

770
No. 2181

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

THE OREGON AND CALIFORNIA RAILROAD
COMPANY, a corporation,

Complainant and Appellant,

VS.

MARIA DE GRUBISSICH, nee MARIA DE PORT-
ALES,

Defendant and Appellee.

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

TRANSCRIPT OF RECORD.

(In Three Volumes)

VOLUME II.

Pages 538 to 1068, Inclusive

1212

FILED

OCT - 7 1912

Records of M. S. Bennett Court
of appeals

770

No.

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

THE OREGON AND CALIFORNIA RAILROAD
COMPANY, a corporation,

Complainant and Appellant,

vs.

MARIA DE GRUBISSICH, nee MARIA DE PORT-
ALES,

Defendant and Appellee.

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

TRANSCRIPT OF RECORD.
(In Three Volumes)

VOLUME II.
Pages 538 to 1068, Inclusive

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

THE OREGON AND CALIFORNIA RAILROAD
COMPANY, a corporation,

Complainant and Appellant,

vs.

MARIA DE GRUBISSICH, nee MARIA DE PORT-
ALES,

Defendant and Appellee.

**Names and Addresses of Attorneys
upon this Appeal:**

For the Appellant:

Wm. D. Fenton, K. L. Fenton, Ben C. Dey and A. P.
Dobson,

Fenton Bldg., Portland, Oregon

For the Appellee:

Henry Conlin,

Pacific Bldg., San Francisco, Cal.

H. W. Hogue,

Sherlock Bldg., Portland, Oregon

Office of the Oregon and California Rail Road Company
Portland, Oregon, Mach 14, 1871.

Pursuant to call of the President by written and personal notice to each director the Board met at 12 M. Present Messrs. Lewis, Weidler, Moores, Crawford, Halsey and Mr. President.

The President called the meeting to order and stated the business to be considered. The following preamble and resolution was then read to the Board. Whereas, the conveyance approved by resolution of this Board in Wednesday December 28th, 1870, and which the President and Secretary of this Company were authorized to sign and deliver to the European and Oregon Land Company has since the adoption of the said Resolution of this Board respecting the same been modified and changed in several essential particulars by negotiations of the parties to said conveyance including this Company and it is necessary before any further action be had in the premises that said Resolution be rescinded and Milton S. Latham, Faxon D. Atherton and William Norris, Trustees named in said resolutions and proposed conveyance as parties of the first part and said "European and Oregon Land Company" party of the second part being desirous that said Resolutions and proceedings of this Board adopted and had on said twenty-eighth day of December 1870, as aforesaid be rescinded and annulled, therefore be it:

RESOLVED: That the resolution heretofore adopted by this board on Wednesday, the twenty-eighth day of December, 1870, by which the proposed

sale by Milton S. Latham, Faxon D. Atherton and William Norris to the European and Oregon Land Company of all and singular the lands, and franchises, rights and interests as declared and specified in the certain proposed indenture embodied in said resolutions was approved, ratified and confirmed and said proposed conveyance was as to its form approved ratified and confirmed and said proposed conveyance was as to its form approved ratified and confirmed and the President and Secretary were authorized and empowered to execute and deliver the said conveyance on the part of this company be and the same hereby are wholly rescinded, abrogated and annulled.

Repealing Mr. Lewis moved its adoption, seconded by Mr. Weidler, and unanimously passed. The following preamble and resolution was then submitted to the Board.

WHEREAS, This corporation did on the 15th day of April, A. D., 1870, duly make, execute and deliver to Milton S. Latham, Faxon D. Atherton and William Norris its certain indenture in writing under seal bearing date on the last named day whereby it the said Oregon and California Rail Road Company as party of the first part therein in consideration and in further consideration of one dollar the receipt whereof was therein and thereby acknowledged, did duly grant, bargain, sell, assign, alien, set over, enfeoff, convey and confirm unto the said Milton S. Latham, Faxon D. Atherton and William Norris

parties of the second part therein, all and singular the lands and franchises with their appurtenances lying and being in the State of Oregon, granted or intended to be granted to the Oregon Company by Act of Congress approved the 25th day of July in the year of our Lord One Thousand Eight Hundred and Sixty six, 1866, Entitled "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," and acts supplemental thereto and amendatory thereof, and also all the right, title, interest, claim, property and demand, whatsoever both legal and equitable, present and prospective, absolute and contingent, which this Company (The Oregon and California Rail Road Company) then had or owned, or to which it was in anywise entitled, in and to any and all lands and franchises in the State of Oregon, granted or intended to be granted to the Oregon Company by the acts of Congress aforesaid and also all further right, title, interest, claim, property and demand which this Company might at any time thereafter, have, own or acquire to any lands lying and being anywhere in the State of Oregon or in any County thereof, by virtue of any further compliance with such acts of Congress by this Company together with all and singular the hereditaments and appurtenances thereto belonging or in any wise appertaining, to have and to hold the said granted lands, property and franchises, and every part thereof to the said Milton S. Latham, Faxon D. Atherton

and William Norris and to their successors or successor or assigns forever in trust, nevertheless for certain uses and purposes and upon certain conditions and covenants in said indenture contained, as by said indenture or the record thereof in the records of Deeds in and for the County of Multnomah in the State of Oregon on pages 727 to 734 Inclusive of Book K of said records reference being thereto had may more fully and at large appear and, WHEREAS

Among other conditions, covenants and agreements in said indenture contained and set forth, the said Milton S. Latham, Faxon D. Atherton and William Norris or their successor or successors and assigns by and with the consent of this Company (The Oregon and California Rail Road Company) but not otherwise were and are duly authorized and empowered and directed at any time before the maturing of the principal of certain bonds of this Company (The Oregon and California Rail Road Company) in said indenture mentioned and described, to sell and dispose of all or any part or portion of the lands and franchises so granted as aforesaid by such Acts of Congress and in and by said indenture conveyed to said trustees to person or persons, firm or firms, associations or bodies corporate, and for such price and upon such terms as this Company (The Oregon and California Rail Road Company) might by and through its president, advise, direct instruct or agree to and WHEREAS

In pursuance of such last specified provision in said

indenture the said Milton S. Latham, Faxon D. Atherton and William Norris have in pursuance of the advice, direction and instruction of the President of this Company, bargained, sold, transferred, aliened, and conveyed all the lands, franchises, right, and interest granted and conveyed to them as such Trustees by the said indenture hereinbefore referred to to "The European and Oregon Land Company" an incorporation duly incorporated and organized under and pursuant to An Act of the Legislature of the State of California, approved the fourteenth day of April, A. D., One Thousand Eight Hundred and Fifty-three, Entitled "An Act to provide for the formation of corporations for certain purposes" and the acts supplemental thereto and amendatory thereof and a full and complete copy of the indenture by which such sale and transfer to said "The European and Oregon Land Company" is made as follows:— Which conveyance contains all the stipulations, conditions and covenants upon which such sale and transfer has been made that is to say: This Indenture, made and entered into at the City and County of San Francisco, State of California this day of in the year of our Lord, One Thousand Eight Hundred and Seventy, Between Milton S. Latham, Faxon D. Atherton and William Norris, Trustees, all the City and County of San Francisco parties of the first part, "The European and Oregon Land Company" an incorporation duly incorporated and organized under and pursuant to an Act of the Legisla-

ture of the State of California, approved the fourteenth day of April, One Thousand Eight Hundred and Fifty-three, entitled "An Act to provide for the formation of corporations for certain purposes" and the acts supplementary thereto and amendatory thereof, party of the second part, and "The Oregon and California Rail Road Company," a body corporate organized at Portland, in the State of Oregon on the seventeenth day of March, One thousand Eight hundred and seventy, under an act of the Legislature of the State of Oregon approved the fourteenth day of October One Thousand Eight Hundred and Sixty-two, entitled "An Act providing for private Incorporation and the appropriation of private property therefor" and acts amendatory thereof and supplemental thereto party of the third part. Witnesseth. Indenture WHEREAS, The said Oregon and proposed California Rail Road Company did on the to be fifteenth day of April in the year of our made. Lord, One Thousand Eight Hundred and seventy duly make, execute and deliver unto the said Milton S. Latham, Faxon D. Atherton and William Norris its certain indenture in writing under seal bearing date on the last named day whereby the said Oregon and California Rail Road Company as party of the first part therein in consideration of certain premises in said indenture declared and expressed, and in further consideration of one dollar the receipt whereof was therein and thereby acknowledged did duly grant, bargain, sell, assign, alien, set over, enfeoff,

convey and confirm unto the said, Milton S. Latham, Faxon D. Atherton and William Norris parties of the second part therein, all and singular the lands and franchises with their appurtenances lying and being in the State of Oregon, granted or intended to be granted to the Oregon Company by Act of Congress approved the twenty fifth day of July in the year of our Lord one thousand eight hundred and sixty six entitled "An Act granting lands to aid in the construction of a rail road and telegraph line from the Central Pacific rail road in California to Portland in Oregon," and acts supplemental thereto and amendant thereof; and also, all the right, title, interest, claim, property and demand whatsoever both legal and equitable, present and prospective, absolute and contingent, which the said Oregon and California Rail Road Company then had or owned or to which it was in any wise entitled in and to any and all lands and franchise in the state of Oregon granted or intended to be granted to the Oregon Company by the Acts of Congress aforesaid, and also all further right, title, interest, claim, property, and demand which the said Oregon and California Rail Road might at any time thereafter have, own, or acquire to any lands lying and being any where in the State of Oregon, or in any County thereof by virtue of any further compliances with the requirements of such acts of Congress by the said Oregon and California Rail Road Company, Together with all and singular the hereditaments and appurtenances thereunto belonging or in

anywise appertaining. To have and To Hold the said granted lands property franchises and every part and parcel thereof unto the said Milton S. Latham, Faxon D. Atherton and William Norris and to their successors or successor and assigns forever:— In trust nevertheless for certain uses and purposes and upon certain conditions and covenants in said Indenture contained as by said Indenture or the record thereof in the Record of Deeds in and for the County of Multnomah in the State of Oregon on pp. 727 to 734 inclusive of Book K of said records reference thereto being had may more fully and at large appear, and

Whereas, among other conditions, covenants and agreements in said indenture contained and set forth the said Milton S. Latham, Faxon D. Atherton and William Norris or their successors or successor and assigns by and with the consent of the Oregon and California Rail Road Company, but not otherwise were and are duly authorized, empowered and directed at any time before the maturing of the principal of certain bonds of the said Oregon and California Rail Road Company in said indenture mentioned and described to sell and dispose of all or any part or portion of the lands and franchises so granted as aforesaid by such acts of Congress and in and by said indenture conveyed, to said Trustees to such person or persons firm or firms, associations or bodies corporate and for such price and upon such terms as the said Oregon and California Rail Road Company might by and

through its President advise, direct, instruct or agree to NOW THEREFORE, this indenture WITNESSETH that the said Milton S. Latham, Faxon D. Atherton and William Norris, Trustees, as aforesaid under and pursuant to the power and authority in them vested in and by said Indenture first herein above referred to and in consideration of the premises and of the certain covenants and agreements hereinafter contained and set forth and to be performed and kept by the said European and Oregon Land Company and in consideration of the sum of one dollar lawful money of the United States to them in hand paid by the said European and Oregon Land Company the receipt whereof is hereby acknowledged and also in pursuance of the advice, direction, instruction and agreement in writing to that effect of the said Oregon and California Rail Road Company, party of the third part by and through its President have granted, bargained, sold, assigned, aliened, set over, enfeoffed, conveyed and confirmed and by these presents, do grant, bargain, sell, assign, alien, set over, enfeoff, convey and confirm unto the said European and Oregon Land Company, party of the second part hereto ALL the lands and franchises with their appurtenances lying and being in the State of Oregon granted or intended to be granted to the said Oregon Company by Act of Congress approved the twenty-fifth day of July, One thousand eight hundred and sixty-six, Entitled "An Act granting lands to aid in the construction of a Rail Road and Telegraph

line from the Central Pacific Rail Road in California to Portland in Oregon and acts supplemental thereto and amendatory thereof and Also all the right, title, interest, claim, property and demand whatsoever, both legal and equitable, present and prospective, absolute and contingent which the parties of the first part hereto now have or hold or to which they may be in any wise entitled in and to any and all lands and franchises in the State of Oregon granted or intended to be granted to the said Oregon Company by the acts of Congress aforesaid; and also all future right, title, interest, claim, property and demand which the parties of the first part hereto may at any time hereafter have own or acquire to any lands lying and being in the State of Oregon or in any County thereof by virtue of any further compliance with the requirements of such acts of Congress by the party of the third part hereto, Together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining, and being the same lands, tenements, franchises, hereditaments, and appurtenances granted, Conveyed and assured unto the parties of the first part herto by the Oregon and California Rail Road Company by Indenture or the record thereof in the Records of Deeds in and for the County of Multnomah in the State of Oregon on p. p. 727 to 734 inclusive of book K of said records reference being thereto had may more fully and at large appear, TO HAVE AND TO HOLD the said granted lands, property and franchises and every part and

parcel thereof unto the said European and Oregon Land Co., party of the second part hereto and to its successors and assigns for ever, subject, nevertheless to the certain provisions and conditions with reference to delivery of possession of said lands and delivery of the surveys, plats, and patents and other muniments of title to or effecting said lands to be hereafter issued by the United States to the said Oregon and California Rail Road Company pursuant to law which are hereinafter mentioned and expressed, And the said parties of the first part and all and every other person or persons whomsoever lawfully or equitably claiming an estate, right, title or interest of in and to the hereinbefore granted premises, by from or under them and each of them shall and will at any time or times hereafter, upon the reasonable requests and at the proper costs and charges in the law of the said party of the second part or its successors or successor or assigns, make, do and execute, or cause to be made done and executed all and every such further and lawful and reasonable acts, conveyances and assurances in the law for the better and more effectually vesting and confirming the premises in and to the said party of the second part, as by the said party of the second part or its successor or successors or the counsel learned in the law shall be reasonably desired, advised or required, And Also that the said parties of the first part the above granted, bargained, sold and assigned premises and every part and parcel thereof with the appurtenances thereof unto the said party

of the second part or its successor or successors and assigns against the said parties of the first part and their uccessors and against all and every person and persons whomsoever lawfully claiming or to claim the same by, through or under them it shall and will warrant and by these presents forever defend.

And in consideration of the premises the said European and Oregon Land Company party of the second part hereto, hath covenanted, promised and agreed and doth hereby covenant promise and agree to and with the said Milton S. Latham, Faxon D. Atherton and William Norris, Trustees as aforesaid in manner following that is to say. THE said party of the second part hereto shall and will on or before the first day of April in the year of our Lord one thousand eight hundred and eighty nine pay to said Milton S. Latham, Faxon D. Atherton and William Norris Trustees as aforesaid the price or sum of One and one quarter dollars lawful money of the United States for each and every acre of said lands and permises hereby conveyed to the party of the second part be and the same more or less IT is further covenanted and agreed by the said parties of the first part that they will notify in writing the party of the second part at San Francisco from time to time as they receive the same that they are prepared to deliver to the party of the second part the plats or surveys of the lands hereby sold or intended to be sold as the same may be hereafter duly segregated from the public domain and set apart to the Oregon and California Rail Road Company, party of the third part hereto, pursuant to law

and for the purposes mentioned in the said act of Congress passed as aforesaid on the twenty-fifth day of July one thousand eight hundred and sixty six and the acts supplemental hereto and amendatory thereof, and all such papers, documents and muniments of title hereafter to come to their possession relating to said lands and premises as may be necessary to enable the party of the second part to select the same by good and sufficient description thereof AND it is also further stipulated, covenanted and agreed by and between the parties of the first and second parts hereto that the said parties of the first part having notified in writing as aforesaid the party of the second part at San Francisco, California, that they are prepared to deliver to the party of the second part any of the said surveys, plats, patents and other evidences and muniments of title relating to or designating said lands as the same may from time to time be issued by the United States to said Oregon and California Rail Road Company under the acts of Congress already passed or which may hereafter be passed in aid thereof or supplemental thereto the said party of the second part at any time before the expiration of Ten years from the day of the receipt by said party of the second part of the said notice relating to the said documentary evidence of location of and title to said lands may and shall receive actual possession of said patents and of the lands therein described upon paying to the parties of the first part the said price of one and one quarter dollars per acre of such lands, but without interest on the said price of the

same for the said period of Ten years. IF however such lands shall for any cause be not all paid for within Ten years from the time the said party of the second part shall be notified by the parties of the first part as aforesaid that said surveys, plats, patents and other evidences and muniments of title are ready to be delivered by the said parties of the first part to the said party of the second part as aforesaid, then the parties of the first part shall charge and the party of the second part shall pay interest at the rate of six per cent per annum upon the said purchase price of one and one quarter dollars per acre of said lands for the period after said ten years and up to and including said first day of April one thousand eight hundred and eighty nine during which said lands shall not be paid for by the party of the second part as hereinbefore provided; It being the intent of this stipulation and covenant that the party of the second part shall have Ten years within which to make payment for and take possession of or sell to others the lands hereby conveyed without paying interest on the said purchase price of said lands for any portion of the whole of that time, but that after said lands or any part thereof shall have been at the disposition of the party of the second part under the covenants of this Indenture for the term of Ten years it shall thereafter pay to the parties of the first part interest at the rate of six per cent per annum on the purchase price of all the lands so at the disposition of the party of the second part which may not for any reason have been paid for by said party of the second part within such period of ten years. But the said surveys,

plats, patents and all other evidences and muniments of title from the United States to said Oregon and California Rail Road Company relating to said lands hereinbefore conveyed shall remain with and the possession of the lands and premises therein described shall always remain in the said parties of the first part, any thing hereinbefore contained to the contrary notwithstanding until said party of the second part shall pay the parties of the first part for the same, or such part thereof as it may from time to time desire to obtain possession of under this conveyance the said price of one and one quarter dollars per acre of said lands, and such rate of interest thereon as is hereinbefore provided for.

IT is further expressly covenanted and agreed by and between the parties hereto each with the other that in case the total amount of the indebtedness of the party of the second part created under this indenture shall at the time of the execution and delivery of these presents or at any future time exceed the amount of the Capital Stock of said party of the second part actually paid in, the parties of the first part in consideration of the premises and of the sum of one dollar to them in hand paid by the party of the second part the receipt whereof is hereby acknowledged hereby covenant promise and agree that they will and they do hereby demise, release and discharge the Trustees of the party of the party of the second part under whose administration such excess may be or is hereby created from all and every liability joint and several, in their or either

of their individual and private capacities to the parties of the first and third parts for the amount of such excess of said indebtedness over the amount of the Capital Stock of the party of the second part actually paid in at the time of the execution and delivery of these presents; And said party of the first part for the consideration aforesaid do hereby waive, surrender and abandon any and all claim demand or right at law or in equity or existing or to exist by operation of the Statute Creating undivided and private liabilities of Trustees of Corporations organized under the laws of California for debts or liabilities incurred in excess of the amount of the capital stock actually paid in and the said party of the third part hath covenanted and agreed and doth hereby covenant and agree to and with the parties of the first part and the party of the second part that it has duly authorized, empowered, directed and required the said parties of the first part as Trustees as aforesaid to make, execute and deliver this Indenture to the said party of the second part in manner and form and upon the terms and conditions hereinbefore expressed. AND the said party of the second part by and through its President, he being thereunto and for that purpose duly authorized and empowered this sale and conveyance and every part thereof hath fully and completely ratified approved and confirmed and by these presents doth fully ratify, approve and confirm the same.

IN WITNESS whereof the said parties of the first part have hereunto set their respective hands and seals and the said party of the second part hath also caused

these presents to be subscribed by its President and its corporate seal hereto affixed by its Secretary by resolution of its Board of Trustees the day and year first above written: and the said party of the third part hath also caused the same to be subscribed by its President and its corporate seal to be hereto affixed by its Secretary, by resolution of its Board of Trustees the day and year first above written

THEREFORE RESOLVED That the sale and transfer made by said Milton S. Latham, Faxon D. Atherton and William Norris to said "The European and Oregon Land Company" of all the lands, franchises, rights and interests specified in the indenture of which the foregoing is a copy be and the same are hereby approved ratified and confirmed and the conveyance thereof (of which the foregoing is a copy) from said Milton S. Latham, Faxon D. Atherton and William Norris to said "The European and Oregon Land Company" is hereby approved, ratified and confirmed and further

RESOLVED: That the President and Secretary of this Company be and they are hereby authorized and directed to execute and acknowledge in the name of this Company and under corporate seal the said Deed of Conveyance to said "The European and Oregon Land Company" in the form and to the effect and for the purposes as set forth and stipulated in the hereinbefore recited copy, blanks for dates in which to be filled at time of, and with date of executing the same.

On motion of Mr. Moores seconded by Mr. Craw-

ford the foregoing preamble and Resolution were un-
animously approved and adopted and ordered to be
spread upon the Journal of proceedings of this Board.

BEN HOLLADAY, President.

A. G. CUNNINGHAM, Secy.

Directors fees for attending meetings of Board since
and including the meeting at which By-laws were adopt-
ed have been Paid to date of and including last meet-
ing. March 23, 1871.

A. G. CUNNINGHAM, Secy.

Stock Holders Election.

Office of the Oregon and California R. R. Co.,

Portland, Oregon, Tuesday, April 11th, 1871.

Pursuant to written notices delivered or mailed to
each stockholder of this company as provided in the
By-laws of this Company, an election was this day held,
at the office of the Company for seven directors, to
serve for the ensuing twelve months, the President, Ben
Holladay, Presiding.

The voting was in accordance with the following cer-
tified statement from the Stock Ledger.

“Office of the Oregon and California Rail Road Co.

Portland, O. April 11th, 1871.

I hereby certify that the following is a true and cor-
rect statement of the Stockholders of this Company as
the same appears on the Stock Ledger this day.

Names of Stockholders.	No. of Shares.
Ben Holladay	1
C. H. Lewis	1
I. D. Moores	1

I. C. Hawthorn	1	
M. Crawford	1	
Geo. W. Weidler	5,000	
Wm. S. Halsey	5,000	
Wm. Norris, Trustee	5,000	
C. Temple Emmet	50,000	
Ben Holladay, Jr.	134,995	
		200,000

(Per Stamp Cancelled) (Seal of Company)

Signed A. G. CUNNINGHAM, Secy.

The following Stockholders appeared and voted the Shares of Stock standing in their names on the Stock Ledger.

Ben Holladay, 1 share.

Wm. S. Halsey, by Ben Holladay, his Proxy 5000 Shares.

Ben Holladay Jr. by Ben Holladay, his Proxy, 134,995 Shares.

I. R. Moores by Ben Holladay, his Proxy, 1 Share.

Geo. W. Weidler, 5000 shares.

M. Crawford, 1 share.

I. C. Hawthorne, 1 share.

Total 144,999 Shares.

Thus voting in the aggregate One Hundred and forty four thousand nine hundred and ninety nine shares.

The following Stockholders each having received the entire vote cast were unanimously elected Directors, as certified by the President's certificate as follows:

Office of the Oregon and California Rail Road Company
Portland, Or. April 11th, 1871.

I hereby certify that at the election by the stockholders of this Company held this day the following stockholders were unanimously elected Directors to serve for the ensuing twelve months.

Ben Holladay, I. R. Moores, C. N. Lewis, Wm. S. Halsey, Geo. W. Weidler, I. C. Hawthorn, Medorum Crawford.

Signed BEN HOLLADAY, President.
(Rev. Stamp Cancelled)

Ctfs signed this day.

A. G. CUNNINGHAM, Secy.

STATE OF OREGON,

County of Multnomah—ss.

We the undersigned, Ben Holladay, C. H. Lewis, I. C. Hawthorn, Geo. W. Weidler and Medorum Crawford, being first duly sworn, do solemnly swear, make oath that we will faithfully and honestly discharge our duties respectively as Directors of the Oregon and California Rail Road Company.

BEN HOLLADAY,
C. H. LEWIS,
J. C. HAWTHORN,
GEO. W. WEIDLER.
M. CRAWFORD.

Subscribed and sworn before me this 12th day of April 1871. Witness my hand and official Seal. Geo. W. Murray, Notary Public, Oregon.

(Six cents in Rev. Stamps cancelled.)

Office of the Oregon and California Rail Road Company.

Wednesday, April 12, 1871.

In accordance with the By laws, the new Board of

Directors met at 11 o'clock A. M. and qualified as such Directors by taking and subscribing the oath of office as appears of record on page 56 of this book.

Present Messrs. Ben Holladay, C. H. Lewis, J. C. Hawthorn, Geo. W. Weidler and Medorum Crawford.

The board proceeded to organize by calling Mr Crawford to the chair.

On motion of Dr. Hawthorn seconded by Mr. Lewis, Ben Holladay was put in nomination for President, there being no opposing candidate the vote was proceeded with and Mr. Holladay was declared unanimously elected, whereupon Mr. Crawford resigned the chair, and Mr. Holladay assumed the duties of President.

On motion of Dr. Hawthorn seconded by Mr. Lewis, Wm. S. Halsey was put in nomination for Vice President, Mr. Crawford objected to proceeding with his election on the ground that Mr. Halsey not having qualified as a Director was ineligible to the office, the objection agreed to, and the election of Vice President deferred.

On motion of Dr. Hawthorn seconded by Mr. Lewis, A. G. Cunningham was put in nomination for Secretary, there being no opposition the election was proceeded with, and Mr. Cunningham having received the entire vote of the Directors present was declared unanimously elected.

The Board now being organized and no business requiring action being presented.

On motion of Dr. Hawthorne seconded by Mr. Crawford the Board adjourned.

BEN HOLLADAY, President.

A. G. CUNNINGHAM, Secy.

Office of the Oregon and California R. R. Co.,
Portland, Or. Wednesday May 10, 1871.

In accordance with the By laws the board met this day at 11:30 A. M.

Present Messrs. C. H. Lewis, Geo. W. Weidler, Medorum Crawford and Wm. S. Halsey.

Mr. Halsey filed his oath qualifying as Director of this Company, as follows,

STATE OF OREGON,
County of Multnomah—ss.

I, Wm. S. Halsey a director elected in the Oregon and California Rail Road Company on Tuesday, April 11th, 1871, do hereby solemnly swear that I will faithfully and honestly discharge my duties as a Director of the Oregon and California Rail Road Company.

(5c stamp cancelled) (Signed) Wm. L. HALSEY,

Subscribed and sworn to before me this 8th day of May, 1871.

GEO. E. COLE,

(SEAL)

Notary Public for Oregon.

Mr. Halsey having qualified as above and holding the office of Vice President from last year, (no successor having been elected) took the chair and called the meeting to order.

On motion of Mr. Crawford seconded by Mr. Lewis, Reading the minutes of the Previous meeting were dispensed with.

Mr. Crawford moved that the board now proceed to the election of a Vice President, seconded by Mr. Lewis and passed.

Mr. Crawford proposed Sm. L. Halsey for Vice President, no other candidates being proposed the election was proceeded with. Wm. L. Halsey receiving the vote of all the Directors present was declared elected unanimously.

No other business being before the board, on motion of Mr. Weidler, seconded by Mr. Lewis, the Board adjourned.

A. G. Cunningham,	WM. L. HALSEY,
Secretary.	Vice Pres.

Office of the Oregon and California R. R. Co.,
Portland, Or., May 31, 1871.

Pursuant to call by the President by written and personal notice to the directors the Board met at 12 M. this day.

Present Messrs. Lewis, Halsey, Weidler and Crawford. The President being absent the Vice President (Wm. L. Halsey) called the meeting to order, the following preamble and resolutions having been read to the Board, were on motion of Mr. Lewis, seconded by Mr. Crawford unanimously adopted.

“WHEREAS, The interests of this Company require that special power and authority should be conferred upon William F. Roelofson, at present of the City and County of San Francisco; State of California, to commence, conduct, manage and conclude in behalf of this Company and as its duly accredited Agent for that purpose, any and all negotiations, contracts, agreements and assurances between this Company and any other railway corporation or corporations in

this State or in any other State, now organized and operating, or which may be organized and put in operation, looking towards or designed to accomplish the sale or lease or consolidation, or amalgamation of this Company, its property and franchises of every description and wheresoever situated, to or with such other corporation or corporations or the sale, or lease or other alienation of this company's property, real and personal to any person or persons whomsoever:

Therefore be it RESOLVED "That special power and authority be and is hereby conferred upon Wm. F. Roelofson, Esq., of the City and County of San Francisco, State of California, to commence, conduct, manage and conclude in behalf of this Company any and all negotiations, contracts, agreements and assurances between this Company and any other railway corporation or corporations in this State, or in any other State, now organized and in operation or which may hereafter be organized and put in operation and upon such conditions or terms as may seem best to him in his judgment looking towards or designed to accomplish the sale, leasing, consolidation, or amalgamation of this company its property and franchises of every description and wheresoever situated, to or with that of such other corporation or corporations or the sale, or leasing, or other alienation of this Company's property, real and personal, to any person or persons whomsoever hereby giving and granting unto the said William F. Rollofson all and singular the powers in respect to selling and leas-

ing, or amalgamation of this company and its property, real and personal, and franchises to or with any other company which this Board of Directors could lawfully have or exercise in the premises, provided nevertheless that it shall be the duty of said William F. Roelfson attorney in fact aforesaid, to make a full and complete report of any lease, sale, amalgamation, agreement or negotiation which he may make under the authority herein conferred by the Board of Directors and the stockholders of this company within thirty days from the time of making such lease, sale, amalgamation, agreement or negotiation and if the acts of said Rollofson in the premises are then ratified and confirmed by said Board of Directors and by the said Stockholders within twenty days from the date of receiving such report then and in that event, all such acts of said Rollofson shall be binding upon this Company, In the event however, that such acts are not ratified by said Board of Directors and by the stockholders of this Company within such time, then and in that event the acts of said Rollofson shall in the premises not be binding on this Company and the right of this Company to ratify and confirm, or reject such acts shall be incorporated in the power of attorney to said William F. Rollofson.

Resolved, That the powers and authority conferred upon said Rollofson by virtue of the foregoing resolution shall not be revocable by this Company for the period of six months from the date of the adoption of this resolution, nor then except upon ninety days

written notice to be signed by the Board of Directors of this Company, or a majority thereof to the effect that said Board of Directors intended at a meeting thereof as a Board duly convened to rescind, modify or alter the said resolution and the powers therein and thereby created.

“Resolved, That the President of this company be, and is hereby authorized and directed to make, execute and deliver to said Wm. F. Rollofson on behalf of this company and as its act and deed, all such instruments indentures and powers of attorney as may be necessary to enable the said Wm. F. Rollofson to execute the trusts and powers created and declared by these resolutions, and that to all such instruments the Secretary of this Company be and he is hereby authorized to affix the corporate seal in attestation thereof.

“Resolved, That the Secretary of this Company forthwith transmit to said W. F. Rollofson a duly attested copy of the foregoing preamble and resolution duly attested under his hand and the seal of this corporation, which the secretary is hereby ordered to affix to said copy of said resolutions.

No other business being before the Board, on motion of Mr. Lewis, seconded by Mr. Weidler, the Board adjourned.

A. G. Cunningham,
Secy.

W. L. HALSEY,
V. Pres.

Office of the Oregon and California Rail Road Company, Portland, Ore.

Wednesday, June 14th, 1871.

In accordance with the By Laws, Messrs. Halsey, Weidler and Crawford were present at 11 o'clock A. M. There not being a quorum for the transaction of business the Board adjourned until 4 o'clock P. M. this day.

Pursuant to adjournment the board met at 4 o'clock P. M., present Mr. Lewis, Halsey, Crawford, Moores and Weidler, 5 members.

In the absence of the President the Vice President took the chair and called the board to order.

Mr. Moores here filed his qualification as a Director as follows:

STATE OF OREGON,

County of Multnomah—ss.

I, I. R. Moores, a Director elected in the Oregon and California Rail Road Company on Tuesday, April 11, 1871, do hereby solemnly swear, that, I will faithfully and honestly discharge my duties as such Director of said company.

(Signed) I. R. MOORES,

Subscribed and sworn to before me this 11 day of May, A. D., 1871.

[Seal.]

GEO. E. COLE,

Notary Public for Oregon.

(Rev. Stamp Cancelled.)

Reading the minutes of previous meetings being first in order, Mr. Moores moved to confirm and adopt the proceedings of previous meetings as recorded herein, which was seconded by Mr. Crawford and unanimously passed.

No unfinished business, reports of committees, or new business being presented in the regular order of proceedings.

On motion of Mr. Crawford, seconded by Mr. Moores the Board adjourned.

A. G. Cunningham,
Secy.

W. L. HALSEY,
V. Pres.

Office of the Oregon and California Rail Road
Company.

July 12, 1871.

There not being a quorum present, and no business requiring action of the Board, the meeting stood adjourned.

A. G. CUNNINGHAM,
Secy.

Office of the Oregon and California Rail Road
Company.

Aug. 9th, 1871.

No quorum present, adjournment stood over.

A. G. CUNNINGHAM,
Secy.

Office of the Oregon and California Rail Road
Company.

Sept. 13, 1871.

No quorum present, adjournment stood over.

A. G. CUNNINGHAM,
Secy.

Office of the Oregon and California Rail Road
Company.

Portland, Or., Wednesday, Oct. 11, 1871.

There not being a quorum present this day, the board stood adjourned.

A. G. CUNNINGHAM,
Secy.

Office of the Oregon and California Rail Road
Company.

Wednesday, Nov. 8, 1871.

