

No. 2400

United States Circuit Court of Appeals

Ninth Circuit

Appeal from the District Court of the United
States for the District of Oregon

OREGON & CALIFORNIA RAILROAD
COMPANY, A CORPORATION, *et al.*,
Defendants and Appellants

JOHN L. SNYDER, *et al.*,
Cross-Complainants and Appellants

WILLIAM F. SLAUGHTER, *et al.*,
Interveners and Appellants

vs.

THE UNITED STATES OF AMERICA
Appellee

—o—

TRANSCRIPT OF RECORD

VOLUME IV

PAGES 1551-2080

FILED

APR 4 - 1916

TITLE

NAMES AND ADDRESSES OF SOLICITORS UPON THIS APPEAL

For Appellants

OREGON & CALIFORNIA R. R. CO., *et al.*:

WM. F. HERRIN,
P. F. DUNNE,
J. E. FENTON,
San Francisco, Cal.

WM. D. FENTON,
Portland, Oregon.

For Appellants—JNO. L. SNYDER, *et al.*:

A. W. LAFFERTY,
Portland, Oregon.

For Appellants—WM. F. SLAUGHTER, *et al.*:

L. C. GARRIGUS,
A. W. LAFFERTY,
MOULTON & SCHWARTZ,
Portland, Oregon.

DAY & BREWER,
Seattle, Wash.

A. C. WOODCOCK,
Eugene, Oregon.

For Appellee:

JAMES C. McREYNOLDS,
Attorney General.

CLARENCE L. REAMES,
U. S. Dist. Attorney for Oregon.

B. D. TOWNSEND,
F. C. RABB,

Special Assistants to the
Attorney General.

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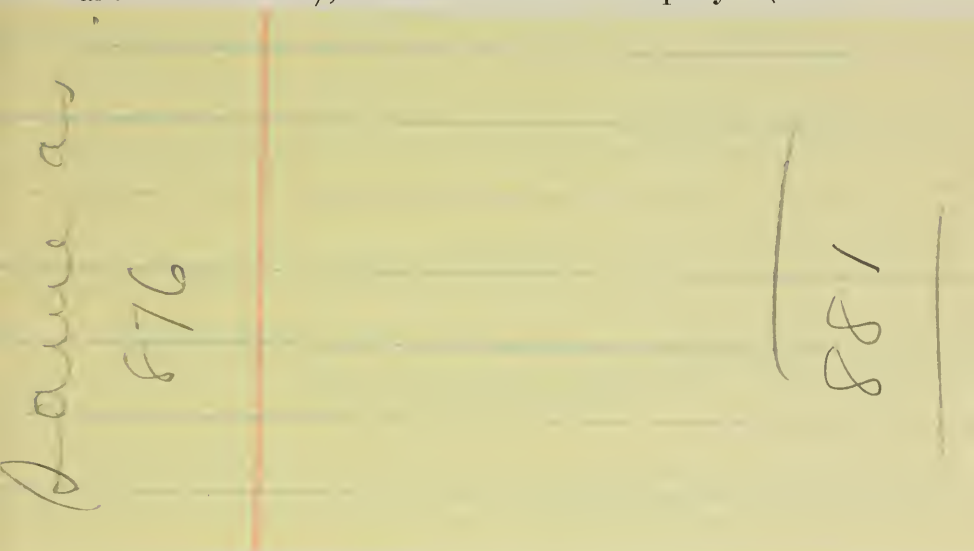
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[STATEMENT OF THE EVIDENCE]

And afterwards, on the . . . day of December, 1913, and within the time allowed by orders of Court the Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage (individually and as trustee), Union Trust Company (indi-



vs.

Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage (individually and as trustee), Union Trust Company (individually and as trustee), and others,

Defendants.

Come now the Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage

[STATEMENT OF THE EVIDENCE]

And afterwards, on the . . . day of December, 1913, and within the time allowed by orders of Court the Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage (individually and as trustee), Union Trust Company (individually and as trustee), defendants and appellants herein, filed their and each of their STATEMENT OF THE EVIDENCE taken, reported, filed and considered in said cause in words and figures as follows, to-wit:

Case No. '3340.

District Court of the United States
For the District of Oregon

United States of America,

Complainant,

vs.

Oregon & California Railroad Company,
Southern Pacific Company, Stephen T.
Gage (individually and as trustee), Union
Trust Company (individually and as trustee), and others,

Defendants.

Come now the Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage

(individually and as trustee), and Union Trust Company (individually and as trustee), defendants and appellants herein, and present this their and each of their statement of the evidence taken, reported, filed and considered in said cause.

WHEREUPON, It is certified that on the 3d day of January, 1913, the complainant and the said defendants-appellants made and filed in said cause, as a part of the evidence therein, a "Stipulation as to the Facts" in words and figures as follows, to-wit:

[STIPULATION AS TO THE FACTS]

[TITLE]

It is stipulated and agreed by and between the undersigned, that the following is a true and correct statement of the particular facts hereinafter set forth, subject to valid objections for irrelevancy or immateriality only; except in the particular instances where objections for incompetency also are herein expressly made and taken; all objections for irrelevancy and immateriality not herein expressly taken, shall be served and filed within twenty days after the filing of this stipulation with the Clerk of the above mentioned Court.

All parties hereto reserve the right to introduce further and additional evidence, within due time.

SUBDIVISION I.

Subdivision I of complainant's Bill of Complaint

(hereinafter referred to as "the Bill") correctly states, on pages 3 and 4 thereof, the citizenship and place of residence of each of the defendants; *excepting* that the defendant Stephen T. Gage is, and at the time of the filing of the Bill was, a citizen and resident of the City of Oakland, in Alameda County, California.

SUBDIVISION II.

ITEM 1. On July 25th, 1866, Congress passed an Act entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific railroad in California, to Portland, in Oregon."; which act was approved and became operative on July 25th, 1866.

ITEM 2. The copy of said Act, set forth on pages 5 to 10, inclusive, of the Bill, is a correct copy thereof.

ITEM 3. The said Act of July 25th 1866 was amended by an Act of Congress approved June 25th 1868, entitled "An Act to amend an Act entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific railroad in California, to Portland, in Oregon.'"

ITEM 4. The copy of said amendatory Act of June 25th 1868, set forth on page 10 of the Bill, is a correct copy thereof.

SUBDIVISION III.

ITEM 1. The document hereto attached, marked "EX-

hibit No. 1 to Stipulation.” is a correct copy of the original Articles of incorporation of the Oregon Central Railroad Company (of Portland).

ITEM 2. The said original document was presented to the said Secretary of State on October 6th 1866 by Joseph Gaston, who requested the said Secretary to file the said document and permit him (Gaston) to immediately withdraw it for exhibition to the Legislature of Oregon, then in session; whereupon the Secretary of State did write with a lead pencil the date, “October 6th 1866”, on the back of the said document or on an envelope containing the same, and the said Gaston immediately departed with the said document and envelope in his (Gaston’s) possession, and it was not returned to the said Secretary of State’s office until November 21st 1866. At the time said document was presented to said Secretary of State as aforesaid no certificate or certificates of acknowledgment were appended thereto, and the only signatures thereto were those of J. S. Smith, I. R. Moores, J. H. Mitchell, E. D. Shattuck, Jesse Applegate, F. H. Chenoweth, Joel Palmer and H. W. Corbett. At the time said document was returned to the said Secretary of State’s office on November 21st 1866, as aforesaid, it was in the form set forth in said “Exhibit No. 1 to Stipulation.”

ITEM 3. The said Oregon Central Railroad Company (of Portland) projected its railroad line from the City of Portland in a westerly direction to the village

of Forest Grove, and thence southerly to and beyond the village of McMinnville, on the *westerly* side of the Willamette River; from which circumstances the said Company became known as (and will be hereinafter designated and referred to as) the "West Side Company", and its railroad line became known as the "West Side Line."

ITEM 4. On October 10th 1866, the Legislature of the State of Oregon adopted, and the Governor of said State approved, the Joint Resolution a correct copy of which is set forth on pages 11 and 12 of the Bill.

ITEM 5. The West Side Company, assuming itself to have been lawfully designated therefor, on May 25th 1867, through its Board of Directors, adopted a Resolution assenting to the said Act of Congress approved July 25th 1866, and on July 6th 1867 filed a certified copy of the said Resolution in the office of the Secretary of Interior, together with a certified copy of its Articles of Incorporation and a certified copy of the said Joint Resolution of the Legislature of the State of Oregon; and on or about August 20th 1868, the West Side Company filed in the Department of Interior a map of survey of its said projected line of railroad, a correct copy of which, on a reduced scale, is hereto attached, marked "Exhibit No. 2 to Stipulation."

ITEM 6. The document hereto attached, marked "Exhibit No. 3 to Stipulation.", is a correct copy of the original Articles of Incorporation of the Oregon Central Railroad Company (of Salem), filed in the office

of the Secretary of State of the State of Oregon on April 22nd 1867; and on or about the last-mentioned date the persons whose names were subscribed to the said Articles of Incorporation, contending that the West Side Company was never lawfully incorporated or organized and designing to secure the grants, franchises and other benefits of the said Act of Congress approved July 25th 1866, caused proceedings to be taken which were intended to organize, under the general incorporation laws of the State of Oregon, the Oregon Central Railroad Company (of Salem) named in the Articles of Incorporation filed, as aforesaid, on April 22nd 1867.

ITEM 7. The last-mentioned Oregon Central Railroad Company (of Salem) projected its railroad line on the *easterly* side of the Willamette River from which circumstance the said Company became known as (and will be hereinafter designated and referred to as) the "East Side Company", and its railroad line became known as the "East Side Line".

ITEM 8. The East Side Company, in furtherance of its aforesaid design, procured the Legislature of the State of Oregon to adopt and the Governor of said State to approve, on October 20th 1868, the Joint Resolution a correct copy of which is set forth on pages 13 and 14 of the Bill.

ITEM 9. A controversy arose between the West Side Company and the East Side Company as to which of the said Companies was entitled to the grants, fran-

chises and other benefits of the said Act of Congress approved July 25th 1866, which controversy, continued until about January 1870.

ITEM 10. On April 10th 1869, Congress passed an Act entitled "An Act to amend an Act entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific railroad in California to Portland, in Oregon.', approved July twenty-five, eighteen hundred and sixty six.;" which Act was approved on April 10th 1869.

ITEM 11. The copy of said Act, setforth on pages 15 and 16 of the Bill, is a correct copy thereof.

ITEM 12. On June 8th 1869, the East Side Company, through its Board of Directors, adopted the Resolution, a correct copy of which is setforth on pages 16 and 17 of the Bill; and on June 30th 1869 the said Company filed a certified copy of the said Resolution in the Department of Interior of the United States.

ITEM 13. On October 29th 1869, the East Side Company filed in the office of the Secretary of Interior of the United States a map of the survey and location of the first sixty miles of its projected line of railroad, extending Southerly from Portland.

ITEM 14. On or about December 24th, 1869, the East Side Company completed the construction of the first twenty miles of its said line of railroad, commencing at Portland and extending southerly therefrom; and on December 31st 1869 the said twenty-mile section

of constructed railroad was approved by Commissioners appointed pursuant to the provisions of Section 4 of the said Act of Congress of July 25th 1866, who had theretofore examined the same.

ITEM 15. "Exhibit A" to the Bill is a correct copy of the original Articles of Incorporation of the Oregon and California Railroad Company, filed in the office of the Secretary of State of the State of Oregon on March 17th 1870.

ITEM 16. The said Articles of Incorporation of the Oregon and California Railroad Company were executed and filed in triplicate, one in the office of the Secretary of State of the State of Oregon, one in the office of the County Clerk of the County of Multnomah, Oregon (being the County in which the principal office of the said company was located), and one in the office of the Secretary of the said Company, at the City of Portland, in the said County of Multnomah.

ITEM 17. On March 29th 1870, the East Side Company executed and delivered to the defendant Oregon and California Railroad Company, the instrument in writing a correct copy of which is attached to the Bill as "Exhibit B"; which instrument was recorded in the office of the County Recorder of the several Counties in which was situated any part of the lands intended to be granted by the said Act of Congress of July 25th 1866.

ITEM 18. On April 4th 1870, the defendant Oregon and California Railroad Company, through its Board of

Directors, adopted the Resolution, a correct copy of which is setforth on pages 20 and 21 of the Bill; and on April 28th 1870 filed a certified copy thereof, together with a certified copy of the said instrument in writing dated March 29th 1870 (copy attached to the Bill as "Exhibit B") in the office of the Secretary of Interior; and at all times since the date of the said instrument the defendant Oregon and California Railroad Company has assumed, and still assumes, itself to be the successor of the East Side Company in and to all the franchises, rights and property granted or intended to be granted by the said Acts of Congress.

SUBDIVISION IV.

ITEM 1. On May 4th 1870, Congress passed an Act entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon"; which Act was approved on May 4th 1870.

ITEM 2. The copy of said Act, setforth on pages 22 to 25, inclusive, of the Bill, is a correct copy thereof.

ITEM 3. By the words "Oregon Central Railroad Company", in the said Act of May 4th 1870, Congress intended to and did refer to the West Side Company.

ITEM 4. On July 2nd 1870, the West Side Company, through its Board of Directors, assented to and accepted all of the provisions of the said Act of May 4th 1870; and on July 20th 1870, filed the said assent in the office of the Secretary of Interior.

SUBDIVISION V.

ITEM 1. By the issuance and negotiation or pledge of mortgage bonds, approximately \$8,000,000 was during the year 1870 procured by the defendant Oregon and California Railroad Company, and approximately \$1,000,000 was during the year 1871 procured by the West Side Company in the same way; and with the funds thus procured the work of constructing the lines of railroad contemplated by the said Acts of Congress of July 25th 1866 and May 4th 1870, respectively, was prosecuted continuously until about January 1873.

ITEM 2. As hereinbefore set forth (Sub III, Item 14), the East Side Company completed the construction of the first twenty miles of its line of railroad commencing at Portland and extending southerly therefrom; and on or about March 29th 1870, executed the instrument in writing a copy of which is attached to the Bill as "Exhibit B". With the funds procured by it in 1870, as setforth in the next preceding "Item 1", the Oregon and California Railroad Company, during the years 1870, 1871 and 1872, completed the construction of the East Side railroad from the point at which the East Side Company had quit the work to a point near Roseburg, a distance of approximately 197 miles; and with the funds procured by it in 1871, as setforth in the next preceding "Item 1", the West Side Company completed construction of the railroad contemplated by the Act of Congress of May 4th 1870, from Portland to McMinnville by way of Forest Grove, a distance of approximately 47 miles.

ITEM 3. About January 1873, the said funds became exhausted, and because thereof further construction of each of said railroads was at that time discontinued, and was not resumed by the Oregon and California Railroad Company until about June 1881, and was never resumed by the West Side Company.

ITEM 4. On or about July 24th 1874, the direction and control of the financial affairs of the said two Companies were assumed, and thereafter exercised, by the then creditors thereof, organized under the name "Bondholders Committee"; which Bondholders Committee, on or about February 29th 1876, acquired all capital stock of both of said Companies and thereafter, and until on or about June 1st 1881, the affairs of said two Companies were conducted by and under the control of the said Bondholders Committee.

ITEM 5. On October 6th 1880, the West Side Company executed and delivered unto the defendant Oregon and California Railroad Company, the instrument in writing a correct copy of which is attached to the Bill as "Exhibit C"; a certified copy of which instrument was filed with the Secretary of Interior of the United States on or about October 20th 1880.

ITEM 6. At all times since the date of said instrument the defendant Oregon and California Railroad Company has assumed, and still assumes, itself to be

the successor of the West Side Company in and to all the franchises, rights and property granted or intended to be granted by the said Act of Congress approved May 4, 1870.

SUBDIVISION VI.

ITEM 1. On or about May 7th 1881, the financial affairs of the Oregon and California Railroad Company were adjusted, substantially, as follows: All the said Company's capital stock was, by action of its Board of Directors and Stockholders, canceled, and the amount of its capital stock was then established at, has ever since remained and still is of, the total par value of \$19,000,000, consisting of \$12,000,000 preferred stock and \$7,000,000 common stock; and in payment of its then existing indebtedness, with accrued interest thereon, all of the said new capital stock was then issued, and ever since has been and still is outstanding. By the issuance of said new capital stock, and use of a part of the proceeds of the new bond issue referred to in "Item 5" of this subdivision, all of the Oregon and California Railroad Company's then existing indebtedness was fully paid and discharged, and the several mortgages and other instruments purporting to secure the same were canceled and satisfied.

ITEM 2. On June 2nd 1881, the defendant Oregon and California Railroad Company executed and delivered to Henry Villard, Robert Peebles and Charles Edward Bretherton, as Trustees for the owners and holders of the said preferred stock, the Trust Deed a correct

copy of which is attached to the Bill as "Exhibit D".

ITEM 3. On or about June 28th 1881, the Trust Deed referred to in the next preceding "Item 2" of this subdivision, was recorded in the office of the County Recorder of Multnomah County, Oregon, in Book 27 of Mortgages at page 179; and thereafter, and about the same time, the said Trust Deed was recorded in the office of the County Recorder of the Several Counties in which was situated any part of the lands granted by either of said land-grants.

ITEM 4. Thereafter such proceedings were had and action taken under the provisions of the said Trust Deed, by and with the consent and co-operation of the Oregon and California Railroad Company, that the defendant Stephen T. Gage became, and now is, the sole surviving Trustee thereunder; and the said defendant Stephen T. Gage as such Trustee (but not individually), and the defendant Southern Pacific Company as the present owner of all of said preferred stock, claim and assert a lien upon the said lands, under and by virtue of the said Trust Deed.

ITEM 5. By the issuance and negotiations of two separate issues of its corporate bonds, bearing date June 1st 1881 and May 26th 1883, respectively (known and designated as "First Mortgage Bonds" and "Second Mortgage Bonds", respectively), the defendant Oregon and California Railroad Company provided approximately \$5,000,000 further construction funds; and on

or about June 1st 1881, the work of constructing the East Side railroad was resumed and thereafter continued until about January 1884. During the last-mentioned period of construction the East Side railroad was constructed and extended from Roseburg to a point about one and one-quarter miles southerly from Ashland, in the State of Oregon, a total distance of approximately 145 miles.

ITEM 6. About January 1884, the last-mentioned construction funds became exhausted, and the work of further construction was discontinued until about April 1887, when it was resumed.

ITEM 7. About January 19th 1885, the said First Mortgage Bonds and Second Mortgage Bonds being still outstanding, in a suit theretofore brought and then pending in the United States Circuit Court for the District of Oregon, wherein certain of the holders of the said First Mortgage Bonds were plaintiffs and the defendant Oregon and California Railroad Company and others were defendants, the railroads and other property of the said Oregon and California Railroad Company were placed in the hands of a Receiver then and in that suit appointed for that purpose.

ITEM 8. On May 12th 1887, the general status of the said land-grants was as follows:

(a). Under the East Side grant, during the year 1871 to 1877, inclusive, patents for 323,078.68 acres of land (being lands contiguous to the first 125 miles

of the said East Side Railroad) were applied for by and issued to the defendant Oregon and California Railroad Company. Except as aforesaid, no patents under the said East Side grant were issued until the year 1893.

(b). No patents under the West Side grant were issued prior to the year 1895.

(c). The total length of the East Side railroad is, approximately, 367 miles. With the exception of the northerly 197 miles thereof, no part of the East Side railroad was constructed within the times prescribed therefor; and on May 12th 1887, the portion of the East Side railroad extending from Ashland to the southerly boundary line of the State of Oregon, remained unconstructed.

(d). That part of the West Side railroad extending from Forest Grove to Astoria, was never constructed, and because thereof the granted lands of the West Side grant contiguous to such unconstructed railroad were, by Act of Congress approved January 31st 1885, entitled "An Act to declare forfeiture of certain lands granted to aid in the construction of a railroad in Oregon.", declared forfeited to and the ownership thereof was resumed by the United States.

(e). Of the aforesaid granted lands, 163,430.28 acres were sold by the Oregon and California Railroad Company prior to May 12th 1887. Nearly all of the said sold lands were so sold to actual settlers, in small quantities, although in a few instances such sales were

made in quantities exceeding 160 acres to one person, and for prices slightly in excess of \$2.50 per acre.

SUBDIVISION VII.

ITEM 1. The defendant Southern Pacific Company was incorporated by an Act of the General Assembly of the State of Kentucky, entitled "An Act to incorporate the Southern Pacific Company.", approved March 17th 1884; which Act was amended by an act of the General Assembly of the State of Kentucky, approved March 21st 1888, entitled "An Act to amend 'An Act to incorporate the Southern Pacific Company' approved March 17th 1884." A correct copy of the said Act of March 17th 1884 and amendatory Act of March 21st 1888, is hereto attached, marked "Exhibit No. 4 to Stipulation."

ITEM 2. "Exhibit No. 5 to Stipulation", hereto attached, is a correct copy of Articles of Association, Amalgamation and Consolidation of the Central Pacific Railroad Company of California and the Western Pacific Railroad Company, filed in the office of the Secretary of State of the State of California on June 23rd 1870, amalgamating and consolidating the said Companies into the Central Pacific Railroad Company, incorporated as such by the said Articles.

ITEM 3. "Exhibit No. 6 to Stipulation", hereto attached, is a correct copy of Articles of Amalgamation and Consolidation between the Central Pacific Railroad Company, the California and Oregon Railroad Com-

pany, and the other Railroad Companies therein named, filed in the office of the Secretary of State of the State of California on August 22nd 1870.

ITEM 4. At the time Articles of Amalgamation and Consolidation referred to in the next preceding "Item 3" of this subdivision were filed, the said Central Pacific Railroad Company was the owner of all unsold lands west of a point near Ogden, in Utah, coterminous with the Central Pacific railroad from Ogden by way of Elko and Reno, in Nevada, Colfax, Auburn, Sacramento, Stockton, Niles and San Jose to San Francisco, in California, granted by the Act of Congress approved July 1st 1862, entitled "An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes.", reference to which is hereby made as the said Act is published in United States Statutes at Large, Volume 12, page 489 and following, as enlarged by the amendatory Act of Congress approved July 2nd 1864, entitled "An Act to amend an Act entitled 'An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes.', approved July first eighteen hundred and sixty-two.", reference to which is hereby made as the said amendatory Act is published in United States Statutes at Large, Volume 13, page 356 and following; and at the time the said Articles of

Amalgamation and Consolidation were filed, the said California and Oregon Railroad Company was the owner of all unsold lands in California, granted by the Act of Congress approved July 25th 1866, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific railroad in California, to Portland, in Oregon.", a correct copy of which is set forth on pages 5 to 10, inclusive, of the Bill.

ITEM 5. From the date of filing the last-mentioned Articles of Amalgamation and Consolidation until July 29th 1899, the said Central Pacific Railroad Company remained the owner of all lands of the three several land-grants setforth in the next preceding "Item 4" of this subdivision, which were unsold at the date of filing the said last-mentioned Articles, and were not thereafter, from time to time (prior to July 29th 1899), sold by the said Central Pacific Railroad Company; and by the instrument in writing executed and delivered on July 29th 1899, a copy of which is hereto attached, marked "Exhibit No. 7 to Stipulation.", the said Central Pacific Railroad Company granted and conveyed unto the Central Pacific Railway Company, all lands of the said land-grants remaining unsold on July 29th 1899. The statements in this Item and the last preceding Item 4 concerning the ownership and conveyance of the lands granted by said Acts of Congress are made subject to the terms and provisions of said Acts of Congress respectively, and all rights of the United States there-

under—the title to said lands not being an issue in the suit at bar.

ITEM 6. “Exhibit No. 3 to Stipulation”, hereto attached, is a correct copy of the Articles of Association and Certificate of Incorporation of the Central Pacific Railway Company, referred to in the next preceding “Item 5” of this subdivision hereof.

ITEM 7. “Exhibit No. 2” to the printed “Joint and Several Answer of Defendants Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, to Bill of Complaint of the United States, in the above-entitled Case.”, on file herein (hereinafter referred to as the “Joint and Several Answer”), is a correct copy of the Agreement, dated February 7th 1885, by which the said Central Pacific Railroad Company leased its said railroad from Ogden to San Francisco and branch thereof from Roseville Junction to Delta, together with certain other railroads and property connected therewith in the said Agreement described, unto the said Southern Pacific Company; pursuant to which Agreement the said Southern Pacific Company has held possession of the railroads and other property therein described, and operated the said railroads, as such lessee, continuously since the date of the said Agreement, and still continues to so operate the same.

ITEM 8. “Exhibit F” to the Bill is a correct copy of the Agreement, dated July 1st, 1887, by which the

defendant Oregon & California Railroad Company leased all its railroads in Oregon (including its East Side railroad and its West Side railroad) and other property used in connection therewith in the said Agreement described, unto the defendant Southern Pacific Company; pursuant to which Agreement the said Southern Pacific Company held possession of and operated the said railroads and property as such lessee, continuously from June 6th 1888, until August 1st, 1893.

ITEM 9. "Exhibit No. 3" to the said Joint and Several Answer, is a correct copy of the Agreement, dated January 1st 1888, by which the said Central Pacific Railroad Company leased its said railroad from Delta to the north boundary line of the State of California, unto the said Southern Pacific Company; pursuant to which Agreement the said Southern Pacific Company has held possession of and operated the said railroad, as such lessee, continuously since the date of said Agreement, and still continues to so operate the same.

ITEM 10. "Exhibit G" to the Bill is a correct copy of a new Lease, dated August 1st 1893, by which the Oregon & California Railroad Company leased all its railroads in Oregon (including the East Side railroad and West Side railroad) and other property used in connection therewith in the said Lease of July 1st 1887, described in "Item 8" of this Subdivision hereof, unto the defendant Southern Pacific Company; pursuant to which last-mentioned Lease the said Southern Pacific

Company has held possession of and operated the said railroads continuously from August 1st 1893, inclusive, to the present time, and still continues to so hold possession of and operate the same.

ITEM 11. On or about December 1867, the principal stockholders of the said Central Pacific Railroad Company of California became the principal stockholders of the said California and Oregon Railroad Company; and on or about August 1st 1899, the said Southern Pacific Company became, has ever since remained and still is, the principal stockholder of the said Central Pacific Railroad Company; and on or about August 1st, 1899, the said Southern Pacific Company became, has ever since remained and still is, the principal stockholder of the said Central Pacific Railway Company; and on or about April 9th 1901, the said Southern Pacific Company became, has ever since remained and still is, the principal stockholder of the said Oregon and California Railroad Company.

ITEM 12. On or about July 31st 1885, the defendant Oregon and California Railroad Company and said Central Pacific Railroad Company entered into a certain agreement in writing, a copy of which marked "Exhibit No. 9 to Stipulation", is hereto attached; and on or about October 11th 1886, the said Central Pacific Railroad Company, the Pacific Improvement Company (a corporation organized in 1878 under the laws of the State of California) and the defendant Southern Pacific Company entered into a certain agreement in writing a

copy of which marked "Exhibit No. 1" is attached to the said printed Joint and Several Answer. Prior to the execution of either of said two last-mentioned contracts, the stockholders of the Oregon and California Railroad Company became and were organized under the name "Stockholders Committee", certain of the owners of the aforesaid mortgage bonds became and were organized under the name "Frankfort Bondholders Committee", and certain other of the owners of said bonds became and were organized under the name "London Bondholders Committee", said Bondholders Committee representing the owners of substantially all of the aforesaid First Mortgage Bonds and Second Mortgage Bonds of said Oregon and California Railroad Company.

ITEM 13. "Exhibit E" to the Bill is a correct copy of a written Contract made and entered into by and between the parties named therein, on March 28th 1887.

ITEM 14. Pursuant to the provisions of the said Contract of March 28th 1887, on or about May 12th 1887 all of the capital stock and all of the said Second Mortgage Bonds of the Oregon and California Railroad Company were transferred, assigned and delivered to the said Pacific Improvement Company, and all of the said First Mortgage Bonds were transferred, assigned and delivered to the defendant Southern Pacific Company. The statements of this Item and the next succeeding Item 15 concerning the transferring, assigning and delivering of the capital stock of the defendant

Oregon and California Railroad Company to said Pacific Improvement Company, and by the latter to said Southern Pacific Company, shall not be taken as an admission on the part of the Government that said capital stock was not held by said Pacific Improvement Company in trust for said Southern Pacific Company, as charged in the Bill.

ITEM 15. The said Pacific Improvement Company held said capital stock of the Oregon and California Railroad Company until April 9th 1901, when it assigned and transferred the same unto the said Southern Pacific Company; and the said Southern Pacific Company has ever since remained, and still is, the owner and holder of said capital stock. The said Pacific Improvement Company owned and held the controlling interest in said Southern Pacific Company from about March 1887 until after April 9th 1901.

ITEM 16. "Exhibit H" to the Bill is a correct copy of the Trust Mortgage, bearing date July 1st 1887, given by the said Oregon and California Railroad Company to the defendant Union Trust Company of New York.

ITEM 17. By that certain provision of the Trust Mortgage referred to in the next preceding "Item 16" of this subdivision hereof, which reads as follows: "And all the property, real, personal or mixed, which on the twelfth day of May, 1887, was covered by the mortgage securing the then existing First Mortgage Bonds of

the Oregon and California Railroad Company", reference was had, and intended to be had, to a certain Deed of Trust, executed by the said Oregon and California Railroad Company to Henry Villard, Horace White and Charles Edward Bretherton, as Trustees, bearing date June 1st 1881, a correct copy of which is attached to the Bill as "Exhibit I."

ITEM 18. The said Trust Mortgage of July 1st 1887, referred to in the next preceding "Item 17" and "Item 16" of this subdivision hereof, was recorded on January 20th 1888, in the office of the County Recorder of Multnomah County, Oregon, in Book 63 of Mortgages, at page 287; and about the same time the said Trust Mortgage was recorded in the office of the County Recorder of each of the several Counties in which was situated any of the lands granted by the said Acts of Congress of July 25th 1866 or May 4th 1870.

ITEM 19. The defendant Oregon and California Railroad Company executed and delivered certain of the bonds provided for by the said Trust Mortgage of July 1st 1887, of which \$17,745,000 in amount are still outstanding; the payment of all which bonds, both as to principal and interest, was and is guaranteed by the defendant Southern Pacific Company.

ITEM 20. The Bonds secured by the Mortgage to the defendant Union Trust Company of New York as Trustee were used in large part, pursuant to the provisions of the Contract of March 28th 1887 ("Exhibit

E" appended to the Bill), to retire the Bonds secured by the earlier Mortgages of June 1st 1881 and May 26th 1883, respectively, which had been sold abroad; and a large part of the balance of said Bonds secured by the Mortgage to Union Trust Company of New York also were negotiated abroad; and most of the Bonds secured by the said Mortgage to the defendant Union Trust Company of New York are now owned abroad—especially in Holland and Germany.

ITEM 21. By the issuance and negotiation of two separate issues of its corporate Bonds bearing date June 1st 1881 and May 26th 1883, respectively, the defendant Oregon and California Railroad Company provided funds aggregating approximately \$5,000,000 which were used in the construction of its railroad; and the Bonds secured by the Mortgage of the Oregon and California Railroad Company to the defendant Union Trust Company of New York, dated July 1st 1887, were used to retire the Bonds secured by the Mortgages of 1881 and 1883, aforesaid, and to complete the construction of the said railroad.

ITEM 22. The total amount of the Bonds issued under and secured by the Mortgage of the Oregon and California Railroad Company to the defendant Union Trust Company of New York was \$20,000,000; and from the proceeds of the sale of lands received by it, the said Union Trust Company of New York has paid off \$2,255,000 of said Bonds, leaving a balance outstanding of \$17,745,000.

ITEM 23. The defendant Union Trust Company of New York, as trustee for the owners and holders of said Bonds, claims to have and hold a lien upon the said granted lands, under and by virtue of the said Trust Mortgage of July 1st, 1887.

ITEM 24. During the year 1887, the last section of the East Side railroad, extending from a point near Ashland to the southern boundary line of Oregon, and the section of railroad in California extending from Delta to connection with the said East Side railroad at the said southern boundary line of Oregon, were constructed by the said Pacific Improvement Company. "Exhibit No. 10 to Stipulation," hereto attached, is a correct copy of a certain contract made and executed on or about June 6th 1887, by and between the said Oregon and California Railroad Company and Pacific Improvement Company. At the time of the execution of said contract of June 6th 1887, a large part of said work of construction had been performed by said Pacific Improvement Company; but it is not intended hereby to stipulate whether said prior work of construction was performed pursuant to said contract of October 11th 1886, or some other contract, or otherwise.

ITEM 25. On or about June 6th 1888, the afore-said Receivership proceedings were dismissed, and the said Receiver was discharged, and all of the said First Mortgage Bonds and Second Mortgage Bonds (not including the bonds issued under the Trust Mortgage of July 1st 1887), together with all Mortgages and Trust

Deeds securing the payment thereof, were canceled and discharged; and thereupon and ever since the defendant Southern Pacific Company has continued in possession of, pursuant to its hereinbefore mentioned Leases from the Oregon and California Railroad Company (copy attached to the Bill as "Exhibit F" and "Exhibit G"), of the railroads and all property therein described.

SUBDIVISION VIII.

ITEM 1. "Exhibit No. 11 to Stipulation", hereto attached, is a correct copy of a Resolution adopted by the Board of Directors of the Oregon & California Railroad Company on February 7th 1891; "Exhibit No. 12 to Stipulation", hereto attached, is a correct copy of Resolution adopted by the said Board of Directors on March 14th 1892; and the forms of Deeds setforth in the said Exhibits are the forms of Deeds referred to in Subdivision VIII, 3rd paragraph on page 41 of the Bill herein.

ITEM 2. Lands of the said East Side grant to the amount of 2,422,708 acres were patented to the defendant Oregon and California Railroad Company between the years 1893 and 1906, both years inclusive; and the lands of the said West Side grant to the amount of 128,618.13 acres were patented to the said Company between the years 1895 and 1903, both years inclusive; which patents were issued, from time to time, between the said dates pursuant to applications made therefor by the said Oregon and California Railroad Company, from time to time, between the years 1876 and 1906.

No patent has issued to the Oregon and California Railroad Company, under either of said land-grants, since the year 1906, except Supplemental Patent No. 3, dated June 21st 1909, for 161.75 acres of land in the indemnity limits of the said East Side grant.

ITEM 3. A rapidly increasing demand for the lands of the Oregon and California Railroad Company, in large quantities and at increased prices, commenced about 1889 or 1890, and has continued ever since.

ITEM 4. From about 1894 to 1903, the said Oregon and California Railroad Company sold and disposed of some of its said granted lands to persons not actual settlers in quantities exceeding 160 acres to one person, and at prices exceeding \$2.50 per acre; and in several instances, between the said dates, the said Company sold lands of the said grants in quantities of from 1,000 to 20,000 acres to one purchaser at prices ranging from \$5.00 to \$20.00 per acre, in one instance at \$35.00 per acre, in one instance at \$40.00 per acre, and in one instance a sale of 45,000 acres at \$7.00 per acre was made by the said Company to a single purchaser.

ITEM 5. The defendant Oregon and California Railroad Company has heretofore made approximately 5,306 sales of its land-grant lands, aggregating 820,000 acres; approximately 4,930 of which sales were for quantities not exceeding 160 acres to one purchaser, aggregating about 296,000 acres, and approximately 376 of which sales were for quantities exceeding 160 acres to one pur-

chaser, aggregating about 524,000 acres.

ITEM 6. Substantially all of the said 524,000 acres were sold to persons other than actual settlers, who purchased the land for purposes other than settlement, and at prices in excess of \$2.50 per acre; approximately 478,000 acres of which 524,000 acres were sold since the year 1897; and approximately 370,000 acres of the said 524,000 acres were sold to 38 purchasers in quantities exceeding 2,000 acres to each purchaser.

ITEM 7. Approximately three-fourths, in number, of all sales made since the year 1897, were made by Contracts providing for payment of purchase price in from five to ten equal annual payments, and execution of conveyance upon final payment; many of which sales were still pending under such Contracts on January 1st 1903, the conveyances under which were executed from time to time after January 1st 1903, and a considerable number of said Contracts were still pending when this suit was brought.

ITEM 8. Of the total sales made as aforesaid, 4508 had been fully executed and conveyances given aggregating 740,002.45 acres at the time the said printed Joint and Several Answer was filed; and at said time 571 executory Contracts were still pending, aggregating 81,684.31 acres.

ITEM 9. "Exhibit No. 4" attached to the said Joint and Several Answer is, substantially, a correct statement of all land sales made by the defendant Oregon

and California Railroad Company, including all sales executed by conveyances and all sales under Contracts not executed by conveyances, at the time the said Joint and Several Answer was filed. "Exhibit J", attached to the Bill is, substantially, a correct statement of all conveyances of said granted lands made by the defendant Oregon and California Railroad Company, and of all contracts pending at the time said "Exhibit J" was compiled, viz: July 1st, 1908. The apparent discrepancies between said "Exhibit No. 4" attached to the said Joint and Several Answer, and said "Exhibit J" attached to said Bill, are explained by the fact that said "Exhibit No. 4" attached to said Joint and Several Answer is compiled with reference to the original date of sales; while said "Exhibit J" attached to said bill is compiled with reference to the date of executed conveyances, except as to pending contracts; moreover the classification of sales (as to purchase price and quantity sold to each purchaser) in said "Exhibit No. 4" attached to said Joint and Several Answer differs from the classification used in said "Exhibit J" attached to said Bill.

SUBDIVISION IX.

ITEM 1. At or about the time the said Joint and Several Answer was filed herein, there remained unsold of said granted lands, 2,360,492.81 acres, of which 2,075,616.45 acres were theretofore patented unto the Oregon and California Railroad Company under the

said land-grants, and 284,876.36 acres thereof at that time remained unpatented; all of which unsold lands are claimed by the said Oregon and California Railroad Company under and by virtue of the said land grants.

ITEM 2. Approximately 1,800,000 acres of the said unsold lands are situated southerly from Eugene, and constitute more than one-third, in alternate sections, of all lands lying within approximately twenty miles on each side of the East Side railroad from Eugene to the southern boundary line of Oregon; only a small portion of which granted lands, in that part of the East Side grant, have ever been sold.

ITEM 3. Since January 1st 1903, and principally since February 14th 1907, persons exceeding 4,000 in number have severally applied to the defendant Oregon and California Railroad Company to purchase certain of the said unsold lands in quantities not exceeding 160 acres to each person; said applicants claiming that they desired such lands to settle and establish a home upon; and in a few instances claiming that they had settled and established a home upon the lands applied for by them; and at or about the time the said applications were made, each applicant stated that he then was willing and able to tender payment at the rate of \$2.50 per acre for the lands applied for by him, and in a few instances such tender was made.

ITEM 4. On or about January 1st 1903, the Oregon and California Railroad Company withdrew from sale

all the said unsold lands; and the said Company at all times refused, and still refuses, to approve or accept any of the applications to purchase referred to in the next preceding "Item 3" of this subdivision hereof, claiming that all the lands so applied for are essentially timber lands, unsuitable for any other purpose.

ITEM 5. The defendant Oregon and California Railroad Company now assumes and asserts an absolute and unconditional estate in and to all of the said unsold lands.

ITEM 6. "Exhibit K" to the Bill, as corrected by "Exhibit No. 5" to the said Joint and Several Answer, contains a correct list and description of all the said unsold lands which have heretofore been patented.

ITEM 7. "Exhibit No. 6" to the said Joint and Several Answer, contains a correct list and description of all unsold, unpatented primary lands, and of all unsold selected but unpatented indemnity lands (claimed by the defendant Oregon and California Railroad Company under the said land-grants.)

ITEM 8. The reasonable value of the said unsold lands exceeds the sum of \$30,000,000.

SUBDIVISION X.

ITEM 1. The defendant Oregon and California Railroad Company has, in addition to the purchase price received from sales of the said granted lands, received and enjoyed the following other benefits on account of

said granted lands, between April 1st 1870 and April 30th 1911; towit:

(a). A large number of contracts of sale have been forfeited because of defaults in payment of the annual installments due thereon, and the installments previously paid, amounting in all to \$88,205.06 have been retained by the said Railroad Company.

(b). A portion of the said lands has, from time to time, been leased for certain rentals therefor paid the said Railroad Company, amounting in all to \$5,532.07.

(c). The said Railroad Company has cut and used large quantities of timber growing upon the said land, receiving the benefit therefrom to the amount of \$18,850.25, a reasonable stumpage value thereof at the times of such cutting.

(d). In addition to the aforesaid amounts, the said Railroad Company has also received \$10,687.92, collected from persons who, without its permission or consent, cut timber growing on the said lands.

SUBDIVISION XI.

The foregoing "Subdivision X" hereof sets forth, substantially, the correct value of all growing timber cut by or with consent of the defendant Oregon and California Railroad Company from the said unsold lands, and the amount received by the said Railroad Company for growing timber cut by others from the said lands without its consent; and the said Railroad

Company has not cut, nor permitted others to cut, timber growing on the said unsold lands, since the commencement of this suit; and all of the said unsold lands now are, and at all times since this suit was brought have been, withdrawn from sale by the said Railroad Company.

SUBDIVISION XII.

ITEM 1. Until about the year 1890, or 1891, there was substantially no demand for said granted lands, except for the purpose of settlement or by persons of limited means able to purchase such lands only in quantities not exceeding 160 acres and at prices not exceeding \$2.50 per acre; and nearly all sales made prior to the year 1894 were of that character, and to such persons.

ITEM 2. During a large part of the time prior to the year 1894, the defendant Oregon and California Railroad Company maintained an immigration bureau, engaged in inducing immigration and settlement upon said lands; and the greater part of the sales of lands to persons not settlers thereon, or in quantities exceeding 160 acres to one person, or for prices exceeding \$2.50 per acre were made after the year 1894.

SUBDIVISION XIII.

ITEM 1. "Exhibit No. 17 to Stipulation" is a correct statement of the facts therein set forth; and is appended hereto for the purpose of correcting "Exhibit No. 9" to the said Joint and Several Answer, and of

admitting the same to be true as thus corrected.

ITEM 2. "Exhibit No. 10" to the said Joint and Several Answer, is a correct statement of the facts therein set forth, after striking out "A few", the first two words thereof.

ITEM 3. "Exhibit L" to the Bill is a correct copy of a Memorial adopted by the Legislature of Oregon on February 14th 1907, and communicated to Congress immediately thereafter.

ITEM 4. The Joint Resolution of Congress, a correct copy of which is set forth on pages 53 and 54 of the Bill, was approved on April 30th 1908; and this suit was instituted pursuant to said Joint Resolution.

SUBDIVISION XIV.

Since the beginning of this suit, forty-five other and separate suits have been brought in the name of the United States, each against the defendants to this stipulation and another person or other persons, asserting and praying for the enforcement of claimed rights and equitable remedies pertaining to certain of said granted lands subject to such suits, sold and conveyed by the defendant Oregon and California Railroad Company to such other persons defendants, in alleged violation of alleged provisions or conditions of the said land grants.

SUBDIVISION XV.

The parties hereto disagree as to what are the true

facts which Subdivision "XV" of the pleadings of the respective parties put at issue, and proof of such facts at issue is left open.

SUBDIVISION XVI.

Pursuant to the rules and regulations of the Department of Interior in that behalf adopted and in force, all of the aforesaid patents were issued and based upon applications in writing therefor, from time to time filed in the appropriate land office of the United States by the defendant Oregon and California Railroad Company as the "successor and assignee" of the said East Side Company and West Side Company, respectively—which said applications contained description lists of the lands so claimed and for which patents were so applied for; and each of said applications was accompanied and supported by an affidavit in writing signed and sworn to by the Land Agent of the defendant Oregon and California Railroad Company thereto duly authorized, alleging among other things as follows: "The said lands are vacant, unappropriated, are not interdicted mineral, nor reserved lands, and are of the character contemplated by the granting Act" under which patents were applied for, and issued as aforesaid.

SUBDIVISION XVII.

ITEM 1. The Contracts and Deeds executed by the defendant Oregon and California Railroad Company prior to about the year 1894, contained (substantially) the following reservation clause:

“Reserving, however, a strip of land one hundred feet wide, to be used by the Oregon and California Railroad Company for right of way or other railroad purposes, when the railroad of said Oregon and California Railroad Company or any of its branches is or shall be located upon the premises, and the right to use all water needed for the operating and repair of said railroad, and also reserving all claim of the United States to the same as mineral lands.”

ITEM 2. The words “and also reserving all claim of the United States to the same as mineral land” were stricken from the said reservation clause in the Contracts and Deeds executed by the said Railroad Company from about 1894 until about 1902; and in Contracts and Deeds executed by the said Railroad Company during and at all times after about the year 1902, the words “and also reserving and excepting from said described premises so much thereof as may be mineral lands”, were substituted for the said stricken out words.

ITEM 3. The defendant Oregon and California Railroad Company claims to be the owner of all rights, lands and interest in lands, at any time excepted or reserved by the said clause.

SUBDIVISION XVIII.

The undersigned defendants claim that the defendant Oregon and California Railroad Company is, and claims to be, the owner of said granted lands (primary

and indemnity), patented and unpatented, not heretofore sold and transferred by its Deeds of conveyance, together with all right of way and other rights and property in Oregon described as granted by section 3 of the said Act of July 25th 1866 and the first section of the said Act of May 4th 1870, and all the rights and property reserved as aforesaid for any and all railroad purposes, and the improvements upon all of the said lands and property; and the undersigned defendants claim that all of the said land and property is subject to the defendant Union Trust Company's said Trust Mortgage of July 1st 1887.

SUBDIVISION XIX.

ITEM 1. "Exhibit No. 13 to Stipulation" attached hereto, contains a correct statement of all maps of survey and location filed in the office of the Secretary of Interior of the United States by the East Side Company and the Oregon and California Railroad Company, and the dates thereof, under and pursuant to the provisions of the said East Side grant; also a correct statement of the map filed in the same office by the West Side Company under and in pursuance of the said West Side grant, with the date of such filing.

ITEM 2. "Exhibit No. 14 to Stipulation" attached hereto, contains a correct statement of the dates of construction, completion, approval and acceptance, of the several sections of the said East Side and West Side railroads, separately stated.

ITEM 3. "Exhibit No. 11" to the said Joint and Several Answer, correctly shows the quantity of land patented to the Oregon and California Railroad Company, compiled by years, separately stated as to the East Side and West Side land grants, and also giving the dates of all Acts of Congress recited or referred to in such patents.

ITEM 4. All of the West Side grant patents listed on the said "Exhibit No. 11" to Joint and Several Answer, recite that they were issued to the said Oregon and California Railroad Company "as successor to the Oregon Central Railroad Company"; but no patent issued for lands of the East Side grant, contains a recitation that it was issued to the Oregon and California Railroad Company "as successor to" any company.

SUBDIVISION XX.

ITEM 1. "Exhibit P" to the Bill gives a correct list of the suits therein referred to; and a fair statement, of reasonable accuracy, is given on page 60 of the Bill, of the allegations and substance of the complaints filed in those suits.

ITEM 2. During the month of December 1908, all of the said suits other than the one brought by Roy W. Minkler, were consolidated with this suit. Thereafter, and on or about January 15th 1909, all the persons other than the said Roy W. Minkler named in the said "Exhibit P" as complainants, filed herein their cross-com-

plaints; and on April 24th 1911, demurrers theretofore filed by the undersigned defendants to each and all of said cross-complaints were sustained by order of the Court.

ITEM 3. On or about June 9th 1910, the said suit brought by Roy W. Minkler, was dismissed by mutual consent of all parties thereto.

SUBDIVISION XXI.

ITEM 1. An Act was passed by Congress entitled "An Act to create an Auditor of Railroad Accounts and other purposes.", approved June 19th 1878; a correct copy of which Act, as published in United States Statutes at Large, Volume 20, on pages 169 and following, is attached hereto marked "Exhibit No. 15 to Stipulation".

ITEM 2. By an Act entitled "An Act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-two, and for other purposes.", approved March 3rd 1881, published in United States Statutes at Large, Volume 21, pages 385 to 413, inclusive, Congress (on pages 409-410 of said publication) provided as follows:

"Office of Auditor of Railroad Accounts—For Auditor, who shall hereafter be styled Commissioner of Railroads, four thousand five hundred dollars; book-keeper two thousand four hundred

dollars; assistant book-keeper, two thousand dollars; railroad engineer, two thousand five hundred dollars; one clerk, one thousand four hundred dollars; one copyist, nine hundred dollars; one messenger, six hundred dollars; traveling and other expenses, two thousand five hundred dollars; incidental expenses, three hundred dollars; in all, seventeen thousand one hundred dollars.”

ITEM 3. By an Act entitled “An Act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred and one, and for other purposes.”, approved April 17th 1900, published in United States Statutes at Large, Volume 31, pages 86 to 134, inclusive, Congress (on pages 124-125 of said publication) provided as follows:

“*Office of Commissioner of Railroads:* For Commissioner, four thousand five hundred dollars; book-keeper, two thousand dollars; assistant book-keeper, one thousand eight hundred dollars; one clerk of class two; one clerk, one thousand dollars; and one assistant messenger; in all, eleven thousand four hundred and twenty dollars; *Provided*, That the office of Commissioner of Railroads shall terminate on the thirtieth day of June, nineteen hundred and one.”

ITEM 4. By an Act entitled “An Act making appropriations for the legislative, executive, and judicial

expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred and two, and for other purposes.", approved March 3rd, 1901; published in United States Statutes at Large, Volume 31, pages 960 to 1009, inclusive, Congress (on page 1000 of said publication) provided as follows:

"Office of Commissioner of Railroads: For Commissioner, four thousand five hundred dollars; book-keeper, one thousand six hundred dollars; one clerk of class two; one clerk, one thousand dollars; and one assistant messenger; in all, nine thousand two hundred and twenty dollars; *Provided*, That the office of Commissioner of Railroads is hereby continued until the thirtieth day of June, nineteen hundred and two, when the same shall terminate, and the duties of the Commissioner shall be transferred to the Secretary of the Interior, together with the records and files of the office."

ITEM 5. By an Act entitled "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes.", approved June 28th 1902, published in United States Statutes at Large, Volume 32, Part 1, pages 419 to 481, inclusive, Congress (on pages 455-456 of said publication) provided as follows:

"Office of Commissioner of Railroads: For Commissioner, four thousand five hundred dollars; one clerk, one thousand dollars; one assistant mes-

senger, seven hundred and twenty dollars; in all six thousand two hundred and twenty dollars; *Provided*, That the office of Commissioner of Railroads is hereby continued until the thirtieth day of June, nineteen hundred and three, when the same shall terminate, and the duties of the Commissioner shall be transferred to the Secretary of the Interior together with the records and files of the office."

ITEM 6. By an Act entitled "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth nineteen hundred and four, and for other purposes.", approved March 3rd 1903, published in United States Statutes at Large, Volume 32, Part 1, pages 1083 to 1147, inclusive, Congress (on page 1119 of said publication) provided as follows:

"Office of Commissioner of Railroads: For Commissioner, four thousand five hundred dollars; one clerk, one thousand dollars; one assistant messenger, seven hundred and twenty dollars; in all six thousand two hundred and twenty dollars; *Provided*, That the office of Commissioner of Railroads is hereby continued until the thirtieth day of June, nineteen hundred and four, when the same shall terminate, and the duties of the Commissioner shall be transferred to the Secretary of the Interior together with the records and files of the office."

ITEM 7. The said Bureau of the Interior Depart-

ment was organized as provided by the said Act of June 19th 1878, and continuously administered as such under annual appropriations from Congress until the termination of said Bureau and the transfer of the duties, files and records thereof to the Secretary of the Interior, in the year 1904, as required by the said Act of March 3rd 1903; and, pursuant to the requirements of the said Act of June 19th 1878, the forms of reports to be made by the Railroad Companies contemplated by the said Act, including the defendant Oregon and California Railroad Company, were prepared and adopted and transmitted to the said Railroad Companies, including the defendant Oregon and California Railroad Company, by the said Bureau, from 1879 to 1903; and the defendant Oregon & California Railroad Company complied with the provisions of the said Act, and the demands of the said Bureau, as to the making of said reports, continuously from 1879 to 1903, both years inclusive, as is hereinafter set forth.

ITEM 8. Beginning with the report for the half year ending December 31st 1879, and continuing down to and including the year 1903, reports were made of the transactions of the Land Department of the defendant Oregon & California Railroad Company, upon the said blanks formulated and furnished therefor by the said Bureau of the Interior Department, as follows:

(9th) *For the year ending June 30th 1884:*

Total cash receipts from all sales to date.....	\$268,317.92
Average price per acre for all sales to date.....	2.4087
Average price per acre for all sales during year.....	2.7250
Average price per acre for all purchases to date.....	.....
Maximum price per acre from sales (not town lots).....	15.00
Minimum.....	0.50
Maximum price per acre now asked.....	7.00
Minimum.....	1.00
Average.....	2.50

(10th) *For the year ending June 30th 1885:*

Total cash receipts from all sales to date.....	\$340,039.95
Average price per acre for all sales to date.....	2.4534
Average price per acre for all sales during year.....	2.5608
Average price per acre for all purchases to date.....	.....
Maximum price per acre from sales (not town lots).....	15.00
Minimum.....	0.50
Maximum price per acre now asked.....	7.00
Minimum.....	1.00
Average.....	2.50

(31st) For the year ending June 30th 1900:

Total cash receipts from all sales to date.....	\$1,542,728.71
Average price per acre for all sales to date.....	3.77
Average price per acre for all sales during year.....	5.02
Average price per acre for all purchases to date.....	.....
Maximum price per acre from sales (not town lots).....	30.00
Minimum.....	0.50
Maximum price per acre now asked.....	15.00
Minimum.....	2.50
Average.....	3.00

(32nd) For the year ending June 30th 1901:

Total cash receipts from all sales to date.....	\$1,852,756.51
Average price per acre for all sales to date.....	4.076
Average price per acre for all sales during year.....	5.348
Average price per acre for all purchases to date.....	.....
Maximum price per acre from sales (not town lots).....	30.00
Minimum.....	0.50
Maximum price per acre now asked.....	15.00
Minimum.....	2.50
Average.....	3.50

For the year ending June 30th 1902:

(33rd)

Total cash receipts from all sales to date	.....	\$2,298,061.25
Average price per acre for all sales to date	.....	5.00
Average price per acre for all sales during year	.....	7.85
Average price per acre for all purchases to date	.....	.....
Maximum price per acre from sales (not town lots)	.....	30.00
Minimum	“ “ “ “	0.50
Maximum price per acre now asked	“ “	20.00
Minimum	“ “ “ “	2.50
Average	“ “ “ “	3.50

For the year ending June 30th 1903:

(34th)

Total cash receipts from all sales to date	.....	\$2,735,532.88
Average price per acre for all sales to date	.....	4.73
Average price per acre for all sales during year	.....	4.22
Average price per acre for all purchases to date	.....	.....
Maximum price per acre from sales (not town lots)	.....	30.00
Minimum	“ “ “ “	0.50
Maximum price per acre now asked	“ “	.....
Minimum	“ “ “ “	.....
Average	“ “ “ “	.....

ITEM 9. The said report for the year ending June 30th 1890, set forth in the foregoing "(21st)" paragraph of "Item 8" hereof, contained the following additional item: "Less Contracts surrendered, During the year No. of acres 34,185.27, Total to date No. of acres 82,279.12."

ITEM 10. The said Bureau of the Interior Department made annual reports to the Secretary of Interior, as required by the said Act of June 19th 1878, from 1879 to the termination of said office; which reports were embodied in the annual reports of the Secretary of Interior for the same years, transmitted by him to the President of the United States and by the latter to the two Houses of Congress, and the said Secretary's annual reports were there referred to appropriate Committees and printed as Executive Documents.

ITEM 11. Of the reports so made, embodied, transmitted, referred and printed, are the following, relating to the Oregon & California Railroad Company:

(1st)—For the year 1883, Executive Documents 2nd Session, 47th Congress, 1882-83, No. 1. Part 5, Vol. 2, page 471:

"Oregon & California Railroad Company chartered March 17, 1870, and opened for business December 1st, 1872. The Company is now successor, by consolidation, of the Oregon Central Railroad Company, purchased September 1st, 1880,

chartered July 25, 1866, and owns the land grant of said Company; the Western Oregon Railroad Company, purchased October 9, 1880; and the Albany & Lebanon Railroad Company, leased December 5, 1880, at a rental of \$1 for each period of six months, this Company to pay taxes and keep up repairs. The several lines are operated in two Divisions, that is:

<i>East Side Division:</i>	<i>Miles.</i>
Main Line, Portland to Roseburg.....	198
Lebanon Branch, Albany Junction to Lebanon	11.5

West Side Division:

Portland to Corvallis..... 97.

Total, exclusive of side-tracks.....306.05

“The estimated grant of land to these combined companies amounts to 3,940,000 acres, of which 322,062.40 acres have been patented to June 30, 1882. Of this latter amount lands had been sold up to December 31, 1881—date of last report—for an amount aggregating \$309,486.15, at an average price of \$2.25 per acre. The minimum price now asked is 25 cents, the maximum \$10 per acre.”

(2nd)—*For the year 1886*, House Executive Documents, 2nd Session, 49th Congress, 1886-87, Vol. 9, page 596:

“The Company has received by patent from the Government 323,068.68 acres of land, of which 237,773.78 acres have been sold. It has received from sales \$384,889.72, and there are outstanding on time sales \$385,647.67.”

(3rd)—*For the year 1887*, House Executive Documents, 1st Session, 50th Congress, 1887-88, Vol. 11, page 1173:

“The Company has received by patent from the Government 323,068.88 acres of land, of which 242,516.35 acres have been sold. It has received from sales \$407,876.54, and there are outstanding on time sales \$377,545.36.”

(4th)—*For the year 1888*, House Executive Documents, 2nd Session, 50th Congress, 1888-89, Vol. 12, page 454:

“The Company has received by patent from the Government 323,068.68 acres of land, of which 254,964.08 have been sold. It has received from sales \$458,836.01, and there are outstanding on time sales \$363,638.55, of which \$91,313.69 is interest.”

(5th)—*For the year 1889*, House Executive Documents, 1st Session, 51st Congress, 1889-90, Vol. 11, pages 512, 513:

“The Company has received by patent from the Government 323,068.88 acres of land, of which 269,442.88 have been sold. It has re-

ceived from sales of land \$541,650.33, and there are outstanding on account of time sales \$394,226.58, of which the sum of \$98,992.42 is interest.

“The average price per acre for all sales to date was \$2.64, while the average price for sales made during the year was \$3.96.”

(6th)—*For the year 1890*, House Executive Documents, 2nd Session, 51st Congress, 1890-91, Vol. 13, page 174:

“The Company reports that to June 30, 1890, there had been patented to it by the United States, 323,068.68 acres of land, and that 225,170.57 acres had been sold, the total cash receipts from all sales amounting to \$626,520.03. There remained outstanding on account of time sales the sum of \$516,287.66. Average price per acre for all sales during year was \$6.32.”

(7th)—*For the year 1891*, House Executive Documents, 1st Session, 52nd Congress, 1891-92, Vol. 16, page 192:

“The Company reports that to June 30, 1891, there had been patented to it by the United States 323,068.68 acres of land, and that there had been sold 298,261.45 acres, the total cash receipts from all sales amounting to \$707,556.88. There remained outstanding on account of time sales \$449,996.40 principal and \$153,031.65 interest, making a total of \$603,028.05.”

(8th)—*For the year 1892*, House Executive Documents, 2nd Session, 52nd Congress, 1892-93, Vol. 14, page 188:

“The Company’s report shows that to June 30, 1892, there had been patented to it by the United States 323,068.68 acres, and that there had been sold 340,475.85 acres, the total cash receipts from all sales amounting to the sum of \$785,536.79. There remained outstanding on account of time sales \$638,055.08 principal and \$194,903.80 interest, making a total of \$832,958.98 on this account.”

(9th)—*For the year 1893*, House Executive Documents, 2nd Session, 53rd Congress, 1893-94, Vol. 15, page 130:

“The report of the Company shows that to June 30, 1893, the total number of acres received by patent was 323,068.68, that the total cash receipts from all sales had amounted to \$859,477.34; and that there remained outstanding on account of time sales the sum of \$861,923.64, principal and interest.

“The receipts of the land department for the year were \$73,940.55, and the expenses \$75,570.07.”

(10th)—*For the year 1894*, House Executive Documents, 3rd Session, 53rd Congress, 1894-95, Vol. 16, page 143:

“The Company submits the following report on

June 30, 1894, of the operations of its Land Department to date:

	<i>Acres</i>
Acquired by United States patent	615,555.58
<i>Acres</i>	
Disposed of for cash	201.93
Disposed of on time con- tracts	17,299.27
	17,501.20
Balance owned by Company	598,054.38

“The Company also reports that the total cash receipts from all sales to date amounted to \$909,008.59, and that there remained outstanding on account of time sales the sum of \$891,905.60, principal and interest. The receipts during the year were \$49,525.25, and the expenses \$55,449.08.”

(11th)—*For the year 1895*, House Documents, 1st Session, 54th Congress, 1895-96, Vol. 16, page 156:

“The records of the General Land Office show that to June 30, 1895, there had been patented to the Company 1,162,067.28 acres.

“The Company submitted the following report on June 30, 1895, of the operations of its Land Department to date:

	<i>Acres.</i>
Acquired by United States patent . . .	1,163,073.56
Disposed of for cash and on time con- tracts	381,402.78
	781,670.78
Difference, unaccounted for	781,670.78

“The Company also reports that the total cash receipts from all sales to date had amounted to \$946,952.81, and that there remained outstanding on account of time sales the sum of \$700,064.64, principal and interest.

“The receipts during the year were \$37,747.22, and the expenses \$59,294.90.

“The average price per acre for all sales to date had been \$3.40, and the average price now asked is \$3.00.”

(12th)—*For the year 1896*, House Documents 2nd Session, 54th Congress, 1896-97, Vol. 14, page 166:

“The records of the General Land Office show that to June 30, 1896, there had been patented to the Company 2,180,366.07 acres.

“The Company reports that to June 30, 1896, it had received by patent from the United States, 2,397,717.17 acres of land, and there had been disposed of for cash and on time contracts 387,119.43 acres, leaving the balance owned by the Company, 2,010,657.74 acres.

“The total cash receipts from all sales to date amounted to \$986,605.69, and there remained outstanding on account of time sales, principal and interest, \$875,146.35.

“The report of the operations of the Land Department during the year, shows a deficit of \$81,770.68.

“Average price per acre received was \$3.57.

“Average price per acre now asked, \$3.00.”

(13th)—*For the year 1897*, House Documents, 2nd Session, 55th Congress, 1897-98, Vol. 14, page 137:

“The records of the General Land Office show that to June 30, 1897, there had been patented to the Company 2,287,131.66 acres. . . .

“The Company reports that to June 30, 1897, it had received by United States patent 2,503,754.59 acres of land, and had disposed of for cash and on time contracts (not including cancelled contracts) 382,443.44 acres.

“The total cash receipts from all sales to date amounted to \$1,020,329.75, and there were outstanding on account of time sales \$775,881.34.

“The receipts for the year were \$33,724.06, and the expenses \$60,012.11.

“The average price per acre now asked for land is \$3.00.”

(14th)—*For the year 1898*, House Documents, 3rd Session, 55th Congress, 1898-99, Vol. 16, page 152:

“The Company reports that to June 30, 1898, it had received by United States patent 2,561,685.30 acres of land, and had disposed of for cash and on time contracts (not including cancelled contracts), 504,606.53 acres.

“The total cash receipts from all sales to date amounted to \$1,069,513.25, and there were outstanding on account of time sales \$792,999.38.

“The receipts for the year were \$49,183.50, and

the expenses \$73,183.06.

“The average price per acre now asked for land is \$3.00.”

(15th)—*For the year 1899*, House Documents, 1st Session, 56th Congress, 1899-1900, Vol. 20, page 181:

“The Company reports that to June 30, 1899, it had received by United States Patent 2,659,300.56 acres of land.

“The total cash receipts from all sales to date amounted to \$1,234,225.97, and there were outstanding on account of time sales \$734,957.16.

“The receipts for the year were \$164,712.72, and the expenses \$77,138.22.

“The average price per acre now asked for land is \$3.00.”

(16th)—*For the year 1900*, House Documents, 2nd Session, 56th Congress, 1900-01, Vol. 29, page 185:

“The Company reports that to June 30, 1900, it had received by United States patent 2,787,363.55 acres of land.

“The total cash receipts from all sales to date amounted to \$1,542,728.71, and there were outstanding on account of time sales \$1,189,918.71.

“The receipts for the year were \$308,502.74, and the expenses \$91,932.33.

“The average price per acre now asked for land is \$3.00.”

(17th)—*For the year 1902*, House Documents, 1st Session 57th Congress, 1901, Vol. 25, page 218:

“The Company reports that to June 30, 1901, it had received by United States patent 2,795,567.64 acres of land.

“The total cash receipts from all sales to date amounted to \$1,852,756.51, and there were outstanding on account of time sales, \$1,808,935.66.

“The receipts for the year were \$310,027.80, and the expenses \$72,713.77.

“The average price per acre now asked for land is \$3.50.”

(18th)—*For the year 1903*, House Documents, 2nd Session, 58th Congress, 1903-1904, Vol. 21, page 159:

“The Company reports that to June 30, 1903, it had received by United States patent 2,928,809.55 acres of land, and had disposed of, for cash and on time contracts, 1,032,591.47 acres.

“The total cash receipts from all sales to above date amounted to \$2,735,532.88, and there were outstanding on account of time sales, principal and interest, \$2,800,637.57.

“The receipts from this source for the year amounted to \$437,471.63, and the expenses to \$105,936.96.

“The average price per acre now asked for land is \$4.73.”

ITEM 12. The Commissioner of Railroads appended to several of the reports set forth in the next preceding

“Item 11” hereof, a copy of the said Acts of Congress approved July 25th 1866, April 10th 1869, and May 4th 1870; for greater particularity as to the reports in which said Acts of Congress are set forth, all parties may refer to the said official published reports.

ITEM 13. The original reports by Railroad Companies to the Commissioner of Railroads, and by the latter to the Secretary of Interior and by the latter to the President, and by the President to Congress, for the years mentioned in this Subdivision XXI of Stipulation, shall be treated as having been offered and received in evidence subject to the defendant’s right to object to all or any part of the same as irrelevant, and immaterial. None of said reports shall be extended into the record (except as set forth and quoted in this Stipulation), but all parties to this Stipulation may refer to said reports in this District Court and in any Appellate Court, the same as if the said reports were inserted in the record of this case.

ITEM 14. For the purpose of showing the use made by Congress of said reports mentioned in the foregoing “Item 13” of this Subdivision XXI, and for the further purpose of showing whether the fact that lands were sold by the Oregon & California Railroad Company for prices in excess of \$2.50 per acre was considered by Congress or any of the Committees thereof, and if so to what extent, all parties to this Stipulation may refer generally to the Reports of Congressional Committees, Congressional debates, and other proceedings shown by

the Congressional Globe or Congressional Record, and other recognized Official Reports; subject to the defendants' right to objection to all or any part of the same as incompetent, irrelevant, and immaterial, *except* that objections as to competency shall not go to identification of the Congressional Globe, Congressional Record, or other Official Reports referred to, beyond the apparent authenticity of the same.

SUBDIVISION XXII.

ITEM 1. The Supreme Court decision in *Holliday vs. Elliott*, as reported in 8 Oregon 81 et seq., shall be treated as if having been offered and received in evidence, subject to the defendants' objection as irrelevant, and immaterial.

ITEM 2. All Committee Reports and debates in Congress as appearing in the official printed copies of the Congressional Globe or Congressional Record, and all other proceedings in Congress which appear in any recognized Official Reports, relating to the enactments of the Acts of Congress approved July 25th 1866, June 25th 1868, April 10th 1869, May 4th 1870, January 31st 1885, and September 29th 1890, referred to in the Bill of Complaint and Answers, shall be treated as having been offered and received in evidence subject to the defendants' right to object to all or any part thereof as incompetent, irrelevant, and immaterial, *except* that objections as to competency shall not go to identification of the Congressional Globe, Congressional Record,

or other Official Reports referred to, beyond the apparent authenticity of the same.

ITEM 3. "Exhibit No. 16 to Stipulation" attached hereto, contains a correct statement of the Stock quotations therein set forth.

SUBDIVISION XXIII.

The foregoing "Stipulation as to the Facts" is made for the purpose of this suit only; and nothing therein contained shall be held or taken as an admission or estoppel affecting any of the parties thereto in any other suit in equity, action at law, other legal proceeding, or otherwise.

B. D. TOWNSEND,

Counsel and Attorney for Complainant.

Special Assistant to the Attorney General.

P. F. DUNNE,

WM. D. FENTON,

WM. SINGER, JR.,

Counsel and Attorneys for Defendants Oregon & California Railroad Company, Southern Pacific Company, and Stephen T. Gage.

JOHN C. SPOONER,

MILLER, KING, LANE and TRAFFORD,

JOHN M. GEARIN, and

DOLPH, MALLORY, SIMON and GEARIN,

Counsel and Attorneys for Defendant Union Trust Company of New York.

EXHIBIT NO. 1 TO STIPULATION.

Know all men by these presents, that we, the undersigned citizens of the State of Oregon, do hereby associate ourselves together as a private incorporation, under and by virtue of the General Incorporation law of said State.

1st.

The corporation hereby created shall be known as the "Oregon Central Railroad Company.", and its duration unlimited.

2nd.

The object and business of the corporation shall be to construct and operate a railroad from the City of Portland, through the Willamette Valley to the southern boundary of the State; under the laws of Oregon, and the law of Congress recently passed granting land and aid for such purpose.

3rd.

The corporation shall have its principal office in the City of Portland.

4th.

The capital stock of said corporation shall be five million dollars, divided into general, and preferred interest bearing, stock, in such proportions as the incorporators, or board of directors, may deem proper.

5th.

The amount of each share of the capital stock shall be one hundred dollars.

6th.

The termini of the railroad proposed to be constructed by said company, shall be for the northern end, at the City of Portland, and for the southern end at some point on or near the southern boundary of the State, as may be hereafter determined by actual survey.

In Witness Whereof we have here set our hands and seals this _____ day of September, A. D., 1866.

J. C. SMITH.	Seal.
I. R. MOORES.	Seal.
J. H. MITCHELL.	Seal.
E. D. SHATTUCK.	Seal.
JESSE APPLGATE.	Seal.
F. A. CHENOWETH.	Seal.
JOEL PALMER.	Seal.
H. W. CORBETT.	Seal.
M. M. MELVIN.	Seal.
GEO. L. WOODS.	Seal.
R. R. THOMPSON.	Seal.
J. C. AINSWORTH.	Seal.
S. G. REED.	Seal.
JOHN McCracken.	Seal.
C. H. LEWIS.	Seal.
B. F. BROWN.	Seal.
T. H. COX.	Seal.
J. GASTON.	Seal.

(Five cents in Revenue Stamps, canceled.)

State of Oregon, Marion County, S. S.:

Be it known that the persons whose names are attached to the foregoing articles of incorporation, appeared before me, the undersigned, a notary public for and within said county and state respectively and at the time and places herein named, to-wit, J. S. Smith, I. R. Moores, J. H. Mitchell, E. D. Shattuck, Jesse Applegate, F. A. Chenoweth, Joel Palmer, and H. W. Corbett at Salem in said State on or about the 29th day of September, 1866, and M. M. Melvin, at Salem on or about October 23rd, 1866, and George L. Woods at Salem on or about November 10, 1866, and R. R. Thompson, J. C. Ainsworth, S. G. Reed, Jno. McCracken and C. H. Lewis at Portland, Oregon, on the 16th day of November, 1866; and they the said several subscribing persons to the aforesaid articles of incorporation did then and there, at the several times set forth in this certificate, sign and seal said articles before me and in my presence, and acknowledge the said signing and sealing to be their voluntary act and deed for the purposes set forth in said articles.

In Witness Whereof, I have here set my signature as said Notary Public and attached my official seal this 16th day November, A. D. 1866.

J. GASTON,

(Official seal)

Notary Public.

(Five cents in revenue stamps, cancelled.)

State of Oregon, County of Marion, ss:

On this 20th day of November, A. D. 1866, before me, a notary public in and for said county, personally came the within named B. F. Brown, Thos. H. Cox and J. Gaston, who are personally known to me to be the identical persons whose names are subscribed to the within instrument, and acknowledged to me that they signed the same for the purposes therein set forth.

Witness my hand and seal of office this 20th day of Novemebr, A. D. 1866.

SETH R. HAMMER,

(Seal)

Notary Public.

(Endorsed.)

Filed in the office of the Secretary of State this 21st day of November, A. D. 1866, at 10-1/2 o'clock A. M.

SAMUEL E. MAY,

Secretary of State.

Map of the Route of the OREGON CENTRAL RAILROAD.

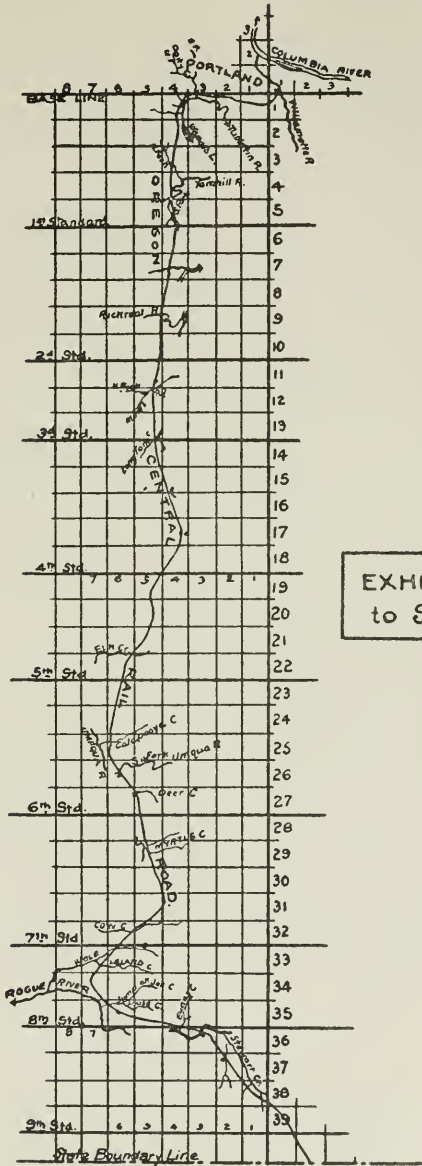


EXHIBIT No 2
to Stipulation.

SCALE 24 MILES TO ONE INCH.

EXHIBIT NO. 3 TO STIPULATION.

Know all men by these presents, that we, J. H. Moores, Geo. L. Woods, S. Ellsworth by Geo L. Woods, his Attorney, I. R. Moores, E. N. Cooke and J. S. Smith, by I. R. Moores, their Attorney, and Samuel A. Clarke have this day incorporated ourselves under and in accordance with the laws of Oregon, and we adopt the following as our Articles of Incorporation.

ARTICLE FIRST.

This corporation shall be known as and do business under the name of the OREGON CENTRAL RAILROAD COMPANY.

ARTICLE SECOND.

The enterprise, occupation and business for which the company incorporates is to construct a railroad with all the necessary branches, fixtures, buildings and appurtenances from Portland, in Oregon, southerly about three hundred miles to the California line, to maintain the said road; in good condition and repair, and to employ the same in the transportation of freight and passengers and freight.

ARTICLE THIRD.

The principal office for the transaction of the business of the Company shall be kept at the City of Salem, Marion County, Oregon.

ARTICLE FOURTH.

The capital stock of the OREGON CENTRAL RAILROAD COMPANY shall be fixed at Seven Million Two Hundred and Fifty Thousand Dollars (\$7,250,000.00).

ARTICLE FIFTH.

The number of shares of the capital stock shall be Seventy-two Thousand Five Hundred (72,500) and the amount of each share of the stock shall be One Hundred Dollars (\$100.00).

ARTICLE SIXTH.

The period of time during which the company shall remain in operation is not limited as to duration.

In testimony of our adoption of the foregoing Articles of Incorporation, witness our hands and seals this the twenty-second day of April, A. D. 1867.

JOHN H. MOORES, (Seal)

GEO. L. WOODS. (Seal)

S. ELLSWORTH,

By GEO. WOODS, Atty. (Seal)

I. R. MOORES, (Seal)

I. S. SMITH,

Per I. R. MOORES, Atty. (Seal)

E. N. COOKE,

Per I. R. MOORES, Atty. (Seal)

SAM'L A. CLARKE. (Seal)

(Fifteen cents in revenue stamps cancelled.)

STATE OF OREGON,
 MARION COUNTY. }^{ss.}

Be it remembered that on this the twenty-second day of April. A.D., 1867, personally came before me, a Notary Public in and for said County and State, the within named I. R. Moores, Geo. L. Woods, I. R. Moores, for himself and also as Attorney in Fact for each of the following named persons: J. S. Smith & E. N. Cooke and S. Ellsworth, by Geo. L. Woods, his Atty. and S. A. Clarke who severally acknowledged that they signed the within and foregoing instrument; in person or as Attorney, for the uses and purposes therein named.

In Witness Whereof, I have hereunto set my hand and Notarial Seal this the day and year above written.

C. S. WOODWORTH,

(Notarial Seal)

Notary Public.

(Five cents in revenue stamps cancelled.)

(ENDORSED)

Articles of Incorporation of Oregon Central R. R. Co. Filed in the office of the Secretary of State this 22nd day of April, A.D. 1867.

I. R. MOORES,
 Acting Secy. of State.

EXHIBIT NO. 4 TO STIPULATION.

CHAPTER 403.

*An Act to Incorporate the Southern Pacific
Company.*

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. That Henry D. McHenry, Wm. G. Duncan, Samuel E. Hill, Samuel M. Cox, Henry McHenry, Jr., and their associates and successors and assigns, be and they are hereby created and constituted a body corporate and politic, under the name of the Southern Pacific Company, and as such shall have perpetual succession, and be capable in law to purchase, grant, sell, or receive, in trust or otherwise, all kinds of personal and real property to such amount as the directors of said company may, from time to time, determine; and to contract and be contracted with, sue and be sued, plead and be impleaded, appear and prosecute to final judgments all suits or actions at law or in equity in all courts and places; and to have and use a common seal, and to alter the same at pleasure; and to make and establish such by-laws, rules, and regulations for the government of said company and the conduct of its business as said corporation or the stockholders therein shall deem expedient or necessary for the management of its affairs, not inconsistent with the constitution and laws of this State or of the United States; and generally to do and execute all acts, matters, and things which may be

deemed necessary or convenient to carry into effect the powers and privileges herein granted; *Provided* however, that said corporation shall not have power to make joint stock with, lease, own, or operate any railroad within the State of Kentucky.

SEC. 2. The said corporation is hereby authorized and empowered to contract for, and acquire by purchase or otherwise, bonds, stocks, obligations, and securities of any corporation, company, or association now existing, or hereafter formed or constituted, and bonds, obligations, and securities of any individuals, state, territory, government or local authorities whatsoever, and to enter into contracts with any corporation, company, or association, individuals, state, territory, government or local authorities, in respect of their bonds, stock obligations, and securities, or in respect of the construction, establishment, acquisition, owning, equipment, leasing, maintenance, or operation of any railroads, telegraphs, or steamship lines, or any public or private improvements, or any appurtenances thereof, in any State or Territory of the United States, or in any foreign country, and to buy, hold, sell, and deal in all kinds of public and private stocks, bonds and securities, and said corporation may borrow and loan money, issue its own bonds or other evidences of indebtedness, and sell, negotiate and pledge the same, to such amounts, upon such terms, and in such manner as may from time to time be determined by the directors of said corporation; and it may mort-

gage all or any part of its property, assets, and franchises to secure such bonds and the interest thereon, on such terms and conditions as shall on that behalf be prescribed by its board of directors.

SEC. 3. The capital stock of said corporation shall be one million dollars, divided into shares of one hundred dollars each; which shares shall be deemed personal property, and may be issued, transferred, and forfeited for non-payment in such manner as the board of directors of such corporation may determine; and no person shall be in anywise liable as a stockholder of said corporation after said capital stock to such amount of one million dollars shall have been paid in in cash, and a certificate to that effect signed and sworn to by the treasurer and a majority of the board of directors of said corporation shall have been filed in the office of the Secretary of State of this State; nor shall the said corporation, nor any of the officers or agents thereof, be thereafter bound to make any further returns or certificates: *Provided*, however, that if, after the payment of such capital stock, any part thereof shall be withdrawn for or refunded to any of the stockholders when the property of the corporation is insufficient or will be thereby rendered insufficient for the payment of all its debts, the stockholders receiving the same shall be bound and obliged to repay to said corporation or its creditors, the amount so withdrawn or refunded.

SEC. 4. Any two of the persons above named as incorporators of said corporation may call the first meet-

ing for the organization of such corporation at such time and place as they may appoint, by mailing a proper notice of such meeting to each of such corporators at least ten days before the time appointed; and in case a majority of such corporators shall attend such meetings, either in person or by proxy, they may open books for the subscriptions to its capital stock; and whenever five hundred thousand dollars shall be subscribed and ten per cent of said subscriptions shall be paid in cash, the stockholders of said corporation may organize the same, and said corporation may proceed to business.

SEC. 5. Each share of stock entitle the holder thereof to one vote, in person or by proxy, at all meetings of the stockholders; the holders of a majority in interest of the capital stock, present in person or by proxy, shall constitute a quorum (the corporation shall have a lien on all the stock and property of its members invested therein for all debts due by them to said corporation, which lien may be enforced in such manner as the by-laws shall prescribe.)

SEC. 6. The stock, property, and affairs of said corporation shall be managed by a board of directors of such number, of not less than three, as may be from time to time determined by the corporators or stockholders. The directors shall be elected by the stockholders at such time and place, and in such manner, and for such terms, as the stockholders shall from time to time determine. Meetings of directors or stockholders may be held within or without the State. No person shall be

elected a director who is not a stockholder of the corporation. A majority of the directors shall constitute a quorum of said board for the transaction of business. The directors shall appoint from their own number a president, and they shall also appoint a clerk and treasurer, and such other officers and agents as they may deem proper, to hold their offices during the pleasure of the board. In case of a vacancy or vacancies in the board, the remaining directors may fill such a vacancy or vacancies. The capital stock of said corporation may be increased from time to time to such sum as may be determined by the board of directors of said corporation, provided such increase or diminution shall be approved by at least two-thirds in interest of the stockholders of said corporation.

SEC. 7. The annual tax upon said corporation shall be the same as is now fixed by law for broker's license. *Provided*, that all property owned by said corporation and situated in the State shall pay the same State and local tax as is assessed upon similar property; and capital stock in said corporation, owned by citizens of the State, shall be assessed against the holders thereof as choses in action under the equalization law.

SEC. 8. The Company shall keep an office for the transaction of business, and the clerk or assistant clerk of said corporation shall reside within the State of Kentucky; but the said corporation may keep offices at such places outside of this State as in the judgment of its board of directors its business may from time to time

require: *Provided*, that nothing herein contained shall be construed as granting any lottery or banking privileges.

SEC. 9. This act shall take effect immediately upon its passage.

Chas. Offutt,

Speaker of the House of Representatives.

James R. Hindman,

Speaker of the Senate.

Approved March 17, 1884:

J. Proctor Knott.

By the Governor:

Jas. A. McKenzie,

Secretary of State.

CHAPTER 601.

An Act to amend "An Act to incorporate the Southern Pacific Company," approved March seventeenth, eighteen hundred and eighty-four.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. That the Act entitled "An Act to incorporate the Southern Pacific Company," which was approved March seventeenth, eighteen hundred and eighty-four, be and the same is amended by adding to Section 1 thereof the following words, to wit: except subject to and in conformity with the provisions of the laws of the State of Kentucky applicable to railroads, and acquiring no special rights that may be possessed by any railroads in the state except the general and ordinary rights of common carriers as possessed by railroads generally.

SEC. 2. This Act shall take effect from its passage.

Ben Johnson, Speaker of the House
of Representatives.

J. W. Bryan, Speaker of the Senate.

Approved March 21, 1888.

S. B. Buckner.

By the Governor:

Geo. M. Adams, Secretary of State.

EXHIBIT NO. 5 TO STIPULATION.

Articles of Association, of Amalgamation and Consolidation, Executed this twenty-second (22nd) day of June, A. D. 1870, by and between "The Central Pacific Railroad Company of California," party of the first part, and "The Western Pacific Railroad Company," party of the second part; both of the said railroad companies being railroad corporations duly organized under and in pursuance of the laws of the State of California.

Whereas, "The Central Pacific Railroad Company of California," was duly organized under and in pursuance of the laws of the State of California, by filing Articles of Association in the office of the Secretary of State of the State of California on June 28th, 1861, and amended Articles of Association on the 8th day of October, 1864, to construct, operate, and maintain a railroad and telegraph line through the Counties of Sacramento, Placer, and Nevada, in the State of California, "from the City of Sacramento, in the County of Sacramento, in said State, to the eastern boundary line of the State of California, at or near the place where said line crosses the Truckee River, and running through Roseville, at the junction of said railroad with the California Central Railroad, and by or near to New-Castle, Auburn, Neilsburg, Illinois town, Gold Run, Dutch Flat, Bear Valley, Crystal Lake, Summit Valley, and Donner Pass, together with such branches and extensions of the said railroad as the Board of Directors of said company may at any time deem necessary or proper to construct, operate, and maintain, by the laws of the State of Cali-

ifornia, or other States or Territories, or the Acts of the Congress of the United States, now in force, or which may hereafter be enacted.”

And Whereas, by the provisions of an Act of the Congress of the United States, entitled, “An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes,” approved July 1, 1862, and the Acts amendatory thereof, approved July 2, 1864, and March 3, 1865, the said “The Central Pacific Railroad Company of California” were authorized to locate and construct their road as aforesaid, and to locate, construct and continue the same eastward in a continuous completed line until it should meet and connect with the Union Pacific Railroad, and certain rights, powers, donations, grants, rights of way, privileges, and franchises were given and granted to them, to aid in the construction of their said railroad.

And Whereas, on the 23rd July, 1868, the said “The Central Pacific Railroad Company of California” increased the capital stock of the company from twenty million dollars to one hundred million dollars, the latter amount being necessary for the constructing, completing, operating, equipping, and maintaining said railroad and its extension.

And Whereas, under and in pursuance of the laws of the State of California, “The Western Pacific Railroad Company” was duly organized on the 11th day of

December, 1862, and on the 2nd day of November, 1869, the "San Francisco Bay Railroad Company," another corporation organized under and in pursuance of the laws of the State of California, amalgamated and consolidated its interests, capital stock, rights, privileges, and franchises with those of the said "The Western Pacific Railroad Company," and formed both of said companies into one new company and corporation, to be called and known as "The Western Pacific Railroad Company," the objects and purposes of which were to purchase, construct, own, maintain, and operate certain railroad and telegraph lines, so as to form a continuous line of railway and telegraph, "Commencing at a point on the Central Pacific Railroad and connecting therewith at or near the City of Sacramento, and running thence by way of Stockton and the several routes mentioned in the several Articles of Association of the said 'The Western Pacific Railroad Company' and of the said 'San Francisco Bay Railroad Company' to a point on the San Francisco and San Jose Railroad, and connecting therewith at or near the city of San Jose, and to the several other points therein mentioned, to wit: The City of San Francisco, 'Yerba Buena Island,' otherwise called 'Goat Island', and the point in the Bay of San Francisco between 'The Encinal' and the City of San Francisco. Also, to purchase, construct, own, maintain, and operate such branch and side lines and railroads between the said 'The Western Pacific Railroad' and such several points on the Bay of San Francisco as the Board of Directors of said new and consoli-

dated company may from time to time determine. The length of the said railroad and telegraph lines being, as near as may be, two hundred and twenty-three miles.”

And Whereas, by the laws of the State of California it is made lawful for any two or more railroad companies to amalgamate and consolidate their capital stock, debts, property, assets and franchises, and they are authorized and empowered so to do in such manner as may be agreed upon by the Boards of Directors of such companies so desiring to amalgamate and consolidate their interests.

And Whereas, the Boards of Directors of the said railroad companies, parties of the first and second parts hereto, have agreed to amalgamate and consolidate the interests of said companies upon the terms, agreements, stipulations and conditions hereinafter set forth.

And Whereas, more than three fourths of the value of all the stockholders in interest of each of said companies, parties of the first and second parts hereto, give and have given their written consent to such amalgamation and consolidation upon the terms, agreements, stipulations and conditions hereinafter set forth.

The said companies, parties of the first and second parts hereto, therefore, hereby mutually covenant and agree to and with each other to the following articles, to-wit:

ARTICLE FIRST.

The said companies, parties hereto, agree to, and do by these presents amalgamate and consolidate the capital stock, debts, property, assets and franchises of each of said companies, the parties hereto of the first and second part, into one company and corporation. And all the capital stock, debts, property, assets, and franchises in or to which said companies, the parties hereto, or either of them, have any right, title, interest or claim, either in possession or expectancy, at law or in equity, or which may in any way relate or pertain to the said companies, parties hereto, or either of them, are hereby amalgamated, united, merged, and consolidated into one company and corporation.

ARTICLE SECOND.

The name of the said new and consolidated company and corporation, hereby formed under these articles, shall be and is. "Central Pacific Railroad Company." The said new company and corporation is to and shall continue in existence for the term and period of Fifty Years from the date of these articles.

ARTICLE THIRD.

The objects and purposes of the said new and consolidated company and corporation are, to purchase, construct, own, maintain, and operate the railroad and telegraph lines, hereinbefore described of said parties of the first and second parts hereto, so as to form a continuous line of railway and telegraph from Ogden, in the

Territory of Utah, to San Jose, in California, and to the waters of the Bay of San Francisco, to wit: Commencing at or near Ogden, in Utah, at the connecting point of the Central Pacific Railroad and Union Pacific Railroad, and running thence along the lines of the Central Pacific Railroad and the Western Pacific Railroad, by way of Sacramento and the several routes mentioned in the several Articles of Association of the said "The Central Pacific Railroad Company of California" and of the said "The Western Pacific Railroad Company," to a point on the San Francisco and San Jose Railroad, and connecting therewith at or near the City of San Jose, California, and to the several other points heretofore herein mentioned, to wit: The City of San Francisco,— "Yerba Buena Island," otherwise called "Goat Island,"—and the point in the Bay of San Francisco between "The Encinal" and the City of San Francisco. Also to purchase, construct, own, maintain, and operate such branch and side lines and railroads between the said "The Western Pacific Railroad" and such several points on the Bay of San Francisco, and between the said "The Central Pacific Railroad" and such several points on the Bay of San Francisco and the navigable waters thereof, as the Board of Directors of said new and consolidated company may, from time to time, determine. The length of the said railroad and telegraph lines being, as near as may be, one thousand (1,000) miles.

ARTICLE FOURTH.

The number of Directors, to manage the affairs of

the said new and consolidated company and corporation, shall be seven. The following named persons shall act as such Directors until others are duly elected, to wit: Leland Stanford, C. P. Huntington, Mark Hopkins, Charles Crocker, E. B. Crocker, E. H. Miller, Jr., and A. P. Stanford.

ARTICLE FIFTH.

The capital stock of the new and consolidated company and corporation is hereby fixed at one hundred million dollars, that being the actual and contemplated cost of constructing the said railroad and telegraph lines thus consolidated, including the cost of the right of way, motive power, and every other appurtenance and thing for the constructing, running, and operating of said railroad and telegraph lines, as nearly as can be estimated by competent engineers. The said capital stock shall consist of, and be divided into, one million (1,000,000) shares of one hundred dollars each.

ARTICLE SIXTH.

The holders and owners of the capital stock of each of the said several corporations, parties of the first and second parts hereto, shall be entitled to receive and hold an equal amount and number of the shares of the capital stock of the said new and consolidated company and corporation now held by them respectively, and shall be entitled to receive from the new and consolidated company and corporation certificates therefor upon the surrender of the certificates of stock issued by said several

parties of the first and second parts, or if their right to stock is otherwise evidenced, then upon surrender of such evidence that they are entitled to certificates from either of said parties.

ARTICLE SEVENTH.

And the said several parties of the first and second parts, each for itself, hereby sells, assigns, transfers, grants, bargains, releases, and conveys to the said new and consolidated company and corporation, its successors and assigns forever, all its property, real, personal, and mixed, of every kind and description; all its capital stock; all its interest in the shares of its capital stock subscribed but not fully paid for; all credits, effects, judgments, decrees, contracts, agreements, claims, dues, and demands of every kind and description; and all rights, privileges, and franchises, corporate and otherwise, held, owned, or claimed by said parties of the first and second parts, or either of them, in possession or expectancy, either at law or in equity, subject, however, to all conditions, obligations, stipulations, contracts, agreements, liens, mortgages, incumbrances, claims, and charges thereon, or in anywise affecting the same.

ARTICLE EIGHTH.

The said new and consolidated company and corporation is to be liable for and shall fulfill, perform, do and pay all and each of the contracts and agreements, covenants, duties, obligations, liabilities, debts, dues and demands of the said several parties of the first and second

parts; but this amalgamation and consolidation shall not in any way relieve the said parties to the first and second parts, or the stockholders thereof, from any and all just liabilities.

In Testimony Whereof, the said parties of the first and second parts have severally caused these presents to be executed in duplicate, and each instrument to be signed by their respective Presidents and Secretaries, and the corporate seals of the said party of the first part, and of the said party of the second part to be hereunto affixed, in pursuance of Orders and Resolutions of their several Boards of Directors made the twenty-second (22nd) day of June, A. D. 1870.

(Stamp.)	The Central Pacific Railroad
(Stamp.)	Co. of California,
C. P. R. R.	By Leland Stanford,
Co.	President.
Seal.	and E. H. Miller, Jr.,
	Secretary.

(Stamp)	The Western Pacific Railroad
(Stamp)	Co.,
W. P. R. R.	By Leland Stanford,
Co.	President,
Seal.	and E. H. Miller, Jr.,
	Secretary.

We the undersigned, being the holders of stock to the extent of more than three-fourths of the value of all stockholders in interest of the said "The Central Pacific Railroad Company of California," party of the first part to the foregoing new Articles of Association, amalgamating and consolidating the said parties of the first and second parts, hereby consent to such amalgamation and consolidation, and to the said new articles of Association, this twenty-second day of June, A. D. 1870.

Leland Stanford.

Charles Stanford.

By Leland Stanford, his Att'y in fact.

Mark Hopkins.

C. P. Huntington.

by Mark Hopkins, Att'y in fact.

C. Crocker.

E. B. Crocker, Att'y in fact.

E. H. Miller, Jr.

C. S. Scudder.

A. P. Stanford,

By Leland Stanford, Att'y in fact.

B. B. Crocker.

D. O. Mills & Co.

Albert Gallatin.

W. R. S. Foye.

C. H. Cummings.

I. E. Hollister.

Julius Wetzlar.

J. S. Friend.

Friend & Terry.

W. E. Terry.

We the undersigned, being the holders of stock to the extent of more than three-fourths of the value of all stockholders in interest of the said "The Western Pacific Railroad Company," party of the second part to the foregoing new Articles of Association, amalgamating and consolidating the said parties of the first and second parts, hereby consent to such amalgamation, and consolidation and to the said new Articles of Association, this twenty-second day of June, A. D. 1870.

Leland Stanford.

Mark Hopkins.

C. P. Huntington,

By Mark Hopkins, Att'y in fact.

C. Crocker.

E. B. Crocker

By C. Crocker, Att'y in fact.

E. H. Miller, Jr.

A. P. Stanford.

By Leland Stanford, Att'y in fact.

C. H. Cummings.

No. 16.

State of California—Department of State.

I, L. H. Brown, Secretary of State of the State of California, do hereby certify that I have carefully compared the annexed copy of Articles of Association of Amalgamation and Consolidation—Central Pacific Railroad Company, with the original now on file in my office, and that the same is a correct transcript therefrom, and of the whole thereof. Also, that this authentication is in due form and by the proper officer.

Witness my hand and the Great Seal of State, at office in Sacramento, California, the 15th day of November, A. D. 1895.

(Seal.)

L. H. Brown,
Secretary of State.

By W. T. Sesnon,
Deputy.

(Endorsed:) 40, Central Pacific Railroad Company. Articles of Consolidation of the Central Pacific Railroad Company of California with the Western Pacific Railroad Company.

(Endorsed:) Filed in office of Secretary of State June 23rd, 1870, H. L. Nichols, Secretary of State. By Lew B. Harris, Deputy.

EXHIBIT NO. 6 TO STIPULATION.

Articles of Association, Amalgamation, and Consolidation, Made and executed on this the twentieth day of August, A. D. 1870, by and between the Central Pacific Railroad Company, of the first part; the California and Oregon Railroad Company, of the second part; the San Francisco, Oakland, and Alameda Railroad Company, of the third part, and the San Joaquin Valley Railroad Company, of the fourth part, all of said parties being Railroad corporations duly incorporated, organized, and existing under and by virtue of the laws of the State of California.

Witnesseth: That Whereas, The said party of the first part was duly incorporated and organized for the purpose of constructing, owning, maintaining, and operating a continuous line of railway and telegraph from Ogden, in the Territory of Utah, to San Jose, in California, and to the waters of the Bay of San Francisco, to wit: Commencing at or near Ogden, in Utah, at the point of Junction with the Union Pacific Railroad, running thence west to the eastern boundary of the State of Nevada, at the town of Toano, thence west across the State of Nevada, to the eastern boundary of the State of California, at the Donner Pass through the Sierra Nevada Mountains, passing through the towns of Elko, Carlin, Argenta, Winnemucca, Wadsworth, Reno, and intermediate points in the State of Nevada, to the town of Truckee, in the State of California; thence west, passing the towns of Cisco, Alta, Auburn, Roseville, Sacramento, Stockton, and intermediate points, to Niles Sta-

tion, in Alameda County in the State of California; thence to a point on the San Francisco and San Jose Railroad, and connecting therewith at or near the city of San Jose; also extending from said Niles Station to the city of Oakland, the city of San Francisco, Yerba Buena Island, otherwise called Goat Island, and the point in the Bay of San Francisco between The Encinal and the city of San Francisco; also to purchase, construct, own, maintain, and operate such branch and side lines and railroads between the said railroad and such points on the Bay of San Francisco and the navigable waters thereof as the Board of Directors of said company may from time to time determine; the length of said railroad and telegraph being, as near as may be, one thousand (1,000) miles.

And Whereas, The said party of the second part was duly incorporated and organized for the purpose of purchasing, constructing, owning, maintaining and operating a continuous line of railroad and telegraph, commencing at Roseville, in the County of Placer and State of California, and there connecting with the railroad of the party of the first part, hereinbefore described, running thence north through the towns of Marysville and Chico, to the northern boundary of the State of California, by such route and to such point on said boundary as may be selected by its Board of Directors, with such extensions into the State of Oregon as said Board may deem proper under and by virtue of a certain Act of Congress entitled "An Act granting lands to aid in the construction of a railroad and tele-

graph line from the Central Pacific Railroad in California to Portland, in Oregon, approved July 25th, 1866," and with the power or right to change the southern terminus to some other point on the said Central Pacific Railroad between said town of Roseville and the bridge crossing the American River, near the city of Sacramento, whenever its Board of Directors may deem proper; the length of said railroad and telegraph in the State of California, being, as near as may be, three hundred and thirteen miles.

And Whereas, The said party of the third part was duly incorporated and organized for the purpose of purchasing, constructing, owning, maintaining, and operating a continuous line of railway from the City and County of San Francisco, through the City of Oakland and through a point on the easterly part thereof, in Alameda County to a point on the line of the railroad, formerly known as the San Francisco and Alameda Railroad, at or near Fruit Vale Station, in said county of Alameda; and also a continuous line of railroad from the extreme western point of the Encinal of San Antonio, in the county of Alameda, passing through said county of Alameda to a point on the Western Pacific Railroad (now a part of the railroad of the said party of the first part), at or near Haywards, in said county of Alameda and State of California; also, for the purpose of purchasing, constructing, owning, maintaining, and operating such branch and side lines and railroads, between the said railroad and such several points on the Bay of San Francisco, as its Board of Directors may,

from time to time, determine; the length of said railroad, being, as near as may be, twenty-five miles.

And Whereas, The said party of the fourth part was duly incorporated and organized for the purpose of purchasing, constructing, owning, maintaining, and operating a railroad from a point on the Western Pacific Railroad (now a part of the railroad of the said party of the first part), at or near the city of Stockton, in the county of San Joaquin, in the State of California, and between said city and the crossing of the San Joaquin River, to a point on Kern River, in the County of Tulare, in said State; said points to be selected by its Board of Directors; said road passing through the counties of San Joaquin, Stanislaus, Merced, Fresno, and Tulare; the length, being, as near as may be, three hundred miles.

And Whereas, Said parties believe a consolidation and amalgamation of their capital stock, debts, properties, assets, roads, telegraph, lands, and franchises will be mutually advantageous.

And Whereas, More than three-fourths in value of all the stockholders in interest of each of said parties, have consented in writing to such amalgamation and consolidation upon the terms and conditions hereinafter set forth.

Now Therefore, Under and by virtue of the statute in such case made and provided, the said parties do hereby mutually covenant and agree each with each and all

the others to the following articles, to wit:

ARTICLE FIRST.

Said parties do hereby amalgamate and consolidate themselves a new corporation under the name and style of the "Central Pacific Railroad Company" which new corporation shall continue in existence for the period of fifty years from the date of these articles; and they do further consolidate and amalgamate their several capital stocks, debts, properties, assets, roads, telegraphs, lands, franchises, rights, titles, privileges, claims and demands of every kind whatsoever, as well in possession as expectancy, at law or in equity, and do grant, convey and vest the same in said new corporation as fully as the same are now severally held and enjoyed by them or either of them subject however to all conditions, obligations, stipulations, contracts, agreements, liens, mortgages, incumbrances, claims and charges thereon, or in any wise affecting the same.

ARTICLE SECOND.

The object and purpose of said new corporation shall be to purchase, construct, own, maintain and operate all and each of the railroad and telegraph lines hereinbefore described for the period hereinbefore stated.

ARTICLE THIRD.

The Board of Directors of said new corporation shall consist of seven persons and the following named persons shall act as such Directors until their successors

shall have been duly elected pursuant to the by-laws of said new corporation hereinafter to be adopted, viz: Leland Stanford, William E. Brown, Mark Hopkins, Collis P. Huntington, Charles Crocker, Edward H. Miller, Jr. and Charles H. Cummings.

ARTICLE FOURTH

The capital stock of said new corporation shall be one hundred million dollars, consisting of one million shares of one-hundred dollars each, that sum being the contemplated actual cost of said railroad and telegraph lines, including rolling stock, motive power, depots, etc.

ARTICLE FIFTH.

Each stockholder of each of said parties shall have the same number of shares of the capital stock of the new corporation which he now owns and holds of the capital stock of his respective company, and shall be entitled to receive from said new corporation, certificates therefor upon the surrender of the certificates now held by him, or such other evidence of his ownership as he may now have, if no certificates have been issued to him by the company of which he is now a stockholder.

ARTICLE SIXTH.

Said new corporation shall assume and perform all the contracts, agreements, covenants, duties and obligations of what kind soever of each of the said parties, and shall pay and discharge all debts, claims, and demands, existing against either and all of said parties;

but nothing herein contained shall release the said parties or either of them or their stockholders, or any of them from any of their just liabilities.

In testimony whereof the said parties have severally caused these articles to be signed and executed by affixing thereto their respective corporate names and seals, by their respective Presidents and Secretaries pursuant to the orders of their respective Boards of Directors heretofore made on the day and year first above written.

Central Pacific Railroad Company,
 (C. P. R. R.) By Leland Stanford, President,
 (Seal) and by E. H. Miller, Jr., Secretary.

(C. & O.) California and Oregon Railroad Company,
 (R. R.) By Leland Stanford, President,
 (Seal) and by E. H. Miller, Jr., Secretary.

San Francisco, Oakland and Alameda Railroad,
 (S. F. O. &) Company,
 (A. R. R.) By Alfred A. Cohen, President,
 (Seal) and by H. Lacy, Secretary.

(S. J. V.) San Joaquin Valley Railroad Company,
 (R. R.) By Leland Stanford, President,
 (Seal) and by E. H. Miller, Jr., Secretary.

The undersigned, being holders of more than three-fourths in value, of the capital stock of the Central Pacific Railroad Company, party of the first part in and to the foregoing articles, do hereby consent to the terms and conditions therein contained.

Done this sixteenth day of August, A. D. 1870.

Leland Stanford.

Mark Hopkins.

C. P. Huntington,

By Mark Hopkins, Att'y in fact.

C. Crocker.

E. B. Crocker.

By C. Crocker, Att'y in fact.

W. E. Brown.

E. H. Miller, Jr.

C. H. Cummings.

The undersigned, being holders of more than three-fourths in value, of the capital stock of the California and Oregon Railroad Company, party of the second part in and to the foregoing articles, do hereby consent to the terms and conditions therein contained.

Done this the sixteenth day of August, A. D. 1870.

Leland Stanford.

Mark Hopkins.

C. P. Huntington,

By Mark Hopkins, Att'y in fact.

C. Crocker.

E. B. Crocker.

By C. Crocker, Att'y in fact.

E. H. Miller, Jr.

B. B. Redding.

The undersigned, being holders of more than three-fourths, in value, of the capital stock of the San Francisco, Oakland and Alameda Railroad Company, party of the third part in and to the foregoing articles, do hereby consent to the terms and conditions therein contained.

Done this the sixteenth day of August, A. D. 1870.

Alf. A. Cohen.

D. O. Mills.

F. D. Atherton.

D. P. Barstow.

W. C. Ralston.

The undersigned, being holders of more than three-fourths, in value, of the capital stock of the San Joaquin Valley Railroad Company, party of the fourth part in and to the foregoing articles, do hereby consent to the terms and conditions therein contained.

Done this the sixteenth day of August, A. D. 1870.

Leland Stanford.

Mark Hopkins.

C. P. Huntington.

By Mark Hopkins, Att'y in fact.

C. Crocker.

E. B. Crocker.

By C. Crocker, Att'y in fact.

E. H. Miller, Jr.

B. B. Redding.

C. H. Cummings.

No. 17.

State of California—Department of State.

I, L. H. Brown, Secretary of State of the State of California, do hereby certify that I have carefully compared the annexed copy of Articles of Association, Amalgamation and Consolidation of the Central Pacific Rail Road Company, with the original now on file in my office, and that the same is a correct transcript therefrom, and of the whole thereof. Also, that this authentication is in due form and by the proper officer.

Witness my hand and the Great Seal of State, at office in Sacramento, California, the 15th day of November, A. D. 1895.

L. H. Brown,

Secretary of State.

(Seal)

By W. T. Sesnon,

Deputy.

(Endorsed:) No. 41. Articles of Consolidation by and between The Central Pacific Railroad Co. The California and Oregon R. R. Co. The San Francisco, Oakland and Alameda Railroad Co., and The San Joaquin Valley Railroad Co.

(Endorsed:) Filed in office of the Secretary of State August 22d, 1870. H. L. Nichols, Sec'y of State. By Lew B. Harris, Deputy.

EXHIBIT NO. 7 TO STIPULATION.

An Indenture and Agreement, made and entered into the twenty-ninth day of July, one thousand eight hundred and ninety-nine, by and between the Central Pacific Railroad Company, a corporation created, organized and existing under the laws of the State of California, and invested with certain rights and franchises by and under the laws of the United States of America, and by and under the laws of the States of Utah and Nevada, party of the first part, and the Central Pacific Railway Company, a corporation created, organized and existing under and by virtue of the laws of the State of Utah, of the second part:

Whereas, the party of the first part is the owner of the lines of railroad, the railways and other properties, rights, privileges and franchises, and the lands and notes and securities and moneys, hereinafter in the granting clause hereof described or referred to; and,

Whereas, certain portions of the said lines of railroad and railways and their appurtenances, and said lands, owned by the said party of the first part, are subject to the liens of certain mortgages severally and respectively securing bonds now outstanding (hereinafter called "outstanding old bonds") for the several aggregate principal sums following, to wit:

(a) The Central Pacific Railroad Company of California First Mortgage Bonds, secured by mortgage

dated July 25, 1865, of the several series and for the amounts and now matured or maturing at the dates hereinafter stated, respectively, viz:

Series.	Amount.	Date of Maturity.
Series A	\$2,995,000.....	Matured.
B	{ \$ 1,000.....	Matured.
	{ \$ 999,000.....	December 1, 1899.
C	{ \$ 4,000.....	Matured.
	{ \$ 996,000.....	December 1, 1899.
D	{ \$ 4,000.....	Matured.
	{ \$1,379,000.....	December 1, 1899.
<hr/>		
Total.....	\$6,378,000	

(b) The Central Pacific Railroad Company of California First Mortgage Bonds, secured by mortgage dated January 1, 1867, of the several series and for the amounts and now matured or maturing at the dates hereinafter mentioned, respectively, viz:

Series.	Amount.	Date of Maturity.
Series E	{ \$ 5,000.....	Matured.
	{ \$ 3,990,000.....	June 1, 1900.
F	{ \$ 9,000.....	Matured.
	{ \$ 3,990,000.....	June 1, 1901.
G	{ \$ 13,000.....	Matured.
	{ \$ 3,985,000.....	June 1, 1901.
H	{ \$ 6,000.....	Matured.
	{ \$ 3,993,000.....	June 1, 1901.

I	{	\$ 13,000.....Matured.
		\$ 3,498,000.....June 1, 1901.

Total.....\$19,502,000

(c) The Western Pacific Railroad Company First Mortgage Bonds, secured by mortgage dated July 1, 1869, of the several series and for the amounts and which matured at the date hereinafter mentioned, viz:

Series A for \$1,970,000.....Matured July 1, 1899.
 B “ 765,000..... “ “ “ “

Total . . . \$2,735,000

(d) The California and Oregon Railroad Company, and Central Pacific Railroad Company, successors, First Mortgage Bonds, secured by mortgages dated January 1, 1868, and January 1, 1872, respectively, of the several series and for the amounts and maturing at the date hereinafter mentioned, viz:

Series A for \$5,982,000.. Maturing January 1, 1918.
 B “ \$1,385,000.. “ “ “ “

Total . . . \$10,340,000

(e) The Central Pacific Railroad Company First Mortgage Bonds (San Joaquin Valley Division), secured by mortgage dated October 1, 1870, for the amount of \$6,080,000, maturing October 1, 1900.

(f) The Central Pacific Railroad Company Fifty-Year Five Per Cent. Bonds, secured by mortgage dated April 1, 1889, to the amount of \$12,283,000, maturing April 1, 1939, of which bonds the amount of \$2,038,000

are held as security for the Land Bonds next herein-after mentioned.

(g) The Central Pacific Railroad Company Land Bonds, secured by mortgage dated October 1, 1870, to the amount of \$2,134,000 and maturing October 1, 1900.

And, Whereas, heretofore and under date of February 1, 1899, the said party of the first part (in pursuance of a Settlement Agreement between the United States of America, the said party of the first part, and Messrs. Speyer & Co., dated February 1, 1899, entered into under the provisions of an Act of Congress, approved July 7, 1898) executed its twenty promissory notes in favor of the United States of America for \$2,940,635.78 each, maturing on or before the expiration of each successive six months from the date thereof; and,

Whereas, the said party of the first part is also indebted to the holders of its bonds to the amount at their face value of \$56,000, bearing date October 1, 1886, and payable October 1, 1936, with six per cent. interest, payable semi-annually, commonly known and referred to as "Fifty-year Bonds of 1936."

And, Whereas, under and by virtue of authority from the States of California, Utah and Nevada, the party of the first part has sold to the party of the second part hereunder, subject to the liens now existing thereon, and upon and subject to the terms and conditions here-

inafter prescribed, all the lines of railroad, railways and other properties and rights, privileges and franchises, and lands, notes, securities and moneys hereinafter in the granting clause hereof described and referred to, and any and all other properties, claims, demands, choses in action, rights, privileges and franchises of the said party of the first part:

Now, Therefore, This Indenture Witnesseth, That, in consideration of one dollar, which, simultaneously with the execution hereof, has been paid by the party of the second part to the party of the first part, the receipt whereof by said party of the first part is hereby acknowledged, and for and in consideration of the undertakings, covenants and agreements on behalf of the said party of the second part hereinafter contained, said party of the first part has granted, bargained, sold, conveyed, assigned, transferred and set over, and hereby grants, bargains, sells, conveys, assigns, transfers and sets over, unto the party of the second part:

First. The lines of railroad owned by the party of the first part, extending from a point about five miles west of Ogden, in the State of Utah, through the States of Utah, Nevada and California, to and into the City of Sacramento, in the State of California, and from said Sacramento to San Jose, in said last mentioned State, and from Niles to Oakland, and from Lathrop to Goshen, all in the State of California, and from Roseville, in said State of California, to the California and Oregon boundary; also the leasehold of the railroad from

a point about five miles west of Ogden to Ogden, in the County of Weber in the State of Utah.

Second. All the railways belonging to the party of the first part in San Francisco, Oakland and Alameda, in the State of California, and the terminals belonging to the party of the first part, used in connection therewith, including wharves, piers, docks, embankments, ferries, steamers and transfer and ferryboats.

Third. All roadbeds, superstructures, rights of way, rails, tracks, side tracks, bridges, viaducts, terminals, buildings, depots, stations, warehouses, car houses, engine houses, freight houses, coal houses, wood houses, machine shops and other shops, turntables, water stations, fences, docks, structures, erections and fixtures, and all other things of whatever kind, now owned by the party of the first part, which shall in anywise, or at any time, belong or appertain to or be provided for use upon, or for the purpose of, any of said lines of railroad, and any and all other property, real or personal, of every kind and description, now owned by the party of the first part, for use upon or for the purposes of such lines of railroad or terminals, or any of them.

Fourth. Any and all locomotives, engines, cars and other rolling stock, equipment, machinery, instruments, tools, implements, materials, furniture and other chattels of the party of the first part now owned for use upon any of such lines of railroad or terminals or other property.

Fifth. Any and all other railroads, equipment and terminals owned by the party of the first part.

Sixth. Any and all corporate or other rights, privileges and franchises which the party of the first part now has or hereafter shall acquire, possess or become entitled to, for, or appertaining to, the construction, maintenance, use or operation of such lines of railroad or terminals or other property.

Seventh. Any and all the rents, issues, profits, tolls, and other income of such lines of railroad or terminals or other property.

Eighth. All and singular the several sections of land granted by the United States to the Central Pacific Railroad Company of California by an Act of Congress approved on the first day of July, 1862, entitled "An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes.", and an act amendatory thereof, approved on the second day of July, 1864, also all the lands granted to the California and Oregon Railroad Company by an Act of Congress approved on the twenty-fifth day of July, 1866, entitled, "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland, in Oregon."; and also all the estate, right, title, interest claim and demand whatsoever, at law or in equity, of, in or to the same

or any part or parcel thereof, which the said party of the first part now has, holds, owns or is entitled to, or hereafter may or shall acquire, have, hold, own or be or become entitled to by force or virtue of the said Acts of Congress, saving and excepting all parts and parcels of said lands which were sold prior to the execution of the mortgage from the Central Pacific Railroad Company to Charles Crocker and Silas W. Sanderson, dated the first day of October, A. D. 1870, securing the Land Bonds of said last-mentioned Company, and all such parts and parcels of said lands as shall have since been released from the said mortgage securing such Land Bonds in accordance with the provisions thereof.

Ninth. All notes now outstanding given in payment for lands covered by such mortgage of the Central Pacific Railroad Company, dated October 1, 1870, securing said Land Bonds.

Tenth. All securities and moneys which are held in any sinking fund created or existing by or under any mortgage existing on the 20th day of February, 1899, whether of the party of the first part or any divisional company by the consolidation whereof it was formed.

Eleventh. All other properties, claims, demands, moneys, choses in action, leaseholds, rights, privileges and franchises owned by or belonging to the party of the first part, or to which it is in any wise entitled.

To Have and to Hold, the premises, railroads, railways, properties real or personal, claims, demands, choses in action, leaseholds, rights, privileges, franchises, estates and appurtenances, lands, land notes and securities and moneys hereby granted, bargained, sold, conveyed, assigned, transferred or set over, or intended so to be, unto the party of the second part and to its successors and assigns forever, but subject to the liens thereon hereinbefore mentioned and referred to.

And in further consideration hereof, and in order to provide for the readjustment of the present funded indebtedness of the party of the first part (subject to which the properties of said party of the first part are hereby conveyed), and for the purpose of securing the payment of the amounts becoming due on the notes given by said party of the first part to the United States under said Settlement Agreement, dated February 1, 1899, as in said Settlement Agreement prescribed, the party of the second part has assumed and hereby assumes the payment of all the indebtedness and guaranties of the said party of the first part, and has undertaken, covenanted and agreed, and hereby undertakes, covenants and agrees to and with the party of the first part that it will issue stocks and securities and execute mortgages as prescribed in the Central Pacific Readjustment Plan and Agreement dated February 8, 1899, issued by Speyer & Co., Speyer Brothers, Laz Speyer Ellissen, Teixeira de Mattos Brothers and the Deutsche Bank of Berlin, as Readjust-

ment Managers, or as the same may be modified under the terms thereof and with the assent of the party of the second part, and in a certain Agreement bearing date the 20th day of February, one thousand eight hundred and ninety-nine, by and between F. G. Banbury, Esq., M. P., John B. Akroyd, Esq., Lord Alwyn Compton, M. P., Daniel Marks, Esq., and Joseph Price, Esq., as the London Committee of Central Pacific Shareholders, Messrs. Speyer & Company of New York, Messrs. Speyer Brothers of London, Mr. Laz Speyer Ellissen of Frankfort-on-the-Main, Messrs. Teixeira de Mattos Brothers of Amsterdam, and the Deutsche Bank of Berlin, as Readjustment Managers as therein stated, and the Southern Pacific Company, and in a certain other Agreement bearing date the 1st day of March, one thousand eight hundred and ninety-nine, by and between August Belmont, Esq., Hon. John G. Carlisle and George Coppel, Esq., as the American Committee of Central Pacific Share-Holders, the said Readjustment Managers and the Southern Pacific Company, and, under arrangements made or to be made with said Readjustment Managers will carry out such Readjustment Plan and said Agreements.

In Witness Whereof, the parties hereto have caused these presents to be signed on their behalf respectively by their respective Presidents, and their respective corporate seals to be hereunto affixed and attested by their respective Secretaries, the day and year first above written.

Central Pacific Railroad Company,

(Seal of Central
(Pacific Railroad
(Company.)

By
Isaac L. Requa,
President.

Attest:

W. M. Thompson,
Secretary.

Central Pacific Railway Company.

(Seal of Central)
(Pacific Railway)
(Company.)

By
Thomas Marshall,
President.

Attest:

David B. Hempstead,
Secretary.

State of California, }
City and County of San Francisco. } ss.:

On this 29th day of July, A. D. 1899, before me, E. B. Ryan, a Notary Public in and for the City and County of San Francisco, duly commissioned and sworn, personally appeared Isaac L. Requa, known to me to be the President, and W. M. Thompson, known to me to be the Secretary, of the Central Pacific Railroad Company, the corporation described in and who executed the within and annexed instrument, and acknowledged to me that said corporation executed the same.

In Witness Whereof, I have hereunto set my hand and fixed my official seal at my office, in the City and

County of San Francisco, the day and year in this certificate first above written.

E. B. Ryan,

(Notarial Seal)

Notary Public,

In and for the City and County of

San Francisco, State of California.

State of California, {
City and County of San Francisco. } ss.:

On the 29th day of July, A. D. 1899, personally appeared before me Isaac L. Requa, who, being by me duly sworn, did say that he is the President of the Central Pacific Railroad Company, the corporation named in the foregoing instrument, and that said instrument was signed in behalf of said corporation by resolution of its Board of Directors, and said Isaac L. Requa acknowledged to me that said corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, in said City and County of San Francisco, on this 29th day of July, A. D. 1899.

E. B. Ryan,

(Seal) A Commissioner of Deeds for the State of
Utah, residing in the City and County of
San Francisco, State of California.

State of California,
City and County of San Francisco. } ss.:

On this 29th day of July, A. D. one thousand eight hundred and ninety-nine (1899), before me, E. B. Ryan, a Commissioner of Deeds for the State of Nevada, duly appointed, commissioned and sworn, residing in the City and County of San Francisco and State of California, personally appeared the within-named Isaac L. Requa, President of the Central Pacific Railroad Company, and W. M. Thompson, Secretary of the Central Pacific Railroad Company, personally known to me to be the said officers of the said corporation, respectively, and the individuals described in and who executed the within instrument as such officers of said Company, and they each severally and personally then and there acknowledged to me that they executed the said within instrument as the free act and deed of the said Central Pacific Railroad Company, freely and voluntarily, and for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand and affixed my official seal as such Commissioner, at my office in said City and County of San Francisco, the day and year last above written.

E. B. Ryan,

(Seal) A Commissioner of Deeds for the State of
Nevada, residing in San Francisco, California.

State of Utah, }
 County of Salt Lake. } ss.:

On this 31st day of July, A. D. 1899, before me, Lula Geoghegan, a Notary Public in and for the County of Salt Lake, State of Utah, duly commissioned and qualified, personally appeared Thomas Marshall, known to me to be the President, and David B. Hempstead, known to me to be the Secretary, of the Central Pacific Railway Company, the corporation described in and which executed the within and annexed instrument, and acknowledged to me that said corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the City and County of Salt Lake, State of Utah, the day and year first above written.

Lula Geoghegan,
 (Notarial Seal) Notary Public.

My Commission expires September 17, 1901.

State of Utah, }
 County of Salt Lake. } ss.:

On this 31st day of July, A. D. 1899, personally appeared before me, Thomas Marshall and David B. Hempstead, who, being by me respectively duly sworn, each for himself says that the said Thomas Marshall is the President of the Central Pacific Railway Company, and the said David B. Hempstead is the Secretary of

said Company, one of the corporations named in the foregoing instrument, and that said instrument was signed in behalf of said corporation by said President and Secretary, respectively, under and in pursuance of a resolution of its Board of Directors; and the said Marshall and Hempstead respectively acknowledge to me that said corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, in said County of Salt Lake, State of Utah, on this 31st day of July, A. D. 1899.

Lula Geoghegan,

(Notarial Seal)

Notary Public.

My Commission expires September 17, 1901.

State of Utah, }
County of Salt Lake. }ss.:

On this 31st day of July, A. D. 1899, before me, Lula Geoghegan, a Notary Public in and for the County of Salt Lake, State of Utah, duly appointed and qualified, personally appeared the within-named Thomas Marshall, President of the Central Pacific Railway Company, and David B. Hempstead, Secretary of the said Central Pacific Railway Company, personally known to me to be the said officers of the said corporation, respectively, and the individuals described in and who executed the within instrument as such officers of said Company, and they each severally and personally then and there acknowledged to me that he executed the said instrument as

the free act and deed of the said Central Pacific Railway Company freely and voluntarily, and for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand and affixed my official seal as such Notary Public, at my office in said County of Salt Lake and State of Utah, the day and year last above written.

Lula Geoghegan,

(Notarial Seal.)

Notary Public.

My Commission expires September 17, 1901.

EXHIBIT NO. 8 TO STIPULATION.

State of Utah, }
County of Salt Lake. } ss.:

Know all Men by these Presents:

The we, the undersigned, whose names are hereunto subscribed, do hereby certify and declare that we have, under and in pursuance of an Act of the legislature of the State of Utah, entitled "An Act to provide for the formation of railroad corporations, for the purpose of purchasing, owning, maintaining, operating and extending railroad lines, franchises, properties and appurtenances, authorizing the issue of bonds, making deeds of trust and mortgages and defining the rights and powers of such corporations," approved January 22, 1897, and the other laws of the State of Utah applicable thereto, associated ourselves together as a corporation for the

purpose of buying, owning, maintaining, operating and further extending the railroads, rights, property and franchises hereinafter described, and we further certify and declare that we have adopted and do hereby adopt the following

ARTICLES OF ASSOCIATION.

Article 1. The corporate name of the corporation hereby formed shall be "Central Pacific Railway Company." By that name the persons subscribing these Articles of Association, and all persons who may from time to time become shareholders in the corporation hereby formed, shall have perpetual succession, with power to adopt a common seal, sue and be sued, to acquire, hold, mortgage and convey property; to make contracts, fix and prescribe tariffs and rates of compensation for the carriage of persons and property, and generally to do all acts necessary or proper to carry into effect the powers and purposes of said corporation.

Art. 2. Said corporation shall continue in existence for the period of fifty years from the date of the filing of these Articles of Association in the office of the Secretary of State of the State of Utah.

Art. 3. Said corporation shall possess all of the powers, rights and franchises specified, referred to or provided for in these Articles of Association; and, also, all of the powers which, by said Act above entitled, approved January 22, 1897, and such other laws of the

State of Utah, corporations formed under, and pursuant to, the said Act and laws, are entitled to have, possess and enjoy as fully as if all of the provisions of the said Act in this behalf were herein set forth at large; and, also, all of the powers, rights, privileges and franchises of railroad corporations organized under the laws of the State of Utah, or under the laws of other States or Territories of the United States, as hereinafter provided.

Art. 4. The amount of the capital stock of the said corporation shall be eighty-seven million two hundred and seventy-five thousand five hundred dollars (\$87,275,500), which shall be divided into and represented by eight hundred and seventy-two thousand seven hundred and fifty-five (872,755) shares of the par value of one hundred dollars (\$100) cash, and each of which shares shall be entitled to one vote at any meeting of stockholders.

Of such Capital Stock two hundred thousand (200,000) shares of one hundred dollars (\$100) each may be issued as Preferred Stock, and six hundred and seventy-two thousand seven hundred and fifty-five (672,755) shares of one hundred dollars (\$100) each may be issued as Common Stock.

Such Preferred Stock shall be entitled, in preference and priority over the Common Stock of said corporation, to accumulative preferential dividends from August 1, 1899, up to four per cent. per annum gold, payable semi-annually, out of net profits of the corporation, as the

same shall be declared by the Board of Directors thereof, and shall be entitled to a preference and priority over said Common Stock in respect of capital in case of liquidation or dissolution. Subject to the preferential rights above described, dividends up to four per cent. per annum out of net profits of the corporation, as the same shall be declared by the Board of Directors thereof, shall be paid upon the Common Stock of the corporation, and the balance of dividends payable out of net profits of the corporation, as the same shall be declared by the Board of Directors thereof, shall be paid *pro rata* upon the Preferred and Common Stock. The Directors may adopt proper by-laws to carry into effect the provisions of this article.

Art. 5. The number of Directors to manage and control the affairs of this corporation shall be seven, a majority of whom shall be sufficient to form a quorum for the transaction of business. The names and residences of those who shall serve as Directors for the first year and until their successors are chosen and qualified, are

Thomas Marshall,	Salt Lake City, Utah.
Jonathan C. Royle,	Salt Lake City, Utah.
David B. Hempstead,	Salt Lake City, Utah.
Douglas O. Morgan,	New York City, N.Y.
Henry Ruhlender,	New York City, N.Y.
Charles J. Dodd,	New York City, N.Y.
Richard R. Rogers,	New York City, N.Y.

Art. 6. The said corporation is organized and formed for and shall have the power to purchase, own, hold, enjoy, maintain, operate and further extend the railroads, property, rights and franchises, or any part thereof, belonging to the Central Pacific Railroad Company, a corporation heretofore organized under the laws of the State of California and invested with franchises under Acts of Congress of the United States, and under the laws of the States of Utah and Nevada.

The said corporation hereby formed shall have the power to acquire, possess and enjoy the lands and land grants, or any part thereof, and all rights with respect thereto, of the said Central Pacific Railroad Company or any or either of its constituent companies; and the said corporation hereby formed shall have the power to construct or acquire by lease, purchase, consolidation, ownership of capital stock or otherwise, branches, extensions and connecting or auxiliary lines, within or without this State, as the Board of Directors may from time to time deem expedient and as may be authorized by law.

The termini of the said railroad which the said corporation hereby formed is authorized to acquire, enjoy and operate as now constructed, and the States and counties through which the said railroad passes, are as follows, to wit:

The railroads extending from a point about five miles west of Ogden, in the County of Weber, in the State of Utah, through the Counties of Weber and Box

Elder, in said State of Utah, and the Counties of Elko, Eureka, Lander, Humboldt, Churchill, Lyon and Washoe, in the State of Nevada, and the Counties of Sierra, Nevada, Placer and Sacramento in the State of California, to and into the City of Sacramento, in said last-mentioned county and state; and from said Sacramento through the Counties of Sacramento, San Joaquin, Alameda and Santa Clara in the State of California, to San Jose in the last-mentioned county and State; and from Niles in the County of Alameda and State of California, through the County of Alameda, in the State of California, to Oakland, in said last-mentioned county and state, and from the Water Front to Mission Bay, in the City and County of San Francisco, in said State; and from Lathorp, in the County of San Joaquin, in the State of California, through the Counties of San Joaquin, Stanislaus, Merced, Madera, Fresno and Tulare, in the State of California, to Goshen, in said last-mentioned county and state; and from Roseville in the County of Placer, in the State of California, through the Counties of Placer, Yuba, Sutter, Butte, Tehama, Shasta and Siskiyou, in said State of California, to the boundary between the States of California and Oregon in the last-mentioned county; also the leasehold of the railroad from a point about five miles west of Ogden to Ogden, in the county of Weber, in the State of Utah.

The railroads situated in the Cities of Oakland and Alameda, in the County of Alameda, in the State of California, between the following termini, that is to say:

(1) From a point in the City of Oakland, County of Alameda and State of California, on the line hereinbefore described, running from Niles to Oakland, and near the intersection of First and Broadway Streets, curving towards and crossing the Estuary of San Antonio, to the City of Alameda in said county and State; thence running northeasterly through the City of Alameda, via Masticks Station, to the junctions with said first-mentioned line at Fruitvale, and Melrose Stations, and also from Masticks Station aforesaid, via Pacific Avenue, to the shore of the Bay of San Francisco.

(2) From Brooklyn Station upon said line from Niles to Oakland westerly through said City of Oakland, via Seventh Street, to the shore of the Bay of San Francisco.

(3) From a point of junction of the Oakland Mole of said line from Niles to Oakland with the wharf known as "Long Wharf," to the western end of said wharf.

The said railroads above described being the railroads which, on the 28th day of July, 1899, were the property of the Central Pacific Railroad Company herein referred to, and being 1,367.78 miles in length.

Together with such branches and extensions of said railroad or railroads, or any part thereof, as the company hereby formed may from time to time be authorized by law to construct, operate, acquire and maintain.

Art. 7. The corporation hereby formed shall be vested with, and entitled to exercise and enjoy, all the powers, rights, privileges and franchises which at the time of the acquisition of the said railroads by the corporation hereby formed, or at the time of the sale thereof, belonged to, or were vested in, the Central Pacific Railroad Company, or in the corporation or corporations last owning the said railroads and properties, as well as all the rights, privileges and franchises of railroad corporations organized under the laws of the State of Utah, including the aforesaid Act of the Legislature of the State of Utah, approved January 22, 1897, and said other laws of the State of Utah; and said corporation shall also possess in each State or Territory, as respects its railroads, or any branches or extensions thereof situate therein, all of the powers, rights, privileges and franchises of railroad corporations organized under the laws of such State or Territory, or of the United States.

Art. 8. The corporation hereby formed may construct or acquire by lease, purchase, consolidation, ownership of capital stock, or otherwise, branches, extensions and connecting lines within or without this State, and for such purposes or any of them, as well as the purchase or acquisition of the railroads described in Article 6 hereof, may from time to time create and issue its stock, Common or Preferred, or both, and execute bonds and mortgages, for such sum or sums, and payable at such times and places, and drawing such rate of interest, as the Directors may deem proper; and may use such stock

and bonds, or any part thereof, in payment of property to be purchased by such corporation, or the improvement or extension thereof, upon such terms, as the Directors may deem expedient; may guarantee the bonds or obligations of extensions, branches, or connecting or auxiliary lines of railroad; and in exercising its corporate powers, it may make such leases, purchases, contracts, conveyances and consolidations, and do such acts, as the Directors may deem necessary or expedient, not inconsistent with these articles or with the Constitution and laws of the State of Utah. The company hereby formed may also consolidate with or merge itself into any other railway company or companies in this or other States or Territories, pursuant to law; it may also from time to time mend these Articles of Association by filing amended Articles of Association, increasing the capital stock, or otherwise, agreeably with law, enlarging or changing the powers of the corporation hereby formed.

Art. 9. The Board of Directors of said corporation may from time to time adopt and change by-laws not inconsistent with the provisions of these articles or the Constitution and laws of the State of Utah. Said by-laws shall provide for annual elections of Directors by the stockholders, and for the election by the Directors of a President and Vice-President, and for the election or appointment of such other Vice-Presidents or other officers as shall be prescribed in such by-laws. Shareholders' or other corporate meetings may be held at such place or places in the United States as the by-laws may prescribe.

Art. 10. Stockholders shall not be individually liable for the debts of the corporation.

In Testimony Whereof, We have hereunto subscribed our names this twenty-sixth day of July, 1899.

Charles Steele.
Thomas Marshall.
Robert C. Chambers.
Jonathan C. Royle.
David B. Hempstead.
John E. Dooly.
Geo. B. Brastow.
Harry T. Duke.
George M. Downey.
Douglas O. Morgan.

State of Utah, }
County of Salt Lake. } ss.:

On this 26th day of July, 1899, before me, the undersigned, Notary Public, personally appeared Charles Steele, Jonathan C. Royle, Thomas Marshall, David B. Hempstead, Harry T. Duke, John E. Dooly, George B. Brastow, George M. Downey, Douglas O. Morgan and Robert C. Chambers, to me known, and known to me to be the identical persons named and described in and who subscribed the foregoing instrument, and they acknowledged to me that they signed the foregoing Articles of Association for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year last above written.

Lula Geoghegan,
Notary Public.

(Notarial Seal)

My Commission expires Sept. 17, 1901.

To the Central Pacific Railway Company.

I, *James T. Hammond*, Secretary of State of the State of Utah, do hereby certify, that on the Twentyninth day of July 1899 was filed in my office, the Articles of Association of said Association that said articles contain the statement of facts required by law, and that said Corporation is hereby constituted a body corporate, with right of succession as specified in its said articles of agreement, and is hereby authorized to exercise all the functions, enjoy all the privileges of a Corporation, and to transact al business of said Corporation, as specified in its said Articles of Association.

In Testimony Whereof, I have hereunto set my hand and affixed the Great Seal of said State at Salt Lake City, this Twenty ninth day of July A. D. 1899 at one o'clock P. M.

Great Seal
of the
State of Utah.

J. T. Hammond,
Secretary of State.

EXHIBIT NO. 9 TO STIPULATION.

This Agreement, Made and entered into this thirty-first day of July, 1885, by and between the Oregon and California Railroad Company, of Oregon, hereinafter called the Selling Company of the one part, and the Central Pacific Railroad Company, of California, hereinafter called the Purchasing Company, of the other part,

Witnesseth, as follows:

First: The Selling Company hereby agrees to sell and transfer to the appointee of the Purchasing Company all its railway lines (the constructed portion of which lines extend from East Portland to a point about one and a half miles south of Ashland, and from Portland to Corvallis, and from Albany to Lebanon and are about 451 miles in length) and the appurtenances and all its rolling stock, supplies and equipment, its lands remaining unsold at the date of this agreement, and its rights and interests in lands, and rights to acquire and earn lands, and all its rights, grants, and franchises granted by the United States and also all its interests of every description in the Northern Pacific Terminal Company, at a price and upon the terms hereinafter specified.

Second: The transfer of the property sold shall be made as soon as possible, and in any case not later than the first day of July, 1886, and in such manner as to give a good and clear title to the property sold to the ap-

pointee of the Purchasing Company, either by means of a sale under foreclosure of the deed of first mortgage of the Selling Company, or by such other means as the Counsel of the Purchasing Company may approve.

Third: The property sold shall, when so transferred, be free from all debts, liabilities and encumbrances of every description, except such liabilities and duties as may be incident to the land grant and franchises granted by the United States to the Selling Company and agreed to be transferred to the appointee of the Purchasing Company and except any and all such liabilities for arrears of rent or otherwise, as may be incident to the interest of the Selling Company in the Northern Pacific Terminal Company. The value of the supplies transferred shall not be less than the value of those on hand at the date hereof and the Selling Company shall keep up the property to its present state of repairs until the transfer takes place. The whole amount of land sold at the date hereof does not exceed in aggregate 300,000 acres.

Fourth: For the purpose of adjusting the accounts and operating expenses, and dividing the earnings on the transfer of the property, an account shall be stated between the purchasing and Selling Companies as of the First day of July next; and all earnings of the railroads and other property sold, received after that date and the net proceeds and rentals of or from all lands sold or leased after the date hereof shall go to the credit of the Purchasing Company or its appointee which shall

undertake all expenses appertaining to the operation of the road as from the first day of July, 1886, and shall from such last mentioned date pay interest on the bonds to be issued in payment for the property purchased as hereinafter specified and shall pay or account for the dividends becoming due after said first day of July, 1886, on the shares in the Purchasing Company, to form part of the price as hereinafter mentioned. All net earnings of the existing railroads previous to the first day of July next, and the net price of all lands sold previous to the date hereof, shall belong to the Selling Company and no charge shall be made by the Purchasing Company or its appointee for receiving and paying over such amounts. The carriage of construction, labor and material over the existing lines shall be done at cost and without profit to the Selling Company, the certificate of the Chief Accounting Officer of the Central Pacific Railroad Company as to the amount of such cost being agreed to be final between the parties.

Fifth: The price of the property sold shall be \$8,000,000 par value of the shares of the Purchasing Company, and carrying all dividends declared after July 1st, 1886, and \$10,500,000 par value of bonds made or guaranteed by the Purchasing Company, to be secured on the property purchased as next hereinafter described, and carrying interest from July 1, 1886.

Sixth: The bonds to be issued or guaranteed by the Purchasing Company and delivered in payment as last mentioned, shall be payable principal and interest

in gold, forty years after date and bear interest from the first day of July next, at the rate of three per cent per annum for two years, and five per cent per annum thereafter, payable half yearly. Such bonds shall be either issued by or unconditionally guaranteed by, the Purchasing Company, as the Purchasing Company may decide, and shall be secured by a mortgage (to be made to the Farmers Loan and Trust Company in case such Trust Company shall perform the duties of trustee at not exceeding fifty cents per bond, otherwise the Union Trust Company, or such Company as shall be agreed upon by the parties) of all the property purchased hereunder, and of all extensions and of the future acquired property of the Purchasing Company in Oregon; and the deed of Mortgage shall be similar—except so far as otherwise stated in this agreement—to the existing deed of trust mortgage of the Selling Company. The net proceeds of the lands transferred and included in this mortgage shall form a sinking fund for the redemption of the bonds at par. The amount of the bonds to be issued under the mortgage shall be as follows: \$30,000 per mile for every mile of standard gauge road, now or hereafter constructed or acquired and comprised in the mortgage and \$10,000 for every mile of narrow gauge road now or at any time hereafter constructed or acquired and comprised in the mortgage. The mortgage deed shall provide for the issue and delivery to the Selling Company, upon the above mentioned transfer of the property to the appointee of the Purchasing Company, of the \$10,500,000 of bonds

above specified and that the trustee of the mortgage shall further issue to the Purchasing Company or its appointee, for each mile of road constructed between Ashland and the California State line, \$100,000 for such bonds, and for each ten miles of steel rails laid down on the present lines of the Selling Company and not now laid with steel rails, 450,000 of such bonds.

On the completion of the rail connection between the present lines of the Selling Company and the line of railway of the Purchasing Company any unissued bonds for which the mileage shall then be constructed, shall be transferred by the trustee to the Purchasing Company, or its appointee; *Provided, However,* that such aggregate issue to the Purchasing Company or its appointee shall not exceed, including the \$10,500,000 to be issued to the Selling Company, the limit of \$30,000 for each constructed mile. For any additional mileage constructed or acquired, either between Junction and Corvallis or elsewhere in Oregon, the Purchasing Company, or its appointee, shall be entitled to receive from the Mortgage Trustee, the sum of \$30,000 for each mile of standard gauge road and the sum of \$10,000 for each mile of narrow gauge road. The Mortgage Trustee, however, not to be compelled to accept less than ten miles of road at one time, except in cases of terminal sections. Deliveries of bonds under such mortgage are to be made by the Trustee from time to time upon presentation to it of affidavits of the President and Chief Engineer of the Purchasing Company, or its appointee, to the facts au-

thorizing delivery of such bonds under this article, and without other evidence and proof thereof.

Seventh: Notwithstanding the provisions to be inserted in the mortgage deed restricting the future issue of bonds to a mileage rate as above specified, the mortgage deed, shall permit the Purchasing Company, or its appointee, to require the Trustee at one time, or from time to time, to issue and permit the sale of such amount or amounts of bonds as the Purchasing Company, or its appointee, may think fit: *Provided, However,* that the proceeds of such bonds shall be received by the Mortgage Trustee, and not by the Purchasing Company, or its appointee, and shall be disbursed by the Mortgage Trustee to the Purchasing Company, or its appointee, only pro-rata as and when the Purchasing Company, or its appointee, would have been entitled to receive such bonds thereunder under the foregoing articles hereof.

Eighth: The present holders of the First Mortgage Bonds of the Selling Company shall have the option, for 21 days after notice to that effect shall have been published in one daily paper in London and Frankfort respectively, of subscribing, in the ratio of one new bond for every three old bonds now held by them, respectively, to the new bonds to be issued in the manner above stated, at the price of eighty-six per cent of their par value, payable one-fifth on subscription and the residue in equal parts at the expiration of three, six, nine and twelve months from the date of such subscription.

Ninth: The Purchasing Company, or its appointee shall, within three years, from the transfer of the property as above prescribed, complete the railway between the present Southern terminus of the railway lines of the Selling Company, at or near Ashland, in Oregon and the present Northern terminus of the Oregon division of the Railway lines of the Purchasing Company, at or near Delta, so as to form a through line between Portland in Oregon and San Francisco in California.

Tenth: The 80,000 shares of the capital stock of the Purchasing Company of the nominal value of \$8,000,000 above mentioned, shall be delivered to the Selling Company upon the transfer of the property as above prescribed, and shall, in the first instance, be registered for the purpose of delivery in the joint names of George Henry Hopkinson, the President of the Selling Company, or of such other person as may be the President of the Selling Company and C. E. Bretherton, Vice President of the Selling Company, or of such other person as may be the Vice-President of such Company. But such shares shall carry dividends only from the 1st day of July, 1886, as above stipulated.

Eleventh: This agreement shall be void unless the Stockholders of the Oregon and California Railroad Company, shall, within two months from this date, ratify this agreement, and the two committees now formed respectively in London and Frankfort and representing the First Mortgage Bondholders of this Company, shall,

within the same time, execute in due form a confirmation and acceptance of this agreement.

Twelfth: The Selling Company binds itself to execute to the Purchasing Company or its appointee, on or before the First day of July, 1886, a proper deed transferring the property hereby agreed to be sold, free from all debts, liabilities and encumbrances, except as above specified, and to transfer the possession thereof and in case it shall fail to do so, the Purchasing Company, may, at its option, declare this agreement to be void.

Thirteenth: No personal liability of any description shall attach to the officers of the two contracting Companies, who execute this agreement on their respective behalf.

In Witness Whereof, the parties hereto have, by their respective Vice-Presidents thereunto duly authorized, executed these presents the thirty-first day of July, 1885.

The Oregon & California Railroad Company,
By C. E. Bretherton,
Vice-President.

The Central Pacific Railroad Company,
By C. P. Huntington,
Vice-President.

EXHIBIT NO. 10 TO STIPULATION.

Agreement for Construction of the Oregon and California Railroad South of Ashland.

This Agreement, Made this sixth day of June, 1887, between the Pacific Improvement Company, a corporation duly organized and existing under the laws of the State of California, party of the first part, and the Oregon and California Railroad Company, a corporation duly organized and existing under the laws of the State of Oregon, and of the United States of America, party of the second part, Witnesseth:—

That the party of the first part agrees to and with the party of the second part,

First:

That it will construct and equip for the party of the second part that portion of the Railroad and Telegraph line of the party of the second part now uncompleted, commencing at a point near Ashland, in the State of Oregon, and extending southward to the Northern boundary line of the State of California, to a connection, at said boundary line, with the Railroad and Telegraph Line of the California and Oregon Railroad Company.

Second:

That it will construct and complete said portion of said Railroad and Telegraph line in a good and workmanlike manner to the satisfaction of the President and Chief Engineer of the party of the second part, and

upon a line located and to be located by said Engineer; that when said Railroad and Telegraph line shall be completed they shall be in all respects equal to the Railroad and Telegraph line of the California and Oregon Railroad Company, and shall comprise all things necessary and proper for a first class single track Railroad and a first class Telegraph line and the operation thereof.

Third:

That it will equip said Railroad with rolling stock (up to the standard of the California and Oregon Railroad) as follows:

1.—One locomotive for every four miles in length of said road constructed by it.

2.—Two passenger or mail or express cars for every five miles in length of said road so constructed.

