reorganization proceedings.

Mr. SUNDERLAND. From the standpoint of representing the trustee in a foreclosure proceeding, and to a much lesser extent in connection with representing representatives or owners of securities.

Mr. LOWENTHAL. Representing committees, you mean, and other owners.

Mr. SUNDERLAND. Yes; principally representing Guaranty as trustee.

Mr. LOWENTHAL. That experience goes back over a good many years, does it not?

Mr. SUNDERLAND. Yes. It goes back to 1913 or 1914.

Mr. LOWENTHAL. You have served as a member of the committee of the New York Bar Association dealing with reforms in equity receivership procedure?

Mr. SUNDERLAND. Yes; and as chairman.

Mr. LOWENTHAL. As chairman, also, over a period of more than a year.

Mr. SUNDERLAND. Oh, yes; a much longer time than that. I appeared before the Judiciary Committee as a member of such a committee in the Seventy-first Congress. Would that be about 1930?

Mr. LOWENTHAL. You mean the Judiciary Committee of the House?

Mr. SUNDERLAND. Yes.

Mr. LOWENTHAL. And you have appeared before other public bodies on receivership procedure and reform, at other times?

Mr. SUNDERLAND. I would not say——

Mr. LOWENTHAL. Public or semipublic?

Mr. SUNDERLAND. Semipublic.

Mr. LOWENTHAL. And you have made recommendations as a member of the committee to the Federal court or courts on changes or reforms in equity receivership procedure?

Mr. SUNDERLAND. I have, in that capacity and my individual capacity.

Mr. LOWENTHAL. Mr. Sunderland, what do you think of the propriety of the attorney for the receivers in as large a receivership as this St. Paul receivership, writing to the attorney for the reorganization managers, as was done in this letter of November 10, of which you have a copy before you? Would you rather not answer the question, Mr. Sunderland, or would you rather answer it?

Mr. SUNDERLAND. No; I am willing to answer the question. I am basing it upon my experience in these matters. I am basing my answer upon the assumption—and I make it advisedly—that counsel for the receivers, counsel for a group of bondholders who may or may not have reorganization managers, and counsel for the parties in the proceeding, have one purpose in mind, the expeditious, economical, and proper orderly procedure. If—and I know of no reason to doubt it—this was a thought to protect the procedure properly, although I may not agree with the thought that was in the mind of the writer, as to whether that in any wise was a financial interest or incapacity, I think it was quite in order for him to communicate his views. My approach to all these problems has been that we have the most open and constructive discussion with all parties in interest, and that has been the position of the Guaranty in all these matters, to communicate with all parties, whether we agree with them or not, and keep them fully informed.

Mr. LOWENTHAL. Mr. Sunderland, did you ever know, prior to this morning, that Mr. Shaw had written such a letter to Mr. Swaine as this letter of November 10?

Mr. SUNDERLAND. I never did.

Mr. LOWENTHAL. Assuming that the reorganization managers were not parties to the proceeding——

Mr. SUNDERLAND. They could not have been, Mr. Lowenthal.

Mr. LOWENTHAL. All right. Assuming that, and assuming also that there was a possibility, as mentioned in this letter, that the bondholders opposed to the Kuhn, Loeb plan might seek to intervene, do you think it is proper for the attorney for the receivers to write to the attorney for the reorganization managers suggesting to him methods which would make it more difficult for bondholders opposing the reorganization managers to intervene in the court proceedings? Do you think it is proper or improper, or would you rather not comment on that?

Mr. SUNDERLAND. I want to give you my best judgment in the matter. I do not think you can generalize about it, Mr. Lowenthal.

Mr. LOWENTHAL. Do you think it is proper in some cases? Do you think it might be?

Mr. SUNDERLAND. I think it is in some cases.

Mr. LOWENTHAL. You mean it might be?

Mr. SUNDERLAND. In some cases I think it is.

Mr. LOWENTHAL. Do you think——

Mr. SUNDERLAND. Let me elaborate on that.

Mr. LOWENTHAL. Let me ask you one question first. Do you think it is proper to have it done secretly, without having the matter spread on the records of the court?

Mr. SUNDERLAND. Well, of course, I am so committed to full publicity and opportunity to everyone to know about those things. I do not believe in a secret action.

Mr. LOWENTHAL. Mr. Sunderland, would this letter have been known to you if it had been spread on the records of the court?

Mr. SUNDERLAND. It would have.

Mr. LOWENTHAL. You never heard of it until this morning?

Mr. SUNDERLAND. I never heard of it until this morning.

Mr. LOWENTHAL. Do you think it is fair for the receivers' attorney to write such a letter to the attorney for the reorganization managers and to do it secretly, without the knowledge of the parties to the court proceeding, and without it being spread on the records in the court proceedings publicly and openly? Do you think it is fair? Do you think it could ever be fair?

Mr. SUNDERLAND. I think, from your question——

Senator TRUMAN. Are not the receivers trustees of the property and representing the court?

Mr. SUNDERLAND. They are representing the creditors. They are agents of the court representing the creditors in a creditors' proceeding.

Senator TRUMAN. They are acting for the court.

Mr. SUNDERLAND. They are acting for the court.

Senator TRUMAN. They are not supposed to be acting for any private individual at all, and I think the attorneys are in the same position, are they not?

Mr. SUNDERLAND. The attorneys are in the same position, but in many cases they are acting in the interests of these creditors as well as for the agent of the court.

Senator TRUMAN. My own view is that this is not a proper procedure for the attorneys for the receivers to do. I do not think it is a proper thing for them to do at all. I think the public should have been informed, as well as the attorneys for one set of bondholders.

Mr. SUNDERLAND. I would agree with you if there were any impropriety in the purpose to be accomplished.

Senator TRUMAN. I am not saying that there was any impropriety in the purpose to be accomplished. There may not have been any impropriety in the purpose to be accomplished, but impropriety was in the action itself.

Mr. LOWENTHAL. Mr. Sunderland, was there not also impropriety in trying to help the reorganization managers to keep bondholders opposed to them out of the proceedings as parties? Was there not impropriety in the receivers trying to do that?

Mr. SUNDERLAND. You are relating it to this situation?

Mr. LOWENTHAL. Yes.

Mr. SUNDERLAND. May I answer that in reference to this situation?

Mr. LOWENTHAL. I am just asking you whether there was impropriety or not.

Mr. SUNDERLAND. May I answer?

Senator TRUMAN. Go ahead.

Mr. SUNDERLAND. Mr. Lowenthal, this was a proceeding, up to this time, in which there was a proceeding in behalf of all the bondholders, foreclosing an indenture. It was the ordinary case of the foreclosure of a mortgage. That was its essential character. In that proceeding the trustees under the mortgage were representing all the bondholders. As a result of the proof in that proceeding we devised a method by which there could be a hearing on any plan. Because of our obligation to represent all the bondholders, and our duty, and the law in respect to intervention, we were in a position where we were devoting our best effort to the prompt determination of our foreclosure proceeding. Bear in mind, there was no question of reorganization or plan before the court.

Mr. LOWENTHAL. May I ask you about that? You took the position that there was no——

Mr. SUNDERLAND. There was no plan of reorganization before the court.

Mr. LOWENTHAL. When was this? As of what time?

Mr. SUNDERLAND. The decree was entered in April 1926 which provided for an orderly method for the plan to be brought before the court, and all persons to be heard in respect to it, and up to that time no plan was before the court. That came in under the requirement of the decree that the sale could not be confirmed until the court determined the fairness of the plan. That was the machinery that we created in the final decree. So, there was no plan or no issue before the court dealing with a plan until it came before the court as a result of that procedure.

Mr. LOWENTHAL. Mr. Sunderland, did the bondholders' defense committee urge upon the court that the Kuhn, Loeb plan, and its fairness and soundness, ought to be considered at a much earlier stage than you thought it should be considered by the court?

Mr. SUNDERLAND. Not to my recollection.

Mr. LOWENTHAL. Your firm and Mr. Tenney argued consistently and throughout that until the sale of the property had been effected there was no plan of reorganization before the court, and that the court could not properly consider the Kuhn, Loeb plan.

Mr. SUNDERLAND. I do not think you meant to say "until the sale of the property had been effected." You see, the procedure——

Mr. LOWENTHAL. Until the sale had been held.

Mr. SUNDERLAND. Until the property had been offered, and under the terms of the decree, whatever bid was made was to be brought back and dealt with before you should have an effective sale.

Mr. LOWENTHAL. You mean offered at public sale.

Mr. SUNDERLAND. Offered at public sale.

Mr. LOWENTHAL. The property was offered at public sale in Butte, Mont., was it not?

Mr. SUNDERLAND. Yes; in November of that year.

Mr. LOWENTHAL. In November 1926.

Mr. SUNDERLAND. 1926, I believe.

Mr. LOWENTHAL. I remember reading some newspaper accounts that said it was a very, cold, snowbound affair. Do you remember that, Mr. Sunderland?

Mr. SUNDERLAND. I think the sun was shining, according to my recollection.

Mr. LOWENTHAL. It was cold out there in November.

Mr. SUNDERLAND. It was cold in November.

Mr. LOWENTHAL. Now, Mr. Sunderland, until some time in November 1926 your firm and Mr. Tenney and his firm had throughout argued to Judge Wilkerson that no plan was before the court, and that the request of the bondholders' defense committee that the court should consider the Kuhn, Loeb plan should be denied, in that period until the property had been offered, is that correct?

Mr. SUNDERLAND. We did not argue that there was no plan before the court. The fact was that there was no plan for reorganization before the court. Nor did the court have jurisdiction over anyone that was interested in a plan.

Mr. LOWENTHAL. You did say to the court that there was no plan of reorganization before the court, did you not?