No quorum being present at the hour of meeting on this day, the Board stood adjourned.

A. G. CUNNINGHAM,
Secy.

Office of the Oregon and California Rail Road
Company.

Wednesday, Dec. 13, 1871.

No quorum being present at the hour of meeting on this day the Board stood adjourned.

A. G. CUNNINGHAM,
Secy.

Office of the Oregon and California Rail Road
Company, Portland, Ore.

Friday, Dec. 22d, 1871.

Pursuant to call by the President the Board met at 11 o'clock A. M.

Present Messrs. Lewis, Hawthorne, Weidler, Moores, Crawford and Mr. President, six (6) members.

The President called the meeting to order, whereupon the Chief Engineer submitted a map changing a portion of the location of the line of this Company's road, as shown by map adopted by this Board on the

10th day of December, 1870, and showing the line of road as located to the California State line, after careful examination of said map, the following resolution was offered by Mr. Moores:

Resolved: That so much of the line of location accepted by Resolution of the Board of Directors on the 10th Dec. 1870, as shown between station 1298 and the terminal point, as shown on said map be, and the same is hereby abandoned and the map now submitted showing the line of definite location of the line of road from Station No. 1298 near the point where said line crosses the section line between Sections 5 and 6, Township 30 R. 5 W. to a post on the State line between Oregon and California marked "67 miles from the N. E. Corner of California 42 degrees Latitude be and the same is hereby adopted as the line of definite location.

Seconded by Dr. Hawthorne and unanimously adopted.

On motion of Mr. Lewis, seconded by Mr. Crawford the Board adjourned.

A. G. Cunningham,	BEN HOLLADAY,
Secy.	President.

Office of the O. and C. R. R. Company, Portland, Oregon.

Wednesday, Jany. 10th, 1872.

No quorum being present at the hour of meeting on this day, the Board Stands adjourned.

A. G. CUNNINGHAM,
Secy.

Office of the O. and C. R. R. Company, Portland, Oregon.

Wednesday, Feby. 14. 1872.

No quorum being present at the hour of meeting on this day, the Board Stands adjourned.

A. G. CUNNINGHAM,
Secy.

Office of the Oregon and California, R. R. Co.,
Portland, Oregon.

Wednesday, March 13, 1872.

No quorum present, board stands adjourned.

A. G. CUNNINGHAM,
Secy.

STOCK HOLDERS ANNUAL MEETING, 1872.

Office of the Oregon and California Rail Road
Company, Portland, Oregon.

Tuesday, April 9, 1872.

Pursuant to notice and in accordance with the By Laws the Stockholders met at the office of the Company this day at 11 o'clock A. M.

Present Messrs. Ben Holladay, Wm. L. Halsey, Geo. W. Weidler, I. R. Moores, C. H. Lewis, J. C. Hawthorne, and Medorum Crawford.

The President, Ben Holladay, called the meeting to order stating that this was the annual meeting of the Stockholders for the purpose of electing seven (7) of their number Directors to serve for the ensuing twelve (12) months and until their successors are elected and qualified.

On motion of Mr. Halsey seconded by Mr. Moores,

the election was proceeded with voting being by ballot, each stockholder present voting the number of shares standing on the stock ledger in his name as shown by the following certificate.

Office of the Oregon and California Rail Road
Company, Portland, Ore.

Apr. 9th, 1872.

Statement of Stockholders of the Oregon and California Rail Road Company.

Ben Holladay	134,996 shares
C. H. Lewis	1 share
I. R. Moores,	1 share
J. C. Hawthorne	1 share
Medorum Crawford	1 share
Geo. W. Weidler	5,000 shares
Wm. L. Halsey	5,000 shares
Wm. Norris, Trustee	5,000 shares
C. T. Emmet	50,000 shares
	200,000 shares

I hereby certify that the foregoing is a correct statement as shown by the Stock Ledger this date.

Signed, A. G. CUNNINGHAM,

Secy.

[Seal of Company.]

The following were the shares voted as represented by the tickets filed.

Ben Holladay	134,996 shares
Wm. L. Halsey	5,000 shares
Geo. W. Weidler	5,000 shares
I. R. Moores	1 share

C. H. Lewis	1 share
J. C. Hawthorne	1 share
M. Crawford	1 share
Total.....	145,000 shares

The following stockholders received each the entire vote cast were declared unanimously elected.

Ben Holladay	145,000 votes
C. H. Lewis	145,000 votes
I. R. Moores	145,000 votes
C. H. Lewis	145,000 votes
J. C. Hawthorne	145,000 votes
M. Crawford	145,000 votes
Geo. W. Weidler	145,000 votes
Wm. L. Halsey	145,000 votes

Certificate of election issued by the President.

Office of the Oregon and California Rail Road
Company, Portland, Ore.

April 9, 1872.

I hereby certify that at the election by the Stockholders of this Company, held this day, the following Stockholders having received the entire number of votes cast were duly elected Directors to serve for the ensuing twelve months and until their successors are elected and qualified.

BEN HOLLADAY,
C. H. LEWIS,
I. R. MOORES,
J. C. HAWTHORNE,
M. CRAWFORD,
GEO. W. WEIDLER,

WM. L. HALSEY,
Signed BEN HOLLADAY,
President.

No further business being before the meeting, on motion of Mr. Crawford, seconded by Mr. Lewis the meeting adjourned.

A. G. CUNNINGHAM,
Secy.

STATE OF REGON,

County of Multnomah—ss.

We, the undersigned Ben Holladay, I. R. Moores, W. L. Halsey, J. C. Hawthorne, Geo. W. Weidler and Medorum Crawford, being first duly sworn do each solemnly swear and make oath, that we will faithfully and honestly discharge our duties respectively as directors of the Oregon and California Rail Road Company.

BEN HOLLADAY,
I. R. MOORES,
W. L. HALSEY,
J. C. HAWTHORNE,
GEO. W. WEIDLER,
M. CRAWFORD,

Subscribed and sworn to before me this the 10th day of April, A. D., 1892.

[Seal.]

JNO. D. BILES,
Notary Public.

Office of the Oregon and California R. R. Co.

Wednesday, April 10, 1872.

In accordance with the By-Laws the newly elected

Board of Directors met at 11 o'clock A. M. Present Messrs. Ben Holladay, I. R. Moores, Wm. L. Halsey, J. C. Hawthorne, Geo. W. Weidler, and M. Crawford, who qualified as such Directors as appears of record on page 68 this book and of this date.

The election of officers being the first business. On motion of Mr. Halsey, seconded by Dr. Hawthorne, Mr. Holladay took the chair and called the meeting to order.

On motion of Mr. Halsey seconded by Dr. Hawthorne, Mr. Holladay was put in nomination for President, there being no other nominations the voting was proceeded with by roll call, which resulted in the unanimous election of Mr. Holladay as President.

Dr. Hawthorne nominated Mr. Halsey for Vice President, seconded by Mr. Moores and unanimously elected by the entire vote of the members present.

Mr. Moores nominated Mr. A. G. Cunningham for the office of Secretary, on the vote being taken by roll call, he was unanimously elected.

The board now being fully organized the President announced the new Board of Directors ready for any business to be considered.

Mr. Halsey, moved that any Director being five minutes after the hour fixed for the holding of the monthly meetings should forfeit his fees for attending such meeting, after some discussion the motion was withdrawn.

On motion of Mr. Weidler, seconded by Mr. Hal-

sey, the Board adjourned.

A. G. Cunningham,
Secy.

BEN HOLLADAY,
President.

Office of the O. and C. R. R. Co., Portland, Oregon.

Wednesday, May 8th, 1872.

C. H. Lewis filed the following oath of qualification as Director of this Company:

STATE OF OREGON,
County of Multnomah—ss.

Before me personally came C. H. Lewis, who being duly sworn, says, that he will faithfully and honestly discharge his duties as Director of the Oregon and California Rail Road Company.

Signed C. H. LEWIS.

Subscribed and sworn to before me this the 11th day of April, A. D., 1872.

Witness my signature and official seal.

[Seal.]

Signed JNO. D. BILES,
Notary Public.

There not being a quorum present at the hour of 11 o'clock A. M., the board adjourned.

A. G. CUNNINGHAM,
Secy.

Office of the O. and C. R. R. Co., Portland,
May 11, 1872.

Pursuant to notice delivered to each director in accordance with the By Laws the Board met at 10 o'clock A. M. this day, Directors present Messrs. Halsey, Moores, Lewis, Crawford, Weidler, Hawthorne, Holladay. (7).

The President called the meeting to order, Mr. Halsey offered the following resolution. Resolved: That the permanent junction of the Oregon and California Rail Road with the Oregon Central Rail Road and the permanent machine shops of the Company be and the same are hereby permanently located and established at Junction City, same County, State of Oregon, on the following described lands, to-wit:— “Beginning at the intersection of the north line of Fourth Street in Junction City in said County and State, with the east line of Front Street, thence easterly along said north line of Fourth Street to the intersection of the west line of Elm Street, thence northerly and along the west line of Elm street to the intersection of the north line of eighth street extended, thence westerly and along the extension of said north line of Eighth Street to a point thirty (30) feet easterly of the center line of the side track of the Oregon and California Rail Road, as the same is platted and recorded on the records of Lane County, thence northerly and parallel with said side track to where it joins the main track of said Rail Road, thence northerly and parallel with the center line of said main track thirty (30) feet distant therefrom, to the intersection of the south line of Seventeenth Street, thence westerly along the south line of Seventeenth Street to the intersection of the east line of Greenwood Street, thence southerly and along the east line of Greenwood street to the intersection of the north line of tenth street, thence easterly and along the north line

of tenth street to its intersection with the east line of Front street, thence southerly and along the east line of Front Street to the place of beginning, containing twenty-six (26) acres, more or less" and Resolved, that this Company co-jointly with the Oregon Central Rail Road Company purchase of James G. Hughes, the land above described for such purpose and enter into an agreement under the corporate seal of this Company, with said James G. Hughes binding this Company to make such grounds such permanent junction and to place thereon the permanent machine and car shops of this Company, and the President and Secretary of this Company, are hereby authorized and instructed to enter into such agreement of purchase upon such terms.

Which was seconded by Dr. Hawthorne and unani-
mously adopted.

No other business being before the Board on motion of Mr. Weidler, seconded by Mr. Crawford, the Board adjourned.

A. G. Cunningham,
Secy.

BEN HOLLADAY,
President.

Office of the Oregon and California R. R. Company,
Portland, Oregon.

Wednesday, June 12th, 1872,

There not being a quorum present at 11 o'clock of this day the Board stood adjourned.

A. G. CUNNINGHAM,
Secretary.

Office of the Oregon and California Rail Road Com-
pany, Portland, Ore.

Wednesday, July 10, 1872.

There not being a quorum present at 11 o'clock this day the Board stood adjourned.

A. G. CUNNINGHAM,

Secretary.

Office of the Oregon and California Rail Road Company, Portland, Ore.

July 20th, 1872.

Pursuant to call by the President the Board met at 12:30 P. M. Present Wm. L. Halsey, Geo. W. Weidler, J. C. Hawthorne, M. Crawford, I. R. Moores, and C. H. Lewis, absent Ben Holladay.

Wm. L. Halsey, V. President presiding in the absence of the President, called the Board to Order.

Mr. Moores offered the following preamble and resolution:

Whereas: The Oregon Steam Ship Company, a corporation, duly incorporated at Portland, Oregon under the general incorporation laws of the State of Oregon, on the 25th day of May, A. D., One Thousand Eight Hundred and Seventy-two (1872), did on the 1st day of July, A. D., One Thousand Eight Hundred and Seventy-two (1872), make issue and deliver to Milton S. Latham, Faxon D. Atherton and William Norris as Trustee for the holders thereof, its Bonds in the sum and to the extent of Two Million of Dollars payable to the holders thereof at the Banking House of Drexel, Morgan and Co., in the City of New York, State of New York, twenty years after the date thereof, in U. S. Gold Coin, of the United States with in-

terest Coupons attached for seven per cent interest thereon, per annum, such interest coupons payable semi-annually in like United States Gold Coin. Said Bonds being of the following denomination, to wit: Two Thousand Bonds of One Thousand Dollars each.

The following is a true copy of said Bonds and interest coupons, to-wit:

No..... \$1,000.

UNITED STATES OF AMERICA,

State of Oregon—ss.

The Oregon Steam Ship Company, Incorporated,
May 25, 1872.

FIRST MORTGAGE BONDS.

Know all men by these presents, that the Oregon Steam Ship Company, a body corporate, created under and pursuant to the laws of the state of Oregon hereby acknowledges itself indebted and bound to Wm. L. Halsey, or bearer, in the sum of One Thousand Dollars, gold coin of the United States, which sum the Oregon Steam Ship Company hereby promises to pay at the Banking House of Drexel, Morgan and Co., in the City of New York, State of New York, to the said Wm. L. Halsey or bearer, on the first day of July, A. D., 1872, with interest from and after the first day of July 1872, at the rate of seven per cent per annum payable semi-annually, at the said Banking House of Drexel, Morgan and Co., in the City of New York, State of New York, on the first day of January and July of each year after the first day of July, 1872, on presentation and surrender of the an-

nexed dividend or interest warrants. This bond is one of a series of Two Thousand Bonds of One Thousand Dollars each, numbered from one to two thousand both inclusive, and amounting in the aggregate to two Millions of Dollars, and which have been made and executed by said the Oregon Steam Ship Company, under authority granted by the laws of the State of Oregon; and as security for the payment to the holders of said issue of said two thousand bonds with interest to grow due thereon, said The Oregon Steam Ship Company has duly executed, acknowledged and delivered under authority of said laws of Oregon, and of resolutions unanimously passed and adopted by its Board of Directors to Milton S. Latham, Faxon D. Atherton and Wm. Norris, as Trustees, a mortgage or Deed of Trust bearing even date herewith and whereby all the Steam Ships, Steam boats, and their tackle, apparel and furniture and also all real and personal property 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 the said mortgage or Deed of Trust, or the record thereof may more fully appear, and to which and to all the terms and provisions thereof, reference is hereby specially made. In witness whereof said The Oregon Steam Ship Company has caused this Bond to be signed by its President and attested by its Secretary, and the corporate seal to be hereunto affixed at its office in the City of Portland, County of Multnomah and

the first of 18....., being the semi-annual interest on Bond No.....

.....Secretary.

and whereas the principal terminus of said Steam Ship line of said The Oregon Steam Ship Company, and the Northern terminus of the line of Rail Road owned and operated by this Company, are both located in the City of Portland, Multnomah County, State of Oregon and Whereas it is of vast importance to this Company, and of great value to this Company, its Stockholders and Bondholders to have through connections for freight and passengers to the City of San Francisco, California, and to the Ports of Victoria, Nainamo and other ports on Vancouver Island and Olympia, Seattle, Port Townsend, and other Ports of Puget's Sound and Setka and other Ports in Alaska, by means of the Ocean Steamers belonging to and operated by said The Oregon Steam Ship Company, which agreement for through connections the said The Oregon Steam Ship Company, have agreed to make with this Company, upon such reasonable terms and upon rates such as may from time to time be mutually agreed upon, in consideration that this Company will covenant and agree to and with said The Oregon Steam Ship Company and to and with said Milton S. Latham, Faxon D. Atherton and William Norris, Trustees of said Bondholders aforesaid and to and with said Bondholders to guarantee and shall guarantee the payment of the interest on said Bonds of the said The Oregon Steam Ship Com-

pany of Two Millions Dollars hereinbefore described at the time and place said interest coupons may from time to time mature, and also the principal of said Two Million Dollars of the Bonds of said The Oregon Steam Ship Company at their maturity, and at the place the same are payable.

Therefore Resolved: That this Company, The "Oregon and California Rail Road Company" of Portland, Oregon, incorporated the 17th day of March, A. D., 1870, in Consideration of said agreement upon the part of the said The Oregon Steam Ship Company to and with this Company to make through contracts of freight and passengers over the line of the railroad of this Company, to and from the different Ports hereinbefore named over the line of the Steam Ships of the said The Oregon Steam Ship Company in the manner hereinbefore specified, and in consideration of the benefits and advantages resulting and to result to this Company, its stockholders and Bondholders by of the said Steam Ship line and its connections aforesaid with this Company, does hereby covenant and agree to and with said The Oregon Steam Ship Company and to and with said Milton S. Latham, Faxon D. Atherton and William Norris, Trustees aforesaid, for the said Bondholders, of the said The Oregon Steam Ship Company and to and with each and every of such Bondholders to guarantee and it does hereby guarantee to them and every one of them the payment of the Interest Coupons attached to said two millions of dollars of said bonds,

hereinbefore described to wit: Said Two Thousand Bonds of denominations of One Thousand Dollars each, so issued as aforesaid by said The Oregon Steam Ship Company at the time of the maturity thereof, as the said Interest coupons may from time to time mature in U. S. gold coin, as per the terms thereof, and also the payment of the whole of the principal sum of said two thousand bonds amounting to two millions of dollars in U. S. gold coin, at the maturity thereof to the several holders thereof . And

Resolved further: That the President and Secretary of this Company are hereby fully authorized and instructed to enter into such contract of guarantee in the Corporate name of this Company and under the corporate seal, pledging the faith of this Company to the faithful and prompt payment of said Bonds hereinbefore described and referred to principal and interest, at the maturity of each thereof, by an endorsement of guarantee on each of said Bonds, or in such other manner as the said The Oregon Steam Ship Company, or the said Milton S. Latham, Faxon D. Atherton and William Norris, Trustees aforesaid may designate or require.

Which having been read to the Board, was, on motion of J. C. Hawthorne, seconded by Mr. Crawford, unanimously adopted.

On motion of J. C. Hawthorne, seconded by Mr. Crawford the Board adjourned.

A. G. Cunningham,
Secy.

W. M. HALSEY,
V. Pres.

Office of the Oregon and California Rail Road Co.,
Portland, Ore.

July 31, 1872.

Pursuant to call by order of the President the Board met at 11 o'clock this A. M. Members present, Messrs. Halsey, Lewis, Crawford, and Weidler, in the absence of the President, Wm. L. Halsey, Vice President called the Board to order, and announced special business in order, The following resolution was then read to the Board, by Company's attorney:

Resolved: That this Company enter into a contract and agreement in writing in the corporate name and under the corporate seal, with The Oregon Transfer Company, a corporation incorporated at Portland, Oregon, on the 5th day of August, A. D., 1871, whereby said The Oregon Transfer Company, its successors and assigns shall covenant and agree to and with this Company and shall be bound in consideration of the agreements and covenants upon the part of this Company hereafter specified, to furnish to this Company, its successors and assigns, and for a period of twenty years, from and after the date of such agreement, all the hacks, carriages, drays, trucks and horses or mules and drivers and other persons necessary to take, and shall take and operate the same, and take to and from the Depots of this Company in East Portland and in Portland, all passengers and freight coming either way over the road of this Company or that of its successors and assigns, to and from the Cities of Portland and East Portland in Oregon, to and

from the several places of destination of passengers in said Cities and to and from the several places of business of consignees and consignors in said Cities; and during said term to carry all such passengers traveling over the Rail Road now owned by this Company, whether such Rail Road be owned by this or some other Company, to and from said Depot to and from the Cities of Portland and East Portland, to and from their several places of destination or places of starting and to transport during such term all such freight to and from the said Depots, to and from the several places of business of consignors and consignees of freight in said cities, as the same may be required by this Company, its successors or assigns or by such consignors or consignees of freight, so as to keep such Depots, clear, In Consideration of which covenants and agreements on the part of said The Oregon Transfer Company, this Company shall for its successors and assigns and by said agreement guarantee to said "The Oregon Transfer Company" its successors and assigns, that it and they shall have the exclusive right and privilege for and during said term of twenty years to convey and transport to and from said Depots of this company in East Portland and in Portland to and from all points in said two Cities, all passengers and freight of every description that shall pass over said Rail Road either way, or to or from said Depots, or either of them, and as further consideration this company shall and does covenant and agree and in and by said written agreement it

shall for itself and its successors and assigns, covenant and agree to and with said The Oregon Transfer Company its successors and assigns that this Company, its successors or assigns shall for all passengers and freight so passing over the Rail Road of this Company, either way during said term of twenty years, whether such Rail Road be owned by this or some other Company, and so transferred by the said The Oregon Transfer Company as aforesaid to or from said Depots, or either of them, to or from any point in said Cities of Portland and East Portland, pay or cause to be paid to said The Oregon Transfer Company its successors or assigns in U. S. Gold Coin payable monthly during said term the following sums to-wit: For each passenger travelling either way over said Rail Road to and from said Depots, or either of them to or from any point within the limits of said Cities of Portland or East Portland the sum of twenty-five cents, Fifty cents per ton for all freight (except wool, stone and Lumber) coming over said Rail Road northward to said Cities of Portland and East Portland or either of them, or to any point therein. For all wool so shipped and passing over said Rail Road northward One Dollar per ton, and on all lumber passing either way one Dollar per thousand. On all stone passing either way one and 50|100 Dollars per ton. Each lot of freight less than four hundred pounds to one address, twenty-five cents. All over Five Hundred pounds to be paid for at full price, to wit: as for a ton and on and for all merchandise going

south over said Rail Road to said Depots or either of them previous to being shipped on said Rail Road (whether said Rail Road is owned by this or some other Company) Seventy-five cents per ton, each lot to one address or more: Over five hundred pounds to be counted and paid for full price, as one ton, On all parcels or packages of freight to one address containing five hundred pounds or less Fifty Cents, and for and on all machinery, safes, and other like heavy freight such sum per ton or lot or parcel what the transfer thereof is reasonably worth for the distance transferred taking as a basis for such compensation the prices per ton herein definitely fixed for other freight for like distances. Provided always that said The Oregon Transfer Company its successors or assigns shall have the privilege and be at liberty, such agreement to the contrary notwithstanding, to make such reasonable charge to passengers and shippers as may be reasonable and just, or such services may be reasonably worth for such conveyance and transportation beyond the limits hereinafter named for all passengers and freight conveyed or transferred by it or its successors or assigns from any point in the City of Portland, south of main and west of Park streets, and provided also as a further consideration that this company for itself, its successors and assigns shall guarantee to said "The Oregon Transfer Company" its successors and assigns the right of free passage for all its said hacks, carriages, busses, drays, trucks, horses, mules and employes for and during said term

of twenty years over all Ferries and Bridges owned or used by this Company, its successors or assigns, or over or across which the passengers and freight of this Company may at any time hereinafter during said term pass over the Willamette River at Portland, Oregon.

Resolved: That the President and Secretary of this Company be and they are hereby authorized and instructed and directed in the corporate name of this Company, and as and for this Company, and as its act and deed and in writing with said The Oregon Transfer Company its successors and assigns in accordance with these resolutions, and embodying in such agreement the terms and conditions fully hereinbefore specified,—

And on motion of C. H. Lewis, seconded by Mr. Crawford was unanimously adopted.

On motion the Board adjourned.

A. G. Cunningham,
Secy.

W. L. HALSEY,
V. Pres.

Office of the Oregon and California R. R. Company,
Portland, Or., Wednesday, Aug. 14, 1872.

There not being a quorum present at the hour for meeting this day. No meeting was had, the Board standing adjourned.

A. G. CUNNINGHAM,
Secy.

Office of the Oregon and California R. R. Co., Port-
lan, Oregon, Wednesday, Sept. 11, 1872.

There not being a quorum present at the hour for

meeting this day, no meeting was had, the Board standing adjourned.

A. G. CUNNINGHAM,
Secy.

Office of the Oregon and California R. R. Co., Portland, Oregon, Wednesday, October 9, 1872.

There not being a quorum present at the hour for meeting, no meeting was had, the Board standing adjourned.

A. G. CUNNINGHAM,
Secy.

Office of the Oregon and California R. R. Co., Portland, Oregon. Nov. 13, 1872. Wednesday.

A quorum not being present no meeting was had this day.

Secy.

Office of the Oregon and California R. R. Co., Portland, Or. Wednesday, Dec. 11, 1872.

No quorum being present this day, no meeting was had.

A. G. CUNNINGHAM,
Secy.

Office of the Oregon and California R. R. Co., Portland, Oregon, Wednesday, Jany. 8, 1873.

In the absence of President and Vice President and want of quorum, no meeting was had this day.

A. G. CUNNINGHAM,
Secy.

Office of the Oregon and California R. R. Co., Portland, Oregon. Wednesday, February 12, 1873.

For some reason as on last regular meeting day no meeting was had this day.

A. G. CUNNINGHAM,

Secy.

Office of the Oregon and California R. R. Co., Portland, Or. Wednesday, Mch. 12, '73.

For some reason as on last regular meeting day, no meeting was had this day.

A. G. CUNNINGHAM,

Secy.

Office of the Oregon and California R. R. Co., Portland, Oregon. March 1873.

As a meeting of the Board of Directors of the Oregon and California Railroad Company, held in Portland on this day of March, 1873 pursuant to notice the following proceedings were had,

Present Ben Holladay, President.

(Across the face of this is written VOID VOID)

Office of the Oregon and California R. R. Co., Portland, Oregon, March 25, 1873.

In pursuance of notice in accordance with the By-laws of the Company, the Directors met at 11 o'clock A. M. this day.

Present, Messrs. J. C. Hawthorne, Medorum Crawford, C. H. Lewis, I. R. Moores, Geo. W. Weidler and Ben Holladay. Absent Wm. L. Halsey.

Ben Holladay, President, called the board to order, and stated that the deficit of April interest on the bonded debt of the Company would be two hundred and five thousand seven hundred and sixty-seven 35-100

Dollars (\$205,767,35) without regard to the net earnings for present month; that he could get this amount temporarily advanced in San Francisco on a demand note of the Company, provided, he, the President, would become personally liable therefor; that,, he was willing to endorse the note, if the board would authorize the application of all its first net receipts to the payment of said note until it be fully paid, principal and interest; that unless this was done the April interest could not be met;

Whereupon, Mr. C. H. Lewis moved that the President and Secretary of this Company be and they are hereby authorized and impowered to execute, to Mr. Ben Holladay, under the corporate seal of the Company, its promissory note on demand for Two Hundred and five thousand seven hundred and sixty-seven 35-100 Dollars (\$205,767.35) Gold Coin of the United States, bearing interest from date at the rate of one per cent per month in gold coin of the United States payable monthly and that upon Mr. Ben Holladay endorsing said note and becoming personally liable herefor and the proceeds being applied to the payment of the April interest due in New York on the bonded debt of the Company, that this Company pledges its net receipts and hereby authorizes the monthly appropriation of same until the said note, principal and interest be fully paid.

Which motion was seconded by Mr. J. C. Hawthorne, and unanimously adopted, the President not voting.

No further business being before the board on motion of Mr. Crawford seconded by I. R. Moores, the board adjourned.

A. G. Cunningham, BEN HOLLADAY,
Secy. President.

STOCK HOLDERS ANNUAL MEETING 1873.

Office of the Oregon and California Rail Road Company, Portland, Oregon, Tuesday, April 8, 1873.

Pursuant to notice in accordance with the By-laws, the meeting took place at 11 o'clock A. M. this day, there not being a majority of the stock represented the election for Directors was not gone into and the meeting adjourned to meet at 1 o'clock P. M. on Thursday at 10 o'clock A. M.

A. G. CUNNINGHAM,
Secy.

Office of the Oregon and California Rail Road Company, Portland, Or., April 10, 1873.

Pursuant to adjournment the Stockholders met at 1 o'clock P. M. this day, present Messrs. C. H. Lewis, I. R. Moores, J. C. Hawthorne, Mr. Crawford and Ben Holladay, representing a majority of the stock of this Company.

On motion Mr. Crawford seconded by C. H. Lewis, Dr. Hawthorne took the chair and on motion of I. R. Moores, 2nd by Mr. Crawford the election was proceeded with, each stockholder voting the number of shares standing in his name on the stock ledger as shown by the following certificate.

Office of the Oregon and California Rail Road Co.,
Portland, Or., April 8th, 1873.

I hereby certify that the following is a correct statement of the stockholders in this Company as shown by the stock ledger after closing the transfer book as provided by the By-laws.

Ben Holladay	11746 Shares
C. H. Lewis	1 Share
I. R. Moores	1 Share
J. C. Hawthorne	1 Share
M. Crawford	1 Share
Geo. W. Weidler	4750 Shares
W. L. Halsey	4750 Shares
Wm. Norris, Trustee	4750 Shares
C. T. Emmet	50000 Shares
W. S. Latham	10000 Shares
Ben Holladay, Trustee	114000 Shares

Total Number 200,000 Shares. Capital Stock issued.

A. G. CUNNINGHAM,

Secy.

The voting was by ballot and resulted as follows.

Ben Holladay voted	11746 Shares
C. H. Lewis voted	1 share
I. R. Moores voted	1 Share
J. C. Hawthorne voted	1 Share
M. Crawford voted	1 Share
Ben Holladay, Trustee	114000 Shares
Total voted	125750 shares

The President examined the ballots, compared with the foregoing certificate of Stockholders, and made the following certificate.

Office of the Oregon and California Rail Road Company, Portland, Ore. April 10, 1873.

I hereby certify that Messrs. C. H. Lewis, Medorum Crawford, Dr. J. C. Hawthorne, I. R. Moores, Wm. L. Halsey, Geo. W. Weidler, and Ben Holladay, each received (125,750) One Hundred and Twenty-five Thousand, Seven Hundred and Fifty votes, being the entire vote cast by the Stockholders for seven (7) Directors of this Company to serve for the ensuing twelve months and until their successors are elected and qualified, and the said before named are hereby declared duly elected.

BEN HOLLADAY,

President.

No further business being before the meeting, on motion of C. H. Lewis, seconded by I. R. Moores the meeting adjourned.

A. G. Cunningham,
Secy.

J. C. HAWTHORNE,
Chairman.

STATE OF OREGON,

County of Multnomah—ss.

We the undersigned Ben Holladay, I. R. Moores, J. C. Hawthorne, C. H. Lewis and Medorum Crawford, being first duly sworn, do each solemnly swear and make oath, that we will faithfully and honestly discharge our duties respectively as directors of the Oregon and California Rail Road Company.

BEN HOLLADAY,
J. C. HAWTHORNE,
C. H. LEWIS,
M. CRAWFORD,

I. R. MOORES.

Subscribed and sworn to before me this 10th day of April, A. D., 1873.

[Seal.] JNO. D. BILES,
Notary Public.

Office of the Oregon and California Rail Road Co.,
Wednesday, May 14th, 1873.

Pursuant to By Laws the Board met at 11 A. M., a quorum not being present the meeting adjourned to 3 o'clock P. M.

3 o'clock P. M.

Pursuant to adjournment meeting was had at this hour, there still not being a quorum the board adjourned until 2 o'clock P. M. on Thursday the 15th inst. at which time the board met, present, Messrs. M. Crawford, C. H. Lewis, G. W. Weidler, I. R. Moores, and Ben Holladay.

Absent Wm. L. Halsey and J. C. Hawthorne.

Mr. Weidler presented his oath of office, as Director as follows:

STATE OF OREGON,

County of Multnomah—ss.

I, George W. Weidler do solemnly swear and make oath that I will faithfully and honestly discharge the duty of a director of the Oregon and California Rail Road Company.

Signed. GEO. W. WEIDLER,

Subscribed and sworn to before me this 15th day of May, A. D., 1873.

Signed. JNO. D. BILES,

[Notarial Seal.]

Notary Public.

On motion of C. H. Lewis, Medorum Crawford took the chair and called the meeting to order. Mr. Moores then nominated Ben Holladay for President, no other nominations being made, the election was proceeded with and Mr. Holladay declared unanimously elected.

Mr. Holladay then assumed the chair and announced the election of Vice President as next in order, Mr. Halsey was then unanimously elected Vice President.

The election of a secretary was next in order, and A. G. Cunningham was unanimously elected secretary of the board.

No further business coming before the board, on motion of Mr. Weidler, 2nd by Mr. Moores the board adjourned.

A. G. Cunningham,	BEN HOLLADAY,
Secy.	President.

Office of O. & C. R. R. Co., Portland, Or.

Wednesday, July 9th, 1873.

A Quorum of the board not being present at the hour of meeting on this day, no meeting was had, the board stands adjourned.

A. G. CUNNINGHAM,
Secy.

Office of O. and C. R. R. Co., Portland, Or.,

Wednesday, Aug. 13, 1873.

There not being a quorum present at the hour of meeting this day, the board stood adjourned.

A. G. CUNNINGHAM,
Secy.

Office of the Oregon and California R. R. Co.,
Portland, Or.,

Sept. 1st, 1873.

Pursuant to call by the President the Board met at 2 o'clock P. M. this day, members present, Messrs. Halsey, Holladay, Moores, Lewis, Weidler, Crawford and Hawthorne.

Mr. Halsey filed his oath as director as follows:
STATE OF OREGON,

County of Multnomah—ss.

I, Wm. L. Halsey being duly sworn say that I will honestly, faithfully and impartially discharge my duty as Director of the Oregon and California Railroad Company.

Signed. WM. L. HALSEY,

Sworn and Subscribed to before me this 8th day of August, A. D., 1873.

[Seal.]

Signed. JNO. D. BILES,

Notary Public.

The President then called the Board to order, and the secretary read the following preamble and resolutions for consideration of the Board.