3.—Six box or flat cars for every mile of road so constructed; and

4.—One hand car for every six miles of road so constructed.

The proportion of passenger, mail, express, box and flat cars to be furnished under the above specifications to be determined by the party of the second part, and all of said equipment to be furnished and delivered upon demand of said party.

Fourth:

That it will construct and equip the said Railroad and Telegraph line between said Ashland and said Boundary line within a reasonable time from the date hereof.

Fifth:

That it will furnish and pay for all the engineering service (except the salary of the Chief Engineer), requisite for the location and construction of said Railroad and Telegraph line.

Sixth:

That it will pay all costs, damages and other expenses henceforth incurred in procuring the right of way for said Railroad and Telegraph line.

Seventh:

That it will lay down upon the present completed line of said party of the second part first class steel rails of the same pattern and weight as those now laid upon the California and Oregon Railroad, to any extent which the party of the second part may, within two years from the date hereof, request and that it will lay said rails in a good and workmanlike manner and to the satisfaction of the President and Chief Engineer of the party of the second part.

And,

This Agreement further Witnesseth:—That the party of the second part agrees to and with the party of the first part as follows:—

First:

That it will pay to the party of the first part for each and every mile of said Railroad and Telegraph line constructed and equipped by said party of the first

part as aforesaid, One Hundred Thousand Dollars of its new Mortgage Bonds, with the coupons thereon, the issue of which is provided for in the third subdivision of an Agreement made and entered into in the year 1887, between George Henry Hopkinson, Robert Davie Peebles, Patrick Buchan and Charles Edward Bretherton, the Stockholders' Reconstruction Committee of the Oregon and California Railroad Company, the Pacific Improvement Company, a corporation organized and existing under the laws of the State of California, Lawrence Harrison, Andrew Haes, Henry Hopkinson, George Henry Kearton and Lawrence James Baker, a committee representing the British holders of the First Mortgage Bonds of the Oregon and California Railroad Company, Heinrich Hohenemser, Hermann Koehler, Carl Pollitz, Adolph Otto, Phillip B. Bonn, Siegmund Lion and Emil Kalb, a committee representing the German holders of the First Mortgage Bonds of said Company, the Southern Pacific Company, a corporation organized and existing under the laws of the State of Kentucky and the laws of the United States of America, the Oregon and California Railroad Company, and the Union Trust Company, a corporation organized and existing under the laws of the State of New York; said payment to be made upon the construction, equipment and acceptance by the party of the second part of each section of ten miles or final fraction of such section of that part of said Railroad and Telegraph line the construction of which is hereinbefore provided for, said construction and acceptance to be established by the affidavits of the President and Chief Engineer of the party of the second part.

Second:

That it will pay to the party of the first part for every ten miles of steel rails laid by it under the provisions of this contract, upon the completed portion of the Railroad of the party of the second part, Fifty Thousand Dollars in Bonds with the coupons thereon, of the issue referred to in the subdivison hereof next preceding, and will make said payment of Fifty Thousand Dollars in said Bonds for every ten miles of rails so laid when the fact of their having been laid in accordance with the terms of this Contract has been established by the affidavits of the President and Chief Engineer of the party of the second part.

Third:

That the party of the first part may use its name in any proceeding necessary to obtain the right of way for said Railroad and Telegraph line to be by it constructed.

And,

This Agreement Further Witnesseth:—That should the party of the second part become dissatisfied with the manner of the prosecution of the work herein provided for, and the party of the first part should fail or refuse when requested to remove the cause of such dissatisfaction, or to prosecute said work as required by the party of the second part, or to perform any of the conditions of this agreement on its part to be performed, then the party of the second part may take possession of all the work finished or unfinished, and of all equipment, and

also of all the tools, horses, carts, wagons, provisions, material and other things used in the construction of said Railroad and Telegraph line, or purchased for that purpose, and may complete the said Railroad and Telegraph line and the equipment thereof, in the manner herein provided, at the expense of the party of the first part, the profit or loss as the case may be, to be received or sustained by the party of the first part.

In Testimony Whereof, the parties hereto have caused this Agreement to be signed by their respective Presidents and Secretaries, and their respective Corporate Seals to be hereto affixed.

EXHIBIT NO. 11 TO STIPULATION.

On Motion of Director Donald Macleay, seconded by Director R. P. Earhart, the following preamble and resolutions were unanimously adopted:

Whereas the sale of certain lands comprised in the land grants of this Company, described in the following schedule, has been effected by the Land Department of this Company; and

Whereas the Company has received the proceeds of such sales, and

Whereas, By decree of the Circuit Court of the State of Oregon for the County of Multnomah, rendered on the 12th day of July 1890, in a suit in equity of which James Steel was plaintiff and the Oregon and California

Railroad Company and the Union Trust Company of New York were defendants, it was adjudged and decreed by said Court that lands which were sold by said Oregon and California Railroad Company prior to May 12 1887 were not included in, or covered by that certain deed of trust from said Oregon and California Railroad Company to said Union Trust Company dated the 1st day of July, 1887, and

Whereas That prior to May 12th, 1887, lands were sold under Contract by this Company with a condition that a good and sufficient deed should be given, and

Whereas, Unpatented lands were sold after May 12th, 1887, under contract for quit claim deed only.

Resolved that the Second Vice President and the Secretary of this Company be and they are hereby authorized and directed to execute under their official signatures and the corporate seal of this Company deeds to the respective grantees in accordance with the terms of the Contract of sale and with the forms of deed now presented to this Board, which forms of deed are in words and figures as follows, to wit:

Deed No.— Issued for Contract No.—

This Indenture Made this _____day
of _____A. D. 18—between the Oregon
and California Railroad Company, a corporation
duly incorporated under the laws of the State of

Oregon, party of the first part, and _____
party of the second part.

Witnesseth, That Whereas, The party of the first part did on the _____ day of _____ A. D. 18____ by its Contract Numbered _____ sell and agree to convey unto _____ the land hereinafter described for the sum and price of _____ Dollars, to be paid as in said contract provided, and

Whereas, Said purchase price has been fully paid to the party of the first part, and said _____ as assignees of said _____ has thereby become entitled to a conveyance from the party of the first part of all the right, title and interest which it, the party of the first part, has or may hereafter acquire from the United States in and to said land, and

WHEREAS, By the judgment and decree of the Circuit Court of the State of Oregon, for the County of Multnomah, rendered on the 12th day of July, A. D. 1890, in a suit in equity, in which James Steel was plaintiff and the said Oregon and California Railroad Company and the Union Trust Company, a corporation incorporated under the laws of the State of New York, were defendants, and appeared in said suit, it was found, adjudged and decreed by said Court that lands which had been sold by the party of the first part prior to the 12th day of May, A. D. 1887, are not included in or covered

by that certain deed of trust executed by the said Oregon and California Railroad Company to said Union Trust Company, on the 1st day of July, A. D. 1887, which trust deed is duly recorded in the record of Mortgages for said County of _____ in the State of Oregon, and it was further decreed that said trust deed is not a lien upon such lands, and that said Union Trust Company has no right, under the terms of said trust deed, to or any interest in the money received by said Oregon and California Railroad Company for lands so sold by it prior to said 12th day of May, A. D. 1887, which judgment and decree is now in full force and effect, and is also recorded in the record of mortgages for said County of _____

Now Therefore, In consideration of the premises, and of the payment to the party of the first part of the said sum of _____ Dollars, the receipt whereof is hereby acknowledged, the said Oregon and California Railroad Company, party of the first part, does hereby grant and convey unto said party of the second part, _____ heirs and assigns, all of the said land, which is known and described as follows, to-wit

containing, according to the United States survey thereof _____ acres, be the same more or less.

To Hold The said premises, with the appurtenances thereto, unto the said party of the second part, heirs and assigns forever, reserving however, a strip of land one hundred feet wide, to be used by the Oregon and California Railroad Company for right of way and other railroad purposes, when the railroad of said Oregon and California Railroad Company, or any of its branches, is or shall be located upon the premises: and the right to take all water needed for the operating of said railroad: and also reserving and excepting from said described premises so much, and such parts thereof, as may be mineral lands, other than coal and iron.

And the said party of the second part does hereby, for———self and ———heirs and assigns, covenant with the said Oregon and California Railroad Company, its successors and assigns, that———will erect and maintain, on the boundary line or boundary lines between said premises and such right of way, a good lawful and substantial fence sufficient to turn stock.

In Witness Whereof, The said party of the first part has caused these presents to be sealed with its seal and executed by its——— president and ———secretary, and the party of the second part has hereunto set ——— hand and seal, the day and year first above written.

(Signatures)

(Acknowledgment)

Deed No.——— Issued for Contract No.———

This Indenture, Made this———day of———A. D. 18—, between the Oregon and California Railroad Company, a corporation duly incorporated under the laws of the State of Oregon, party of the first part, and——— party of the second part.

Witnesseth, That Whereas, The party of the first part did on the———day of———A. D. 18—, by its Contract Numbered———sell and agree to convey unto———the land hereinafter described, upon payment to be made therefor, as in said contract specified, reserving therein the right to said party of the first part, in default of such payment being made to cancel and annul said contract: and

Whereas, For such default the party of the first part did thereafter cancel and annul the said Contract, and did by its Contract Numbered———, on the———day of———A. D. 18— sell said land unto———for the sum and price of———Dollars, to be paid as therein provided; and

Whereas Said purchase price therein specified has been fully paid to the party of the first part, and said———as assignee of said———has thereby become entitled to a conveyance from the party of the first part

of all the right, title and interest which it the party of the first part, has or may hereafter acquire from the United States in and to said land: and

Whereas By the judgment and decree of the Circuit Court of the State of Oregon for the County of Multnomah, rendered on the 12th day of July, A. D. 1890, in a suit in equity, in which James Steel was plaintiff and said Oregon and California Railroad Company and the Union Trust Company, a corporation incorporated under the laws of the State of New York, were defendants, and appeared in said suit, it was found, adjudged and decreed by said Court that lands which had been sold by said Oregon and California Railroad Company prior to the 12th day of May, A. D. 1887, are not included in or covered by that certain deed of trust executed by the said Oregon and California Railroad Company to said Union Trust Company, on the 1st day of July, A. D. 1887, which trust deed is duly recorded in the record of mortgages for said County of _____ in the State of Oregon, and it was further decreed that said trust deed is not a lien upon such lands and that said Union Trust Company has no right, under the terms of said trust deed, to nor any interest in the money received by said party of the first part for lands so sold by it prior to said 12th day of May, A. D. 1887, which judgment and decree is now in full force and effect, and is also recorded in the record of mortgages for said County of _____

Now Therefore, In consideration of the premises, and of the payment to the party of the first part of the said sum of————— Dollars the receipt whereof is hereby acknowledged, the said Oregon and California Railroad Company party of the first part, does hereby convey release and quitclaim unto said————— party of the second part—————heirs and assigns, all the right, title and interest which it the party of the first part, now has or owns, or may hereafter obtain or acquire from the United States, in and to the said land, which is known and described as follows, to wit:

containing, according to the United States survey thereof—————acres, be the same more or less.

To Hold the Said Premises with the appurtenances thereto, unto the said party of the second part,—————heirs and assigns forever, reserving, however, a strip of land one hundred feet wide, to be used by the Oregon and California Railroad Company for right of way and other railroad purposes, when the railroad of said Oregon and California Railroad Company, or any of its branches, is or shall be located upon the premises: and the right to take all water needed for the operating of said railroad; and also reserving and excepting from said described premises so much, and such parts thereof, as may be mineral lands, other than coal and iron.

And the said party of the second part does hereby, for self, _____heirs and assigns, covenant with the said Oregon and California Railroad Company, its successors and assigns, that _____will erect and maintain, on the boundary line or boundary lines between said premises and such right of way, a good, lawful and substantial fence, sufficient to turn stock.

In Witness Whereof, The said party of the first part has caused these presents to be sealed with its seal, and executed by its _____President and Secretary, and the party of the second part has hereunto set _____hand and seal, the day and year first above written.

(Signatures)

(Acknowledgment)

Resolved that the Land Agent be and he is hereby authorized and directed to deliver the deeds to the respective parties when executed by the Company.

EXHIBIT NO. 12 TO STIPULATION.

On motion of Director Donald Macleay, seconded by Director J. McCracken the following resolution was unanimously adopted, viz.

Resolved that the following form is hereby adopted as the form of deed to be given by this Company to purchasers of lands earned by the construction of this Com-

pany's railroads in pursuance of the Acts of Congress approved July 25th, 1866, and May 4, 1870, when under the terms of sale this Company agrees to merely remise, release and quitclaim its right, title and interest in such lands, said form being in words and figures as follows, to wit:

Quitclaim Deed No.—

Issued for Contract No.—

This indenture, Made this ——day of——
A. D. 18— between the Oregon and California Railroad Company, a corporation duly incorporated under the laws of the State of Oregon, party of the first part, The Union Trust Company of New York, a Corporation created and existing under and by virtue of the laws of the State of New York, party of the second part, and——
hereinafter called the purchaser, party of the third part

Witnesseth: That in consideration of the sum of——Dollars, paid to the party of the first part, and the sum of——
Dollars, paid to the party of the second part, by direction of the party of the first part, as per terms of Deed of Trust by party of the first part to party of the second part, of date July 1st, 1887, the Oregon and California Railroad Company doth hereby remise, release and quitclaim unto said purchaser, his heirs and assigns, all of the right, title and interest, which it, the said Oregon and California Rail-

road Company now has, or owns, or may hereafter obtain or acquire in and to the hereinafter described lands, and the said Union Trust Company of New York doth hereby release and confirm unto said purchaser, his heirs and assigns, the said lands which are described as follows, to wit:

containing, according to the United States survey thereof, ————— acres, be the same more or less, being understood to be part of the land granted by the United States to the said Oregon and California Railroad Company, and embraced within the terms of and conveyed by a certain Deed of Trust, executed by the party of the first part to the party of the second part, as Trustee, and bearing date July 1st, A. D. 1887.

To Hold the said premises, with the appurtenances thereto, unto the said purchaser, his heirs and assigns, forever freed and discharged from the lien, powers and trusts of said Deed of Trust or Mortgage of July 1st, 1887, reserving, however, a strip of land one hundred feet wide, to be used by the Oregon and California Railroad Company for right of way and other railroad purposes, when the railroad of said Oregon and California Railroad Company, or any of its branches, is or shall be located upon the premises, and the right to take all water needed for the operating of said railroad, and also reserving and excepting from said described premises so much, and such parts thereof as

or may be mineral lands, other than coal or iron.

And the said purchaser does hereby for himself, and his heirs and assigns, covenant with the said Oregon and California Railroad Company, its successors and assigns, that he will erect and maintain on the boundary line or boundary lines between said premises and such right of way, a good, lawful and substantial fence, sufficient to turn stock.

In Witness whereof, The said parties of the first and second parts have caused these presents to be sealed with their respective seals, and executed by their respective Presidents and Secretaries, and the party of the third part has hereunto set his hand and seal the day and year first above written.

(Signatures)

(Acknowledgment)

EXHIBIT NO. 13 TO STIPULATION.

Statement of maps of survey and location filed in the Interior Department of the United States, by the East Side Company and Oregon & California Railroad Company, under the East Side Grant:

Map of first section extending from East Portland to Jefferson was filed October 29, 1869.

Maps of the second and third sections (two maps) extending from Jefferson to a point in south line of Twp. 27 S., R. 6 W., W. M., was filed March 26, 1870.

Map of the fourth section, extending from the point in the south line of Twp. 27 S., R. 6 W., to a point in Sec. 30, T. 30 S., R. 5 W., was filed January 7, 1871; however, the line of road was amended by the filing of the map of the fifth section so that the railroad, as constructed, coincided with the map of the fourth section only as far as Station 1154 in Sec. 28 T. 29 S., R. 5 W., and the constructed line materially diverged from the location shown on this map for the remaining (approximately) 8 miles.

Map of of the fifth section, extending from Sec. 19, T. 27 S., R. 5 W., duplicating the location shown on the map of the fourth section from that point to Station 1154 in Sec. 28, T. 29 S., R. 5 W., and amending the line as shown by map of the fourth section from that point southwardly and extending to Station 1320+50 in Sec. 6, T. 30 S., R. 5 W., was filed April 6, 1882. This map was returned by the Commissioner of the General Land Office to the Secretary of the Interior with report and was received back by the Commissioner June 2, 1883.

Map of the sixth section, extending from Station 1320+50 in Sec. 6, T. 30 S., R. 5 W., to Station 2376+50 in T. 31 S., R. 7 W., was also filed April 6th, 1882, returned to the Secretary with a report and re-returned to the Commissioner of the General Land Office June 2, 1883.

Map of the seventh section, extending from Station 2376+50 to Sec. 33, T. 34 S., R. 6 W., was filed August 24, 1882, and was also returned to the Secretary with a report and re-returned to the Commissioner of the General Land Office June 2, 1883.

Map of the eighth section, extending from Sec. 33, T. 34 S., R. 6 W., to Sec. 21, T. 36 S., R. 3 W., was filed June 6, 1883.

Map of the ninth section, extending from Sec. 21, T. 36 S., R. 3 W., to the south line of Sec. 32, T. 37 S., R. 1 W., was filed July 3, 1883.

Map of the tenth section, extending from the South line of Sec. 32, T. 37 S., R. 1 W., to East line of Sec. 25, T. 39 S., R. 1 E., was filed September 4, 1883 (General Land Office statement of Land Grants 1908, erroneously shows September 6, 1883).

Map of the eleventh section, extending from East line of Sec. 25, T. 39 S., R. 1 E., to the North line of Sec. 30, T. 40 S., R. 2 E. was filed August 1, 1883 (General Land Office statement of Land Grants—1908, erroneously shows August 2, 1883.)

Map of the twelfth section, extending from Sec. 30, T. 40 S., R. 2 E., to Southern boundary of the State of Oregon in Sec. 13, T. 41 S., R. 1 E., was filed August 18, 1884.

Maps of survey and location filed in the Interior Department of the United States, by the West Side Company claiming under the East Side grant:

Map of First section—60 miles, extending from Portland via Forest Grove and McMinnville, thence southerly towards Corvallis was transmitted by J. Gaston to the Interior Department of the United States and there received July 1, 1868 and was returned July 6, 1868 to Gaston for verification and other requirements.

In accordance with the said requirements a second map showing general location from Portland via Forest Grove, McMinnville and Corvallis to the South line of the State of Oregon, was transmitted by Gaston in compliance with the Secretary's letter of July 6, 1868 and was received by the Department of the Interior September 16, 1868, but no action taken thereon.

Also the map of the first sixty miles was returned by J. Gaston to the Interior Department and there received September 22, 1868.

Subsequently J. Gaston forwarded to the Secretary of the Interior and there received September 24, 1868, another map of the first sixty miles. Such map was sent by the Secretary of the Interior to Commissioner of the General Land Office November 22, 1871.

Maps of survey and location filed in the Interior Department of the United States, by the West Side Company, under the West Side grant:

The map of the section extending from Portland to McMinnville and from Forest Grove to Caster Creek was filed May 17, 1871.

The map of the remainder of the line from Caster Creek to Astoria was filed February 2, 1872.

EXHIBIT NO. 14 TO STIPULATION.

Statement of the dates of construction, completion, approval and acceptance, of the several sections of East Side railroad by the East Side Company and Oregon & California Railroad Company and West Side railroad by the West Side Company:

East Side railroad.

Construction of the First section of 20 miles 400 feet commencing at East Portland and extending to a point near Parrott's Creek was completed December 24, 1869, examined by commissioners appointed therefor and favorably reported upon December 31, 1869; such reports submitted by the Secretary of the Interior January 26, 1870 to the President of the United States and its acceptance recommended, and such recommendations were approved by the President January 29, 1870.

The Second, Third and Fourth sections of 20 miles each, extending from Parrott's Creek south-

wardly to a point about one-half mile beyond the Station of the City of Albany, 80 miles from the initial point, was completed during the year 1870, Commissioners' reports were dated September 28, 1870 as to Second and Third sections and December 10, 1870 as to Fourth section, and were transmitted by the Secretary of the Interior February 28, 1871 to the President of the United States with recommendations that the road be accepted and such recommendations were approved by the President February 28, 1871.

The Fifth and Sixth sections of 20 miles each were completed and the Commissioners' reports on such completion were dated respectively August 11, 1871 and January 13, 1872 and were submitted by the Secretary of the Interior to the President of the United States March 7, 1872, with recommendations that the line be accepted, which recommendations were approved by the President March 11, 1872.

The Seventh, Eighth and Ninth sections, beginning at a point $2\frac{1}{2}$ miles Northwest of Eugene City, probably in NW $\frac{1}{4}$ of Sec. 23, T. 17 S., R. 4 W. and ending near Roseburg at a point which was probably in the SE $\frac{1}{4}$ of Sec. 24, T. 27 S., R. 6 W., a distance of 77.3668 miles, was completed in 1872 and had been in effective use for traffic since the Summer of that year. The report of the Commissioners was dated December 27, 1876, submitted

by the Secretary of the Interior to the President of the United States July 10, 1878 with recommendations that the railroad be accepted and such recommendations were approved by the President July 11, 1878.

The Tenth section of 45 miles, beginning 585.66 feet South of the Roseburg depot in Sec. 24, T. 27 S., R. 6 W., and ending in Sec. 19, T. 30 S., R. 7 W., was wholly in operation from May 1883 and 28 miles thereof, from Roseburg to Riddle had been in operation since about November 1882. The report of the Commissioners was dated August 6, 1883 and was submitted by the Secretary of the Interior to the President of the United States August 20, 1883 with recommendations that the line be accepted, and such recommendations were approved by the President August 29, 1883.

The eleventh section of 100 miles in length, extending from a point 45 miles South of Roseburg to a point about $1\frac{1}{4}$ miles South of Ashland was open for public use on the following dates:

From the North end to Glendale, 20 miles—
May 14, 1883.

To Grants Pass—55 miles—December 4, 1883.

To Phoenix—91 miles February 25, 1884.

To Ashland—99 miles—May 5, 1884.

The report of the Commissioners was submitted

by the Secretary of the Interior to the President of the United States January 13, 1887, with recommendations that the section be accepted. Said recommendations were approved by the President January 29, 1887.

The Twelfth section, extending from the point $1\frac{1}{2}$ miles south of Ashland to the boundary line between Oregon and California, a distance of 24.135 miles, was completed prior to June 20, 1888 and the report of the Commissioners was transmitted by the Secretary of the Interior to the President of the United States October 23, 1889 with recommendations that the railroad be accepted and such recommendations were approved by the President November 8, 1889.

West Side Railroad.

The First section of 20 miles was completed and the report of the Commissioners dated January 6, 1872 was approved and the section accepted by the Secretary of the Interior February 16, 1872.

The Second section, extending from the 20th mile post to the Yamhill River, a distance of $27\frac{1}{2}$ miles, was reported on by Commissioners on May 3, 1876 and the reports approved and the section accepted by the Secretary of the Interior June 23, 1876.

EXHIBIT NO. 15 TO STIPULATION.

An Act to Create an Auditor of Railroad Accounts and for Other Purposes.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That section twenty of the act entitled "An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military and other purposes.", approved July first Anno Domini eighteen hundred and sixty-two, and the act entitled "An Act relative to filing reports of railroad companies," approved June twenty-fifth, Anno Domini eighteen hundred and sixty-eight, be, and the same are hereby repealed.

SEC. 2. That the office of Auditor of Railroad Accounts is hereby established as a bureau of the Interior Department. The said Auditor shall be appointed by the President of the United States, by and with the advice and consent of the Senate. The annual salary of the said Auditor shall be, and is hereby, fixed at the sum of five thousand dollars. To assist the said Auditor to perform the duties of said office, the Secretary of the Interior shall appoint one bookkeeper at an annual salary of two thousand four hundred dollars, one assistant bookkeeper at an annual salary of two thousand dollars, one clerk at an annual salary of one thousand four hundred dollars, and one copyist at an annual salary of nine hundred dollars. Actual and necessary traveling and

other expenses incurred in visiting the offices of the railroad companies hereinafter described, and for which vouchers shall be rendered, are hereby allowed, not to exceed the sum of two thousand dollars per annum; and it is hereby specially provided that each of said railroad companies shall furnish transportation over its own road, without expense to the United States, for the said Auditor or any person acting under his direction, incidental expenses for books, stationery, and other material necessary for the use of said bureau are hereby allowed not to exceed the sum of seven hundred dollars per annum. And the sum of twelve thousand dollars is hereby appropriated for the uses and purposes of this act for the fiscal year ending June thirtieth, anno Domini eighteen hundred and seventy-nine.

SEC. 3. That the duties of the said Auditor under and subject to the direction of the Secretary of the Interior shall be, to prescribe a system of reports to be rendered to him by the railroad companies whose roads are in whole or in part west, north, or south of the Missouri River, and to which the United States have granted any loan of credit or subsidy in bonds or lands; to examine the books and accounts of each of said railroad companies once in each fiscal year, and at such other times as may be deemed by him necessary to determine the correctness of any report received from them; to assist the government directors of any of said railroad companies in all matters which come under their cognizance whenever they may officially request such assistance; to see that the laws relating to said companies are

enforced; to furnish such information to the several departments of the government in regard to tariffs for freight and passengers and in regard to the accounts of said railroad companies as may be by them required, or, in the absence of any request therefor, as he may deem expedient for the interest of the government; and to make an annual report to the Secretary of the Interior, on the first day of November, on the condition of each of said railroad companies, their road, accounts, and affairs, for the fiscal year ending June thirtieth immediately preceding.

SEC. 4. That each and every railroad company aforesaid which has received from the United States any bonds of the said United States, issued by way of loan to aid in constructing or furnishing its road, or which has received from the United States any lands granted to it for a similar purpose, shall make to the said Auditor any and all such reports as he may require from time to time and shall submit its books and records to the inspection of said Auditor or any person acting in his place and stead, at any time that the said Auditor may request, in the office where said books and records are usually kept; and the said Auditor, or his authorized representative, shall make such transcripts from the said books and records as he may desire.

SEC. 5. That if any railroad company aforesaid shall neglect or refuse to make such reports as may be called for, or refuse to submit its books and records to inspection, as provided in section four of this act, such neglect

or refusal shall operate as a forfeiture, in each case of such neglect or refusal, of a sum not less than one thousand nor more than five thousand dollars, to be recovered by the Attorney-General of the United States in the name and for the use and benefit of the United States; and it shall be the duty of the Secretary of the Interior, in all such cases of neglect or refusal as aforesaid, to inform the Attorney-General of the facts, to the end that such forfeiture or forfeitures may be judicially enforced.

SEC. 6. This act shall apply to any and all persons or corporations into whose hands either of said railroads may lawfully come, as well as to the original companies.

SEC. 7. This act shall take effect on and after the first day of July, anno Domini eighteen hundred and seventh-eight.

Approved, June 19, 1878.

EXHIBIT NO. 16 TO STIPULATION.

REPORT OF QUOTATIONS
OF CENTRAL PACIFIC RAILROAD COMPANY STOCK
AND BONDS
EASTERN AND FOREIGN MARKETS

As Published in the San Francisco Evening Bulletin on
the Dates Shown Below.

Date 1886	Page	Col'm.	STOCK		BOND	
			Open	Clos.	Open	Clos.
Oct. 1	3	3	48 $\frac{1}{2}$	48 $\frac{1}{4}$		
" 2	3	4	48 $\frac{3}{8}$	48 $\frac{1}{4}$	...	116
" 3	Sunday—No issue.					
" 4	3	2	48 $\frac{3}{8}$	48 $\frac{7}{8}$		
" 5	3	3	49 $\frac{1}{2}$	49 $\frac{3}{8}$		
" 6	3	2	49 $\frac{1}{2}$	47 $\frac{1}{4}$		
" 7	3	2	49 $\frac{1}{2}$	49 $\frac{1}{2}$		
" 8	3	3	49 $\frac{1}{8}$	48 $\frac{1}{2}$		
" 9	3	3	....	48 $\frac{1}{2}$		
" 10	Sunday—No issue.					
" 11	3	2	48 $\frac{5}{8}$	48	....	115 $\frac{1}{2}$
" 12	3	3	47 $\frac{7}{8}$	....	
" 13	3	3	47 $\frac{1}{2}$	49		
" 14	3	3	49	....	
" 15	3	3	....	....	...	115 $\frac{1}{2}$
" 16	3	3	48 $\frac{1}{8}$	48	...	
" 17	Sunday—No issue.					
" 18	3	3	....	47 $\frac{1}{2}$		
" 19	3	3	....	47 $\frac{1}{2}$	...	115

Date	Page	Col'm.	STOCK		BOND	
			Open	Clos.	Open	Clos.
1886						
Oct. 20	3	3	....	48	115	115
" 21	3	2	....	47 $\frac{1}{2}$	...	115
" 22	3	3	....	47 $\frac{1}{4}$		
" 23	3	3	....	47 $\frac{1}{4}$	...	115
" 24	Sunday—No issue.					
" 25	3	3	47 $\frac{1}{2}$	47 $\frac{1}{4}$	...	115 $\frac{1}{4}$
" 26	3	2	....	47	...	115 $\frac{3}{4}$
" 27	No Market Report.					
" 28	3	3	....	46 $\frac{7}{8}$	...	115 $\frac{1}{4}$
" 29	3	3	....	....	...	116 $\frac{1}{4}$
" 30	3	3	47 $\frac{1}{2}$	47 $\frac{1}{2}$	...	115 $\frac{3}{4}$
Nov. 15	3	3	47 $\frac{1}{8}$	47 $\frac{1}{4}$	...	115 $\frac{3}{4}$
Dec. 15	3	3	44	44	...	....
1887						
Jan. 15	3	3	....	42	...	114 $\frac{3}{4}$
Feb. 15	3	2	37	36 $\frac{1}{4}$		
Mar. 15	3	2	36 $\frac{1}{2}$	36 $\frac{1}{2}$		
Apr. 15	3	2	....	41 $\frac{1}{2}$		
1887						
May 13	3	3	....	40 $\frac{1}{2}$	...	117 $\frac{1}{8}$
Jun. 15	3	2	38 $\frac{3}{4}$	38 $\frac{3}{4}$		
July 1	No Market Report.					
" 2	No Market Report.					
" 3	Sunday—No issue.					
" 4	Holiday—No issue					
" 5	No Market Report.					
July 6	Not quoted.					
" 7	"	"				

Date	Page	Col'm.	STOCK		BOND	
			Open	Clos.	Open	Clos.
1887						
July 8			Not quoted.			
" 9			No Market Report.			
" 10			Sunday—No issue.			
" 11	3	1	38	38		
" 12	3	2	....	....
" 13	3	3	....	37		
" 14			Not quoted.			
" 15	"	"				
" 16	3	2	38	38		
" 17			Sunday—No issue.			
" 18			Not quoted.			
" 19	3	2	....	....	... 114 $\frac{1}{4}$	
" 20			Not quoted.			
" 21	"	"				
" 22	"	"				
" 23			No Market Report.			
" 24			Sunday—No issue.			
" 25	3	1	37 $\frac{1}{2}$	37 $\frac{1}{2}$		
" 26			Not quoted.			
" 27			No Market Report.			
" 28	3	2	35 $\frac{1}{4}$	35 $\frac{1}{4}$		
" 29			Not quoted.			
" 30			No Market Report.			
" 31			Sunday—No issue.			
Aug. 15	3	1	....	....	... 115	
Sept. 10	7	2	36	....	...
" 19	3	2	....	33 $\frac{3}{4}$		
Oct. 14	3	2	29	28 $\frac{1}{2}$		

NOTE: Report of San Francisco Stock and Bond Exchange, as given in the San Francisco Bulletin, shows Central Pacific Railroad Bonds quoted at asked 101 from Oct. 14 to Nov. 11, 1887, inc., without change. Otherwise, neither Central Pacific Stock nor bonds quoted in San Francisco Stock and Bond Exchange Report during the period covered by this statement.

Date 1887	Page	Col'm.	STOCK		BOND	
			Open	Clos.	Open	Clos.
Nov. 17	3	1	....	31½		
Dec. 1	3	1	....	32		
" 2	Not quoted.					
" 3	No Market Report.					
" 4	Sunday—No issue.					
" 5	3	1	35	....	
" 6	No Market Report.					
" 7	3	2	....	37⅞		
" 8	No Market Report.					
" 9	"	"	"			
" 10	"	"	"			
" 11	Sunday—No issue.					
" 12	3	1	36¼	36¼		
" 13	No Market Report.					
" 14	3	2	....	36½		
" 15	No Market Report.					
" 16	"	"	"			
" 17	"	"	"			
" 18	Sunday—No issue.					

Date	Page	Col'm.	STOCK		BOND	
			Open	Clos.	Open	Clos.
1887						
July 19	3	1	....	35		
" 20	Not quoted.					
" 21	No Market Report.					
" 22	"	"	"	"		
" 23	"	"	"	"		
" 24	"	"	"	"		
" 25	Holiday—No issue.					
" 26	No paper in file.					
" 27	No Market Report.					
" 28	"	"	"	"		
" 29	Not quoted.					
" 30	No Market Report.					
" 31	"	"	"	"		

REPORT OF QUOTATIONS
OF CENTRAL PACIFIC RAILROAD COMPANY STOCK
AND BONDS
EASTERN AND FOREIGN MARKETS

As Published in the Portland Oregonian on the Dates
Shown Below.

Date	Price of Stock
1887.	
March 28.....	36
June 6.....	40
June 8.....	50 ¹ / ₄
Dec. 28.....	33 ¹ / ₄
1888	
June 6.....	38
Dec. 1.....	35

EXHIBIT NO. 17 TO STIPULATION.

Exhibit No. 9 to the Answer should be corrected in the following particulars:

1. The introductory clause states that the Exhibit contains "a few instances" of the acceptance by the Interior Department as based for lieu land selections, of lands conveyed by the Oregon and California Railroad Company in quantities greater than 160 acres to a single purchaser, and at a price exceeding \$2.50 per acre. This leaves the implication that there are other similar instances. As a matter of fact, this Exhibit contains all of the transactions of this character.

2. Exhibit No. 9 to the Answer states that in each instance noted the lieu base deed and lieu selection was approved by the Interior Department. The fact is that a number of these forest lieu selections were pending in the Interior Department at the time the investigation of the subject-matter of this suit was instituted in the year 1907. Upon the recommendation of the Attorney General all of these selections pending at that time were suspended, and still remain under suspension. As to these selections which are under suspension no action has been taken by the Interior Department, and the title to the base lands has not been approved. The selections under suspension are as follows:

All of the 5,042.96 acres conveyed by the Railroad Company to A. B. Hammond Company, described in Exhibit No. 9 to the Answer as Contract No. 5392;

All of the 5,013.18 acres conveyed by the Railroad Company to John Claffin, described in Exhibit No. 9 to the Answer as Contract No. 5393;

All of the 6,214.34 acres (excepting 4,014.34 acres) conveyed by the Railroad Company to Big Blackfoot Milling Company described in Exhibit No. 9 to the Answer as Contract No. 5394;

All of the 3,700 acres conveyed by the Railroad Company to Marcus Daly, described in Exhibit No. 9 to the Answer as Contract No. 5395;

All of the 9,044.35 acres (excepting 2,787.72 acres) conveyed by the Railroad Company to R. S. Moore, described in Exhibit No. 9 to Answer as Contract No. 5401;

With the exceptions above noted Exhibit No. 9 to the Answer is correct.

EVIDENCE

Whereupon, It is further certified that in addition to the foregoing "Stipulation as to the Facts" there was duly taken within the time allowed by order of the court, by and before M. A. Fleming, Special Examiner, duly appointed to take and report the testimony herein on behalf of the complainant and the said defendants and appellants in said cause, further and additional evidence in words and figures as follows:

Whereupon, Counsel for defendants objected to any testimony being taken in this cause, on the ground that a court of equity has no jurisdiction and that this court has no jurisdiction to hear and determine the matters in issue.

TESTIMONY FOR COMPLAINANT.

Whereupon W. W. COTTON, called as a witness on behalf of the United States being first duly sworn, testified: That he has resided at Portland, Oregon, for 22 years and is now (December 8, 1911) secretary of the Oregon & California Railroad Company and has been such since September 15, 1904; that his predecessor in office was George H. Andrews and that his first official relation with the Oregon & California Railroad Company (was his position as secretary; that he has also been a director of the Oregon & California Railroad Company) but occupied no other position; that he does not know exactly whether he has been an employe or not of the Southern Pacific Company; that he received no salary from

that Company of any kind, but for a given period—exactly how long he does not know—the Southern Pacific Company paid a portion of his salary to the Oregon Railroad & Navigation Company for part of the work he was doing for the Southern Pacific Company; that he never received, directly, any salary from the Southern Pacific Company or the Oregon & California Railroad Company and no salary as secretary of the Oregon & California Railroad Company. He was secretary, director and general attorney of the Oregon Railroad & Navigation Company from the time of its organization in 1896 and prior to that time had been secretary of the Oregon Railway & Navigation Company and was attorney for E. McNeill, receiver, and also for S. H. H. Clark and others, receivers of the Oregon Railway & Navigation Company prior to that date. From September, 1889, to October 15, 1893, he was attorney for the Oregon Short Line Railroad Company, then operating the lines of the Oregon Railway & Navigation Company under lease; he is the general attorney of the Oregon-Washington Railroad & Navigation Company and its assistant secretary, also held similar positions with some subsidiary corporations of Oregon Railroad & Navigation Company. As secretary of the Oregon & California Railroad Company has custody of its corporate records, including the record of the minutes of its directors' meetings and stockholders' meetings and he has in his possession six volumes of these records: Volume 1 commencing on the 17th day of March 1870, Volume 2 commencing with a continuation of the meeting of December 14,

1878, Volume 3 commencing June 4, 1883, Volume 4 commencing September 19, 1887, Volume 5 continuation of meeting of May 6, 1895, Volume 6 meeting of April 10, 1906. And he has the original triplicate of the Articles of Incorporation of the Oregon & California Railroad Company which the statute required should be filed with the secretary of the corporation; also that he has in his custody the corporate records of the old West Side Oregon Central Railroad Company. Whereupon it was stipulated that Mr. Luther F. Steel may produce for the inspection and use of counsel in this case all the corporate records in the possession of the Secretary of the Oregon & California Railroad Company relating to the Oregon Central (West Side), Oregon Central (East Side) and the Oregon and California Railroad Company. Whereupon, the witness further testified that said Steel was his clerk and in personal charge of all these records; and that he (witness) was about to go away from Portland for an extended absence, that is, to be absent for at least five months, and that he would turn over to said Steel, as his confidential clerk, all records, documents, stock ledgers and other papers in his custody as secretary of these corporations, so that said Steel might identify them if subpoenaed to produce them in evidence in this case. The witness further testified that he identified as the records of these various corporations the documents, and books that he would turn over to Mr. Steel. Whereupon it was stipulated that no question would be raised as to the identification of such documents, books and records.

Whereupon, said witness upon cross-examination further testified: That he received from George H. Andrews, his predecessor, as secretary of the Oregon and California Railroad Company the corporate records of that Company, identified by him, and also the corporate records of the Oregon Central Railroad Company of Portland, known in this record as West Side Company, and also the corporate records of the Oregon Central Railroad Company of Salem, known as Oregon Central East Side, and that he received a large number of other papers all covered by a receipt; that he was not secretary of the Oregon Central (West Side) or Oregon Central (East Side) and never has been; that as a matter of fact there is no corporate officer of the Oregon Central (West Side) or Oregon Central (East Side) at the present time that he knows of; that his leave of absence is on account of serious illness from which he has just now recovered; that he has no official relation with the Southern Pacific Company at this time (December 8, 1911) excepting that he is statutory attorney in fact upon whom process can be served; that he has never been a member of its Board of Directors or a corporate officer, but was a stockholder for a short time.

Whereupon L. F. STEEL, called as a witness on behalf of the United States, being first duly sworn testified: That he is associated with W. W. Cotton and is the same person referred to in the testimony of W. W. Cotton in whose custody Mr. Cotton would leave the records of the Oregon Central Railroad Company of Portland

known as the West Side Company, the Oregon Central Railroad Company of Salem, known as the East Side Company, and the Oregon & California Railroad Company, and witness now produces the records of the directors and stockholders meetings of the Oregon Central Railroad Company of Portland, known as the West Side Company and of the Oregon Central Railroad Company of Salem, known as the East Side Company. Whereupon it was admitted by counsel for the defendants that said records so produced were the corporate records of said Companies. Whereupon the witness further testified that he thought he possibly could not produce the original triplicate of the Articles of Incorporation of the Oregon & California Railroad Company that was filed with the Secretary of the Company but would make a search for the same so that he could either produce said documents or testify that it cannot be produced.

Whereupon the complainant offered in evidence the complete records of the Oregon Central Railroad Company of Portland, known as the West Side Company, produced and identified by the witness L. F. Steel, heretofore marked by the Examiner for identification "Government's Exhibit 100-A" and also the records of the Oregon Central Railroad Company of Salem, known as the East Side Company, produced and identified by the witness L. F. Steel, heretofore marked by the Examiner for identification "Government's Exhibit 100-B" with the understanding that the originals might be withdrawn and copies substituted and read into the records, which said "Government's Exhibit 100-A" is hereinafter set out and described and made a part of this Statement

of Evidence and identified herein as "Government's Exhibit 100-A" and which said "Government's Exhibit 100-B" is hereinafter set out and described and made a part of this Statement of the Evidence and identified herein as "Government's Exhibit 100-B."

Whereupon JOSEPH GASTON, called as a witness on behalf of the United States being first duly sworn, testified; that his full name is Joseph Gaston and he resides at 440 Sixteenth Street, Portland, Oregon, and has lived at Portland for 44 years; was born in 1833 at Loydsville, Belmont County, Ohio; that he spent a year or two occasionally on his farm in Washington County, but considered Portland his home all the time; that he left Ohio in 1862 at the age of 29 and came direct to Oregon, settling at Jacksonville, Jackson County, Oregon, and lived there until the year 1865, when he moved to Salem; that he studied law and was admitted to the bar before he left Ohio and that he practiced law in Jackson County, Oregon, and for a while in Marion County, after he came to Salem; that he moved from Jacksonville to Salem and lived at Salem until 1868, when he moved to Portland and since that time, with the temporary absences mentioned, Portland has been his home; that in addition to practicing law at Jacksonville and Salem, he was engaged in newspaper work, temporarily editing the "Jacksonville Sentinel" for a salary and at Salem the "Oregon Statesman" for a salary; that he is the Joseph Gaston who was the first President of the Oregon Central Railroad Company of Portland (West Side)

and was intimately connected with the whole railroad history of the State of Oregon and that he first became interested in the subject of constructing a railroad in Oregon under the following circumstances:

In the autumn of 1863 a surveying party making a reconnaissance or preliminary survey for a railroad from Marysville in California to the Columbia River, came to Jacksonville on their way north from California and there, not having paid their men, they were stranded and stopped there. And in their troubles to pay their men they came to me to help them out in some way, and I heard all their stories and consulted with various citizens of Jackson County, and finally took up the proposition of taking care of the men until the next spring, and raising some money to continue this survey northward from Jacksonville to Portland, or the Columbia River.

That there were three men, Simon G. Elliott, George H. Belden and A. C. Barry in charge of that surveying party; there were eight men besides these three men who were actively engaged in the work of surveying, and A. C. Barry is the same man who afterwards continued the survey in Oregon. Barry was then a floater in Oregon, but his home residence was in Danville, Illinois. Mr. Elliott was a Californian. Mr. Belden was a citizen of Portland. Belden was a competent engineer. Mr. Elliott claimed to be, but witness does not think he had any qualifications for the place and Mr. Barry was not a surveyor. He was a lawyer that had been in

the army fighting the rebels, got wounded and retired, coming out to Oregon. There was no progress made as to the survey during the Fall of 1863; after the men arrived at Jacksonville they simply stayed there and he (witness) subsisted them until the next spring. A dispute arose between Elliott and Belden as to who should control the survey from Jacksonville to Portland and this controversy was not settled at all. They could not agree. Elliott went back to California and Belden came on to Portland and just left the men there. Neither of them had any further connection with the survey in Oregon. Whereupon the witness further testified as follows:

“The question of a railroad from Portland up the Willamette Valley had been discussed by prominent men in Portland, and Mr. Belden being a civil engineer, and anxious to get into that kind of business, had promoted the idea, and finally a survey was made from Portland to Eugene City, on the East Side of the Willamette River, by Mr. Belden, and the expenses of the same was borne by people of Portland. I think Mr. W. S. Ladd was prominently connected with it; and then by people along through the towns and counties on the East Side of the Willamette River. The survey went no further than Eugene City, and their proposition was no further than Eugene City.”

Whereupon the witness further testified that it was the plan of Belden and Elliott, when the party reached

Jacksonville in October, 1863, that they would continue the survey to Eugene but they could not agree as to who should control the survey between Jacksonville and Eugene City. Belden claimed that he had the right to direct the survey in Oregon, according to the agreement, the same as Elliott had directed the survey in California. They talked it all before him.

The first thing to be done during the winter of 1863-64 preparatory to the continuing of the survey in Oregon, if it was to be continued, was to make a provision for the surveyors, the men who had done the work so far and he secured what was called the old hospital building in Jacksonville, which was already provided with beds and cooking utensils and everything, and vacant, and he put the men in that building to stay there until spring and provided them with food; he then commenced talking with various leading citizens of Jackson County to raise money to pay for the support of the men during the winter and to continue this work next spring on to Portland; he found the farmers generally willing and the first man to contribute any money and actively support the measure was the father of the man now called "Big Bill Hanley"—Michael Hanley—and with his assistance witness raised a subscription of enough money to keep the men during the winter, and to hire a team, and start the men in the spring. For the purpose of making the survey and subsequently building the railroad; he wrote to some men in the northern part of the state and in Jackson County about the matter, but did not get

anybody to encourage it much, excepting Judge Shattuck; there were some others but he was the man that encouraged the matter more than any one else although not a capitalist and not a man who could build railroads; they formed a little temporary incorporation under the laws of Oregon, to be a nucleus around which anything that was done might be held together which was called the California & Columbia River Railroad Company and the articles of incorporation of such Company were filed on October 13, 1863 although he does not remember whether that is the exact date or not; the witness thought that J. H. Moores, J. Gaston, S. G. Elliott and Charles Barry were the signers of the articles of incorporation of the California & Columbia River Railroad Company; this Charles Barry was the same person known as A. C. Barry before mentioned; he signed his name then as Charles Barry. His full name is Augustus Charles Barry. There was never any Board of Directors of the California & Columbia River Railroad Company and the organization was never perfected by the election of officers or the subscription of stock, but the survey during the next year, 1864, was conducted in the name of that Company. The receipts for payments to that promotion fund were issued by the witness as secretary of that corporation and in its name. Mr. Barry, outside of the men that did the actual work, was the only man that rendered any particular assistance associated with witness during the survey of the year 1864; of course there were a great many men that he was in correspondence with that helped along in any

way they could, but in the sense of leadership Mr. Barry assisted witness in a general way. With the financial support that witness had solicited during the winter of 1863-64 they resumed the survey in the spring of 1864, starting from Jacksonville and proceeding northerly, keeping on northerly to the Columbia River at St. Helens, then the party came back to Portland and commenced a line at Portland and ran up through the line now where the Narrow Gauge road is, or what we call the Narrow Gauge road, through the Sucker Lake pass, and on up into Yamhill County, connecting with the original survey there. Witness does not know exactly what time it was they reached Portland, but thinks it was in September, but is not certain as he was not here then, at this end of it. If the record shows October 1st, 1864 that is about correct. In the meantime witness thinks that he was aware of the fact that Congressman Bidwell of California had introduced in Congress a bill providing for a land grant to aid in the construction of a railroad from the Central Pacific in California to Portland, in Oregon. After the survey was completed Mr. Barry and witness got the engineers together at Salem and they made maps of their survey and witness and Barry prepared a pamphlet on the resources of Oregon to show the practicability of this proposition and had it printed at Salem. Mr. Barry took the maps and all the evidence of the engineers and that pamphlet and went on to Washington City to present the matter to Congress, in view of getting a land grant for the Oregon end of the proposition and witness thinks it was in the

month of November 1864 when Mr. Barry went to Washington. Barry remained most of the winter in Washington City. Witness does not know whether the bill introduced by Mr. Bidwell, after some amendment, was the same bill which finally became the Act of July 25, 1866, although he had correspondence with General Bidwell about it and Bidwell advised them to get into that bill in some way and co-operate with him. Witness had correspondence with Cornelius Cole who was a Senator from California. Witness could not say now whether Bidwell's bill was the one that passed Congress. There was a continual effort made to secure the passage of such a bill from some time in 1863 until the final passage of the act of July 25, 1866. Barry did not return to Portland after his trip East in the fall of 1864, but went back to Illinois. He did not have anything further to do with this project after that. The effort to secure the passage of the bill that winter was not successful. Witness did not go to Washington himself after that and he was not in Washington at any time prior to the passage of the Act of July 25, 1866 and took no part in the passage of that Act, except through the local Senators and Representatives in Congress and correspondence, but did endeavor to have the California & Columbia River Railroad Company designated as the corporation to build that part of the railroad in the State of Oregon, but failed in that attempt. Such failure was the trouble between Colonel Barry and Judge Williams who quarrelled over that matter. The fact was that Barry and witness had spent a great deal of time and

some money in trying to elect Judge Williams to the United States Senate on his promise that he would stand by us in that railroad proposition, and when he did not do so and backed out of it Barry and Williams had a quarrel in Washington. After the passage of the Act, his first information as to its passage was a letter from Senator Cole that the Act had passed. Cole sent him a copy of the Act and witness then took steps to get men interested and incorporate a Company in Oregon with a view of being designated under the act to receive the land grant. The Oregon Legislature then convening in September of that year, witness prepared articles of incorporation and got them signed and also prepared a bill pledging the State to pay interest on \$1,000,000.00 of the Company's bonds and presented the matter to the Legislature. After he had got 25 or 30 names—witness has forgotten now how many—signed to the articles of incorporation witness took them to the office of the Secretary of State and to the office of the County Clerk in Portland and had them filed.

“I told the Secretary of State that I still wanted to use them with members of the Legislature after I had handed them to him to file, and he says, ‘Well, I will just make a pencil filing on them, and you can use them,’ and handed them back to me.

Q. Now, do you know what date that was?

A. Well, that was some time in September, I cannot remember just exactly.

Mr. Fenton: October 6, 1866.

Q. October 6, 1866?

A. Well, I thought maybe it was September.

Q. To refresh your recollection, I will direct your attention to a certificate of the Secretary of State upon the subject.

A. Yes, well.

Q. You observe that it was October 6, 1866?

A. Yes, I see. When I prepared that article, of course, I referred to the records.

Q. Now, on October 10, 1866, the Legislature of the State of Oregon passed the Joint Resolution No. 13, designating the Oregon Central Railroad Company as the corporation to receive the benefits of the act of 1866. I will ask you to state what you did after you presented these articles to the Secretary of State for filing and he made the pencil notation, down to the time that the Legislature passed this resolution.

A. Why, I was showing these articles of incorporation to the members of the Legislature.

Q. Were you in Salem at the time?

A. I was there every day. I lived there at that time.

Q. Who was Governor of the State at that time?

A. George L. Woods.

Q. Did you present these articles of incorporation to him?

A. I think so.

Q. Did he address to the Legislature a message upon the subject?

A. He did.

Q. I will ask you if you can identify the document that I now present to you as that message?

A. Yes, that is the message. I know there was a matter of some amusement about it. There was some stuff in it here toward the last that was considered buncombe, and very much like George L. Woods."

Whereupon counsel for the United States offered and there was admitted in evidence the special message of the Governor of Oregon identified by the witness and marked by the Examiner "Government's Exhibit 101," which said "Government's Exhibit 101" is hereinafter set out and described and made a part of this Statement of the Evidence and identified herein as "Government's Exhibit 101."

Whereupon the witness further testified there was no other corporation being organized by the name of "The Oregon Central Railroad Company" at that time so far as he knew and that the corporation referred to in the message aforesaid was the corporation that the witness was then engaged in organizing as he has described. That he consulted with Governor Woods about his signing that message. The Governor was helping him all he could. Witness presented the Governor with the articles of incorporation that he had prepared and

had presented to the Secretary of State and the corporate name of the corporation whose articles of incorporation he had so presented was "The Oregon Central Railroad Company." After the Legislature passed the resolution of October 10, 1866 designating the Oregon Central Railroad Company as the corporation to receive the benefits of the Act of Congress approved July 25, 1866, witness got a certificate under the corporation law signed by a certain number of incorporators designating himself to open the stock books of the Company—the corporation—and after that other signatures were obtained. It was represented to him by Governor Woods, at the time he sent in his message that if he (witness) would see R. R. Thompson with whom he had had a talk—R. R. Thompson was a wealthy man in Portland—and Captain Ainsworth and Simeon G. Reed, that he (the Governor) was satisfied that they would be willing to put up the money to build the first 25 miles of railroad, but that they must be consulted now, and considered, and that if they would sign the articles of incorporation the Governor thought it would be a very fortunate thing, and so witness came to Portland and saw these gentlemen and they did, or at least some of them did sign the articles, or at least agreed to support the proposition. Witness then went back to Salem and reported that he had succeeded in getting these men in. Witness brought to Portland with him the articles of incorporation for the purpose of getting these further signatures and did it with the knowledge and advice of Governor Woods. Witness being asked to examine the

articles of incorporation, a copy of which was then exhibited to him, further testified that he thinks it likely that H. W. Corbett was one of the first signatures he secured after the resolution had passed the Legislature, and that it is likely that Joel Palmer, the name preceding the signature of H. W. Corbett was the last signature obtained prior to the passage of the resolution of October 10, 1866. George L. Woods, the Governor, signed these articles of incorporation after the resolution of October 10, 1866, together with the other names which follow the name of H. W. Corbett. When witness came to Portland and saw Mr. Corbett, with whom he was acquainted, Corbett said "Yes, I will sign the articles, but I cannot put any money in," and witness asked Corbett if he would give him a letter to C. H. Lewis. Witness was not acquainted with Lewis. Corbett said "Yes, my signature is good enough for Lewis. You tell him that I sent you there." Witness went down and saw Lewis who said "Well I will sign them because Corbett did, but I won't put any money in." That was the recollection of witness of these two men. He then went to R. R. Thompson. He had a letter from Woods introducing him to Thompson and Thompson and Ainsworth and Reed all got together in a back room and they talked for an hour or so about the matter and then signed. Witness got John McCracken, who is still living, to sign afterwards. Afterwards he got Brown and Cox and witness was the last man to sign. Of these persons who signed the articles of incorporation prior to the passage of Resolution of October 10, 1866, J. S.

Smith was a man who had been prominent in affairs in Oregon. He was a member of Congress in Oregon afterwards and was at that time in Salem and manager of the woollen factory and was a large owner in the woollen factory in Salem. I. R. Moores was private secretary of Governor Woods and a man of some property in Salem and had been in the mercantile business there for years. J. H. Mitchell is the same Mitchell who afterwards became Senator from the State of Oregon and was afterwards identified with the East Side Company. I. R. Moores was present in the State House at Salem at the time witness presented these articles for filing on October 6, 1866. Samuel E. May was Secretary of State at that time and the conversation with reference to filing the same took place between witness and Mr. May on October 6, 1866, I think, in the presence of Mr. Moores, who was I think, assistant to Mr. May and private secretary to the Governor; that is, he was Assistant Secretary of State. Whereupon the witness further testified as follows:

“Q. Well, Mr. Gaston, I assumed that you had related, or narrated the conversation between yourself and Mr. May, but to avoid any doubt upon the subject, I will ask you to state fully the conversation between yourself and Mr. May upon that occasion, and whether Mr. Moores was present and overheard it.

A. Well, Mr. Moores was present and heard the conversation. And when I presented the articles of incorporation to him, I think that they were not in an envelope, and that Mr. May opened them, and looked

to see if there were three names attached, as he said that that was necessary to form a corporation before the paper could be filed; and after he saw that there was more than three names, he says to me, 'I will just file these in pencil, and give them back to you to use, as you wish.' And he made that filing in pencil, and afterwards admitted that he had made such a filing, because his writing was plainly visible after the trouble commenced between the two corporations. I showed him that and he took back a statement that he said formerly that he had not filed them.

Q. What was that pencil notation? How did it read?

A. Filed October 6.

Q. 1866?

A. 1866.

Q. And upon what part of the document was it?

A. Why, it was on the back part of the folded up document, where the space was left. There was no writing or anything. It was not on an envelope; it was on the document itself.

Q. Now, was it the same day or afterwards that you took them to Governor Woods—took the articles of incorporation to Governor Woods?

A. Well, I couldn't say now whether it was the same day or not, because I was in Woods' office every day that we were working on that proposition.

Q. Well, was it between the time that you had this conversation with Mr. May and the time that the legislature passed the resolution?

A. Oh, yes. I think I took them—I took them to Woods' office immediately afterwards, and then he said he would write this message to the Legislature.

Q. Now, how long were you engaged in soliciting further signatures to those articles of incorporation at Portland? About how long?

A. I think I was only one day in Portland—might have been two. I came down in the steamboat, and stayed a day, and went back, I think the next day.

Q. Can you, by reference to any memorandum or article that you have written upon the subject, state when you returned the articles of incorporation to the office of the Secretary of State?

A. Well, I could not state that exactly.

Q. I say, could you by reference to your articles here?

A. I don't know.

Mr. Fenton: The acknowledgment, Mr. Townsend, will show.

Mr. Townsend: November 21st. It won't do any harm to lead him on that.

Mr. Fenton: No, that is all right.

Q. Everything shows it was November 21st, if that conforms to your general idea?

A. That, of course, I think was about the time.

Q. Now, you did return them to the office of the Secretary of State about November 21st?

A. Yes.

Q. Did you know at the time that any new filing mark was made upon those articles of incorporation?

A. No, I did not.

Q. Did you know that there was then indorsed upon the articles of incorporation a filing mark as of November 21, 1866?

A. No, I did not.

Q. Did you know at that time that other articles of incorporation, designating the same corporate name, had been filed as of November 17, 1866?

A. No, sir, I did not.

Q. When did you first learn that?

A. Well, it was, I think, about a month afterwards, after I took the articles back, that I learned of that.

Q. And who informed you?

A. Mr. Moores.

Q. I. R. Moores?

A. Yes, Mr. I. R. Moores.

Q. Did you then go and inspect the articles of incorporation of the other company?

A. I did.

Q. Did you find the fact to be that the other articles appeared of record as having been filed prior to your articles?

A. I did.

Q. The records show that the signers of the other articles of incorporation were J. S. Smith, I. R. Moores, and E. N. Cooke. Was that the same I. R. Moores?

A. Yes, sir.

Q. Mr. Moores, then, was a signer of your articles?

A. Yes.

Q. And overheard the conversation between yourself and May as to the withdrawal of your articles from the files, and in the meantime signed the other articles, and filed them prior to yours?

A. Yes, sir.

Q. After you learned that articles of incorporation of another company bearing the same corporate name as your own had been filed, just state in a general way what, if any, controversy arose between you, and what resulted, carrying your narrative down to the time that Mr. Elliott arrived and the corporation of April 22, 1867, was attempted to be organized.

A. Well, after I found out that Moores had filed

those second articles, we had conversations. I told him that he could not do it; that there could not be two companies in the same name, and that he was aware that the articles I had filed, and had been before the Legislature, had been filed, and that the corporation was in existence under the statute, and that his filing of second articles was a void act—it was impossible for him to make it stick. But I didn't want any trouble, and he professed the same feeling, that he didn't want any trouble over the matter, and we had several meetings to try and compose the differences. And I wouldn't agree to anything but that they should withdraw their articles and proceed on the original filings, as that was the material that was before the Legislature, and that would not be disputed. It went on that way, in an unsettled manner—there was no agreement arrived at until Mr. Elliott—

Q. How about Mr. Clark?

A. Mr. Clark and then Mr. Elliott arrived on the scene, and after that, why, there were these third articles filed.”

Whereupon witness further testified that the Mr. Elliott referred to was the same S. G. Elliott who arrived at Jacksonville in the fall of 1863 with the party of surveyors and he appeared in Oregon the next spring, in April 1867, he thinks, and immediately after he came to Salem to see him and Elliott said he had made arrangements for capital to build the road and all that and wanted witness to go in with them and become secretary of the Company. Elliott would be president and

they would build the road right off. Witness declined to throw away the old articles. Elliott wanted him to go in on the new articles—the third articles—and finally witness told Elliott if all the incorporators of the Company that witness represented would instruct him so to do, he would do so, but could not stipulate away any rights that they had, so that after Elliott arrived the third set of articles of incorporation, bearing the same corporate name, was prepared and these are the articles of the so-called East Side Company. Nothing was ever done with reference to the second set of articles filed on November 17th other than the mere filing of the same. There never was any organization under that whatever. Witness thinks that the third articles of incorporation were filed about April 22, 1867. The first controversy, after the articles prepared at the instigation of Mr. Elliott were filed, arose from the use of the corporate name and that was the controversy in the newspapers and among the people interested in the building of the railroad in a public way. It was discussed in the newspapers and the first thing witness did after he learned that they had authorized the issue of bonds in the name of the Company of witness was to send a circular to the bankers and brokers in New York, Philadelphia and Boston informing them of the facts of this dispute and that the third Company, or the Salem Company was to his notion, a fraud and a swindle upon any person that would invest in their securities.

Whereupon witness identified "Government's Exhibit 102" as such circular whereupon complainant of-

ferred said exhibit in evidence to which defendants objected as incompetent and as a self serving declaration, which said exhibit is hereinafter set out and described and made a part of the Statement of the Evidence and identified as Government Exhibit 102.

Whereupon witness further testified that in the meantime they had to organize by subscription of one-half the capital stock of the Oregon Central Railroad Company, (West Side) before they (witness and his associates) could elect a Board of Directors. That was done by witness and other parties and they elected a Board of Directors, and proceeded to get their subscriptions and in Portland Captain John C. Ainsworth undertook to canvass himself for stock subscriptions and secure considerable money, which was collected and invested in the construction of the road. Witness does not recollect distinctly with reference to the acceptance of the grant extended by Congress by the Act of July 25, 1866, or as to whether it is not a fact that failing to secure a subscription of one-half of the capital stock of his Company within a reasonable time the incorporators did not sign an assent or acceptance and forward same to the Secretary of the Interior, which was rejected upon the ground that the acceptance had to be by the Directors of the corporation instead of the incorporators.

Whereupon the witness further testified as follows:

“Q. “Now, the records of the West Side Company, which are now in evidence show that the West Side

Company was finally organized on May 24, 1867?

A. Yes.

Q. Now, it is a fact, is it not, Mr. Gaston, that you failed to secure subscriptions to one-half of your capital stock, and to effect an organization you were finally compelled to, and did, subscribe in your own name, for the use of the corporation, a considerable—how much was it? Two Million?

A. Two and a half million.

Q. Two million and a half of the capital stock of the corporation?

A. Yes, sir.

Q. And the organization was effected in that manner?

A. Yes, sir."

Whereupon the witness further testified that it was after that that directors and officers were elected and the assent of the West Side Company adopted and forwarded to the Secretary of the Interior. The subscription by himself was not in the name of the Company like that made by the Salem fellows. It was in his own name, although it was by him as Trustee for the corporation. That O. H. Browning, Secretary of the Interior was part of the Committee that examined witness when he was admitted to the bar and witness wrote him a private letter explaining why these things were done in this way, with the other papers; witness was afraid at the

time that they would investigate that subscription he made to the capital stock and might question it and witness wrote Brownell a private letter explaining that all to him, with the assent of the Company which was forwarded. The Directors of the West Side Company were elected at the time the first stockholders meeting was held in May, 1867 and they proceeded to elect officers. Witness was elected first president and W. C. Whitson secretary, and speaking generally, from that time on until 1870 witness represented the West Side Company in a general way in its controversy with the East Side Company and its other dealings. Down to the time that Mr. Holladay became identified with the East Side Company in September 1868, John H. Mitchell represented them in this controversy and in all the dealings of the East Side Company in Courts and a great deal of the time outside of the Courts, but I. R. Moores was the man in all business transactions. Moores was secretary for a good while, but whether Moores was president at that time or whether George L. Woods was president he could not say. After witness and his associates got the line located for construction purposes as far as Fulkerson Gap in Polk County, they filed a map showing the exact line, in compliance with the formal requirements of the Act of July 25, 1866. It is my recollection that it was the Fulkerson Gap, but it might have been the other Gap. Witness thinks the date, alleged in the bill of complaint and admitted by the answer that the map that he speaks of was filed on August 20, 1868 in the office of the Secretary of the Interior is correct. Dur-

ing the year 1867 witness canvassed among the people of Washington and Multnomah Counties for subscriptions to the stock, and anything to get donations of land or anything that would give the Company a showing of property on which it could get money. Witness put in the time that way and after he quit, Captain Ainsworth took up the work and got subscriptions to the stock among the business men of Portland and the work of soliciting subscriptions to the capital stock was continued after what he considered to be the organization in May 1867. He did not have any other business and prosecuted that as diligently as he could. Nothing was done during the year 1867 in the way of construction work, and nothing was done in the way of construction until after Captain Ainsworth got some \$50,000, he thinks it was, subscribed in Portland, it might not have been more than \$25,000, but they were all cash subscriptions and when that was completed, the Company commenced work. There was nothing done during the year 1867 by the East Side Company in the way of construction, or preparation for construction, and witness thinks the East Side Company did not succeed in getting any subscriptions among the people. What efforts the East Side Company made he does not know, but Elliott went east after their organization, that has been described and endeavored to raise money there by the sale of these bonds that they offered. This general controversy that he has spoken of as to the right of the East Side Company to use the corporate name of the Oregon Central

Railroad Company was carried on throughout the year 1867, but was not so bitter as the succeeding year. The West Side Company broke ground on the 15th of April, 1868, and the East Side Company the next day. Witness further testified that as a result of his work, with the assistance of Mr. Ainsworth, the financial means of the West Side Company for carrying on the work of construction at the time it commenced construction on April 15, 1868, both as a cash donation and guarantees of interest on bonds etc. was as follows: "The most important item in the assets of the Oregon Central Railroad Company (West Side) was ten blocks of land here in the north end of the City, donated by the Couch Estate on condition that we make that the terminus of the line. Then there were various pieces of land in South Portland donated—Judge Marquam, I think, donated some, and other parties; and then there was the subscription list of Captain Ainsworth, which was immediately available, and probably was more important than any of them, because it was ready cash. We didn't have any cash in the treasury—never had any there—but we had these assets. Then in Washington County a great many men had made donations of land. There was one piece of land donated that is now inside of the town of Hillsboro, that was sold. It wasn't sold for very much then, but it was a valuable piece of land; and there were other tracts of land around over the country. And Mr. Newby had succeeded in getting donations of land himself, and Robert Kinney, I think, to the amount of about \$12,000 at McMinnville. Altogether I suppose that these items amounted in value to \$100,000."

Whereupon witness further testified that during the same session of the Legislature that adopted the resolution of October 10, 1866, it passed an Act guaranteeing the interest on a million dollars of the Company's bonds, but witness thought the conditions of that Act were that as each 20 miles of road was constructed the Company would get so much of these bonds guaranteed. There was a guarantee by the City of Portland of interest on \$250,000 of bonds and a like guarantee by Washington County of \$50,000 of bonds and \$75,000 of bonds by Yamhill County. This in a general way constituted the available and prospective assets of the West Side Company. The bonds, of course, were available as they constructed the road, the other matters they had in hand and could deal with. The East Side Company, in a general way, did not have anything at the time it commenced construction. It had no money, no subscriptions to stock that were available, no donations of land or anything else that he ever knew of. The West Side Company commenced construction at a place on Carter Street in South Portland. As to the assets of the East Side Company, Elliott had gone east on the basis of what his Company had done to raise means there. He succeeded in buying two locomotives of someone in the East and in getting rails for 5 miles of track, and these were sent out to Portland. The freight was not paid. Nothing was paid but they were shipped and it looked as if the East Side Company owned them. After they got the bills of lading for the rails and locomotives they went to B. Goldsmith in Portland and borrowed \$20,000

and on that money they commenced work very close to where the car shops of the Southern Pacific are located on the East Side of the Willamette River in East Portland. It was then out in the country. There was no town there then but that piece of land had been donated to them on condition that they would start there and make their track there, or shops, or something. He thinks it was in Tibbetts Addition, about one mile this side of the car shops. Mr. Tibbetts made the donation. It was on his land and he took a very active part for the East Side Company. During the year 1868 the West Side Company built the big bridges on the first five miles and graded the first five miles of track and the East Side Company, during 1868, commenced in East Portland, built a little showing of track along there and along out on their line up towards Oregon City, but he don't know how much work they had done because he never saw it. During the year 1868 the controversy continued between the East Side and West Side Companies. This controversy was carried on by witness and his associates undertaking to stop the East Side Company in every way they could. The East Side Company had located its right of way this side of Oregon City across a man's land that would not consent and they got this man to assist the West Side Company in fighting the East Side Company and the attorneys of the West Side Company answered for this man, denying that the East Side Company was a corporation. The East Side Company did not try the case, but made a new survey and went around the man's land and they

got rid of it in that way. Then the West Side Company brought a suit in Marion County Circuit Court to enjoin the East Side Company from the use of the corporate name. Richard Williams acted as attorney for the West Side Company and Judge Boise declined to grant any relief on the ground that no pecuniary damages had been alleged or shown by the West Side Company, (and another reason was that he did not see such men as W. S. Ladd sitting around interested in the case,) so he turned the West Side Company down. The West Side Company questioned the incorporation of the East Side Company at Portland in Multnomah County. District Attorney Mulkey brought an information questioning their right to act as a corporation, this being a quo warranto proceeding. On some technicality Judge Upton denied the writ. Judge Upton had been down to the office of the West Side Company and wanted Captain Ainsworth to take some interest in it, as this was an important matter and Ainsworth wanted to know what sort of interest they could take. Upton said they could give him some of their bonds. Ainsworth told Upton that they were not in that kind of business. They did not get any decision from Upton on their side of the case. It was then concluded that they would bring the case of Newby—William T. Newby had a son in San Francisco who was a lawyer—and they assigned to him a bond and upon this a suit was commenced before Judge Deady, and this suit was prosecuted until Deady made his decision that the East Side Company had no right to use the corporate name

of the West Side Company and knocked them out. In addition to legal proceedings which he and his associates caused to be instituted, this general controversy was also carried on by public meetings, circulars and newspaper articles. They not only published from time to time over the authority of the Company statements respecting the East Side concern and its illegitimacy but especially pamphlets. The East Side Company published a pamphlet and the West Side Company published a reply to it, but the newspapers on the West Side of the Willamette River, with one exception, took up the controversy and espoused the cause of the West Side Company while the newspapers of the East Side of the River, if they said anything, were generally in favor of the East Side Company on their side of the River. The most of them did not say anything in behalf of the East Side Company. In addition to that public meetings were held at Corvallis and other points and witness attended the meetings generally representing his Company but some of them were attended by Mr. Newby and some by Lair Hill who was one of the attorneys for the West Side Company. John H. Mitchell and Mr. Elliott represented the East Side Company and attended some of those meetings. The West Side Company projected its line of railroad on the West Side of the Willamette River and the East Side Company on the East Side of the Willamette River and these two names East Side and West Side had reference to the Willamette River. In a general way the nature of this controversy between the East and West Side Companies and the particular

questions that were discussed in the newspaper articles, in public meetings and otherwise, were two main points. First, that the East Side Company was not a corporation but a fraud; that it was a violation of the law and it had no legal existence and was simply a nuisance in the way of the West Side Company in carrying out its legitimate work and that it was injuring the prospects of the State and the Company in getting the land grant, and that the West Side Company was really entitled to that land grant. These were the three points that were brought up everywhere and discussed. Of course the personality of the parties engaged was to some extent involved and there were a good many bitter things said on both sides. The East Side Company's contention, in a general way, was that the West Side Company had not complied, that they never were legally organized in time to receive that designation, and therefore never had any right to the land grant, and that after, of course, they were recognized by the Act of Congress of April 10, 1869, that they had as much right to contend for the land grant as the West Side Company had. Witness identified "Government's Exhibit 103" as one of the circulars that was sent out on behalf of the West Side Company, signed by witness as its president, in connection with that controversy. This was distributed to the extent of thousands of them, sent to all the leading men in Oregon, to banking houses, brokers and railroad material men in Eastern Cities and was issued and circulated with the authority of the West Side Company.

Whereupon witness identified the document that was presented to him as a circular printed by the East Side Company during that same controversy marked "Government's Exhibit 104." The last named document is dated 1868 but is not signed by any one at all but was circulated by the Salem people. The witness identified a memorandum on the back of this circular in his own writing that says it was about May 1, 1868, and refreshing his recollection by this notation says that the circular was published and circulated about May 1, 1868, generally. It was sent to a great many people all over the Willamette Valley. Whether it was circulated outside of the State witness has no means of knowing, but there were a great many copies sent to them from friends of the West Side Company up in the Willamette Valley.

Whereupon the complainant offered in evidence "Government's Exhibit 103," to which defendants objected as immaterial, irrelevant and incompetent and particularly in this that it is a self serving declaration and not competent to prove the alleged facts recited therein and does not appear to have been authorized by the Oregon Central Railroad Company of Portland, heretofore marked by the Examiner for identification "Government's Exhibit 103, and which said "Government's Exhibit 103" is hereinafter set out and described and made a part of this Statement of the Evidence and identified as "Government's Exhibit 103."

Whereupon the witness further testified as to "Government's Exhibit 104," that he had no definite knowledge or authority from which he could say that the same

was published and circulated with the knowledge of the East Side Company, but witness believed it was so published and circulated and everybody believed it but there was no definite knowledge or authority that he could refer to, to say that the East Side Company had authorized it. The same general arguments appearing in this circular "Government's Exhibit 104" were made by John H. Mitchell and others representing the East Side Company in the public discussions that took place between witness and others representing the West Side Company, and this circular represents the arguments that were used against the West Side Company. The East Side Company had some men at work right straight along from the time it commenced construction during the year 1868, but he does not know how many men there were, there never was a very large force. They got out of money and had to sell the locomotives in California to continue the work. Mr. Elliott was in charge of the work on the East Side Railroad at that time.

Whereupon the complainant offered in evidence "Government's Exhibit 104" heretofore marked by the Examiner for identification "Government's Exhibit 104" and which said "Government's Exhibit 104" is hereinafter set out and described and made part of this Statement of the Evidence and identified as "Government's Exhibit 104."

To which defendants objected as heresay, incompetent, immaterial and irrelevant and as containing self-serving declarations, and not proven to have been authorized by the Oregon Central Railroad Company of

Salem (East Side Company) and that such document cannot be used to prove substantive facts therein stated.

Whereupon witness further testified that there was another pamphlet after that on behalf of the East Side Company distributed during the year 1868, and witness identified "Government's Exhibit 105" as such circular or pamphlet. It was generally circulated throughout Western Oregon, particularly the Willamette Valley and witness thinks it was taken to Washington City.

Whereupon the complainant offered in evidence "Government's Exhibit 105" heretofore marked by the Examiner for identification "Governments Exhibit 105" and which said "Government's Exhibit 105" is hereinafter set out and described and made part of this Statement of the Evidence and identified as "Government's Exhibit 105" to which defendants objected as incompetent, immaterial and irrelevant and a self-serving declaration incompetent to prove any substantive fact stated therein and as not shown to have been authorized by the Oregon Central Railroad Company of Salem (East Side Company.) These were the only two statements that witness knew of that were circulated ostensibly on behalf of the East Side Company during the year 1868. Elliott had charge of the work on the East Side road from the beginning under a contract of construction given to A. J. Cook & Company, which A. J. Cook & Company was a myth; there was no one but Elliott. It was a contract with himself. Elliott was in charge of the work throughout 1868 but when Holladay came up to Oregon and took over the affairs Elliott

remained a director of construction forces for a short time but they soon quarreled and Elliott was ousted and had nothing further to do with the Company and as to financial affairs he had nothing to do with that after Holladay came. Elliott was superseded entirely by Holladay. Witness cannot tell the date Holladay came, but just as soon as he came to Oregon his financial man was George W. Weidler. He was Holladay's right hand man and made all payments in money after that. Holladay came to Oregon after the East Side Company began construction and after it had graded, as he thinks, as far as the Clackamas River. It was in the latter part of the summer of 1868 witness thinks when Holladay came. Whereupon counsel for complainant and defendants agree that it was September 12, 1868.

The general recollection of the witness was the same as shown by the records of the East Side Company, that Holladay took control of the Company by assignment of the contract with A. J. Cook & Company on September 12, 1868. Prior to that time the East Side Company had not, to his knowledge, made any claim to the land grant.

Whereupon the witness further testified as follows:

“Q. In the circular Government's Exhibit 104, which you say was circulated about May 1, 1868, it is stated as follows: “The charge has been extensively circulated that we are seeking to defraud the West side of the river of a valuable franchise—of State and Government aid—in answer to which we have only to say,

that we recognize that the Act of Congress granting lands, and the Act of the last Legislature of Oregon, are both inoperative, from the fact that the terms and stipulations of those Acts have not been, and cannot be, complied with. Any aid to be granted railroad enterprises in Oregon must be re-enacted by both State and General Government, and we have no hesitation in affirming that we claim no grants, privileges, or rights for our Company, we do not desire also extended to the West side of the valley.' I will ask if that represents fairly the general contention urged on behalf of the East Side Company during the controversy, prior to the time that Mr. Holladay became connected with the transaction.

Mr. Fenton: Objected to as immaterial, incompetent, irrelevant and as not binding on either Company.

A. I think it does."

Whereupon witness further testified that the controversy took this direction after Holladay came in that witness and his associates were soon apprised of the fact that Holladay was going to make an effort in the Legislature to have the Company that he was connected with either designated to receive the land grant or measures or action taken leading in that direction. The Legislature met every two years at that time in September, so that there was a session convening in September 1866 and the next session in September 1868 and the matter was carried before the Legislative session which con-

vened in September 1868. Both Companies appeared before the legislature and carried on the fight in the Legislature. The leaders that addressed the legislature on behalf of the Companies were John H. Mitchell for the Salem Company, the East Side Company, and James K. Kelly on behalf of the West Side Company. Holladay was in Salem and kept open house. Witness only knew from hearsay the manner of Holladay's campaign, he never was at his caravansary, but Holladay had quite a number of hired men there to work with members of the legislature, and after witness sold out his interest to Holladay the latter admitted to witness what Holladay had done there to beat them.

Whereupon witness being asked what Holladay said, counsel for defendants objected to that as not binding on the East Side Company as a corporation and as incompetent, irrelevant and immaterial.

Whereupon the witness answered that "he told me that it cost him \$35,000 to get that action of the legislature in behalf of the East Side Company, and he told me the sums of money that he paid to some of the members of the legislature."

Whereupon counsel for defendants moved to strike out this answer as incompetent, immaterial and irrelevant.

Whereupon the witness further testified that this statement was made to him in the fall of 1870, or sometime between July and the fall, witness cannot tell the exact time. It was in one of his interviews in Holladay's

house on Third Street and Holladay was at that time president of the Oregon & California Railroad Company.

Whereupon counsel for defendants renewed the motion to strike out this testimony upon the ground that the declaration of Holladay could not be binding upon the Oregon and California Railroad Company and that it was not authorized.

Whereupon said witness further testified that this fight that was carried on in the legislature in the fall of 1868 finally resulted in the resolution of October 20, 1868, which in terms rescinded the former designation of the West Side Company and made a new designation in favor of the East Side Company. When the fight in the legislature started, the work of construction continued by both Companies. Witness thought that "Government's Exhibit 105" was not circulated on behalf of the East Side Company until after the legislature adjourned. That is his recollection. If it was circulated, it was circulated secretly. He did not see it until after the legislature adjourned. After the legislature adjourned, the fight was carried into Congress. The East Side Company employed Mitchell and witness thinks Chadwick to go to Washington City and present the matter there before Congress and the West Side Company sent Simeon G. Reed to represent its interests but witness did not go and was not in Washington during the time the matter was before Congress. He did not go until after the fight, until after they had got the

enabling act passed Congress, meaning the Act of April 10, 1869, and after they had practically complied with the act in constructing 20 miles of road. Then, witness went on to Washington City to get the new grant from Portland to McMinnville with a branch to Astoria. He went on to Washington in December 1869, and stayed there until May, 1870, but had only hearsay knowledge as to whether "Government's Exhibit 105" was used before Congress. He heard what he knew from Mr. Reed, their agent there. Reed represented that they had given copies of this to all the members of Congress and Senators.

Whereupon counsel for defendants moved to strike out the answer of the witness as hearsay. Witness further testified that he had a conversation with Senator Corbett on this subject and he told him the same thing but does not recollect that he ever had a talk with Mr. Holladay about it.

Whereupon counsel for defendants renewed his motion to strike out all of said testimony as hearsay and incompetent.

Whereupon the witness further testified that there was a circular prepared on behalf of the West Side Company for use before Congress in reply to "Government's Exhibit 105" and which was used before Congress, also with an additional statement made by Mr. Reed and thinks—but does not know—some other person joined with Mr. Reed in that statement.

Whereupon witness identified that circular as "Government's Exhibit 106" and testified that he wrote the

circular himself after he had seen "Government's Exhibit 105." That he had "Government's Exhibit 105" before him when he prepared "Government's Exhibit 106" and it was prepared for use before Congress and was prepared in January 1869. January 19, 1869 is approximately the correct date and it was authorized by the Company after he had written it.

Whereupon complainant offered in evidence "Government's Exhibit 106" to which counsel for defendants objected as incompetent, immaterial and irrelevant and as a self-serving declaration in favor of the Oregon Central Railroad Company of Portland, West Side, and as not competent to prove any probative or ultimate fact therein stated and as a narrative of alleged past events, as not authorized by the Oregon Central Railroad Company of Portland and as not used or circulated among members of Congress prior to vesting of the rights of the Oregon Central (East Side) to the grant of July 25, 1866, by the designation made by the joint resolution of October 20, 1868.

Whereupon the complainant offered in evidence "Government's Exhibit 106" heretofore marked by the Examiner for identification "Government's Exhibit 106" which said "Government's Exhibit 106" is hereinafter set out and described and made part of this Statement of the Evidence and identified as "Government's Exhibit 106."

Whereupon the witness further testified as follows:

"Q. Well, the controversy in Congress finally re-

sulted in the passage of the act of April 10, 1869?

Mr. Fenton: Objected to as calling for a conclusion and not for a fact.

A. Yes, sir.”

Whereupon the witness further testified that after the act of April 10, 1869 was passed the East Side Company pushed its construction work more vigorously than before and the West Side Company completed temporary grading from the end of the five mile post on its line to the town of Hillsboro during that summer, but the West Side Company did not lay any track whatever prior to December 25, 1869, and the East Side Company completed its first section of 20 miles on December 25, 1869. He does not recollect doing anything on behalf of the Company with reference to the land grant under the Act of July 25, 1866 after the West Side Company failed to complete its first section of railroad within the time required by the granting act. If they did anything it has escaped his memory; that is, anything with reference to the land grant. The condition of the financial resources of the West Side Company in the fall of 1869 were very limited. It received its financial backing from the sources witness has already mentioned and the Washington county people had collected some money on their stipulation to pay interest on the bonds, which was turned over to the Company. The City of Portland had collected \$10,000 or \$12,000 on account of the interest it had stipulated to pay and it was turned over to the Company, and the Yamhill people, he thinks,

never levied any tax to collect the interest on bonds they had endorsed. The Company, by its own officers, carried on the work of construction on the West Side Railroad down to the fall of 1869. They had no contract with any one except the contract for the construction of the bridges which had been let to Stephen Coffin who had, under his contract, constructed the bridges on the first five miles of road. Witness had forgotten, but they had a contract with S. G. Reed & Company to construct, he thinks, 150 miles of road, which the witness thinks was dated in the fall of 1868, and this was one of the reasons that Reed went on to Washington to get the land grant to support that contract. After the act of April 10, 1869 was passed this contract was abandoned, and the Company was again thrown on its own resources. The Reed contract came to be entered into in this way. While witness was engaged in directing the work and expending the money that they had on the West Side road, Edwin Russell, manager of the Bank of British Columbia, said to him that he, Russell, was going back to London on a visit and if witness would give him a power of attorney he would see if he could raise any money for him in London on his bonds. Witness did not think there was much probability of his being able to do anything, but talked the matter over with Captain Ainsworth who thought, with himself, that they could not raise any money in any money market on their bonds as long as they were in litigation in the way they were with the East Side Company, but they decided that it would do no harm anyway and so they made out the

power of attorney to Mr. Russell to sell \$500,000 of the Company's bonds in London. Russell went on there and to their great surprise within 30 days after he reached London cabled back that he could sell \$500,000 worth of the Company's bonds at sixty five cents on the dollar cash and asked him to answer promptly whether they would take it. Witness showed the cable to Ainsworth who said to give him 24 hours to think about it and witness replied "All right," and went out to the country and gave him his 24 hours. Next day, not receiving any answer from witness Russell, knowing that Ainsworth was interested with him in the road cabled Ainsworth who replied declining the offer. Witness very greatly regretted this action and told Ainsworth that he thought it was a great mistake, that that would put the Company in funds to finish their 20 miles of road and get the land grant and Ainsworth said if they sold bonds at that rate they never could sell any more. On account of the disappointment to witness in that London transaction Ainsworth induced Reed to go into the contract to construct 150 miles of the road. When Mr. Reed came back from Washington and failed to get the legislation in shape that he wanted, or prevent the legislation of the East Side Company, the West Side Company abandoned the contract with S. G. Reed & Company and it was apparent to witness then that they would not be able to build the road in time. That is the first section of its railroad in compliance with the Acts of Congress. Subsequently they took steps to get another land grant. With the means he had he kept up work on the road

until the temporary grading was finished to Hillsboro and then Captain Ainsworth gave witness \$1,000 to go back to Washington and see if he could get a subsequent land grant in aid of the West Side Company. Before he went back he had a talk with Senator Williams upon the subject.

Whereupon witness being asked to give the substance of that conversation, it was stipulated between counsel for the parties that this testimony should be subject to the objection of the counsel for defendants as incompetent, irrelevant, immaterial and as hearsay.

Whereupon the witness further testified as follows:

“A. Well, in Congress the senatorial representation from Oregon was divided. Mr. Corbett was an active friend of the West Side Company, and Mr. Williams assumed friendship to the East Side Company, and was instrumental in getting through the act of April 10, 1869; and for that action of Senator Williams, he was very generally condemned on the West Side of the river in the Willamette Valley, by the West Side people, and by a great many men in Portland. And when he came back to Oregon, he felt that more than ever and he came and had an interview with me at my office in Portland, and to defend himself for his course in Congress, and then wound up by saying, ‘Now, I will show you my good faith and friendship for your company by doing everything I can to get you another grant,’ and advising me to go to Washington, and be there and render him any assistance I could.”

Whereupon the witness further testified that this conversation took place about the 20th of December, 1869, Congress meeting on the first Monday in December. Witness went to Washington pursuant to the suggestion of Senator Williams. Captain Ainsworth gave him \$1,000 to defray his expenses there and witness went to Washington and arrived there about 15 days after Congress convened in December, 1869, and after that time the West Side Company never made any claim to the grant under the Act of July 25, 1866. Witness stayed in Washington until May 1870, but as soon as the second land grant bill was passed on May 4, 1870 he left Washington and came back to Oregon, leaving 4 or 5 days after May 4, 1870. During that winter, for the purpose of procuring the passage of that bill, witness met with the Committee on public lands repeatedly and discussed the proposition. The bill was drawn up by Judge Olney. When witness got to Washington he found that Cyrus Olney, of Astoria, had gone there for the purpose of getting a land grant bill in aid of a railroad to Astoria. Witness had not heard of that before leaving Oregon, but when he arrived at Washington Judge Williams told him of that and told him to have an interview with Judge Olney and combine their interests; that it would not do to have two bills, one for his Company and one for Olney's Company, and that they must get together and combine their interests and work together. Witness did that. He had an interview with Judge Olney and they immediately agreed upon a bill for a land grant from Portland to Eugene City on

the West Side of the Willamette River, with a branch from the main line to Astoria, from the vicinity of Forest Grove, and that bill was introduced by Judge Williams. After it was introduced, Mr. Holladay came on there and wanted to get a land grant for himself from Portland to Tacoma and the Northern Pacific people immediately commenced to "oppose our bill" with the belief that "we could knock out Holladay" because they wanted the land grant between Portland and Tacoma. Witness had numerous interviews with the representatives of the Northern Pacific and finally agreed with them that witness and his associates would work for the Northern Pacific land grant and the Northern Pacific representatives would work for theirs and put Holladay out of the ring. Witness then had meetings with the Senate and House committees on public lands and this bill for their Company was drawn up by Judge Olney and before the House Committee. Witness had frequent interviews with George W. Julien, who was chairman of the Public Lands Committee as to the features of that bill. Witness worked also with members of Congress. Sam Cox was an old friend of his from Ohio and John A. Bingham likewise. Bingham made a speech in the house for the bill and Sam Cox, notwithstanding his old friendship, and while witness had helped elect him to Congress, opposed the bill. He did not do it very bitterly but said he had to maintain his record that he was opposed to land grants. Witness had to talk to a great many men. The sentiment in favor of land grants to railroads was about dead and that was

the last bill that Congress ever passed in favor of land grants to railroads.

“Mr. Fenton: That was May 31, 1870?”

Mr. Townsend: May 31, 1870. There was one March 1, 1871, the Texas Pacific.

Mr. Fenton: The one he refers to between Tacoma and Portland, in favor of the Northern Pacific, was May 31, 1870. That is the Northern Pacific Resolution.

A. Well, they were all agreed to at that same time, I think, before the committees. I thought our bill was the last one, and that they got theirs through first.”

Mr. Fenton: No, yours was first.”

Whereupon the witness further testified that the bill for the second grant which may be called the West Side grant, as originally introduced in Congress called for a grant along the west side of the Willamette River to Eugene and there was another proposition introduced in Congress to extend that grant. After witness had been in Washington two or three weeks or more, B. J. Pengra, of Eugene City, came on and made known to Williams that he wanted the land grant for a railroad over the line of the Oregon Central Military Wagon Road land grant, so as to provide for the construction of a railroad from Winnemucca in Nevada to Eugene City, Oregon. This was somewhat embarrassing, and they all had a meeting that were interested in these things at the house of Tom Fitch, who was a member of Congress from Nevada. Pengra had succeeded in interesting

Fitch in the proposition very much, and it was there agreed—at the house of Fitch—Fitch being Pengra's particular friend in the matter, that Pengra should have a land grant from Winnemucca to Eugene City, and that the West Side road, the Oregon Central Company, should have the land grant from Eugene City to Portland, with the branch from Forest Grove to Astoria, which would satisfy Judge Olney; and the land grant to Eugene would satisfy the old West Side Oregon Central Company; and the land grant from Eugene to Winnemucca would satisfy Pengra and his friends and the stockholders in the Oregon Central Wagon Road. When Holladay came into the field he objected to the land grant going any further than McMinnville, in fact any further than Forest Grove for the reason that it would prevent him, Holladay, from selling his bonds on the East Side road and defeat his enterprise, notwithstanding he would get the old land grant because it would be paralleling his line, and would possibly interfere with his land grant, so that Holladay induced Judge Williams to cut off the West Side land grant at McMinnville, under the promise that after he, Holladay, had sold his bonds, at the subsequent session of Congress, witness and his associates should have the gap between McMinnville and Eugene filled up with an additional grant. The bill providing for the grant from Eugene to Winnemucca was then pending in Congress. Winnemucca is on the Central Pacific, so that the plan would have made a continuous line from Portland to the East. There was a change in the legislation after witness left

Washington which had effect upon the future history of the West Side Railroad. Witness left Washington, he thinks, about the 7th or 8th of May and stopped at Wheeling, and at Belmont County, Ohio and then came to Oregon. When he got to Umatilla he received a telegram from Pengra to come back to Washington immediately, that Williams had backed out of his agreement and had introduced an amended bill for Pengra's road, compelling it to connect with the Oregon & California Railroad in the Rogue River Valley and that was the change. That amended bill was brought in in favor of Pengra's road. There was no change in the branch, or Astoria's interest.

Whereupon witness further testified as follows:

“Q. Well, now what promise of financial assistance, if any, had you had, that was withdrawn from you because of that change in the plan?”

A. Well, before we had the meeting at Tom Fitch's house, Pengra brought Mr. C. P. Huntington, who was at the head of the Central Pacific Company over to Washington City to satisfy Judge Williams that he could get the money to build that road; and Huntington authorized the statement, and made the statement there, that if Congress would pass the land grant as Mr. Pengra desired it, and as it was agreed upon at Tom Fitch's house, he would finance the proposition and build the road to Oregon immediately from Winnemucca.”

Whereupon witness further testified that the Pengra

bill was never passed and no effort was subsequently made to extend the grant of the West Side road from McMinnville to Eugene.

Whereupon witness further testified as follows:

“Q. Did you have any other prospective financial support than the assurance of Mr. Huntington at the time you returned to Oregon? That is, I mean, of any substantial character?”

A. Well, I had a contract with some people in Philadelphia to build the railroad to McMinnville.

Q. And when did you make that contract?

A. While I was in Washington City.

Q. The records of the West Side Company disclose that it was on January 19, 1870. Is that approximately correct?

A. I expect it is. I don't recollect the date.”

Q. Well, now, at that time did the West Side Company, as represented by you as its president, have any intention or purpose of claiming any further benefits, making any further claim of benefits, under the act of July 25, 1866?

Mr. Fenton: Objected to as immaterial, and as incompetent, and as not a waiver of any rights which the West Side Company may have obtained by what it did, under what record it had made.

A. No, we never asserted any further rights in the old grant; never expected to get anything from it of interest to us.

Q. And when this contract was made with the Philadelphia people in January, 1870, did that have reference to the former grant, or to the grant that you expected to get?

A. It had reference to the grant we had and what we had promised to get. The Philadelphia people had sent a man over to Washington to see whether we were likely to get what we claimed.

Q. Was that contract an absolute contract, or was it contingent upon your securing the new grant?

A. No, it was an absolute contract. They sent out an agent here to look the ground over afterwards.

Q. Well, now, what became of that contract?

A. Well, it was abandoned when Holladay bought the majority of the stock in the West Side Company."

Whereupon witness further testified that Holladay bought a majority of the stock in the West Side Company in June or July, 1870, shortly after witness returned home from Washington and he was induced to dispose of his interest in the West Side Company because they were in debt very much, and Holladay had bought up claims, and there were threats to bring bankruptcy proceedings against the Company and witness knew that that would be the end of the Company if they

proposition that was in dispute was that Holladay had refused to establish stations at Hillsboro and Forest Grove and wanted to build a town at Cornelius and pull down those two towns, and they had to have that settled, so it was agreed that those two towns were stations and Cornelius paid off all the debts and then the Board of Directors of witness and his associates surrendered and that was the end of the connection of witness with the West Side Company, or the East Side Company either. He never had any connection with railroads afterwards, except to help the Southern Pacific in some of its right of way cases and damage cases and that way. Witness was general freight and passenger agent for the West Side road for several years—three years or more—and had charge of Holladay's real estate companies and edited a daily paper—The Bulletin. Holladay was at the head of the affairs of these two railroads after witness sold out to Holladay. Halsey was Holladay's vice president and George Weidler was a general utility man and they ran the business until the German bond holders sent Mr. Koehler out here and then Holladay did not have so much to say.

Whereupon witness further testified as follows:

“Q. Now, Mr. Gaston, I want to call your attention briefly to a few of the issues raised by the answer of the defendants in this case, and, supplementing your former testimony, I want you to tell us what you can upon those disputed questions, avoiding repetition, so far as you can, of your former testimony. It is charged in the bill

of complaint that a controversy arose between the East Side Company and the West Side Company as to which of the two companies was entitled to the land grant after the resolution of the Legislature of Oregon of October 20, 1868, was passed. The answer admits that a controversy arose, but alleges that it arose at about the time of the incorporation of the East Side Company on April 22, 1867. What is the fact?

A. Why, the controversy arose about the name as soon as the East Side Company was incorporated, and it never stopped until it was apparent that the West Side Company could not earn the land grant. It was a continuing controversy.

Q. As to the name?

A. Yes, sir.

Q. But when did the controversy as to which company was entitled to the land grant arise?

A. Well, that arose as soon as the East Side Company appeared in Congress and wanted to put in its—well, as soon as the legislature passed the resolution declaring that we had not received a lawful designation, it was apparent then that they were going to take steps to get the land grant, and the controversy about that arose then.

Q. Prior to that time had they made any claim to the land grant, so far as you know?

A. No; they had disclaimed any claim to the land grant.

Q. Now, the bill of complaint alleges that after the East Side Company procured the passage of the resolution of October 20, 1868, which rescinded the former designation of the West Side Company, and assumed to make a new designation in favor of the East Side Company, the East Side Company applied to Congress for an extension of the time within which it might file an assent. The answer denies that the East Side Company applied to Congress. State what is the fact with reference to that, if you know.

Mr. Fenton: Object to that as incompetent, that the witness could not know, and that his information would only be hearsay, as he was not in Congress, not there, not a member, and did not go to Congress until December, 1869, after the loss of the land grant of July 25, 1866, by the West Side Company.

A. Well, I could only speak from hearsay and public report, that they were taking steps to claim the land grant. That is the way I understood it from my information.

Q. Was the subject discussed in the newspapers at that time here in Oregon?

Same objection.

A. Oh, yes.

Q. Were the proceedings in Congress upon the subject discussed in the newspapers?

Same objection.

A. Oh, yes, they were all published and discussed by everybody interested in those things.

Q. State whether or not the general newspaper discussion disclosed whether representatives of the East Side Company were in Washington soliciting the passage of a new act.

Objected to as hearsay and incompetent.

A. Yes, from time to time there were publications, by telegrams from Mitchell, as to the proceedings as things went along, and letters published as things went along, and when the act was finally passed in their favor, why, Mitchell and Chadwick sent a telegram to the Oregonian that they had gained everything they claimed—something like that.

Mr. Fenton: I object to that as not the best evidence.

Q. Now, did any officer or representative of the East Side Company ever, to your knowledge, dispute or deny any of those reports, or telegrams, or letters?

Objected to as immaterial.

A. No; not that I know anything about, no.

Q. It is also alleged in the bill of complaint, and

denied by the answer, that the West Side Company appeared in Congress and opposed the application of the East Side Company for an extension of time. You have already identified the circular that you prepared for use in Congress upon that occasion. Have you any further information upon the subject?

Mr. Fenton: Same objection, and as hearsay.

A. Nothing more than the fact that we had sent Mr. Reed there for that express purpose, of opposing any claims of theirs, and Reed's letters to myself and Ainsworth and others.

Q. Did Mr. Reed ever report to you, or the West Side Company, the circulars or statements which he presented to Congress?

A. He sent me copies. He never made any official report. He sent me copies.

Q. Are these documents the ones that you refer to?

A. Yes. These are the two. I don't know of any others, but these are the two documents that I refer to: one 'Remonstrance' signed by Reed and the other 'Objections' signed by Reed."

Whereupon counsel for complainant requested that these two documents be marked "Government's Exhibits 107 and 108" respectively for identification and the same were so marked and were identified by the witness as the circulars received by him from Mr. Reed, sent

from Washington.

Whereupon the complainant offered in evidence "Government's Exhibits 107 and 108," to each of which counsel for defendants objected as incompetent, immaterial and irrelevant, and as self-serving declarations purporting to be made by S. G. Reed, and as incompetent to prove any substantive fact recited or claimed to be stated therein, and as not having been shown to have been authorized by the West Side Company. Which said "Government's Exhibits 107 and 108" are hereinafter set out and described and made a part of this Statement of the Evidence and identified herein as "Government's Exhibits 107 and 108."

Witness was thereupon shown a newspaper clipping and stated that it was a publication of the telegram signed by J. H. Mitchell and S. F. Chadwick, referred to by him in his previous testimony and included in an editorial notice of the matter in the Oregonian.

Whereupon counsel for complainant offered this newspaper publication of the telegram in evidence and asked to read the same into the record instead of identifying the same as an exhibit.

Whereupon counsel for defendants objected to the same as hearsay, incompetent, immaterial, irrelevant and as not binding on any one, waiving objection to the method of identifying the same; which telegram reads as follows:

“Washington, D. C. April 10, 1869.

Editor Oregonian: The East Side Railroad bill has passed both Houses and received the signature of the President. The victory is complete.

J. H. Mitchell. S. F. Chadwick.”

Whereupon the witness further testified as follows:

Q. “Mr. Gaston, the bill of complaint alleges that the West Side Company failed to complete the construction of any of its railroad within the time required by the Act of Congress July 25, 1866, and the Act of Congress of June 25, 1868. The answer denies this fact. Which is correct?

A. Well, it did not construct any railroad within the time required.

Q. The bill of complaint also alleges that the West Side Company abandoned all claim to the East Side grant under the act of July 25, 1866, on or about the month of January, 1870 and in lieu thereof applied for and received and accepted a new grant under the act of May 4, 1870. This is denied by the answer. Please state what is the fact.

Mr. Fenton: Objected to as calling for a conclusion, both of law and fact, and as incompetent.

A. The fact was that the company did abandon all claim to the Act of Congress of July, 1866, and accepted the new act of May, 1870, in lieu thereof.

Q. Who represented the West Side Company at that time? Who had authority to say whether the West Side Company should abandon all claim under the Act of July 25, 1866?

Mr. Fenton: Objected to as immaterial, and for the further reason that the record of the witness thus far taken, and his testimony, shows that the West Side Company was unable to complete the first twenty miles required by the Act of July 25, 1866, after the passage of the act of April 10, 1869, and that when that failure occurred Mr. Gaston, for his company and his associates, no longer made any claim to any interest in the grant of July 25, 1866, but applied for another and an independent grant, without regard to the grant of July 25, 1866, after such failure and loss of the East Side grant by failure to construct within time.

A. Why, the board of directors represented the company, and it was decided to apply for a new grant, without any reference to the old grant. There was no condition of abandonment one way or another. It was simply concluded that the company never could earn the grant nor get it, and the thing to do was to get a new grant, if possible.

Q. Mr. Gaston, it is alleged in the bill of complaint that the East Side Company became involved in litigation, questioning the validity of its corporate organization, and because thereof the East Side Company was in effect reorganized under the name of the

Oregon & California Railroad Company. The answer denies that the East Side Company became involved in any litigation questioning the validity of its incorporation. You have referred in your testimony to two proceedings of that character. Can you call to mind any other proceedings?

Mr. Fenton: Objected to as immaterial and not the best evidence.

A. I think I have stated that proceedings were instituted against the East Side Company to prevent them from using our corporate name, and to dissolve their alleged corporation, under the quo warranto acts of Oregon, in the State courts. Now, if I did not mention the proceeding by the bondholder Newby in the United States Court, why, that—

Q. You did.

A. Well, that is the only thing in addition to what was done in the State courts. That case was prosecuted against the East Side Company until Judge Deady decided the matter.

Q. Mr. Gaston, to what extent, if any, did the line of railroad adopted by the West Side Company under the act of May 4, 1870, from Portland to McMinnville by way of Forest Grove, differ from the route of the road that had been adopted in the first place by the company under the act of July 25, 1866, that is, between those two points?

A. It didn't differ at all. It was precisely the same."

Whereupon the witness further testified that in the settlement with Holladay in the summer of 1870, his stock was assigned to Dr. R. H. Towler, the private secretary of Ben Holladay, as he recollects it, and after this settlement with Holladay the affairs of the two roads were still conducted separately and two corporations were maintained. Witness was general freight and passenger agent of the West Side road when they kept the business separately. Had separate freight offices and a man to look after that whose name he has forgotten, but thinks the general bookkeeping was done by Mr. Cunningham in the O. & C. office. This man whose name he had forgotten was Major Hampton, and then there was another man besides him. Major Hampton was the bookkeeper of the West Side road until it was taken over in 1876. Witness knows he kept his office up at the other place, and that young man, W. S. Ward, had his office in the old freight shed and kept that business separate. That was about all the separation. The freight house of the East Side Company was on the east side of the river and the West Side Company on the West Side of the river; that there was no bridge in those days so that the two freight offices had to be maintained separately.

Mr. Fenton: Mr. Townsend, the general offices also were kept separately. I don't know whether Mr. Gaston meant to be understood as saying that there was

any combination, but, as I understand, the Oregon Central (West Side) offices were kept entirely separate from the Oregon Central (East Side).

A. Yes, as Mr. Fenton says, there was Major Hampton there for years, and there was another man, too. I have forgotten his name. I am just trying to get it clearly in my own head. It was all kept separate, and Mr. Peebles came out here from London to look into the matter for the London stockholders, and I know I went with him out over the road, and everything was kept separately from the other company.

Q. The earnings and everything?

A. I think so. I think there is no doubt about that. Mr. Peebles looked into everything very carefully."

Whereupon witness further testified that Holladay, after settlement with witness the real dominating head of the West Side Company until the German bondholders came and displaced him, and during that same period was the real dominating head of the East Side Company. He does not think there were any relations between Judge Williams and Holladay, except Williams' fear of Holladay's opposition and the influence of Senator Mitchell, whom Holladay controlled. Witness never thought that Williams had ever yielded to any pecuniary influence or anything like that, but the relations of Holladay and Williams were friendly. Aside from what witness has testified, he does not think that Senator Williams gave Holladay any other sup-

port in that fight. Judge Williams was perfectly aware that the majority of the people in Oregon were opposed to Holladay and his ways of doing business, and Judge Williams himself was not in favor of Holladay's corrupt schemes and his highway methods of doing business; but what he did was to placate his opposition rather than to help him along witness thinks. Witness was on terms of friendship with Holladay after his settlement with him and does not think that in his subsequent talks with Holladay he learned anything that would indicate whether the East Side Company was presenting these circulars and making that fight before Congress—he does not think that was ever mentioned between them. Holladay was in Washington during that fight in Congress. He went there every year. He had two purposes there. The first was to look after his railroad interests and the second to get the old "mule claim" paid, as they used to call it. He had a claim before Congress for a large sum of money for the mules that the Indians and the rebels ran off during the war. Alleged mules and alleged rebels.

Whereupon on cross examination witness further testified that he studied law at St. Clairsville, Ohio, and was admitted to the bar of the Supreme Court of Ohio at Newark, by Chief Justice Thomas W. Bartley, who presided over the District Court, which entitled him to practice in all the courts of Ohio, and on this certificate of admission he was admitted to the Bar of the Supreme Court of Oregon in September 1863, about a year after he came to the State. He had practiced at Jacksonville

since about July 1862, being admitted by Judge Prim, a Justice of the Supreme Court at that time, and a Circuit Judge, now dead, and continued his practice at Salem with John Cartwright, afterwards United States Attorney. He was in partnership with him about a year and practiced law to a certain extent with Judge Kelly, afterwards United States Senator from Oregon, and Chief Justice of the Supreme Court of Oregon. He practiced in his office after Judge Kelly retired from the bench in 1882-3 and 4. He was, to a certain extent, in touch with his profession from the time he was admitted to the Bar in Ohio until he retired from active business of any kind. At the time he became connected with the Oregon Central Railroad Company of Portland, called the West Side Company, he would not pretend to say that he was conversant with the land laws of the State, or in a general way with the land grants that had been passed by Congress, or the decisions of the Supreme Court of the United States up to May 4, 1870, because he would not have a knowledge of anything that he had not specially looked up. It was the understanding of witness and his associates that the construction of the first 20 miles of road was a condition necessary to earn the grant. That is to say, if the Company did not construct the first 20 miles, or any part of it, within the time, that by reason of the failure to construct, the grant would be lost and witness thinks that was a provision in the Statute and he thinks it was the general judgment of the legal profession at that time.

Whereupon witness further testified as follows :

“Q. Now, do you recall the case of *Schulenberg v. Harriman*, that was decided in the October term of the Supreme Court, 1874, reported in 21 Wallace page 44, that announced a different doctrine from that generally understood before that time?

A. No, I don't.

Q. You were not familiar with that case?

A. No.

Q. And you have not examined it since?

A. No, Never did.”

Whereupon the witness further testified that the California & Columbia River Railroad Company was never organized. The incorporation papers were filed. Witness prepared them. It was an Oregon corporation. He cannot say whether the articles were filed in the office of the Secretary of State at Salem or whether they were simply executed, but thinks that they were filed.

Whereupon the witness further testified as follows:

“Q. Do you recall whether what is called the Barry Survey, which was printed in the form of a pamphlet, was survey of the California & Columbia River Railroad Company, or was it a survey under the name of the Oregon Central Railroad Company of Portland?

A. I don't think there was any particular—I ain't certain that there was any particular name to it.

Q. Well, you said in your testimony that there was a Barry Survey?

A. Well, that was a general name that got to be attached to it because he was a manager of the party going along with it. It never got to be—it was never any legal or corporate signification.

Q. This Colonel Barry's report, then, was a report that was made and printed, as you recall, and it is referred to in the legislative proceedings, I think the Journal of the Oregon State Senate, 1864, in the Appendix, pages 36 and 37, and also the House Journal of 1864, pages 185 to 189. Do you know of its having been considered by the Legislature of 1864?

A. Well, I think it was read there, or parts of it was read, and referred to, and I think that there was an effort made to have it printed by the state.

Q. Well, now, that was a report based upon what survey and whose survey, as you recall it?

A. That was Barry's survey.

Q. Well, what I am getting at is, is that the same surveying party that stopped at Jacksonville, when you took it up when they were stranded there, and they subsequently went on north to the Columbia River?

A. Yes.

Q. That is the same survey that you referred to in your testimony.

A. Yes.

Q. And that was made in what year?

A. 1864.”

Whereupon witness further testified that he does not think that the California & Columbia River Railroad Company ever had any capital stock subscribed, or elected a Board of Directors, but that was a fact he does not think that Barry knew when he made his report. Witness prepared the articles of incorporation of the Oregon Central Railroad Company of Portland, West Side, and they were written out by him in Salem.

Whereupon the witness further testified as follows:

“Q. I call your attention to page 141 and page 142 of Volume 7, No. 2, of the Quarterly of the Oregon Historical Society, which purports to contain a copy of these articles of incorporation, and of certificates of acknowledgment, and file-mark endorsement by Samuel E. May, and ask you if the signatures to these articles—J. S. Smith, I. R. Moores, J. H. Mitchell, E. D. Shattuck, Jesse Applegate, F. A. Chenoweth, Joel Palmer, and H. W. Corbett were not all taken, and their acknowledgments taken by you as notary public, at Salem, on or about the 29th day of September, 1866, and while the Legislature of the State of Oregon was then in session?

A. Well, now, it don't say—

Q. Will you look at your certificate of acknowledgment so that you may refresh your memory?

A. Well, I suppose that that states the fact. As they were taken, they would sign and acknowledge from time to time; but that certificate was not made up until some time afterwards.

Q. The certificate bears date what date?

A. The 16th of November.

Q. 1866?

A. Yes.

Q. Then the names that I have mentioned were signed to that document sometime on or before the 29th day of September, 1866; that is correct, isn't it?

A. Yes, they were signed before, just as I could see them.

Q. And this certificate shows that M. M. Melvin signed these articles at Salem on or about October 23, 1866, or rather acknowledged it before you at that time—is that correct?

A. Yes. They acknowledged the signature.

Q. And the certificate further shows that George L. Woods, at Salem, on or about November 10, 1866, acknowledged these articles. Now, when did Woods sign the articles? At what date?

A. Well, I suppose so, but I wouldn't say positively. I suppose that states the fact. There is some of them signed after the articles were first filed.

Q. I notice that the certificate recites that R. R. Thompson, J. C. Ainsworth, S. G. Reed, John McCracken, and C. H. Lewis acknowledged the execution of these articles on the 16th day of November, 1866, and it is certified by you under date of November 16, 1866, that they then and there, at these several times set forth in this certificate, did sign and seal said articles before you, and in your presence, and acknowledged the same. Is that according to your recollection?

A. Well, I think that that certificate there states it about as it was.

Q. States the facts?

A. Yes, I should say so.

Q. Now, I notice that on the 20th day of November, 1866, Seth R. Hammer certifies that B. F. Brown, Thomas H. Cox, and J. Gaston, personally known to him to be the identical persons whose names are subscribed to that document, acknowledged to him that they signed the same for the purposes therein set forth. When did Brown and Cox and Gaston sign with reference to that date?

A. I think that day.

Q. Now, the J. Gaston mentioned in that certificate is the same J. Gaston whose name appears last on the articles of incorporation, and that is your name?

A. Yes.

Q. Now, at the time that you went into the Secretary of State's office and delivered one copy of these articles of incorporation to him, being Samuel E. May, and as you say asked him to file the document, whose name, as you now recall it, were on the articles?

A. I think all of them above that of Mr. Corbett.

Q. It would be including Mr. Corbett?

Mr. Townsend: Including Mr. Corbett.

A. Well, maybe including that.

Q. All of those that you certify acknowledged and signed the same on or about September 29, 1866? That is the way your certificate reads?

A. Yes.

Q. At that time, though, when you handed these articles to the Secretary of State, you had not written the certificate of acknowledgement?

A. No, sir.

Q. And you did not then have the signatures of M. M. Melvin, George L. Woods, R. R. Thompson, J. C. Ainsworth, S. G. Reed, John McCracken, C. H. Lewis, B. F. Brown, T. H. Cox, or J. Gaston?

A. No.

Q. And you had not taken their acknowledgments?

A. No.

Q. And the acknowledgment of yourself, Thomas H. Cox and B. F. Brown had not been taken?

A. No.

Q. Now, when you delivered this document in that condition to Mr. Samuel E. May, Secretary of State, what did you say to him, and what did he say to you, as you now recollect?

A. Oh, I couldn't recollect that. I suppose I said that 'Here is the articles of incorporation of the Oregon Central Railroad Company. I want you to file them.'

Q. And what did he say, or do you recollect what he said?

A. And that I wanted to use them afterwards, in showing them to the members of the Legislature. He said, 'All right. I will put a pencil filing on it, and you can bring them back, and then I will put a pen and ink filing on it.' He put that on as a memorandum of the date that I presented it to him.

Q. That is, he put a pencil memorandum, as you recollect, on the back of this article or document?

A. Yes.

Q. Of the date when you delivered it to him?

A. Yes.

Q. And then he handed it back to you?

A. Yes.

Q. Now, was the object of it being handed back to you to enable you to go and get further signatures to the articles of incorporation, and complete the acknowledgment?

A. Yes.

Q. You had intended to get other signatures to it after, at the time he handed it back?

A. Yes; well, my main object was to show it to the members of the Legislature, and get these signatures that George L. Woods said he wanted put on.

Q. That would be Thompson and Ainsworth and Reed, of Portland?

A. Yes.

Q. Now, Thompson and Ainsworth and Reed were all known to be capitalists?

A. Yes.

Q. And were the leading capitalists interested in the West Side of the river, where Portland was then and now is situated?

A. Yes.

Q. C. H. Lewis and W. S. Ladd were the two other leading capitalists interested in Portland at that time?

A. Yes.

Q. Now, pursuant to that suggestion of Governor

Woods, you desired to have these articles so that you could get these other signatures?

A. Yes.

Q. Do you recall when George L. Woods was inaugurated as Governor?

A. No, I don't recollect the date.

Q. He was elected Governor at the June election, 1866, wasn't he?

A. Yes.

Q. Then he was Governor as soon as the Legislature met and canvassed the vote in September, 1866?

A. Yes.

Q. Then he was actually Governor at the time he signed these articles?

A. Yes, sir.

Q. Do you recall when H. W. Corbett was elected to the Senate, whether it was at this session of 1866?

A. Well, let me see—no, it wasn't at that session, was it?

Q. Yes.

A. Well, that was about the last day of the session.

Q. Yes, he was elected in September, 1866?

A. Yes, I recollect now, because he was up there fussing around about his candidacy for the Senate, and among other things, we had a reception up at my house, and he was there, and interviewing members of the Legislature.

Q. Now, I call your attention to the names of all these parties who signed the articles of incorporation of the Oregon Central Railroad Company of September, 1866, referred to in your testimony, and which were acknowledged by you,—the acknowledgments taken by you as indicated and concluded by Seth R. Hammer, and will ask you if there is any one living of that list of eighteen excepting yourself and John McCracken?

A. That is the only ones that I know of. I don't think there is any others.

Q. I call your attention to the articles of incorporation of November 17, 1866, referred to in your testimony, and purporting to be signed by J. S. Smith, I. R. Moores and E. N. Cooke, and will ask you if they are not all dead?

A. They are all dead.

Q. I call your attention to the articles of the Oregon Central Railroad Company of Salem, filed April 22, 1867, signed John H. Moores, Geo. L. Woods, S. Elsworth by Geo. L. Woods, Atty., I. R. Moores, J. S. Smith per I. R. Moores, Atty., E. N. Cooke per I. R. Moores, Atty, Sam'l A. Clarke, and will ask you if they are not all dead?

A. They are all dead.

Q. C. S. Woodworth, Notary Public, appears to have taken the acknowledgment to the articles of incorporation of April 22, 1867. He is dead, too, isn't he?

A. Yes.

Q. Is Seth R. Hammer living?

A. No, Seth is dead.

Q. Is Samuel E. May living?

A. No. May is dead now.

Q. Is J. C. Cartwright living or dead?

A. He is dead.

Q. M. N. Chapman, formerly Deputy Clerk of Marion County—"Mem" Chapman, as you knew him?

A. I don't know whether he is living or dead. He was alive three or four years ago, but I don't know whether he is living or not.

Q. You don't know. He is dead, is he not? I call your attention to an article signed 'Joseph Gaston' which appears in the Quarterly of the Oregon Historical Society, December, 1902, under the subject 'The Oregon Central Railroad,' and found at pages 315 to 326 of this Quarterly, and will ask you if you prepared and wrote and signed that article?

A. I did.

Q. I call your attention to this language, on page 325: 'After losing the land grant the Oregon Central Company sent Mr. Gaston to Washington City in December, 1869, where he was successful in getting from Congress a second grant of land to aid in constructing a railroad from Portland to McMinnville, with a branch from Forest Grove to Astoria; and under which grant the road was constructed to the Yamhill River at St. Joe.' You remember that paragraph, do you?

A. Well, if it is there, I wrote it.

Q. Now, you state there that, after losing the land grant, the Oregon Central Company sent Mr. Gaston to Washington City in December, 1869. Now, it is true, isn't it, Mr. Gaston, that before you started for Washington in December, 1869, the Oregon Central Railroad Company, as you have stated here, thought it had lost the land grant of July 25, 1866?

A. Well, the conclusion was that we were utterly unable to comply with the Act of Congress, and from that we assumed that we had lost the grant.

Q. In other words, because your company (West Side Company) was unable to build its first twenty miles before December 24, 1869, within the time required by the act of June 25, 1868, you and your associates thought the grant was lost?

A. Yes.

Q. Now, isn't this true, Mr. Gaston, that the rea-

son why Mr. Reed, representing the Oregon Central (West Side) went on to Washington to oppose any further legislation, and particularly the act of April 10, 1869, was because your company desired to contest in the courts the rights which each of you claimed to have under the respective designations made by the Oregon Legislature in 1866 and 1868, and that you did not want Congress to pass any act that would allow the East Side Company a chance to compete for the land grant, and give them a chance to build the first twenty miles, or to comply with the previous legislation? Isn't that the reason why your company sent Reed on to oppose any further legislation?

A. Well, now, as I recollect, the conversation between myself and Reed and Ainsworth in their office, when they agreed to that contract, was that if Congress let the grant stand as it was then, and made no alterations or amendments, that they, Reed and Ainsworth and Thompson, would put up the money immediately and build the twenty miles without any reference to any litigation.

Q. In other words, if there was no legislation, the West Side Company was ready, and had promise of financial support, and felt that it could earn the grant of July 25, 1866?

A. Oh, yes, there was no question about that, because those men had the money. They were here in Portland. They didn't have to go anywheres else to get it.

Q. And that was your position—I mean, the position of the West Side Company, and your associates, notwithstanding the Legislature had attempted to designate the Oregon Central of Salem in October, 1868, as the company entitled to the grant?

A. Yes. They didn't care—Reed and Ainsworth said they didn't care a snap for what the Legislature had done; if Congress didn't interfere, why, they would build the road.

Q. And they didn't then ask for any legislation?

A. No.

Q. In 1869?

A. No, they simply—

Q. Opposed it?

A. Opposed it."

Whereupon the witness further testified:

In the controversy at Washington, Mr. Corbett, who lived on the West side of the river, and whose interests were in Portland proper, at that time there being no East Portland, or city on the East side of the river, and he having been elected Senator in 1866, when the West side company was designated as the beneficiary of the grant, or entitled to have the grant of July 25, 1866, supported that company in all of these efforts to prevent legislation, or to help it to earn the grant. While

Williams, elected in September 1864, and who had been two years in the Senate when Corbett arrived, was occupying a rather neutral position as to the two companies, desiring to please both if he could. In 1868 this controversy between these two companies as to who should build the road, and as to where it should be built, and as to which company should have the benefit of the land grant, had become a political question in the election in June 1868, and witness thinks that it is about true that the counties on the West side of the Willamette River as far south as Eugene, or Lane County, was practically unanimous for the West Side Company, and the East side counties from Multnomah as far south as Eugene were practically unanimous for the East Side Company, and that entered into the election of state senators and representatives to the legislature in 1868 on both sides of the river. He does not know whether it is true that the contest was carried forward along the same lines from Lane County south, through and including Jackson County. He had lived in the Southern part of the state, and most of the men down there supported him in the fight, but he does not know that they took sides simply because the West side counties were on his side.

Refreshing his memory of those early days, witness recollects that Upton was a representative from Multnomah County in the Legislature of 1868, and afterwards became Circuit Judge for that county. Witness remembers that some one offered House Joint Resolution No. 13, to designate the Oregon Central Railroad

Company, that is, the West Side Company, as the company entitled to receive the land and all the benefits of the Act of Congress approved July 25, 1866, on October 6, 1866, but he had it in his mind that Foudray of Jackson County offered the resolution, but if it is recorded that Upton offered the resolution, it is probably true. Witness knows that the special message of Governor Woods, identified by him, was communicated shortly before this legislative action was taken, but he does not think that he asked the Governor to send in his message, but the Governor was very enthusiastic over the matter, because he wanted to have some personal interest in it, and volunteered the proposition. Witness knows that House Joint Resolution No. 13 was referred to a committee, and knows W. W. Upton, E. D. Foudray of Jackson, James Gingles of Benton, Binger Herman of Douglas, and John Whiteaker of Lane; they were in the Legislature in 1866. Whiteaker had taken an active part in the matter, and witness thinks he was favorable to it. Witness knows that the Jackson County members supported the measure very enthusiastically, but he does not recollect as to the Portland members, but knows that Upton did, because Upton was figuring all the way through to get some interest in the proposition. Witness knows that Corbett, W. S. Ladd and Governor Woods and others were called before the House, and Woods and Corbett made very encouraging speeches in favor of House Joint Resolution No. 13. Ladd said he did not know much about it, but was in favor of building railroads and in favor of the general proposition; he

had not considered the matter much.

Witness recalls the bill that was passed and approved October 24, 1866, and referred to in the proceedings as House Bill No. 78 entitled, "A Bill to aid in the construction of the Oregon Central railroad," by which the state undertook to pay interest on a million dollars of bonds, to be issued by the Company, he having drawn the bill himself after the decision of the Supreme Court of California on a similar law. It was repealed at the next session and never executed in any particular. He does not recall that on October 17, 1868 Senator Miller of Jackson County introduced or offered Senate Joint Resolution No. 16, reciting the passage of House Joint Resolution No. 13 and making the recitations which appear in that rescinding resolution, and that he urged its passage; and does not recollect the vote on Senate Joint Resolution No. 16, but knows that it carried through the Senate afterwards. He remembers that S. C. Adams of Yamhill County, T. R. Cornelius of Washington County, Binger Herman of Douglas County, B. F. Holtzclaw of Josephine County, H. C. Huston of Lane County, S. Ison of Baker, C. M. Pershbaker of Douglas, Coos and Curry, and B. F. Burch of Polk County, voted against Senate Joint Resolution No. 16. and that the controversy became geographical, the West Side Senators voting as a unit, assisted by scattering votes from the other sections of the state; Witness thinks there was a lot of them dodged, that is, did not vote at all. The action of the Senate was communicated to the House on October 19th, according to the records, and witness re-

calls that C. B. Bellinger, who had successfully contested the seat of Daniel Carlisle, of Benton, strongly advocated this rescinding resolution, and that the House divided upon the same lines geographically as the Senate, but Bellinger was then running a little store up at Monroe, in Benton County, and for his action in that matter was compelled to leave the county or give up his storekeeping, and he came to East Portland afterwards and Holladay gave him a half block over in Holladay's Addition.

Witness knows that there was some scrap between R. A. Bensel and J. C. Alexander, but that was all he knew. The result was that the Legislature of 1868, after a full and vigorous campaign on the respective merits of the two lines, or the location of the two lines, succeeded in dividing Western Oregon geographically. Some of them voted on geographical division and for the people that they thought they were representing, and some of them voted for the coin that was in it.

Witness wrote the book called "Portland, Its History and Builders," as a matter of history and not as a matter of legal parlance, in drawing legal documents, and when he used the words "Thus securing this act of the legislature in his favor, Holladay continued to push the work of construction on the grade, and sent agents to Washington to get an act through Congress enabling his Salem company to file its acceptance of the land grant act. Congress finally, on April 16, 1869, passed an act extending the time for filing acceptance of the land grant and providing that whichever of the two com-

panies should first complete and put in operation twenty miles of railroad from Portland southward into the Willamette Valley should be entitled to file such acceptance of grant." That was the understanding of the effect of what was done, that was the popular way of expressing it. Witness furnished to Mrs. Victor a paper called "Gaston's Railroad Development in Oregon" in manuscript, and from this statement she compiled the statement that is in Volume 2, Bancroft's History of Oregon.

The desire to have a railroad from Oregon to the East took expression in the form of various companies and surveys, various works of exploitation, from as early as the exploitation of Governor I. I. Stevens in 1853. They had a railroad project up in the Provisional Government at one time before that, witness thinks, but Stevens was the first man to call national attention to the matter. The Willamette Valley Railroad Company was a project gotten up, witness thinks, to build a railroad from St. Helens up into the Willamette Valley. He could not vouch for the statement that a charter was granted to a company styling itself the Oregon & California Railroad Company, which proposed to build a road from Eugene City to some point on the East side of the Willamette River below Oregon City, or possibly to the Columbia River, back in April, 1854, but knows there were various schemes proposed about that time, and knows the St. Helens people had a great proposition, proposing to take all the business of the Willamette Valley to St. Helens.

Witness knows that the Governor's special message and this House Joint Resolution No. 13 found on page 251, down to and including the middle of page 260, House Journal, 1866, introduced by Foudray, was referred to a committee of which Foudray was a member, and that he took an active part and made some sort of report back to the House about it, but that is all he knows about it. They submitted therewith House Bill No. 78, a bill to aid in the construction of the Oregon Central railroad, which finally passed and became a law.

Whereupon Counsel for defendants offered and there was admitted in evidence and read into the record from the House Journal of 1866 the following: Mr. Foudray, from the select committee, to whom was referred the special message of the governor, in relation to railroad grant, presented the following report, accompanied by a bill:

REPORT

Mr. Speaker:

The special committee to whom was referred the governor's special message and the house joint resolution No.—, on the subject of railroads, have had the same under consideration, and beg leave to submit the following report, with the accompanying bill, to aid in the construction of the Oregon Central Railroad:

For several years the question of constructing a railroad through the Willamette, Umpqua and Rogue River valleys, has been very generally discussed before the people, some preliminary surveys have been made and much valuable information gathered upon the subject; but before this legislature will adopt any legislation bearing upon the question, it will doubtless be necessary to lay the important and material facts necessary to a proper understanding of the enterprise fully before the house, and to that end your committee has directed its labors.

That a railroad through the above named valleys is badly needed by the farmer and producer, and in fact all classes of our population, must be obvious to the most careless observer, and the bare mention of a few facts is amply sufficient to set it forth in the strongest light.

It is a well known fact that the wheat crop, the great reliance of the Oregon farmer, scarcely ever yields him one-third the price it commands in the San Francisco

market. In 1864 while wheat was selling readily for \$2.00 in San Francisco, it would bring the farmer but 75 cents in the Willamette valley, and now when it is above \$1.00 in San Francisco, it is dull sale at half that price here. The same inequality of prices will be found to prevail in all other articles of produce. It is absurd to expect our farmers to prosper and aid in developing the country, as long as they are subjected to such disadvantages in competing with the farmers of California. And we cannot expect that other branches of business will prosper when the farmer is thus deprived of the profits of a good market for want of cheap transportation at all times. And as agriculture underlies the prosperity and wealth of the state, it is useless to hope for general prosperity unless we resort to the means which other states and countries employ—cheap and ready transportation to a sure market. In southern Oregon the obstacles to the exportation of agricultural products are so great as to amount to a complete embargo; and such must forever continue to be the condition of that country, at least so far as the most profitable part of the farmer's labor is concerned, until the country is tapped by a railroad leading either to Portland or San Francisco. And as illustrating the necessity of a railroad connection to the people of the southern counties, we may mention the fact, ascertained from the books of the commission merchants at Crescent City, California, that the inhabitants of Josephine and Jackson counties have in a single year paid out as freight money alone, on 1,800 tons of merchandise imported, the sum of \$179,-

700. This large expenditure would be reduced fully three-fourths by the construction of a railroad, while it would give the people some opportunity to pay for this merchandise by the exchange of the produce of the farms, while cheap goods and cheap machinery would stimulate the production of the mines immeasurably.

These are some of the burdens that the farmers of Oregon are laboring under for want of railroad transportation. It is growing worse every year, and will continue to do so, for the plain reason that the State of California is fast completing its system of railroads, having now over three hundred miles in actual operation and hundreds more miles projected, by which the resources of every acre of the agricultural land of that State will be afforded the advantages of railroad transportation to tide-water, and thus giving the farmers of that State such an advantage as will enable them to keep Oregon produce out of the markets of the world, until we, as a State, do for our farmers what California, as a State, has done for hers—aid in the construction of a system of railroads.

It is true that we have some steamboat transportation in this State. So had California; but, unfortunately for the State, it was like the steamboat advantages which compelled California to build railroads. It can only be relied on in certain seasons of the year, which being the season of rain and mud compels the farmer to submit to any rate of charges and send his produce to market, it may be, at the very time when prices rule the lowest. The prices for steamboat transportation are generally felt

to be onerous and burdensome, no matter whether they are as low as they might be or not, and the want of a railroad is all the more keenly felt, in order to afford that sure and permanent competition which always results in the prosperity of the country. As further illustrating the advantages of a railroad to the business of the country, we make the following extract from a report on this subject, by the senate committee on corporations to the last legislature:

“The direct pecuniary advantages of a railroad through Oregon may be briefly but more clearly set forth by a little calculation. Statistics carefully prepared by reliable men show that Polk county has this year produced one million bushels of wheat. Suppose that six hundred thousand bushels of this crop could be spared to the San Francisco market. At the prices heretofore prevailing since harvest, this was worth in Polk county about 75 cents per bushels, or \$450,000. If there had been a railroad running through Polk county to steamship landing, this wheat would have sold in Polk county, readily, for \$1.50 per bushel, or \$900,000, making a clear gain of \$450,000 to Polk county, on a single crop of wheat, and leaving a margin of 50 cents per bushel to transport the wheat to San Francisco—and all the direct result of railroad transportation. This calculation might be applied to wool, bacon, lard, oats, and especially to the article of hay. Oregon can ship no hay for want of means of transportation, while we have the ability and can produce the best hay in the world, and at a very large profit, if it could be cheaply trans-

ported to Portland.

“Owing to these burdens on Oregon farming, it is a notorious fact that California is now importing grain for feed from the Atlantic states cheaper than she can get it from the granaries of her neighbor Oregon. Some persons are disposed to berate and belittle Oregon farmers for their want of energy in not supplying this San Francisco demand at such handsome figures, and our newspapers take up and echo the cry, ‘no energy, no industry,’ etc.; and while it is true that Oregon farmers are no better than they ought to be, it is not true that they will be found lacking in energy and industry to supply San Francisco or any other good market, when the means for doing so is afforded them, so they can compete on an equal footing with the farmers of California and the eastern states.”

Freight and passengers—rise in land.

One of the most striking and convincing proofs of the great value of railroad transportation, is to be found in the rapid development of the western states, and especially in the increase of the wheat crop. In 1850, Wisconsin had no railways, and Illinois next to none. The wheat crop of Wisconsin that year was but 4,250,000 bushels; Illinois, 9,500,000; of Pennsylvania, 15,500,000; and Pennsylvania was then the greatest wheat producer of all the states by 2,000,000 bushels. But from 1850 to 1860, Wisconsin and Illinois completed their thorough railroad system, which enabled them cheaply and readily to bring their grain to the markets

of Milwaukee and Chicago; and so, in the year 1860, we find by the census tables, Wisconsin has produced 15,700,000 bushels of wheat; Illinois 23,900,000 bushels, and Pennsylvania but 13,000,000 bushels. During the ten years between 1850 and 1860, there was a falling off in the wheat production of the Atlantic states, while at the same time, almost wholly through the encouragement given to production by railway transportation, the five great wheat states of the west, Indiana, Illinois, Michigan, Wisconsin and Iowa, increased in production 47,000,000 bushels per annum—over three hundred per cent on the products of 1850 was yielded in 1860; and what is most remarkable, the price of wheat was nearly twice as high in the latter as in the former year. In the same states a similar increase is noted in almost every other agricultural production.

As a natural consequence to such results in the production of a country, would be an enormous increase in the value of all real estate and other permanent property. Such is found to be the fact everywhere. The construction of a railroad has always increased the value of the land in any country through which it runs, even in old settled countries, not less than three fold, and often quadrupled the returns on the assessor's list. But this is a fact so well known that it need not be dwelt upon.

THE OREGON CENTRAL RAILROAD

We come now to consider a definite proposition. Through the efforts of a few of our citizens, acting in conjunction with some railroad capitalists of California, and aided by the Pacific coast delegation in congress, a grant of twenty sections of public land per mile has been secured from Congress to aid in constructing a line of railroad from Portland, Oregon, to the Central Pacific Railroad in California. It is made the duty of this legislature to designate the company which shall receive and manage so much of this land grant as lies within the state of Oregon. In view of these facts the following named gentlemen have incorporated themselves under the general incorporation law of this state, to wit: J. S. Smith, I. R. Moores, J. H. Mitchell, E. D. Shattuck, Jesse Applegate, Edward R. Geary, S. Ellsworth and H. W. Corbett, under the name and style of "the Oregon Central Railroad Company," for the purpose of receiving the said grant of land, and using it so far as it may go, towards the construction of the proposed railroad, passing through the Willamette, Umpqua and Rogue River valleys. Under present circumstances, the land is not available for the purpose of raising money, one of the grant conditions being that twenty miles of railroad must be finished and put in operation before the government patent will issue for the land. It would be unreasonable on our part to expect the federal government to construct our works of internal improvement, without the least effort upon our part. We are also able

to state that this corporation, composed of our own citizens, have received an offer from capitalists able to command the means to construct the road, that if the State of Oregon would render certain aid to the enterprise, all the funds needed would be forthcoming. We are of opinion that it is better for the state to aid the matter, in its collective capacity, than to rely on the uncertain aid of private individuals. The reasons for this are many and obvious. It is emphatically a work for the benefit of the whole state, and every man, woman and child in it. It will benefit all in proportion to their property, and it is but simple justice that the property thus benefited should contribute its ratable proportion to secure a work of common benefit. We must offer some inducement for foreign capital to become associated in our interests.

It cannot be expected that the money of our Oregon capitalists, readily yielding here twelve per cent. per annum, will desire or be willing to go into a great enterprise with capital which is satisfied with six and seven per cent. per annum. For this reason we cannot rely on individual aid alone in the matter. The great profits and benefits of a railroad comes back to the people in that indirect way of increasing the value of their land, and raising the prices of their crops, rather than in dividends on subscriptions. Other states aid their railroads. In fact, it is the shape in which almost all the local aid is furnished. New York has been made the Empire State by a liberal policy toward its internal improvements, giving upwards of \$20,000,000 to canals alone. Virginia

has given six millions to railroads. Ohio gave many millions to the construction of its canals and railroads. The young state of Minnesota has contracted to loan its bonds to the railroads of that state, to the amount of \$24,950,000. Missouri has already given \$17,656,000 in state bonds to the railroads of that state, which liberal policy would have ere this made her the Empire State of the west, but for the losses by the rebellion. California has contracted to pay the interest on \$1,500,000 of the bonds of the Central Pacific Railroad Company. And so it is in every state that would keep up with the prosperity of the age.

It is proposed by the Oregon Central Railroad Company, that if the legislature will levy and appropriate, whenever a section of twenty miles of railroad is finished and put in operation, a sum of money sufficient to pay the interest on \$500,000 of the company's bonds; and whenever one hundred miles is finished and put in operation, the additional sum sufficient to pay the interest on another \$500,000 of the company's bonds, and so pay this interest for twenty years, and also loan the company the sum of \$10,000 for preliminary contingent expenses, the whole amount to be secured by a mortgage of all the company's property to the State, and to be returned at the expiration of the twenty years, then this company agrees to proceed at once to the work of constructing the road. After fully considering the matter, your committee are decidedly in favor of the proposition and have reported the accompanying bill to carry the same into effect.

Experience has shown in other states that such assumption of liability has not increased the rate of taxation on the property of tax-payers, and that the consequent increase of revenue growing out of the increase in the value of taxable property has more than compensated the interest assumed, and the states as well as the tax-payers have been less burthened, besides becoming holders of good mortgage security for all the money advanced. In Santa Clara county, California, where the county had subscribed \$100,000 in bonds, the interest on which amounted to \$7,000 per annum, stating that the rate of taxes had not been increased. The town of Evansville, Indiana, subscribed \$200,000 in bonds to the Evansville and Crawfordsville Railroad, and it was not necessary to increase the rate of taxes in order to pay the annual interest. H. C. Wait, register of the United States Land Office at St. Cloud, Minnesota, states that the taxes have not been increased by reason of the aid furnished railroads by that state. The secretary of the state of Wisconsin reports that a large amount of the counties and towns of that state aided in their corporate capacity in the construction of railroads in that state, but that in no instance was it necessary to increase the rate of taxation in order to pay the annual interest on the bonds. In 1852 the state of Illinois issued its bonds to the amount of \$12,000,000, taking therefor stock in the railways projected in that state, and although the annual interest on this vast amount of indebtedness amounted to \$840,000 annually, yet such was the rapid increase of property on the tax roll, that it was not nec-

essary to increase the rate of taxation to pay it. The revenue from taxes on the increased value of property occasioned by these railroads, has already enabled the state to pay off more than \$4,000,000 of the principal debt, and it is now believed that the remainder will be extinguished by the year 1876, without even increasing the rate of taxation from the time the \$12,000,000 bonds were first issued until they are finally paid and cancelled. This is a great historical fact in the growth of this country, and assures us of our duty in going forward to do something for the State of Oregon.

If Oregon gives the aid to this railroad proposed by this bill, it will be necessary to pay \$70,000 per annum as soon as one hundred miles of road is finished. Then how will the taxes stand? One hundred miles of railroad will add to the tax list, first, its own cost—not less than \$4,000,000; secondly, not less than fifteen million dollars on the increase of value of land and all other property; aggregating an addition of nineteen million dollars to the assessable property of the state. At five and a half mills on the dollar, the present rate for state taxes, this railroad addition to the tax roll would produce \$104,000 annually—\$34,000 more than is asked for by the proposition submitted; so the argument is in favor of granting the aid asked for to build the railroad.

Your committee recommend the passage of the accompanying bill.

H. B. No. 78—“a bill to aid in the construction of the Oregon Central Railroad.”

Whereupon the witness further testified that S. F. Chadwick, J. H. Mitchell, W. S. Ladd and Simeon G. Reed are dead. The old West Side Company did not lay any track prior to December 24, 1869. It made a temporary grade all the way to Hillsboro by December 26, 1869, and had built the bridges referred to and had built some bridges in Washington County further out, but had laid no rails. The Company obtained an ordinance for the location of its line on Fourth Street earlier than December 26, 1869. The measure had been pending for some time before the council, but he does not know exactly when it was passed. The bond issue of the City of Portland was for \$250,000, and was afterwards enjoined in a suit brought by H. C. Coulson against the City of Portland and set aside as illegal. The counties of Washington, Multnomah and Yamhill turned over the money that they had collected; they made an assessment to pay the interest on the \$50,000 and collected that money in and gave it to the West Side Company, but afterwards this was enjoined by the courts. A petition was circulated over Washington County asking the County Court to guarantee the interest on \$50,000 of the bonds, and the County Court made an order to that effect. That was afterwards set aside, but Yamhill County made no order.

Witness has seen the articles reported in the Oregonian April 16, 1868, giving an account of the exercises which took place at the breaking of ground on the West Side April 15, 1868, and he made an address on that

occasion, and he supposes he must have subscribed it "J. Gaston, President of the Oregon Central Railroad Company," or else it would not have been in the paper that way.

"Q. I understood you to say that the Oregon Central Railroad Company (West Side) did not have one-half of its capital stock subscribed prior to the Stockholders' meeting of May 24, 1867, when the minutes of the Stockholders' meeting, as shown by Journal No. 1 introduced in evidence, were recorded in this book, at which B. F. Brown was President, George W. Lawson was Secretary, and it is recorded here as the first Stockholders' meeting. Had there been no Stockholders' meeting of the Oregon Central (West Side) before that time?

A. Isn't that a meeting of the incorporators?

Q. It reads this way: 'Stockholders' Meeting. Salem, Oregon, May 24, 1867. At a meeting this day held at the office of the company B. F. Brown was duly made president and G. W. Lawson secretary of the first stockholders' meeting. Whereupon came Seth R. Hammer holding the proxy of Thomas H. Cox, incorporator, G. W. Lawson holding the proxy of M. M. Melvin, incorporator, Cyrus A. Reed holding the proxy of Joel Palmer, incorporator, and B. F. Brown and J. Gaston, incorporators, in person, and also the present stockholders of said company, and upon a ballot being taken for the election of a board of directors, the following named persons were duly elected directors of the Oregon

Central Railroad Company, to-wit: William T. Newby, J. M. Belcher, B. F. McCleuch, W. C. Whitson and J. Gaston. The incorporators appointed Saturday, the 25th day of May inst. as the time and the town of Amity, in Yamhill County, as the place for the first meeting of said Board of Directors. Whereupon the meeting adjourned. B. F. Brown, President.'

A. Now, I had forgotten that meeting. I thought it was held at Amity, but that was a meeting of the directors that was held at Amity.

Q. This was at Salem. This was the first meeting, then, of the corporation?

A. Yes.

Q. Had you not had a meeting of the stockholders before that?

A. That was a meeting of the stockholders as well as of the incorporators.

Q. Yes, I know; but at that time, isn't it true, Mr. Gaston, that more than half of the capital stock of this company had been subscribed, so that you were legally organized?

A. Yes. In order to make a legal incorporation, I had subscribed one-half of the stock, and others had subscribed a little—a share or so.

Q. When was that subscription made by you of

one-half of the capital stock?

A. It must have been about that time—a day or two before, or on that day—I couldn't say.

Q. Well, the articles were filed with the Secretary of State, or by Samuel E. May, Secretary of State, were actually formally filed, and indorsed as filed, on November 21, 1866, and you claim they were actually tendered for filing, and received by him for filing, on October 6, 1866, in their uncompleted condition?

A. Yes.

Q. Now, when were the stock books opened for the subscriptions to the stock? About when, do you remember?

A. Well, it was about the time of that meeting there that you just read.

Q. Not until about May 24, 1867?

A. Well, that must have been about the time.

Q. Then, at the time that you were designated by the Legislature the stock had not been subscribed?

A. No, no stock had been subscribed.

Q. There had been no election of directors?

A. No.

Q. There had been nothing done excepting to execute in part the articles of incorporation?

A. Yes.

Q. Had you at that time filed the triplicate in the County Clerk's office, of Multnomah County?

A. Yes.

Q. You did that when?

A. I did that a day or two before I presented them to May.

Q. That is, before the 6th of October?

A. Yes.

Q. Well, now, did you leave them with the County Clerk in their then signed condition?

A. In Multnomah County?

Q. Yes.

A. I can't say now whether I did, or whether I brought them back that copy to Salem or not. I couldn't say positively about that.

Q. Well, now, if you left them with the clerk here of Multnomah County in October, but prior to October 6, 1866, then the articles that you left here were only signed by the first four or five people?

A. Yes. I must have taken them back and carried the three copies around, because they are all signed, I think, the whole three copies are all signed by those folks.

Q. Then if you tendered it for filing here, you did it the same as you did with May:

A. Yes.

Q. And withdrew it to get more subscribers?

A. Yes.

Q. And did you afterwards leave with the Secretary of the Oregon Central Railroad Company a completed copy?

A. Yes.

Q. As certified and acknowledged by you, and Mr. Hammer as the Notary Public?

A. Yes, sir.

Q. And that, of course, was not done until on or about November 21, 1866?

A. Yes.

Mr. Townsend: It could not be done until after May, 1867. There wasn't any secretary, you know, don't you? There wasn't any secretary until May 24th.