Mr. SUNDERLAND. We stated it as a fact.

Mr. LOWENTHAL. You stated it very often, did you not, in your briefs and in your oral arguments?

Mr. SUNDERLAND. Certainly.

Mr. LOWENTHAL. Let me read you, subject to correction——

Mr. SUNDERLAND. There was no plan before the court.

Mr. LOWENTHAL. Let me read you, subject to correction, Mr. Sunderland, this excerpt. According to the records that we have seen, on the argument on the motion that you made for a sale of the property, the bondholders' defense committee urged that the court ought to hold a hearing, or ought to consider the fairness of the Kuhn-Loeb plan first, and ought not first to order a sale of the property. Do you remember that, Mr. Sunderland?

Mr. SUNDERLAND. I do.

Mr. LOWENTHAL. And according to the copy of the stenographic minutes of that proceeding, you said to the court [reading from "Exhibit No. 2038"]:

> So far as this record is concerned, there is not any plan that we know of or that we have had anything to do with.

That would accord with your general recollection of what you said to the court?

Mr. SUNDERLAND. Yes; but in the context of what I had to say—you cannot take those words simply by themselves.

Mr. LOWENTHAL. What else——

Mr. SUNDERLAND. My recollection was perfectly clear that I was dealing with the record; that so far as the record was concerned there was no plan before the court, and no one interested in a plan before the court, where the court could effectively deal with the proponents of the plan or the plan itself.

Mr. LOWENTHAL. I have here also, Mr. Sunderland, an excerpt from a brief by your firm and Mr. Tenney, dated September 13, 1926, submitted to the court, in which you said [reading from "Exhibit No. 2038"]:

> The petition for intervention—

That was the bondholders' defense committee petition for intervention—

> contains page after page of discussion of the so-called Kuhn, Loeb-National City plan of reorganization, which plan has not yet been brought before the court by the proponents of such plan—

That means by Kuhn, Loeb & Co. and the National City Co. and their counsel.

Mr. SUNDERLAND. That is correct.

Mr. LOWENTHAL (continuing reading from "Exhibit No. 2038"):

> nor in accordance with the provisions of the final decree. Obviously, since such plan is not regularly and properly before the court—

You felt, at that time, September 13, 1926, that the time had not yet come when the plan was properly or regularly before the court; is that correct?

Mr. SUNDERLAND. Yes; and what you read, "nor in accordance with the provisions of the final decree." We were responsible, in working this out so that it could come before the court——

Mr. LOWENTHAL. Later?

Mr. SUNDERLAND (continuing). And all objections to it dealt with effectively.

Mr. LOWENTHAL (reading from "Exhibit No. 2038"):

> Obviously, since such plan is not regularly and properly before the court, any discussion thereof is quite premature and immaterial and irrelevant to this proceeding.

That is taken from one of your briefs.

Mr. SUNDERLAND. Yes; and this proceeding was a foreclosure proceeding, getting to a decree where you could sell the property.

Mr. LOWENTHAL. When that same matter that was in dispute, and on which your brief of September 13, 1926, was submitted, went up to the circuit court of appeals, your brief contained this language:

> No plan of reorganization is before the court.

Do you remember when that matter before the circuit court of appeals was argued?

Mr. SUNDERLAND. No; I do not.

Mr. LOWENTHAL. The brief to the district court was dated September 13, 1926, and this was some time in October or November 1926 do you think—or later?

Mr. SUNDERLAND. I think so. We were speaking as of the situation from which the appeal was taken, as of that situation at that time.

Mr. LOWENTHAL. Mr. Chairman, I offer for the record these excerpts from the briefs, together with the other excerpts referred to.

Senator TRUMAN. It may be received.

(The document referred to was marked "Exhibit No. 2038" and is included in the appendix on p. 7082.)

Mr. LOWENTHAL. Mr. Sunderland, I should like to read to you a portion of an exhibit introduced into the hearings before this subcommittee on December 6, 1937, "Exhibit No. 1933,"[1] which was a copy of a letter from Mr. Paul D. Cravath. He is the head of the firm of Cravath, de Gersdorff, Swaine & Wood.

Mr. SUNDERLAND. I believe so.

[1] See supra, p. 6804 et seq.

Mr. LOWENTHAL. And they were the attorneys for the reorganization managers in the St. Paul receivership, or in the reorganization of 1925–28.

Mr. SUNDERLAND. They were attorneys for the reorganization managers.

Mr. LOWENTHAL. In this letter Mr. Cravath, writing to Mr. Shaw, the attorney for the receivers, says [reading from "Exhibit No. 2038"]:

I read in the Times this morning the inclosed account of Mr. Rosenthal's silly attack on the Kuhn, Loeb-National City plan for the reorganization of the St. Paul Railroad.

Mr. Rosenthal was the attorney for the committee seeking intervention, the Iselin committee.

Mr. SUNDERLAND. Yes.

Mr. LOWENTHAL (continuing reading):

I am very anxious that the court should get no wrong notions of the comparative merits of our plan (which I will call for brevity the present plan) and the so-called Roosevelt plan. I very much hope, therefore, that you will some time take an opportunity of explaining the subject to the court. To that end I inclose for your information—

Then there is a long discussion. The entire letter is in evidence.

Skipping:

The present plan * * * is fair to all interests. * * * I think that these brief observations and after perusing the circulars, you will have the situation clearly in mind and will be in a position to explain it to the court and to Receiver Brundage, which I hope you will do at an early opportunity.

That letter, Mr. Sunderland, is dated October 29, 1925. You will find, on the same sheet that has been handed you, Mr. Sunderland, an excerpt from Mr. Shaw's telegram[1] in answer, dated the very next day. [Reading from "Exhibit No. 2038":]

The matter mentioned in your letter of October 29th has been attended to.

Now, Mr. Sunderland, you were one of the attorneys at the hearing on the application of the Iselin committee in October and November 1925, were you not?

Mr. SUNDERLAND. Yes.

Mr. LOWENTHAL. It was October 29, 30, and 31. Was there called to your attention at that time, or at any time prior to this morning, the letter from Mr. Cravath to Mr. Shaw and the telegraphic answer by Mr. Shaw to Mr. Cravath?

Mr. SUNDERLAND. No.

Mr. LOWENTHAL. You had never heard of those two communications until this morning?

Mr. SUNDERLAND. I never have.

Mr. LOWENTHAL. Do you think it fair, Mr. Sunderland, for the attorney for the reorganization managers to get their reorganization plan secretly to the judge in October 1925 while the attorneys for the trustees are arguing, all the way through 1926, until at least November 1926, that the court ought not to consider the request, ought not to heed the request, of bondholders opposing that plan, that the court should have an open public hearing on the merits of that plan? Do you think it is fair, Mr. Sunderland?

Mr. SUNDERLAND. I think that it was a matter of common knowledge that the owners of these obligations were attempting to work out a plan. They were having discussions. They were communicating to

[1] The entire telegram was introduced as "Exhibit No. 1934," appendix, p. 7033.

the security holders the proposals for reorganization. This was a proceeding in which we, the trustees, or I, in behalf of them, was attempting to get the legal situation to a point where there could be a frank, open discussion of any plan that anyone bid under. I think that if you ascribe to those security holders the purpose of earnestly trying to work out a fair reorganization expeditiously, and someone who disagreed with their effort had attempted to come into a foreclosure proceeding of this kind and interfere with its primary purpose at this stage—and there had been some publicity about it—I can understand the jealousy which those who had worked on such a plan had, in not having the plan misrepresented or misunderstood. If you ask me whether, in a court proceeding, counsel in an ordinary court proceeding should indulge in communications to the court and to receivers, affecting other parties in the proceeding, I want it made perfectly clear that where there is an issue before the court of a character where any disadvantage would be worked in any secret or confidential communication of that kind, I do not think it is fair. But in an equity proceeding, where all are earnestly engaged in working out a complicated situation, and someone endeavors to bring into a proceeding a plan at a time when it was not appropriate or helpful to the interest of creditors to have it brought in, and says something about a plan that it is hoped would be brought in later, I think that anyone who earnestly believed in that plan might, with some reasonable degree of understanding, be thought to properly have said: "I do not want our position, where we are engaging in this work, misrepresented or misunderstood."

Senator TRUMAN. You would not say "with a reasonable degree of propriety," would you?

Mr. SUNDERLAND. Not "with a reasonable degree of propriety," no. But I think you have to take the circumstances——

Senator TRUMAN. I do not think there was any propriety in it at all.

Mr. SUNDERLAND. If your purpose in doing that was to improperly prejudice the judge——

Mr. LOWENTHAL. What do you think the purpose here was, Mr. Sunderland, in sending the judge secretly——

Mr. SUNDERLAND. I do not know, but I assume that if there was a misstatement made—and I do not say that there was—that anyone would be warranted in seeing that the statement was corrected.

Mr. LOWENTHAL. In seeing that it was corrected secretly with the judge, through the receivers' counsel appointed by the judge? Do you really believe that, Mr. Sunderland?

Mr. SUNDERLAND. If you put it on that basis, I say no; but I have already explained——

Senator TRUMAN. That is the proper answer.

Mr. LOWENTHAL. Do you think it was a proper thing for the receivers' counsel secretly to go to the judge with that kind of material?

Mr. SUNDERLAND. If you use the word "secretly"——

Mr. LOWENTHAL. It was a secret, was it not?

Mr. SUNDERLAND. I do not know whether it was secretly or not.

Mr. LOWENTHAL. Mr. Sunderland, you never heard Mr. Shaw say in court——

Mr. SUNDERLAND. So far as this proceeding is concerned, and so far as I am concerned, it was not known.