Whereas, This Company is unable to pay the semi-annual interest falling due October first 1873, upon its bonds now outstanding and whereas a committee of the bond holders of this Company in Europe at the request of Ben Holladay, Esq., President of this Company has appointed agents to visit this State and examine into the conditions and affairs of this Company and the construction and management of its road

and to receive proposition for the reduction of interest upon its said bonds and report the same to said committee, and whereas such agents have lately visited this State and examined into the condition and affairs of this Company and the construction and operation of its road and whereas it is desirable that negotiations for the reduction of the interest upon its said bonds should be continued in Europe and that the arrangement for such reduction should be then consummated or that some arrangement should be then made with said bondholders and creditors of this Company for the payment or redemption of said bonds or such a modification, change or extension of the indebtedness of this Company as will make it possible to meet and pay the accruing interest upon its said bonds, and whereas, for that purpose it is necessary that this Company should have an agent or attorney in fact in Europe visited with full and complete power and authority to represent and act for this Company in the premises, and Whereas the interests of this Company require the presence of the President of this Company in this State and William Norris, Esq., of San Francisco, State of California, is well informed as to all affairs of this Company and a suitable person to act as such agent and attorney in fact therefore be it

Resolved: That William Norris, Esquire, of the City of San Francisco in the State of California in the United States of America be and he hereby is made constituted and appointed the true and lawful attor-

ney in fact of this the Oregon and California Rail Road Company, a corporation duly incorporated, organized and existing under the General Laws of Oregon and having its principal office and place of business in the City of Portland, Oregon, for and in the name of this Company and in its behalf to proceed to the Continent of Europe and there or elsewhere, except in the State of Oregon to settle and adjust all accounts and demands now subsisting or which may hereafter subsist between this Company and any and all persons, firms or corporations whatsoever and to compound for any and all debts dues or demands owing to or by this Company and to agree for the same in such manner and in such terms as he in his discretion may deem proper; and to borrow money for the use of and in the name of this Company upon such terms and interest as he may deem advisable and as security for the payment of the same to mortgage and pledge any and all of the real, personal and mixed estate of this Company or any part thereof and negotiate and agree for the issue and sale of the bonds and other evidences of indebtedness of this Company and especially to negotiate and agree with the bondholders of this Company, their agents and trustees for a deduction of interest on bonds heretofore issued by this Company and to agree for such rate of interest on the said bonds of this Company as to him shall seem meet and proper; to negotiate and agree for the cancellation and surrender of said bonds upon the issue of other bonds of this Company in lieu there-

of, of such denominations in such amounts, payable in such times and bearing such interest as he shall deem for the best interests of this Company, to be secured in such manner as he shall deem advisable or if he shall deem it advisable to negotiate and agree for the payment and cancellation of said bonds by the sale, transfer, and conveyance of any or all the property, rights and franchises of this Company or other wise, and to negotiate for the sale of, mortgage, pledge, sell, transfer and deliver any or all bonds of this Company which may be hereafter issued, and to sell, mortgage, pledge and to convey, transfer and deliver the railroad with the appurtenances and rolling and other property of this Company both real, personal and mixed, upon such terms to such persons, firms or corporations as he shall see fit, and for such sums as he shall deem advisable, and for any or all of these purposes to make execute and deliver mortgage, transfer, bills of sale, deeds, and other writings in the name of this Company and any compromises, compositions, agreements or contracts by deed or otherwise in his opinion necessary or expedient in the premises and generally to do and perform all matters and things, transact all business, make, execute and acknowledge all contracts, orders, deeds, writings, assurances and instruments which may be requisite or proper to effectuate all or any of the purposes or any other matter or thing appertaining or belonging to this Company with the same power and to all intents and purposes with the same validity as if done or executed by this Company.

Resolved. That the President and Secretary of this Company do execute and deliver to said William Norris a Power of Attorney embodying the power and authority hereby granted him in the name of this Company and under its corporate seal.

Mr. Halsey moved the adoption of Preamble and Resolutions, which was seconded by Mr. Crawford, and unanimously passed.

No other business being before the board on motion of Mr. Halsey, seconded by Mr. Crawford, the board adjourned.

A. G. Cunningham,	BEN HOLLADAY,
Secy.	President.

Office of the Oregon and California R. R. Co.,
Portland, Or.

Wednesday, Sept. 10th, 1873.

There not being a quorum present at the hour of meeting the Board stood adjourned.

A. G. CUNNINGHAM,
Secy.

Office of the Oregon and California R. R. Co.,
Portland, Oregon.

Wednesday, Oct. 10, 1873.

No quorum being present at the hour of meeting this day the board stood adjourned.

A. G. CUNNINGHAM,
Secy.

Office of the Oregon and California R. R. Co.,
Portland, Or.

Nov. 5th, 1873.

Pursuant to call of the President by notice to each director, the Board met at office of the President, Corner of 3rd and Stark Streets at 2 o'clock P. M.

Present, Messrs. Holladay, Halsey, Weidler, Moores, C. H. Lewis and Medorum Crawford. Absent J. C. Hawthorne.

The President called the meeting to order and announced the business to be considered by the Board, to be the issuing of Passes. The subject was then freely discussed by the Directors.

Mr. Halsey offered the following resolution.

Resolved: That from and after this date no pass for free travel over the Oregon and California Rail Road shall be issued to any person whatever except to Directors, Officers, agents, and Employees of the Company.

Seconded by I. R. Moores, and unanimously adopted.

Mr. Halsey then offered the following resolution:

Resolved: That the President or Superintendent of the Oregon and California Rail Road Company be authorized to issue exchange passes in their discretion to officers, of other Rail Road Companies.

Seconded by Mr. Crawford and unanimously adopted.

No other business coming before the Board, on motion of Mr. Halsey, seconded by Mr. Crawford the Board adjourned.

A. G. Cunningham,
Secy.

BEN HOLLADAY,
President.

Q. You do not yourself know the handwriting of A. B. Cunningham, secretary, and Ben Holladay, president?

A. No.

Q. Have you in your possession a schedule of documents deeds, and papers, transferred to secretary Cotton by Secretary George H. Andrews?

A. Yes sir.

Q. I call your attention to a memorandum receipt of date December 21, 1904, consisting of a 64 page document purporting to be a receipt or schedule of deeds, documents, and papers transferred to W. W. Cotton, secretary of the Oregon and California Railroad Company by George H. Andrews, secretary, which reads as follows: "Portland, Oregon, December 21st, 1904,—received from George H. Andrews books and papers per following schedule:— W. W. Cotton by Blanche Lucke" by whom and for whom was that receipt given if you know?

A. This was given by Miss Lucke as private secretary for W. W. Cotton. I think I have not checked over these things.

Q. For whom was Miss Lucke acting?

A. Mr. Cotton.

Q. And that then is Mr. Cotton's receipt?

A. Yes sir.

Q. I call your attention to the first page of this schedule, and to this entry,—“No. 8, James Grindley—sale of stumpage—S. E. $\frac{1}{4}$ and lots 5-7-6—section 29, T. 1 S. R. 2 E.—No. 9, William Showers—sale of

stumpage—north $\frac{1}{2}$ northeast $\frac{1}{4}$ section 32, T. 1 S. R. 2 E, and will ask you whose machine or typewriting that is, if you know?

A. To the best of my knowledge that is Miss Lucke's.

Q. I call your attention to this entry,—“No. 26—James Grindley and wife—conveying east $\frac{1}{2}$ of southeast $\frac{1}{4}$, and lots 5 and 6, section 29, T. 1 S. R. 2 E, also No. 27, James Grindley and wife, patent of the United States to James Grindley and wife for east $\frac{1}{2}$, southeast $\frac{1}{4}$, and lots 5 and 6, section 29, T. 1 S. R. 2 E,—was that written on the same typewriter by the same person?

....A. Yes.

Q. At the same time?

A. Yes.

Q. I call your attention to No. 31—Gardiner Elliott and wife conveying north $\frac{1}{2}$ of northeast $\frac{1}{4}$ of section 32, T. 1 S. R. 2 E,—was that written at the same time by Miss Lucke?

A. Yes, as far as I know.

Q. It is part of this same receipt?

A. Yes.

Q. Now, what has become of the papers referred to in there,—No. 8, No. 9, No. 26, No. 31?

A. No. 26 and 27 and 31 are shown here in this complainant's exhibit No. 9 as having been sent to Mr. Eberlein.

Q. What numbers did you say?

A. 26-27-31.

Q. Do they bear the same number in the receipt of Mr. Eberlein as they do in the receipt of Mr. Cotton?

A. Yes, sir.

Q. What became of No. 8,—James Grindley—sale of stumpage?

A. I have not made search for those two particularly.

Q. Will you look for Nos. 8 and 9 being James Grindley sale of stumpage S. E. $\frac{1}{4}$ and lots 5-7-6, section 29, and No. 9, William Showers, sale of stumpage north $\frac{1}{2}$ of Northeast $\frac{1}{4}$, section 32, T. 1 S. R. 2 E., and if you can find them, or any evidence of what became of them, I will recall you.

A. Yes, I will look.

Counsel for complainant now offers in evidence so much of the receipt of W. W. Cotton of date December 21st, 1904, as is indicated by these words:—“Oregon and California Railroad Company, schedule of deeds, documents, and papers, transferred to W. W. Cotton, Secretary of the Oregon and California Railroad Company by George H. Andrews—No. 8, James Grindley sale of stumpage—S. E. $\frac{1}{4}$ and lots 5-7-6, section 29, T. 1 S. R. 2 E.—No. 9, William Showers—sale of stumpage, north $\frac{1}{2}$ northeast $\frac{1}{4}$, section 32, T. 1 S. R. 2 E., No. 26, James Grindley and wife, conveying east $\frac{1}{2}$, southeast $\frac{1}{2}$ and lots 5 and 6, section 29, T. 1 S. R. 2 E., No. 27 patent of the United States to James Grindley conveying east $\frac{1}{2}$, S. E. $\frac{1}{4}$, and lots 5 and 6, section 29, T. 1 S. R. 2 E.—No. 31, Gardner Elliott and wife, conveying north $\frac{1}{2}$, northeast $\frac{1}{4}$

section 32, T. 1 S. R. 2 E., and the words at the bottom of the last page, George H. Andrews, November 5, 1904, Portland, Oregon, December 21, 1904, received from George H. Andrews books and papers per following schedule, W. W. Cotton by Blanche Lucke, and ask permission to withdraw the original and consider the language dictated into the records as complainant's exhibit No. 15 in lieu of the original withdrawn.

Counsel for defendant makes no objections to the withdrawing of the original, but objects to the introduction of the same as incompetent, irrelevant, and immaterial.

Q. I show you a document, which for the purposes of identification may be marked complainant's exhibit 16, purporting to be a list of papers sent to J. L. Wilcox, March 13th, 1905,—apparently that was filed in box No. 1, and on the first and second pages of this memorandum, and I will ask you who made that memorandum, and the occasion of this memorandum, and what became of those documents that are referred to in this memorandum, and particularly on the first two pages thereof?

A. It was evidently made by Miss Lucke, in Mr. Cotton's office for some purpose or other.

Q. Do you know whether the documents referred to in that memorandum were sent to Mr. Wilcut March the 13th, 1905 or not?

A. I know only as indicated there, that is certainly correct.

Q. Did you have anything to do yourself?

A. I had nothing to do with it.

Q. Who did, do you know?

A. I am under the impression that probably Mr. Loring did,—I do not know whether Miss Lucke had anything to do with it or not.

Q. Do you know whether Mr. Cotton as Secretary received a receipt or letter from J. L. Wilcut acknowledging the receipt of the document contained in this memorandum?

A. I will look over the files in our office and see if I can find any such paper among the letters there.

Q. Will you search the records of the secretary's office in any place where this receipt or letter would likely be found, and see if you can find any such receipt or letter referred to in this memorandum, complainant's exhibit 16, and produce the same if you can find it?

A. Yes, sir.

Counsel for complainant offers in evidence the first two pages and the last page of the memorandum referred to with the promise to connect it with the delivery to Mr. Wilcut, and ask that the same may be spread upon the records and the original withdrawn.

Counsel for defendant makes no objection to the spreading upon the records of a copy in lieu of the original, nor to the withdrawal of the original, but objects to the offer of the same in evidence as incompetent, irrelevant and immaterial.

The pages of the document referred to are received

in evidence and are herewith spread upon the records as complainant's exhibit 16, and are in words and figures as follows, to-wit:

Page 1

Schedule of deeds and documents and papers transferred to W. W. Cotton, Secretary of the Oregon and California Railroad Company by Geo. H. Andrews, retiring Secretary.

No. 1. S. Coffin Agreement for conveyance of block 292 Coffins' addition to Portland; also 80 acres of land.

2. Hyer Jackson conveyance of east half of donation claim of Hyre and Elizabeth Jackson.

3. L. Patterson conveyance of land at Hillsboro .

4. J. R. Boyce conveyance of lot 5 block 18, Hillsboro.

5. D. L. Turpin et al conveyance of land in section 36 Tp. 1 N R 3 W.

6. Sylvanus M. Nye conveyance of SE 1-4 Sect 30 Tp. 1, S. R. 1 W.

No. 7. Hector Campbell, sale of stumpage.

8. James Grindley, Sale of stumpage SE 1-4 and lots 5 7 6 Sect 29, 1S, 2E.

9. William Showers, Sale of stumpage N 1-2 of NE 1-4 sect 32 1S 2E.

10. Charles McKinney, west part of NW1-4 sect 24 1N, R 3W.

11. O. P. Smith, Sale of stumpage.

12. John Harrison, Conveyance of 48 acres sect 27 Tp 2N, R 2W.

13. A. C. Brown and wife, conveyance of SW 1-4 of SW 1-4 sect 18; SE 1-4 of SE 1-4, sect 7; SE 1-4 of

NE 1-4 sect 18; NW 1-4 of NW 1-4 sect 17 Tp 2N, R 1W.

14. C. A. Westfall, conveyance of N 1-2 of NE 1-4 sect 8, Tp 3S R 1W.

15. Renyon Crandall conveyance 44 acres Washington Co.

16. Norman Martin and wife, conveyance lot 4, block 31, Forest Grove.

17. Thos. Standley and wife, conveyance of 200 acres off north end donation claim No. 6399.

18. Geo. W. Ebbert and wife, conveyance of 32-15-100 Don. Cl. No. 64.

19. I. M. Johns and wife, conveyance of 125 26-100 acres Don. Cl. No. 1238.

20. The Oregon Iron Works, conveying waterfront of Ferris Carruthers Don. Cl. East Portland.

21. Thos. Hart and wife, conveying block 10, Hillsboro.

22. Joshua Welch and wife, conveying blocks Town of Beaverton.

23. Charles Conklin and wife, conveying each half of their donation claim.

24. Geo. H. Smith and wife, conveying 87 acres of their donation claim.

25. Thomas Stewart and wife, conveying 10 57-100 Washington Co.

Page 2

No. 26. James Grindley and wife, conveying E 1-2 of SE 1-4 and lots 5 and 6, sect 29, Tp 1S, R 2E.

27. James Grindley and wife, patent of United States

to James Grindley of E 1-2 of SE 1-4 and lots 5 and 6 sect 29, 1S, 2E.

28. Charles McKinney, conveyance of conveyance of 100 acres of Don. Cl. of Robert and Annie Freeman.

29. P. A. Marquam and wife, conveying NE 1-4 of donation claim of Nathaniel and Nancy Ann Hamlin

30. Robert Walker and wife, conveying 50 acres sect 6, Tp 1N, R 3W.

31. Gardner Elliott and wife, conveying N 1-2 of NE 1-4 sect 32, Tp 1S, R 2E.

32. A. F. Hedges and wife conveying right of way Clackamas Co.

33. Canemah Lumbering Co. conveying of property.

34. Power of Attorney Ben Holladay & Company to Geo. W. Weidler.

35. Gideon Tibbets and wife conveying right of way.

36. Edmund Ross et al conveying stumpage.

37. Daniel Hathaway permission as mortgagee to cut timber from lands Edmund Ross et al.

38. Hector Campbell and wife sale of stumpage.

39. Edward Long and wife sale of stumpage.

40. Certified copy of resolution of Willamette University.

41. Joseph Knight and wife, sale of stumpage.

42. Philander Lee and wife conveying 111 acres of donation claim No. 55.

43. Joseph Knight and wife conveying 186 acres of donation claim No. 48.

44. Moses Miller, Sale of stumpage.

610 *The Oregon & California Railroad Co.*

45. Receipt of H. S. Davis for \$225 for stumpage.

46. Geo. W. Weidler, certificate of plat of town of Canby.

47. Samuel Heiple and wife conveying land in East Portland.

48. S. W. Eddy et al conveying 11 21-100 acres Clackamas County.

49. Peter K. Murphy and wife conveying 10 acres sect 26 Tp 5S R 2W.

50. Jacob Wheeler assignment of subscriptions.

51. Jefferson Institute, vacation of street depot grounds, Jefferson.

52. Ferry license and assignment of Geo. W. Weidler Nos. 74 and 360 filed herewith.

Page 34

NEW YORK OFFICE RECORDS under Mr. Villard:

Ledger,

Journal,

Monthly Journal

Petty Cash,

1 pkg sundry papers,

1 tin box, key lost contents unknown.

Filed in box No. 4, marked:

O C R. R. Co

Secretary Records.

O. C. RR Co.

E & O Land Co.

P WH & Dock Co.

Geo. H. Andrews, November 5, 1904.

NEW YORK OFFICE RECORDS under Mr. Villard:

2 pkgs letters sent

2 pkgs letters received.

2 pkgs telegrams received

6 filing boxes of miscellaneous papers, chiefly copies.

Filed in Box No. 5, marked:

O & C R. R. Co.

Secy Records

O C RR Co of Salem

Papers N. Y. Office.

Geo. H. Andrews, November 5, 1904.

Portland, Oregon, December 21, 1904.

Received from Geo. H. Andrews books and papers per foregoing schedule.

W. W. Cotton

Geo. H. Andrews.

By Blanche Luckey.

Q. I call your attention to the minutes of the Oregon and California Railroad Company of April 19th, 1876, found in minute book No. 1, of the Oregon and California Railroad Company, identified in this case as complainant's exhibit 14, which minute book from the bottom of page 183 extending to and including the signature of Henry Villard, president on page 224, and I will ask you if those minutes are a part of the minute book referred to and were in the custody of Secretary Cotton, the same as the minutes that have been heretofore introduced in evidence?

A. Yes.

Q. Do you know the signature of Henry Villard, president and of A. G. Cunningham, secretary?

A. I do not.

Counsel for complainant offer in evidence the pages of the minute book referred to with the promise to prove the signature of Henry Villard, president, and of A. G. Cunningham, secretary, and also with the promise to account for the loss of the agreement of February 29th, 1876, referred to in the bill of complaint, and referred to at page 190 of these minutes, and particularly to the eighth clause of this agreement found at page 194, and ask permission to have a copy of these minutes spread upon the records in lieu of the original as a part of complainant's exhibit 14 and that the original may be withdrawn.

Counsel for defendant does not object to the withdrawal of the original and the substitution of a copy to be spread upon the records, but objects to the same because the execution of the document has not been shown and for the reason that no rights existed under such agreement, if any such agreement was in existence in favor of the complainant, and against the defendant in this case, and that if any such rights existed they are barred by the statute of limitations of the state of Oregon, and by complainant's laches.

The pages of the book referred to are in words and figures as follows, to-wit:—

Office of the Oregon and California R. R. Co.

Portland, Or. Wednesday, Apr. 19, 1876.

Pursuant to adjournment and by notice to each director the Board met at 11:30 o'clock this day.

Present Messrs. Koehler, Chadwick, Theilsen, Lewis and Weidler. 5.

Absent Mr. Holladay, 1. Mr. Halsey having transferred his stock ceased to be a director.

Minutes of previous meeting read and adopted. The Vice President called the meeting to order and announced the board as ready to receive the qualifications of the new Board elect.

The new Board of Directors then appeared and qualified as Directors by taking and subscribing to the following oath:

STATE OF OREGON,
County of Multnomah—ss.

We, W. L. Halsey, Geo. W. Weidler, R. Koehler, C. H. Lewis, H. Theilson and S. F| Chadwick being each severally and duly sworn say and each for himself says that we will faithfully and honestly discharge the duties of Director of the Oregon and California Railroad Company a corporation duly incorporated under the laws of Oregon, to the best of our ability, so help us God.

Geo. W. Weidler.

R. Koelher.

C. H. Lewis.

H. Thielsen.

S. F. Chadwick.

Subscribed and sworn to before me this 19th day of April, A. D. 1876. JNO. D. BILES, Notary Public.

The members of the new Board present having qualified as above in accordance with the resolution of Stockholders passed at the meeting on the 15th inst., and the term of office of the present board having expired the board stood adjourned.

GEO. W. WEIDLER, Vice. Pres.

A. G. CUNNINGHAM, Secy.

Office of the Oregon and California R. R. Co.

Portland, Or. April 19, 1876.

There being a quorum of the newly elected board of Directors present and all having qualified as such Directors, proceeded to organize for the transaction of business, as provided by resolution passed at meeting of the Stockholders on the 15th inst. Messrs. Weidler, Koehler, Lewis, Theilson and Chadwick being present. The Secretary called the meeting to order and announced the election of a chairman as being in order. Mr. Weidler was nominated for Chairman of the Board and unananimously elected, and took the Chair.

The following telegram from Ben Holladay was then read to the Board.

Washington, D. C. Apr. 18, 1876.

T. A. G. Cunningham, Secy.,

I respectfully decline position as director of Oregon and California Rail Road and decline to qualify.

Signed BEN HOLLADAY.

On motion of Mr. Lewis seconded by Chadwick Mr. Holladay's resignation was accepted.

Mr. Lewis offered the following. Whereas W. L. Halsey since the last stockholders meeting ceased to be a stockholder of this Company and thereby became ineligible to the office of director,

Resolved: That this Board now proceed to elect a director for the ensuing year in place of said Halsey, seconded by Chadwick and passed.

Mr. Koehler then nominated Mr. Henry Villard, a stockholder in this Company to fill the vacancy caused by Mr. Halsey ceasing to be a stockholder, seconded by Mr. Theilson and unanimously elected such director.

The vacancy occasioned by the resignation of Mr. Holladay was not acted upon but laid over to next meeting by consent.

Mr. Villard qualified as Director by subscribing to the following oath:

I, Henry Villard, being first duly sworn say that I will faithfully and honestly discharge the duties of Director of the Oregon and California Rail Road Company, a corporation duly incorporated under the laws of Oregon, to the best of my ability, so help me God.

HENRY VILLARD,

Subscribed and sworn to before me this 19th day of April, 1876.

(S E A L) JNO. D. BILES, Notary Public.

Mr. Koehler then nominated Mr. Villard for the office of President, seconded by Mr. Thielsen and on the vote being taken was declared unanimously elected such President.

GEO. W. WEIDLER, Chairman.

Mr. Villard the President elect then took the chair and announced the election of Vice President as next in order.

Mr. Koehler was then placed in nomination for the office of Vice President, by Mr. Chadwick, seconded by Mr. Thielsen, and the vote being taken was declared duly elected such Vice President.

The election of a Secretary being next in order, Mr. Koehler noimnated A. G. Cunningham, for said office, which was seconded by Mr. Chadwick, and on the vote being taken was declared duly elected such secretary.

The election of Auditor being next in order, Mr. Weidler nominated Mr. R. Koehler for said office, which was seconded by Mr. Chadwick and on the vote being taken was declared duly elected such Auditor.

The President announced the Board as now fully organized and ready for the transaction of business.

Mr. Dolph the attorney of the Company proceeded to read the following preamble and resolution for the consideration of the Board.

Whereas in and by a certain contract between Heninch Hohenemser, Avon Neiderhofheim, Julius Schmidt, Henry Villard, Michael Benjamin, Carl Saehelin Bucknor, F. S. Van Neidop and William Koester holders of a majority in interest of the bonds or this Company, parties of the first part, this Company, The Oregon and California Rail Road Company as party of the second part, Ben Holladay as party of the third part and Faxon D. Atherton and Milton S. Latham, Trustees, as parties of the fourth part dated July 25th, 1874, this Company is obligated in substance and affect to turn over all the receipts of this Company from whatever sources derived to the financial agent of the said parties of the first part to said agreement, and it is therein provided that all moneys needed to meet the current expenditures of the

Company is to be paid out by him or on his order and the net receipts applied on account of the interest coupons or certificates for unpaid interest in said agreement named, and in full payment thereof on account of the principal sum due on the first mortgage bonds of this Company all of which will more fully appear by said contract.

And Whereas in a certain agreement made on the 29th day of February A. D. 1876, between Ben Holladay party of the first part and Heinrich Beingamon, Herman Koehler, Adolph Otto, Michael Benjamin, Cal Staehelin-Bucknor and Henry Villard, parties of the second part it is amongst other things agreed as follows, "the said parties of the second part covenant that they will within a reasonable time after the execution hereof cause to be created executed and delivered to the said Holladay or to his assigns three hundred bonds of one thousand dollars each payable in thirty years after their date (to-wit Mch. 1st 1876) bearing seven per cent interest payable semi-annually, principal and interest payable in Gold such bonds to be created and issued by the Oregon Central Railroad Company under the corporate seal of this Company and to bear coupons as usual the form and manner of the original creation and issue of said Bonds to be agreed upon between the respective counsel of said Company and the Counsel of the parties hereto and also that the interest on the above named three hun-

dred thousand dollars of bonds shall be apt legal instruments to be devised by counsel, be secured by the pledge of the net earnings of the Oregon and California Railroad so far as the said parties of the second part have the right to receive or control the same as representatives of the bondholders as aforesaid, so that they shall be first applied to the payment of seven per cent interest on such three hundred thousand dollars (\$300,000) of bonds of the Oregon Central Railroad Company before any interest is paid on any of the existing bonds of the Oregon and California Rail Road Company owned or controlled by said parties of the second part, but the rights of Sulzbach Brothers are hereby expressly saved as the same are named under a certain contract assignment and pledge of the interest coming to the bondholders represented by the parties of the second part to secure the repayment of \$250,000, in sums not exceeding \$40,000 per annum.

and Whereas said parties of the second part to said agreement of February 29th, 1876 are the same parties interested who executed said agreement of July 25, 1874 as parties of the second part,

and Whereas the form of said bonds and coupons have been agreed upon by the respective counsel of the parties to said agreement and it is supposed said Oregon Central Railroad Co., will by resolution of its Board of Directors authorize the issuing and delivery to said Holiday of said three hundred bonds in the following form,

FORM OF BOND.

No—————

\$—————

United States of America, State of Oregon.
OREGON CENTRAL RAILROAD COMPANY
Incorporated.

November 21, 1866.

MORTGAGE BONDS.

Know all men by these Presents: That the Oregon Central Rail Road 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 the Banking House of Messrs. Ruetten and Boun in the City of New York, State of New York, to the said holder, on the first day of March, A. D. 1906, with interest from and after March first, 1876, at the rate of seven per centum per annum, payable semi-annually at the said Banking House of Messrs. Ruetten and Boun in the said City of New York, on the first days of March and September of each year after March first, 1876, on presentation and surrender of the annexed dividend or interest warrants. This bond is one of a series of three hundred bonds of one thousand dollars each, numbered from one to three hundred both inclusive, and amounting in the aggregate to three hundred 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 the Congress of the United States of

America, approved May 4th, 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 purpose authorized by and specified in said Acts, and each of them, and as security for the payment to the holders of said issue of three hundred 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 W. D. Shipman and S. L. M. Barlow, as Trustees, a mortgage or deed of trust bearing even date herewith, and whereby all the real and personal property, rolling stock, road, 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 of 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 three hundred 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 4th, 1876, 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," 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, in the County of Multnomah and State of Oregon, under the express authority of resolutions of its Board of Directors this first day of March in the year of our Lord one thousand eight hundred and seventy-six.

_____—President.

_____—Secretary.

This is to certify that the above bond is one of three hundred 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, road, depots, 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 4, 1870, 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 subject to a prior mortgage of all said property executed to Milton S. Latham and Frank D. Atherton as Trustees, dated July 15th, 1871, 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 a lien or incumbrance upon the property therein described, subsequent only to the lien of said prior mortgage.

Trustees.

Interest warrant or coupon annexed to the foregoing bond as follows:

\$—————

The Oregon Central Railroad Company will pay to the holder hereof \$————— in United States Gold Coin at the Banking House of Ruetten and Bown, in the City of New York, on the first day of _____, 18——, being semi-annual interest on Bond No. ———

And whereas the said Henrich Hohenemser, Avon Neidenhofheim, Julius Schmidt, Michael Benjamin, Carl Stachlin-Buckner, F. S. Van Nierop and William Koester by their attorney in fact Henry Villard of the City of Heidelberg, Grand Duchy of Baden and that the said

Henry Villard, parties of the first part to the aforesaid contract of July 25, 1874, or their successors in interest, have by a communication in words and figures as follows, to-wit:

To the President and Board of Directors of the Oregon and California Railroad Company:

Gentlemen:—Upon behalf of Henrich Hoheneimer, Julius Schmidt, Paul Reingamon, Herman Koehler, Adolph Atto, Michael Benjamin, Carl Stachlin-Buckner, of the Frankfort Committee, owners or holders of certain first mortgage bonds of your company and as their attorney in fact and for myself personally as a member of said committee, I herewith submit to you a copy of a contract entered into February 29th, 1876, between Ben Holladay, party of the first part, and said Henrich Hohenemser and others, parties of the second part, and a supplemental agreement entered into April 19th, 1876, between the same parties, which agreements explain themselves, and as you will perceive secures to your company certain important advantages and require upon the part of your Company the performance of certain things, which as representative of so large a portion of the bond debt of your company and agent and attorney of the Committee entitled to receive and distribute the earnings of your Company under the agreement of July 25, 1874, the parties of the second part to said agreement of February 29, 1876, felt authorized to stipulate should be performed and I have now to request, on behalf of said Committee representing over nine millions of the first mortgage bond of your company that if it shall be by the Board of Directors of

your company deemed for the best interests of your company to carry out the provisions on your part to be performed of said contract of February 29, 1876, and said supplemental contract, that you take such steps as the attorney of your company shall advise to be necessary for that purpose.

Respectfully yours,

(Signed) Henry Villard.

Portland, O., Apl. 19, 1876.

COPY

Of the Agreement of 29th February, 1876, referred to in above LETTER.

Agreement made this 29th day of Feby., A. D. 1876, between Ben Holladay, of Harrison, Westchester County, New York, party of the first part, and Heinrich Hohenemser of the City of Frankfort, on the main Prussia, director of the Deutsche Vereinsbank, in the same City, Julius Schmidt, banker of the City of Frankfort on the Main, Paul Reingaman, doctor of law and attorney at law, of the City of Frankfort on the Main, Herman Koehler, merchant of the City of Frankfort on the Main, Adolph Otto, doctor of law and attorney at law of the City of Heilbrown, Kingdom of Wurtemberg, Michael Benjamin, banker of the City of Munich, Kingdom of Bavaria, Carl Staehelin-Buckner of the City of Basle, Switzerland, partner in the house of Messrs. Iselin and Staehelin and Henry Villard, of the City of Heidelberg, Grand Dutchy of Baden, being owners and possessors of Ten Million (\$10,000,000) Dollars, more or less First mortgage bonds of the Oregon and California Railroad Company, parties of the second part, witnesseth:

In consideration of the mutual covenants and agreements hereinafter expressed, the said parties have agreed and do hereby mutually agree as follows:

First, The said Holladay sells and transfers and agrees to sell and transfer to said parties of the second part, or to such persons as they may designate nineteen millions of the stock of the Oregon and California Railroad Company, being all of the lawfully issued stock of the said Company excepting only one million now held by M. S. Latham.

The said Holladay in like manner sells and transfers and agrees to sell and transfer to said parties of the second part, or to such persons as they may designate a majority of the stock of the Oregon Central Railroad Company, viz., over twenty-five thousand shares thereof, the remainder being held by M. S. Latham and others.

Third, The said Holladay in like manner sells and transfers and agrees to sell and transfer to said parties of the second part or to such persons as they may designate all of the stock of the Oregon Steam Ship Company, the same now standing in the name of M. S. Latham, and at the option of said parties of the second part, or such persons as they may designate, the said Holladay agrees to guarantee and to fulfill said guaranty and he hereby guarantees that the benefits arising from the now existing contract or contracts for the carriage of the mails between Portland and Sitka for the remainder of the time of said contract shall accrue to the Oregon Steamship Company if it elects to continue said service for the remainder of said contract term.

Fourth, The said Holladay in the same manner sells

and transfers and agrees to sell and transfer to said parties of the second part or to such persons as they may designate all of the stock of the Portland Warehouse and Dock Company, viz: Five Hundred thousand dollars, and the said Holladay covenants that the said title of said Company to its real estate is perfect and free from liens or incumbrances and that said company is free from floating debts and other debts except as to a mortgage on its real estate of thirty-five thousand dollars or thereabouts, which mortgage said Holladay agrees to pay and cancel out of the first monies to be paid to him by said parties of the second part, or such persons as they may designate as is hereinafter agreed, the net earnings of said named company up to the date of this agreement are not to belong to said parties of the second part.

Fifth, and the said Holladay agrees that any existing contracts between the Oregon and California Railroad Company, the Oregon Steamship Company and the Oregon Central Railroad Company or either of them with the Oregon Transfer Company shall be modified previous to the execution of this contract by a new agreement between the proper parties to the reasonable satisfaction of the parties of the second part to these presents or of both persons as they may designate.