Q. With whom, now, did you leave this third copy?

A. I kept it myself.

Q. What capacity did you have?

A. Well, I was appointed, you know, by the incorporators to solicit stock, and had in that way the

charge of the papers.

Q. You had custody of the corporate records, as far as anybody had custody of them?

A. Yes.

Q. Until the stockholders met with the incorporators on May 24, 1867?

A. Yes, the incorporators executed a paper authorizing me, as secretary of the incorporators, to solicit subscriptions of stock.

Mr. Townsend: Just a moment Mr. Gaston. The statute provided that the incorporators, or a majority, should designate one of their number to receive subscriptions to capital stock?

A. Well, that is what they did.

Mr. Townsend: Yes, and it was under that authority you were designated?

A. Yes, and under that authority I had kept the office copy of the incorporation papers.

Q. But, as a matter of fact, the corporate stock books, or the subscription of the stock, was not actually made until a few days before the meeting of May 24, 1867?

A. No.

Q. That is to say, the physical subscription of your

name for one-half of the capital stock was not made until a day or two before May 24, 1867?

A. Yes, I think that is the fact.

Q. And do you recall whether that subscription was made on a stock book, or what it was made on?

A. Oh, I think we had a little stock book, but I don't know what became of it, or how that was managed. We must have had a little stock book.

Witness further testified that J. M. Belcher was a director and elected Vice-President of the West Side Company, and was a merchant at Lafayette. Belcher had a farm out near Wheatland in Yamhill County, at the time this was going on. Mr. McClench had a farm near Wheatland; lived just over the county line, above Wheatland. Belcher is dead. W. C. Whitson and Judge Williams are dead, and he thinks F. A. Chenoweth is dead. M. M. Melvin, J. C. Ainsworth, C. H. Lewis, B. F. Brown, Geo. L. Woods, Joel Palmer, R. R. Thompson, T. H. Cox, C. N. Terry, W. T. Newby, B. F. McClench, S. Ellsworth, W. W. Upton, E. D. Shattuck, Matthew P. Deady, C. B. Bellinger, W. S. Caldwell, J. A. Chapman, former mayor of Portland, Ira Jackson, County Judge of Washington County, Thomas B. Humphreys, County Clerk of Washington County, E. W. Haines, Secretary of the West Side Company, George H. Andrews, T. R. Cornelius, S. C. Adams, James B. Newby, son of William T. Newby, S. G. Elliott, Ben Holladay, J. N. Dolph, George Weid-

ler, R. W. Towler, H. B. Tucker, George W. Eberts, S. Coffin, C. M. Carter, J. B. Underwood, Levi Estes, S. M. Smith, C. S. Silby, Judge Olney of Clatsop, W. R. Halsey, all are dead. All of the men, as far as he knows, that were in any wise connected with the Oregon Central Railroad Company (West Side), excepting himself and John McCracken, one of the incorporators, are dead.

Whereupon the witness, upon redirect examination, further testified that after he sold out his interest in the West Side Company to Holladay, as he has described, and after he entered the employ of the West Side Company under Holladay, he became acquainted, to a certain extent, with the plans of Holladay as to handling the land grants. He became so acquainted by conversations with him, just casual conversations, not specially you know.

Q. What were those general plans, so far as you became acquainted with them?

Mr. Fenton: Objected to as hearsay, and as not binding on the Oregon Central Railroad Company of Portland, or the Oregon Central Railroad Company of Salem, or on the defendants or either of them, and as not showing any authority on the part of Mr. Holladay to make any declarations or statements on this subject.

A. He had organized a corporation, with main office in San Francisco in charge of Mr. Wilson, who had formerly been Commissioner of the General Land Office

in the United States Government, and who had charge of the whole business of disposing of the lands. Mr. Wilson had prepared maps and pamphlets, and sent them broadcast over the United States and European countries, advertising the lands for sale; and they had appointed a local land agent here in Oregon, and made Mr. I. R. Moores, who had formerly been connected with the East Side Oregon Central Railroad Company—put him in charge of that office in Portland; and advertised the lands in Oregon. And men would come in there and file applications to purchase the lands on time. I filed applications to buy a quarter section in Wapato Lake, in Washington County; and oh, there were a great many men came in; and the terms were very liberal to people who wanted to buy the lands—a small payment down and interest on the balance, and small payments running for eight or ten years.

Q. Well, now, was the corporation that you refer to The European and Oregon Land Company?

A. I think that was the name of it.

Q. You say that he placed Mr. Joseph F. Wilson—was it?

A. Joseph S. or Joseph F. I couldn't say what the middle name was. I was acquainted with Mr. Wilson. I met him in Washington City.

Q. Joseph S. Yes, you are right—Joseph S. Wilson. He had formerly been Commissioner of the General Land Office at Washington, D. C.

A. Yes, sir.

Q. Now, when was he Commissioner of the General Land Office?

A. Well, he was Commissioner of the General Land Office when I was in Washington City in the winter of 1869-70.

Q. Did you know anything about any correspondence between Mr. Holladay and Mr. Wilson on the one hand, and Senator Williams, who had become Attorney General of the United States, on the other hand, with reference to a legal construction of the provision of the grant prohibiting sales except to actual settlers, in limited quantities, and for a limited price?

A. No, sir, I did not know anything about it.

Q. Or did you know anything about any correspondence between Mr. Holladay and Mr. Wilson, on the one hand, and the Department of the Interior on the other hand, upon that subject?

A. No, sir.

Q. Did you see Mr. Wilson's writing so as to become acquainted with it?

A. Well, I think I had correspondence with Mr. Wilson myself. I have seen his signature.

Whereupon, the witness, being shown Government's Exhibit 109, identified the copies of the letters purport-

ing to have been signed by Wilson therein, and identified the signature of Wilson, as being his signature.

Whereupon, Counsel for complainant offered in evidence Government's Exhibit 109, Government's Exhibit 109-A, Government's Exhibit 109-B, Government's Exhibit 109-C and Government's Exhibit 109-D, duly certified, as prepared by and under the direction of James F. Casey, employee in the Railroad Division of the General Land Office at Washington, D. C., to each and all of which exhibits Counsel for defendants objected that the same were immaterial, irrelevant, and as not controlling the legal effect of the acts of Congress; which said several Government's Exhibits 109, 109-A, 109-B, 109-C and 109-D are hereinafter set out and described, and made a part of this statement of the evidence and so identified herein.

Whereupon the witness further testified on re-direct examination, that he thought he had made himself clear, that the vote on the proposition of this railroad grant before the Legislature of Oregon in 1868 was made on geographical lines, except where members of the Legislature were influenced by other and improper considerations. It was the understanding of witness then and is yet that the division in the vote for and against the proposition referred to was upon geographical grounds except where the members had changed their minds and voted for a consideration personal to themselves without reference to the justice of the contentions of the two companies or the interests of their constituents.

STIPULATION

Whereupon it was stipulated between the parties by their respective counsel that the record from the Senate and House Journals of the State of Oregon for the year 1868 shows the residence by counties of the members of the Senate and the members of the House who voted in favor of Senate Joint Resolution No. 16, which subsequently became the resolution of October 20, 1868, and that the Senate Journal for the year 1868, at page 253, shows that there were fourteen votes cast in favor of the Resolution and eight in opposition thereto and that the fourteen Senators voting in favor of the Resolution were from and represented the fourteen counties, as follows:

Name of Senator	County
Bayley	Benton
Brown	Marion
Cochran	Lane
Crawford	Linn
Cyrus	Linn
Dribblesbis	Grant
Ford	Umatilla
Hendershott	Union
Miller	Marion
Miller	Jackson
Powell	Multnomah
Stout	Multnomah
Thompson	Clackamas
Trevitt	Wasco

It is further stipulated that the House Journal shows at page 366 that twenty-eight votes were cast in favor of the Resolution and eighteen in opposition thereto and that the names of the twenty-eight who voted in favor of the Resolution, together with the counties which they represented, respectively, are as follows:

Name of Representative	County
Alexander	Linn
Alexander	Benton
Bellinger	Benton
Beers	Baker
Bryant	Linn
Butler	Wasco
Cox	Josephine
Crooks	Linn
Davenport	Marion
Denny	Marion
Gerrett	Clackamas
Gray	Grant
Gilfrey	Lane
Johnson	Linn
Kirk	Umatilla
Louden	Jackson
Litchenthaler	Marion
Minto	Marion
Powell	Multnomah
Rinehart	Union
Smith	Jackson
Stites	Linn

Name of Representative	County
Simpson	Marion
Trullinger	Clackamas
Tandy	Lane
Winston	Clatsop
White	Jackson
Whiteaker	Lane

Whereupon upon re-cross examination the witness further testified that he had no personal knowledge of the formation of the partnership agreement of Ben Holladay with C. Temple Emmett and S. G. Elliott, alleged to have occurred on September 12, 1868; he only knew the general statement that they were partners. Holladay came to Oregon first in connection with the railroad enterprises in the latter part of June or the 1st of July, 1868. Witness does not know whether Holladay was interested or not in the promotion of surveys of California parties earlier than that. That was his earliest knowledge of Holladay being in Oregon. He met William Norris connected with these railroads only once. Norris was a great friend of Holladay and was in some way an intermediary in the steamship companies with Latham. He did not know that the European & Oregon Land Company was incorporated as a California corporation December 21, 1870. He only knew in a general way that it was a California corporation, but did not know when it was incorporated. Witness knew that Joseph S. Wilson was president of that company and he saw the offices at 3320 California Street, San

Francisco, California. Witness does not think that Wilson was ever in Oregon in connection with this business. I. R. Moores was the land agent of the company at Portland during this short time that the European and Oregon Land Company undertook to dispose of this grant, but he does not think it ran a great while. They did not succeed in selling the land; it was a very expensive proposition and Holladay said to witness that he would have to get rid of it, or something like that. They caused the advertisement of the sale of this land to be circulated on the Continent of Europe in various languages and spent considerable sums of money to invite settlement of these lands as early as 1871 and 1872 as witness understood from the statements and the literature that he saw. He saw a great deal of that literature and knew that a great deal of it was in languages he could not read and that they were extensively circulated for the purpose of inviting settlement of these lands; witness saw several pamphlets at Holladay's rooms; of course he could not read them, but Holladay said they were being circulated. Witness thinks that Norris was concerned in that matter, he was a sort of confidential friend of Holladay's. He could not say that he knew any of the officers of the European and Oregon Land Company, except Wilson. He was personally acquainted with Wilson before Wilson came to California. Witness knew that William C. Ralston and Francis Avery were interested with Holladay in these schemes, but he could not say that they were officers of the European and Oregon Land Company. He re-

members that Ralston was cashier of the Bank of California and knew him personally; he knew that William Norris was connected with the Northern Pacific Transportation Company, but could not say in what capacity, and that Faxon D. Atherton of San Francisco was one of the trustees of this company, and that Milton S. Latham was manager of the London and San Francisco Bank and also one of the trustees of this company; he knew Latham in Ohio before Latham came out here. Witness did not know Ed. H. Green and does not recollect that he was one of the board of trustees of the European and Oregon Land Company.

Whereupon *S. S. Marr*, called as a witness on behalf of the United States being first duly sworn, testified upon direct examination; that he is now what is called law examiner in the General Land Office and has been working continuously in the Railroad Division of the General Land Office since May 1, 1877. The Railroad Division was created about June, 1872. Before that, it had been what was called "F Section of Division C" of the Public Lands Division. He was formerly Chief of the Railroad Division from 1897 or 1898 until sometime in 1908 and was chief at the time this suit was instituted.

Witness prepared at the request of counsel for complainant, or caused to be prepared in his Division a statement showing the date of the lists or selections, the number of selections, the Act of Congress under which they were made, the area as finally clear listed, and pat-

ented, the date of approval by the Secretary, number and date of patent, of all lists and selections and patents pertaining to the grant in Oregon under the Act approved July 25, 1866 and the grant under the Act approved May 4, 1870.

Whereupon the witness identified this statement as Government's Exhibit 110 as such statement prepared by him and under his direction and from his belief it is correct; it was prepared for that purpose and was compared and the statement is correct as far as it could be made. It was prepared under such circumstances that as an official he could certify as to its accuracy; he was Chief of that Division at the time it was prepared from the records of his Division, under his immediate supervision and he felt responsible for the accuracy of it.

Whereupon counsel for complainant offered in evidence Government's Exhibit 110, to which counsel for defendants objected as immaterial, irrelevant and incompetent, and renewed the objection to the jurisdiction as made at the opening of the case and it was stipulated that these objections may be understood as going to all the testimony of the witness. Whereupon it was stipulated between the parties that Government's Exhibit 110 may be read into the record and the original exhibit withdrawn, which said Government's Exhibit 110 is hereinafter set out and described and made a part of this statement of the evidence and identified herein as Government's Exhibit 110. Whereupon witness further testified that Government's Exhibit 110 was pre-

pared before the year 1909, during his service in the Railroad Division of the General Land Office, his work pertaining to the administration of these railroad land grants, including the proceedings with reference to lists and selections and the issuance of patents. He would not like to say now that he approved any of the lists with reference to any of the lands involved in the present suit; he does not remember whether any patents were issued to the company during his time, but the record will show if any were issued during his time, that he approved those lists as Chief of the Division, approved the certificate of the clerks of his Division that was attached to them, that the lands are clear, of the character prescribed in the grant, and passed under it. Such a certificate as that is attached to every list, and if any such patents were issued during his time as Chief of the Division he approved that certificate. Whereupon, upon cross-examination, the witness further testified, that he was clerk in the Railroad Division from May 1, 1877, up to the time he became chief; his duties were from May 1, 1877, up to the time he became chief, adjusting conflicting claims between the railroad companies and settlers or others within the limits of the railroad grant; when any tract of land became in conflict or was claimed by somebody other than the railroad company, within the limits of this railroad grant, that came up to his Division for adjustment; that Division determined and decided the matter, and witness did that; that was his particular duty during that time. He examined some of the grants, perhaps some of the lists to see wheth-

er they were clear or not, but the particular duty was settling that contest between the settler or other claimant and the railroad claimant. When he became Chief of the Railroad Division his duties were to administer the Division; review all the letters that were written, see whether they were correct or not and in accordance with the law. He had about 20 clerks under him as chief of the Division, and the Commissioner who would sign the letters, was his superior officer. After a letter was prepared, that is a decision rendered deciding this conflict that occurred, it would go to what is called the law clerks—an examining board of lawyers; they would pass upon this question, and issue it, sign it, approve of it, and then it would go to the Commissioner for signature, who would sign it, return it to the Division and the Division would copy and mail it. Any of the clerks of the Division that had any occasion to go to the files would have access to the files relating to these two grants. In the adjustment of a claim, a conflict between the railroad and settler, or others, it was the duty of all the clerks who had that to examine to examine all these files; not only that but to examine the plat books and all the other records of the office and often times the field notes. In explanation of the manner in which the correspondence relating to these grants is kept the witness says: “When a letter would come to the office that had reference to any particular railroad grant, we have a file that belongs to that particular railroad—a box that we put that letter in. If it is something that we don’t think would affect the grant in any way, why, it goes

as a miscellaneous letter; but if it is a letter that we think would have any effect upon this grant, we would put it in what we would call the Oregon and California file—have a file for that purpose. Now, when that letter is answered, or any decision is rendered in the matter, why, that is press-copied—used to be—in a book for that purpose, just an ordinary press-copy book. And they had no particular press-copy book; they all went into the same book. All the letters addressed to registers and receivers went into one book, and all the letters addressed to individuals, miscellaneous letters, went into another.” Witness further testified that letters addressed to the Secretary of the Interior would go into the miscellaneous press-copy book, as a rule. For a time they had a Secretary’s record, but for a good many years back now it has gone into the miscellaneous book. Different persons would pass upon the railroad selection lists in the Railroad Division and in other Divisions. It used to be the practice to have two clerks examine that list in his Division and append their certificates to it and sign it; then at times there were other clerks—it went to what is called the Swamp Division; a clerk there would examine it and append his certificate; it went to the Mineral Division, and clerks of the Mineral Division would append their certificate. Each one of those certificates, being approved by the chief of the respective Divisions. It is now the practice upon its return from the Department clear-listed and approved by the Secretary to go to the Recording Division to be written up as a patent. At the time that most of these patents were

issued, they were written in the Railroad Division. No one clerk had full charge of examining the lists and writing the patent, but it was the practice, really, to give the lists to the clerks who had charge of the particular state that the land was located in, because he was more familiar with that than anybody else, and more likely to get it right, but no one man had everything to do with one particular list. Whereupon the witness upon re-direct examination, further testified that the course one of these lists and selections of lands by land grant railroad companies took, in detail, from the time it was first filed in the local land office and transmitted to the general land office was that the list was taken up and examined by the Railroad Division of the office, for the purpose of determining whether it was of the character of lands prescribed in the grant and subject to patent to the company. The examination of the Railroad Division was of tract-books and the plats and field notes, to determine that there was no conflicting claim. After the examination was made the list was referred to the Mineral Division of the General Land Office for examination by that Division to determine whether it was free from any mineral claim. After that it was referred to the Swamp Division to determine that it was free from any swamp claim. The Mineral Division and the Swamp Division appended their certificates to the list, but only as to whether the land was mineral or swamp land. The Railroad Division did all the rest of the examination. The Railroad Division determined that the land was within the proper limits described in the list. Some-

times it was an indemnity selection, an indemnity list; sometimes it was a primary list. If it was a primary list the office determined that the land was within the primary limits of the grant; and if it was an indemnity list, the office determined that it was within the indemnity limits of the grant, in the first place. They had on file maps which defined the primary and indemnity limits of each grant, so that by reference to the records he could tell whether the lands claimed by the railroad company were within the limits of the grant to that company. That was one thing that the Railroad Division determined. The other Divisions didn't pay any attention to that part of it. Their certificates were as to whether the land was mineral in the Mineral Division, and whether it was swamp in the Swamp Division. There were some claims in the Mineral Division that did not show upon the tract books. That was the reason of referring to the Mineral Division. The Swamp Division kept a set of tract books of its own, and that was the reason of sending it to the Swamp Division, for fear that there might have been some neglect or error in posting it. But the work of determining that the land was free from all claims was the work of the Railroad Division, and that Division first determined whether it was within the limits of the grant at all. After witness came into the office it was determined by the office whether the railroad had been constructed opposite the lands claimed, and whether the lands had been earned. Prior to that time this had not been done. It frequently happened that there was land, particularly under the old state grants, which the

office certified without knowing whether the road was constructed at all, and that happened so in the other grants, too, sometimes; witness thinks that this was avoided when he came in the office in 1877. The office then determined that the road was constructed opposite the land and it ought always to have been done so. The office determined whether there were conflicting homestead, pre-emption or other claims of record; that is any claim under the public land laws of the United States, or any other laws of the United States, or any private claim, or anything else that conflicted with that grant. In the examination of those grants, if they found there was a claim existing to that land, either at the date of the grant or at the date of the definite location of the road, then they would cut that tract out of the list. That would defeat the grant, even though the land might have been free at the time of the selection or listing by the company. If it was covered by some claim at the date of the grant or at the date of the definite location, it ought not to pass under the grant. These are what the office calls present grants, and when the line of the road is definitely located, then the grant attaches in the primary limits; and whatever is free and clear and of the character of lands intended to be granted, passed at the time of the definite location of the road, or did not pass at all. In the indemnity limits, the right accrued on selection, and it did not make any difference what the previous condition of the land might have been if it was clear at the time of the selection; but in the primary location, that land must have been free at the date of the

grant and at the date of the definite location. Witness does not think that outside of these several things mentioned by him that the Railroad Division determined anything else. When these things were all determined in favor of the Railroad Company, the list was submitted to the Secretary, with recommendations that it be approved. The land was all clear-listed before it went to these other Divisions. If the other Divisions found anything the matter with the list they would have to write that list over again, or partly, whatever it was to make it clear. After all the examinations had been made the list was then submitted to the Secretary for his approval, and if there was anything discovered that was wrong with it up to the date of approval, they would correct it if necessary. They got the clear list after examining the records of each Division, excepting the Mineral Division and the Swamp Division. Many times they would have that examination made by the Mineral Division and Swamp Division before the Railroad Division made the fair clear-list, then it would have to be gone over again afterwards before the other Divisions put their certificates on. The certificate of the Mineral Division would show that there was no mineral claim there, or if there had been a mineral claim that the mineral claim had been adjusted, and rejected, and wiped off the record. And it would be the same with the Swamp Land Division. Then it was for the Railroad Division to determine if there had been any previous claim that had been wiped off the record, whether that claim was sufficient to have defeated the grant, that

is to bring the lands within one of the exceptions to the grant.

“Q. Now, since you have been identified with the Railroad Division in 1877, has the Railroad Division ever, in recommending a list or selection for patent, considered or determined whether any of the conditions subsequent annexed to the grant have been violated?

Mr. Fenton: Objected to as immaterial and incompetent.

A. No.

Q. Well, why haven't you done that?

Mr. Fenton: Same objection.

A. Why, the reason, perhaps, why we haven't done this was that this land passed under the grant. We had determined that, that it passed under the grant.

Q. That matter was determined by the Department of the Interior's own act?

A. Yes.

Q. And the rule as to what it would do?

A. Yes.

Q. I want to know what the practice has been, and when it arose, and whether it has been followed, and for how long, of passing upon the breach of conditions subsequent annexed to the grant or not passing upon them. I want to know which is the fact.

A. We did not. We never passed upon the question as to the breach of the conditions subsequent. The way I understand this thing is this, now, that that was something that the company was required to do after it got its patent. It had no right, legally, to do these things until it got its patent. For instance, the sale of the land, if it did, it might have sold something that it had no right to at all. But after the company got its patent, then the condition subsequent required it to do something. Now, that was a matter that we didn't pay any attention to.

Mr. Fenton: I move to strike out the answer of the witness as an opinion on a legal question, and as incompetent.

Q. I will ask you, Mr. Marr, whether, since the decision of the Supreme Court in *Schulenberg v. Harri-*man, speaking generally now, the Department of the Interior, and particularly the Railroad Division of the General Land Office, either considered or determined whether there had been any breaches of any conditions subsequent annexed to the grant, in passing upon lists and selections of land and approving them for patent?

Mr. Fenton: Objected to as incompetent and immaterial.

A. Well, I will say this, that only for a short period along in the early '80's—I cannot remember the time exactly—when there was a question as to looking to the forfeiture of these grants, we were directed then not to issue patents under railroad grants where the road had

been constructed after the time prescribed in the law when it should be constructed. That was afterwards set aside, or anyhow we were directed to go on and issue these patents, for the reason that we had no right to do anything else. After the road was constructed, that was.

Q. I understand. Well, at the time in the early 80's that you were instructed not to issue patents for lands to railroad companies who constructed the railroad after the time prescribed, do you not recall that there were many acts pending in Congress for the forfeiture of those grants, some general acts as to all grants, and a great many acts relating to pacific grants, and that the order of the secretary in most instances referred to the fact that legislation was pending, and no patent should be issued until Congress had acted?

A. Yes.

Q. You find that set forth in Donaldson's Public Domain?

A. Yes. Yes, that was the reason for it—there was legislation pending. In fact, the Act of March 3, 1887, was under consideration some time before it was passed.

Q. And the General Forfeiture Act of September 29, 1890, was under consideration for some time?

A. Yes.

Q. Thirteen or fourteen years, was it not?

A. I don't remember how long, but it was some time; a good while, anyhow."

Whereupon, upon recross examination, the witness further testified, that since he had been connected with the **Railroad Division**, he had always ascertained, or attempted to ascertain, whether the roads claiming lands under these land grants had constructed their roads opposite to and coterminous with the lands applied for, and he thinks that this rule has not been departed from since he has been with the **Railroad Division**. For a time he was instructed not to approve for patents lists applied for where the roads were not constructed within the time, although at the time of the application for patent the road had been constructed past or opposite to and coterminous with the lands; and that was particularly from the time these acts introduced in Congress were first introduced up to September 29, 1890, when the General Forfeiture Act was passed, that, that practice prevailed. The Act of September 20, 1890, was a General Forfeiture Act, and attempted to forfeit, and did forfeit, for failure to construct opposite to and coterminous with the road not then constructed. It did not forfeit anything opposite constructed road. All constructed road, whether constructed in time or not, was considered as if it had been constructed within the time under that act, and was so construed in the **Railroad Division**. These lists were posted on the tract-books as soon as they could get them there, but at the time witness first came into the office, those lists would come to the **Railroad Division** first, and they would send them up to be posted on the tract-books before the **Railroad Division** took action. That was the first thing the **Railroad Division** did.

Whereupon J. F. CASEY called as a witness on behalf of the United States, being first duly sworn testified; that he is at present employed in Division F of the General Land Office, which has several Divisions designated by letters. Division F is the designation of the Railroad Division. He has been employed in the Railroad Division for about a year (March 4, 1912), but was there before, about fourteen years before for about four years and in the meantime has been employed all the time in some other Division of the General Land Office. He first came in to the General Land Office in 1889. Was out then for a short time and returned in 1893 and has been continuously in the General Land Office since 1893. He is familiar with the records of the Railroad Division in the General Land Office pertaining to railroad grants. "Government's Exhibits 109, 109-A, 109-B, 109-C and 109-D" were prepared and certified under his direction, for use as evidence in this case, at the request of counsel for the Government. Explaining the manner in which correspondence is filed and kept for reference in this division, witness testified that the letter, when it is received, goes to what is called the mail room, is there docketed and a jacket made for it; the jacket is briefed. All the papers pertaining to that letter are put in one jacket; that is, if there were more than one or two papers, if not, it did not have any jacket. Then the letter is referred to the Division in which it belongs. It is answered there and if the letter relates to one of these particular grants, it is put in the file box of that grant. If it relates to any general subject it is put

in Miscellaneous Files. There is a separate file for each grant. This jacket contained a brief of what the letters contained, that is, the subject matter of the letters. At the time he had the certified copies designated as "Government's Exhibit 109, 109-A, 109-B, 109-C and 109-D" prepared they covered all the correspondence upon that subject found in the files of the General Land Office, but he did not examine the records in the Interior Department thoroughly. He did examine the complete files pertaining to the Oregon and California grant and the so-called Oregon Central grant, being grants under the Acts of Congress approved July 25, 1866, and May 4, 1870, respectively and there were no other papers in these files pertaining to the subject matter of these exhibits, except the ones set out in said exhibits. He took all the boxes containing the files of letters received, examined these and then went through the press copies of the answers, that is he read them and he did not find in the files anything pertaining to the restrictions of the grant, upon the sale of the granted lands, other than disclosed by "Government's Exhibits 109, 109-A, 109-B, 109-C and 109-D."

Whereupon, witness testified as follows:

"Q. Is there any record in the General Land Office showing that that subject was ever before the General Land Office, except this one transaction?"

A. This is all found in the Railroad Division. As to other divisions, I could not answer."

Whereupon witness further testified that he is familiar with the general system of handling the correspondence in the General Land Office and if any correspondence had reached the General Land Office, or any transaction had been addressed to the General Land Office in any manner pertaining to the construction or administration of these provisions of the grants restricting the sale of the granted land, they would have been referred for action and for filing to the Railroad Division. He gained his familiarity with the manner of handling the mail in the General Land Office in what is known as the Mail Room, where the mail is received and distributed. He worked there for two, or three or four years. He does not exactly remember how long. He has examined the records of the General Land Office and particularly the Railroad Division so that he can explain the circumstances under which the patent of June 21, 1909, designated as "Supplemental Patent No. 3 for 161.75 acres of land, covered by Selection List No. 2, of September 23, 1871" was issued to the Oregon & California Railroad Company. The patent was issued for the fractional northeast quarter, the southeast quarter and the fractional southwest quarter, away back. Subsequently Mr. Hoehling, on June 10, 1909, requested that as a re-survey had been made of that and the plat showed the description to be different from the description which is in the patent, a supplemental patent correcting the description so it would agree with the survey, be issued, and that was the reason the second patent was issued, to correct that description in the original. It was just to cor-

rect the original patent and not to cover any additional lands. To correct the description of the patent dated May 29, 1872. He has examined the lists and selections filed from time to time by the Oregon & California Railroad Company under the Act of July 25, 1866, and also under the Act of May 4, 1870, upon which patents were issued, as to the form of these lists and selections and the name of the party who acted for the Railroad Company as Land Agent or Land Commissioner, and has prepared a statement which accurately sets forth the facts.

Whereupon witness further testified as follows:

“Q. Please refer to this statement, and explain fully concerning the forms of lists and selections used in the administration of these two land grants, and the names of the persons acting on behalf of the Oregon and California Railroad Company from time to time as land agent, or acting land agent, or Land Commissioner.

A. Under Act of July 25, 1866, no lists or selections were made except in the name of the Oregon and California Railroad Company. Under the last named Act lists and selections were made in the general form of List No. 1 (Government's Exhibit 111), dated July 12, 1870. Selections and lists continued in this general form until early in 1876, and were signed by I. R. Moores as Land Agent. Beginning on or about June 17, 1876, the selections and lists were upon the general form of List No. 8 (Government's Exhibit 111-A), signed by Paul Schulze as Land Agent. Selections and lists continued in this general form until about the year

1885. From the latter date the selections and lists were upon the general form of List No. 16 (Government's Exhibit 111-B), signed by George H. Andrews as Acting Land Agent, until November 19, 1888, when William H. Mills was appointed Land Agent, and thereafter the lists and selections were in the general form of List No. 17 (Government's Exhibit 111-C), until September 15, 1904, at which latter date Charles W. Eberlein was appointed Acting Land Agent, and thereafter the selections and lists were in the general form of List No. 104 (Government's Exhibit 111-D), until June 15, 1908; at the latter date Henry Conlin was appointed Acting Land Agent, and thereafter the lists and selections were in the general form of List No. 106 (Government's Exhibit 111-E), until September 21, 1908, when B. A. McAllaster was appointed Land Commissioner, and since that time lists and selections have been in the general form of List No. 116 (Government's Exhibit 111-F).

Under the Act of May 4, 1870, all lists and selections upon which patents have been issued were made in the name of the Oregon and California Railroad Company. Under the latter act the selections and lists upon which patents have issued were in the general form of List No. 1 (Government's Exhibit 111-G), dated January 20, 1888, signed by George H. Andrews as Acting Land Agent, until November 19, 1888; since which latter date all lists and selections have been in the general form of List No. 11 (Government's Exhibit 111-H), signed by

William H. Mills as Land Agent. No lists or selections have been made under the Act of May 4, 1870, since Mills ceased to be Land Agent for the Oregon and California Railroad Company.”

Whereupon the lists and selections referred to in the answer of the witness are produced and identified respectively to conform to the answer of the witness.

Whereupon the complainant offered in evidence “Government’s Exhibits, 111, 111-A, 111-B, 111-C, 111-D, 111-E, 111-F, 111-G and 111-H” excepting the description of lands and blank forms which are not filled out, and which by consent are omitted, to each of which counsel for defendants objected to as immaterial.

STIPULATION.

Whereupon it was stipulated that certified copies of said exhibits just offered may be substituted for the originals and that such certified copies should be read into the record, which said several exhibits are hereinafter set out and described and made a part of this Statement of the Evidence and identified herein as “Government’s Exhibits 111, 111-A, 111-B, 111-C, 111-D, 111-E, 111-F, 111-G and 111-H” respectively.

Whereupon the witness further testified that the subject of the issuance of the corrective patent on June 21, 1909, as shown by the records of the office was referred to Mr. Lord, an employe of the Railroad Division, who prepared the letter transmitting the patent to the

Recorder for signature. Mr. Lord is now dead. Everybody knew that this suit was pending, but he could not tell whether Mr. Lord knew it. Witness looked up generally the records of the Railroad Division relating to any correspondence or other transactions involving the provisions of these two grants, restricting the manner of selling the granted lands. There was no other correspondence with other parties, or other transactions relating to the same subject that he was able to find.

Whereupon the witness, upon cross-examination, further testified that the stamp on the letter of June 10, 1909, purporting to be signed "A. A. Hoehling, Jr., attorney for said Company," referring to the Oregon Railroad and Navigation Company which contained on the upper right hand corner these words and figures "65218. Registered G.L.O. June 12, 1909. Referred to _____ Assigned to Lord." was put on in the Mail Room where they received the mail and the Mr. Lord there referred to is F. C. Lord of the Railroad Division, who had charge of the lists and patents. The presumption is that this matter was referred to Mr. Lord and that he prepared the patent and sent the letter transmitting the patent to the Recorder for the President's signature. Mr. Lord was in the Railroad Division in that capacity a great many years, and was between 50 and 60 years of age somewhere when he died.

Whereupon the witness further testified as follows:

"Q. Isn't he the man that would know, probably,

as much about the pendency of this suit to forfeit these land grants as any other man in the Railroad Division?

A. Not that I know of.

Q. Wasn't it his duty to know about the issuance of patents, and to take orders as to the refusal to issue further patents?

A. Yes, sir.

Q. Now, if there was a suspension of the further issuance of patents, on account of this suit or for any other reason, Mr. Lord would be the man to have that knowledge, wouldn't he?

A. He would be very apt to have it, yes, sir.

Q. Whom would he get it from?

A. Just like the rest of us.

Q. I mean, from whom would he get it?

A. Unless he was told unofficially, there would be an order issued.

Q. If it came to him unofficially, from whom would it come?

A. From his chief, or somebody told him.

Q. Who was his chief?

A. I don't know whether it was at that time a Mr. Dudley or Obenchain.

Q. It was a matter of common knowledge that the Government, after the passage of the resolution of April 30, 1908, by Congress, was prosecuting this suit to forfeit these lands? I mean, a matter of common knowledge in the office of the General Land Office?

A. I don't know whether it was common knowledge. I couldn't say that of course.

Q. The officers in the Railroad Division knew it?

A. I couldn't answer that.

Q. In your direct examination, I understood you said everybody knew it?

A. Well, at that time, 1909."

Whereupon the witness further testified that the letter of Mr. Hoehling of date June 10, 1909, was referred to Division F, Oregon and California Railroad Company, and is a request for a supplemental patent, and this is the patent about which he has been interrogated. Acting upon that request the patent was issued.

Whereupon defendants offered in evidence, as part of the cross examination of the witness this letter marked "Defendants' Exhibit 250," and requested that the exhibit be read into the record and withdrawn by consent, which said "Defendants' exhibit 250" is hereinafter set out and described and made a part of this Statement of the Evidence and identified as "Defendants' Exhibit 250."

ago, I notice copy of opinion given by Samuel M. Wilson, etc., marked in red 'B'—letter 'B'; and I notice a letter from Willis Drummond, of June 14, 1872, addressed to George H. Williams, Attorney General, on paper headed 'Department of the Interior, General Land Office.' And I notice a printed document, with the red letter 'A' on the same, being copy of contract between Trustees of Land Grant, Second, The E. & O. Land Company, and third, The O. & C. R. R. Company; and a letter to Attorney General Williams on the office letter-head of The European and Oregon Land Company, of date January 27, 1872, signed 'Jos. S. Wilson, Prest.' And I notice a letter of June 5, 1872, purporting to be a copy, on paper 'Department of the Interior, Washington, D. C.' signed 'C. Delano, Secretary.' And I notice another letter, on the letter-head of the European and Oregon Land Company, of date January 27, 1872, addressed to Ben Holladay, and signed 'Jos. S. Wilson, Prest.' And I notice another letter, of April 10, 1871, addressed to Hon. Jos. S. Wilson, Prest. E. & O. Land Co., purporting to be signed 'I. R. Moores, Land Agent O. & C. R. R. Co.' And another letter, of no date and no signature, but headed 'Department of the Interior, Washington, D. C. 18—' addressed to Jos. S. Wilson, President E. & O. Land Co., San Francisco, Cala.' Now, are these all of the documents, letters or correspondence, or papers, that you found in this jacket when you first made your search?

A. I couldn't answer that without examining that copy there to check it. I think it is, though.

Q. Well, if these documents that I have referred to all are copied and no others are copied, in Government's Exhibit 109 and 109-A to D, inclusive, then your answer would be that it covers all that was found in the jacket when you went there?

A. Yes, sir.

Q. You didn't find any written opinion there from John H. Mitchell as the attorney of the Oregon and California Railroad Company?

A. No, sir, not unless there was a copy made.

Mr. Townsend: No, it is not there.

Q. As a matter of fact, there is no such opinion in that file, or was in that jacket, written or signed by John H. Mitchell as attorney for the Oregon and California Railroad Company?

A. No, sir.

Q. Do you know how many different people may have had access to this jacket and its contents since July 16, 1872, down to a year ago, when you first examined it?

A. No, sir.

Q. Every clerk in the General Land Office, or in the Railroad Division, would have access to that, wouldn't they?

A. If they had some business, yes.

Q. As a matter of fact, it was out in the hall, where any one could come along and look at it?

A. It was out in the hall, yes, sir.

Q. And this file is in a loose jacket, and how is it kept separate from the other years, or other letters in the file known as the Oregon and California Railroad Company file?

A. That is 1872. There was a band around the 1872 letters.

Q. Well, now, isn't it true, Mr. Casey, that these contents are sometimes not all returned into the same jacket, and that one paper might get into a file for 1873, for instance?

A. Yes—it doesn't very often happen.

Q. It does happen, though?

A. Yes, sometimes.

Q. And isn't it true that sometimes an important instrument, like the assent of a railroad company to a land grant, is examined by some person who is interested, gets into the wrong file, or gets into an entirely different pigeonhole in these records, and is afterwards found in this place, and restored to the proper file?

A. Papers are sometimes misplaced.

Q. And that experience is not altogether unusual, then, in the way these records are kept?

A. It is not very ordinary.

Q. And it sometimes might get into a file entirely different from the Oregon and California Railroad Company, as in a case where an acceptance got into the file of the Northern Pacific Company, and was afterwards found in the wrong file?

A. There is a possibility."

Whereupon the witness further testified that he could not say that sometimes a letter or document belonging in one file may be mislaid and placed inadvertently in the file of another different company or individual and does not come to light for some years. That is not very liable to happen. These records known as the Oregon and California Railroad Company file, that were in the General Land Office, that is the general files, were not kept in one room, but were in about four rooms. That is, three and the hall, as witness thinks. He thinks there is no clerk, or chief, or officer here in the office that was in charge in 1872. Witness could not answer whether nearly all are dead or are gone or out of the service that were employed in 1872, but that Mr. Marr was the oldest employe in the General Land Office in this Division. That is, the oldest in service, and is the oldest one that would have anything to do, or any connection with, the file of the Oregon and California Railroad Company. Witness does not know who Buxton is, whose name is on this jacket in pencil. This name was on the jacket when witness first examined it. He does not know whether he was a clerk in the office or not.

Whereupon, upon re-direct examination, the witness further testified as follows:

“Q. Mr. Casey, your attention has been called to the fact that the photographic copy of the jacket containing the Government’s Exhibits 109, 109-A to 109-D, inclusive, reads at the top ‘Letter L,’ whereas it appears upon the original to be ‘Letter K,’ and your attention was also directed to the fact that upon the original jacket it appears to be ‘No. 7128,’ while upon the photographic copy it appears ‘No.—,’ the number itself not appearing. Combining these two circumstances, and examining the original jacket and the ink in which the letter ‘K’ is written and the figures ‘7128’ are written, I will ask you to explain how this probably occurred.

A. The letter ‘K’ is written in purple ink, and it does not photograph. The figures ‘7128’ are so faint that they possibly did not photograph, or probably did not photograph.

Q. So that this jacket originally was printed in black ink ‘Letter L. No.—’ and the letter ‘K’ has been written over the printed letter ‘L’ in ink, so that if the ink did not take the photograph would show ‘Letter L. No.—,’ as it was originally printed?

A. That is correct.

Q. Did you find any other jackets relating to this general subject?

A. Two others.

Q. Please produce them.

A. Letter I No. 92,880, containing a letter from Honorable George H. Williams, Attorney General, dated April 20, 1872; and letter K. No. 6956, which contains a copy of letter of June 5, 1872, from the Secretary of the Interior.

Q. Now, can you explain why when the letter of June 27, 1872, was received from Attorney General Williams, the former correspondence was transferred to the jacket in which was placed the last letter received from General Williams upon the subject?

A. The papers were all taken over, presumably, from the way the answer reads, the papers were taken over to the Secretary and brought back, and the letter answered, and all the papers placed in the last jacket.

Q. Do the documents placed in this last jacket, which has been identified here as 'Letter K. No. 7128' bear any filing marks that show that they were intended to be kept in that jacket?

A. Yes, sir.

Mr. Fenton: In what jacket?

A. This last one.

Q. How is that indicated?

A. They are labeled on the inside, each paper, beginning with 'A'—labeled 'A-7128,' 'B-7128,' etc.

Mr. Ogilvy: Are there two A's and two B's?

A. No.

Mr. Fenton: While we are on that subject, I don't understand the reason for the A, B, C, D, E, F, G, H.

A. Each letter was indicated in that manner that went into the file.

Mr. Ogilvy: Were these numbers there when you first examined them, Mr. Casey—A, B, C, D, etc. 7128?

A. I couldn't swear to that. I think they were, though. I didn't notice for that particularly.

Q. I will call your attention to the notation at the bottom of this jacket, 'Letter K No. 7128.' It originally read as follows: 'Received (G. L. O.) June 28, 1872' which was the day after the date of the last letter written by Attorney General Williams; and the date at the bottom was subsequently changed to read July 17, 1872; and a further notation upon this jacket shows that the letter was answered on July 16, 1872. Does this not indicate that the entire files were transferred to the Secretary's office, as you have stated, and were finally refiled on July 17, 1872?

A. Yes, it appears to indicate that. The letter downstairs shows the date it was received was on the 17th. It was taken over, and must have been received informally.

Mr. Ogilvy: It shows it was received the day after it was answered?

A. Yes. It was probably received informally."

Whereupon, the witness further testified that from the records of the Railroad Division, it appears that William H. Mills, who acted as Land Agent for the Oregon and California Railroad Company from 1888 until some time in 1904, also acted during the same period as Land Agent for the Central Pacific in 1888, but he could not tell for how long thereafter. Mr. Lord died about a year ago, to the best of his knowledge. Other people besides the clerks of this Division had access to these files; an attorney in good standing, and attorneys for the Railroad Companies have access to them. It is a frequent occurrence for attorneys representing those land grant companies to go up and inspect these files. He has not had charge of the files but believes the attorneys had had as much access to these old files ordinarily as the employes of the Department. He could not state how recently these files had been examined by attorneys for the Railroad Companies, but he does not mean by his testimony to raise any implication that papers have been taken out of their proper files either accidentally or intentionally by the employes of the division.

Whereupon upon re-cross examination, the witness further testified that he does not mean to imply by his testimony that any employe or attorney of any of these railroad companies intentionally or accidentally took out any of these documents.

Whereupon the witness further testified as follows:

“Q. I notice that this jacket you referred to under the head of ‘Letter K’ bears a number ‘6956’ and is headed ‘Honorable Secretary of the Interior, June 5, 1872.’ and down below in pencil ‘Copy of’—then in ink ‘Reply to ours of the 20th ult.’ and then in pencil this language: ‘This copy belongs to certain papers filed by Attorney General Williams May 20, 1872, and has been placed therewith:’ and in brackets ‘To be filed:’ then the usual blank ‘Referred to Division F’ in ink; then ‘Received (G. L. O.)’ in print; in ink ‘July 16, 1872.’ This is the jacket that you referred to as from which the transfer was made to jacket No. 7128?

A. No, sir; it is the first one—92880.

Q. Well, that is one of them—one of the two jackets?

A. Yes, sir.

Q. In whose handwriting is this pencil memorandum ‘This copy belongs to certain papers filed by Attorney General Williams May 10, 1872, and has been placed therewith. (To be filed)’ And at the bottom in pencil is the name ‘Cromwell’. Is that in his handwriting?

A. I couldn’t tell you that, sir. There was a clerk here by the name of Cromwell.”

Whereupon witness further testified that Cromwell was just a clerk in connection with the Railroad Division and would have access officially to these files, and his

duties would sometimes require him to have such access. Cromwell died about 1895. The pencil memorandum on this jacket was there when witness first saw it. He notices that the jacket now contains a copy of a letter of June 5, 1872, purporting to be from Secretary Delano to Commissioner of the General Land Office Willis Drummond, which is typewritten on Department of the Interior stationery, but he does not think the original is in '7128.' The original letter of the Secretary addressed to Commissioner Drummond is not in these files and he cannot tell where the original is. It would probably be in these files, he could not tell why the original letter of Secretary Delano addressed to Commissioner Drummond should be in the Secretary's office and not in the Commissioner's office. This is a typewritten and not a photographic copy witness thought.

Whereupon witness further testified as follows:

"Q. Now, I notice this 'Letter I. No. 92,880' jacket is endorsed in writing 'Hon. George H. Williams, Attorney General, April 20, 1872. Papers in the case of Oregon & California R. R. Co. &c. Acknowledged May 20, 1872. Papers sent to Secretary May 20, 1872. Sec. to Atty. Genl. June 14, 1872, transmitting copy of Secretary's opinion;' and then 'Received (G. L. O.) April 22, 1872.' Now, is that a part of this same file relating to this correspondence between Attorney General Williams and the Commissioner of the General Land Office?

A. Yes, sir.

Q. And I notice the figures '15-139' on the back of that jacket. What does that mean?

A. It means the volume in which the thing was docketed.

Q. Now, in that jacket I now find an original autograph letter of George H. Williams, written on stationery 'Department of Justice, Washington, April 20, 1872,' addressed to Hon. Willis Drummond, Commissioner General Land Office, Washington, D. C. From your knowledge of the handwriting of General Williams, or Attorney General Williams, would you say that was an autograph letter of his? It is written in the same hand as the signature, isn't it?

A. Yes, sir.

Q. And appears to be an autograph letter, doesn't it?

A. Yes, sir.

Q. Now, is that photographed by you, or did you photograph the carbon copy?

A. That was photographed.

Q. The letter itself?

A. Yes, sir.

Q. The photograph would take all this ink, would it?

A. Yes, sir.

Q. Now, you found that as the only inclosure in jacket No. 92,880 at this time?

A. That is all.

Q. These three jackets are the only jackets that you found anywhere in the office of the General Land Office, or in the files of the General Land Office, relating to this subject matter?

A. That is all.

Q. You don't mean to say that there are no other? There may be some other correspondence?

A. That is all I found.

Q. That is all you found. That is all.

Mr. Townsend: In your investigation of the records relating to the Oregon and California grant, you have also examined the files of the office of the Secretary of the Interior, have you not?

A. Yes, sir."

"Counsel for defendants admits that the counsel for the Government, through Mr. Casey, produces a jacket from the files of the Oregon and California Railroad Company, formerly the Oregon Central, indorsed thereon 'Received January 20, 1869. Dated January 19, 1869. From Hon. George H. Williams, U. S. Senate. Subject, encloses S. Bill No. 776, To authorize the Oregon Central R. R. Co. to file assent to Act July 25,

1866, and asks for Secretary's views. Case 2, G 1, and answered January 20, 1869, page 565, Volume 1 Railroad,' and therewith a letter of George H. Williams of date January 19, 1869, headed 'Senate Chamber,' addressed to 'Hon. O. H. Browning, Secretary of the Interior, Washington, D. C.' together with a pamphlet enclosed therewith entitled 'Statement of facts relative to the incorporation and organization of the Oregon Central Railroad Co. of Salem, Oregon,' being a copy of Government's Exhibit 105."

STIPULATIONS.

Whereupon it was agreed that the circular or pamphlet designated as "Statement of Facts" need not be included because it is a duplicate of "Government's Exhibit 105." It was also admitted that by letter dated January 20, 1869, Joseph Gaston transmitted to the Secretary of the Interior a copy of "Government's Exhibit 106," entitled "The Inside History of the Oregon Central Railroad Companies," which was filed in the office of the Secretary of the Interior on March 15, 1869.

And it was further stipulated that if the Government shall offer certified copy of the jacket enclosing this document, the document itself need not be repeated for the reason that it is an exact duplicate of "Government's Exhibit 106." And it was further stipulated that if this copy is made, the ink writing will be shown

on the photograph, by ink if necessary.”

Whereupon it was further stipulated between the parties, by their respective counsel, as follows:

STIPULATION.

Mr. Townsend: It is stipulated that J. F. Casey, if recalled as a witness on behalf of the Government, would testify that the records of the General Land Office show that the forest lieu selections referred to in Exhibit No. 9 to the joint and several answer of the defendants Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, were examined as to the title of the base lieu land tendered to the Government by the following named persons, who were law clerks in the General Land Office during the time that said forest lieu selections were pending in the Interior Department, namely: F. C. Dezendorf, Albert G. Hall, Harry W. Happy, Marvin M. McLean, Fletcher Meredith, Benj. F. Sparhawk, George C. Stewart, Alva S. Taber, James D. Tyler and Hugh H. Williams; and that, in so far as the titles to any of said base lands were accepted and approved by the Interior Department, as set forth in said Exhibit No. 9 to said joint and several answer as corrected by Exhibit No. 17 to the Stipulation as to Facts entered into in this suit, the same were approved and accepted by the foregoing named law clerks.

It is further stipulated that, if the foregoing named law clerks were called and sworn as witnesses on behalf of the Government in this cause, each of them would

testify that he approved the title to said base lands without actual knowledge of the provisions of the Act of April 10, 1869, or the Act of May 4, 1870; that he passed the title after an examination in the following manner: Accompanying each forest lieu selection was an abstract of title showing patent by the Government to the Oregon and California Railroad Company, conveyance by the latter to a certain grantee, and conveyance by the latter or some subsequent grantee to the United States; the patent record of the General Land Office was examined to verify the statement in the abstract as to the issuance of patent—all of which patents were recorded and of record at length in the General Land Office; the tract books were then examined to ascertain that the lands tendered as base had not been used before for the same purpose, and to ascertain generally whether the lands tendered were proper base for the selections tendered; each of said law clerks passing upon said titles as aforesaid then approved the title, assuming that the patent created an unconditional and unrestricted title, and without examining the granting acts, and without actual personal knowledge of the provisions of the Act of April 10, 1869, or the Act of May 4, 1870; after the title to the base lands tendered had been examined in this manner, the selection was referred to the several divisions of the General Land Office to ascertain if the selected lands were subject to any prior adverse right of any kind; after the selection had been approved by each division of the General Land Office examining the subject, it was referred to the Chief of the Forest Lieu

Division, with the certificates of all of the law clerks and other employees who had examined and approved the selection as above stated; the Chief of the Forest Lieu Division then approved the selection without special examination of any of the subjects investigated by the law clerks and chiefs of the several divisions as stated above; in reliance upon the approval of the latter, the selection was then approved by the Commissioner of the General Land Office, and in like manner was approved and patent ordered issued by the Secretary of the Interior.

It is further stipulated that, for the purpose of this case, it shall be considered that the parties above named have been sworn and testified as heretofore set forth, subject to such objections as counsel for defendants now desire to interpose.

To which testimony contained in said stipulation, and the whole thereof, and to each and every part thereof, excepting as to the approval by the Secretary of the Interior, the defendants objected upon the ground that the same is incompetent, irrelevant, and immaterial and particularly upon the ground that such testimony cannot be considered to impeach, qualify or limit the action of the Secretary of the Interior, or of the United States acting by and through him as such Secretary.

STIPULATION.

Whereupon it was stipulated that Mr. Charles J.

Winton, if called as a witness would testify as follows:

“That he and three of his former business associates came from Wisconsin, where they were engaged in business, in the year 1901, for the purpose of purchasing timber lands in Oregon, which trip resulted in a written contract between the Oregon and California Railroad Company, as vendor, and A. B. Hammond and Charles J. Winton, as purchasers, covering approximately 45,000 acres of these railroad lands situated in the Counties of Tillamook, Yamhill and Washington, all of which were included in the West Side grant with the exception of 160 acres. The lands covered by this contract are not involved in the present suit, No. 3340, but are involved in the separate suit instituted against Hammond and Winton and others, being suit No. 3449. The contract referred to was dated August 16, 1901, but was in fact executed early in September of the same year, when Mr. Winton made a second trip to Oregon for that purpose. This general statement is made to explain the references by Mr. Winton in his testimony to the different trips to Oregon. The transactions referred to in the testimony of Mr. Winton now offered occurred after the signing of the contract dated August 16, 1901, and during Mr. Winton’s second trip to Oregon, which was some time in September, 1901.”

Whereupon it was further stipulated that the George H. Andrews referred to by witness in his testimony was George H. Andrews who, as shown by other testimony in this case was for many years acting land agent and

secretary of the Oregon & California Railroad Company, and who died about two years ago, to all of which testimony the defendants objected upon the ground that the same is incompetent, irrelevant and immaterial and particularly upon the ground that it appears from the testimony of Winton that the so-called verbal option was not in fact or in law an option, but if anything, a general conversation with a prospective purchaser of some of these lands; that it does not appear that Andrews, either as secretary or acting land agent, had any authority to make or offer to make a verbal or any option; that the terms of the verbal option were not reduced to writing, were not certain either as to price or quantity or location, and the same would be void under the statute of frauds because not in writing and void because uncertain; that the minds of the parties did not meet either as to price, acreage, time or terms.

Whereupon counsel for defendants admitted that contract No. 6242 of date August 16, 1901, was executed by the Oregon & California Railroad Company, as party of the first part and A. B. Hammond and Charles J. Winton, as parties of the second part, and that it was executed by the Company in the words stated and that this is the contract referred to in the testimony of witness.

Whereupon a certified copy of this contract of August 16, 1901, as recorded in the county records was admitted in evidence on behalf of the Government, to which contract reference is made in this Statement of

the Evidence, as if the same were fully written herein and the same may be considered a part of this Statement of the Evidence.

Whereupon it was stipulated that said witness C. J. Winton, would further testify as follows:

“Q. What else did you have to do with Mr. Andrews at that time in reference to the purchase of these lands, and what else did you do?

A. I talked with Mr. Andrews regarding the timber resources of Oregon, chance of manufacturing, and asked him as to what his opinion was as to my coming to Oregon to live—whether there was an opportunity here of carrying on a successful active operation in his judgment, and he told me that there was and that he thought I could make no mistake in coming, and before I left for my home—I am not sure whether it was on that trip or the third trip I made, because I came to Oregon a third time in the Fall—it was on the second trip, I think I am correct in saying it was on the second trip, and I had a verbal option from Mr. Andrews on one hundred thousand acres of Southern Pacific land, or the Oregon and California land—

Q. When you speak of the Southern Pacific lands you refer to the lands of the Oregon and California Railroad Company—

A. Which were in Oregon.

Q. Which is a part of the Southern Pacific system, so far as the operation is concerned?

A. Yes, sir. The lands upon which I had this option embraced all the so-called Oregon and California Railroad lands in the State of Oregon, and were to be selected in lots of not less than ten thousand acres in one locality, burned spots and bare spots thrown out, and the price was eight dollars an acre, and the terms were one-tenth down, and the balance in nine annual payments, six per cent interest. The price on the lands of the Oregon and California Railroad Company had been advanced—their general price—from seven to eight dollars per acre, shortly after the purchase made by Mr. Hammond and myself of the Tillamook tract.

Q. The first thing you did when you came to Portland on the second trip was to go before Mr. Andrews in company with Mr. Hammond and close up your contract?

A. Yes, sir.

Q. Your option for additional lands was a subsequent transaction?

A. Yes, sir.

Q. How long was it before you returned home on that trip that you had this conversation with Mr. Andrews with reference to the purchase of additional railroad lands?

A. We had talked in a general way about different tracts of lands that he was offering for sale and during one of those conversations I brought up the proposi-

tion of getting an option on one hundred thousand acres from him in groups, as I have stated. This—shall I tell you what was in my mind on that thing, or don't you care?

Q. Go ahead and state completely the negotiations you had with Mr. Andrews upon that subject, give the nature of the understanding you had with him, and any purpose you had you may add by way of explanation.

A. He gave me the option and said that this would mean the withdrawal of the Oregon and California lands in the State of Oregon from market until we had made our selections.

Q. That is—now, to make that definite, Mr. Winton, he gave you an option to select one hundred thousand acres from all of the unsold railroad lands?

A. Yes, sir.

Q. The lands to be in tracts of not less than ten thousand acres in any one particular locality or watershed?

A. Yes, sir.

Q. And the price was to be eight dollars an acre?

A. Yes, sir.

Q. How long was the option to run?

A. The option was to run until I could tell him definitely whether we would make the purchase, and

payment would be made then of one-tenth the purchase price.

Q. That is when you exercised the option?

A. When we made the selections.

Q. But how long were you to have to make the selection—how long after you got home?

A. A year to make the selection, if we told him we would take it—we were to have a year to make the selections.

Q. How long were you to have to tell him whether you would take it?

A. Until I could confer with my associates.

Q. That is after your return home?

A. The second time.

Q. And he understood in a general way that that would be within a couple of weeks or so—something like that?

A. Something like that.

Q. Now, did you have any contract in writing covering that option?

A. No contract in writing, no writing about it.

Q. You simply had a verbal option and probably an understanding that some written agreement would be

made if you notified him that you and your associates would exercise the option?

A. Yes, sir.

Q. After your return to your home after the second trip you did not exercise the option, and so notified him, I assume?

A. Yes, sir.

Q. And that was the end of that transaction?

A. Yes, sir.

Q. For a course of two or three weeks, then, you had under consideration, as you understand it, had the right to exercise the general option which you have described?

A. Yes, sir.

Q. Well, now, why didn't you exercise that option, Mr. Winton?

A. I favored exercising that option. My associates thought it would be better—they didn't favor it and they were in the majority and I let it lapse.

Q. What objection did they have to the deal?

A. They knew of the lands that we were buying on the Kilches River for less money, and I told them that we could buy claims here—at least they were so represented to me and we had bought some of them for less money than the railroad company's offer. We could

get them direct from the homesteaders at from six to six and a half an acre; the railroad company asked eight dollars.

Q. Who made that objection? Who of your associates objected to the exercising of this option upon the ground that you have just stated?

A. Why, it was talked over in a general meeting that we had, and that was the conclusion arrived at.

Q. How did Mr. Mortenson feel on that subject; how did he express himself, I mean?

A. I don't know as I could say. He has generally been pretty lenient with me in letting me have my own way in transactions we have been interested; I think he would have agreed if I had urged him to. I wasn't perhaps as strong in my conviction that that was the thing we ought to do as—I don't remember how he expressed himself on that.

Q. Do you remember how the Gilberts expressed themselves?

A. I think it was the general talk that we had better rest a little bit and await developments.

Q. Do you remember how Mr. Ross and Mr. Smith expressed themselves with reference to this option?

A. I think Mr. Ross didn't favor buying it.

Q. Well, now, if you knew that you could get lands from homesteaders at six dollars and a half an acre,

why did you favor the purchasing of timber lands from the railroad company at eight dollars an acre?

A. I thought it was a chance to do a big amount of business on a small amount of money. The selecting of that land would tie up all the railroad company's lands in Oregon for a year, and I didn't think it could be done inside of two years. In the meantime we would select out the choice tracts of ten thousand acres at eight dollars an acre, and I thought we could in turn sell them and make a good turn on them at an advance over what we had paid.

Q. Well, now, neither you nor your associates had learned of anything that influenced you in determining whether you would exercise that option?

A. Not a thing. The question of the title of these lands never came up in any way, shape or manner that we have had any occasion to consider it until this agitation in 1907. We considered that the contract that we had with the Oregon and California Railroad Company was just as good as though we had a contract with the United States Government for that much land, and that we got exactly the same title.

Q. I understood you to say yesterday that you and Mr. Mortenson and your associates on your return to Wisconsin, the first trip, considered that you could afford to pay more for these railroad lands than for the homestead lands because of your confidence in the titles?

A. And the fact that they were grouped up. It costs money to group up lands. Some one has to stay here and meet the man when he comes in to sell, got to meet him and wait for him until the time comes when he wants to sell.

Q. Now, if that consideration influenced your associates and yourself on your first trip to Oregon, what occurred between these two trips that you know of that induced your associates to reverse their position and recommend not taking these additional lands because homestead lands could be bought for less?

A. Well, the transaction of these one hundred thousand acres was a large transaction and they didn't care to go into a transaction of that magnitude; they didn't want to obligate themselves for that much money. The business had developed into one of a great deal larger magnitude in just a few months than any of us contemplated when we first came to Oregon and it was turned down on that account.

Whereupon Frank Griffith, called as a witness on behalf of the complainant, and being duly sworn, testified: That he is in the employ of the Government at the present time and has been in its service since 1899, and during that time he has been employed in the Interior Department and under assignment to the attorneys for the Government in connection with public land cases and is at the present time assigned by the Interior Department to assist counsel for the Government in this

Oregon and California land grant case and other public land cases; that at request of counsel for Government in this case he examined the files of the office of the Secretary of the Interior and the General Land Office with reference to all correspondence and all documents relating to land grants of the Oregon and California Railroad Company that are involved in this suit. He found among the files of the General Land Office and the office of the Secretary of the Interior, correspondence relating to the construction of the Act of April 10, 1869, which has been introduced in evidence in this case as Government's Exhibit 109, and this exhibit together with the other documents that have been introduced in evidence by the defendants in connection therewith, constitute all of the letters, files and other records relating to that question which are on file in the office of the Secretary of the Interior and the General Land Office; he made a careful search to ascertain if what he has stated is true, extending over a period of several weeks. He made different trips, once in regard to the land office and at another time in regard to the Secretary of the Interior's office and examined every document on file in either office relating to these two grants; these files included the letters that had been received by the Commissioner of the General Land Office, or by the Secretary of the Interior, in any way appertaining to these grants, or at least, the files purport to contain those letters.

“Q. I will ask you whether during the early administration of the Oregon and California Railroad Company land grants, being the Act of July 25, 1866,

and the Act of May 4, 1870, involved in this cause, who, if any one, acted as the medium of communication between the railroad company or its officers on the one hand, and the Interior Department, or Commissioner of the General Land Office on the other part?

Mr. Fenton: I object to that as calling for the opinion of the witness, and his conclusion from numerous documents and files and from the correspondence itself, and is therefore not competent, the documents being the best evidence.

A. George H. Williams, both while he was in the Senate and was Attorney General for the United States.

Mr. Townsend: Q. About how many communications did you find which were presented to the commissioner of the General Land Office or the Secretary of the Interior by George H. Williams which emanated from the Oregon and California Railroad Company or its officers relating to these land grants?

Mr. Fenton: Same objection.

A. I should say about forty-five.

Mr. Townsend: Q. Did those letters relate to varied subjects or to one particular subject?

Mr. Fenton: Same objection.

A. They related to every subject connected with the road.

Mr. Townsend: Q. Including filing maps of location, etc., of lands, issuance of patents, and subjects of that kind?

A. Yes."

Whereupon the witness further testified that during a part of the time he was engaged in examining the records of these offices Mr. Townsend, counsel for the Government, personally participated with him in the work. A. A. Hoehling, Jr., is the Washington Attorney, or one of the Washington attorneys, of the Oregon and California Railroad Company, the California and Oregon Railroad Company, Central Pacific Railroad Company, and Southern Pacific Railroad Company, or allied companies which had land grants. Witness during that time, and while he was examining the records of the General Land Office and of the office of the Secretary of the Interior, found Mr. Hoehling or his assistants engaged in a search of those records relating to land grants of the Oregon and California Railroad Company. Witness is familiar with Government's exhibit 105, being "Statement of facts relative to the incorporation and organization of the Oregon Central Railroad Company of Salem, Oregon," and found a copy of that pamphlet in the files of the office of the Secretary of the Interior. Whereupon, upon cross examination the witness further testified that he did not read the whole of Government's Exhibit 105, but from the outside cover of it and about the last page of it, he would say that it is the same thing. He did not read either of them all the way through;

he read the outside cover and the last page. He saw no more than one pamphlet there, that is the only one of its kind that he saw on file back there were other pamphlets but not on that subject. The one he saw was Government's Exhibit 105. He was going through those files on two different trips. The trip that he found the pamphlet was in 1912, about the end of March. He found these various documents, including the correspondence, and communications from the various companies to the Commissioner of the General Land Office and the Secretary of the Interior pretty well scattered around the General Land Office. They did not keep the same system; whether the system was bad or not he would not want to say, but it was the old style system of filing that was followed, there was a place for everything, but nearly everything was in that place. It goes by years. They would just put on the year 1868, and everything that related to a railroad company for that year would be there; there would be a band right on the outside of it, but it just goes by the year. There is a band around 1869, too, and if that band happened to get loose and the papers detached, the papers for the several years might be mixed. He could not say whether the files of the Oregon Central of Salem were separately kept or not, and would not say that they were found indiscriminately among the files of the Oregon and California Railroad Company and the Oregon Central, West Side. He does not recollect whether he found a separate file for the Act of May 4, 1870, or found a separate file for the Oregon Central. He saw that Book

of Letters Received, but did not pay much attention to that part, because there was not much correspondence there at that time. It was generally given under the name of the person who wrote the letter. No one showed him where these files were, as he was pretty well acquainted where they were, or where they ought to be, but he went down with another fellow and they hunted for them and found them. He had worked at this thing for over thirteen years and knew where all of those files were and where they ought to be.

STIPULATION.

Whereupon it was stipulated that the court should take judicial notice of the pleadings, records, files and proceedings in each of the suits in equity referred to in Exhibit No. 10 of the joint and several answer of the defendants Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage herein.

Whereupon Richard Koehler, called as a witness on behalf of complainant, being first duly sworn, testified; that he now lives and has lived in Portland since 1874; that he was born in Germany; in 1874 he came to the United States as the financial agent or representative of the German bondholders of the Oregon and California Railroad Company under its bond issue of 1870 and some subsequent issues; he was connected with the railroad in various capacities as the representative of the bondholders committee jointly with Mr. Villard

and others for some time, and when the road was reorganized in 1881 became vice-president; was vice-president before that and was manager or local manager of the property. When the road was placed in the hands of a receiver in January 1885 he became such receiver and had charge of and managed the road during the receivership until June 6, 1888, when the receivership terminated. He then became general manager of the railroad and acted in that capacity until 1904. He is and was familiar with the railroad, the nature of its property, the character of the track, extent of the track, extent and character of the rolling stock, depots, buildings and other equipment, and has been so familiar since shortly after he came to Oregon in 1874. At the time the mortgage of July 1, 1887 was executed the Oregon and California Railroad Company owned 451 miles of railroad in Oregon; the mortgage covered that, together with any additional mileage that the railroad might afterwards acquire, and the company had this number of miles of railroad as early as January 19, 1885. After the railroad was reorganized in 1887 and 1888, as set forth in the pleadings and evidence in this case, the railroad was extended from Ashland to the southern boundary line of the state, connecting with the line which had been extended from the south; since that time the company has constructed and has bought and reconstructed a number of miles of railroad, until the present mileage is about 661 miles and a fraction, but he does not know the exact mileage at this very moment, but would have to refer to some

of the annual reports or statements, but it is over 660 miles. In his judgment the railroad of the Oregon and California Railroad Company, including all equipment and rolling stock, and the other property mentioned in the mortgage, on July 1, 1887, with the exception of the land grant lands, was of the value at that time about \$50,000 a mile. To which last named testimony the defendants objected as incompetent and immaterial, but the competency does not go to the qualification of the witness to testify on that subject, and it was understood that this objection should go to all the rest of the testimony of the witness upon this subject. The witness further testified that the value of the road, after that time, has increased and to-day with its 660 miles of track, or more, he thinks the reasonable cash value of the road exceeds \$50,000 a mile. The mortgage of July, 1887, restricted the bond issue to \$30,000 a mile, that is, bonds were issued in accordance with the terms of the mortgage, and these bonds were never issued to a greater extent than the limitation provided for in the mortgage. Whereupon upon cross examination on behalf of the defendant Union Trust Company the witness further testified: That in his testimony he estimated the value of the road at the time of the Union Trust Company mortgage at \$50,000 a mile and bases that figure upon his remembrance of the value of the railroad property generally, the cost of construction of railroads, and its prospective earning power. These are the three elements he would mention, and also his knowledge of railroad property

generally. The road was finished to a connection with the lines of the Central Pacific in the State of California, except the part to be built over the Siskiyou Mountain Range. While this construction was quite expensive, yet it would have created practically a through line between the Northwest and Portland, Oregon, and San Francisco, and there was to be expected a large amount of passenger travel as well as freight travel to be gradually developed. He took this into consideration when he stated that the property was worth \$50,000 a mile. He figured that if the connection was made with the California and Oregon line in California, there would be a future probably for the road. If connection had been absolutely impossible for whatever reason it may have been, the value would have been less, how much less he is not prepared to say. The cost of construction from Ashland south was very great. That was an expensive piece of road to build, that is to a connection with the California and Oregon line over the Siskiyou Mountains. The road was only once in the hands of a receiver, but it was near bankruptcy often; it was near bankruptcy in 1884, but never came to actual bankruptcy until January, 1885. His testimony that the value of the road has increased since that time up to the present, is based also upon the consideration of the traffic arrangements between the railroad and the Southern Pacific and what is denominated by the Government as the Southern Pacific System. Without through traffic, the value of the property would not be as much as it is by enjoying this

through traffic. Suppose that in the future, or immediately, or at any time these traffic arrangements should cease, and the Southern Pacific, instead of continuing to use the line as at present, should use the Natron cut-off, which comes into the Oregon and California at Eugene, and connects with the Central Pacific at Weed, and suppose in addition to that, that a parallel line down the Willamette Valley should connect at Eugene with this line over the Central Pacific at Weed, he could not give any estimate what the Oregon and California line from Portland to Ashland would be worth, but thought however that the increase in population all over this section of the country would in part at least compensate for any loss of travel which at present is enjoyed by the only line between Portland and San Francisco. A condition is possible when it would not be the only line down through the Willamette Valley and there is now a line known as the "Oregon Electric" running to Eugene. If traffic arrangements were made so as to connect that up and go across over to Weed then the Oregon and California line from Eugene to the southern boundary of the state would not grow in value as if it remained a monopoly; it would be a local line beginning at Portland and ending at Ashland, with no transcontinental connections whatever, unless it found its own independent connections in California, and unless it should go on and build, say from Ashland, a separate line on down through, but as the conditions are now, it would have no connections with anybody or any other line, except

its own. To which last named testimony counsel for complainant objected for the reason that the Act of July 25, 1866, requires the operation of the railroad from Portland to the southern boundary line of the state and from there connecting with the California and Oregon Railroad in California to the Central Pacific in California, as a continuous line. Witness further testified upon redirect examination, that on July 1, 1887, the railroad from Ashland to the southern boundary line was nearly completed and the same was true of the railroad on the California end northerly to connect with it and that the contract for the construction of the railroad was made early in the year 1887 and work was well along at that time. In the valuation of the road on July 1, 1887, he had taken into consideration the connection of the two lines. He thinks the name of the road constructing the Natron cut-off is the Oregon and Eastern Railroad Company. He is now exclusively an official of the Oregon and Washington Railroad and Navigation Company. He would not go so far as to assume that there will be no future railroads constructed unless there is an increase in business which justifies the investment. He has not taken into consideration the construction of future roads in making his estimates, but does not believe there will be any future road constructed for the sole purpose of depreciating the value of this railroad. The railroad of the Oregon and California Railroad Company is in his opinion an essential link in the railroad service of the Pacific Coast, and in his judgment this

railroad will always possess a value, not only for the local business, but as a connecting link in the general railroad systems of the United States, and particularly the Pacific Coast, but he would say that there is a possibility that several lines of railroad may be built within territory which permits of better operating features as to grades and curvature than the Oregon and California extension presents, but that fact does not change his opinion as to the value of the property.

STIPULATION.

Whereupon it was stipulated that Richard Koehler if called as a witness by the complainant, would testify that the Southern Pacific Company, one of the defendants in this case, is solvent and financially responsible and financially able to pay all outstanding bonds of the defendant, Oregon and California Railroad Company, the payment of which has been guaranteed by the Southern Pacific Company, as set forth in the pleadings and as shown by the evidence and stipulation as to the facts in this case. But the defendants object to the testimony as incompetent, immaterial and irrelevant. Whereupon the complainant offered in evidence that certain contract, dated November 11, 1902, between the Central Pacific Railway Company and the Oregon and California Railroad Company, as parties of the first part, and the Pokegama Sugar Pine Lumber Company, as party of the second part, being a certified copy of the original contract filed in the office of the County Clerk for Klamath County, Oregon,

which was admitted in evidence and marked Government's Exhibit 127, which said Government's Exhibit 127 is hereinafter set out and described and made a part of this statement, of the Evidence and identified herein as Government's Exhibit 127.

STIPULATION.

Whereupon it was stipulated by and between the parties hereto that all the facts and circumstances proven by Government's Exhibit 109, should for all purposes be deemed to have been specifically pleaded in detail in the bill of complaint herein, and that the admissibility of said evidence and the legal effect thereof should in all respects be the same as if all of said facts and circumstances had ben set out in detail in said bill of complaint; and that a formal amendment to said bill of complaint may be made at any time herein, in this court or in the appellate court, to carry out the purpose and intent of this stipulation. And it was further stipulated by and between the parties that the replication filed by the complainant herein shall have the same force and effect as if filed after the filing of the amended answers of the defendants and all amendments to the amended answer, the purpose hereof being to waive the filing of a second replication subsequent to the aforesaid amendments to the answers. It was further stipulated by and between the parties hereto that all of the evidence in this case shall be deemed to have been taken after all of the amendments had been made to the pleadings and the issues framed. It

was further stipulated that no further pleadings, answer or amendment on the part of the defendants shall be necessary or required as to the facts and circumstances proven by Government's Exhibit 109, to which the stipulation hereinbefore made refers. It was further stipulated by and between the parties that the corporate records of the defendant Oregon and California Railroad Company shall be considered in evidence as Government's Exhibit 129, and that the originals may be withdrawn, and that such portions thereof as either party may desire may be included in the printed record in this cause and made a part of this statement of facts, subject to any objection that either party may have that the same are incompetent, immaterial, or irrelevant. Whereupon the complainant offered in evidence certified copies of letters on file in the office of the Secretary of the Interior and General Land Office, collectively, and identified as Government's Exhibit 130, it being agreed that the original certified copies may be withdrawn and the documents read into the record, which said Government's Exhibit 130, as read into the record, is in words and figures as follows to-wit: Letter of George H. Williams addressed to Secretary of the Interior O. H. Browning, dated January 19, 1869:

‘Senate Chamber,
Washington, Jan’y. 19, 1869.

“Sir:

I respectfully invite your attention to Sec. (1) of an Act entitled ‘An Act granting lands to aid in the

construction of a railroad & telegraph line from the Central Pacific Railroad in California to Portland in Oregon approved July 25, 1866,' providing for the disposition of the lands granted by said Act in the State of Oregon.

"Enclosed please find a pamphlet entitled 'Statement of Facts' which fully sets forth the rights & claims of a company designated by the Legislature of said State in October, A. D. 1868, commonly called the 'East Side Company.'

"Enclosed also please find a paper signed by nine members of the Oregon Senate protesting against the action of said Legislature in October A. D. 1868, in which the rights & claims of a company designated in October 1866 commonly called the 'West Side Company' are fully stated.

"I have nothing to say as to the rights or claims of either company, but in view of the fact that the Articles of Incorporation of the West Side Company were not filed in the office of the Secretary of State until after its designation by the Legislature in 1866, & in view also of the fact that the East Side Company cannot file its assent as required by the Sixth Section of said Act, I am apprehensive that the benefits of said Act will be wholly lost to the State unless something is done to prevent it. Will you be good enough to advise me if there is anything in the action of your Department or the views you entertain of this matter making unnecessary

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O. & C. R. R. Co., et al.

the proposed legislation.

Yours truly,

Geo. H. Williams.

Hon. O. H. Browning,

Secty. Interior,

Washington, D. C.”

Also letter written by Secretary O. H. Browning to George H. Williams in response to the foregoing, dated January 20, 1869:

“DEPARTMENT OF THE INTERIOR.

Washington, D. C. January 20, 1869.

Sir:

I have received your letter of the 19th instant, and the accompanying copy of S. Bill 770, to amend ‘An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland in Oregon, approved July 25th 1866,’ with other papers relating to the subject.

Said act of 1866 required the Legislature of Oregon to designate a company organized under the laws of the State to locate and construct so much of said road as was in Oregon, and that the Company so designated should file its ‘assent’ to the Act of Congress within one year after its passage.

By a resolution adopted by the Legislature, October 10, 1866, the Oregon Central Railroad Company was designated to locate and construct said road in Oregon.

Two companies called the Oregon Central Railroad Company claim to have been so designated. These it appears are locally called the East-Side Company and the West-Side Company.

At the date of the adoption of said resolution by the legislature neither company had been organized as required by the laws of Oregon. The West-Side Company however filed its assent to this Department within the year.

By a resolution adopted by the legislature in October, 1868, the East Side Co. was designated. The purpose of the bill as understood, is to authorize this company to file its 'assent' without prejudice to the rights or interests of the other company, and you ask for an expression of my views as to whether there is any necessity for the proposed legislation.

In reply I have the honor to state, that as the matter now stands, the grant so far as the portion of road in Oregon is concerned, has lapsed, while the grant for that portion of the road situate in California is still in force, and some legislation by Congress is necessary to revive the grant for the Oregon portion of the road.

The proposed bill, if it becomes a law, will, in my opinion, accomplish that purpose.

On the 13th instant, I declined to act upon maps filed by the West-Side Company 'in the absence of a judicial decision as to the rights of the claimants, or some action by Congress upon the subject.' I enclose a copy of said letter.

The papers which accompanied your letter are herewith returned.

I am, Sir,

Your Obt. Servant,

O. H. Browning,
Secretary.

Hon. George H. Williams,
United States Senate.

Also letter written by J. H. Mitchell, signed as Attorney for the Oregon Central Railroad Co., Salem, Oregon, addressed to Honorable Jacob D. Cox, Secretary of the Interior, dated April 12, 1869:

“Washington, D. C.,

April 12th, 1869.

Hon. Jacob D. Cox,

Secretary of the Interior.

Dear Sir:

By the terms of an Act passed by Congress and approved July 25, 1866, entitled ‘An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon,’ it was provided that the grant so far as Oregon was concerned should go to such company thereafter organized under the laws of Oregon as the Legislature of that State should designate. The sixth section of such act also required the assent of the company so designated to be filed in your Department within one year from the date of the passage of such Act.

No company was designated, however, until October, 1868, when the Legislature by Joint Resolution, which I herewith transmit, designated the Oregon Central Railroad Company, of Salem, Oregon, as the company to take and manage the grant.

By an act passed June 25, 1868, the time in which the first twenty miles, and in fact the whole road was to be completed was extended, and by another act passed at the recent session of Congress, and approved April 10th, 1869, the time in which the assent of the company designated was to be filed in the Department of the Interior was extended giving one year from that date. This assent will be presented for filing as soon as I can return to Oregon and have a resolution for that purpose adopted by the company designated in Act 1868, which is the only company that ever has been designated by the Legislature. And I now call attention to this matter in order that no action may be taken by your department that will in any way recognize another company known as 'The Oregon Central Railroad Co. of Portland, Oregon, which never has been designated by the Legislature, and which has been attempting to secure some recognition by your department as being entitled to the grant. And in this connection I would attract your attention to a letter of Secretary Browning addressed to Senator Williams dated January 20, 1869, wherein your predecessor decided that unless some such legislation as the act recently passed was had the grant would lapse. In proof of the statement here made I beg leave to submit the accompanying documents which

this communication I ask may be filed in your office, to the end that no action may be taken until the assent of the Oregon Central Railroad Co. of Salem, Oregon, can be filed.

Very respectfully,

J. H. Mitchell,

Attorney for the Oregon Central Railroad Co., Salem, Oregon.”

Also letter written by George E. Cole, as Secretary O. C. R. R. Co., dated June 9, 1869, addressed to Honorable Jacob D. Cox, Secretary of the Interior:

“Office of the O. C. R. R. Co.

Salem, Oregon,

June 9th, 1869.

Dear Sir:

Herewith please find enclosed proceedings of the Board of Directors of the Oregon Central Railroad Company of Salem, Oregon, assenting to the provisions of the Act of Congress of July 25, 1866, and acts amendatory thereof, which assent I am instructed to present in your office for filing. In doing so I would respectfully attract your attention to a letter of your predecessor (Secretary Browning) of date January 20th, A. D. 1869, also to report of Senate Committee on Public Lands made March 22, 1869, a copy of which I herewith enclose; and would also attract your attention to an Act of Congress approved April 10, 1869, based on said report, whereby the Act of July 25, 1866, aforesaid entitled ‘An Act to aid in the construction of

a railroad and telegraph line from the Central Pacific Railroad in California to Portland in Oregon' was amended so as to authorize the company designated to file its assent within one year from that date. A map showing the location of the road for the first sixty miles will be forwarded at an early day.

Hoping enclosed assent will be filed and requesting an acknowledgment of receipt of same.

I have the honor to be very respectfully,

Geo. E. Cole, Secretary O. C. R. R. Co.

Hon. Jacob D. Cox,
Secretary of Interior,
Washington, D. C."

Also letter signed by I. R. Moores, as president of the O. C. R. R. Co. of Salem, and Geo. E. Cole as Secretary of the O. C. R. R. Co. of Salem, addressed to Honorable J. D. Cox, Secretary Department of the Interior, Washington, D. C., dated September 19, 1870.

"Office of

OREGON CENTRAL RAILROAD COMPANY.

Salem, Sept. 19, 1870.

Sir:

At the request of J. Gaston, Secretary of the Oregon Central Railroad Company of Portland, Oregon, we the undersigned hereby certify that 'The Oregon Central Railroad Company of Salem, Oregon, was disincorporated and dissolved according to the laws of Oregon, on

the seventh day of April, 1870, and does not now exist as a corporation or company under the laws of this State.

Respectfully yours,

I. R. Moores, Pres, O. C. R. R. Co. of Salem,
Geo. E. Cole, Secy. O. C. R. R. Co. of Salem.

To Hon. J. D. Cox,
Secy. Dept. Interior,
Washington, D. C.”

Also letter signed by George H. Williams, addressed to Honorable J. D. Cox, Secretary Department of the Interior, Washington, D. C., dated September 21, 1870:

“Portland, Oregon, Sept. 21st, 1870.

Sir:

J. Gaston, Secy of the Oregon Central R. R. Company, has handed me your letter of August 2, 1870, addressed to him as the President of said company, in which you state that the ‘assent’ offered by said company, to the provisions of an Act of Congress entitled ‘An Act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville in the State of Oregon,’ approved May 4, 1870, will be accepted as a sufficient ‘Assent’ to said Act, if it be shown that the company which Mr. Gaston represents is ‘the Company for whose benefit the said grant was made.’ I can state of my own knowledge that the company of which Mr. Gaston was formerly President, and of which he is now Secy, is the corporation entitled to the benefits of said Act, and for which it was passed.

The *East Side Oregon Central R. R. Co.* was regularly disincorporated and dissolved by voluntary action of its stockholders, before the above named Act of Congress became a law; and the company which Mr. Gaston represents is now the only corporation under its name in this State.

Respectfully yours,

Geo. H. Williams,

Hon. J. D. Cox,

Secy. Dept. of Interior,

Washington, D. C.”

Also letter signed by J. Gaston as Secretary O. C. R. R. Co., addressed to Honorable J. D. Cox, Secretary Department of Interior, Washington, D. C., dated September 21, 1870:

Portland, Oregon, Sept. 21st, 1870.

Sir:

Enclosed please find certain documents, which please place on file, with the ‘Assent’ heretofore sent you on the 18th of July, 1870.

I am directed to notify you that the Oregon Central Railroad Company and their assignee, The Willamette Valley Railroad Company, objects and protests against the withdrawal of any public lands for the Northern Pacific Railroad Company on their line between Portland, Oregon, or Vancouver, W. T., and Puget Sound, until such reasonable time as the two first named companies can file their maps on their line between Portland and Astoria, Oregon; for the reason, that the land

Grants of these several companies, on these lines, will overlap, each other, and the grant of the first named companies being prior in time, is prior in right.

Respectfully yours,

J. Gaston,
Sec. O. C. R. R.

Hon. J. D. Cox,
Secy. Dept. Interior,
Washington, D. C.”

Whereupon the defendants objected to the admissibility of each of said documents and to the whole thereof, as immaterial and irrelevant.

Whereupon complainant rested its case in chief.

TESTIMONY FOR DEFENDANTS.

Defendants proceeded to offer testimony in their behalf.

Whereupon B. A. McALLASTER, called as a witness on behalf of defendants, being first duly sworn, upon direct examination testified that he resides at Oakland, California, and is Land Commissioner of the Oregon and California Railroad Company, Land Commissioner of the Central Pacific Railway Company, Southern Pacific Railroad Company, and Southern Pacific Land Company, and was appointed by the Board of Directors of the Oregon and California Railroad Company its Land Commissioner September 28, 1908, effective September 21, 1908.

Whereupon witness produced a certified copy of the

resolution of said Board of Directors, which was offered received in evidence marked "Defendants' Exhibit 251," and is hereinafter set out and described and made a part of this statement of the evidence, identified herein as "Defendants Exhibit 251."

Whereupon witness produced a copy of his appointment by the Board of Directors of the Central Pacific Railway Company as its Land Commissioner, which was offered and received in evidence and marked "Defendants Exhibit 252," and is hereinafter set out and described and made a part of this statement of evidence, identified as "Defendants Exhibit 252."

Whereupon witness further testified that he was appointed Land Commissioner of the Central Pacific Railway Company on September 26, 1908 as of date September 21, 1908, and was appointed Land Commissioner of the Southern Pacific Railroad Company by the Board of Directors September 23, 1908, effective September 21, 1908. Whereupon defendants offered in evidence the minute book of the Oregon and California Railroad Company, the minute book of the Central Pacific Railway Company, and the minute book of the Southern Pacific Railroad Company, showing the adoption of these various resolutions, and asked leave to withdraw same and substitute copies thereof marked as heretofore. Whereupon the resolution of the Board of Directors of Southern Pacific Railroad Company was marked and identified as "Defendants Exhibit 253," which is hereinafter set out and described and made a part of this statement of the evidence, identified herein as "Defendants Exhibit 253."

STIPULATION.

Whereupon it was agreed between the parties that the Southern Pacific Railroad Company is the Southern Pacific Railroad Company of California, and not the defendant Southern Pacific Company, and the so-called Southern Pacific Railroad Company is the company that was consolidated pursuant to the laws of the State of California, the constituent companies consisting of the former Southern Pacific Railroad Company of California and corporations bearing the same corporate name organized under the laws of Arizona and New Mexico.

Whereupon witness further testified that he first entered the land department of the Union Pacific Railway Company, in the branch office at Kansas City, in December, 1882, as a clerk; that office then handling what were formerly land grants of the Kansas Pacific Railway Company, extending from Kansas City to Denver, Colorado, and the land grant of the Denver Pacific Railway and Telegraph Company, extending from Denver, Colorado, to Cheyenne, Wyoming. In 1887 that Kansas City office was consolidated with the Omaha office of the Union Pacific Railway Company, which office had previously handled the Union Pacific land grant from Omaha, Nebraska, to Ogden, Utah, and at that time he was made chief clerk of the consolidated office. In May, 1890, he was appointed land commissioner of the consolidated office, and retained that position until September 21, 1908, and was land commissioner of the Union Pacific Land Department from 1890 to 1908;

from 1882 to 1887 he occupied various desks in the office, and then in 1887 was made chief clerk of the consolidated office and had general charge of the entire office under the then land commissioner, and after his appointment as land commissioner, he had the administration of the land grants of the Union Pacific, Kansas Pacific and Denver Pacific companies, leasing lands, selling lands, appraising them, acquiring patents, and attending to all the duties pertaining to the land department. He was appointed by the executive committee of the Southern Pacific Company as land commissioner on or about the 8th of October, 1908, to take care of certain lots which that company owned in the towns of Russell City, Alameda County, California; Mina, Esmeralda County, Nevada, and Imlay, Humboldt County, Nevada. Whereupon defendants offered in evidence the instrument evidencing the appointment of witness as land commissioner of the Southern Pacific Company for the purposes stated by him, and asked leave to read the same into the records as "Defendants Exhibit 254," which said "Defendants Exhibit 254" is hereinafter set out and described and made a part of this statement of the evidence and identified herein as "Defendants Exhibit 254." The Southern Pacific Company never has had a land department, within his knowledge. From 1882 to 1887 the Kansas City land office had charge of the Kansas Pacific land grant from Kansas City, Missouri, to Denver, Colorado, and the Denver Pacific Railway and Telegraph Company's land grant from Denver, Colorado, to Cheyenne, Wyoming. From 1887

to 1908 the consolidated office at Omaha cared for those two grants, and also the Union Pacific Railway Company grant from Omaha, Nebraska, to Ogden, Utah. The dates of the Acts of Congress making these grants to the Union Pacific and Central Pacific Railway from the Missouri River to the Pacific Ocean were July 1, 1862 and the amendatory acts of July 2, 1864.

The jurisdiction of the Central Pacific Railway Company in relation to its land grant, territorially, was from Ogden, Utah, to Sacramento, California, under the acts of 1862 and 1864, and from Roseville Junction, California, to the north line of the State of California under the act of July 25, 1866. The Central Pacific grant originally ran through to San Jose, but that grant was disposed of. The Central Pacific does not own it now from Sacramento to San Jose; the railroad between Sacramento and San Jose came back to the Central Pacific, but not the land.

The Southern Pacific Railroad Company held the grant from San Jose to Tres Pinos in California, and from Alcalde to Needles in California under the act of Congress approved July 27, 1866, and branch line grant from Mojave to a point near Yuma, Arizona, under the Act of Congress approved March 3, 1871.

The Central Pacific Railway Company now owns that portion of the grant in the State of California made to the California and Oregon Railroad Company under the act of July 25, 1866. As Land Commissioner he

has jurisdiction over that portion of the grant of July 25, 1866 made to the California and Oregon Railroad Company, now owned by the Central Pacific Railway Company in California, and also the grant of land owned by the Southern Pacific Railroad Company, and also that portion of the grant of July 25, 1866 in Oregon now owned by the Oregon and California Railroad Company, and such jurisdiction also covers the unsold portion of the grant of May 4, 1870 owned by the Oregon and California Railroad Company. As Land Commissioner he keeps records showing the boundaries of the various grants; plats showing the location of the lands granted to the company and also those lost to the grant; records showing the applications filed by the company for patents; the issuance of patents; any and all contests or hearings in the land offices relating to the right of the company to receive patents for certain or any lands; records of the field examinations of the lands, of their appraisal, and the character and topography of the lands; records of sales made by contract or for cash; records of deeds made, and various and sundry other records necessary to know what is acquired, how disposed of, and what is left. He has a fairly complete set of the plats of the United States surveys, and copies of field notes to an extent, but not complete. The companies have tract books showing in a condensed way the various conditions of title, etc., although these are not now in use. The companies substituted for that a card record as to lands that had not been disposed of prior to the institution of the card record system. The card records

do not show all the lands, because cards were not made for those lands which had been sold and deeded by the company prior to the time when the card record was instituted. Otherwise than that, they do show all of the land owned by the company or claimed by it. The tract books show the rest up to that time. The companies have reports showing the topography and character of the lands, occupancy of them, the values as estimated by the field agent who makes the examination. Those values are not always treated as being the market values. It is absolutely necessary that these various records, reports, etc., be kept full and complete and correct. Otherwise the companies could not handle the land grants at all.

In the execution of land sales, the companies use generally a deed which grants and conveys the land, and these forms are substantially the same as to each land grant. In cases where the companies may sell a piece of land for which patent has not yet been received by the company, or where there may be some occupancy that the companies would prefer to recognize the occupant and deal with him on a quitclaim deed rather than first dispossess him in order to put it where the companies could handle the tract with a grant and convey deed, the Companies use quitclaims for conveyances. There are very few quitclaim deeds used. They use quitclaim deeds where a former deed has been lost by the grantee, who seeks a deed of further assurance, or a deed from the company to replace a lost deed that has not been recorded. He has three forms of Central Pa-

cific deed. Form No. 3332 has been in use heretofore, but is not now used. Form 4501 is for the conveyance of land in which there is no right of way to be reserved for the railroad, and Form 4502 is the form in which rights of way are reserved, and these two forms are the ones customarily used at the present time to convey Central Pacific lands. Deeds of the other companies are similar in form. These forms 3332, 4501 and 4502 are not used for conveying Oregon and California Railroad Company lands, but they are substantially the same.

Whereupon defendants offered in evidence Forms 3332, 4501 and 4502, which were received in evidence as "Defendants Exhibit 255," which is hereinafter set out and described, made a part of this statement of the evidence and so identified herein.

Whereupon witness further testified that Form 3332 is one used when the company has occasion to convey a tract of land that is unpatented but the company claims that it is entitled to a patent but has not yet received it, and that is the reason that form is used. Form 4501 is used for any patented land through which it is not necessary to reserve rights of way for the railroad, but occasionally it is necessary to include some special exceptions in particular cases, and for this there is a blank space left for such exceptions. Form 4502 is used in conveying lands through which it is necessary to reserve rights of way for the railroad. He had made no sales since his appointment as Land Commissioner of the Oregon and California Railroad Company of any conse-

quence, and the only deeds that have been executed, with certain exceptions to be mentioned later, were deeds made in completion of contracts outstanding prior to the institution of this suit, that is to say, where there were executory contracts upon which partial payments had been made, which were in effect, where parties were entitled to their deeds on payment of the balance of the purchase price as they matured,—and in such cases the company has performed by executing the deeds called for by these contracts. Since this suit was instituted in September, 1908, there has been made a sale, in October, 1908, to the City of Sheridan of forty acres, as to which the City of Sheridan had previously instituted proceedings to condemn the tract for water supply, and the purchase price for this tract was \$10.00 per acre,—\$400.00. In December, 1908, a sale was made of 160 acres, at \$2.50 per acre,—\$400.00, to Franklin Martin, in settlement of a suit which Martin had brought some time before. This suit was not brought pursuant to any claim that he had a right to it at the \$2.50 per acre under this statute. In December, 1910, the company sold a right of way to the Salem, Falls City and Western Railway Company, 3.20 acres at \$15.62 per acre, total \$50.00, pursuant to condemnation proceedings which had been instituted by that company. In May, 1912, the company sold to the Oregon Electric Railway Company a right of way, 2.60 acres, for \$500.00, pursuant to condemnation proceedings. In January, 1910, the company sold a right of way to the Portland Southwestern Railway Company, number of acres not stated, total consid-

eration \$1220.80. That was also pursuant to condemnation proceedings. In June, 1910, the company sold to Roy W. Minkler 80 acres at \$22.50 per acre—\$1,800.00, and that sale was in settlement and compromise of a suit brought by Roy W. Minkler, one of the defendants in this suit. With the exceptions noted, no sales of Oregon and California Railroad Company lands have been initiated or consummated by him as Land Commissioner since his appointment or since the commencement of this suit.

The form of deed which the Oregon and California Railroad Company has been using in the consummation of the executory contracts for land that were contracted to be sold prior to the commencement of this suit, is Form No. 3398, which is regularly executed by the Vice President and Secretary of the Oregon and California Railroad Company, and where they are trust lands, joined by the Union Trust Company. Whereupon defendants offered in evidence said Form 3398, which was received and marked "Defendants Exhibit 256," which is hereinafter set out and described and made a part of this statement of the evidence and identified herein as such.

Q. Now, I wish you would state, if you know, what the policy of the land department of the various companies that you have represented in the past, and that you now represent, has been in respect to promotion of settlement of any of these lands that are subject to or capable of settlement? What do you know about that?

Mr. Townsend: That is objected to, on the ground that it is immaterial and irrelevant, and particularly in view of the testimony of the witness that his personal knowledge as to the Oregon and California Railroad land grant is limited to the period commencing September 21, 1908, during which entire period the pleadings admit that all lands of the Oregon and California Railroad Company have been withdrawn from sale, and therefore this witness can have no personal knowledge as to the policy of the Oregon and California Railroad Company, and the testimony is therefore incompetent and hearsay.

A. The policy of the Union Pacific Railway Company was always to induce settlement by every means possible, for the reason that settlement means building up the country and traffic for the road. The policy of the Central Pacific Railway Company and of the Southern Pacific Railroad Company since my appointment has been along the same lines.

Q. What would have been the policy of the Oregon and California Railroad Company as to that class of lands but for the institution of this suit, if you know?

Mr. Townsend: That is objected to as incompetent, irrelevant and immaterial, calling for a conclusion of the witness as to what would have been the policy, instead of evidence as to the actual policy of the company.

A. The policy would have been to have offered the lands for sale, had it not been for the fact that this

suit had been instituted before I took hold of the department.

Q. And in making these offers of sale, what would have been the policy of the company as to inducement to promote settlement as to lands that were capable of settlement, if you know?

Same objection.

A. Well, the principal inducement that we offer is a long-time contract.

Q. What I mean is, would you have offered any inducements to promote the settlement of any of these lands that are capable of settlement, if you had the opportunity to sell?

Mr. Townsend: Same objection; and upon the further ground that it permits to the witness his own opinion as to what lands are capable of settlement.

A. Well, the efforts of the department are mainly directed to securing settlers.

Q. Is or is not this a policy which these land-grant roads have pursued from the beginning of your connection with them, and continued up to the present time wherever possible?

A. It has always been the policy to sell the lands to people who would settle on them and improve them.

Whereupon the witness further testified that he had prepared or caused to be prepared a tabular statement

for each county in which some portion of the lands of the so-called East Side and West Side grants are situated, showing the record of deeds or contracts, selling or for the sale of the lands of the Oregon and California Railroad Company, which tabulated statement was prepared under his direction and supervision, and is an accurate transcript of these records. Whereupon witness produced the tabulated statement for inspection, and further testified that this tabulated statement had been checked up and found to be correct according to the recorded instruments, with the character of the instrument, the date, the name of the grantee, the description of the lands, and consideration stated, and the book and page of the various records. They show that information correctly, and in the conduct of his office these documents are relied upon by him as correct and as correctly stating the facts therein collated. Whereupon defendants offered in evidence said tabulated statements for Columbia, Washington, Multnomah, Tillamook, Yamhill, Polk, Marion, Lincoln, Linn, Lane, Douglas, Clackamas, Coos, Josephine, Curry, Jackson, and Klamath Counties, Oregon, and Clarke County Washington, which was marked collectively "Defendants Exhibit 257," which "defendants Exhibit 257" is hereinafter set out and described and made a part of this statement of the evidence, and identified herein as such.

Explaining how these documents were tabulated and from what sources of information they have been obtained, witness further testified that the fire of April

1906 destroyed all of the records of the land department, and after that it became necessary to restore those records from all sources from which the information could be obtained. In so doing, individuals were sent to the various counties, or arrangements made with abstract companies who had abstracts of record, to furnish the department with complete abstracts of all deeds which had been given by the Oregon and California Railroad Company. The same arrangements were made in respect to deeds of the other companies, and not only deeds, but contracts—anything—any document of record in the county records, which had been executed by or on behalf of the Railroad Company, were ordered abstracted in that manner, and those abstracts became the company record of the deeding of lands prior to the 1906 fire, and these are compiled from those abstracts. These abstracts and examinations thus made were furnished to him as the records of his office, upon which he acted, and upon which the company relied to re-establish the records of the land department after the fire of April, 1906, and witness has these original abstracts and reports for the inspection of counsel for the Government if desired. Witness is satisfied from these abstracts and from the reports thus made and obtained, that this tabulated statement is a correct record of what it purports to be, and he, as Land Commissioner, is acting upon that record. Whereupon defendants renewed their offer of these documents so tabulated and so compiled, heretofore herein referred to as “Defendants Exhibit 257.”

Whereupon Counsel for Complainant interrogated

the witness, who further testified that he first came to San Francisco to take charge of the land department of the Oregon and California Railroad Company, together with these other companies mentioned by him, September 21, 1908, and prior to that time he had had nothing whatever to do with the land department of the Oregon and California Railroad Company, although he had inspected somewhat the records of the land department of the Oregon and California Railroad Company in May 1907. May, 1907, was the first time he saw any of the records of the land department of the Oregon and California Railroad Company, from which he compiled "Defendants Exhibit 257," and his knowledge as to the manner in which they were obtained is what he had to learn in order to carry on the office. He had nothing to do personally with the procuring of these records, and his knowledge was from what he learned in the office, and not from his personal contact with the transaction, as witness said he found the records in the office, and as to the manner in which they were obtained his knowledge was limited to what he had ascertained from the employees of the office, or otherwise, since he became connected with it.

Mr. Townsend: Now, the Government objects to the introduction of this Exhibit 257, on the ground that it is incompetent and hearsay, and no foundation has been laid.

Mr. Fenton: I was going to say that counsel for the Government, unless he withdraws this objection, puts us to the expense and necessity of calling the county

recorder of each of these counties to check up personally these lists; and if he can satisfy himself that they are correct, I should be glad to have him do so, and save us that expense and delay.

Mr. Townsend: In response to that, I will state in the record, that I have no present reason to doubt the accuracy of these statements, but, in view of the manner in which they have been vouched for, not intending to challenge the good faith of the witness, still I do not feel justified in consenting that they be received in evidence at this time. However, if I can satisfy myself that they are correct in fact, the objection as to the manner of identifying the county records will not be urged as an objection.

Mr. Fenton: Very well. I will ask leave to withdraw these, and have the recorder and clerk put in the date of the record of each one of these documents in a column on the margin of them, and then return them to the files.

Mr. Singer: And certify to it.

Mr. Fenton: I will offer them for the present with that promise, and ask leave to withdraw them from the examiner for that purpose.

Mr. Townsend: The Government consents to the withdrawal of these documents for the purpose stated, reserving the right to either renew or waive its objection when the documents shall be reoffered as proposed.

Mr. Fenton: That will be all right. I would like

to have it understood, Mr. Townsend, that all these records and files referred to by Mr. McAllaster are subject to your inspection, and tendered to you for that purpose, if you should desire at any time to do so.

Mr. Townsend: I will not attempt to avail myself of that privilege at this time, but will indicate later to the witness any records that I desire to inspect.

Received and marked as "Defendants Exhibit 257," and withdrawn as agreed.

Whereupon witness further testified that he, as Land Commissioner of the Oregon and California Railroad Company, has in his possession certain records required to be kept by him in the administration of these two grants, known as the East Side and West Side grants, and had prepared a typewritten statement of the results shown by the tract books and cards referred to by him, as to the status of all lands within the limits of the East Side grant, so-called, and a similar statement of all lands within the limits of the West Side grant, so-called, as of May 1, 1912, showing the total quantities lost by or on account of other grants, entries, etc., with the particulars, the total quantities realized, with the particulars, and the total deficiencies of each grant, and the causes thereof, which the witness then produced, and the same was identified and marked "Defendants Exhibit 258." Whereupon witness testified that "Defendants Exhibit 258" correctly states the status as of date May 1, 1912, of that part of the grant situated in Oregon made by

Act of Congress approved July 25, 1866, and also the status as of date May 1, 1912, of the grant made by Act of Congress approved May 4, 1870. Whereupon counsel for Complainant reserved the right to object to the introduction of said document, after cross examination of the witness. Whereupon, the same was received and marked "Defendants Exhibit 258," which is hereinafter set out and described, and made a part of this statement of the evidence, and identified herein as such.

Whereupon witness further testified, in explanation of the figures representing the acres stated on Defendants Exhibit 258, that the information is contained in the company's land office records, and was obtained from examination of the General Land Office records and United States Local Land Office records, and this "Defendants Exhibit 258" correctly states, as shown by the company's land department records, and as shown by the records of the General Land Office and the United States Local Land Offices, the facts upon which this exhibit is based. These figures and notations explaining the figures are relied upon by him as correct in the administration of these grants. He has prepared a map showing the results disclosed by the records of the land department in his custody, as to the primary and indemnity lands of the so-called East Side and West Side grants, showing in colors lands patented to the company, granted or available under the grants but not patented, lost to the grants by other disposition made by the United States, and disposed of by the company. This map was prepared under his direction and super-

vision, and the information on which it was prepared is based upon the records of his office, and as in the case of the statement just presented, is based on information taken from the General Land Office and local land offices of the United States. He believes the map to be absolutely correct, and he, as Land Commissioner of the Oregon and California Railroad Company, acts upon it and relies upon its verity. Whereupon witness produced said map, and the same was received in evidence as "Defendants Exhibit 259," which is hereinafter set out and described, and made a part of this statement of the evidence, and identified herein as such.

In explanation of that map and the legends thereon, the witness says that the interior red lines on the map indicate the 20-mile or primary limits of the grant of July 25, 1866 on either side. The exterior red lines indicate the indemnity limits—the 30-mile limits on each side. The green interior lines up at the top of the map indicate the 20-mile limits of the grant of May 4, 1870, and the exterior green lines indicate the outer five-mile limits, or indemnity limits of the same grant. The green coloring on the sections indicates the patented and unpatented unsold lands of both grants, not including unselected indemnity lands. The sections colored carmine are lands covered by outstanding contracts of sale. The sections colored blue are those lands which have been deeded by the grantee companies. The sections colored yellow are lands lost to both grants by adverse entries. The sections colored brown are lands unavailable for in-

demnity selection because within forest or other reserves established subsequent to the grant. The sections enclosed within green lines are unselected indemnity, including pending suspended lists and unsurveyed lands. In other words, they are indemnity lands that either have not been selected or are in pending selection lists. The large body of land in yellow from Portland south to about Creswell, Lane County, Oregon, both within the place and indemnity limits of the grant of July 25, 1866, indicates lands which were lost to the grant by reason of entries or other disposals made by the United States before these grants became operative. The most of the losses came under the Donation acts and the Settlement acts in that territory. There were other causes of loss. To a very large extent these parcels marked in yellow are lands which were occupied or taken under the Donation or Settlement laws in the early settlement of Western and Southern Oregon, as ascertained by witness from his knowledge of the township plats and records in the General Land Office and in the United States Local Land Offices, obtained in various ways, and particularly in compiling this map. To a large extent, the lands indicated by a large valley in yellow, or a body of land in yellow indicated on this map, of which Roseburg, Douglas County, on the Umpqua River, is substantially the center, were lost by donation claims and homestead entries. That body of land also includes the Roseburg and Coos Bay Wagon Road grant, which was lost because the United States erroneously patented them under the wagon road grant instead of holding

them for the railroad grant, to which they properly belonged.

Whereupon, counsel for complainant objected to the testimony of witness last above, as to whether the United States erroneously patented these lands, as incompetent, irrelevant and immaterial, and a mere conclusion of law and fact by witness.

Whereupon witness further testified that it was a fact that these lands were lost to the Oregon and California Railroad Company and were granted or patented to the Wagon Road Company, and it is true that these lands in and about Roseburg, Douglas County, Oregon, that were taken under the Donation Land Laws, were settled, as witness understood, in the early settlement, and are largely in the agricultural portion of Douglas County. The lands indicated by the body of yellow surrounding the town of Medford, in Jackson County, are agricultural, and were lost to the company under the Donation Land Law and other settlement laws, long prior to the grant of July 25, 1866. That constitutes part of the Rogue River Valley, of which Medford is the central town. This yellow, all through on this map, shows lands that are situated in the valleys of Western Oregon, and which are chiefly in the agricultural portions thereof, to which counsel for complainant objected as incompetent, irrelevant and immaterial.

Whereupon witness further testified that he had been through these lands on the train and particularly observed that in certain localities lands in sight from the

train were agricultural lands, and were being cultivated, and he would not dispute that the Willamette Valley is situated largely where that large body of yellow shown on this map is located, for it is a fact that the Willamette Valley is so situated. The Umpqua Valley is situated in and about Roseburg, as shown on the map. The Rogue River Valley is situated in and about Medford. He has prepared another map of the unsold lands involved in this suit, showing as a result from the records of the company, the timbered and non-timbered lands of these grants, the topography of the country in which they are situated, and generally the character of these lands, which was marked as "Defendants Exhibit 260." The information indicating the different classes of lands indicated by the green and yellow coloring on the map, was obtained from the records of his office, based on General Land Office and United States local Land Office records. The information as to topography, streams, mountain ranges, etc., was taken from the plats in the office of the Surveyor General of the United States for Oregon. As a sample report showing information as to the topography, timbered character or non-timbered character, or other information for use in his office, used by him in connection with the field notes of the Surveyor General's office and the United States Land Office records, in the preparation of this map, witness says there are six original reports of field examination of lands which show the information required. He has all of the original reports in his office, of which this bunch of six is a sample, and they are all prepared in the same way

under his direction by his employees and representatives, for the files of his office, and largely all on the same printed forms, although there have been different forms in use at different times. These reports are required by him to be made in the administration of the grant, and the Company acts upon and relies upon them and they are part of the files of his office as Land Commissioner.

Q. For the guidance of yourself as Land Commissioner, and in the administration of the land grant, is there any other way to obtain accurately the information contained in these reports, excepting in the way these have been obtained?

Mr. Townsend: Objected to as incompetent, irrelevant, immaterial, a mere conclusion, and argumentative.

Q. I mean, any other practicable way?

A. No, sir.

Q. As Land Commission, in your experience with the various land grant companies to which you have referred and about which you have testified, is this the usual and ordinary way to obtain the information desired?

Same objection.

A. Yes, sir.

Q. As a man experienced in the operation and administration of land grants, and in ascertaining the value, the physical characteristics, situation, location, topog-

raphy and timber contents, have these reports been obtained in the usual and ordinary way by you as an expert, in the conduct and management of these particular land grants?

Mr. Townsend: Objected to upon the same ground.

A. Yes, sir.

Q. Are you prepared to say, from these records, reports, and the records of the United States Land Office, and the records of the Surveyor General's office, that this map—Defendants' Exhibit 260—correctly represents what it purports to represent?

Mr. Townsend: That is objected to on the ground that it is incompetent, irrelevant and immaterial; that it is based entirely upon hearsay and self-serving declarations made by the officers and agents of the railroad company; that the witness has not qualified himself to testify as to the character of the lands included within this grant, and that his testimony is necessarily hearsay and incompetent; and upon the further ground that the so-called classification of these lands is a mere arbitrary classification, and does not describe the lands with reference to any issue involved in this case; and upon the further general ground that it is immaterial in this case whether the lands are timbered lands, agricultural lands, or what their character may be.

A. Yes, sir, it does.

Mr. Fenton: Defendants now offer these six sample

reports as a physical illustration of the method pursued by the Land Commissioner, and as part of the files of his office, and ask to have the same marked as "Defendants' Exhibit 261." I now tender to the Government's counsel all the records and files of the office of the witness, particularly all of the original reports of which Defendants' Exhibit 261 is a sample, which is received in evidence and marked Defendants' Exhibit 261, and is hereinafter set out and described and made a part of this statement of the evidence, identified herein as such.

Mr. Townsend: Government objects to the introduction of Defendants' Exhibit 261, upon the same general grounds last stated, and upon the further specific ground that this is an attempt to prove the character of two million three hundred thousand acres of land by exhibiting unidentified reports and thus denying to the Government the opportunity to cross-examine the men who claimed to have made an examination of these lands, and upon whose alleged examination of the lands it is now sought to establish the character of the lands; the evidence is therefore incompetent and hearsay; and the evidence is further incompetent and hearsay to prove the contents of other reports made by the land examiners of this railroad company.

As to the offer by the counsel for defendants to the attorneys for the Government that the records of the office of the witness may be inspected, counsel for the government further objects, upon the ground that such an offer is obviously impracticable, and furnishes the

Government no opportunity whatever to test these records, it being obvious from the testimony of the witness that it has required a large force of officers and agents of the railroad company to compile the information which they themselves now offer, and it is impossible for the Government attorneys to inspect these records and verify the accuracy of the hearsay evidence now offered; and moreover there is no legal authority for an attempt to prove these facts in any such manner.

Q. Please, state, Mr. McAllaster, the names of your field examiners and their residences, so that counsel for the Government may know who they are, who made these reports.

A. Mr. A. W. Rees, Portland, Oregon. He is our chief field examiner for that district, and in charge of the work, and does a great deal of it himself. He has as his assistants Mr. L. D. McLeod, S. C. Bruce, D. C. McLennan, J. C. Rogers, Alexander Wilkinson, Elmer Capell. Those men constitute our present force of examiners in Oregon.

Q. Are these the names of all who made reports of field examinations of these lands, that were and are a part of the files of your office, on which any part of this map Defendants' Exhibit 260 is based?

A. No, we have had other men in that kind of work, who are not now with the Company.

Q. Can you give me their names, and their residences, if you know?

A. S. A. Carmichael, C. A. Cavel, F. A. Elliott, Ben Irwin, Roy Woods. That is all of which I have a record at hand. There may have been others.

Q. Who was or is Mr. F. A. Elliott? What position does he hold at the present time?

A. He is State Forester—I think is his title—of Oregon. He has charge of the forestry work carried on by the state.

Q. His offices are at Salem, Oregon, are they?

A. Yes, sir.

Whereupon witness further testified that he had prepared a statement showing the number of acres of land in each county in Oregon and Washington involved in suit 3340, being the suit now on trial, United States vs. Oregon and California Railroad Company et al., showing the number of acres which had been covered by the Oregon and California Railroad Company's field examinations, and the classification thereof as determined from such examinations, as shown by these reports, whereupon witness produced that table or statement identified as Defendants' Exhibit 262, and testified that it is a correct statement. Whereupon defendants offered the same in evidence, to which counsel for complainant objected upon the same grounds as hereinbefore set out, and it was agreed that such objections may be considered as here set forth in full. Which said Defendants' Exhibit 262 was received in evidence and is herinafter set out and described, and made a part of this statement of the

evidence, and identified herein as such. This Defendant's Exhibit 262 purports to show that the total acres involved in this suit are 2,075,616.45 acres, of which there has been examined 847,795.98 acres up to the date stated, and that this is forty per cent of the entire grant. These figures are correct. It purports to show that seventy-eight per cent of the area examined is timber land, and this is correct according to these reports. Whereupon it was stipulated that all testimony as to the details of Defendants Exhibit 262, including the preceding testimony and all similar testimony that may follow, shall be received subject to the objections heretofore assigned by complainant.

Whereupon witness further testified that the table or statement showing that nineteen per cent of the area examined was grazing land is correct according to these reports, and that two per cent of the area examined is agricultural land, and is correct according to these reports.

Whereupon defendants offered in evidence the map heretofore identified as "Defendants' Exhibit 260," and the same was received in evidence and marked "Defendants' Exhibit 260," which said Defendants' Exhibit 260 is hereinafter set out and described and made a part of this statement of the evidence, and identified herein as such, to which complainant objected upon the same general grounds heretofore assigned as to any evidence based upon the reports of the so-called land examiners of the railroad company and other sources of information

related by the witness, it being stipulated that these objections may be considered as having been made and set forth in full.

Whereupon witness further testified that as Land Commissioner of the Oregon & California Railroad Company, he had prepared a third map showing the unsold lands of both grants and illustrating in colors the disposition made by the United States of intermediate even sections, which he produces for the purpose of identification and which is marked "Defendants' Exhibit 263." This map was made upon information, records and files in his office and is a correct map. The green coloring indicates the lands of the Oregon & California Railroad Company involved in this suit; the lands colored green without other marking being patented lands; those colored green with a red circle are unpatented lands involved in this suit; and those colored green with black circle are unsurveyed lands involved in the suit. The red coloring indicates lands not involved in the suit which were taken up as public lands of the United States under settlement entries. The lands colored yellow are those taken up as public lands of the United States under non-settlement entries. The homestead entry law was principally availed of to obtain the settlement entries indicated in red; the timber and stone law principally to obtain the lands indicated as non-settlement entries in yellow, and some to general entries and cash entries. The timber and stone act of 1878 included the State of Oregon, but he does not remember what other Pacific Coast States or Territories it embraced, or whether it

was limited to Oregon, California, Nevada and Washington. The information as to the Company's own lands was obtained from its own records made up as heretofore explained. The information as to the even numbered sections was obtained by examination of the records of the United States Local Land Office and abstracted from them.

Whereupon defendants offered in evidence "Defendants' Exhibit 263" to which counsel for complainant objected, upon the general grounds heretofore stated and particularly upon the ground that no foundation has been laid for the testimony of this witness, as to the accuracy of the map, and it appears from such testimony that the map is compiled from information furnished to the witness, or his office, by others, and there is no testimony vouching for the accuracy of the details from which the map is compiled.

Whereupon said "Defendants' Exhibit 263" was received in evidence and is hereinafter set out and described and made a part of this Statement of the Evidence and identified as "Defendants' Exhibit 263."

Whereupon witness further testified that the information from which "Defendants' Exhibit 263" is compiled is all of record in his office and part of the records of the office and the Company relies upon the map as being correct. Referring to rough township plats prepared by him, showing disposition by entrymen of the portions of even sections marked "Defendants' Exhibit

264" he testifies that this set of plats was compiled from abstract made by employes of the Department from the United States Local Land Office records in Oregon, from the County records of the sundry Counties in Oregon, and from examinations made of the lands themselves and it is a correct showing of the facts therein indicated.

Certain of the settlement entries, which were entries made under the Donation claims law, Homestead law, Pre-emption law, and like laws, were not examined—that is, the lands were not examined in the field—and those tracts are marked by the letters "P" indicating pre-emption, "H" indicating homestead, "D" indicating Donation claims. Other lands, taken under like settlement entries, were examined in the field, and the green coloring indicates grazing lands now owned by the entrymen, but not occupied. Green coloring with the black "T" indicates grazing lands owned by transferee from the entryman, but not occupied. Green coloring with the letter "E" indicates grazing lands occupied by the entryman. Green coloring with the letter "O" indicates grazing land occupied by a transferee from the entryman. The red coloring indicates timber lands owned by the entryman, but not occupied. Red coloring with the letter "T" indicates timber land owned by a transferee from the entryman, but not occupied. Red coloring with the letter "E" indicates timber land occupied by the entryman. Red coloring with the letter "O" indicates timber land occupied by transferee from the entryman. Under the head of "Non-settlement

Entries" are shown those lands which have been taken by any form of entry under a public land law which does not require settlement as part of the acquirement of title. Lands covered by these entries were not examined in the field. The blue coloring with the letter "E" indicates timber entries owned by the entrymen. The blue coloring without any letter indicates timber entries owned by transferees from the entrymen. The yellow coloring indicates lands entered by scrip, and now owned by timber companies. The yellow coloring with the letter "S" indicates lands entered by scrip, and now owned in small holdings. Uncolored lands marked with letter "C" were cash entries. Those marked with letter "M" were mineral entries. Those marked with the letter "I" were Indian allotments. Those marked with the letters "Is." were isolated tract patents. And those marked "Coal" were coal entries. These colors in "Defendants' Exhibit 264" are not intended to have any relation to the colors on these maps. It is a separate color scheme used in these plats. Roy Woods, whose name appears on the first seven townships of this "Defendants' Exhibit 264" was one of his employes as a field agent who examined lands in the field. The coloring indications, so far as land examinations go are based on his reports. W. E. Stuart, whose name is mentioned on this Exhibit was an employe of the Department and did all the work of coloring and lettering of these plats. He compiled the information from the records made by abstractors and examiners. J. H. Ray was one of the employes of the Department engaged in gathering the

information. He was a field man. Edmond Stowe was one of the field men engaged on that work. Ivan Hawkins was one of the men engaged. Kendall, whose name appears on certain of these sheets was one of the men engaged on the work. Kinser, Kemptoy, G. E. Cartier, E. and W. J. Lander, L. M. Stonebreaker, C. L. Knox, Lynch, Olinger, White, Boehmer, Beekman, Eberspacher, Rodolf, Williams, Lake, Coppock, Landers, O'Shea, Lyman, Ashford and Look, were field agents employed by the Department to make this examination and reports. They made, respectively, written reports from field examinations and delivered them to him, and based upon these reports and upon the examination of the Local Land Office records, and the County Records, where the deeds are recorded and other records, all sources of information obtainable by him, this "Defendants' Exhibit 264," with the showing as stated, was prepared and brought to date (about May 12, 1912).

Whereupon defendants offered in evidence said document "Defendants' Exhibit 264," reserving the right to call any or all of these field men to testify further in reference thereto if Governments counsel shall not be satisfied, on investigation, that it is substantially accurate.

Whereupon counsel for the Government objected to the introduction of said exhibit upon the general grounds heretofore assigned as to compilations attempted to be identified by the witness, including the ground

that the same is incompetent, irrelevant and immaterial, based upon hearsay, and no foundation has been laid for the testimony of the witness as to the accuracy either of the compilation itself or to the materials from which the exhibit is compiled, which said "Defendants' Exhibit 264" is hereinafter set out and described and made a part of this Statement of the Evidence and identified as such.

Whereupon witness testified that he had certified copies of the field notes of the surveyor generals office of Oregon showing the character of the land as returned by the surveyors when the Government survey was made and these notes were a part of the information used in making up "Defendants' Exhibit 264." These certified copies have been conveniently bound in packages 1, 2 and 3 and for the purpose of identification being marked "Defendants' Exhibit 265" were produced by him.

Whereupon defendants offered in evidence said certified copies so identified as "Defendants' Exhibit 265," to which counsel for complainant objected as irrelevant, immaterial and incompetent particularly upon the ground that the character of the lands involved in this suit is immaterial under the issues.

Whereupon it was stipulated that all evidence as to the character of the lands involved in this suit, or the lands in the intermediate even sections, including "Defendants' Exhibit 264" is received subject to this same general objection.

Whereupon said "Defendants' Exhibit 265" was received in evidence and is hereinafter set out and described and made a part of this Statement of the Evidence and identified herein as such.

Witness testified that he had prepared from the records of the Company, or caused to be prepared, a map showing the elevations above sea level of stations between Roseville Junction, California, and Portland, Oregon, on the line of the located and operated road mentioned in the act of July 25, 1866, and produces the same for the purpose of identification, and the same was marked "Defendants' Exhibit 266," and in explanation of said map witness further testified that the green line shown thereon is the line of the present constructed and operated so-called West Side line (that is, from Portland by way of Forest Grove to a point at or near McMinnville) under the Act of May 4, 1870. The red line shown on the map is the line of the constructed and operated road from Portland south to Roseville Junction, known as the East Side line, constructed under the Act of July 25, 1866. These lines appear to be located on the map of the standard form of the Oregon and California Railroad Company, showing the lands granted, not only to that Company, but to the California and Oregon. It is the Company's lithographed map showing the lands which the Companies claimed. That is to say, it shows the place and indemnity limits of the grant of July 25, 1866, and of May 4, 1870, on either side of the located and constructed and operated roads indicated in green and red respectively. It shows the lands un-

sold and claimed by the Company at the time the map was printed, June 1, 1907, and it aims to and does show the exterior limits of both grants. The figures in circles along this line show the elevation in feet above sea level. The lands shown in black on this map represent the lands that were owned at the time the map was printed, June 1, 1907. No sales have been made since 1907. There have been lands deeded since, that were sold under contract, with the exception of the few instances heretofore related by him. Lands that were standing under executory contract in 1907, when this map was lithographed, in many instances, have been subsequently deeded, but this would not bear on this map. It is not a title map of the lands, or aimed to be. He has used the lithographed map of the Company and has located these railroad lines or tracks with the elevations and that is the purpose of that map.

Whereupon defendants offered and there was received in evidence said map "Defendants' Exhibit 266" which is hereinafter set out and described and made a part of this Statement of the Evidence and identified herein as such.

Whereupon witness produces "Defendants' Exhibit 267" and in explanation of such exhibit testifies that this picture and photograph and memoranda attached, were records of his office, found by him therein when he took charge September 21, 1908. Charles W. Eberlin was the Acting Land Agent of the Oregon & California Railroad Company and F. A. Elliott and Homer D.

Angell were employes of defendant's land department. B. A. Gifford was the photographer that took the pictures, but witness has no personal knowledge of the taking of the photographs, or the facts stated in the memoranda, merely producing them as a part of the files of his office.

Whereupon defendants offered in evidence "Defendants' Exhibit 267" under promise to call Homer D. Angell and B. A. Gifford to further identify the exhibit. Whereupon counsel for complainant objected to the introduction of said exhibit on the ground that same is incompetent, irrelevant and immaterial and that the character of the land is immaterial and irrelevant.

Whereupon said exhibit was received in evidence with the memoranda thereto attached and the same is hereinafter set out and described and made a part of this Statement of Evidence and identified herein as "Defendants' Exhibit 267."

Whereupon witness produced a photograph with certain memoranda attached dated April 15, 1912, which was marked "Defendants' Exhibit 268." Whereupon witness testified that the photograph shown in "Defendants Exhibit 268" was taken under instructions given by witness to Mr. Rees and taken by Mr. Gifford during the spring of 1912 and covers lands within the limits of the grant.

Whereupon defendants offered in evidence this exhibit with leave to verify the memoranda attached if re-

quired by complainant. Whereupon counsel for complainant made the same objection to said exhibit as to "Defendants' Exhibit 267." Whereupon the said exhibit was received in evidence and is hereinafter set out and described and made a part of this Statement of Evidence and identified herein as such.

Whereupon witness produced a map marked "Defendants' Exhibit 269" and testified in relation thereto that the photograph was taken during the year 1912 under instructions given by him to A. W. Rees and the photograph was made by Mr. Gifford and shows an area lying within the limits of the land grant. There are two photographs taken from slightly different view points.

Whereupon "Defendants' Exhibit 269" was offered in evidence by defendants, with leave to call A. W. Rees and Mr. Gifford to further identify the same and the lands shown therein, to which counsel for complainant made the same objection as last above, which said exhibit was received in evidence and is hereinafter set out and described and made a part of this Statement of the Evidence and identified herein as such.

Whereupon witness produced a package of photographs, 92 in number, marked collectively as "Defendants' Exhibit 270." Whereupon witness testified that seven of these photographs were taken in the early part of 1912, under his direction, and the direct supervision of A. W. Rees, and taken by a photographer employed by Rees; that attached to each photograph is a

memorandum showing the location of the land and the names of the parties claiming the improvements shown. The remainder of the photographs were largely taken before witness took charge of the Department and he found them in his office when he came in. Attached to each photograph is a memorandum showing the location of the land and the name of the party claiming the improvements in each case and the name of the photographer who took the photograph. Some of these were taken shortly after witness came to San Francisco; that is, those that are dated subsequent to September 21, 1908, but under instructions given by his predecessors in office. They also bear similar memorandum. These lands shown in these various photographs are all lands belonging to the Oregon and California Railroad Company and involved in this suit. From his knowledge of these structures and his investigation of the matter, none of these structures were put upon these lands by the consent, permission or direction of the Company, or any representative of the Company. Most of these structures were built along about 1907 and 1908. All of these photographs, except the seven taken in 1912, are photographs of locations involved in the so-called Lafferty suits parties plaintiff who have been made defendants in this suit, or who may have intervened, or filed cross complaints. Some of these taken in 1912 were lands involved in such suits and others not. The remainder of the seven relate to improvements made by trespassers or so-called applicants to purchase these lands who have been refused. About 10,000 applications to purchase

quarter sections of timber lands belonging to the Company at \$2.50 per acre have been made to the Company and refused since the commencement of the first Lafferty suit, about that time, up to July 30, 1912. These applications are made usually in this way. Some person comes in to the office with a bunch of applications, any where from 5 to 10 up to 50 or 100 and presents one application and tenders the sum of \$400.00 with it and that being rejected, this person follows by presenting another application and tendering the same \$400.00 and that being rejected the process is gone through with the entire bunch that the party brings in. This party is attorney or agent for the applicant, or at least claims so to be and in nearly all cases the blanks used by these so-called applicants are printed forms. He has prepared a memorandum showing the number of applications of that class up to a certain time and whether or not several persons have made application for the same quarter section. This memorandum was prepared about March 1, 1909 and shows the applications that were in his hands at that time. There were 7991 applications in his hands on March 1, 1909, covering 6168 quarter sections, or in some cases less. Occasionally an 80 acres. The entire number of applications up to July 30, 1912, would, he thinks, approximate 10,000. When this table was made up on March 1, 1909, there were 4749 tracts of land each covered by one application; there were 1097 tracks each covered by two applications; 256 tracts each covered by three applications; 54 tracts each covered by four applications; 8 tracts each covered by 5 applica-

tions and 4 tracts each covered by six applications.

Whereupon witness testified that insofar as the lands covered by these applications had been examined, he finds them to be timber lands. To which testimony counsel for complainant objected upon the ground that the testimony of witness and exhibit compiled by him with reference to the character of the lands involved in this suit is incompetent, immaterial and irrelevant, the character of the lands not being a material issue in this suit.

STIPULATION

Whereupon it was stipulated between the parties, by their respective counsel, that any and all testimony hereinbefore and hereinafter set out tending to show the character of this land, submitted by defendants, shall be deemed to be taken subject to this objection. This stipulation shall be deemed to apply to all of such testimony hereinafter set out taken on behalf of defendants and shall apply to all testimony, including exhibits hereinafter set out, taken on behalf of defendants, tending to show the character of the even intermediate sections within the limits of the grants involved in this suit.

Whereupon witness testified that the lands covered by these applications are all valuable timber lands and the best are included therein, and they are chiefly valuable at the present time for the timber. The lands will range in value from \$10.00 an acre to \$100.00 an acre. The value of these lands with reference to their desirability is fixed by the amount of timber measured or expressed in the number of thousand feet board measure;

that is to say, the stumpage, or the number of board feet as shown by the cruise of a timberman. The value ranges from 75c per thousand feet up to \$2.00 per thousand feet stumpage for these lands and similar lands in Oregon. The variation in value between 75c per thousand feet and \$2.00 per thousand feet is caused by the kind of timber, the character of the timber, its location and the logging conditions, and he had in mind by the use of the word location, accessibility to transportation by water or rail. These improvements shown in these various photographs "Defendants' Exhibit 270" are largely in what are known specifically as the Lafferty suit cases, and his recollection is that they made application in practically the same way.

Whereupon witness produced three printed blank applications filled out, which collectively were marked as "Defendants' Exhibit 271" and testified that these were a fair sample of the printed applications presented to the Company in the way he has indicated by these so-called intending purchasers. He did not, nor did anyone connected with the Company have anything to do with the preparation of these printed blanks, or authorize the use of the same. When these applications are received by mail, or presented in person, they are rejected and filed away and preserved. They have been preserved upon the advice of counsel for the Company. These applications generally contain a tender and witness thinks it occurs in all of them, to-wit:

"I herewith tender to said Company the sum of

\$2.50 per acre in payment for said land," etc. When coin is produced it is merely tendered in connection with a group of applications, if more than one is presented. The same coin is used by the same person for each of the different applications. The business of land brokers that has grown up out of this controversy and which has resulted in the application of some 10,000 people to purchase these lands is co-extensive with the boundaries of the United States, perhaps including Alaska and the Islands. There are offices and men engaged in this kind of business advertising it in Omaha, Kansas City and as witness recollects in Boston and New York and many other places that he does not now recollect. These attorneys or timber locators interested, take these applications on behalf of the applicants and purport to file the applications upon lands which the County Records show free from any similar application and they charge the applicant generally about \$75.00 per application, sometimes it is \$50.00 and at other times it may be other amounts, but as a rule it is about \$75.00 per application. That is their fee and the understanding is that the applicant will have \$2.50 per acre to pay whenever this suit is determined. In many cases these attorneys or land brokers require the applicant to sign an agreement to sell the land whenever they get title at an agreed price per thousand feet of stumpage that may be on the land, usually at a price of about one-half of the market value. Whether there is any contingent fee in it, he does not know.

Whereupon defendants offered in evidence "De-

fendants' Exhibits 270 and 271" which was received and are hereinafter set out and described and made a part of this Statement of Evidence and identified as "Defendants' Exhibits 270 and 271."

Whereupon witness testified that he had seen a good many advertisements purporting to advertise for applications and applicants headed "Oregon & California Railroad Company lands" where the party did not disclose his agency but attempted to represent that he was really acting for this land grant or for the Company, but he does not recall now the particular wording in any of the cases, but as a rule they were so worded that to the ordinary reader they would appear to be published by someone authoritatively acting as agent for the Oregon & California Railroad Company. They were not authorized in any instance.

Whereupon witness produced a package of advertising blanks and forms used by these timber locators so-called, with notations of his office thereon, which collectively were marked "Defendants' Exhibit 272."

Whereupon witness further testified that some of these were clipped from newspapers, others came in with correspondence from different people making inquiry regarding the matter and asking if the facts were as there stated. The power of attorney purporting to appoint H. W. Miller of the City of Portland, State of Oregon, the true and lawful attorney for the applicant came in with some letter. Miller had no authority to act for the Oregon & California Railroad Company for him or for

any one else connected with the Company. Some one at St. Louis wrote him to ascertain something concerning the advertisement of John M. Kreider, Suite 806-7 New Bank of Commerce Building, St. Louis, Mo. and that is all he knows about Kreider.

Whereupon witness, referring to a letter purporting to be signed J. M. Kreider, addressed to A. C. Edwards, 3863 Farnam Street, Omaha, Neb. dated July 15, 1909, and the letter of witness of July 20, 1909, to Edwin R. Tuttle, Traveling Passenger Agent, Union Pacific Railroad Company, St. Louis, Mo. enclosing the following clipping:

“OREGON.

OREGON TIMBER.

United States government gave 6,000,000 acres choice timber land in Oregon to railroad company 40 years ago, to be sold at \$2.50 per acre; 1,300,000 acres remain unsold; now worth \$50 per acre; male and female American citizens only can now apply for 160 acres of this land at \$2.50 per acre; only \$75 payable now. For full particulars address, J. M. Kreider, 806-7 New Bank Com. Bldg., St. Louis, Mo.”

stated that these are a part of the advertisements and literature circulated by J. M. Kreider procured by witness since this question arose as to the disposition of this grant. Kreider enclosed a lithographed circular under St. Louis date July 21, 1909, purporting to be signed by St. Louis business men of standing and this accompanied these circulars. Witness does not remember that

they had any particular application from clients through John M. Kreider, although there may have been, but he did not represent the Oregon & California Railroad Company or the land department or any one connected with it.

Q. I call your attention to my letter to Mr. Eberlin, of August 9, 1907, enclosing clipping from the "Journal" and "Telegram," which clippings, for the purposes of this record, I will identify by reading them. Telegram July 18, 1907:

"FOR SALE—TIMBER LANDS.

TIMBER—

Parties wishing to make an application for some choice railroad lands, heavily timbered, cannot do better than to call at our office and get full particulars. We are prepared to locate several at this time, and our fees, including making all the papers and location, are within the reach of all.

**HOWSE & MILLER,
66 Sixth St."**

Also notice purporting to have been printed in the Journal of July 19, 1907, which reads:

"TIMBER.

WE ARE STILL IN A POSITION TO locate several parties on railroad lands in southern Oregon, cruising better than 4,000,000 feet per quarter section; for making tender to the company and filing papers in the clerk's office afterward, location, including all attorney fees, we charge the sum of \$25. Now come and

look into this proposition, if you have never bought any lands from the company heretofore, remember this does not interfere with any of your other rights, call and get full particulars.

HOWSE & MILLER,

66 6th St.

Open evenings. Phone Main 6188."

Also:

"TIMBER LANDS.

Intending purchasers desiring to be located upon lands with heavy timber in the land grant of the Oregon & California railroad in southern Oregon can secure the same by acting quickly. Location fees including all necessary attorney's fees are reasonable. Address J. E. Verdin, Grants Pass, Or."

Did you receive, or did you find these in your files and the files of your predecessor in office?

A. Yes, sir.

Whereupon the witness further testified that he did not know Howse & Miller, or either of them, or J. E. Verdin and neither of them had any authority to act for the Company, him or the land department. The Portland Journal and Evening Telegram were printed and circulated in Portland at that time.

"TIMBER CLAIMS. The present time now affords you the opportunity to locate yourself upon a splendid timber claim, accessible to both railroad and driving streams; cruise ranges from 4,000,000 to 9,000,000 feet. Price \$2.50 per acre. We locate and you

purchase. Address P. O. Box 1206, Tacoma, Wash.”
Is that one of these advertisements that you found?

A. Yes, sir.

Q. Did that advertiser represent you or the company?

A. Not at all.

Q. Does that refer to the same class of lands that these others refer to, as far as you can tell?

A. Presumably so, yes.

Q. I notice a circular here headed: “Land Grant is Basis of Suit,” purporting to be from the Evening Telegram, Portland, Oregon, Monday, September 16, 1907; and purporting to be an advertising circular of Coates & Horsman, Spokane, Washington, on the outside cover of which appears these words:

“C. H. Coates

J. H. Horsman.

COATES & HORSMAN.

Railroad Timber Lands \$2.50 per Acre.

ranging from 3,000,000 to 6,000,000 ft. to quarter section. Direct purchase. No rights required. Telephone Main 7245. Office, 415-416 Mohawk Block.

Spokane, Wash.”

Do you know these gentlemen?

A. No, sir.

Whereupon witness testified that he received this circular in the usual way. That these gentlemen did not represent the Oregon & California Railroad Company, himself or any one else and that neither authorized the publication of this circular or the article.

Q. I notice another circular here, headed "Extracts from the Oregon and California Railroad Grants, Act of 1869," purporting to be from M. P. Alford, Chicago Office 923, 184 La Salle St. 'Phone Main 2022." Did Mr. Alford represent the company or you?

A. Not in any way.

Q. Did you receive this in the same way that you received these others?

A. Yes, sir.

Q. I notice a circular here enclosed by Mr. M. P. Alford, Chicago Office, headed: "Exceptional. An Opportunity to file on Timber Lands in Oregon." Did you obtain that circular in the same way that you obtained these others?

A. Yes, sir.

Q. And did Mr. Alford have any authority to represent you or the company?

A. No, sir.

Q. I notice a long circular here headed: "Railroad Lands. Statement of Facts," with pencil notation, "Trewavas, Lee & Co., 26 Montgomery St., S. F." with a report thereon by you to Mr. Herrin, of date March 19, 1912. Do you know this firm?

A. Not personally, any more than as shown by that report.

Q. Where do they purport to be doing business?

A. At 26 Montgomery Street, San Francisco.

Q. Have they any authority, or did they ever have any authority, to represent the Oregon and California Railroad Company, or to make these advertisements?

A. No, sir.

Q. One of these refers to a clipping from the Oakland Tribune, of Sunday, March 17, 1912, relative to lectures given by this firm. Do I understand that these gentlemen conducted a lecture course here in Oakland, or in San Francisco, trying to induce people to make application to them for the purchase of these lands?

A. Yes, sir.

Q. I notice a clipping here purporting to be from the Omaha World-Herald of December 18, 1909, which reads:

“Oregon.

\$75.00 will locate you on a quarter section of the best agricultural land, level, heavy timber, close to the Pacific Ocean and accessible to railroads and rivers. Price \$2.50 per acre when you secure title. Call or write 413 Karbach Block.”

Is that one of these advertisements that you secured the same way?

A. Yes, sir.

Q. I notice another which reads:

“OREGON TIMBER LANDS.

You now have an opportunity to apply (without interference with homestead rights) for 160 acres of valuable timber and agricultural lands in Oregon at \$2.50 per acre; timber averages 4,000,000 to 8,000,000 feet per quarter section (cedar and fir); accessible to railroads and rivers; close to Pacific Ocean and in a de-

sirable climate; limited 160 acres to each applicant; locating fees very reasonable.

FORREST LAND CO., 612-613 Shukert Bldg.”

Is that one of these numerous advertisements that you procured?

A. Yes, sir.

Q. Who is the Forrest Land Company?

A. I don't know them at all.

Q. Who is the party who says, “Call or write 413 Karbach Block,” and where is that?

A. That is a building in Omaha. I think I had some correspondence with the people, the name I don't remember now.

Q. Did these people, or either of them, or did this company, have any authority to represent the Oregon and California Railroad Company, or to act for it?

A. No, sir.

Q. I notice also an advertisement which reads:

“\$150.00.

“\$150 is all the money required to get 160 acres of timber land in Oregon cruising from 3 to 6 million feet of good merchantable timber. No prior timber or homestead applications affect this, as it is not Government land. For full information call at

OREGON DEV. CO., 1110 and 12 Call Building.”

Did this so-called Oregon Development Company

have any authority to make this advertisement, or to represent the Oregon and California Railroad Company, or you?

A. No, sir.

Q. That appeared in a San Francisco paper, did it, or do you know?

A. Well, I should judge so, but I couldn't say positively.

Q. I show you a circular purporting to advertise "Timber Land Information Club, Daniel McDonald, Hotel Chandler, Marshfield, Oregon." Did this gentleman represent you or your company, or any one connected with it?

A. No, sir.

Q. Did he have any authority for the company, or for you, or any one else connected with it, to issue that circular?

A. No, sir.

Q. I notice, among others here, a clipping from the San Francisco Chronicle, headed "Denounced by Land Office. Statements of Northern Promoters Declared to be Untrue." "Special Dispatch to the 'Chronicle'." Under a Seattle date line. Is that one of the clippings that you made with reference to the activities of these gentlemen in advertising these lands?

A. Yes, sir.

Q. You had nothing to do with the publication of any of these notices, did you?

A. No, sir.

Q. I notice "San Francisco, March 16," 1912 date line dispatch which appears in the Oakland Tribune of Sunday, March 17, 1912, descriptive of the firm of Trewavas, Lee & Co. Is that the same firm about which you spoke some time ago in this examination?

A. That is the same firm, yes, sir.

Whereupon defendants offered all of these for the purpose of showing in part the origin of the long list of applications and that defendants did not authorize or promote the same and to show that this activity took place since about 1907, subsequent to the passage of the Memorial of the Legislative Assembly of the State of Oregon of February, 1907, to which said exhibit counsel for the Government objected as follows:

"The Government admits that the defendant Oregon & California Railroad Company never authorized any of the parties mentioned as having solicited applications to purchase to represent the railroad company or its land department, or any of its officers; but the Government objects to the evidence as immaterial and irrelevant, in so far as it may be claimed to characterize all of the applications to purchase, because it does not appear that all of the applications to purchase originated in this manner; and further objects to the exhibit upon the ground that it is immaterial how the parties were induced to make applications to purchase, if applications in fact were made and rejected, and the terms of the grant were violated in that manner; and the Govern-

ment objects particularly to the letters that are included in this exhibit, upon the ground that they are incompetent, hearsay, irrelevant and immaterial."

Whereupon said documents were received in evidence and marked "Defendants' Exhibit 272" which is hereinafter set out and described and made a part of this Statement of the Evidence and identified as such.

Whereupon witness testified that he had caused to be taken certain photographs, 88 in number, showing the improvements upon certain lands in even sections within the limits of these grants, which were collectively marked "Defendants' Exhibit 273" and that these photographs were taken under his instructions by field agents, showing as they made examinations of the even numbered sections, which are shown on the map, improvements or lack of improvements, as the case might be on those tracts. These photographs of tracts on the even sections are tracts of land within the limits of this grant and were taken the early part of 1912, possibly a few the latter part of 1911, but he thinks all were taken in 1912. Noticing a memorandum on one of these, which, for illustration, reads "Photo by C. W. Kempton 5/7/12/ S. E. $\frac{1}{4}$ Sec. 26-4, S. R. 5 E. Looking Southeast. No improvements except pile of stones which appear to have been used as temporary fireplace." He testified that Mr. Kempton was one of the field agents engaged in making examination of these lands and as a rule the memoranda on the backs of these various photographs identify the land claimed by so-called

settlers and the date when the photograph was taken. The photographs were taken under his direction and supervision for the use of his office. Noticing as a sample "S. W. $\frac{1}{4}$ Sec. 34, Township 8 South, Range 2 East. Leon D. Hedges' Homestead. View looking north. Picture taken by C. W. Kempton April 27, 1912." He testifies that he ascertained that that was the homestead of this man on this particular quarter by abstracting the United States Land Office records and the field man then went upon the premises and took this photograph. Witness ascertained, or caused to be ascertained in the same way, the name of the so-called entryman and the description of his land and then the location of the land by his employes and these entries of settlers or entrymen were obtained from the United States Local Land Office records in each instance. These photographs give on the back the description of the particular land where the photograph was taken, or where it is shown in the picture. J. A. Kinser was one of the field agents and the photographs were taken under the immediate personal supervision of A. W. Rees and witness relied upon them as being correct.

Mr. Fenton: I offer these now, for the purpose of showing the general character of the improvements of the entrymen on the tracts described—general character of their improvements and general character of the land—under the promise, if required by the United States or counsel for the Government, to call the photographers and field examiners for further identification, if the defendants shall be so advised that it is neces-

sary, and ask to have them marked collectively as "Defendants' Exhibit 273."

Mr. Townsend: The Government objects to this evidence, on the ground that it is immaterial and irrelevant; that the character of the intervening sections and the character of the improvements thereon is immaterial to any issue found in the case; and the Government expressly objects to the statement of fact as to the presence or absence of improvements, and other like notations appearing upon the back of these photographs, on the ground that it is incompetent and hearsay. As to the identification of the photographs themselves, the Government reserves the right to object to them upon the ground that they are not properly identified if it shall so appear.

Whereupon said "Defendants' Exhibit 273" was received in evidence and is hereinafter set out and described and made a part of this Statement of the Evidence and identified as such.