Mr. LOWENTHAL. You were at all the hearings?

Mr. SUNDERLAND. I was at all the hearings. There were many hearings.

Mr. LOWENTHAL. There were public hearings going on before the court at this very time, were there not?

Mr. SUNDERLAND. There were.

Mr. LOWENTHAL. There was full opportunity at that time for Mr. Cravath or Mr. Shaw to say these things openly and disclose these letters openly, was there not?

Mr. SUNDERLAND. But it was not an issue in the court.

Mr. LOWENTHAL. You mean there could be an issue in the court publicly and not an issue before the judge privately, and there could be an issue before the judge privately and secretly, and not an issue in the court openly? Do you think there can be justice on that basis, Mr. Sunderland?

Mr. SUNDERLAND. I think you have to take the circumstances into consideration, Mr. Lowenthal, when you form an opinion as to the propriety of any act.

Mr. LOWENTHAL. Look at the excerpt from your brief dated September 13, 1926, some 8 or 9 months or more later [referring to "Exhibit No. 2038"].

Mr. SUNDERLAND. May I ask where, Mr. Lowenthal?

Mr. LOWENTHAL. It is on the second page of the material before you. Some 10 months after the letter and the telegram that have just been mentioned, you say to the court, in a brief, that the Kuhn, Loeb plan has not yet been brought before the court by the proponents of such plan. Ten months earlier the attorneys for the proponents of such plan, Kuhn, Loeb & Co., had sent arguments in behalf of that plan, and the plan, I assume, had also been called to the attention of the court by those proponents, secretly and privately.

Mr. SUNDERLAND. Oh, Mr. Lowenthal, I agree with you that if there was the effort on the part of anyone to secretly, by any communication, prejudice the court in his favor, that was reprehensible. On that clear issue there can be no question.

Mr. LOWENTHAL. Mr. Sunderland, you stated to the court in September 1926, 10 months after Mr. Cravath had secretly sent his views in behalf of the Kuhn, Loeb plan to the judge, through Mr. Shaw, that that plan, the Kuhn, Loeb plan, was not regularly and properly before the court. If it was not regularly and properly before the court in September 1926, how could it have been regularly and properly before the court in October 1925?

Mr. SUNDERLAND. Of course it was not, in the sense of regularly and properly, because it was not there under the regular machinery that required any plan to be there.

Mr. LOWENTHAL. Was it not irregularly and improperly before the court, through Mr. Cravath's efforts in October 1925?

Mr. SUNDERLAND. I think you and I are talking about different things.

Mr. LOWENTHAL. Are we?

Mr. SUNDERLAND. I am saying that before the court in the proceeding the plan was not there. If you say that it was the purpose of Mr. Cravath or anyone else to bring the plan secretly before the court prior to that——

Mr. LOWENTHAL. Don't you so gather from this correspondence, that it was his purpose to so do?

Mr. SUNDERLAND. I do not so gather. I gather, as I stated earlier, that an attempt had been made to bring certain objections to a plan that was not before the court, and could not have been, into discussion to influence the judge: and I take it that the purpose in commenting upon this—and all I have said is on that assumption—the purpose was to overcome any impression that might have been created in the minds of the court, the public or anyone else in that endeavor. There can be no dispute between you and me as to the fullest disclosure and regularity with which a matter of this kind should be brought into a court proceeding. It could not be brought secretly by conversations with the court or receivers, without the fullest opportunity to everyone to be heard and to participate in them.

Mr. LOWENTHAL. Mr. Sunderland, your views, as one experienced in this field, are valuable. Do you think it was proper procedure for Mr. Cravath to send this letter to Mr. Shaw, and for Mr. Shaw to take those data to the judge, as was done in October 1925?

Mr. SUNDERLAND. If his purpose was to influence the court, it was not.

Mr. LOWENTHAL. Do you think, when he says in his letter to Mr. Shaw, "I am very anxious that the court should get no wrong notions of the comparative merits of our plan and the so-called Roosevelt plan," that Mr. Cravath was not trying to get what he believed to be right notions on that contested subject to the judge?

Mr. SUNDERLAND. I do not want to be repetitious, Mr. Lowenthal, but I am trying to give you my honest and best opinion in this matter. There had been an attempt to deal with a plan that was not at issue in the proceedings, and certain comments had been made in regard to it. I assume that that was the incident that resulted in those who were working on the plan trying to overcome any impression that they may have gotten with respect to the matter, by having the matter frankly and clearly understood. Now, if there was any purpose in Mr. Cravath or anyone else to influence the court on a plan that was ultimately to come before the court, I say that was reprehensible.

Mr. LOWENTHAL. Mr. Sunderland, I will hand you full copies of Mr. Cravath's letter to Mr. Shaw of October 29, 1925, and Mr. Shaw's reply telegram of October 30, 1925, and if later today, or at some subsequent day, you would like to offer comments for the record, we would be obliged to you if you would let us know.

One further question. Mr. Sunderland, Judge Wilkerson upheld your contention and rejected the bondholders' defense committee contention on the question whether the Kuhn, Loeb plan ought to be considered before the court, in open court, early in 1926.

Mr. SUNDERLAND. And prior to any bid made thereunder, under the provisions of the decree; yes.

Mr. LOWENTHAL. But, as it turned out, it was an issue as to whether it could be heard prior to November 1926 or thereafter.

Mr. SUNDERLAND. Yes; and he was sustained by the circuit court of appeals and the United States Supreme Court, and also by the other judges. You remember there were five other judges in this case.

Mr. LOWENTHAL. I am coming to that. Throughout the period until November 1926 the Jameson committee, or the bondholders' defense committee, was constantly urging or frequently urging on

Judge Wilkerson that the Kuhn, Loeb plan should be considered publicly in the court proceedings, and you were constantly or frequently urging the contrary; is that correct?

Mr. SUNDERLAND. Not exactly. We were proceeding as rapidly as we could to a situation where the bondholders' defense committee plan or the other plan could, in an effective, orderly way, come before the court and be dealt with.

Mr. LOWENTHAL. Mr. Sunderland, I understood you to say that, as it turned out, no plan could properly have been considered by the court prior to November 1926 or until some time thereafter. As it turned out, the property was not offered until November 1926.

Mr. SUNDERLAND. Yes; and I do not think the report came in until some time later, for consideration of the plan.

Mr. LOWENTHAL. Until that time, in November 1926, or some subsequent time, it would have been, in your view and the view that you expressed to the court throughout 1926, improper to have the Kuhn, Loeb plan considered by the court in open hearing; is that correct?

Mr. SUNDERLAND. Where the plan was not brought before the court in an effective way, it was improper to have considered it.

Mr. LOWENTHAL. Mr. Sunderland, let me put it to you this way: At various times in 1926, until November 1926, the Jameson committee was urging on the court that at the time of such urging, and as early as possible, the court ought to have a public hearing on the merits and demerits of the Kuhn, Loeb plan, is that correct?

Mr. SUNDERLAND. They were urging that position.

Mr. LOWENTHAL. At all times that they so urged, you were opposing that contention, were you not?

Mr. SUNDERLAND. No; not exactly, Mr. Lowenthal. I was not taking any position in behalf of these trustees as to a hearing on that plan. There was no party acting under a plan in the court. There was an effort on the part of these intervenors to obtain a position to hold up an orderly procedure on an enforcement of the mortgage until some plan was dealt with by the court.

Mr. LOWENTHAL. Mr. Sunderland, when the Jameson committee, in the early part and middle part of 1926, said to the judge, "This is the time when you ought to consider in public hearing the merits and demerits of the Kuhn, Loeb plan," you said, "It is not the time." Is that correct? For whatever reasons, you said it You did say it, did you not?

Mr. SUNDERLAND. I do not think I said it that way at all.

Mr. LOWENTHAL. But you did say it was not the time to consider that plan or any plan in a public hearing?

Mr. SUNDERLAND. No; I do not think I ever took that position. I took this position, that until you could deal effectively with a plan the proceeding should not be held up until that plan came before th court in a manner whereby the court could effectively deal with ite I remember that Judge Wilkerson said, "If they bring in the plan I am prepared to consider it," in effect. But no plan was brought in. What could I do?

Mr. LOWENTHAL. When did he say that?

Mr. SUNDERLAND. My recollection is that he said it at one of these hearings on the intervention proceeding.

Mr. LOWENTHAL. At what time in 1926?

Mr. SUNDERLAND. My recollection is that it was some time about early March 1926, when the proofs had been taken and we were proposing a decree which provided for the bringing in of a plan.

Mr. LOWENTHAL. Mr. Sunderland, when the Jameson committee urged, in the spring and summer of 1926, on various occasions, that then was the time for the court to have a public hearing on the Kuhn, Loeb plan, the court overruled the Jameson committee's contentions, or decided against the Jameson committee, is that correct?

Mr. SUNDERLAND. That is correct.

Mr. LOWENTHAL. Do you think it was fair, Mr. Sunderland—and if you prefer not to answer this question I will not press it in its present form—do you think it was fair for a Federal judge to overrule, on an issue of that kind, the opponents of the Kuhn, Loeb plan, when months earlier, he had already secretly received, through the receivers' attorney, arguments of the Kuhn, Loeb lawyers in support of that plan?

Mr. SUNDERLAND. I think the way you put the matter, the question of fairness is an entirely different question from the question of propriety.

Mr. LOWENTHAL. Would you answer the question, or tell me whether you care not to answer it?

Mr. SUNDERLAND. Would you read the question again?

(The reporter read the pending question.)