Sixth, The said Holladay agrees to furnish to said parties of the second part or to such persons as they may designate on the execution hereof a full release by the North Pacific Transportation Company of all its claims both upon the Oregon and California Railroad Company, and the Oregon Central Railroad Company; that against the last named Company being in amount about ninety

thousand dollars and until said claims are in some manner satisfactorily released the parties of the second part may retain an amount of said bonds part of the three hundred thousand dollars herein agreed to be paid to said Holladay equal to the amount of said claims.

Seventh, The said Holladay agrees to pay on the execution hereof to the Oregon and California Railroad Company the amount due to it by the Portland Street Rail Road Company, for certain iron, being five thousand one hundred and three dollars and fifty-eight cents; and said Holladay further agrees to pay on the execution hereof all other sums for which he is liable to any of the Companies hereinbefore named amounting to two thousand eight hundred dollars or thereabouts and in some valid and effectual manner to release and waive previous to the execution hereof all claims for salary as President of the Oregon Steamship Company and to cause the entries to his credit on this account on the books of said Company to be effectually cancelled and discharged in accordance herewith, and said Holladay also agrees previous to the execution hereof to waive and release his claim to additional compensation as President of the Oregon Central Railroad Company made since December 2nd, 1875, and cause the entries to his credit on this account on the books of said Company to be effectually cancelled and discharged in accordance herewith, and said Holladay likewise agrees on the execution hereof to pay the sum of three hundred dollars toward the cost of investigating the title of the Portland Ware House and Dock Company to the real property sold herein, all the

monies the payment of which is herein stipulated by said Holladay shall be deducted from the first cash payment herein named for the properties of the Portland Warehouse and Dock Company.

Eighth, and the said Holladay further covenants and agrees with the said parties of the second part that the books of account of the Oregon and California Railroad Company and the Oregon Central Railroad Company are to the best of his knowledge full, accurate and true and that the trial balance and monthly statement of January, 1876, are as he believes, full, accurate and true and that there are no other legal and valid claims against either of said Railroad Companies of which he had any knowledge or notice excepting only sundry small claims for right of way and certain claims of Hallet and Elliott which have been made known to the parties of the second part, and that there are no contracts with or for salaried officers or other officers except for the ordinary services and salaries of the current year, and that there are no contracts which do not expire at the end of each fiscal year and which have not been made known to the parties of the second part, and the said Holladay further covenants and agrees with the parties of the second part that the books of account of the Oregon Steamship Company so far as he knows and believes are accurate and full and that there are no debts or claims due by said Company so far as he, said Holladay, knows and believes, which are not fully known to M. S. Latham, and the only debts which the said Holladay has any knowledge or information apart from the current monthly bills and repairs and the debt of the European Creditors represented

by said Latham is what may be due for current salaries, supplies and pay rolls, and said Holladay further covenants and agrees for himself, his heirs and legal representatives that he will on demand either convey to the Oregon and California Railroad Co., to the Oregon Central Railroad Company, to the Oregon Steam Ship Company and to the Portland Ware House and Dock Company or to any of them, or else as the case may be will take all necessary legal proceedings in conjunction with said companies or any of them for the purpose of compelling the transfer to said Companies or any of them of any real estate or other property or rights which equitably belongs to said companies or any of them (if any such rights or property there be) but which may now be held by or stand in the name of said Holladay or any other person or persons or corporations in tracts having been purchased for said corporations or conveyed to him for their use.

for their use.

Ninth, and said Holladay further covenants that he will obtain and cause to be delivered to the Oregon and California Railroad Company a good and sufficient deed with covenants of warranty against the acts of the grantor from one James C. Hughes to the said Railroad Company for certain property at Junction City and Drain Stations and Oregon City, being all the property at said places standing in the name or under the control of said Hughes which has heretofore been a subject of controversy between the parties to this agreement, or will take such proceedings as may be necessary to secure such title, and also that he will obtain and cause to be de-

livered a good and sufficient deed with full covenants of warranty from the Willamette Real Estate Company to the said Railroad Company in accordance with an existing contract for the said conveyance, and also that he will cause to be executed and delivered to the Oregon Central Railroad Company a good and sufficient deed with full covenants of warranty by the Portland Warehouse and Dock Company of the Depot property sold by it to said Railroad Company and said Holladay further agrees to execute or cause to be executed all further or other instruments or assurances which may be proper or necessary to perfect the title to any of said parcels of said real estate.

Tenth, and said Holladay covenants that to the best of his knowledge and belief the Company has settled, confirmed and paid all claims of one Hallett against the Oregon and California Railroad Company and that he has no valid claims against the said Company and that in like manner all claims of said Elliott or of Elliott and one Nightingale are invalid and said Holladay agrees without charge to furnish the said parties of the second part for the use and benefit of the Oregon and California Railroad Company when required any assistance in his power to defend and defeat all of said claims and said Holladay also agrees to furnish copies of all agreements of one Gaston made at the time of the compromise of his claims against the said Oregon Central Railroad Company, if the same are not already on file in the Companies office, and further said Holladay agrees on demand to give to the parties of the second part his resignation as President of the companies herein referred to and also

to procure the resignation of the Vice-Presidents and Secretaries of said Companies, excepting only the secretary of the Oregon and California Railroad Company and the secretary of the Oregon Steam Ship Company, which last he will obtain if possible.

Eleventh, and the said Holladay covenants and agrees not to engage directly or indirectly whether as past owner of a vessel or in any other way whatsoever, in any trade or business which can or shall be in conflict with the business or interests of the Oregon and California and the Oregon Central Railroad and the Oregon Steam Ship Companies and not to erect any docks or ware-houses which might come in competition with and effect injuriously the business of the Portland Warehouse and Dock Company, and the said Holladay at the time of the execution hereof shall enter into a penal bond in the sum of One Hundred Thousand Dollars in Gold Coin for the faithful performance of this covenant, said covenant shall continue in full force for the term of ten years from the date hereof. But this covenant is not to be construed so as to effect the full use and enjoyment of the present charter of the Steam Ship California which said parties of the second part agree shall be confirmed in its present tenor for the full unexpired term thereof, provided the same was made with the knowledge and consent of M. S. Latham for the European creditors of the Oregon Steamship Company, nor shall said covenants effect the use in trade or business not directly in conflict for the time being with the business of the Oregon Steamship Company of the ship "Idaho" in which vessel said Holladay is a part owner. But except as afore-

said this general covenant shall apply to both the California and Idaho so long as Ben Holladay retains any interest therein, as owner or otherwise and the said parties of the second part in consideration of the premises and of the foregoing covenants to be kept and performed by said Holladay, in behalf and as the agents and representatives of bond holders of the Oregon and California Railroad Company to the extent that they represent the said bonds as aforesaid, covenant and agree with the said Holladay and with his legal representatives as follows:

Twelfth, That all of said stocks referred to in article first and second of this agreement may be forthwith placed in the hands of the Bank of the State of New York of the City of New York, as a Trustee to be held by it until the delivery of the three hundred thousand dollars of bonds hereinafter more specifically referred to, whereupon the same are to be duly delivered to said parties of the second part or to such persons as they may designate and until this surrender it is agreed between the parties to these presents that said parties of the second part or such persons as they may designate shall have the power to vote by proxy upon all of said stocks.

Thirteenth, That simultaneously with such deposit the said parties of the second part shall pay to said Ben Holladay the sum of Two Hundred Thousand Dollars (200,000) in Gold Coin of the United States, less the amount due under the mortgage on the property of the Portland Ware House and Dock Company hereinbefore mentioned and less the payments stipulated in Article Seven of this agreement, and within one year thereafter the said parties of the second part will make to said Hol-

laday or to his assigns a further payment in like Gold Coin of the sum of Fifty Thousand Dollars (50,000) with interest at six per cent per annum if the said Holladay shall have faithfully and strictly complied with his covenants and agreements hereinbefore expressed.

Fourteenth, And further the said parties of the second part covenant that they will within a reasonable time after the execution hereof cause to be created, executed and delivered to the said Holladay or to his assigns three hundred bonds of one thousand dollars each, payable in thirty years after their date, to-wit, March, 1876, bearing seven per cent interest payable semi-annually, principal and interest to be payable in Gold, such bonds to be executed and issued by the Oregon Central Railroad Company under the corporate seal of said Company, and to bear coupons as usual the forms and manner of the original creation and issue of said bonds to be agreed upon between the respective counsel of said company and the counsel of the parties hereto. The said bonds shall be secured by a mortgage of said road and in case the said parties of the second part shall hereafter secure the control of the existing bonds on the Oregon Central Railroad Company, said bonds shall be retired and cancelled and the mortgage securing them be extinguished. But in case of such retirement or cancellation of the present mortgage bonds of the Oregon Central Railroad Company said Company may create a new mortgage for a sum not exceeding twenty thousand dollars a mile of which the mentioned three hundred thousand dollars of bonds shall be part; upon the completed road to Junction City, these bonds shall be issued only pro rata as said

railroad is completed, and the interest on the above named three hundred thousand dollars of bonds shall be at legal instruments to be devised by counsel be secured by the pledge of the net earnings of the Oregon and California Railroad so far as the said parties of the second part have the right to receive or control the same as representatives of the bond holders as aforesaid, so that they shall be first applied to the payment of seven per cent interest on such three hundred thousand dollars (\$300,000) of bonds of the Oregon Central Railroad Company before any interest is paid on any of the existing bonds of the Oregon and California Railroad Company owned or controlled by said parties of the second part. But the rights of Sulzbachs Brothers are hereby expressly saved as the same are named under a certain contract assignment and pledge of the interest coming to the bondholders represented by the parties of the second part to secure the repayment of \$250,000 in sums not exceeding \$40,000 per annum. But neither the Oregon and California Railroad Company nor the said parties of the second part shall in anywise be liable directly or indirectly for the payment of the principal of said three hundred thousand dollars of bonds, nor for the payment of interest otherwise than as aforesaid, and the said parties of the second part further covenant that in case of an arrangement by which the Railroads controlled by the Stocks now purchased from said Holladay and either of them shall be consolidated with any other railroad or railroads or shall be sold to any other railroad or corporation and upon any such sale or reorganization or combination new bonds of any kind shall be issued and

paid for the road or roads now controlled under this agreement by said parties of the second part, that then and in any such case an equal number of such new bonds or an amount the annual interest upon which shall be equal to the interest payable to said Holladay upon the three hundred thousand dollars of bonds above referred to, shall be offered to said Holladay or his assigns in exchange for the three hundred thousand dollars of new bonds hereinabove agreed to be created and paid to him, and in case such new bonds shall be equal in value to the bonds of the Central Pacific Railroad Company or shall be guaranteed by the Central Pacific Railroad Company or other corporations of equal financial standing then said Holladay for himself and his assigns agrees to accept the same in exchange for the said three hundred thousand dollars of bonds, this covenant on said Holladay's part to expire in six years from the date hereof, the rights and powers of the parties of the second part and those whom they represent over the net earnings of the Oregon and California Railroad Company it is now expressly stated that they represent the portion of said earnings belonging and coming to such of the holders of the first mortgage bonds of the Oregon and California Railroad Company as are represented by the parties of the second part.

Fifteenth, and the said parties of the second part further agree with said Holladay that upon the strict fulfilment of the several covenants hereinbefore expressed and upon the condition that the property of the several companies herein named is found to correspond with the statements and accounts rendered up to the exe-

cution of this agreement in so far as he is personally responsible for the same, he, the said Holladay and his associates as officers and agents whose shares in the several companies afore-mentioned are hereby sold and also all other holders of stock in the several companies before named whose shares are hereby sold and the said Holladay individually shall be formally and legally discharged and released by the various companies against all accounts, agreements, guarantees and demands incurred by them in their representative capacities to this date, as far as such acts, accounts, agreements, guarantees and demands are shown and proven by the books and public statements of the several Companies herein named and for which said Holladay is liable to either of said Companies, it being the intention of the parties hereto by this sale to settle and end all previous transactions between the parties aforesaid and said Companies respectively, including those which have hitherto been disputed by said parties of the second part, or of which they have had actual or constructive notice, and also that said Holladay shall be protected from and indemnified against all liability under the contract made between said Holladay and said parties of the second part of July, 1874, by means of a covenant not to sue or other instrument to secure him from all liability thereunder without in any manner releasing or discharging any other party. But such instrument shall not affect the respective rights or liabilities of the said Holladay and Messrs. Sulzbach Brothers under said agreement in respect of a claim made by the latter for a payment on account of interest of Fifty Thousand Dollars or thereabouts.

Sixteenth, and said Holladay agrees in case the issue of the pending suits of one Elliott and of said Elliott and Nightingale shall in any way injuriously affect the right of the bondholders of the Oregon and California Railroad Company that the said Holladay will indemnify them for any loss or damage that they may suffer in consequence thereof, and said Holladay further covenants that he has full right and lawful power to make and agree to make all the transfers, conveyances and assurances herein above agreed upon and that he will on demand execute and secure to be executed further necessary transfers and assurances in order more fully to carry out the purposes of these presents, the intention of the parties hereto being to secure to the said parties of the second part through the transfer of the railroad stocks and the other stocks above mentioned the substantial and absolute control of both of said corporations and their properties.

In witness whereof the said parties have hereunto set their hands and seals the year and day first above written.

In the Presence of:

Signed.

By all the parties hereto.

COPY.

Of Supplemental Contract Referred to in Letter on Page 190 and 191.

Whereas, an agreement was entered into, the 29th day of February, A. D., 1876, between Ben Holladay, of Harrison, Westchester County, New York, party of the first part and Heinrich Hohenemser of the City of Frankfort on the Main, Prussia, director of the Deutsche Vereins-

bank in the same city, Julius Schmidt, of the City of Frankfort on the Main, Paul Reingaman, doctor of law and attorney at law of the City of Frankfort on the Main, Henry Koehler, merchant of the City of Frankfort on the Main, Adolph Otto, doctor of law and attorney at law of the City of Heilbrow, Kingdom of Wurtemberg, Michael Benjamin, banker of the City of Munich, Kingdom of Bavaria, Carl Staehelin-Buckner, of the City of Basle, Switzerland, partner in the house of Messrs. Iselin and Staehelin, and Henry Villard of the City of Heidelberg, Grand Duchy of Baden, owners of certain First Mortgage Bonds of the Oregon and California Railroad Company, the parties of the second part; and whereas, the facts and circumstances unknown or not contemplated by the parties, have arisen or been developed in attempting to carry out and execute said agreement in detail which necessitates certain changes in said agreement in some minor particulars; and whereas, both parties to said agreement desire such changes to be now made: Now therefore, this agreement made and entered into this 19th day of April, A. D., 1876, between Ben Holladay of Westchester County, New York, by Henry Hampton, his attorney in fact, duly authorized and empowered as such, residing at the City of Portland, in the State of Oregon, party of the first part, and Heinrich Hohenemser of the City of Frankfort on the Main, Prussia, director of the Deutche Vereinsbank in the same city, Julius Schmidt of the City of Frankfort on the Main, Paul Reingoman, doctor of law and attorney at law of the City of Frankfort on the Main, Hermann Koehler, merchant of the City of Frankfort on the Main, Adolph

Otto, doctor of law and attorney at law of the City of Heilbrown, Kingdom of Wurtenberf, Michael Benjamin, banker of the City of Munich, Kingdom of Bavaria, Carl Stachelin-Buckner of the City of Basle, Switzerland, partner in the house of Messrs. Iselin and Staehelin and Henry Villard of the City of Heidelberg, Grand Dutchy of Baden, the parties of the second part.

Witnesseth, In consideration of the promises and the mutual covenants in said agreement of February 29, 1876, and herein contained the said parties have agreed and do hereby mutually agree to the following changes and modifications of said agreement.

First, that the amount of the first mortgage bonds of the Oregon and California Railroad Company owned and held or represented by said parties of the second part, approximate Ten Millions of Dollars and the said parties of the second part shall not be bound or held to any more particular statement of the amount of said bonds, any thing in said contract of February 29, 1876, to the contrary notwithstanding.

Second, The net earnings of the Portland Ware House and Dock Company, prior to the 13th day of April, A. D., 1876, shall not belong to the said parties of the second part, the provisions of the "fourth article" of said agreement to the contrary notwithstanding.

Third, Nothing in said agreement of February 29th, 1876, shall be so construed as to prevent the Oregon Central Railroad Company from at any time hereafter issuing bonds to the amount of more than twenty thousand dollars per mile of the road and of mortgaging

its road, lands and other property to secure payment thereof, but not to impair the security of said three hundred bonds mentioned in said agreement.

Fourth, No covenant or agreement of the parties of the second part in said contract of February 29, 1876, contained or herein contained affecting in any manner the rights of the Bondholders of the said Oregon and California Railroad Company, shall be construed to bind said parties of the second part, to any greater extent than that they hold and represent the holders of the said first mortgage bonds of the said Oregon and California Railroad Company.

In witness whereof, the said Ben Holladay, by his said attorney in fact Henry Hampton and the said Heinrich Hohenemser, Julius Schmidt, Paul Reingoman, Herman Koehler, Adolph Otto, Michael Benjamin, and Carl Staehelin-Buckner, by their attorney in fact, Henry Villard, and the said Henry Villard for himself, have hereunto set their and Seals the day and year first above written.

In the presence of

Signed.

Ben Holladay (SEAL)

By H. Hampton, his attorney in fact.

Heinrich Hohenemser (SEAL)

By Henry Villard, his attorney in fact.

Julius Schmidt (SEAL)

By Henry Villard, his attorney in fact.

Paul Reingoman (SEAL)

By Henry Villard, his attorney in fact.

Herman Koehler (SEAL)

By Henry Villard, his attorney in fact.

Adolph Otto (SEAL)

By Henry Villard, his attorney in fact.

Michail Benjamin (SEAL)

By Henry Villard, his attorney in fact.

Carl Staehelin-Buckner (SEAL)

By Henry Villard, his attorney in fact.

Henry Villard

requested this Company to pledge the net earnings of this Company which would otherwise be paid to said parties on account of the interest coupons or certificate for unpaid interest of the bonds of the Company for the payment of interest to become due upon said three hundred bonds of one thousand dollars each to be issued by said Oregon Central Railroad Company aforesaid and to guarantee the interest upon said bonds so far as said Heinrich Hoehnemser, Aron Neiderhofheim, Julius Schmidt, Henry Villard, Michael Benjamin, Carl Staehelin-Buckner, F. S. Van Neirop and Wm. Koester have a right to receive or control the same as representatives of the Bondholders of this Company subject to the conditions in said communication mentioned therefore.

Resolved, that subject to the terms and conditions of the said contract of Feby. 29th, 1876 hereinbefore referred to and so far as this Company can lawfully and rightfully under said agreement of July 25th, 1874, hereinbefore referred to and the said communication from the said Henry Villard and others hereinbefore set forth in consideration of the premises and the benefits secured to this Company by said agreement of February 29th, 1876, this Company the Oregon and California Railroad Company a corporation duly incorporated under the laws

of Oregon, does hereby guarantee to the owners and holders of the said three hundred bonds to be issued by the Oregon Central Railroad Company as aforesaid at the times when said interest shall become due and payable until the maturity of said bonds, the payment of the interest thereon according to the tenor and effect thereof.

Resolved, That the net earnings of this Company subject to the conditions of the said contract of February 29, 1876, and to the contract assignment, and pledge of the interest coming to the Bondholders represented by the parties of the second part to said agreement, in said mentioned and so far as this Company can lawfully and rightfully under said contract of July 25, 1874 and under the pryor pledge the same are hereby irrevocably pledged first to the payment of the semi-annual interest to become due upon said three hundred bonds to be issued by the said Oregon Central Railroad Company until the maturity of said bonds before any portion thereof except to the said Sulzbach Brothers under the aforesaid contract and pledge and to the extent in said agreement of February 29th, 1876, specified shall be paid to said Heinrich Hohenemser, Avon Heiderhofheim, Julius Schmidt, Henry Villard, Michael Benjamin, Carl Staehelin-Buckner, F. S. Van Nierop and Wm. Koester or to their successors or assigns on account of principal or interest upon the bonds of this Company.

Resolved, that the President and Secretary of this Company be and they are hereby authorized and directed to cause to be endorsed upon each of said three hundred bonds the guarantee of the Company of the interest thereon as hereinbefore provided in the following form.

INTEREST GUARANTEE CLAUSE.

The within bond is one of three hundred each of the same tenor and amount, issued in pursuance of the terms of a certain agreement, dated February 29th A. D. 1876, made between Ben Holladay of the first part, and Heinrich Hohenemser and others of the second part representatives of over nine million dollars of the first mortgage bonds of the Oregon and California Railroad Company, subject to the provisions, conditions and reservations of said agreement by which the semi-annual interest upon said three hundred bonds is to be paid out of the first net earnings of the said Railroad, and the said Oregon and California Railroad Company has by a vote of its Board of Directors, agreed to and does hereby, in consideration of the covenants in its behalf, in said agreement contained which agreement is hereby made a part hereof, and of one dollar to it paid by the Oregon Central Railroad Company, within named, the receipt whereof is hereby acknowledged, guarantee the interest on said three hundred bonds, subject only to the provisions and conditions of said contract, but not so as to prevent a distribution of net earnings from time to time among said bondholders, after payment of all interest then due and unpaid on said three hundred bonds, which may be coming to the bondholders represented by said Hohenemser and others.

In witness whereof, the said Oregon and California Railroad Company, has by a resolution of its Board of Directors, caused this guarantee to be signed by its President and Secretary and its corporate seal to be attached, this.....day of.....A. D. 1876.

Oregon and California Railroad Company,
 ByPresident.

Oregon and California Railroad Company,
 BySecretary.

and to execute such guarantee in the name of and for and as the act of this company under their official signatures and the corporate seal of this Company.

Which was duly considered by the board and fully explained by the President and on motion of Mr. Chadwick seconded by Mr. Koehler, was put to vote and unanimously passed, and declared adopted.

Mr. Dolph, Company's attorney then read the following preamble and resolution for the consideration of the board.

Whereas, this company on or about the 31st day of July, 1872, entered into a contract for a term of years with the Oregon Transfer Company a corporation duly incorporated under the laws of the State of Oregon, among other things for the transportation of all freight arriving at the Cities of Portland and East Portland over the road of this company, from the depot of this Company to the point or place within said Cities or either of them to which such freight was directed, consigned or to be delivered and all freight shipped by this company over its Railroad from any point within the said Cities or either of them to said depot all of which will more fully appear by reference to said agreement.

And whereas certain provisions of said agreement have proved by experience to be impracticable and have never been carried into effect, and certain other provisions are found to be necessary or proper to effectuate the object

intended to be accomplished by said agreement, and whereas both parties to said contract desire certain changes and modifications thereof which are contained in the new and substituted agreement hereinafter set forth,

and Whereas it is deemed by this Board for the best interest of this Company in order to secure the prompt delivery for shipment at the depots and stations of this Company of all freight to be shipped from the City of Portland upon the road of this Company and the prompt delivery of all freight arriving at said City of Portland upon its road and the other advantages secured to this Company by an agreement hereinafter set forth to enter into a contract with the Oregon Transfer Company a corporation duly incorporated under the laws of the state of Oregon and having its principal office and place of business at the City of Portland, Oregon, of which contract the following is a copy, to-wit:

This Agreement, made and entered into this 29th day of April A. D. 1876, between the Oregon Transfer Company, a corporation duly incorporated and organized under the general corporation laws of the state of Oregon, and having its principal office and place of business at the City of Portland in the State of Oregon, party of the first, and the Oregon and California Railroad Company, a corporation duly incorporated and organized under the said laws of the State of Oregon, and having its principal office and place of business at said City of Portland, party of the second part, Witnesseth: That whereas, said parties on or about the thirty-first day of July, 1872, made and entered into a contract in writing, of that

date concerning the subject matter of this agreement; and whereas certain provisions of said contract have proved by experience to be impracticable and have never been carried into effect, and certain other provisions are found to be necessary or proper to effectuate the object intended to be accomplished by said contract, now therefore, in consideration of one dollar, paid by each to the other of the parties to this agreement, the receipt whereof is hereby acknowledged, and of the mutual agreements of the parties hereinafter contained, and the mutual benefits resulting and to result to all the parties under this agreement, and the cancellation of said agreement of July 31, 1872; It is now covenanted and agreed by and between the said parties of the first and second parts hereto, as follows:

First, The said Oregon Transfer Company, party of the first part herein, for itself, its successors and assigns, in consideration aforesaid, covenants and agrees to and with the said Oregon and California Railroad Company, its successors and assigns that it the said Oregon Transfer Company, and its successors and assigns will for the period and term of ten years next immediately following after the date of these presents, furnish all drays, trucks and horses or mules and drivers and other persons necessary from time to time, to take, and shall and will operate the same, and take, transfer and convey to and from the depots of the said the Oregon and California Railroad Company, party of the second part herein, in the Cities of Portland and East Portland, all freight coming either way, over the said The Oregon and California Railroad Company, or its successors, to and from said

depots , to and from any and all points in the Cities of Portland and East Portland; in the State of Oregon, and will, during said term of ten years, transport all such freight passing over said Railroad either way, that is to say: all freight coming from the south over said Railroad to any point within said Cities of Portland and East Portland, to which the same is directed, consigned, or is to be delivered and all freight to be shipped south over said Road, from any point within said Cities, or either of them, to said depot in East Portland or in Portland, as the Railroad may require with promptness and dispatch.

In consideration whereof, the said the Oregon and California Railroad Company, party of the second part herein, for itself, its successors and assigns, does covenant and agree to and with said The Oregon Transfer Company, party of the first part herein, that it, the said The Oregon Transfer Company, party of the first part herein, its successors or assigns, shall for and during the said term of ten years aforesaid, from and after the date of this agreement, have the sole and exclusive right and privilege of conveying and transporting from said depots of the said The Oregon and California Railroad Company, party of the second part, all freight of every description coming over the Railroad of the said The Oregon and California Railroad Company, its successors and assigns, to the Cities of Portland and East Portland, to such point or place within the Cities of Portland and East Portland, to which such freight may be directed or consigned, or at which it is to be delivered; and also the sole and exclusive privilege and right of conveying and transporting to said depots from any point or place within

said Cities of Portland and East Portland, or either of them, all freight of every description that may, during said term of ten years, go from either of said Cities to said depots, or either of them, or that may during said time, go or be forwarded southerly over said Railroad of the said The Oregon and California Railroad Company, party of the second part herein, for itself, its successors and assigns that the said party of the first part, its successors and assigns, shall for and during the said term of ten years, have passage free from all charges for all their hacks, carriages, teams, Busses, Trucks, Drays, Wagons, Horses and mules, Drivers, men and employes, across any ferry over the Willamette River between the Cities of Portland and East Portland, that may be at any time, during said term owned or leased by said The Oregon and California Railroad Company, its successors or assigns, in transporting over or across said River, passengers and freight or either, to and from the Depot or Depots of the said Railroad Company, or the Depot or Depots of its successors or assigns.

And the said the Oregon and California Railroad Company, party of the second part, in further consideration of the covenants and agreements aforesaid, for itself, its successors and assigns, does covenant and agree to and with the said party of the first part, its successors and assigns, that the party of the second part, its successors and assigns, shall and will, for and during said term of ten years next ensuing, after date of this agreement pay or cause to be paid, monthly, at the end of each and every month, during said ten years, in United States Gold coin, so long as the business of the party of the second

party shall continue to be transacted upon a coin basis, but, should, hereafter, at any time within the term of this contract, the business of said party of the second part, be conducted upon a currency basis and freight and fares received on its road be paid in currency, then, in that case, the several sums to be paid by the party of the second part, under this contract, shall be paid in currency, to said The Oregon Transfer Company, party of the first part, its successors or assigns, the following rates and sums for all freight so conveyed, transported or transferred by said the Oregon Transfer Company, or its successors or assigns, for said party of the second part, or its successors or assigns, to or from either of said Depots, or such Depot or Depots in said Cities as may at any time hereafter be established by said Railroad Company, party of the second part or by its successors or assigns, to or from any point or place within the corporate limits of either of said Cities of Portland or East Portland, during said period of ten years, that is to say: Fifty Cents Per Ton for all freight (except stone and lumber), coming over said Railroad, northward, to said Cities of Portland and East Portland, or either of them, which shall be actually hauled by the party of the first part; and on all Lumber One Dollar Per Thousand, and on all stone One Dollar Per Ton, either way; and on all merchandise, going southward over said Railroad of the party of the second part, its successors or assigns from the Cities of Portland and East Portland or either of them, and transported to such Depot or Depots, or either of them, as hereinbefore stated, by the Oregon Transfer Company, its successors or assigns Seventy-five Cents per

ton, and on all machinery, safes, and other like heavy freight, what the transfer thereof is reasonably worth, for the distance transferred, taking as a basis for such compensation the prices per ton herein definitely fixed for other freight for like distances, and for all freight received at any and all of said Depots in said Cities of Portland and East Portland, from the south, not actually hauled by said The Oregon Transfer Company, the said the Oregon and California Railroad Company, party of the second part, shall pay to said the Oregon Transfer Company, party of the first part the sum of Twenty-five cents per ton as aforesaid; Provided, however that if the aggregate amount to be paid to the said The Oregon Transfer Company under the last provision, or upon such freight not actually hauled by said Oregon Transfer Company during any one year of said term of ten years from the date hereof, shall not exceed the sum of Eight Thousand Dollars then and in that case the said The Oregon and California Railroad Company, party of the second part, shall pay such additional sum to the said party of the first part as shall make the amount paid upon such freight not actually hauled by said The Oregon Transfer Company, the said sum of Eight Thousand Dollars, but, in no event shall the amount paid upon such freight not hauled exceed fifty cents per ton, and Provided further, that if the amount received in any one year during said term of ten years as aforesaid by said The Oregon Transfer Company party of the first part, for freight actually hauled, under the provisions of this agreement, shall not equal in amount the sum of Sixteen Thousand Dollars (\$16,000), then and in that case, the

said The Oregon and California Railroad Company, the party of the second part shall and will pay to the said the Oregon Transfer Company, party of the first part, an additional sum sufficient to make the amount so received in such year, by said the Oregon Transfer Company, upon freight actually hauled, the said sum of Sixteen Thousand Dollars, but such additional sum so paid shall in no case exceed the sum of Two thousand dollars, in any one year, so that in no case shall the amount paid, or to be paid, by said the Oregon and California Railroad Company to the said The Oregon Transfer Company on any account other than for freight actually hauled exceed in the amount, the sum of ten thousand dollars per annum. PROVIDED, that in case, hereafter at any time, during the continuance of this contract the said party of the second part, shall cease to own or control a ferry or bridge across the Willamette River, and the party of the first part shall be compelled to pay ferriage or toll, for crossing said River with such freight then and in that case said party of the first part shall be entitled to and may charge and collect from the shippers or consignees of such freight in addition to the compensation to be paid by the party of the second part, under this contract, all such ferriage or toll as shall have been paid by the said party of the first part in transporting such freight and the said The Oregon Transfer Company, party of the first part agrees to pay to the said The Oregon and California Railroad Company the party of the second part the sum of six and one-fourth ($6\frac{1}{4}$) cents per ton for handling all freight not actually handled or hauled by said The Oregon Transfer Company, but exclusively

handled by said Railroad Company, up to the amount of Sixteen thousand tons a year, where the amount received for freight not actually hauled by the said The Oregon Transfer Company does not exceed the sum of Eight thousand Dollars in any one year, but if for any one year, the amount so received from said the Oregon and California Railroad Company by said The Oregon Transfer Company for freight, not hauled, shall reach in amount the sum of Ten thousand Dollars, then and in that case, the said The Oregon Transfer Company shall pay to the said The Oregon and California Railroad Company Six and one-fourth ($6\frac{1}{4}$) cents per ton on twenty thousand tons of freight so handled, exclusively by said The Oregon and California Railroad Company, but in no case shall said six and one-fourth ($6\frac{1}{4}$) cents per ton be paid by said Oregon Transfer Company upon more than twenty thousand tons of freight handled exclusively by said Oregon and California Railroad Company—and it is mutually understood and agreed that nothing shall in any instance be paid by said Oregon and California Railroad Company, or charged by said The Oregon Transfer Company, upon any freight for which drayage or compensation for handling or hauling shall have been already paid by either the Oregon Central Railroad Company or the Oregon Steam Ship Company corporations under the laws of Oregon, to said The Oregon Transfer Company where such freight requires but one haul. It is further expressly understood and agreed that if in any one year during the term of this contract, the net earnings of said The Oregon Transfer Company shall enable said Company to pay more than fifteen per cent per

annum dividends on its capital stock of Two Hundred Thousand Dollars, and to purchase sufficient horses, wagons, trucks, drays, etc., necessary to keep said Company's equipment up to its present standard and necessary to conduct the increased business of said Company, then and in that case, any such amount of net earnings, beyond said fifteen per cent on said capital stock of Two Hundred thousand dollars shall be paid to said The Oregon and California Railroad Company, party of the second part, as a part of the consideration of this contract.

It is further expressly understood, covenanted and agreed, by and between the parties hereto:

First, that if said Oregon Transfer Company, party of the first part, shall at any time during said term of ten years, fail or neglect to furnish all drays, trucks, horses or mules, drivers and persons necessary to carry and transport all freight, as hereinbefore specified, to and from the stations, depots and warehouses of said Oregon and California Railroad Company, party of the second part and to convey and transport the same as fast as the business of said Company may require, so as to keep such depots and warehouses clear of freight arriving by said Road, that then and in that case said Oregon and California Railroad Company, its successors and assigns, may have such freight for the time being and during such neglect, or failure of the party of the first part, carried, transported and delivered by any other corporation, firm, person or persons upon such terms and for such reasonable compensation as shall be by said party of the second part deemed necessary to pay therefor, and for all such

freight, so conveyed and transported said party of the first part shall receive no compensation, and whatever sum so necessarily paid to such corporation, firm, person or persons for such services over and above the contract price herein provided, shall be charged to said party of the first part, and deducted out of the monthly payment to said party of the first part, herein provided for, for the month in which such payment was made.