Whereupon witness further testified that these photographs purporting to show panoramic views of certain sections of the country marked "Defendants' Exhibit 274" were taken under his direction and show the general character of the country in the immediate vicinity of the points noted on the back of each photograph and all within the limits of the Oregon & California grants; that is they are within the indemnity limits of the grants and cover, in view not only lands claimed by the Oregon & California Railroad Company, but lands in the even

sections. They are within the primary, as well as the indemnity, limits. They are intended to show the general character of the country within the exterior limits of the grant.

Whereupon defendants offered in evidence said "Defendants' Exhibit 274" and the same was received and is hereinafter set out and described and made a part of this Statement of the Evidence and identified as such.

Whereupon witness testified that he had prepared a tabular statement marked "Defendants' Exhibit 276" and that it was compiled from the records of his office, the sources of which were the United States Local Land Office records, the General Land Office records and in part his attorney's records in Washington. These selection lists are made up in the first place and sent to the United States Local Land office. Two copies are retained by that office, one of which is transmitted to the General Land Office in Washington, the other retained in the Local office and two copies are returned to his office, certified by the Register and Receiver, one of which is retained in his office and the other one sent to his attorney in Washington. This tabular statement is made from these lists and from the ultimate action taken by the land office, local or general, and the ultimate action taken by the President of the United States in issuing patents. This "Defendants' Exhibit 276" correctly states the selection lists and all other matter found in this statement. The date certified, refers to the certification by the Local Land Office and this abbreviation

“O. C” refers to Oregon City, “Van.” refers to Vancouver, “Ros.” to Roseburg, “Port.” to Portland, “L. V.” to Lakeview, “Pat.” means patented, “Resel.” means reselected, “Rear.” rearranged, “Rej.” rejected, “Er. sel.” erroneous selection and “Dup.” duplicate.

Whereupon defendants offered in evidence such tabulated statement as “Defendants’ Exhibit 276” which was received and is hereinafter set out and described and made a part of this Statement of the Evidence and identified herein as such.

Witness understands that sales of granted lands were temporarily suspended pending examination that was being made into the condition of the land grants, records, etc., but there never was any order of withdrawal to his knowledge, and there was no formal order of restoration. Before he took charge of the land department at San Francisco he was advised by Judge Cornish, then Vice President of the Southern Pacific Company, that as soon as the records could be straightened out, after the fire, the intention was, as to these lands, in so far as they were not needed for company uses, to offer them for sale; referring by “not needed for company uses” to the lands described in Exhibits numbered 7 and 8 to the answer. Judge Cornish is William D. Cornish, who was the executive assistant to E. H. Harriman, President or an officer of the Oregon and California Railroad Company. The executive jurisdiction over these lands at this time was under Mr. Harriman, and Judge Cornish was his assistant and had special charge of this mat-

ter. Judge Cornish is dead. He had some correspondence with Cornish concerning matters relative to these lands, and thinks possibly some reference was made in that correspondence to the sale of these lands, other than the reserved portions. He had seen a telegram signed by Cornish to the predecessor of witness, Eberlein, which was part of the files of the office and preserved from the fire. There are two telegrams that relate to that land, which read:

“New York, April 5, '07.

C. W. Eberlein, (Received Apr. 5, 1907.)
(Land Dept. S. P. R. R. Co.)

San Francisco.

Please mail me report at convenience showing progress made in rehabilitating your office and also what extent you are receiving and handling applications for lands and especially lands other than timber and mineral.

W. D. Cornish. 3:50 P. M.”

“New York, April 24, 1907.

C. W. Eberlein, (Received Apr. 24, 1907.)
(Land Dept. O. & C. R. R. Co.)

San Francisco.

I have not yet received any report from you as to progress in selling lands.

W. D. Cornish. 12:23 P. M.”

Counsel for complainant objects to the materiality and relevancy thereof. Witness further testified that Chas. W. Eberlein, mentioned, was the acting land commissioner of the Oregon and California Railroad Com-

pany and his predecessor as land commissioner. He resigned some months before witness took charge, and Eberlein was succeeded by Henry Conlin, who is not now in the service. Witness succeeded Conlin.

The list described in Exhibit No. 7 to the answer of the defendants, is a statement showing right of way and unsold East Side Grant lands acquired through Oregon and California Railroad Company, and is correct. This suit No. 3340, now on trial, was brought before he was appointed land commissioner September 21, 1908. The complaint was filed September 4, 1908. Exhibit No. 8 to the answer of the defendants is correct. The records of the department, when he took charge in September 1908, showed the reservations contained in Exhibit No. 8 to the answer, which purports to be a schedule of unsold lands under reservation from sale on account of timber, iron, coal or oil which they are known or supposed to contain. So far as he knows, the reservation was made on the new records after the fire on the strength of a list which Mr. O'Brien furnished as being the list furnished him previous to the fire, of lands reserved for these purposes, referring to the fire of April 18, 1906 in San Francisco which destroyed almost all of the records of the land department. O'Brien was then Vice President and General Manager of the Oregon and California Railroad Company, and the operating official of the line of road from Portland to Ashland, and also an executive officer of the company. The record shows that these lands were reserved on account of being supposed or known to contain timber, coal, iron and oil, and his de-

partment did not undertake to determine that these substances which were supposed to be in these lands, were necessary to the railroad in its operation and maintenance; that was an operating department matter. They had been directed to be reserved by the operating department, and there have been no restorations of any kind with reference to these lands thus reserved, and no order of reservation made by the Board of Directors of the Oregon and California Railroad Company so far as he knows. He never received any formal order. These reservations are usually made on the request of some operating official who knows or thinks there may be something in the land. Since becoming Land Commissioner of the Oregon and California Railroad Company, the Department has at all times asserted ownership of the lands. As they examine the lands and find parties occupying them, the company asserts its ownership and insists that these parties take leases on the lands or vacate. The company has paid taxes on the lands—done whatever might be necessary to assert ownership. It has appeared in contests in the land office where the question of its right to claim has been raised, and it has defended its title of ownership. The company has sent field agents over about forty per cent of the entire grant, making examinations as to the character and value of the lands. The company maintains a force of fire wardens to patrol the lands and protect against fire during the summer. The examinations made by field agents cover forty per cent of the entire grant—78 per cent of the timber. The company has made a good many

leases of lands for grazing purposes, and where it finds some one occupying a small piece of land, there may be a few acres in cultivation, or where an adjacent owner wants to use the lands for pasture purposes, the company has made leases in those cases. In a good many cases the reason for making the lease where there is an actual occupation, is to prevent the statute of limitations running against the company by the occupancy. The company has maintained quite a force of fire wardens in the State of Oregon, patrolling the lands during the dry season. The company has paid taxes on these lands. The counties of Oregon in which the lands are situated, through their county assessors, have continued their assessments, increased their valuations for assessment purposes, and made assessments upon these lands the same as other or similar lands that are privately owned, and without regard to this suit or the claim of the United States. The valuations have been raised, witness thinks, in all of the counties, certainly almost all of them. The company is at all times endeavoring to keep the assessments down as low as may be possible. It is a fact, within his knowledge, that some of the counties, through their county courts, have authorized the assessors to employ, or have directly employed timber cruisers, and have made cruises of substantially all these lands for assessment purposes, and made their assessments on the basis of the board measure reported by their cruisers, and witness thinks that this accounts in part for the increased assessment of a considerable portion of these grants. There are about 240 leases out-

standing. He has prepared a statement showing the lease number, date of lease, when it expires and the number of acres, and the total acreage is 24,671.02. Whereupon witness produces Defendants Exhibit 278, and states that it is a correct statement of what it purports to show. Whereupon defendants offered said exhibit in evidence and the same was received and marked "Defendants' Exhibit 278," which exhibit is hereinafter set out and described and made a part of this Statement of the Evidence and identified herein as "Defendants' Exhibit 278."

Whereupon the witness further testified that but for this suit, he should have proceeded to secure his examination of the land, determine valuations, and make sales of the land as opportunity offered. In so far as the lands were capable of settlement, the company would have preferred always to sell to a settler. Defendants Exhibit 279 shown witness, consists of advertisements published by his department, setting forth the facts that the lands of the Southern Pacific Railroad Company and the Southern Pacific Land Company now—formerly railroad company—are on the market for sale, and setting forth the natural resources of these lands. These advertisements show that they are specially addressed to farmers and others desiring to make settlement on these lands when purchased, which are capable of such settlement. The practice of publishing these advertisements was, generally speaking, commenced about July, 1911, when they actually had some lands ready for sale, and the advertisements had been spread broadcast over the Western

half of the United States, with the result that there has been a sale of a very considerable area of land within the past year. If this suit had not been brought he would have pursued the same policy with reference to the lands in Oregon that were capable of settlement, or that could be disposed of, other than the lands described in Exhibits 7 and 8. Whereupon defendants offered in evidence said collection of advertisements, marked "Defendants' Exhibit 279." Whereupon, upon examination by counsel for the Government, the witness further testified that this advertising material had been prepared and circulated by him or under his direction, since he became Land Commissioner of the several companies named by him, and has been prepared and circulated since the institution of this suit. Whereupon counsel for complainant objected to the introduction of this Defendants' Exhibit 279 as incompetent, irrelevant and immaterial. Whereupon said Defendants' Exhibit 279 was received in evidence and marked "Defendants' Exhibit 279," which is hereinafter set out and described and made a part of this Statement of the Evidence, and so identified herein.

Whereupon the witness further testified that Defendants' Exhibit 280 was in the files of his department when he took charge, that is, it was a part of the records of his office. Whereupon defendants offered in evidence Defendants' Exhibit 280, to which complainant objected as immaterial and irrelevant, which Defendants' Exhibit 280 is hereinafter set out and described and made a part of this Statement of the Evidence, and so identified herein.

Whereupon the witness, upon cross-examination, further testified that Defendants' Exhibit 278, containing statement of outstanding leases, represents as high an acreage as has ever been under lease, so far as he knows. There was very little correspondence in the files of the land department of the Oregon and California Railroad Company preserved from the San Francisco fire of 1906, but he can produce what was saved. The correspondence in the land department now is generally filed with relation to the land particularly referred to, and in so far as correspondence was saved from the fire and capable of being preserved, it has been filed in the same way, and may be scattered through a large number of files. It can all be produced.

This testimony is being taken in the Flood Building, at San Francisco. The greater portion of the offices of the Southern Pacific Company and its proprietary corporations are located in this building, so far as they have offices at San Francisco, but he could not say what the percentage is, he does not know; a very considerable portion of it is occupied by the offices of the Southern Pacific Company and its proprietary corporations, say six or eight floors, but does not know how many floors, or how much space they occupy. He has occupied his present offices since he became the Land Commissioner of the Oregon and California Railroad Company, and his personal room is number 880. The main entrance is number 801, where the clerical force is at work. There is upon the door of room 801 these words "801 Southern Pacific Company—Land Department—B. A. McAl-

laster, Land Commissioner—F. W. Houts, Assistant Land Commissioner.” He has testified that the Southern Pacific Company never had a land department.

Whereupon, upon re-direct examination, witness further testified that that sign on the door of room 801 was put on the door about a year ago, excepting the words “Southern Pacific Company,” and these words “Southern Pacific Company” were placed there within the last two months, and without his knowledge or direction, or permission being asked, or anything else, and he does not know who did it, or why it was done. The Southern Pacific Company has no land whatsoever. It has a few town lots, and has no occasion for a land department, nor has it a land department, and it has no records in the land department that are called Southern Pacific Company Land Department records, except the records of those few town lots about which he has testified, and for which he is land commissioner.

Whereupon the witness, upon re-cross examination, further testified that very likely he had stationery which was used for a number of years, which reads “Southern Pacific Company—Land Department,” and which was used in correspondence referring to this grant. It also shows Oregon and California Railroad Company upon it, and Southern Pacific Railroad Company, as separate companies, but using a joint letter-head. Whereupon the witness produces, upon request of counsel for the complainant, Form 3311, and further testified that they used that form in conducting correspondence in relation to the affairs of any of the companies that they may be

corresponding about. Sometimes—a great many times they do not use a letterhead at all in conducting the correspondence of the office. In purely office correspondence they do not use any letterhead. Sometimes this letterhead is used in carrying on the correspondence relating to the affairs of his office, and sometimes it is not. He does not know how long it had been in use. He does not remember now just what they were using when he came, or whether, so far as the printed matter is concerned, this is substantially the form in use when he came; that particular form was not in use when he came. No one printed the words “Southern Pacific Company—Land Department” on this letterhead without his knowledge or consent. He does not know who it was that put the words “Southern Pacific Company” on the entrance door of his office. It has been there two or three months, but he has made no complaint to any one about it. He assumes that these words were put on the door by some one’s order, but he does not know whose. He has had no occasion to inquire, and it does not make any difference to him.

Whereupon complainant offered Form 3311 in evidence, marked “Government’s Exhibit 112,” to which counsel for defendants objected as immaterial and irrelevant, which was received and so marked, and is hereinafter set out and described and made a part of this statement of evidence, and so identified herein.

Whereupon witness further testified that until the death of Judge Cornish in October or November, 1908, Judge Cornish had general charge of the land grant of

the Oregon and California Railroad Company and other land grants mentioned. Cornish was Vice President of the Southern Pacific Company, but could not state whether he was an executive officer of the Oregon and California Railroad Company, but his impression now is that he was not. He took instructions from Judge Cornish without inquiring what his relationship was to the company, because he had been working under Judge Cornish's instructions for a good many years. At the time he took his instructions he had not inquired whether Judge Cornish had anything to do with the Oregon and California Railroad Company or not, but Cornish gave him instructions concerning the company and he took and followed them. No deeds had been signed under direction of witness at the time of the death of Judge Cornish. Cornish died very shortly after witness became Land Commissioner.

Whereupon witness, upon re-direct examination, further testified that he had produced and tendered to Government counsel all of the records of his office that were saved from the fire of April, 1906, and that his assistant and one of the assistants to counsel for the Government are in possession of these records now, going through them, and he has gathered together and delivered, as stated, all of the records of the land department which were saved from the fire, so far as he knows of such records. Referring to Government's Exhibit 112, being letterhead Form 3311, witness says that the words and figures "Standard 12-11-20,000" means, standard form, December 11, 20,000 printed, and the

date when that supply of blanks was printed. The form was probably in use before that. Form 3311, with the words and figures "Standard 7-08-10,000" containing typewritten figures "March 23, 1909" is the form that was in use in the office when witness took charge of it in September 1908. This was clipped from a letter in his office files of date March 23, 1909, the date on which the particular letter was written. Government's Exhibit 112 was not in use when he came. That form is one that he prepared some time after he came, in consequence of consolidation of the three land departments into one office under his control, referring to the three land departments of the Southern Pacific Railroad Company, the Central Pacific Railway Company, and the Oregon and California Railroad Company, and the stamp on Government's Exhibit 112 "Southern Pacific Land Company" is a rubber stamp that has been placed on the form since the organization of the Southern Pacific Land Company, which is a part of this department. The Southern Pacific Land Company holds by purchase the residue of the Southern Pacific Railroad Company's land grants. Oregon & California Land Company is a company organized and holding title to lots in certain townsites in Oregon, and a few acreage tracts, generally called non-operating lands. He does not know as to how the stock is held, but assumes that it is a small corporation with a capital stock of about \$5000.00—stock of which is held in trust for the Oregon and California Railroad Company.

Whereupon defendants offered in evidence Form

3311, Standard 7-08-10,000, March 23, 1909, and the same was marked "Defendants' Exhibit 281," which is hereinafter set out and described and made a part of this statement of evidence, and identified herein as such.

Whereupon the witness further testified that in speaking of the consolidation of the office, he referred to the fact that he was Land Commissioner of each one of these various companies, and as Land Commissioner had the records of all of these various companies under his control and in one office, or set of offices. There had been no legal consolidation of the land departments of these various companies. Their business is kept separate, and he is the one officer for all of them, and the records are kept in his offices under one control. Whereupon witness was shown a letterhead which was marked Defendants' Exhibit 282, and the witness testified that it is a letterhead that he found among his files and supplies, and the imprint "12-24-06" indicates that it was printed December 24, 1906, and the fact that Charles W. Eberlein's name is on there indicates that it was the form that he used while he was Acting Land Agent for the Oregon and California Railroad Company. The use of the form probably terminated about the time that Defendants' Exhibit 281 was printed in July 1908. Witness used the form of July 1908 for some time after he became Land Commissioner. He does not think that they used the other form, but thinks that they were practically all used up before that.

Whereupon defendants offered Defendants' Exhibit 282 in evidence, and the same was so received and

marked "Defendants' Exhibit 282," and is hereinafter set out and described, and made a part of this statement of the evidence, and so identified herein. Whereupon the witness further testified that these defendants' Exhibits 281 and 282 are printed upon green paper, which was the standard color used prior to Government's Exhibit 112, for all the Oregon and California Railroad Company's supplies used in the land department. He made up a separate pay roll for the Oregon and California Railroad Company, and it passed through the Oregon and California Railroad Company's land accounts and was paid by check on the Oregon and California Railroad Company. The Southern Pacific Land Company and the Central Pacific Railway Company each has its own pay roll form, its own pay roll is made out, passed through its own books of account, and is paid by its own checks. His salary as Land Commissioner for these different companies is apportioned in part against the Central Pacific Railway Company, in part against the Southern Pacific Land Company, and in part against the Oregon and California Railroad Company. He does not know of his own knowledge how the account is kept, where the Oregon and California Railroad Company has no funds available for payment of its indebtedness on account of the operation of the land department—that is properly an accounting matter. He does not know exactly, not sufficiently to explain to the court, what the relations of the Southern Pacific Company as a clearing house are to the Oregon and California Railroad Company in respect to its financial mat-

ters. He thinks that the proceeds of the sales of lands, with reference to the Union Trust Company, are handled through the New York Office, but he does not know the details of it. Supposing that he should receive the proceeds of a sale of land, for which a deed is executed in which the Union Trust Company joins, the proceeds would go to the Assistant Treasurer from the Oregon and California Railroad Company at San Francisco. The Auditor does all the bookkeeping in connection with that money and the Assistant Treasurer makes disposition of it. Witness has nothing to do with that.

Whereupon, upon further cross-examination the witness testified that six letters shown him marked "Government's Exhibit 113," were found in the files of the land department of the Oregon and California Railroad Company, which survived the fire of April 18, 1906, and the letters written upon green paper are answers that were written by his predecessor Eberlein. Whereupon complainant offered these six letters in evidence as Government's Exhibit 113, which said Government's Exhibit 113 was received in evidence, and is hereinafter set out and described and made a part of this statement of the evidence and identified herein as such.

Whereupon witness further testified that the file which he had produced as requested, related to the years 1904 and 1905, and they were the only files which survived the fire. A very few boxes of letters, and just as they could take them out without reference to what they were or anything else, survived the fire, and the balance was destroyed. Whereupon the witness being

shown some correspondence during February 1904, identified same as Government's Exhibit 114, and testified that that is a part of the correspondence that was saved. Whereupon complainant offered said correspondence in evidence and the same was received and marked "Government's Exhibit 114," which is hereinafter set out and described and made a part of this statement of the evidence and identified as such.

Whereupon witness further testified that Government's Exhibit 115 is also a part of the files of the Oregon and California Railroad Company Land Department that survived the fire. Whereupon complainant offered Government's Exhibit 115 in evidence, which was received in evidence and is hereinafter set out and described and made a part of this statement of the evidence and identified herein as such.

Whereupon the witness further testified upon re-direct examination, that he had made additions to Defendants' Exhibit 257, and each of them had been certified by the county clerk or county recorder of the respective counties, showing the dates on which the various deeds were recorded in the county records. This is shown on the right hand margin of each page. The necessary corrections made in the book and page of record and each county statement has been certified by the county recorder or county clerk of the county.

Whereupon the defendants re-offered Defendants' Exhibit 257 heretofore received in evidence and so marked, and counsel for the Government making no ob-

jection that this is a summary from the public records certified by the county clerk, instead of a certified copy of each of the documents, and the same is hereinafter set out and described and made a part of the statement of the evidence and identified herein as such.

Whereupon the witness further testified that he had prepared a statement concerning the lands involved in certain suits pending in the then Circuit Court, now District Court of the United States for the District of Oregon, wherein the United States is complainant and the Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, Union Trust Company, and other co-defendants named in the statement are parties defendant, showing the number of the suit, the number of the contract involved, the purchaser, the acres involved, the price per acre, the consideration, the number and date of each deed, the grantee, the date of contract, purporting to be a statement summarizing what are commonly called in this record Forty-five suits against so-called Innocent Purchasers and others. This statement is compiled from the bills of complaint in the various cases, and from his record of the sales that were made, and it is a correct statement. Whereupon defendants offered and the same was received in evidence as Defendants' Exhibit 294, which is hereinafter set out and described and made a part of this statement of the evidence and identified as such herein.

Witness further testified that he had prepared a map showing the location of the lands involved in the so-called Forty-five suits that are summarized in Defend-

ants' Exhibit 294, and it shows in colors the lands involved in the various suits, and bears a legend showing the particular suit indicated by each color, the number of suit, acres involved, and upon the face of the map the name of the purchaser of the land who is the defendant in the suit. The lands are correctly shown on this map. The lands of the Oregon and California Railroad Company that are involved in this pending case have not been colored on this map.

Whereupon defendants offered Defendants' Exhibit 295 in evidence and the same was received and is hereinafter set out and described and made a part of this statement of the evidence and identified herein as such.

Whereupon the witness further testified that he had prepared a statement showing the executory contracts outstanding January 1, 1903, covering the land sales of the Oregon and California Railroad Company, giving the number of the contract and date of the contract, the name of the contract holder and description of the land, the number of acres, the price per acre, the consideration, the amount unpaid when default occurred, the date of default, the date when payments were made after default occurred, the amount of such payment, if made, the date of closing account in consequence of the default, the date of final payment or deed, and the character of land as shown by the field agent's report where there were any reports, the name of the field agent and the date of examination where there were such field agents and examination, and showing the totals of these

various matters. The statement was prepared from the land department records and is correct in so far as those records give the information. The figures 2110 under the heading "Contract number," means the number of contracts that were outstanding on that date. The figures 462,614.59 mean the total number of acres covered by those outstanding contracts, and under the column "Consideration" the figures \$2,746,216.35 indicate the total purchase price for the lands covered by those contracts, that is, the purchase price agreed to be paid. The figures \$207,614.14 represent the portion of the purchase price which was unpaid on contracts on which default had occurred prior to January 1, 1903, that is, the total amount of overdue payments, or total amount of payments where default had occurred necessary to take up the entire contract, that is, contracts that were in default, and the figures \$9530.19 mean that that is the amount that was subsequently paid after January 1, 1903, of the total amount of \$207,614.14 which was unpaid on that date on defaulted contracts. Whereupon defendants offered in evidence this statement marked "Defendants' Exhibit 296." Whereupon, upon examination by counsel for complainant, the witness further testified that as far as they had the information, under the heading "Name of contract holder," he has given the name of the assignee. In many cases they have neither the name of the assignee nor the original purchaser. This statement covers not only the contracts which were in default, but all pending contracts on January 1, 1903. Whereupon counsel for complainant objects to the last

two columns of this statement as incompetent, irrelevant and immaterial, and upon the specific ground heretofore urged as to the character of the lands.

Whereupon the witness further testified upon re-direct examination, that he had the original reports from the men who made these reports in the records of his office, and this memorandum is made from these reports and is correct in accordance with these reports. These reports are part of the official records of the Company, and were acted upon by him, acting for the company as Land Commissioner, in handling these lands, and relied upon by him as accurate. They were made in the usual and ordinary course of business as conducted by field agents in this business. These examinations by field agents, being of lands under outstanding contracts, were made on a different form, and covered somewhat different information, that is, they covered practically the same information as to the character and topography of the land, but went more into the question of improvements, the whereabouts of contract holders, and like information, which was not necessary in connection with unsold lands.

Witness made another report or statement showing sales made during the year 1903, and it contains a complete statement of all contracts issued. Cash sales were not included in this statement, and the statement is correct. It is obtained from records of the sales made. Whereupon defendants offered and there was received in evidence this statement marked "Defendants' Exhibit 297" and also "Defendants' Exhibit 296," which are

hereinafter set out and described and made a part of this statement of the evidence and identified herein as such.

Whereupon the witness further testified that the reports referred to by him are a part of the office files; that they were made in the ordinary course of business and there are no new names indicated other than those shown on Defendants' Exhibit 296; witness relied upon these reports as being correct in the administration of this grant and in the sale of these lands. Contract No. 6695, in favor of N. Rust, is still an outstanding contract and is not reported as defaulted, the payments due on it have not been paid and it is still a valid contract. Whereupon complainant interposed the same objection to Defendants' Exhibit 297 as was interposed to Defendants' Exhibit 296. Whereupon the witness further testified that Defendants' Exhibit 298 is a statement prepared from his office records and is correct; there are statements there for each year from 1903 down to 1912. These yearly statements, Defendants' Exhibits 297 and 298 supplement Defendants' Exhibits 296 and 297. By referring to Defendants' Exhibit 296 one can, wherever his records show, ascertain the name of the purchaser which is not included in these annual statements since January 1, 1903; there were no contracts issued after 1903. Whereupon defendants offered and there was received in evidence Defendants' Exhibit 298, which is hereinafter set out and described, and made a part of this statement of the evidence and identified herein as such. Witness further testified that he had prepared statements show-

ing "Defaulted contracts upon which accounts were closed during 1903," and "Contracts not in default January 1, 1903, upon which default occurred during 1903, but accounts not closed during 1903," and the contracts outstanding January 1, 1903, from the records of the Oregon and California Railroad Company Land Department, and these statements are correct. Whereupon defendants offered these statements in evidence and the same were received and marked Defendants' Exhibit 299, which is hereinafter set out and described and made a part of this statement of the evidence and identified herein as such. Witness further testified that he had prepared similar statements, marked Defendants' Exhibits 300, 301, 302, 303, 304, 305, 306, 307 and 308, covering the succeeding years and testified that these statements were prepared from the Land Department records of the Oregon and California Railroad Company and correctly show the facts. Whereupon defendants offered each of these statements in evidence and the same were received and marked respectively, Defendants' Exhibits 300, 301, 302, 303, 304, 305, 306, 307 and 308, which said several exhibits are hereinafter set out and described and made a part of this statement of the evidence and identified herein as such. Whereupon the witness upon further cross-examination testified that his experience in the handling of railroad lands, commenced in 1882 as a clerk in the office at Kansas City, which handled the Kansas Pacific and Denver Pacific grants; those roads were consolidated with the Union Pacific in 1880 and were consolidated at the time he entered the office; he served

in that office until 1887 when it was consolidated with the Omaha office, which handled the grant of the Union Pacific proper. Mr. Harriman was not connected with the road at the time witness went to Omaha in 1887; Harriman's connection with the road began about 1899 or 1900. Witness knew Judge Cornish; Cornish's first connection with the Union Pacific was as special master in chancery during the receivership, which occurred about 1893, and Cornish was made special master shortly after that; the receivership continued until Mr. Harriman re-organized the properties in 1898 and until the reorganization became effective. Shortly after the road was reorganized Judge Cornish became connected with it as Vice President and held this position until his death. Judge Cornish was located at New York; he was one of the executive officers of the Union Pacific, having general supervision of the subject of its land grants and supervised the general handling of those grants by the land commissioner or other officer having direct charge of the subject. The policy of the Union Pacific at the time of the consolidation of the Kansas City office with the Omaha office in 1887, in regard to the handling of the land grants of the companies composing the Union Pacific System, was the same policy that had been in force for years before, generally speaking. The several grants were owned by the one company from 1880 on. The Union Pacific acquired the properties of the Kansas Pacific and the Denver Pacific by consolidation, and the Kansas Pacific and Denver Pacific corporations became extinct. So that selections and lists under the

Denver Pacific and Kansas Pacific grants, after the consolidation, were made by the Union Pacific itself, and patents issued to the Union Pacific as the assignee or grantee of these other two corporations. In May, 1890, he became land commissioner of all these Union Pacific grants mentioned, and served in that capacity until 1908, when he came to San Francisco and entered upon his present employment. During that period from 1890 to 1908, a period of 18 years, or after Judge Cornish became connected with the Union Pacific' he supervised in a general way the work of witness as land commissioner of the Union Pacific. Judge Cornish was the man who in 1908 sent witness to San Francisco to enter upon his present employment; and after he entered upon his present employment his work was still supervised by Judge Cornish until his death. There was no real change in that respect as to the person who supervised his work after he came to San Francisco from what it had been when he served in Omaha as long as Judge Cornish remained alive. Judge Cornish died November 1, 1908. Judge Cornish was succeeded, temporarily, in his work at San Francisco, as land commissioner of these several companies, by R. S. Lovett and then by Mr. Herrin. Lovett supervised his work from about April or May, 1909, until March 1, 1910, since which latter date his work has been under the supervision of Mr. Herrin, general counsel of the Southern Pacific Company. Witness could not say positively as to whether Judge Cornish ever held any official position with reference to the Oregon and California Railroad Company and he never

addressed him as such official as he recalls. He thinks that Judge Lovett was president of the Oregon and California Railroad Company, but not positive about that. Mr. Harriman was president of that company until he died, and thinks Lovett was president after Mr. Harriman died. His work as land commissioner of these several companies mentioned has to some extent been supervised by President Sproule. Mr. Kruttschnitt has not, since witness' connection with the land department at San Francisco, or with the Union Pacific Land Department, had any supervision of land grant matters pertaining to these railroads. The land department maintains a number of men as mineral field agents, and ordinary field agents, and timber cruisers, who are engaged in examining the lands under his jurisdiction, the lands of the Oregon and California, the lands of the Central Pacific, and the lands of the Southern Pacific Land Company. The Southern Pacific Company maintains a geological department, and it has been his practice to call upon the consulting geologist at the head of that department for information concerning mineral lands and at his request he has made examination of lands and charged the cost of that work against the land department, and witness charges it against the proper company. He has not done any work of that character in Oregon. He does not know why the Southern Pacific Company maintains a geological department, that company has always had it so far as he knows; but he does not know how it was instituted. He is familiar with the litigation involving the oil lands down in Elk Hills,

which is now pending in the southern district of California, in a general way, but does not know that the Southern Pacific Railroad Company contends by way of a defense that Mr. Dumble, one of the geologists of the Southern Pacific Company, was not an employe of the Southern Pacific Railroad Company, and therefore the latter company is not bound by his knowledge, although witness is not fully familiar with that feature of the case. He knows Mr. Dumble, who is head of the geological department of the Southern Pacific Company; he is the consulting geologist and has an office at San Francisco and also one in Houston, Texas.

“Q. Now, Mr. McAllaster, the fact is that you are selected and employed by the Southern Pacific Company, without saying anything at the present as to how your salary is paid, but you were actually selected and employed by Southern Pacific officials for the Southern Pacific Company, were you not?

A. Well, that is not in accordance with my appointment. My appointment was by the Board of Directors of each company; and my appointment by the Board of Directors, or rather the executive committee of the Southern Pacific Company, was made some time after the other appointments, and for the limited purposes named in the appointment only.

Q. But at the time that Judge Cornish transferred you from Omaha to San Francisco, you had an understanding with him as to the terms of your employment, did you not?

A. Yes, sir.

Q. The amount of your salary?

A. Yes, sir.

Q. And that was afterwards apportioned among the companies the boards of directors of which appointed you land commissioner?

A. At the same time that the resolution of appointment was made by each board, the compensation to be paid by that company was also fixed by another resolution.

Q. I understand; but your total compensation was fixed by Judge Cornish at the time that he transferred you from Omaha to San Francisco, was it not?

A. Yes.

Q. And after you got to San Francisco, the several companies whose granted lands came under your management then divided the total that you were to receive among themselves by resolution of their board of directors?

A. Well, just as I hire a man today as a field agent, for instance, and he is to do work wherever I happen to send him for any one of the companies or all of them, as the case may be.

Q. That is another circumstance, is it not—that you hire men for work generally upon all of these land departments, and then charge for their services against the several companies as you may direct them to work from time to time?

A. Yes.

Q. The only difference in your own case being that yours is a fixed charge, apportioned arbitrarily among

the several companies regardless of the amount of time that you may spend one month on one land grant or upon another?

A. Yes.

Whereupon the witness further testified that at the time that quit claim deeds were adopted by the Oregon and California Railroad Company, he was not in its employ and he has no way of testifying as to what the real reason for the change was, except as he might infer or may have been informed by others. He could tell in any particular individual case why a quit claim deed was given in that case, because the record will show the reason why. He has gathered from the office records and reports that these forms were used in connection with unpatented lands. He does not think quitclaim forms were used generally for patented lands. Since he became land commissioner he used a form which he thinks reads: "Grants and conveys all the right, title and interest the company has or may hereafter acquire." He does not consider that a quitclaim form of deed. And he makes this distinction in his answer that he does not consider a deed which grants and conveys the right, title and interest that the railroad company has or may hereafter acquire as a quitclaim form of deed; he means by the term quitclaim form of deed the old familiar form which simply quitclaims the present interest of the grantor. And this deed covering interest that may hereafter he acquired distinguishes it in his mind from the ordinary quitclaim deed and the fact that they used the word "grant" in there. No warranty forms of deed have

been used as to patented or unpatented lands since he became land commissioner of the Oregon and California Railroad Company. He knows that generally on the Coast "bargain and sale" deed is used instead of a warranty for all land conveyances. There are comparatively very few warranty deeds used on the Pacific Coast by anybody. There is a limited implication of warranty in a "bargain and sale" deed, at least in California; he would not say as to the other states. He would not know and would not undertake to give the technical definition of what the implied warranty is. The only reason why the Oregon and California Railroad Company uses a form of deed which carries with it no warranties whatever when conveying lands that have been patented to it by the United States, that he knows of, is that it is practically the standard form for all of the several companies and generally the form that is used by individuals. Referring to these maps and statements and other compilations identified by witness, and received in evidence, witness testified that he has a good deal of personal knowledge as to the accuracy and details of them, in that he supervised the making of them, and to a considerable extent had personal knowledge of the details that go into them; but he would not admit that he had personal knowledge or information as to the details of the maps showing what lands of the even numbered sections intervening the lands involved in this suit were entered under settlement laws and what were entered under non-settlement laws, but would admit that the details of abstracting the records of the United States

Land Office and county records were done by the employes of his department, the information they obtained was sent into the department and then under his direction it was transferred to these maps. He knows that the information which they sent in is correct, because they were sent out to get the correct information and he relied upon them to do so. This does not constitute personal knowledge upon his part as to the accuracy of those details and he disclaims in a way any personal knowledge of the abstract work, because that was all done by employes outside of the office and he did not see them do the work, and was not with them at the time they were doing it. The map was made in the office from the information they furnished and under his supervision. He did not check over all of the details of that map, but simply directed men upon whom he relied and upon whose competency and integrity he relied, and who were employed in his office to make the map as he instructed them to. He can say that if he was using the map for any purpose, he should rely upon it as being correct. He understands the distinction between the knowledge that a business man might rely upon and the knowledge which may be the basis of evidence in court as personal knowledge of the facts. He did not personally put the coloring on the map, but he did watch while the work was being done, looked at the map from time to time and saw that it was being correctly done and as he wanted it done. He did not check each individual tract to see that it was colored properly, but presumes that he checked some of the tracts to see that they were colored properly. He does not remember just

what particular details he had to do with the map, but had the work done in such a way that he could ascertain that it was correct, by relying upon the accuracy of the men who were doing the work. That is not the sole basis of his knowledge of the accuracy of the map. He was looking at the map every few days, and seeing that they were proceeding along the lines of what was laid down for them to do, and doing the work as he wanted it done, and correctly, but he did not check each individual entry and showing on the map. If he discovered anything that was not right he had it corrected. There is not a piece of work that is done in his office that is not checked at least once, or perhaps two or three times before it is considered final, by the men under him. He does not undertake to do these things himself, there are so many of them. His general statement with reference to this map is also true of the others in a general way. And it is true with reference to these compilations that have been introduced in evidence, to a considerable extent; some of these compilations he did more detail work on than others. In each instance he relied on the records of the office, and a large part of this was done before he became connected with the office.

“Q. Now, take for example, that map which purports to show what lands are timbered and what lands are agricultural—defendants’ exhibit 260—now all you know as to the accuracy of that map is that you had employed graders and examiners of land from time to time, and you found in the office reports of graders and examiners who were employed before you became con-

nected with the office, and you directed that the reports of all of these examiners and graders be used for the purpose of compiling a map that would contain the information which their reports conveyed to the land department—isn't that true?

A. Yes, sir.

Q. As to the accuracy of the reports of these graders and examiners, you have no personal knowledge?

A. I have not.

Q. Other than your personal reliance upon those men?

A. That is all."

Whereupon the witness further testified that he realizes that men under certain circumstances might reasonably differ as to whether a given piece of land was susceptible to cultivation after the timber was removed. The differences in opinion of land examiners and land graders would not be very great, the character of the land is too well defined. Frequently he had land examined by more than one grader; sometimes intentionally and sometimes the work will overlap. Sometimes the work was done three or four years ago and he would want it done over again as of date. One piece of land may be timbered land three or four years ago and somebody cut the timber off in the mean time. There is nothing to show upon the map which of these lands, if any, would be susceptible to cultivation after the timber was removed. He does not remember that in the an-

nual reports of the Southern Pacific Company each year that it is stated that it has a land department, and gives the officers thereof, but thinks his name is shown in the annual report of the Southern Pacific Company, but just how it is shown he does not remember. Defendants' exhibit 260 purports to give the character of the land in detail by sections. An individual examination of each section is not necessary in order to prepare such a plat. He has many reports in the office to show a particular district is all timbered, or a particular township, or a part of a particular township. Those were not taken into consideration in making up that detailed statement of forty per cent examined. They were taken into consideration in making Defendants' Exhibit 262, which simply goes into the general showing of what is timbered land and what is non-timbered land. There is nothing on the map to show what part of it is based upon detailed examination of the land, and what part is based upon general reports as to large areas, for instance a township or a half township. When a man reports as to an entire township instead of by sections, he has not made a close detailed examination of it, or he would have reported by sections. Very frequently they get what he calls reconnaissance reports, which are intended to tell in a general way where the timber is and what part is non-timbered claims, or what part may be agricultural land. When land has timber on it, it is, generally speaking so classified by him and his graders, without reference to the question whether it could be used for agricultural purposes after the tim-

ber is removed; at the same time his reports show that the printed forms call for the information as to whether or not the land will be agricultural land after the timber is taken off. At the same time, for all present purposes they call that timber land. Defendants' Exhibit 262 does not show what is suitable for agriculture after the timber is logged off, and the stumps cleared out and the land leveled up and put in shape for farming. That has not been taken into consideration there. That is called timber land, because that is what it is valuable for now, and will be for a good many years to come. It will take a long time before the land will be worth the expense of removing the timber and grubbing out the stumps to make it agricultural. There is a very large part of the lands involved in this suit that never will be suitable for agriculture. There is another part that after the land is logged off, if developments in the way of transportation facilities and opening of the country are sufficient, or if they ever become sufficient to warrant the expense of grubbing out the stumps, the land might then be used for agriculture, but that will be years and years from now. There may be some tracts that might warrant that expense in the near future, but they are a very small proportion of the whole.

“Q. Now, from Albany in this state to the state line, there are no transportation facilities except those controlled by the Southern Pacific Company. Isn't that true?

Mr. Fenton: From Albany which way?

Mr. Townsend: South to the state line. I mean west of the Cascades.

Mr. Fenton: That projection of the line, about 25 miles of it built from Medford to the Rogue River, called the Medford and Eagle Point out from Medford; and then there is the Oregon and Southeastern for 18 miles into the Bohemia district, that we don't have anything to do with.

Mr. Townsend: Where is that?

Mr. Fenton: Cottage Grove to Bohemia. It is 18 or 20 miles.

A. And there is the whole Pacific Ocean with several streams extending up into this grant that can be utilized for transportation purposes.

Q. Particularly fish.

A. Particularly what?

Q. Particularly fish?

A. I am not a fisherman. I don't know.

Q. You don't know why those streams have not been utilized for transportation purposes, do you?

A. To some extent because the harbors are not as good as they might be, or as good as the population immediately surrounding those harbors hope to make them in the near future.

Q. But in a general way, it is a fact, is it not, that the Southern Pacific is the only means of transportation with reference to these lands, from Eugene, I will put

it, south to the southern boundary line of the state?

A. No, because they can be transported out over the ocean, and have been—the products are being transported.

Q. How do they get to the harbor?

A. Down the rivers.

Q. What rivers?

A. The lower portions of the Rogue River, the Umpqua River and Siuslaw River.

Q. How long a distance from the harbor are those streams navigable?

A. Well, I cannot give you the distance in miles, but I do know that more or less lumber is taken out through those streams and through the bays at their mouths.

Q. Well, do you mean that there are mills situated upon the streams, and that the lumber is transported down the streams for any considerable distance to the harbor, or do you mean that the logs are floated down to the mills?

A. I don't know for what distance. I do know that lumber is—I say I know—it is my information from reliable sources that lumber is transported from the west coast of Oregon by water.

Q. Now, what companies, what mills do you refer to?

A. I cannot give you the names of any of them.

Q. Do you refer to the Smith mill on Coos Bay?

A. As I said, I cannot give you the names of any of them, but it is my general information that that is done.

Q. Well, do you know that there are any transportation facilities that would be available to the lands in this grant for agricultural products to be transported to the harbor and thence by sea.

A. I can judge from the fact that there have been a half dozen ports organized under the Oregon law for the purpose of developing that traffic, by water from the west coast of the State of Oregon. There is some traffic now, and they expect to develop more.

Q. You have not answered my question as to whether or not any of that is available with the present facilities to any of the lands involved in this suit.

A. Well, very little with the present facilities.

Q. So that, speaking with reference to the present facilities, it is a fact, is it not, that the Southern Pacific Company is the principal means of transportation with reference to that portion of the land involved in this suit that are situated from Eugene south to the southern boundary line of the state?

A. It is the principal means of transportation for that territory, yes."

Whereupon the witness further testified that he did not admit that a large quantity of this land would be available to settlement if it had improved transporta-

tion facilities. A small quantity might be made available for settlement with a great deal of expense. He does not classify as non-agricultural lands, lands which are not now available for settlement because of the lack of transportation facilities. They are classified as timber lands if they carry timber, or they are classified as grazing lands if they do not carry timber. That is all they are good for now, and all they will be good for for a good many years to come and until transportation facilities are afforded and until settlement within the Willamette and other valleys, has reached a point where there is no more room, and the settlers have been forced into the outlying districts. In other words one could not today, and witness is speaking now as a land man, sell those lands that witness is speaking of for agricultural purposes. No one would buy them for that purpose; meaning, generally speaking, the lands in this suit. He knows from 25 years experience in handling lands. Not handling these lands, but from handling lands of like character; he handled a lot of them in California during the last three or four years. He has had no experience whatever in handling these lands or offering them for sale upon the market. These have not been on the market. He has had eight or nine thousand applications to buy these lands at \$2.50 per acre, which he has refused. Those applications did not contemplate buying them for farming purposes, because that is not what they are useful for and he assumes to speak for the purpose, the mental purpose, of eight thousand people that he has never seen, because he can read from

the character of the land itself what they are buying it for. When a man applies to buy a quarter section at \$2.50 an acre that carries fifty or a hundred thousand feet, board measure, of timber to the acre, it is absurd to suggest for a moment that he is buying that for agricultural purposes. He is buying it for the timber pure and simple. The mere fact that a man offered one hundred dollars an acre for the land would not make it agricultural land, it would make it timber land. He does not know that the price of \$2.50 an acre has anything particularly to do with the character of the land. He has not seen any of this land applied for except from the railroad. He has not been over the land personally and he does not know from what he has seen from the railroad that he has seen any tract covered by these applications. Without seeing the lands or the persons who applied to purchase it, he would not assume to assure the court that none of them applied to purchase that land for the purpose of homes and there may be some tracts that homes might be made on, but speaking comparatively and taking into consideration all of the lands involved in this suit, the percentage is very small. So far as the settlement of these lands, using that word settlement in the sense of going upon them and living there and making homes on the tract, he does not think the suspension of sales has retarded the settlement of Oregon at all. It possibly has delayed somewhat the timber operations in Oregon. He does not know that settlers have gone upon the lands intervening those railroad lands, and have been compelled to abandon their

homes because they were living in a checkerboard, where each section was separated from the other section by this railroad land that is withheld from sale. If a settler could get a quarter section on an even numbered section, and off that quarter section could make his living, it would not make any difference whether there was any other quarter section open for the entry of someone else or not. If he went on a quarter section and the surrounding land was withheld from the markets and the result was that he could not make a living, then the land that he went on was not suitable for his settlement. Lands otherwise suitable for settlement will not be rendered unsuitable for settlement in the sense that the settlement would be profitable by the withholding of the intervening lands from the market. The withholding of the intervening lands does not render the others unsuitable for settlement.

“Q. Does it not render them unsuitable for a home, in the sense that the surrounding lands cannot be settled up, roads cannot be opened, schools cannot be established.

A. But surrounding lands are settled up, roads are opened, and schools are established in this very land grant. You are outlining conditions that do not exist.

Q. Well, how do you know they do not exist?

A. From the reports that I have of conditions that do exist.

Q. Now, you have had some thirty or forty men employed in examining this grant for different purposes

that you named in your direct examination, did you not?

A. Yes.

Q. Did you ever instruct one of them to ascertain whether any settlers had been compelled to abandon their settlement because of the retardation of development of the vicinity in which he lived, by the withholding of these railroad lands from sale?

A. I do not know that we ever instructed them to go into the reasons why the lands were abandoned. In fact, that would be a hard thing to do, when you go and find a quarter section with some battered down improvements on it, that show abandonment for years—it would be pretty hard to find the man that was there and abandoned it, and find out why he abandoned it. We have not undertaken to chase up that information.

Q. Because that would be adverse to you, wouldn't it?

A. No, because it would be of no earthly use to us or anybody else.

Q. You have not looked for any information that would be adverse to you, have you?

A. And I want to say further that my whole testimony has been based on the understanding that I was testifying from knowledge gained in my work, not from personal examination. I have stated that many a time. What I have said, I have said knowing it to be the fact from the information that I have gained, and necessarily gained in carrying on my office.

Q. But you have no personal knowledge of the accuracy of the information upon which you base your testimony?

A. Well, I have this personal knowledge, that if I find a field agent or other man don't accurately report the facts, he don't stay with me very long.

Q. How would you find it out?

A. In many ways."

Whereupon the witness further testified that they have many ways of finding out whether a man is doing his work right or not. If the company had occasion to have that particular piece of land re-examined by some other field agent, and the report was absolutely different, then they would undertake to have both reports verified and see which one was right. Witness is speaking now of an individual particular quarter section where, for some reason or other, the company thought here had been some mistake made. He has had many quarter sections re-examined because he thought there was some mistake made. He is speaking now of his entire experience and not particularly in this Oregon and California grant. The question necessarily goes into 25 years of experience in handling land grants, and one cannot be confined to any one particular quarter section, or any one particular land grant. If an examiner had been in his employ and he had found him accurate, he would rely upon his report being correct. He would not know if the report was correct except in so far as he relied upon that man.

Whereupon the witness upon re-direct examination further testified that he recognized "Defendants' Exhibit 366" as an official publication of the United States, which was received in evidence and marked "Defendants' Exhibit 366" and is hereinafter set out and described and made a part of this Statement of the Evidence and identified herein as such.

Whereupon the witness recognized House Report No. 2215 House of Representatives, Fifty-first Congress, first session, as an official document published by the United States.

Whereupon defendants offered said report in evidence and asked leave to have the map read into the record, together with the amended bill accompanying the report, as a part of the same. Whereupon it was stipulated between counsel for the respective parties that all of the reports of the Committees of either House of Congress and the general debates upon the subject of the bill in both Houses of Congress, may be considered as having been received in evidence the same as if extended at length in the record. It being understood that such evidence shall be subject to the objection that the same is incompetent, irrelevant and immaterial, and that the purpose of this stipulation is that the Court shall take Judicial notice of the official reports, the Congressional record containing these Committee reports, the Congressional debates and other proceedings without further identification. Counsel for the Government objected to the introduction of Report No. 2215 and the

bill accompanying the same on the ground that the same is incompetent, immaterial and irrelevant and counsel for defendants objects to the admissibility of the debates in Congress or Committee reports generally as incompetent.

Whereupon said report No. 2215 and bill accompanying the same was received in evidence and is in words and figures as follows:

“The Committee on the Public Lands, to whom was referred the bill (S. No. 2781) ‘An act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads and for other purposes,’ having fully considered the same, would respectfully report:

“On April 1, 1890, this committee reported a bill on this subject (H. R. No. 8919), which bill has not yet been considered by the House.

“In some respects the two bills are in substance the same, and we recommend the amendment of the Senate bill No. 2781 as follows:

“Strike out all after the enacting clause, and insert—

“(1) Section 1 of the House bill as section 1. This is substantially the same as section 1 of the Senate bill.

“(2) Section 2 of the House bill as section 2.

“(3) Section 2 of the Senate bill as Section 3.

“(4) Section 4 of the House bill, which is identical with section 4 of the Senate bill.

“(5) Section 3 of the Senate bill as section 5.

“(6) Section 5 of the Senate bill with an addition as to the reduction in price of lands restored to \$1.25 per acre, to stand as section 6.

“(7) Section 6 of the House bill to stand as section 7. This leaves of the Senate bill sections 7, 8, and 9.

“Section 7 would include the Tennessee and Coosa and the Mobile and Girard Railroads in Alabama, and extend the time for their completion one year.

“Section 8 applies to the Gulf and Ship Island Railroad in Mississippi.

“More than thirty years have elapsed since these grants were made by Congress in aid of these railroads, and not only has the policy of making such grants been long abandoned, but your committee think proposal to extend time for construction has not met with favor in the House. And so they do not include these sections in the amended bill.

“Nor do the committee recommend section 8.

“The committee has for several years recommended in forfeiture bills a prior right of purchase of a limited quantity not exceeding 320 acres of forfeited land to any one having a contract of purchase with the State or corporation under the grant.

“Section 8 proposes to give this privilege to holders of tax titles and to an unlimited amount of land.

“We do not give this our assent.

“We recommend that the Senate bill, amended as indicated, do pass.

“AMENDED BILL.

“AN ACT to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes.

“BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad not now completed, for the construction or benefit of which lands have heretofore been granted; and all such lands are declared to be a part of the public domain: PROVIDED, that this act shall not be construed as forfeiting the right of way or depot grounds of any railroad company heretofore granted, or lands included in any city, town or village site.

“Sec. 2. That all persons who, at the date of the passage of this act, are actual settlers in good faith on any of the lands hereby forfeited and are otherwise qualified, on making due claim on said lands under the homestead law within six months after the passage of this act, shall be entitled to a preference right to enter the same under the provisions of the homestead law and this act, and shall be regarded as such actual settlers from the date of actual settlement or occupation; and any per-

son who has not heretofore had the benefit of the homestead or pre-emption law, or who has failed from any cause to perfect the title to a tract of land heretofore entered by him under either of said laws, may make a second homestead entry under the provisions of this act. The Secretary of the Interior will make such rules as will secure to such actual settlers these rights.

“Sec. 3. That in all cases where persons are in possession of any of the lands affected by any such grant and hereby resumed by and restored to the United States, under deed, written contract with, or license from, the State or corporation to which such grant was made, or its assignees, executed prior to January first, eighteen hundred and eighty-eight, they shall be entitled to purchase the same from the United States, in quantities not exceeding three hundred and twenty acres to any one such person, at the rate of one dollar and twenty-five cents per acre, at any time within two years from the passage of this act, and on making said payment to receive patents therefor; PROVIDED, That in all cases where parties, persons, or corporations, with the permission of such State or corporation, or its assignees, are in the possession of and have made improvements upon any of the lands hereby resumed and restored, and are not entitled to enter the same under the provisions of this act, such parties, persons, or corporations shall have six months in which to remove any growing crop, and within which time they shall also be entitled to move all buildings and other movable improvements from said lands: PROVIDED FURTHER, That the provis-

ions of this section shall not apply to any lands (situate in the State of Iowa) on which any person in good faith has made or asserted the right to make a pre-emption or homestead settlement: **AND PROVIDED FURTHER,** That nothing in this act contained shall be construed as limiting the rights granted to purchasers or settlers by 'An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes,' approved March third, eighteen hundred and eighty-seven, or as repealing, altering, or amending said act, nor as in any manner affecting any cause of action existing in favor of any purchaser against his grantor for breach of any covenants of title.

"Sec. 4. That section five of an act entitled 'An act for a grant of lands to the State of Iowa in alternate sections to aid in the construction of a railroad in said State,' approved May seventeenth, eighteen hundred and sixty-four, and section seven of an act entitled 'An act extending the time for the completion of certain land-grant railroads in the States of Minnesota and Iowa, and for other purposes,' approved March third, eighteen hundred and sixty-five, and also section five of an act entitled 'An act making an additional grant of lands to the State of Minnesota in alternate sections to aid in the construction of railroads in said State,' approved July fourth, eighteen hundred and sixty-four, so far as said sections are applicable to lands embraced within the indemnity limits of said grants, be, and the same are hereby, repealed; and so much of the provisions of

section four of an act approved June second, eighteen hundred and sixty-four, and entitled 'An act to amend an act entitled 'An act making a grant of lands to the State of Iowa in alternate sections to aid in the construction of certain railroads in said State,' approved May fifteenth, eighteen hundred and fifty-six, be, and the same are hereby, repealed so far as they require the Secretary of the Interior to reserve any lands but the odd sections within the primary or six miles granted limits of the roads mentioned in said act of June second, eighteen hundred and sixty-four, or the act to which the same is amendatory.

"Sec. 5. That if it shall be found that any lands heretofore granted to the Northern Pacific Railroad Company and so resumed by the United States and restored to the public domain lie north of the line known as the 'Harrison line,' being a line drawn from Wallula, Washington, easterly to the southeast corner of the northeast one-fourth of the southeast quarter of section twenty-seven, in township seven north, of range thirty-seven east, of the Willamette meridian, all persons who had acquired in good faith the title of the Northern Pacific Railroad Company to any portion of said lands prior to July first, eighteen hundred and eighty-five, or who at said date were in possession of any portion of said lands or had improved the same, claiming the same under written contract with said company, executed in good faith, or their heirs or assigns, as the case may be, shall be entitled to purchase the lands so acquired, possessed, or improved from the United States, at any time prior to

the expiration of one year after it shall be finally determined that such lands are restored to the public domain by the provisions of this act, at the rate of two dollars and fifty cents per acre, and to receive patents therefor upon proof before the proper land office of the fact of such acquisition, possession, or improvement, and payment therefor, without limitation as to quantity: **PROVIDED**, That the rights of way and riparian rights heretofore attempted to be conveyed to the city of Portland, in the State of Oregon, by the Northern Pacific Railroad Company and the Central Trust Company of New York, by deed of conveyance dated August eighth, eighteen hundred and eighty-six, and which are described as follows: A strip of land fifty feet in width, being twenty-five feet on each side of the center line of a water-pipe line, as the same is staked out and located, or as it shall be hereafter finally located according to the provisions of an act of the legislative assembly of the State of Oregon approved November twenty-fifth, eighteen hundred and eighty-five, providing for the means to supply the city of Portland with an abundance of good, pure, and wholesome water over and across the following described tracts of land: Sections nineteen and thirty-one, in township one south, of range six east; sections twenty-five, thirty-one, thirty-three and thirty-five, in township one south, of range five east; sections three and five, in township two south, of range five east; section one, in township two south, of range four east; sections twenty-three, twenty-five, and thirty-five, in township one south, of range four east, of the Willam-

ette meridian, in the State of Oregon, forfeited by this act, are hereby confirmed unto the said city of Portland, in the State of Oregon, its successors and assigns forever, with the right to enter on the hereinbefore-described strip of land, over and across the above-described sections for the purpose of constructing, maintaining, and repairing a water-pipe line as aforesaid.

“Sec. 6. That no lands declared forfeited to the United States by this act shall by reason of such forfeiture inure to the benefit of any State or corporation to which lands may have been granted by Congress, except as herein otherwise provided; nor shall this act be construed to enlarge the area of land originally covered by any such grant, or to confer any right upon any State, corporation, or person to lands which were excepted from such grant. Nor shall the moiety of the lands granted to any railroad company on account of a main and a branch line appertaining to uncompleted road and hereby forfeited, within the conflicting limits of the grants for such main and branch lines, when but one of such lines has been completed, inure, by virtue of the forfeiture hereby declared, to the benefit of the completed line; and the price of all lands affected hereby and hereby restored when in any way sold is hereby reduced to one dollar and twenty-five cents per acre.

“Sec. 7. That nothing in this act shall be construed to waive or release in any way any right of the United States to have any other lands granted by them, as recited in the first section, forfeited for any failure, past or future, to comply with the conditions of the grant.”

Whereupon the witness upon cross-examination further testified that the various compilations and maps identified by him were all prepared, except one or two which may show the contrary on the face, since the institution of this suit, for the purpose of being used in this suit. They were compiled to show the facts as shown by the records of the office. Witness testified that the compilations themselves are not of any practical use, and were never of any practical use in the office. He does not remember anything that is especially part of the office records. "Defendants' Exhibit 263" purporting to show the disposition of the even numbered sections intervening the unsold portions of the land grant involved in this suit was prepared specially for use in this case and had no practical use in his office in the administration of the grant, and when he says that some of these documents, speaking generally, are relied upon by his office, he refers to the sources from which these maps and computations have been compiled rather than the maps and statements themselves, and it is largely true that his only knowledge as to the accuracy of these maps and compilations rests upon the fact that he directed how they should be compiled and prepared and knows that the men that did the work had before them the details from which they could have made them accurately, the witness supervising the work as much as he could. He attended to some of the detail work, but as a rule it was done by clerks in the office. It was not possible for him to give a close personal check. In "Defendants' Exhibit 263" he has included any form of selection or

entry that did not require settlement on the land. It was not the intention to say that none of these lands may have been taken for settlement purposes, that was not within his knowledge. The records of his office disclose that quit claim deeds had been used by the Oregon & California Railroad Company in conveying lands that had not yet been patented and such instances of conveyance are not limited to cases where mineral claimants contested the Company's selections or lists and the contest was finally compromised between the mineral claimants and the Company. It is impossible for him to say, from recollection, how many instances he has found where the Company did issue deeds prior to patent outside of lands claimed by mineral claimants. The records show quite a number. The records show that the lands were sold in the ordinary course of events, the deed issued and the patent sometimes subsequently acquired and sometimes not yet acquired. He would not say that these were prior to the receivership in 1885, he does not recollect. Any lands lost by the Act of January 31, 1885, are not considered other than to show them as lost, if shown at all.

Whereupon witness further testified as follows:

“Q. Now, you recall that there was litigation instituted by the United States involving the northern four or five townships on the easterly side of the grant under the act of July 25, 1866, known as the Northern Pacific Overlap case. You recall the fact that there was such litigation?”

A. I know there was such a case, yes.

Q. Now, do you not know that, when the Northern Pacific Overlap suit was instituted by the United States, the railroad company gave notice to all parties holding contracts for lands involved in that litigation that no further payments would be received under the contracts until the litigation was terminated?

A. I know only that some people have claimed to have received such notice. I don't know the facts as to the notice having been given.

Q. Well, now, do you not know that there are quite a number of outstanding contracts involving lands that were tied up in that litigation for some time, and which contracts have not been finally forfeited for failure on the part of the purchaser to comply with the conditions of the contracts, and at the same time that those lands are not included in the defendants' answer here as either sold or unsold lands?

A. I remember of a few cases,—I don't think there is quite a large number—where contracts are still open accounts on our books, and where parties claim that they were given some extensions of time on account of the Northern Pacific Overlap cases. Now, I do not recall that there is any showing in the answer of tracts of land that have been sold. The answer is confined to a showing of lands unsold, as I recollect it, and those contracted lands are not in the list of unsold lands."

Whereupon the witness further testified that "Defendants' Exhibits 296 and 297" show whether the con-

tract has been cancelled on the books or not, and show in a column under the heading "Date of closing account in consequence of default" the dates when all contracts that have been closed for default were so closed. So far as these contracts are concerned, they have been forfeited and the lands may have been sold under another contract later on. So far as these contracts are concerned, the lands unless later sold, would appear in the statement of unsold lands. Under another column is shown "Dates of final payment or deed." These dates show that a deed had issued, or that the contracts had been paid in full. Where no date appears in either of these columns the contract is still outstanding, so far as the accounts and records show and the description of the land, contract number, name of contract holder, so far as the Company is advised, are shown in connection with the statements. He cannot tell without a very great deal of research the cases where the purchasers dispute the claim that the lands have reverted to the Railroad Company. On pending contracts that are in default, the exhibit shows which of these pending contracts is in default, where the account is still open on the books. Under the heading in the two columns "Amount unpaid when default occurred" and "Date of default" that information is given. Then under double column "Payments made after default occurred. Date—Amount" it shows what has been paid subsequent to the date shown in the column headed "Date of default." By taking this exhibit and referring to these items which show default and also the column showing date of final pay-

ment or deed, as well as "Date of closing account in consequence of default," one would have all contracts as to which default has occurred and where the rights of the purchaser and the Railroad Company have not yet been settled; that is, if there is no entry under the heading "Date of closing account in consequence of default" and likewise under the heading "Date of final payment or deed" then that means that the contracts are in default and if nothing appears under the heading "Payments made after default occurred" that means that the default is still continuing. None of these instances are included in the pleadings in this case as unsold lands. The donation land claims were taken up before this grant was made, and that is the reason for the resulting loss within place limits. Donation land claims were a matter of record in 1866.

Witness further testified that the records and letter files of the Oregon & California Railroad Company which survived the San Francisco fire of 1906, and heretofore produced at the request of counsel for the Government, were such records and files and were found in the form produced when he entered the office. That he was present when Mr. Eberlein testified and remembers that Eberlein explained that "Government's Exhibit 115," being correspondence in which the assignability of that entire grant, with right of lieu selection in favor of the assignee was discussed, belonged to other files than the Oregon & California Railroad Company. Witness did not intentionally put any of the files belonging to any other grant in the Oregon & California Rail-

road Company files. This exhibit had inadvertently gotten in there and was there when the files were gotten out and so far as he knows was there during all the time that he had had custody of those files. Witness does not recall definitely relating to the sale to Franklin Martin in December 1908 of 160 acres of the granted lands at \$2.50 per acre. The case was terminated shortly after witness took charge of the office and his action in connection with the matter was largely in accordance with advice of the law department, which was thoroughly familiar with the facts. He does not recall where the land was situated and would have to refer to the files in the case in order to say much concerning it, beyond the fact, as he has heretofore testified, that that was a sale which had been entered into pursuant to settlement of a law suit. It is his recollection that these lands are involved in this suit now pending. Referring to the sale made in June 1910 to Roy Minkler of 80 acres at \$22.00 per acre, that was a suit instituted for Minkler by A. W. Lafferty, in the Federal Court sitting at Tacoma and is the suit referred to in the bill of complaint in this case and that was the suit that was compromised. He admits that there is a small percentage of agricultural lands involved in this suit but does not remember whether his previous testimony was confined to a statement that he would have sold agricultural lands but for this suit. He presumes he would have sold timber lands had it not been for this pending suit.

Whereupon witness being recalled on behalf of defendants on direct examination testified as follows:

Mr. Fenton: Q. Mr. McAllaster, you may state, if you will, whether or not you have examined the corporate records of the Oregon Central Railroad Company of Salem, the Oregon Central Railroad Company of Portland and the Oregon and California Railroad Company in the custody of the secretary of the Oregon and California Railroad Company, and as a result of such examination of these corporate records, you are able to state succinctly what you find with reference to the financial operations of these companies from the beginning down to the period covered by your investigation?

A. Yes, I made such examination of these corporate records while I was in Portland last October, and I found the result as follows:

“The Minute Books of the Oregon Central Railroad Company (East Side) and the Oregon Central Railroad Company (West Side), and the Oregon and California Railroad Company show certain moneys to have been obtained towards the construction of the road, as follows:

“The East Side Company was incorporated April 22, 1867, and immediately thereafter let a contract to A. J. Cook & Company for construction of the line for one hundred and fifty miles south from Portland. Subsequently this contract was amended and later another contract was entered into with Cook and Company for construction from the 150th mile post south to the Oregon State line. All of these contracts were eventually assigned by Cook & Company to Ben

“Holladay and Company, and from time to time certain shares of capital stock and certain mortgage bonds were delivered to either Cook & Company or Ben Holladay and Company.

“On March 28, 1870, the East Side Minute Book shows a proposition from Ben Holladay and Company to the effect that such Company would turn over to the East Side Company all stocks and bonds it held, all the completed and uncompleted railroad lines, all rolling stock and other property, all mills, machine shops and their contents, all live stock, implements and property owned by or standing in the name of Ben Holladay and Company which had been acquired or were intended for use in construction and operation of the railroad, in consideration of which the Railroad Company was, within two years, to pay the full amount of money which Ben Holladay and Company had expended, and to pay all liabilities which had been incurred by Ben Holladay and Company in connection with the construction of the road, or defending the corporate rights of that railroad, which amounts were supposed to aggregate between \$800,000.00 and \$1,000,000.00.

“Coincidentally there was received by the East Side Company from the Oregon and California Railroad Company a proposition to purchase the entire property in consideration of the Oregon and California Railroad Company assuming the payment to Ben Holladay and Company of the \$1,000,000.00, or thereabouts, above referred to.

“Wherefore it appears that there had actually been expended by Ben Holladay and Company about \$1,000,000.00, which had gone into the construction of twenty miles of completed road, and of a considerable grading and partial construction beyond the end of the completed line, and in the purchase of equipment for operating the completed twenty miles, and equipment of all kinds for railroad construction.

“The Minute Books of the West Side Company show that stock was authorized to be sold on certain terms, and that from time to time calls were made upon stock subscribers for cash payment of percentages of their subscriptions; also that subscriptions were received of real estate, for aid in the construction of the road; also that contracts were let with S. Coffin and S. G. Reed & Co. for construction and that some payments were made on account of those contracts, but the books are not clear as to the amounts paid; also that on or about September 8, 1880, certain construction work had been done by the Northwestern Construction Company, amounting in value to \$20,893.92, against which the West Side Company had an offsetting bill for freight transportation amounting to \$7887.40, leaving \$13,006.52 unpaid.

“From the West Side Company’s Minute Book the following statement has been compiled:

“Feb. 9, 1872, page 228, — Borrowed	
“	from London Syndicate
“	by depositing \$4,395,000
“	first mortgage bonds as
“	collateral .....\$1,000,000.00

“In addition, the Oregon and California Railroad Company, in taking over the West Side Company’s property, assumed the following liabilities:

“Amounts borrowed by West Side Company from O. & C. R. R. Co to pay interest on bonds and for other purposes	\$120,997.40
Interest owing on two notes for \$1,000,000.00	612,796.34
Interest owing on second mortgage coupons	97,230.00
Total	<u>\$831,023.74</u>

“from which it would appear that at the time Oregon and California Railroad Company acquired the East Side there was an actual investment of.....\$1,000,000.00 and at the time O. & C. R. R. acquired the West Side Company there was an actual investment of

.....	<u>\$1,532,484.13</u>
-------	-----------------------

“Total investment	\$2,532,484.13
“Accrued interest charges.....	831,023.74

“The accrued interest charges, the \$300,000.00 second mortgage bond issue and the \$1,000,000.00 borrowed from the London Syndicate, and the balance due the Northwestern Construction Company were subsequently taken care of by O. & C. R. R. Co.

“Concerning the showing that on or about January 31, 1881, the stockholders made payment in full for

“the then remaining capital stock of the Oregon and California Railroad Company, amounting to \$1,759,-200.00, beg to advise that the records of the minutes of meetings of Boards of Directors and stockholders of the Oregon and California Railroad Company show as follows, book and page reference being in the typewritten copies of the original records which have been certified to by Mr. W. D. Fenton, Secretary:

“Prior to February 1, 1881, there was outstanding capital stock amounting to \$20,000,000.00, held by the following persons:

“R. Koehler, Trustee	\$19,999,500.00
“R. Koehler	100.00
“C. H. Lewis	100.00
“P. Schulze	100.00
“J. N. Dolph	100.00
“C. A. Dolph	100.00
	\$20,000,000.00

“There was outstanding indebtedness as follows:

“Outstanding first mortgage bonds O. C. R. R. Co., dated April 14, 1870 . . .	\$10,950,000.00
“Outstanding West Side Company first mortgage bonds, amounting to \$4,-395,000.00, which were pledged as collateral security for two notes amounting to	1,000,000.00
“Outstanding second mortgage bonds West Side Company	300,000.00
“Note due Northwestern Construction	

“ Company on account of construction	
“ work done for West Side Company . . .	13,006.82
“Interest due thereon	520.27
“Interest owing on the two notes for	
“ \$1,000,000.00	625,296.35
“Balance of interest owing on the second	
“ mortgage bonds West Side Company	93,490.00
“Outstanding indebtedness of the West-	
“ ern Oregon Railroad Company which	
“ O. & C. R. R. Co. had assumed as the	
“ purchase price of that line	\$ 1,520,564.05
“Total of such outstanding indebtedness.	\$14,502,877.49

“(a) Holders of all of the 7% bonds of April 14, 1870, except \$32,800.00 supposed to have been lost or destroyed, and \$30,700.00 held in the congressional land grant sinking fund, also

“(b) The trustees of the mortgage of April 15, 1870, covering the railroad,

“(c) The trustees of the trust deed of April 15, 1870, covering the land grant,

“(d) All the stockholders:
 “that the capital stock be reduced to \$1,759,200.00, and
 “that first mortgage bonds aggregating \$2,000,000.00
 “be issued to apply in part upon liens of the West Side
 “Company, just bought in, and in part upon liens of
 “the Western Oregon Railroad Company, just bought,
 “and to provide a fund for the general purposes of the
 “company.

“In connection with the stockholders meeting held
“February 1, 1881, it is shown that the stock had been
“transferred so that the holdings on that date were,—

2744

“R. Koehler, Trustee 199,943.17592 shares
6488

“R. Koehler 11 17592 “
6488

“C. H. Lewis 11 17592 “
6488

“P. Schulze 11 17592 ”
6488

“J. N. Dolph 11 17592 “
6488

“C. A. Dolph 11 17592 “

“Total 200,000.00 shares

“It was shown that the capital stock of \$20,000,000.00
“was wholly unpaid, and the holders were unable to pay
“a greater assessment than \$1,759,200.00, and that if
“the stock was reduced to that amount the holders pro-
“posed to pay the same in full, and therefore the reduc-
“tion was ordered made.

“It is shown the proceedings authorizing the issue of

“\$2,000,000.00 six-per-cent bonds, as a superior lien to
 “that of the mortgage and deed of trust of April 15,
 “1870.

“It is recited the outstanding indebtedness as herein-
 “before given.

“The proposition is shown that upon the
 “surrender of the two West Side notes
 “for \$1,000,000.00

“and the surrender of the first mortgage
 “bonds of the West Side Company . . . 4,395,000.00

“and the surrender of the second mortgage
 “bonds of the West Side Company . . . 300,000.00

“and the surrender of the interest coupons
 “thereon, amounting with interest to . . . 93,490.00

“and the full satisfaction of the Western
 “Oregon Railroad Company mortgage 1,520,564.05

“and the surrender of the Northern Con-
 “struction Company’s note for 13,006.82

“and upon the stamping of the first
 “mortgage bonds and coupons (ex-
 “cepting those lost and those held in
 “the Congressional land grant sink-
 “ing fund), that the Oregon and
 “California Railroad Company will
 “thereupon pay to the holders of in-
 “debtedness in such proportion as
 “may be agreed upon, cash \$93,755.00

“and deliver in such proportion as

“may be agreed upon new first mort-
 “gage bonds (\$2,000,000.00 issue) . . 1,700,000.00
 “and for the balance of said indebted-
 “ness will credit as payment for re-
 “duced capital stock upon assign-
 “ments from holders of indebtedness. 1,759,122.95

“the total of said indebtedness being. \$3,552,877.95

“At a stockholders meeting held on February 2,
 “1881 it is shown that the stockholders then were:

“R. Koehler, Trustee	\$1,758,700.00
“R. Koehler	100.00
“C. H. Lewis	100.00
“P. Schulze	100.00
“J. N. Dolph	100.00
“C. A. Dolph	100.00
<hr/>	
Total	\$1,759,200.00

“It is evident that the proposed arrangement had
 “been carried out and that therefore the holders of the
 “various items of indebtedness, who apparently were the
 “German bond holders and who were also apparently
 “the actual owners of all of the outstanding stock, had
 “in effect appropriated \$1,759,200.00 of the amounts
 “coming to them in the payment of the indebtedness,
 “and used the same as their payment in full to the Rail-
 “road Company for that amount of capital stock.

“The same result as to outstanding indebtedness and
 “capital stock would have been obtained if the German

“bond holders, being also the stockholders, had paid
“in cash the \$1,759,200.00 and the Railroad Company
“had then used that money, together with the \$1,700,-
“000.00 of bonds and the \$93,755.00 of cash to satisfy the
“\$3,552,877.49 of indebtedness. It is immaterial wheth-
“er the German bond holders and stockholders, being
“identical, were out of pocket by failing to receive \$1,-
“759,200.00 of the indebtedness due them, or by paying
“into the Company’s treasury that amount of money out
“of their own pockets and subsequently receiving it back
“again as payment of the indebtedness due them.”

Whereupon witness further testified that from these books, or corporate records of these Companies he had prepared a statement showing in a general way the financial operations of the Oregon Central Railroad (East Side) and the Oregon Central Railroad (West Side) and the Oregon & California Railroad Company, as gathered from the records of the meetings of the stockholders and directors of the Company, and being shown “Defendants’ Exhibit 380” testified that he prepared that statement and that it is an abstract from the records of the meetings of the directors and stockholders of the Companies named and is correct according to the records; that he has had experience as an accountant and bookkeeper sufficient to justify him to make this statement and compilation.

Whereupon defendants offered in evidence “Defendants’ Exhibit 280” which was received in evidence and is hereinafter set out and described and made a part of this Statement of the Evidence and identified herein as

such.

Whereupon the witness produced a certified copy of the patent issued by the United States to the Oregon & California Railroad Company, which includes the lands described in contract 5394, being the third item of Exhibit No. 9 of the answer and by consent of the parties the same was read into the record, omitting descriptions and is as follows:

“The United States of America.

“To all to whom these presents shall come, Greeting:

“Whereas by the Acts of Congress approved July 25, 1866, June 25, 1868, and April 10, 1869, to aid in the construction of a railroad and telegraph line from Portland in Oregon, thence southerly through the Willamette, Umpqua and Rogue River Valleys to the Southern boundary of Oregon. Authority is given to the Oregon and California Railroad Company of Oregon, a corporation existing under the laws of the State ‘to construct a railroad and telegraph line’ under certain conditions and stipulations as expressed in said Acts and provision is made for granting to the said Company every alternate section of public land designated by odd numbers, to the amount of ten alternate sections per mile on each side of the said railroad on the line thereof and within the limits of twenty miles on each side of said road, not sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time, the line of said road is definitely fixed.

“And Whereas, it is further enacted in said section
“that when any of said alternate sections or parts of
“sections shall be found to have been granted, sold, re-
“served, occupied by homestead settlers, pre-empted or
“otherwise disposed of, other lands designated as afore-
“said shall be selected by said Company in lieu thereof,
“under the direction of the Secretary of the Interior in
“alternate sections designated by odd numbers as afore-
“said nearest to, and not more than ten miles beyond
“the limits of said first named alternate sections.

“And Whereas, official statements from the Secre-
“tary of the Interior have been filed in the General Land
“Office, that Commissioners appointed by the President
“under the provisions of the fourth section of said Act
“of July 25, 1866, have reported to him that the said
“Oregon and California Railroad and Telegraph Line
“commencing at a point in East Portland in the County
“of Multnomah, State of Oregon, and ending at a point
“on the boundary between the States of Oregon and
“California where it joined the California and Oregon
“Railroad a distance of three hundred and sixty miles has
“been constructed and fully completed and equipped in
“the manner prescribed by said Act.

“And Whereas, that portion of said road lying be-
“tween the city of Portland, Oregon, and the town of
“Roseburg in Township 27 South, Range 5 West, a
“distance of one hundred and ninety-seven miles was
“completed within the time prescribed by the law, and
“the balance of the road was completed after the expira-
“tion of such time. And Whereas certain tracts of

“land have been selected by the duly authorized agents
“of the Oregon and California Railroad Company as
“shown by such agent’s original lists of selections ap-
“proved by the local land officers and now on file in this
“office. And Whereas said tracts of land lie within the
“indemnity limits of said grant and are particularly de-
“scribed as follows, to-wit:”

(Descriptions omitted.)

“The said tracts of land as described in the fore-
“going make the aggregate area of ninety-seven thou-
“sand nine hundred and twenty-nine acres and sixty-
“seven hundredths of an acre (97,929.67).

“Now, Know Ye, that the United States of Amer-
“ica in consideration of the premises and pursuant to
“the said Acts of Congress have given and granted, and
“by these presents do give and grant unto the said Ore-
“gon and California Railroad Company of Oregon, and
“to its assigns all the tracts of land selected as afore-
“said and described in the foregoing, yet excluding and
“excepting from the transfer by these presents ‘All Min-
“eral Lands’ should any such be found to exist in the
“tracts described in the foregoing but this exclusion and
“exception according to the terms of the statute ‘shall
“not be construed to include coal and iron lands.’

“To have and to hold the said tracts with the appur-
“tenances unto the said ‘Oregon and California Rail-
“road Company of Oregon, and to its assigns forever
“with the exclusion and exception as aforesaid.

“In testimony whereof, I, Benjamin Harrison, Pres-

“ident of the United States of America, have caused
“these letters to be made patent, and the seal of the Gen-
“eral Land Office to be hereunto affixed.

“Given under my hand at the City of Washington,
“this the third day of March in the year of our Lord,
“one thousand eight hundred and ninety-three, and of
“the Independence of the United States the one hundred
“and seventeenth.

“(Seal)

“By the President Benjamin Harrison,
E. Macfarland, Asst. Secretary.”

Whereupon on cross-examination witness further testified that this statement of the financial affairs of these Companies is based strictly upon what appears in the minute books and other books of these corporations; that the question whether Holladay had accepted \$1,000,000 or \$800,000, or any other particular sum is based upon the fact that he so contended in the reorganization of 1870, and that the Company, by accepting his proposition, virtually conceded it and it so appears in the minutes of the Company relating to that transaction, and he has no way of knowing from these books whether Holladay did actually advance that money himself or whether he had borrowed it and then repaid it out of the bond issue of 1870 and there is no way for him to know whether that did or did not occur, beyond what is set forth in the minute books and there is nothing in the minute books showing how Holladay expended the money that came into his hands, but simply the fact

that the money did come into his hands and was exhausted and that is the only thing that the minute books show concerning it. The minute books do not show or for the main part, the books do not show how he expended the money, they do not show specifically that it was for the purpose of construction. They do not show it in detail.

Whereupon the defendants offered in evidence in connection with the testimony of witness the minute books referred to by him and asked leave to withdraw the same, which was assented to by the Government.

Whereupon, WILLIAM HOOD, called as a witness on behalf of defendants, being duly sworn, testified that he is Chief Engineer of the Southern Pacific Company and its leased lines; was educated as a civil and railroad engineer at Dartmouth College. He has been connected with the construction of all of the Southern Pacific Company lines between Ashland, Oregon, and San Antonio, Texas, and Ogden, Utah, excepting what was built prior to 1867, and has been continuously in the service of the Central Pacific Railway Company, Southern Pacific Railroad Company, and other lines now leased to and operated by the Southern Pacific Company, since May 3, 1867. He was assistant engineer for some time, then assistant chief engineer for a certain period, and then chief engineer for the Central Pacific Railway Company and the Southern Pacific Railroad Company, and as such Chief Engineer or otherwise of the Central Pacific Railway Company was intimately connected with the construction of the road between Roseville Junction and Ashland, known as the

land grant road of the California and Oregon Railroad Company in California, under the Act of Congress of July 25, 1866, and known in Oregon as the Oregon and California Railroad Company, from the state line to Portland, under the same grant, from Marysville to Tehama, and somewhat connected with it from Tehama to Redding, and closely connected with it and actually in charge from Redding to Ashland, Oregon. He recalls an agreement of date October 11, 1886, between the Central Pacific Railroad Company, Pacific Improvement Company, and Southern Pacific Company, known as "Exhibit 1" to the printed joint and several answer of the Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage in this suit, and has seen a copy of same to refresh his memory recently. At the time this agreement was put in force it was handed to him to read for his guidance in connection with the construction of the railroad. He would not remember at this time its dates, or other matters of that description. His remembrance is that he saw a duplicate belonging to the Pacific Improvement Company, which was an executed document, as he remembers. He constructed that portion of the road between Delta and Ashland under this agreement. Roseville Junction to Lincoln is 10.4 miles; Lincoln to Wheatland, 11.1 miles; Wheatland to Yuba, which was then a local name on the railroad immediately south of the Yuba River at Marysville, 10.1 miles, and it should be understood that he had no connection with this construction, but he has compiled this from his office records, which office records he has

renewed since the fire. The methods by which payments were made as the work of construction progressed on that portion of this line constructed by him, was that when a certain number of miles had been built, any convenient number of miles, a certificate would be issued signed by the President of the road and himself, certifying that the Pacific Improvement Company had completed a certain number of miles, and giving initial and terminal points of this certain number of miles—that was from Delta to Ashland, a distance of 132.387 miles. These certificates that Pacific Improvement Company had constructed certain mileage and was entitled to such and such compensation, were issued by the president or vice president in his absence, and by himself as chief engineer. He was an officer of the Central Pacific Railroad Company. The officers who signed these certificates were officers of the Central Pacific Railroad Company. He does not remember occupying at that time any position with reference to the Central Pacific Railroad Company other than chief engineer. As such officer, as its chief engineer, he constructed the road from Delta to Ashland. The company abandoned something like a mile and a half of track south of Ashland, which had been constructed by Oregon and California Railroad Company, and built an entirely new road to correspond, situated somewhat to the eastward of this abandoned road, so that the Central Pacific Railroad Company constructed beyond the Oregon line the distance from the State line between Oregon and California to Ashland, that is, the Pacific Improvement Company con-

structed, for the Railroad Company, between the State line and Ashland. Whether it was the Central Pacific Railroad or the Oregon and California Railroad Company, he could not tell. As Chief Engineer of the Central Pacific Railroad Company he had charge of all that construction, although the contract was in the name of the Pacific Improvement Company. It was under this contract, said Exhibit No. 1, his position as Chief Engineer caused him to be in charge of the construction to see that it was done satisfactorily.

Whereupon, upon cross-examination, witness further testified that the Pacific Improvement Company was, in effect, the contractor, and he was in charge of their work in as intimate a degree as he would be in any case in charge of the work of a contractor, which would mean that he was responsible for the location of the road, its grade system, its curves, and every detail; the contractor, Pacific Improvement Company, building it as directed, and under his immediate supervision. He performed a similar service quite frequently where the Pacific Improvement Company was the contractor. He knows that Huntington, Crocker, Stanford and Hopkins, in a general way, had the reputation of controlling the Pacific Improvement Company, but he did not know. He knew that these were the men who directed and controlled its affairs—he having no personal knowledge of the stockholders. He knew in a general way that they controlled and directed the affairs of that corporation. A great deal of the contract work of the Southern Pacific Company and the so-called constituent companies of the

Southern Pacific system, was done in the name of the Pacific Improvement Company. The cash payments to men on the pay rolls for the construction of the California Line from Delta to the northerly line of the state, were made by the Pacific Improvement Company, excepting his salary and expenses. The contract provided that his salary and expenses should be paid by the Central Pacific Railroad Company. He does not know how the Pacific Improvement Company was paid by the Central Pacific Railroad Company other than the contract, and he is not clear in his remembrance of that in detail. He knows that they were authorized to get paid by his certificate and the certificate of the president. He remembers in a general way that this contract provided that the Pacific Improvement Company should be paid for constructing the railroad from Delta to the northern boundary line by 80,000 shares of the capital stock of the Central Pacific Railroad Company, and \$4,500,000 of bonds. His certificates, however, did not take that into account, they simply certified to the completion of the road in sections, according to mileage. He does not know how they apportioned these payments. He does not remember in detail that a similar contract was entered into between Pacific Improvement Company and the Oregon and California Railroad Company for the construction of the road from Ashland to the southern boundary of Oregon, but he does remember clearly that he certified as to the completion of the road in that district, the same as he did south of the State line, and must have had authority for it. The certificate was

made, as he remembers it, not addressed to any one, simply "The Pacific Improvement Company has completed," etc., etc., specifying the distances; was signed by the president and himself, and the Pacific Improvement Company presented that to the proper company for payment. He is not clear who was president of the Central Pacific at that time. It may have been Charles Crocker; he paid very little attention to those things. The executive officers of that company have changed a number of times in its history, and he could not remember as to the Oregon and California, who was president in 1887. He does not remember of being consulted by the president of the Central Pacific Railroad Company, or any of its officers, with reference to the Oregon and California Railroad property prior to this time, and he did not inspect the road, or its general properties, before the Central Pacific people became interested in the Oregon and California Railroad Company or entered into any contract with reference to it. He did not make any inspection of the Oregon and California railroad, or any part of its railroad, prior to the time that he performed this work in connection with construction. He does not know when the Pacific Improvement Company acquired its holding of the capital stock of the Southern Pacific Company, and has no knowledge whatever as to the ownership by the Pacific Improvement Company of Southern Pacific Company stock. He has no knowledge of the details of any common interest the Pacific Improvement Company, and the Southern Pacific Company, and the Central Pacific Company, or the other

constituents of the so-called Southern Pacific Railroad System, or that they were closely related, or controlled by the same set of men, except such as any other citizen would have through newspapers, and his knowledge would be about as reliable as that of any other citizen in those respects. He had no occasion to know anything about who controlled or directed the affairs of the company, referring to Huntington, Crocker, Stanford and Hopkins. He would be notified that a road was to be constructed; he would see a contract, like the one testified to, to guide him; he would then direct the construction; he would not receive any instructions from any one; they never gave him any, and he controlled the engineers on construction, the same as if they were on his own road, although they were not. He was assistant engineer in 1867, and was not appointed to that place, but was employed. He was appointed assistant chief engineer of the Southern Pacific Railroad Company, and thereafter of the Central Pacific Railroad Company, by Charles Crocker. He was appointed or elected, which ever it was, chief engineer of the Southern Pacific Company, which covered everything, so to speak, *ex-officio*, on account of the lease, but does not remember whether it was an appointment or an election. If it was an appointment, it was by Charles Crocker, as he remembers that Crocker was active here at that time, whatever position he may have held. His relations with Charles Crocker and Leland Stanford, and C. P. Huntington, and Charles F. Crocker, and Mark Hopkins, and D. D. Colton, were entirely relations with

them as railroad officers, that is, as president, vice president, etc., treasurer, and the like of that, directors of the railroad corporations and of the Southern Pacific Company. He had no relations whatever with these men concerning the Pacific Improvement Company, or any other company, excepting as officers of the railroad company. His relations with the Pacific Improvement Company were entirely through its secretary, who was an employe.

“Q. Yes, but you are now stating the nature of your relations with these men, Mr. Hood, whereas I want you to state whether or not the same men did not, in a general way, control and direct the affairs of one company that also did of the others—of one railroad company, of all railroad companies, and of the Southern Pacific Company?”

A. I knew that officially.”

Whereupon the witness further testified that he did not know of his own knowledge, that these same men controlled and directed the affairs of the Pacific Improvement Company. He dealt with the secretary of the Pacific Improvement Company exclusively, frequently from 1888 on. If it had been a practical question in the administration of his affairs to go to the man who controlled and directed the affairs of the Pacific Improvement Company, he would have gone, and did go to the secretary of Pacific Improvement Company, who was a salaried employe, like almost any secretary. He would say that he was dealing exclusively with the secre-

tary of the Pacific Improvement Company. He recalls at certain dates that for some time J. H. Strowbridge was president of the Pacific Improvement Company, and F. A. Douty was secretary, and he remembers that was the state of the case while the road was being built from Delta to Ashland, although he may be mistaken as to the president, but he does know that Strowbridge was for a considerable period president, and Douty was secretary of Pacific Improvement Company, and knows that he went to Douty on business between the Central Pacific Railroad Company and the Pacific Improvement Company. It is difficult to remember specifically how many contracts there were between Pacific Improvement Company and any of the constituent companies of the Southern Pacific Company. He can remember in general what roads they built, but could not give the dates of contracts or terms. For instance, they built the road from Shingle Springs to Placerville, and he thinks the road from Mojave to Needles. He was not chief engineer of that road, and that is why he says he thinks so. He was assistant chief engineer of that road, it was the Southern Pacific Railroad. He thinks that the Pacific Improvement Company built from Indio to Yuma, and he could probably, if he took time, recall other construction. As he recalls, in all the contracts that he has examined for the construction of railroad by the Pacific Improvement Company, payment was to be made in either capital stock or bonds of some of the railroad companies now constituting the Southern Pacific System; the amount of capital stock or bonds

was generally, but not always defined. When the amount was not defined, it was determined by the cost of the road, and a small percent, sometimes five, sometimes ten, for administration service and possibility of loss in marketing securities—that is, the contract would provide that the Pacific Improvement Company should construct the road and it should receive the actual cost, with five or ten per cent for administration. He thinks the contract provided that, but at any rate he remembers instances where that was the way that payments were actually made. This was a good while ago and he don't remember always in detail. He performed exactly the same service as to that part of the railroad situated in the State of Oregon south from Ashland, as he did to that part of the railroad in the State of California from Delta north—his action and certificates were identical. From Delta to Ashland, he was shown the agreement for his guidance, and instructions were given when to commence work. That was really all the instructions he got. As to that portion between the State line and Ashland, his recollection is not clear, except as to one point, and that is, he kept going on with his work. He did not build south from Ashland at the same time that he was building north from Delta. He built straight north through to Ashland continuously and laid track the same way. The last track laid was right in the north end of Ashland yards—in Ashland. That included a new line for a mile and a half south from Ashland, in place of that which had formerly been constructed and abandoned; instead of building to the south end of the line as originally

constructed a mile and a half, or thereabouts, south of Ashland, he built to Ashland direct. He does not know, only in a general way, who built that mile and a half of track that was abandoned, or when it was built, but understood it was a portion of the construction to Ashland from the north. It was not a part of the construction that was commenced under the new management of 1887, and abandoned. To make it clear—in addition to building a mile and a half of track south of Ashland, the people who did that had also started isolated pieces of construction between Ashland and the State line. For instance, they had partially built a tunnel at a place known as Buck Rock. They had occasionally built a little piece of grade. They had commenced and built quite a little of the present Summit tunnel near Siskiyou station, which portion of the Summit tunnel he fixed up, and completed the tunnel. That portion of the Summit tunnel which he mentions at Siskiyou station, which was built by his predecessors, is the only part of their work south of Ashland which he utilized. He could give no details as to the organization which did this work. He did not certify in these certificates as to the amount of cash that should be paid. The certificates simply stated that the Pacific Improvement Company had completed so many additional miles of railroad, from survey station to survey station, blank miles; that is, it specified the miles. They were signed by the president of the road, or a vice president, and himself. That was the last he would see of it. They did not state the amount of money that the contractor was entitled to. He does

not know what was the cost of construction of the railroad from Ashland to the southern boundary line of Oregon. He would be on the work during the period of construction from seven to ten days at a time; perhaps in the next week or ten days he would be as far south as San Diego, and would then swing back and stay there another week or ten days. He kept in very intimate touch with the actual work of construction. He commenced construction from Delta sometime after the spring of 1884. His remembrance is that the work commenced in this way, by spending a little money getting some bridge foundations excavated, and the masonry brought up above flood mark, and so on, ready for fast construction, and that construction went on that way for some little time, and then finally a real force was put to work. This was shortly after the summer of 1884, and he would think it was about the fall that they went to work more in earnest, that is, north from Delta. In addition, he would say that they had done previous to that time some isolated pieces of work north of Delta; he is speaking now of the way the work went on, not the continuous railroad. There was some work done in isolated places along the proposed line of railroad prior to the execution of this contract of October 11, 1886. There was some work done north of Delta in a small way, in advance of the track here and there, during the summer and fall of 1883. Then they stopped entirely the fall of 1883, at which time the track was at Delta. In fact, the track was a mile or two north of Delta, and they recommenced in a small way, with bridge founda-

tions, he thinks, in the fall of 1884, and later commenced more vigorously somewhere in the fall of 1884, or the spring of 1885. He is speaking now regardless of any documents. The Pacific Improvement Company was constructing this railroad at that time, that is, was actually doing the work, and his remembrance is that the final written agreement was made retroactive with respect to this work; that was his understanding at any rate. The Company was paid on that basis. The Pacific Improvement Company had, in any event, done some portion of this work of construction prior to October 11, 1886, and they are the ones who paid the bills. He could only state in a general way the amount of work that was done in that way prior to October 11, 1886. The track was laid a mile or two beyond Delta, north of it, in the summer of 1883, and up to Christmas or thereabouts, there was considerable work done north of Delta, in the way of grading at isolated spots. The work then stopped entirely for quite a period and was commenced again in isolated spots in a small way, he thinks in the spring of 1884, possibly in the next year, he could not be positive now; and the work then went on faster in 1885. The Pacific Improvement Company paid all money to the laborers and others, paid every one but him. There was a great deal of construction done in 1886 north of Delta, and the road was finally completed to Ashland in December, 1887. He thinks the road on January 1, 1887, had the end of the track somewhere near where Weed station is now, a little north of Mt. Shasta—a little north of the summit. The track

was at Igerna, or thereabouts, on January 1, 1887. Igerna is about 57 miles from the State line, and it is about 26 miles from Ashland to the southern boundary of Oregon. As he remembers it, the railroad was constructed and completed during the year 1887 from Igerna to Ashland. His forces were scattered over the line from Igerna to and including Siskiyou Summit tunnel on the first day of January, 1887, and on that date the track had been completed to Igerna, but a very great amount of work had been done north, but he could not say what per cent or proportion of the total work had been done north of Igerna before January 1, 1887, but would simply say that the grading and masonry forces and tunneling force had been scattered over the distance from Igerna to Ager, which is about 40 miles, at off and on points, and forces were also at work or about to commence work on the Siskiyou Summit tunnel, and the tunnels north of that point. The Summit tunnel was situated in Oregon, and he is not clear whether he commenced or was about to commence work on it January 1, 1887, but his remembrance is that he was about to commence work on it. He remembers going up there and finding about four feet of snow about that time, along with Strowbridge, who was, he thinks, president of the Pacific Improvement Company, and a force was sent on there to the tunnel promptly thereafter. It is impossible for him to say whether it was before or after January 1, 1887, that the force actually commenced work on the Siskiyou Summit tunnel in Oregon. The first work that was done in Oregon by the Pacific Im-

provement Company forces, outside of engineering work, was on the Siskiyou Summit tunnel and its approaches, and that commenced, as nearly as he can recollect, somewhere about January 1, 1887.

Whereupon, upon redirect examination, the witness further testified:

Q. Mr. Hood, in order that you may refresh your memory and make any explanation you may desire, I call your attention to the fifth clause in this agreement of date October 11, 1886, being Exhibit 1 of the answer, and under which you, as chief engineer of the Central Pacific Railroad Company constructed the line from Delta to the State line between California and Oregon, which reads: "Fifth. That the said Pacific Improvement Company shall and will repay to the said Central Pacific Railroad Company within one hundred and twenty days from the date thereof all sums of money with interest thereon, at the rate of six per cent per annum heretofore by the said railroad company expended upon that portion of its aforesaid line of Railroad and Telegraph Line lying north of Delta, and that if said railroad company has not fully paid all the costs and expenses incurred as aforesaid, the said improvement company will assume the whole thereof and will upon demand pay off and discharge the same, or that if the said railroad company is compelled to pay the same or any part thereof the said Improvement Company will within one hundred and twenty days after notice thereof, repay to the said railroad company the full amount of any such payment or payments, with interest at the

rate aforesaid.” And referring to same now, isn’t it true that, prior to the execution of this contract of October 11, 1886 (Exhibit 1 of the answer) the Central Pacific Railroad Company had done construction work from Delta north, under your supervision as chief engineer—you had done it yourself, in fact—for the Central Pacific Railroad Company, and that this fifth clause in this agreement was to cover that?

A. Well, that is my general remembrance of it. You understand that absolutely the Pacific Improvement Company organization paid out these moneys—these advance moneys that you speak of. Whether they did it acting, for instance, for convenience, for the Central Pacific Railroad Company or not, who had no such organization, I could not tell you at this late date. But, as a matter of fact, the Pacific Improvement Company paid the payrolls and the material bills. Now, if they did it for the Central Pacific Railroad Company and immediately were reimbursed therefor, as agents, I am simply in ignorance of it—don’t know anything about it.

Q. You remember the fact, though, that physically there was construction north of Delta before the date of this agreement of October 11, 1886?

A. Yes, surely; and we all considered it retroactive; and I know that actually the Pacific Improvement Company organization paid the money, perhaps as agents of the Central Pacific—I am in ignorance of that; don’t know anything about it.

Q. You constructed, as chief engineer or assistant

chief engineer, roads for the Central Pacific Railroad Company and the Southern Pacific Railroad Company long before there was any Pacific Improvement Company?

A. Oh, yes.

Q. Or any Southern Pacific Company?

A. Yes.

RE-CROSS EXAMINATION.

Q. Well, now, prior to the organization of the Pacific Improvement Company, what company was the contractor that the Central Pacific Railroad Company dealt with, and the Southern Pacific Railroad Company?

Q. Well, I will say, what company or individual?

A. I think the Pacific Improvement Company was organized—

Q. Now, it is stipulated in this case that it was organized in November, 1878, Mr. Hood, and I assume that is the correct date.

A. Yes—I was trying to think when in the 70's it was. It was some time in the 70's—I remember that.

Q. I am stating that to refresh your recollection.

A. Yes, it was in the 70's—I remember that. There was a Contract and Finance Company that did work.

Q. What was the name of that company?

A. Contract & Finance Company.

Q. Oh, that is the corporate name?

A. Yes, Contract and Finance Company. And there was at one time a Southern Development Company, but I think that was subsequent to 1878. And there was a Western Development Company. My impressions are that the Western Development Company was just prior to the Pacific Improvement Company.

Q. Well, didn't the Pacific Improvement Company in effect succeed the Western Development Company?

A. That is my remembrance, without any specific knowledge. That is my impression.

Q. Now, in a general way, Mr. Hood, these various contracting companies were controlled by the same general interests, were they not?

A. Well, I cannot testify in any general way. I can testify only that I had relations of the kind I have described with the officers of the railroad company and with the officers of the sundry construction companies. I consider them as contractors.

Q. Yes, but there was some relation between the construction companies and the railroad companies?

A. I had no knowledge whatever of that kind, any more than any contractor.

Q. Well, was it not a matter of common history that those companies were companies controlled by Huntington, Crocker, Stanford and Hopkins?

A. No, nothing but hearsay—nothing but common talk. It was common talk. I knew nothing about it.

Q. That was the common talk, was it not?

A. Common newspaper talk.

Q. Did you ever see it denied?

A. I don't remember. Quite willing to testify to anything I know.

Q. I understand; but I think you are unduly conscientious about it. I think that your knowledge is sufficient to enable you to testify to some of the facts that I have asked you, and you are reluctant because you are too conscientious about it.

A. Not at all. I would be very glad to testify to anything that I know, but I am unwilling to testify to something that I never had any means of proving.

Q. Well, in your dealings with these various contracting companies, did you not learn who were the controlling factors of the company?

A. Ordinary talk—no specific knowledge. I knew only the officers of the contracting companies.

Q. State whether or not the contracts made with these other construction companies were carried on in the same general way as the contracts that were made with the Pacific Improvement Company.

A. I had no specific knowledge of the contracts until the time that we now have in hand; that is, the construction of the Central Pacific Railroad or California and Oregon Railroad. That was the first time that I was chief engineer of the Railroad Company and had to handle the contracting company. That is the first

contract that I ever say. I have seen anything there was subsequent to that time, but never anything before. Previous to that time I was assistant chief engineer of the Central Pacific Railroad or Railway, which ever it might have been from time to time, and of the Southern Pacific Railroad of the sundry states and territories, actively in charge of work wherever work was going on the fastest, but not in charge of certificates as to what contractors had done.

Q. Well, now, in your entire experience from May 3, 1867, with these different companies that you have mentioned, did you ever know of an instance where the railroad company itself constructed the railroad, that is, without contract, you understand?

A. Well, a good many instances recently.

Q. Well, I will limit the question, then, to the year 1901?

A. I think that in some instances the Pacific Improvement Company did not have a contract, where they constructed the roads, but were paid cost and per cent; I think that was the case; but in general in years back the roads were built by contract with a construction company. It is impossible for me to be specific.

Q. I understand. Now, did the Central Pacific Railroad Company have any construction equipment? Did it own any construction equipment, other than the limited amount always carried by a railroad for the purposes of its repairs?

A. I don't know of any.

Q. And is that true of the other railroad companies with which you have been connected?

A. That is in general true, yes. It is true today where we let contracts to individuals.

REDIRECT EXAMINATION.

Q. Isn't it true, Mr. Hood, that nearly all construction today that is undertaken by railroad companies, is let to contractors, whether organized as corporations or as firms, or partnerships, or individuals; the railroad company protecting itself by written contracts and supervision, inspection, and approval of its chief engineer?

A. Almost universally true, so nearly so as to be stated as universally true.

RECROSS EXAMINATION.

Q. Is it usual for the railroad company to enter into its construction contracts with a corporation controlled and owned by a part of the stockholders and officers of the railroad company itself?

A. I have no information that I could testify on in that particular.

Q. Now, Mr. Hood—Mr. Huntington, Mr. Crocker, Mr. Stanford, and Mr. Hopkins were influential in the affairs of the Southern Pacific Railroad Company, the Central Pacific Railroad Company and these other companies that you have mentioned, were they not, down to the year 1901?

A. I knew them as officers of those companies—

officers and directors.

Q. And you knew that they were influential in the management of the affairs of those corporations, did you not?

A. I so considered them.

Q. Now, did you not also know that they were influential in the affairs of the Pacific Improvement Company?

A. No knowledge of it definitely.

Q. Have you knowledge of it indefinitely?

A. I have no means of adding to my previous testimony on that subject.

Q. You dealt with the Pacific Improvement Company from 1878 until 1901, did you not, at various times?

A. Up to the time that I was chief engineer of the Central Pacific Railroad Company and the Southern Pacific Railroad Company, and also the Southern Pacific Company, whenever I had any relations with the Pacific Improvement Company they paid my salary and I was working for them.

Q. Who employed you?

A. The Pacific Improvement Company.

Q. What individual?

A. According to contract. You will notice the contract provides for the payment by the Pacific Improvement Company of engineering salaries, except of

the chief engineer, and I was not the chief engineer.

Q. But what individual employed you for the Pacific Improvement Company?

A. The chief engineer of the railroad companies, as, for instance, myself after I became chief engineer, employed all the engineers, in the way of engaging them, that the Pacific Improvement Company paid the salaries and expenses of.

Q. Well, then, the relations between the Pacific Improvement Company and the railroad company were so intimate that the railroad company actually designated the employees of the Pacific Improvement Company?

A. The Pacific Improvement Company had no power to employ engineers pertaining to these constructions, except those engineers were approved by the chief engineer of the railroad company. This was to enable the chief engineer of the railroad company to suitably protect the interests of the railroad company.

Q. Well, now, will you please examine Exhibit 1 attached to the answer, and tell me where the provision is to authorize the railroad company to designate the engineers that shall be employed by the Pacific Improvement Company?

A. The second clause on page 88: "Second. That the said Pacific Improvement Company, shall furnish and pay for all the engineer service necessary or requisite for the location and construction of said railroad and its appurtenances, such location and construction to be

subject to the approval of the President or Chief Engineer of said Central Pacific Railroad Company, who may direct such changes to be made as they may deem proper; but, the salary of the Chief Engineer shall be paid by the said Central Pacific Railroad Company.”

Q. Well, now, where is there anything in there that authorized the officers of the railroad company to designate the engineers that should be employed by the Pacific Improvement Company?

A. The fact that the location and construction of the railroad was to be subject to the approval of the President or Chief Engineer of the railroad company, and that approval was in fact delegated to the Chief Engineer, practically, implied that the engineering force should be to his satisfaction, and was always so construed, and was always so practically carried on.

Q. Well, this provision authorized the chief engineer of the railroad company to change the route of road as surveyed by the engineers of the Pacific Improvement Company?

A. Which meant that he could order the engineers of the Pacific Improvement Company to do anything he chose.

Q. Does that mean that the railroad company could designate the employees of the Pacific Improvement Company?

A. Absolutely; and they did so.

Q. So that the Pacific Improvement Company was

entering into a contract with the railroad company to build the road for a certain specified price, and they had no means of knowing where the road would be located, or what would be the actual cost of construction?

A. Other than such information as might be given them by the chief engineer.

Q. Well, where is there anything in this contract that designates the location of the road?

A. I don't know of any place.

Q. Well, can you explain what relation existed between the Pacific Improvement Company and the Central Pacific Railroad Company that would induce the Pacific Improvement Company to construct a road of over 130 miles in length, or of over 100 miles in length, for a certain specified price, and leave it to the railroad company to afterwards determine where the railroad should be located, and how it should be constructed?

A. It was known, as it is always known, very closely where the railroad was going to be built. The terms of the act of the land grant, if I remember rightly, practically specified a general route in the way of where the railroad should go, up the Sacramento River, etc. And today, if we were to let a contract to an individual or a contracting firm, as is not unprecedented in railroad work, that they should build a certain distance of railroad for, for instance, a certain lump sum of money, we should unquestionably insist, even where they paid as a part of their work the salaries and expenses of the engineers

on location and construction, that those engineers should be exclusively, in all essential matters, under the orders of the chief engineer of the railroad, and their personnel should be subject to his approval. We would not let a contract any other way to John Smith at this minute, under any circumstances, if we wished to protect the interests of the railroad company.

Q. I want to ask this witness, as a practical engineer, if he ever knew of a contract between strangers—I mean, where the contracting parties had no other relations—in which the contractor agreed to build a railroad between certain specified points for a certain lump sum, and leave to the railroad company the right to designate the location of the road afterwards?

A. The location of the road is generally approximately designated in advance, or no contractor or firm would make such a proposition.

Q. Don't the contracts provide expressly where the survey shall be, and don't the ordinary railroad construction contracts include profile maps and everything, showing the amount of grading, and the amount of tunneling, and all other general features of the proposed line of railroad?

A. Always subject to change.

Q. Certainly. But when they are subject to change, do they not always provide for a proportionate compensation to the contracting party?

A. Generally by the cubic yard, or lineal foot, or

other function.

Q. But in this instance the Pacific Improvement Company agreed to take 80,000 shares of the capital stock of the Central Pacific Railroad Company, and \$4,500,000 of its bonds, and construct a railroad from Delta to the State line, upon such route as the railroad company might thereafter designate?

A. Unquestionably, except as generally outlined in the contract. But I am not clear as to the drift of your question. Is it that they made a bad trade?

Q. No, it is because the Pacific Improvement Company, and the Central Pacific, and the Southern Pacific were one concern, and it didn't make any difference to them what the terms were?

A. I know nothing about that.

A. I know nothing about the relations of the companies, other than as shown in the contract.

REDIRECT EXAMINATION.

Q. This is a land grant road that was under construction, and it had to be constructed on a line of definite location, did it not, under the requirements?

A. General route.

Q. Yes, under the requirements of the Act of Congress; and the first paragraph of Exhibit No. 1, page 87 of the printed answer of the defendants, uses this language: "That the said Pacific Improvement Company shall in a good workmanlike manner construct,

finish, furnish and complete the railroad and telegraph line of the said Central Pacific Railroad Company, commencing at a point near the said town of Delta and running thence in a general northerly direction by the most practicable route to a point on the Southern boundary line of Oregon, there to connect with the road of the said Oregon and California Company a distance of one hundred and four miles, as near as may be, together with the rolling stock, buildings, instruments, and fixtures thereof," etc.

A. Yes.

Q. Now, that was the line upon which that railroad was proposed to be constructed, was it not?

A. Yes, sir.

Q. And at that time the Central Pacific Railroad Company, as you have testified, had already proceeded with considerable construction prior to the date of that agreement?

A. Yes, sir.

Mr. Townsend: This witness has said the Pacific Improvement Company did—the Pacific Improvement Company paid the bills?

A. Paid the bills.

Mr. Townsend: Well, the Pacific Improvement Company did the work, did they not?

A. Not of necessity; they might have been agents of the Central Pacific.

Q. The Central Pacific Railroad Company had

theretofore located this line, and had done some general construction along between Delta and the State line, as you have heretofore testified?

A. Yes, sir.

Q. But the bills for that work were either paid by the Pacific Improvement Company, excepting your own salary, or thereafter assumed?

A. Yes, sir; that was my understanding of it.

Q. The map of definite location of this line had been filed in the General Land Office as early as 1871, had it not?

A. Very early, before I had anything to do with it.

Q. And the road today is, substantially, constructed and operated where it was originally located?

A. Yes, sir, where it was originally filed.

Q. Yes, that is what I mean. So that, as a practical proposition, any contractor could, in advance of making his contract, ascertain substantially where the road was to be built, and its probable cost?

A. He could form an idea of the practicable final location of the road and its probable cost.

RECROSS EXAMINATION.

Q. Well, now, Mr. Hood, I don't want to have an extended argument with you about this, but there are many ways of building a railroad from Delta to the Northern boundary line of the State, along the identical

route designated by the maps filed by the railroad company? Were there not?

A. You mean—

Q. I mean as to grades and curves?

A. You mean whether it would hit a point harder, or less, and so on?

Q. I mean, there could be many different plans of constructing it over that identical route?

A. In detail, yes.

Q. As to grades, and curves, and other detail?

A. Yes.

Q. And the ascertainment of those details would be essential to approximate the probable cost of construction, would it not?

A. Except in this way; that it was specified and understood that it should be located in a practicable and commonsense manner.

Q. Yes, but, for instance, it might cost twice as much to construct a railroad between those two points which at no place should have more than a two per cent grade than to construct one which might have four per cent grades?

A. It might cost a great deal more, yes.

Q. And those details are essential to know in order to approximate or estimate the probable cost of construction?

A. It might differ very materially with the grade system.

Whereupon, the witness, upon cross examination, further testified that he has no data of any kind and there is no record existing, by which he would know, or by reference to which he could approximate the cost of construction of the railroad from Delta to Ashland. He saw the contract of October 11, 1886, identified as Exhibit 1 of the answer, in executed form, at about that time. He drew the conclusion from the contract that he was to build the road properly and to his satisfaction, and to certify to its having been so completed from time to time, and he acted accordingly. He has no remembrance or knowledge that there may have been some other contract that succeeded the contract of October 11, 1886, which determined the price to be paid, and the other details of the transaction. He only recollects this one contract, and he supposes that the railroad was constructed by the Pacific Improvement Company for the Central Pacific Railroad Company pursuant to this contract, which is the only one that came to his attention. He acted according to that contract, certified the distances constructed, and saw that the road was built right. It was the custom to certify as to the completion of the road in sections, and he refers to the specification in the contract to that effect. He would say that that was the general provision that he referred to, and that his recollection is that he certified to the completion of the road in sections, as provided by this contract. He could not change his previous testimony, which was to

the effect that, physically, he went right on and built the road in Oregon, and certified to its completion, and whether it was under this contract or another contract, he could not possibly tell.

Whereupon, upon redirect examination, the witness was shown an official volume, published by authority of the State of California, called the "Seventh Annual Report of the Board of Railroad Commissioners of the State of California, for the year ending December 31, 1886." Whereupon, there being no objection to the introduction of the portion of said volume hereinafter set out, the defendants offered in evidence the official report of the Central Pacific Railroad Company for the year ending December 31, 1885, printed therein, and the same was received in evidence and read into the record as follows:

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No. 2400

United States Circuit Court of Appeals Ninth Circuit

Appeal from the District Court of the United
States for the District of Oregon

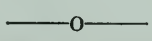
OREGON & CALIFORNIA RAILROAD
COMPANY, A CORPORATION, *et al.*,
Defendants and Appellants

JOHN L. SNYDER, *et al.*,
Cross-Complainants and Appellants

WILLIAM F. SLAUGHTER, *et al.*,
Intervenors and Appellants

vs.

THE UNITED STATES OF AMERICA
Appellee



TRANSCRIPT OF RECORD

VOLUME V

PAGES 2085-2666

FILED

APR 4 - 1914

TITLE

NAMES AND ADDRESSES OF SOLICITORS UPON THIS APPEAL

For Appellants

OREGON & CALIFORNIA R. R. CO., et al.:

WM. F. HERRIN,
P. F. DUNNE,
J. E. FENTON,
San Francisco, Cal.

WM. D. FENTON,
Portland, Oregon.

For Appellants—JNO. L. SNYDER, *et al.*:

A. W. LAFFERTY,
Portland, Oregon.

For Appellants—WM. F. SLAUGHTER, *et al.*:

L. C. GARRIGUS,
A. W. LAFFERTY,
MOULTON & SCHWARTZ,
Portland, Oregon.

DAY & BREWER,
Seattle, Wash.

A. C. WOODCOCK,
Eugene, Oregon.

For Appellee:

JAMES C. McREYNOLDS,
Attorney General.

CLARENCE L. REAMES,
U. S. Dist. Attorney for Oregon.

B. D. TOWNSEND,
F. C. RABB,

Special Assistants to the
Attorney General.

No. _____

United States Circuit Court of Appeals

Ninth Circuit

Appeal from the District Court of the United
States for the District of Oregon

OREGON & CALIFORNIA RAILROAD

COMPANY, A CORPORATION, *et al.*,

Defendants and Appellants

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Interveners and Appellants

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THE UNITED STATES OF AMERICA

Appellee

—o—

TRANSCRIPT OF RECORD

VOLUME V

PAGES 2085-2666

“CALIFORNIA RAILROAD COMMIS-
SIONERS.

REPORT 7.

1886.”

SEVENTH ANNUAL REPORT

OF THE

Board of Railroad Commissioners

OF THE

STATE OF CALIFORNIA

FOR THE

YEAR ENDING DECEMBER 31, 1886.

(SEAL).

SACRAMENTO.

State Office. P. L. Shoaff, Supt. State Printing.
1887.”

Page 233:

“Central Pacific Railroad Company,

Names and Residences of Officers and Directors.

Leland Stanford, President San Francisco, Cal.

C. P. Huntington, First Vice-President

23 Broad Street, New York, N. Y.

Charles Crocker, Second Vice-President,

23 Broad Street, New York, N. Y.

Timothy Hopkins, Treasurer San Francisco, Cal.

E. H. Miller, Jr., Secretary San Francisco, Cal.

Charles F. Crocker San Francisco, Cal.

Moses Hopkins San Francisco, Cal.

Business Address of the Company.

Fourth and Townsend Streets San Francisco, Cal.

No. 23 Broad Street New York, N. Y.

The Central Pacific Railroad Company was incorporated August 22, 1870, and formed by consolidation of the companies whose names and dates of incorporation are shown in the table below:

1. Central Pacific Railroad Company, consolidated June 23, 1870. Central Pacific Railroad Company of California (chartered June 28, 1861; amended October 8, 1864.)

The Western Pacific Railroad Company, chartered December 13, 1862 San Francisco Bay Railroad Company, chartered September 25, 1868	}	The Western Pacific Railroad Company, consolidated November 2, 1869.
---	---	--

2. California and Oregon Railroad Company, consolidated December 18, 1869.

California and Oregon Railroad Company, chartered June 30, 1865	} California and Oregon Railroad Company, consolidated Jan. 16, 1868.
Marysville Railroad Company, chartered November 29, 1867..	
Yuba Railroad Company, chartered November 17, 1862.....	

3. San Francisco, Oakland and Alameda Railroad Company, consolidated June 29, 1870.

San Francisco and Alameda Railroad Company, chartered March 25, 1863.....	} San Francisco and Alameda Railroad Company, consolidated Oct. 15, 1868.
San Francisco, Alameda and Stockton Railroad Company, chartered December 8, 1863....	

San Francisco and Oakland Railroad Company, chartered October 21, 1861.

4. San Joaquin Valley Railroad Company, chartered February 5, 1858.

The above four roads were consolidated August 22, 1870, under the name of the "Central Pacific Railroad Company."

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"1. Date when the road, or portions thereof, were opened for public use (northward) :

From Roseville Junction to Lincoln. . . Oct. 24, 1867.
 From Roseville Junction to Wheatland. Oct. 28, 1867.
 From Roseville Junction to Yuba. . . . Sept. 19, 1868.
 From Roseville Junction to Marysville. June 1, 1869.
 From Roseville Junction to Nelson. . . . May 31, 1870.
 From Roseville Junction to Chico. July 2, 1870.
 From Roseville Junction to Sesma. . . . July 11, 1871.
 From Roseville Junction to Tehama. . Aug. 28, 1871.
 From Roseville Junction to Red Bluff. . Dec. 6, 1871.
 From Roseville Junction to Redding. . Sept. 1, 1872.
 From Roseville Junction to Delta. . . . Sept. 1, 1884.”

Page 259:

“State of California,
 City and County of San Francisco. } ss.

Charles F. Crocker, Acting President of the Central Pacific Railroad Company, and E. H. Miller, Jr., Secretary of the said company, being duly sworn, depose and say, that the statements, tables, and answers contained in the foregoing sheets, have been compiled and prepared by the proper officers of said company, from its books and records, under their direction and supervision; that they, the deponents, have carefully examined the same, and that as now furnished by them to the Board of Railroad Commissioners, they are, in all respects, just, correct, complete, and true, to the best of their knowledge, and, as they verily believe, the same contain a full and true exhibit of the condition and affairs of said

company on the thirty-first day of December, 1885.

CHAS. F. CROCKER,

E. H. MILLER, JR.

Subscribed and sworn to before me, this fourteenth day of July, 1886.

E. B. RYAN, Notary Public in and for the City and County of San Francisco, California.”

Whereupon defendants offered in evidence in connection with the testimony of witness, a certified copy of a resolution of Board of Directors of the California and Oregon Railroad Company, adopted October 8, 1866, assenting to the Act of Congress of July 25, 1866, and the same was received in evidence, marked “Defendants’ Exhibit 284,” subject to the objection of the Government that the same was immaterial and irrelevant, which said Defendants’ Exhibit 284 is hereinafter set out and described and made a part of this statement of evidence, and identified as such.

Whereupon defendants offered in evidence as a part of the testimony of witness, a certified copy of the reports of the Commissioners to the President of the United States, approving and accepting the railroad constructed under the Act of July 25, 1866, from Roseville Junction northward 77.6 miles to a point near Chico, in California, of date August 9, 1870, with endorsements of approval and acceptance thereof by the Secretary of the Interior and the President of the United States, which reports were received in evidence and marked “Defendants’ Exhibit 285,” to which counsel

for complainant objected as immaterial and irrelevant, which said Defendants' Exhibit 285 is hereinafter set out and described, and made a part of this statement of the evidence, and identified as such.

Whereupon GEORGE M. CUMMING, called as a witness on behalf of defendants testified that he resides at San Francisco, is a civil engineer by profession, retired at the present time. He was shown what to the best of his recollection was a copy of the agreement of October 11, 1886, being Exhibit 1 to the answer of the Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage in this suit, and asked to see if he could locate the original. To the best of his recollection an executed copy of this instrument was at one time in the files of the Pacific Improvement Company, in whose employ he was for quite a number of years. He called at the office of the Pacific Improvement Company in this City sometime in the early part of 1912. He does not remember exactly the month, and made a search of their office and also of the warehouse over in Alameda, in which place was supposed to be all the papers that they had that they were not using at that time, papers that were taken away from their own vault at Fourth and Townsend and stored after the fire of April, 1906, in San Francisco. He examined all the papers in that storehouse, paper by paper and was unable to locate the original of that. He was given absolutely free access to all the papers of the Pacific Improvement Company and searched very care-

fully every place where the paper should possibly have been. This typewritten copy is the one which was handed to him by Judge Singer to guide him in looking for the original, and while he could not state positively, in a general way he thinks it is a correct copy of the original document which he saw while he was in the employ of the Pacific Improvement Company, in its office or in its possession. He had the handling at one time, as such employe, of a great many contracts the details of which he does not remember, but while he cannot positively swear to it, he is almost positive that he must have handled that document in the course of his employment and he would say that this is a copy of the document which he handled. He was assistant engineer on the construction of the line between Delta and Ashland and an employe of the Pacific Improvement Company. He took orders from Mr. Hood who was in charge of construction. Witness was the office engineer in charge of the office work representing the Pacific Improvement Company in the construction of that mileage. He was not aware at the time, that he was in charge of the office and engaged in construction under the supervision of Chief Engineer Hood, under this contract, but he presumed that he was; that is, at that time he was not aware personally of that contract excepting in a general way. They knew that they were working for the Pacific Improvement Company which was building the road under contract. They understood that the work was to the State line for the Central Pacific Railroad Company. He was in charge of the

office under Mr. Hood but not in charge of construction and all of this time he was acting as an employe of and paid by the Pacific Improvement Company. All that he knew as to whether or not that railroad from Delta north to the State line was constructed by the Pacific Improvement Company under its contract said Exhibit 1, is that he was an employe of the Pacific Improvement Company and they were building the road for these different companies, but as to the existence of that specific contract at that time, he was not aware of it; that is, he was in a subordinate capacity. He does not know of his own knowledge who paid for the construction of that part of the railroad, what Company received the pay, excepting that he knows as an office engineer he made estimates and was an employe of the Pacific Improvement Company and they as contractors had at least one subcontract for masonry. The Pacific Improvement Company had no outfit for building masonry and that contract was sublet. He prepared the estimates at the end of the month for the masonry on the different 20 mile sections as they went along and turned this in to the Pacific Improvement Company. He knows that the Pacific Improvement Company paid these bills to the masonry contractor James Scobey. Witness was personally on the construction work from Delta to Ashland from June, 1886, to sometime in the fall of 1887. When he started in they were camped at a place called Mears Creek, in Shasta County, California, north of Delta on the first 20 mile section. They always counted by 20 mile sections north of Delta. That was

June, 1886. He started in at Mears Creek in June, 1886. The work had been progressing some time before that. He had been employed in the office in San Francisco for a time and had gone up on this construction work in 1886 in June, and they were there until some time in July when they moved their camp to a point just above Dunsmuir, they were there until sometime in August or September, 1886, when they moved to Sisson Station; they then moved from there and held a Thanksgiving Day celebration when the camp was at Edgewood, in Siskiyou County. They moved from there to what was the Salt Works on the Shasta River, several miles this side of the station which is called Montague. In January he came to San Francisco, just after the new year of 1887. They celebrated Christmas by going into Yreka from this place at the Salt Works and along in February, 1887, they moved to a point about 3 or 4 miles south of the Klamath River opposite Laird's ranch and on the first of June, 1887, they were camped right at the State line. In June or July they moved from the Siskiyou Mountains and camped on the land of Dollarhide who owned the toll road. That was the last camp that they had that he was in. That was the main office camp, besides that they had other smaller camps where an assistant engineer having a party in charge, or four or five men, was either ahead or behind the main office. They had small parties a great many miles ahead of them, but he is speaking now of the general office force, the headquarters. He left somewhere in the fall before the last spike was driven and does not recol-

lect now the exact date that he left. He quit about a month or two before the construction was completed in December, 1887. The work was well on to Ashland, as far as grading was concerned. He had been to Ashland and was familiar with the work going on, but did not stay until the end. Towards the end work slackened up, the number of men employed became gradually less as they got towards the finish, but he remembers as a matter of historical fact that the last spike was driven in December or before Christmas, 1887, from the fact of the return of some of the men from up there.

Whereupon defendants offered in evidence the type-written copy of this document of date October 11, 1886, being Exhibit 1 of the answer.

Whereupon witness further testified that to the best of his recollection he was sufficiently familiar with the general records of the Pacific Improvement Company and made such a search based upon his familiarity with such records that he can assure the Court that the executed copy of this contract "Defendants Exhibit 283" was once in existence among the records and files of the Pacific Improvement Company, that it has since been lost and that it cannot now be found or produced and that "Defendants' Exhibit 283" is, according to his recollection, a copy of that lost instrument.

Whereupon counsel for complainant objected to said evidence as immaterial and irrelevant.

Whereupon said "Defendants' Exhibit 283" was received in evidence and marked "Defendants' Exhibit

283" and is hereinafter set out and described and made a part of this Statement of the Evidence and identified herein as such.

Whereupon witness further testified that he first entered the employ of the Pacific Improvement Company in 1881, some little time after he graduated from the University of California. He was first in its employ in Monterey, making surveys around Hotel del Monte and Pacific Grove, and in 1882 was in the employ of the Central Pacific Railroad Company, under S. S. Montague, chief engineer and continued in his employ until along in 1883 or '4 or '5. He was in the employ of the Pacific Improvement Company from 1885 until the fall of 1887, the time of the completion of this road. He entered the employ of the Southern Pacific Company and was in their employ until 1890. He re-entered the employ of the Pacific Improvement Company, in its office, from 1890 to 1902. After 1902 he was employed by the Southern Pacific Company up to 1910 and resigned from the employment of the Southern Pacific Company, December 31st, 1910. The president of the Pacific Improvement Company in the early days, along about 1883, '4, '5 and '6 was J. H. Strowbridge, but as he understood it, according to the by-laws of the Company, the secretary, F. S. Douty, was the executive officer and he knows that he was authorized to perform many acts as such executive officer. All of his business was done with Frank S. Douty. He was supposed to be the executive officer of the Company. So far as his own employment was concerned with regard to the Pacific

Improvement Company, Douty was the man with whom he had to do. Witness was of course a subordinate employe and not an officer. The Pacific Improvement as far as he was concerned was a separate entity or corporation and was always looked upon as such, as having no connection with any of the others. Mr. Douty himself used to impress that upon his employes. Some of them, whether joking or in earnest, would ask the relationship to the Central Pacific Railroad Company and later to the Southern Pacific Company and Douty always insisted that they were absolutely separate corporations and had no connection one with the other. The Southern Pacific Company was incorporated in 1884. He did not personally know, while he was an employe of the Pacific Improvement Company, anything about the holdings of the stock or the control of the Pacific Improvement Company by any of these railroad companies. He had no access to the stock books whatever. So far as he knew no one directed Douty what to do or what not to do. He took orders himself from Douty and understood, and from his recollection of the by-laws, Douty was authorized and empowered to do a great many things. For instance, to sell land, execute deeds and contracts. The Southern Pacific Company, so far as he knew never undertook to make any direction or supervision or any orders directing or controlling the Pacific Improvement Company or its employes. There was an incident when they were in the same building at Fourth and Townsend when the Southern Pacific Company issued a set of rules for the

guidance of the employes of the company and for the tenants of the building. These rules were framed under glass and sent around to the different departments and one was sent in to the office of the Pacific Improvement Company. Douty called one of the clerks in the office, presented him with these and told him that he wanted these rules carried out. The clerk said that he would see that they were carried out. Douty said, "Excuse me, you don't understand what I mean. I want you to take these rules and carry them out and throw them in the ash heap. The Southern Pacific Company has nothing to do with us. We don't take orders from them." That was the general tenor of the two companies as far as the employes knew. He knows that there were quite a number of contracts where the Pacific Improvement Company constructed railroads or had contracts for the construction of other roads, or other properties other than this particular one of October 11, 1886. They were all kept in a box called "Contracts" that is, contracts for the construction of different lines. There was one for the Southern Pacific branch railway, one for the line from Collis to Fresno, one from Shingle Springs to Placerville, a lot of small roads that were built, and that the Pacific Improvement Company built under contract with these different roads. These roads were all subsequently incorporated either into the Central Pacific Railroad Company or the Southern Pacific Railroad Company, but he could not say who owned them all at the time they were built. He knows that they were small companies, separate corporations, and had

separate directors. The Pacific Improvement Company, during the time it was engaged in the construction of railroads, always had a construction outfit up to a certain time, but somewhere late in the 1890's the Pacific Improvement Company sublet its contracts to other contractors and did not actually perform the work themselves. Charles Crocker, the father of Charles F. Crocker, was the actual railroad builder. He was the man out in the field himself. He died in 1888. Crocker was present when the spike was driven. He was specially requested to come up there. C. P. Huntington, Leland Stanford, and T. R. Judah are dead. S. S. Montague, former chief engineer of the Central Pacific Railroad Company, died in 1884. Mark Hopkins died in 1887, F. S. Douty died April 11, 1900. J. H. Strowbridge is still alive, but he has not seen him for a great many years. He must be an old man well on to 90. He lives in Alameda County, but has not heard of him for a long time. Witness is informed that the Pacific Improvement Company still owns Del Monte and the property at Pacific Grove,—he has never heard of its parting with the title.

Whereupon upon cross examination, witness further testified that he graduated from the University of California in 1881, and shortly afterwards entered the employ of the Pacific Improvement Company, making application for the position to F. S. Douty.

“Q. Now, you have known, during all of your experience with the Pacific Improvement Company, the

general historical fact that C. P. Huntington, Leland Stanford, Charles Crocker and Mark Hopkins or their respective estates after they died, controlled and virtually owned the Pacific Improvement Company, did you not?

A. Well, I personally, of course, did not know that, but it was so stated in the papers and public prints many times.

Q. I don't mean, now, Mr. Cumming, to ask you to state as to the actual ownership of stock, but this general historical fact is what I wish to bring out. That is true, is it not?

A. That was generally believed in California.

Q. Do you know whether Mr. Douty owned any of the capital stock of the Pacific Improvement Company, other than a few qualifying shares to act as a director?

A. Well, I don't think he did. I don't know, though.

Q. What I mean is this, Mr. Cumming: In the same general way that you know that Mr. Harriman was the controlling spirit of the so-called Harriman lines, and Mr. Hill is the controlling spirit of the so-called Hill lines, you do know the historical fact that these four gentlemen who were associated in business, and were sometimes called the "Big Four" of California, did control the affairs of the Pacific Improvement Company?

A. Well, as I say, it was generally believed in California that that was so.

Q. Well, that has been believed so long that it has become an historical fact, has it not?

A. Well, I don't know whether I am competent to say that or not. I presume it has.

Q. Now, the same gentlemen also controlled the affairs of the Central Pacific Company, did they not?

A. The same answer to that. That is, it was generally believed in California that that was so.

Q. And also the Southern Pacific Railroad Company?

A. Yes, sir.

Q. And the several constituent companies, these other companies that I have mentioned, as rapidly as they were acquired?

A. That was generally believed, yes. Whether it was so or not, of course, I do not know.

Q. Of course, I do not refer now to a time after any of them died, but I mean down to the time that they died, and then their estates, of course, succeeded them. Do you know what the general business was of the Pacific Improvement Company?

A. Well, I know, as a matter of fact, that they were incorporated to do almost anything in the world, whether it was banking business, building railroads, buying and selling lands, loaning money, and everything else.

Q. Well, you know that they lived up to their articles of incorporation, too, don't you? They did engage in almost all kinds of business?

A. Yes, sir.

Whereupon witness further testified that he worked for the Pacific Improvement Company from 1881 to 1882. In 1882, he entered the employ of the Central Pacific Railroad Company under Montague, Chief Engineer, and afterwards in 1885 entered the employ of the Pacific Improvement Company again, serving until towards the fall of 1887, when he went into the employ of the Southern Pacific Company and was in its employ until 1890, when he went back into the employ of the Pacific Improvement Company and continued in its employ until 1902, and then returned to the employ of the Southern Pacific Company, remaining until December 31, 1910. Nearly half of the time since 1881, he has been in the employ of the Pacific Improvement Company and became acquainted with its general affairs in a general way and knows that it was the owner of a number of town sites along the lines of the Central Pacific Railroad Company and the Southern Pacific Railroad Company, also owned and leased some terminal facilities but does not think it operated any but presumes that the Railroad Companies themselves operated the terminal facilities but does not know. He does not remember and does not know that the Company owned and leased bridges at different points along the lines of

the railroad. The Pacific Improvement Company sold terminal facilities and right of way to the Railroad Company which were acquired in course of construction. The Pacific Improvement Company from 1881, down, did most of the construction of these railroads he has mentioned and under the terms of the contracts, as he remembers them, the Pacific Improvement Company was required to furnish right of way and depot grounds for the Railroad Company. He does not recall that that is not true in the case of contract Exhibit 1 attached to the defendants' answer. In most contracts the Pacific Improvement Company was authorized to use the name of the corporations for condemnation purposes. Sometimes the Pacific Improvement Company received in payment for constructing these lines of railroad, different portions of them, capital stock and bonds or other corporate securities and sometimes it was cost and a percentage. In some instances the Pacific Improvement Company constructed the railroad and the railroad merely paid it a percentage profit on the work. It was quite a common practice, during his experience, for employes of the Pacific Improvement Company, Southern Pacific Railroad Company and Central Pacific Railroad Company and afterwards the Southern Pacific Company to be interchanged. That is, for a man to be employed for part of his time by the Pacific Improvement Company and part of his time by these railroad companies. They shifted them from one to the other, from the payroll of one company to the payroll of another, as they would in any other business. The

Pacific Improvement Company constructed street railroads for the Oakland Railroad Company and for the Market Street Railway Company in San Francisco and Oakland. These are entirely independent companies and not subsidiary companies of the Southern Pacific Company, that is they are now, and he thinks they had no connection with the Southern Pacific Company at any time, so far as he knows. He believes also that the Pacific Improvement Company constructed a line in Washington, now a portion of the Northern Pacific—a coal road at Carbonado. The Pacific Improvement Company built up to 1902, or somewhere along there, most of the railroads that at that time constituted, or at least not most of them but a great many, that constituted, the Southern Pacific system at that time and that represented a very large proportion of the business done by the Pacific Improvement Company.

Whereupon witness further testified as follows:

“Q. Now, there was such a co-operation between the Pacific Improvement Company and these other railroad companies, of which Mr. Huntington, Mr. Hopkins, Mr. Crocker and Mr. Stanford were the principal stockholders—I say, there was such a co-operation between those companies that it became a matter of common rumor about the Pacific Improvement Company’s office that they were virtually one enterprise?

A. Well, no, not as far as the secretary was concerned. He always insisted quite to the contrary. In fact, he was a crank on that subject, as to the separation of the two companies.

Q. I understand, but I say that the business was so carried on as to lead to general rumors of that kind among the employees of the Pacific Improvement Company, with the exception of the secretary?

A. Well, I don't know whether that is so or not. The secretary insisted that the two companies, or the different railroad companies and the Southern Pacific Company were not in any way part of the Pacific Improvement Company, and employees were instructed—in fact, when it came down to that, there was, as a matter of fact, you might say, a great deal of feeling between the employees of the Pacific Improvement Company and the employees of the Southern Pacific Company. They didn't consider themselves of the same outfit at all.

Q. There was considerable jealousy between them, was there not?

A. Yes, sir.

Q. The same as there has developed a jealousy between the officers and employees of the Oregon Railway and Navigation Company and the Southern Pacific Company since they were absorbed by the Harriman lines?

A. I don't know anything about that. I never was up on that road at all.

Q. Well, now, you say that Secretary Douty was constantly insisting that there was no identity between the Pacific Improvement Company and these railroad

companies?

A. Yes, sir.

Q. Well, why did he have to keep warning the employees of the Pacific Improvement Company of that fact?

A. I don't know, excepting he used to say it was merely the truth, that was all, that it was so, and he was simply trying to correct, as he used to say, a popular error.

Q. Well, he never issued any statements, or made any statements to indicate that the Pacific Improvement Company was not connected with the Northern Pacific Railroad Company, did he?

A. Well, I don't know whether he ever made any such statement as that or not. It probably never was called to his attention.

Q. None that you know of?

A. None that I know of.

Q. Or as to the Great Northern Railway Company?

A. No.

Q. Well, now, why was it that it was necessary for him to be constantly warning his employees that there was no connection between the Pacific Improvement Company and the Southern Pacific Company, or its constituent companies?

A. Well, I don't know his mental processes at all,

excepting what he said, that it was practically to disabuse their minds of any idea that they would get from anything they saw in the newspapers, or, as he put it, "popular error."

Q. Well, did you not testify on direct examination that it was common rumor among the employees of the office that they were virtually one and the same thing?

A. Well, no, I don't think I testified to that.

Q. Did you not say that there was a rumor to that effect, and that Mr. Douty used to make these statements to correct what he termed an error?

A. No. As I said, there might have been talk—I don't believe that I actually said that; that is, you asked me if it was not an historical fact that they were the same parties that owned both companies, and I answered that, as far as I knew, that that was commonly believed, yes.

Q. Well, now, did you know the historical fact that the Pacific Improvement Company owned virtually a controlling interest of the capital stock of the Southern Pacific Company?

A. I say that was generally believed, yes, but I didn't know it.

Q. You know the general historical fact, do you not, that the Southern Pacific Company was organized by Mr. Huntington and his associates whom I have heretofore mentioned, and became the general operating company for these constituent companies of the Southern Pacific system?

A. That is, the Southern Pacific Company?

Q. Yes.

A. Yes.

Q. And did you not know that at the time, or shortly after the Southern Pacific Company was organized, Mr. Huntington and his associates of whom I have spoken before, placed their Southern Pacific Company stock-holdings in the Pacific Improvement Company?

A. Well, I don't know that, no.

Q. You do not know that general historical fact?

A. Well, I have known quite a few historical facts in my time, which were subsequently ascertained not to be facts.

Q. Well, I am not asking for any historical facts that you have ascertained not to be facts. I am asking you for historical facts that you have not ascertained to be untrue.

A. Well, I don't know whether that was so or not—whether it was true or untrue.

Q. But you know that general historical fact, do you not?

Mr. Fenton: I object to the use of the word "historical" fact as misleading. A fact is a fact, and a rumor or report, or common rumor would be a different thing. It might be true or might not be true. And I make the further objection that all of this inquiry has

no relevancy to the question as to whether or not the lands involved in suit are subject to forfeiture for violation of the land grant made July 25, 1866, or any amendments thereto, or the act of May 4, 1870; and, of course is not cross-examination.

Q. I refer to the general historical fact that Mr. Huntington and his associates organized the Southern Pacific Company, under the laws of the State of Kentucky, as an operating company to take over under leases the several railroads constituting the present Southern Pacific Railroad System, and that they pooled their holdings of the Southern Pacific Company's stock in this Pacific Improvement Company?

A. That was a thing a great many people generally believed; but I don't know it.

Q. The Pacific Improvement Company had its offices in the same building as the Southern Pacific Railroad Company and Central Pacific Company?

A. Yes, sir.

Q. All of the constituent companies of the Southern Pacific Railroad System had their offices in the same building?

A. Yes, sir.

Q. And the Pacific Improvement Company also had offices in that building.

A. Yes, sir.

Q. When the rules promulgated by the Southern

Pacific Company were delivered in the office of the Pacific Improvement Company, do you know who it was that made the mistake that you have referred to? Who was it that delivered the rules there?

A. Who delivered them?

Q. Yes.

A. They were brought into the Pacific Improvement Company by a porter in the employ of the Southern Pacific Company, as I remember it.

Q. You don't know why this employee of the Southern Pacific Company made the mistake of considering the Pacific Improvement Company as virtually identical with the Southern Pacific Company?

A. I don't know whether he thought he made a mistake or anything. He probably was acting under orders from his superior officer, who was a Southern Pacific official.

Q. You never knew of the rules and regulations of any other railroad company being delivered in the offices of the Pacific Improvement Company, did you?

A. No, it didn't come to my knowledge. Possibly the Market Street Railway Company may have issued some rules of that kind, but I don't know anything about it.

Q. But you don't know of any of the rules of another railroad company having been delivered in the offices of the Pacific Improvement Company?

A. Not to my knowledge, no, sir.

Q. With the exception of these street railways that you have mentioned, it is a fact, is it not, that all of the railroads that were constructed by the Pacific Improvement Company for these various small railroad companies that you have mentioned, shortly after construction became merged into the Southern Pacific System?

A. Oh, I wouldn't say shortly afterwards. Some were shortly afterwards, and some some time afterwards.

Q. That may be because the fact was not brought to your attention until some time after it occurred?

A. Oh, excuse me, I misunderstood your question. Yes, that is a fact, yes. I thought you said it became incorporated in the Central or Southern. It was some time after they were constructed, in some cases quite a number of years, before they were consolidated into the Central or Southern Pacific Railroad Company.

Q. That is, as the Pacific Improvement Company constructed these lines of railroad, the general practice was for the Pacific Improvement Company to receive the corporate securities of the railroad company as the consideration for construction?

A. Yes.

Q. And then subsequently the lines of railroad would be merged into the Southern Pacific Railroad System?

A. Yes, they became part of the Southern Pacific

Railroad System afterwards, yes, sir.

Q. Now, you don't deny the general fact that there was obviously complete co-operation between the Pacific Improvement Company and these various constituent companies of the Southern Pacific System, do you?

A. I don't deny or affirm anything of that kind. I don't know.

Q. Well, what is the fact?

A. I don't know.

Q. You do not know whether there was co-operation between those companies?

A. Well, co-operation in what way?

Q. Well, in all substantial ways that affected the interests of those companies?

A. Well, all I know is, the Pacific Improvement Company built the road and turned it over—built these different roads and turned them over.

Q. Well, have you any way to account for the coincidence that, every time they constructed a railroad and took the corporate securities of the railroad in payment for construction, the Southern Pacific System subsequently absorbed those railroads?

A. Well, no, I don't know why they did it. All I know, the Pacific Improvement Company built the roads and received their pay for them, and they became part of the Southern Pacific System after they were built.

Q. But they were constructed originally as independent companies?

A. Yes, they were all separate corporations, all these small companies you speak of—separate corporations.

Q. And invariably, they afterwards went into the Southern Pacific System?

A. They all are in there now, yes.

Q. Did you know to what extent the Pacific Improvement Company was a stockholder of the Southern Pacific Company at any time in its history?

A. No, sir, I never knew that definitely.

Q. Therefore it necessarily follows that you know nothing of the circumstances under which it disposed of any of its holdings that it might have had?

A. No, sir.

Q. Now, as to the construction of this railroad north from Delta to Ashland, you were asked whether that railroad, or at least that part of it that is situated in California, was constructed under this Exhibit 1 annexed to the answer, which is identical with "Defendants' Exhibit 283," which you have identified?

A. Yes, sir.

Q. Now, isn't this the fact, Mr. Cumming: that you simply recollect that there was such a contract at one time, of which you saw a duplicate original, but as to whether it was superseded during the progress of this work of construction, you have no knowledge yourself?

A. No, sir.

Q. So you would not assume the responsibility of testifying to the conclusion that, in a legal sense, the road was constructed under this contract or any other particular contract?