Mr. SUNDERLAND. In the circumstances that existed I think that the matter of acting on the application to consider a plan which was not before the court, and the other elements dealing with the intervention, were quite a different matter, and that he properly ruled on that aspect of the matter. If your question relates to the question of arguments on a plan, the pure question, irrespective of the proceeding—if it relates to that, of course I do not think it was fair for him to hear arguments against the plan, and then to hear arguments in favor of it, and to make any distinction between the two.

Mr. LOWENTHAL. Mr. Sunderland, you referred——

Mr. SUNDERLAND. But your question involves always the other elements dealing with an intervention, Mr. Lowenthal, in this proceeding. Your question was based upon whether the court fairly protected the proceeding and excluded the intervention. That is a different question than the hearing, or hearing criticisms of a plan that was not before him, that was to come before him. I think, if I understand your question, I certainly do not think it was fair and proper to give one person who proposed something, and one who objected to it, any different treatment.

Mr. LOWENTHAL. Mr. Sunderland, you said a few minutes ago that on various points, such as the request of the bondholders' defense committee for permission to intervene, the circuit court of appeals had ruled in the same way that Judge Wilkerson ruled. Do I recollect your testimony correctly?

Mr. SUNDERLAND. That is my recollection.

Mr. LOWENTHAL. And that whenever the Jameson committee, or the bondholders' defense committee, tried to bring the issue before the circuit court of appeals, or even the Supreme Court of the United States, it was unsuccessful. Is that correct?

Mr. SUNDERLAND. It brought the matter before the court. You mean as to——

Mr. LOWENTHAL. It was unsuccessful in its contention.

Mr. SUNDERLAND. Unsuccessful in its contention.

Mr. LOWENTHAL. Do you know whether the record on appeal before the circuit court of appeals and before the United States Supreme Court in any of those proceedings in which the appellate courts ruled against the bondholders' defense committee, showed in any way whatsoever that Judge Wilkerson had secretly received the arguments of the attorneys for the bankers in support of their plan and in opposition to the opponents of their plan, as early as October 1925?

Mr. SUNDERLAND. I am pretty clear in my recollection of the records, and I am quite certain that they did not, because I think I would have known of it, and I did not know of this attempt until you told me about it this morning.

Mr. LOWENTHAL. And if there had been anything in the records on appeal, or in the briefs—either excerpts from these communications between Mr. Shaw and Mr. Cravath, or any other communications, or any reference to them, you would have known of it?

Mr. SUNDERLAND. I am quite clear that I would have, but I do not think it could have been in that record, Mr. Lowenthal.

Senator TRUMAN. I think this is a matter that the Judiciary Committee of the House ought to take a look into. As it appears on the surface, it is a matter for impeachment, in my opinion.

Mr. LOWENTHAL. By the way, Mr. Sunderland, the Jameson committee, or the bondholders' defense committee, when it finally went to the United States Supreme Court, was turned down by that Court some time in November 1927.

Mr. SUNDERLAND. If that is the fact, that would seem to be about right.

Mr. LOWENTHAL. They petitioned the Court to consider the case, and the Court rejected the petition for a writ of certiorari.

Mr. SUNDERLAND. Yes.

Mr. LOWENTHAL. I should like to offer for the record, Mr. Chairman, a copy of a telegram from Mr. Shaw to Mr. Swaine, dated November 28, 1927, following upon that victory by the reorganization managers.

Senator TRUMAN. It may be received.

(The letter referred to was marked "Exhibit No. 2039" and is included in the appendix on p. 7083.)

Mr. LOWENTHAL. This telegram reads as follows [reading]:

> Hearty congratulations over results in St. Paul. You fought a long hard fight and while it is sometimes better to compromise rather than to litigate, nevertheless in the particular case I am very glad that instead of settling you had the courage, confidence, and tenacity of purpose to win. With regards and best wishes.

Mr. Shaw wanted to get away yesterday. We did not feel that we could insist on his staying, but I assume that that telegram of congratulation was paid for by the St. Paul receivership estate. I am noting it for the record so that if anyone knows to the contrary—Mr. Shaw's firm or anybody else—they can advise us.

Senator TRUMAN. That can be corrected if it is not the truth.

Mr. LOWENTHAL. I also offer for the record, Mr. Chairman, a copy of the answer of Mr. Swaine to Mr. Shaw, dated November 29, 1927.

Senator TRUMAN. It may be received.

(The letter referred to was marked "Exhibit No. 2040" and is included in the appendix on p. 7083.)

Mr. LOWENTHAL. This telegram reads as follows [reading]:

> Many thanks for your cordial telegram. The result has been achieved by "team play" in which you know that I feel you have had a real part.

Did you know, Mr. Sunderland, or Mr. Callaway—let me ask Mr. Callaway first. Did you know at any time that there was "team play" going on between Mr. Swaine and Mr. Shaw in connection with the court fights or the fights between the bondholders' defense committee and any other groups?

Mr. CALLAWAY. Certainly none in which I had any part.

Mr. LOWENTHAL. You did not know of any team play between them?

Mr. CALLAWAY. No.

Mr. LOWENTHAL. Did you, Mr. Sunderland?

Mr. SUNDERLAND. No.

Mr. LOWENTHAL. Don't you think, Mr. Sunderland, that if there was team play between attorneys for the reorganization managers and the attorneys for the receivers in connection with a fight against the reorganization managers' plan by bondholders, that the fact of that team play should have been publicly known to all the parties, including the opposing bondholders, and should have been made a matter of record in the proceedings?

Mr. SUNDERLAND. Yes. I think that all the activities that were pertinent to the proceedings should have been made a part of those proceedings.

Mr. LOWENTHAL (continuing reading from "Exhibit No. 2040"):

> I am hoping that we will get the I. C. C. order not later than December 10, that the matter of allowances can be worked out during the current year—

That means the fees for counsel and others, Mr. Sunderland?

Mr. SUNDERLAND. I assume so. I do not know, except what it says here.

Mr. LOWENTHAL (continuing reading):

> and that the property can be turned over to the new company on January 1. Indeed, so optimistic am I—

By the way, Mr. Sunderland, on November 29, 1927, the Interstate Commerce Commission had not yet decided that the reorganization securities, the issuance of which was necessary for the consummation of the plan, could properly be issued?

Mr. SUNDERLAND. I do not recall the date. I should think very likely not.

Mr. LOWENTHAL. They did not decide that until January 1928.

Mr. SUNDERLAND. If that is the correct date. It accords with my recollection.

Mr. LOWENTHAL. I call your attention and the attention of the chairman to the fact that Mr. Swaine's letter to Mr. Shaw, after referring to what he expects from the Interstate Commerce Commission, says [reading from "Exhibit No. 2040"]:

> Indeed, so optimistic am I that I have booked passage on the France for Africa, sailing January 7. Can't you come along?

GUARANTY TRUST CO.'S ACTIVITIES AS CORPORATE TRUSTEE—EXTENT OF PARTIALITY IN REPRESENTING BONDHOLDERS IN VIEW OF DIVERSE INTERESTS

Mr. LOWENTHAL. Mr. Sunderland, some time at the end of 1926 or in 1927 the court finally held a public hearing at which the fairness or unfairness, soundness or unsoundness, merits or demerits of the Kuhn, Loeb reorganization plan were publicly considered; is that correct?

Mr. SUNDERLAND. Yes; upon the coming in of the report of the master on the bid made thereunder.

Mr. LOWENTHAL. It was in 1927, Mr. Sunderland?

Mr. SUNDERLAND. I cannot recall whether it was in 1926 or 1927.

Mr. LOWENTHAL. Mr. Swaine——

Mr. SUNDERLAND. It may have been in January.

Mr. LOWENTHAL. Mr. Swaine, do you recollect about when the first public hearing on the Kuhn, Loeb plan, or the Kuhn, Loeb-National City plan, was held before Judge Wilkerson?

Mr. SWAINE. It was some time after the sale in Butte. I do not remember the exact day.

Mr. LOWENTHAL. Mr. Sunderland, in those proceedings the bondholders' defense committee or the Jameson committee was opposed to the Kuhn, Loeb reorganization plan, was it not?

Mr. SUNDERLAND. They proposed certain modifications to it. I do not know whether they opposed the plan in its entirety. They asked that certain modifications be made in it.

Mr. LOWENTHAL. They opposed the plan as it stood, did they not?

Mr. SUNDERLAND. As it then stood.

Mr. LOWENTHAL. And Judge Wilkerson overruled them, decided against them, did he not?

Mr. SUNDERLAND. Not on the basis of their ideas regarding the plan. The question before Judge Wilkerson was whether they were entitled to be made a party to the proceeding.

Mr. LOWENTHAL. I think, Mr. Sunderland, you might want to correct that. Perhaps you misunderstood me.

Mr. SUNDERLAND. I am sorry.

Mr. LOWENTHAL. At the time of the hearing on the fairness or equitableness of the plan itself——

Mr. SUNDERLAND. I beg your pardon. Yes.

Mr. LOWENTHAL. They contended in opposition to the plan as it stood.

Mr. SUNDERLAND. That is correct.

Mr. LOWENTHAL. And Judge Wilkerson overruled them.

Mr. SUNDERLAND. That is correct. I am sorry.

Mr. LOWENTHAL. And the Jameson committee tried to get a different decision from the circuit court of appeals and failed, did it not?

Mr. SUNDERLAND. That is correct.

Mr. LOWENTHAL. Then it tried to get the Supreme Court of the United States to consider the plan, and the Supreme Court declined to grant the petition for a writ of certiorari.

Mr. SUNDERLAND. But it came up on technical questions. I do not know whether——

Mr. LOWENTHAL. Mr. Sunderland, I should like to read to you from the brief which you and Mr. Tenney submitted in the proceedings before Judge Wilkerson at the hearing on the fairness of the Kuhn, Loeb plan. First, I offer for the record excerpts from the brief dated December 31, 1926, submitted to the United States district court in reply to the brief filed by the bondholders' defense committee against the plan, and also from the brief dated May 18, 1927, submitted to the United States circuit court of appeals in the same proceeding.