Second, That should the said party of the first part, The Oregon Transfer Company at any time during said term of ten years from the date of this contract, wilfully, refuse, neglect or fail, for the period of thirty days, to furnish the transportation hereinbefore provided, or to convey, transport and deliver all freight hereinbefore specified, and as hereinbefore provided, then and in that case the said party of the second part may at its option declare this agreement forfeited, and may by notice to the party of the first part, terminate the same, and shall thereupon be fully and absolutely relieved from all obligations thereunder, and may make other provisions for the performance of the service agreed to be, by the party of the first part, performed under this contract.

Third, that in case of any failure on the part of the said party of the first part, to keep and perform any of its covenants and agreements herein, and in consequence of such failure, any goods which should have been delivered by the party of the first part under this agreement, to the consignees, or at any point or place within the City of Portland, or any freight delivered at the depots or stations of said party of the second part, within the said City of Portland, for shipment, which might and would

have been shipped before its loss, except for such wilful neglect and failure on the part of the party of the first part, shall be lost by fire, explosion, flood, theft, robbery or any other cause whatever, to the loss or damage of the said party of the second part, its agents, or employees then in that case, said party of the first part shall repay all such loss, damages, costs and disbursements as shall be sustained thereby, by said party of the second part, and which it shall be compelled to pay, by any action, suit or proceeding or shall pay without action, suit or legal proceeding upon compromise or otherwise by consent of the party of the first part, and it is further understood and mutually agreed, that in case through connection by Railroad is made between the said Cities of Portland and East Portland and any point in the States of California or Nevada or the territory of Utah, with a Railroad in said states or territory forming a through connection by Rail with the Eastern States or California, within the term of this contract, then and in that case the said party of the second part, may at its option terminate this contract by a notice to the party of the first part, and upon the happening of such contingency, and the giving of such notice, this contract shall become null and void.

And it is further understood and mutually agreed by the parties hereto that upon the execution and delivery of this agreement, said contract of July 31st, 1872, shall be and become void and of no effect, and shall be hereby cancelled and annulled.

In testimony whereof, the parties to these presents The Oregon Transfer Company and the Oregon and Cali-

ifornia Railroad Company, by resolution of their respective Board of Directors have caused these presents to be signed by their respective Presidents and Secretaries, and their corporate seals to be hereto affixed, at the City of Portland in the State of Oregon this 29th day of April, A. D., 1876.

Therefore,

Resolved, that the President and Secretary of this Company be and they are hereby authorized and instructed to execute said agreement in the corporate name of this Company and for and as the act of this Company, under their official signatures and under the corporate seal of this Company.

Which was fully explained by the President, duly considered by the Board and on motion of Mr. Koehler seconded by Mr. Chadwick and passed, and declared unanimously adopted.

Mr. Thielson then moved that the Board now adjourn to meet on Saturday the 22nd inst. at 11 o'clock A. M. Seconded by Mr. Lewis and passed, and the President declared the Board so adjourned.

Saturday, April 22nd, 1876, Pursuant to adjournment the Board met at 11 o'clock A. M. this day. Members present, Messrs. Chadwick, Theilsen, Weidler, Lewis, Koehler and Villard (6) being all the members elect. The President called the Board to order and stated that the business now to come before the board was an agreement to be entered into by and between this Company and the Oregon Steam Ship Co., and the Oregon Central Railroad Company, The Company's attorney, I. N. Dolph., then read the following preamble and resolution.

Whereas, in the opinion of the Board it is to the best interest of this Company that it assent to and execute as a party and agreement of which the following is a copy, to-wit:

This Agreement, made and entered into this day of April, A. D., 1876, between the Oregon Steam Ship Company, a corporation duly incorporated and organized under the laws of the State of Oregon, party of the first part, The Oregon and California Railroad Company, a like corporation duly incorporated and organized under the laws of said State, party of the second part and the Oregon Central Railroad Company, of Portland, Oregon, a like corporation duly incorporated and organized under the laws of said state, party of the third part, Witnesseth:

Whereas, on the 25th day of July, A. D., 1874, the said Oregon Steam Ship Company, as party of the first part, the said Oregon and California Railroad Company, as party of the second part, Heinrich Hohenemser, Director of the Deutsche Vereins bank at Frankfort on the Main, Avon Heiderhofheim, manager of the Branch of the Bank of Commerce and industry at Frankfort on the Main, Adolf Otto, counsellor at law at Heilbronn, in the Kingdom of Wurtemberg, Michael Benjamin, Director of the Baierische Wechsler Bank at Munich, in the Kingdom of Bavaria, Carl Staehelin-Bucknor of the firm of Isilin and Staehelin, of Basle, in Switzerland, F. S. Van Neirop, Director of the Bank of Amsterdam, in the Kingdom of Netherlands and William Koester, of the firm of Koester and Company, at Manheim, in the Grand Duchy of Baden, by Henry Villard of Heidelberg in the Grand Duchy of Baden, their attorney in fact, and said Henry Villard of

Heidelberg in the Grand Duchy of Baden, for themselves, their executors, administrators, successors and future holders of the Bonds of the Oregon and California Railroad Company, as parties of the third part, certain creditors of the said Oregon Steam Ship Company represented by Milton S. Latham, as Trustee and attorney in fact for themselves, their heirs, executors, administrators, successors and assigns, as party of the fourth part, and certain creditors of the said Oregon Central Railroad company represented by Milton S. Latham, as their trustee and and attorney in fact, for themselves, their heirs, executors, administrators, successors and assigns, as party of the first part, entered into a certain agreement in writing which, among other things, contained the following provisions:

Article 1. The entire net receipts of said Oregon Ship Company (meaning by the term "net receipts" wherever it is used in this agreement, all receipts remaining after paying the operating expenses, taxes and harbor dues, and keeping the property of said Steam Ship Company in reasonably good repair, all other outlay, in every case, being prohibited except by agreement of all parties to these presents) shall be first applied to the payment of interest at the rate of ten (10) per cent per annum on the principal of Eight Hundred thousand (\$800,000) loaned by said party of the fourth part to the party of the first part, as well as to the extinction of the said principal.

Whenever the principal and interest of said debt of said Oregon Steamship Company shall be paid in full, said net receipts and the security held by said party of

the fourth part as collaterals shall be applied to the payment of the interest at the rate of ten (10) per cent per annum and of the principal of one million dollars in gold loaned by said party of the fifth part, to said Oregon Central Railroad Company, in so far only, however as the net receipts of the said Oregon Central Railroad Company shall not be sufficient for the payment of said principal and interest, or any part of it, and in so far only as the pledge by Oregon Central Railroad Company, namely Four million Three Hundred and ninety-five thousand (\$4,395,000) Dollars, First mortgage Bonds, shall not yield sufficient, if any sold, to repay said loan of one million dollars and interest; but in the last named event, said receipts of said Steamship Company shall be used for the repayment of said principal and interest only to the aggregate amount of Four Hundred thousand (\$400,000) Dollars.

Article 2. As soon as the conditions set forth in article first shall be complied with, the entire net receipts of the Oregon Steamship Company shall to the said parties of the third part or their agent and attorney at the end of each calender month, and the parties of the third part shall apply thereto the current interest of the First mortgage Bonds of the Oregon and California Railroad Company to the amount of seven per cent per annum; and whenever in any one year the net receipts of the Oregon and California Railroad Company added to the receipts which may be contributed by the Oregon Steamship Company shall exceed the sum of seven per cent on the Bonds issued and unredeemed of the Oregon and California Railroad Company, then one-half of such excess shall be

applied to the redemption of scrip and one-half be applied to the stockholders of the Oregon Steamship Company.

Article 3. The securities of the Oregon Steamship Company now in the hands of the party of the fourth, to-wit: Two million dollars of the First mortgage Bonds and twenty-nine thousand nine hundred and ninety-eight (29,998) shares of the capital stock of said Oregon Steamship Company, shall be secondly additional security for the aforementioned claim of said parties of the third part within the afore described limits, and thirdly, shall be additional security to the said parties of the third part for its claims mentioned in Article 2, without prejudice; however, to the prior rights of the parties of the fourth and fifth part, and said securities shall be as a pledge by the said party of the fourth for its own benefit and as security for the payment of its claim as well as the claim of the parties of their third and fifth parts. Upon the payment in full of said party of the fourth part, possession of said securities shall be given to said party of the fifth part, which hold the said securities as a pledge for its own benefit as well as for the benefit of said parties of the third part, without prejudice, however, to its own claims and upon the payment of its own claims possession of said securities shall be given to the parties of the third part; nothing herein stipulated shall prevent, however, the said parties of the fourth part from making good their claims against said party of the first part for principal and interest by sale, at any time they may find it to their interest to make such sale of the securities of said party of the first part held by them as collaterals,

all of which by reference to said agreement of July 25th, A. D., 1874, will more fully appear.

And Whereas, on the 6th day of April, A. D., 1876, an agreement was made and entered into by and between the said Milton S. Latham, as agent of the said creditors of the said Oregon Steamship Company, and as agent of the said creditors of the said Oregon Central Railroad Company, as party of the first part, and Henry Villard, as agent of and on behalf of the holders of the First mortgage bonds of the Oregon and California Railroad Company, represented by the Frankfort Committee, party of the second part, modifying and changing said agreement of July 25th, A. D. 1874.

And Whereas, said Frankfort Committee, and the Bond holders of said Oregon and California Railroad Company represent thereby, are the same committee and Bondholders who executed the aforesaid agreement of July 25, 1874, as party of the third part, with such additional Bondholders and such changes of said Committee as were authorized by said agreement and the principal agreement to which the same referred and of which the same was part.

And Whereas, That said party of the first part, for and on behalf of the said creditors of the Oregon Steamship Company, covenants and agrees that the shares of the Capital Stock of said Company now standing in the name of Ben Holladay shall be transferred to the said party of the first part and the legal title thereof placed in him in trust and as security for the debt due the creditors of said Steamship Company, but that the sale and exclusive right to vote upon the said stock shall be vested

in said party of the second part, or some proxies or proxy by him selected for that purpose, and that a collateral agreement creating and authorizing said right to vote thereon shall also be made by the said party of the first part, as a separate instrument and deposited in the office of the said Company and that the lawful voting power, vested in said shares, shall be exercised by the said party of the second part, or his said proxies or proxy provided, that the said party of the second part, or his said proxies or proxy, shall always consent to and vote for any nominations of two members of the Board of Directors of said Company, which the said party of the first part shall make, the right to make such nominations and have them thus voted for being hereby expressly conceded by said party of the second part.

Second, The said party of the first part, for and on behalf of the creditors of the said Oregon Steamship Company, further covenants and agrees to receive out of the net earnings and proceeds of the said steamship company, now pledged to him in trust for said creditors the sum of Fifteen thousand (15,000) Dollars annually for a period of three (3) years, in installments of Seven Thousand Five Hundred Dollars each payable every six months, from the date of these presents, said payment to be applied to the interest on Three Hundred Thousand Dollars seven per cent Oregon Central Railroad second mortgage Bonds, to be issued to the said Ben Holladay in pursuance of an agreement between him and the party of the second part.

Third, The parties of the first and second parts in their representative capacities aforesaid, hereby mutually cov-

enant and agree that, in order to provide the said Oregon Steam Ship Company with the necessary means of transportation, a suitable new steamship shall be purchased without delay, at a cost of not exceeding in lawful currency of the United States, for said Steamship Company in the following manner (it being assumed that such purchase can be made on the payment of One Hundred Thousand Dollars cash and balance in equal payments in six, nine, twelve and eighteen months) to wit: To meet the first cash payment aforesaid the party of the first part, as such representative as aforesaid, shall contribute the proceeds of the sale of the River Boats belonging to said Oregon Steamship Company, such sale to be effected at the earliest possible moment, and the party of the second part, as such representative as aforesaid, shall contribute whatever amount of money shall be required over and above the proceeds of said sale of the River Boats to make up the sum of One Hundred Thousand Dollars and such further sum as may be required to equip, alter or repair the said Steamship so as to fit her for the purposes of said line. Whatever amount shall thus require to be contributed, by said party of the second part, towards the purchase and equipment of said new Steamer, shall bear interest at the rate of six per cent per annum, in said interest to be paid out of the net earnings and proceeds of the said Steamship Company after the prior payments, 1st of the Fifteen thousand dollars annually as before mentioned, and 2ndly of the full amount of the cost of the said new Steamship, whereupon, after payment of the said Fifteen thousand dollars annually, and the full amount of the cost of said new Steamship and the said

interest shall have been made in the order aforesaid, there shall next, from the said net earnings and proceeds, be paid to the creditors of the said Oregon Steamship Company any possibly accrued back interest and upon the completion of all the payments aforesaid the principal sum so advanced by the party of the second part towards the purchase and equipment of the said new Steamer shall be repaid to him in installments of not less than six thousand dollars per annum, but such installments shall not exceed the said sum of Six Thousand Dollars per annum unless and until the current interest due to the creditors of the Oregon Steamship Company shall have been fully paid. Until the repayment of said principal in the manner so specified it shall stand as a first lien upon the said new Steamship with legal priority over the lien held by said party of the first part, as such representative on the property of said Steamship Company.

Fourth, The said parties of the first part and second part, in their said representative capacities, also mutually covenant and agree that if upon further consideration it should be found necessary or desirable to purchase a second new Steamship, for said Oregon Steam Ship Company, a joint arrangement for such purchase, similar as far as possible to the one set forth in the foregoing articles, shall be made between the parties hereto.

Seventh, The said party of the first part, in such representative capacity, further covenants and agrees that upon the payment of the cost of said new Steamship and upon the extinction of the debt of the said Oregon Steamship Company to said party of the first part, in such representative capacity, the net earnings and proceeds of such

company shall be equally divided, after allowing for the subsidiary payment of Fifteen thousand dollars for the time before mentioned, between the creditors of the Oregon Central Railroad Company and the Oregon and California Railroad Company in a manner to be agreed upon hereafter. But the portion of such net earnings or proceeds allowed and coming to said Oregon and California Railroad Company shall be applied to the completion of the said Oregon Central Railroad.

Eighth, The said party of the first part, in said representative capacity further covenants and agrees that upon the extinction of the debts of the said Steamship Company and of the said Oregon Central Railroad Company, the Oregon and California Railroad Company shall enter upon the full enjoyment of the entire net receipts of the two companies first above mentioned,—All of which will more fully appear by reference to said contract, which is hereby made part hereof.

Now Therefore, in consideration of the premises and the mutual benefits to be derived by each under said agreement of April 6th, A. D. 1876, the said parties hereto covenant and agree with each other to all the provisions and conditions of the aforesaid agreement of April 6th, A. D. 1876, whether hereinbefore expressed or otherwise, and to all the modifications and changes thereby made in said agreement of July 25, A. D. 1874, and hereby ratify, confirm and adopt said agreement of April 6th, A. D. 1876, so far as the same affects the rights of the parties hereto as fully and completely as if the parties — hereto had been made parties to said agreement and had executed the same.

In Witness Whereof, the said parties have, by resolutions of their respective Boards of Directors caused their respective corporate seals to be hereunto affixed and these presents to be signed by their respective Secretaries this day of April, A. D. One Thousand Eight Hundred and Seventy-six.

.
.
.

Resolved, that the President and Secretary of this Company be and they are hereby authorized and directed in the name of, and for, and as the act of this Company under their official signatures and the corporate seal of this Company, to execute said agreement.

After due consideration by the board, and full explanations made by the President, Mr. Lewis moved its adoption, seconded by Mr. Thielsen and passed, and declared unanimously adopted.

The election of a stockholder of this Company as a Director, to fill the vacancy occasioned by Ben Holladay, was submitted to the board by the President, whereupon Mr. Koehler nominated Henry Failing for such Director, seconded by Mr. Chadwick, and on the vote being taken, Mr. Failing was declared duly elected a Director of this Company for the unexpired term.

Mr. Failing being present qualified as such director as follows:

State of Oregon,
County of Multnomah. ss

I, Henry Failing, being first duly sworn say that I will

faithfully and honestly discharge the duties of Director of the Oregon and California Railroad Company, a corporation duly incorporated under the laws of Oregon to the best of my ability, so help me God.

Signed,

Henry Failing.

Subscribed and Sworn to before me this 22nd day of April, 1876.

Signed,

Jno. D. Biles.

(Seal)

Notary Public.

Mr. Failing then took a seat in the board. No further business being before the board, on motion of Mr. Thiel-sen seconded by Mr. Koehler, the board adjourned by a unanimous vote.

The President then announced the board adjourned subject to the call of the President.

A. G. Cunningham, Secy.

Henry Villard,

President.

Q. Mr. Steel, will you look for the original agreement called for in this record of February 29th, 1876, referred to in the minutes that have been introduced in evidence and also the letter of Henry Villard of April 19th, 1876, copied into the minutes addressed to the president and Board of Directors, and if you are able to find such a letter, will you produce the same?

A. I will.

Q. And also the contracts?

A. Yes.

Q. I show you a book called a time book, originally introduced in evidence by reading certain entries from this book, being pay roll of saw mill No. 3, and particularly the entries relating to Gardner Elliott and James

Grindley,—where did you obtain this book, which, for the purpose of identification, I will ask to have marked complainant's exhibit 17, (and the book is so marked)?

A. That is one of the record books which have been produced here.

Q. Was this book a part of the record delivered by Secretary Andrews to Secretary Cotton?

A. It was.

Q. At the same time.

A. Yes sir.

Q. And has it since that time been in Mr. Cotton's custody?

A. Yes sir.

Counsel for complainant now reoffers the entries that have been heretofore read into the record, and asks permission to withdraw the original book and to have the record as the same has been read stand in lieu of the original.

Counsel for defendant makes no objection to having the record as read stand in lieu of the original and allowing the original to be withdrawn, but objects to the introduction of the same in evidence because the same is incompetent, irrelevant, and immaterial, and not the best evidence, and because no foundation has been laid for the introduction of the document in evidence.

The entries referred to, which have heretofore been read into the record are now considered as reoffered as complainant's exhibit No. 17.

Witness excused.

G. H. Marsh is called as a witness for the complainant and being first duly sworn to tell the truth, the whole

truth, and nothing but the truth, testified as follows:

Direct Examination.

Questions by Mr. W. D. Fenton.

Q. State your name, age, residence, and occupation.

A. G. H. Marsh, forty-five years old, clerk United States Circuit Court, for the District of Oregon, residence, Portland.

Q. How long have you been clerk of that court or a deputy of that court?

A. Since December 1, 1890.

Q. I will ask you to state if you have in your custody as clerk of the Circuit Court of the United States for the District of Oregon the judgment roll and papers, reports, and so forth, of R. Koehler, receiver, in the case of complainants vs. the Oregon and California Railroad Company et al, and judgment roll No. 1319,—whether you have them in your custody or not?

A. Yes, I have in my custody the judgment roll, and all the reports and papers that were filed by the receiver, but I have in my custody at the present time, only a part of the records.

Q. I will ask you to produce the order of appointment of R. Koehler as receiver if you have it with you?

A. I have it attached to other papers.

Q. Under what date was that order entered?

A. On the 19th day of January, 1885.

Q. Is the original entry signed by Judge Deady?

A. Yes, the original order is signed by Judge Deady.

Counsel for complainant offers in evidence the original order in this case, and asks permission to withdraw the original and substitute a certified copy of the same.

Counsel for defendant makes no objection to the withdrawal of the original and substitution of a copy, but object to the same as incompetent, irrelevant, and immaterial.

The same is received and filed in evidence marked complainant's exhibit 10.

Q. I will ask now, if you have in your custody, and can produce at this hearing the bond and oath of office of R. Koehler, receiver?

A. I have here the bond, but I was unable to find any oath of office with such search as I have made. I have examined the document indexed, and I have no memorandum of any oath having been filed, and the order of appointment of the receiver does not seem to require an oath.

Q. In this the original bond that you have produced here filed January 21st, 1885, R. H. Lamson, clerk?

A. That is the original bond, yes.

Q. This is the bond bearing the approval of the master in chancery, W. B. Gilbert?

A. Yes.

Counsel for complainant offers in evidence the bond produced by the witness and asks permission to withdraw the original and substitute a certified copy.

Counsel for defendant makes no objection to the withdrawal of the original and the substitution of a certified copy, but objects to the same as incompetent, irrelevant, and immaterial.

The document referred to is received and filed in evidence and marked complainant's exhibit 11.

Q. State whether you have with you the report of the

receiver the inventory of the property of the Oregon and California Railroad Company that passed into the possession and custody of such receiver?

A. I have here the first report of the receiver which purports to contain a list of the property in one of the schedules referred to in the report.

Q. Have you the report and schedule which refers to the property described as eighty acres south of Milwaukie comprising the north $\frac{1}{2}$ of the northeast $\frac{1}{4}$ of section 32, township 1 south, range 2 east of the Willamette Meridian and 149.90 acres south of Milwaukie, comprising the east $\frac{1}{2}$ of the southeast $\frac{1}{4}$ and lots 5 & 6 of section 29, township 1 south, range 2 east of the Willamette Meridian,—the property being in exhibit L or schedule L under the title “Oregon and California Railroad Company, R. Koehler receiver,—schedule of land showing property, representing all miscellaneous land of the Oregon and California Railroad Company in Clackamas County,” and is that document on file in this case No. 1109, and referred to in the first report of the receiver in that case?

A. It is, Yes sir.

Q. Have you the report and exhibit?

A. This is the report which I now produce, and this is the exhibit L showing that description of land.

Q. I notice that these documents apparently have no file marks on them of your office,—where did you find them?

A. The reports of the receiver were numbered and in this case the monthly report, accompanied by the various schedules and vouchers were a very large number,

and they were put in boxes, and the boxes were endorsed and filed as containing the report, and one file mark was put on the box.

Q. What is the file mark date of the box from which were taken these reports of the receiver containing schedule L?

A. It bears date, March 31st, 1885.

Counsel for complainant offers in evidence the report of R. Koehler, identified by the witness, and sworn to before F. C. Ewald, notary public, March 31st, 1885, and exhibit L or schedule L referred to in this report in so far as it relates to the land in Clackamas County and asks permission to substitute a copy of these two documents, and vouchers properly certified, and that the originals may be returned to the clerk of the court, and asks that the two documents be marked as one exhibit.

Counsel for defendant does not object to the certified copy in lieu of the original but objects to the introduction of the same in evidence as incompetent, irrelevant, and immaterial.

The documents referred to are received and filed in evidence and marked Complainant's exhibit No. 12.

Q. Have you got the order of discharge of the receiver?

A. I have the order of discharge.

Counsel for complainant offers in evidence certified copy of the order of discharge of the receiver in this case, objected to by the defendant as incompetent, irrelevant, and immaterial, and the same is received and filed in evidence, marked complainant's exhibit 13.

Counsel for the defendants desire at this time to make

a further objection to the book offered by complainant's counsel in evidence as exhibit No. 7, in so far as any of the documents therein contained are offered as evidence of any transfer of conveyance of the real property in question or any estate or interest or right or title therein or thereto, that any cause of action upon said document is barred by the statute of limitations of the state of Oregon, and by complainant's laches.

Counsel for complainant offers in evidence the document heretofore identified as complainant's exhibit 8, and asks that the examiner copy into the record the lines in the instrument heretofore referred to, and asks permission to withdraw the original and return the same to the custody of the secretary of the Oregon and California Railroad Company with the promise that complainant will prove the handwriting to be the handwriting of E. G. Ewald, who was at that time an employee of the Oregon and California Railroad Company, and with the promise to have the same in court at the time of the trial of this case for the inspection of the court and counsel.

Counsel for defendant objects to the introduction of the same in evidence as incompetent, irrelevant and immaterial, but makes no objection to the withdrawal of the original and the substitution of a copy thereof in lieu of the same.

J. T. Apperson is called as a witness for the complainant, and being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination.

Questions by Mr. W. D. Fenton.

Q. State your name, age, residence, and occupation.

A. J. T. Apperson is my name, age seventy-six, past, my residence is near Oregon City, Clackamas County, Oregon; my occupation at the present time is farming.

Q. How long have you resided in Clackamas County, and what public position have you held in that county?

A. I have resided in Clackamas County up near Oregon City since 1855, with the exception of a short period that I was away.

Q. What official position have you held?

A. The first public position that I held was as a member of the legislature in 1870 from Clackamas County, and in 1874 I was sheriff up to 1878 of that county, and I have occupied a number of positions since that period,—I have been in the legislature I think three or four different times since that time as Senator and Representative, but I have not filled any other public office with the exception of that of register of the United States Land Office, 1889 to 1893.

Q. At Oregon City?

A. At Oregon City, yes,—the office was at Oregon City during that period, and I have been a member of the Board of Regents of the State Agricultural College, and am now, and I have been a member of that board since 1885. That is briefly a statement of my public position.

Q. Were you acquainted with Gardner Elliott in his life time?

A. I was.

Q. Did you know Ben Holladay in his lifetime?

A. I did.

Q. Did you know J. Grindley or James Grindley in

his lifetime?

A. It is possible I may have known him, but I cannot now call him to mind.

Q. I call your attention to a tract of land involved in this suit described as the east $\frac{1}{2}$ of the southeast $\frac{1}{4}$, and lots 5 and 6 of section 29, and the north $\frac{1}{2}$ of the northeast $\frac{1}{4}$ of section 32, all in township 1 south, range 2 east of the Willamette Meridian, in Clackamas County, Oregon, as shown in red on complainant's exhibit No. 1, —the first tract being known as cash entry 641, of James Grindley, containing 149 acres and a fraction and the second tract being cash entry 693 of Gardner Elliott, and I also show you complainant's exhibit 2 purporting to show the boundaries of these tracts, and the location of a county road to Oregon City on the east boundary line, and a diagonal road across the southeast corner of the Gardner Elliott tract, and at present a road on the section line between these two tracts, and all this land lying east of, and adjoining the donation land claim of Hector Campbell and Daniel Hathaway, and lying about a mile and a quarter in a straight line northeast of the present located track of the Oregon and California Railroad Company, and about two miles east of Milwaukie station, or old Willsburg station on this same line of railroad, and I will ask you if you are acquainted with and have been upon these lands?

A. I am.

Q. I will ask you to state to the court what kind of improvements were upon these lands in the way of manufacturing establishments or otherwise in 1869, and by whom was this concern operated, if you know?

It is understood that all this testimony goes in under the same objection by defendant's counsel, that the same is incompetent, irrelevant, and immaterial.

A. I think that the only manufacturing plant that was on the land during the period indicated or possibly ever has been was a saw mill, and it was operated, I think, by Gardner Elliott during the period I have mentioned.

Q. Do you know or do you not know whether or not this mill was operated by Gardner Elliott for Ben Holladay and Company for the manufacture of ties and railroad material for use in the construction of the first twenty miles of road?

A. It was known as the Holladay and Company property for the purpose of cutting timber and ties for the construction of the Oregon Central Railroad and it was then known from Portland to Parrott Creek.

Q. Were you at any time at this mill and saw it operated?

A. I was.

Q. Now, I wish you would describe to the court what you saw, and about how large a mill it appeared to you to be,—its general capacity, if you can recollect, and about how many men were apparently there in the crew or on the premises engaged either in the operation of the mill or in cutting logs or in hauling logs or in hauling ties and material away if you have any independent recollection?

A. During the first two years of the operation of this mill,—during that period I was on the ground,—I think there was quite a large and extensive crew cutting timber, and hauling logs to the mill and operating the mill, and hauling ties from there to the railroad. It was known

as Holladay's Mill.

Q. I will ask you to state if you recollect when the first twenty miles of road from James B. Stevens donation land claim in East Portland, or Gideon Tibbett's donation land claim in East Portland,—from where the ground was broken, or the first ceremony of the beginning of a road or the construction of a road towards Oregon City, and Parrott Creek beyond Oregon City was completed if you remember?

A. I think in the fall of 1869.

Q. Do you recall the circumstance that under the contract or under the grant the first twenty miles was required to be completed by the twenty-fifth day of December, 1869?

A. I do.

Q. Do you recall, or do you not recall, that it was completed by the twenty-fourth of December, 1869, to Parrott Creek,—that is the first twenty miles?

A. My recollection is that it was just completed the day before the expiration or limitation of the grant, and I was, I think, present at the celebration.

Q. You were present?

A. I was present.

Q. It was a matter of general notoriety in the community?

A. Yes.

Q. Now, I will ask you to state to the court what the fact is if you know, whether or not all of the bridge timbers, ties, and material, that this mill cut on this land were used for the construction of this road, then owned by the Oregon Central Railroad Company?

A. I will state in answer to that question that the whole of it was used for that purpose. I think the mill was maintained there for that purpose.

Q. Do you recall Captain Apperson what became of this mill, and who operated it, and for whom it was operated?

A. I will state that after the timber had been practically devastated from this tract of land that the mill was torn down from its location and moved to Canemah and set up there and for a number of years was operated in the interest of the railroad company in cutting ties and timber for the Oregon and California Railroad, and was operated by Gardner Elliott.

Q. Where is Canemah?

A. Canemah is just about three quarters of a mile south and west of Oregon City on the bank of the river.

Q. Is it on or off the line of the Oregon and California Railroad Company?

A. The mill was erected immediately adjoining the Oregon and California Railroad Company's line. I believe the bluff is narrow there, and there was just room for the tracks between the mill and the point of the bluff, and it was operated there for a number of years cutting timber for the railroad company.

Q. Do you know the relation of Gardner Elliott to Simon G. Elliott, the partner of Ben Holladay in 1869?

A. I think they were brothers,—that is my understanding.

Q. What number, if you know, was given to this saw mill that was on these premises that are in dispute or

do you remember what number they called it?

A. No, I do not.

Q. Do you, or do you not recall that there were some other mills operated by Ben Holladay and Company,—one at the car shops or where the car shops now are and one at Milwaukie and one over on the road southeast of Milwaukie across the flat, or have you any recollection of this matter?

A. I will state that I have this recollection about that part of it that Mr. Holladay was very anxious to complete the initial portion of the road and that he had a number of mills operating in conjunction with the road.

Q. In carrying on this work?

A. Yes, sir, to secure the necessary timber and ties for the road.

Q. Did you see, or did you not see any of the ties being hauled from this mill on these premises to the railroad track between Milwaukie and Clackamas station?

A. Yes, I saw them hauling ties when I was there, and I know that they hauled ties from the mill to the railroad track, and I think they distributed them by teams,—considerable of the time. Most of the timbers that were used in the construction of the Clackamas bridge,—that was a wooden bridge originally,—most all of those timbers were cut at this mill and hauled from the mill to the railroad track and were run up the track to the Clackamas River, and were there used in the construction of that bridge, and some of them, I think, were transported on up and used as far as they operated.

No Cross Examination.

Witness excused.

Mr. J. T. O'Brien is called as a witness for the defendant, and being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination.

Questions by Mr. Henry Conlin.

Q. Mr. O'Brien, you are at the present time Vice-President and general manager of the Southern Pacific lines in Oregon?

A. General Manager,—not Vice-President.

Q. How long have you held that position?

A. About five or six years.

Q. Do you know the piece of land that is involved in this suit described and generally known as the Holladay tract and which is described as the north $\frac{1}{2}$ of the north-east $\frac{1}{4}$ of section 32, and substantially all of the southeast quarter of section 29, as shown on this map introduced by Mr. Fenton, and marked complainant's exhibit 1?

A. I do in a general way. I have never been on the ground, but I know its location on the map.

Q. Do you know its location on the ground with reference to the line of railroad that is now the Oregon and California Railroad?

A. I do, yes sir.

Q. Do you know the distance it is from there?

A. I should say that it was about a mile and a half,—I do not know exactly,—it is quite a distance away.

Q. During the time that you have been general manager of the Southern Pacific lines in Oregon, including the Oregon and California Railroad, has the railroad company ever used any of this land for railroad purposes?

Counsel for complainant objects to the question as irrelevant and immaterial.

A. I know of use they have put it to from an operating standpoint.

Q. Not from an operating standpoint?

A. No.

Q. Do you know of any use that the railroad company would ever have of the land for operating purposes?

A. Not unless there is timber on it, or something of that kind that they would need to get material or for gravel.

Q. That would hardly be for operating purposes?

A. No.

Q. My question was for use in the operation of the road.

A. No, I do not, unless they could get timber or if we found gravel we might use it for maintaining the present line.

Q. Mr. O'Brien, you verified the complaint in this case?

A. I would have to see my signature first.

Q. We have not got the original, we have the copy, (handing same to witness).

A. Yes.

Q. Did you read it?

A. Yes sir.

Q. This complaint alleges that the tract of land involved in this suit was taken possession of by the Oregon Central Railroad Company on March 28th, 1870, as a positive fact, and in verifying this as a fact of your own knowledge, or upon information and belief,—I would like

to know whether or not that statement is verified by you as of your own knowledge, or upon information and belief?

Counsel for complainant objects to the question as incompetent, irrelevant, and immaterial.

A. It was based on records that were furnished me, I did not know it really, because I was not here at that time. I verified it from records, information, and data, that was furnished me.