A. Oh, no, sir; I couldn't draw any such conclusion as that.

Q. And you have no knowledge as to the contract under which the railroad was constructed in the State of Oregon?

A. No, sir.

Whereupon witness further testified that the Strowbridge referred to as president of the Pacific Improvement Company was generally in charge of all the grading forces in the construction work, he was not an engineer but was a practical railroad builder, he was the original—what we would call riding boss—on the old Central Pacific when that was constructed. Charles Crocker was the head pioneer in the field work. Originally Strowbridge was an employe or superintendent under Crocker, away back before the time of witness, that is what he heard, he does not know that of his own knowledge. Crocker died in 1888, Hopkins in 1877. Crocker returned from active work in the field after the completion of the Central Pacific sometime before 1870. The Central Pacific was completed May 10, 1869. Strowbridge did not have any other business than that of construction work, of course he was president of the Pacific Improvement Company, but witness means ac-

tive physical work in the field in the construction of railroads. Strowbridge was a masterful big man in his way, but he does not know that he would be termed a man of executive ability so far as office work goes. He was in and out of the field and in and out of the City, that is his work carried him over a great deal of territory and in the course of that migration he was passing in and out of San Francisco just the same as the chief engineer of the road was passing in and out. He was president of the Pacific Improvement Company, but the executive officer of that Company, under its by-laws, as he understood it, was its secretary. There were separate boards of directors of these various Companies, there may have been duplications of some or all of them, but he does not remember and does not know whether these separate boards of directors were identified in any way. His work with the Pacific Improvement Company was that of an engineer in charge of the office records of the Company, with reference to construction, and also other matters with regard to land, that is when he was in the San Francisco office. Out in the field, he was just simply on regular construction work in charge of the office, calculating estimates, figuring out quantities and work of that character. In the San Francisco office, he was there as an engineer and in charge of different branches of work, did almost anything besides engineering work that came up. He was, in a general way, familiar with different branches of the business. When he was out in the field he was engaged in making estimates, requisitions for necessary supplies, etc., figuring quantities on South-

ern Pacific contracts, in fact doing all the ordinary office work that an engineer would do on construction, making drawings of masonry plans and things of that kind. He could not say exactly when the Pacific Improvement Company started to construct the railroad north from Delta, but knows work was going on in 1885 when he was there. Whether it was Pacific Improvement Company or the Railroad Company he does not know. He was not engaged on it himself. He was working for the Pacific Improvement Company, but not in that neighborhood. He was out on some surveying work that had no connection with that work at that time—it was on another line of railroad. He was making preliminary surveys in Southern Oregon on a line from Ashland south to the state line to connect with the southern end of the railroad when it finally reached the State line and his recollection is that he was employed and paid, at that time, by the Pacific Improvement Company. This was a preliminary survey that he made, practically a *reconnaissance*. He does not think that they followed the general line of survey for the location of that railroad, they made several surveys and he thinks part of it was finally adopted, approximately, portions of it were adopted. There was construction work going on then north of Delta, and the men strung out for some little distance beyond, maybe twenty to forty miles, that was in 1885. In 1886, he actively went up on that work and they were then some twenty miles north of Delta with finished line. He does not know under what arrangement if any, the Pacific Improvement Company was extending this survey or making this survey from

Ashland to the southern boundary line of the State of Oregon during the year 1885. He never knew the history of that at all, the work was done under Hood's direction. Witness does not remember what official of the Pacific Improvement Company directed him to engage in the work, he was in a very subordinate capacity on that work and did not come in contact with anybody other than the immediate man that was running the party who was an assistant engineer. He was merely doing what they called topographical work on that survey and he does not know whether the assistant engineer that was in charge of the party was an assistant engineer of the Central Pacific Railroad Company or whether he was a Pacific Improvement Company employe. It is in part true that a great deal of that work was done under such circumstances that it was difficult for him to say whether it was done by the Pacific Improvement Company or by the Central Pacific Railroad Company, that is this first part, but he remembers positively they were paid on the construction work, he was an employe of the Pacific Improvement Company, and was paid by that Company. The chief engineer engaged on this work was paid by the Central Pacific Railroad Company so they have always heard him state. He cannot say or recall whether the assistant engineer was paid by the Pacific Improvement Company or the Central Pacific Railroad Company and does not know where the Pacific Improvement Company secured the funds used in the construction of this railroad, and he has no idea of the approximate cost of the construction

of this railroad from Delta to the northern boundary line of the State of California and from the northern boundary line of the State of California northerly to Ashland. He knew, in a general way at the time, possibly in a specific way, but it passed from his recollection. These estimates that he made had reference to sub-contracts rather than the general work itself. Undoubtedly there was an estimate made of the entire cost of construction from Delta north to Ashland, this being the usual custom in advance of construction. He knows that he personally estimated quantities on surveys on the California and Oregon, that is on surveys, if he recollects rightly, between or through the Sacramento canyon as far as Sisson. His recollection is that he calculated the quantities in the earth work on that part before construction. This is situated north of Delta. He does not remember when he made the calculations excepting that it was sometime before its construction and after its location, in fact in his time, he calculated a great many estimates of quantities after the survey was made, preceding construction and he cannot recall any specific piece or time, except in a general way. He knew it was the general practice, he would not swear positively as to any piece except that he recalls some work in the vicinity of Sisson, south of that, probably in his general duties work of making estimates and calculating probable cost of construction during the years 1886 and 1887, would come up. The actual final location of the railroad in the State of Oregon between Ashland and the southern boundary line of the State was run on

the ground by stakes, the location was actually finished in 1887 antedating construction. Actual location of a portion of the line was antedated, as he remembers it, the actual construction probably a short time, how short he could not say, he knows the locating party was, in 1887, making final location quite frequently at the last moment the actual location had been changed as they would put in what they called a "D" line, that is some little change to lessen a cut, or go around a rock point, or something of that kind. He has no personal recollection of the market value of the capital stock of the Central Pacific Railroad Company during the year 1887, knows nothing about it. He does not know in detail concerning the ownership by the Pacific Improvement Company of the capital stock of any other corporation, and does not know what constituted the general assets of the Pacific Improvement Company during this time.

Whereupon on re-direct examination the witness further testified that he knows in a general way that the Pacific Improvement Company was interested in and became a purchaser of large bodies of land adjacent to or through which these railroads would be subsequently constructed during a period of time before construction, out of which they made town sites and conveyed rights of way to the Railroad Company and in that way they would convey a right of way through these lands and the Railroad Company and the Pacific Improvement Company would be interested in the town

sites that would be subsequently developed by reason of the construction of the railroad. Occasionally the Pacific Improvement Company, in order to get right of way, would have to buy a whole ranch; that is unless they condemned the right of way, occasionally they would buy the whole ranch, deed the right of way and depot grounds to the Railroad Company and keep the remainder. He could not say how large an acreage the Pacific Improvement Company owns at the present time at Del Monte and Pacific Grove, it was several thousand acres the last he knew of it. He knows they owned the Point Pinos, Pescadero and Laureles ranches and the Del Monte grounds and that they had built a tourist hotel of large proportions at Del Monte and have maintained and operated that for a good many years and that they owned practically all the lands on the peninsula where Pacific Grove was laid out, and sold practically all the town lots in the town of Pacific Grove; that they have a 17-mile drive through their forest to Cypress Point on the ocean, leading off from Del Monte and have other lands throughout the State. The railroad never had any connection with these properties that he knew of. Since the Pacific Improvement Company moved its offices from Fourth and Townsend January 1st, 1895, they occupied some rooms in the Union Trust and some rooms in the Crocker Building, but a few years after that their offices were entirely in the Crocker Building, apart from the Union Trust Company building and apart from any building that had any connection with the Southern Pacific Com-

pany offices. Horace G. Platt became president of the Pacific Improvement Company, with offices in the Crocker Building, and Richard Derby was manager of the Pacific Improvement Company, succeeding Douty and after the death of Derby A. D. Shepard became and still is manager. Neither of these gentlemen had any connection with any of these railroads. The Pacific Improvement Company removed its offices from the building at Fourth and Townsend on the first day of January, 1895. The Pacific Improvement Company and the Southern Pacific Company were in the same building afterwards, that is in the Union Trust Building, situated at the corner of Market, Montgomery and Post, and they were there until 1898, when the Pacific Improvement Company moved across to the Crocker Building. The Railroad Company, at a later period moved as an entirety to the Merchants Exchange Building on California Street in San Francisco and had offices in the Hobart Building and in the Wells Fargo Building previous to that time and at these times the Pacific Improvement Company had no offices in these buildings, after 1898 when the Pacific Improvement Company moved into the Crocker Building. From 1894 to 1898 part of the offices of the Pacific Improvement Company were in the Union Trust Building and part of the offices of the Southern Pacific Company were in the same building but after 1898 they did not occupy the same building, that is his recollection. The offices of the Pacific Improvement Company at the present time (August, 1912) are in the Crocker Build-

ing, San Francisco, and have been since 1894 in part and entirely since 1898.

Whereupon upon re-cross examination the witness further testified that the Pacific Improvement Company acquired in a number of instances tracts of land along the proposed lines of railroad of these Southern Pacific constituent companies and afterwards platted them into town sites and handled them as such. The Central Pacific Railroad Company did not own town-sites along its line nor did he know of the California and Oregon Railroad Company, afterwards consolidated with the Central Pacific Railroad Company, owning any townsites on the line. He presumes that the Railroad Company had the right to designate where town-sites should be located along the line of railroad. Explaining why the Pacific Improvement Company was permitted by the Railroad Company to acquire the townsites and then subsequently give it the benefit of these townsites, witness testified that the Pacific Improvement Company bought the land and deeded the right of way to the Railroad Company, laid out the land into townsites which it had purchased and sold it. The Railroad Company could have located the townsites where it saw fit, or individuals could have gone and bought a piece of land and if it was a natural site for a town, built a town on it and got a side track put in by the railroad company, and got a townsite the same as the Pacific Improvement Company, which was done in different parts of the State of California. Down in the San Joaquin Valley, there are towns other than the

railroad towns. That is true in the construction of any new line of railroad.

Whereupon the witness further testified as follows:

“Q. But insofar as the railroad company itself might have availed itself of its opportunity to acquire townsites and secure the profit that would result from the sale of townsite lots, it did not do it, but the Pacific Improvement Company did it? Isn't that true?

A. I don't know of the Central Pacific Company engaging in any townsite business. In fact, I know there was one townsite proposition they had over in Alameda County.

Q. That antedated the organization of the Pacific Improvement Company, which was organized in 1878?

A. No, that was subsequent that they subdivided that—subsequent to the organization of the Pacific Improvement Company.

Q. Do you know whether the townsites along these railroads were all located on even numbered sections or not?

A. They were located on odd numbered sections and even numbered sections.

Q. Well, the Pacific Improvement Company had to acquire the odd numbered sections, if they hadn't been previously entered, from the railroad company, did it not?

A. It would have to acquire the odd sections, pro-

vided it was going through territory in which the land had been unsold.

Q. I say, which had not been previously entered?

A. Oh, yes.

Q. Now, you know the fact to be, do you not, that the Pacific Improvement Company actually took deeds for some of these townsites, if not several of them, from the railroad company itself, and afterwards platted the townsites, and made the profits that resulted from the sale of the town lots?

A. Yes, in some cases they got them from the railroad company, and others from other private proprietors.

Q. Now, can you explain the relation that existed between the Pacific Improvement Company and the railroad company, that induced the railroad company to turn over its own lands to the Pacific Improvement Company, to enable it to enjoy the profits resulting from the platting of townsites and the sale of town lots?

A. Why, they sold the land to the P. I. Company the same as they would sell it to any one else. The P. I. Company frequently paid large prices to the Central Pacific Railroad Company for the land.

Q. But the fact is that, not only the Central Pacific Company, but the other constituent companies of the Southern Pacific Railroad System, as it constructed its road under contract with the Pacific Improvement

Company, instead of platting the townsites along the line, sold the lands to the Pacific Improvement Company, and the latter company handled the townsites?

A. Well, that is, of course, where it fell upon a railroad section. There are a great many cases—for instance, the townsite of Sisson, townsite of Smithson, and other townsites on this particular California and Oregon line—where the Pacific Improvement Company acquired the land and laid out the townsite itself—bought the land. That is true of Montague, and Sisson, Delta and Smithson. The only townsite that that applied to was the townsite of Dunsmuir on that line—that is the only case. All the others were acquired by the Pacific Improvement Company by purchase, or by an agreement with the owner, who entered into an agreement with the Pacific Improvement Company in consideration of their putting a townsite on his land—they gave a deed to the Pacific Improvement Company, and took back an agreement by which they were to receive one-half of the net proceeds of the sales of the town lots. That was the general method with the Pacific Improvement Company. Most of their townsites were acquired in that way.

Q. Well, then, the Pacific Improvement Company was permitted by the railroad company to enter into contracts that would locate the townsites along the railroad?

A. Well, any person could have started a townsite as well as the P. I. Company.

Q. But they had to be located where the stations were established on the line of the railroad, didn't they?

A. Yes.

Q. So that it rested with the railroad company to designate where the townsite should be situated, governed, of course, by general considerations of the topography of the country?

A. Yes.

Q. But it was always optional with the railroad company to change the location of the townsite?

A. Oh, the railroad, of course, could change the townsite if it pleased anywhere—put it on top of a mountain or down in a swamp—but there were certain physical conditions, of course, which they could not get away from, and frequently that land was owned by a private individual, who entered into a contract with the P. I. Company, or started a townsite of his own.”

STIPULATION.

Whereupon it was stipulated between the parties that other witnesses, employes, officers or custodians of the records of the Southern Pacific Company and Central Pacific Railroad Company, parties to the agreement Exhibit No. 1 of the answer, would, if called, corroborate the testimony of the witness Cumming that they had made a search and had been unable to find the original of said Exhibit No. 1 to the answer and such search would show that the original could not be found.

Whereupon C. P. LINCOLN, called as a witness on behalf of defendants, and being duly sworn testified, that he is head clerk in the Auditor's office and as such has custody of the corporate accounts of the Oregon and California Railroad Company, which he received from the Secretary George H. Adams through J. L. Wilcutt in September, 1904; from that time Wilcutt has had the custody; witness was in direct charge of the books from September, 1904, until August, 1912, but until May 10, 1910, they were in the custody of Mr. Wilcutt, when they were transferred to Auditor McDonald. Witness has kept the books posted, making monthly statements therefrom personally. That balance sheet, Defendant's Exhibit 286, as of February 11, 1912, shows the outstanding bonds under the mortgage to the Union Trust Company of July 1, 1887, and also the capital stock. They aggregate thirty-six million dollars practically and that bears a close relation to the cost of the properties. There are four million dollars additions and betterments, making forty million dollars that is shown. The four million dollars is not capitalized. But this thirty-six million dollars, the cost of the property, is practically the face amount of the stocks and bonds outstanding as shown on this exhibit. This exhibit, which is a correct reproduction of the books of corporate accounts of the Oregon and California Railroad Company for the eleven months ending May 31, 1912, has been verified and found to be correct by him from the books of the company. Whereupon defendants offered this balance sheet, marked Defendants' Exhibit 286, in evidence, whereupon the following col-

loquy occurred between counsel for the parties :

“Mr. Townsend: Government objects to the introduction of Defendants’ Exhibit 286, upon the ground that the same is incompetent, irrelevant and immaterial. It is merely a copy of the records carried by the company, and does not import any verity. The item as to cost of constructing the railroad is in no way vouched for, and the cost of construction is not an asset in any event. This document is purely hearsay and secondary evidence, and no foundation has been laid for the introduction thereof. This latter objection does not go to the question whether Exhibit 286 is a correct copy of the original of which it purports to be a copy, but does go to the question that the original itself is but a compilation of deductions and computations, and is therefore hearsay and not the best evidence.

Mr. Fenton: Would you require the company to produce the original blotters and the original vouchers that enter into these balance sheets?

Mr. Townsend: Well, I cannot concede the accuracy of that item “Cost and construction” unless I see upon what it is based.

Mr. Fenton: Counsel for the defendants desire to state at this time that, if the original blotters, vouchers and other documents upon which the corporate records of the Oregon and California Railroad Company are based, showing this Balance Sheet of General Ledger for eleven months ending May 31, 1912, are required to be produced or accounted for, the defendants would

be able to prove that all the originals were destroyed in the fire of April 18, 1906, and that the re-establishment of these corporate accounts is based upon official reports made to the Interstate Commerce Commission required by law, to the Oregon Railroad Commission at various times required by law, and copies saved in the New York Office, and that since April 18, 1906, the records have been carried forward in the same manner in original books of entry based upon actual transactions from time to time, and that the witness, if required or permitted, would so testify, and vouchers for which are in existence since April 18, 1906. Now, I ask the Government whether counsel would require us to go into this vast mass of testimony in detail, for the purpose of showing a summary of what the books now show, as evidence by this Balance Sheet 'Defendants' Exhibit 286?'

Mr. Townsend: I am willing to admit that this statement is a correct statement of the corporate assets and liabilities of this company as they have been carried in the books of the company from time to time; but I do not admit the accuracy of the items.

Mr. Fenton: That is to say, that the items represent money actually received or disbursed?

Mr. Townsend: Yes. I don't admit that the balance sheet of the corporation as to its assets and liabilities is competent evidence of the facts which it purports to state. I do not admit that as a matter of law, and I reserve my objection to the competency and relevancy

and materiality of the statement upon that ground. But I do admit that this exhibit, 'Defendants' Exhibit 286,' is a correct statement of the continued balance sheet as appears on the books of this corporation from the beginning down to the time that this purports to have been made.

Mr. Fenton: You dispense with the production of such books as we may have—they are here for your inspection—and to our accounting for the destruction of those prior to the fire of April 18, 1906?

Mr. Townsend: There is no necessity for proof on that point. I may want to examine the books personally."

Whereupon said Defendants' Exhibit 286 was received in evidence and is hereinafter set out and described and made a part of this statement of the Evidence and identified as such. Witness further testified that Defendants' Exhibit 286 was prepared about the first or second of July, 1912, that he prepared one of these statements every month and sent two copies to the New York office and one to the auditor. One copy is kept by witness in the Corporate Accounts Bureau. This exhibit is a correct summary from the original books of the Oregon and California Railroad Company, and correctly shows what it purports to show.

"Q. Now, if the \$17,745,000 worth of bonds issued and outstanding had inured to the benefit of the Southern Pacific Company, would that balance sheet show what it does?

Mr. Townsend: Objected to as incompetent, irrelevant and immaterial, calling for a mere conclusion or opinion upon a matter that is not properly the subject of expert testimony.

A. That balance sheet would not show that.

Q. That is to say, if the \$17,745,000 had been received by the Southern Pacific Company, this balance sheet would be entirely different?

Same objection.

A. Now, those bonds, the proceeds of the bonds were paid to some one for constructing a road, the balance sheet indicates. Whether the proceeds were paid to the Southern Pacific Company or not, that balance sheet does not show. They might have been paid to John Smith, if John Smith built the road, you see.

Mr. Townsend: That answer is objected to, upon the ground that the exhibit itself is the best evidence of what it purports to show, and the answer is but a mere conclusion upon a subject that cannot be proven by expert testimony."

Whereupon the witness further testified that Defendants' Exhibit 287 is correct according to the books of the company in the auditor's office. Whereupon defendants offered Defendants' Exhibit 287 in evidence, and in connection therewith offered to prove, if required, loss of the records prior to April, 1906, and their re-establishment from the best sources available, and their actual record since that date based upon vouchers of ac-

tual daily transactions in the custody of the auditor, and verified by the witness, and that the witness would so testify, if necessary or required by the Government. Whereupon the following occurred:

“Mr. Townsend: This statement—this covers only transactions during April, 1911, is misleading.

A. This is April, 1911, but here is where it is carried forward right to since the beginning on this balance sheet. The balance sheet is a sumamry right from the beginning.

Mr. Fenton: Those statements or balance sheets are made every month, are they?

A. Made monthly.

Q. And what do you do with these monthly statements?

A. They are distributed to various officials—one to the deputy comptroller, one to the auditor, and several other officials receive them.

Mr. Townsend: The Government does not object to the introduction of Defendants' Exhibit 287 upon any ground relating to the question whether this is a correct copy of the balance sheet as it has been maintained from time to time by the railroad company; but it does object to the document on the grounds of its competency, immateriality and irrelevancy, and particularly on the ground that the balance sheet does not import verity.

Mr. Fenton: You don't require us to account for the loss of the original books or material upon which the

balance sheet is based, or to produce the original books and offer them in evidence, do you?

Mr. Townsend: There are some accounts that I wish to have examined; for instance, the account of taxes—I think that should be itemized by year, so that we may see how much taxes were paid at the time this suit was instituted.

Mr. Fenton: Counsel for defendants offer to produce and furnish for Government counsel, if not to offer in direct evidence on behalf of defendants' case, at Portland, an itemized statement showing the taxes paid each year, as far as it is possible to do so from the records that have been preserved from the fire, bringing the showing down to and including March 15, 1912, the date when the last payment of taxes was required to be made, under the laws of the State of Oregon.

Mr. Townsend: I also wish the same itemization as to the accounts of examination and appraisal of lands, salaries and expenses—general offices, salaries and expenses—miscellaneous, and law expenses.

Mr. Fenton: That can be made since 1906. The disbursements prior to that date I do not believe can be itemized, as the books containing the items have been destroyed. But since that date we will undertake to comply with the request of the Government's counsel, and have them ready at the Portland hearing.

Mr. Townsend: I also would like these itemized accounts by years to state with more particularity what ex-

penses enter into these general items. I do not ask for each specific item, but to classify the items with more particularity than appears here, so we may know.

Mr. Fenton: We will offer to do that from the books since April 18, 1906. I will have the transcript of your requests furnished to Mr. Lincoln, account officer, and try to produce this at the hearing at Portland.

Mr. Townsend: Now, with that general understanding, the Government will reserve the question of requiring the production of the books and vouchers upon which this statement is based until the compilation just requested is furnished to counsel for the Government. I assume that it will cover it.

Mr. Fenton: Defendants' counsel desire the record to show that all the books of the Oregon and California Railroad Company now in the offices of the auditor in relation to this matter are open to examination of any representative of the Government, and the books are in part now present, and counsel is at liberty to avail himself, by himself in person or by his representative, of the inspection of these books for any purpose, at his convenience between now and the Portland hearing." Whereupon said Defendants' Exhibit 287 was received in evidence and is hereinafter set out and described and made a part of this statement of the evidence and identified as such.

Whereupon the witness further testified that he had checked up Defendant's Exhibit 288 and verified the

same with the records of the auditor of the company and the figures shown in that exhibit are correct according to these records. Whereupon counsel for complainant objected to the same as immaterial and irrelevant, which said Defendants' Exhibit 288 was received in evidence and is hereinafter set out and described and made a part of this statement of the evidence and identified herein as such. Whereupon the witness upon cross examination testified as follows:

“Q. Mr. Lincoln, there are a number of items in this balance sheet, such as law expenses, examinations and appraisals, and other items which were incurred by the company because they were endeavoring to sell the lands other than “to actual settlers in quantities not exceeding one quarter section and for a price not exceeding \$2.50 an acre,” are they not?

Mr. Fenton: Object to that, for the reason that there is nothing in the account to show anything about sales at \$2.50 an acre, or in excess of that, or in excess of 160 acres, and no segregation.

A. I cannot say. I cannot answer it.

Q. Well, can you explain why there should have been any expenses for examination and appraisals of the lands if the company had obeyed the law, and simply endeavored to sell them to actual settlers, in quantities not greater than one-quarter section, and for a price not exceeding \$2.50 per acre?

Mr. Fenton: Objected to as an argument on behalf of the United States, and not an inquiry into the facts,

and a matter about which the witness could have no knowledge.

A. I cannot answer that.

Q. You cannot explain why examinations and appraisals of the lands were necessary if the railroad company had kept within the restrictions imposed by the granting act?

Mr. Fenton: Objected to as calling for a conclusion of law to be tried in the case, and the witness cannot testify as to the conclusions of law.

A. I cannot, no, sir."

Whereupon witness further testified that he does not know what the assessed valuation for taxes was based on and has no personal knowledge as to the accuracy of the items contained in Defendants' Exhibit 286, except that he found them upon the books of the company. Witness did not state that this statement shows that the bonds issued by the Oregon and California Railroad Company, secured by the mortgage of July 1, 1887, did not inure to the benefit of the Southern Pacific Company. The balance sheet does not show to whom the bonds were paid. They may have been paid to any one who built the road. Witness is not familiar with the contract of March 28, 1887, entered into between the Southern Pacific Company, the Pacific Improvement Company, the Oregon and California Railroad Company, the Union Trust Company, and the so-called London Bondholders' Committee, and Frankfort Bondholders' Committee. Wit-

ness does not know whether the bond issue under the mortgage of July 1, 1887, and payment of which was guaranteed by the Southern Pacific Company inured to the benefit of that company or not. There is nothing to show that they did or did not inure to the benefit of the Southern Pacific Company, according to that balance sheet. It does not indicate whether the bond issue of July 1, 1887, was used by the Southern Pacific Company to buy a former bond issue. It shows four million dollars expended for additions and betterments that have not been capitalized yet, in other words that the road cost over forty millions of dollars and they have only got about thirty-six million dollars for the capital liabilities, which shows it paid for those betterments, if not out of earnings, that they advanced the money for those betterments, and that they were essential and necessary, and that the Oregon and California Railroad Company has never capitalized that at all. The money for those betterments and additions has been advanced by the Southern Pacific Company to the Oregon and California Railroad Company to pay for those betterments and additions in accordance with the terms of the lease. He does not mean to testify that the lease provides that the Southern Pacific Company shall advance money to the Oregon and California Railroad Company, or that the Southern Pacific Company itself shall make the additions and betterments. It is in the third paragraph of Exhibit "G," at the bottom of page 147 of Government's Exhibit "G" in the bill. When it comes to settlement, "Provided, however, that if at the time, viz.: Such 1st day of May

when such balance of such income or rental is provided to be paid to the party of the first part, there shall be any such sum due or owing from the party of the first part to the party of the second part, for or in respect of advances or payments theretofore made by the party of the second part, or for new additions or improvements to the demised premises, or any part thereof," that covers it, the Southern Pacific Company deducts that advance before it makes the settlement with the Oregon and California Railroad Company, indicating that the Oregon and California Railroad Company pays the betterments. The second item in Defendants' Exhibit 286 reads: "Additions and betterments \$4,131,296.40 represents money expended by the Southern Pacific Company for additions and betterments under the terms of the leases set forth in the bill of complaint in this case."

Whereupon ROBERT ADAMS, called as a witness on behalf of defendants, and being duly sworn, testified, that he is Assistant Auditor of the Southern Pacific Company, and resides in Oakland, California. That the Defendants' Exhibit 269 is a correct summary taken from the books of the company. Whereupon defendants offered said Exhibit in evidence, to which counsel for complainant objected as immaterial and irrelevant, upon the theory that the amount of money received by the railroad company from the sale of lands, and its expenditures, is not material to the issues in this case, but the Government did not object that Defendants' Exhibit 289 is a correct transcript of the books of the company, but does object to general compilations and balance

sheets as evidence, but admits the loss of documents heretofore referred to as similar evidence, which said Defendants' Exhibit 289 was received in evidence and is hereinafter set out and described and made a part of this statement of the evidence and identified as such. Whereupon witness further testified that statements of the Oregon and California Railroad Company, Forms 77 and 78, for the month of March, 1906, had been sent to the Eastern offices. These statements showed the transactions for the month of March, and cumulative from these statements the records of the company were started; that is to say, the statements that had been made from the books of the Oregon and California Railroad Company which were in existence prior to April 18, 1906, had been forwarded to the offices of the company at Omaha and New York, and these statements were based upon the books of the Oregon and California Railroad Company that were destroyed, and that is why the statement "Defendants' Exhibit 289," since April 1906, is made up from the records of the Oregon and California Railroad Company that are now in the custody of the Auditor and kept here. Defendants' Exhibit 288 is a correct statement of the transportation of Government freight and passengers for the five years 1906 to 1910, inclusive.

Whereupon, on cross examination, witness further testified that Defendants' Exhibit 289 is made up in the following manner: It has been the custom to render monthly reports, showing a general balance sheet of the Land Department business, at the end of each month,

and which reports were cumulative, showing all transactions down to the date of the report; that report was compiled from the detailed records of his office, and the report of March 31, 1906, was sent to the New York office and the Omaha office, and after the destruction of his other records, these reports were used for the purpose of continuing that balance sheet, and the only possibility of error is between the first day of April and the 18th day of April, 1906, the day of the fire, and with that exception he feels confident to vouch for the general accuracy of this present balance sheet, Defendants' Exhibit 289, and the statement is correct.

Whereupon Defendants' Exhibit 289 was received in evidence and marked "Defendant's Exhibit 289" and is hereinafter set out and described and made a part of this statement of the evidence and identified as such.

Whereupon, on redirect examination, witness further testified that he had prepared a statement, Defendant's Exhibit 290, showing the financial account between the Southern Pacific Company and the Oregon and California Railroad Company under the lease of July 1, 1887, and the succeeding lease of August 1, 1893, showing receipts and disbursements by fiscal years down to and including June 30, 1912; that the statement was prepared from the general books of the Oregon and California Railroad Company, starting with the balance as of June 30, 1905, and then gives in detail all entries on the books from that date to June 30, 1912. Whereupon defendants offered said exhibit in evidence, to which counsel for complainant objected upon the same grounds as

were urged as to Defendants' Exhibits 286 and 287, but no objection was made because of the failure to produce the original books from which said exhibit was transcribed, the Government admitting that this is a correct copy of these books. Whereupon said statement was received in evidence, marked "Defendants' Exhibit 290," and is hereinafter set out and described and made a part of this statement of the evidence and identified as such.

Whereupon, the witness further testified that he had prepared a financial statement showing the account between the Oregon and California Railroad Company and the Union Trust Company from July 1, 1887, under the mortgage of that date, showing receipts and disbursements on account of land sales so as to show the actual disposition of the proceeds of sales of lands and the income from lands, and this statement is prepared from the books of original entry of the company, and is a correct statement from July 1, 1887, to the close of June, 1912, showing all transactions.

Whereupon defendants offered said statement in evidence and marked "Defendants' Exhibit 291."

Whereupon witness further testified that he knows that the statement from the trustee shows the payment of the sum of \$300 marked as "Paid to John M. Gearin," and \$713.41 "Paid to Dolph, Mallory, Simon & Gearin" for expenses in connection with this litigation, which said Defendants' Exhibit 291 was received in evidence and so marked, and is hereinafter set out and described

and made a part of this statement of evidence, and identified as such.

Whereupon witness further testified that the item of \$3,062,364.80 is in the statement as of June 30, 1912, but the details of the expenses and taxes are shown in the exhibits more in detail. They will not check with this, for the reason that these statements are of April, while this statement—Defendants' Exhibit 291—has been brought down to June, 1912, but the expenses for the subsequent months are similar to those as shown in detail on those statements. From that statement—Defendants' Exhibit 291—the Oregon and California Railroad Company had paid to the Trustee, Union Trust Company, up to June 30, 1912, \$2,497,713.01, as shown in the second part of the statement, "cash paid over to Trustee as per previous statement." That statement means that the Oregon and California Railroad Company had paid over to the Trustee, the Union Trust Company, the amount of \$2,497,713.01. The lower part of the statement, "Statement of application of cash receipts by Trustee to date," shows again the amount paid over, the "interest allowed by Trustee on cash deposits, \$51,523.87," and then the use of that fund—"Paid for 2255 called bonds, \$2,245,075. Paid for accrued interest on called bonds, \$51,175." Certain other expense, and the "cash in hands of trustee unapplied," as of June 30, 1912, \$242,859.76. The statement of \$3,062,364.80, in the upper part of this Defendants' Exhibit 291, showing a total of \$4,603,250.82, means that during the period of this litigation, or for the past

three years or more, that the company, Oregon and California Railroad Company, has paid taxes and other expenses; that is, that the sum of \$4,603,250.82 represents the total cash received by the Oregon and California Railroad Company from May 13, 1887, to June 30, 1912, from all sources, as shown by the first part of the statement. Of that amount it paid to the trustee \$2,497,713.01, and the balance is the amount that has been paid for expenses and taxes during the period of the last three or four years—how long, he does not remember. The lower part of the statement shows that the advances by the Oregon and California Railroad Company for expenses and taxes were \$956,826.99, and according to this statement this item of \$956,826.99 represents advances by the Oregon and California Railroad Company for expenses and taxes; that is, the Oregon and California Railroad Company would still owe the Union Trust Company under this mortgage \$1,540,886.02; that is to say, the Oregon and California Railroad Company has received from all sources on account of the trust fund from May 13, 1887 to June 30, 1912, \$4,603,250.82, \$1,540,886.02 is really reduced by the amount \$956,826.99 advanced by the Oregon and California Railroad Company, as shown in the lower part of the statement. He has brought with him samples of the blanks, showing the transaction as it is handled through the accounts and reports made to the trustee.

Form 215 O. & C., which is a statement made to the Union Trust Company of New York, is prepared monthly, shows the contract number, name of purchaser,

description of land sold, number of acres, price per acre, and the consideration, and is signed by the land agent of the Oregon and California Railroad Company and the Vice-President of that company. Form 216 O. & C. is the memorandum of contract made for sale of land, shows the date of contract, name of purchaser, residence, description of tract, the number of acres, and price per acre, and the amount, and the terms of payment under the contract. This is certified as correct by the land agent of the Oregon and California Railroad Company. Form 217 O. & C. is statement made to the Union Trust Company of New York, of land sales and collections, monthly statement showing the date, name of purchaser, contract number, and the principal and interest, and new sales during the month.

218 O. & C. This is made to Union Trust Company of New York, Trustee under Indenture dated July 1, 1887. This shows the date of the collection, contract number, whom it is collected from, stumpage and deprecations, land leases, expenses and taxes refunded, and other collections—what for and the amount, and to what account credited. Form 219 O. & C. is statement of land contracts cancelled. This is made to the Union Trust Company of New York, monthly, shows the contract number, name of purchaser, description of land, and amount of principal cancelled, and the amount of interest cancelled during the current month and from May 13, 1887, to the beginning of current month, and total cancellations from May 13, 1887, to end of current month. This is certified as correct by the Land Com-

missioner. Form 220 O. & C. is an abstract of disbursements made monthly to the Union Trust Company of New York, shows the date of voucher, voucher number, issued to, what for, and the amount. It is signed by the Land Commissioner and vice-president, subscribed and sworn to before a Notary Public for California and for Oregon. Form 221 O. & C. is the monthly statement of account with the Union Trust Company of New York, showing the cash receipts, expenditures, Union Trust account with the Oregon and California, and statement of application of cash receipts by trustee. Form 222 O. & C. is monthly statement to the Union Trust Company of deeds authorized for execution by Board of Directors, showing the deed number, contract number, issued to, date of final payment, principal, interest, interest cancelled on anticipated payments, net interest collected on contracts, interest collected on overdue payments, total. This is signed by the Land Commissioner and subscribed and sworn to before a Notary Public for California. Form 223 O. & C., certified copy of resolution of Board of Directors. This is a statement to the Union Trust Company of New York, being certified copy of resolution of Board of Directors authorizing the execution of deeds on the part of the Oregon and California Railroad Company; shows deed number, grantee, description of land, and the consideration. It is signed by the Secretary of the Oregon and California Railroad Company.

Whereupon, defendants offered in evidence these forms as Defendants' Exhibit 292, which was objected

to by complainant as immaterial, and the same was received in evidence and marked "Defendants' Exhibit 292," and is hereinafter set out and described and made a part of this statement of the evidence and identified as such. Whereupon witness further testified that he had prepared another table or statement outlining the manner of handling cash receipts and the movement through the records, and refreshing his memory from this memorandum which he had made, stated the course of business as follows: The application to purchase, with the remittance, is sent to the assistant treasurer in San Francisco. The same report, or application to purchase as it is known, is then sent to the auditor, and the money received thereon is reported. Third, the application to purchase is entered in the record of contracts and record of land sales books, and then sent to the Land Commissioner to have the contract prepared. Fourth, the remittance reported by the assistant treasurer is applied to the purchase account in the record of contracts book, and receipt therefor issued. Fifth, auditor advises land commissioner when contract is paid in full. Sixth, land commissioner prepares deed for contract. Seventh, deed is sent for execution and release by the trustee. Eighth, deed when returned from trustee is delivered to the grantee. Ninth, sales and income from lands are credited to an account styled "Proceeds from Sales of Granted Lands." That is the bookkeeping course. That this was the bookkeeping process, and that these receipts as the proceeds of sales, income account, are credited on the auditor's books of the com-

pany. They are first entered on the treasurer's books, and the postings made to the auditor's books from the treasurer's cash record, and that covers the total. The net amount is what has always been paid to the Union Trust Company, that is, the receipts less expenses and taxes. Instead of sending the gross receipts to the Union Trust Company, out of the gross receipts is paid the expenses and taxes, and the net amount is sent. The trust fund is charged with these expenses and taxes. The relations of the United States and the company in the transportation of freight and passengers between Roseville Junction, in the State of California, and Portland, Oregon, on the line of this road constructed under the Act of July 25, 1866, as to Government transportation of property and passengers, are, that such property and passengers are handled free to the Government over that part of the line, and it is known in the requisitions made by the United States, and called "Free Land Grant Road." This free movement applies to all shipments from any part of the United States that may be received and carried over that portion of the mileage, except United States mails. Witness thinks there is no other exception. It would and does apply to transportation of troops of the United States. He knows that from August 1, 1902, freight and passengers have been handled without cost to the Government, or free, over that line, and from his recollection of the records of what was done prior to that time, and from information furnished by men who have been in the office for a great many years and handled that line of business con-

tinuously for thirty-five or forty years, during the earlier years, the business was very heavy. He says the earlier years—for a period, he thinks it was during the Spanish-American-Cuban war, it was very heavy over that line, but what is the practice now has existed during the life of the entire operation of the property, and he would say that it was understood that a statement had been filed in an Oregon case at one time which showed a very large volume of business handled over that line during the early days, but he has not been able to duplicate that statement in the office. It was thought possibly it was at Portland or at Salem. He refers to a statement from the Auditor's office prior to the fire, and thinks it was in 1904, as recollected by Mr. Sherburne, who has handled the business for years, that he had had the statement prepared. He tried to refresh his memory, but could not. In regard to the freight matters, there is an exhibit in the case covering the transportation subsequent to the fire, but prior to the fire it is a matter of recollection.

Whereupon, on cross examination, witness testified that he was assistant auditor for Southern Pacific Company; had been with that company for ten years last past, but assistant auditor for about three years; before that, auditor of disbursements. He was promoted from disbursements department to assistant auditor. He commenced work with the Southern Pacific Company in 1902. Prior to that time he had never been employed by the Southern Pacific Company or any of its allied or subsidiary corporations, or by the Union Pacific. He

was employed on the Chicago & Alton Railroad, which is not considered a Harriman line. He was first employed by the Chicago & Alton, then by the Southern Pacific Company. He was with the Illinois Central for about two years. The auditor's office is located in San Francisco, as is also that of the general auditor of the Southern Pacific Company. While the Southern Pacific Company is a Kentucky corporation, its operating and administrative offices are at San Francisco. The chief executive office is located at San Francisco; that is, the President of the road, and the other officers are located there. It has also an office at New York. It is a fact that the Southern Pacific Company operates a number of companies under lease, and he thinks it is the principal stockholder of these companies from which it holds leases, and believes that the Southern Pacific Company practically owns all of the stock of the Oregon and California Railroad Company. His duties relate to the accounting department of the Southern Pacific Company, and that includes the operation of all these roads that comprise the system of roads operated by the Southern Pacific Company.

Q. Now, have any of these companies from which the Southern Pacific Company holds a lease, a separate accounting division, or does it all pass through the one accounting division?

A. No, the accounting organization would take care of the corporate accounts of the Oregon and California Railroad Company, for instance.

Q. Yes, but it is all one general accounting division, with separate books for each of the companies whose accounts you keep? Isn't that true?

A. Well, no, not that way; I think I can clear that up; that each company keeps its own books, that is, its corporate accounts, from which this statement, for instance, is prepared, of the Oregon and California Company. But the operating accounts, revenues and expenses, from the operation of the Oregon and California, or the Central Pacific, or the other companies, are all handled in the one office and by the same force of men—of course, distributing the earnings and expenses to each company—which could not be handled otherwise very well.

Q. Well now, you said that where lands were sold, for instance, the moneys received were paid to an assistant treasurer?

A. Yes.

Q. What is his name?

A. The present treasurer is H. A. Jones, assistant treasurer.

Q. He is assistant treasurer of what?

A. He is assistant treasurer of the Southern Pacific Company.

Q. Now, is it not true that all of the constituent companies of the Southern Pacific system, their funds are paid in to that same man, this same assistant treasurer?

A. That is correct.

Q. And the Southern Pacific organization there acts as a sort of a clearing house for all of the constituent companies of this railroad system?

A. The Southern Pacific Company handles the accounts and the affairs of the other companies, and distributes through their accounts to each corporate company the revenues and the expenses. You might call it a clearing house.

Q. That is only by way of analogy. I do not mean it is technically correct.

A. Yes, that follows the idea.

Q. So that the receipt of moneys from the sale of the lands which were granted by these two acts of Congress involved in this case, is by the assistant treasurer of the Southern Pacific Company, and then the accounting department of the Southern Pacific Company disburses it, and credits it, and charges it where it belongs?

A. The assistant treasurer shows on his books that the amount was received from a certain source, and to be applied to a certain source—his records show that; and the accounting department abstracts his records distributing the amount accordingly.

Q. Now, from whom do you get instructions as to the distribution of these moneys—these receipts and disbursements?

A. The statement that is received with the receipt will show that it is to be applied on the sale of a certain

piece of land, for instance, land of the Oregon and California Company, or the Central Pacific Company, or what not, and that amount is checked, of course, and the credit applied accordingly.

Q. Well, the Southern Pacific Company acts as a sort of a banker for all of these constituent companies, doesn't it, receiving the moneys of the various companies, and disbursing them?

A. That is correct. It receives the money, and disburses it or accounts for it.

Q. Now, the moneys of these constituent companies are disbursed upon the authority of what office?

A. On the authority of the officers of the Southern Pacific Company; or in the case of the land department, on authority of the land commissioner—the Oregon and California land commissioner.

Q. Well, there is one officer who acts as land commissioner for all of the constituent companies, too, is there not?

A. I would not be positive as to that, whether he is land commissioner of all or not. I think at the present time that Mr. McAllaster is land commissioner of the Oregon and California Railroad Company, yes.

Q. And of the Central Pacific?

A. I could not say as to that. I believe that he is, but I would not be positive as to that.

Q. Well, that is already in the record, so if you

have no personal knowledge, I will not question you about it.

A. No, I don't know.

Q. Then, it is a fact, is it not, that the Southern Pacific Company determines what shall be done with the moneys received from the sale of Oregon and California Railroad Company lands?

A. I would say no, that the Southern Pacific Company does not; that it is disbursed in accordance with the terms of the agreement.

Q. I will ask you to examine defendants' exhibit 290. State if that does not show that the Southern Pacific Company does disburse the moneys and renders monthly accounts showing how it has disbursed it.

A. No, this statement is prepared from the books of the Oregon and California Railroad Company that are kept by the accountant who has charge of the corporate accounts of the Oregon and California Company.

Q. Well, isn't this also kept in the books of the Southern Pacific Company?

A. No. No, this is taken from the books of the Oregon and California Railroad Company.

Q. Do you mean that the Southern Pacific Company has received and disbursed these many millions of dollars, and has never kept any record of it?

A. No, I don't mean that, no. Of course the Southern Pacific Company keeps records of all receipts

and disbursements. But this statement which we have here is a statement prepared from the books of the Oregon and California Railroad Company. The Southern Pacific Company books will show the same information, of course.

Q. Well, that is just what I am getting at. These same items appear in the books of the Southern Pacific Company, do they not?

A. Why, most of them, yes; most of these items; yes, most of them. For instance, I find here, showing the earnings and expenses of the Oregon and California Railroad Company for this period to June 30th, that these earnings come from the operation of that railroad, and they will appear in the Southern Pacific accounts.

Q. That is, the totals, or in detail?

A. They will appear there in detail, and of course in a great deal more detail than on the Oregon and California books.

Q. Because the Southern Pacific Company is the operating company?

A. The Southern Pacific Company is the operating company, yes.

Q. Now, by this it appears that the Southern Pacific Company carries a general cash account with the Oregon and California Railway Company, in which is charged all moneys received by the Southern Pacific Company on account of land sales, receipts from transportation, and from all other sources, in one general

cash account, and in the same account there is credited to the Southern Pacific Company the amounts that it has expended?

A. Just a moment, please—in one general cash account. I don't grant that.

Q. Well, one general account? Eliminate the word cash—one general account between the Southern Pacific Company and the Oregon and California Railroad Company? Well, I will use your own language, "In general account." That is correct the way you drew this up, isn't it?

A. Yes.

Q. There is such an account, "Southern Pacific Company in General Account with the Oregon and California Railroad Company?"

A. Covering everying, the entire transactions between them.

Q. Yes. And the Southern Pacific Company receives all the cash and disburses all of the cash, charging itself with what it receives and crediting itself with what it disburses? Isn't that true?

A. That is correct, yes, sir.

Q. Now, do you know whether, when the Southern Pacific Company makes an expenditure, for instance, for taxes on these Oregon lands, whether it receives any authorization from the Oregon and California Railroad Company officers to make that disbursement?

A. Taxes on the Oregon land?

Q. Yes.

A. Why, those taxes are taken care of by the Oregon and California Land Department.

Q. You say is taken care of?

A. Yes. They would check up, prepare the voucher and everything for payment.

Q. That is simply to convey to the officers of the Southern Pacific Company the information as to the amount of taxes, isn't it?

A. Why, it is to pass it through the accounts and through the treasurer for payment, but the entire work and everything in connection with it is done by the Oregon and California Land Department, not by the tax agent of the Southern Pacific Company. He knows little or nothing about it.

Q. Are you sure about that?

A. Why, I would be quite sure of it, because he does not handle such matters. If he does, why, I don't know anything about it.

Q. The tax agent of the Southern Pacific Company in the Wells Fargo Building here at Portland does not handle the subject of taxes?

A. I was thinking of the tax agent in San Francisco. I do not know what Mr. Eddy does up here.

Q. You would not deny the tax agent of the Southern Pacific Company located here in Portland does not attend to these tax matters here in Oregon?

A. I do not know as to that. No, I would not deny it.

Q. Do you know who it was that determined that the Southern Pacific Company should deduct the amount that it paid for taxes on account of these Oregon lands from the receipts from the sales of the lands?

A. No, I don't know, but I understood that was in accordance with the terms of the mortgage.

Q. Are you familiar also with the terms of the lease?

A. No, I cannot say that I am.

A. No, I am not familiar enough with that to answer any questions in regard to it.

Q. You cannot explain upon whose authority the expenses of maintaining the land department, and the taxes paid upon these lands, were deducted from the amounts that were turned over to the Union Trust Company?

A. No, I am not familiar with that at all.

Q. This exhibit 290 is not a detailed statement of the account but simply the monthly totals of the several items? Isn't that true?

A. Not altogether. If you will notice, we have given the items in considerable detail. For instance, there is sundry disbursements by San Francisco office during July, 1905, \$4,454.82; land department, \$4,382.99; director's fees, \$65.00; stationery, \$6.83—\$71.83

total. We have given enough of it all through all of these items, we have endeavored to make sufficient segregation to make the matter clear.

Q. But they are compiled by month, I say, rather than by individual item.

A. Yes, they are compiled by monthly entries, and where segregation was necessary to make clear, why, we have done that. For instance, there is July 31, "Coupons and Registered Bonds Interest paid by New York office during July, 1903, \$422,050." Nothing more is necessary there to make that clear. But where it was, where the amount was made up of several items, we have divided it to give complete information. But when you take gross receipts, for instance, the amount there is gross receipts for the period—of course, there is no detail except showing the class—mail, express, freights, etc.

Q. Exhibit G of the bill of complaint, which is admitted to be correct by the answer, is the supplemental lease of August 1, 1893, between the Oregon and California Railroad Company and the Southern Pacific Company, which it is admitted by the pleadings is still in full force and effect, and has been since that date. This lease provides that the Southern Pacific Company shall pay, among other things, the interest upon the bonded indebtedness of the Oregon and California Railroad Company. Now, if that be true, why does the Southern Pacific Company charge the Oregon and California Railroad Company with the amount that it pays

pursuant to this lease?

A. I know nothing about it. It is a matter I have nothing to do with—I am not called upon to handle at all.

Q. Well, then, there is no way that you can assure us that any of the items of this exhibit 290 is correct, in the sense that it was an indebtedness owing by the one company to the other?

A. Oh, this is the record of actual transactions as handled through the books. There is no doubt that the statement is correct. But just why they do that, or the terms of the lease pertaining to the bond interest, I know nothing about that. I am not required to handle it, and do not handle it.

Q. Do you know whether there is charged in here \$5,000 a year that is paid to the Oregon and California Railroad Company under the terms of the lease?

A. No, I don't find that in here.

Q. There is included, however, in this statement all items of construction and improvement, including new mileage, new railroad—isn't that true?

A. Yes; yes, the operating revenues and expenses and charges for the betterment and addition of the line of the Oregon and California Railroad Company.

Q. And this account starts out on June 30, 1905, with a balance in favor of the Southern Pacific Company of over six millions of dollars? That is true, is it not?

A. \$6,338,936.79. And it closes on June 30, 1912, with that balance reduced to \$2,542,721.18?

A. That is correct.

Q. And in addition to that reduction in the cash balance claimed by the Southern Pacific Company on June 30, 1905, there is the amount that has been invested in new railroad between those two dates as the net result?

A. In addition to that, you say?

Q. Yes.

A. No.

Q. What I mean is that the so-called deficit of over six million dollars has been reduced to a little over two million, and a large amount of money has at the same time been invested in new railroads and betterments and improvements?

A. Everything that has been invested in new railroads, betterments or improvements of the Oregon and California Railroad Company are in these figures.

Q. Yes, but what I am getting at is this: That the operation of this railroad and the receipts from the sale of lands, and the amounts that the railroad company has paid out, results in the reduction of a deficit of six million and a little over to a little over two million, and at the same time in the increasing of the total amount of the property as disclosed by your statement of assets—you have withdrawn that for the purpose of being corrected—but of several million dollars between those

dates—that itemized statement you had there; it had the word “Grants” instead of “Railroads.”

A. No, this doesn't show that part of it.

A. In this statement?

Q. Yes.

A. Where do you find that?

A. Yes.

Mr. Townsend: You mean there has been no new mileage constructed since 1905 in the State of Oregon?

Mr. Fenton: That is included in this account.

A. Let's see. I wouldn't be sure about that.

Mr. Townsend: What about that, Mr. Koehler?

Mr. Koehler: Not that I know of.

Mr. Townsend: No new mileage since 1905?

A. It is possible that there have been some extensions of the line up there.

Mr. Koehler: That is not the O. & C.

Mr. Fenton: There has been no Oregon and California mileage constructed since 1905.

Mr. Koehler: I was thinking of that extension from Natron, but that is not O. & C.

A. That is from Natron down to Klamath.

Mr. Koehler: Yes.

A. That is separately incorporated. Yes, that is separately incorporated. But this shows, of course,

that the deficit of six million dollars has been decreased to two million five hundred and forty-two thousand.

Q. Take the item under date of August 31, 1905: "Sundry Disbursements by San Francisco Office during August, 1905, namely: Land Department \$62,873.55." Do you know what that was for?

A. You mean generally what that was for, or the specific items? Of course, I haven't a statement.

Q. No, I mean specifically, why was that month so much larger than the others?

A. I don't know. I couldn't state as to that. I don't know why August is heavier than the other months—August 31, 1905, no, I cannot explain it.

Q. Has the Oregon and California Railroad Company a treasurer?

A. Mr. Jones, assistant treasurer, is treasurer for all these companies, handles the funds of the companies; he is treasurer of the Southern Pacific, the Oregon and California, the Central Pacific, the S. P. R. R.

Q. Did you ever see a check drawn on the bank account of the Oregon and California Railroad Company?

A. Never have.

Q. Has there ever been one that you know of?

A. Not that I know of.

Q. Mr. Adams, I notice in the statement of assets and liabilities of the Oregon and California Railroad

Company no reference to the land grant. Point out to me, if it be a fact, where it is listed there as one of the assets of the company. I refer to Defendants' Exhibit 286.

A. Nothing in here refers to the land grant specifically.

Q. Well, or otherwise.

A. Let us see. Land grant accounts and land trust fund. This covers the entire account of the Oregon and California Railroad Company, including the land matters.

Q. Where is there anything in here showing the lands listed as an asset of this Oregon and California Railroad Company?

A. This is a balance sheet.

Q. Doesn't this purport to be a statement of assets and liabilities?

A. Oregon and California Railroad Company balance sheet as of May 31, 1912, showing the capital expenditures and other matters pertaining to the accounts for that period.

Q. I said, does it not purport to be a statement of the assets and liabilities of the Oregon and California Railroad Company?

A. Yes, balance sheet.

Q. Now, the assets are made up of the items stated here, none of which include any of the lands still held

by the Railroad Company or claimed by the Railroad Company? Isn't that true?

A. Let me look at that again.

A. This is a balance sheet of the Oregon and California Railroad Company for the eleven months ending May 31, 1912, which shows the capital expenditures, cost of road and franchises, \$36,791,228.12; additions and betterments \$4,131,296.46; equipment \$95,918.00.

Q. I ask the specific question whether there is any item there that includes the unsold granted lands still claimed by the railroad company, and which are involved in this matter?

Mr. Fenton: The defendants will admit that it does not include the railroad land grant, the acreage, or any valuation of that acreage. It does not purport to show it.

Q. That is true, isn't it?

A. There is nothing in this statement, no. This shows the capital expenditures and the current assets and liabilities referred to.

Q. Now, among the liabilities are included the outstanding bonds secured by the mortgage of July 1, 1887, stated here to be \$17,734,000. That is one item of the liabilities, is it not?

A. That is first mortgage five per cent bonds of 1887. That is correct.

Q. And it also includes nineteen million dollars of capital stock?

A. That is correct.

Q. So that this statement shows the assets of the company to be \$43,807,385.36?

A. The assets of the company as capital and—

Q. Well, that is the assets?

A. That is correct, yes.

Q. And the liabilities to be \$44,143,631.93?

A. That is correct.

Q. So that, deducting the capital stock it shows the liabilities to be \$25,143,631.93, and the assets to be as heretofore stated?

A. I don't get that. The capital stock is \$19,000,000. Deducting that, I think you have the answer.

Q. Do you know where, if any place, in the books of the Oregon and California Railroad Company, or of the Southern Pacific Company, if at all, these unsold granted lands that are involved in this suit are inventoried or carried as an asset?

A. No, I do not.

Q. The railroad is carried as an asset at its cost, is it not?

A. At its cost, yes.

Q. Yes, but it is carried as an asset?

A. Yes.

Q. The only question is whether it should be carried at a valuation independent of its actual cost.

Q. You carry it at its actual cost in your books?

A. Yes, the books show the amount that was put into the railroad—the cost of construction.

Whereupon the witness further testified that he could not say in what form money is remitted to the Union Trust Company. That is handled through the New York office. The New York office conducts the transactions with the Union Trust Company and reports to him the payments made to the Trust Company, and these are entered upon his books. He does not know anything about the manner in which the prices for which the lands are sold are determined, but accepts the price approved by the land department. Part of his salary is apportioned to the Oregon and California Railroad Company, the same as the other officers who act for more than one company; their salaries and general office expenses are apportioned among the several companies which they represent. The leases of the companies provide for that. These expenses are all in the first instance paid by the Southern Pacific Company out of its funds, and charged against the company in the proportion which is agreed upon. The rules determine what proportion shall be charged against each company. These rules that are laid down by the commissions, vary. Train mileage, car mileage, road mileage, locomotive mileage, or some other basis is used which determines the value of the service to each company. The expenses of station agents and other employes located on the line of the Oregon and California Railroad Company are

charged to that company. The expenses of officers whose services and jurisdiction extend over more than one corporate property are distributed on the basis that will nearest cover the actual services performed for each. The passenger officials are distributed over corporate properties on a passenger train or car mileage; freight officials on a freight train or car mileage. The Commission of the State of Oregon have prescribed rules for apportioning salaries of officers whose jurisdiction extends over more than one state, and these rules are followed in distributing salaries and expenses in the State of Oregon. They state that the salary of an official whose services extend into some state other than Oregon shall be distributed on a mileage basis, or whatever other basis that in their judgment is considered just and equitable. The distribution of his own salary so far as the State of Oregon is concerned, is determined by the Railroad Commission of that state. The question of service performed for the land department is decided by the officials of the Southern Pacific Company. The accounting department would probably say to Mr. McAllaster, "How much of your services are chargeable to this company or to the Oregon and California Land Department, and how much to the C. P. Land Department?" That would receive consideration and very likely his recommendation would be considered. The auditor of disbursements considers the apportionment recommended by the man in charge. If Mr. McAllaster of the land department, recommends certain apportionment should be made of the salaries, that receives con-

sideration and final approval until such time as it is considered that there should be a change made in it. This auditor of disbursements is the auditor of the Southern Pacific Company. He performs services for all of the companies, and his salary is charged just the same as that of witness, to all of the other companies. He is subject to the general auditor of the Southern Pacific Company, who is subject to the President of the Southern Pacific Company. This distribution is determined by the executive officers of the Southern Pacific Company. Payments by the New York office and similar items are in this statement, and the item under August 31st, "Coupons paid by New York office during August, 1905, \$30,625," is for interest coupons on the bonds. These items of payments by the New York office and similar items are the disbursements referred to by him as made direct by the New York office as distinguished from the other items in the statement. Explaining the statement—Exhibit 290—showing payments made to the Union Trust Company on account of land sales,—there is an item under January 31st on the first page, 1906, "Union Trust Company of New York, Trustee Mortgage, 1887, amount collected on Ida M. Eaton note and paid to Union Trust Company of New York by the New York office, \$1,193.53," and on the next page under date of March 31st, an item "Payment by the New York office during March, 1906, (additional) \$34,657.47, which is itemized as "Union Trust Company of New York, Trustee Mortgage of 1887, amount due from April-

October 31, 1905, \$9,467.29. Amount due for November, 1905, \$19,415.18;" that represents the monthly collections from the sales of land that were paid over to the Union Trust Company. That is taken up in the account of the month of March, 1906, and means that the actual turning over of the money was deferred these few months, so that while the money was paid in March, the item here shows that it was for the preceding months.

Q. Well now, dropping down to the bottom of that same page, under date of June 30th I find expenditures for the year ending June 30, 1906, as follows: "Construction, Henderson to Springfield \$120,049.94; Construction and Improvement \$537,649.67." Do you know whether that is new construction or simply reconstruction or betterment of the existing road?

A. Why, I could not be positive as to that, but I believe from the reading of it that it is what is known as additions and betterments to the existing line, although the first item, "Construction Henderson to Springfield \$120,049," looks as if it was construction of a new line from Henderson to Springfield. The other item "Construction and Improvement \$537,649," I think is improvements to existing property, for the reason that there are no other items in here.

Mr. Fenton: What is the date of that? I can tell you.

Mr. Townsend: It says for the fiscal year ending June 30, 1906. It does not give it any more specifically.

Mr. Fenton: There was a link between the Natron

branch and the main line from Henderson over to Springfield that might be called new construction. I don't remember the date. It connected the two lines. That is, the Woodburn-Springfield branch and the main line, Henderson being at a point near Engene.

A. I find on the statement for the year 1907 as follows: It reads, "Construction and improvements" and there it is divided between the betterments and additions, which satisfies me that this item in 1906, "Construction and improvements," is construction of additions and betterments to the operated line rather than new construction; that during the year 1906 we had some difficulty in dividing our new work between additions and betterments because of the records destroyed in the fire, so in some cases we had to lump them.

Q. Under date of June 30, 1907, I find the following items going into construction and improvement. The first item that you have just referred to "Account Construction Henderson to Springfield," \$39,150.57 with an interest charge added amounting to \$841.75, and then these other two items, namely, "Account betterments \$621,580.83, account additions \$277,625.50." What were those additions, if you know?

A. Those were additions made to the operated line. I can speak positively as to that, because all charges to these accounts additions and betterments are made in accordance with the classification as prescribed by the Interstate Commerce Commission.

Q. Would you include in additions additional ter-

minal facilities, switches or sidetracks?

A. Yes, or increased weight of rail, and there are a great many things. There is a classification prescribed that includes additions.

Q. How would you distinguish betterments from additions? Now, for instance, the laying of new rails, would you call that a betterment or an addition?

A. That is done for us by the Commission. The Interstate Commerce Commission prescribe rules stating what shall be an addition and what shall be a betterment to the property. But you and I, I think, will understand it if we say that it is an improvement to the operated lines. In one case it is considered an addition and in another a betterment. Just how I can explain that, it is not clear in my mind now. In fact, it is pretty hard for any one to understand just where they draw the line between an addition and a betterment; but it is an improvement to an existing property. An addition is a new building where none existed before; a betterment is enlarging that building or structure.

Q. The renewal of rails and ties as they are worn out is not put in as a cost of operation?

A. Yes; oh, yes.

Q. The replacing of worn out material then, is a cost of operation?

A. That is correct, yes, sir.

Q. That would be included in this general amount which I find at the end of each year for the total of the

fiscal year?

A. Operating expenses, yes, sir, except that the Interstate Commerce Commission have prescribed rules governing as to what shall be considered an operating expense and what shall be considered an addition or betterment to the property, so that the rules of the Commission have been strictly observed, of course, in arriving at these figures.

Q. That is true with reference to this particular statement, exhibit 290, is it?

A. Everything, yes.

Q. That the distribution of those items has been as nearly as you could in accordance with the rules of the Interstate Commerce Commission?

A. Yes, just as closely as we could follow it.

Q. On page 12, under date of June 30, 1911, you will see also charged \$33,080.22 for construction of motor car line—Ashland, Oregon. That of course is new construction.

Mr. Fenton: No.

Q. Do you find it?

A. Yes, sir.

Q. It says, "Expenditures during year ending June 30, 1911, motor car line—Ashland, Oregon, construction."

A. I don't know what that item is, whether that is a new line or whether it is reconstruction of an old

line. We have done a great deal of that work in Oregon and California.

Q. Under date of June 30, 1911, on page 12, the second item "Interest on open account with Southern Pacific Company for year ending June 30, 1911, \$310,892.40." What is that?

A. That is interest on cash advanced to the Oregon and California Railroad Company that year.

Q. Well, that is this balance of credit that is carried in favor of the Southern Pacific Company on this statement from time to time, isn't it? For instance, it starts out with a cash credit at the very beginning of the statement, \$6,338,000.

A. Oh, no, no. The Southern Pacific Company advanced money, you will find down here. Take this year, that motor car line Ashland construction, addition and betterment \$378,032.25. To betterments \$206,011.82, and other amounts that have been advanced to the Oregon and California Railroad Company, and the interest is computed on those advances.

Q. Well, then, you mean that every investment that the Southern Pacific Company makes of its moneys, in betterments and improvements on the Oregon and California Railroads, carried as a continuing indebtedness by the Oregon and California Railroad Company, and interest is charged upon it?

A. Interest is charged, yes. Interest is charged on all amounts advanced the Oregon and California Rail-

road Company for additions, betterments and new construction work, just as is common between any companies.

Q. But the Southern Pacific Company gets the benefit of those additions, because it operates the line, does it not? Let me ask you a question: Is that done under the lease, or because of any agreement outside of the lease, so far as you know?

A. Really, I never considered that. It is so common that you get interest on money that you loan or advance to another concern.

Q. Or that you build a railroad to operate for yourself?

A. Yes.

Q. The Southern Pacific Company spends money to build a railroad to operate itself, and charges somebody else interest on it?

A. It is operating the Oregon and California Railroad under a lease.

Q. Yes, but it gets all of the proceeds from the operation, doesn't it?

A. No, I don't think it does. I don't remember just what the terms of the lease are now. The facts are, though, that the Southern Pacific Company charge and collect interest on cash advanced these other companies—the Oregon and California or whatever company it advances money to.

Mr. Fenton: Defendants will admit, that is, defendants for whom we speak, that under the lease the Southern Pacific Company operates the Oregon and California Railroad, collects its entire income from operation, and accounts for it and charges that company with any advances that it may have made over and above what it has received, and that that was the reason why this deficit appears; that there has been a deficit from the beginning of the lease down to the present time.

Q. You have nothing in your office, so far as you know, that would show who actually advanced the money that was used in the construction of this railroad from Ashland southerly to the State line, have you?

A. No.

Q. Nor from Delta in California northerly to the State line?

A. No. Our records—

Q. Nothing from which you could send any statement after you return to San Francisco upon that point?

A. As to who advanced the cash?

Q. Yes, who actually advanced the cash.

A. No, only from the records as they now exist showing that the cash was advanced.

Q. That the cash was expended, you mean; but as to whether it was advanced by one company to another, there is nothing in your records here to show, is there?

A. The cash was expended but not advanced—I don't quite understand.

Q. I say your record here shows simply so much cash expended in construction, but it does not show where the money came from?

A. No. No, it shows the cost of the property there as about forty million dollars.

Q. What rate of interest is charged by the Southern Pacific Company on these advances?

A. I could not say. I cannot answer that.

Q. Look on page 8, the last item under date of June 30, or the next to the last item under date of June 30th, it says: "Difference in rate of interest from 4 per cent to 6 per cent on open account with S. P. Co., year ending June 30, 1909." Now, what does that mean?

A. That would indicate that there was an adjustment in the accounts as between the two roads of interest charged.

Q. Well, that the rate was raised to six or reduced to four?

A. Raised to six.

Q. It indicated it formerly had been charged at four per cent, and the difference was now charged?

A. Two per cent more.

Q. To raise it to six per cent?

A. Yes. That is year ending June 30, 1909.

Q. It is possibly the result of an erroneous compu-

tation.

A. Pretty low rate of interest that year.

REDIRECT EXAMINATION.

Q. I now show you a statement which for the purpose of identification may be marked "Defendants' Exhibit 293," and ask you to explain where you obtained that statement and what you understand it represents.

A. This statement represents the cost of the road and equipment of the Oregon and California Railroad Company at the close of each of the years named in the statement—December 31, 1888, \$30,927,000,—and June 30, 1912—

Q. You need not read the statement.

A. The first year in the statement is December 31, 1888, \$30,927,000; June 30, 1912, \$41,147,417.58.

Q. Now, from what sources did you obtain the figures for the years ending December 31, 1888, and down to and including December 31, 1895?

A. The figures for those years were taken from the annual reports of the Southern Pacific Company forwarded to its directors.

Q. Do you recall, Mr. Adams, whether those reports are made to the Interstate Commerce Commission in the name of the Oregon and California Railroad Company as well as in the name of the Southern Pacific Company, as to this particular mileage, or as to each so-called leased company?

A. There are two reports made. One is by the Southern Pacific Company—the operating company, and the other by the Oregon and California Railroad Company.

Q. They are both required to be made to the Interstate Commerce Commission?

A. Yes. They require a different form of report for an operating company and a leased company; but the reports are rendered in accordance with the requirements of the commission.

Q. And these, then, are official figures taken from those reports?

A. Oh, yes, yes.

Whereupon defendants offered in evidence Defendants' Exhibit 293, to which complainant objected on the ground made to Defendants' Exhibit 286. Whereupon said Defendants' Exhibit 293 was received in evidence and marked "Defendants' Exhibit 293" and is hereinafter set out and described and made a part of this statement of the evidence and identified as such.

Whereupon the witness further testified:

Q. Do you know why it was there was a change in the fiscal year from December 31st to June 30th, or do you have any knowledge on that subject?

A. Why, yes, it was made to conform with the reports that were made by railroad companies generally to the Interstate Commerce Commission. Their fiscal year ends June 30th.

Q. That is, the fiscal year of the Interstate Commerce Commission?

A. Yes, the fiscal year; and usually a railroad company's fiscal year ends June 30th to conform with the Commission's year.

RECROSS EXAMINATION.

Q. Now, by process of subtraction you can determine from this defendants' exhibit 293 the amount expended in any given fiscal year that is covered by the report for betterments and improvements and additions?

A. That is correct.

Q. And construction? [That is all included of course?

A. Yes.

Q. That is, it would include new construction and betterments and additions as well?

A. It would include—no, new construction. Construction of a new line would not be included in there. I mean by that that that does not include the entire construction of lines in Oregon. It would include any new work on the Oregon and California Railroad.

Q. Or any new construction by that company or in the name of that company?

A. Yes.

Q. But not any new Southern Pacific Company lines in the name of some other corporation?

A. Yes, that is it.

Q. I understand.

REDIRECT EXAMINATION.

Q. Mr. Adams, I wish you would refer to defendants' exhibit 291, and make such explanation of that exhibit as you think will show what is the status of this \$956,826.99.

A. On the right hand side of the statement we find cash receipts from May 13, 1887, to end of current month, \$4,603,250.82. We find on the middle part of that statement advances by O. & C. railroad \$956,826.99, making a total of \$5,560,077.81, which was disposed of as follows: Expenses and taxes (left hand side of the statement) \$3,062,364.80; cash paid over to trustee \$2,497,713.01, making the total of the receipts \$5,560,077.81.

Q. Then somebody must have advanced \$956,826.99 for expenses and taxes more than the total receipts on account of this trust fund?

A. The expenditures for that amount in excess of the receipts, which amount was advanced by the Oregon and California Railroad Company as shown by the statement.

RE CROSS EXAMINATION.

Q. Is that item included in the expenses and taxes account of \$3,062,364.80?

A. The item of advances by O. & C.?

Q. Yes.

A. No, sir.

Q. Then this statement shows the expenses and taxes of this land grant, or these land grants, from May 13, 1887, to June 30, 1912, to be over \$4,000,000.00?

A. No, sir. It shows them to be \$3,062,364.80.

Q. Well, I ask you if that item of expense that is designated as advances by O. & C. R. R. Co. for expenses and taxes—\$956,826.99, is a part of the \$3,062,364.80, or whether it should be added to it to get the total expenses and taxes.

A. No, no, not at all. The item of expenses and taxes, the \$3,062,364.80 is fixed—that is an expense. That is nothing else. That is expenses incurred. Now, to meet the expenses incurred and the amount paid to the trustee required over and above the receipts some one to advance some money, namely \$956,826.99, which was advanced by the Oregon and California Railroad Company.

Q. I am going to get to that part in a moment, but you don't understand me. I say, that that is not an expense in addition to this \$3,062,364.80, but is included in that amount.

A. No, it is not an expense in addition, nor is it included in the amount.

Q. Why is it designated for expenses and taxes?

A. Where is it designated?

Q. Why is it designated for expenses and taxes?

A. It is not designated for expenses and taxes. The expenses and taxes are as shown—\$3,062,364.80, you see. That is expenses and taxes. Now then, paid to trustee \$2,497,713.01, making the total of \$5,560,077.81. Now, the receipts were short of that amount \$956,826.99. Some one put up that cash—the Oregon and California Railroad Company.

Q. That is exactly the point. But I am trying to get you to explain that that is not an added expense. If it had just read, “Cash advanced,” it would have been just as intelligible as it is now.

A. Excuse me, but it is not an added expense. If I did not state that, it is not.

Q. That is what I am trying to develop—that should not be added to the other.

A. No, you are right.

Q. It is just cash advanced?

A. Yes.

Q. You say that is advanced by the Oregon and California Railroad Company?

A. Yes.

Q. Well, where do they get the money?

A. Why, the Oregon and California Railroad Company—where did they get that money? Presumably from the Southern Pacific Company. But whether they got this money, or what money they got, the South-

ern Pacific Company advanced them money and have advanced money to them all through the year and years.

Q. Do you keep a cash account for the Oregon and California Railroad Company?

A. In that way—credit their account with the credit, and charge their account with the cash received and with the cash disbursed on account of the land accounts, speaking of Oregon and California land accounts.

Q. You mean, as you testified this morning, that you keep an account of the cash that the Southern Pacific Company receives and that it disburses?

A. Yes.

Q. But you do not mean that the Oregon and California Railroad Company actually receives or disburses any cash?

A. No. No, I don't mean that at all.

Q. And this \$956,826.99 was obviously advanced by the Southern Pacific Company, but in its account with the Oregon and California Railroad Company it was charged against the Oregon and California Railroad Company.

A. That is what it amounts to.

Q. That is all there is to it?

A. Yes; there cannot be anything else.

Q. You don't understand that to be an advance in one sum, but the total of perhaps several items?

A. They paid the bills as they came along.

Q. It is probably the total of a number of items rather than a single item?

A. That is right.

Q. And I presume those same items, or at least a part of them, would be found in this more detailed statement, defendants' exhibit 290, as having been advanced by the New York office, or the San Francisco office for that matter, and charged against the O. & C.?

A. Yes, they will appear in there as the transactions occurred, but as to detail more particularly in the statement of expenses and receipts as shown by this. This is the analysis always.

Mr. Fenton: Referring to what exhibit now?

A. 287, I guess that is called. That form is the class of expenditures, you know. But your statement is correct that they will be found in that form.

Q. That is, for the years that are covered by exhibit 290?

A. Yes, sir.

Q. This may include additions prior to the year 1905? This item of \$956,826.99 appearing in defendants' exhibit 291 may include items antedating this exhibit 290, for all you know?

A. Possibly, but I think not. I think there is nothing there prior to 1908. I think it is all since that time.

Q. You think the items could be ascertained more specifically, then, in this exhibit 290?

A. Oh, no; you could not find the item in there, no. You could not get that out. It simply means that the Southern Pacific Company has paid those bills, and that is the amount that they have advanced to them.

Q. They must appear in this?

A. They do appear in there, but you would not recognize them from that statement, nor no one else. I mean that you could not locate an expenditure with cash as you find it in there. Now, I wanted to make this clear, and I hope that I have. The statement seems to be left handed till you look at it closely.

Whereupon J. H. SHARP, called as a witness on behalf of the defendants being first duly sworn, testified that he is tax clerk in the Land Department and commenced employment with the Company in 1883, under William H. Mills, then land agent for the Central Pacific Railroad Company. He became a deputy under Mills in 1885, and continued such deputy for William H. Mills, land agent of the Central Pacific Railroad Company until the death of Mills in May, 1907. Mills was appointed land agent of the Oregon and California Railroad Company in 1888 and until his death occupied that position; his position as deputy did not apply to the Oregon and California; he had no formal appointment, but had charge just the same. "Defendants' Exhibit 255" being deed form 3332, form 4501 and form 4502, purporting to be forms of deeds of the Central

Pacific Railway Company are the same forms in general use by the Central Pacific Land Department at the time Mills was appointed land agent of the Oregon and California Railroad Company. These forms were drafted by William Singer, Jr. Mills was never at any time land agent of the Southern Pacific Company. The Southern Pacific Company did not, to his knowledge, have a land department in San Francisco. Prior to the time that Charles W. Eberlein succeeded George H. Andrews as acting land agent, the land department of the Oregon and California Railroad Company was maintained and operated at Portland. Andrews reported any matters of that kind to Mills under whose direction he was acting.

Whereupon on cross-examination witness further testified that Mills was land agent of the Central Pacific Railroad Company, which included not only the grant to the Central Pacific under the Act of July 1, 1862, but the grant to the California & Oregon Railroad Company under the Act of July 25, 1866. His title was land agent. Shortly after the Oregon and California Railroad Company became a part of the system of railroads operated by the Southern Pacific Company. Mills then became land agent of the Oregon and California Railway Company and George H. Andrews at Portland acted under the direction of Mills. He means to say that the Southern Pacific Company itself did not have anything to say as to the policies to be pursued in the disposition of the lands of its constituent companies, and that it did not influence under the administration of

Mills the policies pursued by the Central Pacific Railroad Company as to its original grant or as to the grant to the California & Oregon Railroad Company, or as to the grants in the State of Oregon involved in this case. He believes Huntington was president of the Southern Pacific Company during that time, but could not say whether or not Mills was responsible to Huntington for the discharge of his duties. He supposes Mills took his instructions from the Board of Directors of the Central Pacific Railroad Company, but he never knew Mills to have any practical instructions or suggestions from time to time while Mills was engaged in that work. He does not know that Mills was subject to instructions of Huntington as to land matters, but thinks Mills was given free range by the Board of Directors. He does not know anything about any other duties of Mills, but only knows that his duties related to land matters. The connection of Mills with the Company related to these land grants and land matters and not to operation or anything of that kind. He believes that Judge Cornish was at the head of the land department after the Southern Pacific Company became a part of the so-called Harriman lines—he so understood it. In that way he may have at that time had general supervision of the policies of all these land departments, but he does not know anything about that himself. He took his instructions from Mills, and he does not feel competent to say from whom Mills took his instructions, outside of the instructions that Mills got from the Board of Directors of the Central Pacific Railroad Company in his appointment.

Whereupon DAVID LORING, called as a witness on behalf of defendants and being first duly sworn, testified that he resides at Portland, Oregon, and is at present a civil engineer and surveyor and is not in the employ of the Southern Pacific Company or the Oregon and California Railroad Company, or any of the parties to this suit. He entered the employ of the Oregon and California Railroad Company March 1, 1882, as engineer on location and construction during a portion of that year. Later on he was for a short time in charge of the taxes of the land department and immediately after that was right of way agent, obtaining the right of way on the southern extension from Roseburg to the State line of Oregon, to the southern State line. After that was finished he went into the land department of the Company as chief clerk, that was sometime in 1884, and he remained there as such until October 1, 1904. During the last two years, or about that length of time, he was assistant treasurer to the Oregon and California Railroad Company, his immediate superior, while he was in the land department was George H. Andrews, who was first secretary and treasurer of the Company and supervised the operation of the land department and who later on became acting land agent and remained such until October 1st, 1904. Andrews was succeeded as acting land agent of the Oregon and California Railroad Company by Charles W. Eberlein, who took charge as he understands. He has no personal knowledge what his position was. The land department of the Oregon and California Railroad Company during the time he

was connected with the Company was maintained, located and operated at Portland, Oregon, and he served as chief clerk from early in 1884.

Whereupon over the objection of counsel for complainant that the same was immaterial and irrelevant and that the witness was incompetent to testify as to the policy of the corporation, witness further testified that when he went into the office the land agent I. R. Moores had just lately died and he was put in charge of the office, subject to the supervision of Mr. Andrews, whose office was on the lower floor while theirs was on the upper floor of the building. He found a form of contract in force requiring payments annually with interest and deeds to cover the same when paid up in full and collections were made on these contracts according to the form required. The tract books, meaning the plat books, showing the land, had prices marked on them by their predecessors, and where he thought the land was not priced high enough, he changed the prices to conform to what in his judgment they should be sold at, and in cases where those lands were sold the contracts were made out in conformity with those prices, subject to Mr. Andrews' revision. In some cases Andrews changed the prices and in some he did not. They had a book which had been made up before the time of witness from examinations made by field agents of the property with the appraised prices on them, varying from 25 cents to \$10.00 or \$12.00 an acre. These prices were not marked on the plats, but in selling any of the land included in these examinations they were guided by them in the price.

Some years afterwards they started examining lands on their own behalf and the appraised values as given by the examiners were entered with the description of the property in the same book up to a certain length of time. Then he made a set of books which each field agent should have covering a whole township of odd numbered sections and his descriptions were all written in those with his appraisement of value, and filed, and were used thereafter. When contracts which had been made were paid up, the proper deed was filled out to conform to the conditions in the contract, and a list of the same was made up monthly or periodically, and executed by the president and secretary and he as notary executed nearly all of these deeds with the exception of when he might have been away on a vacation or sick. The deeds provided a release of the mortgage given to the Union Trust Company of July 1, 1887, for that particular tract of land and after the deeds were executed at Portland they were sent to the trustees to be released there. A list of the lands with a full statement of the amounts received was sent with them and in due time they came back and were delivered to the owners, if they could find them. They could not always find them. That is to say that the deeds were so drawn that the Union Trust Company joined in releasing that particular tract.

Whereupon the witness further testified as follows:

Q. Now, what was done, if anything, about observing in any way the Act of April 10, 1869, attempting to modify or limit the price and quantity at which the lands

granted by the Act of July 25, 1866, should be sold, and the provision of the Act of May 4, 1870, upon the same subject, during the time that you had official connection with this land department?

A. I don't think that I was governed at all by the Act, only by instructions from my superior as to what I should do in the office.

Q. And in placing the prices and in estimating the quantities of land which should be sold or included in any contract of sale or deed, did the Company in the administration of this grant while you were in the office or connected with the land department, pay any attention to those statutes?

A. In respect of settlers on railroad land, odd sections, they made a point of selling to them at the appraised value of the land without considering the improvements that there might be on it.

Q. By what appraised value do you mean?

A. By our field agent's, or such information as we could otherwise gather.

Q. Now did that appraised value have any reference to the two dollars and a half an acre?

A. I don't know that it did; not in my instructions.

Q. Now those so-called settlers that might be on an odd section within the limits of the grant, were there many of them in the latter part of your administration or were these principally during the very early part?

A. They were nearly all south of Roseburg, who

had settled on the land prior to the construction and withdrawal of the land south of Roseburg, before my time.

Q. That is to say, when the Company came to the administration of the grant after the withdrawal of the lands and the construction of the road it was found that there were some people actually on odd sections within the limits of the grant that had gone there prior to the withdrawal and that as to these you recognized their applications to purchase and sold it to them at the appraisal prices fixed by your cruisers; is that the way I understand it?

A. That is the fact.

Q. And that is the way that that was handled?

A. That is the fact.

Q. Could you, roughly speaking, give any estimate as to the number of such so-called settlers or cases where persons had gone upon the lands and had made some improvements and were in possession when the Company undertook to administer the grant?

A. I could not give any estimate of amount or number of people. There was a book kept, called Railroad Pre-emptions.

Q. Railroad Pre-emptions?

A. A railroad pre-emption book; and that was the list I referred to. It was written out in the handwriting of our predecessors almost entirely, and when the withdrawals were made so that it made the grant ef-

fective to us we sent them proper notices, and I think that out of the whole amount on that list not over five per cent responded. We sent them regular notices, and then after a length of time we sent them a registered letter stating that if they did not buy within a certain time we should cancel that old filing and sell to anyone else. Some responded and we sold to them at the appraised value after we had examined it. When they answered we sent out some one to look at it, and then from his report we fixed the price.

Q. Were these so-called settlers that were in that situation persons who had entered upon the lands supposing or believing that they were public lands?

A. I could not say.

Q. And had undertaken to make settlements at one hundred and sixty acres or less?

A. I could not say. I know positively, though, that a great many of them were old donation settlers having donations and having other lands adjoining.

Q. Well, had they moved off of their donation claims on to these railroad lands, or simply enclosed them?

A. I can't remember about that.

Q. In making these appraisals and selling these lands to those people, did you, or did you not, estimate the value of any of their improvements and charge them for them, or did you just estimate the value of the land?

A. Estimated the value of the land.

Q. Do you recall whether there was ever any conflict or contest between any of these so-called settlers and the Company with reference to any of these lands?

A. I don't remember now.

Q. Don't you know, as a matter of fact, that there were never any contests with reference to these lands that were settled upon under these circumstances during the time you had charge?

A. Not to my knowledge or remembrance.

Q. There were none to your knowledge?

A. Not to my knowledge or remembrance.

Q. What became of that book which you called the Pre-emption Book, do you know?

A. It was, with all papers, turned over to Mr. Eberlein.

Q. And could you give the Court any idea of about the number of entries, I mean claims or pre-emption claimants approximately that that book would have in it?

A. I could give you approximately the number, but a great many of them were by different parties for the same land, or a portion of the same land overlapping, so that it would not be the actual number of say one hundred and sixty acres each.

Q. Can you give the Court any idea of the probable acreage of land that might have been affected or that was affected by these so-called pre-emption filings, as

you call them?

A. My remembrance is that there were in the neighborhood of four hundred odd filings; but that would not represent one hundred and sixty acres to each, as I say, because what proportion were duplicated or partially duplicated I can't tell.

Q. Now, as I understand you, Mr. Loring, the Company undertook to recognize these people when they were actual settlers on odd sections and to adjust the prices to let them have the lands if they desired them?

A. We did; and we sent notices to every one of them.

Q. Without regard to the \$2.50 an acre clause, or without regard to their improvements?

A. Without regard to their improvements or any price except what our field agents placed on it. If we had an answer from a man that we sent to, then we examined the land. If we had no answer, we didn't examine the land.

Q. About what proportion of these pre-emption entries in this book were put there by the predecessor of Mr. Andrews, Mr. I. R. Moores?

A. Nearly all of them. There may have been a few in the first two or three years of Mr. Andrews' and my supervision.

Q. Now what was the policy, if you know, of the Company during this time that you were in the admin-

istration of this grant with reference to encouragement of the sales of these lands to persons who would settle or cultivate the same or establish homes upon them?

A. The preference right was always given to them as against anyone else.

Q. Do you recall, Mr. Loring, about when it was that these lands that were remote from the foothills and remote from the Willamette Valley and from the Rogue River Valley and the Umpqua Valley, and the other agricultural portions of Western Oregon, and that were situated in the Coast Mountains and in the Cascade Mountains, began to have an inquiring or general market value for timber purposes? Do you remember about when that was?

A. No, I don't think I do.

Q. Well, was there a time during your connection with the Company when there began an inquiry for these outlying lands that had hitherto had no market value and the inquiry was on account of their timber values?

A. My impression is it was after 1894, the high-water; scarcely much of anything before that.

Q. Well now, was this inquiry all at once or was it gradual?

A. It was gradual and increased as the Michigan and Wisconsin and Minnesota timber men came out here.

different varieties on these lands. The lands were nearly always examined for timber. The books referred to were about six inches by four and a half square, about three-quarters of an inch thick. On the left hand side of the page would be lines and the initials northeast, and part way down northwest, and then southeast and then southwest, for the quarter sections, and space enough on that page to write in those descriptions of the land. On the opposite page facing it was shown the quarter sections, subdivided into forty-acre tracts, so that the topography of the country could be put in there and that went all through the book by quarter sections, so that each book covered a whole township. The topography of these lands examined, was shown, on that quarter section diagram, on the opposite page from the writings, they were not put in by gradients. By topography he means showing the lands where the streams ran across the different lines of the forties or through them, and showed, where the man was able to do it, the hatching, as they called it, showing the hills or the valleys, as they might be; and in some instances they had barometers, in most cases they did, and they put down the barometer reading of the elevations of the different points. These books were printed and furnished by the Company through him in the shape of small octavos of about seventy-two pages, practically. There were 18 sections to a township and four pages to each section and the books were three-quarters of an inch thick. When they were completed by the field men, they were filed away in the Company's office. He does not recall or state how

much of these grants involved in this suit, including the unpatented lands, was cruised in the field and reported upon in this way before he left the Company in October, 1904, but would say that it was considerably more than half. Richard Koehler was the executive officer of the Oregon and California Railroad Company that resided at Portland at the time and had general supervision over the land department and was in charge of the operation of the road. His position as related to the Oregon and California Railroad Company was that of second vice-president and manager, as he understood it. Koehler was also a director of the Company.

Whereupon the witness further testified as follows:

Q. What is the fact, Mr. Loring, if you know, as to whether some of these lands in these early days that were sold were sold at a price less than two and a half an acre?

A. I don't think any were in our time, but my remembrance is that there were some few cases showing on the contracts as sold less than that before our time.

Q. You say "our time"; you mean from the time you came into connection with the Company?

A. Prior to 1884.

Q. Yes.

Mr. Townsend: Now you mean subsequent to 1884.

Mr. Fenton: When he said prior to his time he meant prior to 1884.

Q. Were you yourself over a considerable portion of these lands during the time you were connected with the Company in any way?

A. Yes, quite a considerable.

Q. What would be your knowledge as to whether or not these parcels of land that were susceptible of actual settlement or the establishment of homes were large or small tracts contiguous to each other, or whether they were large or small tracts that were widely separated from each other and with other lands between that were either timber or incapable of actual settlement? What is your recollection and knowledge on that subject, based upon your personal knowledge from being over these lands, and based upon your knowledge of these field reports, these books that were returned to you, and the official knowledge that you obtained in that way from the records of the Company?

Mr. Townsend: The question is objected to in so far as it relates to the knowledge of the witness based upon field reports and any other source of information than personal observation, as incompetent, hearsay and irrelevant and immaterial. There is so much evidence concerning the character of this land and its susceptibility to settlement that I have not incumbered the record by interposing an objection every time the subject is touched in the examination of the witnesses, and I therefore ask counsel to stipulate at this point that all testimony heretofore taken or hereafter taken concerning the character of the land and its susceptibility to settlement

shall be received subject to the objection by the Government that it is immaterial and irrelevant, the character of the lands in no way excusing breaches of the condition as to quantity of lands to be sold to any one purchaser or as to the price at which the same should be sold, and the character of the land or its susceptibility to settlement, therefore, being in no way at issue, directly or indirectly, in this case.

Mr. Fenton: It may be understood, and the defendants so stipulate, that the Government may save its objection and exception to all testimony of this character heretofore taken or all that may be taken hereafter, tending to show the character or kind of land, or its capabilities, as stated by counsel.

A. I had occasion to go over the greater part of the lands south of Roseburg during my term as right of way agent. Also after that every year I took two weeks in the mountains hunting, and at a different locality every year, for upwards of fifteen years, and I that way became very conversant with the country and the nature of the land. I can't remember any large tracts which were remote from the immediate valley which would be easily settled and upon which a man could make a living. There were some small places which would make a very good residence and perhaps could make a garden, but he would have to clear the heavy timber to do anything further, and they were not very near together.

Q. Were these parcels that were capable of being occupied for a home site, for a garden and dwelling,

with that. It was all done by instructions from Mr. Andrews personally.

Q. Was this claim of the Company to ownership one that was open and generally known to everybody, if you know?

Mr. Townsend: Objected to as incompetent, irrelevant and immaterial, and assuming a state of facts not shown to exist, and calling for a conclusion of the witness upon a question of fact and also a question of law as to the character of the so-called claim of ownership.

A. It was so understood through the country, commonly.

Q. What is the fact, if you know, as to whether prior to the completion of the railroad from Roseburg south to the California state line, the timber lands, that is such lands as were chiefly valuable for timber and were not available or susceptible of settlement or the establishment of homes, had any market or other value? That is, the road was completed over the territory I have mentioned in December, 1887. I refer to the time prior to that time as to whether these timber lands so-called had any market value.

Mr. Townsend: That is objected to as incompetent, irrelevant and immaterial, and assuming that some of the lands were not susceptible to settlement.

Witness: Will you state in what part of the grant?

Mr. Fenton: Read the question and that will indicate it. I say the timber lands, prior to 1887.

(Last question read.)

A. There was no demand on our office for any of the land as timber land. The only land I ever heard of prior to that date as having a market value was the Government even section lands south of the Siskiyou Mountains and east of the Cascades known as the Jenny Creek district, which was bought up by cash entry, a great deal of it, and some by timber claims for timber.

Q. Was that in the eastern part of Jackson County, Oregon?

A. The southeastern and partly in Klamath.

Q. And in the State of Oregon or in the State of California?

A. Oregon.

Q. Then you did hear that some of these lands were entered under the pre-emption law, I mean the even sections in the southeastern part of Jackson County and the western part of Klamath County, known as the Jenny Creek country?

A. Yes, sir.

Q. And do you know what became of those lands? Did you follow it up?

A. They were bought by speculators.

Q. Timber investors?

A. Yes, sir.

Q. Now were these lands prior to December, 1887, and commonly called timber lands, applied for by any

persons desiring to settle upon them the same so far as you know? I mean to the Company.

A. If they applied for the lands we didn't know that they wanted to settle on them. The application didn't have to so state.

Q. I understand, but from your knowledge of the administration of the grant aren't you able to say whether people applied for any of these timber lands for the purpose of going in there and making homes on them or settling?

A. Not to my knowledge.

Q. As a matter of fact, was there prior to 1887 any movement in these Company lands on the part of the Company or any applicants to purchase for any purpose of any considerable amount?

A. No, except there was a slight movement in the eastern part of Clackamas County.

Q. Clackamas County?

A. Yes, which was nearby here.

Q. That is south of Portland here?

A. And the timber being susceptible, being easily gotten to market; they would go in there and cut that off and could utilize it nearby.

Q. Well, these people that would apply for the purchase of these lands in Clackamas County, were they applying for it or buying it for the timber that was on it, or buying it for the land to make homes?

A. Some of them made homes on it after they cut the timber off, but whether they stayed there any length of time I could not say. They had their homes there at the time, a few of the purchasers. They were purchasers from us.

Q. But you don't know whether these purchasers in a short time sold the lands to mill men and afterwards moved away? You don't know?

A. I have no knowledge of that.

Q. Do you know of your own knowledge of any of these people that bought a quarter section from the Company in the eastern part of Clackamas County that removed all the timber from any of those quarter sections that were timbered lands when they bought them?

A. No.

Q. As a matter of fact, a few German settlers bought some of these lands in the eastern part of Clackamas County and made small clearings and lived on these lands and sold timber from these lands to the saw mill men while they were living there?

A. Yes.

Q. Isn't that about the way that that was done in small quantities?

A. To my personal knowledge it was done in some few cases. I was on the ground and saw the places.

Q. Was there any considerable number of those instances, or only a few?

A. Not many.

Q. What do you mean by not many, as many as twenty or thirty, or how many?

A. Well, of the lands which we sold in that locality I should not suppose there was more than five per cent of them that did that.

Q. Five per cent of the sales which the Company made?

A. Yes.

Q. Now what is the fact, Mr. Loring, as to whether or not during all the time you were connected with the Company in its land department the Company did not undertake to sell its lands that it did sell at the best price that it could obtain to anyone who wanted to buy without regard to two and a half an acre, or without regard to the area, other than these cases where these pre-emption people had, as you say, in the early days gone upon some of these lands where the Company preferred them? What is the fact as to how that was done?

A. We always got the best price we could.

Q. And did you, or not, sell more or less than one hundred and sixty acres, as the circumstances seemed favorable to the Company?

A. We sold as much as the man was willing to buy.

Q. Is it or not true that the land sales at prices exceeding two and a half an acre and in quantities exceeding one hundred and sixty acres to a single person were generally unknown and kept secret by the Company? Did the Company maintain, or attempt to maintain,

any secrecy as to its conduct of its business in this respect?

A. I never knew there was any particular secrecy maintained, otherwise than if an outside party who was not purchasing should inquire what land we had sold and how much to any particular person, we refused to give him information, as it was none of his business.

Q. Well, why did you do that?

A. Simply because it was a matter between us and the purchaser.

Q. If you had other lands for sale in the same vicinity and had sold to John Smith, for instance, one eighty in the same section and John Jones would come in and want to buy an eighty alongside of him and should ask you what John Smith paid for the eighty, would you refuse to tell him?

A. I don't remember, but I don't think I should tell him. I should tell him the price of the land we wanted, but it didn't matter—

Q (Interrupting) Now did you give any instructions to these people who took these contracts for the purchase and sale of the property that were payable in installments, that they should keep still and never show their contracts to anybody, or keep it away from the public?

A. No.

Q. Now, if you had been handling this same body of land and had not obtained the title under these acts

of Congress but had bought them yourself without regard to any of the terms of any statute, had a fee simple title, would you have maintained the same policy of telling an inquirer who asked about the price at which somebody else had bought a piece of land, that you could not tell him what it was, or you didn't want to, or you would not tell him? Would you have pursued the same policy with reference to that kind of land as you did with reference to this land grant?

A. I don't know but what I should have.

Q. State to the court whether or not, Mr. Loring, the company, or any of your officers over you and giving you directions, at any time withheld from the public or secreted from the public, as charged in the bill of complaint in this case, in substance, so as to conceal the fact that some of these lands were sold and most of them were sold in excess of two and a half an acre, and some of them in quantities in excess of one hundred and sixty acres?

A. No.

Q. Did the Company, or you, or anyone connected with the Company, withhold from the public records any of these contracts if the parties desired to have them recorded?

A. No.

Mr. Townsend: Were any of these contracts acknowledged?

A. No.

Mr. Townsend: Were any of them entitled to record under the laws of this state?

A. They were recorded, some were.

Witness: I said some were recorded.

Mr. Townsend: Were any of them entitled to record under the laws of this state?

Witness: I don't know."

Whereupon the witness on cross-examination further testified that he has lived in Portland continuously since he severed his connection with the Oregon and California Railroad Company on October 1, 1904, and he was living in Portland during the year 1907 and recalls meeting Mr. Townsend, counsel for the complainant, on August 23, 1907, or about that time and discussed the general subject of his knowledge concerning this land grant with him. The conversation took place in the old grand jury room of the Post Office Building and in the northwest corner thereof at Portland, Oregon. He could not say that Mr. Fulkerson as stenographer took down in short hand the information which witness gave Townsend. His impression is that the stenographer was a woman but he would not say that Mr. Fulkerson was not the person, he does not know. He remembers that the statement was taken down in short hand and that he gave the information from time to time as Mr. Townsend dictated the substance of it to the stenographer in his presence, and that afterwards when the statement was completed, a copy was given to

him for inspection in Mr. Townsend's office and he read it over and corrected it.

Whereupon witness examined "Government's Exhibit 116" and further interrogated in reference thereto testified that Mr. Townsend, after discussing one subject with him would then dictate the substance of it consisting of a few lines or in some instances a paragraph and in that way they went through the subject and Mr. Townsend and he did not talk the entire subject first and then dictate the entire statement afterwards. He corrected Townsend, if the latter made an erroneous statement as he dictated. He did not intend to make any statement to Townsend but intended to assent to what Townsend might make if it was correct. Witness gave Townsend the information first and then Townsend attempted to dictate to the stenographer the information which he gave to Townsend and as Townsend dictated witness corrected it from time to time if Townsend made any error. Referring to this statement "Government's Exhibit 116" witness says that it is not the statement which he made for the reason that he swore to and signed two statements under promise that he would have one of them which was never given to him—this statement is not signed.

Whereupon the witness further testified as follows:

"Q. Now, you have examined this document Government's Exhibit 116; you have read it, have you, Mr. Loring?"

A. Yes, sir.

Q. You have just called my attention to one portion of it which you say you do not recollect of having stated. Please underscore that part, and then I will read it into the record. I erased your crosses, but you know where it is.

(The witness here underscored portions of said document, as requested.)

Q. Now you have indicated that on page 5 of this statement the words "and it was the policy of the Company to avoid selecting as long as possible in order to keep them off the tax rolls," and also the words occurring four lines beyond, "and second, to avoid taxes," were not included in the oral statement which you made to me and that you do not recall that it was included in the statement that I dictated?

A. It should not have been, because it was not a fact and I would not have made any such statement unless it were a fact.

Q. So that your recollection is that you did not make those statements and that those expressions and words were not in the statement that you made to me and which I dictated?

A. They were not intended to be.

Q. I say that is your recollection, that they were not?

A. Yes, because I would not have assented to anything of the kind if I had known that it was there.

Q. With that exception do you say that the bal-

ance of the statement is correct, in substance, as the statement that you made to me at that time?

A. As near as I can remember.

Q. You would not now deny any of the balance of the statement?

A. I don't think I should, no.

Mr. Townsend: I now offer—

Witness (interrupting): One minute, Mr. Townsend, further on there, there are some statements relating to mineral examinations and sales which are rather obscure in the wording. I can understand what is meant there, but perhaps someone else might not.

Q. Well, I will give you an opportunity to explain what you meant by that, and that will clear it up. That is not probably material at this time, because not covered by your present examination, but so that you may not be misunderstood you are entitled to explain it, and I will give you an opportunity to, and I don't know any better time than right now. Please indicate the part that you refer to, designating it by page, and make any explanation that you think proper.

A. Mr. Townsend, this is what I referred to. The clause here reads, "It is also a fact that afterwards minerals were discovered, and such lands were sold as mineral lands after being patented." That is not what I would have intended to say. I should have intended to say, "It is also a fact that where mineral lands were discovered such lands were sold as mineral lands after be-

ing patented.”

Mr. Townsend: I will state that I had that same understanding.

Witness: That I have just stated?

Mr. Townsend: Yes; and the awkward phraseology of it in this statement was mere carelessness in dictating.

Witness: That is the way it looked to me.

Mr. Townsend: I did not understand that you meant to say that they found where there were mineral lands and then got them patented.

Witness: That is the way it reads there.

Mr. Townsend: Well, it is susceptible, possibly, to that construction.

Witness: Yes.

Mr. Townsend: But that is not the way it was intended.

Witness: No.

Whereupon complainant offered and there was received in evidence “Government’s Exhibit 116” to which defendants objected as incompetent, immaterial and irrelevant and not competent particularly by way of impeachment, which exhibit is hereinafter set out and described and made a part of this Statement of Evidence and identified as such.

Whereupon witness further testified that when he

became chief clerk of the Land Department in 1884 he found the records of the office were kept at least in part upon plats and part upon tract books and that some of the patented lands had been appraised and prices had been fixed upon the lands and these prices noted only on the plats. They also included lands not patented but no indemnity lands that had not been patented and they related more to the northerly part of the grant than to the southerly part. He has no personal knowledge of the method pursued by his predecessors in that work arriving at these prices except from the books of reports of field examiners. There were some small packages in the office when he went there but most of these had been rewritten into the book to which he has referred, but there was a great deal more examination and appraisal of the lands and fixing prices after he came into the office than before. When he and Andrews were of the opinion that the price which he found in the office, as to any particular piece of land, was insufficient he raised it to its real market value, according to his judgment. He fixed these prices subject to the approval of Andrews for the first year or two, and after that either Andrews did it or he and Andrews did it jointly, after Andrews moved up into their office. That practice continued as to fixing the price of these railroad lands more or less until he severed his connection on October 1, 1904. Andrews practically did it all the last ten years of their connection. No one supervised Mr. Andrews' work and Mills did not give his personal attention to the fixing of the prices of these lands unless Andrews asked his advice and that

was not as to all of the lands but as to some particular parcel of land, nor did Andrews ever consult anyone else besides Mills to the knowledge of witness. Witness did not to his knowledge consult anyone except Andrews or Mills, at least he has no personal recollection of doing so and never to his knowledge, after July 1, 1887, did the Union Trust Company take any part whatever in fixing the price at which these lands should be sold. The matter was determined, so far as he knew, by the employes of the Railroad Company and the Trust Company's connection with the sales of the land was limited to receiving the money and joining in the deeds.

Whereupon the witness further testified as follows:

“Q. Now, I did not quite understand what you meant by this class of pre-emptioners who were listed in this book which you found, and I think you said perhaps some additions were made to it after you came into the office. Let me ask you rather an involved question, but please follow it closely so that I can see what you mean. Do you mean that this book contained a list of those people who settled upon the land before the filing of the map of definite location and before the withdrawal of the lands of the Department of the Interior?

A. I don't know that they settled on it. They made their filings with us prior to that time. I have stated that I don't know if any of them were actual settlers on the land, in direct-examination.

Q. I understand, but they purported to be and filed some sort of a claim to that effect with you; is that it?

A. Yes.

Q. Now did you have regular blanks for them to make those claims upon, to make those filings?

A. I don't remember.

Q. You don't know whether it was a uniform form of blank, or whether they came in in different forms?

A. I can't remember that. They were all entered in this book in somebody's handwriting but ours; whether they were in regular formal application blanks or otherwise I don't now remember.

Q. Well, the substance of them was that they represented that they had settled upon the lands before the lands had been withdrawn, and that they desired to purchase them from the Railroad Company? Was that the substance of it? Or did they claim some right to purchase?

A. I don't know that they claimed any right. I think that they claimed that they were settlers on the land.

Q. And desired to purchase?

A. And desired to purchase.

Q. When you say that they were given preference to purchase, Mr. Loring, isn't this the fact: That at that time there was not a very large demand for those lands, and they were the most likely purchasers and therefore you were naturally brought into negotiation with them first as to the sale of those lands?

A. I don't know about that. All that southern country from Roseburg south, before the maps of definite location and withdrawal nearly all of that land could have been bought and was bought around there for a dollar and a quarter an acre. It was then offered land and it could be bought cheaply, and they did buy it all through there for that.

Q. You mean from the Government?

A. From the Government. You could go into the Land Office at Roseburg and buy day after day; one person could buy as much as he wanted to.

Q. Well then, you do not remember, do you, of there being any contests or any competition between these so-called settlers who wanted to purchase and persons who did not claim to be settlers?

A. Not at that time.

Q. As a matter of fact, if a person who had not claimed to be a settler had offered you more for the land you would have sold to him, wouldn't you?

A. Not if it had this filing on it. When we commenced selling south of Roseburg, which we didn't do until after the maps of definite location and withdrawal, and I think still later than that, when anyone made an application for land we always referred to this old pre-emption book to see if it conflicted with any of those applications before we sold to the one that was a new applicant.

Q. If the so-called pre-emption claimant, which is

sufficiently accurate for the purpose of our examination here, if he would give the same price as anyone else you gave him preference, did you not?

A. Yes.

Q. Now if he would not give as much as another applicant to purchase, would you still give him the preference?

A. There never was such an instance.

Q. Well, that is what I meant before, that there never was a time when you really had an opportunity to demonstrate whether you would give the settler the preference if somebody else would have offered a greater price. There never was such a time, was there?

A. I don't know of any such instance.

Q. So that you do not mean that you gave these settlers a preference in that sense that you would sell to them for less than you would to anyone else?

A. Not unless they had refused to purchase at the price we offered.

Q. Not unless who had refused?

A. You see, we notified all those parties to purchase when we were ready to sell; all of them; and then afterwards, whether we got replies, or if we did not get replies we sent registered notices to see if we could get answers, and where we got answers we then had the land examined and gave them a price at which we would sell to them. In almost all cases where we had answers

they purchased, and some they didn't. But I don't remember of any case where anyone who was not one of these pre-emptors offered to buy any land that a pre-emptor had applied for and had answered those letters which we sent out.

Q. So that this competition between the settlers and the non-settlers never took place during that time?

A. Not as regards those pre-emptors south of Roseburg.

Q. Now Mr. Loring, speaking generally the Company never to your knowledge made any effort to confine themselves, or, rather, to keep within the restrictions of these two grants as to the sale of the lands? I think you testified on your direct-examination to that effect.

A. In what respect?

Q. As to the sale to actual settlers only in quantities not exceeding one hundred and sixty acres to one purchaser and for a price not exceeding two dollars and a half an acre.

A. Only in relation to these pre-emption claimants I have just lately referred to.

Q. Well, did you understand that that was in obedience to these provisions of the grant?

A. No.

Q. So that that was a mere business policy of the company rather than responsive to these provisions of the grant?

A. That is all; thinking that they were there they had the best right if they had made the improvements which they claimed in their applications, we always gave them the preference right; or any settler at any time when he came up and claimed that he had a claim out in the mountains anywhere and he wanted to buy, we sold to him, rather, as against a large timber purchaser.

Q. Was there ever a time when you refused to sell to anybody that came to purchase and would pay the price that you asked?

A. I don't know any case.

Q. You don't know of a single instance during your twenty years' experience when they ever refused to sell to anybody when they came there and applied to purchase and would pay the price that the Company asked for the land?

A. I haven't any remembrance now, if there was any such.

Q. So that, if a man came into the office and applied to purchase a tract of land and offered to pay your price, he did not have to state whether he was a settler or not in order to negotiate a purchase of the land?

A. No.

Q. Do you not remember the fact to be that after Mr. Mills became land agent, and commencing with the years, speaking generally now, from 1890 to 1894, without confining it to any one of those years but at that

general time, that the Company, acting through its land graders and timber curisers, and particularly Mr. Britt and Mr. Elliott, went out and blocked out timber lands and rather encouraged the sale of the lands to the purchasers of timber lands?

A. I don't know that that was done, no.

Q. It is a fact, is it not, that during all that time the Company was endeavoring to sell all of the lands it could and for the best price it could; that is true, isn't it?

A. Yes.

Q. And when this demand for timber lands began the Company encouraged it and promoted the sale to the timber land buyers, did it not?

A. That is the fact.

Q. And with that end in view they employed experienced timber cruisers, like Mr. Britt and Mr. Elliott, and had them go out and block out timber properties that could be operated as one body and then negotiated sales of those large bodies of timber lands?

A. I don't know that they blocked it out especially. When any of those principal examiners went out they would examine a township, or a certain number of townships, but if some of the land was over a different watershed or different drain to that they were not so particular in examining that as they were the main body, but they would complete the township over that divide if they could do so in that season or in that trip.

Q. Well, that is what I meant. You have ex-

pressed it more clearly than I did in my question; that they would examine the land with reference to the watershed so that they could report the bodies of timber that could be operated together.

A. That was part of their business; what they went for, in any event, anyhow.

Q. Now do you not remember that one of the first large timber sales that was made was in the Mohawk Valley to the Boothe-Kelly Company, where Mr. Britt went out and examined a body of land there in a given watershed and reported it and through his efforts in connection with yours, perhaps, and the other employes of your office, that sale was negotiated to the Boothe-Kelly Company?

A. Well, he didn't examine that for any one particular watershed. He was directed, if I remember right, to examine all the lands in that locality that he could that season. I don't think he did it in one season; I think he took parts of two seasons to examine that tract in there, and later on it took other parties' time to examine the balance that was further back.

Q. Now, after that body of timber was examined and the practicability of operating it as a lumbering concern was determined, do you not remember that negotiations were entered into which resulted in the sale of a large body of land in that vicinity to the Boothe-Kelly Lumber Company?

A. The Boothe-Kelly Lumber Company,—John Kelly applied at the office and went into the matter with

Mr. Andrews and eventually bought a large tract of the land and at another time later on bought some more.

Q. But you do not remember personally whether Mr. Britt at the time he cruised it and examined it had in mind a prospective sale to the Boothe-Kelly people?

A. No, I haven't the slightest idea.

Q. You don't remember? You don't know?

A. Oh, no, I don't know what he had in mind at all.

Q. Now Mr. Loring, your recollection is that the substantial demand for timber lands began in 1894, or about that time?

A. Somewhere after 1894; about that.

Q. There were a few scattering sales, you said, before, but the substantial part of the sales of timber lands in large quantities took place after that?

A. Yes, except this large sale in eastern Multnomah, which was made before our time.

Q. To whom?

A. Neppach, I think.

Q. Oh, yes; and then there was that sale to the Gardiner Mill Company, too, that was made before your time?

A. Yes.

Q. So that down to that time, speaking generally, the conditions of the market was such that there was not much demand for these lands, except by settlers and

in small quantities and for a small price? That is true in a general way, is it not?

A. Yes, generally.

Q. And the greater part of the large sales, that is sales of large quantities to single purchasers and for a price considerably in excess of two dollars and a half an acre, took place after this demand for timber land arose which you describe as having occurred about 1894, or a little afterward?

A. That is correct.

Q. Did you ever hear while you were in the office any discussion of these provisions of the grants relating to the sale of the lands other than the discussion with reference to the Eaton case over here in Clarke county, Washington?

A. No; it would not be discussed except between Mr. Andrews and myself and Mr. Ewald, the old assistant treasurer, and the question did not arise except in that Eaton case.

Q. Down to that time it had never been discussed even between yourselves?

A. Not between Mr. Andrews and myself?

Q. Well, between yourself and anybody else?

A. No.

Q. That is what I meant.

A. Not with me; I hadn't.

Q. Then there was no discussion of it to your knowledge?

A. No.

Q. Now is it not true that there had been no public discussion of the question that came to your knowledge?

A. I haven't any knowledge of that.

Q. What I mean is, you knew of none?

A. I hadn't heard any.

Q. Now you do not know why this subject was not discussed, do you?

A. Not the slightest idea.

Q. Have you any other explanation other than that it had not been brought to the attention of the public?

A. I haven't any knowledge why it wasn't brought to the attention of the public.

Q. But it was not brought to the attention of the public, so far as you know?

A. Not to my knowledge.

Q. Did you find in the office any correspondence with reference to these provisions of the grant and the question whether they were enforceable or not?

A. Not that I know of. If there was I didn't search back through anything. I had enough troubles of my own without looking for back records.

Q. Well, of course in your work you would sometimes have occasion to refer to the back records, but at no time did you run across any correspondence of that

kind, as you now recollect? Is that true?

A. So far as I know. We had a good many papers in the files and correspondence with the Registers and Receivers of the various land offices, and that matter so far as I saw in those files and looking for information relating to different cases, never was touched on.

Q. Did you personally know of these restrictions of the grant at the time that you entered the office?

A. No.

Q. It was some time afterwards that you learned of it yourself?

A. A long time afterwards.

Q. Did you learn of it before the Eaton case?

A. No, it wasn't called to my attention.

Q. Nothing arose then, either publicly here in Oregon or in connection with the discharge of your own duties down there in the office, which called your attention to these provisions of the grants?

A. No.

Whereupon defendants moved to strike out "Government's Exhibit 116" and the whole thereof as incompetent, irrelevant and immaterial and as hearsay and as shown to be a narrative of a past transaction and a good deal of such narrative as hearsay.

Whereupon CHARLES W. EBERLEIN, called as a witness on behalf of defendants, being first duly sworn testified that he resides at San Francisco. Was

appointed acting land agent of the Oregon and California Railroad Company in the fall of 1904, resigned as such June 1, 1908. Before that time he reorganized all the land grants of the Harriman System of roads, Union Pacific, the several grants in Texas, Central Pacific, Southern Pacific—Southern Pacific Railroad Company and Oregon and California Railroad Company. When he refers to the Harriman System of railroads, he alludes to the Union Pacific, Southern Pacific Company and the Southern Pacific Railroad Company, all of these constituent companies. He made a quick trip to the Pacific Coast in 1902, as near as he can place it now, took a glance at things generally in the Portland and San Francisco offices and returned to New York. Later, about the first of January, 1903, he came to Portland and entered into a thorough examination of all the affairs of the Oregon and California Railroad Company land grants and went to California about June 1st and there took charge of land affairs. Subsequent to January 1, 1903, the Oregon and California Railroad Company land grants and Southern Pacific Company land grant and the Central Pacific Railway grant came under his supervision and examination. One of his chief reasons for coming to the coast was to examine into the affairs of these different land grants from a business point of view to see if they could be handled more economically and with greater facility and ease. There were three complete organizations at that time and all of them running on different plans—plans that had been the growth of a great many years. Their books

and their blanks, their method of doing business and methods of accounting were all different. Each land department was handling cash and doing an accounting business, and for general purposes it was thought to be wasteful and cumbersome, difficult to understand by people at a distance. It was for the purpose of consolidation and simplification that the work was done, as much as for anything else. On an examination of records at San Francisco he found complications arising from a divided control. William H. Mills who was land agent of the Central Pacific Railway Company, held the title of land agent of the Oregon and California Railroad Company, and had a set of tract books in the office at San Francisco. George H. Andrews held the title of acting land agent of the Oregon and California Railroad Company and was loaded with the care and all the work practically of the Oregon and California Railroad Company grants. The divided control, the continued interference by Mills in things he did not know anything about, led to a condition, necessarily, of confusion in the records, and it was necessary in order to get any understanding, and particularly to reform the records, to suspend temporarily the business of the department, and that was done on his order, referring to suspension of business, he means the sale of land, which temporary suspension he ordered in the spring of 1903. There was no regular order of withdrawal, he simply told them to hold up sales while they wrote up new tract books. In furtherance of his general plan to reorganize the land department of the Oregon and California

Railroad Company and to ascertain the status of these grants, the financial situation of the sales and the condition of the taxes, he found out by a pretty extended examination made by himself individually, that a great many errors and omissions had taken place in the tract books of the Company and from any data in possession of the road that he could find, it could not be supplied. Deeds had been issued, warranty deeds in some cases, the consideration taken and accepted and the lands afterwards lost. Very often there had been sales, in a number of instances enough to put him on inquiry, lands had been sold before patents had been issued and afterwards patents had been denied. The whole condition was such that any business man reducing his affairs to order, would have called a halt. He devised a tract book that would serve for all land grants, meaning the three land grants, speaking of the Oregon and California grants as one, Southern Pacific Railroad Company grant as another and Central Pacific Railway grant as another. The same form of tract book was devised to meet all these cases, so that one set of men could keep these different books, that there should be system and order in all these land grants. The condition of the Oregon grants—he does not wish to reflect on Mr. Andrews, who is dead—the control of the grant was not in his sole control, he was subject to very vexatious limitations—the condition that had grown up called for a change of system, which should have been made before it was, to take care of complications in title. For instance, the preparation of that general printed map of

June 1, 1907, was started long before that date, that is the date when it was printed, but in the preparation of that map, his recollection is now, that many thousands of donation land claims, about 10,000, are found within the limits of that grant. There were a large number unsettled and complications arising from resurveys. These donation land claims had been taken up during the fifties and their exterior boundaries did not coincide at all times, leaving a small triangular strip of ground in a great many cases—islands in the Willamette River and elsewhere—a large amount of land which, in the condition of these grants down to very recent times, was not considered worth anything; but it was his business to see that every particle of property that belonged to the road should be gathered up and a record made of it. That was the general condition that existed and had he not come upon the ground at that time, some one would have had to take up that work and prosecute it, simply by reason of the changed land conditions, which were then becoming acute, as they have since become acute. It became necessary to practically examine in detail every single section of land that originally fell to the two roads, to follow the title first through the land offices, and they were abstracted and all the data collated and transferred to new tract books. They made examinations, took the plats—United States Surveyor General's plats,—and in a number of cases those plats have been succeeded by others. There have been innumerable changes in these land grants. These donation land claims were necessarily irregular and there were many

thousands of them. There were no quadrangular surveys at the time those lands were taken in Oregon. The donation land claims were not taken according to legal subdivisions. There were no legal sub-divisions at the time they were taken. The lands were settled upon as the records apparently indicate and enclosures made, or temporary surveys made, by settlers under the Donation Act, and afterwards surveys were run out by the Surveyor General to conform to the notification made by the donation claimant. In doing so, donation land claims were taken so as to include the best available land at the time, and they would run the lines up the little valleys of small streams. At the time he took charge of the lands of the Oregon and California Railroad Company they were not all surveyed, a large body is unsurveyed. Speaking in a general way without reference to particular detail and referring to "Defendants' Exhibit 259," that is a fair representation of the record title as reflected by the records of the Surveyor General's office and of the United States Land Offices and in checking up the lands that are covered by the act of July 25, 1866, and the act of May 4, 1870, he found that it required, and became necessary in his judgment, to go through all of these public records. He thinks the records of the county were examined at that time for taxes and that they relied upon the deed records of the Company. They did not examine for deeds until at a subsequent time. The work of reorganization and checking up, was begun in the late spring of 1903 and was practically completed in the fall of 1904. The work

was pushed to the utmost. Worked as many people as they could. The work was jammed through pretty hard. It was desirable, in his opinion, that there should be a careful examination of the lands lying along the railroad lines by operating officials and traffic officials, to determine what lands the railroad company should reserve for its own operating and traffic purposes. As to that, he means that it was simply good business that at this time the operating officials should say what lands they were going to need for extension of yards, for water supply for engine, for fuel supply. At that time engines were burning wood on some of these divisions south. As to traffic, his experience on the Union Pacific and in the east had shown him that with the filling up of the country, the extension of traffic would call for grounds at central shipping points for stockyards and things of that kind. He turned over to the operating and traffic officials a list of lands which he had prepared co-ordinately with this other work, lands classified by section, township and range and also by counties, and they entered opposite the specific tracts what the land was to be reserved for and such reservations were entered on the tract book. In the fall of 1904 the work had practically been finished, excepting some general cleaning up, and he removed all the records, files and property of the land department to San Francisco and consolidated it there with the Southern Pacific Railroad Company. He does not mean consolidation in a legal sense of the term, but simply it was kept in the same office, under his supervision as land officer, and the books and records of the

two grants, that is the Southern Pacific Railroad grant and these two grants of the Oregon and California Railroad Company, were kept by the same set of men and the records were kept separately. There could be no consolidation of records. He removed the physical custody of these records of the Oregon and California Railroad Company appertaining to the land department to the same set of offices in which he was also placing the records of the Southern Pacific Railroad Company, having charge of the grants in California, and he allowed the same staff of clerks to work upon the respective books of these land departments. Everything was kept entirely separate. The blanks and correspondence of the Oregon and California Railroad Company were even printed on green paper to distinguish at all times and keep from confusion. The Southern Pacific was on yellow paper. The reservation of 100,000 acres of timber lands for the future use of the Companies, in the operation of the Oregon and California railroad was made around near the railroad, convenient to transportation, such as for the manufacture of ties and bridge timbers and things of that kind, for the purpose of protecting the railroad against any possible contingency that might arise and to prevent the railroad, and incidentally the public, from extortion on the part of large timber interests; and that was afterwards found to be most necessary. These 100,000 acres were down around the Umpqua River, he cannot give the exact boundaries, though the lands were reserved and the plats thereof were all filed in the New York office when he left there.

Whereupon the witness further testified as follows:

Q. Now, what, if anything, did you do after you had thus re-established the records according to your plans, re-established the tract books according to your plans, and removed the offices of the land department of the Oregon and California Railroad Company to San Francisco, towards the restoration of the lands to sale in the usual and ordinary way, and why was that not consummated prior to April 18, 1906, when the fire in San Francisco occurred? State fully and generally, in your own way.

A. I notified my superiors in 1904, I think before I took the property, the books and records away from Portland, that we were ready; that the affairs of these two grants had been thoroughly reorganized and placed in a condition, a statement of the condition of the grants, the acres patented and unsold, and unpatented and unsurveyed, the whole thing was sent on, with the information that we were—I was ready at least, to proceed with the sales, or turn the grants over to a successor, which was the agreement with me when I consented to take the acting land agency, that I was to be relieved just as soon as this thing could be brought about. Now, as to the rest of your inquiry, in the fall of that year, I think it was the winter of that year 1904-5, before the first of January, though, because I fix the first of January by a forestry congress held in Washington, to which I was the delegate from the Southern Pacific Railroad Company. I was there at that time, so it was before

that time that I fix it. I was called to Portland—I don't know now just how or why, or whether it was on a request from Mr. Cotton—but at any rate Mr. Cotton surprised me by telling me that he had understood that I had given out that the road was going to resume sales, and was ready to, and I told him that I had, and as far as I knew, there was no reason why they should not go on at that time. "Well," he said, "you can't do it. The taxes have not been paid for years on some of it, and there are tax complications there. The records are in such shape that you could not go on and sell land, because you don't know but what a large part of this grant has been lost."

Q. Who was and is Mr. Cotton?

A. W. W. Cotton is, I think, he was in those days the attorney of the Oregon Railroad and Navigation Company.

Q. Was he or not also the adviser of the general officers that were in charge of the operation of these railroads in Oregon?

A. Why, as I understood it, you were the counsel and adviser for the Southern Pacific lines in Oregon; but as an explanation, as near as I can place it, how Mr. Cotton came to interest himself in this matter, was that there had been about that time, I think before that time a change in the tax management of these properties, both the O. R. & N. and the Southern Pacific lines in Oregon, and Mr. Morrow, J. W. Morrow, I think his name is—

Q. Yes.

A. Was appointed the tax agent or commissioner of all of these properties, the Harriman properties in Oregon.

Q. Isn't it a fact, Mr. Eberlein, that J. W. Morrow, who had been the tax agent of the O.-W. R. & N. Company, or the O. R. and N. Company it was then, was placed in charge of the tax matters of the Oregon and California Railroad Company and the Southern Pacific lines in Oregon, as a joint officer?

A. Yes, sir.

Q. And that Mr. Cotton was the legal adviser of the O. R. & N. Company, and in that way came into official relation with the tax department, or with the officer handling the tax department of the Oregon and California Railroad Company and its properties in Oregon?

A. Mr. Morrow, as I recollect, I understood had for years, or for some time at least, been the tax officer of the Oregon Railroad and Navigation Company, reporting directly to Mr. Cotton, and that when a change was made in the tax matters of the Southern Pacific lines his jurisdiction was extended to cover, and he still reported to Mr. Cotton.

Q. Now, then, at that point, after you had received this advice from Mr. Cotton with reference to the state of the tax affairs, tax matters, or tax titles affecting these land grants in Oregon, what, if anything, did you do towards investigating this matter, and what attorneys

did you employ, and for how long did this work continue?

A. The tax situation had not been considered by me as important, as I understood that the taxes had been paid on all patented lands. I had, in entering the data, looked into that matter somewhat, but not at all carefully, because I assumed that that had been done. Mr. Cotton informed me that that condition was very bad; that undoubtedly a lot of lands had been lost. How Mr. Cotton knew I never have been informed. At his request I had employed his uncle, who is since dead, to assist in this reorganization here, and he was representing me while I was necessarily absent below, as I was a great deal of the time.

Q. You refer to Mr. William Wick?

A. W. W. Wick. Now, Mr. Cotton made it appear to me that the situation was very bad.

Q. What was the title of Mr. Wick's employment? What was he called?

A. Oh, he was a clerk; that was all. He had no title at all.

Q. But when you were absent, he was your representative?

A. He was here, not in charge, but simply in the reorganization of the records doing the record work and following up these matters of title in the different offices, and collating the stuff and putting it in shape that it might be entered in the tract books. And Mr. Cotton

then advised me that it would be necessary, by reason of the peculiarity, as I recollect his advice, the peculiarity in the laws of Oregon, that there should be an examination of the tax records of all the assessors' offices in every county in which the grant lay in Oregon, for a period of fifteen years, as to each tract of land, and he advised the appointment of W. C. Bristol to take charge of that, and to organize a force to go on and make this examination, and that was done.

Q. Now, this reference to the tax laws of Oregon, at that time do you recall whether it referred to the fact, that under the laws of Oregon, then and now, lands were required to be assessed in legal subdivisions, or by proper descriptions, and that they might be assessed to the owner, if known, or if not known, to an unknown owner?

A. Yes, sir. We found that there was a large amount of land assessed to unknown owner. Some of it had gotten away.

Q. How long were your attorneys and tax agents and special employes in that work, engaged in this work of going through the assessment rolls and the tax matters for the purpose of removing any delinquent tax sales, or clearing up the title that might be involved by reason of anything of that kind over the period of fifteen years?

A. I can only speak for the work that was done under my own jurisdiction, for which I was responsible.

Q. Well, that is what I mean.

A. That investigation was a very long-winded affair—necessarily so by reason of the condition of tax records in some of these outlying counties, which was exceedingly bad, and it took over a year. My report, as I refresh my recollection from some correspondence I saved from the fire, shows that I turned over the results of that investigation to Mr. O'Brien on, I believe, the 30th of March, 1906. I think it appears in there, just prior to the fire, with a request that he should take it up and place it in the hands of attorneys to be cleaned up.

Q. Now, did you also cause to be employed Angell and Fisher, attorneys and searchers of records, and competent men of this city, in connection with this work?

A. Yes, sir. Angell and Fisher were employed by me, and they reported first to Mr. Bristol; and afterwards Mr. Bristol dropped out, and they reported to me as long as that investigation was in effect.

Q. Now, as a matter of fact, Mr. Eberlein, after your attorneys and your special representatives had made this investigation of these tax matters, you found that there wasn't very much trouble with the lands on account of tax matters, didn't you?

A. I paid very little attention to it after that; it dragged along, as I was informed from time to time—it dragged along for several years in the hands of Mr. Cotton, through a man by the name of Kollock, I believe.

Q. J. K. Kollock?

A. Yes. But the final outcome of it all was that a very small amount of land—some land was lost by that, and there was a considerable body of land that was subject to small—oh, unpaid taxes in some cases, tax title which were redeemed, and all that; but take it altogether, for the amount of time involved and the amount of money spent, if we had known what the land was, we would very much better have let it go.

Q. Now, as the result of that investigation, you found that, on account of the peculiar assessment laws, that is, assessing lands perhaps to a man who had purchased the lands under contract—

A. Yes, that is what I mean.

Q. And he had neglected to pay the taxes as required by his contract, that these lands had become delinquent, and that when the contract was forfeited, the company had overlooked the payment of taxes until probably tax sales had resulted, which required redemption? You found some instances of that kind, didn't you?

A. Oh, there were a number of instances of that kind. There were also instances of where land was deeded and the company continued to pay taxes.

Q. That is to say, where lands had been deeded away by the company, and the company's tax list had included those in a few instances, and they were being carried on the tax roll of the company?

A. Yes. Things had been run in that respect very

lax in the department. For instance, the land agent would send out a list to a county, a list of lands, and ask for extension of the current taxes, and the county officer in charge would find himself too busy, or otherwise engaged, to comply, and he would simply send back the list with a memorandum of the total amount; and instead of following the thing up, Mr. Andrews, who was then in charge, and a good man, but inclined to give everybody the benefit of the doubt, in his good intentions, he would simply make up his voucher for the full amount, and send it down; and so we found, in a number of cases, they had the receipt for taxes in a county for a year that didn't specify a single description of land and in that case there were sales made out of that surreptitiously; and by your advice, I know I made a redemption in a case of that kind.

Q. You refer to the Garbutt matter?

A. The Garbutt matter?

Q. Over in Curry County?

A. Yes.

Q. We redeemed in that case by paying the penalty and the purchase price and interest and a small consideration above, did we not?

A. Yes, sir. We paid enough.

Q. Now, didn't you find also this situation: that many times, or in some instances, if not many, the county assessors would assess the entire reported area of lands owned by the company in his county, in bulk?

A. Yes.

Q. As so many acres, say 200,000 acres, and it would be assessed in bulk, without any particular description of any particular quarter section on the assessment roll, and the taxes would be charged against the entire valuation, and when the company came to pay it, it paid it in bulk? You found that in some instances?

A. That followed. There was every kind of a variation of unbusinesslike methods that appeared in that investigation.

Q. That was the result of the improper assessment by the assessor, in the first instance?

A. Yes, sir. It seemed to be impossible to control the situation.

Q. In the later years, however, the lands were carefully listed and assessed by legal subdivisions, as I understand?

A. Oh, yes, I think so. It took some time to get them into businesslike shape.

Q. Now, you say that you reported the completion of this matter about March?

A. May I refer to this correspondence here to clear up that date?

Q. Well, just refresh your memory by looking at that correspondence. About March, 1906?

A. Well, I find that this was being done all through March. For instance, I find here a letter to Mr. J.

Kruttschnitt, who was director of maintenance and operation, advising him that I had sent to Mr. O'Brien, the Vice-President of the Oregon and California Railroad Company, a list of Congressional lands in Douglas County, Oregon, which has been corrected to date. That is the list I told you I had made contemporaneously with that map.

Q. That was reservation for railroad purposes?

A. No—well, that as for general purposes. In this case I sent it to him showing the tax situation. It was all printed, and we had a large number of copies, and we sent them out. I have also sent him a summary of the tax investigation, for use of the tax commissioners and attorneys employed to clear the company's title to these lands from tax complication.

Q. What is the date of that letter?

A. That is March 30, 1906. There are other letters, though, that appear a little earlier than that. They were sent in as fast as they were completed, each county by itself. Here is one in Lincoln and Washington counties. Here is a letter to Mr. O'Brien of January 26, 1906. There is one for Multnomah and Marion Counties, of January 10, 1906. I think the last went in about the 30th of March, 1906. We kept them going. There are some in December, 1905—December 26, 1905; December 13—and some even earlier than that. Anyhow, it shows that the utmost dispatch was had, and nothing was held up.

Q. Now, Mr. Eberlein, before this tax investiga-

tion was entered upon in this specific and general way, at the suggestion of Mr. Cotton, by reason of his belief that the records were in such shape as to justify the detailed tax search that you have referred to, had you taken any steps to announce the resumption of sale of these lands that were to be sold, and, if so, what notice or publication did you cause to be made?

A. Why, the first intimation I gave out that they would be for sale was in 1904.

Q. Yes, I understand, but you afterwards, in a talk with Mr. Cotton, found that you should make search. Now, did you give any notice of intention to resume sale in 1904, in the latter part of that year?

A. Yes, sir.

Q. What did you do in that respect?

A. Mr. A. L. Craig was at that time the general passenger agent of the Oregon Railroad and Navigation Company. Mr. Craig was interested in the settlement, of course, of all this territory, and we had frequent talks about the condition, and he was urging very strongly that lands that could be settled upon should be thrown open to settlement, and while there was very little land in this grant that would be available, still any movement at all would probably stimulate people to come in and buy land here, and settle.

Q. You mean lands outside of the grant?

A. Oh, yes, outside of the grant, in private ownership. So in 1904, right in that winter, that fall rather,

I inserted a page advertisement in a pamphlet in which this matter was called attention to.

Q. Do you remember what that pamphlet was or what its uses were?

A. Well, it was one of these highly colored flamboyant pieces of railroad literature. I don't remember its title. Lurid colors and lots of adjectives, I remember, that is about all.

Q. Sending out to eastern people?

A. Yes, all over, for general distribution everywhere.

Q. Advertising the promotion of immigration, etc., in this territory?

A. In this territory.

Q. That was published about what time?

A. In the fall of 1904 is my recollection.

Q. Then after this tax matter went under way, did you take any steps to discontinue your advertisements to sell?

A. Well, that had gone in. Mr. Cotton called my attention to that, and considered it a very grave mistake, and it did embarrass me a great deal. There was no definite offer made in it, but it was calling attention to the conditions here, and that the sales would be resumed in the near future. Of course, the resumption of sales rested upon orders from elsewhere.

Q. Now, what happened shortly after March 30,

1906, when you say you had completed practically your reports on tax matters?

A. On the 18th of April, 1906, the earthquake and fire in San Francisco occurred, which destroyed everything that the land department owned in the way of records and correspondence. The only correspondence saved, I think, was about ten boxes of files like those you see here, partially charred and of very little value.

Q. Now, what happened to the tract books that you had prepared?

A. They were destroyed—had to be entirely renewed.

Q. What other records were destroyed, now? Just state, in a general way, what other records were destroyed belonging to the operation of the land department of the Oregon and California Railroad Company.

A. The tract books, deed records, sales records—every book and scrap of paper, the whole of its contracts, I think, none of the outstanding contracts, executory contracts which the company held at that time numbering several hundred—they were entirely destroyed, and the record had to be renewed.

Q. I will ask you to state, Mr. Eberlein, whether or not the company, by its acting land agent, Mr. Andrews, and his predecessors in office, and you as his successor, kept large leather bound books, in which were extended the duplicate of every executory contract made by the company, and upon which a marginal reference was made to assignments that might be made from time

to time, and whether, when you came into the possession of these records, you did not find several volumes of those which had been kept in due course, showing the duplicate contract retained by the company of all these sales?

A. You mean the record of it?

Q. Yes.

A. Yes, sir, there were such records. It was part of the record of the office to keep a sales record.

Q. Do you remember how many volumes there were from the earliest date down to the time you took charge in October, 1904?

A. No; but I remember that there were about seven thousand contracts issued up to that time.

Q. Do you recall the fact that one volume of these records, or two of them, were used and produced in court, and went to the supreme court of the state of Oregon in the case of Neppach against the Oregon and California Railroad Company, and that this large volume was filed as an exhibit in that cause, and was in the supreme court of the state of Oregon, and that it contained several hundred of these contracts at the time this Neppach contract was recorded and entered.

A. I remember very well, now that you recall it to my mind, of that record being taken from the office to be introduced as testimony, as an exhibit in that Neppach case.

Q. And do you recall that Mr. O. F. Paxton, who

was the attorney for Mr. Neppach at that time, had access to all these records, and that this volume was in the circuit court here, and also in the supreme court of the state of Oregon, and afterwards returned to you with the file marks of J. J. Murphy, Clerk, by A. S. Benson?

A. I remember the return and the file marks very well.

Q. Now, didn't that contract book contain several hundred contracts in addition to the old Neppach contract upon which that suit was based?

A. Oh, yes.

Q. Now, what became of all those record books?

A. Every record book of every description that was in the department on the 17th of April, 1906, was destroyed. That is my information in regard to it, or so badly charred as to be of no value at all as a record.

Q. Well, now, how did you restore these contracts and get any trace of them, and how long a time and what amount of work was it to do that? What difficulties did you surmount?

A. That makes the back of my head ache to think about it.

Q. State in your own way.

A. We found ourselves, the week following the fire, without any records, without any means of doing business. The contracts were gone. It was not expected that they would be recorded. The company

never recorded duplicate originals, unless it were for the purpose of a suit, or something of that kind.

Q. Executory contracts for the sale of land in this state are not required to be put on record, are they?

A. No, so I understand.

Q. Never have been?

A. Never have been. Nor were they in California.

Q. Recurring again to the employment of Mr. W. C. Bristol, was he not also employed to take over from my office at that time the collection and adjustment of delinquent contracts upon which there had been payments in default for a number of years?

A. Oh, yes—tried to make Billy earn his pay.

Q. Do you recall—in fairness to Mr. Cotton and to yourself—the fact that in September, 1904, Mr. Fenton was seriously ill?

A. I remember it very well.

Q. And that he was temporarily absent from his office for a period of about two months?

A. Yes, sir.

Q. And do you recall the fact that he did not actively resume business until about the first of May, 1905?

A. Well, I remember that he was absent for some time, and was reported seriously ill.

Q. And was absent by permission of his superior officers?

A. Oh, yes.

Q. Do you recall also the fact that Mr. A. L. Craig, who was general passenger agent of the Oregon Railway and Navigation Company, was the joint general passenger agent of the Southern Pacific line in Oregon at that time?

A. Yes, sir.

Q. Now just state to the court in your own way, in a general way, how you succeeded, if you did succeed, in finally reproducing the record evidence, or some record evidence, of some records upon which the company could safely proceed to administer these grants, and collect its outstanding executory contracts, and proceed with the performance of the same by making deeds from time to time as they were discharged or paid.

A. As I have already testified, in the making of these new tract books and records, I at the same time made up a classified list of all the lands of the company in these grants, and that list, in the case of the Oregon and California Railroad Company, was printed on green paper, long sheets, classified by section, town and range, and also by counties. It made a pile of paper something like three feet high. That list I had sent to Mr. O'Brien to assist him, to give him information as he might want it of what lands the company owned.

Q. He was then vice-president of the Oregon and California Railroad Company?

A. He was then vice-president, and that list was

classified as to patented, unpatented, selected, unselected, unsurveyed lands, and was a transcript of the books, at the time that it was made. It of course changed every day. In the office that list was kept even with the record every day, changes made, as they were made in the record they were also made in this list; but of course in the case of a list being sent, as this was to Mr. O'Brien, no change was possible. He was not advised when we made a deed or took patent, or lost land, or anything of that kind. That list also had a classification by counties, and by section, town and range, of all sold lands subject to unpaid contracts, and opposite, as I recollect it, the description the number of the contract was given, but that was all the data there was. Now, when the fire came along, Mr. O'Brien notified me that he had the list.

Q. Where was Mr. O'Brien's office at that time?

A. Here in Portland.

Q. Had been all the time?

A. Had been all the time. And to that one circumstance alone, we owe that we were able to begin operations within six months from the time that the fire took place, and give notice of the sale of such lands as we were able to sell at that time, which would be agricultural or grazing lands. We could not sell timber land, because our cruising reports for about forty years had been entirely wiped out by the fire.

Q. Now, these contract numbers shown on this list would give you, you say, the number of the contract.

Would it also give you the name of the vendee?

A. Gave no other information except the description of the land covered and number of the contract. Of course, if we had anticipated any such thing as occurred, why, we would have put more information, but all we could do in that case was to examine the records of the counties. The examination was made—had to be made again of the United States Land Office records. They had to be abstracted again so as to show the change of land between the date of this list and the date of the fire, at the time the examination was made, to show the changes in regard to patent or loss of land, or other complication—governmental complication. Then we had to examine every recorder's office in every county in which any of the grant lay, in Washington and Oregon; and then we also examined the deed records and the contract records for every year since 1866 in all those counties. In that way we were able to supply a lot of missing information. For instance, we reorganized or restored our deed record for one thing, but it so happened that, in a very large number of instances, the deeds given in years past had not been recorded. In a great many cases it arose from ignorance, and in a great many cases from intention.

Q. You mean people who had obtained deeds from the company would retain them off the records?

A. Keep them off the records, yes. And from the currency that was given to the catastrophe that had happened to us, a search began to be made by the

people among their papers, and very often they found that they had mislaid them, very often they had been lost, and there was an immediate demand, and a very insistent one, for deeds, which we were wholly unable to act upon, and it took months to make these examinations of county records. In that way we found that in some cases an inconsiderable number, but still it all helped, that the vendees had recorded contracts, which, of course, were not entitled to record, but still had been accepted and recorded. Well, that helped us somewhat. But the struggle to restore missing information took us all over the United States and down into Canada, and we had to send everywhere. The people holding contracts, in the vast majority of instances were very kind and agreeable, and sent their contracts in.

Q. Allowed you to make copies of them?

A. To allow us to make copies of them and restore our records. And only in a very few instances was any attempt made to take advantage of our condition. In some cases it became known that we had lost our duplicate contracts, and the vendees holding them committed the offense of altering the provisions in some cases—very few, though.

Q. Well, in fairness to the public generally, you would say that there were only a few rascals like that?

A. But very few. The public generally responded, and did everything they could to assist us.

Q. Now, about how many would you say were there of those unrecorded deeds, which happened to go upon

the record after the fire, just roughly speaking?

A. I couldn't make a guess.

Q. You recall there were some instances?

A. Oh, there were a number of instances; they kept cropping up for several years—demands for deeds on the claim that they had lost.

Q. I understand, but you spoke about some deeds being in existence after the fire, in the custody of the grantee after the fire, that found their way to the record. Now, there were not very many, were there, of that kind?

A. I cannot say. Of course, they would slip their deeds on the records of the county where they were and that would not become known to us, nor would we be posted. We probably caught them when we made our abstracts from the county records.

Q. Now, as to the deeds which were lost, and for which they desired new deeds, in those instances, where the grantee made a bona fide showing and submitted an abstract of title showing that he was entitled to a new deed, did the company regularly execute deeds of further assurance?

A. Why, that is a matter that I left entirely in the hands of the law department for the grant, and took the advice of the attorneys. In those cases they satisfied themselves as to the bona fide character of the applicant, and as to whether he was entitled or not. In some cases I understand the suggestion was made of a friendly

action, and an order of court that would protect the company.

Q. Yes, in some instances they brought a suit to restore their title or establish the existence of the muniment of title that had been lost, and in other instances the company made quitclaim deeds.

A. I believe at the time I left all connection with the land grant in 1908, I think in all the grants that were under my control something like 20 tracts of land remained which we had been unable to discover the grantee.

Q. Yes, to discover who was the grantee.

A. Yes, who was the grantee.

Q. Now, this brings the matter down to what period of time? About when did you succeed in getting your records restored, and to be in condition for a second resumption of sales of these lands?

A. There was an immediate and fierce onslaught on the office before the remains of the city was cool, for a sale of lands—timber lands.

Q. By whom were these applications? What class of lands were applied for? Who were the people that were wanting these lands?

A. Well, the Booth-Kelly Company was extremely active and insistent. Weyerhauser Timber Company wanted land right off quick.

Q. Well, were these people that were applicants

for the purchase of lands intending settlers, or were they timber investors?

A. Oh, just investors in timber—speculators.

Q. Now, when were you, with your records thus destroyed and finally restored, in condition to proceed with sales in the regular and orderly course, outside of timber lands, I will say, if there were any such lands?

A. The fall of that year the rumpus and noise had grown to such an extent—

Q. 1906?

A. 1906, the summer of that year, that in the latter part of August, I think, I notified my superiors that we could act upon such applications, as we had information or could get it quickly, and we also gave notice at that time by circulars to all that we would sell agricultural lands such as we might have, or grazing land, just as soon as the application could be examined; and as to timber land we were not in a position to sell timber land until such time as we could restore the necessary data upon which to act intelligently, and that was being done as quickly as possible.

Q. You refer to the cruising of the timber lands?

A. Yes, sir.

Q. Now, pursuant to this notice that you were prepared to receive applications from persons desiring to purchase any of such agricultural lands or grazing lands as the company might have, and that upon investigation of these tracts, if they were found to be such, that a price

would be given, could you say to the court approximately about how many such bona fide applications were received and acted upon before you left the company's service in 1908?

A. I don't remember any that were acted upon.

Q. I mean that were received of this class that intended to apply for agricultural or grazing lands, excluding now timber.

A. I don't remember any.

Q. Now, isn't it true, or is it true, Mr. Eberlein, that whatever applications were made for the purchase of lands, were applications to purchase lands that were chiefly valuable for timber, or in some instances, in Jackson and Josephine counties, lands that were thought to contain mineral prospects, by miners and others of that type?

A. On examination of these so-called agricultural applications, they were found to be in cases mineral; in almost all cases—in the vast majority of cases, simply timber, and in the remainder of the cases water power.

Q. Now, isn't it true, or is it true, Mr. Eberlein—you may state in your own way—that the agitation for a forced sale, or to force this land on to the market, began in the preliminary campaign for the election of the legislative assembly of 1907, which took place the first Monday in June, 1906?

A. Yes, sir, it began in the summer of 1906, and the fact that we were helpless was disregarded, and

brutally so, by a great many people down in these valleys.

Q. Do you recall the fact that in Jackson county, the campaign in that county was made by the two political parties, from which Senator Mulit was a state senator who afterwards introduced and secured passage of senate joint memorial 3 in the legislative assembly of 1907; that the canvass in that county took the form of an agitation against the Oregon and California Railroad Company because it would not restore to sale these so-called agricultural lands—mineral lands in Jackson county? Do you recall that agitation?

A. I recall that agitation you refer to, and I also recall the fact that this agitation was made the basis of a congressional campaign—as to whether that year or later, I do not know—in which one Hawley campaigned on the basis of this agitation.

Q. Do you remember that there was some action obtained from chambers of commerce and commercial bodies, and other influential bodies, calculated to—calling upon the legislative assembly or congress to take action?

A. As near as I could get at the facts, and I believe they are true, the threats that emanated from particularly Booth-Kelly Lumber Company that we would be forced to let go, and all that sort of thing—the agitation started, I believe, at Eugene, the headquarters of that concern, and was regularly worked up among these commercial bodies all down through the valley, and I remember having correspondence with a man by the

name of Eggleston, I believe, who was secretary of the Rogue River Valley something or other association, demanding immediate restoration to sale of all the lands in the grant, and I simply wrote him, and gave him the exact facts and conditions as they were.

Q. Do you remember that Mr. A. C. Dixon, representing the Booth-Kelly Lumber Company, was an active promoter of this agitation in 1906 and 1907?

A. Yes, sir. He also came to San Francisco and made demands to see records and all such things that did not exist at that time, and did a good deal of talking. He was also present at the hearing of the land committee of the house of representatives at Washington, held, I think, in 1907, and was present there with Mr. John W. Blodgett and Arthur C. Hill.

Q. Who were they?

A. They were officers and large owners of the Booth-Kelly Lumber Company, and Mr. Dixon was there representing, and did a great deal of talking, and as I recollect it admitted openly before the committee of the house that his concern had taken the lead, and had secured and fomented this agitation, and that was the understanding conveyed by him to that committee and all before it.

Q. He made a statement, did he not, before the committee that was published as an official document?

A. Yes.

Q. Now, who were the Booth-Kelly Lumber Com-

pany? That is, what interest had they in all this matter?

A. The Booth-Kelly Lumber Company, when I first began to examine into the affairs of this land grant, were very active in the manufacture of lumber, and they had mills—large mills, I believe, at Eugene and at Springfield, and Wendling, I believe at that time. I may be mistaken as to just those names, but that is my recollection. They were also acquiring very largely timber down through their section of the country, and they had acquired, as I discovered at that time, directly from the railroad company about 70,000 acres.