Senator TRUMAN. It may be received.

(The document referred to was marked "Exhibit No. 2041" and is included in the appendix on p. 7083.)

Mr. LOWENTHAL. In your brief dated December 31, 1926, submitted to Judge Wilkerson, you stated [reading from "Exhibit No. 2041"]:

> The Trustees stated at that time and reiterate here that as such Trustees they neither approve nor disapprove the Plan.

Mr. SUNDERLAND. That is correct.

Mr. LOWENTHAL. This was a proceeding before the judge before whom you had opposed the application for intervention submitted by the bondholders' defense committee; is that correct?

Mr. SUNDERLAND. Yes.

Mr. LOWENTHAL. You also stated in this brief [reading further]:

> Consistent with the position maintained by the Trustees throughout the foreclosure proceedings they do not now undertake to express any view as to the equity or fairness of the Plan now being considered by this Court.

Mr. SUNDERLAND. That is correct.

Mr. LOWENTHAL. You in fact said that it was not the function, and would not be proper for the trustees to take a position for or against the plan.

Mr. SUNDERLAND. At that stage of the procedure it would not.

Mr. LOWENTHAL. I want to read to you some excerpts from your brief submitted to the United States circuit court of appeals in the same proceeding, when the Jameson committee tried to get the United States circuit court of appeals to decide that the Kuhn, Loeb plan should be rejected. In your brief dated May 18, 1927, you stated in part as follows [reading from "Exhibit No. 2041"]:

> these Trustees * * * have not and do not now attempt to express the views of any bondholder in respect to the equity of the Plan of Reorganization.

That conforms to your recollection?

Mr. SUNDERLAND. That conforms to my recollection.

Mr. LOWENTHAL. Do you remember appearing subsequently before the Interstate Commerce Commission on the application of the new St. Paul Co. to the Commission for authorization to issue the securities for effectuation of the Kuhn, Loeb plan?

Mr. SUNDERLAND. I do.

Mr. LOWENTHAL. Is it correct to say that if the Commission had declined to authorize the issuance of those securities the plan could not have been effectuated?

Mr. SUNDERLAND. That is correct; and there would have had to be a resale of the property.

Mr. LOWENTHAL. Is it correct to say also that the Commission in that proceeding actually considered whether the plan was a sound plan or an unsound plan, a fair one or an unfair one?

Mr. SUNDERLAND. Within the limitations of the submission of it to the Commission, as to whether it was in the public interest to issue the securities provided for therein.

Mr. LOWENTHAL. The issue as to whether the plan was fair and sound was argued in the briefs submitted to the Commission by the various groups opposing and supporting the plan, and was considered by the Commission in its decision.

Mr. SUNDERLAND. I believe so.

Mr. LOWENTHAL. That application was made by the Chicago, Milwaukee, St. Paul & Pacific Railroad Co.

Mr. SUNDERLAND. Correct.

Mr. LOWENTHAL. That was an application requesting the Commission to authorize the issuance of those securities.

Mr. SUNDERLAND. That is correct.

Mr. LOWENTHAL. That application was for the purpose of effectuating the reorganization plan, the Kuhn, Loeb plan.

Mr. SUNDERLAND. That is correct.

Mr. LOWENTHAL. Do you remember that in that proceeding you appeared before the Commission in behalf of the trustees and supported that application?

Mr. SUNDERLAND. I do.

Mr. LOWENTHAL. Mr. Chairman, I have already offered for the record excerpts from the briefs submitted by Mr. Sunderland and Mr. Tenney, or their firms, in reference to the proceeding before the Commission.

Mr. SUNDERLAND. In connection with that may I point out that this plan was the plan under the decree; that the trustees for whom I was acting represented over 80 percent of the securities which had been issued under this plan, as being the plan that they had approved; that the plan and all objections thereto had been pursuant to the machinery of our decree, fully heard by the court, and by the appellate court; that the sale had taken place and that the position of the trustees, after the vesting of the property, under that machinery, in the purchaser, the new company, was, in our judgment, necessarily the position of supporting the position of the purchaser, and our position, therefore, changed after the sale and after the matter had been approved by the court and was before the Commission.

Mr. LOWENTHAL. Mr. Sunderland, you say your position had changed, but is it not correct that before the district court, in a brief dated December 31, 1926, after the property had been offered for sale and when the court was already considering the fairness of the plan, you told the district court that you took no position on the plan at all?

Mr. SUNDERLAND. Exactly, because that was the question of fairness that was before the court, and he was to determine it on the basis of the views of those bondholders who supported it and those who opposed it. But when it had been determined in accordance with the decree, as a fair and equitable plan, and the sale had been confirmed and the property had been acquired and was vested in the new company, if we had not supported that plan before the Commission in connection with the issuance of the securities, we would have been in the position of tearing down this whole transfer of property in which we had been engaged in seeing brought about, so far as the foreclosure of the mortgage was concerned.

Mr. LOWENTHAL. Mr. Sunderland, before the property was actually transferred—is that the date you are thinking of, before or after, when you are allowed to change your position?

Mr. SUNDERLAND. The purchaser was obligated to take, and he had bought the property. I am not sure about the specific date of the delivery of deeds. I think that occurred some time later.

Mr. LOWENTHAL. What is the dividing line? What circumstance creates the dividing line prior to which it is not proper for you to do anything to help put through the plan, and subsequent to which it is proper for you to endeavor to get the property taken over by persons or corporations for the effectuation of that plan?

Mr. SUNDERLAND. As I have said before, when the property has been sold under the decree, and the fairness of the plan and all the other questions which deal with the propriety of vesting the title in a purchaser as the resulting incident of a foreclosure proceeding have been considered and decided, and when that purchaser, in order to follow through, is dependent upon the issuance of the securities which would be delivered against the property, it seems to me that our position at that time necessarily is that where a sale has been had under those circumstances, the purchaser and the plan under which he purchases—the two are tied up in one thing—he should be permitted to go forward and issue the securities necessary to get the title.

Mr. LOWENTHAL. Did that event that created or constituted the dividing line, in point of time, follow after the Supreme Court, by its rejection of the petition of the bondholders' defense committee for a writ of certiorari, had made it clear that so far as the courts were concerned, the plan had gone through and the bondholders' defense committee had been defeated?

Mr. SUNDERLAND. I cannot say. I do not think that was a matter—I cannot say. My recollection is not clear as to when that happened.

Mr. LOWENTHAL. Is the dividing line between the time subsequent to which you can support a plan and prior to which you may not properly do so as trustees based upon some event that followed the decision of the district court upholding the fairness of the Kuhn, Loeb plan?

Mr. SUNDERLAND. No.

Mr. LOWENTHAL. Would that have come prior to the time when the district court decided that the Kuhn, Loeb plan was all right?

Mr. SUNDERLAND. I do not think those are the considerations that determined what you call the dividing line.

Mr. LOWENTHAL. I am trying to find out when it happened. When was the event that created the division for you, so that prior to that attempt it would not have been proper for you to support the plan, but subsequent to that event it would be proper? When was that, can you tell us?

Mr. SUNDERLAND. Yes. I cannot as to date.

Mr. LOWENTHAL. Can you give us some approximate notion of it?

Mr. SUNDERLAND. I will attempt to give it to you approximately; but after the decree had afforded an opportunity for all the security holders whom we had represented to be heard with respect to the fairness of the plan and the other questions which were essential to be determined before a sale could be confirmed—after that opportunity had been regularly and effectively accorded, and the courts had sustained——

Mr. LOWENTHAL. The courts or court?

Mr. SUNDERLAND. The court had sustained——

Mr. LOWENTHAL. The district court, Judge Wilkerson?

Mr. SUNDERLAND. Yes—had sustained the fairness of the plan, and the sale had been confirmed——

Mr. LOWENTHAL. By Judge Wilkerson.

Mr. SUNDERLAND. Yes. Then I think that the trustees in the foreclosure proceeding, as a result of all that, were bound to recognize the position of the purchaser.

Mr. LOWENTHAL. Was that before or after the circuit court of appeals had ruled in support of the Kuhn, Loeb plan?

Mr. SUNDERLAND. I think it was after.

Mr. LOWENTHAL. Don't you think, Mr. Sunderland, looking at the excerpts before you from your brief to the circuit court of appeals, that you were in effect saying to the circuit court of appeals: "We as trustees would really like you to go the same way Judge Wilkerson did on this reorganization plan of Kuhn, Loeb?" Would you mind looking at the excerpts before you, Mr. Sunderland?

Mr. SUNDERLAND. That excerpt is on the second page that you refer to?

Mr. LOWENTHAL. It is on the first page. It is taken from pages 6, 14, 15, and 19 of your brief to the circuit court of appeals, and it flows over onto the second page of those excerpts before you.

Mr. SUNDERLAND. Will you read the question, please?

(The reporter read the pending question.)

Mr. SUNDERLAND. No; I think not, Mr. Lowenthal. We were not taking a position on the merits of the plan. It is perfectly clear that we were anxious to see that the orderly procedure that had brought about this result—unless there was some inequity in it—should be maintained.