Q. Was there any data furnished you other than the complaint?

A. I do not think so,—I do not think it was furnished me.

Q. Now it is formally alleged in this complaint to have been transferred by Ben Holladay and Company on March 28th, 1870, to the Oregon Central Railroad Company, and to have been delivered,—you did not mean to verify this complaint as to that feature of it upon your own knowledge?

Counsel for complainant objects to the question as immaterial.

A. No, not by personally seeing the document.

Q. I will ask you one question and you can answer it in a general way,—state whether or not all matters stated in this complaint with reference to this tract of land including the execution or delivery or possession or existence, or loss of the instruments alleged in here or any of them are known to you of your own knowledge or whether it is all based upon information and belief.

A. It is all based upon information furnished.

Q. And as to any possession which the railroad com-

pany claims to have had of this land that is based upon information also?

A. Yes.

Cross-Examination.

Questions by Mr. W. D. Fenton.

Q. You have not yourself gone out to that place and taken charge of this land and set down upon it?

A. No.

Q. You have not gone out to this land, and taken physical, bodily possession of it yourself?

A. No.

Q. Counsel asked you if this land was needed for operating purposes,—you cannot undertake to say and do not undertake to say that it was not needed for operating purposes or for construction purposes in 1869 and 1870, and later years?

A. No, I do not.

Q. And it might even now be needed for gravel or for timber for the operation of the road?

A. Yes.

Redirect Examination.

Questions by Mr. Henry Conlin.

Q. But they do not need it at the present time?

A. Not at the present time,—not that I know of. I do not think that we have ever prospected it very thoroughly—we have merely examined the outside. We have purchased an adjacent piece of ground for the purpose of getting gravel and such stuff as that for ballasting purposes, which is a part of the operation of the line.

Recross Examination.

Questions by Mr. W. D. Fenton.

Q. Do you know, Mr. O'Brien, of your own knowledge that there are one or two gravel pits on this ground from which gravel has been taken for graveling the road,—have you any knowledge on that subject?

A. I simply know in a general way in discussing the question of getting ballast for our line,—somebody told me I do not know just exactly who that there was gravel out on this land, but we would have to build a line to the tract and also secure the right of way to reach it if we would attempt to use it for that purpose.

Q. Are you acquainted with the character of land in that vicinity as to whether or not there is a gravel bed on the land or not?

A. Not sufficiently to answer the question thoroughly.
Witness excused.

Mr. Koehler is called as a witness for the complainant, and being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination.

Questions by Mr. W. D. Fenton.

Q. State your name, age, residence, and occupation.

A. Richard Koehler, age sixty-seven, residence 72 North Nineteenth street, Portland, Oregon, occupation purchasing agent of the Oregon and California Railroad Company, and Southern Pacific lines in Oregon.

Q. Please state to the court, Mr. Koehler, when you first came into relationship with the properties of the Oregon and California Railroad Company, and the record of the Oregon Central Railroad Company of April 22nd, 1867, the predecessor in interest of the Oregon and California Railroad Company, being a railroad now operated

by the Southern Pacific Company, and in what capacity did you first come to have any connection with this property?

A. I came in connection and relationship with these properties of the Oregon and California Railroad Company in July, 1874. I was sent over from Germany, as agent of the committee for the protection of the holders of the bonds of the Oregon and California Railroad Company, and I came into relationship with the Oregon and California Railroad Company as auditor and chief engineer, and I was also made a director of such company.

Q. Just describe to the court your duties and occupation in a general way in connection with these properties,—how familiar you became with these properties of the Oregon and California Railroad Company, and with the agreement and records of that company, and with the agreements and records of the predecessor of that company, the Oregon Central Railroad Company of Salem, just describe in a general way your opportunities to know about the properties and about the records, documents, vouchers, and so forth?

A. I had an office in the building of the Railroad Company and came in daily contact with its officials,—the superintendent and the treasurer,—with the transportation department and with the passenger agent and so forth, and I kept a set of books and checked the account of the railroad minutely, and made a monthly statement of the company and of the earnings which were turned over to me for remittance to the committee in Frankport on the Maine, in Germany, and in my capacity as chief engineer, I made trips over the line from

time to time, and I had also supervision over the land department affairs of the company.

Q. What jurisdiction did the land department exercise over the lands of the Oregon and California Railroad Company, and what classifications, if any, were adopted and continued in use?

A. That was in 1874 and '76. The land department at that time attended to the administration of the land grant lands and such other lands which the company had as town lots, and such things.

Q. Now state what other positions,—official or otherwise that you sustained to the Oregon and California Railroad Company or to these properties after you relation as agent and representative of the bondholders or of the Frankfort committee discontinued,—or during the time of its discontinuance,—if you had a dual relationship to the properties?

A. In 1876 we made an agreement with Ben Holladay, who up to that time was the principal stockholder in the Oregon and California Railroad Company, and also the principal stockholder of the Oregon Central Railroad Company, by which he sold his capital stock in the companies to the Frankfort Committee.

Counsel for defendant objects to this evidence for the reason that the agreement was in writing and the agreement itself is the best evidence, and the testimony is incompetent, irrelevant, and immaterial, and it is understood that all of this testimony goes in subject to the same objection without the necessity of repeating the same.

A. (continued) The Frankfort Committee then took control of the road through its officers—Mr. Henry Vil-

lard was then elected President and I was elected Vice-President of the Oregon and California Railroad Company, and soon the position of Manager of the property.

Q. And you were also a director of the Oregon and California Railroad Company during this time?

A. Yes, and I was Vice-President and director.

Q. Now, in these capacities, how familiar were you, or did you become with the properties of the company, and with the agreement and record of that company, and with the agreement and records of its predecessor, the Oregon Central Railroad Company of Salem, and with the land department and with the management, supervision and general control of the lands of the land department,—state the course of business and your familiarity and knowledge of such matters.

A. I had charge of the properties of the company here in Oregon, and as such took frequent opportunities to look into the records and minutes of the company, and of its corporate books. There was a special land agent appointed who under the direction of the president and under the direction of myself carried on the land business, and the business of the land department, which, at that time, was exclusively that of the land grant lands acquired under the grant from the United States Government.

Q. I call your attention to the fact that among other records produced here and identified is a book marked complainant's exhibit No. 7, purporting to be the minute book of the Oregon Central Railroad Company of Salem, and beginning with page 1, April 22nd, 1867, and extending to and including page 208—the first 134 pages of

this minute book being apparently in the handwriting of S. A. Clark, secretary, and the succeeding pages from 136 to 208, being attested to by I. R. Moores, president, and J. E. Cole, Secretary—did you know S. A. Clark, Secretary?

A. I did.

Q. When did you become acquainted with him,—how soon after you came to Oregon?

A. I cannot say how soon after my arrival, but I should think within a year or two.

Q. Did you ever see this minute book and was it under your general supervision and control during the time you were connected with this company?

A. Well, it was in the Secretary's control in the vault in which were kept the documents and books of the company.

Q. State whether this book and the book which purports to have been kept by the officers of the Oregon Central Railroad Company, was in the custody of the secretary at the time you first came to this property?

A. Yes,—and this book, which I understand to be the minutes of the Oregon Central Railroad Company was in the custody of the secretary of the Oregon and California Railroad Company.

Q. Did you, as an officer of the Oregon and California Railroad Company act upon it as such official record of the Oregon Central Railroad Company?

A. Yes.

Q. Do you know, or do you not know, the handwriting of S. A. Clark, secretary of the Oregon Central Railroad Company?

A. Yes sir.

Q. Are you able to say from the examination of the minutes, from page 1 to 134, both inclusive of this book, complainant's exhibit 7, that the signature, or purported signature of S. A. Clark to those minutes is his signature?

A. Yes, that is my recollection of the signature of Mr. Clark?

Q. These signatures purporting to be the signatures of S. A. Clark, secretary, found in these minutes upon the pages indicated, you recognize as the signature of S. A. Clark?

A. Yes.

Q. Did you know George E. Cole in his lifetime?

A. I did.

Q. When did he die,—if you know, about when?

A. I do not know, I think it was about four years ago.

Q. Did you know him while he was connected with the Oregon Central Railroad Company?

A. No.

Q. I call your attention to the minutes in this book, plaintiff's exhibit 7, beginning with page 136 down to and including page 208, which purports to be signed by George E. Cole, secretary, and by I. R. Moores, president,—did you know I. R. Moores?

A. I did.

Q. You were acquainted with I. R. Moores in his lifetime?

A. Yes. He was up until his death clerk in the land department of the Oregon and California Railroad Company.

Q. Please state to the court whether or not the purported signature of George E. Cole, secretary, and of I. R. Moores, president, that appear in this minute book are the genuine signatures of George E. Cole, secretary, and of I. R. Moores, president?

A. Yes. I recognize these signatures as the genuine signatures of the two gentlemen named.

Q. I call your attention particularly to the meeting of the Oregon Central Railroad Company, recorded at pages 162 down to and including page 208,—being the minutes of the meeting held March 28th, 1870, and March 29th, 1870, respectively, and will ask you if you know in whose handwriting the minutes are beginning about the middle of page 162, and running through to the conclusion of the minutes of that meeting to the signatures of the officers, do you know whose handwriting that is?

A. No, I do not.

Q. I call your attention particularly to the instrument set out at page 175 of these minutes, and page 176 purporting to be a copy of an agreement signed by Ben Holladay and by C. Temple Emmett by Ben Holladay, attorney in fact, and by Ben Holladay and Company by Ben Holladay and will ask you if you ever saw the original agreement of which that purports to be a copy, and if not, what has become of the original agreement if you know?

A. I do not recollect to have seen the original of that.

Q. State to the court whether or not the record of that instrument as it appears on those pages has been in this book ever since you first saw this book in the same condition in which it now is?

A. Yes, I believe so.

Q. I call your attention to the pencil memorandum on the margin of page 175 "B. Holladay and Company," and I will ask you whose handwriting that memorandum is, if you know?

A. That is the handwriting of George H. Andrews.

Q. Who was George H. Andrews?

A. Secretary of the Oregon and California Railroad Company.

Q. What relation did he sustain to the land department of the Oregon and California Railroad Company?

A. He was also land agent.

Q. Did you know Ben Holladay personally?

A. I did.

Q. Did you know the firm of Ben Holladay and Company?

A. No, I did not know them.

Q. Did you know anything about this mill No. 3 that has been referred to in the testimony of this case, and what became of that mill, or was there any such mill after you came to these properties to your knowledge?

A. I never have seen the mill—I have been told in inquiring into the affairs of the company that there was such a mill.

Q. When did you first have any knowledge that there ever had been such a mill on these lands referred to in complainant's exhibit 1 and known as the land involved in this suit,—about when would you say that you first knew of the mill?

A. I think that in the period of four or five years or from one to five years from the time I became connected

with the property I heard talk about this mill.

Q. That is from 1874 to 1879?

A. Yes.

Q. I now show you minute book No. 1 of the Oregon and California Railroad Company, which has been introduced in evidence as complainant's exhibit 14, and will ask you to look at this minute book from page 6 to and including the top of page 95, where the signature of Ben Holladay appears and the signature of A. C. Cunningham and I will ask you if you recognize that as the first minute book of the Oregon and California Railroad Company, and if it was recognized by you as such and in your custody or accessible to you as an officer of the Oregon and California Railroad Company from 1874 down to the present time?

A. Yes sir. This is the minute book of the Oregon and California Railroad Company for the period shown therein.

Q. Did you know A. G. Cunningham, who purports to be secretary of the Oregon and California Railroad Company as shown in this minute book?

A. Yes.

Q. When did he die?

A. I do not recollect.

Q. He is dead?

A. He is dead, yes.

Q. Do you know his handwriting?

A. Yes.

Q. Do you know the handwriting of Ben Holladay?

A. I do.

Q. I call your attention to the signature of A. G. Cunningham, secretary, and Ben Holladay, president, to the minutes recorded in this book, complainant's exhibit 14, from pages 6 to and including page 95 and will ask you whether or not the signature purporting to be the signature of A. G. Cunningham as secretary is or is not his genuine signature?

A. Yes, it is.

Q. What do you say with reference to the purported signature of Ben Holladay, president, covering the same period of time, and the same pages of this minute book?

A. That is the handwriting and signature of Ben Holladay as president and is his genuine signature.

Q. I call your attention to this minute book, beginning with page 183 purporting to be a record and minutes of the meeting of the Board of Directors of the Oregon and California Railroad Company of April the 19th, 1876, and purporting to end at page 224, and purporting to be signed by A. G. Cunningham, secretary, and Henry Villard, President, and I will ask you if you knew Henry Villard?

A. I did.

Q. In what capacity was he acting at that time, and what relation did he sustain to this company?

A. He was a member of the committee for the protection of the bondholders of the Oregon and California Railroad Company and was elected President in 1876, when we took control of the property.

Q. President of the Oregon and California Railroad Company?

A. Yes.

Q. I show you what purports to be the signature of the president at page 224 of this minute book, and I will ask you whether or not that is his genuine signature?

A. That is his signature.

Q. And the signature of A. G. Cunningham, President, is his signature?

A. Yes sir.

Q. I call your attention to the purported agreement of February 29th, 1876, apparently transmitted to the president and board of directors in the letter of Henry Villard of date April 19th, 1876, and which purported agreement is found at pages 191, 192, 193, 194, and subsequent pages of these minutes, and particularly to the eighth clause of this agreement found on page 194, where these words appear: "And the said Holladay further covenants and agrees with the said parties of the second part that the books of account of the Oregon and California Railroad Company and the Oregon Central Railroad Company are to the best of his knowledge full, accurate and true and that the trial balance and monthly statement of January, 1876, are as he believes full, accurate and true and that there are no other legal and valid claims against either of said railroad companies of which he has any knowledge or notice excepting only sundry small claims for right of way and certain claims of Hallett and Elliott which have been made known to the parties of the second part, and that there are no contracts with or for salaried officers or other officers except for the ordinary services and salaries of the current year, and that there are no

contracts which do not expire at the end of each fiscal year and which have not been made known to the parties of the second part, and the said Holladay further covenants and agrees with the parties of the second part that the books of account of the Oregon Steamship Company so far as he knows and believes are accurate and full and that there are no debts or claims due by said company so far as he, said Holladay, knows and believes, which are not fully known to M. S. Satham, and the only debts which he, said Holladay, has any knowledge or information apart from the current monthly bills and repairs and the debt of the European Creditors represented by said Satham is what may be due for current salaries, supplies, and pay rolls, and said Holladay further covenants and agrees for himself, his heirs and legal representatives that he will on demand either convey to the Oregon and California Railroad Co. to the Oregon Central Railroad Company, to the Oregon Steamship Company and to the Scotland Ware-House and Dock Company Company or to any of them, or else as the case may be will take all necessary legal proceedings in conjunction with said corporation or any of them for the purpose of compelling the transfer to said companies or any of them of any real estate or other property or right which equitably belongs to said company, or any of them (if any such rights or property there be) but which may now be held by or stand in the name of said Holladay or any other person or persons or corporations in trust, having been purchased for said corporation or conveyed to him for their use." And I will ask you where the original instrument

of which this purports to be a copy is if you know, and explain fully the circumstances under which that agreement was made?

Counsel for defendant objects to the question as incompetent, irrelevant, and immaterial, and upon the further ground that it is not the best evidence, and no foundation laid.

A. Well, this agreement was made after we had seen the impossibility of getting along with Mr. Holladay, who, up to this time, was still in control of the road, and he had failed to pay his share of the interest coupons which fell due and which he had agreed to make good to some extent, and there were a great many other controversies arising in which we could see that our interests would be injured and instead of foreclosing under the first mortgage coupon or bond coupon, which were then overdue, it was deemed best to adjust this matter by buying Mr. Holladay out, and this agreement here shows the terms under which the settlement was made.

Q. Was such an agreement in fact executed by the parties who purport to have executed it?

A. Yes.

Q. What is the fact, if you know, as to whether or not the Oregon and California Railroad Company received the document in duplicate as stated in Mr. Villard's letter, and as appears in these minutes at the time of the execution of the instrument as indicated in the minutes?

A. The copy of the agreement was received.

Q. Where was the agreement received, if you know?

A. From Mr. Villard.

Q. This letter referred to in this minute book appears to be addressed to the president and Board of Directors of the Oregon and California Railroad Company, and appears to bear date April 19th, 1876,—it appears to be dated at Portland, Oregon, April 19th, 1876, and this meeting apparently was held on the 19th of April, 1876, the same day,—were you a member of the Board of Directors, and were you at that meeting?

A. I was.

Q. I call your attention to page 184, which purports to show a telegram from Ben Holladay of date April 18th, 1876, addressed to Secretary Cunningham, dated Washington, D. C., declining the position of director of the Oregon and California Railroad Company, and declining to qualify,—do you have any personal recollection now of a telegram having been received as stated in these minutes?

A. I do not recall about these details, but I feel sure that we took action on this telegram as shown by the records.

Q. I note that the minutes at page 184 show that Mr. Koehler appears to have nominated Mr. Henry Villard a stockholder in this company to fill the vacancy caused by Mr. Halsey ceasing to be a stockholder, and that he was unanimously elected such director, and that the vacancy caused by the resignation of Mr. Holladay was not acted upon but laid over to the next meeting by consent and that Mr. Villard qualified as director on that date—do you recognize the signature at the bottom of page 184 as his signature?

A. Yes.

Q. Then, Mr. Villard was apparently nominated as president and elected at that time as president at that meeting of the board, and that George W. Weidler acted as chairman, as shown by these minutes,—now refreshing your memory from these minutes, which purport to show that this letter of Mr. Villard was presented to the meeting in person and acted upon by the board at the time at a meeting in which he was present?

A. Yes, I think he was present in person.

Q. I notice that his letter terms this a copy of a contract entered into February 29th, 1876, between Ben Holladay party of the first part and Heinrich Hohenemser, and others who are named,—who was Heinrich Hohenemser?

A. He was a member and chairman of the committee for the protection of the bondholders.

Q. Who were these other parties, whose names appear as parties of the second part?

A. They were all members of the same committee.

Q. Where did they reside?

A. Most of the members resided in Frankfort, Germany, Adolph Otto resided in Damstadt, Germany, and I believe Michael Benjamin resided in Holland somewhere, and Carl Stachelin resided in Basle, Switzerland, but my recollection of the residence of these three mentioned members is somewhat indefinite.

Q. Where was Ben Holladay on February 29th, 1876, so far as you know?

A. I believe he was in Washington.

Q. I notice that this document appears to have been

signed by these parties by Henry Villard as attorney in fact, and Ben Holladay by H. Hampton, his attorney in fact,—who was H. Hampton?

A. Mr. Hampton was an employee of the Oregon and California Railroad Company.

Q. Is he living, or is he not?

A. He is dead.

Q. Do you know where this original agreement could be found at this time?

A. I do not know positively, but I believe it is in the Bank of California in San Francisco, unless it was burnt up by the fire.

Q. If it was ever in the Bank of California, in San Francisco, California, it was there prior to the date of the fire and general conflagration of April 18th, 1906?

A. Well, this document, as I understand it, has been in the London and San Francisco Bank in California, which was the bank in which Mr. Milton S. Latham, whose name appears in the minute book of the Oregon and California Railroad Company was president, and so I believe that the agreement is in the bank of California because the London and San Francisco Bank sold out to the Bank of California, and I should think that all documents, which had been delivered to them were turned over to that bank.

Q. Do you know when the fire and earthquake and general conflagration occurred in San Francisco?

A. April 18th, 1906.

Q. If this document was ever in the custody of the London and San Francisco Bank between February 29th,

1876, and April 18th, 1906, it was prior to the last named date?

A. Yes.

Q. Do you know whether or not that document is now in existence?

A. I do not.

Q. You do not know whether it was destroyed in that general conflagration or not?

A. No sir.

Q. Did the Oregon and California Railroad Company act upon this copy as a true copy of the original?

A. Yes.

Q. Was Ben Holladay thereafter a stockholder or officer of the Oregon and California Railroad Company to your knowledge?

A. No, he ceased to be a stockholder or officer.

Q. State to the court whether or not that agreement of which this record purports to show a copy has at any time ever been questioned, or called in controversy by Ben Holladay or any of his heirs or representatives?

Counsel for defendant objects to the question as incompetent, irrelevant, and not the best evidence, and as leading.

A. Not to my knowledge.

Q. I now show you complainant's exhibit 8, purporting to be a summary record of deeds, contracts, agreements, and so forth belonging to the Oregon and California Railroad Company, and particularly to the following entries on page 53, No. 31, under the column, "Date, 1869, October 5," under column, "Party of the First Part, Gardner Elliott,"—under the column "Party of the Sec-

ond Part, Ben Holladay and Company, and I will ask you in whose handwriting that entry is and by whom it was made, if you know, and about when this entry was made, and for what purpose?

A. This is in the handwriting of F. G. Ewald, who was at that time in the employ of Mr. George H. Andrews, secretary and at the same time of the Oregon and California Railroad Company.

Q. When did Mr. George H. Andrews first become secretary of the Oregon and California Railroad Company, if you recollect?

A. I do not recollect,—I think it must have been the year 1884.

Q. When did Mr. F. G. Ewald first enter the employ of the Oregon and California Railroad Company, either with Mr. Andrews or with you?

A. Well, he came to the Oregon and California Railroad Company, or with me, rather, in 1879.

Q. In what capacity?

A. He was clerk in my office,— chief clerk until 1883.

Q. Is he living or dead?

A. He is dead now,—in 1883 he was transferred to the land department.

Q. What is the fact as to his continuing in the employ of the land department under the direction of Mr. Andrews until the time of his death, or about that time?

A. Well, he staid in the employ of Mr. Andrews until he was pensioned.

Q. About when was that?

A. I do not recollect exactly, I should think perhaps in 1902.

Q. Now, what was the occasion for the making of this record, which contained about 235 or 236 pages with the heading on each page printed, "Oregon and California Railroad Company, Record of deeds, contracts, agreements, &c" and a column headed "Date—party of the first part—party of the second part—consideration—remarks", and under those various columns, a number of deeds, papers, &c.—when was this record first begun to be kept, and what was the purpose?

A. I do not recollect the exact date, but I think it must have been in 1883, or 1884, that we started this record, and the purpose was to have a complete index to all the important papers belonging to the company.

Q. I notice that this particular instrument was a warranty deed of certain land in Clackamas County, of date October 5th, 1869, from Gardner Elliott and wife to Ben Holladay and Company, and I will ask you to state whether or not that instrument was at that time—I mean at the time when this book was first begun to be kept—in the custody of the officers or of the secretary of the Oregon and California Railroad Company?

Counsel for defendant objects to the question as incompetent, irrelevant, and immaterial, and as calling for a conclusion of the witness, and not the best evidence, and as leading.

A. It certainly was.

Q. I call your attention to an entry at page 79 on this same record, complainant's exhibit No. 8, under the same printed heading, which reads,—“November 19, '68,” under the date column, and under the heading, “Party of the first part—James Grindley,” and under

the heading "Party of the Second Part," Ben Holladay and Company, and under the heading, "Synopsis of Instrument" bill of sale of fir trees, on certain land in Clackamas County, and under the heading "Consideration" the figures \$20.62, and also to No. 26, under column "Date 69, May 4th," and under the words "James Grindley" the words "Do and wife," under the column "Party of the Second Part" the words "Ben Holladay and Company," under the column "Kind of Instrument," or "Synopsis of Instrument," "Warranty deed for 149.91 acres of land in Clackamas County," under the column "Consideration" \$187.30, under the column "Remarks," the words "Signed only by James Grindley."

Also No. 27, under the first column 69—August 5th, under the column "Date of Instrument," under the column "Party of the First Part" the Government, under the title "Party of the Second Part," James Grindley; under the column "Synopsis of Instrument," the words "Conveying 149.91 acres of land in Clackamas County," and will ask you in whose handwriting these words are?

A. They are in the handwriting of F. G. Ewald.

Q. When were they made?

A. I cannot tell you, I presume they were made either in 1883 or 1884.

Q. About the same time?

A. About the same time.

Q. What was the object of making these entries in this book, and keeping this book?

A. I have already stated what the object was in making and keeping this book.

Q. At the time that these entries were made, state

whether or not the Oregon and California Railroad Company by its secretary and land agent had in its possession these documents referred to?

A. It did.

Q. Where has that book been since the time these entries were made,—in whose custody has it been?

A. In the custody of the secretary for the time being, whoever it was.

Q. The secretary of the Oregon and California Railroad Company?

A. Yes.

Q. I show you complainant's exhibit 17, purporting to be the time book of the pay roll of mill No. 3, and other mills of Ben Holladay and Company, and will ask you whether you ever saw this book in the custody of the secretary of the Oregon and California Railroad Company?

A. I do not recollect that I ever saw that.

Q. I now show you complainant's exhibit 1, purporting to be and being a township plat of township 1 south, range 2 east upon which is entered thereon the land in controversy in this suit, being lots 5 and 6, and the east $\frac{1}{2}$ of the southeast $\frac{1}{4}$ of section 29, and the north $\frac{1}{2}$ of the northeast $\frac{1}{4}$ of section 32, township 1 south, range 2 east of the Willamette Meridian in Clackamas County, Oregon, and referred to in some of the testimony in this case as the Ben Holladay Company tracts or tract,—the first tract being cash entry 641 of J. or James Grindley, and the second tract being cash entry 693 of G. Elliott, or Gardner Elliott, and upon which there has been some testimony tending to show that there was a mill known as

mill No. 3 of Ben Holladay and Company one time, and I will ask you if you have any knowledge or recollection of these lands, and if so, what character of land it is as to classification and where it or how it has been treated by the Oregon and California Railroad Company from the time you first came in connection with the company?

A. I remember to have seen a plat which shows these lands in the land office of the Oregon and California Railroad Company in one of the township books which they had,—they are of record with all the lands enuring to the company under the land grant, and the name of these parties there,—Gardner Elliott and James Grindley were marked.

Q. What classification did these lands come under?

A. They had really nothing to do with the land department,—the land department as such did not really attend to the administration of these and other lands which were called miscellaneous lands,—it was always included with the miscellaneous land, and the secretary for the time being had charge of these lands and they were called miscellaneous lands, and these lands were classed under that head.

Q. In what way were the taxes on lands owned by the Oregon and California Railroad Company, and classed and known as miscellaneous lands, ascertained, and vouchers paid from time to time from the time you became connected with this company from 1874 down to the time you discontinued your connection with the land department?

A. In the beginning the secretary of the company paid these taxes, and after Mr. Andrews took charge of

the secretaryship and became land agent all taxes and tax matters were really attended to by his office.

Q. In what way, if any, did you become connected with, or know about the payment of these taxes,—what action, if any, were you required to do, or did you take to see that these taxes were paid?

A. It took my signature as manager so long as they were paid to the secretary, and in fact, at all times, it took my signature to the voucher.

Q. I note from the records introduced in this case that you were appointed receiver of the property of the Oregon and California Railroad Company in the suit of

.....
and others against the Oregon and California Railroad Company pending in the Circuit Court of the United States for the District of Oregon on the 19th day of January, 1885,—did you take physical possession as receiver of these properties?

A. I did.

Q. In what capacity were you acting at the time of your appointment as receiver,—what position did you hold in the Oregon and California Railroad Company,—or what office did you hold?

A. I was either first or second vice-president, I do not recollect, and I was manager.

Q. Were you a member of the Board of Directors of the Company?

A. Yes, I was.

Q. Now, at that time as such receiver I notice that you made a report pursuant to the order of appointment covering a period from January 19th, 1885, up to Febru-

ary 18th, 1885, which has heretofore been introduced in evidence, marked complainant's exhibit and that therewith you filed schedule L, the original of which report and schedule I now show you, and call your attention to the following language of schedule L:—"Oregon and California Railroad Company,—R. Koehler, receiver,—schedule of lands, showing property represented by miscellaneous lands. Account 1 Title in Oregon and California Railroad Company, Clackamas County." Omitting property not material "80 acres south of Milwaukie, comprising the north half of the northeast quarter of section 32 T. 1 S. R. 2 E. W. M. 149 90/100 acres south of Milwaukie, comprising the east half of the southeast quarter and lots 5 and 6 of section 29 T. 1 S. R. 2 E. W. M." and I will ask you what the fact is if you know as to whether or not the Oregon and California Railroad Company at that time claimed to be the owner in fee simple of that property and claimed to be in possession of the same?

A. Yes, the Oregon and California Railroad Company at that time claimed the ownership of this land.

Q. From what sources did you obtain this information that is contained in this schedule L and this report of yours to the Federal Court,—I mean as to the property of the company?

A. From the files and from the records in the office, which as far as miscellaneous lands were concerned, consisted of the entries in certain books which were kept for that purpose.

Q. What can you say as to the length of time this had existed and how continuous has been the claim of the Oregon and California Railroad Company to the

ownership of this property in fee simple, and how long has such claim to your knowledge?

Counsel for defendant objects to the question as leading and argumentative, and as calling for a conclusion of the witness, and as incompetent, irrelevant and immaterial.

A. From the time I became connected with the company in 1874, this land has always been claimed by the railroad company.

Q. State to the court what claim, if any, the defendant Mary d'Grubissich, being the granddaughter of Ben Holladay, and alleged devisee, under his will, ever made to any interest to that property at any time until the commencement of this suit?

Counsel for defendant objects to the question as leading and as calling for a conclusion of the witness, and as incompetent, irrelevant, and immaterial.

A. I do not know of any claim ever having been made.

Q. I call your attention to complainant's exhibit 6 purporting to show a transcript of the assessment rolls covering this property from the year 1869 to and including the year 1910, and purporting to show the assessed valuation,—taxes paid,—to whom assessed,—by whom taxes paid, and giving the receipt number, and I will ask you to state what the fact is, if you know, as to whether or not these taxes were paid from the time you first became connected with the company in 1874 or '75 up to the time you discontinued your position as manager of the properties, I think, in 1904?

Counsel for defendant objects to the question as leading and as calling for a conclusion of the witness, and as

incompetent, irrelevant, and immaterial.

A. It is my firm belief that those taxes were paid by the company.

Q. In the conduct of its business, if these taxes had not been paid by the company would you have had notice of it from some of your subordinates?

A. I should have received notice that there was an omission.

Q. Do you know, or, have you ever known of any one else paying the taxes upon this property and particularly of the defendant, Maria D'Grubissich ever having paid the taxes upon this property?

A. No,—I do not know of any one.

Q. What knowledge have you of the physical characteristics of this property, if any, from personal inspection,—were you ever on the premises?

A. I was once on the premises.

Q. State when, and the occasion of your going there.

A. I have only a rather dim recollection of that,—I think it was between 1890 and 1900.

Q. What was the occasion?

A. I think we were looking for wood, and the question was whether we could cut some wood upon these premises for locomotive purposes.

Q. Were you on the premises,—did you go and examine the property with this end in view?

A. I was on the premises but only on a very small part of it.

Q. What knowledge, if any, have you of a survey having been made by Sidney Smith or his deputy in 1894, and do you have any recollection of having had

anything to do with this survey, or with directing to have the same made or with the payment, or with the indorsement of approval of the voucher or the payment of the bill?

A. I have a very dim recollection that this matter was discussed before the survey was made.

Q. Was your attention ever called to the gravel or gravel bed upon these premises by any one, and if so, state when, and the circumstances under which this matter came up?

A. Yes, some parties called my attention to the fact that gravel had been taken away from this land by Clackamas County.

Q. When was this,—about when?

A. I think it was the latter part of the last century,—the last three or four years preceding 1900, or perhaps 1900.

Q. What adjustment, if any, was made between the company and Clackamas County as to that matter, if you recollect?

A. The matter was hanging fire for quite a while, and finally we made an adjustment by the county paying us a certain royalty on the estimated yardage which they dug.

Q. Now, Mr. Koehler, you have had experience as an operating official of this railroad for a great many years,—have you, or not, some knowledge as to the adaptability of this land for gravel, or for ballast for railroad purposes?

A. Do you mean general knowledge?

Q. Yes.

A. Yes, I have hunted up a great many gravel beds.

Q. What would you say as to whether or not this land would be, or might be available if necessary for gravel, or could be used by the railroad in railroad construction, or for ballast, if accessible?

A. I could not say because I have not examined the land sufficient enough.

Q. What knowledge, if any, have you about a wood contract for cutting wood from these premises, and when was this arrangement made, if there was one made?

A. I have only a general knowledge that some was cut.

Q. You did not have anything to do with the matter personally?

A. No sir.

Q. Have you any knowledge as to how much was cut under this arrangement?

A. No.

Q. Give the date of your resignation as manager of the properties as near as you can?

A. I think it was September 1st, 1904.

Q. State to the court whether or not you have continued as a member of the board of directors of the Oregon and California Railroad Company, and as an officer of that company from that time and if so, in what capacity have you acted?

A. I have continued to be a director of the company up to sometime in July of this year, when, because of a trip to Europe I left my resignation with Mr. O'Brien, which I understand has been acted on, and I also understand that I have been reelected at the meeting yester-

day. I was acting second vice-president for the greater part of the time, but there were one or two gaps in my holding this office.

Q. I will ask you to state, if you know, when, or about when Charles W. Eberlein became connected as acting land agent with the Oregon and California Railroad Company?