Q. That is from the Oregon and California Railroad Company?

A. Yes, sir. The reason for my examination into their affairs particularly was the bitter complaints that were made by other large timber buyers and owners, of the favoritism which they claimed was extended by the railroad company to Booth-Kelly Lumber Company. They certainly did have some exceedingly favorable contracts. They bought land with timber on time, with very little cash payment, and at such prices which even at that time created a credit upon which they could raise money. All those things were known all throughout the lumbering circles on this coast and in the East, and many complaints were made in regard to it; and it is their large holdings, and their determination to get the inside track and keep it (as they had it at that time so far as railroad lands were concerned) that made them very insistent, and so much so that they rather assumed

to dictate the affairs of the Land Department.

Q. Did they or did they not insist to you upon sales of further lands to them, to fill out their holdings in Lane County and elsewhere?

A. Yes. Their purchases from the railroad company had been made in such a way that I thought it necessary to call the attention of my superiors in New York to the system which they had pursued. For instance, in sales of 20,000 acres, they would go through three townships, and take a string of forties down through the center, in some cases, of a section, take a piece off another section, and so on down through the entire purchase, and in that way they beat down the value of the remaining timber, and they then came in immediately on the heels of it, and would say, "Now, here is the rest of the timber in these townships, and nobody will want it, nobody can use it but ourselves. We will give you \$2.00, or some such price, an acre for it."

Q. Were those applications favorably entertained by you?

A. No, sir. I believed that the Booth-Kelly Lumber Company had all the timber at that time that was necessary to a profitable operation for a great many years to come, and that disposing to them would only foster a monopoly, and that in the end it would result in curtailment of product, and it would be an injury both to the state and the railroad.

Q. There has been some complaint made here that the Oregon and California Railroad Company, through

the dominance of the Southern Pacific Company or otherwise, had created a land monopoly here, and that this land monopoly had interfered with the development of Western Oregon. Now, referring to the timber lands, Mr. Eberlein, I would like you to state to the court, from your knowledge and experience and observation, and from actual transactions, why it was desirable and necessary for this company to reserve about 100,000 acres of these timber lands for its own use, for ties, bridge timbers, etc.?

A. I believed that the railroad company should protect itself while it could in regard to necessary supplies of timbers and ties. It had this considerable body of timber, which was fast disappearing from its ownership, and that I could see, from having run out the purchases that, for instance, the Booth-Kelly Lumber Company had made, and the Hammond & Winton purchases, that were afterwards crystallized under the Weyerhauser interest and some other interests that I could mention, and having followed the thing out through county records to see whether these same large interests were not consolidating the even numbered sections in their holdings, I found that to be the case. That was my own investigation, and in that way it appeared to me that the timber of Western Oregon was gradually becoming consolidated into a few large holdings; that the result might be very detrimental to the railroad company, and of course to the people of Western Oregon, by reason of increase of rates which must necessarily follow increase of operation cost; and for that reason that 100,000 acres

of timber was set aside to be a perpetual reserve for the protection of the railroad company from extortion. Now, that was the reason for that reservation, and that reservation itself for that purpose is evidence of the intention of the railroad company to depend on that, but not to retain the ownership of the remaining timber land.

Q. Now do you recall the circumstance following the fire where ties were one price, and where the tie was immediately advanced by timber manufacturers in Western Oregon?

A. They were jumped, as I recollect it, from about 22 or 23 cents to 63 1/3 cents over night, and the threat was that they would go to a dollar.

Q. Who were the large timber holders? I mean, who were manufacturing railroad material in Western Oregon at that time?

A. Largely Booth-Kelly Lumber Company; and the railroad depended upon them largely—had to—for its supplies.

Q. Did you ever examine the rating of Booth-Kelly Lumber Company, to ascertain their financial rating, and what it was?

A. I don't recollect of having made any examination of that kind, though I think that the ownership—the control, I should say, passed from the individuals who were in control when I first came here, to this Bay City or Menominee crowd, of Blodgett and Hill, Michigan operators.

Q. That is to say, the Booth-Kelly Lumber Company stock, and the control of that was disposed of by John F. Kelly and R. A. Booth, or a majority of it, and passed to Michigan timber investors, who now own the property?

A. Yes, sir, I think so.

Q. Do you recall the fact that Mr. Hawley, that you referred to, was Honorable W. C. Hawley, a professor in the Willamette University at Salem, when he was elected to Congress from that district?

A. Why I don't remember. I thought he was a preacher or something of that kind.

Q. No, he was Professor of History in the Willamette University, a Methodist institution at the capital of the state, and was elected to Congress from that district.

A. He was elected to Congress, I know. I believe he is still an incumbent.

Q. Do you know, or can you say whether or not he was affiliated with and a political associate of Senator Booth, who was one of the controlling men in the Booth-Kelly Lumber Company, about this time?

A. I understood that he and Mr. Booth were very friendly. They were both of the same faith, and prominent in those circles.

Q. The same political party?

A. Yes, sir.

Q. And Mr. Hawley is the present Congressman who has been rather active in the procurement of the passage of the resolution of April 30, 1908, under which this suit is being prosecuted?

A. Yes, sir.

Q. And also somewhat active in securing the passage of what is called the "innocent purchasers" bill, by which a million acres of these lands that have been passed to these large holdings, have been confirmed in these holdings upon payment of \$2.50 an acre, by stipulation of the attorney general?

A. Yes, sir.

Q. You speak of the number of acres approximately that the Booth-Kelly Lumber Company acquired from the Oregon and California Railroad Company. How early were these first contracts made, in a rough way, would you say?

A. Subsequent to 1898, I should say. That is my recollection.

Q. And how late would you say was the last contract? I am not asking you to give an accurate time, but approximately and as your memory serves you?

A. The last contract made directly by the company, it seems to me was made about 1902.

Q. Do you recall, Mr. Eberlein, about the total holdings of the Booth-Kelly Lumber Company of timber lands outside of the 70,000 acres which they acquired from the Oregon and California Railroad Company in

that vicinity?

A. I had an examination made of the records of those central counties there—Marion and Douglas and Lane, and probably as far down as Jackson and Josephine, to find out what they had acquired. I knew what they had from the Railroad Company, which amounted to about 70,000 acres at that time. I found a large number of assignments of small contracts—railroad contracts, contracts to individuals or small concerns—and I found also the transfer to them of a large number—I say a large number—a considerable number, as I remember it, of timber entries that had ripened into titles—understand I don't mean that there was any collusion, or to suggest anything of the kind, but what on the record appeared to be perfectly proper purchases by them from individual holders who had taken title directly from the Government, or from the railroad of such, and it amounted to about 100,000 acres, as I remember.

Q. That is including the 70,000 acres?

A. Yes, including the 70,000 acres.

Q. Now, you found, did you or did you not, by this investigation, that the Booth-Kelly Lumber Company had succeeded in obtaining title to numerous or several homesteads down in these timber belts?

A. Yes, sir, I think so.

Q. And others were under the Timber and Stone Act, do you think?

A. I think so. I had them, I remember, platted in different colors to show the different class.

Q. Now, I wish you would state to the court whether there is any other, or was during that time any other large manufacturing timber company in Western Oregon south of Salem, other than the Booth-Kelly Lumber Company?

A. I don't remember of any.

Q. I mean outside of the mills on the coast.

A. Yes. So far as mills within this grant are concerned, I do not think there were any of any size. There were a few that had bought timber, a small amount of timber, but they were inconsiderable in size. My recollection is that Booth-Kelly Lumber Company, in their operation, had taken up, bought the lands of some small mill proprietors, and shut down the mills, consolidated in their large milling operations at these different places on the Willamette River—the upper river, at the head waters. And I don't think there were any. The railroad company depended largely, had to depend largely on them for its supplies, and at the time of the fire they immediately shut off those supplies and forced the railroad company to establish mills of its own.

Q. Where were those mills established?

A. Those were established at different points—I cannot tell you just now, but in the neighborhood south of Eugene.

Q. At Marcola, in Lane county?

A. Marcola, yes, that is one place, Lane county. I think that was run by Fisher Brothers. We established mills at different points down throughout the grant, for the purpose of supplying ties and timbers.

Q. They were not commercial mills, were they, at all?

A. Not at all. The operation of lumber business is ultravires, as I understand, and not possible for a railroad company; and those mills are operated at a serious loss, simply because the railroad company could not take advantage of the market—could not sell its seconds and stuff of that kind, which make a margin of profit in commercial mills. And those mills were established and operated simply because Booth-Kelly and other operators refused at once to furnish the railroad company with necessary supplies to keep its lines open, except at most ruinous prices, which could not be considered.

Q. That is to say, the mills on these lands of the Oregon and California Railroad Company were operated for railroad purposes, to manufacture ties, bridge timbers, and other material necessary for renewals and betterments of the lines, and were not operated for commercial purposes.

A. They were not operated for commercial purposes at all, and were operated simply by reason of the company being forced to operate them, by the action of Booth-Kelly largely, and other mills too; but Booth-Kelly was the principal supply, and it was immediately

cut off.

Q. Now, you spoke something about Mr. Dixon being at Washington at this particular time. Have you any personal knowledge of his being active before the legislature of the State of Oregon for 1907, or do you know anything about that?

A. Only by hearsay. That is all.

Mr. Townsend: The Government objects to all of the testimony of this witness as to the circumstances leading to the adoption of the Joint Memorial of the Legislature of the State of Oregon in February, 1907, addressed to Congress and the Executive Officers of the United States, and also leading to the adoption of the Joint Resolution of Congress, approved April 30, 1908, directing and authorizing the institution of this suit, and also the recent act of Congress authorizing a compromise of the so-called purchaser suits; also all testimony relating to the action of the Booth-Kelly Lumber Company and other lumber companies with reference to the sale of ties and other building material to the Railroad Company; also the efforts on the part of these lumber companies and timbermen to purchase lands from the defendant Oregon and California Railroad Company; also all other testimony implying that the agitation resulting in the institution of the present suit was brought about by or on behalf of these timber men and mill operators by Congressman Hawley, Senator Multit, or anyone else, for the purpose of enabling these timber men and mill operators to acquire a monopoly of

the manufacture or sale of lumber in Western Oregon or any part thereof, upon the ground that the same is hearsay, incompetent, irrelevant and immaterial and was elicited from the witness by questions calling for mere conclusions and arguments and not for facts within the knowledge of the witness. For the purpose of avoiding the incumbering of the record objection was not made specifically to these questions at the time they were propounded, under agreement with counsel that the general objection could be made at the conclusion of this line of testimony as to the whole thereof and it being understood that the same shall be considered as having been interposed as to each question and answer as well as to the whole thereof. Unless you have some objection I am going to adopt that general objection to avoid the incumbering of this record.

Mr. Fenton: None at all. I was going to say that counsel for the defendants desires to say that the defendants do not admit that the statement by Government Counsel is a fair statement of the facts as testified to by the witness, and that the objection made by counsel is in a sense argumentative, and the defendants desire the record to show that they object to the statement as not in accordance with the testimony disclosed by the record, the record showing that the witness was present and participated personally in many of the matters about which he testified and that the record will speak for itself. We make no objection that counsel reserved his right to object at this time.

Mr. Townsend: Yes, but I want the record to show

that this objection shall be considered as being addressed to each question specifically.

Mr. Fenton: Oh, yes; it may be so understood.

Mr. Townsend: And each answer.

Mr. Fenton: It may be so understood.

Whereupon witness further testified that as to the sources of his information, or information received from others as to the general character of the unsold portions of these grants involved in this suit, he would just say generally in the beginning that a large part of the grant had been cruised and examined and reported on and the reports covered not only the character and the amount, the condition of the timber, but also the character of the land. They attempted to report upon the general character of the land as land. These reports were made during a period of time from 1870 down to the time of the fire (April 18, 1906) and so far as he could judge from the character of the reports that were on file when he took possession, the reports were made by men who were in the employ of the Company in the capacity of cruisers for years together, which would argue that they were well made and consecutively made in a great many cases. As to the cruising done under his own control and direction, he could speak of those. As to his personal examination of the grant he cannot say that he has been over the entire grants, but has been through the grants in different places at different times from 1902 down. In February and March, 1903, he made a trip through the upper part of the grant, Clackamas, the upper part

of the country below, back through the grant, back out of the valley; that is where the lands of the company are. He had been across the grant, across the Cascade Forest Reserve through the Company's lands on horse back where there were no trails, looking after the character of the timber and the land, everything connected with it. He has been in different parts of the heavily timbered part of the grant, the valuable part of the grant, repeatedly through it; that is, in the southern part of the State. He has been a land owner and a rancher down in Klamath County adjoining the grant for the last seven years. He knew something about the character of land and what it will produce and its capacity for production. He has dealt in land for a good many years in one way or another. He is not a timber cruiser, but has been through these grants in different places to examine the stand of timber and the character of it. The cruising done during his control of the grant was by men formerly in the employ of the Company when he came there and they had been for years in that particular branch of the business. N. E. Britt was the chief cruiser and F. A. Elliott was under him. Both left the service while he was still in control, several years after he came here. A. W. Rees, he believes is still in that capacity with the Company, and then there were quite a number of others whose names he does not remember, who were taken on or off just as the occasion would require. He has been through the timber lands in the grant owned by the Company in the eastern half or part of Jackson County, Oregon, and in the western

part of Klamath County, Oregon, known generally as the Jenny Creek country. He made reconnoissance of the Klamath River Country once and reported on it from Klamath Falls down Klamath River. He has never been to Coos Bay. Never in that part of the grant and has not been on the water shed west of the Coast Range. In California he has been immediately below the line and knows the general character of the country. He has been in the Cascade Forest Reserve in the eastern part of Multnomah and Clackamas Counties and went through that property and the intermediate lands of the Oregon and California Railroad Company pretty thoroughly once with Mr. Pinchot. He has been in the Cascade Forest Reserve clear down to 48 south, somewhere down in there, very near the State line; that is, to fractional section 41, which is the Oregon boundary. He has been through the southern or lower end of the Cascade Forest Reserve and the lands of the Company within the indemnity limits and abutting on the west of the indemnity limits on the east side of the grant adjacent to the Forest Reserve and through that country repeatedly. He is not familiar with the western side of that part of the grants. He has not been in Yaquina Bay through Lincoln and Benton Counties. These are not very valuable lands and he never took the time to go near them. Has not been on the granted lands of the West Side land grant. Does not know those lands (Referring to grant of May 4, 1870). The general character of the land that he has been over in the grant of July 25, 1866, the northern part of that grant, the extreme

northern end of that grant, that is about east and south-east of Portland, there is some very heavy timber. It is rough country and no large agricultural possibilities at all. As to the south end of that grant the land—practically all the unsold land—lies in the mountainous country or rough country, very much broken. The best part of the timber lies in the extreme southern end of the grant; that is the sugar pine country in Jackson and Klamath counties, but that country lies high, very dry and is cold. There are practically no possibilities in there, for extensive cultivation, because the land is not suited for it, the character of the land is thin and sandy. It will be a forest country always, and in his opinion it would not be susceptible to cultivation on account of the climatic conditions and soil, rock, etc., even if the timber were removed. He cannot speak, except in a general way, of the lands in the eastern part of Josephine County, east of the railroad and immediately north of Jackson county, having skirted that country east of the range. The general character of this land is timber and wood land very rough and broken. The land in the eastern part of Douglas County on the Umpqua River and the streams that lead into the North and South Umpqua, is a good timber country. It is all timber, practically. The valleys are narrow and it is valuable chiefly for timber, so held to be now. The timber lands in Lane County on the head waters of the Willamette River, Coast Fork, Middle Fork and the McKenzie are good timber lands, but in a rough country, what there remains. There are small patches of land all through the country,

isolated tracts here and there, where, if the timber was removed, the land would be susceptible to agricultural purposes, but the country is full of land, the Willamette Valley is full of land, covered with brush now, that is very much better for cultivation than any lands that he knows of, in this grant and more accessible to transportation.

If for no other reason the stumps would be prohibitive to the adaptability of this land for agricultural purposes, because of the character of the growth, especially the fir growth which is the principal growth of the country tributary on the slopes into these interior valleys on the west of the summit of the Cascades and that by its resinous character, its long tap roots, as everybody knows in this part of the country, are exceedingly hard to extract, and it costs from fifty to one hundred and fifty dollars, that has always been his information, to clear the land of stumps and there is plenty of land to be had in these interior valleys for less than that price. Well on toward 200,000 acres of this grant is rough, is absolutely barren, rock slopes, without any possibility of growth of any kind. He would call it chaparral down in the lower country. The land that he speaks of has not even chaparral growth and would not even be goat pasture and there is no value at all to that land that he knows of. You could not settle a colony of flies on there and get sustenance for them. He thinks it would not be valuable for a homestead or preemption if it were to become public land. It is just waste land, that is all. He can give only a general description of that land. He

cannot give the particular section, township and range descriptions. He can only give the general locations. The company is still paying taxes on this land, they were when he was there, such as have been surveyed. Shortly after the fire, the Weyerhauser Timber Company made an application to purchase all the timber in certain townships, he cannot name them now but they are in the townships from the state boundary north, part lying particularly around Pokegama, which is their center. They own about 12,000 acres of land there, which was originally purchased from the Railroad Company by a man by the name of Cook, he believes, which passed to Hervey Lindley, who built that little line of road from Thrall Junction on the Southern Pacific main line north into and across the state line into Oregon, with a terminus at Pokegama, where Lindley had some kind of a mill operation; and before this time the Weyerhausers had acquired that little railroad and that timber holding of Lindley. They made an application for all the land in these townships, aggregating about 50,000 acres, as he now recollects, and they wanted to buy it right off, and his belief is that they offered about \$5.00 an acre for it. Their application was entertained and it was pushed very vigorously by the Weyerhauser people. This came to him through Mr. Calvin; then there was a great deal of correspondence back and forth between himself and Mr. Kruttschnitt, who took a hand in it and Judge Cornish. Witness protested against taking any action at that time, because the company was wholly unprepared. The company had no cruisings of that country at

all and could not act intelligently, and it was the heaviest timber in the grant; being the sugar pine belt and practically the only body of sugar pine that the Railroad Company had. The pressure was very heavy, and finally he got an order to have the land cruised and have it done with the greatest possible dispatch, which he did. He ordered Mr. Rees down there and the company got as many cruisers, that it could depend upon, as possible. They established two, probably three, camps in that district and cruised it that summer and late in the fall of the same year, 1906. He found that they had asked for just the nucleus of that country; with the 50,000 acres that they wanted, there was tributary and depending upon it, about 70,000 acres more than would either have to go with that sale or else become of very little value, because it would be worthless to anybody except the Weyerhausers; that is it could be sold for very little. So that was included. He submitted the results of that report and the whole negotiation flattened out and was never resumed. That is to say, when his final report was turned in, the application to purchase by the Weyerhausers, was denied. There never was any negotiation for the sale of the grant entire, to any one that he knows of, but he cannot say that there were no negotiations with Weyerhausers or any one else during his time, that he was not cognizant of, but he believes that he knew everything of the kind that was going on. The company never made any attempt to sell the grant as a whole to anybody, and there never was any application that he knows of, to buy it as a whole. He does not re-

call anyone who ever applied to purchase so large a body of land as 50,000 acres, other than the Weyerhauser Timber Company referred to. There were some small sales made after the discontinuance of sales in 1904, up to the time he retired from the management and control of the companies—to timber people. Some small sales were made to timber people. He refers to some small timber sales that were made subsequent to April, 1906. These were sold to the Southern Pacific and by that Company were sold, he thinks, to Cole Brothers, and to Fisher Brothers, at Marcola, and other small mill men. The sale of these lands to these parties in connection with the mill manufacture of lumber for ties and bridge material, was part of the means the company was obliged to resort to, to keep the lines open during that period of the rebuilding of San Francisco. Those mills were entirely additional, to the mills that the Southern Pacific Company itself established. These small sales referred to represent just a few sections; a half dozen sections would cover it. The letter of August 16, 1905, addressed by him to Peter F. Dunne, General Attorney, Southern Pacific Company, being Government's Exhibit 115, had nothing to do with this case. This is the letter that was published and it has nothing to do with the Oregon and California lands even remotely. That letter and the correspondence going before and after between himself and Mr. Dunne and other officers related entirely to a proposal at that time to transfer the lands unsold of the Southern Pacific Railroad grants in California to a land company and the occasion for that suggestion at that

particular time was the fact, that the issue of bonds of the Southern Pacific Railroad Company of California, dated in 1875, matured, he thinks, the 1st of April, 1905; at any rate they matured that year. A refunding issue was in process of being put out to refund these matured obligations. The old issue of 1875 was a lien upon all the lands of the Company, that is the Southern Pacific Railroad Company. It had nothing to do with this company in suit, and it became necessary in drawing the new deed of trust to secure refunding bonds to include the usual provisions in regard to the security, the land grant security for these bonds and the manner in which it should be handled, the same thing that is usual and customary in such instruments. During the discussion of the deed of trust the suggestion originated, to divorce entirely these lands from this refunding issue, to turn the lands over when they were relieved from the lien of the old issue into a land company. It had no relation whatever to the Oregon and California Railroad Company grants in Oregon. Something is said in that letter, which stated that, "Mr. Chambers has undoubtedly looked this matter up. He makes no citation to Department Decisions but I think this matter can be brought about by conference with the officials at Washington, who are just now inclined to be friendly to us." D. A. Chambers was an attorney of the Southern Pacific at Washington, attended to all departmental matters referred to him by the land department and other departments. The whole question involved and the one that was submitted to Mr. Dunne and myself,

was a practical one as to how or whether these grants could be transferred by the Railroad Company, the original grantee, to a grantee of the Railroad Company, and whether such grantee of an entire grant would be subrogated to all the powers and privileges as to the selection of indemnity for lost lands enjoyed by the original grantee under the acts of Congress. The question was a complicated one, necessarily for one reason, because of the intense complication that had arisen in that particular grant, those two particular grants to the Southern Pacific Railroad Company, out of suits brought by the United States, a number of them, in what is known as the Overlap Litigation. The United States had made an alternative grant to the Southern Pacific Railroad Company and to the old Atlantic and Pacific Railroad Company. That was one suit out of which, or one condition of facts, out of which, grew several suits. In that case the lines of general location of those two roads when first projected were very near coterminous; they crossed and recrossed; and although the Atlantic and Pacific never did construct a foot of road in California, still some of those old alternative rights survived and were cut off finally by action of Congress in 1886, he believes. However, the Government of the United States set up the most unusual charge that notwithstanding the grant was forfeited, the Southern Pacific had constructed and had earned its grant, the United States insisted that it step into the shoes of the old Atlantic and Pacific grant which never constructed, and therefore brought a suit and finally prevailed. He merely cites this to give an in-

stance of the character of the complication that existed at this time and that is referred to in this letter. That involved the practical question whether or not an assignee of a grant under one of these acts of Congress would be recognized as the beneficiary of the grant in the readjustment of claims in relation to the payment of fees for lands, selection of indemnity, and so on and so on, and obtaining patents to lands that were not patented, and whether they could surrender base lands lost and take indemnity, the same as the grantee company. By the term "friendly" he did not mean anything improper. He never was mixed up in anything improper that he knows of, certainly not with the United States in regard to land matters. The question there involved was simply this: The facts mentioned were notorious throughout all the departments, beginning late in 1904 and from that on during the whole Roosevelt administration, and he thinks, the present administration has inherited that tendency. The Departments at Washington were exceedingly hard to deal with. He means that when one would go to talk with the head of a department about the ordinary business of the department—he knew it was so in his case—before he could get a hearing, the attorney for the department and two or three witnesses, had to be brought in to hear what you had to say. He thinks—the suggestion seemed to him that being an official of the Harriman lines, one was under suspicion, and the heads of the department evidently thought that somebody might report it to the head "Bull Moose" and he would go and toss them. The whole air was charged

with suspicion. It was hard to deal with them. It was hard to get anything through the departments. He does not care to go into details very much except to clarify the statement. The condition of affairs existed that he speaks of. In January, 1905, the first Forestry Congress was called in Washington and the railroads were all invited to send delegates, and they represented a large, as they did in these grants, a very large interest in forestry matters, but in that case there was not a single representative of any of the Harriman lines that was asked to participate; they were shut out and snubbed in every way; and it only emphasizes the unfriendly situation in which he found the affairs at Washington—the Government officers at Washington. During 1905, the Reclamation Service, in January, 1905, and the head of the Geological Survey made very insistent appeals to him for assistance, in getting certain things through the Oregon and California legislatures in regard to the Klamath Irrigation project. They had spent \$90,000 in making surveys and examinations, and had to get the co-operation of the states of California and Oregon in releasing and conveying such rights as the states had, in these interstate lakes to the United States before that project could be put on its feet. That is one of the things. This finally resulted in the passing of acts by both California and Oregon, granting the rights of the states to the United States. They did everything they could to assist them at that time, and it was to the work done by the Railroad Company that the Reclamation Service and Geological Survey owe their

success in that matter wholly. During that year Mr. Pinchot came to California, just about this time, just before the time this letter was written, and he made a formal request, that the Oregon and California Railroad Company should deed by absolute conveyance to the United States all of the lands granted or claimed by the Railroad Company in the southern end of the Cascade Forest Reserve in Jackson and Klamath Counties, Oregon; embracing probably 400,000 acres of the very best timber land in the grant, carrying all the sugar pine, the best belt of sugar pine there is, in Oregon today, and that was to be turned over, and the consideration offered to the Railroad Company for such a proposed transfer, was the privilege of cutting off its own timber on those lands whenever and subject to such conditions and regulations as the Forestry Bureau of the United States might impose. The object of Mr. Pinchot, as Chief Forester, in securing this land, was to make a permanent forest reserve, and when the timber was cut off it would be valuable for reforestation. The elevation of these lands is 5,000 feet and over, and agricultural crops would be very limited in that region and he doubts very much whether one could raise profitably any crops in that particular country. That proposal was made to him verbally by Mr. Pinchot in San Francisco and was afterwards renewed by him in New York, and was afterwards renewed in writing to him, and he supposes the papers are in the department now. It was renewed by Mr. Pinchot and made by him, as an official of the United States, as he was then Forester of the De-

partment of Agriculture, formerly of the Department of the Interior. But what he had reference to in that case was simply, that the friendly disposition of these gentlemen was so much in contrast with the notoriously unfriendly attitude, not of the gentlemen personally because they are very courteous gentlemen, and he has had the very most pleasant social relations with them, but as officials they were very, very hard to deal with, and their attitude at that time was such a strong contrast to the atmosphere in which they lived in Washington that it was worthy of comment. He alluded to the changed situation when he used the word "friendly," and if they wanted something out of the Company, why that was the time to get what the Company needed. At that time the Company wanted to have recognition of the department that this grant would be assignable and that the holding company would have the same rights that the land grant company had as to selections and obtaining patents, and things of that kind; perfectly proper in every way and a business proposition. Referring to Government's Exhibit 113, the Company was not in a position to entertain applications to purchase from any of these gentlemen, and he has explained heretofore the reasons why the Company was in no position to offer these lands for sale, or to sell them. These letters, Government's Exhibit 113, are all requests for transportation, trip passes and things of that kind. They are just the common run of stuff, of that kind, with which the departments are always flooded. When he received these applications, he notified them that their applica-

tions would be examined as soon as possible, and they generally were examined at once and if found to be agricultural or grazing, as they were in a few cases specified to be, he notified them, the Company would enter into negotiations with them for sale. Upon investigations of the applications to purchase these particular lands, they were usually found to be timber, sometimes water power, sometimes mineral, but mostly water power and timber.

“Q. It is alleged in the Answer that ‘Said Oregon and California Railroad Company has at all times openly and notoriously claimed,’ and so forth, to be the owner of the lands in this suit, has at all times caused the said lands to be protected by field agents who traveled over and protected the same against depredation and waste, has at all times paid the taxes levied and assessed upon and against the said lands, and in divers other ways openly and notoriously proclaimed and asserted and has been in possession of the said lands, and that large and different portions of said lands were reduced to possession and improved from year to year by persons holding leases thereof for grazing and other purposes from the Company, and other portions of lands were reduced to possession as right of way, station ground, depot ground, and the like for railroad purposes of the Company. Now what would you say as to the facts in respect to that matter? What was done, or did you do, towards carrying out and protecting the possession of these lands during the time you had charge or control of the same?

Mr. Townsend: Objected to as incompetent, irrel-

evant and immaterial, and assuming that the lands were reduced to possession of the Oregon and California Railroad Company, which is not disclosed by the evidence.

A. The lands were absolutely owned and controlled, and so always understood to be, and we paid our money, protected it at great expense against fire and depredation, paid the taxes, an increasing burden of taxes, exercised every incident of ownership in regard to real property.

Mr. Townsend: The answer is also objected to as incompetent, irrelevant and immaterial and consisting of mere conclusions of fact and law and not a statement of facts from which the ultimate facts of possession may be deduced.

Q. State to the Court whether or not the Company while you were in charge took such possession of these lands as their nature and character permitted?

Mr. Townsend: Objected to as incompetent, irrelevant and immaterial, and calling for a mere conclusion and an opinion of the witness as to what constitutes possession, and a conclusion of the witness upon the question of fact as to what extent the lands could be reduced to possession and in no way establishing the rule as to actual possession within the meaning of the Oregon statute relating to suits to determine adverse claims to real property.

A. We took possession; we had possession, continuous possession, during my time.

Mr. Fenton: Just read the question. I don't think you got the question, Mr. Eberlein.

(Question read)

A. Yes."

Witness further testified that his official relations with the Oregon and California Railroad Company were discontinued June 1, 1908. He made an official report or statement of facts relating to the land grants of the Oregon and California Railroad Company, the successor in interest of the Oregon Central Railroad Company, East Side, and the Oregon Central Railroad Company, West Side, on or about that time. On one of those pages he gives a list of the authorities, sources of information. It is a bald statement of facts, reproduces the acts of Congress and the legislature, the correspondence of the Interior Department and other sources, reproduces the articles of incorporation of the different railroad companies, and was intended to be a full statement of all the facts bearing upon the case. The facts concerning the physical character of the grant were from all reports and from his own knowledge, the number of acres, the acreage and condition thereof, from the letters of the Commissioner of the General Land Office, reproduced in full in that compilation. The letter of Binger Herman adjusting and settling the grant is reproduced in full. This report is based upon the records of examinations of the lands in the grant by particular tracts made during all the years prior to April 18, 1901. All the information that was in the department or could be gathered was

summarized in the facts given.

“Q. Well, I notice at page 70 of this report, which I will show you presently and which I will offer for identification, a statement that the report of your field agents shows 1,496,640 acres covered with timber and unsuitable for agriculture, and 703,652 acres of grazing land unsuitable for agriculture, and 7,320 acres that might be used for agricultural purposes at the present time but which acreage consists of small isolated tracts, many of them remote from transportation and settlements and scattered in small bodies in different places throughout the whole extent of the grant along creek bottoms and on hill sides. Now from what sources of information outside of your personal knowledge did you obtain that information?”

Mr. Townsend: That is objected to as incompetent, irrelevant and immaterial, and being an attempt to introduce in the record this self-serving statement of the witness while an officer of the defendant and obviously made after the passage of the Act of April 30, 1908, as a part of the preparation of the defense in this case.

Mr. Fenton: No; it was made May 1st, 1908.

Mr. Townsend: Well, the Act was passed April 30th, and had been pending six months before and Mr. Eberlein was there. I know; I saw him myself.

Mr. Fenton: You don't think he made it that night?

Mr. Townsend: No; I think he made it anticipating that the act would go through.

A. From the field force of the department, men employed who had long familiarity with the grant having reported on the grant for a great many years.

Mr. Townsend: The answer is also objected to upon the ground that it now appears that the statement was made upon hearsay of others.

Q. Were these reports reports of your employes?

A. Yes sir.

Q. And were the reports made in the usual and ordinary course of business by your men in the field, thus employed, on which you relied as an official of the company?

A. Yes, sir.

Q. And did you act upon them as correct?

A. I did.

Q. I notice on page 69 of this official report of yours of May 1st, 1908, statement of lands in various counties, embracing Oregon and California Railroad Company land grant assessed for taxation as shown by record of county assessors for year 1906, and showing assessors' classification of Oregon and California Railroad Company lands as tillable and non-tillable. From what sources was that table prepared?

A. From the official statement of the officers of the various counties. I think the sheriffs make those statements in this state, do they not?

Q. The Assessor.

A. The Assessor?

Q. Yes.

A. Anyhow, the official whose business it was; in his official statement. I think they are on file in the department still.

Q. I notice in this statement that the acreage of patented unsold lands of Oregon and California Railroad Company assessed as tillable is only fifteen acres and the balance all assessed as non-tillable?

A. That is the fact.

Q. For that year?

A. For that year.

Q. That was 1906?

A. That is the assessment of 1906.

Q. That was about two years before the resolution of April 30th, 1908?

A. Yes sir.

Q. Now I notice a map attached to this report of yours of reduced size. What do you have to say about the accuracy of that map, if you know?

A. Well, the map was made up under my order and shows the amount of land that was excepted from the grant by process of law.

Q. What it purports to show is a correct delineation of the grant?

A. Of the grant and the character as to certain

things.

Q. Now to whom were these reports submitted?

A. To the different officers of the company, primarily to Judge Cornish. I left for Europe immediately, severed my connection entirely with the road, and that was the last work of any magnitude I did for the Company, and I think copies of it were sent to different—

Q. (Interrupting) To the officers of the Oregon and California Railroad Company?

A. Yes, sir, I think so; to the attorneys.

Q. What have you to say as to the correctness of that report in the statement of ultimate facts based upon your knowledge and the knowledge of the records upon which it is based?

Mr. Townsend: That is objected to as incompetent, irrelevant and immaterial and a mere conclusion of both law and fact, and necessarily hearsay.

A. The report as it stands is all but a very small part official records, as to which there can be no question.

Q. As to the balance?

A. As to the balance it is simply bald statement of actual facts and figures; there can be no other deduction—there are no deductions in that report; it is simply a statement of actual figures and facts.

Q. Well, such of the facts as are stated and such of the figures here as relate to the acreage of grant, and such matters as that, upon what are they based?

A. They are based upon the actual books of the Company and they are corroborated by the official statement and settlement of the grant by the Honorable Binger Herman officially, and his letter, his official communication is reproduced in full in that.

Q. As to the sales and matters of that kind that would appear in the records of the Company and as to the reports of cruisers and things of that kind upon which you base the acreage of timber and of grazing and of non-agricultural lands, as I understand that is based upon the official reports made to you by these cruisers and others?

A. That is true.

Q. Do you recognize this document which I now hand you as your official report made May 1st, 1908, as identified, and about which you have been testifying?

A. This is one of the copies, one of the duplicates or triplicates, or quadruplicate copies; I don't know; and it is exactly the same as the original, excepting my signature which appears to be omitted from this copy.

Q. It is a typewritten duplicate of the original which you signed, and is an original in itself, excepting that your signature is not on it?

A. Yes, sir.

Mr. Townsend: That is objected to as calling for a conclusion of the witness on a question of law and evidence.

Witness: That is my copy that has been in my possession ever since it was made.”

Whereupon defendants offered in evidence said report prepared by the witness and marked Defendants' Exhibit 309, to which counsel for complainant objected as incompetent, irrelevant and immaterial, based upon hearsay, and a mere statement of conclusions of fact and law, and is a self-serving declaration, prepared by one of the officers of the company for the purpose of this defense and that there is no evidence accounting for the loss of the original documents upon which the statement is based. Whereupon the same was received in evidence and was marked Defendants' Exhibit 309 and is hereinafter set out and described and made a part of this statement of the evidence and identified herein as such. Whereupon the witness further testified, referring to the number of outstanding contracts, in giving the name of the grantee or vendee, that the names of the vendees were practically unknown the morning after the fire, and it was very difficult and a long drawn out operation to ascertain the addresses and names of the vendees of a number of these sales. He took a man to New York in May, 1906, and put him to work in the office of the Union Trust Company making abstracts of all data that the Union Trust Company had regarding sales and collections from 1887, the date of their mortgage down. He went further than that and made arrangements with the officers of the Farmers Loan and Trust Company, which was the trustee under former instruments, and got what information it had, and he scraped New York

clean so far as he could find anything that was there and he discovered a great deal of information in that way. Whereupon the witness upon cross-examination further testified that he has none of the files of the Oregon and California Railroad Company relating to these land grants,—nothing relating to the Oregon and California Railroad grants. He has this statement of his and if there is anything that he has, of course he will go through it and let counsel for the Government have it. He formerly lived at St. Paul in Minnesota and became acquainted with and knew Judge Cornish a great many years. Judge Cornish was appointed by Judge Sanborn as Master in Chancery in the receivership proceedings involving the Union Pacific Railroad about 1893, and that receivership continued about five years until about 1898, and in the discharge of his duties Judge Cornish naturally became familiar with Union Pacific affairs. Cornish became vice president on the reorganization of the Union Pacific by Mr. E. H. Harriman and served in that capacity until his death. Witness resided at St. Paul about 15 years, until about July 1, 1901, when he entered some form of employment in connection with the Harriman lines. His original employment was assisting the Vice President in regard to land affairs of the Union Pacific. His first employment was to assist Judge Cornish in connection with the administration of the land department of the Union Pacific, and that was his first official connection with railroad land grants. He had more or less to do with the lands of the old St. Paul and Sioux City grant in the matter of handling them as

the trust officer of the old St. Paul Trust Company. When he first became associated with Judge Cornish his official residence was at St. Paul. He was then employed on some special work by Cornish in connection with the Union Pacific land grants. He had several different employments practically at the same time, but it had to do with lands largely, referring to his employment beginning July 1, 1901, which included the Union Pacific land grants. Most of his work was done there outside of just digressions when he would be sent out to make special reports or something else, like the irrigation possibilities of the Snake River Valley. He made a long examination and report on that in the winter of 1901 and 1902, but returned to the land grant business. Judge Cornish was then stationed at New York City, but rarely visited St. Paul after 1901, he was there occasionally but not very often. He had conferences with him almost always at New York. Sometimes he met him on his way west, or when he came to Omaha, but that was very rarely. He left St. Paul when he went to the Union Pacific employment. On July 1, 1901, he went to Omaha. He was confidential adviser of Judge Cornish and the New York office and his work there in a general way was the same as his subsequent work in the west. That is, to make recommendations as to the reorganization of the land department and the reformation of some of the methods of handling its business, and that was the general character of his work at Omaha, making reports and recommendations. He remained at Omaha from July 1st, 1901, until some time in 1902, when he

first came to the Coast. But this trip was one for the purpose of general observation, and he returned to Omaha after that trip. He returned to New York, but didn't have much to do. He was detailed on his return from that trip to Omaha to take up and examine into the affairs of the Union Pacific Coal Company, and barely got started on that work when he was sent for, to be consulted about coming out here. That was some time in 1902. He had practically finished the work he was sent there to do with the Union Pacific land grant. It was sometime in 1901, or 1902 that the ownership and control of the Southern Pacific was acquired by the group of financiers known as the Harriman System, and the same group became interested in the affairs of the Oregon and California Railroad Company, and Mr. Harriman became president of the Oregon and California Railroad Company. Harriman became president of some of the constituent lines of the so-called Southern Pacific System, but he does not know as to all; he was president of the Southern Pacific Railroad Company, he does not know as to the Central Pacific, but understands that he became president of the Oregon and California Railroad Company. Judge Cornish was never an officer of the Oregon and California Railroad Company to his knowledge, but Judge Cornish gave attention to the work which witness was doing and witness reported to him. Whether Judge Cornish had official connection or not with all of the land grants constituting the so-called Harriman lines, he does not know or remember as to some of them, but as to having immediate supervision and being the

man between witness and Harriman and to whom the reports went and someone to whom he reported in New York on these special missions and which he was sent out to fulfill, Judge Cornish was that man. That included work with reference to the Union Pacific grant, the Kansas Pacific grant, the Denver Pacific grant, the Central Pacific grant, the Southern Pacific Railroad grant, and California and Oregon grant and Oregon and California grants; and he may say the grants in Texas. But there is a distinction to be made as to the Union Pacific proper land grant, Union Pacific Railroad land grant, Kansas Pacific grant, and Denver Pacific. In that case Judge Cornish was the vice-president of the Union Pacific Railroad, in direct charge officially. He was president of the Union Pacific Land Company, which took over and held title and managed and disposed of all of the lands of the Kansas Pacific and Denver Pacific grants. In these other cases, he was not officially connected with the subordinate companies, to his knowledge. But waiving the question of his official authority, Judge Cornish actually supervised the work of all the grants in substantially the same manner. Supervision is the right word, because he did not exercise the same authority by any means over these grants here on the Pacific Coast that he did over the Union Pacific grants. Judge Cornish did control the actions of witness upon questions of policy, and did give witness instructions on the Union Pacific, but he never thought he had the same amount of authority on these grants on the

Coast, including the land grants involved in this suit and he, Cornish, never exercised it. Judge Cornish always waited to hear what Mr. Harriman had to say about it. So really Mr. Harriman was the man who directed it. That accounts for long delays that were suffered here in the rehabilitation and other things, because there was no one who would act offhand as they did on the Union Pacific. Judge Cornish acted as a sort of go-between for witness and Mr. Harriman. There was no practical purpose served in this roundabout way of getting his recommendations to Mr. Harriman. It was an unfortunate occurrence, that was all. He does not mean to be understood that Judge Cornish did not exercise any authority at all, but he does say that Judge Cornish did not have and did not attempt to exercise, the same authority on these grants on the Pacific Coast that he did on the other grants, for the reason of lack of official connection. It seemed to witness that almost any specific question that he presented to Judge Cornish in connection with the Oregon and California Railroad grant as to which he deferred action until Judge Cornish consulted with Mr. Harriman, was about everything that amounted to anything of any importance; that Judge Cornish was a great fellow to sidestep things; in this connection it may be well to say that Mr. Kruttschnitt exercised or assumed to exercise about as much authority over these land affairs as Judge Cornish did, and it was the practice of witness,—he was very often at a loss to know how to proceed and he made reports, as will be found, to Mr. Kruttschnitt at the same time that he made

them to Judge Cornish,—and between the two stools he generally fell down between them and affairs were hung up here for that reason. Now as to particular instances of this, he does not call to mind any particular one at present. There was a reason why Judge Cornish should not sidestep as to the Union Pacific grant the same as he did with reference to the grants in question. Judge Cornish was the vice president and by direction of the board in charge of land affairs of the Union Pacific Railroad Company, and was also the president of the Union Pacific Land Company. He was the man that was vested with absolute and final authority in those matters and he acted promptly in those cases; so much so that in a little over a year's time they thoroughly reorganized these grants and put them on the market, and in three years' time they were practically sold out, referring to the Union Pacific grant. On these grants in question the trouble was, from the very start, to get authority for anything. If there was anything that looked as though anybody had to have authority, why, it would go to Judge Cornish and he would discuss it with Mr. Kruttschnitt and the latter would pass it back and then sometimes they would jointly go to Mr. Harriman and have a talk. Harriman was president of the Union Pacific at the time Judge Cornish was appointed to this office. He does not think that Mr. Harriman disturbed himself very much about the Oregon and California grant, that he ever heard of; that is, not to his knowledge. Harriman really depended upon somebody to look after these affairs for him, but the fact remains that they did not act

on that but felt as though these matters on the Pacific Coast were large and complicated, and they wanted some more direct authority, as he supposes. Judge Cornish had no authority from any board of directors that he ever heard of; and the only authority Judge Cornish had was by letter from Mr. Harriman. Witness got his authority from Judge Cornish, who had authority enough to give him authority. Everything witness did in connection with these grants on the Pacific Coast was under the authority of Judge Cornish, except what Mr. Harriman gave himself. Practically he was just as much under the supervision of Judge Cornish after he was formally appointed acting land agent as he was before; at least he assumed that he was. That is, in the actual practical carrying out of his work, he consulted with Judge Cornish just the same after his appointment on October 1, 1904, as he did before, but he also consulted with Mr. Kruttschnitt and others. There was a divided control out here all the time. His appointment as acting land agent made no change in that respect. He came from New York and reported back to New York right along. In connection with his work, that is the result of his work relating to these several land grants, he observed a general policy that was pursued by Mr. Harriman and Judge Cornish with reference to the administration of these land grants. They attempted to consolidate and standardize all their activities, and they also attempted to administer the land grants with reference to one another to serve the common interests of the constituent companies and also of the parent companies, and it never got

beyond the stage of reorganization with him. Ties were bought here in Oregon, not only for the lines in Oregon, but for other Southern Pacific lines, and Union Pacific lines. The reservation of 100,000 acres of timber lands never got so far as to serve all of the constituent lines of the Harriman lines, so far as he knew. The intention as to that reservation was, so far as he was concerned, simply with the road which he was interested in. But he assumes of course that those timbers and ties cut from that land might be used and probably would be used by other lines and paid for by them. He does not know how many ties could be cut from the 100,000 acres that were reserved, nor how many miles of railroad it would supply with ties and bridge timbers, but generally speaking, if properly administered and reforested, it would supply a large one. Whether the entire Harriman System he would not say, because the entire Harriman System would not come here for ties. They would not want to come here for ties, because the freight would eat them up. That 100,000 acres of timber lands there, would supply the lines on this coast, he presumes; though of that he does not claim to be qualified to speak. The number of acres that should be reserved was, he thinks, determined in conference with Mr. Kruttschnitt, who was the general manager and vice president of the Southern Pacific Company, and he thinks on the board of all of the original companies on this coast. He knows he was a director, probably an officer, of the Southern Pacific Railroad Company, and believes he was a director and probably an officer of the Oregon and California Rail-

road Company and was vice president of the Southern Pacific Company; but he thinks he was not an officer of the Union Pacific, or the Oregon Railroad and Navigation Company, or the Short Line. He thinks that the quantity of timber lands that should be reserved was determined in that conference with Kruttschnitt. He does not think Judge Cornish passed upon them, because that was something outside of his knowledge. Cornish would necessarily have to depend upon recommendation. As to the fact of the advisability of making the reservation and setting aside the lands he does not think that Judge Cornish would attempt to pass on the question. He does not think that he knew anything about it.

“Q. Now, Mr. Eberlein, it was one of the policies of Judge Cornish and yourself and, I may say, Mr. Harri- man and the other officers of any of these companies who assumed or exercised any authority with reference to the subject, that the land grants should be administered with a view to promoting the general financial interests of these companies; isn't that true?

A. Well, if you mean by the general financial interests the managing of them in a careful, conservative, economical way in which they would produce the greatest results, both in money and in other ways for the roads, yes.

Q. That is what I mean; that the administration of these land grants was conducted along lines of policy that included other questions than the mere money that might be derived from the sale of the lands?

A. Well, that was always my idea.

Q. And you got that idea as the result of your connection, consultation and work with the other officers that you have mentioned, as well as your own initiative?

A. My own study of the case.

Q. And you found that that general view was shared by the others with whom you came in contact, including your superiors?

A. I believe so.

Q. Now when you came to Oregon or to the Pacific Coast in 1903 and entered upon the work of straightening out the affairs of the land grants involved in this case as well as the other land grants upon the Coast, you made your office where? Your headquarters, I mean.

A. The headquarters were San Francisco.

Q. You had offices elsewhere where your work was carried on, but your personal headquarters were San Francisco, were they?

A. Yes. I kept an office in New York and was called there frequently, but I was in San Francisco most of the time. But it must be understood that I didn't come here to run any land grants.

Q. I said to straighten out the affairs.

A. Just the matter of reorganization, the examination and reporting. The other was an afterthought and was to be temporary. That was the agreement with me,

that I would not be required to administer details only for a short time to relieve a difficulty.

Q. You came here with the understanding that your work here should involve substantially the same scope as it had on the Union Pacific?

A. Yes, sir.

Q. Straighten out the affairs of these land departments and put them upon a more economical and more practical basis and start it along the lines of the new policies and then that you would be succeeded by some one else?

A. Yes, sir; relieved.

Q. Now, Mr. Eberlein, you know as a practical fact, do you not, that the Southern Pacific Company virtually controls transportations affairs, speaking in the broad sense now, in western Oregon west of the Cascades and particularly from say Albany to the southern boundary line of the state?

A. I believe it is the only rail line between those points.

Q. There are some small—

A. (Interrupting) I mean through.

Q. (Continued) —transportation facilities in addition to that, but in a general way the Southern Pacific lines constitute substantially all of the available means of transportation of the products of the State of Oregon west of the Cascade Mountains and particularly south of Albany?

A. Yes.

Q. And that was true during all of the time of your work out here?

A. Yes, sir."

Whereupon defendants objected to this character of testimony as immaterial, incompetent, and irrelevant and it is stipulated between counsel that this objection may go and is understood as reserved to all this class of testimony.

Whereupon the witness further testified as follows:

"Q. Now, Mr. Eberlein, Mr. Harriman was really the dominant factor in all of these companies, was he not?

A. In everything he had anything to do with I think he was the dominant spirit.

Q. That was owing not only to his peculiar and wonderful genius in affairs of this kind, but also to the natural disposition of the man?

A. Yes, sir.

Q. And it is entirely correct to say that after the Union Pacific acquired the controlling interest in the Southern Pacific lines that you have mentioned that the affairs of all of these constituent companies were conducted with reference to the will of Mr. Harriman in so far as he exercised it?

A. That is generally true, I believe.

Q. Now reverting again to the fact that the Southern Pacific Company, as the operating company of these

constituent lines, including the Oregon and California Railroad, controlled virtually all of the transportation facilities in western Oregon in the district that I have indicated in a previous question, it is also a fact, is it not, Mr. Eberlein, that at the time you entered upon your work in connection with these land grants and even to the present day the Oregon and California Railroad Company, subject to the rights asserted by the Government in this suit, owned and still owns between one-third and one-half of all of the lands tributary to the line of its railroad here in Oregon? I refer now to the main line extending from Portland south through Salem, Albany, Eugene, Roseburg, Medford, from say Eugene southerly to the southern boundary line of the state and by tributary to its line of railroad I mean within the limits of its land grant, both primary and indemnity, as exemplified on the maps that have been introduced in evidence here?

A. I should judge that the statement of about one-third within the limits fixed by you would be—

Q. (Interrupting) Substantially correct?

A. About correct as between the exterior boundaries of the grant. However, I never understood that the ownership was subject to any claim of the United States,—not while I had anything to do with it.

Q. I say, subject to the rights asserted in this suit?

A. Well, that I could not pass upon. I am speaking of the thing I always understood and so held it to be in absolute ownership in the railroad.

Q. I understand that.

A. Yes.

Q. But you do not deny—

A. (Interrupting) That there is a suit.

Q. That the ownership is subject to any rights that the United States may have, without conceding that they have any?

A. Without conceding they have any, certainly.

Q. But you do not deny they are subject to any rights the United States may have, though?

A. If the United States can prove any rights, yes.

Q. So that in the discharge of your duties in connection with this land grant in Oregon you found the Southern Pacific in control of the transportation in western Oregon and particularly southerly from Eugene, and also in control through its stock ownership of the Oregon and California Railroad Company of virtually one-third of the lands tributary to that line of railroad?

A. Within the limits of the grant?

Q. Yes.

A. I won't say outside of that, because there may be a large body of land outside to the west that would be tributary and perhaps is tributary, that I would not know enough about to testify to.

Q. Well, as I explained before, by tributary to the line, I mean within the limits of the grant?

A. Yes; yes. Very well.

Q. Now in your work in connection with this grant and in devising the plans for the reorganization of the land department and the adoption of new policies for the handling or use of these lands, did it ever occur to you that the lands controlled to a certain extent the subject of transportation in future years?

A. Why, I don't know that I thought of it in exactly that angle. The matter had a great deal of thought on my part, all that I could give to it. The principal thing in my mind was the divesting of the Railroad Company of this large body of lands. I didn't think that it was to the best interests of the road that it should retain these lands. It was a burden.

Q. It was your opinion that the best policy was to pass these lands on into independent proprietorships?

A. Yes, sir.

Q. To become an instrument of production to aid in transportation?

A. Population and industry. That was the whole idea. There was no advantage to this line of road, or any line of road, to have a contiguous land grant without settlers, without people on it.

Q. Well, if a line of railroad has virtual control of the subject of transportation in a given community and owns virtually one-third or more of the lands tributary to the line of road, and by that I mean as I have explained before within thirty or forty miles of the railroad, and specifically speaking within the limits of this land

grant, it also controls to a very marked extent the production of the territory tributary to that line of railroad, does it not?

A. Not necessarily.

Q. Well, it can control it?

A. It might; if it wished to pursue a suicidal policy it might do so. But I don't understand that that has ever been the policy of the Southern Pacific.

Q. But you realize, do you not, the difficulties that a competing line of railroad would encounter if it attempted to invade a field where its competitor owned one-third of the lands tributary to the line?

A. It might be, as you say, something that a competitor would have to consider. On the other hand, it would be unfair to the line of road, the pioneer, that its property should be used to induce a competitor.

Q. In other words, you feel that it would be unfair for the pioneer road, as you describe it—and by that you mean the Oregon and California Railroad in this case?

A. Yes, sir.

Q. To so dispose of its lands that it might attract a competing line of railroad?

A. Yes, sir; that is my idea.

Q. And that was your idea during the time that you were engaged in the work in connection with these land grants that you have described?

A. Yes, sir.

Q. Now what plan or policy, if any, did you discuss or attempt to evolve or devise that would secure to the Southern Pacific Company and its constituent company, the Oregon and California Railroad Company, the benefits of the transportation of the products of this land included in this land grant?

A. My plan, which was simply a recommendation, originated with me, never had any active recognition that I know of from the general officers of the road, was that that land grant should be sold out reserving only so much of it as was necessary to the operation and to the traffic of the road, in exactly the manner testified to by me yesterday. That would mean simply reservation for stations and rights of way for various purposes, stock yards for traffic, and land that had water for engine supply, gravel banks, and things of that kind, which were of more value to the road than to anybody else and which the road would have to acquire from some one else if it disposed of them; and after those reservations had been made, to sell that grant in such a manner as to produce the best business results for the Railroad Company and by doing so it would produce the very best results for the community. And my idea was, and I believe it is correct economically, the land belongs to the road; they paid for it by the construction of the road, earned it. If it owns the land it owns the product of the land, as the timber, I recommended the land should be sold at a very reasonable price to responsible people who would within a reasonable time develop, that is by the establishment of mills, develop the product, and when so developed that

all the Railroad Company reserved would be the right when so developed to carry the product, the lumber product, at the rates then current as to which any other line would carry the product; otherwise, to have the right of the shipment and the routing of the product of the land.

Q. So that your plan was to sell the lands by such a method and upon such terms to be inserted in the conveyance as to create covenants running with the land that would guarantee to the railroad the transportation of the product of the land?

A. Exactly, subject only to such further reservation as would protect the shipper; and that is, he would not have to pay any more for the transport of that over the Southern Pacific lines and its connections than he would over any other competing line at the time of shipment.

Q. Well, do you honestly think if all of the lands marked in black upon any one of those maps were passed into private proprietorships under conditions which required that the product of those lands should be shipped over the Southern Pacific line, that there would ever be any competing line?

A. Certainly.

Q. You think there would be?

A. Certainly. It is the history of all railroads that where you have an industrial community growing, that a single line will not carry the product, and that the very fact Congress of the United States established that grant in the form that it established it as well as every other

land grant established by Congress—and I have reorganized several now—in the way it did, to prevent a monopoly, and it does prevent a monopoly. There is one-half of all the land that is in there—yes; there is more than that; there is the entire body of the Willamette Valley, as you will see from those maps.

Q. I refer now southerly from Eugene.

A. Well, take it southerly from Eugene; you have got the Umpqua Valley, the entire body of that valley is in private ownership and has been since before the time this road was established, and it is open to any competing line who will come in; and it must be remembered that a competing line has actually paralleled that line that you have reference to east of the mountains, throwing feeders across the mountains into the Rogue River Valley, for instance. There is not anything to prevent another line, notwithstanding that land grant. The Southern Pacific, according to my view of the case, was simply holding what belonged to it of right, and it should have.

Q. Do you mean to say that, referring now to Defendant's Exhibit 259 and pointing to the City of Eugene, if the Southern Pacific Company had the right guaranteed by covenants running with the land, to transport the product of all of the railroad lands appearing upon this map from Eugene southerly to the state line, that it would have no advantage over a competing transportation line that would attempt to enter that field?

A. Certainly.

Q. It would have?

A. It would. But you must remember that the timbered land in your district you have just indicated has been culled over and the best of it has gone into ownership other than the Oregon and California. They are there; you can see them on that map.

Q. They are not indicated on that map. Here is the map they are indicated upon. Now if you will examine it you will find but a very small proportion of it has passed into other ownership.

A. As I say, it is the best part of it.

Mr. Fenton: About four hundred thousand acres, Mr. Townsend.

A. You go down into the sugar pine belt and you will find that the heart of that was disposed of. The best of the timber of that grant was, as I say, culled, and has been since 1898, and the culling process was simply stopped when the lands were, or the business of the grant was suspended necessarily.

Q. But you considered it substantial enough to recommend it, didn't you?

A. Certainly.

Q. And your recommendation was considered and entertained by Judge Cornish, was it not?

A. I don't know whether by Judge Cornish, it was by others.

Q. Did they ever go so far as to consider the form

of deeds that should be executed that would contain covenants of the character I have described?

A. I believe that Judge Singer drew a clause; whether in form of deed, I don't know that it ever got that far.

Q. Do you know of any instance in the industrial history of this country, or any other country, when a transportation line had a legal right to the transportation, exclusive legal right to the transportation of the products of virtually one-third of the land tributary to the line?

A. Well now, south of Eugene?

Q. No; I am referring to any railroad, now, for any district.

A. I am not familiar enough with the transportation history of the world to know. You could find such examples in Europe, I have no doubt, but all I am interested in was what was for the best interests of this strip of country and what it needs is industries. It is of no advantage to this state, or certainly not to the road, the condition in which I found this grant.

Q. It is not yet, is it?

A. That is not the fault of the road.

Q. It doesn't make any difference—

A. It is the fault of the United States.

Q. It doesn't make any difference, the fact is that the present condition is detrimental to the commercial

and industrial interests of this state, is it not?

A. Certainly, by reason of the suit of the United States which prevents any sale or disposition, that has prevented men from even milling the timber that they own.

Q. Who?

A. The men who have bought timber from the Railroad.

Q. Well, who has been prevented from cutting it?

A. Anybody.

Q. Well, name one.

A. Anyone who has bought that timber, until the passage of this act which galvanizes their title; they were not safe in cutting any timber that was on land bought from the Railroad Company.

Q. I am not talking about whether it was safe, or not. Tell me one company that quit?

A. I don't know that they quit, but they must have cut under—unless they had some agreement with the United States they were not safe.

Q. Well, did the suit of the United States in any way interrupt the operation of a single industrial plant in Oregon?

A. I believe it has.

Q. What one?

A. I can't name them, but the impression that I gained from being in this state is that it has. From the

talk that I have had with the timber men themselves I believe it has.

Q. What timber men have you talked with who expressed that?

A. Oh, I have talked with Mr. Hammond; I have talked with Mr. Blodgett; I have talked with a number of them at different times; and the consensus of opinion of those who were milling was that they didn't know where they were.

Q. Well, did any of them say that they had arrested for a moment the turning of a single wheel?

A. No, I don't suppose they did, because they were in a position where they had to go ahead in order to keep their plants open.

Q. Well, how did the suit in any way interfere with the operation of existing industrial plants?

A. Simply by clouding titles and making it a very dangerous performance for any man to proceed.

Q. Well, however dangerous it might have been they did proceed, didn't they?

A. I can't say as to whether they did or not. My impression is they did not run to their full capacity in the way they were before.

Q. Well now, where did you get that impression?

A. My impression gathered from my familiarity with conditions in this state, living in the state as I do most of the time and in the southern part of it which is a timber country.

Q. Well, can you tell me one mill that has reduced its products because of the pendency of this litigation?

A. Now I am not familiar with the inside operations of these milling companies. I am testifying generally to the general expressed opinion, the fact that the lumber industry, whether entirely due to that cause or not, has suffered prostration in that lower part of the state. Whether that extends all over I do not know.

Q. Well, you know, don't you, that the Southern Pacific Company tried to nearly double the cost of transportation on timber from that part of the state to San Francisco?

A. I am not familiar with that fact.

Q. They tried to raise it from \$3.20 a ton to over \$5.00 a ton, didn't they?

A. Well, that is information to me. I didn't know it.

I don't know it. It may be the fact, but I don't know it.

Q. Now have you ever considered the question whether the milling industry in Oregon, and particularly western Oregon, has been in any way stifled by the service and rates of transportation put in force by the Railroad Company?

A. That might be.

Q. I say you have never studied that?

A. That was never a part of my business to study that.

Q. Mr. Eberlein, this proposition or suggestion, however you may describe it, of selling the lands upon such terms as to guarantee to the Railroad Company the transportation of the product of the lands, was under discussion and consideration at about what time?

A. I think that suggestion was made by me about 1904. Anyhow, it was when I was actively at work making a report on the conditions here as I found them.

Q. It was after your appointment as acting land agent?

A. I think before.

Q. And how long was it under discussion and consideration?

A. I don't know as to that. It cropped up again. I renewed that recommendation as late as 1906.

Q. Now your testimony upon direct examination indicates the fact to be, and I therefore ask you if it is not a fact, that when in the fall of 1904 you contemplated the resumption of the sale of the lands, and which purpose was abandoned as you have described because of the objections urged by Mr. Cotton, and when you again formed the purpose in 1906 of resuming the sale of lands, which purpose was again interrupted as you have described by the loss of your records in the San Francisco fire—

A. (Interrupting) That is, as to the sale of timber lands only.

Q. Yes, but what I am getting at is that at those

times you intended to put on sale only the agricultural lands, did you not?

A. That is all that it was possible to put on at that time.

Q. It was not intended to put on sale any of the timber lands?

A. Just as fast as it could be cruised and we were justified by information in making the sale.

Q. Well now, you don't mean that they were to have been put on sale until the question of the manner of selling them and whether this condition that you have referred to should be imposed upon sales, had been determined, do you?

A. No. It was not in my province; I wasn't an operating official nor a high official of any kind. That was largely a traffic matter, beyond my province entirely, and I merely made that suggestion. It was for others to act upon it. But I will say that I never had any orders to incorporate that suggestion. I believed in it thoroughly myself and I renewed it, I remember, in 1906.

Q. What I mean is this: That when the time would have finally arrived when you would recommend that the sale of timber lands be resumed, you would have renewed the same recommendation, wouldn't you.

A. I did. I will say that. I did.

Q. And the question was never definitely decided, so far as you know, was it?

A. It never was during my time.

Q. Now you say that in 1906 if a party would have applied to purchase agricultural lands you would have entertained the application and sent out a person to examine the lands and fix a price?

A. I did just that.

Q. Why couldn't you send out a person to examine any particular timber lands that were applied for and examine them?

A. I did, just that,

Q. Did you make any sales?

A. No, sir.

Q. Why not?

A. Because they would not take them.

Q. At the price you fixed?

A. I suppose so. I refer now to the application of the Weyerhauser Timber Company.

Q. But to no other?

A. I don't recall any other, because we did cruise some timber which we sold to the Southern Pacific Company, but that was under the necessities created by the fire; and as to others, I was in the East largely in 1907, I think pretty nearly the whole year, so that what was done here was done during my absence and I can't say, only that I know that cruising went on.

Q. Well now, when the Weyerhauser people applied to purchase this large body of timber land you had

it cruised and fixed a price?

A. Yes, sir.

Q. Well, when the Booth-Kelly Company applied to purchase some timber lands in 1906 why didn't you have that cruised and fix the price?

A. I don't recollect the specific application of Booth-Kelly Lumber Company in 1906.

Q. Well, I understood you to say that they applied to purchase land from you in 1906, and because they could not purchase it that they started this entire agitation?

A. I think they did.

Q. Well, what land did they apply to purchase?

A. Probably that that lay contiguous to their purchases down there. I can't give you the facts because I have no papers before me.

Q. Well, did they apply to purchase any?

A. I think they did.

Q. Well, why didn't you have it examined and give them a price?

A. Possibly did.

Q. Well now, please do not deal in possibilities. If you have no recollection please say so.

A. I can say I have no recollection of particular facts.

Q. Well, have you any recollection of having had the lands cruised that they wanted to purchase, and sub-

mitting to them a price?

A. No, I have not.

Q. But you do recollect very clearly having done so with reference to the application of the Weyerhauser Company?

A. Certainly.

Q. Now with reference to the purpose of resuming the sale of these lands after clearing the records, in the first place, and then renewing the records after the San Francisco fire, you of course can only speak for yourself; isn't that true, Mr. Eberlein?

A. Yes.

Q. That is as to what the real purpose of Mr. Harriman was, or his intent, or that of Mr. Cornish, you cannot assume to speak?

A. I don't assume to speak for anyone but myself.

Q. Do you remember when Mr. Harriman visited Oregon and California and the Pacific Coast generally, in September, 1907?

A. September, 1907? I didn't know—I don't remember of his being here at that time.

Q. Do you remember that he was here in September, 1907, at Portland, and went south to San Francisco and Sacramento and addressed a conservation congress at Sacramento in the early part of September, 1907?

A. I may have known it at the time, but I have no

recollection now.

Q. Do you remember that Mr. Harriman, on September 2nd, 1907, at Portland, gave out an interview, which was published in the Evening Telegram of Portland, Oregon?

A. I don't remember of any such article.

Q. (Interrupting) Wait a minute; let me finish the question. In which he stated that it was his policy to put on sale the agricultural lands but that the timber lands should be reserved by the Railroad Company? Do you recollect it?

A. No, I don't recollect it; nor do I believe that he ever said it.

Q. Do you recollect that at Sacramneto in his speech there he stated that the timber lands in Oregon would not be sold but would be reserved by the Railroad Company?

Mr. Fenton: The same objection. What date, Mr. Townsend?

Mr. Townsend: That was in the fore part of September, 1907.

Mr. Fenton: At Sacramento?

Witness: Now, let me just qualify my testimony that has gone before. I do recollect now that you call it to mind, of being at Sacramento and of being one night at, I believe it was the Irrigation Congress.

Q. It might have been the Irrigation Congress in-

stead of a conservation congress.

A. I think it was an irrigation congress, and I was there and I met Mr. Harriman there, and I don't recall at this time having heard any such remark made by him.

Q. Well, did you hear his speech before the congress?

A. I think I did. He was there for that purpose that night. He would not be there for any other purpose. The record of the congress, though, will be conclusive on that, of course. Let me suggest something to you. The record of the proceedings of the National Irrigation Congress of that date are to be had. I believe they can be found in the city.

Q. Do you know where we could get a copy without too much delay?

A. Any of these libraries.

Mr. Fenton: Would that contain the speech?

A. It contains verbatim reports of all speeches and all proceedings.

Mr. Fenton: Would it contain Mr. Harriman's speech that night?

A. If he made that speech it was reported. I was an officer of the Congress one time when it was here in Portland, and I know that all speeches, all proceedings are reported verbatim.

Q. Well, you have no reason to doubt the accuracy of the Associated Press records of that subject, have you?

A. Why certainly.

Q. What is it?

A. Why, of course.

Q. Now, is it not a fact, Mr. Eberlein, that in 1906 and 1907 it was your purpose to resume the sale of agricultural lands only but not timber lands at that time?

A. Now, so far as I controlled it myself, and speak for myself, it was my desire and my recommendation; whatever was the determination of my superiors I can't speak for, but my recommendation was to resume the sales of timber as fast as they could.

Q. I direct your attention to Defendants' Exhibit 277, consisting of two telegrams addressed to you by W. D. Cornish, the first bearing date New York, April 5, 1907, and the second bearing date New York, April 24, 1907, and ask you to read those, please, not aloud but for your own information.

A. Yes, sir.

Q. You observe that in his first telegram Judge Cornish said as follows: "Please mail me report at convenience showing progress made in rehabilitating your office and also what extent you are receiving and handling applications for lands and especially lands other than timber and mineral." You observed that language, did you?

A. Yes, sir.

Q. Well now, is it not a fact that at that time, without referring now to your own individual judgment as

to what should be done, that it was the purpose and intent of Judge Cornish as expressed to you, not to resume the sale of timber and mineral lands?

A. That is not what that means.

Q. What is it?

A. That is not what that means. It might bear that construction from your point of view, but the fact is that the reference to timber land there had reference to the impossibility of our making any general sales at that time.

Q. What do you mean by general sales?

A. I mean throw the thing open to everybody to come in.

Q. Well, can you explain why you could not have sold any timber lands in the year 1907, if you had wanted to?

A. Because you can't do a thing piece-meal, not timber; that is, if you have any consideration at all for what you are doing. There are one or two reasons why it was not practical. In the first place, my recommendation was to cruise the grant generally and classify it and group it before resuming sales.

Q. Well, was there any reason why if a man wanted to buy a particular piece of land in a locality which had been completely cruised and classified and graded, that you could not entertain his application without waiting until the entire grant was cruised?

A. That may be, but there were no conditions of

that kind.

Q. Did you have any applications to buy timber during the year 1907?

A. I think so.

Q. Other than the Weyerhauser Company?

A. I think so.

Q. Did you sell any?

A. No, I didn't.

Q. Did you quote a price to any of the applicants to purchase?

A. I think not.

Q. Did you send anyone out to cruise the land which they applied to purchase?

A. Yes, sir.

Q. And did not quote a price?

A. I don't recollect of any prices being quoted. I recollect of sending applications with the information and everything to Cornish at New York. I didn't assume to sell, you understand. The matter was referred to him, the matter of all sales. Had he ordered the sales made they would have been made.

Q. Then the reason that they were not sold was because Judge Cornish did not authorize the sales?

A. Neither he nor anyone else.

Q. Now that is also true during the year 1908 down to the time that you severed your connection with the

road?

A. I was in New York the entire time, almost the entire time of 1907. I was here only a few weeks.

Q. How about 1908?

A. I was not here at all, except to pack up some goods, some household goods and go back to New York.

Q. You were in New York then in 1908 until May 1st?

A. Until June 1st.

Q. Until June 1st?

A. Yes.

Q. Well now, during that time were there any applications for the purchase of timber lands?

A. I think there were applications. No; I wont be sure about that. It was about that time that, after the excitement here, as you know, started, it had a very quieting effect on everybody.

Mr. Fenton: What do you mean by excitement?

A. Oh, I mean the excitement that was fomented against the Railroad Company and the land grant.

Q. Well now, without speaking with any feeling in the matter, you mean that when the question of the right of the Railroad Company to convey the lands in quantities exceeding one hundred and sixty acres and for a price exceeding two dollars and a half an acre, and to other than actual settlers, that then there were not very many people who cared to risk the title and therefore

there were few applications to purchase? Is that what you mean?

A. My recollection is just this: As to 1907, in fact, subsequent to the Weyerhauser Timber application, which was disposed of in Decemebr of that year 1906, it is my recollection and I believe I am correct that there were no applications, bona fide applications to buy. There were a number of cases where people asked that an application be filed; and I will say they went so far in, I think a number of instances, a great many, probably, to say that there was no immediate desire for it but that whenever the Company was in a position to sell, that they understood there was to be some litigation, that they wanted to be in a position to have their application recognized and considered.

Q. Now, so that the examination may not be misleading, I will state that I do not include in the scope of any of my questions at the present time the so-called applications to purchase by those who claim the right under these acts of Congress to buy at two and a half an acre.

A. No, I don't refer to that class at all. I refer to those simply making application to buy tracts of land and asking that their applications might be filed so that they be recognized in order.

Q. Now you were authorized by Judge Cornish to sell strictly agricultural lands, were you not?

A. Yes; subject to his approval in each case.

Q. But you were not authorized by him to sell timber lands?

A. None. He did not authorize, and so did Mr. Kruttschnitt authorize the cruising of the Weyerhauser timber.

Q. But that was an exception that was made, wasn't it, Mr. Eberlein, and over your protest?

A. Well, it would appear so.

Q. And really against your advice, wasn't it?

A. Against my advice.

Q. Your advice was not to entertain that application to purchase?

A. I would not.

Q. I say that was your advice?

A. That was my advice.

Q. Now with that exception you were not authorized to entertain any application to sell timber lands during the years 1906 and 1907 or 1908?

A. I think not, so far as I know.

Q. But you were authorized to entertain applications and sell agricultural lands, subject to the approval of Judge Cornish?

A. And grazing lands.

Q. And grazing lands?

A. Yes, sir.

Q. But even those had to be referred to Judge

Cornish?

A. Yes, sir, that is true.

Q. And at that very time, Mr. Eberlein, as your report shows which you made to Mr. Cornish, you believed that there was but fifteen acres of agricultural lands in this grant?

A. No, I won't say that I believed there were only fifteen acres.

Q. Well, you so reported, did you not?

A. Oh, no.

Q. Based upon the Assessors' reports?

A. I put in the table the official returns of those Assessors to show what the Assessors themselves thought.

Q. Well, did you think that the Assessors' returns were correct?

A. No, I do not think they are correct, not when they assess railroad lands ever, or railroad property.

Q. Well, did you think the Assessors' returns were correct as to what quantity of these railroad lands were agricultural in character?

A. No, sir.

Q. You thought that there were more agricultural lands?

A. There were more, and that report states the fact to be what I did think there was.

Q. You thought there were about seven thousand

acres?

A. About seven thousand acres.

Q. So that it is a fact, is it not, that during the years 1906, 1907 and 1908 until you severed your connection with the Railroad on June 1st, 1908, you were authorized only to sell agricultural and grazing lands and no timber lands?

A. That is true.

Q. And it is also a fact, is it not, as disclosed by your report, that out of the two million three hundred thousand acres involved in this suit over two million acres were considered as timber lands?

A. No, not two million acres. I think there was about a million and a half acres considered as timber and wood land. That is my recollection.

Q. Your report here states that your information from the reports of your graders and land examiners is that of the patented lands 1,496,640 acres were covered with timber and unsuitable for agriculture?

A. Yes, that is right.

Q. Were you on the Coast in September, 1907?

A. Yes, sir. I was here and left here in October, 1907, to New York, and was practically not here again during my incumbency, except about a week, leaving on the 22nd of February, 1908. My work was practically finished in September, 1907, and I resigned at that time, though my resignation was not accepted until the following June.

Q. Do you remember whether you were in Oregon in September?

A. I don't think I was.

Q. You now recollect that you did see Mr. Harriman at the time that he visited the Coast during that month, but you think that it was in California that you saw him?

A. I saw him in Sacramento. I went up to Sacramento to the Irrigation Congress and was there the night that he addressed the convention.

Q. Do you recollect of learning that on September 2nd, 1907, when Mr. Harriman visited Portland, he was reported in the newspapers as having said to the reporter of the Evening Telegram, of Portland, as follows:

Mr. Fenton: We object to that as purely hearsay, of about the third degree. Go on.

Q. (Continued) "What conditions did you find in the interior?" "Sparsely settled regions. You go miles and miles before you see a face or a habitation. I traveled vast stretches and saw nothing but chipmunks. The country is undeveloped. Oregon needs more people. I passed forest reserves and timber land granted to military wagon road companies. The reserves and the military road companies control too much land. This should be remedied. The reserve policy requires changing and the military company should be made to dispose of holdings." Next question: "Then, Mr. Harriman, your contention is that Oregon cannot be properly nor speedily developed until the corporations which have

vast holdings are forced to open the country to dispose of the lands?" Answer: "Yes." Question: "And does this include the lands granted to the Southern Pacific?" Answer: "Yes, the Southern Pacific, too. But the Southern Pacific hasn't much land. You see, before we came into the Southern Pacific the Company was pressed for money and was disposing of lands and giving options to syndicates and speculators, and we didn't know how much land we had so we stopped until options expired to ascertain just what we had in land. The Southern Pacific will sell land to settlers but not to speculators. We can tell a speculator from a settler as well as anyone. The agricultural land we will sell, but the timber land we will retain because we must have ties and bridge timbers and we must retain our timber lands for future supply. The Southern Pacific has an insufficient amount of timber now, and we have had to buy large tracts looking to the future supply of ties and materials. Yes, we will sell to settlers, but speculators will get none." Do you remember of such an interview having been brought to your attention?

A. I may have read the stuff at the time; probably did, because it was in the line of my work. It made no impression. It is gospel, though.

Q. It is what?

A. It is gospel; it is good sense.

Q. What do you mean is good sense?

A. Oh, I mean to say that if he said as is reported,

with the emphasis on the "if," that the Company would not sell any more timber to speculators, he said a very wise thing and the only wise thing for this state. That is the trouble with the conditions down there now.

Q. He says he would not sell agricultural lands to speculators and would not sell timber lands to anybody, speculators or otherwise?

A. Well, I didn't understand the reading, if that is the case. It is just as well not to sell land to speculators, though. That is, as I say, what the road and the country have suffered from. You take the Weyerhauser timber interests, for one thing; they have an enormous investment in this state in timber but not to my knowledge have they ever milled a foot.

Q. And yet the Weyerhauser Company was the only company whose application the Railroad Company would entertain?

A. Oh, no.

Q. In 1906?

A. Oh, no; no, I think not.

Q. What other application was entertained?

A. Now, let's see —

A. Now, if you want to know about that, I can tell you a little incident that only goes to show, that I made a call once with Mr. Harriman on Mrs. Potter Palmer at the Waldorf in New York; I made more than one call. That was in response to an application which

she made about in 1907, and she was very insistent upon it. I had that land cruised.

Q. How much land was it?

A. Oh, several thousand acres; I forget how much. That is immaterial. It is the fact that you are after whether these applications were considered.

Q. Well, where was that land situated?

A. That land was situated in the grant.

Q. I understand, but where?

A. Well, I am coming to that. Don't get impatient with me. I am kind of slow. That, as I recollect, was southwest of Eugene, somewhere in the neighborhood of the McKenzie River, somewhere where some sons of hers were interested, and she referred to friends of hers who bought very largely, Michigan interests, Michigan people. I believe she referred to the interests now in control of the Booth-Kelly Lumber Company. While she made a great fuss about that timber that was for speculation, not for any immediate use at all, and that fell through. It must be remembered that in the fall of 1907—meanwhile the work of getting records together and keeping up field work had been going on ever since the fire. In the fall of 1907 the great crisis struck New York, and, as you may remember that, it put a pretty effectual stop to every kind of industry, speculation in timber land and everything else as well. People didn't have the money to buy, and my recollection is that the effort to acquire timber land when the Railroad Company was in no posi-

tion to sell it stopped about that time as everything else did, and I think that it was pretty effectually stopped until some time in 1908 or 1909. Meanwhile the suit had intervened and that stopped things. I don't think anything was done in 1908 that I remember of.

Q. How many times did you see Mrs. Potter Palmer?

A. I think twice.

Q. I thought you said several times?

A. Twice, I think.

Q. Did Mr. Harriman go with you, did you say?

A. He did. He did.

Q. Did she designate the lands that she wished to buy?

A. She did, and, as I have testified, I had them examined.

Q. Why did you have them examined?

A. Because they were applied for.

Q. Well, I thought you said she was a speculator and you would not sell to her?

A. We didn't sell to her.

Q. You didn't have to have the lands examined to determine whether she was a speculator or not, did you?

A. Oh, possibly.

Q. You did?

A. Certainly.

Q. You had to have the lands examined to determine whether Mrs. Potter Palmer was a speculator in these lands?

A. Whether she intended to speculate in these lands, yes.

Q. Well, how could you tell from an examination of the lands?

A. Well, you can tell sometimes from the location of the land. It is queer but it is the fact. And you can tell very frequently by your conversations, your conferences with people, what they propose to do with land. That might not have appeared in the first instance. The first instance was that there was an application came out to me and the cruising was done as rapidly as possible and the papers went on to New York about the time that I went down there, and Mrs. Palmer came there about that time.

Q. Well, you knew who Mrs. Potter Palmer was when the application came in, didn't you?

A. Oh, yes.

Q. You knew she had some interests near Eugene?

A. I didn't at the time when the application came in; I knew it afterward.

Q. But then you knew her general history as Mrs. Potter Palmer of Chicago?

A. Oh, I knew she was financially responsible, I

suppose.

Q. And you knew who she was?

A. Oh, yes.

Q. In a general way?

A. Oh, yes.

Q. When her application to buy these lands came in you sent a cruiser out to have them cruised?

A. Yes.

Q. And the report of the cruiser was sent East?

A. Yes, sir.

Q. Do you remember whether the report of the cruisers included anything other than the general character of land and an estimate of the amount of timber?

A. Just the usual data that a cruiser turns in, the character of the land, the character of the timber, the classification of it, and the——

Q. (Interrupting) Value of it?

A. The value of it.

Q. Well then, you and Mr. Harriman went and called upon Mrs. Palmer?

A. At her request.

Q. Did you ask her whether she wanted the lands for speculation?

A. Well now, to go into that, the incidents of that call, the last call developed the fact that Mrs. Palmer not only wanted that timber but she wanted to buy

all the timber in about six townships down the east side of the grant, along about I think opposite or in the neighborhood of the Booth-Kelly holdings. There was no immediate intention on her part to make use of them. The first application she made was for a comparatively small body of timber that might have been, though it was not immediately tributary it might possibly have been used for some small milling operation, but when we got down to talk about it she had made up her mind, or changed her mind, rather, that she wanted a vast deal more, and the thing fell right there. We didn't cruise that timber; we didn't go on with it in my time. I think she abandoned the project.

Q. Now, do you recall any other applications to purchase during that year?

A. I might if I had time to think it over, but I never charged my mind with things of that kind, though other applications were undoubtedly made and probably other cruising made. As I have already testified that in 1907 my work proper was finished in the summer of 1907, and early in September, 1907, I resigned, sent my resignation to Mr. Harriman, and instead of accepting it he ordered me to New York and my office was there during the remainder of the time in which I was connected with the road. I was here for about one week after that. That was all.

Q. Was there any policy adopted at that time not to sell timber lands to speculators?

A. I don't remember of any such policy being defi-

nitely enunciated. No orders given, if you mean that. I don't know of anything of that kind being done. But it had been my recommendation long before not to do it.

Q. Well, you mean then that the application of Mrs. Palmer was turned down because she was a speculator?

A. I can't say so in terms.

Q. Well, what has her being a speculator got to do with it? That is what I am trying to get at.

A. It has a very great deal to do with it, in tying up timber land for an indefinite time, just as has been done here. A very, very small fraction of the timber that the Southern Pacific, or the Oregon and California has sold since 1898 has ever been milled. It has just been held for the rise.

Q. Held for the what?

A. Held for the rise.

Q. Oh, yes.

A. Just the increase in board measure per annum in these large purchases is more than interest and taxes, and that is why they can carry it and why they do carry it. The Oregon and California Railroad has sold the most valuable timber in all this holding, allowed them to cull it and sold it at less than twenty cents a thousand feet board measure.

Q. Now, your idea is that the Railroad Company should hold it and get the benefit of the rise?

A. Not at all; it never has been; but—

Q. Well, how does it help the state industrially to have these lands held by Mrs. Potter Palmer? I mean by the Railroad Company instead of Mrs. Potter Palmer?

A. It helps it to this extent: That the Railroad Company has no intention of holding it in mort main.

Q. Oh; and Mrs. Potter Palmer has?

A. Yes, undoubtedly. Anybody that comes in and wants to buy all the timber in six townships of land, you can take it right straight that they have no immediate intention of doing anything with it. And that is borne out in the case of every large purchase, and I don't except any, because of the purchases made by the Booth-Kelly Lumber Company, even, of seventy thousand acres, probably more than that with what they acquired indirectly from the railroad, of that very, very little has been cut. They bought it so cheap that it is more profitable for them to hold it, and that is why Mrs. Palmer and everybody else wanted to buy very cheap and of the Railroad Company. So far as my connection with the Railroad Company goes and my suggestion to it was that you could afford to proceed with your sales of timber at these very low prices but you must provide for some kind of use being made of it industrially and not allow it to be tied up, because in that way it is simply strangling industry, and, by the way, prevents that competing road you were talking about a while ago.

Q. So that your idea was that the Railroad Com-

pany should hold this land so as to prevent somebody else from strangling industry?

A. No, no, not at all. The Railroad Company could not do so. That is self evident from the map. You cannot tie up the country with a checkerboard map. You can't do it. You can by selling to these large holders, because they can and they do body up their timber, and they can make a complete monopoly and they can limit output. They may do about anything they please. The Railroad Company can't, you could not tie up—you can't make a monopoly of a single section, nor of a dozen sections, nor of a hundred sections, if you have got the same amount of land of the same character intervening which may go into private ownership; but the minute you turn it over to a single individual who can and who does body the country up, as the Weyerhauser Timber Company has done, you are simply tying up that country and you await their good pleasure; that is all.

Q. Do you mean that the Booth-Kelly Company and the Weyerhauser Company and these other large purchasers after acquiring the railroad lands bottled up the even numbered sections?

A. Certainly. That is what the Railroad Company never did, never intended to do, never could do.

Q. So that the ownership of the odd numbered sections by the Booth-Kelly Company, or the Railroad Company, or anybody else, is necessarily a leverage which will control the even numbered sections, isn't it?

A. Not at all, not in the hands of the Railroad Company.

Q. Why not?

A. Because, as I have said, the Railroad Company has not, cannot and will not if it could, body up the timber. It never has attempted to, never intends to do so, and could not do so.

Q. Why couldn't it?

A. In the first place, it is not transportation business. I believe, as you gentlemen would all call it, it is *ultra vires*. They are not authorized to go into the timber business. They would have no object in bodying up timber if they were not.

Q. Now the Southern Pacific Railroad Company in California was not authorized to go into the oil business, was it?

A. It may not have been, but——

Q. (Interrupting) I say it was not, was it?

A. Not that I know of.

Q. But it had no difficulty in organizing a subsidiary corporation called the Kern Trading & Oil Company and engaging in the oil business, did it?

Mr. Fenton: We object to that as wholly irrelevant, and, as I am informed by Judge Singer, not the fact in the case, and a matter about which the witness would have no knowledge.

Mr. Townsend: Well, the witness approved the lease.

Mr. Fenton: And wholly irrelevant in this case.

Witness: I approved the lease?

Mr. Townsend: You approved it or disapproved it. You know the fact.

Witness: Well, you know the difference between approving and disapproving it.

Mr. Townsend: Well, it doesn't make any difference, you are acquainted with the fact.

Witness: It makes a great deal of difference, going into this record at this time. I never approved any lease.

Q. You know that the Kern Trading & Oil Company was organized in California as a subsidiary organization of the Southern Pacific to operate its oil lands, don't you?

A. The Kern Trading and Oil Company is a corporation organized I believe under the laws of California, and more than that I don't believe I know much about it, as my evidence involuntarily and otherwise in this Elk Hill suit will show that I didn't know what the purposes of that Company were, and I don't now.

Q. Do you mean to say if the Oregon and California Railroad Company here in Oregon wished to block out these timber lands that you do not know that they could organize a land company and do it, and no question of ultra vires would intervene?

A. I don't believe that is a supposable case between us.

Q. It could not be done?

A. I don't believe it would be done.

Q. I am not asking whether it would be done, but is there any legal obstacle in the way of it?

A. I can't say.

Q. "Do you mean to say if the Oregon and California Railroad Company here in Oregon wished to block out these timebr lands that you do not know that they could organize a land company and do it, and no question of ultra vires would intervene?"

A. So far as that calls for a legal conclusion I must decline to answer, because I don't know. As to the practical question, which I take to be the only question here, it is that such a thing is not a supposable case even.

Q. Well now, you had no difficulty in answering a similar question when it was addressed to you by the Southern Pacific people in May, 1905, concerning which you testified yesterday, did you?

A. May, 1905? I don't recollect what you refer to.

Q. Do you remember that you testified that the letter that you wrote to Mr. Dunne with reference to the transfer of an entire grant was with reference to the question of organizing a land company and transferring the entire grant to that company?

A. That had reference to the transfer of a land grant to a land company operating not as a usual land company does for the purpose of acquiring property, but for the purpose of merely selling the rest of that grant.

Q. Well, do you mean to say that you don't know

whether a land company so operated, so organized, could acquire other land?

A. I do not know. It would depend entirely upon its articles of association.

Q. Well, couldn't its articles of association so be drawn that it could?

A. I haven't any doubt that it might be.

Q. But you see in the fact that the Booth-Kelly Company has acquired over seventy thousand acres of this land an industrial menace that you do not see in the holding of two million three hundred thousand acres by the Railroad Company?

A. They are entirely different cases. In one case the lands were acquired for a certain purpose. They were acquired by reason of certain acts which the Railroad Company had consummated. In the other case this property was acquired from the Railroad Company presumably for industrial purposes. The Railroad Company is not authorized, as I understand it, to go into any manufacturing business. If it has this land, which it got honestly and openly, it certainly has the right to dispose of that land in such a way as will do to the railroad the most good, and you can't do the railroad any good without doing this whole body politic in here the same measure of good. There can be no throttling of industry that does not injure the railroad, and there can be no expansion of industry without benefiting both the state and the railroad. Those are self-evident, hardly

worth mentioning but I just set them down.

Q. Well, then, it necessarily follows that the logical thing would be to transfer all the lands in the state to the railroad?

A. No, not at all.

Q. Why, if you think that the industrial interests of the railroad and the industrial interests of the state and the interests of the railroad as the proprietor of the lands are identical, then you mean to say that there would be no industrial injury if the Railroad Company owned all the lands, do you not?

A. No, I can scarcely agree with the logic. It seems to me faulty. This is a case where the railroad finds itself possessed of certain property, with certain industrial capabilities. As I have testified over and over again, so far as I am concerned,—and my acts, reports, everything, speak for themselves,—the Railroad Company tried this experiment for years of disposing of timber lands to whoever would come for them and let them cut out what they wanted and practically at their own price. As I have said heretofore, the net result of that was that the Railroad Company sold timber, standing timber, merchantable timber, for less than twenty cents a thousand feet on the average. I believed, and so recommended, that the selling of timber at such very low prices up to the present time had but one effect. That was to tie the timber up. It was more profitable to hold it than it was to manufacture it. Now the only suggestion that has been put to the railroad by me has

been that the timber land should be sold, but it should not go to augment any more large holdings, because there is no reason for doing so, no commercial reason for doing so. It limits the number of operators in the state. My recommendation was specific to the point that the small mill men should have a chance and not be compelled to go to these large holders and get at a large price what they needed for their mills. I believe that is the proper policy. Anyhow, it is what I recommended.

Q. Now you say it was more profitable to hold these timber lands than to mill the timber off of them?

A. It was in the hands of these people who bought at that price.

Q. Well, do you suppose that they have not been aware of that fact the same as you?

A. Oh, undoubtedly.

Q. The truth of the matter is that the price of lumber and other commercial conditions have rendered milling enterprises unprofitable for the last few years; isn't that so?

A. I am not familiar with prices of lumber or building conditions. I have not followed them since I was in the Railroad Company. I do know, however, and I know from talking with the people who are interested, that the whole northeastern end of California—I say the whole; a large part of it; Modoc, Shasta, Lassen counties—is owned by the T. B. Walker interests, and they began to acquire those interests in 1889. They

bought out timber concerns and mills and shut them down and they have existed all this time simply upon the increase in the growth of the timber which, as I have told you, is large enough in timber of certain age to more than equal the taxes and interest on the investment; and in this particular case it must be remembered that this timber was sold by the Railroad on conditions that never were duplicated that I know of in this country. Take the Booth-Kelly Lumber Company, for instance; it bought tract after tract and gave contracts which required practically no payment of money, which created at once a credit by which they could borrow money, and the Railroad Company got no benefit from it.

Q. Well, you know that the Northern Pacific sold all of their timber lands to the Weyerhausers, substantially, don't you?

A. Yes, they did, and they were sorry for it afterward.

Q. I know, but why are you picking out the Booth-Kelly Company as the great depredator in all these transactions?

A. Because it was.

Q. What is it?

A. Because it was, certainly.

Q. Yes, you have personal feeling against Booth-Kelly Lumber Company, haven't you?

A. Absolutely none whatever.

Q. When you came out here you suspected that

there had been some improper influence by which they had obtained exceptional terms from the Railroad Company, did you not?

A. When I came out here I had never heard of them.

Q. After you came out here and learned of these sales you did, did you not?

A. When I became aware of what was done and became aware and received their calls and their demands, and when I had their depredations reported every week and knew the unusual terms that had been granted to them, I saw by looking into those affairs that that kind of business was not good for the railroad and was good for nobody but the people interested in that enterprise; that is all.

Q. You even went so far as suspecting some of the Southern Pacific officials with having been in collusion with the Booth-Kelly Company, didn't you?

A. I didn't suspect.

Q. You didn't suspect it?

A. No.

Q. You knew it?

A. I knew that they were interested with them in certain purchases.

Q. Who?

A. Oh, is it necessary to go into those old things?

Q. I want to know why you have such a feeling

against the Booth-Kelly Company.

A. So far as Booth-Kelly is concerned, I have mentioned Booth-Kelly for the reason that they were the largest purchasers, individual purchasers, I believe. They were the most active, and it was a typical case and it is a typical case in regard to this grant. Now it don't make any difference to me who has the Booth-Kelly, who is interested in it, but when you are discussing this grant you will sooner or later come right back to that. How did it work in those cases? They had the largest number of contracts. They had the most unusual contracts granted, and their whole connection brought out a great many protests from other timber buyers, and large ones, wanting to know why they should have these special privileges, and all that sort of thing, and I could not—

Q. (Interrupting) Now, just a moment right there. Who made those protests?

A. Well now, let's see. Those protests were made by different lumbermen in the East for instance. I have a recollection of one man, whose name I can't recall, who was a large timberman in the East whom I met on Mr. Kruttschnitt's private car on a trip East in 1904, who asked me the direct question why they and why other large timber operators could not get the same privileges and the same terms as Booth-Kelly. I had to disclaim, because so far as I knew there was no reason; the only fact was that they had it; they were on the ground; they were the most active, energetic, and they were conducting mills.

Q. Now I want you to put into the record the contracts that you say constituted special privileges to the Booth-Kelly Lumber Company.

A. Well, do you expect me to give them by number and description of the land?

Q. No; I want to know it so I can trace it up and see whether you are correct.

A. You can just call for the record of those contracts.

Q. They are here in evidence. You can look them through.

A. Show them to me.

Mr. Townsend: Where is that exhibit of defendants' contracts of January 1st, 1903? (Counsel here refers to exhibit.) Now I want you to point out the contracts.

Witness: What is it you want?

Mr. Townsend: I want the contracts that the Booth-Kelly Company had when you came here and that you found and which you criticise as having extended to them special privileges that were not extended to other purchasers of timber land?

A. You can't show that by that record.

Q. Why not?

A. Why, because it don't show the terms.

Mr. Fenton: Those are the outstanding contracts.

Q. I don't ask you to find the terms in this record, but I ask you to designate the contracts.

A. Well, anything you find in there that is Booth-Kelly, or John F. Kelly, Trustee; and I think a large number of those shows no assignments. There are a great many that were acquired; and, as I have testified, that they bought directly seventy thousand acres and acquired about thirty thousand more, which makes a hundred thousand acres of timber, and they claim by their advertisements and published stuff to control and have an ownership of about ten billion feet of standing timber. I don't vouch for that fact; that is their own statement.

Q. Now any contracts that they bought by way of assignment, certainly they got no concession from the Railroad Company as to them, did they?

A. No, not at all.

Q. Now the principal contract that you have in mind, and to be frank with you, which I thought you would refer to, was the contract for about twenty thousand acres to John F. Kelly as trustee?

A. No.

Q. Is it not?

A. I didn't have that in mind.

Q. You didn't have that contract in mind?

A. No, I didn't have that in mind.

Q. They then didn't get special privileges as to that contract, did they?

A. The Booth-Kelly Lumber Company?

Q. Yes.

A. As assignee, yes.

Q. Well, how did they get it as assignee when the Railroad Company sold it to someone else? and they had to buy it from that other person?

A. I am merely stating the fact as I believe it is and has been reported. John F. Kelly was a member of the firm. George H. Kelly was. Booth was, J. H. Booth and R. A. Booth, and that contract was, I believe, though not in my time that I know of, assigned to the Booth-Kelly Lumber Company.

Q. Well, how does that show that the Railroad Company extended special privileges to the Booth-Kelly Company in the sale of that land?

A. Well, you are talking about all the contracts, aren't you?

Q. I am speaking about that particular contract. Let's get through with that one.

A. Well, suppose we talk about the contracts made directly to the Booth-Kelly Lumber Company. Wouldn't that be within the purview of your inquiry?

Q. No; I want to finish with reference to that contract with John F. Kelly, Trustee, first.

A. Yes.

Q. Now in what respect did the Booth-Kelly Company get any special concession or privilege with reference to that contract?

A. Well, I will tell you, that contract covers about

three townships of land, as I recollect it. Now, mind you, this is a good many years old.

Q. Well, your recollection is correct.

A. Very well.

Q. It is townships twenty, twenty-one and twenty-two south, range one west.

A. I compliment you on your ability to remember the location. I could not. That contract was made in such a way, and the privilege granted was of this character: Pieces of timber were taken out of a whole section, the whole thing was riddled up and down one side and another, so that the remainder of the timber on that purchase must come to the holder of that contract at practically his own price. Now I say that constitutes a special privilege. It ought not to have been sold that way.

Q. Well now, Mr. Eberlein, isn't it possible that you are mistaken about that?

A. I think not. I would refer to the contract.

Q. Now that contract is of record there, and if it were not for the fact that it would unnecessarily delay your examination I would like to have you take a set of township plats and map them out, because I did it this noon.

A. I mapped that once. I believe that map is still in the files of the Railroad Company in New York.

Q. Well now, do you not know the fact to be that

the Railroad Company placed their price upon that land and that Mr. Dixon and Mr. Kelly and other comparatively small stockholders of the Booth-Kelly Company, tried to induce that Company to buy the land, brought it before their board of directors and the company refused to buy it, did not consider it a good buy, and that was why Mr. Kelly and a few of his associates bought it for their own personal speculation?

A. I think very likely that is true.

Q. Well now, if this was such an unusual privilege to the Booth-Kelly Lumber Company, how do you account for the fact that they refused to buy it on those terms?

A. Now, just let's get that straight. You have picked out a contract which was not made to the Booth-Kelly but was acquired by them by assignment. Now, you see your inquiry tends to confuse me; whether it will confuse the Court I don't know, but it confuses me. Now we will just keep those things separate. I don't claim, nor do I think you do, that the making of that contract to John F. Kelly, Trustee, even though among them were these same men, same stockholders of the Booth-Kelly Lumber Company, was binding upon the Booth-Kelly Lumber Company, but they got control of it by assignment afterwards. I think the facts that you state are undoubtedly true.

Q. Do you not also know it to be a fact that these same men, Mr. Eberlein, who had tried to persuade their company to buy it and the Company had refused to do

it because they didn't consider it an attractive purchase, that after they had made three or four payments the Company finally changed its mind and bought it back from these men at an advance of something like ten dollars an acre?

A. I don't know anything about that. I only know the fact that they did. But that is not what I was referring to in my testimony. As I tell you, I didn't refer to that particular contract.

Q. Well, you must have had that contract in your mind or you would not have had it platted up; you say it is now on the records of the Company?

A. I think it is.

Q. You certainly had it in mind at one time?

A. Well, I know; but I didn't necessarily have to connect it up with the Booth-Kelly Lumber Company. It was an improvident contract, and as such I characterized it; and it was. And that is the policy, not only the Booth-Kelly but all of them, of large purchases to which I objected. Now don't put it on the ground that I have any particular grudge against Booth-Kelly, because I haven't. I don't care anything about them.

Q. Well, I am afraid that the import of your testimony would give that impression, Mr. Eberlein.

A. Well, then, it would weaken my testimony, would it not?

Q. Not if it were well founded; not if you had grounds for it; but if you don't mean it that way I want

the record to correctly represent your feeling on that.

A. Well, I am here to give you the facts. The fact is that probably the reason why I have mentioned them more than any other is that I had more to do with them than any other; I had more trouble with them than anybody else.

Q. Now when Mr. Dixon came to San Francisco and asked to see certain records in your office what records did he ask to see?

A. I have a recollection on two or three occasions that he demanded—he didn't put it very much in the way of a request, either, but he was pretty insistent on seeing our cruisings on certain timber lands; what timber lands I don't pretend to recollect.

Q. Who brought him into your office?

A. Oh, I don't remember that.

Q. Who sent him there, if you know?

A. Sent him to the office?

Q. Yes.

A. Well, I presume he knew the way there and came.

Q. No, but who introduced him into your office, if you know?

A. Well, now, my recollection is that I didn't meet him at all.

Q. Do you remember the fact to be that Mr. Herrin introduced him into the office?

A. Not that I know of. He may have been to Mr. Herrin, as a great many people did go to Mr. Herrin; when they wanted to do business with the land department and they thought they might not be able to do business with me they went very often to Mr. Herrin. Now that you mention it I have a recollection of somebody, a messenger or somebody coming down from the law department with the information that Mr. Dixon wanted something and he wanted it right away, and I said, "Who is Mr. Dixon?" And he said he was some connection to the Booth-Kelly Lumber Company. I merely said that if Mr. Dixon had any business to do with the land department he had better come down. He never came.

Q. When did he make the request for these cruises?

A. I think that same time. That is my recollection.

Q. Well, you say that your only recollection of it is that a messenger came down?

A. Yes.

Q. And said he wanted some information?

A. He did. I am giving you the recollection.

Q. And Mr. Dixon never came down himself?

A. He didn't come to me; no.

Q. I understood you to say that Mr. Dixon came and made certain demands and rather in an offensive way?

A. It was. The way it came about may have been the fault of the intermediary, but the demand was a pretty peremptory one, as I recollect it, to send out of the office, not to the law department but to Mr. Dixon, who was I understood up there at that time, certain documents, and my recollection is that those documents were not in existence at that time and could not be sent. That is, that the cruisings had not been made. He probably had been advised or thought probably that we had restored certain cruisings.

Q. Now, did he ask for the cruisings, Mr. Eberlein, or the price that you asked for the land?

A. No; it was papers, Mr. Townsend. If it had been price there would not have been any—that would have been very easily answered and he would have been answered at once. But the extraordinary demand for papers belonging to the department to be sent out of the department to a man who had no connection with the department and whom I didn't know at that time rather made an impression.

Q. Well, you know that the man who came into your office was an employe of the Southern Pacific Company?

A. Oh, I don't remember anything about that. I don't charge my mind with a lot of detail of that kind, but the man probably I knew or probably he came to my assistant; I can't tell you. But that is the way it got to me. I am giving you the fact as I remember it.

Q. Well now, the upshot of all this is that you considered that all of the timber land had been sold in Oregon that could be used by mill men legitimately for some time to come?

A. No, not at all; all that could be used within a reasonable time by the large purchasers. There were other men in Oregon who were not men of large capital at all, but who had small mills and were turning out ties and timbers, and I believed that those men ought to be fostered, and I think so yet.

Q. Well, did any of them apply to purchase any of these lands during the years 1906, 1907 and 1908?

A. Well, there were indirectly several sections of timber turned over to Cole Brothers and to Fisher Brothers. Those are two I remember. There may have been others. But it only illustrates the policy which I wished to pursue.

Q. Well, those were turned over by the Southern Pacific Company and not by the Oregon and California Railroad Company, were they not?

A. For the reason that the Oregon and California Railroad Company, under contract with the Union Trust Company, could not enter into the kind of an agreement that was necessary to enter into with those men.

Q. But the fact is that those lands were first conveyed by the Oregon and California Railroad Company to the Southern Pacific Company, were they not?

A. So we got our money for them. The Oregon and California got their money .

Q. And it was a year or two afterwards that the Southern Pacific Company made its dealings, whatever they were, with Cole Brothers and Fisher Brothers?

A. No.

Q. If I have the names correctly.

A. Yes, you have the names correctly, but you are mistaken as to that fact. They were at work in 1906 on those lands, and as I recollect it and as my information goes, we made a price on those lands to the Southern Pacific Company, who took them over in order to get necessary supplies to keep open the lines of this operating company. They paid for that to the Oregon and California Railroad Company and the money was turned over to the representative of the bondholders. Now the Southern Pacific Company, as I recollect it, made a contract with these men agreeing to take their output, paying them, they returning such part of it every month, the cost, to the Railroad Company, because they were not in funds to enable them to buy outright. And that was a very good arrangement for them; it enabled them to make more than days' wages, which they could not have done if they had to go to any one of these large timber owners and buy the timber.

Q. The Southern Pacific Company took most of the product of their mills, do you mean?

A. I think it took it all, and paid for it current prices.

Q. Then, when you get right down to it, the fact of the transaction was that that was the method by which the Southern Pacific arranged to supply itself with ties and building material without actually operating the mill itself?

A. Certainly. That is right. They did, though, operate mills themselves.

Q. I understand, but I am talking about these particular mills?

A. Yes, sir; that is right.

Q. Now in grading these lands as agricultural lands, lands that were capable of settlement, as has sometimes been said in the course of the examination, you did not do that with any idea of complying with the laws involved in the case at bar, did you?

A. Well, do you mean having this land appraised?

Q. Having them classified as agricultural or settlement lands; you didn't do that with any idea of selling the lands within the terms of the grants which are involved in this case?

A. If you mean this little accident of a few lines that old George W. Julian slipped over on Congress there, why of course not. We never pretended to, never entered into any calculation at all.

Q. You have apparently the same feeling towards George W. Julian that you have toward the Booth-Kelly Lumber Company?

A. Oh, no. One man was a common nuisance; I don't say that of the Booth-Kelly Lumber Company.

Q. Which one was that?

A. Julian.

Q. Oh, yes. He was a member of the Joint Committee of Congress in charge of the conduct of the War of the Rebellion, was he not?

A. He was a member of Congress from Indiana, and I came from that general part of the country, and, as I remember, he had a reputation of being an objector to anything and everything, a mischief maker; and there was a sigh of relief when he retired from Congress.

Q. Relief to the railroad companies, do you mean?

A. Relief to Congress, to the suffering people.

Q. It was under his leadership that the policy of granting lands in aid of internal improvements finally ceased, was it not?

A. I don't know as to that. I was pretty small at that time.

Q. Well, you ought to remember the good things about him as well as the bad, no matter how small you were.

A. Probably his obituary notice takes care of all of that.

Q. You have just concerned yourself in finding out what you could that was bad about him; is that it?

A. Oh, no; no; but unfortunately the evil that men

do lives after them, and that is the only thing that has survived that I know in regard to Mr. Julien.

Q. You haven't read my brief?

A. No. I have been intending to take a week off to read that. I hear it is a good one, and I am going to read it, I will promise you.

Mr. Fenton: It will take more than a week.

Q. Would you have put any of the agricultural lands on sale to actual settlers only in quantities not greater than one quarter section to one purchaser and for a price not exceeding two dollars and fifty cents per acre?

Mr. Fenton: Objected to as immaterial.

A. If I had the sale of it I would have sold the agricultural land first to the adjoining proprietor, if he wanted it, the man that had struggled along making a farm down there in that country, and if there was any adjoining land which he might make use of by incorporating it into his farm he should have had the opportunity first, and that was what we endeavored to do, and I would not have cared anything at all about the amount or the price.

Q. Well, you would have cared about the price, wouldn't you?

A. I would have got a reasonable, fair price for it, on general principles, and for the particular reason that the contract with the Union Trust Company, the deed of trust, provides that the land must be sold for a fair

actual value, and they refused on several occasions to pass deeds on the ground that the consideration was not large enough.

Q. But you would not have paid any attention to this little joker that you describe as having been slipped over on Congress by Mr. Julien?

A. No, sir, I would not.

Mr. Fenton: Defendants admit that they would not have paid any attention to the proviso of April 10th, 1869.

Mr. Townsend: Or of the similar provision of May 4th, 1870?

Mr. Fenton: Or of Section 4 of the Act of May 4th, 1870, with respect to the limitation on the grant, which was not a valid limitation among other things and never was recognized by the Company and never was insisted on by the United States until April 30th, 1908.

Witness: And it was disregarded by every respectable attorney in the state that ever examined the title.

Mr. Townsend: Now I will pause for a moment for Mr. McAllaster and Mr. Singer to extend their remarks into the record, so that there may be a complete representation on this subject.

Mr. Singer: Well, I would suggest a limitation of Mr. Townsend, who is a respectable lawyer, and he has a different opinion, and you didn't mean it that way.

Witness: Oh, no.

Mr. Singer: Mr. Townsend is certainly a respectable lawyer and the equal of any of us.

Mr. Fenton: Let's not put all of that in the record.

Witness: No, don't put this in the record, but Mr. Townsend knows I had no intention of applying these remarks to him.

Mr. Townsend: Well, the record will show for itself how those remarks were intended.

Q. The fact is, I think, as has been developed from the testimony, but to make it positive I will ask you, that no lands were sold during the years 1906, 1907 and 1908, with the exception of the conveyance to the Southern Pacific Company, if it took place during those years? I am not certain of the date of that, but with that exception there were no sales of any of these lands, were there?

A. That is all I recollect at this time.

Q. Now you say that in the fall of 1904 Mr. Craig, who was the Joint Passenger Agent of the Oregon Railway & Navigation Company and the Southern Pacific lines in California, after conference with you upon the subject caused circulars to be issued announcing the intention to resume the sales of lands that were susceptible to cultivation?

A. I don't remember the limitation in the advertisement. It was general in its terms and referred to the approach of the time when land grant lands would be offered for sale.

Q. Well, you say it was designed to attract set-

tlers?

A. Yes, sir. It wasn't a special circular; it was something inserted into a pamphlet that was put out by his department.

Q. You say that it was expressed in flamboyant terms, lurid colors and lots of adjectives?

A. Yes, that is right. I don't mean this particular notice, because as I recollect it I wrote it myself, but the general literature in which it appeared was ordinary railway literature of that character.

Q. Now you say that after the fire in 1906 you had no means of knowing what deeds had been executed. Did you not know that in May or June, 1879, the Oregon and California Railroad Company through its board of directors adopted a bylaw prohibiting the execution of any conveyances on behalf of the Company unless the same were specifically authorized by resolution of the board of directors and that thereafter no deeds were executed until authorized by resolution of the board of directors and that the minute books of the meeting of the board of directors disclosed all deeds that were executed after that time?

A. I may have known that fact, and I have no doubt that we exhausted all the means of information that were open to us and that among them. But I don't recollect of having recourse to that particular source. I do remember of going to the Union Trust Company and getting a lot of information.

Q. Now you say that in 1906 by the latter part

of August this rumpus and noise that had been stirred up with reference to forcing the Railroad Company to dispose of these lands had become so great that you gave notice to your superiors that you were able to sell agricultural and grazing lands; that is true, isn't it?

A. Well, I gave notice to them that we were in position to go ahead and to treat applications for that class of lands as rapidly as they could be examined.

Q. Now from whom did you learn that the Booth-Kelly Company had made threats that they would force you to let go of this land?

A. Directly.

Q. From whom?

A. A talk with Mr. John W. Blodgett at one time.

Q. When?

A. In New York, in my office there, I think during the year 1907. There was a great deal of talk indulged by them which traveled to me—I speak of these talks, these particular conversations—that we would be obliged to let go. I didn't pay much attention to the talk at that time but it was current.

Q. Well, who did you hear say it personally, John W. Blodgett, you say?

A. Why, I refer to my talk with Mr. Blodgett more than anyone else.

Q. And what did Mr. Blodgett say?

A. I can't remember the exact language.

Q. Well, give the substance of it?

A. But Mr. Blodgett is a courteous gentleman and would not be apt to use brutal language at all, and in that case it was simply a very positive intimation on his part that we would have to do it. I believe at one time in one conversation—I had more than one; he was in my office there several times; one time Mr. Arthur C. Hill was with him; among other things he made bitter complaint to me in criticism of the railroad by reason of their running mills, that we had no right to run mills and that they ought to buy their stuff from them; and I told him that the only reason the mills were ever started or operated was simply because they canceled their contracts and refused to furnish any stuff when the company most needed it. But that can hardly be urged against them, because the market at San Francisco took a tremendous jump, and they paid large bonuses for furnishing lumber quickly; but the Railroad Company was criticised very severely by them.

Q. Well, I understood you to say that the Booth-Kelly Company boosted the price on ties from twenty-three cents to over sixty cents over night?

A. They did, so I was advised.

Q. Now you say that the market price raised at San Francisco now?

A. Why, of course. It certainly did, by reason of the fire.

Q. Well, the Booth-Kelly Lumber Company was not the only party that supplied ties and building ma-

terials at San Francisco, was it?

A. No, no; a great many others.

Q. Well, who was it that boosted the price?

A. They did so far as I was informed. Probably the rest did, too; but as I understand it they were the main dependents of the road; from their geographical position the lower end of the road in making their extensions always got their supplies from them.

Q. They didn't boost the price, then; they simply took advantage of the advanced price?

A. They took advantage of the advanced price, but it had the same effect upon the Railroad Company; it left them helpless.

Q. That is, the Railroad Company had to pay the market price for the stuff?

A. The contracts were canceled, as I was informed by Mr. Harriman himself, practically without any notice. Now of course there may have been reasons for it, but still it was very burdensome upon the Railroad Company, and it might be urged, I think justly, that the Railroad Company should have notice in a case of that kind; but I am not making any point as to that.

Q. Now you say that Mr. Dixon was present before Congress in the year 1908 or 1907, and assisted in the passage of the resolution directing the institution of this suit?

A. Why, he appeared before the committee of the House, which you addressed.

Q. Well, did he urge the pasasge of the resolution?

A. Yes, sir.

Q. Well now, don't you know that he was the only opposition I had during the entire effort I made to get that resolution through?

A. No, I don't.

Q. Don't you know that he first tried to amend it and afterwards tried to defeat it?

A. I don't know anything about what his lobbying was, but I know what his remarks were before the committee.

Q. Well, what were his remarks before the committee?

A. Well now, I think they are quoted. I make a quotation in that document there. I will not undertake to repeat remarks; I will read them to you.

Q. Well, if you take out any isolated quotation it might not fully represent the position that he took before the committee.

A. Well, I believe it did. Now what you refer to, you may think that I knew of Mr. Dixon's activities down there but I did not. It may have been known to others in connection with the Railroad, but not to me. I merely appeared before that committee with Mr. James Gore King, who was the representative of the Union Trust Company. We came down from New York to attend that hearing, and those remarks were made by

Mr. Dixon, and the understanding of his attitude was the same by Mr. King and myself. That is why we never had any reason to change our opinion that he was there throwing the burden of everything on the Railroad, claiming the dubious honor of having fomented all of this agitation for the purpose of depriving the Railroad Company of a land grant. I believe his language is not susceptible of any other construction. What his subsequent acts were I don't know anything about.

Q. Now did Mr. Dixon or any other representative of these purchasers do anything before that committee other than to contend that they had purchased their lands in good faith, without knowledge of these restrictions, and asked to be relieved by an amendment to the bill or resolution?

A. I remember the address of Mr. Blodgett and of Mr. Hill, and my recollection is that theirs was along that line. They testified, too, as to the non-agricultural character of the land which they had purchased, and I don't remember of their making any direct onslaught on the Railroad Company, but it was different in the case of Mr. Dixon, though I understand he represents the same company that Mr. Hill and Mr. Blodgett did.

Q. Now you say that Mr. Hawley, Congressman Hawley, he also made a campaign upon this same general subject?

A. Yes, sir.

Q. And that he was a colleague of Mr. Booth, who

was a member of the Booth-Kelly Lumber Company, or, at least, was very friendly with him, you say?

A. I have understood that he was, that they were very close together, socially and otherwise.

Q. And the fact was developed during the course of your direct examination that Mr. Hawley was very instrumental in getting through the resolution directing the institution of this suit and also instrumental in getting through the recent act authorizing the compromise of the purchaser suits. Do you mean to imply Mr. Hawley has been actuated in this matter by a desire to help the Booth-Kelly Lumber Company?

A. Why, that wasn't my direct testimony at all. I don't think it can be inferred from it. Mr. Hawley in doing what he did I have no doubt did what he thought was right and in accordance with campaign promises he had made.

Q. Well, do you mean to say that your direct testimony did not develop the fact that the Booth-Kelly Company had started this agitation, and that Mr. Hawley then carried it on in his campaign and was a great friend of Mr. Booth, and that afterwards when he went to Congress he got through the act that would carry out the threat of the Booth-Kelly Lumber Company and had subsequently gotten an act through that would now galvanize the title of the Booth-Kelly Lumber Company, as you expressed yourself?

A. Well, I believe those are the facts as you have stated them.

Q. So you did think then that Mr. Hawley has been actuated in his public service in this matter by a desire to assist the Booth-Kelly Lumber Company in carrying out its original threat and now giving it entity?

A. That would be calling for a personal opinion and I don't care to give a personal opinion about these people.

Q. Well, isn't that the intention of your testimony?

A. No. My testimony is to try to stick to facts. I have been drawn into some discussion here, but as to that I don't think I will go that far. I don't care to impute or impugn Mr. Hawley's motives. I only know the fact to be that his campaign was contemporaneous with the events which you mention, that he went into Congress on a campaign of agitation against this land grant, and I believe that is the fact.

Q. Well, what special significance did you mean by calling attention to the fact that he and Mr. Booth were very friendly, to quote your exact language?

A. I believe that was called out by the examination, and I am merely stating what I have heard. You may call that hearsay.

Q. You say, "I understood that he and Mr. Booth were very friendly; they were both of the same faith."

A. Yes.

Q. "And prominent in those circles."

A. I believe that is true; and I say that that was

called out in examination.

Q. Have you in mind now anyone else who is very friendly with Mr. Hawley and was of the same faith and prominent with him in the same circles?

A. I don't know, I am sure.

Q. Mr. Booth is the only man in the State of Oregon that you call to mind who is friendly to Mr. Hawley and is of the same faith and prominent with him in the same circles?

A. If I were well acquainted in the State of Oregon I might be able to cite others, but at the present time I haven't an acquaintance that would justify me making any such statement.

Q. Well then, do you mean to say that when you called attention specifically to Mr. Booth that you did not mean to carry with it any implication of the motive of Mr. Hawley in this matter?

A. I believe again that my answer in that case was called out by examination, and I have stated the case. Now if there is a connection I think that it will appear right there.

Q. Well, what has taken place to call your mind so particularly to the friendly relations between Mr. Booth and Mr. Hawley and not to the friendly relations between Mr. Hawley and any other resident of this state?

A. I think it is a fair conclusion from known facts, if I may be permitted to testify to conclusion—am I?

Q. You have to a great many.

Mr. Fenton: Answer the question in your own way.

A. That the agitation, as I was informed and as I believe, started at Eugene. As I was informed and as I believe it was started through, largely so, members of the Booth-Kelly Lumber Company, and I think that this agitation was seized upon for campaign purposes and was used as such, and Mr. Hawley was the beneficiary of this situation which was thus created. I think that is a fair, reasonable, safe conclusion.

Q. Now, you also directed attention to the fact in your examination that Mr. Hawley was somewhat active in securing the passage of what is called the Innocent Purchasers Bill, by which the large holdings of these large purchasers have been confirmed?

A. Yes.

Q. Now, don't you know that that bill was passed unanimously by both houses of Congress?

A. It may; it may be.

Q. Don't you know that that bill was promoted by Senator Bourne, Senator Chamberlain, Congressman Lafferty and Congressman Hawley alike, all of them in favor of it?

A. Undoubtedly, though I don't know the fact; I don't keep up with such things.

Q. Well, why have you been keeping up with Hawley so much and not the rest of them?

A. Well, I haven't been singling out Mr. Hawley; as I say, his name has been called out in this examina-

tion.

Q. Well, I have called out the others?

A. Very well.

Q. Now don't you know about the others?

A. Why, what do you want me to testify in regard to the others?

Q. I ask you if you don't know the others have been equally active and you say no?

A. I say I presume they were. They were all from Oregon.

Q. Well, do you know whether they were or not?

A. This condition, however, exists in Mr. Hawley's district, and this as I understand it was not the basis of any legislative campaign, congressional campaign. It may have been in Mr. Lafferty's case; I don't know; I presume it was. But I suppose all of the representatives in Congress at this time have taken advantage of this unfortunate condition. I don't see that that, however, is pertinent in this inquiry.

Q. Well, it is just as pertinent on cross examination as it is on direct, isn't it?

A. Oh, certainly; certainly.

Q. Now when you examined these lands in your various trips in the grant that you describe were you looking to see how much of it could be settled upon?

A. That was one of the things I looked at.

Q. Why did you want to ascertain that?

A. Why, I didn't go for any such special purpose. I went taking a general look over the grant, to see the character of the land, the timber or whatever there was on it. That is only one element in the calculation.

Q. Now you say you went through the Cascades; at what point?

A. We crossed below here, came out about Hood River.

Q. Any other point?

A. No; we crossed over here and came out at Hood River.

Q. Is that the only place you ever crossed the Cascades?

A. Oh, no; I have crossed the Cascades below.

Q. Where?

A. Klamath County.

Q. So that Multnomah and Klamath Counties were the only two places you ever crossed the Cascades?

A. I think so.

Q. Well, that gave you no personal information as to the land between, of course?

A. Oh, no; I haven't testified to anything else.

Q. Well, I didn't know just where you crossed; it wasn't brought out in your direct examination.

A. Well, I understood that it was brought out and

that I testified as not having been in the district around the center of the grant or around east of Eugene, or in any of that country, and it is true.

Q. You say you have never been in the western part of the grant?

A. I have never been in the west side of the grant at all.

Q. You don't know anything of the character of the Coast Range from personal observation, except such as may be——

A. (Interrupting) Except at the boundary of the state on the California side. I know that very well.

Q. But you don't know the character of the Coast Range?

A. North of that point?

Q. North of that point.

A. No.

Q. You do not know that in many places you can find land under cultivation clear to the top of the Coast Range, do you?

A. No, I do not, not on these grant lands. It has never been so reported to me, at least.

Q. Now in making up your statements and in forming your estimate as to the character of this land you have relied considerably upon the reports made to you by these cruisers that you have referred to?

A. Yes, sir.

Q. Including Mr. Britt and Mr. Elliott you mentioned in your direct?

A. Yes.

Q. You relied upon their statements, did you?

A. I did, also on Rees's statement.

Q. Well now, did you really trust Britt's judgment in those matters?

A. Oh, I trusted Britt's judgment in a great many matters; no reason why I shouldn't.

Q. Well, weren't there some matters in which you didn't trust his judgment?

A. His judgment?

Q. Yes.

A. What do you refer to?

Q. Well, wasn't Britt one of the fellows that you thought was interested in that sale to John F. Kelly, Trustee?

A. I believe he was.

Q. And you thought that was dishonest on his part, didn't you?

A. I don't believe any man can serve two interests, the buyer and the seller, at the same time.

Q. That is what I mean.

A. Well, that is what I mean.

Q. Now as I recollect it, his interest there was in the name of his wife or some relative, wasn't it?

A. My recollection is that it was; I was so informed.

Q. Well, after having learned that he was guilty of a double dealing of that sort, did you still trust his reports as to other matters that came to your attention?

A. I think Mr. Britt was out of the service about that time, but later I have had talks with Mr. Britt and he is a man who has had a very wide experience here, and as to his testimony as to the character of lands, that does not attempt to fix a value, but as to character of lands I could not understand and I don't understand why his statement should not be taken.

Q. Now you explain this letter that you wrote August 16, 1905, addressed to Mr. Dunne, as having reference to certain conversations that you had had with Mr. Pinchot?

A. Why, a part of the letter refers to that.

Q. Well, I mean the part referring to the change in the attitude of the officers of the Government.

A. Yes, sir.

Q. Now you say Mr. Pinchot came to you what time?

A. Some time in that year prior to that time, he was in San Francisco, as I remember it, and made that proposal to me, and he afterwards covered it by letter.

Q. Now this proposal, stripping it of the embellishments with which he might have adorned it, was a simple

proposition that the Railroad Company should give the Government a large tract of land, approximately four hundred thousand acres, I think you said?

A. I didn't say four hundred thousand; I don't know; but it was as I recollect it all the land—

Q. (Interrupting) In the Cascade Mountain Reserve?

A. In the Cascade Forest Reserve, lying in the eastern part of Jackson and in Klamath counties, the western part of Klamath.

Q. And that the only consideration that the Railroad Company was to get was the privilege of cutting off the timber under such rules and regulations as the Forestry Service might establish?

A. That is what I remember of it.

Q. Well now, did that appear to you to indicate that that was a friendly act?

A. Well, I don't know. I had the feeling all the time that it was the steel hand in the velvet glove; is that it? We were so much in the bad books of the Government at that time I thought Mr. Pinchot thought we would be willing to do most anything.

Q. Well then, it wasn't so much that you thought that he was friendly with you as it was that he was taking advantage of the situation?

A. Well, what I did think was that the attitude having changed to such an extent that a representative of the administration would come asking something in

the form of a favor, whatever you might think about the ultimate outcome of it, was such a remarkable change that if we wanted to get our transfer of that grant recognized, recognized within a reasonable time, why that was the time to do it.

Q. Why, you hadn't any idea of complying with his request, did you?

A. I had none; no.

Q. Nor any other officer of the Railroad Company, so far as you know?

A. I don't believe so.

Q. Your idea was to string him along until you could get what you wanted and then turn him down; is that it?

A. Oh, no, no, no; not at all; because the matter was simply pending at that time and this other matter was pending at that time, and it was not a question of stringing anybody because the Government of the United States had a right to make any such suggestion or proposition and have it considered.

Q. But you have no further explanation to make as to why you considered that an evidence of friendship on the part of the officials of the Government?

A. Not at all, excepting the attitude, as I say, both of that and the Reclamation Service, all wanting something and wanting to apparently be friendly.

Q. Now you remember of writing the letter of August 11, 1905, to Mr. D. A. Chambers that has been

introduced in evidence, don't you?

A. Yes.

Q. Now if you didn't have in mind a transfer of the Oregon and California Railroad grant why did you use this language: "I merely wish to explain that what I wish to know is what is the practice regarding transfers of grants made by Congress for railroad purposes, such as Southern Pacific, Oregon and California," and so forth?

A. Such as what?

Q. Southern Pacific, Oregon and California, and so forth?

A. Oh; Oregon and California has no significance there. I might just as well have said Central Pacific. That just came in my head.

Q. Now can you explain why throughout this correspondence, including your letter to Mr. Dunne, there is not the slightest reference to the transaction to which it relates?

A. Why, there were so many letters that passed in regard to that same thing. That is simply a coincidence. There was no intention at all to leave out anything. And another thing, while I think of it, you called attention to the fact that I have cited as an example the Southern Pacific Railroad Company grants and the Oregon and California Railroad grants is that they are the particular grants which we dealt with that have an indemnity provision, and that was the great thing that was the stumb-

ling block in that case.

Q. Well, I know, but now if you were simply inquiring with reference to the Southern Pacific grant why didn't you say so, say that you wanted to know what would be the practice under the Act of July 27th, 1866, granting lands to the Southern Pacific Railroad Company?

A. Why, probably because it didn't occur to me to do so.

Q. You knew that the Interior Department had held that some grants were assignable and that others were not?

A. I did not, or I would not have taken the trouble to have Chambers look the matter up. You see, I am not an attorney, and there are a lot of things I don't know and I depend on attorneys to find out for me.

Q. Well, do you consider that in asking an attorney a question as to whether the Southern Pacific Railroad grant in California could be assigned and the assignee could exercise the right of indemnity selection could be intelligently presented to an attorney without calling his attention to the grant that you had in mind?

A. My dear sir, as I have said there are a number of letters that preceded and also followed that particular letter. That letter possibly had some ear mark on it at the top of it as to subject that would disclose that; whether that copy shows it I don't know.

Q. This letter shows, Mr. Eberlein, that it is the

first communication from yourself to Mr. Chambers upon the subject, because it starts out and says, "I found it necessary to wire you today as follows."

A. Yes.

Q. Then quotes the telegram, and then you follow on and explain to him why you had to send it. It shows upon the face it is the first communication.

A. Yes. Well, what is the matter with the letter?

Q. What I am asking you is, why, if it referred only to the Southern Pacific Railroad grant you didn't mention it in any of this correspondence?

A. It is not necessary in that case at all. I was asking for an opinion as to a principle, and if the Government of the United States had in other cases accepted an assignee of a congressional grant that is what I wanted to know and it didn't make any difference to me what name you put on it. As far as that objection goes I consider that entirely immaterial. But I will say here, if that is what you want to know, that if you think that there is anything in that correspondence that even obliquely refers to this Oregon and California grant I can tell you emphatically no, it does not. The idea of transferring the Oregon and California grant to a land company was never sprung that I know of.

Q. Have you any way of explaining how or why that correspondence was filed in the Oregon and California Railroad file?

A. I can't tell you. That might be the blunder of

a clerk. It may not have been Oregon and California file; I don't know that it was.

A. I can testify as to the filing system before the fire, and that is what governs here.

Mr. Townsend: Wasn't there a separate filing system for the Oregon and California correspondence?

A. No, sir. We kept them filed, as I recollect it, by a system which—we didn't keep them in that shape; I will tell you that right now. That is something that wasn't saved from the fire, which you have in your hand.

Mr. Fenton: The box, you mean?

A. No; the box wasn't saved from the fire.

Mr. Fenton: That is the letter file?

A. No, no; the case wasn't filed; or that wasn't the way they filed letters. Now, what you have there, gentlemen, is the results of this tax investigation in Oregon, which happened to be saved and thrown into that box. But those boxes never were in the fire, which can be seen. You could not scorch part of those contents and not scorch the outside.

Q. Now you say that when the Government was installing the Klamath Irrigation project that the Railroad Company, referring, I assume, to the Southern Pacific, did everything it could to get the states of Oregon and California to consent to either the raising or the lowering of the level of those intra-state lakes, or securing legislation which granted to the Federal Gov-

ernment the title to the bed of the lake.

A. Those series of lakes, naming them in the acts.

Q. Now what did the Railroad Company do to induce the states to pass those bills?

A. I don't know what steps were taken. I only know that I was importuned to get Mr. Harriman interested so that the matter might be taken up in these two legislatures and passed. The time was getting short and what steps were taken here I don't know because I wasn't present in the state. I was in the East at the time.

Q. Well, you have testified, however, that the Railroad Company had sufficient influence to get those bills through the legislatures of the two states?

A. Did I? They may have had; I don't know; but I wasn't present in the state and I only know the fact that the bills passed in the time that the Government desired.

Q. You say here, "It finally resulted in the passage of acts by both California and Oregon?"

A. Yes, sir.

Q. Granting the rights of the states to the United States?

A. We did everything we could to assist them at that time and it was to the work done by the Railroad Company that they owe the success in that matter wholly."

A. Well, I will stand by it. I believe it is true.

Q. Now, Mr. Eberlein, you say that the Booth-Kelly people started this agitation in 1906 and that it spread quite rapidly until about August that the public agitation was so great that you took cognizance of it in some way, it was brought to your attention in some way. That is the general substance of your former testimony. Hadn't there been considerable agitation before that time?

A. Why, not that character of agitation; not demands. What I referred to was the proceedings and resolutions by different commercial bodies, of which they always favored me with a copy and a pretty stiff letter. That was the first time there was any organized movement that I know of.

Q. You had been anticipating that for sometime, hadn't you?

A. That there would be trouble over that?

Q. Yes.

A. Oh, I think that signs pointed that way.

Q. As a matter of fact, when you first came out here you read the granting acts and discovered this provision, which is the general basis of this present litigation, didn't you?

A. Why, I read the granting acts but as to that clause that you mention I was informed at the time that that was not considered operative, and I will take this opportunity of changing my very unfortunate remark

that I made there a while ago without any reference at all that could be offensive to any one in regard to the opinions of attorneys. I sincerely regret the remark that might be construed in a way that I had no intention at all. What I had reference to was that I was informed and believed that up to the time that I came here that these titles had passed muster with attorneys and that it was the consensus of legal opinion here on the Coast and in Oregon that the language did not operate to cloud the title to these lands.

Q. But, I say, you learned of the provision in the grant, without calling now for any testimony as to what you were advised with reference to its validity?

A. Oh, I read the act, yes. I believe there is some such language in the Union Pacific grant, but I don't remember as to that exactly.

Q. No; it is entirely different in the Union Pacific grant.

A. The same question was brought out in the old Crowe resolution at one time I remember down there.

Q. But I want to get at the question now of the responsibility of the Booth-Kelly Lumber Company for this agitation. As a matter of fact, were you not looking for agitation and wouldn't there have been the same agitation if the Booth-Kelly Lumber Company had never been in existence?

A. I don't believe there would. Possibly. You can't tell what might have come about. But a concerted action of this kind has to have promotion by some in-

dividual or individuals that have power and have standing in their districts, and it originated at Eugene, and as I say I am informed and believe that R. A. Booth was chairman of the first meeting that was called to protest.

Q. The matter was under discussion and consideration, however, by yourself and other officers of the Company prior to 1906, was it not?

A. I don't think it was under any serious discussion at any time. I have one recollection of having made an inquiry in regard to some case or other in which that was spoken of. I remember particularly of taking notice of a suit or an effort made by so-called bona fide purchasers who attempted to acquire the lands of the Elijah Smith grant in that way, and I took the matter up then and suggested—

Mr. Fenton (interrupting): You refer to the Southern Oregon Company's grant?

A. Yes, sir, the Southern Oregon Company. I suggested at that time that if those clauses were identical with these in the Oregon and California grant, that any adjudication there would undoubtedly affect us.

Q. Well now, if the Booth-Kelly Company was responsible for initiating this agitation, why, in your letter of February 20th, 1904, addressed to Judge Cornish, did you use these words: "I hand you copy of letter written to Mr. Herrin on the subject of the two dollar and fifty cent limitation sales to actual settlers in the grant to the Oregon and California Railroad Com-

pany. The matter is going to come to a head without any action on our part. I enclose copy of the printed reports on the subject. I have advice from Oregon that there is considerable excitement and undoubtedly we shall be obliged to defend ourselves vigorously. I wired Mr. Andrews as per copy enclosed to keep to work"—I think that should be at work, probably a clerical error—"vigorously with his defaulted contracts so as to save us as much trouble as possible."

A. I am familiar with the letter. Now what is that question? What did I mean by it?

Q. I say if the agitation was started by the Booth-Kelly Company why did you write him in 1904, two years before, that you were advised that there was considerable excitement in Oregon then upon the subject and you should undoubtedly be obliged to defend yourselves vigorously?

A. Because that was the only thing that a business man of reasonable intelligence could infer from what was transpiring. That had reference, I believe, to this action I have just testified to in reference to the Southern Oregon Company.

Q. Oh, yes; the correspondence shows that.

A. Well now, that is what I meant, and I think it is easily inferable that if those people had a like clause in their grant that undoubtedly the whole thing would spread. It did not, though, at that time, and the peculiar circumstance in all this is that this business, so far as the Oregon and California Railroad Company is concerned,

became acute only after the fire. Then it came to a head with surprising rapidity when we were entirely helpless to proceed.

Q. Now Mr. Eberlein, I want you when you return to San Francisco to consult such records of the office of Mr. McAllister as you can and designate in a written statement the deeds or contracts to the Booth-Kelly Lumber Company which you contend—

A. (Interrupting) Are improvident?

Q. (Continuing) Were improvident and included special privileges extended to that Company, and address your communication to Miss Margaret A. Fleming, the Special Examiner before whom this testimony is being taken, at Postoffice Building in the City of Portland. Identify it by your signature so that she may extend it in the record as your complete answer to one of the questions which I asked you and which you were unable to answer from the material now before you.

A. I will be very, very glad to do so.

Mr. Fenton: Will the witness be good enough to furnish counsel for the Government and counsel for the defendant a copy of his letter for their files?

Witness: Yes, sir.

RE-DIRECT EXAMINATION.

Questions by Mr. Fenton:

You were asked about a reservation of a hundred thousand acres of timber lands of the Oregon and Cali-

fornia Railroad Company for railroad purposes; do you or do you not know whether or not the Union Pacific Railroad Company has a reservation of about forty thousand acres of timber land of its own which is likewise under reservation for railroad purposes?

A. You mean the Union Pacific?

Q. Yes.

A. No, I do not. I don't recall any reservation there.

Q. You don't remember?

A. No. Mr. McAllaster would be competent to testify about that.

Q. You don't know whether there is or is not?

A. No, sir, I do not.

Q. Now referring to the John F. Kelly, Trustee, contract which you regarded as improvident, and which you learned was a contract in which some twenty-five people were interested and for whom he was trustee, and in which you say some employes or officers of the company were interested, I wish you would state to the Court whether or not any of the officers of the Oregon and California Railroad Company, or whether or not any of the counsel for that Company or for the Southern Pacific Company, and particularly whether Mr. P. F. Dunne, Mr. William D. Fenton, Mr. William Singer, Jr., Mr. William F. Herrin, were in any wise interested in, connected with, or parties to, that contract, directly or indirectly?

A. No, sir, not that I am advised. The names of railroad men whom I identified on that contract were those employes of the Southern Pacific Company.

Q. Were they men of official responsibility, executive officers of the Company?

A. They were not in the first rank.

Q. Were they in any wise connected with the land department excepting Mr. Britt?

A. No, sir.

Q. Who was interested as a cruiser?

A. No, sir.

Q. And who had nothing to do with fixing the values?

A. With the traffic and operating departments were all.

Q. From whom did Judge Cornish take his directions as to any action for the Oregon and California Railroad Company?

A. Mr. Harriman, I understand.

Q. You were present at the meeting of the Irrigation Congress held at Sacramento in 1907, in September, which Mr. Harriman addressed?

A. I went there to hear the address.

Q. And did you hear it?

A. I did.

Q. Do you think that is reported officially in the

proceedings of that year of the Association?

A. I was not a delegate to that particular Congress, but I was officially connected with the National Irrigation Association at its annual meeting in Portland, and at that meeting and at all others that I have attended there was an official stenographer who took down verbatim all the addresses and the debate, I believe.

Q. Now you spoke about your idea of the sale of these timber lands which you suggested to your superiors when sales should be resumed of timber land, was to reserve in the contract of sale the products of the land. Do you mean that the Company making the sale should reserve in that contract, or was it your recommendation to reserve in that proposed contract anything else other than the products of the manufacture of the timber, or did it have application to grain and wheat?

A. Nothing whatever but the transport of the product of the timber in cases where it was shipped.

Q. This contract of reservation would be in the contract of sale, and was it your idea that such a reservation or covenant should be in the deed?

A. I understood—my advice was, that it would be necessary to include it in the deed.

Q. Yes. That was never adopted?

A. Never to my knowledge.

Q. Any reservation of that kind as to the transportation of the products, consisting of timber, by the South-

ern Pacific Company in this case, or the Oregon and California Railroad Company, if it should resume the operation of its road in its own name, you said would be at current rates. Do you not know that those rates, if unreasonable, would be fixed by the State Commissions of the State for local hauls or intra-state hauls, and by the Interstate Commerce Commission for interstate hauls?

A. Yes, sir.

Q. Whatever the agreement might be?

A. Yes, sir; certainly.

Q. You understood that, did you?

A. I understood that, and my idea was to include that provision so that it would be thoroughly understood.

RE-CROSS EXAMINATION.

Questions by Mr. Townsend:

In any of your experience in connection with this land grant, and by that I mean the two land grants involved in this suit, do you know of any instance where the purchaser of lands knew at the time of the purchase of this clause in the grant which in terms restricts the manner in which the granted lands might be sold?

A. I wasn't present at the time these sales were made.

Q. Well now, I am asking you if anything that came within your observation had any bearing upon that subject, to the end that I may send for the evidence if it

is in existence?

A. The only thing that I know of is talk with these different purchasers who came in and spoke of that.

Q. But that was after this agitation arose, was it not?

A. Oh, I think so; probably before in some cases, but always after the execution of the contract. I wasn't present at that time, and whatever of that kind came up was taken up afterward, and it is only from what these people have said that leads me to believe that they examined their title and believed that they were safe in getting it.

Q. That they had no knowledge of any defect of any kind?

A. Oh, they had knowledge. I know some of them evidently had knowledge. I mean the larger purchasers. The small purchasers, I haven't an idea that they ever knew of it at all or examined the title. They bought under an executory contract and they never saw an abstract.

Q. You don't know whether any of the large ones did at the time of the making of the sale, or not, but you do recall that some of them spoke of it afterwards?

A. They spoke of it afterwards in such a way that led me to believe that that matter was discussed and passed up.

Q. Now do you remember who discussed it with you?

A. Well, now, this is a hazy recollection. I can't swear positively, but I had a number of talks with Mr. A. B. Hammond, and it is in my mind, when you mention that, that he told me of that. He is the kind of a man who would examine his purchase pretty carefully, and I believe I have heard it mentioned, just when I don't know, that this matter was gone into by—

Q. (Interrupting) Mr. Linthicum?

A. Yes, for the Weyerhausers.

Q. No; for the Booth-Kelly.

A. Booth-Kelly?

Q. Yes.

A. Well, didn't they make—I have got it when they bought out Lindley that they made an examination of that.

Q. They may have done so at that time, too, for all I know.

A. Yes.

Q. With the exceptions that you have stated, you know of no specific instances of that kind?

A. I don't recall any; no.

Q. That is, that you recall now?

A. I don't recall them now.

RE-DIRECT EXAMINATION.

Questions by Mr. Fenton:

Out of the many hundreds of contracts in all nearly

eight thousand, you had no opportunity to talk with the vendees or with the grantees as to whether they knew at the time or before they bought the land as to what their knowledge was of these provisos in the acts of Congress of April 10, 1869, and May 4, 1870?

A. Oh, no; I never had any talks with them generally.

Q. What you mean to say is, then, that you never heard that question discussed by any of these purchasers or parties who had acquired the title until after this question was raised in the public prints and in these discussions?

A. Yes; that is what I intend to convey.

RE-CROSS EXAMINATION.

Questions by Mr. Townsend:

Just one more question on that subject. You found nothing in the records of the office before the fire indicating that any of the purchasers had discovered these provisions and objected to the title upon that ground?

A. No, I never saw a case of that kind.

Whereupon J. N. **SHERBURNE**, called as a witness on behalf of defendants, being first duly sworn, testified that he resides at San Francisco, California, and is head clerk of Government accounts of the Southern Pacific Company, and has been in the employ of that company and its predecessor since 1881. Its predecessor in the operation of the railroad from **Roseville**

Junction to the extension towards the California-Oregon state line, was the California and Oregon Railroad Company, and later the Central Pacific Railway Company, and he has been continuously in the department mentioned up to the present time. He had immediate charge of the preparation of Defendants Exhibit 288, purporting to be a "Statement of Government freight and passenger transportation over the free road between Portland, Oregon and Roseville Junction, California, for the years 1906 to 1910, inclusive, showing proportions accruing north and south of Oregon-California state line." This exhibit was prepared as to freight from the waybills, and the transportation of passengers from the ticket reports of the station agents.

Whereupon it was understood that all the evidence upon this subject should be received subject to the objection of the Government that it is incompetent, irrelevant and immaterial, and to the objection that the amount of service rendered by the Company in transportation of troops and property is no defense in this case; it being understood that no objection is made on account of not producing the original books of the company.

Whercupon witness further testified that the exhibit is a correct statement of the various amounts, and what it purports to show, as shown by the records of the company for that period. The records of these accounts in San Francisco prior to April 18, 1906 were destroyed by fire. He was familiar with these accounts previous to that time, that is, from 1882 down to 1906. The vol-

ume of business of this kind in the movement of Government freight and passengers over the road from Portland, Oregon, to Roseville Junction, California, from 1882 up to the year 1906, was approximately the same by years as shown in Defendants' Exhibit 288, as he remembers, with the exception of the period of the Spanish-American War in 1898, when it was heavier by reason of a great many regiments coming through Portland to San Francisco. He recalls at that time several of these regiments, some of the northern regiments, intended for the Philippines and destined for Manila were moved by the company from Portland to Roseville Junction and then to San Francisco. He recalls particularly Idaho and South Dakota and Minnesota. With the exception of the special occasion of 1898, known as the War with Spain, the movement of Government freight and passengers was approximately the same from the time the road opened, as shown in Defendants' Exhibit 288.

Defendants' Exhibit 336 is Department Circular No. 62 of date October 29, 1907, as issued by the Comptroller of the United States Treasury, different departments, with a view of having a uniform bill of lading on transportation, requested to cover movements of troops and property of the United States, and is furnished by the United States and the Treasury Department for use by this company and other companies in the transportation of Government employes and property.

Whereupon defendants offered and there was received in evidence, Defendants' Exhibit 336 which is hereinafter set out and described and made a part of this state-

ment of the evidence and identified as such.