Mr. LOWENTHAL. Mr. Sunderland, someone said here yesterday that there can be differences of opinion; but I say to you that the excerpts here and your testimony of a few minutes ago on your position before the Interstate Commerce Commission indicate to me that you were gradually moving over. Before the district court you had constantly said that the bondholders' defense committee should not be allowed to intervene. You constantly said, in support of that position, that you were fair and impartial, and took no sides in that court. You said you took no position on the Kuhn, Loeb plan. In the circuit court of appeals you were saying to the appellate court: "Well, you ought to be awfully careful before you upset what Judge Wilkerson has ruled." And before the Interstate Commerce Commission you said, in effect: "Please grant the application so that the Kuhn, Loeb plan can be put through."

That is the way it strikes me.

Mr. SUNDERLAND. Mr. Lowenthal——

Mr. LOWENTHAL. I say that so that you can comment if you wish.

Mr. SUNDERLAND. Yes; I should like to comment on that. I have already pointed out to you—and I shall not be repetitious—the position of these trustees. They were trustees on a mortgage which gave them the responsibility and duty of enforcing the indenture. They went forward with their proofs. They believed it to be in the security holders' interest and the public interest to get a decree which would permit a sale and get this property out of the courts as soon as possible. Now, when, in the course of that regular foreclosure proceeding, an effort was made to bring in a dispute in respect to a matter that was

not properly or effectively before the court, which would delay that proceeding, and when claims were made which were not supported by the law, as to the right of anyone who attempted thus to interfere with the regular procedure, and the court protected that procedure and got a decree, throughout that time we were zealously endeavoring to prevent any interference with that procedure, not because it had to do with a plan. Our position, again and again, was very clear on that. We did not participate in the discussion of the plan. The merits, or whether that intervention was allowed or not, had nothing to do with their views on the plan.

When we provided in that decree for an effective, expeditious time when the views of the security holders could be effectively dealt with, and they were dealt with, and a sale took place and the property was about to be vested in the purchaser, very naturally we were jealous of protecting the work that we had done so far as a decree of sale was concerned. And when, after all this hearing, the matter came before the Interstate Commerce Commission to issue those securities, I think you will find, in other places in my brief, that I clearly set forth our position in substance before the Interstate Commerce Commission as I have now. We were certainly anxious to have this sale held under those circumstances, and the plan under which such a large percentage of our security holders had indicated their approval, carried into effect. In order to do that these securities had to be approved by the Commission. It was a progressive matter.

Mr. LOWENTHAL. Mr. Sunderland, I believe you testified a little while ago that on the subject of the fixing of the date for sale of the property, the bondholders' defense committee claimed that the position that you and Mr. Tenney and the Guaranty Trust Co. and Mr. Callaway were taking was hostile to the interests of the bondholders' defense committee and favorable to the interests of the Kuhn, Loeb group and their plan.

Mr. SUNDERLAND. They made that claim, but we denied that that was so.

Mr. LOWENTHAL. Mr. Chairman, I offer for the record excerpts from the diary slips of Cravath, de Gersdorff, Swaine & Wood, and from the affidavit submitted by Mr. Sunderland in the court proceeding.

Senator TRUMAN. It may be received.

(The document referred to was marked "Exhibit No. 2042" and is included in the appendix on p. 7084.)

Mr. LOWENTHAL. You did submit such an affidavit, did you not, Mr. Sunderland?

Mr. SUNDERLAND. Will you indulge me a moment? [After examining papers.] Yes.

Mr. LOWENTHAL. Mr. Sunderland, the bondholders' defense committee criticized, did it not, the Guaranty Trust Co. as hostile to the bondholders' defense committee, by reason of the affidavit that you made and submitted to the court?

Mr. SUNDERLAND. Will you read that again?

(The reporter read the pending question.)

Mr. SUNDERLAND. They may have. I do not recall.

Mr. LOWENTHAL. Did you confer with the attorneys for the reorganization managers in connection with the preparation of that affidavit, Mr. Sunderland?

Mr. SUNDERLAND. I did.

Mr. LOWENTHAL. And they assisted you in preparing that affidavit?

Mr. SUNDERLAND. I think they very likely did. May I comment on that?

Mr. LOWENTHAL. Please.

Mr. SUNDERLAND. The affidavit was with reference to——

Mr. LOWENTHAL. Will you wait just a moment?

May I offer for the record at this point, Mr. Chairman, an exhibit prepared by the staff of the subcommittee, referring to the date of Mr. Sunderland's affidavit on the upset price and sale matter on which the bondholders' defense committee was opposed to Mr. Sunderland's position, and excerpts from the diaries of Cravath, de Gersdorff, Swaine & Wood.

Senator TRUMAN. It may be received.

(The document referred to was marked "Exhibit No. 2043" and is included in the appendix on p. 7085.)

Senator TRUMAN. Proceed, Mr. Sunderland.

Mr. SUNDERLAND. This was either just after or about the time that the representatives of the bondholders, and I think representatives of the managers, requested that under the decree that had been entered, the foreclosure decree, which required the fixing of the time of sale and the fixing of upset prices, it should be brought on for the consideration of the court as to when he would fix the time and those upset prices. In that connection, either informally—I think it was in open court, in some hearing—in any event, it was well known that such a hearing as was contemplated by the decree was shortly to be held—the court asked, or Judge Wilkerson asked, what had been done by judges in other circuits in other matters, and responsive to that, I undertook to get the amounts of the upset prices in the decrees with relation to the market value of the securities just prior to reorganization, not only on matters that I was familiar with, but other receivership proceedings of railroads. In that connection I communicated with the attorneys that had to do with generally similar matters. I assume that these conferences were with respect to this request that the matter be brought on for the fixing of the time of sale and the upset prices.

Mr. LOWENTHAL. Are you through, Mr. Sunderland?

Mr. SUNDERLAND. Yes.

ISSUE OF GUARANTY TRUST CO.'S IMPARTIALITY RAISED IN COURT PROCEEDINGS—DIVERSE INTEREST NOT DISCLOSED

Mr. LOWENTHAL. Mr. Callaway, you swore to an affidavit submitted to Judge Wilkerson in these proceedings?

Mr. CALLAWAY. At one time; yes.

Mr. LOWENTHAL. An affidavit dated September 11, 1926.

Mr. CALLAWAY. I do not remember the date.

Mr. LOWENTHAL. Excerpts from it have already been introduced in evidence.[1]

Mr. CALLAWAY. You have it there.

Mr. LOWENTHAL. You have excerpts before you.

Mr. CALLAWAY. All right.

[1] See "Exhibit No. 2035," p. 7080.

Mr. LOWENTHAL. Would you refer to those excerpts? They are headed "Excerpts from Statements Submitted by Guaranty Trust Co. and M. P. Callaway."

Mr. CALLAWAY. Is that the last one? There is no heading on mine.

Mr. LOWENTHAL. It is a little earlier. It is a two-page statement. In that affidavit you stated, according to the copy of the excerpts before you, Mr. Callaway, that the trustees, namely, yourself as individual trustee and Guaranty Trust as corporate trustee, "are competent, ready, and willing to enforce the rights of such bonds without selection or favor."

You also stated in your affidavit that you denied that the Guaranty Trust Co. is not in a position to represent fairly the interests of bondholders who have not deposited their bonds under said deposit agreement or said reorganization agreement.

The "said deposit agreement" was the deposit agreement of the Ecker bondholders' committee, was it not?

Mr. CALLAWAY. Yes, sir.

Mr. LOWENTHAL. That committee was supporting the Kuhn, Loeb plan.

Mr. CALLAWAY. Yes.

Mr. LOWENTHAL. The reorganization agreement referred to in the excerpt was the Kuhn, Loeb reorganization agreement.

Mr. CALLAWAY. Yes.

Mr. LOWENTHAL. You denied in this affidavit that the Guaranty was not in a position to represent fairly the interests of the bondholders who had not supported that Kuhn, Loeb plan.

Mr. CALLAWAY. I did.

Mr. LOWENTHAL. There were at that time bondholders who were opposing the Kuhn, Loeb plan.

Mr. CALLAWAY. Yes, sir.

Mr. LOWENTHAL. This affidavit was submitted to the judge before whom that fight was running almost continuously for many months.

Mr. CALLAWAY. Yes.

Mr. LOWENTHAL. Mr. Callaway, did you, at any time while that fight was on, and while this affidavit was under consideration, tell the court about the conferences that Mr. Harold Stanley had been holding with Mr. Hanauer to get as good a mortgage trusteeship as possible under the Kuhn, Loeb reorganization plan?

Mr. CALLAWAY. No, sir.

Mr. LOWENTHAL. You never told the court anything about your efforts to get from the reorganization managers of the Kuhn, Loeb plan the best possible trusteeship?

Mr. CALLAWAY. No, sir.

Mr. LOWENTHAL. Do you know whether anybody else told the court, in behalf of Guaranty Trust?

Mr. CALLAWAY. Not that I know of.

Mr. LOWENTHAL. Mr. Sunderland, do you know whether the court was informed of that at any time?

Mr. SUNDERLAND. Not to my knowledge. I do not know that I knew about it myself.

Mr. LOWENTHAL. Do you know whether Mr. Tenney ever told the court?

Mr. SUNDERLAND. I do not think he would have known, except through me. I do not think he knew.

Mr. LOWENTHAL. Do you know whether Mr. Tenney ever had any conferences with Judge Wilkerson in connection with any matters relating to this St. Paul receivership proceeding, which conferences were not held in public and in the presence of all the parties to be present, or of opposing bondholders?

Mr. SUNDERLAND. Do you mean conferences on some substantial matter, other than adjournment, or such matters?

Mr. LOWENTHAL. Yes; whether he made any comments to the judge at any time in private on the proceeding.

Mr. SUNDERLAND. Not to my knowledge.

Mr. LOWENTHAL. Can you say definitely that he did not?

Mr. SUNDERLAND. I cannot say definitely that he did not.