A. About 1904,—I cannot give you the exact date.

Q. Whom did he succeed?

A. Mr. George H. Andrews.

Q. Where did he keep the office, and such records of the Oregon and California Railroad Company as he obtained?

A. The office of Mr. Eberlein was located in San Francisco.

Q. Do you have any knowledge of his taking any of the records from the custody of the office here to San Francisco?

A. Only in a general way.

Q. I suppose the minute book will show the date of his appointment as acting land agent?

A. I think so, yes.

It is stipulated by and between the parties that Charles W. Eberlein was appointed acting land agent of the Oregon and California Railroad Company by the board of directors on September 15th, 1904, and that he continued to act as such until theday ofwhen Mr. Henry Conlin was appointed acting land agent and that he acted as such until theday of when Mr. B. A. McAllister was appointed land commissioner, September 21, 1908, and that he is now acting land

commissioner of the Oregon and California Railroad Company, with offices in San Francisco, California.

It is further stipulated that Mr. W. W. Cotton was appointed secretary of the Oregon and California Railroad Company, September the 15th, 1904, to succeed George H. Andrews, whose resignation was accepted on that date, and that Mr. Cotton has continued to act as secretary from that date to the present time, and is now secretary of the Oregon and California Railroad company.

Cross-Examination.

Questions by Mr. Henry Conlin.

Q. Mr. Koehler, you testified, I believe that the agreement, which purports to be copied in that book complainant's exhibit 14 was executed in duplicates,—did I understand you right, and was called the Frankfort Committee Agreement?

A. I do not know whether I said that, but I believe it was executed in duplicate.

Q. And who were the copies given to,—the duplicates,—who had the duplicates?

A. I do not know,—but I think one was in the London and San Francisco Bank and the other was given to Mr. Holladay.

Q. Mr. Holladay had the other?

A. I think so.

Q. This agreement provided, did it not, that Ben Holladay was to turn over all of his stock in the Oregon and California Railroad Company?

A. Yes, sir.

Q. And also all the stock which he controlled, which was practically all of the outstanding stock of the O. C. Railroad Company?

Counsel for complainant objects to the question as incompetent, irrelevant, and immaterial, and not proper for cross examination.

A. Yes.

Q. And also he was to turn over his interest in stocks and bonds in other corporations,—in fact, it was a clean up by Ben Holladay of all of his interests in the various companies, and he was to receive \$300,000 in bonds of the Oregon and California Railroad Company, was he not?

A. Yes, sir.

Q. And he was also to be paid a certain sum of money \$200,000?

A. He received \$300,000 in bonds and in addition thereto he was paid for what was called the Portland Warehouse and Dock Company, which he also turned over the stock for \$250,000.

Q. Now, these bonds were not to be delivered until he had carried out what he had agreed to do in this agreement?

A. Well, I understand the agreement provided what he should do later on.

Q. He was not to receive the money or these bonds until he had performed what he had agreed to do under this agreement?

Counsel for complainant objects to the question as incompetent, irrelevant, and immaterial, and because the agreement speaks for itself.

A. The agreement says that he undertook to do certain things, and in case that it should be found that any property was standing in his name or in the name of any one connected with or belonging to the company then he should turn that over.

Q. That is, property, having been purchased for the company or held in trust?

A. Anything which should be found.

Q. What I am getting at is, he was to receive these bonds and this money and he was to do and perform certain things under the contract before he was paid that money,—that is, he was to turn over what property he had in his name that belonged to the Oregon and California Railroad Company, or any of these other companies.

Counsel for complainant objects to the question as not proper cross examination.

A. No, the agreement does not state that.

Q. Well, at any rate when Ben Holladay gave his bonds in the Oregon Central West Side, he was paid the money that it was provided by this agreement that he should be paid?

A. Yes.

Q. And about the same time did Ben Holladay make a deed,—do you know of some property standing in the name of Ben Holladay and Company?

Counsel for complainant objects to the question as immaterial.

A. No.

Q. That is the fact?

A. No.

Q. In this exhibit 8 there appears to be a paper recorded here,—Ben Holladay and wife to the Portland Warehouse and Dock Company,—you do not know anything about that?

A. Yes.

Q. You know that he did make that deed?

A. Yes.

Q. And that probably stood in his name and was deeded March the 4th, 1876, or about the same time?

A. Yes, I think that is when he received the \$250,000.

Q. About the time this so called Frankfort Agreement is said to have been made, Ben Holladay made this deed to this property, which was then standing in the name of Ben Holladay and Company?

A. It stood in the name of the Portland Warehouse Company and I think Ben Holladay held the majority of stock, or the control of the stock, and he turned this stock over, but I do not think there was any deed made,—I think it was signed in blank.

Q. But the property stood in the name of Ben Holladay and Company?

A. No, it stood in the name of the Portland Warehouse and Dock Company.

Q. Well, this property did stand at one time in the name of Ben Holladay and Company?

A. Never,—I do not think that it ever did.

Q. It shows by the records?

A. No, you are mistaken.

Q. Well, was it not considered that Ben Holladay at the time he received these bonds and this money, provided for by the contract had substantially complied with

all the conditions, and with all that he was required to do under this agreement?

Counsel for complainant objects to the question as incompetent, irrelevant, and immaterial, and because the agreement speaks for itself.

A. No.

Q. But he was paid his money nevertheless,—the full consideration for which he made the agreement?

A. No.

Q. When was he paid the money, and when was he given the bond?

A. I do not know. I think he was paid the money for the Portland Warehouse and Dock Company's stock right at once on the delivery of the stock, and I think the bonds had first to be created,—action had to be taken by the board after the authorization of these bonds, they had to be engraved and they had to be delivered. I do not know when he received the bonds, but probably very shortly afterwards.

Q. According to your best knowledge and recollection of the matter, how long would you say it was after this agreement was executed before the bonds were delivered to him?

A. I cannot recollect,—in fact, I do not know when he did get these bonds, but I should say that it probably took two or three months.

Q. Well, within two or three months the bonds were delivered to him?

A. Yes.

Q. And the money was paid to him right away?

A. Yes.

Q. Was the Oregon and California Railroad Company a party to this agreement?

A. No.

Q. What has become of the bonds that this Frankfort Committee were directed to issue,—are those bonds still outstanding?

A. No.

Q. Is the mortgage securing those bonds still in existence?

A. No.

Q. When was that satisfied?

A. In 1880, I think.

Q. And the bonds were cancelled?

A. Yes.

Q. Surrendered for cancellation?

A. Yes.

Q. So the obligation of this contract then became extinct,—at that time so far as the Frankfort Committee was concerned,—that is, they had no further interest in it?

A. Oh, yes.

Q. In what way?

A. They were the owners of the stock in the Oregon and California Railroad.

Q. Did they own all the stock?

A. They owned the majority of the stock.

Q. How was that stock held,—in the name of these individuals constituting this committee?

A. Yes, the committee held the stock, I think it was all either in Mr. Villard's name or part in my name, and

part in Mr. Villard's name,—the records will show.

Q. Well, how long did they continue to hold that stock?

A. You mean the stock of Holladay's?

Q. The stock of the Oregon and California Railroad Company.

A. I cannot tell you that,—in a general way I will say to make the thing clear that this stock of Mr. Holladay's which was acquired at that time,—twenty millions of it, was cancelled in 1880 or 1881.

Q. Cancelled as having been fraudulently issued without consideration?

A. As never having been paid for, and not as fraudulently issued.

Q. It was issued without consideration?

A. No,—it was issued, and under the laws of the State of Oregon was perfectly legal, but there was a liability of \$20,000,000 on it. The bondholders converted their bonds into preferred stock of the Oregon and California Railroad Company for their bonds and interests in the common stock.

Q. There was a new issue of stock in place of the old issue of \$20,000,000 which had been cancelled because issued without having been paid for?

A. Yes.

Q. That stock was 13,000,000 common stock and 7,000,000 preferred stock?

A. Yes.

Q. Did they get all that stock?

A. Yes, for their bonds and for their interest.

Q. What did they do with that stock?

A. They held it.

Q. They do not hold it now, do they?

A. No.

Q. When did they transfer it?

Counsel for complainant objects to the question as immaterial.

A. The holders transferred it as they pleased, and when they pleased, but it finally found its way into the Southern Pacific Company.

Q. All of it?

A. Not all, there was some still outstanding.

Q. But the stock that was held by the Frankfort Committee was that all transferred?

A. No. It was transferred by the real owners of the stock when they pleased.

Q. Does the Frankfort Committee still exist?

A. No, the Frankfort Committee does not exist any more.

Q. When did it cease to exist?

A. It ceased to exist about the date of the reorganization in 1881. No, I will correct that,—it continued to exist until 1887, at the time when the bulk of the stock was sold to the Southern Pacific Company, or the Pacific Improvement Company.

Q. So I suppose all the duties and obligations and liabilities between the Frankfort Committee and the people for whom they acted, and for whom they held stock in trust ceased at that time?

Counsel for complainant objects to the question as immaterial.

A. You mean the liability under that agreement?

Q. No, I mean as between the Frankfort Committee, and the people that they acted for, and held the stock for in trust,— the people for whom they held the stock in trust and for whom they acted,—as between them and the Frankfort Committee, all liability, and all duties, and all relations ceased when the committee ceased to exist?

Counsel for complainant objects to the question as incompetent, irrelevant, and immaterial.

A. Yes.

Q. Mr. Fenton asked you if when you were appointed receiver you took possession of these properties,—physical possession of these various properties,—do you mean to be understood as saying that you took physical possession of the land in controversy in this case?

A. No, I did not go on the land,—I did not go upon any part or parcel of the property and take possession of the property, but I exercised rights of ownership.

Q. Do you mean to say that you qualified as receiver of these properties and acted in that capacity to manage them?

A. Yes, I filed an inventory with the court.

Q. Mr. Fenton asked you with reference to this exhibit 7 and to some handwriting here, and from the way you answered and from the way the question was asked your answer may be ambiguous,—as I understood Mr. Fenton's question related to the lead pencil memorandum here?

A. Yes.

Q. The lead pencil memorandum upon page 175 of

complainant's exhibit 7 "Ben Holladay and Co." that you say was in the handwriting of Mr. Andrews?

A. Yes.

Q. And you do not mean to be understood as saying that the handwriting on the page indicated was Mr. Andrew's handwriting?

A. No, I do not know who wrote it in fact.

Q. Was I. R. Moores whom you say was clerk in the land department,—was he president of the Oregon Central Railroad Company?

A. Yes.

Q. You say you have known this land for how long a time?

A. Well, from the first few years after I came here to Portland and took office,—since that time.

Q. You became acquainted with it a few years after 1874?

A. Yes.

Q. Was the land ever used for operating purposes by the railroad?

Counsel for complainant object to the question as immaterial.

A. No, not for operating purposes, during my time,—of course I do not know what was done before.

Q. I mean during the time you have known it.

A. No.

Q. Has it ever been either necessary or convenient or would it ever be necessary or convenient for operating the railroad?

Counsel for complainant objects to the question as irrelevant and immaterial.

A. Well, yes, at one time it was rather convenient to cut some wood there.

Q. Except for that it was either necessary or convenient?

A. A man cut some wood for the company for locomotive use.

Q. Except for that it was not used?

A. No.

Q. It was not more used in that respect than any of the other two or three millions of acres of land that the railroad company owned from its land grant?

A. Except it was closer to the track.

Q. There was a good deal of other land close to the track?

A. Not very much.

Redirect Examination.

Questions by Mr. W. D. Fenton.

Q. Mr. Koehler, this property, if it was heavily covered, with timber in 1869, out of which ties and bridge timbers and other railroad material were used in the construction of the railroad and out of which repairs to the road could be made,—what would you say as to whether or not it would be reasonably necessary and convenient,—located as it is, for the purpose of construction of the first twenty miles of this road from Portland south, or for railroad material at any time?

A. It was certainly very convenient.

Q. What is the fact, if you know, as to whether or not the railroad company is constantly requiring in renewal and betterments, bridge material and ties and other tim-

ber of large size for the maintenance of its track, bridges, trestles and other structures?

A. I buy large quantities of it every year for the railroad company.

Q. You said in your testimony, I think, on cross examination that Mr. Holladay at one time owned a majority of the stock of the Oregon Central, and you made reference to the Oregon Central of Portland?

A. Yes.

Q. The West Side?

A. Yes.

Q. Incorporated in 1866?

A. Yes.

Q. And not the Oregon Central of Salem incorporated April 22nd, 1867?

A. Yes, I referred to the Oregon Central of Portland,—I think I said so.

Q. Did Mr. Ben Holladay at any time to your knowledge own any stock of the Oregon Central of Salem?

A. I do not know anything about that.

Q. You have no personal knowledge of the contract that A. J. Cook & Company assigned to Ben Holladay or an interest in that firm about the time that Ben Holladay or the firm was constructing the Oregon Central Railroad Company, except as it appears in the minutes of the Oregon Central Railroad Company of Salem.

A. That is all.

Q. I will ask you to state. Mr. Kochler, what the fact is as to whether or not these miscellaneous lands were held in the name of various persons or individuals during most of the period from 1874, when you became ac-

quainted with the property up to 1905, or about that time,—what is the fact as to whether or not a large number of these lands called miscellaneous lands were so held?

A. Yes, there were quite a number of them held by Ben Holladay, Jr., and some by J. W. Weidler, and some by A. G. Hughes. These lands for stations,—town lots, principally on the Oregon and California Railroad between Portland and Roseburg,—at Junction City and elsewhere.

Q. There were some of these miscellaneous lands also held in the name of George H. Andrews,—townsite lands, etc.?

A. There were some lands that were not miscellaneous lands,—they were lands which come to the railroad company through the construction of its extension from Roseburg south, which were for convenience put in Mr. Andrew's hands.

Q. What was this tract involved in this suit,—by what name was it commonly known among the officers of the company, and in the land department, and by the officers and employees of the Oregon and California Railroad Company?

A. As the Grindley land.

Q. Was it also called the Ben Holladay tract, or the Ben Holladay and Company tract at times?

A. I do not recollect ever hearing it called that.

Q. I notice in this document complainant's exhibit 6 that the property appears to have been assessed in 1880 in the name of Ben Holladay, 160 acres of it, and then in 1902 it appears again in the assessment roll under the

name of Ben Holladay and Company,—have you any knowledge as to how that happened or came about?

A. No.

Q. What is the fact as to whether or not Ben Holladay and Company were in existence at any time after the dissolution of that firm in 1879?

A. I do not know anything about it.

Q. Did or did not Ben Holladay and Company ever have anything to do with the payment of taxes on this land or make any claim of ownership over it since you came in control of it?

A. Not to my knowledge.

Q. Counsel asked you if you took physical possession of these lands as receiver when you made your report to the court, and when you made this schedule L,—did you or did you not take the same possession and make the same claims as to the title as you did the other lands of the Oregon and California Railroad Company?

A. I did. I filed a complete inventory so far as I knew of the property of the Oregon and California Railroad Company.

Q. This report and schedule as I understand it was based upon the records in the office of the company at the time you made this report under oath to the court?

A. Yes.

Q. These lands involved in this suit, as I understand you, Mr. Koehler, were always called or classed as miscellaneous lands?

A. Yes sir.

Q. Did you know Ben Campbell Holladay, and Linda

Campbell Dorcy, two children born to Ben Holladay and Esther Holladay, who lived in this city at one time?

A. No, I do not think I knew them,—I might have seen them.

Q. You have no personal knowledge of them, and you do not know how long they lived in this city?

A. No.

Q. You do not know where they live at the present time?

A. No.

Q. How long was it before the death of Ben Holladay on July 7th, 1887, did you see and know and meet with Ben Holladay, as near as you can recollect?

A. Well, as near as I can recollect, perhaps two years before.

Q. What is the fact, if you know, as to where Ben Holladay resided for several years preceding his death?

A. I do not know where he resided.

Q. Did Ben Holladay in his lifetime and after March 28th, 1870, at any time ever make any claim to any of these lands?

Counsel for defendant objects to the question as leading and as calling for a conclusion of the witness, and as incompetent, irrelevant, and immaterial.

A. Not to my knowledge.

Witness Excused.

Thereupon the taking of testimony herein is adjourned until tomorrow morning, September the 20th, 1911, at 9:30 o'clock A. M.

Portland, Oregon, September the 20th, 1911, 9:30 A. M., at this time appear the parties herein as before, the com-

plainant by Mr. W. D. Fenton, and the defendant by Mr. Henry Conlin and Mr. H. W. Hogue, her attorneys, and thereupon the following proceedings are had, to-wit:

L. F. Steel is recalled as a witness for the complainant and having heretofore been duly sworn, testified as follows:

Direct Examination.

Questions by Mr. W. D. Fenton.

Q. Since you were on the witness stand yesterday,— what search, if any, have you made to ascertain what became of the documents referred to in complainant's exhibit 16, purporting to contain a list of papers sent to J. L. Wilcut, March 13th, 1905, and if you found any receipt showing what became of these documents, please produce the receipt, and state, to the best of your knowledge what became of these documents?

A. The only receipt that I found is the receipt of the express company for eight boxes showing that they were sent to Mr. Wilcut.

Q. Have you that receipt?

A. I have it here.

Q. Please produce that receipt for the inspection of counsel, and the examiner, and I will ask to have the same marked for identification, complainant's exhibit 18.

A. Witness produces receipt.

Q. I will ask you if that is the receipt for the shipment of eight boxes of books and records to J. L. Wilcut, San Francisco, California, dated March 13th, 1905, which you found in the office of the secretary of the Oregon and

California Railroad Company amongst its files?

It is understood by and between counsel that all of this testimony is taken subject to the objection that the same is incompetent, irrelevant, and immaterial.

A. Yes, that is the case.

Counsel for complainant offers in evidence the receipt heretofore marked for identification as complainant's exhibit 18, and the same is received and filed, marked complainant's exhibit 18, purporting to be a receipt of Wells Fargo & Company in favor of Mr. Cotton for eight boxes sent to J. L. Wilcut, San Francisco, California.

Q. Do you know who Mr. J. L. Wilcut was at that time?

A. I do not recall his title.

It is admitted that Mr. Wilcut was secretary of the leased lines of the Southern Pacific Company and resided in San Francisco, California.

Q. Are these books or boxes, or any of them referred to in complainant's exhibit 16 now in the custody of the Oregon and California Railroad Company or the secretary at Portland, Oregon?

A. No sir.

Q. I now show you what purports to be a bill of sale of date November 19, 1868, from James Grindley to Ben Holladay and Company, and will ask you where you found that record or document?

A. In the files of the company.

Q. Is that the same instrument that is referred to in the registry of instruments,—complainant's exhibit 8?

A. It is.

Counsel for complainant offers in evidence the document last shown the witness.

Objected to by Complainant's Counsel as incompetent, irrelevant and immaterial, and not the best evidence and because no foundation has been laid for its introduction.

The document referred to is received and filed in evidence, marked Complainant's Exhibit 19.

Q. You were asked also to look for an instrument called a bill of sale from William Showers to Ben Holladay & Co., of date Nov. 19, 1868, which I now show you and ask you if you found this instrument, and if so, where?

A. Yes, I also found that with the records of the company.

Q. Is that the same instrument referred to in complainant's exhibit 8?

A. It is.

Counsel for complainant offers in evidence the document last referred to by the witness.

Counsel for defendant objects to the same as incompetent irrelevant and immaterial, and not the best evidence, and because no foundation has been laid for its introduction.

The document referred to is received and filed in evidence and marked Complainant's Exhibit 20.

Q. The other documents referred to in Complainant's Exhibit 8 the entries of which have been introduced in evidence, you have looked for and have not been able to find, have you?

Counsel for defendant object to the question as incompetent, rrelevant and immaterial and as calling for a

conclusion.

A. Yes I have looked for them, but I have not been able to find them.

Q. Those are included in the receipt,—complainant's exhibit 9, given by Mr. Eberlein?

A. Yes.

Q. Can you give the date when Mr. Charles W. Eberlein resigned as acting land agent of the Oregon and California Railroad Company, and when his successor was appointed?

A. Mr. Conlin succeeded Mr. Eberlein on June 15th, 1908.

Q. Mr. Henry Conlin?

A. Yes. And Mr. Conlin was succeeded by Mr. McAllister.

Q. B. A. McAllister?

A. Yes, as land commissioner on September 28th, 1908.

Q. Is this data which you have taken from the minute book of the company?

A. Yes it was taken from the minute book of the company.

It is admitted that the instrument found in the minute book of the Oregon Central Railroad Company of date March 28th, 1870, purporting to be signed as therein stated does not appear to be listed in complainant's exhibit 8, being a book indorsed in writing on the outside "O. & C. R. R. Co. Secretary's record,—deeds, contracts, and agreements, etc." and having printed at the top of each page the words "Oregon and California Railroad Company, record of deeds, contracts, agreement, etc.,"

and being a book consisting of 236 printed pages alphabetically indexed from a to w.

Witness Excused.

R. Koehler is recalled as a witness for the complainant and having heretofore been duly sworn testified as follows:

Direct Examination.

Questions by Mr. W. D. Fenton.

Q. Mr. Koehler, I show you a document purporting to be a memorandum of agreement, dated April 23d, 1867, between the Oregon Central Railroad Company, and Albert J. Cook, upon the front page of which in red ink is written these words: "In consideration of One Dollar paid by each of the parties hereto by the one to the other, the receipt whereof is by each of the parties hereto hereby acknowledged and in consideration of other valuable considerations moving from each to the other, it is hereby agreed between the Oregon Central Railroad and Ben Holladay and Company, parties to this contract, that this contract be and the same is hereby cancelled, set aside, and held for naught, witness the hand of Ben Holladay and Company and the Oregon Central Railroad Company, by R. I. Moores, president, and George E. Cole, secretary, and the seal of said corporation,—dated this 29th day of March, 1870,—purporting to be signed Ben Holladay and Company, and the Oregon Central Railroad Company, by R. I. Moores, president of the Oregon Central Railroad Company, and George E. Cole, secretary of the Oregon Central Railroad Company, and the corporate seal, and witnessed by J. H. Mitchell and M. M. Chapman, and which instrument has on the back of the

same, the words, "Filed November 24th, 1875, J. L. Story, Clerk, by R. L. Durham, deputy," and the words, "Filed June 19th, 1876, D. H. Murphy, clerk," and has also in writing these words "In consideration of the sum of one dollar to me in hand paid by S. G. Elliott, of San Francisco, the receipt whereof is hereby acknowledged, I do hereby transfer and assign forever all my right, title, or interest, in and to the within instrument. Witness my hand and seal this 2nd day of May, 1867. Albert J. Cook,—in the presence of W. B. Ritchfield." And I will ask you to look at the purported signature of Ben Holladay and Company signed to the agreement of cancellation, across the first page of this instrument under which in red ink is the purported signature of Ben Holladay and Company,—I will ask you whether or not that is the signature of Ben Holladay and Company and in his handwriting?

A. That is the signature of Ben Holladay and Company, and it is his handwriting.

Q. You refer to the words "Ben Holladay and Company"?

A. Yes, that is in the handwriting of Ben Holladay.

Q. I will ask you if you know the signature of I. R. Moores, and George E. Cole?

A. I do.

Q. State to the court whether or not the signature,— "Oregon Central Railroad Company by I. R. Moores, president, and by George E. Cole, secretary," is respectively the handwritings of I. R. Moores and George E. Cole?

A. It is.

Q. Do you know the handwriting, and signature of J. H. Mitchell?

A. I do.

Q. I call your attention to the fact that this instrument purports to be signed as a witness by J. H. Mitchell, and I will ask you if that is the genuine signature of J. H. Mitchell?

A. I am sure it is.

Q. When did J. H. Mitchell die?

A. A few years ago.

Q. Do you know whether or not he was at one time attorney for the Oregon Central Railroad Company and for the Oregon and California Railroad Company, its successor?

A. That was before my time,—I believe he was.

It is admitted that J. H. Mitchell was attorney for Ben Holladay and Company and the Oregon Central Railroad Company of April 27th, 1867, of Salem, and also of the Oregon and California Railroad Company, on or about March 28th, 1870, and for some time preceding and subsequent thereto.

Q. Did you ever see that document before?

A. I do not recollect, though I feel sure that I have seen this before.

Counsel for complainant here states that complainant offers to show and will show that this document was introduced in evidence in the suit of Ben Holladay against Simon G. Elliott, et al., brought in the Circuit Court of the State of Oregon for Multnomah County, and appealed November 4th or 5th, 1869, and that this document was thereafter transmitted upon the appeal of said

cause from the Circuit Court of Marion County to which the case was transferred by a change of venue, and is now in the custody of the clerk of the Supreme Court of this State, where the same was obtained, and counsel for complainant now offers in evidence the document referred to and asks to have the same marked complainant's exhibit 21, and asks permission to withdraw the original, and substitute a certified copy of the same in lieu thereof, certified by the clerk of the Supreme Court.

Counsel for defendant does not object to the withdrawal of the original and the substitution of a copy, but objects to the introduction of the document in evidence, as incompetent, irrelevant, and immaterial, and not the best evidence, and because no foundation has been laid for its introduction.

Q. I now show you an instrument purporting to be dated May 12th, 1868, between the Oregon Central Railroad Company and A. J. Cook and Company upon the first page of which in red ink are these words: "In consideration of one dollar paid by each of the parties hereto by the one to the other the receipt whereof is by each of the parties hereto hereby acknowledged, and in consideration of other valuable considerations, moving from each to the other it is hereby agreed between the Oregon Central Railroad Company, and Ben Holladay and Company, parties to this contract that this contract be and the same is hereby cancelled, set aside, and held for naught,—witness the hand of Ben Holladay and Company, and the Oregon Central Railroad Company by the signatures of I. R. Moores, president and George E. Cole, secretary thereof, and the seal of said corporation at-

tached this 29th day of March, 1870,—purporting to be witnessed by J. H. Mitchell, and M. M. Chapman, signed Ben Holladay and Company and the Oregon Central Railroad Company, by I. R. Moores, president of the Oregon Central Railroad Company, George H. Cole, secretary, and I will ask you to look at the purported signatures of Ben Holladay and Company and state whether or not that is the genuine signature of Ben Holladay and Company written by Ben Holladay?

A. It is.

Q. Look also at the purported signatures of I. R. Moores, president, and George E. Cole, secretary, and state whether or not those are the genuine signatures of I. R. Moores and George E. Cole, respectively?

A. They are.

Q. I call your attention to the fact that this document appears to be executed in the presence of J. H. Mitchell and of M. M. Chapman, the same as complainant's exhibit 21,—do you know the handwriting of both of these men, or either one of them?

A. I only know J. H. Mitchell's handwriting.

Q. Is that the genuine signature of J. H. Mitchell?

A. It is.

Q. The same person who signed as a witness complainant's exhibit 21?

A. Yes.

Q. Do you know that M. M. Chapman was a resident of Marion County, and clerk of that county, or do you have any knowledge on that subject?

A. I do not know.

Counsel for complainant offers in evidence the documents last shown the witness and the whole thereof together with the file mark on the back as follows,—filed November 24th, 1875, George L. Story, clerk, by R. L. Durham, deputy, and also filed by D. H. Murphy, and complainant's counsel promises to show that this document like complainant's exhibit 21 was obtained from the clerk of the Supreme Court for the State of Oregon from the records of the case of Ben Holladay vs. Simon G. Elliott, et al, brought in the Circuit Court of the State of Oregon for Multnomah County, November the 4th, 1869, and being the same cause referred to in complainant's exhibit 21, and counsel for complainant asks permission to withdraw the original and substitute a certified copy in lieu thereof.

Counsel for defendant makes no objections to the withdrawal of the original and substituting a copy in lieu thereof, but objects to the introduction of the document in evidence as incompetent, irrelevant, and immaterial, and as not the best evidence and because no foundation has been laid for the introduction of the same in evidence.

The document referred to is received and filed and marked complainant's exhibit 22.

Q. Mr. Koehler, do you recall anything about the number of acres that the Oregon and California Railroad Company own where the car shops referred to in the testimony in this case are now located, and were located the time you came here in 1874?

A. Well, I do not recollect the exact acreage, but I think it is either thirty or fifty acres.

Q. You know nothing about any saw mill on these

lands when you came?

A. No.

Q. The testimony tends to show that there was a saw mill on these lands at the car shops which was afterwards converted into a machine shop,—you have no knowledge of that?

A. No.

Q. That was before your time that that existed?

A. Yes.

Counsel for complainant offers in evidence a certified copy of the decree of the Supreme Court,—the final decree of the Supreme Court in the case of Ben Holladay and C. Temple Emmett, respondents, vs. S. G. Elliott, appellant.

Counsel for defendant objects to the same as incompetent, irrelevant, and immaterial, and not the best evidence, because no foundation has been laid.

The document referred to is received and filed in evidence, marked complainant's exhibit 23.

Counsel for complainant offers in evidence with the promise to identify it as a part of the record in the case referred to in the suit of Ben Holladay and C. Temple Emmett vs. Simon G. Elliott et al, brought in the circuit court of the State of Oregon for Multnomah County, filed November the 5th, 1869, and transferred by a change of venue to the Circuit Court of the State of Oregon for Marion County, on June 19th, 1876, and decided in the Supreme Court, July the 7th, 1879, as shown in complainant's exhibit 23,—the original amended complaint of Ben Holladay and C. Temple Emmett, verified Novem-

ber 5, 1869, by Ben Holladay, before C. A. Dolph, Notary Public for Oregon,—and also the answer of S. G. Elliott, filed in said cause, March the 4th, 1870, and also the reply, or replication verified by Ben Holladay before C. A. Dolph, Notary Public, filed April the 11th, 1870, in said cause, and asks leave to substitute a certified copy of these documents certified by the clerk of the Supreme Court of this state in whose custody these documents now are, as a part of the record of said suit in the Supreme Court.

Counsel for defendnat makes no objections to the substitution of the certified copy in lieu of the original, but objects to the introduction of the documents in evidence as incompetent, irrelevant, and immaterial, and not the best evidence, and because no foundation has been laid for the introduction of the same.

The documents referred to are received and filed in evidence, marked complainant's exhibit 24.

Counsel for complainant offers in evidence the certified copy of the petition for the probate of the last will and testament of Ben Holladay, deceased, filed in the county clerk's office of Multnomah County, Oregon, and the order of the County Court of the State of Oregon for Multnomah County admitting the will to probate, and the inventory filed in the County Court of the State of Oregon for Multnomah County, in said estate, and the order of final settlement in said estate, made by the county court of the State of Oregon for Multnomah County, and asks to have the same filed and marked complainant's exhibit 25.

Counsel for defendant objects to the introduction of the same in evidence as incompetent, irrelevant, and immaterial, and not the best evidence, and because no foundation has been laid.

The documents referred to are received and filed in evidence, marked complainant's exhibit 25.

Counsel for complainant offers in evidence certified copy of the deed dated March 29th, 1870, executed by the Oregon Central Railroad Company of October 22nd, 1867, to the Oregon and California Railroad Company, recorded in the records of Clackamas County, Oregon, on April the 18th, 1870.

Counsel for defendant object to the introduction of the same in evidence, as incompetent, irrelevant, and immaterial, and if offered for the purpose of showing a conveyance of the property in question in this suit because the same is void for uncertainty, because the same does not describe the property or identify it in any way, nor apparently attempt to convey it, and further object to the same as not the best evidence, and because no foundation has been laid.

The document referred to is received and filed in evidence, marked complainant's exhibit 26.

Counsel for complainant offers in evidence certified copy of the articles of incorporation of the Oregon and California Railroad Company, incorporated March 17th, 1870.

Counsel for defendant object to the same as incompetent, irrelevant, and immaterial, and not the best evidence, and because no foundation has been laid.

The document referred to is received and filed in evidence, and marked complainant's exhibit 27.

Counsel for complainant offers in evidence the certified copy of the articles of incorporation of the Oregon Central Railroad Company, incorporated April 22nd, 1867.

Counsel for defendant objects to the same as incompetent, irrelevant, and immaterial, and not the best evidence, because no foundation has been laid for its introduction.

The document referred to is received and filed in evidence, and marked complainant's exhibit 28.

Counsel for defendant further objects to the introduction of the document in evidence because it appears by other evidence that there never was such a corporation and that its attempted organization was void.

Counsel for complainant offers in evidence the joint resolution of the legislative assembly of the State of Oregon, passed October 26th, 1868, found at pages 109-110 of the Session Laws of the State of Oregon for that year, published by authority, and which reads as follows, and asks to have the same copied into the record as complainant's exhibit No. 29.

Counsel for defendant objects to the introduction of the same in evidence as incompetent, irrelevant and immaterial, and not the best evidence, and because no foundation has been laid.

The document offered is in words and figures as follows, to-wit:

SENATE JOINT RESOLUTION NO. 16.

Relating to the Railroad Land Grant from the Central

Pacific Railroad in California to Portland, Oregon.

WHEREAS the Congress of the United States by an Act approved, July 25th, 1866, entitled "An Act granting lands to aid in the construction of a railroad and telegraph from the Central Pacific Railroad to Portland, Oregon," did grant certain lands in the State of Oregon, and confer certain benefits and privileges upon such company, organized under the laws of Oregon as the legislature of such state should thereafter designate, and

WHEREAS the Legislative Assembly of Oregon, at its fourth regular session, did adopt a joint resolution, known as "House Joint Resolution No. 13," designating in terms the Oregon Central Railroad Company as the company entitled to receive the land granted by and all the benefits and privileges of the said Act of Congress, and

WHEREAS, at the time of the adoption of said Joint Resolution aforesaid, no such company as the Oregon Central Railroad Company was organized or in existence, and the said Joint Resolution was adopted under a misapprehension of facts as to the organization and existence of such company, and

WHEREAS the designation of the company to receive the lands in the State of Oregon granted and the benefits and privileges conferred by the said Act of Congress yet remains to be made,

BE IT RESOLVED by the Senate, the House concurring that the Oregon Central Railroad Company, a corporation organized at Salem, on the 22nd day of April, in the year One Thousand Eight Hundred and Sixty-seven (1867) in pursuance of the laws of the State of

Oregon, be and the same is hereby designated as the Company entitled to receive the Lands in the State of Oregon and the benefits and privileges conferred by the said Act of Congress.”