Whereupon witness further testified that Defendants Exhibit 337 is Circular No. 16, Quartermaster General's Office, of date July 1, 1912, and is entitled "Schedule of Land-Grant and Bond-Aided Railroads of the United States and Instructions concerning Settlement of Accounts over such roads, with a Compendium of United States Laws showing the Conditions of the Grants or Subsidies," and has a map in the back of same, and was issued by the Quartermaster's Department of the United States Army, as a guide to the Railroad Company performing the transportation, the manner in which the bills are to be rendered for charges, and also as a guide to the settling or disbursing officers of the Government as to the settlement of such bills. There is at page 42 of this Circular the following:

No. 58.—Southern Pacific Company. From Roseville Junction, California, to East Portland, Oregon, under the column Statute, Volume and Page, these entries—July 25, 1866. 14—239; June 25, 1868, 15—8; April 10, 1869, 16—47, and opposite thereto these words: "And be it further enacted, That the grants aforesaid are made upon the condition that the said companies shall keep said railroad and telegraph in repair and use, and shall at all times transport the mails upon said railroad, and transmit dispatches by said telegraph line for the Government of the United States, when required so to do by any department thereof, and that the Government shall at all times have the preference in the use of said railroad and telegraph therefor at fair and reason-

able rates of compensation, not to exceed the rates paid by private parties for the same kind of service. And said railroad shall be and remain a public highway for the use of the Government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the Government of the United States.—Act of July 25, 1866, Section 5.”

This is the Act or section of the Act under which this service of which he has been speaking, has been performed by the Southern Pacific Company and its predecessors, since the construction of the road and since his knowledge of the same in 1882. The free service furnished by the company and represented by Defendants' Exhibit 288, is the free service referred to in the Act. The object of keeping a record of the amount of that free service is for statistical purposes. There is no stated period for the issuance of these circulars. Circular No. 16 is practically a reissue of Circular No. 13 issued June 1, 1912, and Circular No. 16 is the one under which the Government and the company are now doing business.

Whereupon defendants offered and there was received in evidence Circular No. 16, marked “Defendants' Exhibit 337,” which is hereinafter set out and described and made a part of this statement of the evidence, and identified as such.

Circular No. 16 practically supercedes General Orders No. 41 from the War Department of date February 28, 1907, entitled "Regulations governing the military transportation over land grant and bonded railroads and the settlement of accounts for such service, with a compendium of United States laws showing the condition of the grants or subsidies, with map and other data, somewhat similar to the Circular No. 16, identified as Defendants' Exhibit 337, and containing at page 42, under No. 50, this entry: "Southern Pacific Company, San Francisco and Portland lines, from junction with Central Pacific Railroad to northern boundary of California," giving then the dates of the statutes and the section 5 of the Act of July 25, 1866, the same as set out in Circular No. 16, and which General Order No. 41 appears to be issued by order of the Secretary of War, J. Franklin Bell, Major-General Chief of Staff.

Defendants' Exhibit 338 is a complete set of forms of requisition made by the United States under this Act of Congress, upon the railroad operating the line from Roseville Junction, California, to Portland, Oregon, and they are known as a Quartermaster's Department United States Army bill of lading, requesting the transportation of property of the United States in three sections; the first the bill of lading proper, the second, a memorandum bill of lading, the third the shipping order. Also a Government Request for Transportation of passengers, Quartermaster's Department Form No. 17. This is only a copy of the form that is used as a requisition for passenger transportation. It is not

valid until it is filled out by the proper officers, and is identical with that used for transportation, but has on it the words in red ink "Copy not valid transportation request." The transportation request is issued by an officer of the army requesting certain transportation of a railroad company, the document being filled out, showing the number of passengers to be transported, and between what points. That document is surrendered to the company's agent, and transportation is furnished, either tickets, or a ticket covering the number called for by the document, the agent accepting the transportation request in lieu of cash. The request is then sent to the general office by the agent, to cover tickets issued by him, and the general office uses that as a bill against the Government for the service. If it is a free service, it is carried on the books of the company without charge to the United States and no bill presented. The three blanks relating to shipment of goods of property, are filled out or issued by a shipping officer, stating the commodity and points between which it is to be carried. That is also surrendered to the company, and used by the company to bill against the Government for such services, and if it is free service it is held in the records of the company and not surrendered to the Government, which is not presented with a bill. If the United States desires to ship a regiment from St. Paul to San Francisco, going partly over bond-aided or land-grant roads, over which the United States is entitled to free transportation, and it is routed in part over non-aided railroads, intermediate or connecting, and reaches Portland over a non-

aided road, or a road over which the Government is not entitled to free transportation, the shipment or movement of a regiment, and a like movement of Government property under this statute, receives free transportation over the road from Portland to Roseville Junction, and if the movement is destined over the non-aided road from Roseville Junction to San Francisco, that is charged against the Government and bill presented, and that part is paid by the Government; possibly not for the full amount which the company would charge for that service, but the Government makes a cash payment; that is, if the Government asks for service over a portion of the mileage that is bond-aided, over which it is entitled to free transportation, and it is a through movement over a part of a line that is connected therewith, that is entitled to charge for and be paid. The traffic offered by the Government at any point in the United States moves over this segment or portion of the bond-aided line, and also over that portion which is free, and it does not make any difference where the traffic originated, or over what roads it comes, if it is Government traffic, entitled to move free over a bond-aided or land-grant road over a portion of that haul, it is carried free. The business does not have to originate at Roseville Junction on the one hand, or at Portland on the other in order to entitle it to free movement.

Whereupon defendants offered and their was received in evidence these four documents marked "Defendants' Exhibit 338," which is hereinafter set out and described and made a part of this statement of the evi-

dence and identified as such.

Whereupon witness further testified that the United States is making these requests continually and has been up to this date, and the company is furnishing under the Act of Congress all transportation requested by the Government.

Whereupon witness, on cross examination, further testified that this transportation commenced in 1887, he believes, when connections were made between the California and Oregon and Oregon and California Railroads. There were a few military posts along the uncompleted portions of the roads prior to the completion of the continuous lines. The company used to have business as far north as Redding on the original California and Oregon Railroad running from Roseville Junction north, and there were a few shipments of property for the Weather Bureau and Signal Service, but the volume of business did not reach the company until the road was opened in the middle of December, 1887. The company commenced to keep an account of the amount of this traffic furnished the Government from the time the service was performed. It was in vogue when he took charge of the work, so that it was kept by his predecessor, but he has no personal knowledge of the time the company did commence to keep a record. He does not know anything about how to compute the amount of traffic of this character that the Government may have lost by reason of the delay in completing the construction of the railroad in accordance with the terms of the granting Act, and it would be difficult to make a computation of that

kind. It is the rule of the company that a record be kept of all transportation, whatever its nature, not only the Government transportation, but commercial, and this is the reason for keeping these records for statistical purposes. They keep a record of the amount paid by the Government for the transportation of mails, and that amounts to a considerable sum each year, on the road from Roseville Junction to Portland. The company is paid for that service on rates made by Congress, based on weight, but he does not recall the amount. He thinks this transportation account is greater than the mail account.

Whereupon, on redirect examination, witness further testified that he became an employe of the Central Pacific Railway Company in 1881, and at that time the Central Pacific Railway Company was operating the line from Roseville Junction towards the north as far as completed, and the Oregon and California Railroad Company operated the road from Portland to Ashland prior to 1887, and was operating the road, as he recollects, from 1882 down as far south as it was completed. He does not mean to say that the first free transportation under this Act of July 25, 1866, began in 1887, when the road was completed through. The company handled or had free transportation, to his knowledge, since 1882, when he went to work on that particular class, that is, as far north as the road was opened, but he knows nothing of that traffic from Portland as far south as it was opened. He had nothing to do with the Oregon and California Railroad Company. The Southern Pacific

Company was not incorporated until 1884, after the Central Pacific Railway Company was incorporated. He has no knowledge whatever of how much business of this kind was moved from 1869 up to completion in 1887 on the Oregon and California Railroad Company. Fort Vancouver is situated six miles from Portland, and Vancouver Barracks are on the Columbia River, and they have been there for a great many years.

Whereupon, on recross examination, witness further testified that it is his understanding there was a post at Vancouver before there was any railroad in there. Vancouver is on the Northern Pacific Railroad Company line. He remembers that the Northern Pacific was completed by Villard before he failed in December, 1883. While the Northern Pacific is a land-grant road, it is not under obligation to furnish free transportation. It is what is called a fifty per cent line, that is, in accepting the grant of lands, the company conceded the right of Congress to make such rates as Congress saw fit, and Congress has seen fit to cut the rate to fifty per cent.

Whereupon it was stipulated that J. A. Ormondy, Chief Clerk of John M. Scott, General Passenger Agent of the Southern Pacific Company Lines in Oregon, would testify substantially the same as J. N. Sherburne on the subject matter of inquiry, other than as to the volume of business with which the witness is not familiar.

Whereupon, F. W. SERCOMBE, a witness called on behalf of defendants, being first duly sworn, testified that he resides at East Orange, New Jersey; is an ac-

countant, and was in the office of the auditor at San Francisco, California, on September 20, 1905, and prior thereto, up to as late as January 4, 1906. His superior or chief officer, part of the time was George Klink, who was the auditor of the Southern Pacific Company and subsequently Charles B. Seger. These statements, Defendants' Exhibit 320, consisting of "Statement No. 1, showing by counties the assessment upon Congressional lands of the Oregon and California Railroad Company from 1891 to 1904, inclusive," and "Statement No. 1-A, showing by Counties the assessment upon Congressional lands of the Oregon and California Railroad Company from 1891 to 1904, inclusive," the first statement bearing date September 20, 1905, the second statement being dated January 4, 1906, were prepared under his direct supervision and instruction, in San Francisco, at the time specified and mentioned on these respective statements. The signature in the lower left hand corner of Statement No. 1 is his signature, and indicates that, to the best of his knowledge and belief, the statements are correct. The facts purporting to be stated, for instance, in the column as to "Taxes Paid" for each year, were obtained from the tax receipts of the company in the auditor's office, showing taxes paid on these lands. These compilations or computations showing average assessed valuation per acre, and average tax paid per acre, were made under his direction. It is his recollection that the figures showing the total acreage in columns, for the various counties, were obtained by him from the tax receipts and added up, and these state-

ments, computations and figures are correct, based upon the tax receipts and the records of the company examined by him at the time. His recollection is that these documents were prepared at the request of the office in Portland.

Whereupon, on cross examination, witness further testified that at the time these statements were made, Charles B. Seger was auditor. Seger did not sign these statements for the reason that he had recently come from Texas and was not thoroughly acquainted with the organization, and for the further reason that witness was in charge of the general accounts of the Southern Pacific Company, which included the so-called land accounts. He supervised the preparation of these statements to the extent of indicating to the clerks, precisely what kind of a statement he desired prepared, the documents from which this information should be compiled, and the manner in which it should be finally turned over to him, for transmission to the person requesting the information. He was asked for certain information and then issued instructions or directions to his clerks to prepare these statements accordingly. He supervised the preparation of the statements. He would check the work against the records of the company, the ledgers of the company, to see that the total taxes paid would agree with the aggregate of the statement, and it is his recollection that he would and did apply this check to the work to see whether the total amount corresponded with the ledger account.

Q. Well, now, for illustration, I call your attention

to Statement No. 1-A, referring to Tillamook County for the year 1902. I see that it states here the acres assessed to be 60,261.39; assessed valuation \$148,420; average assessed valuation per acre \$2.50. It shows right on the face of it that it is not correct. Did you notice that?

A. In what way is it not correct?

Q. Well, there is only one way in which it could not be correct; that is by being incorrect.

A. That the division of the acreage into the assessed valuation does not equal \$2.50?

Q. Yes.

A. Well, I would have to verify that before I could say it is not correct.

Q. Well, you could see that 60,000 acres at \$2.50 would be \$150,000. It is more than 60,000 acres, and the total assessed valuation is \$148,420, and the average is stated there to be exactly \$2.50 an acre. Did you pay any attention to those things to say whether that is correct or not?

A. Not these deductions. They were made mentally or by pencil by the clerk preparing them. Those two columns, though, were from the original tax receipts. A clerk is liable to make a mistake there in carrying out those particular extensions; that information being prepared principally for the person who requested it as to the average assessment and average tax per acre, and in no way affecting the acreage or the taxes paid.

Q. Well, you did not purposely have those made incorrect, did you?

A. Oh, no; no.

Q. There is no reason why it should not have been made correct, is there?

A. No reason at all. There may be a clerical error in making that computation anywhere in the statement.

Q. I also observe here Washington County for the year 1892; acres assessed 22,748; assessed valuation \$22,915, showing average assessed valuation more than \$1.00 an acre, although it is stated here to be 58 cents.

A. Yes.

Q. Have you any way to account for that?

A. The same thing applies. It may also be accounted for by a typographical error in the stenographer copying the figures.

Q. The statement shows on page 1, if I understand it correctly, average of 2 cents and 7 mills tax paid per acre per year for the years 1891 to 1904, inclusive. Is that correct?

A. Yes, 2 cents and 7 mills.

Q. So that the total tax paid during those fourteen years average per acre is 37 cents and 8 mills, or fourteen times 2 cents and 7 mills?

A. Yes, that is the average.

Q. And, if I understand you correctly, these statements are based entirely upon your ledger account show-

ing tax account, taxes paid, and the receipts received each year from the local county officers?

A. County officer, whoever he was, yes.

Whereupon, on redirect examination, witness further testified that he is now employed in the office of the controller of the Southern Pacific Company at New York, Mr. Mahl, and has been continuously in the employ of the Southern Pacific Company during the times with reference to which he has testified. At the time these tables were prepared he was in San Francisco; he left San Francisco after the fire of April 18, 1906.

Whereupon, A. N. HOFFMAN called as a witness on behalf of defendants, being first duly sworn testified, that he is clerk in the Land Department of the Southern Pacific Company and has been in the employ of the Company two and a half years as clerk, on the records in the office and examining records in the United States District Land Offices. His work in United States Land Offices has been abstracting entries that bear adversely to the Company in different land offices in California, Nevada and Roseburg, Oregon. He has made an examination of the land in the Roseburg land office for the purpose of ascertaining the acreage of public lands not entered within the limits of the grant of July 25, 1866 and May 4, 1870. Although he did not enter all the work on the map, he checked it back with reference to the map. He verified "Defendants' Exhibit 339" in his examination of the public records of the Local Land Office of the United States at Roseburg. The red squares

on this exhibit show the vacant public land as to the even numbered sections within the limits of the grant. These red squares circled with green show the land within the forest reserves, the limits of forest reserves, and those with other circles show lands withdrawn for power sites, Fisheries Bureau and Indian Reservations. The memorandum with this map showing the estimated acreage of public lands in the Portland and Roseburg, Oregon, Land Districts of 1,012,960 acres within the limits of these grants as public lands not entered in the counties of Multnomah, Washington, Tillamook, Yamhill, Polk, Clackamas, Marion, Lincoln, Benton, Linn, Lane, Coos, Curry, Douglas, Josephine, Jackson, and Klamath, is, so far as these counties lie within the United States Roseburg Land Office District, correct on an estimated basis. In making the investigation, he worked from the tract books and from the plats in the District Land Office and those that showed vacant, he marked upon some smaller plats, that he had, and used that data from original search of the public records and transferred it to Defendants' Exhibit 339 which is correct according to the search which he made. Mr. Wall, he believes, assisted in the preparation of this data on this map and statement with reference to the lands situated in the Portland United States Land Office District and he and Wall worked together in connection with the preparation of this map. Wall did the work in the office and witness transferred Wall's work on to this map; that is to say, Wall did the work in the Local Portland United States Land Office, searching the records there for the data

and furnished him with data, and witness transferred it to this map in connection with the work that witness had personally done in the Roseburg office. These two districts covered all those counties mentioned in this list and a little more, he believes, up north. The table covers all of the vacant lands within the limits of the grant in these two land districts.

Whereupon defendants offered and there were received in evidence these Exhibits marked "Defendants' Exhibit 339" and "Defendants' Exhibit 340" to which complainant objected as immaterial.

Whereupon it was stipulated that the Wall referred to by the witness would, if called, testify as to said exhibits the same as witness Hoffman and that the testimony of the two witnesses would cover both exhibits, excepting that the testimony of Wall would relate to the land situated in the United States Land Office Portland District, which exhibits are hereinafter set out and described and made a part of this Statement of the Evidence and identified herein as such.

Whereupon L. F. STEEL, recalled as a witness for defendants, further testified that he had custody of the corporate records of the Oregon and California Railroad Company under W. W. Cotton, Secretary of that Company up to January 15, 1912, when Cotton resigned and his successor was elected. He has prepared a summary showing the stockholders, number of shares, the date of the election of directors, president, vice-president and secretary from the earliest period of the Oregon and

California Railroad Company down to January 15, 1912 and "Defendants' Exhibit 341" is the statement prepared by him from the records of the Company and is a correct summary of the facts as shown by the corporate records of the Company and was prepared at the request of Mr. Townsend, representing the United States in this suit.

Whereupon defendants offered and there was received in evidence "Defendants' Exhibit 341" which is hereinafter set out and described and made a part of this Statement of the Evidence and identified herein as such.

Whereupon JOSEPH GASTON, recalled as a witness on behalf of defendants testified that he is acquainted with the work which the Oregon Central Railroad Company East Side, known as the Salem Company, did by way of construction, grading etc. of its railroad from East Portland south in 1868 and prior to April 1869. They were in a contest with the Salem Company with respect to the land grant made by Congress in aid of the construction of the railroad from Portland to the California line and it was the interest and purpose of himself and associates to delay the East Side or Salem Company in every way they possibly could so as to exhaust their resources and prevent them from being in a position to have any claims or chance to get the land grant for their Company. In this work of opposing them, he and his associates, incited opposition among the land owners to give them the right of way or asking exorbitant prices for the right of way and they pre-

vented them in every possible way they could, from getting labor, and did all they could to break down their credit and stir up law suits against them about their right of way. For the purpose of ascertaining the amount of actual construction work and the extent of the grading and other construction work between East Portland and Salem, he went over the line once with the superintendent of construction of the Oregon Central Railroad, or as it was called then the West Side. Afterwards this superintendent M. S. Hart went over the East Side line several times as many as three times, he thinks, to ascertain how much work the East Side Company had done and where it was and what sort of work it was and what probably were the expense in doing this work, his object being to ascertain the resources and to exhaust them, if they could. Prior to February 1, 1869 and during 1868, including January, 1869, as nearly as he could estimate it, there was work done all the way along the line of the Oregon Central of Salem, East Side, from East Portland to within five miles of the City of Salem. He thinks there was one patch of work on the south side of Lake Labish, and it was in places all along, owing to the disposition of farmers to give right of way and the facility for making a showing of work done, and his associates had Mr. Hart, the superintendent of the West Side Company make an estimate on his last trip, as to the amount of what Hart thought the whole amount of money the East Side Company had expended, that is supposing that they had paid for it all and Mr. Hart put the amount at \$150,000.

Hart's estimate was made in February 1869, and he thinks that Hart's estimate was reasonable. He and his associates and everybody else knew that the East Side Company was not connecting up its work, that it would not count on the first 20 miles of railroad but was work that would count in the construction of the line.

Whereupon the witness further testified as follows:

“Q. Do you know anything about the pay-roll set out at page 130 of the printed record in the case of *Holladay v. Elliott*, which purports to show a correct footing of the pay-rolls and number of men employed on the Oregon Central (East Side), commencing with September, 1868, down to and including January, 1869, and for the period up to September 12, 1868, which foots up, according to this table, \$49,113 from September, 1868, to and including January, 1869, and \$81,455.31 prior to September 12, 1868, giving it by months, the number of men employed in each month, and the rate per month excepting that prior to September 12, 1868, which is given in a lump sum and referred to in Mr. Elliott's testimony as \$81,455.31 in that case; and all aggregating \$130,568.31, money disbursed on pay-roll account for construction? Have you any knowledge of that, or as to whether that is fairly accurate?”

A. I think these old pay-rolls were submitted to me in some litigation between *Holladay* and *Elliott*, or *John Nightingale* and *Elliott*—I could not be certain which; but the pay-rolls were submitted to me as to my opinion of their reasonableness or honesty, and anything else I

might choose to say about them. I could not identify them now, but if they are the same payrolls, my opinion at the time was that Elliott had spent the money that he claimed he had.

Whereupon on cross examination witness further testified that there was no construction work prior to April 16, 1868 by either the East Side or West Side Companies. They commenced about that date, the West Side Company on one day and the East Side Company on the next day. The East Side Company projected its line on the East Side of the River where for the most part the expense of grading was much less than the expense of grading the line on the West Side road during the first few miles.

Q. Mr. Holladay and his associates spent a great deal of money in that political fight, did they not?

A. Yes, I think they did.

Mr. Fenton: Objected to as immaterial, and as not cross-examination.

A. Holladay admitted to me he had spent considerable money.

Mr. Fenton: It already has been testified to in direct by this witness called for the Government.

Q. And do you not remember, Mr. Gaston, that after the fight was taken into the Legislature and Holladay finally won out and got his resolution of October 20, 1868, adopted and approved by the Governor, that both sides then went to Washington to fight the next

battle there, which finally resulted in the act of April 10, 1869?

Mr. Fenton: Objected to as not cross-examination, and as incompetent, and as impossible for the witness to state what caused the act of April 10, 1869.

Q. You remember that?

A. I remember that both parties sent agents to Washington. Mr. Simeon G. Reed went on behalf of the West Side Company; and John H. Mitchell and Stephen F. Chadwick—I think that Mitchell went first, and that Chadwick joined him afterwards, or he was in Washington, and he helped in the fight there—helped Mitchell.

Q. Didn't Mr. Holladay himself go East?

A. I think he was—I think he was in the East; whether he was at Washington or not, I don't know.

Q. Well, now, isn't it a fact that after that resolution of October 20, 1868, was passed by the Legislature of Oregon both sides suspended construction until the fight in Congress had been disposed of?

A. Well, not immediately. I know that we kept our forces at work for a while, and I think they did theirs, too. But it was suspended by the West Side—I know Captain Ainsworth, who was putting up money for us, declined to put up more money until he saw the result at Washington; but we still did keep some men at work, and my recollection is that they kept some men at work, too, but how large a force, I couldn't say.

Q. Well, now, Mr. Gaston, don't you remember that Mr. Elliott came to Oregon in April, 1867, with \$15,000 that he had gotten from the Huntington crowd in California, for the California end of this grant, and that that was substantially the extent of his financial resources?

Mr. Fenton: Defendants object to that as incompetent, and as hearsay.

A. No, I couldn't say what his resources were. I only knew by hearsay that he had sold out his interest in the California end of it to the Huntington crowd for \$15,000, I think, as I recollect. If he had any other money, or if that was all in money, I don't know.

Q. And do you not remember that after he came here in April, 1867, and organized the last East Side Company, he immediately entered into a contract with A. J. Cooke & Company, which you have heretofore testified was simply Elliott acting under a fictitious name? You remember that?

A. Oh, yes, that was my information. I couldn't tell you how I found it out, but that was given out by their side, that they had made a contract with A. J. Cook & Company. And that circulated sometimes as J. Cook & Company. Jay Cooke was the great capitalist promoter of the Northern Pacific at that time.

Q. Now, do you know that Mr. Elliott immediately went East, and spent the year 1867 trying to raise money on the bonds of his East Side Company, and you were trying to block him in the meantime by sending circulars

to all the bankers of the East, exposing what you contended to be an attempted fraud on the part of Elliott?

A. Yes, I remember that. How long Elliott was in the East about that, I couldn't say. But I know he went East, and that I sent those circulars there to bankers, Jay Cooke, and the Railroad Journal, and everybody else—I got a Bankers' Gazetteer, and sent it to all of them.

Q. And do you remember that there was no construction work during the year 1867 by either the East Side Company or the West Side Company, both companies being engaged in an effort to raise money?

A. Yes, sir.

Q. You were raising money here in the West, in Oregon locally?

A. Yes.

Q. While Mr. Elliott was in the East endeavoring to raise it there?

A. Yes.

Q. Now, don't you remember that, as the total result of Mr. Elliott's effort to raise money in the East, all he brought back was a couple of locomotives, which he brought around by way of the Horn, landed them at San Francisco, and then sold them to the Central Pacific, and brought to Oregon as his only financial resources the money that he got from the sale of those two locomotives?

Mr. Fenton: Objected to as hearsay and as incompetent.

A. Well, I know that was the talk, but I don't know that that was all the money Elliott had. I know that before—I think before they sold the locomotives they got \$20,000 from Barney Goldsmith here in Portland.

Q. Do you know of any other resources that they had, except the \$20,000 they got from Mr. Goldsmith and the money that they realized from the sale of the locomotives?

A. I only know from what men have told me, that is to say, that I would know personally, except hearsay, Now, they got \$1,000 from Sam Brown, up there in French Prairie; and they got \$1,000 from another man—I tried to recollect his name there, but I couldn't—he is an old friend of mine; and they got money from other people there, that it was never reported, simply because it was a general opinion among people on the East Side, a great many people, that Elliott's concern was not sound, but they were willing to put up money to help build a railroad, if the money was spent, believing that finally there would be a railroad, and that it would not be lost, and that it would help out the fight against the West Side people. Now, that is the way Sam Brown put it to me, and this other man. And each one of them were wealthy farmers, and they put in a thousand dollars apiece that they told me about; and they said others had, but I don't know who the others were. And how much money they raised in that way, I never could find out, of course.

Q. Well, now, isn't it a fact that, after Mr. Elliott started construction on April 17, 1868, he had not proceeded more than sixty days before he was unable to pay his men, and that you used that to embarrass him—you took advantage of that circumstance to embarrass them in the further prosecution of their work?

A. Yes, they missed on a pay-day, and we made all the capital we could out of it against them.

Q. Now, that was the time he enlisted the services of Holladay and brought Holladay to Oregon, or anyway that Holladay came to Oregon?

A. Well, now, I couldn't say about that. Now, they got that money from Barney Goldsmith, and they spent it along. I think Goldsmith put the same sort of condition upon them that the farmers of French Prairie did—that the money must be spent on the road, and not on lawyers; or, as they called it, in lawsuits or that sort of thing. They were willing to give money to help build a railroad, but not for lawsuits. And I couldn't tell you now whether the Goldsmith money was spent before the locomotive money and these different resources—I couldn't tell you. Of course, they would not—it was not to their interest to let out anything that they could keep back.

Q. But you do remember that they were practically "all in," as the expression goes, financially early in their work, and before Holladay came to their assistance?"

A. Oh, yes. And we thought we had them beat

several times. But it was just like the man who thought he had scotched the snake—why, they would curl up again, and start in.

Q. Now, as a matter of fact, Mr. Gaston, don't you know that their corporate minutes show that they were expending a large part of this money that they were getting from the various sources for attorney's fees and the expenses of the fight with you, to try to get the land grant away from you?

A. Well, they had to spend something that way; but I don't think that Mitchell got—he was their principal fighter—I don't think he got much money until Holladay came in; and then they struck Holladay for all the money they could get out of him.

Q. Do you know what Holladay's resources were?

A. I don't know about Holladay's particular resources just at that time; but I know from the statement of men in the East how he got his money to commence business on the Pacific Coast, and whether he had any left for this railroad enterprise or not, I don't know.

Q. Well, don't you know, Mr. Gaston, from your observation at that time and what you learned afterwards, that Mr. Holladay had gone broke at San Francisco and borrowed money from Latham, that Latham had advanced money to him, and finally financed his last venture here in Oregon, with the hope that he might pull out and repay Latham the money that he had borrowed from him at San Francisco?

Mr. Fenton: Objected to as immaterial and not cross-examination.

A. I don't know. Of course, I don't know anything about that certainly. I only heard reports that the money that he beat Russell, Majors & Waddell in Missouri out of—four or five hundred thousand dollars—he had put into steamships out here, and then by his reckless way of doing business he got in debt, and then he had to mortgage his steamships to Latham for money.

Q. Well, didn't you understand that the only money he had to use here in Oregon he got from Latham?

A. Well, I couldn't say that I understood just that; but that Latham was financing his speculations, and that in the end, why, he sent that man—I have forgotten his name now, a friend of his—to Germany to sell the bonds. Latham put up the money to send the people to Germany to sell the bonds. Holladay told me that himself.

Q. Well, now, this first year, 1868, that the East Side Company was engaged in construction, you have told me the fact—it is a fact, is it not, Mr. Gaston?—that they simply put in grading work, which could be done with the least expense, so as to make the greatest showing in the way of mileage?

A. Yes, they did that. They spent their money where it would make the biggest show.

Q. They would take the leveler stretches of the road, where the grading would be inexpensive, and throw in some grading?

A. Yes. And take a side hill and run up there, by New Era there, they could take the shovels and go along and shovel out over the bank there, and make a showing of track for quite a ways without a great deal of money. They did that wherever they could.

Q. Now, about how many miles of grading did the East Side Company do during the year 1868, if you should connect it up and make it continuous?

A. Oh, they must have done—in the way they did it, they must have done considerable over thirty miles.

Q. Well, now, don't you think that \$5,000 a mile would be pretty expensive for that kind of grading that they did?

A. Yes, I think it would; but they spent money on other things, you know.

Q. What other things?

A. Well, they had a sawmill, and they had a pile-driver outfit, and various things like that. And then they had to keep up their organization, and those fellows require money. They had to have a superintendent and foreman, and all that sort of thing.

Q. Well, you could grade that tract from Portland to Salem, even as it is graded now, with \$5,000 a mile, couldn't you?

A. No, you couldn't do that as it is graded now.

Q. Haven't you included, unintentionally, Mr. Gaston, some of the work that was done in the year 1869? Haven't you got the two years confused in your mind?

A. No. We was figuring on, you know, the session of Congress that came in—we was figuring on what sort of a showing could be made there at Congress.

Q. Well, now, don't you remember that, even after the East Side Company had beaten you in the Legislature and secured the resolution of October 20, 1868, and had again beaten you in Congress and secured the act of April 10, 1869—that even then, with their improved credit, it was all they could do to complete twenty miles by Christmas day, 1869?

A. Oh, I know it was. I know Holladay was exhausted, and they had a whole lot of trouble to get this little piece of road right over here in East Portland. They were awful hard up. And if I had been as smart as I ought to have been, I could have still beaten them. I had a chance to have got money from London, but I submitted the whole thing to Captain Ainsworth, who had put up the money for our side, and he turned down the proposition. I know they were hard up even after they got the action at Washington.

Whereupon witness further testified that he does not think that the East Side Company did more work in 1869 than it did in 1868, except buying of iron, which was a big item. He thinks it was 50 pound rails they put in but he cannot tell where they got the iron. The

iron was brought across the continent on the Central Pacific to San Francisco and then brought up in steamers. In the year 1868 the West Side Company did not do as much work as the East Side Company, by way of construction. He did most of the work for the West Side Company himself with a little party of men and he thinks they had about three little gangs working between the top of the ridge near Portland and Hillsboro. They spent a large part of their resources on some of these heavy grades. The bridges were the biggest items on the twenty six-miles of road from Portland. He could not say whether the East Side Company put any bridges in in 1868. He thinks the East Side Company had a sawmill installed up at, or this side, of New Era before the year 1869. He does not know what representations Mr. Reed made to Congress upon the amount of work that had been done by the East Side Company, in these pamphlets submitted to Congress. Witness issued a pamphlet explaining the unsoundness and crookedness of the organization of the East Side Company and that was circulated. He thinks Mr. Reed probably gave each member of Congress a copy of that pamphlet. He would not now change any statement that he had made in that pamphlet. He would not say now that he had not strained a point a little to depreciate the East Side Company before Congress, because that was part of the game, to belittle their work all they could. He had seen the pamphlets, the East Side Company issued and they pursued the same tactics. It was just about the same thing. Each side was trying to

belittle what the other had done and to exaggerate what his side had done. He fought them with the same weapon. He did not intend to make a downright false statement, he had some friends in Congress that he would not have liked to have caught him in that. Sam Cox and John Bingham from Ohio were very good friends of his and they had known him personally from boyhood. He did not want them to think any the less of him. He thinks that the land Holladay got on the East Side was entirely donated to him and knows that old Gideon Tibbitts gave a tract of land this side of the car shops and thinks that the land Holladay got was given to him. He does not recollect now of the East Side Company buying the lands. Witness thinks that if, on March 19, 1870, Holladay and his associates had expended \$800,000 on the east side road, there must have been a great deal more expended during the year 1869 than during the year 1868, but he don't know whether they expended any \$800,000—that is just a mere assumption. He remembers that at the time of the organization of the East Side Company, under the name of the Oregon and California Railroad Company, the documents relating to that transaction, all of which are introduced in evidence, show, or purport to show, the expenditure of \$800,000 by Holladay and his associates prior to that time, but whether Holladay and his associates had really expended that, he has no knowledge and would not say that the statement of expenditures of \$800,000 by Holladay and his associates or its pay rolls were correct. He could only give his opinion

of the value of the work done. He does not believe that Holladay and his associates ever spent \$800,000 at that time and he would not give any credit to Elliott's payrolls because they are payrolls, because he knows from the character of the man that he might make up any sort of a payroll. He could only judge from the appearance of the work done. In judging as to the extent of the work done by the East Side Company he is relying upon the reports of Superintendent M. S. Hart who was a better judge of that than he was. Hart was an old railroad grader and he put more confidence in Hart's judgment than in his own. At the time he saw the work it had not been anywhere near completed for that year. The East Side Company did a great deal more work after witness saw it than they had had done. It was about three months after the East Side Company commenced this work that he went over it, which would be sometime in July and as to what work was done after that, he has no personal knowledge, but is giving the information gained from Mr. Hart. He and Hart went along and saw where the line of the East Side Company was and they had worked a good many places and then Hart told him how much more they had done made his reports to him personally, so that he and Hart had knowledge of how the East Side Company was getting along. At the time witness inspected that amount of work there, he does not think there had been more than \$40,000 spent and as to anything that was spent after that he has no personal knowledge but relies simply upon the reports of Hart to him, both as to

quantity of work and the probable amount that had been expended in connection with it, including the character of the work.

Whereupon on re-direct examination witness further testified that he went with Hart on one of these trips checking up this work. They went over the work to see the line of the East Side Company and how it was doing the work and where and getting all the information they could about it. They went as far south as Gervais, clear to the end of the work, and they had a party of men cutting out timber beyond Lake Labish this side of Salem, about 5 miles. He and Hart went over this work sometime in July, the exact date he could not say. He was up to Salem in September or October, 1868 and this was July 1868 when he and Hart went over the work. At that time they had cut out the timber beyond Lake Labish, of course that was part of the grading work. There was grading in French Prairie north of Lake Labish about the time he and Hart went over it, along about Gervais. Hart is dead. Hart was superintendent of the Oswego Iron Works for several years. The West Side Company took him from that work and he was then on construction work of the Oregon Central, West Side, after that, when he made personal reconnaissance of the line of the East Side Company. Hart worked for the Oregon Central, West Side, for a number of years and completed the line from Portland to Forest Grove, laid the track and everything. Witness as an officer of the Oregon Central, West Side, acted upon the report of Hart as superintendent

and engineer as to the value of the work done by the Oregon Central, East Side, in part in his calculations but witness had his own personal views up as late as July 1869. He does not think that he, witness, went over the line after that, towards Salem from East Portland, up as late as October, 1868, although he passed through that country on the old stage road which passed pretty close to this work and he could see from the stage line the work at several points and that the work was going on while the Legislature was in session. The East Side Company was making quite a showing in June, 1868. There was an election at which the respective friends of the two Oregon Centrals had a spirited contest as to who should win the legislature. All through the Willamette Valley people took sides. At that time the election to the Legislature took place in June. Milton S. Latham was president of the London & San Francisco Bank, Limited, a man of financial standing and good reputation as a financier. He had been United States Senator from California and was quite a successful man. He raised the money to build the railroad in California. The Oregon Central, East Side, built a lot of trestle work in East Portland along what is now East First Street and it had graded the track on the ground there and it built the trestles after it got the action of Congress.

Whereupon witness further testified as follows:

Q. I show you, at page 95 of this printed brief of counsel for Elliot in the case of Holladay and Emmet

v. Elliott and others, in the Supreme Court of the State of Oregon, January term, 1879, a picture which purports to be "Defendants' Exhibit No. 11. View of Oregon City—Willamette Falls. Railroad graded under Elliott in 1868. Referred to in P. Buckley's testimony," and will ask you to look at that, and state if you recognize that as a part of this grading done by Elliott in 1868, as shown by that exhibit, and as a picture of Oregon City and the falls, as they looked in 1868.

A. Yes, that is a very good picture of matters about Oregon City at that time; and that is where the track was located there along the foot of the bluff.

Q. That is about where it is now, isn't it?

A. Yes, the same position; and it shows the track here. Away up there is what was called "The Basin." You see, the steamboat men built a bulkhead around the lower end of the cliff—the cliff across the river—and made a basin there, that would bring the steamboats down there where they could shoot the freight right down to the lower boat. That was before the building of the locks and canal.

Mr. Fenton: I offer that exhibit, with the promise to still further connect it with further testimony, and ask leave to take it out of the book or to substitute a duplicate of it from another brief. I think I have another one or can get one; and ask to have it marked "Defendants' Exhibit 367."

It may be stipulated that photographic copies of these exhibits may be substituted in lieu of the originals?

Mr. Townsend: Yes, that is all right. I desire to ask a question with reference to the admissibility of this exhibit.

EXAMINATION BY MR. TOWNSEND.

Q. Are you certain, Mr. Gaston that the track was actually laid in 1868?

A. No, I wouldn't say that; but the grade is on there.

Q. As a matter of fact, I think your former testimony was that you think the track was all laid in 1869, don't you?

A. Yes, I think the track, the iron—the ties and iron—was laid in 1869.

Q. Put down in 1869?

A. Yes.

Mr. Townsend: With that qualification, I have no objection to the admission of this exhibit, although I do not concede that this exhibit was taken in 1868, or that the track was laid as shown in this exhibit in 1868; but will concede, on the faith of Mr. Gaston's testimony, that the grading was done as shown in this exhibit, with the exception of the laying of the ties and rails.

Mr. Fenton: Counsel for defendants desire to state that "they do not know whether the iron was laid in 1868, but do not wish to admit that it was not—leaving that to the testimony."

Whereupon defendants offered and there was re-

ceived in evidence "Defendants' Exhibit 367" which is hereinafter set out and described and made a part of this Statement of the Evidence and identified herein as such.

Whereupon witness upon re-cross examination further testified that on this trip in July, 1868, made by him and Mr. Hart, he found stretches of grading at different points along the line. They must have had eight or ten different bunches or crews of men, had one in each place and they were separated by ungraded sections of the road. Some of them had graded maybe a mile or two or more and so on—it varied. He could not say that there were stretches of five or six miles where there had been no grading at all, but there might have been some places, one place as much as that, but they were scattered all along the road, all along the line. As a matter of fact they were doing all they could to get financial support on the East Side all along the line. They were trying to get local support and to create public opinion in their favor and political opinion, in view of the approaching election and all that sort of thing and they were distributing their work with all these things in view. There is no question about that. Their work in the vicinity of Salem was undoubtedly for the purpose of influencing the acts of the Legislature and the people of Salem. They got no support from the people of Salem. They got no subsidy from the people of Salem but got promises of land. They did get land there for a station, but he does not think they got any money. They got money from big farmers, wealthy men, along the line. Brown was quite a wealthy man and there was quite a number

of others in French Prairie who were wealthy, as wealth went in those days. He does not recollect of ever having any conversation with Holladay or Mitchell or any of the people connected with the East Side Company about the statement that the East Side Company made before Congress, heretofore introduced in evidence.

Whereupon GEORGE H. HIMES, called as a witness on behalf of defendants and being first duly sworn testified that he is Assistant Secretary of the Oregon Historical Society and has been an officer of that Society since its organization, December 16, 1898. He has been secretary of the Pioneer Association of Oregon for 28 years and has lived in Oregon over 59 years. He was in business in Portland in 1868, as a job printer and was in Oregon when the Oregon Central Railroad Company, East Side, commenced construction in East Portland on April 16, 1868, and was present at the breaking of the ground on that day. He had occasion to go from Portland to Salem by stage during the summer of 1868, in July and in passing along the stage road of that time came in sight of the track where the line of the East Side Company was laid out and more or less of grading was being done and groups of men were scattered along from place to place covering a distance of several miles. These extended at that time, as near as he can recall somewhere probably between Hubbard and possibly as far south as Woodburn, that is, what is now known as Woodburn. Sam Brown's place is in the vicinity of what is now called Gervais, about two miles distant and there was grading in the vicinity of Sam

Brown's place. He remembers that, because he happened to stay there all night and knew Sam Brown very well indeed. He did not go off the stage road, but just observed the work as he went along, observed the road, the grading condition all in sight of the stage road at all points. This was along about the middle of July, or the first of August, 1868. There was no particular circumstance that fixed that date in his mind. He simply had occasion to go to Salem and had no other way of getting to Salem on a hurried trip at that season of the year, except by stage. The boats were going, but quite often it would take a much longer time to go by boat than by stage. The bars in the river frequently interfered. He remembers once he went and it took him two days to go by boat from Portland to Salem. The event of breaking ground for this East Side Railroad on April 16, 1868, attracted a great deal of attention because it was a movement, or the beginning of the movement, which led the people of that time to pay a good deal of attention to it. It was practically the first railroad. There was a movement the day before on the West Side of the river and there was a starting point of railroad construction. At that time there was no other railroad in Oregon aside from the Portage Road between The Dalles and Celilo and with that exception this was the only railroad in the State commenced. The first settlement was made by Young, in Oregon in 1834. There was Jason Lee on the East Side of the River, ten miles north of Salem, and Young on the West Side of the Willamette River, in the vicinity of what is now

Newburg. Young got there probably a little earlier than Lee, although both arrived in the same year, 1834. That, is the American settlement he refers to. Commencing with the immigration of 1834, which was the largest up to that time, Oregon began settling pretty generally through the Willamette Valley, especially in the vicinity of Hillsboro, in Washington County, and along up the Valley. Commencing 1843, largely in Yamhill County, in the vicinity of Lafayette and McMinnville, 1844 and 1845. W. T. Newby who came in 1843, settled upon the townsite of what is now McMinnville. Between 800 and 1,000 people came in the immigration of 1843, not all adults. There were a little short of 300 men capable of bearing arms who came in that immigration. There was no attempt made in those early days to make any record of the women and children, but he has added enough to the list of women and children so that it aggregates now the names of about 800 all told. Considerable immigration came in 1845, which must have been about 3,000. They settled adjoining those that had already settled—the land was not taken up consecutively, that is, continuously—there were stretches between these settlements that were already made, where others followed. The first settlers, settled along the water courses largely and followed the streams, and the second lot of settlers would settle just next to them, adjacent to water courses. The next large immigration was in 1847, and was probably about the same as that of 1845. There was a large immigration in 1849, but a large part of that went to California. The

discovery of gold on January 19th, 1848, and the information respecting that, got back in to the eastern part of the country the latter part of that year and the spring of 1849 brought out great numbers of people. A goodly number came into Oregon, but the number in proportion to those that went to California was very small. The immigration of 1852 was from 25,000 to 30,000, that is those who came across the plains in the year 1852. The proportion of men coming in that year was much greater than any other year before or afterwards. From his investigations so far, the proportion of those who came into Oregon would be about 10,000 out of the 30,000. They settled just adjacent to these settlements already made, and broadening out from the water courses, from the river towards the foothills. Up to 1852, they took their land commencing after the passage of the Donation Land Law, September 27, 1850, under that law. All claims prior to September 27, 1850, were taken up under what might be termed the land law of the Provisional Government, that is squatters' claims, afterwards perfected donations. There was no large immigration after 1852. There was not much of an immigration in 1865, especially in the Willamette Valley. There was considerable immigration in 1862, 1863, 1864 and 1865 in Eastern Oregon.

Whereupon witness further testified.

“Q. I will call your attention to Defendants' Exhibit 259, which I would like to have you look at. It shows a yellow field in the Rogue River Valley surrounding Medford, where I am now pointing, and a

yellow field in the Umpqua River Valley surrounding Roseburg, and from there on through to Oakland north, and then beginning south of Cottage Grove and all up through Eugene, Junction City, Corvallis, Albany, Salem, Oregon City and Portland. This yellow field shows lands that were lost to the railroad company within the limits of the grant, either by being taken under the Donation Land Law, or as in the Oregon Central Military Wagonroad grant along the Middle Fork of the Willamette, and the Coos Bay Military Wagonroad grant along the Umpqua, and other public land laws by which the railroad grant was lost in that limit. Where with reference to that map were the main donation land claims situated?

A. Well, they were all through from Portland southward as far as to the Calapooia Range, and then there were quite a number of settlers went into Douglas County, what we know now as Douglas County, in the vicinity of Yoncalla and Roseburg, in 1849, '50 and '51, and extended as far south as Jackson County, or Rogue River Valley, as early as 1851, '52 and '53.

Q. Then, as I understand you, Mr. Himes, the oldest settled portions of Western Oregon were in the Willamette Valley and the Umpqua Valley and the Rogue River Valley?

A. Yes, sir. Of course, there were a few settled over at Port Orford in 1851, and there were some settlements along in the mountains—not in the mountains, but across the mountains, on the ocean side of the Coast Range.

Q. These were chiefly on streams?

A. Yes.

Q. And watercourses?

A. Yes; but on watercourses that had tributaries to the ocean; "some of the inlets or bays."

Whereupon, on cross examination witness further testified that these donation claims had all been taken long prior to 1866. No donation claims were taken, he thinks, later than 1855. It was modified by cutting down to one-half, the number of acres that could be taken under the donation land law. In a general way he thinks that the situation of these donation claims and their location and extent, were well known to local people in 1866 and from that on, so that the parties who secured this land grant for the Railroad Company, he thinks, well knew or must have known, the extent to which the lands had been previously settled upon. His connection with the job printing office commenced July 26, 1865, and was continuous from that date up to January 9, 1899. The original firm name was Carter & Himes. In a general way he knew of the railroad fight between the East Side and West Side Companies and was here while that was going on, and some of the literature with reference to that was printed in his office. He remembers in a general way, after Holladay came and became identified with the East Side Company that the matter was taken into the legislature in the fall of 1868, resulting in a resolution rescinding the designation in the year 1866, of the West Side or Gaston Company.

Whereupon witness further testified as follows:

Q. Now, do you remember after that that the matter was taken before Congress, and was a matter of discussion in Congress and before the committees of Congress, until the passage of the act of April 10, 1869?

Mr. Fenton: Defendants object to that as necessarily hearsay as to this witness. He could only tell what he had read in the newspapers or heard others say.

A. I remember in a general way about that from the public press.

Q. Well, you know those historical facts just as well as you do the historical facts Mr. Fenton has been asking you about, don't you, Mr. Himes?

A. Yes, sir.

Q. As to the settlement of Oregon and all these historical facts? That is true, isn't it, Mr. Himes?

A. That is true, yes.

Q. Now do you remember that in November or December, 1868, the East Side Company had a pamphlet printed by you, which was afterwards used in the controversy in Congress?

A. It was not printed at that time. It was printed in the following year—1870.

Q. In 1869, you mean?

A. No, I think not. It was not printed until 1870. I worked all day—set the whole business up myself with my own hands, did the press work, and I worked

night and day on that proposition some little time; and among other things I worked all day on the 4th of July. It couldn't have been in 1869. I think it was in July 1870 before that was printed. That is, now, the pamphlet I refer to gives what purports to be Elliott's side of the whole controversy.

Q. Well, now, you have the wrong pamphlet in mind. This was a pamphlet after Mr. Elliott's,—

A. Well, the pamphlet I have in mind would be a pamphlet I suppose hard on to one hundred pages. I have a copy of that pamphlet.

Q. This pamphlet that I refer to was printed before Elliott's connection with the company was severed.

A. Oh, I see.

Q. And before his controversy with Holladay arose; but has reference to the controversy between the East Side and West Side Companies. Now, I will show it to you, and see if you can recall it.

A. I rather think that is the pamphlet that Walling printed.

Q. No.

A. In looking this over, I see it was not the pamphlet I had in mind.

Q. Here is the resolution at the close of it.

A. This is a short, small pamphlet as compared with the other.

Q. Here is the resolution that goes with it, which

shows that, "At a regular meeting of the Directors of the Oregon Central Railroad Company, held November 25th, 1868, the following proceedings were had: 'On motion of Mr. Ellsworth, the foregoing statement of facts was unanimously adopted by the Board and the President and Secretary were instructed to officially sign the same, and attach the seal of the company thereto.'

I. R. Moores, President.

Saml. A. Clarke, Secretary."

A. I remember this pamphlet very well.

Q. Now, don't you remember that that was printed after the fight was concluded before the Legislature in Oregon here in 1868, and before the fight was concluded in Congress?

A. Well, I couldn't say. I remember the printing of that pamphlet as to its relation to the fight that was going on. Of course, I don't know that I have any recollection about that at that time, but, of course, it must have been by the showing of the date.

Q. Do you remember who had you print that?

A. I am not sure, but I think that—of course, Mr. Carter was the senior partner in the office, and he knew Mr. Moores very well, and he knew Mr. Ellsworth very well—Strictly Ellsworth—and my recollection about it is that the arrangement for printing was concluded between Mr. Moores and Mr. Ellsworth; and I was there, of course, as a partner, but was busy about other mat-

ters in connection with the office; and I have no distinct recollection about this matter, any further than that the copy and everything was turned in by those men, and then, of course, I did my work in connection with the printing of it; and as far as the business end of the transaction was concerned, I had no special thing to do with it; although in a great many cases—Mr. Carter was out of the office a good deal—I took in work; but in that particular case I never met Mr. Moores or Mr. Ellsworth up to that time.

Q. And is Mr. Carter alive?

A. No, he has been dead a number of years.

Q. Would there be any way in which you could ascertain the date that that was printed by you people?

A. Well, if you give me the date I will make a memorandum of it. I am not sure—I think, however, that I can tell.

Q. The date of the resolution of the Board of Directors of the Oregon Central Railroad Company in which it was directed that it be signed is November 25, 1868, and I therefore assumed in my former question that it was printed after that time. We have other evidence that it was in existence early in 1869, and I just wanted to see if you could not tell—

A. Well, I think it is possible that I can determine that date, although it might take me some time. I believe that I have the account books of the firm of that time. They would be stowed away among a good deal

of other stuff, and it might take me some time. I would be glad to look them over, and hunt it up. Now, just excuse me one moment—what is the date where the imprint is on that page, the date of that?

Q. That is 1868. You can testify that that is correct, can you not?

A. Yes, there is no question about that. That is correct, 1868—the firm of Carter & Himes was organized, or rather the partnership was entered into on October 5, 1868. The firm prior to that date was simply W. D. Cater, but our terms of copartnership began on October 5, 1868.

Q. And how long did it continue?

A. And it continued one year. It would take it in 1868 and up to the following year, 1869.

Q. So that this pamphlet must have been printed—

A. That was printed between October 5, 1868, and December 1, 1868. Somewhere along there.

Q. Well, now, are you acquainted enough with the manner in which the work was done so as to be able to testify that that was printed with the authority of the officers of the East Side Company?

A. Well, I should say it was, without any—scarcely any doubt. But in order to satisfy myself absolutely respecting that, I think it would be very necessary for me to overhaul the old books, if I can find them—and I believe I can—and see who made the entry, whether I made the entry myself for the work, or whether Mr.

Carter made it. If I made it myself, I could probably give some information about it; but if Mr. Carter made it, I could not.

A. Now, I was going to say in this connection, I have a very distinct recollection of doing some printing for Mr. Gaston, but I am not able, from anything that I can recall in connection with the wording of this, to say that that was what Mr. Gaston had printed; but I do know that Mr. Gaston had something printed. He made the arrangements with Mr. Carter. I did the type-setting myself. But it seems to me, from my recollection, that the matter Mr. Gaston had printed respecting matters of the railroad, was not so voluminous as that appears to be. But I would like, if it is possible, to see the original of that. I perhaps might be more sure.

Mr. Fenton: May I ask counsel what Government's exhibit you are asking the witness about?

Mr. Townsend: 105.

A. Yes, I remember this very well indeed. (Printed exhibit.)

Q. Well, now, Mr. Himes, having examined the original of Government's Exhibit 105, a typewritten copy of which was exhibited to you before, are you prepared to testify that Government's Exhibit 105 was printed by the firm of which you were a member, some time between October 5, 1868, and December 31, 1868?

A. I am, yes, sir.

Q. You know that at no time you permitted a false

date like that to get out?

A. Never. Never.

Q. From your general knowledge of the manner in which the business was conducted, and the business habits of yourself and Mr. Carter, and your general knowledge of this entire subject, the history of this railroad fight, are you not prepared to state, according to your best recollection, that the document was printed with the authority of those who acted for the Oregon Central Railroad Company, East Side?

Mr. Fenton: Defendants object to that as not the best evidence, and as only hearsay. You may answer.

A. My judgment is that publication was printed at the instance of Mr. Joseph Gaston—in my judgment.

Q. Mr. Joseph Gaston?

A. Yes.

Mr. Fenton: No. He has got it mixed up.

A. Yes, sir. Another publication that I had in mind, and I thought when I was looking over it casually that there was some reference to that—but I am satisfied that was printed by Mr. Gaston, or caused to be. I had nothing to do with the business arrangement. I remember those circumstances in connection with it—I wouldn't swear to it positively, but then it is my impression—I know that we printed a publication for Mr. Gaston connected with the railroad matters, and it gave a recital of the affairs in connection with the organization of the company, and also it related to some difficulty between

the two corporations, so-called.

Q. Well, you knew which company he was connected with, didn't you?

A. I knew he was connected with the West Side Company.

Q. Well, do you mean that Mr. Gaston put out a document purporting to be the authorized document of his adversary?

A. Well, of course, I couldn't go into the merits and give the reasons, or anything of that sort, but it is my judgment now—I cannot get rid of that impression. I know we printed something for Mr. Gaston, and I am satisfied, as far as I can recall, that that is the document. As I say, I am not positive of it. Of course, there might have been some other, but it has the earmarks of Mr. Gaston's work, as I understood the situation at the time. Of course, as I say, the business arrangements were made between Mr. Gaston and Mr. Carter. Mr. Gaston didn't know me in the premises, and I didn't know him, except simply as he came in. I remember distinctly a circumstance like this in connection with it; whatever the document was, there was a question about the payment for it; and I am not sure but Mr. Gaston brought the work to me first, when I come to recollect the circumstances connected with it, and that there was a job of a little bit more magnitude than I felt disposed to take into account without inquiring into the financial responsibility of the party offering the work; and that Mr. Carter came in soon afterwards, and I said to him "Here is a job that

is left here, but I didn't give him a price on it, because it is a man I don't know, and I want you to take care of it." And I remember that he said that there was quite a little work about that, and that we would have to be sure of the financial end of it. And when Mr. Gaston came in and talked the matter over—of course, I couldn't hear what was said; but whatever it was, it was entirely satisfactory, and the work was proceeded with and finished. The only way I could absolutely be sure would be simply to go back—I think I can find the old books of that date, and that would settle the question in my mind.

Mr. Townsend: I think Mr. Himes is mistaken.

A. It may be a confusion in the two different pamphlets.

Mr. Townsend: This is a scurrilous attack on Gaston, which he answered.

A. Now, this, I was going to say—of course, I didn't look it over only simply to examine the text of this—I simply recognize the printing and the type and everything of that sort; no doubt about that, not the least bit. We printed a pamphlet for Mr. Gaston. There is no question about that part of it. But my idea of the pamphlet that Gaston printed—and I didn't examine this more than simply looking at the type to find out the discussion of the text—only my idea of it was this: that it was a history, so to speak, of the transactions between the two companies, and an attempt on his part to show that the East Side Company had no rightful claim to the name.

Q. But this pamphlet is right the reverse.

A. Well, then, I am mistaken.

Q. This is an attack on the West Side Company.

A. Well, then, I am mistaken then, because, as I say, I didn't look it over sufficiently to get at the bearing; I just simply looked through to gather the type, and the headlines, and the subdivisions.

Q. You do not mean to put into the record here any suggestion that Mr. Gaston came to your printing office and had a pamphlet issued in the name of the other company, the East Side Company?

A. Oh, no, no; not by any means.

Q. Well, if this pamphlet, Government's Exhibit 105, is an attack by the East Side Company on the West Side Company, then that is not the pamphlet that Mr. Gaston brought to you?

A. No, that is not the pamphlet that Mr. Gaston brought to me. As I say, I didn't examine it thoroughly enough to get the trend of the document. There was only one point of doubt in my mind—that the pamphlet we printed for Mr. Gaston was not quite so voluminous as that one appears to be, or as that one is. The circular that Mr. Gatson brought, I couldn't really say how many pages, it was his side of that controversy, or at least bearing upon his side.

Q. There were several circulars issued. How about this one—Government's Exhibit 103? Do you recognize that type?

A. No, I think that is printed by A. G. Walling. However, there was one form of type that each of us had in common, and were frequently loaned some sorts, as we say, from one to the other, and it is possible that that might have been printed by our firm. We only printed—there was only one job that was printed for Mr. Gaston.

Q. How about that?

A. Well, I printed that.

Q. That was one which he did have printed? That is the Newby case.

A. I printed that.

Q. No, this is the brief of Mitchell, Dolph & Smith. Let's see if I can't get their brief in the Newby case.

A. There is the document I had in mind. I printed that.

Q. This is the document which was used before the Oregon Legislature presenting the claims of the West Side Company.

A. Well, that is the document—that is the one. I was mistaken. When I looked through that, there was so much more matter. I know that one you have your hands on.

Mr. Fenton: You better identify it, hadn't you? Salem, Oregon, October 13, 1868. Signed T. R. Cornelius.

Mr. Townsend: It is not necessary to put that in,

is it?

Mr. Fenton: No, it is not necessary. The witness says that is the one he printed, not the other.

A. Yes, that is the one.

Q. Mr. Himes, I have presented to you a book consisting of newspaper clippings, pamphlets and various documents and letters, which are collectively bound together and entitled "Oregon Railroad History," which has been compiled by Mr. Gaston from the various documents that he has had relating to the early railroad history of Oregon, and having directed your attention to a certain pamphlet issued by the West Side Company, under date of October 13, 1868, addressed to the Oregon Legislature, I will ask you if that is not the document which Mr. Gaston brought to you to have printed, instead of Government's Exhibit 105?

A. Yes, sir. I am very clear about that now.

Q. Did Mr. Gaston bring more than one document to you?

A. Only one.

Q. So that you are now positive that you were mistaken when you said that you thought he brought Government's Exhibit 105?

A. Yes, sir.

Q. Well, now, going back to that question again, have you any way of refreshing your recollection, without going over these old records that you spoke of, as to

who did bring this to you to be printed, referring to Government's Exhibit 105?

A. No, I have not. I couldn't remember.

Q. Well, I will not ask you to do that if it involves too much labor, Mr. Himes; but if you should happen to run across it without too much effort, would you please let us know?

A. Yes.

Q. And we can recall you to testify upon that subject.

A. Situated with the work that I have in hand today and tomorrow, it would be almost impossible; but I think that I can find it during the week, that is, in the course of a couple of days, and let you know.

Q. It is not of sufficient importance to justify our imposing upon you, Mr. Himes. If you can do it without too much inconvenience, I will thank you.

A. All right.

Whereupon J. C. MORELAND, called as a witness on behalf of defendants, being first duly sworn testified that he resides at Salem and is clerk of the Supreme Court and came to Oregon in 1852. He was referee in the case of Ben Holladay and C. Temple Emmet, plaintiffs against Simon G. Elliott and others, defendants, brought in the Circuit Court of the State of Oregon for Multnomah County and appealed to the Supreme Court of the State of Oregon, and heard and determined in the Supreme Court, in July 1879, and took and reported

all the testimony in that case, except a few depositions that were not taken before him. Most of it he took in long hand. The testimony of S. G. Elliott was taken down in short hand by A. J. Marsh and reduced to long-hand by him and read over to Elliott in the presence of witnesses. "Defendants' Exhibit 368," being a document of date April 23, 1867, purporting to be an agreement entered into between the Oregon Central Railroad Company of Salem, and A. J. Cook and Company, for the construction of the first 150 miles of the Oregon Central Railroad Company's railroad (East Side) was an exhibit offered and admitted in evidence in that case, and he knows the signature of I. R. Moores and Ben Holladay and the signatures to this document by these parties are genuine. He knows the signature of S. G. Elliott and of A. J. Cook & Company by S. G. Elliott and that is the genuine signature of S. G. Elliott. He knows the signature of John H. Mitchell and is not sufficiently acquainted with the signature of M. N. Chapman to identify it. Both of these men are dead. The endorsement or assignment, or purported assignment, of that document on the back of it, dated May 2, 1867, signed Albert J. Cook in the presence of W. D. Litchfield was on the document at the time it was introduced in evidence, but he does not know the signature of Albert J. Cook or W. D. Litchfield. He knew George L. Woods, president of the Oregon Central Railroad Company, and Samuel A. Clarke, secretary of the Oregon Central Railroad Company, and they are both dead. He is not sufficiently acquainted with the signature of

George L. Woods, but has seen his signature a good many times. He has seen the signature of Clarke and knows it very well and that is his signature. He has no question about that. When this document was admitted in evidence before him it was admitted without question to have been executed by the parties; both parties recognized it as the original. The signature in red ink on the front page of that cancellation signed "Ben Holladay & Co. Oregon Central Railroad Company, By I. R. Moores, President. Oregon Central Railroad Company, By Geo. E. Cole, Secretary." Witnesses "J. H. Mitchell" and "M. N. Chapman" are the signatures that he recognizes. These are the signatures of all these parties. That cancellation was on there at the time that this document was admitted in evidence before him. He commenced taking the testimony in this case in 1870 and it was continued at intervals until 1875. The signature on the assignment, or a part of it, by S. G. Elliott, of date May 20, 1867, witnessed in the presence of Walter Van Dyke, is the signature of S. G. Elliott, and it was on there when the document was admitted in evidence. "Defendants' Exhibit 369" purporting to be a memorandum of agreement of date May 12, 1868, between the Oregon Central Railroad Company and A. J. Cook & Company, and which purports to be signed on behalf of the Oregon Central Railroad Company "I. R. Moores, President O. C. R. R. Co., S. A. Clarke, Secretary O. C. R. R. Company, A. J. Cook & Co." Witnessed by Geo. Anderson and E. D. Towl, is a document he recognized as having been admitted in evidence before him and these signa-

tures are the signatures of I. R. Moores, and S. A. Clarke. The signature of A. J. Cook & Co. is in the hand writing of S. G. Elliott. The signatures of Ben Holladay, I. R. Moores, George E. Cole and J. H. Mitchell, on the document to the cancellation in red ink on this document of date March 29, 1870, signed "Ben Holladay & Co. Oregon Central Railroad Company, By I. R. Moores, President. Oregon Central Railroad Company, By Geo. E. Cole, Secretary." Witnessed by "J. H. Mitchell and M. N. Chapman," are the signatures of Ben Holladay, I. R. Moores, George E. Cole and J. H. Mitchell, and that endorsement and these signatures as they now purport to be, were on that document at the time it was admitted in evidence before him. Referring to "Defendants' Exhibit 369" which shows file marks "Filed Nov. 24, 1875, Geo. L. Story, Clerk, By R. L. Durham, Deputy," and then "Filed June 19, 1876, D. H. Murphy, Clerk," witness stated that George L. Story was clerk of Multnomah County and D. H. Murphy was Clerk of Marion County. The case was transferred for hearing from Multnomah to Marion. There was change of venue and the case was tried before Judge Boise. Judge Shattuck, who was on the bench in Multnomah County, had been an attorney in the case. He did not know how the file mark before the Clerk of the Circuit Court of Multnomah County came to be made. He had turned all the documents and papers in to the clerk of Multnomah County when he was through with it. The document purporting to be signed "Albert J. Cook, in the presence of W. D. Litchfield,"

bearing date May 2, 1867, purporting to be "Exhibit "W" attached to S. G. Elliott's deposition," and initialed "J. C. M." was an exhibit in the case and was introduced in evidence during the taking of S. G. Elliott's deposition, and the words "Exhibit 'W'" attached to S. G. Elliott's deposition is initialed "J. C. M." and are in the hand writing of witness. He did not know the signature of Albert J. Cook or the attesting witness W. D. Litchfield. This document was introduced by Elliott and sworn to as genuine.

Whereupon defendants offered in evidence each of these respective documents, "Defendants' Exhibits 368, 369 and 370," to which complainant objected as incompetent, irrelevant and immaterial, and hearsay, which said documents were received in evidence and are hereinafter set out and described and made a part of this Statement of the Evidence and identified herein as such.

Whereupon witness further testified that Elliott was a witness in this case before him and called and recalled a good many times, and that these original documents belong in the custody of witness as clerk of the Supreme Court and that he would like to have these documents returned.

Whereupon it was stipulated that these original documents could be withdrawn and said Exhibits extended in the record by the Examiner and a copy thereof verified by the Examiner substituted therefor.

Whereupon witness further testified that he came to Oregon from Boise City, arriving on July 3, 1868. His

father then lived in Clackamas County, and shortly after coming he went up there and was there two or three times that summer and fall. He had never seen a railroad except those from lower to upper Cascades and from The Dalles to Celilo, and he was a good deal younger than he now is and was interested to see what a railroad would look like, and he paid some attention to that. He was over on the French Prairie and as far up as what is now the town of Gervais, or very nearly there. He was up to Sam Brown's place during that summer and fall, and wherever he got a chance or was in sight of it he would leave the road and go over and look where they were grading, between Oregon City and Portland. He was over that road three or four times that year. The grading was scattered along from about Stark Street in East Portland up to about as far as he was along that road, approximately where the town of Gervais is now. It is about thirteen or fourteen miles from Salem. He is not able to state how many gangs of men were working between these points grading, but they were scattered all along the way. He saw them quite frequently. He does not think that he is competent to judge of the value of that work. He was never engaged in it. He could not now identify the photograph "Defendants' Exhibit 367" as having been taken in that case, but knows there were a number of photographs introduced. This photograph represents Oregon City of course, taken there at Oregon City. That is familiar to everybody that is familiar with Oregon City, but this was not taken until after the road had been built, this was taken after 1868 because there

were not any rails laid there in 1868 at that point. When he took the testimony the road had been built. There were no rails there in September, 1868. He is very certain that picture was taken after that. There was some work done on the grading. Referring to "Defendants' Exhibit 371" witness says that it looks very much like that wall did up there, and a good deal like it does now. It has been changed some.

Whereupon said "Defendants' Exhibit 371" was offered and received in evidence and is hereinafter set out and described and made a part of this Statement of the Evidence and identified herein as such.

Whereupon witness further testified that he has been continuously a resident of Portland from 1868 up to June, 1907, and since then a resident of Salem, and is familiar generally with the general value of timber lands in Oregon from 1866 up to 1892 and thinks that timber lands as such were practically valueless up to sometime in the '80s. Then there began to be some demand for timber lands, as he recollects it, sometime, he could not fix the date, but it was along in the latter '80s he should fix it. In the early days in Oregon timber was not considered of any value. Men wanted places for farms and when they took a farm they burned up the timber. On his father's claim out in Clackamas County, trees that would make elegant saw logs, were burned to get them out of the way. The timber, on land in the Willamette Valley that had timber on it, in those early days that was needed for farm purposes, was all destroyed. There was no sale for the timber at all. His father took

a donation land claim in Marion County, approximately five or six miles east of what is now the town of Hubbard, it was pretty nearly in Clackamas County. Historically the first American settler in Oregon was Jason Lee in the year 1834. He settled ten miles below Salem in what is known as Mission Bottoms. In pioneer days, there was quite an immigration in 1843, some came every year from 1834 on, but the first large immigration came in 1843, there were about 1,000 that year. The next large immigration after that was in 1852, that was the largest immigration, he thinks, that ever came across the plains. It was considerably larger than in 1843. These people settled all the way from Multnomah County to Jacksonville. Some people who came in their train went out as far as Jacksonville and they took up their land mainly under the donation land law of 1850. Prior to 1866 there was a railroad built from The Dalles to Cellilo around the portage and he thinks this was built about 1866. He knows it was there in 1867, because he traveled over it. It was built by the Oregon Steam Navigation Company and as part of the link to operate their steamers in river transportation. With that exception there was no railroad in Oregon prior to the road built from Portland south. The construction work on the Oregon Central, East Side, and the construction work on the Oregon Central, West Side, was the first railroad construction work in Oregon, with the exception of this link referred to as built by the Oregon Steamship & Navigation Company. Those were great days for Oregon when the road was opened. There were some settlements

along the edges in the mountains in those days, extending up into the Cascade Mountains out beyond the Sandy. He was through there in 1866 and there were some—one cabin he knows beyond the Sandy on the road across the Cascade Mountains. These settlements were along streams and on lands that they could secure for agricultural purposes and grazing, but there were only a few settlers in the mountains.

Whereupon on cross-examination witness further testified that the litigation between Elliott and Holladay and others, extended over a period of several years and the case was of a good deal of importance for those times and in that case the general early history of the building of these railroads was gone into quite thoroughly. In that suit Holladay and his associates did not seek to cancel securities held by Elliott, but to cancel a contract of partnership that was entered into between Holladay and Elliott. That was the subject of the suit, to cancel that partnership, these partnership articles. The general object of the suit was to dissolve the partnership. To some extent it did involve incidentally some of these corporate securities that Elliott had claimed in that suit. Holladay and his associates claimed to have made certain advances for the benefit of the former copartnership, which were to some extent disputed by Elliott, and Elliott claimed to have made some advances which were to some extent disputed by Holladay. It is true, that to take the testimony of Elliott as to what he advanced, by way of money, he could find corresponding testimony on the other side of the case, disputing these items in whole

or in part. In that litigation, Holladay claimed a considerable balance from Elliott and Elliott claimed a considerable balance from Holladay. In the final judgment of the Supreme Court, that is as far as his findings were set aside, the Court found that Holladay was indebted to Elliott about \$28,000 on that agreement signed by C. Temple Emmett for Holladay and Emmett, of \$21,000 at the time the partnership was entered into. The Supreme Court found that had not been paid. With that exception, the accounts were balanced. He does not remember how much Elliott claimed from Holladay in that suit, but it was a great many thousand dollars. The amount which Holladay claimed against Elliott aggregated a good deal in the way of damages that he claimed against Elliott for breach of the copartnership and for failure of Elliott to carry on the work. Witness reported findings of fact and performed the office of a master in chancery under a strict equity practice. There was considerable conflict in the evidence as to the manner of the work that had been done by Elliott and as to his competency to perform the work. There was a great deal of contradictory evidence. It was contended in that case that Elliott had misrepresented his financial backing and the question as to who Albert J. Cook was, and his backing was very extensively gone into. To his mind there was never any satisfactory evidence to account for Albert J. Cook. He heard the evidence on both sides and thought that Elliott had been operating under the name of Albert J. Cook and that Albert J. Cook was either a myth or some insignificant person that

Elliott had picked up and who was without any financial backing at all. Albert J. Cook had nothing to put into the concern so far as he recollects. He does not think Elliott claimed that Cook had put anything into it. His recollection is that Elliott did not organize the Oregon Central Railroad Company.. What influence a prospective contract with Elliott under the name of A. J. Cook & Company had in the organization of the Company, he does not know. His recollection is that the Oregon Central Railroad Company, East Side, was organized by a company of men interested in having a railroad on the East Side as against a railroad on the West Side and he does not think Elliott had that company organized. That is his judgment about it now.

Whereupon witness further testified:

Q. Don't you remember that Elliott came to Oregon early in 1867, and first tried to do business with Gaston, and then having failed caused this new company to be organized and capital stock to be subscribed in the name of the corporation itself, and then the construction contract which he immediately caused to be executed provided for the turning over of a large part, if not all, of that capital stock to him as A. J. Cook and Company, and that it was because he held that stock that Mr. Holladay, for one reason, organized the Oregon and California Railroad Company in 1870. And in this litigation Mr. Elliott was asserting some rights by reason of this preferred stock of the old East Side Company, possession of which he secured under this construction contract

he had held.

Mr. Fenton: I object to that as not in accordance with the record of either the Oregon Central or the Oregon and California Railroad Company.

A. It has been a long time ago and my memory may play me false as to that, but I do not now recollect that Elliott claimed any stock in the company. He claimed large interests under mortgages that had been introduced, but if Elliott had ever had any of that stock of the Oregon Central Railroad Company my memory fails now. I have not looked over this thing since 1875 to any great extent. If he got any of that stock I am not certain. These articles of agreement I have not read, but if he got any of that stock my memory plays me false. My recollection on that is not at all distinct—my memory. The stock, I think, was not made any particular question in this case because the stock was regarded as absolutely valueless. I have forgotten what became of the stock.

Q. Both sides treated the Oregon Central Railroad Company (East Side) as an invalid corporation, and as in effect a copartnership, did they not?

A. Well, I think it was rather conceded that that was an invalid corporation; that the president could not subscribe the majority of the stock.

Q. And that was the decision of the Supreme Court finally?

A. I so understand it.

Whereupon witness further testified that he and his people when they first came to Oregon went to live in Clackamas County, about six miles from the town of Hubbard, in township 5 south, range 1 east. The country there is pretty level and is a considerable distance from the foothills. His father took a donation land claim of 320 acres. The law was amended in 1852 so that he could take only a half section. Prior to that time they could take up a section. It was all timbered in spots. The timber was scattered but it extended all over the place. A great deal of it was good saw timber, a great many good saw timber trees were on the place. A good deal of that land is cleared now. When they lived there, there was probably not over 20 acres cleared. It was cleared in the main by hard work, by cutting down the trees and then burning them up and then grubbing up the grubs and hazel brush that were on them. If one would undertake the job of burning down one of these big fir trees and burning it up, it would, he thinks, be a big obstacle, although not insurmountable. It was good land, good soil, when cleared, but the clearing of those big trees was a big job.

Whereupon witness further testified.

Q. Yes, but here is what I am getting at, Mr. Moreland. In this case there has been some testimony introduced tending to prove, or at least intended to prove, that some of the lands, if not all of the lands involved in this case cannot be used for the purpose of settlement and cultivation, and one of the reasons as-

signed is the presence of the timber on the land. And what I am trying to get at is that that same obstacle was encountered by the early settlers, even under the donation claims.

A. Yes, sir. And it cost more to clear the land of those fir trees when they had to be burned up than the land was worth after it was cleared, if a man got anything for his wages while he was at work at it.

Q. Now, if the timber has since acquired a value, and it can be sold to assist the settler in clearing the land, then the difficulties confronting the settler are not as great today as they were then?

A. Nothing like as great if he can sell the timber. If we could have gotten pay, stumpage, for the trees that had to be burned up on that place the way they are paying for them now, the place would have paid for itself, I think. The timber would have paid for clearing.

Whereupon upon re-direct examination witness further testified that the Willamette Valley generally was not a timbered country when he came to Oregon. There were a great many prairies. The donation land claims that were taken were mainly taken in the valley, on level land. The preferred claims in these early days were on the prairies. Referring to "Defendant's Exhibit 259" and the yellow field on the map showing lands lost to the Company's grant by prior settlement in the vicinity of Needy and around there, witness further testified that the country around there was chiefly taken under the do-

nation land law, or some public land law prior to the time the railroad grant took effect. That it was all taken up as far as they thought it could be cultivated then. Out in Molalla there was a very beautiful prairie. There was no timber there. That prairie was taken up by early settlers before they came to Oregon. His father lived on his donation claim eight years and made their living on the place. They made all the living they got on the place, that is, his father used to go away and work for some of the neighbors very frequently and the boys and girls worked on the place and did what they could, but it was hard picking. He was eight years old when they came there.

Whereupon witness upon re-direct examination further testified that he remembers that there was a contract of partnership entered into between Ben Holladay, C. Temple Emmett and S. G. Elliott of date September 12, 1868, and that that was the contract involved in that suit. That suit was begun very shortly after Holladay discharged Elliott as superintendent. It was a question as to Holladay's power, Elliott being one of the partners, whether Holladay had the power to discharge Elliott from the position to which he was assigned by these articles of co-partnership and he thinks he was discharged in September, 1869, but he is not certain. The suit was begun, he thinks, less than a month after that, but he does not remember, the records will show that.

Whereupon witness identified his findings of fact and conclusions of law as referee in the case of Ben

Holladay and C. Temple Emmett, plaintiffs against S. G. Elliott and others, defendants, about which he has testified and the same were offered and received in evidence, together with the certified copy of the findings and decree of the Supreme Court of Oregon in that case as one exhibit, subject to the same objection heretofore made by complainant as to proceedings in that case, which said findings of fact and conclusions of law and certified copy of findings and decree of the Supreme Court are in words and figures as follows, to-wit:

“In the Circuit Court of the State of Oregon, for the
 “ County of Marion. At Chambers, September 28th,
 “ 1877, before his Hon. R. P. Boise, Circuit Judge.

“Ben Holladay and

“C. Temple Emmet,

Plaintiffs,

vs.

“S. G. Elliott, Gardner Elliott,

“T. R. Brooks and J. B. Rogers,

Defendants.

“This cause having been heretofore tried, on the motion of plaintiffs to affirm the report of J. C. Moreland, Referee, and the objection to said report filed by the defendant, S. G. Elliott, which report is as follows, viz:

“In the Circuit Court of the State of Oregon, for Multnomah County.

“Ben Holladay and C. Temple Emmet, plaintiffs,
 vs. S. G. Elliott, Gardner Elliott, T. R. Brooks and
 J. B. Rogers, defendants:

“I do hereby certify that I have taken the testimony

offered by the parties, and the same is herewith submitted in eleven volumes, together with the printed deposition of Ben Holladay and a large number of exhibits, papers, documents and drawings.

“The findings embrace every issue upon which I have been requested by either party, and upon the issues raised by the pleadings.

“The case was argued for the plaintiffs by J. N. Dolph, Esq., and submitted by the defendants without any argument on the 8th day of November, and the testimony, together with my findings of facts are herewith submitted.

“That each of the witnesses whose testimony was taken by me before proceeding to their examination, were severally sworn by me to tell the truth, the whole truth and nothing but the truth. Said depositions were read over to, or by each of said witnesses, and then by them severally subscribed.

“J. C. Moreland, Referee.

“In the Circuit Court of the State of Oregon for Multnomah County.

“Ben Holladay and C. Temple Emmet,

Plaintiffs,

vs.

“S. G. Elliott, Gardner Elliott, T. R. Brooks and J. B. Rogers, Defendants.

“To the Hon. E. D. Shattuck, Judge of the Court above entitled:

“Having been appointed sole Referee in the above entitled case on the 25th day of July, 1870, and having taken the testimony offered by both parties (which is herewith submitted, together with the minutes of my proceedings thereon) I beg leave to submit the following as my

“FINDING OF FACTS.

“First—That on the 12th day of September, 1868, the plaintiff, Ben Holladay and C. Temple Emmet, and the defendant, S. G. Elliott, entered into a copartnership of that date for the purpose of constructing, equipping and operating one or more railroads in the State of Oregon, and the States and Territories adjacent thereto; that by the terms of said copartnership the interest of each member thereof was as follows: Ben Holladay, 24-40 parts; C. Temple Emmet, 10-40; Simon G. Elliott, 6-40.

“Second—That said copartnership articles contained also the following special agreement: And, whereas, The parties hereto are about to purchase and take an assignment of all the contracts now subsisting between the Oregon Central Railroad Company of the one part, and A. J. Cook of the other part, and between the Oregon Central Railroad Company of the one part, and A. J. Cook & Co. of the other part, for the construction and equipment of the railroad from the city of Portland to the northern boundary line of the State of California.

“It is hereby further witnessed, that the said Simon G. Elliott shall not be called upon to advance out of his

own private means any money towards the work undertaken by this copartnership under the said contract, but the said Simon G. Elliott shall be charged with and shall account for his proportion of the expense of the said work whenever this copartnership shall have realized under and by virtue of the said contracts, or any of them, sufficient moneys to cover the outlays and expense incurred and paid by this copartnership in and about the said work. And it is further understood and witnessed, that the said Simon G. Elliott is hereby appointed the General Superintendent of the work of constructing, equipping and operating the said Oregon Central Railroad under the said contracts, and that he is to receive a salary of five hundred dollars per month, payable in gold coin of the United States.

“Third—That after the execution of the articles of co-partnership, and as part of the partnership transaction, plaintiffs gave to the defendant, S. G. Elliott:

“Office Ben Holladay & Co.

“Portland, Oregon, Sept. 12th, 1868.

“S. G. Elliott, Portland:

“Dear Sir:—On our purchase of this date from A. J. Cook & Co. of the pending contracts with the Oregon Central Railroad Company for the construction of the railroad from Portland to the California line, it is understood that we are to pay you the money furnished by you to the firm of A. J. Cook & Co. and standing to your credit on their books. This money is stated by you

to amount to about twenty-one thousand dollars. When the accounts are fully made up and the balance correctly ascertained, you will be entitled to our obligations for the correct amount. Respectfully yours,

“Ben Holladay & Co.

“That said paper was not executed on the day it bears date, but it correctly expressed the agreement between the parties thereto.

“Fourth—That on the 12th day of March, 1867, the defendant S. G. Elliott, procured from one A. J. Cook, at San Francisco, California, a written power of attorney to himself, to make all necessary arrangements with certain parties in Oregon for the building of a railroad from Portland south through the Willamette Valley, a distance of one hundred and fifty miles.

“Fifth—That said Cook was a man of small means, inexperienced in railroad matters, and that the writing was obtained from him at the request of defendant S. G. Elliott, with the understanding and under the agreement that said Cook was to have no interest whatever in said contracts to be made, and was not to be made liable for anything whatever, and that he took no part or interest whatever in the contracts afterwards made.

“Sixth—That on or about the 22d day of April, 1867, a corporation was formed under the general incorporation laws of this State, under the name of the Oregon Central Railroad Company, for the purpose of building and operating a railroad from Portland, Ore-

gon, southward to the California line, on or near the stage road, and having its principal office in Salem, Oregon; but that on the 23d day of April, 1867, only seven shares of stock had been subscribed to the capital stock thereof, by bona fide subscription—said Oregon Central Railroad Company, by George L. Woods, chairman, on the 22d day of April, 1867, having attempted to subscribe seventy thousand shares to said capital stock, and that there were never but thirty-one shares subscribed to the capital stock of said corporation, excepting said seventy thousand so attempted to be subscribed, the capital stock of said corporation being \$7,250,000, divided into 7,250 shares of \$100 each.

“Seventh—That at the time of the incorporation of said company there was another company organized and incorporated under the general incorporation laws of the State, under the name of the Oregon Central Railroad Company, for the purpose of constructing, maintaining and operating a railroad from Portland south to the California line, having its principal place of business and office at Portland, Oregon—said corporation being designated in these findings as the ‘O. C. R. R. Co. West Side.’ The first named being designated herein as the ‘O. C. R. R. Co. East Side.’

“Eighth—That on or about the 23d day of April, 1867, the defendant S. G. Elliott, in the name of A. J. Cook, entered into a contract with the said O. C. R. R. Co., East Side, for the construction and equipment of one hundred and fifty miles of its road from Portland

south, a true copy of which contract is set forth as Exhibit 'A' attached to the deposition of Ben Holladay, as contained in volume 1 of the testimony herewith returned; and that on the 27th of November, 1867, the defendant S. G. Elliott, in the name of A. J. Cook, entered into a supplemental contract with said O. C. R. R. Co., East Side, modifying and changing said first contract, a true copy of which is attached to said deposition of Ben Holladay, marked Exhibit 'B.'

"Ninth—That on or about the 12th day of May, 1868, the defendant S. G. Elliott, in the name of A. J. Cook & Co., entered into another agreement, or contract, for the construction of the balance of said road from the end of the first 150 miles to the California line, being 210 miles more or less, a true copy of which contract is contained in Exhibit 'C,' attached to said deposition of Ben Holladay; and that on or about the 10th day of June, 1868, a supplemental agreement was entered into by the defendant S. G. Elliott, in the name of A. J. Cook & Co., with said O. C. R. R. Co. East Side, constructing and explaining the aforesaid agreement, a true copy of which is attached to said deposition of Ben Holladay, marked Exhibit 'D.'

"Tenth—That on the 2d day of May, 1867, said Albert J. Cook endorsed upon the first contract herein referred to of date April 23d, 1867, the following assignment:

"'In consideration of the sum of one dollar to me paid by S. G. Elliott, of San Francisco, the receipt of

which is hereby acknowledged, I hereby transfer and assign forever all my right, title and interest in the within instrument.

“ ‘Witness my hand and seal this 2d day of May, A. D. 1867.

“ ‘Albert J. Cook.

“ ‘In presence of W. D. Litchfield.’

“And that thereafter said S. G. Elliott never had any other or further authority to use the name of said A. J. Cook, or had any further communication with him upon that subject.

“Eleventh—That at and prior to the time of making the said contract between A. J. Cook and said O. C. R. R. Co. East Side, referred to as Exhibits ‘A’ and ‘B,’ the defendant S. G. Elliott, fraudulently concealed from and misrepresented to the officers and Directors of said company the financial ability of A. J. Cook and his interest in said contracts.

“Twelfth—That in making said contracts said railroad company, relying upon the representations of the defendant S. G. Elliott, believed said Cook to be a man of large means, able to carry out his contracts and to be the real party interested in the contracts.

“Thirteenth—That on the 20th day of May, 1867, the defendant S. G. Elliott, assigned to N. P. Perrine seven-twentieths of said first mentioned contract of date of April 23d, 1867, for the sum of \$3000 coin, which was paid by Perrine to said Elliott, and on said day said

Perrine and Elliott formed a copartnership under the name of A. J. Cook & Co., as equal partners, a true copy of which article of partnership is set forth in the deposition of S. G. Elliott returned herein on pages 90, 91 and 92 of the printed deposition.

“Fourteenth—That on or about the 29th day of May, 1867, the defendant S. G. Elliott assigned to James P. Flint one-tenth interest in said contract of date April 23d, 1867, a copy of which assignment is in the same printed deposition of S. G. Elliott on pages 100 and 101.

“Fifteenth—That during the latter part of March, 1868, the defendant sold and assigned to T. R. Brooks two-twentieths of said first contract, and to Gardner Elliott one-twentieth interest therein for \$1,500 coin, which sum was paid to said defendant.

“Sixteenth—That on or about the ——— day of April, 1868, the defendant S. G. Elliott sold and assigned to Ignatz Frohman seven-twentieths of said contract of date April 23d, 1867, for the sum of \$14,000 coin, and that said Frohman paid to said Elliott the sum of \$13,300 coin, thereon, and that on said date said Frohman and said Elliott formed a partnership under the firm name of A. J. Cook & Co., a true copy of which articles of partnership are set forth on pages 307 and 308 of the printed deposition of said defendant Elliott.

“Seventeenth—That prior to the date of the formation of the copartnership herein the defendant Elliott had assigned one-twentieth in said contract to some other

person, whose name is not disclosed by the evidence, but said S. G. Elliott held control of the same, as he did of the two-twentieths assigned to J. P. Flint, referred to in the fourteenth finding, which control did not give him any interest therein.

“Eighteenth—That at the date of the formation of said partnership said persons still held said interest, respectively, in said contracts as aforesaid, but the plaintiff Ben Holladay held an agreement for the purchase of the interest of said Perrine, at the option of said Holladay, and that after the formation of the said partnership the plaintiff purchased said interest of said Perrine and Frohman.

“Nineteenth—That at and prior to the execution of the articles of partnership the defendant S. G. Elliott represented to the plaintiffs that he was a civil engineer, and that he was competent and well qualified to fill the position and to perform all the duties pertaining to the office of superintendent of the work of constructing, equipping and operating the said railroad under the said contract.

“Twentieth—That said representations were a moving cause in the formation of said partnership, and the sole reason of said Elliott being appointed to said position, plaintiff relying solely upon his representations therein.

“Twenty-first—That said defendant S. G. Elliott, at the time of the formation of said partnership was, and is wholly incompetent and not qualified to perform the

duties of such position.

“Twenty-second—That at and prior to the formation of said partnership, S. G. Elliott represented to the plaintiffs that the work of construction was so far advanced that it could be completed, ready for the ties from Portland to Salem, for the sum of \$40,000 coin, and that plaintiffs relied upon such representations in forming said copartnership; that it cost for work done after said partnership was formed to finish said twenty miles ready for the ties \$175,653 55-100.

“Twenty-third—That prior to and at the formation of said partnership the defendant S. G. Elliott represented to these plaintiffs that the said firm of A. J. Cook & Co. had received \$775,000 of the bonds of the said O. C. R. R. Co. East Side, and \$1,000,000 of the stock called interest-bearing preferred non-assessable stock, which had not been transferred to said company, all of which he represented he could control and would turn over to said firm upon its formation, except \$39,400 bonds, which he represented to have negotiated for machinery.

“Twenty-fourth—That at the time of the formation of said partnership the defendant S. G. Elliott did not have control of all said stock and bonds, but had given away and sold for small sums \$470,000 of said stock as follows: J. P. Flint, \$100,000 of said stock; C. Temple Emmet, \$100,000 of said stock; T. R. Brooks, \$100,000; S. F. Elliott, \$100,000; Gardner Elliott, \$40,000; B. F. Avery, \$10,000; E. B. Sadler, \$100,000; John J. Kro-

mer, \$10,000; Gen. B. F. Pratt, \$10,000; Parker, \$10,000 of it. That of said bonds that he had placed \$22,800 in the hands of W. H. Martin, who refused to deliver the same up until he was paid for service in trying to negotiate them, and that a bond for \$500 had been placed in the hands of one Brick who claimed to own the same.

“Twenty-fifth—That said S. G. Elliott, for said stock so disposed of, had received money as follows: S. F. Elliott, \$7,500 coin; Parker, \$500 currency; J. F. Emery, \$350 coin; and that in account of money advanced to S. F. Elliott, for money advanced to A. J. Cook & Co. he should be charged with these amounts.

“Twenty-sixth—That among the property purchased for use on said railroad were four locomotives, which were sold by S. G. Elliott in San Francisco at a net profit of \$4,000 in currency, and that in said account with A. J. Cook & Co. defendant S. G. Elliott should be charged with that sum.

“Twenty-seventh—That at or prior to the formation of said copartnership there were several suits or actions instituted and pending against the said O. C. R. R. Co. East Side, designed to test the right of the said O. C. R. R. Co. to use the corporate name.

“Twenty-eighth—That by reason of said suits and the cloud cast over the company, its bonds were of no value in the market.

“Twenty-ninth—That the stock called preferred interest-bearing non-assessable stock, was illegal and of no value.

“Thirtieth—That said contracts and none of them were, at the formation of said copartnership, or ever since have been of any value.

“Thirty-first—That prior to the formation of said co-partnership the Congress of the United States by an Act entitled ‘An Act granting bonds to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland, Oregon, approved July 25, 1866,’ granted to such company organized under the laws of this State, as the Legislature might designate for the purpose of aiding in the construction of a railroad and telegraph line from Portland, Oregon, southward to the California line, every alternate section of the public lands (not mineral) designated by odd numbers, to the amount of twenty alternate sections per mile, ten on each side of said railroad line; and when any of said alternate sections or part of sections should be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of, the right of way left to said company to select other land designated by odd sections nearest to and within ten miles of the limits of said first named alternate sections; and that among other things said grant was conditional that said railroad company should complete the first 20 miles of its road and put the same in running order on or before December 25th, 1869.

“Thirty-second—That the Legislative Assembly of the State of Oregon, by a joint resolution passed at the regular session thereof 1866, had designated the said O. C. R. R. Co. West Side, as the company to receive said

grant under said Act of Congress.

“Thirty-third—That the Legislative Assembly of Oregon at its regular session held in 1868, after the formation of the copartnership herein, by a like joint resolution designated the said O. C. R. R. Co. East Side as the company to receive said land grant.

“Thirty-fourth—That after the execution of said articles of copartnership, September 12th, 1868, the said firm entered upon the work of constructing the said road under said contract, the defendant S. G. Elliott acting as general superintendent of construction until October 4th, 1869.

“Thirty-fifth—That by reason of the incompetency and mismanagement of the said S. G. Elliott, the work on said first 20 miles was so delayed thereon that it could not have been completed under his superintendency within the time required by the Acts of Congress.

“Thirty-six—That by reason of the incompetency and mismanagement of the defendant S. G. Elliott as general superintendent of construction, work was delayed on said first 20 miles so far that the greatest portion of said work had to be done at increased cost on account of the heavy and bad weather, and that by reason thereof the cost of completing said first 20 miles was increased at least \$10,000, and that plaintiffs have been damaged in that sum by his incompetency and mismanagement.

“Thirty-seventh—That on the 4th of October, 1869,

the plaintiff Ben Holladay, acting for himself and the plaintiff C. Temple Emmet, caused a notice to be delivered to the defendant S.G. Elliott, of which the following is a copy:

“ ‘Office Ben Holladay & Co.,)
 “ ‘Portland, Oregon, Oct. 4th, 1869.)

“ ‘Mr. S. G. Elliott: As your services as general superintendent in the construction of the Oregon Central Railroad are no longer required, Mr. John F. Kidder has been employed to take charge of the work as constructive engineer.

“ ‘Respectfully, Ben Holladay & Co.’

“ ‘Thirty-eighth—That thereafter the said S. G. Elliott ceased to act in any manner, as a member of said firm in any capacity.

“ ‘Thirty-ninth—That thereafter the plaintiffs proceeded to complete the first 20 miles of said road, and by great exertion and diligence completed the same on the 24th day of December, 1869.

“ ‘Fortieth—That if the said S. G. Elliott had remained in charge as general superintendent said first 20 miles would not have been completed within the time specified by the Act of Congress.

“ ‘Forty-first—That nothing whatever was done by either of the parties thereto under either of the contracts referred to as Exhibits ‘C’ and ‘D’ heretofore.

“ ‘Forty-second—That on the 24th of December, 1869, work was suspended by the firm of Ben Holladay

& Co., except as to taking care of the property and disposing of the same.

“Forty-third—That there were no profits ever realized by the firm of Ben Holladay & Co.

“Forty-fourth—That said contracts were of no value to said firm or to any firms, and that to have fulfilled them would have entailed so great financial loss upon the contractors as to render the same impracticable as a business transaction.

“Forty-fifth—That on the 28th of March, 1870, the said contracts were by the said O. C. R. R. Co. East Side, duly canceled by the consent of the plaintiffs acting as the firm of Ben Holladay & Co.; and all the bonds and stock of said company that had come into the possession of said firm of Ben Holladay & Co. were delivered up and canceled, and on the said 28th of March, 1870, said company was dissolved.

“Forty-sixth—That all the assets of the firm of Ben Holladay & Co. (aside from the bonds, stock and contracts above referred to) did not exceed in value the sum of \$10,000 (ten thousand dollars).

“Forty-seventh—That the total amounts paid out by the firm of Ben Holladay & Co. in the construction of the O. C. R. R. Co. under said contracts, exclusive of the amount paid to A. J. Cook & Co., was \$596,510 55-100, which money was all paid out by the plaintiffs and was repaid to them by the said O. C. R. R. Co. upon the cancellation of said contracts.

“Forty-eighth—That after the execution of said partnership and prior to the commencement of this action, the defendant S. G. Elliott sold and assigned to the defendant T. R. Brooks, one-fortieth interest in said partnership, being one-sixth of his interest therein, and to the defendant Gardner Elliott another fortieth interest therein, leaving the defendant and S. G. Elliott only four-fortieths interest in said partnership.

“Forty-ninth—That neither party to said partnership was importunate to have the same formed, but the same was willingly entered into by each of said parties.

“Fiftieth—That since the commencement of this suit the plaintiff Ben Holladay has purchased the said interest from T. R. Brooks and Gardner Elliott and is now the owner thereof.

“Fifty-first—That the accounts of the parties stand as follows: Total amount expended on the road by A. J. Cook and A. J. Cook & Co., including \$6,000 for services and expenses to April 23d, 1858, \$64,109.82. The amount of expenses charged in this item of \$6,000 were not more than \$500, leaving a charge of \$5,500 for services which plaintiff did not agree to pay. The amount received from the sale of \$39,400 bonds in currency at par, gold being 140, would make in gold \$28,142.85, with which he should be charged. He received from Ignaz Frohman \$14,000, less \$700 drawback, leaving \$13,300 with which he should be charged. Received from N. P. Perrine \$3,000; received from Gardner Elliott, \$1,500; received from S. F. Elliott, \$1,500; received

from J. S. Emery say \$350; received from Parker \$500 in currency, gold being 140 make \$357; borrowed from Trust Company in San Francisco, paid by plaintiffs, \$6,560; profits on locomotives, \$4,000 in currency, gold being 140, \$2,859; making a total of \$63,006 to be deducted from the amounts on the road, would leave \$1,103 with which plaintiffs should be charged on their letter or agreement dated Sept. 12th, 1868, as the money advanced by S. G. Elliott to the firm of A. J. Cook & Co., which plaintiffs had agreed to pay. Plaintiffs should also be charged with his salary to Oct. 4th, 1869 twelve (12) months and twenty-two (22) days, at 500 per month, \$6,366.50; also, one-tenth of the assets of B. H. & Co. \$1,000, would leave a total of \$8,469.52, with which plaintiffs should be charged. Defendant S. G. Elliott received over and above his traveling expenses, from the plaintiff, \$9,000—would leave the defendant S. G. Elliott upon a proper accounting between him and the plaintiffs, indebted to them in the sum of \$530.45.

“Fifty-second—That on or about the 4th day of Nov. 1869, the defendant S. G. Elliott made a bill of sale to the defendant J. B. Rogers of all his household furniture and a lot of personal property. That said bill of sale was simply between the parties to facilitate the sale of said property to other purchasers by said Rogers, in the contemplated absence of Elliott, and was void as to the creditors of said Elliott.

“J. C. Moreland, Referee.

“I also find the following

"CONCLUSION OF LAW

"1st. That said Oregon Central Railroad Company was illegally organized, and its stock called non-assessable interest bearing preferred stock, was void.

"2d. That the plaintiffs had no legal right to discharge the defendant S. G. Elliott from the position of general superintendent, but his incompetency and delay in prosecuting the work precluded him from recovering damages for such discharge.

"3d. That the misrepresentations of the defendant S. G. Elliott as to his qualifications for the position of general superintendent of construction under the said contracts, his incompetency for said position and his sale of said interests in said partnership to T. R. Brooks and Gardner Elliott, entitle the plaintiffs to a decree dissolving said copartnership as of Nov. 5th, 1869, the date of the commencement of this suit, and a settlement of the partnership accounts as of that date.

"4th. That plaintiffs had judgment and decree against the defendant S. G. Elliott for the sum of \$530.48, balance of account, and the sum of \$10,000 damages to be apportioned by plaintiffs according to their respective interests.

"5th. That neither party received of the other any costs or disbursements.

"All of which is respectfully submitted.

"J. C. Moreland, Referee.

"And the Court having taken the same under advise-

ment, after fully considering the allegations and proofs of the parties and the finding of said Referee, finds:

“1st. The 20th finding of said referee should be modified in this—said representation of S. G. Elliott of his competency was not the sole cause of his being appointed superintendent of said road, but his position in being then in control of said road was one cause of his being so appointed.

“2d. That findings 35th and 36th are not supported by the evidence.

“3d. The 40th finding is modified so as to read as follows: The incompetency of S. G. Elliott as superintendent of said road made it necessary and proper for Ben Holladay & Co. to suspend him from that position and trust and to substitute another man in his place.

“4th. The 42d finding is not supported by the evidence.

“5th. The 2d finding of said referee as a conclusion of law is rejected as erroneous.

“6th. The Court further finds as a conclusion of law that from the fact found by said referee as modified as aforesaid, that the plaintiffs are entitled to a decree dissolving partnership, and that the defendant S. G. Elliott is indebted to the firm of Ben Holladay & Co. on account, the sum of \$530; that of this sum plaintiffs are entitled to 9-10 dollars, equal to the sum of \$477 (dollars), for which sum they are entitled to a decree, but not for costs and disbursements.

“It is therefore ordered and decreed by the Court that the said firm of Ben Holladay & Co. be dissolved, and that the plaintiffs have and recover from S. G. Elliott the defendant, the said sum of four hundred and seventy-seven dollars (\$477), to be distributed between said plaintiffs—twenty-eight fortieths to Ben Holladay, and ten fortieths to C. Temple Emmet—and that they have execution therefor.

“R. P. Boise, Judge.”

FINDINGS AND DECREE.

“At a Supreme Court begun and held at the City of Salem, County of Marion, State of Oregon, on Monday, the 7th day of July, A. D. 1879.

“Present: Hon. James K. Kelly, Chief Justice; Hon. R. P. Boise, Associate Justice; Hon. P. P. Prim, Associate Justice; P. H. D’Arcy, Clerk; Joseph A. Baker, Sheriff and Ex-Officio Bailiff.

“WHEREUPON on Fr¹day, the 15th day of August, 1879, the same being the 28th Judicial Day, the following proceedings were had:

“Appeal from Marion County.

“Ben Holladay and C. Temple Emmett, Respondents,

vs.

“S. G. Elliott, Appellant.

“Now on this day the above entitled suit having heretofore been tried and submitted to the Court and taken under advisement, and the Court being now fully advised as to what final decree should be entered therein,

the Court finds:

“First, that the contract of co-partnership of Ben Holladay & Co., set forth in the complaint, was entered into without fraud or misrepresentation upon the part of either the appellant or the respondent.

“Second, that the bonds of the Oregon Central Railroad Company, mentioned in the pleadings, and the preferred interest-bearing non-assessable stock issued by the Oregon Central Railroad Company of Salem were illegal and of no value.

“Third, that on the 22nd day of April, 1867, John H. Moores, J. S. Smith, George L. Woods and others, filed articles of incorporation in the office of the Secretary of State and in the office of the County Clerk of Marion County, to incorporate the Oregon Central Railroad Company. That the capital stock was fixed at \$7,250,000, divided into 72,500 shares of \$100 each, and on the same day stock books were opened, when six shares of stock were subscribed by six different persons; then followed this subscription: ‘Oregon Central Railroad Company, by George L. Woods, Chairman, 70,000 shares, \$7,000,000.’ That on the same day directors and other officers were elected, and on the 23rd day of April, 1867, the O. C. R. R. Co. thus organized; entered into the contract with A. J. Cook to construct 150 miles of its road, from Portland south through the Willamette Valley, for \$5,250,000, to be paid in first mortgage bonds of the company payable in twenty years, and to be taken by the contractor, A. J. Cook, at par; That payments of

eighty per cent were to be made by the O. C. R. R. Co. for the work done by A. J. Cook; to be paid every month as the work progressed; That the O. C. R. R. Co. also agreed at the same time to issue \$2,000,000 of preferred stock unassessable and bearing interest at the rate of seven per cent per annum, and deliver the same to A. J. Cook immediately after signing the contract, and that the common stock of the company should be offered to the people of Oregon at ten cents on the dollar; That afterwards the appellant, who became the owner of the A. J. Cook contract, associated others with him under the firm name of A. J. Cook & Co., and on the 27th day of November of that year entered into a supplementary agreement with the O. C. R. R. Co. whereby in consideration of materials bought for the construction of the road, the company agreed to issue and deliver to A. J. Cook & Co., \$775,000 of first mortgage bonds on its railroad and franchises, and the bonds were issued accordingly. That the \$2,000,000 of preferred stock specified in the agreement of April 23rd, had already been issued and delivered by the O. C. R. R. Co. to A. J. Cook & Co. That one million dollars of this preferred stock was given back to the directors of the company, according to a private understanding with them, that they were to have it to be used by them in procuring the necessary legislation in Oregon to promote the interests of the corporation, and that this delivery to the directors of \$1,000,000 left still \$1,000,000 of the preferred interest-bearing non-assessable stock in the possession of A. J. Cook & Co. That this is the stock and these are

the bonds, less \$68,000, which was transferred by A. J. Cook to the firm of Ben Holladay & Co., upon the formation of the copartnership.

“Fourth, that the attempt to subscribe 70,000 shares to the stock of the O. C. R. R. Co. by the corporation itself through a person styling himself chairman, was done simply to evade the liability which the law imposes on all persons who subscribe to the capital stock of corporations.

“Fifth, that such subscription to the capital stock of said company by the corporation itself was illegal and void.

“Sixth, that such attempted organization of said company, based upon said illegal and void subscription to its capital stock, was illegal and void, and the said corporation was not organized according to law.

“Seventh, that it was under said illegal and void organization of said company that the contracts set forth in the complaint were executed by said company, and the stock and bonds therein mentioned were issued.

“Eighth, that said contracts were of no value.

“Ninth, that upon the formation of the copartnership of Ben Holladay & Co. in September, 1868, the work of constructing the railroad under the contracts of A. J. Cook and A. J. Cook & Co. was continued under the appellant as general superintendent, and was prosecuted with reasonable vigor until December, when it was partially suspended, and from that time until July, 1869, but little work was done. That during the month of

May, only nine, and July only eleven men were employed on the whole line of the road from Portland to Salem. That the appellant was absent in the Atlantic States during the preceding winter and returned too late to commence operations on the road during the months when work could have been prosecuted with the greatest benefit to the firm and the best season of the year for profitable labor in railroad building was suffered to go by and the appellant was discharged by the firm of Ben Holladay & Co. from their employment as general superintendent and for alleged inefficiency, and after he ceased to act as superintendent on the 4th day of October, 1869, a largely increased force of laborers was placed on the road, far higher wages were paid for workmen, and in this way the section of twenty miles was completed on the 24th day of December, 1869. That one of the chief causes why the work progressed so slowly during the spring of 1869 was the inability to procure the funds necessary to carry it on more vigorously.

“Tenth, that suits had been commenced in the U. S. Circuit Court and in the Circuit Court of this State against the O. C. R. R. Co. to test the legality of its existence as a corporation, and they had so far progressed as to foreshadow its overthrow. That Joseph Gaston, the president of a rival corporation of the same name, known as the Oregon Central Railroad Company (west side), had issued circulars and sent them to bankers and brokers in the East, setting forth that ‘the corporation was a humbug and its bonds were worthless.’ That it was known that the company was hopelessly in-

solvent; that Ladd & Tilton had presented to it for payment certain interest coupons which were protested for non-payment, and that there were no subscribers to the capital stock of the corporation from whom any money could be collected to defray the rapidly accumulating interest on the bonds and its preferred interest-bearing stock, and said bonds were worth nothing in the money markets of the world, and that to have gone on and attempted to complete the road under the contracts of A. J. Cook & Co. with that corporation would have been simply an act of folly, and would have bankrupted not only Ben Holladay & Co. but financially ruined every member of the firm, and that it was an impracticable undertaking to construct the railroad under the copartnership of Ben Holladay & Co. and for that reason a dissolution of the co-partnership should be decreed.

“Eleventh, that at the time of entering into the copartnership the firm of Ben Holladay & Co., in consideration of the transfer, to-wit of the property of A. J. Cook & Co., agreed to pay the indebtedness of that company, including a debt due to the appellant, then estimated at \$21,000. That sometime after the formation of the copartnership Ben Holladay & Co. gave the appellant a written instrument to this effect, which was antedated so as to conform to the date of the agreement, which is as follows:

‘Office of Ben Holladay & Co.

Portland, Ore., Sept. 12, 1868.

S. G. Elliott, Portland, Dear Sir: On our purchase

this date from A. J. Cook and A. J. Cook & Co. of the pending contracts with the Oregon Central Railroad Company for the construction of a railroad from Portland to the California line, it is understood that we are to pay you the money furnished by you to the firm of A. J. Cook & Co. and standing to your credit on their books. This money is stated by you to amount to about \$21,000. When the accounts are fully made up and the balance correctly ascertained you will be entitled to our obligation for the correct amount. Respectfully yours,
Ben Holladay & Co.'

"That this writing was accepted by the appellant, and that the amount of money furnished to the firm of A. J. Cook & Co. by the appellant, Elliott, was \$21,000, and that said appellant is now entitled to that sum with interest, less the amount which was paid to him thereon by Ben Holladay & Co.

"Twelfth, that prior to the bringing of this suit the firm of Ben Holladay & Co. had paid to said Elliott, on account of said sum of \$21,000, the sum of \$8,000, and that there is due from the said firm of Ben Holladay & Co. to the appellant the sum of \$13,000 with interest thereon since September 12, 1868.

"Thirteenth, that at the time this suit for a dissolution of the copartnership was commenced, the assets of the firm of Ben Holladay & Co. consisted in part of a section of twenty miles of railroad, then nearly completed. That by the terms of the contract entered into between the O. C. R. R. Co. and A. J. Cook & Co. the latter firm was to

receive \$32,000 per mile for the construction and equipment of that portion of the road, or \$640,000 for the twenty miles, which sum was to be paid to the firm of Ben Holladay & Co. under the contract of A. J. Cook & Co. in bonds of the O. C. R. R. Co. which were of no value for reasons already stated, and that the Oregon Central Railroad Company, having no lawful organization, the respondents appropriated and converted that section of the railroad to their own use and benefit, and subsequently sold it to the Oregon & California Railroad Company, a new corporation organized to complete it, and the amount of money necessarily expended in constructing that section of the road cannot be satisfactorily ascertained from the evidence in the case. That inasmuch as the respondents appropriated that section of the road, as well as all the work on the other portions to their own use, without the consent of appellant, it should be presumed that it was worth to them what it cost to construct it, including not only what they paid out upon it, but also the unpaid balance of \$13,000, which A. J. Cook & Co. had expended upon it, and which Ben Holladay & Co. assumed to pay to the appellant when the copartnership was formed, and that having terminated that copartnership and excluded the appellant from any participation in the settlement of its affairs and the disposal of its assets, the respondents should be held liable to pay the debts of the firm, as well as those due to themselves, as the amount due to the appellant; and the Court further finds that besides the railroad property belonging to Ben Holladay & Co. that firm had the machine shops,

also saw mills, wagons, carts, horses, etc. which the respondents also appropriated to their own use and subsequently transferred to the O. & C. R. R. Co., worth in the aggregate \$19,500, of which the appellant was entitled to four-fortieths or one tenth, that being the interest which he had in the copartnership at the time this suit was commenced, making his share therein the sum of \$1950.

“Fourteenth, that though in law the firm of Ben Holladay & Co. had no title to the lands granted by Congress to aid in the construction of the Oregon Central Railroad, yet in equity it was entitled to them, as all these lands were earned by the money and labor of Ben Holladay & Co., and were in fact afterwards transferred to the O. & C. R. R. Co., and whatever may have been realized by the sale must in equity be regarded as part of the assets of that firm, and although the partnership was terminated by the respondents before the lands for the first section were fully earned, yet they will not be permitted to exclude the appellant from his rightful share in the lands by affecting a dissolution of the copartnership a few weeks before the title to them became perfected. That nearly all the valuable lands embraced within the limits of the Railroad Grant for the first 20 miles had already been disposed of by the U. S. Government before the grant was made, and that up to September, 1868, there had been selected and patented to the O. & C. R. R. Co. for the first section of 20 miles, 32,267.36 acres, and about the same number of acres more could be selected whenever the surveys should be made.

That these lands were worth in the aggregate about 25 cents per acre, and that all the lands patented and unpatented, amounting to about 64,534 acres, were worth \$16,133, of which sum the appellant ought to have one-tenth or \$1,613.

“Fifteenth, that upon a fair settlement of the partnership transactions the respondents are justly indebted to the appellant in the following sums: Nine-tenths of the balance of A. J. Cook & Co. indebtedness unpaid by Ben Holladay & Co., \$11,700, interest since September 12, 1868, \$12,622.70; appellant’s interest in machine shops, sawmills, etc., \$1950, interest since November 5, 1869, \$1886; equitable shares in land grant \$1613; eight years interest on same \$1280. Total \$31,051.70. That of this sum the respondents should pay in proportion to the interest which they had respectively in the copartnership of Ben Holladay & Co., that is the respondent Holladay is to pay twenty-four parts or \$21,909.46, and respondent Emmett ten parts or \$9,132.08.

“It is therefore ordered, considered and decreed that the report and findings of law and fact of the referee and of the Court below, in so far as they are not changed and modified by the foregoing findings and conclusions, be and they are hereby confirmed, and that so far as they conflict therewith that they be and they are hereby in all things set aside and modified.

“It is further ordered and decreed by the Court that the copartnership of Ben Holladay & Company in the complaint mentioned be and the same is hereby dissolved

as of the commencement of this suit, and that said respondents be and they are charged with all the assets of said firm in accordance with the findings aforesaid, and that the appellant, Simon G. Elliott, have and recover from the respondent Ben Holladay the sum of \$21,919.46 and that he also have and recover of and from the respondent, C. Temple Emmett, the sum of \$9,132.08.

It is further ordered and decreed that all the costs and disbursements incurred by the respondents and appellant in the Circuit Court and in this Court shall be paid by them in proportion to the interest which they have respectively in the copartnership; that is, the appellant shall pay one-tenth of such costs and disbursements to be taxed, and the respondents shall pay the remaining portion of such costs and disbursements; that the costs and disbursements in the court below shall be taxed there; that the costs and disbursements in this court are allowed, taxed at \$359.10, and that execution issue therefor.

“It is further ordered that this cause be remanded to the court below for such further proceedings as are by law required.

“STATE OF OREGON, }
 “County of Marion- } ss.

“I, J. C. MORELAND, Clerk of the Supreme Court of the State of Oregon, do hereby certify that the foregoing copy of Decree has been by me compared

with the original, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record, and in my office and custody.

“IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Salem, Oregon, this 18th day of September, 1911.

(SEAL)

J. C. Moreland, Clerk.”

Whereupon WILLIAM SINGER called as a witness on behalf of defendants, and being duly sworn, testified that he is a member of the law department of the Southern Pacific Company in San Francisco, and as such has charge of all suits and proceedings in courts and land offices involving questions of title to lands or rights of way granted by the so-called Oregon and California land grant, California and Oregon land grant, Central Pacific land grant, and Southern Pacific Railroad Company land grant. He is also an attorney in such matters for the Southern Pacific Company. In the United States land office, pursuant to the rules of practice of that office, he authorizes the appearance of attorneys over his signature as general land attorney for the particular company represented. He commenced this employment in the year 1878, as a land office attorney for the California and Oregon land grant, then owned by the Central Pacific Railroad Company, as attorney for B. B. Redding, land agent of that company. In 1884, or 1885, he became land attorney for the Central Pacific Railroad Company's land grant, and for the entire land grant of the California and Oregon Railroad Company,

both in land office proceedings and in courts, other than federal courts. In 1894 there was added to his jurisdiction, federal cases for the California and Oregon, Oregon and California, Central Pacific and Southern Pacific Railroad Company's land grants. In 1888, when William H. Mills was appointed land agent of the Oregon and California land grant, witness investigated the title of that company to its lands in Oregon, and reported that to William H. Mills. After the year about 1884 or 1885 until 1894, he owed no allegiance to the chief counsel of the companies but acted as attorney for William H. Mills, as he understood it, under authority from Mr. C. P. Huntington, that he was such attorney for William H. Mills.

Referring to the form of deed described in Exhibits 11 and 12 to the Stipulation as to the Facts in this case, witness testified that upon investigation of the operation of the land department of the Oregon and California land grants, he found that warranty deeds were being given for patented and unpatented lands. He recommended to Mr. Mills in 1889 or 1890 that the issuance of warranty deeds be discontinued and that a deed granting and conveying the lands be given to patented lands, and that a deed quitclaiming all the right, title and interest which the company had or might thereafter acquire, be given to unpatented lands for the Oregon and California land grants, and his recollection is that he drafted the deeds set forth in those exhibits. This is confirmed by the peculiar phrase of the granting clause, "Grant and convey" not having been used, so far as his

observation goes, by any conveyancer but himself, and the other form of deeds "Remise, release and quitclaim all right, title and interest which the company owns or may hereafter acquire" having originated, he believes, with him; his belief is that those forms were drawn by him, sent by Mr. Mills to Secretary Andrews, then Secretary of the Oregon and California Railroad Company, with instructions to adopt and use them thereafter. Those forms of deeds comply substantially with the forms of deeds about that time drafted by him for use in conveying lands of those land grants, for which William H. Mills was land agent. The primary object of these forms of deeds was to standardize the forms of deeds, although an important consideration with him was to dispense with warranty deeds, which, in his experience as a railroad attorney, were not given by any railroad company other than the Oregon and California. There was no purpose by these instruments, or the adoption of these forms, to anticipate or meet any contention or claim now made by the United States in this suit as to the provisions of Section 4 of the Act of May 4, 1870, or the Act of April 10, 1869. His recollection is that prior to that time he had given a written opinion that the proviso in the Act of May 4, 1870 was a covenant and not a condition and that the Act of April 10, 1869 imposed no covenant if it had any effect at all. In fact, prior to the commencement of the case of Oregon & California Railroad Company against Eaton and the answer filed therein, they had attached no significance whatever to the proviso referred to either in the Act of

May 4, 1870 or the Act of April 10, 1869. It was his understanding always, and he believes it to be true, that Mills, during the lifetime of C. P. Huntington, acted as supreme executive officer in land grant matters, and did not submit forms of deeds to the consideration of anybody but witness and upon the approval of witness Mills passed them up to the secretaries of the companies for adoption.

Witness recognized what purports to be a certified copy of letters dated May 7, May 23, 1870, and May 20, 1872. The letter of May 20, 1872 purports to be a certified copy of a letter from Willis Drummond, Commissioner, to Honorable C. Delano, Secretary of the Interior, which letter refers to certain papers filed in his office by the Honorable George H. Williams, Attorney General, for the purpose of obtaining a construction by the department, of the proviso of the Act of Congress approved April 10, 1869, Statute, Volume 16, page 47, amendatory to the Act of July 25, 1866, Statute, Vol-16, page 239, etc., as an apparent certified copy under the seal of the general land office, marked as Defendants' Exhibit No. 373. Whereupon the same was offered and received in evidence and is hereinafter set out and described and made a part of this statement of the evidence and identified as such.

Whereupon witness was shown Defendants Exhibit 374, purporting to be a certified copy of a form of deed and acknowledgment from the European and Oregon Land Company, together with letter of date January 23rd, 1874, signed I. R. Moores, Land Agent, together

with a letter of Willis Drummond, Commissioner, to I. R. Moores, Land Agent, of date March 13, 1874, all certified by the recorder of the general land office under date of April 11, 1912, and the seal of said general land office affixed, and witness recognized the same as so certified. Whereupon defendants offered and there was received in evidence Defendants' Exhibit No. 374 which is hereinafter set out and described and made a part of this statement of the evidence, and identified as such.

Whereupon witness was shown Defendants Exhibit No. 375, purporting to be correspondence between the general land office and the Oregon and California Railroad Company, and therewith certified copies of executed deeds by Milton S. Latham and others, to the United States, Oregon and California Railroad Company, Farmers Loan & Trust Company, to the United States, and approved by R. Koehler, Receiver, in the suit of Lawrence Harrison, et al, against the Oregon & California Railroad Company, et al; from the Oregon and California Railroad Company to the Union Trust Company of New York, and to the United States, all relating to lands claimed by the United States to have been erroneously patented, and which documents purport to reconvey the title to the United States, together with the correspondence transmitting the same, and all being certified of date April 11, 1912 by the recorder of the general land office, under the seal of that office, and witness recognized that as a duly certified copy of these documents.

Whereupon defendants offered and there was received in evidence Defendants' Exhibit 375, which is hereinafter set out and described and made a part of this statement of the evidence, and identified as such.

Whereupon witness was shown and recognized as a duly certified copy, a letter of the Assistant Attorney General, Walter H. Smith, to Secretary Delano, of date May 5, 1871; a letter of Secretary Delano to Attorney General Akerman of date May 8, 1871; a letter of Attorney General Akerman of date May 9, 1871 to Secretary Delano, and certain other correspondence connected therewith, and marked Defendants' Exhibit No. 376.

Whereupon defendants offered and there was received in evidence Defendants Exhibit No. 376, which is hereinafter set out and described and made a part of this statement of the evidence, and identifid as such.

Whereupon witness was shown a printed copy of an opinion of Attorney General Brewster, dated June 15, 1882, addressed to Secretary of the Interior H. M. Teller, being on pages 35 to 39 inclusive of Executive Document No. 29, 47th Congress, Second Session.

Whereupon defendants offered and there was received in evidence and is hereinafter extended in the record and is as follows:

“DEPARTMENT OF JUSTICE,

Washington, D. C., June 15, 1882.

“Sir: By a letter dated the 5th of January last, your
“predecessor submitted to me a number of questions aris-

“ing upon an application of the New Orleans Pacific
“Railway Company for certain lands claimed under the
“land grant made to the New Orleans, Baton Rouge and
“Vicksburg Railroad Company by the act of Congress of
“March 3, 1871, chapter 122.

“The land grant mentioned is contained in the twen-
“ty-second section of that act, which provides:

“That the New Orleans, Baton Rouge and Vicks-
“burg Railroad Company, chartered by the State of
“Louisiana, shall have the “right to connect, by the most
“eligible route to be selected by said company, with the
“said Texas Pacific Railroad at its eastern terminus, and
“shall have the right of way through the public land to
“the same extent granted hereby to the said Texas Pa-
“cific Railroad Company; and in aid of its construction
“from New Orleans to Baton Rouge, thence by the way
“of Alexandria, in said state, to connect with the said
“Texas Pacific Railroad Company at its eastern ter-
“minus, there is hereby granted to said company, its suc-
“cessors and assigns, the same number of alternate sec-
“tions of public lands per mile, in the State of Louisiana,
“as are by this act granted in the State of California to
“said Texas Pacific Railroad Company; and said lands
“shall be withdrawn from market, selected, and patents
“issued therefor, and opened for settlement and pre-
“emption, upon the same terms and in the same manner
“and time as is provided for and required from said
“Texas Pacific Railroad Company, within said State of
“California; PROVIDED, That said company shall

“complete the whole of said road within five years from
“the passage of this act.”

“The eastern terminus of the Texas Pacific Rail-
“road, as fixed by the same act, was a point at or near
“Marshall, Tex.

“The New Orleans, Baton Rouge and Vicksburg
“Railroad Company was incorporated by an act of the
“legislature of Louisiana passed December 30, 1869,
“which authorized it to construct and operate a railroad
“ ‘from any point on the line of the New Orleans, Jack-
“son and Great Northern Railroad, within the parish
“of Livingston, running from thence to any point on the
“boundary line dividing the States of Louisiana and Mis-
“sissippi,’ the route here indicated lying east of the Mis-
“sissippi River. It was also authorized to construct and
“operate a branch railroad from its main line (above
“described) to the City of Baton Rouge; and for the
“purpose of connecting its railroad with the railroads of
“other companies, &c., it was furthermore authorized ‘to
“construct, maintain, and use, by running thereon its
“engines and cars, such branch railroads and tracks as
“it may find necessary and expedient to own and use;’
“and such branch railroads were, for all the purposes of
“the act, to be deemed and taken to constitute a part of
“the main line of its railroad within the State of Louis-
“iana.

“On November 11, 1871, that company filed in the
“General Land Office a map designating the general
“route of a road projected thereby from Shreveport, by

“way of Alexandria, to Baton Rouge, and thereupon a
“withdrawal of the public lands along the same was or-
“dered, which became effective in December following.

“Subsequently by an act of the legislature of Louis-
“iana, passed December 11, 1872, the same Company was
“given ‘full power and authority to commence the con-
“struction of their road in the City of New Orleans or
“Shreveport, or at any intermediate point on their line
“of road, as may best suit the convenience of said com-
“pany, and facilitate the speedy construction of a con-
“tinuous line from the City of New Orleans to the City
“of Shreveport, or perfect railroad communication with
“the Texas Pacific Railroad, or any other railroad in
“northwestern Louisiana, at or near the Louisiana State
“line: PROVIDED, however, That the said Company
“shall construct the line of its road between the City of
“New Orleans and the City of Baton Rouge on the east
“side of the Mississippi River, to the corporate limits
“of the said City of Baton Rouge, or adjacent thereto.’

“In the mean time, by the act of Congress of May
“2, 1872, chapter 132, the Texas and Pacific Railway
“Company (formerly styled the Texas Pacific Railroad
“Company) was ‘authorized and required to construct,
“maintain, control, and operate a road between Marshall,
“Texas, and Shreveport, Louisiana, or control and oper-
“ate any existing road between said points, of the same
“guage as the Texas and Pacific Railroad.’ The same
“act further provided that ‘all roads terminating at
“Shreveport shall have the right to make the same run-
“ning connections, and shall be entitled to the same

“privileges, for the transaction of business in connection
“with the said Texas and Pacific Railway, as are granted
“to roads intersecting therewith.’

“On February 13, 1873, a second map was filed in the
“General Land Office by the New Orleans, Baton Rouge
“and Vicksburg Railroad Company, designating the
“general route of a road projected thereby from New
“Orleans to Baton Rouge, and a withdrawal of the pub-
“lic lands along the same was ordered, which took effect
“in April, 1873. The route between those places, those
“designated, lies on the east side of the Mississippi River.
“That company has not constructed any part of its road,
“either on the route between New Orleans and Baton
“Rogue or on the route between the latter place and
“Shreveport; nor, indeed, has there been a definite loca-
“tion of its road anywhere between the points mentioned.
“Nothing beyond the designation of the general route
“thereof appears.

“Pursuant to a resolution of its board of directors,
“adopted December 29, 1880, all the right, title, and
“interest of that company in and to the aforesaid grant of
“public lands made by the act of March 3, 1871, were
“deeded to it by the New Orleans Pacific Railway Com-
“pany. This action of the board of directors and offi-
“cers of the former company was afterwards approved
“and ratified by the stockholders thereof at a meeting
“held in December, 1881.

“The New Orleans Pacific Railway Company was
“originally incorporated under the general laws of the

“State of Louisiana in June, 1875. Its charter was subsequently amended by acts of the Louisiana Legislature, passed February 19, 1876, and February 5, 1878. It is thereby authorized to construct a railroad “beginning at a point on the Mississippi River, at New Orleans or between New Orleans and the parish of Iberville, on the right bank of the Mississippi, and Baton Rouge, on the left bank &c., or from any point within the limits of this State, and running thence toward and to the City of Shreveport,’ which is made its northwestern terminus.

“The route of this company as projected is understood to extend from New Orleans to Baton Rouge, and thence by way of Alexandria to Shreveport. Between New Orleans and Baton Rouge it lies on the west side of the Mississippi River; while the designated route of the New Orleans, Baton Rouge and Vicksburg Railroad Company, between the same points, lies on the east side of that river. Between Baton Rouge and Shreveport its general course and direction corresponds, in the main, with the route designated by the last named company. It is throughout its entire length from New Orleans to Shreveport within the limits of the before-mentioned withdrawals of public lands.

“In October, 1881, the president of the New Orleans Pacific Railway Company made affidavit that three sections of its road were then completed and ready for examination by the government; whereupon a commissioner was appointed to examine the same, the result of whose examination appears in a report made by

“by him to the Secretary of the Interior, under date of
“the 26th of that month. One of the sections embraces
“68 miles of road, beginning on the west bank of the
“Mississippi River, opposite New Orleans, and ending
“near the town of Donaldsonville; another embraces 20
“miles of road near Alexandria; and the third embraces
“50 miles of road terminating at Shreveport. For each
“of these sections lands are claimed by that company
“under the aforesaid land grant, as assignee of the New
“Orleans, Baton Rouge and Vicksburg Railroad Com-
“pany.

“No map of definite location of any portion of its
“road has been filed, other than those of constructed por-
“tions. It appears that in February, 1881, the New Or-
“leans Pacific Railway Company purchased from Mor-
“gan’s Louisiana and Texas Railroad and Steamship
“Company, the road constructed on the west bank of
“the Mississippi River by the New Orleans, Mobile and
“Texas Railroad Company, from Westmego to White
“Castle, a distance of 68 miles, and that the same has
“become a part of the main line of the road of the New
“Orleans Pacific Railway Company.

“The following are the questions submitted:

“1. Was the grant to the New Orleans, Baton
“Rogue and Vicksburg Railroad Company, a grant in
“presenti?

“2. Had the New Orleans, Baton Rouge and Vicks-
“burg Railroad Company, at the date of its alleged
“transfer of land to the New Orleans Pacific Railway

“Company, such an interest in the lands, under said
“act, as was assignable?

“3. Is the New Orleans Pacific Railway Company,
“such a successor to or assignee of the New Orleans,
“Baton Rouge and Vicksburg Railroad Company as is
“contemplated by said act?

“4. Should it appear that the 68 miles of the New
“Orleans, Mobile and Texas Railroad was constructed
“prior to the act of March 3, 1871, granting lands to
“aid in the construction of the New Orleans, Baton
“Rouge and Vicksburg Railroad, can the New Orleans
“Pacific Company (its assignee) claim any benefit from
“the grant? Or in the case of such prior construction,
“and the nonconstruction of any portion of the New Or-
“leans, Baton Rouge and Vicksburg road, has the pur-
“pose for which the grant was made failed, and the
“grant consequently lapsed?

“5. If the New Orleans, Mobile and Texas road
“was constructed, subsequently to the date of said act,
“is so much of its road as is now owned by the New Or-
“leans Pacific Company such a road as is contemplated
“for acceptance by the president within the meaning of
“said act, and may patents issue to the latter for lands
“opposite to and co-terminus with such constructed por-
“tion of road?

“These questions are accompanied by a request for
“an opinion upon such other questions of law as may
“suggest themselves touching the transfer of said land
“grant, to which reference is above made.

“Of the above stated questions the first three may be considered together in connection with the following inquiry, which presents itself at the outset, whether the assent of Congress to the transfer made by the New Orleans, Baton Rouge and Vicksburg Railroad Company of all its interest in said land grant to the New Orleans Pacific Railway Company is necessary (by reason of anything in the provisions of the grant itself) to entitle the latter company to the benefit of said grant in aid of the construction of the road projected by it.

“The act of March 3, 1871 passed to the New Orleans, Baton Rouge and Vicksburg Railroad Company a present interest in a certain number of alternate sections of public lands per mile within the limits there prescribed. Its language is ‘there is hereby granted to the said company’ the number of alternate sections mentioned; words which import a grant in present, and not in future, or the promise of a grant (97 U. S. Rep., 496) But the grant thus made is in the nature of a float. It is of sections afterwards to be located, their location depending upon the establishment of the line of the road. Until this is definitely fixed the grant does not attach to any specific tracts of land. Upon the line of the road being definitely located the grant then first requires precision, and the company becomes invested with an inchoate title to the particular land covered thereby, which can ripen into a perfect title only as the construction of each section of 20 miles of road is completed and approved, when the right to patents for lands opposite to and coterminous with such con-

“structed section accrues.

“The proviso in the grant that the company shall
“complete the whole of its road within five years from
“the date of the act is a condition subsequent, the failure
“to perform which does not ipso facto work a forfeiture
“of the grant, but only gives rise to a right in the govern-
“ment to enforce a forfeiture thereof. Yet in order to
“enforce a forfeiture such right must be asserted by a
“judicial proceeding, authorized by law, or by some legis-
“lative action amounting to a resumption of the grant.
“(Schulenberg vs. Harriman, 21 Wall., 44) Hence,
“until advantage is taken of the non-performance of the
“condition, under legislative authority, the interest of the
“grantee in the grant remains unimpaired thereby.

“Such being the nature and effect of the grant and
“its accompanying condition, and no action having been
“taken by legislation or judicial proceedings to enforce a
“forfeiture thereof, it follows that at the period of said
“transfer by the New Orleans, Baton Rouge and Vicks-
“burg Railroad Co. this company was invested with a
“present interest in the number of alternate sections of
“public lands per mile granted by the act of 1871, not-
“withstanding it was already in default in the perform-
“ance of the condition referred to, and that it still re-
“tained a right to proceed with the construction of the
“road in aid of which the grant was made until advantage
“should be taken of the default. But as it had not then
“definitely fixed the line of its road, although a map des-
“ignating the general route thereof was duly filed, that
“interest did not attach to any specific tracts of land,

“but remained afloat, as it were, needing a definite loca-
 “tion of the road before it could become thus attached.
 “Was the interest here described assignable to another
 “company, so as to entitle the latter to the benefit of the
 “grant in aid of the construction of its road between the
 “places named therein, without the assent of Congress?

“Doubt has perhaps arisen on this point in view of
 “the fact that in one or two instances it has been thought
 “expedient to obtain legislation by Congress confirming
 “or authorizing a similar assignment (see section 2 of
 “the act of March 3, 1865, chapter 88, and section 1 of
 “the act of March 3, 1869, chapter 127), and also in view
 “of the adverse ruling of this department in the case of
 “the Oregon Central Railroad Company. (13 Opin.,
 “382) However, a similar assignment made in 1866 by
 “the Hannibal and Saint Joseph Railroad Company to
 “the Pike’s Peake Railroad Company, afterward known
 “as the Central Branch Company, was held to be valid
 “by Attorney-General Stanbury in an opinion given to
 “the Secretary of the Treasury under date of July 25,
 “1866.

“In the latter case the Hannibal and Saint Joseph
 “Company, which was incorporated by the State of Mis-
 “souri, with authority to construct a railroad between
 “Hannibal and Saint Joseph, within that State, was, by
 “the Pacific Railroad act of July 1, 1862 (section 13),
 “authorized to ‘extend its road from Saint Joseph, via
 “Atchison, to connect and unite with the road through
 “Kansas, and may for this purpose use any railroad
 “charter which has been or may be granted by the legis-

“lature of Kansas’, & c., and by the fifteenth section of
“the same act it was provided that ‘wherever the word
“company is used in this act it shall be construed to em-
“brace the words their associates, successors and assigns
“the same as if the words had been properly added there-
“to.’ Subsequently, in 1863, an assignment was made
“by that company of all its rights under said act (which
“included an interest in both a land and a bond subsidy)
“to the Atchison and Pike’s Peake Railroad Company,
“a company previously organized under a charter grant-
“ed by the legislature of Kansas. The latter company
“having constructed a section of 20 miles of the proposed
“road west from Atchison claimed the benefit of the
“grant made to the Hannibal and Saint Joseph Com-
“pany, as its assignee, and this claim was recognized and
“allowed, in accordance with the opinion of the Attorney-
“General. It will be observed, however, that the Hanni-
“bal and Saint Joseph Company was authorized to ‘use
“any railroad charter which has been or may be granted
“by the legislature of Kansas,’ and this, together with
“the provision in the fifteenth section quoted above, may
“have been regarded as sufficient to sustain the assign-
“ment.

“In the case of the Oregon Central Railroad Com-
“pany, mentioned above, a grant of a right of way
“through the public lands, and also of alternate sections
“thereof, was made to that company, ‘and to their suc-
“cessors and assigns,’ by the act of May 4, 1870, chapter
“69, for the purpose of aiding in the construction of a
“railroad and telegraph line between certain places in

“Oregon. In August following an instrument was executed by the company assigning all its interest in the grant to the Willamette Valley Railroad Company, and thereupon the question arose whether the grant was susceptible of being thus transferred. The Attorney-General (Mr. Akerman), to whom the question was submitted, after reviewing the various provisions of the act, some of which (see section 5) imposed certain duties and required certain important acts to be performed by the company, decided in the negative, holding that, upon consideration of those provisions, the Oregon Central Company was alone within the contemplation of Congress in respect to the donation made and duties imposed by that act. The words ‘their successors and assigns’ as used in the act, were regarded as words of limitation merely.

“But the grounds upon which that decision appears to have been based are not found to exist in the case now under consideration. Here a grant of a certain number of alternate sections of public lands per mile is made to the New Orleans, Baton Rouge and Vicksburg Railroad Company, its successors and assigns, in and of the construction of a road from New Orleans, by the route indicated, to connect with the eastern terminus of the Texas and Pacific Railroad, which lands are required to be “withdrawn from the market, selected, and patents issued therefor, and opened for settlement and pre-emption upon the same terms and in the same manner and time as is provided for and required from said Texas Pacific Railroad Company.”

“The grant is coupled with no special duties or trusts, for the performance of which there is reason to believe the particular company named therein was more acceptable to Congress than any other. Its purpose is to secure the construction of a railroad between the points designated, and whether this purpose be fulfilled by that company or by another company must be deemed unimportant in the absence of any provision indicative of the contrary. The interest derived by the grantee, though it remains only afloat, is a vested interest, and it is held under the same limitations which apply after it develops into an estate in particular lands until extinguished by forfeiture for non-performance of the condition annexed to the grant. I perceive no legal obstacle arising out of the grant itself to a transfer of such interest by the grantee to another company, and should the latter construct the road contemplated agreeably to the requirements of the grant, and thus accomplish the end which Congress had in view, I submit that it would clearly be entitled to the benefits thereof.

“The question of the assignability of the interest of the grantee would be more difficult if, after definitely locating the line of its road, and thus attaching the grant to particular lands along the same it was proposed to transfer that interest to another company for the benefit of a road to be constructed by the latter on a different line, though following the general course of the other road. But in the present case the facts give rise to no such difficulty. The grant had not

“previous to the transfer become thus identified with a particular line of road, and was thereafter susceptible of location upon the line of the road projected by the assignee (the New Orleans Pacific Company), provided this road met the requirements of the grant in other respects, as to which no doubt is suggested.

“My conclusion is that the assent of Congress to the assignment made by the New Orleans, Baton Rouge and Vicksburg Railroad Company, as above, is not necessary in order to entitle the assignee to the benefit of the land grant in question.

“The remaining questions relate to the 68 miles of railroad formerly belonging to the New Orleans, Mobile and Texas Railroad Company, but now owned by the New Orleans Pacific Company, and made a part of its main line between New Orleans and Baton Rouge.

“The land grant in question was, as its language imports, made in aid of the construction of a railroad between certain termini, contemplating a road to be constructed, not one already constructed. It has not been the policy of Congress thus to aid constructed roads. Had a constructed road existed at the date of the grant, which extended from one terminus to the other, and afterward the New Orleans, Baton Rouge and Vicksburg Railroad Company, instead of entering upon and completing the construction of a road, had purchased the road already constructed, this, it seems to me, would not have satisfied the purpose of the grant so as to entitle the company to the benefit thereof. The same

“objection would apply where the constructed road extended over only a part of the route contemplated by the grant. So far as I am advised, the action of the government hitherto has accorded with this view. On the other hand, if such road was constructed subsequently to the date of the grant, and is owned by the grantee or the assignee of the latter, I see no ground for excluding it from the benefit of the grant should it otherwise fulfill the requirements thereof.

“Agreeably to the foregoing views, and in direct response to the several questions submitted, I have the honor to reply as follows: The first, second, and third questions I answer in the affirmative. The fourth question (including the alternative added thereto) I answer in the negative. The fifth question I answer in the affirmative—assuming, as I do, the company named therein to be an assignee of the grantee in the act referred to.

“I have the honor to be, very respectfully,

“BENJAMIN HARRIS BREWSTER,

“Attorney General.

“Hon. H. M. Teller,

“Secretary of the Interior.”

Whereupon witness was shown and recognized Report No. 906, 47th Congress, Second Session, Senate, of date January 2, 1883 from the Committee on the Judiciary to accompany Bill S. 2301, by Mr. Garland, and identified as Defendants Exhibit No. 377. Whereupon defendants offered and the same was received in evi-

dence, and is hereinafter set out and described and made a part of this statement of the evidence, and identified as such.

Whereupon witness was shown and recognized Defendants Exhibit No. 378, being certified copies of certain correspondence between Joseph S. Wilson, as president of the European & Oregon Land Company, with replies thereto by the Commissioner of the General Land Office, offered collectively as one exhibit, which correspondence is in part under the signature of Joseph S. Wilson, President, on the letterheads of the European & Oregon Land Company. Whereupon defendants offered and the said Defendants Exhibit 378 was received in evidence, and is hereinafter set out and described and made a part of this statement of the evidence, and identified as such.

Whereupon witness was shown and recognized Defendants Exhibit 379, being a certified copy of map of the Oregon Central Railroad Company, West Side, filed by it under the Act of May 4, 1870, showing the definite location of the line of the Oregon Central Railroad under the Act of May 4, 1870, which was received in evidence and is hereinafter set out and described and made a part of this statement of the evidence, and identified as such.

Whereupon it was stipulated between the parties that the Court in any stage of this case until and including a final hearing in the Supreme Court of the United States, if the case

shall reach that court, shall take judicial notice of all proceedings had in and final disposition of the forty-five suits against purchasers referred to in the "Stipulation as to the Facts," including issuance of patents to the lands therein described when issued, if any shall be issued, which stipulation, it was agreed, was subject to the objection on the part of complainant that the evidence is immaterial and irrelevant.

Whereupon, on cross examination, witness identified Government's Exhibits 126A, 126B, 126C, 126D, 126E, 126F, 126G, 126H, and 126I as correct copies of the originals of which they purported to be, and it was stipulated that these documents were properly executed and acknowledged, or signed by the parties purporting to have signed the same; proof of the execution and further identification of such documents being waived.

Whereupon complainant offered and there was received in evidence said Exhibits 126A, 126B, 126C, 126D, 126E, 126F, 126G, 126H and 126I, and the same are herinafter set out and described and made a part of this statement of the evidence, and identified as such.

Whereupon, witness further testified that there is printed in the same type as that of all other documents introduced in said Government's Exhibit 126A, 126B, 126C, 126D, 126E, 126F, 126G, 126H and 126I, Acts of Congress relating to the Oregon and California and Oregon Central Railroad Companies, chapter 242, "An Act granting lands to aid in the construction of a rail-

road and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon," (14 U. S. Statutes, page 239), at the foot of which printed statute appears the words "Approved July 25, 1866; also chapter 80, "An Act to amend an Act entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon,' " (15 U. S. Statutes, page 80), at the bottom of that "Approved June 25, 1868"; and also "An Act to amend an Act entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon, approved July 25, 1866"; and at the bottom of that "Approved April 10, 1869 (16 U. S. Statutes, page 47); also "An Act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon," at the bottom of that "Approved May 4, 1870 (16 Statutes, page 94), these statutes, respectively, being set out in this printed document at length and in full.

Whereupon it was stipulated that the Central Pacific Railroad Company completed the construction and equipment of the California and Oregon Railroad from Chico to the south boundary line of Oregon in several sections, all on or before June 20, 1888; that the said entire constructed railroad was examined by commissioners appointed for the purpose and favorably reported on by them; that such report was submitted by the Secretary of the Interior with his favorable recommenda-

tions to the President, and such recommendations approved by the President, all on or before November 8, 1889.

Whereupon it was stipulated by and between the parties that the Court may take judicial notice of the decisions of the Secretary of the Interior and the Commissioner of the General Land Office, and the rules and regulations of the Land Department, of the reports of either of these officers to Congress, and the reports of any committee of Congress and the action of Congress thereon; subject to the objection that may be made by either party to the same, or any thereof, as incompetent, immaterial or irrelevant, or any other objection which might legally be interposed, it being intended to waive the actual production of these documents, to save expense and the incumbering of the record.

It was further stipulated by and between the parties that the following documents were recorded, in the manner provided by law, in the Records of Deeds and Mortgages of Multnomah County, Oregon, at the dates hereinafter mentioned, and thereafter, and about the same time, in the Records of Deeds and Mortgages of the other counties of Oregon in which any part of the lands involved in this suit are situated, to-wit:

Oregon and California Railroad Company to Faxon D. Atherton and Milton S. Latham, of date April 15, 1870, recorded April 16, 1870, at page 745, Book C, of the Records of Mortgages of Multnomah County, Oregon;

The Oregon Central Railroad Company to Milton S. Latham and Faxon L. Atherton, Trustees, of date July 15, 1871, recorded at page 132, Book E, of the Records of Mortgages of Multnomah County, Oregon, October 14, 1871;

The Oregon and California Railroad Company to Milton S. Latham, Faxon D. Atherton and William Norris, Trustees, of date April 15, 1870, recorded at page 727, Book K, of the Records of Deeds of Multnomah County, Oregon, April 18, 1870;

Oregon and California Railroad Company, Richard Koehler, Heinrich Hohenemser and others, to Klaas Van Oterendorp and Philip N. Lilienthal, Trustees, of date January 1, 1881, recorded February 28, 1881, at page 346, Book X, of the Records of Mortgages of Multnomah County, Oregon:

Oregon and California Railroad Company to Henry Villard, Horace White and Charles Edward Bretherton, Trustees, of date June 1, 1881, recorded August 18, 1881, at page 1, Book 27, of the Records of Mortgages of Multnomah County, Oregon;

Oregon and California Railroad Company to Henry Villard, Robert Davie Peebles and Charles Edward Bretherton, Trustees, of date June 2, 1881, Recorded September 13, 1881, at page 179, Book 27, of the Records of Mortgages of Multnomah County, Oregon.

Oregon and California Railroad Company and Robert Davie Peebles, George H. Hopkinson and Patrick Buchan, to Farmers Loan and Trust Company, of date

May 26, 1883, recorded at page 33, Book 41, on that date, in the Records of Mortgages of Multnomah County, Oregon;

Oregon and California Railroad Company to Union Trust Company of New York, of date July 1, 1887, recorded January 20, 1888, page 287, Book 63, of the Records of Mortgages of Multnomah County, Oregon.

Deed executed by Oregon Central Railroad Company to Oregon and California Railroad Company, of date March 29, 1870, recorded April 14, 1870, Page 702, Boox K, of the Records of Deeds of Multnomah County, Oregon;

Deed of Oregon and California Railroad Company, Milton S. Latham, Faxon D. Atherton and William Norris, to European and Oregon Land Company, of date March 28, 1871, recorded page 223, Book N, of Records of Deeds of Multnomah County, Oregon, April 4, 1871;

Deed from the European and Oregon Land Company to Milton S. Latham, Faxon D. Atherton, and William Norris, Trustees, and others, of date July 25, 1874, recorded page 264, Book Z, of the Records of Deeds of Multnomah County, Oregon, on January 4, 1875;

Deed from Oregon Central Railroad Company to Oregon and California Railroad Company, of date October 6, 1880, recorded at page 555, Book 42, Records of Deeds of Multnomah County, Oregon, on October 6, 1880.