Mr. LOWENTHAL. Mr. Sunderland, I should like to refer to your affidavit, excerpts from which also appear in the exhibit just referred to. In your affidavit you told the court, in effect, that the Guaranty Trust Co. has no financial or other commitments placing it in an inconsistent position to the situation.

Don't you think, Mr. Sunderland, that when Guaranty Trust Co. is actively engaged in a highly competitive race to get a mortgage trusteeship under the Kuhn, Loeb plan from Mr. Hanauer, and to get the best possible mortgage trusteeship that he is willing to give them, that they have acquired a position, and, after they get tentative assurances of a trusteeship, they have acquired an interest, which makes it rather difficult for them to represent in court a bondholders' committee that is opposed to the plan?

Mr. SUNDERLAND. They were not representing, in the first place, a bondholders' committee that was opposed to the plan, in that sense. They were representing all the bondholders. They did not take any position on the plan one way or the other.

Mr. LOWENTHAL. Who are "they"?

Mr. SUNDERLAND. The trustees.

Mr. LOWENTHAL. Guaranty?

Mr. SUNDERLAND. Guaranty. What they did seek was that the different views of the different holders should be dealt with effectively. I do not know that you can properly draw such inferences by reason of the fact that Guaranty and Mr. Callaway asked for a trusteeship under a plan that was public, and in which it was necessary for some trustee to be appointed, particularly in view of the fact that it has been common practice and knowledge that where a trustee has foreclosed a mortgage in a reorganization, because of his familiarity with the securities, having certified them, he is more often than not a trustee under the new indenture for the benefit of those security holders. I would not say that that was a commitment or financial interest. I do not think, from the point of time, it has ripened into that.

Mr. LOWENTHAL. Mr. Sunderland, the bondholders' defense committee was trying to be allowed to intervene as a party in the proceedings and the Guaranty Trust Co. was opposing that effort of the bondholders' defense committee, is not that correct?

Mr. SUNDERLAND. Yes.

Mr. LOWENTHAL. And at that time the Guaranty Trust Co. had already entered into negotiations with Mr. Hanauer, of Kuhn, Loeb & Co., resulting in his tentative promise to give Guaranty Trust Co. the second-best mortgage trusteeship under that reorganization plan.

Mr. SUNDERLAND. It would appear so.

Mr. LOWENTHAL. That fact was not called to the attention of the court by Guaranty Trust Co. when it was trying to prevent the bondholders' defense committee from being allowed to intervene in that court proceeding.

Mr. SUNDERLAND. Mr. Lowenthal, they were not attempting to prevent that particular committee as much as they were attempting to carry through their responsibilities.

Mr. LOWENTHAL. Did you oppose the bondholders' defense committee's application to be allowed to intervene?

Mr. SUNDERLAND. We did, for that reason.

Mr. LOWENTHAL. I call your attention, Mr. Sunderland, to a brief, an extract from which appears on the paper before you, a brief submitted by you and Mr. Tenney to Judge Wilkerson, dated September 13, 1926,[1] in which you say that the trustee must be disinterested. Would you say that at a time when the trustee had been trying to get a big piece of business from the reorganization managers, which piece of business would be available after the plan went through, and at the time at which the bondholders' defense committee was opposing that plan, that Guaranty Trust Co. was sufficiently disinterested to say to the judge, "Don't let the bondholders' defense committee intervene as a party in these proceedings"?

Mr. SUNDERLAND. Now, Mr. Lowenthal, the question of disinterestedness relates to the matter which was before the court. The trustee had taken, as is indicated by those various excerpts, a disinterested position in that sense, with regard to those issues. It was generally known that the trust company that had familiarity with the matter in foreclosing would be very likely entitled to, and receive, a trusteeship under a reorganization of the property. I do not think it is fair to label that a form of interest which would disqualify it in performing its duties under the mortgage.

Mr. LOWENTHAL. Mr. Sunderland, dropping down to the second paragraph of the excerpts from that brief, on page 2 of the paper before you, you and Mr. Tenney said to Judge Wilkerson [reading from "Exhibit No. 2035"]:

> There is nothing in the record which shows, nor can there be shown any conflict of duty against the trustees representing the bondholders.

Mr. Sunderland, if these memoranda written by Mr. Stanley, Mr. Callaway, and Mr. Platner, of the Guaranty Trust Co. and Guaranty Co., showing their efforts to get business from Mr. Hanauer in connection with Mr. Hanauer's reorganization plan—if those papers, or copies of them, or the very existence of such papers, or any factor relating to those transactions, were unknown to the court, do you not think that the court and the court's record were deprived of facts on which a reasonable man or a reasonable judge might conceivably have thought that there was a conflict of duty and interest, or that there was at least a situation that made it only fair that a committee opposing the Kuhn, Loeb plan should be allowed to intervene in the proceedings?

Mr. SUNDERLAND. I do not.

Mr. LOWENTHAL. Mr. Callaway, do you feel the same way about it?

Mr. CALLAWAY. Yes. I do not consider that we had any interest at all contrary to our duty as trustee by reason of the fact that we

[1] See "Exhibit No. 2035", p. 7080.

had solicited a trusteeship from him. It would not have made the slightest difference to us in the conduct of our business whether we had gotten it or not. We did not live on that one trusteeship. We would like to have had it. We sought it, because it is customary to get it. But so far as what I did is concerned, and so far as what the Guaranty Trust Co. did is concerned, it had no more effect, and was not any more in our minds when we undertook to object to Mr. Jameson or any other intervener coming in there, than if it had never happened at all. When you bring it forward here as an implication, it is the first time in all my connection with it that it ever occurred to me that anybody might think that.

Mr. LOWENTHAL. Mr. Callaway, it is possible, is it not, to draw a distinction between what might be in your mind and what might be in the mind of a court, or an opposing party? There is a possibility there.

Mr. CALLAWAY. Yes; of course there is.

Mr. LOWENTHAL. Do you not suppose, Mr. Callaway, that if the bondholders' defense committee had known of these memoranda in your files, some of them written months before they made their application for permission to intervene, that the bondholders' defense committee would have called those things to the attention of the court, and based upon those memoranda the argument that the only fair thing in those circumstances would be to let the bondholders' defense committee speak for itself in opposition to what was going on in court and in opposition to what the Guaranty Trust Co. was proposing, rather than to put the bondholders' defense committee in the position in which it could only speak through Guaranty Trust Co. and its lawyers?

Mr. CALLAWAY. They probably would, but I think we could have defended it just as successfully as the other two charges that were made.

Mr. LOWENTHAL. Mr. Callaway, is not this the kind of a situation that confronted at one time the Iselin committee, and at another time the Jameson committee, both of whom were at various times opposing the Kuhn, Loeb plan?

Mr. CALLAWAY. They might have. I think you should let me speak——

Mr. LOWENTHAL. May I finish?

Mr. CALLAWAY. Yes; but by the time you have finished you have asked me something else.

Mr. LOWENTHAL. Go ahead.

Mr. CALLAWAY. I think I should be allowed to explain just what was in our minds with reference to these two interventions. I am not speaking to you as a practicing lawyer, for I am not, as you know. Here we had started out to foreclose a mortgage, to bring a creditors' proceeding to foreclose that mortgage. First came up the Iselin committee, who were stockholders who undertook to intervene in that case. We were advised by our counsel, Mr. Sunderland, that it was a recognized rule of law that in a proceeding of this sort where you are endeavoring to bring a proceeding to finally bring about a foreclosure and be able to convey good title in the regular order to a purchaser, stockholders had no right to come in in that sort of a proceeding; that when you came to a final decree, the decree at that time would provide that if the bids made for this property were made

through any plan, at that time any objection to plans or the propriety of the purchase, or the price, or any of those things, would then be considered, and that was the time to do it. That seemed to me a reasonable and logical sort of thing.

He also told me that there were decisions of the courts to that effect.

When it came to the Jameson proposition, which was a bondholder, and a little different, he again advised me that so far as a bondholder attempting to get into court outside of the trustee, is concerned, whose duty it was under the very indenture under which these bonds were held to bring this proceeding, and only to bring the proceeding, that unless there was fraud or something of that sort on the part of the trustee, the bondholders had no right to come in, because, as I recall they stated to me that the question of a plan at this point is one that the court cannot undertake to consider, because you do not know whether they will ever put in the plan. The court could not say to those people, "You have to come and put this plan in after I have considered it." The proper place to bring it was after we had gotten a final decree which provided for a purchase, and at that time these plans would be brought up, and everybody would have an opportunity to come in and be heard about it.

Again, that strikes me as being a logical thing. Mr. Sunderland stated that that was a rule of law in this country, and my understanding is that it was carried up to the appellate courts. You will recall that Mr. Jameson made two allegations with regard to the trustee. As I recall it, the first one was that it was a depositary, and therefore that would involve fiduciary relations.

Mr. LOWENTHAL. On that issue, that you were a depositary and were going to make money out of the Kuhn, Loeb plan going through, the judge overruled the Jameson contention and supported yours.

Mr. CALLAWAY. Yes; and as I understand it, that matter was one of the matters that went up on appeal, and the court was sustained.

The second proposition was that the trustee had no right to represent him because of the fact that a majority of bonds had been deposited, and that the majority of bonds had the right to direct the trustee, but that the majority of the bonds could not properly direct with regard to his bonds, and that therefore, under those circumstances, after there had been a majority of the bonds deposited, the trustee could not properly represent the minority. That was passed upon fully by the courts, and they also went up to the appellate court.

As I understand it, those were the two matters that were brought up. I think if the question had been brought up as to whether we had an interest in that situation because of the fact that we had asked Mr. Hanauer to give us one of the trusteeships if and when this thing went through, as we would have asked any committee that might put through a plan—I just cannot see that the court would have felt that that put us in a position where we could not act, any more than in the case of the depositary issue. In the depositary matter, we were acting in a purely clerical, ministerial capacity. When it came to soliciting a trusteeship in the future, I assure you, sir, it had no effect on us.