It is further stipulated and agreed that either party may at any time furnish a certified copy of either of said documents herein above set out, and the same shall be admitted in evidence subject to any objection that the same is incompetent, irrelevant or immaterial; and this stipulation is made subject to any objection that either party may desire to make to the same, or any part thereof, as incompetent, irrelevant or immaterial.

It is further stipulated that, with respect to all of the conveyances, deeds of trust, mortgages and other documents above described, such proceedings were had that at the time of the filing of the bill of complaint, and at all times subsequent thereto, no parties had any right, title, or interest in or to, or lien upon, any of the lands involved in this suit, other than the defendants herein; the sole purpose of this portion of the stipulation being to avoid any question of defect of parties defendant.

It is further stipulated that the court may take judicial notice of the pleadings, proof and final decrees in the cases of *United States v. Oregon and California Railroad Company, John A. Hurlburt and Thomas L. Evans*; and *United States v. The Oregon and California Railroad Company and Oregon Central Railroad Company*—the latter named case commonly known as the “*Quadrant Case*,” and both of which cases reached the Supreme Court of the United States; and that either party, without being compelled to produce the records, may refer to any part of said record, including all plead-

ings, stipulations of fact, and other proceedings in each of said suits, subject to any objection that the same may be incompetent, irrelevant or immaterial, all parties reserving the right to introduce at any time to complete the record a certified copy of such pleadings, papers, stipulations, decrees or other proceedings in either of said cases, or any thereof, subject as aforesaid to any objection of either party that the same may be incompetent, irrelevant or immaterial.

It is further agreed between the parties hereto that the stipulations of fact signed by the parties in said causes were prepared by the attorneys for the defendants therein, and submitted to the Attorney General, who signed them.

Whereupon defendants offered in evidence, marked collectively "Defendants' Exhibit 381," Circulars Nos. 208 and 218, issued by the Department of the Interior, described as follows:

"Circular No. 208. The Three-Year Homestead Law. Department of the Interior, Washington, February 13, 1913."

"Circular No. 218. Additional Entries under the Enlarged Homestead Acts—Instructions. Department of the Interior. General Land Office. Washington D. C., March 17, 1913. (To) Registers and Receivers, United States Land Office, Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, Utah, Washington and Wyoming.

Whereupon the same were received in evidence and

marked as "Defendants' Exhibit 381" subject to the objection of the complainant that the same are incompetent, immaterial and irrelevant, and the said exhibit is hereinafter set out and described and made a part of this statement of the evidence, and identified as such.

Whereupon defendants offered in evidence a summary of patents to the Oregon and California Railroad Company, marked "Defendants' Exhibit 382," the Government waiving the calling of a witness to verify the accuracy of the statement, which said Defendants' Exhibit 382 was received in evidence and is hereinafter set out and described and made a part of this statement of the evidence, and identified as such.

Whereupon defendants offered in evidence a certified copy of the original reports of the commissioners appointed to examine and report upon the various sections of the constructed railroad of the Oregon Central Railroad Company (West Side), and of the Oregon Central Railroad Company (East Side), together with the action of the Secretary of the Interior and the President of the United States thereon, marked collectively "Defendants' Exhibit 383," which was received in evidence and is hereinafter set out and described and made a part of this statement of the evidence, and identified as such.

Whereupon defendants offered in evidence a certified copy of the affidavit of Henry Villard, of date January 8, 1883, from the records of the office of the Secretary of the Interior, marked Defendants' "Exhibit 384,"

to which complainant objected upon the ground that the same is incompetent, irrelevant and immaterial, and was an affidavit unauthorized by law, and is a self-serving declaration made by the President of the Oregon and California Railroad Company, and not a proceeding in which the Secretary of the Interior had any jurisdiction or discretion to act, and therefore such affidavit imports no notice of any kind to the United States,, and did not in any way pertain to any official duty of any officer of the United States.

Whereupon said affidavit was received in evidence, marked "Defendants' Exhibit 384," and is hereinafter set out and described and made a part of this statement of the evidence, and identified as such.

Whereupon defendants offered in evidence, for convenience of parties, and in furtherance of the stipulation, Report of the Committee on Public Lands, No. 1664, of date May 29, 1884, 48th Congress, First Session; Report No. 931 from the Committee on Public Lands, March 8, 1886; and Report No. 390 from the Committee on Public Lands, March 8, 1886—the last two reports being to the 49th Congress, First Session, and the same were marked collectively "Defendants' Exhibit 385", and were received in evidence, subject to the objections herein heretofore reserved, which said "Defendants' Exhibit 385" is hereinafter set out and described and made a part of this statement of the evidence, and identified herein as such.

Whereupon, for convenience, defendants offered and

there was received in evidence in connection with the stipulation as to the Quadrant Case, reference to *United States vs. Oregon & California R. R. Co.*, 57 Federal 426; *Oregon and California R. R. Co. vs. United States*, 67 Federal 650; *United States vs. Oregon &c. Railroad*, 164 U. S. 526; and for convenient reference in the case known as "Northern Pacific Overlap"; *U. S. vs. Oregon & C. R. R. Co.*, 69 Federal 899; *Oregon & C. R. R. Co. vs. United States* 77 Federal 67; *United States v. Oregon & California Railroad Company* 176 U. S. 28.

Whereupon defendants offered in evidence, marked collectively "Defendants' Exhibit 386", certified copies of the following deeds:

A deed from the Oregon and California Railroad Company to the City of Portland, of date July 3, 1893, for the S. $\frac{1}{2}$ of S. $\frac{1}{2}$ and NE $\frac{1}{4}$ of SE $\frac{1}{4}$, Section 23, Township 1 S., Range 5 E.; all of Section 27, Township 1 S., R. 5 E.; N. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, SE $\frac{1}{4}$ of NW $\frac{1}{4}$, W. $\frac{1}{2}$ of NE $\frac{1}{4}$, SE $\frac{1}{4}$ of NE $\frac{1}{4}$, NE $\frac{1}{4}$ of SW $\frac{1}{4}$, and SE $\frac{1}{4}$, Section 31, Township 1 S., R. 5 E.; E $\frac{1}{2}$ Section 33, Township 1 S., R. 5 E.; N $\frac{1}{2}$ Section 19, Township 1 S., R. 6 E.; N $\frac{1}{2}$ Section 5, Township 2 S, R. 5 E., containing 2234.70 acres, of which 514.80 acres are in Bull Run Forest Reserve, for the consideration of \$4579.40.

Also a deed of date July 3, 1893, for S $\frac{1}{2}$ of NE $\frac{1}{4}$ and S $\frac{1}{2}$, Section 25, Township 1 S., Range 5 E.; N $\frac{1}{2}$ of NE $\frac{1}{4}$ and NW $\frac{1}{4}$, Section 35, Township 1 S., Range 5 E., S $\frac{1}{2}$, Section 19, Township 1 S., Range 6 E., con-

taining 955.52 acres, all of which is in the Bull Run Forest Reserve for the consideration of \$1958.82, which said Defendants' Exhibit 386 was received in evidence and is hereinafter set out and described and made a part of this statement of the evidence, and identified as such.

In connection with Defendants' Exhibit 386, defendants refer to the Act of September 29, 1890, known as the General Forfeiture Act, 28 Stat. L. 496-498.

Whereupon defendants offered in evidence certified copies of stipulations as to facts in the following cases:

No. 2272. United States v. Oregon & California Railroad Company; No. 2661. United States v. Oregon & California Railroad Company; No. 2658. United States v. Oregon & California Railroad Company; No. 2273, United States v. Oregon & California Railroad Company; No. 2657. United States v. Oregon & California Railroad Company; No. 1936. United States v. Oregon & California Railroad Company and Oregon Central Railroad Company; and the same were severally and separately marked, in the order named, "Defendants' Exhibits 387, 388, 389, 390, and 391, and 392, to each of which complainant objected on the ground that these are manifestly introduced for the purpose of binding the Government by the matters of fact set forth in such stipulations, and that such stipulations show upon their face that they were designed for use in the particular cases in which they were made, and not for use in any other litigation, and upon the further ground that the

issues in those cases in no way involved the question of the exact date or manner of the vesting of the grant under the Act of July 25, 1866, and further, upon the general grounds that they are incompetent, irrelevant and immaterial. Which said Defendants' Exhibits 387, 388, 389, 390, 391 and 392 were received in evidence and are hereinafter set out and described and made a part of this statement of the evidence, and identified as such.

Whereupon defendants produced and formally offered in evidence certified copies of the deeds and mortgages hereinbefore referred to in the stipulation of parties, and the same were severally and separately marked as Defendants' Exhibit 393, 394, 395, 396, 397, 398, 399, 400 and 401, described as follows:

Mortgages. Oregon and California Railroad Company to Faxon D. Atherton and Milton S. Latham, of date April 15, 1870, recorded April 16, 1870, page 745, Book C. (Marked "Defendants' Ex. 393").

Oregon Central Railroad Company to Milton S. Latham and Faxon D. Atherton, Trustees, of date July 15, 1871, recorded page 132, Book E. (Marked "Defendants' Ex. 394").

Oregon and California Railroad Company et al. to Van Oterendorp et al., of date January 1, 1881, recorded page 346, Book X. (Marked "Defendants' Ex 395").

Oregon & California Railroad Company to Villard,

White and Bretherton, of date June 1, 1881, recorded page 1, Book 27. (Marked "Defendants' Ex. 396").

Oregon & California Railroad Company to Villard, Peebles and Bretherton, of date June 2, 1881, recorded page 179, Book 27. (Marked "Defendants' Ex. 397").

Oregon & California Railroad Company et al. to Farmers Loan & Trust Company, of date May 26, 1883, recorded page 33, Book 41. (Marked "Defendants' Ex. 398").

Deed of Trust. Oregon and California Railroad Company to Latham, Atherton and Norris, Trustees, of date April 15, 1870. (Marked "Defendants' Ex. 399").

Deeds. Oregon & California Railroad Company to European and Oregon Land Company, dated March 28, 1871, recorded Book N, page 223. (Marked "Defendants' Ex. 400").

European & Oregon Land Co. to Latham, Atherton and Norris, of date July 25, 1874. Recorded page 264, Book Z. (Marked "Defendants' Ex. 401").

Whereupon defendants produce certified copy of Quitclaim deed No. 1719, Oregon and California Railroad Company to the City of Portland, issued for Contract 3827. Dated March 14, 1892. Recorded Book 179, p. 203. Deed No. 995. And offer the same in connection with Deeds No. 2045 (issued for contract 1705), of date July 3, 1893, recorded Book 245, page 438, Oregon & California Railroad Company to the City of Portland; and deed No. 2046 (issued for Contract 1804),

of date July 3, 1893, recorded Book 246, page 468; heretofore offered and received as "Defendants' Exhibit 386."

Received and marked "Defendants' Exhibit 402," which said exhibits, so marked, are hereinafter set out and described and made a part of this statement of the evidence, and identified as such.

Whereupon defendants offered in evidence Exhibit 402, described as follows:

Certified copy of Quitclaim deed No. 1719, Oregon and California Railroad Company to the City of Portland, issued for Contract 3827. Dated March 14, 1892. Recorded Book 179, p. 203. Deed No. 995. And offered the same in connection with Deeds No. 2045 (issued for Contract 1705), of date July 3, 1893, recorded Book 245, page 438, Oregon & California Railroad Company to the City of Portland; and deed No. 2046 (issued for Contract 1804), of date July 3, 1893, recorded Book 246, page 468; heretofore offered and received as "Defendants' Exhibit 386," and the same was received in evidence over the objection of complainant that the same was incompetent, irrelevant and immaterial, and is hereinafter set out and described and made a part of this statement of the evidence, and identified as "Defendants' Exhibit 402."

"Whereupon it was stipulated between counsel for the respective parties that Deed No. 2046, of date July 3, 1893, consideration \$1958.82, was executed pursuant to Contract No. 1804, of date February 16, 1883, exe-

cuted to A. G. Cunningham; and that the deed of date March 14, 1892, executed by Oregon and California Railroad Company to the City of Portland for the Northwest quarter of the Southwest quarter and the Southwest quarter of the Southeast quarter, of Section 23, Township 1 South, Range 4 East, W. M., and the North half of the Southwest quarter of Section 5, Township 2 South, Range 5 East, W. M., containing 160 acres, was executed pursuant to contract No. 3827, but date of contract is not given in deed and date is unknown to counsel at this time.

It was further stipulated that at a meeting of the Water Board of the City of Portland of April 7, 1891, a committee was appointed to investigate these contracts and find out the amounts due, and the chairman, Henry Failing, reported that the amount necessary to pay off contracts was \$8532.84; whereupon warrants were drawn for this amount, but deeds were not delivered until two years later, on account of final payments required according to the following memorandum, which appears on an envelope in the handwriting of Superintendent Dodge of the Water Board of the City of Portland:

Amounts paid O. & C. R. R. Co. by City of Portland:

April 17, 1891	\$5958.69	
	2574.15	\$8532.84
May 18, 1893	\$ 522.05	
	490.00	
	102.80	1114.85
	222.30	
	208.65	
	33.00	463.95
		<hr/>
		10,111.64

“X.” “Form of First Mortgage Construction Bonds of
the Oregon Central Railroad Company.

No..... \$.....

UNITED STATES OF AMERICA

STATE OF OREGON.

OREGON CENTRAL RAILROAD COMPANY.

Incorporated November 21, 1866.

FIRST MORTGAGE CONSTRUCTION BONDS.

KNOW ALL MEN BY THESE PRESENTS: That the Oregon Central Railroad Company, a body corporate, created under and pursuant to the laws of the State of Oregon, hereby acknowledges itself indebted and bound to the holder hereof, in the sum of one thousand dollars, gold coin of the United States of America, which sum the Oregon Central Railroad Company hereby promises to pay, at banking-house of Messrs. Dabney, Morgan & Company, in the City of New York, State of New York, to the said holder, on the fifteenth day of July, A. D. one thousand eight hundred and ninety-one, with interest from and after July fifteenth, A. D. one thousand eight hundred and seventy-one, at the rate of seven per centum per annum, payable semi-annually at the said banking-house of Messrs. Dabney, Morgan & Company, in the said City of New York, on the fifteenth day of January and July of each year after July fifteenth, one thousand eight hundred and seventy-one, on presentation and surrender of the annexed dividend and interest warrants.

This bond is one of a series of twenty-nine hundred thirty bonds of one thousand dollars each, numbered from one to twenty-nine hundred and thirty, both inclusive, and of twenty-nine hundred and thirty bonds of five hundred dollars each numbered from twenty-nine hundred and thirty-one to five thousand eight hundred and sixty, both inclusive, and amounting in the aggregate to four millions three hundred and ninety-five thousand dollars, and which have been made and executed by said Oregon Central Railroad Company under express authority granted by Acts of the Legislature of the State of Oregon, and also by an Act of Congress of the United States of America, approved May fourth, in the year of our Lord, one thousand eight hundred and seventy, and entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon,' and for the purposes authorized by and specified in said Acts, and each of them, and as security for the payment to the holders of said issue of five thousand eight hundred and sixty bonds, with interest to grow due thereon, said Oregon Central Railroad Company has duly executed, acknowledged and delivered, under the authority of said several Acts and of resolutions unanimously passed and adopted by its board of directors, to Milton S. Latham and Faxon D. Atherton, as Trustees, a mortgage or deed of trust bearing even date herewith, and whereby all the real and personal property, rolling-stock, roads, depots, stations, side-tracks, wood-yards, franchises and effects, now owned or acquired,

or hereafter to be owned or acquired by it, are mortgaged and conveyed to the said trustees and the survivors of them, as by reference to said mortgage or deed of trust, or the record thereof, will more fully appear, and to which and to all the terms and provisions thereof, reference is hereby specially made.

And as a further security for the payment to the holders of said issue of said five thousand eight hundred and sixty bonds, with interest to grow due thereon, the said Oregon Central Railroad Company, has, in the manner and upon the terms and conditions specified in the said mortgage or deed of trust, irrevocably appropriated and set apart all the net proceeds of the sales of the lands granted to aid in the construction of the railroad and telegraph line of the said Oregon Central Railroad Company from Portland to Astoria and McMinnville, in the State of Oregon, described and mentioned in the Act of Congress of the United States of America, approved May fourth, one thousand eight hundred and seventy, entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon,' for the creation and maintenance of a sinking fund to be kept invested in the bonds of the United States, or other safe and more productive securities, for the purchase from time to time, and the redemption at maturity of all said bonds, both principal and interest, in the mode and manner specified in said mortgage or deed of trust, and to which reference is hereby made as a part hereof.

In witness whereof, the said Oregon Central Railroad Company has caused this bond to be signed by its president and attested by its secretary, and its corporate seal to be hereunto affixed, at its office in the City of Portland, county of Multnomah, and State of Oregon, under the express authority of resolutions of its board of directors, this fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy-one.

..... President.
..... Secretary.

This is to certify that the above bond is one of five thousand eight hundred and sixty bonds which are embraced in the mortgage or deed of trust, bearing even date herewith, made and executed by the Oregon Central Railroad Company, whereby all its real and personal property, rolling-stock, equipment, depots, roads, stations, side-tracks, wood-yards, franchises and effects, acquired and to be acquired, and also all the lands granted to said Oregon Central Railroad Company by the act of Congress of the United States of America, approved May fourth, one thousand eight hundred and seventy, and entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon,' are mortgaged and conveyed to us as trustees, as security for the payment of all said bonds, and which mortgage or deed of trust has been recorded in the several counties of Oregon, through which the railroad of said company runs, and constitutes the first lien or incumbrance upon the property therein described.

....., Trustees.

(Form of Coupon.)

\$..... The Oregon Central Railroad Company will pay to the holder hereof..... in United States gold coin, at the banking house of Dabney, Morgan & Company, in the City of New York..... on the fifteenth day of.....18.....being semi-annual interest on bond No.....

....., Secretary.”

Whereupon the defendants offer in evidence from said printed document page 11 thereof, No. VII., likewise identified by the witness William Singer as a part of the collection of Laws and Documents referred to, and which is in words and figures as follows, to-wit:

“First Mortgage Bond of the Oregon and California Railroad Company.

UNITED STATES OF AMERICA.

STATE OF OREGON.

No..... \$1000.

OREGON AND CALIFORNIA RAILROAD COMPANY.

Principal and interest payable in U. S. gold coin.
Free from any U. S. government tax.

FIRST MORTGAGE BOND.

The Oregon and California Railroad Company acknowledges itself indebted for value received to the holder hereof in the sum of one thousand dollars, gold coin of the United States of America, which it promises

to pay to the holder hereof in the City of New York, on the first day of April, one thousand eight hundred and ninety, with interest thereon at the rate of seven per centum per annum, payable in gold coin as aforesaid, free from any U. S. government tax, semi-annually on the first days of April and October of each year, at the banking-house of Messrs. Dabney, Morgan & Co., in the city of New York, on presentation and delivery of the annexed interest warrants as they severally become due. And the said company agrees that this obligation and all rights and benefits arising therefrom may be transferred by general or special indorsement or by delivery as if the same were a note of hand payable to bearer.

This bond is one of a series issued by said company amounting in the aggregate to the sum of ten millions nine hundred and fifty thousand dollars, the said issue of bonds being expressly limited to the sum of thirty thousand dollars per mile for the entire length of the railroad of the said company to provide for the construction and equipment of the said railroad, and the said bonds are secured by a first mortgage on the said railroad, its franchise and rolling stock properly executed by the said company to Milton S. Latham and Faxon D. Atherton, trustees, for the holders thereof, by which mortgage the said company has conveyed to the said Milton S. Latham and Faxon D. Atherton in trust for the use and benefit of the holders of said bonds the said railroad, its franchises and rolling stock, as by reference to the said mortgage or the record thereof, as by reference

being thereunto had will more fully appear. And the said bonds have been further secured by a conveyance to the said Milton S. Latham and Faxon D. Atherton as trustees of the entire land grant made by the United States to said company of 12800 acres of land for each mile of its said railroad, said lands having been set apart and their proceeds having been pledged as a sinking fund, for the redemption of said bonds, as by reference to said last-mentioned conveyance in trust, or the record thereof, reference being thereunto had, will also more fully appear.

In witness whereof, the Oregon and California Railroad Company has caused its corporate seal to be affixed to this bond, and the same to be signed by its president and secretary, at the office of the said company in the State of Oregon, this fifteenth day of April, one thousand eight hundred and seventy.

....., President.
....., Secretary.

Coupon No. 40. \$35. The Oregon and California Railroad Company will pay to the holder hereof thirty-five dollars, in U. S. gold coin, at the banking-house of Messrs. Dabney, Morgan & Co., at the city of New York, on the first day of April, 1890, being semi-annual interest on bond.

A. E. CUNNINGHAM, Secretary.

(Indorsed:) No..... \$1000. United States of America. State of Oregon. Oregon and California Railroad Company. First mortgage, land grant, seven

per cent. gold bond. Interest payable in gold on the first days of April and October of each year, at the banking-house of Messrs. Dabney, Morgan & Co., in the city of New York, free from any U. S. government tax.

We hereby certify, that this bond is one of the within described series, amounting in the aggregate to \$10,950,000, and is secured by a mortgage upon the property and franchises of the company, and is further secured by a conveyance to us, in trust of its land grant of 12800 acres of land for each mile of road constructed as within described, the said mortgage being dated the fifteenth day of April, 1870, and executed and delivered to us, which said mortgage is recorded in the several counties of the State of Oregon, through which said railroad passes.

....., Trustees.”

Mr. Townsend: Both of the last two preceding forms are subject to the objection on the part of the Government that the same are incompetent, irrelevant and immaterial.

Whereupon A. K. SLOCUM was called as a witness on behalf of defendants, and being duly sworn, testified that he was manager of Circulation of the Oregonian on February 15, 1908, and recognized the photograph attached to his affidavit as a correct reproduction of a portion of the Morning Oregonian of the issue of August 12, 1871, which is undoubtedly a copy from the Oregonian of that date, and his affidavit to the effect that it is a photographic copy of the paper of that issue is correct, because he checked it up at that time. That

advertisement appeared in the Oregonian of the issues from August 12, 1871 to September 11, 1872, upon the dates listed in his affidavit, and the dates given are correct as shown by the original files of the Oregonian, which he inspected. Which evidence was received subject to the objection heretofore made to said Defendants' Exhibit 280 heretofore received in evidence.

Whereupon J. B. EDDY, called as a witness on behalf of the defendants, and being duly sworn, testified; that he is tax and right of way agent of the Southern Pacific Company, and tax agent of the Oregon and California Railroad Company, and has been in the tax department of the Oregon and California Railroad Company eight years. He was State Railroad Commissioner from 1893 to 1898. He entered the services of the Oregon and California Railroad Company in the tax department when it was consolidated with the O. R. & N. Company. He means when the offices were consolidated, the companies were not consolidated, they were put under the same general management at this end. He was right of way agent for the Southern Pacific Company, Pacific Railway and Navigation Company, Corvallis and Eastern Railway Company—the allied lines of the Southern Pacific Company in Oregon; and was also right of way agent for the Oregon and California Railroad Company—that is all property purchased for the use of the Southern Pacific Company for operating is purchased in the name of the Oregon and California Railroad Company, in connection with its leased lines. The Southern Pacific Company does not own any lands. The Oregon and

California owns it all, and when the Oregon and California Railroad Company finds it necessary to have additional right of way for any additional mileage that may be operated by the Southern Pacific Company, that right of way is acquired in the name of the Oregon and California Railroad Company and added to the holdings of that Company as railroad property. He has procured certain copies of so much of the assessment rolls of the Counties of Washington, Yamhill, Clackamas, Polk, Marion, Lincoln, Benton, Linn, Lane, Douglas, Coos, Curry, Josephine, Jackson, Klamath, Columbia, Tillamook, and Multnomah, in which the unsold lands of the Oregon and California Railroad Company involved in this suit are situated, including the unpatented lands to which the Company has obtained title within the primary or selected limits for the year 1911. Whereupon witness being shown Defendants' Exhibit 318, purporting to be such certified copy of so much of said assessment rolls for those counties as relates to said lands, and the same being recognized as such by the witness, defendants offered and they were received in evidence over the objection of complainant, that the same are incompetent, irrelevant and immaterial, being Defendants' Exhibit 318, which is hereinafter set out and described and made a part of this statement of the evidence identified as such. Whereupon witness further testified that he had prepared or verified from his records, based upon the taxes actually paid by the Oregon and California Railroad Company on the unsold Congressional lands, the acreage for each county, the valuation as shown by the

records of his office and the assessment rolls, and the valuation upon which the company has paid these taxes, the average value per acre as computed, the average value in mills, the total tax paid, and the average tax per acre in all of these counties, from 1904 down to and including the year 1911, and had prepared a blue-print tabulated statement, which he is able to say is correct, based upon the tax records of the company and the vouchers for taxes paid. Whereupon witness recognized this tabulated or comparative statement, marked Defendants' Exhibit 319, and further testified that this was prepared in his office, under his direction, from the press-sheets, vouchers, tax receipts and records of the office pertaining to these unsold Congressional lands, and obtained the facts shown in his vouchers from the assessment rolls in the hands of the sheriff for the collection of taxes. These are taken from the counties. They always send some one there to check them up and then transfer them to their records. This table is based upon disbursements actually made to the sheriffs of the various counties in payment of taxes and represents the payments actually made by the company, and they are correct. Whereupon defendants offered in evidence Defendants' Exhibit 319, to which complainant objected as incompetent, irrelevant and immaterial, which was received in evidence, so marked, and is hereinafter set out and made a part of this statement of the evidence and identified as such. Whereupon witness being shown two documents, marked for identification Defendants' Exhibit 320, and treated as one exhibit, Statement No.

1-A, showing by counties the assessment upon Congressional lands of the Oregon and California Railroad Company from 1891 to 1904, inclusive, of date January 4, 1906, purporting to be prepared by the auditor in San Francisco on that date; and Statement No. 1, showing by counties the assessment upon Congressional lands of the Oregon and California Railroad Company from 1891 to 1904, inclusive, together with the acreage assessed, the assessed valuation, the average assessed valuation per acre, the total taxes paid, and the average taxes paid per acre, purporting to be prepared by the auditor at San Francisco, California, September 20, 1905, Statement No. 1-A also showing the acreage assessed, the assessed valuation, the average assessed valuation per acre, the total taxes paid, and the average tax paid per acre, and stated that these documents came from the auditor at San Francisco and are a part of the records of the office. The records of the company in San Francisco were destroyed by earthquake and fire on April 18th, 1906. The name of Robert Adams is the name of an employe in the auditor's office, signed at the lower left hand corner of Statement No. 1, and he is satisfied from the documents that they were prepared in the auditor's office from the records of the company, and he has acted upon that as such for the company, and has every reason to believe that they are correct. He did not make them, but they correspond with the records of later date. Whereupon defendants offered these documents as one exhibit, Defendants' Exhibit 320, to which complainant objected as incompetent, irrelevant and im-

material, which exhibit was received in evidence and is hereinafter set out and described and made a part of this statement of the evidence and identified as such. Whereupon witness further testified that one of these documents was arranged by counties and the other by years, merely for convenience. The same information is in one that is in the other, only put in a little different way for convenience of reference. He prepared Defendants' Exhibit 321 from the records in his office, and that table or statement includes the information contained in part in Defendants' Exhibit 319 and Defendants' Exhibit 320. There is an overlap in those though. Defendants' Exhibit 319 and Defendants' Exhibit 320 are all summarized in Defendants' Exhibit 321. Defendants' Exhibit 321 is a correct statement of what it purports to show. Whereupon defendants offered in evidence Defendants' Exhibit 321, to which complainant objected as incompetent, irrelevant and immaterial, which exhibit was received in evidence and is hereinafter set out and described and made a part of this statement of the evidence and identified as such. Whereupon witness further testified, that this Defendants' Exhibit 321 showed in Coos County the total tax per acre from 1891 to 1911, inclusive, as \$2.54 per acre and that is correct; that the total tax in Columbia County is \$2.75 per acre for the same period of time, and that is correct; that the total tax paid during that period of time, in Multnomah County, is \$2.75 per acre and that is correct. These exhibits refer to the Congressional lands, granted lands, of the Oregon and California Railroad Company, and in

so far as they cover the unsold patented lands, they include all those that are involved in this suit. Witness further testified that he has been more or less familiar with the territory shown by the yellow field on Defendants' Exhibit 259, for twenty-nine years; tolerably familiar with it for twenty years, going up and down in it, traveling on the railroads, and on the wagon roads; and he became familiar with the topography and general physical characteristics of what is known as the Willamette Valley as an officer of this company and otherwise as an officer and citizen of the State. Whereupon complainant objected to any testimony as to the character of the lands involved in this suit upon the ground that the same is incompetent, irrevelant and immaterial. Whereupon it was stipulated between the parties that this same objection should be considered as taken to all testimony offered by defendants relative to this subject without the necessity of repeating the same. Whereupon witness testified that the territory known as the Willamette Valley is practically all in yellow within the 20-mile limit of the grant made to the Oregon and California Railroad Company of date of July 25, 1866, and is all that portion of the map north of Cottage Grove to Portland, a distance of about 125 miles, roughly speaking. On the east side of the Willamette River it is practically level from Eugene to Oregon City. On the west side it is level in Lane, Benton and Polk Counties; Yamhill, Washington and Columbia Counties are more rolling. It was taken up largely under the old Donation Land Act, in the early days of the settlement of the

state. He refers to the donation land law, but does not recall its date. He knows these things from the fact that, in checking the right of way deeds they bear reference to the donation claims. Oregon City is the County seat of Clackamas County; Salem the county seat of Marion County; Albany the county seat of Linn County; Eugene the county seat of Lane County; Corvallis the county seat of Benton county; Dallas the county seat of Polk County; and Hillsboro the county seat of Washington County; St. Helens the county seat of Columbia County. The State Capital is at Salem. The State Agricultural College at Corvallis. The State University at Eugene. Oregon City is the oldest town in the State of Oregon, according to history and his knowledge. In the beginning of the government in this country Oregon City was the State Capital. Dr. John McLoughlin took a donation claim at Oregon City. He was the Hudson Bay Factor, the virtual ruler of this whole territory at the time the settlement began, and is commonly called in the history of the country "the Father of Oregon." Portland was first established as a town about 1845 or 1846, and was named after Portland, Maine. Oregon City is the head of shipping on tide water with reference to the Willamette Valley. Portland is the chief port for shipment of the products of the Willamette Valley by sea. Astoria was founded by John Jacob Astor in the early part of the last century, as a fur trading point. The Columbia River is the northern boundary of the State of Oregon. Captain Gray discovered that stream in 1792. Salem has been

the capital of the State ever since it has been a state, but there was a territorial capital before that, at Oregon City and at Corvallis a little while. Oregon was admitted into the Union in 1859. The Territory of Oregon was first organized in 1849 and the Provisional Government in 1843. Polk County was named after James K. Polk, President of the United States. Dallas, the county seat of Polk County, was named after George M. Dallas, Vice-President of the United States. Benton County was named after Thomas H. Benton, Senator from Missouri. Linn County was named after Senator Linn, Senator from Missouri and a friend of the Oregon Territory. Lane County was named after General Joseph Lane, the first Territorial Governor of Oregon, and its first Senator in Congress after it became a State. The first settlement of any consequence in the Willamette Valley was in 1843. There was considerable immigration in 1842. Jason Lee came in 1836 and settled at Salem, or near Salem; Mission Bottom, he thinks, just below Salem. The bulk of that land covered with yellow, not taken by these wagon road grants is agricultural land. There are large areas of the Willamette Valley that are open plains; French Prairie, Howell Prairie, Tualatin Plains, and the Albany Prairie, and quite a number of others of lesser note. The sides of this field in yellow, begin to rise up gradually, are foothills—foothills of the Cascades on the east side, and foothills of the Coast Range on the west. In Polk County the foothills begin practically at the town of Dallas. East of Dallas it is level. West of Dallas it is foothills, rising up to tall

mountains and to timber. The large body of land in yellow in the vicinity of Roseburg and Oakland, in Douglas County, outside of the Roseburg and Coos Bay Military Wagon Road grant, were settled under the Donation Law in the fifties. The lands marked in yellow that were thus settled are small prairies and foothills. The large body of yellow along the creek from Ashland to the Rogue River was settled in the early fifties under the Donation Land Law and the Pre-emption and Homestead laws. That is the section known as the Rogue River Valley, and from the junction to Bear Creek with the Rogue River southerly to Ashland, and is a valley mostly prairie, open country. The Siskiyou Mountains are at the south end. The summit of the Siskiyou Mountains is about ten miles this side of the Oregon and California boundary; and the summit is about fifteen miles from Ashland on a direct line. Ashland is about twenty miles from the summit by the wagon road, but in a direct line it would be perhaps twelve or fifteen miles. Cottage Grove is approximately 140 miles from Portland. Roseburg by railroad is 198 miles from Portland. Ashland about 343 miles from Portland. He cannot speak from knowledge as to these lands in the Willamette Valley in their native state being covered with any kind of timber; he can only speak from information; that there was on his first appearance in the valley extensive growths of fir and oak, mostly second growth fir and oak grubs—scrub oak. These lands in the valley were not called timbered lands in any sense as compared with these lands in the mountains. The lands in the

valleys are such lands as, when cleared, make first class agricultural land, and the lands in the mountains, when they are cleared, would not be worth much, if anything. This second growth fir and oak grubs in the Willamette Valley is good for cord wood. He caused a statement of taxes that were paid upon this land prior to 1891 to be prepared as far as he could get it. P. A. Worthington had charge of the preparation of the data for that; he was acting under his direction for the Oregon and California Railroad Company. Defendants' Exhibit 321 in the computation of total taxes paid, total taxes per acre, average tax per acre per year, does not take into consideration any taxes paid prior to 1891. This exhibit includes taxes from 1891 to 1911. The assessment rolls as shown are attached to a certificate for the Multnomah County assessment. The other forms for the other counties were prepared in his office on the usual form that the Company filled out for furnishing the Assessors with a list of these properties, and were filled out for the clerks to compare with their tax rolls and certify to the correctness thereof to save time. The "Port of Portland" shown on the tax roll for Multnomah County is local to that county and that form does not obtain elsewhere, excepting where there are different ports in different counties. Some counties do not have any. Taxpayers are allowed to pay half the taxes prior to the first Monday in April and the next half prior to the first Monday in October, if they so elect. If they are paid prior to the 15th of March a three per cent rebate is allowed, equivalent to six per cent interest

on the money. This is at the election of the taxpayer. He has caused to be prepared a summary of the census returns. Defendants' Exhibit 322 is a typewritten statement showing the population of certain places at each census for which there were returns for 1860, 1870 and 1880, and a printed slip giving the population of each of the counties in Oregon from 1850 to 1900 furnished by E. Dana Durand, Director of the Bureau of the Census, Department of Commerce and Labor, at Washington. Whereupon defendants offered the said exhibit as Defendants' Exhibit 322 in evidence to which complainant objected as incompetent, irrelevant and immaterial, which exhibit was received in evidence, and is hereinafter set out and described and made a part of this Statement of the Evidence and identified as such. Whereupon witness further testified that he had caused to be prepared Defendants' Exhibit 323, showing the population of certain counties and towns for the years 1890, 1900 and 1910 and the same is a correct summary of the census for the various years named to the best of his judgment and knowledge. This was furnished to him by Seneca Beach, who was superintendent of the census for Oregon. Whereupon defendants offered in evidence Defendants' Exhibit 323, to which complainant objected as incompetent, irrelevant and immaterial. Which Exhibit was received in evidence, and is hereinafter set out and described, and made a part of this Statement of the Evidence, identified as such. Whereupon witness further testified that Defendants' Exhibit 324, is a statement of the summaries of the assessment

rolls of the several counties of the state for the year 1911 as equalized by the county boards of equalization, and compiled by the Board of State Tax Commissioners of the State of Oregon as an official compilation, published by authority of the State of Oregon by the Secretary of State, of this State, and was furnished to him by the State Tax Board, and witness testified to the same effect with reference to Defendants' Exhibits 325, 326, 327, 328, 329 and 330; to which the complainant objected as incompetent, irrelevant and immaterial. Whereupon each of said exhibits was received in evidence, so marked respectively, and are hereinafter set out and described, and made a part of this Statement of the Evidence, identified as such. Whereupon witness further testified that Defendants' Exhibit 301, which purported to show the year, the acres, the valuation, the taxes paid for Benton County, Douglas County, Lane County, Linn County, Marion County, Washington County and Yamhill County, was prepared by P. A. Worthington, under his supervision. The lands referred to in this exhibit 331 are the unsold lands of the Oregon and California Railroad Company for the respective years in the various counties. The assessment of these lands in some of the counties was included with other property for taxation purposes. The tax figure represents the entire tax paid including rolling stock and road bed and other things. They were assessed in a lump. The assessors in those days did not seem to have as good a record as they have in these. He was able to ascertain from these statements the amount of taxes paid by the company

on its lands in the Congressional land grants, by going back and getting if he could, the taxes levied for that year and computing it on the valuation of the land, and by comparing it with the previous year where the land alone was assessed. That is, by taking the previous year and the succeeding years, where the land is assessed alone, and striking an average he could very nearly get it. Whereupon defendants offered in evidence Defendants' Exhibit 331, to which complainant objected as incompetent, irrelevant and immaterial; which was received in evidence and is hereinafter set out and described, and made a part of this Statement of the Evidence, marked Defendants' Exhibit 331, identified as such. Whereupon on cross-examination witness further testified, that he had lived in Oregon about 31 years, had farmed a little since that; served as deputy sheriff four years; Special Indian Agent of the Government for three years; Railroad Commissioner nearly six years and with the Railroad Company for twelve years; the balance of the time he edited a newspaper. When he first came to Oregon he took a bunch grass ranch in Eastern Oregon and farmed that for two years. Thirteen or fourteen years ago he bought a farm in the Willamette Valley and farmed that for a period of six months. This bunch grass farm in Eastern Oregon is in an open country and the farm that he purchased in the Willamette Valley had 27 acres of it improved and the rest of it was timber. It was located in Clackamas County, but he cannot give the description of it, section, township and range. It was just below the mouth of the

Molalla, on the west side of the Willamette River, three miles straight out from Canby, and then across the river. He lived six months on this farm, cleared up six acres, and hauled rails and sold the land. He has been in the employ of the Railroad Company nearly 12 years and is still in its employ. Whereupon on redirect examination witness further testified that he had made a computation of the average assessed value per acre of these lands from 1892 down to and including 1911, both inclusive, based upon the assessment rolls and the assessment of the property and the taxes paid, and prepared this Defendants' Exhibit 359, purporting to show the year, the average value per acre from 1892 down to and including 1911, and showing the highest assessed value of any lands in Columbia County and the lowest in Tillamook County, and it is a correct showing from the records of the company. Whereupon defendants offered said exhibit marked Defendants' Exhibit 359 in evidence. Whereupon the witness further testified that he took Columbia and Tillamook Counties because they were the highest and lowest average assessment for the year 1911. Whereupon complainant objected to the introduction of said exhibit as incompetent, irrelevant and immaterial, and that the amount of taxes is no defense in this suit. Whereupon said exhibit was received in evidence, and is hereinafter set out and described, and made a part of this Statement of the Evidence, and identified as such. Whereupon witness on cross-examination further testified that the average assessed valuation per acre during the year 1911, was the highest in Columbia Coun-

ty and the lowest in Tillamook County as compared with all of the counties within which these land grants are. He has been employed by the Railroad Company nearly 12 years as right of way agent, right of way and tax agent, special right of way agent and special tax agent and has had to do with the payment of taxes since 1904. He was in the tax and right of way office with J. W. Morrow, beginning in 1904, but his connection with it for the first two or three years was only incidental. His attention was given more especially to right of way matters. He knows that there was a system in effect with reference to the listing of lands for taxation, segregating those that were subject to contracts from those that were not subject to contracts, but whether that system had just been inaugurated or whether it had been in effect prior to that time he could not say. He thinks he has had enough to do with the matter of taxes on these lands since 1905 so that he can speak with reference to the general methods pursued by the Company. He does not think that the Company ever objected to the assessment of any of these lands above a valuation of \$2.50 per acre on the ground that that was the limit of the interest of the Company in the lands. There was not to his knowledge any effort made to keep the assessment down to the point where the Government contends was the extent of the interest of the Company. The Railroad Company handled the subject upon the theory that it was the absolute owner of the lands, without reference to these restrictions in the granting acts. The only thing that it has been contending for was to see

that the land was assessed in about the same proportion as other lands of like value and no effort was made to avoid assessment above \$2.50 per acre. He realizes that if the assessed valuation of these lands had since the year 1904 been kept down to not exceeding \$2.50 per acre that the amount of the total taxes paid by the Railroad Company would be very greatly reduced. It is a fact that \$1,637,314.69 have been paid since the year 1904, not taking into account the present year (1912) as against \$737,601.12 paid down to and including the year 1904. These figures include all the taxes paid by the Railroad Company up to this time; that is the amount relating to the years 1905 to 1911 inclusive, included all taxes paid down to the present time, the taxes for the year 1912 not being due until March, 1913.

“A. Prior to 1891 the record of taxes paid is exceedingly difficult to obtain from the fact that some of the counties did not begin to assess granted lands until 1890, and in other of the counties the taxes are included with property such as roadbed and station grounds, so that the taxes on the lands can only be approximated. From the best available data, I find that prior to the year 1891 we paid in Benton County \$2,546.42; Douglas County approximately \$4,400.00; Jackson County, \$40,-878.22; Josephine County, \$100.00; Lane County, \$4,816.26; Linn, \$1,400.00; Marion, \$2,076.32; Multnomah, \$723.40; Washington, \$1456.56; Yamhill, \$1,530.34, or a total of \$59,927.52. From 1891 to 1904, inclusive, we paid \$737,601.12; from 1905 to 1911, inclusive, \$1,637,314.69, or a grand total of \$2,434,843.33.

In 1911 the holdings of the Company were 2,119,927 acres, so that, on this acreage, the taxes paid would average \$1.15 per acre. From 1874 to 1898, inclusive, the taxes paid were \$326,420.61. In the latter year the holdings represented 2,322,084 acres, so that the taxes paid to that time would average within a very small fraction of 14c an acre. From 1874 to 1907, inclusive, the taxes paid were \$1,208,833.86 or 58c an acre on 2,073,415 acres then owned. From 1908 to 1911, inclusive, we paid \$1,266,009.47, or 57c an acre on 2,119,927 acres owned in the latter year. In the earlier years when the assessors began assessing the granted lands of the company, the valuation placed thereon was about 40c an acre in 1874, gradually increasing, and in but few instances exceeding \$1.00 an acre as late as 1890."

Whereupon witness further testified, that he has computed the average amount of the taxes paid during these several periods with reference to the holdings of the company from time to time. If the taxes were apportioned among all of the lands that inured to the Railroad Company under its grant, including approximately 820,000 acres that have been heretofore sold and 2,300,000 acres that are involved in the present suit, the average tax per acre would be a little less as to the unsold lands. The taxes per acre prior to 1905, for instance, was very light, and if those acres were taken off and the taxes paid to that time were deducted from it it would not make a very material difference, but would make some difference. The gross amount of lands appearing to have inured to the Railroad Company under

these grants is 3,182,169.57 acres. Apportioning the total taxes paid by the Railroad Company down to this date, that is, apportioning the total taxes among all the lands that inured under the grant instead of the present holdings of the company, the average tax per acre is a fraction over 76 cents, figured on the basis of 3,000,000 acres and over. The average tax per acre on the total amount paid, prior to the institution of this suit on September 4, 1908, computing the average with reference to the total amount of lands which inured to the company under its grant, instead of the present holdings of the company, or the holdings of the company at the time this suit was instituted is a very little less than 38 cents per acre; making the same deduction with reference to the total amount of taxes paid down to the year 1904, and including that year, the average tax per acre paid would be less than 25 cents per acre, and making the computation with reference to the total quantity of land which inured under the grant, that is 3,182,169.57 acres instead of the holdings of the company in the year 1904. More than one-half of all the taxes that have been paid by the company on these lands, from the beginning down to the present time have been paid since the institution of this suit. Whereupon on re-direct examination witness further testified, that since 1908, including that year, most of the counties in which these lands are situated, have employed cruisers and have cruised the timber lands of the company in these various counties, including other lands of like character, which has resulted in largely increased assessments, not

only of the company's lands, but all other lands of that character. In making distribution or apportioning this tax per acre on the total lands inuring to the grant,—3,182,169.57 acres,—it is his understanding there would be included the lands that have been sold and deeded from time to time from the beginning down to date, that is, that the acreage 3,182,169.57 acres is the total number of acres in the grant. After these lands are conveyed to others, aside from the executory contracts of sale, by which the vendees assume the payment of the taxes as between the company and the county, the owners would pay these taxes on these lands, and the company would have no record of it in its disbursements. The owners would pay the taxes when the lands are deeded, and the taxes paid by the owners would not appear in the figures which the company charges as having paid on the grant. That would be stricken from the list. That would be true as to the executory contracts where the parties paid the taxes. Whereupon upon recross examination, witness further testified, that this computation of his, has been made from the records in the office since 1892. When the company makes a statement to the sheriff for the payment of taxes, for each county, every subdivision that it pays on, is included in the receipt. The company keeps duplicates of these, in the office and these reports are made from those duplicates? He has simply added together the amount of those receipts for each year in each county. The amounts paid by the company on lands that were subject to contracts, and then the amounts so paid charged against the purchasers, seem to

be very small. There have been about two or three instances since he has been handling it direct, and they are small amounts. Where the purchaser or the owner of the contract had not paid and allowed the tax to become delinquent, the company would pay it. Whereupon on redirect examination the witness further testified, that he is tax and right of way agent of the Oregon and California Railroad Company and the Southern Pacific Company, and has checked up Defendants' Exhibit No. 7, printed in and part of the joint and several answer of the defendants in this case, being a "Statement showing right of way through unsold East Side Grant Lands required for Oregon and California Railroad," and it is a correct reservation as made by the company. There are some extra widths that are required for meeting special conditions. As right of way agent he could say that that was reasonably necessary for the operation of this railroad. The tract described as "North half of Section 15, Township 33 South, Range 6 West. Reserve entire half section for reconstruction of railroad on account of change of line," is at the point just immediately south of Tunnel No. 9, where the road is constructed largely upon trestles and cuts through points of the hill. It is contemplated to change the line, taking out those curves and trestles, and a large amount of the land will be needed for borrow material. The company has not fully determined just where the relocated line will be. Whereupon, upon cross examination, witness further testified, that the Railroad Company has set this apart so that it will not be included

in any of the sales made of any of the granted lands, until after these changes are made, and it sees just what it needs out of that half section. All of these other reservations have reference to the permanent track and for the most part consists of 100 feet on each side of the track, which gives the railroad company a continuous right of way through that part of the state, at least of 100 feet on each side of the track, connecting it up with the public lands which it obtained, and includes the same general width of right of way on the odd numbered sections which it obtained in the even numbered sections of the grant.

Whereupon defendants offered in evidence Defendants' Exhibit No. 7 to the answer, in connection with the testimony of the witness, to which complainant objected as immaterial and irrelevant; which said Exhibit No. 7 is attached to and made a part of the joint and several answer of said Defendants in this suit, and designated as Exhibit No. 7 of said answer.

Whereupon P. A. WORTHINGTON, called as a witness on behalf of defendants, being duly sworn, testified that he is at present employed by the Southern Pacific Company and has been specially employed by Mr. Eddy of the Tax Department of the Oregon and California Railroad Company for the last 30 days going to the different county seats and checking the rolls and looking over the tax records all that he could find in the different counties. His purpose was to find what the records disclosed as to the amount of taxes paid by the

Oregon and California Railroad Company on its congressional lands in the different counties, referring to the lands described in the bill of complaint in this cause granted to the predecessors of the Oregon and California Railroad Company under the Act of July 25, 1866 and the Act of May 4, 1870. These certified copies of the assessment rolls for the year 1911 of the Congressional lands of the Company for the various counties include unpatented lands unsold, primary; these are in addition, as he understands, to the lands described in this suit. He found out by checking over the amount of land described in the suit, that these are in addition to those lands, and that would account for the fact that the Company apparently is paying on some unpatented unsold primary lands, that are not included in this suit and makes the difference between the acreage footing of say Clackamas County as shown in "Defendants' Exhibit 318" and as shown by the bill of complaint. In doing the work of preparing this statement in "Defendants' Exhibit 318" he checked with the officers where he could get them to assist him and at times went through and compared them with their roll and checked them over himself, and made the balances and saw that they balanced with the roll. These statements are correct upon his own knowledge, from the rolls officially on file with the sheriff or clerk of the respective counties. An examination of the headings of "Defendants' Exhibit 318" shows that the sheriffs or clerks certified in the major part of those outside of Multnomah County to that part of the roll which pertains only to the Congres-

sional lands, the valuation and taxes thereon, but do not go into the merits of the school districts and various other items that are on the roll generally. They did not use the top of the roll which is usually printed on these forms of blanks, the rolls are furnished to the various counties, like Multnomah for instance, by the State. That form is the form furnished by the State for different assessments and they are uniform for each county. There may be some minor changes as for the different parts in different sections of the State. He prepared personally "Defendants' Exhibit 331" from the records as he found them in the several counties and these statements are correct as found upon the records of the different counties and were taken from the assessment rolls—some of them—all that he had would be from the assessor's rolls and sometimes he would find the tax rolls in the hands of the sheriff. He found the records in many instances in the attics, piled away in some corner of the vault and very hard to find, and in some cases they could not be found at all, but he examined all the records that he could find in the counties named in the statement. Referring to the memorandum "No evidence that this was paid" referring to Lane County assessment for 1890 stating the number of acres, valuation and tax, witness testified that he found on the roll opposite the name and tax as to the other items marked the word "paid." In that particular instance he found the value was carried out and the number of acres, but there was no note on the margin of the book showing that the tax had been paid. Upon further investigation his

attention was called to the case of the Oregon and California Railroad Company against Lane County and James E. Noland, Sheriff, reported in 23 Oregon, to the effect that that year's assessment, made by the sheriff, was involved in litigation and resulted in a suit so that it appears that for 1890 a part of the taxes on these lands were paid and a part apparently unpaid, as shown by the roll, and that the reason of the sheriff's assessment was that it was an assessment upon indemnity lands that had not been selected that the sheriff made. Where the items shows the words "Included with other property" that means that the road bed or the station grounds and rolling stock of the Company were included. These were all carried in one column and he could not segregate them to tell how much of it was on the land without going back and getting the levy of that year and making a calculation. He found this the way in which the assessment was carried on the roll for Marion County. He has made a computation as best he could from these records and from "Defendants' Exhibit 331" to show what taxes have been paid by the Oregon and California Railroad Company on its Congressional lands from 1873 down to 1890, both years inclusive, and the result of his computation is that in Benton County the average number of acres assessed from 1873 to 1890 were 9753 acres and the tax paid \$2546.42, the average tax per acre 26 cents. In Lane County from 1874 to 1890, the average number of acres assessed for the time were 52,000 acres, taxes paid \$4816.26, the average tax per acre 9 cents. Linn County, from 1883 to 1890, the aver-

age acres assessed were 28,714 acres, and the tax was \$1400.00, average tax per acre about 4.8 cents. From 1883 to 1890 Washington County, the average number of acres of land assessed was 5360 acres and the tax \$1456.56, or an average tax per acre of 27 cents. Yamhill County, from 1877 to 1890, 11106 acres was the average assessment and the tax was \$1530.34 or 13 cents per acre. This is substantially correct as shown by the assessment rolls and by "Defendants' Exhibit 331." Lincoln County was carved out of Benton County since 1891. It is his understanding that the lands had not been patented or selected by the Railroad Company and that was why these lands did not appear upon the rolls earlier. He has undertaken to show by "Defendants' Exhibit 331" all that he was able to find in these various counties and his search was confined to the counties disclosed in "Defendants' Exhibit 331." He has made an investigation and search of the records of Multnomah County prior to 1891 to see whether the lands in Multnomah County were withheld from taxation or assessment on account of the suit of the United States against the Oregon and California Railroad Company, Hurlburt and Evans and the record shows that the taxes were paid from 1875 to 1890 and the lands were not omitted from assessment and taxation on account of that suit. That suit was after the date mentioned by him along in 1893. He prepared "Defendants' Exhibit 352." These figures are copied direct from the records of Multnomah County and are correct.

Whereupon defendants offered in evidence "De-

fendants' Exhibit 352," to which complainant objected as incompetent, irrelevant and immaterial, which exhibit was received in evidence and is hereinafter set out and described and made a part of this Statement of the Evidence and identified as such.

Whereupon R. A. BOOTH, called as a witness on behalf of defendants, and being first duly sworn, testified that he resides at Eugene, Oregon, and that "Defendants' Exhibit 332," being two maps purporting to show the lands of the Booth-Kelly Lumber Company in red, and the lands of the Wentworth Company in green, were prepared in the office of the Booth-Kelly Lumber Company under his direction. He is a shareholder and director of the Booth-Kelly Lumber Company, and is familiar with the holdings of that company and the Wentworth lands, and believes these maps to be accurate.

Whereupon counsel for complainant objected to the testimony of this witness relating to the character of the lands and their values, within the limits of these grants involved in this suit as incompetent, irrelevant and immaterial, and it was stipulated that this objection shall be considered as taken and made to all of the testimony of this witness on this subject.

Whereupon witness testified that these lands of the Booth-Kelly Lumber Company thus indicated on these maps, are chiefly valuable for their timber—except those that have been cut over. He does not know the name of the holding company of the lands colored in green,

known as the Wentworth lands, but his relation to these lands in organizing them into a fire district when he was manager of the Booth-Kelly Lumber Company, was with Mr. Wentworth of Chicago, who, he understands, is still interested in the lands. His understanding is now that they are under the care of L. J. Wentworth of the Portland Lumber Company in Portland, Oregon. These lands are chiefly valuable for their timber. Speaking of the character of these lands, with the timber cut off, they are ordinarily termed stump lands, the stumps still remain and all of the heavy debris such as does not burn readily with fires that are run over them for the purpose of clearing them as well as they reasonably and easily can be done for the purpose of protecting the remaining forest; they are hillsides, mountainous. The lands of the Booth-Kelly Lumber Company now owned in Lane County and in Linn County adjoining those in Lane, a bit more than half of them, or about 75,300 acres out of a total of about 136,000 acres, were acquired from the Oregon and California Railroad Company, and were originally part of this grant to that Company. He could not say, but Mr. Dixon could say, what proportion of this holding thus acquired from the Oregon and California Railroad Company has been completely logged off. The timber lands owned by the Booth-Kelly Lumber Company, as shown on these maps, are in the western foothills of the Cascade Range. They are along the small creeks which are tributary to the Willamette River, the different prongs, and on the hillsides and ridges between the streams. They are all mountainous and

hilly lands, except such as they find on benches formed by old slides and erosions and the narrow creek bottoms. The soil varies. It is all more or less rocky. Some of it is dark alluvial soil on the benches. Some of it is red. Some of it is rocky ridges. It has no value except for the timber, where the timber is standing, because the light is excluded, and there is no growth of vegetation that is valuable. After they are cut off and the light debris burned, so as to give a coating of ash, they are good grazing lands. Grass grows readily wherever it is seeded, and they form good pasture lands. If it is seeded immediately after burned, with such tame grasses as are in ordinary use in that locality, they can all be used the greater portion of the year, if the timber is cut off and the debris burned and then seeded in the stumps. The high lands perhaps would be covered with snow during three or four months of the year, and only the lower lands could be used. From his knowledge and investigation, the cost of clearing these lands of the stumps to render them suitable for plowing, where there is any soil that could be adapted to pasturage or grazing or agricultural purposes of any kind, varies greatly because of the different number of trees on the ground and the different character of the soil in which they grow. It would range anywhere from \$50 to \$500 an acre.

Q. Now, let me put to you this question. Suppose that an intending settler should apply to purchase one of these quarter sections in the state of nature in which it was before any of this timber was cut off, and should offer to the company, seeking to purchase it, \$2.50 an

acre under this act of April 10, 1869, go on the premises as an actual settler, and there to make his home as an actual settler, I wish you would state to the Court whether or not in your judgment such land is adapted or was adapted to actual settlement in quarter sections in that way.

Mr. Townsend: That is objected to as incompetent, irrelevant and immaterial and calling for a conclusion of the witness both upon a question of fact and law, and not being a subject that comes within the scope of expert testimony in any way.

A. It is not adapted to settlement, and settlers could not make a living on it until after the timber was removed because of shade excluding the light and preventing any vegetable growth.

Q. Would or would not such settler be able to make a living on these lands for himself, or for himself and family, without cutting and selling the timber therefrom?

A. He would not.

Q. What, then, is the chief value of these lands and of lands similarly situated in this grant?

A. In their virgin state?

Q. Yes, that is what I mean.

A. The lands to which I refer belonging to the company and those intermingled are chiefly valuable for their timber.

Q. What would you call these lands then, what class would you put them in, agricultural or timber or stone or grazing, or what?

A. Timber-lands.

Q. About what proportion of these lands belonging to the Booth-Kelly Lumber Company in your judgment are without any soil that would be useful for any purpose—I mean that are rocky or contain no soil of value or are unfit even after cleared and grubbed for agricultural purposes or grazing purposes?

A. The percentage that would not do for grazing is very small, practically all do for grazing except where there are rocky ridges and where it is too rocky to allow the grass to reach the soil; but the percentage of that is very small as far as our land is concerned.

Q. You say it is nearly all suitable for grazing after it has been cleared of the timber and the debris by burning, and after being seeded. Suppose that a settler or a man buying one of these quarter sections of logged off land was expected to make his living by grazing on the quarter section, and was not permitted to have the out-range all over the country, you may state whether or not the grazing on this quarter section under these circumstances would be sufficiently good to enable him to support himself or his family.

A. It would not be. It is not the custom for one to use grazing lands unless they have some arable land to use in conjunction with it, so that they may provide winter feed; but I consider the lands splendid grazing lands, and he could rent them to others.

Q. About what rental could he get from them, as compared with the rental charged by the Forest Reserve, or do you know?

A. If they were seeded he could get from 50 cents to one dollar per year.

Q. Per acre?

A. Per acre, yes; and seeded.

Q. From whom could he get that—large herdsmen?

A. Yes, and the ranchmen who own stock.

Q. About what would it cost him to prepare this land for seeding and pasturage and to put it in grass, as you have indicated?

A. If he simply runs a fire over it the cost would be very slight, unless he was unfortunate in burning adjoining timber for which he might be liable. The fire spreads over it quickly, and perhaps would permit 70 to 80 per cent of it to be used for pasture, and the cost of the seed would be from \$1.25 to \$2.50 per acre, owing to the kind of grass and quantity that he sowed on it.

Q. And does that include the labor of seeding as well?

A. Yes, sir. I think so.

Q. Now, does this grass that you refer to in that way require reseeding annually, or is it like meadow or something of that kind that lasts for a number of years and then would have to be reseeded?

A. The custom, of course, or good custom, would be to have perennial grasses, those that don't require to be seeded often.

Q. Then they would simply be reseeded after they had run out?

A. Yes, sir.

Q. Like an ordinary meadow in bottom lands?

A. Yes, sir.

Witness further testified that he was familiar with the unsold lands of the Oregon and California Railroad Company in Lane County; some of them in Linn, Douglas and Josephine, and that the lands of the Booth-Kelly Lumber Company are similar to the remaining lands of the Oregon and California Railroad Company that are intermingled and lying in the same vicinities. He would call these unsold lands timber or burned over lands. They are essentially the same in soil or in rock or in topography, in a general way, as the lands of the Booth-Kelly Lumber Company, and he would say as to the ability of a settler to make a living on these lands in their native state, that the settler could not do it. Of course, by that, he means if the settler remains on the land all the time. It is a mere guess as to what is the present value of the best particular quarter section of these timbered lands, either unsold or belonging to the Booth-Kelly Lumber Company, measured by its market or commercial value. There is no market for the lands now. There is no call for lands in that locality except as the Booth-Kelly Lumber Company may be picking up

occasionally a claim that adjoins their own. He does not know of any lands being sold in the market in the ordinary way. The Booth-Kelly Lumber Company buys some lands. He could give something of an idea what it pays for them, meaning the Booth-Kelly Lumber Company. The highest price that he knows, of timber investors paying for this class of land per quarter section, taking the best quarter section in Lane County, is about \$1.00 per thousand on a stumpage basis. There are quarter sections that would be worth \$10,000 at that rate. There have been no sales of these timber lands in the vicinity of the lands of the Booth-Kelly Lumber Company that he can recall, where they paid as high as \$10,000 per quarter. There have been, however, within the last year, lands sold in western Lane County at about the rate he has named. The price that he named is the extreme price so far as he is advised, but there have been quite large sales within the last year in the Siuslaw region. He knows that the Johnson-Wendling Lumber Company made a large purchase in Lane County in the last year. This concern is composed of G. X. Wendling, of San Francisco; two of the Johnsons, and the Fleischackers of banking interests in San Francisco and largely interested in power lines. He cannot tell how many acres these gentlemen purchased in the sale mentioned by him. In the papers it is frequently referred to as a billion and a quarter and a billion and a half feet, and he has seen the map. It covers, or at least it is a number of different townships, but the acreage he could not give. It would be considered a large purchase. The lands of

the Booth-Kelly Lumber Company were purchased from the Oregon and California Railroad Company between 1898 and 1902.

Q. I wish you would state, Mr. Booth, in your own way, whether or not at the time you made these purchases, or at the time they were made, by the Booth-Kelly Lumber Company, they were made in the usual and ordinary course of business and at the then market price. State the circumstances under which these purchases were made, and including your judgment as to whether or not the prices paid were at the time reasonable.

A. The parties who organized the Booth-Kelly Lumber Company had been operating for quite a good many years previously in Josephine County, and attention was first called to the fir timber at Saginaw in 1896. We had been operating about ten years in Josephine County on lands purchased from the Oregon and California Railroad Company and others, and came to Saginaw to look over the operations there of Mr. J. I. Jones in 1896, and soon thereafter leased his plant for one year, with privilege of buying. At that time these lands were involved because he had contracts running with the company and they were assigned to us. Within the year we exercised our right to purchase, took over the contracts and bought a few hundred acres additional lands in that locality. The price that we paid for the lands that were under the contract was the price at which they had been sold or bargained to Mr. Jones, and the price that we paid for the adjoining lands was the price that

was asked us when we applied for it. After about a year's operation, or during the close, about the close of 1898, we applied for other lands known now as the Wendling Basin. The lands were on the market then, had been frequently quoted from \$6 to \$6.50 an acre, and we entered into a contract in March, 1899, for 18,000 acres plus, at \$7 an acre, is all that we were asked for them. In fact it was 50 cents per acre more than they had been quoted to us in the beginning of the negotiations, but our company was small and taking a less area than had first been discussed; the price was advanced 50 cents. During 1898 and for two or three years thereafter we made frequent purchases from the company, but purchased more of the company lands from others who had contracts with them. In this way we purchased all the lands, all of the company lands that are shown by these maps. And during the same period, and since, we have purchased the intervening even sections. The prices that we paid were the prices asked by the Railroad Company, and were open to all buyers so far as I know. We paid the usual market prices in the usual way.

Q. How did these lands compare in quality with the remaining unsold company lands in the vicinity?

A. Well, we aimed at all times to buy in compact bodies, and in the purchases that I refer to we did buy in compact body unless it was a place where lands were burned.

Q. Before you made these purchases did the Booth-Kelly Lumber Company inform itself by cruising or in

any way as to the timber character of these lands?

A. It did.

Q. In doing this, did it proceed in any other or different way from that of any prudent buyer of timber lands in western Oregon?

A. I think not. The lands were examined by members of the company and their cruisers, then written into a contract. Before examining, however, we would confer with the Railroad Companies as to whether the lands were sold and at what price they would be offered us, and ordinarily we were given time to cruise them.

Whereupon witness further testified that no consideration was ever extended or given to the Booth-Kelly Lumber Company that was not extended or given to every other timber buyer that sought to buy land from the Oregon and California Railroad Company. He could not give the average price per acre of these lands purchased from the Oregon and California Railroad Company which the Booth-Kelly Lumber Company paid, but he could give the price stated in the principal contracts. The increase in value of timber lands and timber holdings in all parts of western Oregon, since the purchase by the Booth-Kelly Lumber Company of these lands, has been quite marked. In fact Booth-Kelly Lumber Company was the first large buyer from the Oregon and California Railroad Company in the interior, to do an interstate business. The Booth-Kelly Lumber Company demonstrated that the timber had value and was a fair competitor with other fir timber

shipped from coast points. When that was known, buying became general. Large timber buyers have made investments in Western Oregon and now have holdings there, from Wisconsin, Michigan, Minnesota, Illinois, Iowa, and other points, and also by people in Oregon. He considers that the Booth-Kelly Lumber Company was the pioneer company in demonstrating the fact that these timber lands when accessible to transportation, had a value resulting from the manufacturing of the timber into lumber and its shipment. Then later investors from these states mentioned, gradually came into this market, and from that time, the market gradually appreciated. He can name quite a number of these people who have thus come from these states and made investments in various parts of Western Oregon in the timber sections: Charles Green, the Wentworths, the Wright-Blodgett people, various people from Saginaw, Michigan, the Danahers and others from Detroit, the Drew Timber Company, and many others. The investments of these people, extended to timber lands of Western Oregon in different localities, both within and without the grant. From the date of the organization and operation of the Booth-Kelly Lumber Company, the price of timber lands in Western Oregon has been gradually appreciating, and he thinks, it is continuing. This market has developed in all of the counties of Western Oregon where there are timber lands. Those who invest for the purpose of operation, either immediately or within a reasonable time, buy only within the influence of transportation facilities. There are others who buy for the pur-

pose of holding a long time who pay little regard to transportation facilities, but buy for investment purposes. Transportation facilities are the principal factor so far as properties are concerned; that is, transportation that in some way gets connection with the ocean or a rail line. He has lived in Oregon all his life, and most of the time in Western Oregon. He commenced lumbering first in 1880, and has been interested in it at all times since, and has been acquainted with the value of these timber lands, or their market value, or whatever value they may have had, from 1880 down to the present time. These timber lands of the Oregon and California Railroad Company had no market value about 1880 of consequence for timber purposes or otherwise. At times small tracks, 40 or 80 or 160 acres, were purchased by small mills for local use, and at the time in the 80's when the railroad was extended from Roseburg south, there was some little market developed in that way for railroad use, but not in any other way. He thinks that these lands first began to have a market value about 1898; that their purchase was the first of consequence. About 1898 all the principal valleys of Western Oregon had been settled in a general way, and these valleys were used mostly for agricultural and grazing purposes. The first large claims were taken under the Donation Land Act and subsequent acts for homesteaders, the pre-emption law and public entry. In 1898 there was little land in the valley belonging to the railroad companies. There was considerable in the foothills that was purchased for agricultural and grazing purposes. Prior to 1898 there

was no demand in the region of the holdings of the Booth-Kelly Lumber Company by purchasers, or by any one, for these timber lands of the Oregon and California Railroad Company. When Booth-Kelly Lumber Company went in there, these timber lands of the railroad company were all offered for sale. There had been no purchases of any consequence. The timber lands of Josephine County, were purchased earlier than those of the Willamette Valley. The timber lands there, were mostly covered with pine, and had uses different from fir, and the operations followed immediately there, after the completion of the railroad. The chief value of these lands was their timber. He was interested in the manufacture of sugar pine and other pine lumber at Grants Pass for a number of years. The concern was, Sugar Pine Door and Lumber Company. He became an employe in August, 1888, shareholder in 1889, secretary in 1890, and manager in 1895. They sold their business there, after the organization of the Booth-Kelly Lumber Company, he thinks, in 1903. Practically all the timber of the Sugar Pine Door and Lumber Company that it purchased, was logged off by 1903, and the Sugar Pine Door and Lumber Company was manufacturing lumber that it purchased from the mills. The Sugar Pine Door and Lumber Company manufactured sash, door and general finish from sugar and yellow pine, or what is now known as California white pine, and the bird's-eye pine was used in some high class finish. It also manufactured box shooks and things of that kind—that was the principal item of business. Most of these lands that

were owned by the Sugar Pine Door and Lumber Company were acquired from the Oregon and California Railroad Company.

Q. What would you say as to the character of the soil there, and as to the fitness for any particular use after the timber was removed?

A. The most of the pine that we operated was taken from the granite soils. It grows there on that class of land more than any other, at least in all the regions near the railroad where we operated. The soil has little value after the timber is removed. There is, however, a red soil in the country, in that section where the pine also grows, that is valuable for fruit purposes.

Q. What would it cost, roughly speaking, to take the stumps out of this land that you refer to in Josephine County, and to make it arable, where there is any soil for that purpose?

A. It would vary, I think, from \$20 to \$50 an acre. The trees are scattering, and there is but little underbrush.

Q. Less stumps per acre on that character of land than on the lands in Lane County?

A. Yes, and they are more easily removed.

Whereupon defendants offered and there was received in evidence Defendants' Exhibit 332, which is hereinafter set out and described and made a part of this statement of the evidence, and identified as such.

Whereupon witness further testified—

Q. Mr. Booth, some testimony has been offered in this case from Mr. Charles W. Eberlein, and a report has been introduced in evidence written by Mr. Eberlein, on the subject of the agitation in Western Oregon, or in Oregon, to compel the Oregon and California Railroad Company to sell these unsold lands involved in this suit, and I think it is stated by Mr. Eberlein in substance that you had something to do with this matter. I deem it proper that you should make such statement on that subject as you care to make, and I will ask you therefore to state what, if any, connection you had with that matter, and what knowledge you have on the subject, stating the same in your own way.

A. Will I confine the statement to that phase of Mr. Eberlein's testimony to which you refer?

Q. For the present, yes.

Mr. Townsend: The Government objects to evidence of this character on the same ground that was urged during the examination of the witness Eberlein, namely, that it is incompetent, irrelevant and immaterial, the circumstances under which the Government instituted this suit being in no sense a defense existing in favor of the Railroad Company.

Mr. Fenton: Counsel for the defendants understand the objection is made, but deem it proper that the witness shall make such statement as he cares to make on this subject.

Mr. Townsend: Now, may it be understood that this

objection shall apply to all of the evidence of this witness upon the subject without renewing the same?

Mr. Fenton: Yes, it may be so understood.

A. Mr. Eberlein testified, as I understand it, that members of our company, and myself in particular, agitated the matter of forfeiture of the grant; that I had been at various meetings where there was such agitation, and that I had presided at one. The statement is unqualifiedly false.

Q. Mr. Eberlein somewhere in his testimony, I can't call particular attention to it, stated in substance and effect that these contracts made by the Oregon and California Railroad Company for the sale of these lands which were ultimately conveyed to the Booth-Kelly Lumber Company were improvidently made, and that certain officers of the Oregon and California Railroad Company, or certain employes of the company, were covertly or secretly interested in these contracts, or some of them, and that from his investigation of the matter he felt that the contracts were not made in good faith on the part of the Oregon and California Railroad Company, and that there were some favors of some kind extended to the Booth-Kelly Lumber Company for certain undefined reasons, and I think I recall asking him if certain particular officers whose names had been associated with the transaction were in this deal, to which he replied No, but that certain others were. I wish you would, in your own way, on behalf of yourself and on behalf of the Booth-Kelly Lumber Company, and on

behalf of the Oregon and California Railroad Company employes, state what the fact is in that respect, and whether or not any favors were extended, or any employes of the Oregon and California Railroad Company were interested, directly or indirectly, in this matter.

A. The best answer, I think, is to review the circumstances of the organization of the company and the purchases of the land. As stated before, the first purchase that we made of these lands (I refer now to the lands of the Booth-Kelly Lumber Company) was made from Mr. J. I. Jones. The company had not been organized, nor had any members of it had any acquaintance with Mr. Jones at the time of the initiation of this transaction. After acquainting ourselves somewhat with the manufacture of fir and its uses, and believing that a business could be built up by its manufacture, we brought the matter to the attention of a number of gentlemen whom we knew, and with whom we had business relations in California, and we talked to the principal officers of the company in relation to further operations, the uses of the materials, and the places where it could be marketed, and rates that would be given. This matter was taken up directly with Mr. C. P. Huntington, Mr. H. E. Huntington, Mr. George Crocker and Mr. William H. Mills. After negotiating with Mr. Mills for the lands in the Wendling Basin, which was the first purchase of consequence—

Q. That is in Lane County, I believe?

A. In Lane County, as shown on the map that has

been introduced—we agreed to purchase the lands at \$7 per acre, which, as I stated a while ago, is 50 cents more than the price that was first asked, on account of our taking a less area than had been first discussed. The purpose of selling us the lands was to build up the transportation business of the road, and after the contract had been agreed to, and even after it had been written, we were not permitted to sign it until we had made an agreement for the manufacture and the transportation of the lumber. We made such agreement with Mr. C. P. Huntington simultaneously with the signing of the contract, and agreed to move over the rails of the company from Wendling, one point, not less than 2500 carloads of forest product within twelve months from the time that they would lay their rails to our mills. We purchased the right of way for that track, gave them the ties, and fulfilled our part of the contract. We have been operating since. As to whether it is improvident or not, the best answer is the condition of that community now. It is populous and prosperous, and ten-fold more settlers than there were at that time. We received no favors in it whatever.

Q. You say settlers—you mean people living in the country?

A. People living in that locality, employed in lumbering and supplying those who are employed in lumbering. There was no member of the company, of the railroad company, or of any other railroad company, interested then or at any other time or in any lands

that the company have owned or do own; that is to say, at any time that the company owned them. After the company had purchased as much land as its principal officers thought it should have, and a quantity sufficient to operate over an extended period of time, I called the attention to the directors to a body of land that was lying adjoining some that we had already purchased, and suggested that the company should own it. It was decided by the directors that they had purchased a sufficient quantity, and I then asked for permission to form a company to buy the lands so that they might be held in friendly hands. That was the last large purchase of lands made from the company in which I was interested, and I was one of 25 who purchased them. The purchase was made in the name of John F. Kelly, a trustee, and at the time the purchase was made there was no thought of any one in connection with the railroad being interested, but at a later time some of the employes of the company—

Q. Of the Southern Pacific Company?

A. Of the Southern Pacific Company, were interested, but the lands were eventually sold to the Booth-Kelly Lumber Company; but before they were, all the individual members sold their interests.

Q. I will ask you to state whether any officer or employe of the Oregon and California Railroad Company was interested, directly or indirectly, in this so-called Kelly contract, or in any of these lands that afterwards came to the Booth-Kelly Lumber Company.

A. Well, I think the parties were officers who were interested while they were held by Kelly.

Q. Well, I say the Oregon and California Railroad Company?

A. Oh, no, sir; they were not. I beg your pardon; none of them, or in any other lands owned by the Booth-Kelly Lumber Company.

Q. I wish particularly to inquire whether or not Mr. Richard Koehler, who was First Vice-President of the Oregon and California Railroad Company and General Manager of the Southern Pacific Company at that time, of the lines in Oregon, and who had been connected with the Oregon and California Railroad Company since 1874 down to I think 1904, had, directly or indirectly, any interest in any of these lands or in this contract.

A. Absolutely none.

Q. I will ask you whether George H. Andrews, Acting Land Agent and Secretary of the Oregon and California Railroad Company for a great many years, and who resigned September 15, 1904, and was succeeded by Mr. Charles W. Eberlein, and who had been with this company from the early days down, and who is now dead, had any interest in these lands or these contracts, directly or indirectly, or ever had?

A. He did not.

Q. I will ask you to state whether or not Mr. William F. Herrin, Chief Counsel of the Southern Pacific Company since 1894, down to the present time, had any

interest in these lands or contracts, directly or indirectly, or in any other way.

A. He did not.

Q. I will ask you whether or not Mr. William D. Fenton, who became counsel for this company in June, 1891, and who has continued in such relation up to the present time, ever had any interest, directly or indirectly, in these lands, or was connected, directly or indirectly, with the Booth-Kelly Lumber Company in any way.

A. He was not. Neither he nor any of the persons named ever had any discussion, and so far as I know any thought of such a thing.

Q. I will ask you to state whether Judge William Singer, Land Attorney of the Company, and connected with the Southern Pacific Company and the California and Oregon railroad, Central Pacific Railway Company and these companies since 1878, and continuously since, and still in such position, ever had any connection with Booth-Kelly Lumber Company or any interest in these lands, directly or indirectly.

A. None whatever.

Q. I will ask you to state whether or not any of these gentlemen, or all of them, because of any political relations to you or to any member of Booth-Kelly Lumber Company, ever exercised, attempted to exercise, or suggested to the Booth-Kelly Lumber Company, or to you, or you to them, any favors, concessions, undertakings or arrangement because of any political relations or otherwise.

A. Absolutely none.

Q. Then, as I understand, Booth-Kelly Lumber Company bought these lands from the Oregon and California Railroad Company in the same way as any other purchaser, and upon the same basis?

A. That is my understanding.

Q. Who was William H. Mills?

A. He was the Land Agent.

Q. Where was his office?

A. Located in San Francisco. The first purchase of consequence that we made was directly with him.

Q. Who fixed the price for the Oregon and California Railroad Company on these lands that were purchased through Mr. Mills?

A. Mr. Mills did. I would like to add, if I may be permitted—

Q. Go ahead.

A. That the majority of the lands formerly owned by the Railroad Company that were later purchased by us was purchased indirectly or purchased from parties who assigned contracts with the company, without any knowledge or initiation from us.

Q. These persons from whom you took assignments, were they any of the company's employes or persons interested?

A. They were not.

Q. And were these officers or any of them that

I have named interested in those contracts?

A. No, sir, or in any lands that we own or ever owned.

Q. I desire to call your attention to a statement contained in Mr. Eberlein's report, Defendants' Exhibit 309, found at page 80, which reads: "It may be asserted confidently that the present movement against the Oregon & California land grant was not instituted by persons wishing to settle, nor is it a movement for the general good." This report bears date May 1, 1908. "It has been brought on by agitation begun by certain large timber holding interests in Oregon for the sole and express purpose of compelling the railroad company to part with its timber holdings, in order that they might be acquired by these same timber holding interests. This fact has been well known by the land officers of the Oregon & California Railroad Company since the agitation was commenced, but it is brought to light clearly by the statement of Mr. A. C. Dixon of Oregon, an officer of the lumbering and timber holding corporation of the name of 'The Booth-Kelly Company,' before the Committee on Public Lands of the House of Representatives, on March 12, 1908. (See 'Hearings Held Before the Com. on the Pub. Lands,' etc., page 76), where he says: 'It was at a meeting of shippers, mostly lumbermen, that the question of disposal of lands still in the hands of the original grantees (Oregon & California Railroad Company) was first brought out in a public way, and the lumber interests were behind and favored every resolution on this sub-

ject adopted in the State and are still in hearty accord with the original purpose of the movement.' And, further: 'The Government, with all the agencies at its control, should secure their (the people's) rights from an offending corporation in a suit which we and other public-spirited citizens of our State have proposed and furthered continuously since it was first brought to public notice.' " This appears to be a quotation from the remarks of Mr. Dixon, set out at page 76 of a Statement of Mr. Dixon, made at the Hearings held before the Committee on the Public Lands of the House of Representatives, March 12 and 14, 1908, on Senate Resolution No. 48, instructing the Attorney General to institute certain suits, etc., published by the Government Printing Office at Washington, 1908; and I have verified the quotation from this statement of Mr. Dixon, as thus reported, and it seems to be an accurate copy of what Mr. Dixon is purported to have said. In view of Mr. Eberlein's statement in this report and his testimony elsewhere, that you attended and presided at one of these meetings, I wish you would state further, if you care to, what meetings, if any, you attended, where, and what was the purpose of these meetings, and what was the subject under consideration, whether you had anything to do with making this statement quoted from Mr. Dixon, or whether the Booth-Kelly Lumber Company, other than as represented by Mr. Dixon, so far as you know, took any such position.

A. I never attended any meeting that had for its purpose the discussion of the forfeiture of the grant, but

I attended one meeting in 1906 at Eugene that was called by the commercial organization at Cottage Grove. Their call was extended to the commercial bodies of the towns of the Willamette Valley. The meeting was quite largely attended in which they were discussing the proposed advance in rates, mainly what was known as the \$3.10 rate to Bay points, but also the increase in the eastern rate.

Q. You mean lumber rates?

A. Lumber rates. I did not preside. I spoke at that meeting.

Q. What is the fact as to whether or not this meeting was called and attended mainly by persons who were interested in the manufacture and sale of lumber?

A. The call was a general one to people in the Willamette Valley. It was attended by quite a number of gentlemen from Portland, representing the transportation committee, as I think, of the Chamber of Commerce, and various other members of the commercial bodies of the Valley.

Q. Was there at that meeting under discussion the subject of compelling the Oregon and California Railroad Company to sell its unsold timber-lands?

A. Not so far as I recall.

Q. What was said, if anything, if you recall, at that meeting about an effort to be made to forfeit the grant for failure to sell the lands at all, or for failure to sell it in accord with this act of April 10, 1869, at

\$2.50 an acre and to actual settlers, and in quantities not to exceed 160 acres?

A. Well, the matter discussed principally was the matter of rates on lumber, and so far as I recall nothing else. That is what I discussed.

Q. Was there or not any statement by any representative members there that the lumbermen should institute some method of reprisal looking towards forcing the company to sell these lands or to forfeit the grant if these rates were advanced? Was there not something of that kind said?

A. Nothing that I recall. It would have been absurd, of course, for the owners of timber-lands to urge forfeiture of the grant, when they would certainly know it would cloud their own titles.

Q. Well, at that time, Mr. Booth, isn't it true that the timber men, I mean the people who desired to invest in these lands, were opposed to the company's discontinuance of sale?

A. Well, I don't think that was so with timber men any more than other classes of people. There was a general remonstrance against it, and it extended to all classes of people, that it was not right and a mistaken policy, and so on.

Q. That is to say, to suspend the sales of the land?

A. To suspend the sales of the land.

Q. As they had been sold theretofore?

A. Yes, sir.

Q. Was there or not any particular demand voiced at that meeting, or any other, that these lands should be sold at \$2.50 an acre to actual settlers in quantities not to exceed 160 acres?

A. There was not at that meeting, nor at any other meeting that I know of.

Q. The opposition, as I understand you, then, to the policy was because the lands were not open to sale, as they had been theretofore.

A. That is it.

Q. Did you or did you not have anything to do personally with the preparation of the joint memorial which was passed in February, 1907, by the Legislature of the State, introduced, I think, by Senator Multit of Jackson County, other than to vote for it with all the other senators?

A. I had nothing to do with the preparation of it. I voted for it.

Q. The records of the Senate and of the House show that it was practically a unanimous vote on that measure. Was there or not any discussion in the Legislature on that subject?

A. I think there was. A number of senators spoke in favor of it.

Q. That was in February, 1907?

A. About that time, yes, sir. There was a general demand for it from the constituency all over Western Oregon.

Q. That demand was because the company had not continued to sell the lands as before?

A. Yes, sir. Now, if I may refer to a further statement there in connection with our company?

Q. Yes.

A. And the matter of agitation. I am informed that Mr. Eberlein said that we had threatened to have such measures introduced.

Q. I don't find that in the record. I don't think it is there.

A. I think it was in the newspapers.

Q. Well, I don't think it is in the evidence, but you may make your statement.

A. Because the company declined to sell us lands. That is not true, so far as I know. We never applied to the company for any lands that we did not purchase unless it might be two or three sections that were intermingled with ours. That was about the time the lands were withdrawn. But we never had any trouble with the company in any way in relation to the purchase of the lands—never any misunderstandings, and had no occasion whatever from that cause to agitate the forfeiture of the grant.

Q. I wish you would refresh my memory by stating who were the members of the Transportation Committee of the Chamber of Commerce that attended that meeting at Eugene to which you refer, in 1906.

A. Mr. Devers was there.

Q. A. H. Devers?

A. Yes, sir.

Q. H. Wittenberg?

A. I am not sure as to Mr. Wittenberg. Mr. Samuel Connell I remember. I don't know whether he was there as a member of the body, but I remember his being there. I don't think I can name any others, although I know there were several of them.

Q. Mr. Samuel Connell, I believe, at that time was in the manufacturing of lumber, the same kind of lumber, here in Portland?

A. Yes, sir; and I am inclined to think at that time he was Secretary of the Chamber of Commerce; if not he had been prior.

Q. Mr. Devers was a—

A. Member of the Committee.

Q. Member of the Committee. He was not in the lumber business.

A. No, sir; a grocer.

Q. He was a grocer?

A. Yes, sir.

Q. This meeting, then, was primarily to discuss a proposed increase of rates on lumber, common lumber, common green lumber, that was destined to Bay points in California, from \$3.10 to a rate of about \$5. Is that correct?

A. That is correct. I think also it had to do with

the advance of the eastern rate from 40 cents to a higher price.

Q. Fifty cents?

A. Yes, sir.

Q. And at that time the rates put in by the company, or threatened to be put in, or announced to be put in, were satisfactory to the Portland lumber manufacturers, who didn't use the railroad but who shipped by water, and were not satisfactory to the interior manufacturer?

A. That is correct.

Q. It was claimed, was it not, by the Booth-Kelly Lumber Company, that this rate of \$3.10 had been put in by Mr. C. H. Markham about the time the Booth-Kelly Lumber Company established its business at Saginaw and Wendling, and that it was not a temporary rate but one that was to be continued? That was the claim, was it not?

A. The statements that have been made by members of the company, and by myself, were that it was a temporary rate when it was first made, but that after a year's time the rate had been tested, that it was satisfactory and was made permanent.

Q. Do you recall the fact that during that agitation of rate Mr. Stubbs, Traffic Manager, came to Oregon, and that there was some effort to agree on the restoration of that rate? He went to Wendling. He went over these properties with you and with other mem-

bers of the Booth-Kelly Lumber Company. Do you recall that circumstance?

A. I do.

Q. Do you recall that it was contended by the Company officials that the rate of \$3.10 under the circumstances was not a compensatory rate, and that for that reason they ought to and should raise it; that it was afterwards litigated, and the rate was made \$3.40?

A. Not just in the way you state it, Mr. Fenton.

Q. Well, just state it. I am stating from general recollection.

A. At that time our Wendling mill, the principal mill, was shut down, and Mr. Stubbs asked if we would operate it if the \$3.10 rate was restored. We informed him that it would be, and he restored it on common green rough lumber, and we continued to operate. At a later time it was taken out and the \$5 rate put in, and then it was litigated.

Q. Well, that is right. And what was the ultimate result of the litigation?

A. The rate was made \$3.40.

Q. Do you recall that in that matter there was a difference of opinion among traffic officials in Oregon and traffic officials in San Francisco as to this controversy, and that the Oregon end of it, including Mr. Markham, wanted to maintain the \$3.10 rate?

A. I do.

Q. That was a fact?

A. Mr. Markham wanted to maintain it, and other members. Mr. Stubbs was opposed but yielded.

Q. Now, then, that was the subject really under consideration at this meeting in Eugene in 1906, was it?

A. It was; and in connection with the eastern rate also.

Q. That is what I mean.

A. Yes, sir.

Q. In the discussion there do you recall that there was anything said or intimated by anybody as to the land matters?

A. Except indirectly. I remember this, that the establishment of the company's mills operating on its own lands was considered unfair to mill men.

Q. You refer now to the company's mills on—

A. The Wendling branch.

Q. On the Wendling branch, situated at Marcola?

A. Marcola, yes.

Q. Now, who considered it really a breach of good faith or an improper thing for the company to do under the circumstances? What manufacturing concern?

A. Well, as a matter of good faith I don't know that any one did, but it was very generally condemned; I think by all of us. I know it was by me.

Q. That is to say, the Booth-Kelly Lumber Company and other manufacturers felt that the company

ought not to engage in a business in which they were common carriers and in which others who were patrons of the road were making their living and making their profits, if any?

A. Yes; because these parties had purchased the company's lands, demonstrated that they were valuable, and were then operating and were at a disadvantage in selling if the company provided itself with its material.

Q. Now, then, that was a source of some irritation between the manufacturers and owners of timber-lands and the company?

A. It was a matter frequently talked about, yes.

Q. Now, did that give rise or occasion to the policy which later became generally supported by the public, leading to the attempt to forfeit the grant?

A. It might have been a factor, but I don't think a very material factor. Now, it was stated, if I may answer that more fully, in Mr. Eberlein's testimony that the Railroad Company was compelled to do this largely on account of the acts of the Booth-Kelly Lumber Company.

Q. On account of raising the price of ties?

A. Yes, and cancelling contracts for ties.

Q. What is the fact about that?

A. It is absolutely false. The Booth-Kelly Lumber Company never did cancel a contract with the Railroad Company, could not if it wanted to; but it frequently permitted contracts to be cancelled and never

had any trouble with the Railroad Company as to the sale of its product.

Q. Was there or not about that time a sharp advance in the price of ties by all dealers?

A. Yes, sir; in all kinds of lumber, not ties alone.

Q. What was the occasion of that sharp advance?

A. The extended markets and the general demand for lumber.

Q. Do you recall what was the price of ties about that time?

A. I do not.

Q. Mr. Booth, I show you what purports to be a certified copy of "An Act Supplementing the joint resolution of Congress approved April thirtieth, nineteen hundred and eight, entitled 'Joint resolution instructing the Attorney General to institute certain suits,' and so forth," which appears to be an Act of Congress, approved August 20, 1912, commonly known as the Innocent Purchasers Act, which, for the purpose of identification, may be marked Defendants' Exhibit 333. Do you recall the fact that such an act has been passed?

A. I do.

Whereupon witness further testified that the Booth-Kelly Lumber Company has a suit pending known as one of the forty-five Innocent Purchaser suits in this court, and that the lands involved in this suit and in another suit against John F. Kelly, Trustee, and a

third suit in which Booth-Kelly Lumber Company is interested, aggregate about seventy or seventy-five thousand acres, the entire purchase from the Oregon and California Railroad Company.

Whereupon defendants offered and there was received in evidence Defendants' Exhibit 333, which is hereinafter set out and described and made a part of this statement of the evidence, and identified as such.

Whereupon witness further testified that it was his understanding that Charles W. Eberlein testified that on account of some grievance of the Booth-Kelly Lumber Company, W. C. Hawley was induced to run for Congress for the First District, and to introduce the resolution of forfeiture, and that witness urged him to support it. This statement is not true, and witness never at any time suggested to Hawley that he should run for Congress, and never discussed the matter of forfeiture with him at any time prior to his election, or at any time prior to the introduction of the resolution known as the Fulton resolution. After that resolution was introduced, he talked to Hawley about it, at the time witness was a witness before the Interstate Commerce Commission, as it affected the purchasers of the grant. He had a short conversation with Hawley in which Hawley stated that the matter had not been very generally canvassed, and what would be done so far as innocent purchasers, if there were any innocent purchasers, had not been developed. Hawley made no statement in relation to his action in regard to this act. With that exception, he had no conversation with Haw-

ley as to this resolution, nor as to his action in the matter, nor even as to running for Congress.

Whereupon upon cross examination witness further testified that he had lived in Oregon 54 years, was born in Yamhill County. He had not lived all of his life west of the Cascades. He had been in Eastern Oregon about three years in the 70's, with that exception he had lived in Western Oregon, that is in that part of Oregon situated west of the summit of the Cascades, and for a number of years last past he has been quite familiar with the general industrial and commercial history of Western Oregon. Kelly was associated with him in the Sugar Pine Door and Lumber Company but Kelly was not a stockholder until 1895 when witness became interested in the subject of establishing a general milling business, the first place was Saginaw and Kelly was one of his associates. He first took an option at Saginaw from J. I. Jones, whose holdings consisted mostly of railroad lands, but the option also covered some even sections. They first took an option for the purchase or lease and a few months after that, they made a lease for 12 months with the option of buying within the life of the lease and they exercised the right to purchase during that year and purchased in 1897. Shortly thereafter, they extended their plans and commenced purchasing these other railroad lands mentioned by him. Their negotiations for the purchase of lands in the Mohawk Valley, that is for the first large holdings, were in the latter part of 1898, the contract was in March 1899, and from that time on until late in 1902, they

made other purchases. In the meantime they got several small contracts and two large ones, where the Railroad Company had sold lands to other purchasers. The large ones were from Amos Hyland, for lands tributary to the Middle Fork. The Hyland contract covered nearly 7000 acres of railroad lands. They purchased from him at the same time, some lands from the even numbered sections intervening the railroad lands. After they negotiated these contracts with the Railroad Company, they filled in their holdings as much as they could reasonably, by purchasing the intervening even numbered sections. These contracts where they purchased from other persons, were generally in other localities. The Hyland contract, being on the Middle Fork, was where they had no holdings of any consequence at that time and the Jones and Cook contracts were on the Brumbaugh River. It is a fact, generally speaking, that they first acquired the railroad holdings and afterwards picked out the even numbered sections intervening them, except where they made large purchases like the Hyland and Cook. The deal with them carried also even sections, but the Company added to them, even and odd sections from time to time. In the case of Mr. Hyland he owned quite a little of the even numbered sections then, where it was in the locality where he lived and had an extensive stock business. He owned many of the even sections and had purchased timber lands from his neighbors on the even sections. In the case of the Jones and Cook contracts it is true that they had purchased the odd numbered sections from the Railroad

Company and then filled in by acquiring the even numbered sections. A large part of these lands referred to by the witness in his testimony, after they have been logged off, can be at a comparatively slight expense, converted into very good pasture lands. That has actually been done as to some of the lands that have been logged off; that has been fairly demonstrated. There is a sufficient rainfall in that general vicinity to give reasonable assurance of annual crops without irrigation. Dairying is generally carried on in this general vicinity and is understood to be profitable and he thinks it is. This dairying industry, has reference to lands between these holdings of the Booth-Kelly Lumber Company and the railroad, as a rule in the little valleys on the edges of the foothills. There are ranchers as far east as the holdings of the Booth-Kelly Lumber Company. These lands of the Booth-Kelly Lumber Company could not be used for agricultural or dairying purposes, until the timber has been removed, then if they are seeded to tame grass they would make good pasture lands and of course a considerable portion of them would do for fruit, gardening and even agriculture, if they were cleared. While he does not know the fact beyond the State of Oregon, it is true, he thinks that the timber must first be removed before lands covered with evergreen forests, not of deciduous trees, can be used for any kind of agricultural pursuits, dairying or grain growing, or fruit growing or otherwise. Grass grows more or less among the oaks and maples and things of that sort. The timber of fir and pine lands, must first

be removed and this is true with reference to these particular lands. When he refers to these lands as timber lands, he refers to the first use that can be made of such lands, and he does not mean by that, to exclude the possible use of the lands after the removal of timber, for grazing and agricultural purposes and when he says that these lands could not be used for the purpose of settlement and that the settler could not maintain himself upon the lands, speaking generally, he means that the lands could not be put to any use that would maintain a settler while the timber was standing. The reasonable value of the timber would go a long ways towards clearing the land and assisting the settler in establishing a home there. If he had the privilege or had the opportunity of disposing of the timber while he was clearing his land, he could make settlement on it. He thinks that to some extent as the milling industry has proceeded in this vicinity, with which he is personally familiar, employes of the different milling companies working for these companies at the same time have prepared lands in the vicinity in which they worked, by grubbing up the stumps, referring to lands that have been logged over and have thus prepared for themselves homes in that general vicinity. That has taken place to some extent. It has in instances where members of families working for the lumber concerns and other members of the family are clearing up homes along the foothills in the brush lands and in places in cut over lands.

Whereupon witness further testified as follows:

Q. Is it not a fact that a number of families have established homes in that general vicinity by that method that you have just described? I refer to lands that were timbered but have been logged off.

A. Well, that is especially true of the lands in the lower foothills that were covered with timber that has been removed and is being removed for wood and hauled into towns. There is a lot of that in Lane County, and I think in other counties, settlements being made in that way, but not much of that from the lands that we own or lands as remote from towns as they.

Q. Well, that is owing to the fact that settlement has not yet reached those remote parts, rather than the fact that the lands could not be so used. Isn't that true?

A. Well, there has been no policy adopted, so far as I know, of people who have cut over the lands yet of disposing of them, and the opportunity has not been given in that locality for that reason. It could be done if the cut over lands were sold to them.

Whereupon witness further testified that the Booth-Kelly Lumber Company has discussed the policy of reforesting its lands, but had not yet adopted a policy as to cut over lands. Pending a decision on that point, the Company has not disposed of its cut over lands. He lived at Grants Pass 12 years and at Eugene or in the vicinity 13 years and about 10 years at different periods near Roseburg. He is familiar in a general way with the country from Eugene south, practically to the State Line, but not very familiar at the present time with

Jackson County but is with Josephine, Douglas and Lane Counties. His knowledge of the character of the soil in Josephine County and its susceptibility to cultivation and growing of vegetable products, was gained largely during his residence there. It is true, that since he left there, the granite soils of Josephine County are being exploited, the lands are being cleared and advertised and offered for sale and some of them sold, but so far as his knowledge extends, it has not been demonstrated that these granite lands were good for vegetable products. He was there recently, at their fair, going there to attend to business matters in relation to his brother's estate, as he frequently does, and he made considerable inquiry then and also of the probability of irrigating the lands near Grants Pass, for the purpose of ascertaining how it would affect values there of lands than he had under control for his brother's estate. He was shown some products that were said to be grown on granite soil, that were fairly good, but the general understanding was that without irrigation the granite would not produce well. He is familiar with those lands immediately around Grants Pass, so far as planting is concerned. He knows that these lands have been planted and planted to grapes, lands on the hill sides in granite soil in sight of Grants Pass but the grapes are not yet bearing. What they may have done on any of these soils there since he left, with the exception of that immediately around the town and along the railroad he gained from inquiry from others. As he has stated these granite soil lands would produce with sufficient mois-

ture from irrigation, but while there was plenty of water in close proximity, the cost of putting it on the granite lands was excessive and that had not been carried out yet to any great extent, but probably would be. He is positive that they will produce some sorts of vegetation with irrigation. That has been demonstrated. The meeting at Eugene referred to by him in his testimony, was brought about by the announced plan or purpose of the Railroad Company, to increase rates on milling products and that is what really brought forth the meeting. The milling industry in Western Oregon in those vicinities that are dependent upon the railroad for transportation, had very largely been built up, on the faith of the former rates that the railroad company had put in force. Markets had been established and mills erected and the entire industry, built up with reference to the existing transportation rates and he considered, that the territory south from Eugene to the State Line, within 30 or 40 miles of the railroad is dependent for transportation facilities upon the Southern Pacific Company, as lessee of the Oregon and California Railroad Company. It is a fact that about the same time that the Railroad Company threatened or gave notice in some way, that it was about to increase the rate on lumber, that it installed also at about the same time, mills of its own at Marcola.

Whereupon witness further testified as follows:

Q. Now, I will ask you if it is not a fact that the real reason that brought about this public remonstrance that you referred to yesterday, this general public de-

mand which resulted in the unanimous adoption of the joint memorial of the legislature of Oregon addressed to Congress and the executive officers of the National Government, was the general fact that the Railroad Company had a virtual monopoly of transportation from Eugene southerly to the State line, and owned nearly one-half of all of the lands tributary to its line of road, and that the policy that had been adopted by the Railroad Company to withhold its lands from sale had materially checked the industrial and commercial development of that part of the state, resulting in this popular remonstrance and protest that you referred to, and which subsequently induced the unanimous adoption of this joint memorial to Congress.

A. I understand the question, but there is a certain deduction made there that I am not quite sure about. I can answer it in a general way, I think, so far as my own opinions are concerned.

Q. You understand the question now is, whether or not that general condition did not exist and that it was the discussion of that general condition that brought about this popular remonstrance, resulting in the unanimous adoption by the legislature of the State of this joint memorial?

A. I think it is true that the memorial was the outgrowth of the action of the Railroad Company in withdrawing its lands from sale and in the disturbance of freight rates. So far as I know, the agitation came first and continued from the commercial organizations at

Cottage Grove, where the town and the community was largely dependent on lumbering, where many small mills had recently been established. I think that those two things were the principal causes of the memorial.

Q. Well, now, from your general knowledge of the industrial and commercial history of Western Oregon from Eugene southerly to the southern boundary line of the State, and especially the territory tributary to the line of railroad of the Oregon and California Railroad Company, is it not a fact that the withdrawal of those lands from sale by the Railroad Company, and the withholding of the lands by the Railroad Company did materially check the industrial and commercial development of that country?

A. I think that is true to some extent in the three counties named, more particularly in Josephine County. It was true in a less measure in Douglas because there is not a great deal of milling there, and in Lane because most of the milling concerns had provided themselves with timber; but it affected Josephine County directly and immediately.

Q. Was not that view publicly discussed in this general public discussion that you referred to, which brought forth the joint memorial of the Legislature, was not that one of the elements that entered into the discussion?

A. That is a claim that was very generally made.

Q. One of the principal problems that your com-

pany has had to contend with has been the subject of transportation. Is not that true?

A. Yes, sir.

Q. And that has led you to give general study to that subject and particularly with reference to the community wherein the holdings of the Booth-Kelly Lumber Company are situated?

A. Yes, sir.

Q. Well, is it not true that the Railroad Company has virtually a monopoly of transportation from Eugene southerly to the southern boundary line of the State, and has had since the construction of the railroad? I am speaking now with reference to the subject of transportation as applied to the practical development of the industrial and commercial resources of that territory.

A. They are the only general transportation company in the regions near the railroad. Of course in that part of Western Oregon west of the Coast Range it is not influenced by that directly.

Q. You refer now to the territory that may make use of the ports on the Oregon Coast?

A. Yes, sir.

Q. Well, that is limited to the lands situated west of the summit of the Coast Range, is it not?

A. Yes, sir.

Q. And by far the greater part of this land grant is situated east of the summit of the Coast Range.

A. Yes, sir; so far as it relates to their land grant the answer would be in the affirmative. I understood you to include all Western Oregon.

Q. Well, my question did include Western Oregon, and for the purpose of completing the record I will ask you to limit yourself to the territory within the exterior boundary lines of this land grant. Now, is it not true that that territory is at the present time wholly dependent upon this Railroad Company for transportation, and has been since the construction of this railroad?

A. All the transportation is controlled by them, or influenced by them.

Q. Now, in your judgment, Mr. Booth, what effect would it have upon the future industrial and commercial development of the territory within the exterior boundary lines of this land grant from Eugene southerly to the southern boundary line of the State if the Railroad Company should permanently withhold these lands as a permanent estate existing in its favor? My question is, what effect in your judgment would that have upon the general development of the industrial and commercial resources of that territory? I forget now whether I included that in my former question, this of course being subject to the same objection that has already been interposed.

A. If the lands are not to be occupied it would retard the growth in a general way and prevent the normal increase of population. But it would depend largely

on what policy the railroad might adopt as to the lands in permitting them to be settled.

Q. Well, would it not give the Railroad Company the opportunity to entrench its monopoly of transportation by virtually a monopoly of production of the lands tributary to the railroad?

Q. Omitting now from consideration the lands that at the present time have passed from the Railroad Company?

A. That would be true if the Railroad Company removed the growth from their own lands and carried it over their own rails, or if they required settlers who might go on those lands to ship over their own rails. I do not know how it could be otherwise.

Q. But the ownership of the alternate sections, either even or odd, necessarily controls the industrial and commercial development of that country, does it not, by anybody, either the Railroad Company or anybody else?

A. It affects and retards it.

Q. Can there be any general development of this territory with which you are familiar within the exterior boundary lines of this railroad grant if the Railroad Company owns and holds virtually one-half of the lands situated in alternate sections, as this grant is, unless the Railroad Company will join in the effort to develop those industrial and commercial resources?

Q. Would it be practical to develop that country

with the odd numbered sections withheld from development by the Railroad Company?

A. If they hold the timber-lands in any region it will probably retard the milling from the even sections that are intermingled, but when the timber is removed from the even sections, or on the brush lands, or things of that sort, it might retard, but it would not prevent the settlement on the even sections.

Q. But bearing in mind the establishment of roads and schools and other necessary incidents to the development of any territory, it is true of this territory, the same as any other, is it not, that the withholding of the alternate sections from settlement or improvement or industrial use would materially check and retard the development of the territory generally?

A. Well, I think my answer is a fair one, that it will retard it but not prevent it entirely.

Q. As illustrating that point, you testified yesterday, did you not, that there is no market for the lands intervening the holdings of the Booth-Kelly Lumber Company except the Booth-Kelly Lumber Company itself. Nobody else is buying the lands intervening your holdings.

A. No, sir. I didn't testify that. It is not true.

Q. What did you say with reference to that?

A. I don't think the question was up. What I mean to say is that other people are purchasing the lands intervening so that we do not own on the even sections, have been doing so.

Q. You were asked yesterday as to the reasonable market price for the most valuable piece of land within your holdings. My understanding was that you testified that there was no present market for those lands except such as the Booth-Kelly Lumber Company itself purchased.

A. I did not mean to be so understood.

Q. Well, then, I either misunderstood you, or you misspoke. That was my understanding yesterday.

A. I understood the question to be the maximum value of any given claim. I think that that was repeated several times, that it should be the maximum value, and that is what I meant to respond to.

Q. But it is true, is it not, that where the lands in one or more townships are held, one-half of them in alternate sections by a single proprietor or owner, and the intervening sections in small quantities by a large number of holders, that the owner of one-half of the lands in alternate sections does to a large extent control the market value of those lands?

A. It has a very marked influence.

Q. It is difficult, is it not, to secure a purchaser for lands covered with timber, which are situated in isolated tracts, even as large as a section.

Mr. Fenton: Does your question apply to timberlands?

Mr. Townsend: Yes.

A. The market is quite active in a small way for

timber-lands anywhere within the vicinity of our holdings; that is to say, they are changing hands, from one to another, but not in a large way nor at a high price; not at such prices as I named yesterday as a maximum price. But if the odd sections are held by one concern there can be no large grouping of lands, and without the grouping or continuous ownership the milling industry cannot be profitably carried on.

Q. That is, with the many problems that confront the milling industry, including the establishment of logging roads and the logging off of the land itself, and in view of the amount of profit made out of the business, it is impracticable to attempt an enterprise of that kind on any large scale with reference to the alternate sections of any particular tract of land?

A. That is true.

Q. Now in the valleys, and even in some of the foothills, it is a fact, is it not, Mr. Booth, that in the early days prior to 1880 the early settlers actually burned the timber in order to make way for a settlement, because there was not then market for the timber itself?

A. Yes, that was done much later than 1880.

Q. What I mean is, that the settlements that have been made in the valleys and in the sloping foothills were made many years ago, in a great many instances, even where the settlers had to burn the timber and got no value for it at all?

A. Yes, sir."

Whereupon witness further testified that he, in connection with Frank H. Buck, president of the Booth-Kelly Lumber Company, negotiated most of these purchases of railroad lands, so far as the first purchases were concerned. Later, the negotiating was done almost wholly by himself. The negotiation of those purchases was about equally divided, perhaps with the officers of the Company at San Francisco and at Portland. Negotiation for the first large purchase was conducted at San Francisco, and that related particularly to the general policy that the Company should pursue. Negotiations for the smaller ones, perhaps, the greater number of all the smaller ones, were with the Portland office, and in one instance, perhaps, the matter was discussed with both offices. George H. Andrews represented the Portland office and at San Francisco, they dealt with William H. Mills. They discussed the policy of the Railroad Company with Mr. Huntington, as to the uses the Booth-Kelly Lumber Company should put the timber to, that it bought, and they stated to Huntington that they were buying this, for the purpose of manufacturing, and agreed to ship at once and as soon as the land should come into their possession to construct a mill and commence shipping at once. They gave Huntington the territory about where they expected to ship, but the land negotiations were with Mills. Negotiations opened with Andrews were carried to San Francisco in order to get final decision in only one instance, where the matter was taken up at both ends. That was by common consent and not to go over Andrews or anything of that sort. The con-

tract was finally signed by Andrews. Andrews was subject to the general supervision of the San Francisco office during that time. That is his understanding.

Whereupon on re-direct examination witness further testified that he did not testify that the lands of the Booth-Kelly Lumber Company were in the Mohawk Valley, he did not mean to so testify, but that the lands about Wendling are in the Mohawk water shed. The lands of the Booth-Kelly Lumber Company about Wendling are mountainous lands and are not in any valley. He testified that the dairying was mostly between the holdings of the Booth-Kelly Lumber Company and the railroad. That is, the railroad referred to by him was the main line running from Portland through Eugene to the California State Line, or such branch lines as the Wendling line. There is considerable dairying in the Mohawk Valley below the other mills, and that is what might be called an extension of the Willamette Valley country. It is true that the valley lands of the Willamette Valley and other valleys in Western Oregon were settled under the public land laws and were mainly cleared of timber and were agricultural in their character, in their original state, but it is true that along the small streams extending well up into the foothills and even up to the timber regions, settlements up to 12 or 15 years ago, the cleared area was extended, even homes made, by felling timber and burning it. These lands referred to by him are along the border of the sections and the small streams that are tributary to the different prongs of the Willamette. He did not think that he

said in his testimony that these timber lands had no value and now have no value excepting for timber that is on them, but he said and repeats, that that is their chief value. He thinks they have some value after the timber is removed. He thinks that the reforestation is entirely problematical, but it is demonstrated so far as their value as pasture is concerned. The men who own these timber lands, who have logged them off, in his region, are considering the question of what to do in that respect. The beginning of the market for timber was when the Booth-Kelly Lumber Company had demonstrated that by manufacturing the timber into lumber and shipping the same, there could be something realized out of the timber. The percent of their output affected by the \$3.10 rate varied at different times. There was quite a good deal of disturbance about the \$3.10 rate as he now recalls. It either was withdrawn or threatened to be withdrawn three different times. In their early work, he thinks as much as 30 to 40 percent of their output was influenced by it. This \$3.10 rate applied to all classes and later and finally it applied on rough green common lumber. That was the final adjustment.

Whereupon witness further testified as follows:

Q. Now, then, the \$3.10 rate as it affected this rough green common lumber only affected it from Willamette Valley points to Bay points in California?

A. Well, that situation is comparatively recent, Mr. Fenton. Our early milling in the beginning to the time to which you first referred, in 1898, and around

there, our output went largely to California and to points that were influenced by that rate, where it was used as base rate, and so on. But the change to the common green rough lumber was the final adjustment of the rate, and with an understanding between the Railroad Company and the shippers. But earlier the \$3.10 rate applied to all classes of lumber.

Q. I understand. And this later understanding was when with reference to the first application of the \$3.10 rate?

A. I cannot give you the exact date now.

Q. Well, you had not been long manufacturing until the understanding was had that this \$3.10 rate was limited to the common rough green lumber?

A. Yes, we had manufactured quite a number of years and had manufactured extensively before it was ever disturbed; established all of our mills.

Q. Yes, I know; but it finally was limited to the class of lumber that you speak of, and was in operation for a good many years before there was an effort made to raise it to the \$5.00 rate, about which the complaint was made in 1906.

A. The \$3.10 rate was in operation for quite a good many years.

Q. That is what I mean.

A. Before there was an attempt to raise it.

Q. Yes.

A. That is true.

Q. Well, then, later it was applied only to the common lumber, common rough green lumber?

A. Yes, sir.

Q. And that was the situation when the effort was made to raise it to \$5.00?

A. The final effort.

Q. Yes, by the company.

A. Yes, sir.

Whereupon witness further testified that there were copies in his office of some affidavits that were procured by the Booth-Kelly Lumber Company and submitted to the Public Lands Committee at Washington while the Congress was considering a bill to compromise with the purchasers involved in the 45 suits referred to in this record, which affidavits were submitted to the Public Lands Committee by Mr. Dixon. These related to the character of the lands and the cost of clearing.

Whereupon witness further testified as follows:

Q. These were—you might state generally—these related to the character of the lands, as I understand, and the cost of clearing?

A. Yes, sir.

Q. Suppose the Oregon and California Railroad Company had in 1906 or 1907 offered for sale all of these timbered lands to so-called actual settlers in quantities not exceeding 160 acres and at a price not exceeding \$2.50 an acre, and had sold them to so-called actual

settlers or persons who would go actually and build a cabin and live on the land for six months, or whatever the time, three months, no time being fixed in the statute, and the title of the company had vested in these actual settlers, how long, in your judgment, Mr. Booth, would it have been until these actual settlers acquiring these lands at \$2.50 an acre could have resold them to timber buyers and timber investors and mill men at a large advance; and how long would it have been until most of these lands would have passed into timber investors or timber men for the purpose of development?

Q. You may answer.

A. I think your question is at what time they could have done that?

Q. Yes; and what would they have done probably?

A. Well, I could answer it perhaps more accurately by referring to the conditions in the Mohawk or Wendling Basin. When we purchased the lands of the Railroad Company there about all of the even sections had been taken either by homesteaders or entrymen, under the Timber and Stone Act, but there were no residents in there except along Mill Creek, and as I recall now in two places where the lands had been cut over in part and the logs floated down the stream to Coburg, and there were two families living there, the families except the husband remaining on the property, but the husbands were away at work. And with that exception there was no one in that region. And of course they could not make a living on them, and did not attempt

it, and there was no opportunity given them until our mill was established there, which was about 1898.

Q. What became of the title to these even sections?

A. We purchased them.

Q. That is to say, their chief value was for the timber, and the party holding the title disposed of them for that purpose?

A. That is right.

Q. And in your judgment that would have been the result if these lands had been sold to actual settlers under this \$2.50 an acre—

A. It is the result of all the lands we own.

Q. Well, from your knowledge of the character of the lands that you own, the same thing would apply to other lands in the grant of the same class?

A. Yes, sir.

Q. Now, then, would there have been any more of a commercial or industrial development if the company had sold these lands to these so-called actual settlers and required them to stay there on the land? Would that have been at all practicable or possible?

A. It would not have been, the class of lands to which we are referring.

Q. Then the only industrial development that would have resulted from the sale to actual settlers would have been the vesting of the title ultimately in timber investors to these lands, and their consequent

use in due time when they desired them to manufacture.

A. So far as it relates to these lands that is true.

Whereupon upon re-cross examination the witness further testified as follows:

Q. Now, it is a fact, is it not, Mr. Booth, that the milling industry in Oregon has been conducted, to a very great extent, under a system by which the millers purchase the timber instead of the land itself. That is true, is it not?

A. I think not; not in our locality.

Q. Well, it is true, is it not, that the timber on a stumpage basis will usually bring almost as much money as the title to the land itself, if there is a reasonable time given for the removal of the timber?

A. If it is purchased at a time that the timber could be removed that is true, but in many instances, of course, cases where it is purchased for an investment, they would not buy unless they had fee to the land. But if it is for the purpose of manufacturing, I think they would bring just about as much.

Q. The Forestry Service is doing that same thing today, selling the timber and reserving the fee to the Government, is it not?

A. Not in our locality; but it is more or less negotiating; but there have been no transactions made there that I know of, though there has been considerable talk of it.

Q. That is largely because the Forest Reserve lands

are more remote than other lands that are held by the mill owners, and therefore it is not a practical business proposition to purchase the timber within the Forest Reserves at the present time?

A. Principally because of the higher prices that they ask for their timber, and the restrictions in removing it.

Q. That is, the Forestry Service has been asking for a higher price than the real market value of stumpage in that vicinity?

A. Yes, and that other lands can be purchased for, and they have imposed restrictions.

Q. And in addition to that have imposed certain restrictions as to the removal of the timber and the clearing of brush, etc.

A. That is right.

Q. That makes it a less profitable business transaction for the mill operator?

A. That is right.

Q. Mr. Booth, in all of your dealings with the railroad people in the purchase of these lands, did any of them ever call your attention to this clause in the granting act which in terms prohibits sales except to actual settlers in quantities not greater than 160 acres to one purchaser, and for a price not exceeding \$2.50 per acre?

A. They did not.

Q. Did you yourself know of them until after this agitation arose?

A. I did not.

Whereupon A. C. DIXON, called as a witness on behalf of defendants being first duly sworn testified that he resides at Eugene, Oregon, and is manager of the Booth-Kelly Lumber Company and has resided in Oregon twenty-three years, ten years in Jackson County, seven months in Josephine County and between twelve and thirteen years in Lane County. He was a student from 1889 to 1893 and has been engaged in the lumber business since 1893. He attended the public and high schools at Ashland and the normal school at Monmouth, but did not graduate at Monmouth. He was there in 1892 and 1893. His business career has been at Ashland, Grants Pass and at two or three different towns in Lane County. At Ashland, he was in the retail lumber business from 1893 to 1899 and the firm name was Norris & Company. He was in the retail business for the major portion of that time, about five years as Norris & Company and then under the firm name of Hicks and Dixon. They purchased a sawmill and continued to retail lumber and at the same time manufactured lumber. They also leased a claim. Their sawmill was about six miles south of Ashland, in the foothills of the Siskiyou and they manufactured pine and fir, mostly pine. He was connected with the Sugar Pine Door & Lumber Company in Grants Pass for about seven months as stockholder and working in the office under Mr. Booth, at the same time working in the Bank part of the time. The Sugar Pine Door & Lumber Company operated at Grants Pass and then sold out to other people. The operation is still going on there in some modified form.

The general character of the timber that was used there, was mostly pine. There were several small mills operating there, principally in the summer time, and closed down in the winter, and he could not state with any accuracy, the amount of the cut. His next lumbering experience was at Wendling, Lane County, where he went in March, 1900, until August 1901 when he went to Coburg and was there until June 1905, and then went to Eugene, where he has been since. He is a stockholder and manager of the Booth-Kelly Lumber Company and has been its manager since February 1910. The majority of the stock of that Company is owned in Michigan, in the hands of parties who live in Michigan. John W. Blodgett is one of the large stockholders, and their Michigan headquarters or place of business, is at Grand Rapids. The cut of the mills of the Booth-Kelly Lumber Company, when they are running, is 175,000 feet a day of ten hours. One mill is idle, which if running would add about 40,000 feet a day to the cut. One of the mills was burned down last year, it was cutting a little over 100,000 feet a day. They have two mills now operating and one idle. They did have four. One of these mills operating is located at Wendling, one that is operating at Coburg, one at Saginaw that could be operated but is idle, and one at Springfield that is burned. He is more or less familiar with the lands of the Booth-Kelly Lumber Company and knows where they are located and thinks he is familiar with the character of the lands as to their being timbered or otherwise. These lands are chiefly valuable for the timber and he thinks

the Wentworth lands are chiefly valuable for timber, only he has not seen all of the Wentworth lands. He has been through some of them. It is his understanding that the Wentworth lands are purely timber lands. In his judgment, he would think the larger portion of the unsold lands of the Oregon and California Railroad Company involved in this litigation, are in the same general class. He was in attendance before the Committee on Public Lands of the House of Representatives, March 12 and 14, 1908, when the committee had under consideration Senate Resolution 48, instructing the Attorney General to institute a certain suit. He made no formal appearance before that Committee at that time. He made a written general statement in behalf of the Booth-Kelly Lumber Company directly, and not with any authority from any other Company, and as purchasers of these lands. He made the statement headed "Statement of Mr. A. C. Dixon, of Oregon" found at pages 76 and 77 of the printed "Hearings Held Before The Committee on the Public Lands of the House of Representatives, March 12 and 14, 1908, on S. Res. No. 48 Instructing the Attorney-General to Institute Certain Suits, etc." and that statement was according to the facts as he understood them.

Whereupon defendants offered in evidence that portion of this document set out at pages 76 and 77 purporting to be "Statement of Mr. A. C. Dixon of Oregon" including the front page of this document and the second page down to and including the word "Committee" and just preceding the words "The American Eagle."

To which complainant objected upon the ground that it is incompetent, irrelevant and immaterial, and not a proper method of examination, and consists largely of hearsay statements and conclusions of fact and law.

Whereupon there being no objection, said portion of said document so offered was received in evidence and read into the record instead of the original in words and figures as follows:

“HEARINGS
HELD BEFORE THE COMMITTEE ON THE
PUBLIC LANDS OF THE HOUSE OF
REPRESENTATIVES
MARCH 12 and 14, 1908
ON
S. RES. No. 48
INSTRUCTING THE ATTORNEY-GENERAL
TO INSTITUTE CERTAIN SUITS, ETC.
WASHINGTON
GOVERNMENT PRINTING OFFICE
“INSTRUCTING THE ATTORNEY-GEN-
ERAL TO INSTITUTE CERTAIN
SUITS.

COMMITTEE ON THE PUBLIC LANDS,
HOUSE OF REPRESENTATIVES,

Washington, D. C., Thursday, March 12, 1908.

The committee met at 10 o'clock a. m.

Present: Representatives Mondell (chairman), Volstead, Smith of California, Gronna, Howland, Reynolds, Hall, Hamilton, Ferris, Craig and Hammond.

Present also: Hon. William F. Englebright, Representative from California; B. D. Townsend, Esq.; Aldis B. Browne, Esq.; L. E. Payson, Esq.; J. B. Thompson, Esq.; W. S. Humphreys, Esq.; John W. Blodgett, Esq., and others.

The committee thereupon proceeded to the consideration of Senate Resolution No. 48, heretofore considered by a sub-committee.

The Chairman. The meeting this morning was called for the consideration of Senate Resolution No. 48. This resolution was referred to a subcommittee by the chairman for the consideration of certain legal questions; but since the appointment of that subcommittee other questions as to the equities of certain purchasers of the land in question have arisen which had not been presented at that time, involving questions of public policy. In view of that fact, without discharging or relieving the subcommittee, it was deemed best to have a hearing this morning before the full committee; and while we have not a quorum at this time, if there is no objection we will proceed to hear the gentlemen who are here for the purpose of presenting facts with regard to the resolution to the committee."

“STATEMENT OF MR. A. C. DIXON, OF
OREGON.

Mr. Chairman, as one interested in the effect of Senate Resolution No. 48 I wish to address you briefly as to some phases of the question not fully presented at any of the hearings before your committee up to the present time.

In order to explain my position clearly and to indicate from what sources and in what manner I have gathered the information I wish to place in your hands, I will say that I went to Oregon when 15 years of age, and have lived there over seventeen years, and for fifteen years of that time have been engaged actively in the lumber business. A good portion of the few thousands of dollars I have been able to accumulate is invested in the Booth-Kelly Lumber Company, with which company I have been connected for nine years, purchasing a small interest therein long before the time Messrs. Blodgett, Hill, and other Michigan men came into our company. For several years past I have interested myself in transportation matters in the State of Oregon and have been very actively engaged in securing a railroad commission law in that State and in conducting several suits against the Harriman system before our State Commission and the Interstate Commerce Commission on account of what we claim are unjust and illegal rates on lumber maintained by these lines. By reason of my position as chairman of the committees in charge of these rate cases I have come in close contact

with the timber owners and mill men who are now deeply concerned by the measure your committee is deliberating on.

There are over 250 sawmills located along the line of the Oregon and California Railroad within the limits of the grant lands. These mills produce 600,000,000 feet of lumber per year, employing at least 8,000 men, with a yearly pay roll in excess of \$4,800,000. The development of this industry, which may be considered a vast one when the sparsely settled condition of Oregon is understood, would never have assumed any proportion up to this time if the mill owners had not been able to buy grant lands and had not felt that they could purchase them from time to time as they needed the timber, for the following reasons:

These grant lands comprise practically every alternate section in the region the mills are located in; and if these lands are eliminated from the timber accessible to any mill, then between each 640 acres belonging to the operator there will be one mile in each direction of territory from which no timber can be taken and across which his logging roads can not be built or, assuring that they can be, from which he could secure no tonnage.

A glance at any township map will convince the most skeptical that no one could begin to operate under these circumstances. It therefore follows that the manufacturer must control or have access to timber in bodies more or less solid and united in character.

It was at a meeting of shippers, mostly lumbermen,

that the question of disposal of lands still in the hands of the original grantees was first brought out in a public way, and the lumber interests were behind and favored every resolution on this subject adopted in the state and are still in hearty accord with the original purpose of the movement, it being necessary for the perpetuation of their business, for the reasons stated above. It has never been contemplated that lands already sold and upon which development has been in progress for years should be taken from the present holders and again placed on the market. To do this would arrest development of the State and give its chief industry a blow from which it would perhaps never fully recover. To even attack the titles of the present holders would be almost as serious a matter, as during the time suit was being conducted none of the lands, either in odd or even numbered sections, could be logged.

As to development, within the time of my connection with my company we purchased 17,000 acres of grant lands in a body, the nearest point of which was 17 miles from a railroad. We furnished the ties and right of way, and the Southern Pacific Company built a road 17 miles in length, connecting the timber with a shipping point. I aided in construction of our Wendling mill at a place where there were less than a half dozen families within a radius of 5 miles, and the men of these families had to leave home a portion of each year to make a living for those dependent upon them. Now there is a town of 600 to 800 people at this point, with employment for 300 men, and along this 17-mile road are 10 sawmills where

there were formerly none, and the little valley is alive with the hum of industry and has developed beyond the dreams of those who were familiar with it ten years ago. Every acre of farming land in this valley has necessarily appreciated in value as these mills were built, and employment was furnished by them to large numbers of men.

I submit to you that, leaving aside all technical questions as to conditions subsequent, covenants, violation of contract, constructive notice, etc., we did, after using all possible business caution and as between men of honorable intention and fair dealing, innocently buy these lands in good faith, for value, and are the bona fide holders of same, and are the true settlers and developers of the State of Oregon, and our title to these lands should be quieted now, in the interests of the industries of Oregon and its further development and in the interests of fair play, justice to all, and in consideration of public policy in its broadest sense.

I have in the past and want to continue to interest myself in the development and welfare of the State, and can not bring myself to believe that the property and possession of myself and of friends who are similarly situated are to be placed in jeopardy in order that the Government, with all the agencies at its control, and the people thereof should secure their rights from an offending corporation in a suit which we and other public-spirited citizens of our State have proposed and furthered continuously since it was first brought to public notice and the primary intent of which we are still in hearty accord with.

I hope that the resolution before you will be so reported that the lands still in the hands of the railroad company will be opened to settlement and development and that those already in process of development and in the hands of innocent purchasers will be in no way disturbed."

Whereupon witness further testified that at the time he made this statement he was acting directly for the Booth-Kelly Lumber Company and the statement was submitted to some of the principal stockholders of the Company and some other owners, or representatives of owners of these lands which had been purchased. The circumstances were, that the statement was submitted in lieu of an oral statement and for the purpose of presenting their ideas to the Committee. The statement "there are over 250 sawmills located along the line of the Oregon and California Railroad within the limits of the grant lands," is a correct statement. The information was compiled by the Secretary of the Oregon & Washington Lumber Manufacturers' Association and by Mr. George Cornwall, editor of *The Timberman*, at the request of the witness, as chairman of the Transportation Committee of that Association. He is not sure, but thinks that Edmund P. Sheldon was secretary of the Oregon & Washington Lumber Manufacturers' Association at that time, but they had had several secretaries and he is not certain as to who was secretary at that time. He thinks that the statement "These mills produce 600,000,000 feet of lumber per year, employing at least 8,000 men, with a yearly pay roll in excess of \$4,800,000," was

fairly accurate and correct at that time. The information was prepared by these same men, as the result of replies to inquiries that had been sent to the mills through the Association where they were asked to report the capacity and cut of their mills and some of which was furnished by himself in regard to their own mills, based upon the best statistical information that he could verify by himself. Those figures were at that time approximately correct. Many of these mills were operating on lands acquired from the Railroad Company, the larger ones on lands acquired from the Railroad Company and the even sections. The smaller ones, some of them were very small, and only operated on one section during their entire existence, sometimes on the even and sometimes on the odd section. The fact stated in the statement that "The development of this industry, which may be considered a vast one when the sparsely settled condition of Oregon is understood, would never have assumed any proportion up to this time if the mill owners had not been able to buy grant lands and had not felt that they could purchase them from time to time as they needed the timber," is in his opinion just as stated, and the reason for it is that mills could not attain any size or do any considerable amount of business, if they confined their operations to the even numbered sections, because of the physical impracticability and almost impossibility of logging on alternate sections and leaving the intermediate sections standing. From an operating standpoint in the lumber business, it is economically best to have the holdings of the land in continuous solid bodies rather than

to be interrupted by holdings between different tracts that might be owned by the operating company. These granted lands are these involved in this suit against the purchasers, those that they were operating on, and referring to the statement "If the mill owners had not been able to buy grant lands and had not felt that they could purchase them from time to time as they needed the timber," witness says, that they could not have started on any considerable scale if they had not already purchased, or been able to purchase immediately, lands from the Oregon and California Railroad Company. They could not continue their operations only as they could purchase them later on, purchase more of them, and he thinks it is true that these unsold lands involved in this suit still owned by the Oregon and California Railroad Company would become a commercial necessity to the continued and further operation of these mills already located on the even sections or on granted lands already purchased. His statement would only apply to the timber lands because they would have no use for any others. The statement that "It was at a meeting of shippers, mostly lumbermen, that the question of disposal of the lands still in the hands of the original grantees was first brought out in a public way, and the lumber interests were behind and favored every resolution on this subject adopted in the State and are still in hearty accord with the original purpose of the movement, it being necessary for the perpetuation of their business, for the reasons stated above," is both accurate and truthful so far as he knows. He speaks from his own personal knowledge, except as

to any negative questions involved. He stated that that was the first meeting at which this was brought out in any public way and it was the first one of which he had any knowledge. That meeting was at Eugene. He thinks the statement "It has never been contemplated that lands already sold and upon which development has been in progress for years should be taken from the present holders and again placed on the market. To do this would arrest development of the State and give its chief industry a blow from which it would perhaps never fully recover," is correct. He made the statement that certain action had never been contemplated. He of course has no means of knowing what some people might have contemplated, but he never had heard of it, and it was not a matter of general knowledge and he thinks the statement is true now that that never was contemplated by people in general to disturb the owners and those in control of the property involved in these suits against the defendants. As to arresting the development of the industry he thinks that would go without saying. They could not operate without the timber lands. He is quite sure that it was the principal industry in the State at that time, in that section of the State at least. If they had been enjoined or prevented from cutting on these lands, practically all the large mills would have been compelled to close up. John W. Blodgett was one of the principal stockholders, not an officer, of the Booth-Kelly Lumber Company.

Whereupon the witness further testified as follows:

Q. I notice in this statement of Mr. Blodgett, at

page 100 of this document :

“The Chairman, Mr. Blodgett, while the question of the value of these lands would certainly not control in any action that the committee may take, still the question of value has been raised here a number of times, and just as a matter of interesting information, I think the committee would like to know as to the character of these lands generally; for instance, the character of the lands that your company own. Take your 70,000 acres and average them, and what do they run?

“Mr. Blodgett. Do you mean how many thousand feet per acre?

“The Chairman. Yes.

“Mr. Blodgett. Our lands were selected lands, of course, selected for the timber, and they represent, of course, a higher average than the average of the grant in that territory. I should say they ran perhaps 40,000 feet per acre.

“The Chairman. The entire 70,000 acres?

“Mr. Blodgett. Our lands, possibly 40,000 per acre; that is, they did average that originally. Of course we have cut a great many thousand acres.”

What is your information on that subject, and how does it correspond with the statement of Mr. Blodgett?

Mr. Townsend: Objected to as incompetent, irrelevant and immaterial, and particularly upon the ground that it incorporates into the record the unsworn statement of Mr. Blodgett, and is therefore hearsay.

Q. You may answer.

A. I should say that his statement as to the stumpage per acre is probably slightly under the actual figures as demonstrated by the land we have cut off since that time. I have not made an accurate average. I should say perhaps it was 10 per cent too low.

Q. I notice in this same statement of Mr. Blodgett this:

“The Chairman. What is a fair estimate of the value of stumpage in that country in advance of the improvements you have put on to make them accessible?

“Mr. Blodgett. Well, in the boom time, existing about a year ago, I should say perhaps 75 to 80 or 90 cents per thousand feet, in large, compact bodies, large enough for an operation. That would not be true of an isolated tract of 160 acres, because 160 acres in that mountainous land of itself is of no value except speculative value.”

What is your knowledge and judgment as to the accuracy of that statement and as to your own views on the subject?

A. I am not so very familiar with stumpage values at that time. I didn't at that time know any price as high as that being paid. And as far as it being an average of any prices we had ever paid or been paid in that section of the country, I think it was considerably above the average.

Q. How is the price now of stumpage on lands such

as the Booth-Kelly Company owns, or lands similarly situated?

A. That is a very difficult question to answer intelligently. I have been buying lands for the company for three years approximately. Have bought several thousand acres. The highest price that I have paid has been twenty-two dollars an acre, twenty-two dollars and some cents. I have not bought any large quantities at one time, however, probably 1100 or 1200 acres in one purchase is as much as I have bought.

Q. Do you know what the United States asks for its stumpage in the forest reserve in Oregon?

A. Not except through newspaper report and hearsay.

Q. I notice in this statement of Mr. Blodgett, page 101, this question :

“The Chairman. You are fairly familiar with that grant yourself, personally?

“Mr. Blodgett. Yes; I have traveled over quite a portion of it myself.

“The Chairman. It does not average in timber anything like as good as the lands you bought?

“Mr. Blodgett. No, sir. As soon as you get out of the Willamette Valley you run out of the fir country and run into the white pine or yellow or sugar pine. The land of the gentleman Mr. McKee represents is in the white and sugar pine. I have also inspected that land.

“The Chairman. That is good timber land?

“Mr. Blodgett. Yes, sir; excellent timber land. That was also selected timber land.”

Now, what do you say as to the correctness of those statements of Mr. Blodgett, from your own knowledge?

Mr. Townsend: Objected to upon the same grounds urged before to questions incorporating portions of the statement of Mr. Blodgett, and on the further ground that the statement of Mr. Blodgett is not before the court and cannot be made the subject of contradictory or impeaching testimony, and this is not a proper method of eliciting testimony from the present witness.

A. I have seen part of the land owned by Mr. McKee's client. I have seen quite a good deal of the grant—not all of it by any means. I think his statement is correct. That is, that we have selected lands, and the other large timber companies have selected the best of the lands.

Q. I notice Mr. Blodgett, further interrogated by the Chairman, says:

“The Chairman. That is good timber land?”

“Mr. Blodgett. Yes, sir; excellent timber land. That was also selected timber land.

“The Chairman. As heavy as yours?”

“Mr. Blodgett. No, sir; because, as I say, sugar pine does not grow as heavy.

“The Chairman. Is it of higher or about as high stumpage value?”

“Mr. Blodgett. It is of a little bit higher stumpage value, all things considered.

“The Chairman. Possibly a dollar?

“Mr. Blodgett. Yes, sir.

“The Chairman. It possibly would run as high as 35,000 to 40,000 feet?

“Mr. Blodgett. No, sir; white and sugar pine, an excellent yield of that is 20,000 feet.”

Now, what do you say, from your own knowledge, as to the accuracy and correctness of that statement of Mr. Blodgett's?

A. I know nothing about the pine values in that particular section at that time. The statement as to stumpage to the acre, 20,000 feet being an excellent yield in pine, is correct.

Whereupon witness further testified that he thinks he knows, in a general way, the present market value of stumpage of white and sugar pine. It is another very difficult question to answer. It is from \$1.00 a thousand to \$2.50, and depends very largely upon accessibility to transportation and availability for immediate use. Arthur Hill, who appeared before this committee and made a statement was, probably at that time, the largest stockholder in the Booth-Kelly Lumber Company. He then lived at Saginaw, Mich., but is now dead. Probably with one or two others, Blodgett and the estate of Arthur Hill control a majority of the stock of the Booth-Kelly Lumber Company, although he is not sure. They are

very large holders of stock. No policy as to the best use of logged-off lands of the Booth-Kelly Lumber Company, has been settled upon. It has been actively discussed several times and he thinks covered by what the witness Booth said, discussing the policy of reforestation, the disposal to settlers, and the possibility of grazing and pasturing lands. He has no means of knowing what would become of the titles to these timber lands if the Company had sold them to actual settlers in quantities not exceeding 160 acres at a price not exceeding \$2.50 per acre and had made these sales, say, in 1906. The titles that had been given to individuals before that time largely went into the hands of the lumber companies and timbermen. He has no personal knowledge of the lands that the so-called actual settlers have applied for excepting from newspaper reports and court records.

Whereupon the witness further testified as follows:

Q. Well, what would be, in your judgment, the value of the best quarter section of the unsold land of the Oregon and California Railroad Company? What would it be sold for at private sale without being forced, for the purposes of the timber holdings or the timber that is on the same, within your knowledge?

A. The best possible price that could be secured would be from some one who was operating close to that section, right up against it—could use the timber quickly—you said quarter section, or section?

Q. Yes, 160 acres of the best timber land that is

left.

A. I should say from eight to ten thousand dollars.

Q. I have had submitted to me, as representing a small mill company known as the Nehalem River Lumber Company, at Timber, Oregon, the purchase of the timber on a quarter section of land near Timber, in Tillamook County, the present owner of the timber or quarter section submitting a price of practically \$40,000 for the timber on that quarter section, reserving the title to the land for reforesting, or for logged off purposes, or for any useful purpose, if there is any, and merely proposing to sell the timber, this timber being situated close to a sawmill situated on the Pacific Railway and Navigation Company's line west of Hillsboro. Do you or do you not regard that as an extravagant price for timber on a quarter section of the best fir land in this country, situated on a railroad close to a mill?

Mr. Townsend: Objected to as incompetent, irrelevant and immaterial.

A. It would be for any quarter section of O. & C. lands in the Willamette Valley that I know anything about. The timber in the Nehalem country is, I understand, somewhat different from what it is here.

Whereupon witness further testified that he has no present knowledge of any quarter section in the Siuslaw country or elsewhere in Lane County being sold for more than the price he paid for the quarter section mentioned, \$3500.00 for 160 acres. He knows of one quar-

ter section that the purchaser told him he paid \$5000 for, and he thinks that he did. He knows of the purchase made by the Wendling Johnson Lumber Company. The lands were west of the Coast Range, practically all in Lane County, although there may have been a very little of it in Douglas County, but he thinks not. The men who did the buying told him approximately the amount of money expended, which was between a million and a quarter and a million and a half dollars, but the amount of acreage he never heard. The purchase was made from a great many different individuals and ran along for several months as different titles came in. Booth-Kelly Lumber Company had about 2200 acres there that they sold and he thinks that sale was consummated in January, 1912. The Booth-Kelly Lumber Company got for these 2200 acres \$54,000, about \$24.00 an acre. The Booth-Kelly Lumber Company had a cruise on these lands and the sale price was made on the basis of approximately \$1.00 per thousand feet. These lands were situated near the Siuslaw River, scattered some on the east side and some on the west side of the Coast Range, about 30 to 36 miles west of Eugene. These lands were in Lane County, just outside the limits of this grant, he thinks. The deed was passed in January or February, 1912. He was present at a number of hearings before the Committee on Public Lands of the House of Representatives on the hearing of H. R. 22002, concerning the Oregon and California land grant, and made a verbal statement to the Committee. He was acting for the Booth-Kelly Lumber

Company and almost all of the other defendants in what are known as the "Forty-five Innocent Purchaser Suits." When he made that statement he was not acting for all of them, but most of them, and he made the statement found at pages 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65 and 66 of a document published by the Government Printing Office at Washington, 1912, entitled "Oregon and California Land Grant Hearings Before the Committee on the Public Lands, House of Representatives on H. R. 22002, Concerning the Oregon and California Land Grant April 2, and May 2, 6, 8 and 25, 1912," and reading from that statement, pages 55 to 66, both inclusive, the witness said that is the statement he made.

Q. Now, I call your attention particularly to this part of your statement:

"Now, as to our views relative to our situation and to the compromise, we feel that the Government can afford to be very considerate of us for a number of reasons. First, going back to the purpose of Congress in granting these lands, it was primarily that the road be built, and, secondarily, that the country be developed as a result of this grant of land. We take the position that we have aided in the development of that section of the country to the fullest extent, and that in no other way could the lands have been used for development except in the way we have used them.

"The reason for that is this: The land is heavily timbered, much of it on steep hillsides, and in most in-

stances the soil is rocky and not susceptible of cultivation. Now, no actual settler could have taken 160 acres of these lands, nor 1600 acres, nor any other number of acres, and made a living for himself and family. It would have been practically impossible, and is today, with the better means of transportation and other facilities that they have now.”

What is the fact as to the accuracy of that statement, and is that based upon your personal knowledge?

Mr. Townsend: That is objected to as incompetent, irrelevant and immaterial, hearsay, and an attempt to incorporate into the record mere conclusions of fact and law and not evidentiary matters.

A. The statement is correct, as I thought at that time, and believe now.

Q. I call your attention to a statement on page 58 of this document, which reads:

“We think that there is no question about the original purpose of the Government having been literally carried out in a much better way than it could have been under actual settlement. In this regard, Secretary Fisher, in talking to me the other day, said that if the lands were of the character I said they were the Government made a tremendous mistake in 1866 in granting to the railroad company lands of a character not susceptible to settlement and then asking the railroad to sell them only to actual settlers. Now, they did do that, and you must know without seeing photographs of the timber that these lands are timberlands or we would not

have them, because we are in the timber business only. Now, if the Government did make this mistake 40 years ago we ask you here that we be relieved from the ill effects of it.”

What have you to say with reference to the truth of that statement?

A. The statement that I had this conversation with Mr. Fisher, that he stated what I said there and my reply is correct, and the rest of it was my opinion at that time and is now.

Whereupon complainant objected to this testimony as incompetent, irrelevant and immaterial and hearsay and an attempt to incorporate into the records mere conclusions of fact and law and not evidentiary matter, but a mere argument made by witness on behalf of one of the parties against whom the United States had instituted its suit, as a reason for urging Congress to authorize this compromise, and complainant particularly objects, to the method of examination, in reading to the witness, hearsay statements, and incorporating them, in this record, as evidence of the statements themselves.

Whereupon witness testified that the statement:

“We have done the larger part of the work necessary to make that land valuable for cultivation, and nobody wants to buy these lands now as homesteads at any price. Eighty-five or ninety per cent of them are useful only for reforestation, and we have not started to reforest them because we do not know to whom they belong. We have spent the necessary money to clear them of tim-

ber, and if the intention was that actual settlers should make homes on these lands, how much less useful for this purpose would they be if the timber was still standing?" and which contains the words "nobody wants to buy these lands now as homesteads at any price," he thought was not sufficiently full as to the use to which these lands could be put. He stated that they could be used only for reforestation, at least 80 or 85 per cent. He should have said reforestation or pasture because he knows that they are used for that. It was an oversight that he did not say so. To which testimony of the witness complainant objected as incompetent, irrelevant and immaterial and upon the further ground that the lands were involved in litigation in which injunction was asked against the incumbrance of the title.

Whereupon witness further testified that it is a fact that no one wanted to buy these lands as homesteads at any price. There have been some applications to buy small pieces, a few acres of bottom or arable land, as there are scattered around through them, but no application to buy for the purpose of buying 160 acres, or anything of that sort to make a living on.

Whereupon the attention of witness was called to page 60 of the statement, which reads:

"The Chairman. You have stated that the lands you have are not fit for actual settlement. Is the general character of these lands the same?"

"Mr. Dixon. Well, as I stated, the fact that we purchased the lands for lumbering purposes is pretty

good evidence that the land is not fit for actual settlers. As to the railroad grant itself, I have been over it pretty well a number of times and out into the timber, and I think the actual percentage—anything that I might say would be a guess, but 20 per cent would be a pretty close guess—I think there might be 20 per cent of these lands that can be cultivated.”

and testified that what he stated there was a guess and he could not do any better now. His impression is that his statement is correct.

Whereupon the attention of witness was called to a portion of his statement in that document as follows:

“The Chairman. What is the general description of the lands which your client holds?

“Mr. Dixon. They are all timbered lands, all covered with fir timber. They are rather hilly, usually along a little canyon with a creek running down the center. We have five timbered bodies, each one along a creek or river. We like to have them that way on account of the facilities for operation. The timber is cut and hauled down to the creek; then we build dams and float it out to the river or railroad it out.”

and witness testified that that statement is correct, except perhaps in using the word “all.” The lands are all timbered lands technically, that is incorrect because there are a few acres now and then that are not in timber, but the statement is to all intents and purposes correct. Those acres that might be capable of cultivation are widely separated from the rest, in spots here and there throughout the grant.

Whereupon there was read to the witness from said statement the following:

“The Chairman. What area of lands that have been cut off have been sold approximately?”

“Mr. Dixon. Practically none.”

Is that correct?

A. That is correct.

Q. “The Chairman. What area of them, if any, has been cultivated.

“Mr. Dixon. Practically none. They are not susceptible of cultivation. Our idea has been to reforest them, and we have left the small timber standing for that purpose.”

What do you say as to the accuracy of that statement?

and the witness answered that that is correct. He would say that the idea of reforestation and pasturage is not paradoxical or incompatible. They go together and the Booth-Kelly Lumber Company has pasture land but thought perhaps later it might be reforested.

Whereupon defendants offered in evidence the entire statement of the witness, together with the opening introduction of the Committee on Public Lands, House of Representatives, etc., pages 55 to 66 both inclusive and asked to have same read into the record.

Whereupon counsel for complainant objected to the document upon the same grounds hereinbefore set out but waived objection as to reading the same in to the record, which portion of said document reads as follows:

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