Mr. LOWENTHAL. Mr. Callaway, I wonder if you could possibly conceive of this as being something that might have affected the arguments urged by a bondholders committee that was opposing the Kuhn, Loeb plan, or might have affected a judge or an appellate

court, in particular, in considering the question of letting that committee come in as a party—that on the one hand the attorneys for the reorganization managers were secretly getting their views about the plan to the judge——

Mr. CALLAWAY. Wait a minute, now.

Mr. LOWENTHAL. And on the other hand——

Mr. CALLAWAY. You are putting a question to me about things I had nothing to do with.

Mr. LOWENTHAL. I realize that.

Mr. CALLAWAY. Yes; but——

Mr. LOWENTHAL. And, on the other hand, the trust company, which was claiming that it alone could speak for those opposing bondholders, had been engaged in secret negotiations with the reorganization managers for profitable business to flow to the trust company from the effectuation of that reorganization plan; and that the attorney arguing before the court in behalf of that trust company that there is nothing in the record, and there could be nothing shown to indicate any conflict of duty, was a former law associate of that judge when he had been in private practice, and would therefore be likely to have a standing before that judge, who would give special credence to the truthfulness of any statement such attorney would make to the judge.

Mr. CALLAWAY. If you want me to answer that question, which is a statement coming from you, and contains many things that you know I knew nothing about, and had nothing to do with, and could not have influenced, and did not influence my actions in any way at all—as I understand your question——

Mr. LOWENTHAL. Would you like to have it read?

Mr. CALLAWAY. No; I would not. I heard it, and I am trying to answer it, if you will give me a chance to do it.

Mr. LOWENTHAL. Please.

Senator TRUMAN. Proceed.

Mr. CALLAWAY. As I understand your question, it was as to whether or not I think these attorneys representing those bondholders, if they had information that we had solicited a trusteeship from Mr. Hanauer, would have brought it up before the court. I think they would, if they brought up such a question as the fact that merely because the majority of bondholders had deposited their bonds, the trustee was no longer in a position to act for the minority. I think they would have brought up anything they could have found; but, further answering your question, I think that if it had been brought up and we had been in a position to explain to this court how these trusteeships were ordinarily handled—the fact that it was customary for the depositary or for the old trustee—I should not say the depositary; I mean the old trustee—to be appointed by reason of its experience and knowledge of that situation, the court would have believed it. So far as we were concerned, it had no effect at all on us. I think the court would have believed it. I think any court would have believed it. I would almost venture to say that you would believe it.

Mr. LOWENTHAL. I am afraid, Mr. Callaway, since you have made that comment, that I think that the practice is one that ought to be torn up, root and branch, from this large-scale financing, and I think it would be to the interest of the trust companies themselves if it were torn up.

Mr. CALLAWAY. There are two ways of thinking about these things. I do not mean to say that this is the way you think about it, but there is one school of thought that always thinks that whenever any set of circumstances appears by which somebody could have possibly gotten something for his own benefit, to the hurt of somebody else, if he is in a fiduciary capacity, he would do it. My experience has been, sir, in a life that I am sorry to say is longer than yours, that that is not true. I have not found that to be true. I have found that the majority of people are square and honest, and the majority of trustees, thank God, that I have come in contact with in my life, have endeavered to be fair and honest. Just because you can build up some possibility by which, if he wanted to do something crooked, he could step out and do it, it does not mean that he is going to do it. I do not think that is a true statement of the attitude of people. Certainly it is not the attitude of the people I have known.

Mr. LOWENTHAL. I do not think you have fairly stated the issue.

Mr. CALLAWAY. I hope I have fairly stated my position.

Mr. LOWENTHAL. The bondholders' defense committee was not asking that the judge, on the question of intervention, should rule other than on the question of intervention. They were only asking the judge to let them be a party to the proceeding. You were telling the judge he ought not to even let them be a party to the proceeding.

Mr. CALLAWAY. Yes.

Mr. LOWENTHAL. And be on an equality with the Guaranty Trust Co. in presenting evidence, arguments, and in appealing, and so forth.

Mr. CALLAWAY. Yes, sir.

Mr. LOWENTHAL. On that kind of an issue is it not conceivable that a judge would say, where the trust company has been entering upon private negotiations with the reorganization managers out of which it will get a profit if their plan goes through, that the opponents of the plan ought at the very least to be allowed to be an intervening party in the proceeding?

Mr. CALLAWAY. No, sir.

Mr. LOWENTHAL. And not have to talk to the court through a trustee so placed?

Mr. CALLAWAY. No, sir; and I have stated——

Mr. LOWENTHAL. You do not think so?

Mr. CALLAWAY. Wait a minute. I have stated to you, sir, that if that matter had been brought up, knowing what I do about it, in my judgment if it had been brought up before the court, also the appellate court, if it had gone to them, would have held that it was immaterial. That is the most I can say about it.

Mr. SUNDERLAND. May I just make a comment, Mr. Lowenthal? You did not mean to imply, did you, that both the Iselin committee and the Jameson committee were not accorded the fullest opportunity to file papers and to have trials, and to state their position? The only position that the court took, and the only position we were taking, was that they should not be permitted to have the right of appeal, and that technically means permitted to be an intervenor in the case. They had the fullest notice. They made all their claims in great elaboration, and had opportunity to be heard and to argue

from the very beginning. You did not mean to imply, because that is a matter of record——

Mr. LOWENTHAL. I meant to imply this, Mr. Sunderland, that when an opposing committee is not allowed to intervene it is in court on sufferance. It can be pushed out at any second. It can be cut off at any second. It is on a distinctly lower status than the parties which are intervenors; and when the parties who are intervenors or who are parties on any basis, such as the receivers and their counsel, Mr. Shaw, and the Guaranty Trust Co. and its counsel—when they are parties, and a bondholders committee that is opposing what they are proposing to the court is not allowed to be a party, as a practical matter, taking into account both concrete situations and imponderables, the opposing group is put at a very, very serious disadvantage.

Mr. SUNDERLAND. Under the circumstances in this case, where the matter that they were trying to deal with was not before the court, and the trustees acting for them were as rapidly as possible getting to a place where the matter could be effectively dealt with by the court——

Mr. LOWENTHAL (interposing). But they were saying to the court that the matter should be before the court.

Mr. SUNDERLAND. They had a right to appeal, then, and did appeal.

Mr. LOWENTHAL. They said to the court, Mr. Sunderland, that they did not want the Guaranty Trust Co. to speak for them because the Guaranty Trust Co. was tied up with Kuhn, Loeb & Co.

Mr. SUNDERLAND. Speak for them on the subject of a reorganization plan?

Mr. LOWENTHAL. On any subject.

Mr. SUNDERLAND. And they were given an opportunity to speak for themselves on the reorganization plan and on these other matters.

Mr. LOWENTHAL. Mr. Sunderland, the whole technique and technical procedure in the St. Paul receivership, in my judgment, played into the hands and into the purposes and into the projects of the Kuhn, Loeb group, and played strongly against their opponents. I am speaking of the technical steps on which you took a position which the bondholders' defense committee said was injurious to it, on issue after issue. Even though you thought it was not injurious to them, they were not allowed to be a party to the proceeding on those issues.

Mr. SUNDERLAND. I assume that the thought that you have just expressed has been expressed, after reading the arguments and the briefs in the courts.

Mr. LOWENTHAL. Yes.

Mr. SUNDERLAND. That very thought was expressed and was dealt with, and the courts found that there was not any basis for it.

Mr. LOWENTHAL. In the absence of knowledge of what was going on in secret as between the judge and the receivers' counsel, and as between the Guaranty Trust Co. and Mr. Hanauer.

Senator TRUMAN. I dislike the whole procedure. I think some means ought to be found to prevent such things from taking place. I think it is highly unethical for the attorneys for the receiver to act as a go-between between one party to a receivership and the court. I think that the statement I made the other day fits this case exactly.

I want to say that we are excusing Mr. Scandrett on account of illness in his family. It is going to interfere somewhat with our hearing, and we hope he can be back by Monday.

Mr. SCANDRETT. Mr. Chairman, I can be here all afternoon.

Senator TRUMAN. We cannot hold a hearing this afternoon, Mr. Scandrett. I regret it very much. There are matters pending in the Senate that require our attention there.

Mr. SCANDRETT. I waited over from yesterday. I wanted very much to leave last night.

Senator TRUMAN. I know you did, and I am excusing you. I know the conditions.

Mr. LOWENTHAL. Mr. Chairman, may I read just a few extracts from the report of the Federal Coordinator?

Senator TRUMAN. Very well.

Mr. LOWENTHAL. This was the report, Mr. Callaway, with respect to which you indicated yesterday that you did not remember having heard of it. This is a report to the Federal Coordinator which he issued, a report headed "Analysis of Railroad Fiscal and Related Work."

Mr. CALLAWAY. I had not known of that.

Mr. LOWENTHAL. He proposed that this kind of financial business be taken away from the banks and trust companies in New York and elsewhere and placed in a company or companies operated by and for the railroads, at cost.

Mr. CALLAWAY. I did hear of that. I remember that.

Mr. LOWENTHAL. I should like to read just a few of the items and place them in the record.

Mr. CALLAWAY. I did not identify that particular report when it was referred to.

Senator TRUMAN. You may go into that at the next session.

(Whereupon, at 12:45 p. m., an adjournment was taken until the following day, Thursday, Dec. 9, 1937, at 10 a. m.)