Adopted by the House, October 20th, 1868.

JOHN WHITEAKER,

Speaker of the House of Representatives.

Adopted by the Senate, October 17th, 1868.

B. F. BURCH,

President of the Senate.

Pages 109-110, Session Laws of Oregon, 1868.

Counsel for complainant offers in evidence the act of Congress of July 23, 1866, found at page 239 of Volume 14 of the United States Statutes at large, which complainant asks leave to read into the record as complainant's exhibit 30.

Counsel for defendant objects to the introduction of the same in evidence as incompetent, irrelevant, and immaterial, and not the best evidence, and because no foundation has been laid.

The document referred to is in words and figures as follows, to-wit:

Complainant's Exhibit 30.

Being Chapter CCXLII of United States Statutes at Large, pages 239, 240, 241 and 242 of Vol. 14 thereof:

CHAPTER CCXLII:—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.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES

OF AMERICA IN CONGRESS ASSEMBLED: That the "California and Oregon Railroad Company," organized under an act of the State of California to protect certain parties in and to a railroad survey, "to connect Portland, in Oregon, with Marysville, in California," approved April sixth, eighteen hundred and sixty-three, and such company organized under the laws of Oregon as the Legislature of said State shall hereafter designate, be and they are hereby authorized and empowered to lay out, locate, construct, finish and maintain a railroad and telegraph line between the city of Portland, in Oregon, and the Central Pacific Railroad, in California, in the manner following, to-wit: The said California and Oregon Railroad Company to construction that part of the said railroad and telegraph within the State of California, beginning at some point (to be selected by said company) on the Central Pacific Railroad in the Sacramento Valley, in the State of California, and running thence northerly, through the Sacramento and Shasta Valleys, to the northern boundary of the State of California; and the said Oregon Company to construct that part of said railroad and telegraph line within the State of Oregon, beginning at the city of Portland, in Oregon, and running thence southerly through the Willamette, Umpqua, and Rogue River Valleys to the southern boundary of Oregon, where the same shall connect with the part aforesaid to be made by the first named company: PROVIDED, That the company completing its respective part of the said railroad and telegraph from either of the termini herein named to the line between California and Oregon before the other company shall have like-

wise arrived at the same line, shall have the right, and the said company is hereby authorized, to continue in constructing the same beyond the line aforesaid, with the consent of the State in which the unfinished part may lie, upon the terms mentioned in this act, until the said parts shall meet and connect, and the whole line of said railroad and telegraph shall be completed.

SEC. 2. AND BE FURTHER ENACTED, That there be, and hereby is granted to the said companies, their successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the line of said railroad, every alternate section of public land, 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 parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first named alternate sections; and as soon as the said companies or either of them, shall file in the office of the Secretary of the Interior a map of the survey of said railroad, or any portion thereof, not less than sixty continuous miles from either terminus, the Secretary of the Interior shall withdraw from sale, public lands herein granted on each side of

said railroad, so far as located and within the limits before specified. The land, herein granted shall be applied to the building of said road within the States respectively, wherein they are situated. And the section and parts of sections of land which shall remain in the United States within the limits of the aforesaid grant shall not be sold for less than double the minimum price of public lands when sold: PROVIDED, That bona fide and actual settlers under the pre-emption laws of the United States may, after due proof of settlement, improvement and occupation, as now provided by law, purchase the same at the price fixed for said lands at the date of such settlement, improvement and occupation; AND PROVIDED ALSO, That settlers under the provisions of the homestead act, who comply with the terms and requirements of said act, shall be entitled, within the limits of said grant, to patents for an amount not exceeding eighty acres of the land so reserved by the United States, anything in this act to the contrary notwithstanding.

SEC. 3. AND BE IT FURTHER ENACTED, That the right of way through the public lands be and the same is hereby granted to said companies for the construction of said railroad and telegraph line; and the right, power, and authority are hereby given to said companies to take from the public lands adjacent to the line of said road, earth, stone, timber, water and other materials for the construction thereof. Said right of way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, depots, ma-

chine-shops, switches, side-tracks, turn-tables, water stations, or any other structures required in the construction and operation of said road.

SEC. 4. AND BE IT FURTHER ENACTED, That whenever the said companies, or either of them, shall have twenty or more consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated in this act, the President of the United States shall appoint three commissioners, whose compensation shall be paid by said company, to examine the same, and if it shall appear that twenty consecutive miles of railroad and telegraph shall have been completed and equipped in all respects as required by this act, the said commissioners shall so report under oath to the President of the United States, and thereupon patents shall issue to said companies or either of them, as the case may be, for the lands hereinbefore granted to the extent of and coterminus with the completed section of said railroad and telegraph line as aforesaid; and from time to time, whenever twenty or more consecutive miles of the said road and telegraph shall be completed and equipped as aforesaid, patents shall in like manner issue upon the request of said commissioners, and so on until the entire railroad and telegraph authorized by this act shall have been constructed, and the patents of the lands herein granted shall have been issued.

SEC. 5. 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 tele-

graph 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 reasonable 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 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.

SEC. 6. AND BE IT FURTHER ENACTED, That the said companies shall file their assent to this act in the Department of the Interior within one year after the passage hereof, and shall complete the first section of twenty miles of said railroad and telegraph within two years, and at least twenty miles in each year thereafter, and the whole on or before the first day of July, one thousand eight hundred and seventy-five; and the said railroad shall be of the same gauge as the "Central Pacific Railroad" of California, and be connected therewith.

SEC. 7. AND BE IT FURTHER ENACTED, That the said companies named in this act are hereby required to operate and use the portions or parts of said railroad and telegraph mentioned in section one of this act for all purposes of transportation, travel, and communication, so far as the government and public are concerned, as one connected and continuous line; and in such operation

and use to afford and secure to each other equal advantages and facilities as to rates, time, and transportation, without any discrimination whatever, on pain of forfeiting the full amount of damage sustained on account of such discrimination, to be used for and recovered in any court of the United States, or of any State, or competent jurisdiction.

SEC. 8. AND BE IT FURTHER ENACTED, That in case the said companies shall fail to comply with the terms and conditions required, namely, by not filing their assent thereto as provided in section six of this act, or by not completing the same as provided in said section, this act shall be null and void, and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of any such failure, shall revert to the United States. And in case the said road and telegraph line shall not be kept in repair and fit for use, after the same shall have been completed, Congress may pass an act to put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the United States, to repay all expenditures caused by the default and neglect of said companies or either of them, as the case may be, or may fix pecuniary responsibility, not exceeding the value of the lands granted by this act.

SEC. 9. AND BE IT FURTHER ENACTED, That the said "California and Oregon Railroad Company" and the said "Oregon Company" shall be governed by the provisions of the general railroad and telegraph laws of their respective States, as to the construction and management of the said railroad and telegraph line hereinbe-

fore authorized, in all matters not provided for in this act. Whenever the word "company" or "companies" is used in this act it shall be construed to embrace the words "their associates, successors and assigns," the same as if the word had been inserted thereto, or annexed.

SEC. 10. AND BE IT FURTHER ENACTED, That all mineral land shall be excepted from the operation of this act; but where the same shall contain timber, so much of the timber thereon as shall be required to construct said road over such mineral land is hereby granted to said companies; PROVIDED, That the term "Mineral lands" shall not include lands containing coal and iron.

SEC. 11. AND BE IT FURTHER ENACTED, That the said companies named in this act shall obtain the consent of the legislatures of their respective States, and be governed by the statutory regulations thereof in all matters pertaining to the right of way, wherever the said road and telegraph line shall not pass over or through the public lands of the United States.

SEC. 12. AND BE IT FURTHER ENACTED, That Congress may at any time, having due regard to the rights of said California and Oregon railroad companies, add to, alter, amend, or repeal this act.

APPROVED JULY 25, 1866.

W. D. Kelley is called as a witness for the complainant and being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination.

Questions by Mr. W. D. Fenton.

Q. State your name, age, residence, and occupation.

A. W. D. Kelly,—thirty-seven, Oakland, California,—title clerk of the Southern Pacific Company, land department, embracing the Oregon and California Railroad Company land department.

Q. You may state, Mr. Kelley, for whom you are employed and for how long, and what your duties have been?

A. I went with the company in March, 1905, for the performance of special work, and at that time was digesting opinions rendered our department by the law department of the company, and about the Fall of 1905 I became conveyancer of the land department, and remained such until about April 18th, 1906, at the time of the fire.

Q. As an employee of the land department what familiarity with, or knowledge of the records of the land department of the Oregon and California Railroad Company and particularly of the tax receipts and vouchers for taxes paid upon the land designated in this suit and other lands of the company, did you obtain?

A. Before the fire of April, 1906, my knowledge of the payment of taxes then being paid was only of a general character. However in the special work which I had been doing before I became conveyancer, I had made an examination of the vouchers brought down from Portland to San Francisco, which I believe embraced all vouchers for the payment of money for taxes and other disbursements of the Oregon and California Railroad Company.

Q. Now, what became of these tax vouchers and receipts that were received and obtained for the payment

of taxes or that may have existed prior to April 18th, 1906,—which may have been sent to the land department in San Francisco by the officers and employees of the companies including the Southern Pacific Company, and which may have been transmitted or shipped either to Charles W. Eberlein, or to J. L. Wilcut, or to any other person having anything to do with the business of the Oregon and California Railroad Company, or of the Southern Pacific Company, its lessee.

Counsel for defendant objects to the question as incompetent, irrelevant, and immaterial, and not the best evidence, because no foundation has been laid, and as leading.

A. These vouchers for the payment of taxes and other vouchers and books of account were in the building at Fourth and Townsend Streets, San Francisco. That building was burned to the ground and all of those papers and books of account and documents were destroyed in the fire.

Q. What became of any deeds or instruments or muniments of title that were received by Charles W. Eberlein in complainant's exhibit 9 as having been received by him, from Secretary Cotton on August 23d, 1905, and particularly the deed number 26,—James Grindley and wife to Ben Holladay and Company,—No. 27, patent of the United States to James Grindley, No. 31, deed, from G. Elliott and wife to Ben Holladay and Company, if you know?

A. Those documents to the best of my knowledge and belief were in the office of the land department of the Oregon and California Railroad Company in San Francisco at

the time of the fire of April, 1906. And added to my general knowledge of the land department there at the time as to such matters, my brother,—J. Frank Kelley, who was then an employee of the Oregon and California Railroad Company, in the investigation of miscellaneous land titles was associated with me, and lived with me, and was with me in the office at that time, and gave me knowledge of matters pertaining to miscellaneous lands generally, and of such original documents as there may have been in the office of the land department at that time. On the morning of April 18th, 1906, at the time of the earthquake and fire, my brother, J. F. Kelley, and myself about half past seven in the morning,—the earthquake having occurred shortly after five o'clock that same morning,—went to the office of the land department of the Oregon and California Railroad Company at the Merchant's Exchange building in San Francisco, and believing that there was some original documents out of the vault at that time,—certain abstract sheets that were then being made up by Mr. J. F. Kelley by way of showing these various transfers of properties from the original documents covering miscellaneous lands and abstracts of such documents,—we took these papers, original documents, and abstracts, and abstract sheets that he was making, and put them into the vault. There was in the vault at that time other original documents in relation to miscellaneous lands of the Oregon and California Railroad Company. We left the building then. I returned to the building shortly after noon,—about half past twelve, having seen the Call building take fire and believing that the Merchants Exchange building would burn, I went to the

office of the land department of the Oregon and California Railroad Company in the Merchants Exchange building at that time, and placed in the vault all correspondence and files of our land department, and I can say absolutely that so far as I know all matters of record, correspondence, original documents, by way of conveyances or other documents affecting miscellaneous lands were in the vault of the land department of the Oregon and California Railroad Company when that building burned, and were destroyed.

Counsel for defendant objects to the question and answer given by the witness and moves to strike out the same as incompetent, irrelevant, and immaterial, and because the same calls for a conclusion of the witness about facts not within his knowledge and as not the best evidence and because no foundation has been laid.

Q. Was this vault into which these documents were placed destroyed in that fire,—I mean the contents of it?

A. Not all destroyed.

Q. Was any of these deeds, or original documents relating to this land or to any of the miscellaneous lands recovered?

A. Not that I have ever seen.

Q. Have you been there continuously since that time so that your opportunities to see would be good?

Counsel for defendant objects to the question as incompetent, irrelevant, and immaterial and as leading and as calling for a conclusion of the witness and because the testimony asked for is not based upon anything within the knowledge of the witness, and is not the best evidence because no foundation has been laid.

A. I have been employed by the company continuously and have had opportunities to see whether,—after the fire, there may have been in existence any document saved from that fire.

Q. State to the court whether or not you have looked among the records and files of the Oregon and California Railroad Company's land department in San Francisco, California, in the Merchants Exchange building, for the original patent from the United States to James Grindley and the original deed from James Grindley and wife to Ben Holladay and Company described in Complainant's exhibit 8 as numbers 26 and 27 and also for the original deed from Gardner Elliott and wife to Ben Holladay and Company, described in complainant's exhibit 8 as No. 31, and whether you were able to find these documents or either of them?

A. I have not looked particularly for any of the documents mentioned,—but I have looked for any and all original documents pertaining to miscellaneous lands that were saved from the fire, if any, and have found no such documents.

Q. State whether or not you have looked for any tax receipts or vouchers for taxes paid by the Oregon and California Railroad Company on miscellaneous lands or other lands which may have been in the possession of the land department, or in the possession of Mr. Wilcut or any one else connected with the Oregon and California Railroad Company or the Southern Pacific Company, and particularly tax receipts or vouchers for taxes paid upon the lands in suit which may have been paid prior to April

18th, 1906, and if you have made any search or inquiry, please state what you found, if anything, in relation to these lands.

Counsel for defendant objects to the question as leading and as calling for the conclusion of the witness and as not the best evidence, and because no foundation has been laid, and as incompetent, irrelevant, and immaterial.

A. I have made no particular examination to find such tax receipts, if any there are, in existence for the reason that my examination and search of the records saved from the fire in our department did not show that such receipts, if there were any, in our office at the time of the fire were saved.

Q. Did I understand you to say that all tax vouchers and tax receipts prior to the fire relating to these lands were in the building at Fourth and Townsend Streets, prior to the fire, and that that building was destroyed?

A. I can only answer that in this way that there were vouchers for the payment of money by the Oregon and California Railroad Company at Fourth and Townsend Streets building of the Southern Pacific Company, and those vouchers, as I remembered, were numbered consecutively, and I feel very certain that it included vouchers for the payment of taxes.

Q. How general was this conflagration and earthquake in San Francisco, and to what extent, if you know, did it destroy the public buildings and office buildings, and places of business in San Francisco?

A. In the business district,—comprising and including all of the districts lying east of Van Ness Avenue to San Francisco Bay was destroyed by fire, except, I be-

lieve the Government Appraiser's building, wherein were the Government offices.

Q. Were the vaults in the buildings generally damaged or destroyed so far as you know?

A. The vaults in our own department I can best show its destruction from my personal observation. In company with other employees of our department from three to four days after the fire we went to the Merchants Exchange building for the purpose of an examination of the company's vault, and found that it was exceedingly hot, and believing that this was from the effects of the fire outside we left the vault and returned maybe two or three days later. At this point I wish to say that my memory is not entirely clear as to the days intervening between our visits to the vault. Mr. Henry Conlin, whom I believe was then acting rather as chief clerk, was present during these times of the examination of the vault, if my memory is clear upon this point,—we returned to the vault some two or three days later and found the vault still hot,—and believing then that there might be a fire or was at that time a fire smouldering in the vault, we took means to make a hole in the vault for the purpose of spraying the interior with a chemical fire extinguisher,—all of which was done, and the whole was sealed up after that, and another visit made to the vault, and it was found that the vault was still hot. It was then determined that a fire was very likely burning in the vault, and that the best thing we could do would be to make an entrance into the vault and take from it such papers as we might be able to secure. This was done and an entrance into the vault was made. Immediately at that

time the whole interior of the vault became ablaze, and all of us present dragged out from the vault as much of the contents as we could.

Q. You say Mr. Henry Conlin was then Chief Clerk,—under whom?

A. Under Mr. C. W. Eberlein.

Q. You mean Mr. Henry Conlin appearing as one of the counsel for the defendant in this suit?

A. Yes.

Q. Did he participate in the attempt to recover the records of the company from this vault?

A. He did.

Q. Do you know if he took any of those records with him to the new offices?

A. That I am unable to state.

Q. Where did they open new offices?

A. In Oakland,—I think it was Tenth and Broadway.

Q. How long did they remain in that place, do you remember?

A. That I am unable to state as shortly after that period I was sent to Los Angeles on company business.

Q. When did you return to the employ of the land department if you did return?

A. I was in the employ of the land department when I was sent to Los Angeles, and remained in its employ all the while I was there, and have been in its employ ever since.

Q. When was it that you first came into official relation with B. A. McAllister, land commissioner?

A. On his arrival at San Francisco,—I believe it was in August, 1908.

Q. And have you been in his employ and in his department since that date continuously?

A. I have.

Q. Where is Mr. J. L. Wilcut, or do you know?

A. I do not know him personally, but he has, I think, retired from the office of secretary of the Southern Pacific Railroad Company.

Q. Is he still in the service or has he retired?

A. I believe he still has some connection with the company, in a way,—by way of his knowledge of the affairs of the company,—but I am unable to state whether he has any official relation with the company.

Cross-Examination.

Questions by Mr. H. W. Hogue.

Q. Mr. Kelley, at the time, and before the fire that you have narrated,—just what were your duties in the land department?

A. Just immediately prior to the fire I was conveyancer.

Q. When you say conveyancer, just what were your duties,—what did your work consist of?

A. In attending to the correspondence in relation to the issuance of deeds on contracts of the Oregon and California Railroad Company, and Southern Pacific Company.

Q. Did your duties also include the separation of deeds that were executed in pursuance of contracts?

A. No more than to indicate to the stenographer what writing should be shown on the deeds, and then checking it and being responsible, of course, for its accuracy.

Q. And your duties were confined to that, were they not?

A. Yes, except as I might be called upon to give advice in relation thereto.

Q. And so far as these miscellaneous land records referred to were concerned, you had nothing whatever to do with them?

A. I had no official connection with them at all.

Q. And you did not know where they were in the office or whether they were there at all?

A. I did, yes.

Q. Do you know where they were?

A. They were in the vault,—yes, I will say that they were there.

Q. Where is the vault?

A. In one of the boxes in the vault.

Q. What box in the vault, and where?

A. I cannot indicate exactly.

Q. In what part of the vault?

A. There were some, I should say, a dozen or more filing boxes on the left hand side of the vault as you would enter, and in those filing boxes were contained the original documents.

Q. But you do not mean to be understood as saying that you knew what documents were in there?

A. No, I do not know what documents were there.

Q. And whether or not any of the documents referred to here were there, you do not know?

A. I do not know as to any particular document.

Q. In a general way, you know, there was a vault there, and there were some documents in the vault?

A. I know particularly that there was a vault there, and that there were documents in there.

Q. But as to any specific document, you do not know?

A. As to any specific document, I do not know.

Q. You stated that there were certain documents at Fourth and Townsend Streets,—do you mean to say that you know what documents were there?

A. Yes, I do.

Q. Any specific document?

A. I cannot identify any specific document by way of giving its exact terms.

Q. How do you know there were any documents at Fourth and Townsend Streets?

A. In the summer of 1905 in my special work with the land department my brother J. F. Kelley called upon me to assist him in making an examination of the vouchers and boxes of records that had been brought down from Portland to San Francisco.

Q. How many of those documents were there?

A. I cannot give the number of them.

Q. Were there many?

A. Yes, there were hundreds upon hundreds of vouchers, and several books of account.

Q. You have no recollection of any specific voucher?

A. No, I cannot recollect any specific voucher, any more than that they were vouchers of the Oregon and California Railroad Company.

Q. Now, you say that the building at Fourth and Townsend Streets burned?

A. Yes sir.

Q. And that the contents of the vault burned?

A. These were not in the vault.

Q. They were not in the vault?

A. Not in the vault at Fourth and Townsend Streets.

Q. Do you know that from your own knowledge?

A. I am stating it of my own knowledge.

Q. Did you see these documents in the building at Fourth and Townsend Streets?

A. Which documents?

Q. The documents that you refer to.

A. Yes.

Q. You saw them in that building?

A. I saw them in that building, yes.

Q. But you do not know where they were at the time of the fire?

A. I am unable to state that any more than that they were there in the summer of 1905.

Q. Then at the time of the fire do you know whether or not those papers were in that building or in the vault, or where they were?

A. I made no visit to the building at the time of the fire.

Q. State whether they were or not?

A. I say that I did not make any visit over to Fourth and Townsend Streets at the time of the fire.

Counsel for complainant offers in evidence a certified copy of the patent of the United States for the north $\frac{1}{2}$ of the northeast $\frac{1}{4}$ of Section 32, Township 1 south, range 2 east of the Willamette Meridian, issued to Gardner Elliott and executed May the 2nd, 1870, and the same is received and filed, marked complainant's exhibit 31.

It is stipulated by and between the parties hereto that

a patent was issued by the United States Government to James Grindley for the east $\frac{1}{2}$ of the southeast $\frac{1}{4}$, and lots 5 and 6 of section 29, being cash entry 641, homestead No. 1146, on August the 5th, 1869, recorded page 378 of Volume 1 of the records of the general land office, Washington, D. C.

Witness excused.

B. A. McAllister is called as a witness for the complainant, and being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination.

Questions by Mr. W. D. Fenton.

Q. State your name, age, residence and occupation.

A. My name is B. A. McAllister, age fifty-one, residence, Oakland, California, occupation, land commissioner of the Southern Pacific Company, including the Oregon and California Railroad Company.

Q. Where are the offices of the land department of the Oregon and California Railroad Company?

A. In San Francisco, California.

Q. How long have you been land commissioner, and connected with the Oregon and California Railroad Company?

A. Since September, 1908.

Q. State what are your duties, and what have been your duties in a general way.

A. To generally supervise all matters and things relating to the handling of the lands under the grant to the Oregon and California Railroad Company and also

the lands known as miscellaneous lands.

Q. I wish you would state to the court what the fact is as to your payment of taxes for the Oregon and California Railroad Company on its miscellaneous lands—who has general supervision of that, and how has it been done?

Counsel for defendant objects to the question as incompetent, irrelevant and immaterial, and not the best evidence, and because no foundation has been laid.

A. The immediate attention to all tax matters and the preparation of vouchers in payment of taxes is in the hands of Mr. J. W. Morrow, tax agent. The tax vouchers, when prepared, are checked with the records in my office, and then passed to the auditor, and then it is passed to the assistant treasurer, at San Francisco, for payment.

Q. When you came to your office as land commissioner and came into official connection with the properties of the Oregon and California Railroad Company, and such miscellaneous lands as stood in its name or belonged to the company—did your department have general supervision of the payment of taxes on the premises described in this suit?

A. Yes sir.

Q. Referring to complainant's exhibit 6, it appears that this land has been assessed since 1902 in the name of Ben Holladay and Company—do you know of your own knowledge as to how that came to be so assessed?

Counsel for complainant objects to the question as incompetent, irrelevant, and immaterial, and as leading and as calling for a conclusion of the witness.

A. I have no knowledge as to how it came to be assessed in that manner.

Q. In the correspondence, between your office, is there or not to your knowledge any allusion to this tract of land as the Holladay tract?

Counsel for defendant objects to the question as incompetent, irrelevant, and immaterial, and not the best evidence, and as calling for a conclusion of the witness, and as leading.

A. It has been so called merely as a matter of identifying the tract.

Q. Have you the files of your office that relate to this land—the correspondence files here?

A. Yes sir.

Q. I show you a document purporting to be an application for a lease April 20, 1908, purporting to be signed by T. I. Hickey, of Lents, Post Office—application approved Charles W. Eberlein, acting land agent—“C,” which for the purpose of identification, I will ask to have marked, complainant’s exhibit 32, and will ask if you know whose writing that is,—Charles W. Eberlein, and whether that document was among your files relating to these lands when you took office?

A. The signature “Charles W. Eberlein”—“C,” was written by Mr. Henry Conlin, and the document has been among our files continuously.

Q. Do you know Mr. Henry Conlin’s hand writing?

A. I have seen it very frequently.

Q. Is that his signature there?

A. Yes, sir.

Q. Now, I note that that application for lease is apparently to the Oregon and California Land Company, and I will ask you to explain to the court how this land seems to be carried in your files, and to be referred to as Oregon and California Land Company's miscellaneous land?

Counsel for defendant objects to the question as leading and as calling for a conclusion of the witness, and not based upon any facts, and as not the best evidence, and because no foundation has been laid, and as incompetent, irrelevant, and immaterial.

A. Well, I gather from the records of the department, and from information that I have gained since coming in connection with the company that the Oregon and California Land Company was organized, if I remember correctly, in 1905, for the purpose of taking title to all miscellaneous lands, the title to which had theretofore been held by sundry individuals, and that it was evidently the intention that this tract of land should be so conveyed, but it never has been conveyed to that company, so far as I know.

Q. What relation does the Oregon and California Land Company sustain to the Oregon and California Railroad Company?

A. It was a corporation organized as I have stated for the purpose of taking over the title to these miscellaneous lands and hold them for the benefit of the Oregon and California Railroad Company.

Q. Have you examined the deed made to the Oregon and California Land Company to ascertain, or do you

know whether or not this land is actually included in any deed, executed by any of these parties or by the Oregon and California Land Company?

A. I have examined the deed to the Oregon and California Land Company, and this tract is not in any of the deeds.

Q. This application for a lease took place when with reference to the time Mr. Henry Conlin was acting for the acting land agent, Mr. Eberlein,—the date of it so far as you know?

A. It was dated April 20, 1908, and that was during the time that Mr. Eberlein was acting land agent.

Q. And who was his chief clerk during that time as shown by your files?

A. Well, I know that Mr. Conlin was in the office at that time. I cannot say now as to whether he was chief clerk or assistant.

Q. Now, since you have been land commissioner of the Oregon and California Railroad Company,—what is the fact, if you know, as to whether or not the Oregon and California Railroad Company has claimed to own this land, and to be in possession of it?

Counsel for defendant objects to the question as leading, and as calling for an opinion of the witness and as not the best evidence, and because no foundation has been laid, and as incompetent, irrelevant, and immaterial.

A. It has claimed to own the land and to be in possession of it through its tenants and lessees.

Q. If it should turn out that the tax receipts for the years 1906, 1907, 1908, 1909, 1910, should show that the

taxes were paid by the Oregon and California Land Company,—how can you explain that?

Counsel for defendant objects to the question as leading and as calling for a conclusion of the witness, and as incompetent, irrelevant, and immaterial, and not the best evidence, and because no foundation has been laid.

A. Well, that would not be material, because whatever the Oregon and California Land Company owns or holds title to is practically the property of the Oregon and California Railroad Company.

Q. Who has charge of the acts of the Oregon and California Land Company as to all these lands, and the payment by that company?

A. I do.

Q. Is that in your department in connection with the Oregon and California Railroad land department?

A. Yes, sir.

Q. Then, if I understand you, the Oregon and California Land Company is merely a holding company for the Oregon and California Railroad Company?

A. Yes,—it is an auxiliary company.

Q. Do you know who these titles were taken in,—what individuals?

A. Titles were taken in the name of Mr. Richard Koehler,—Mr. George H. Andrews and Mr. George W. Weidler.

Q. State to the court what relation these various parties sustained to these titles, and whether they conveyed the same to the Oregon and California Land Company at the request of the Oregon and California Railroad

Company, if you know,—that is, were they holding them as trustees for the company?

A. Yes, they held these titles in trust for the Oregon and California Railroad Company.

Q. Do you know what the fact is as to why these lands were not conveyed direct to the Oregon and California Railroad Company?

A. They were lands which, it was proposed to offer for sale, and it was more convenient to handle and sell them through this auxiliary company than to handle them through the railroad company.

Q. Why was it more convenient with relation to the mortgage of July the first, 1897, to the Union Trust Company, if you know?

A. Well, because if conveyed to the Railroad Company, they would become subject to that mortgage, and would cause trouble and inconvenience in getting releases from that mortgage in case of sale.

Counsel for complainant offers in evidence the document last shown the witness.

Objected to by defendant's counsel as incompetent, irrelevant, and immaterial, and not the best evidence, and because no foundation has been laid for its introduction.

The paper referred to is received and filed in evidence, marked complainant's exhibit 32.

Q. I show you what purports to be an original letter of date January 21st, 1908, addressed to Angel and Fisher, and will ask you if you recognize the handwriting in that letter, and if so, whose handwriting it is?

A. The signature to the letter, Charles W. Eberlein

(“C”) was written by Mr. Henry Conlin.

Q. For whom was Mr. Conlin acting at that time?

A. He was acting for Mr. Charles W. Eberlein,—then acting land agent of the Oregon and California Railroad Company.

Counsel for complainant offers in evidence the letter last shown the witness.

Counsel for defendant object to the same as incompetent, irrelevant, and immaterial, and not the best evidence, and because no foundation has been laid for its introduction.

The letter referred to is received and filed in evidence, marked complainant’s exhibit 33.

Q. I show you an instrument purporting to be a letter of date, January 2, 1908, written by Charles W. Eberlein, and marked with “C” addressed to Angel and Fisher, and will ask you whose handwriting that signature in that letter is?

A. That signature was also written by Mr. Conlin.

Q. The same party that you mentioned as having written the name of Mr. Eberlein to the other letter?

A. Yes, sir.

Q. It appears to have been addressed to Angel and Fisher,—who were they, and for whom were they acting?

A. They were acting here at Portland,—well, they were employees of the Oregon and California Railroad Company under Mr. Eberlein.

Q. They were attorneys at law, and are now?

A. Yes sir, they were and are now.

Counsel for complainant offers in evidence the letter

last shown the witness.

Counsel for defendant objects to the same as incompetent, irrelevant and immaterial, and not the best evidence, and because no foundation has been laid for its introduction.

The letter referred to is received and filed in evidence, marked complainant's exhibit 34.

Q. I show you a letter addressed to Angel and Fisher of date November 5, 1907, purporting to be written by Charles W. Eberlein, with a "C,"—acting land agent, and will ask you in whose handwriting that signature is, and by whom it was written?

A. That signature was also written by Mr. Henry Conlin.

Counsel for complainant offers in evidence the letter last shown the witness.

Counsel for defendant objects to the same as incompetent, irrelevant and immaterial, and not the best evidence, because no foundation has been laid for its introduction.

The letter referred to is received and filed in evidence, marked complainant's exhibit 35.

Q. I show you a letter purporting to be dated October 10, 1907, addressed to Angel and Fisher, signed Charles W. Eberlein "C," acting land agent and on the back of this is endorsed "Holladay Tract and Alprey D. L. C. tract" and I will ask you who wrote that letter and where that file mark on the back came from, and whose signature is that to that letter?

A. This letter came from the files of our office here in

Portland, and the signature to it Charles W. Eberlein "C," was written by Mr. Henry Conlin.

Q. And on the back, do you know who wrote that?

A. I think that is an endorsement made here in the Portland office.

Q. Do you know in whose handwriting it is?

A. No, I do not.

Counsel for complainant offers in evidence the document last shown the witness being three sheets attached together, as complainant's exhibit 36.

Counsel for defendant objects to the same as incompetent, irrelevant, and immaterial, and not the best evidence, because no foundation has been laid for its introduction.

The document referred to is received and filed in evidence, marked complainant's exhibit 36.

Q. I show you a letter written by C. B. Sullivan, dated September 11, 1907, addressed to Henry Conlin, land department, San Francisco, and a carbon copy of a reply dated October 2, 1907, addressed to C. B. Sullivan, and will ask you where those letters came from, and from what files?

A. This came from the land department files.

Q. Your files in San Francisco?

A. Yes.

Q. You found them there when you came into possession of that office?

A. Yes.

Counsel for complainant offers in evidence the document last shown the witness.

Counsel for defendant object to the same as incompetent, irrelevant, and immaterial, and not the best evidence, because no foundation has been laid for its introduction.

The document referred to is received and filed in evidence, marked complainant's exhibit 37.

Q. Mr. McAllister, have you looked for the original contract set out in this complaint as having been made by Ben Holladay and Company with the Oregon and California Railroad Company, on April 29, 1870, and the original contract of February 27, 1876, referred to in the pleadings, and known as the Frankfort Committee agreement, and the original instruments and conveyances relating to these lands, executed by Elliott and Grindley, and the United States patent, and other original documents, and if so, with what result?

Counsel for defendant object to the question as leading, and as calling for a conclusion of the witness, and as incompetent, irrelevant, and immaterial, and not the best evidence, and because no foundation has been laid.

A. I have had the files and storage places of our office thoroughly searched time and again for all these documents without being able to find them.

Q. What have you done with reference to trying to find the tax receipts and vouchers for the payment of taxes upon these lands from the time they were first paid by any one down to the time of the fire of April 18, 1906, and with what results?

Counsel for defendant objects to the question as leading, and as calling for a conclusion of the witness, and

as incompetent, irrelevant, and immaterial, and not the best evidence, and because no foundation has been laid.

A. I have been informed all the time that all those papers were burned in the fire. They are not in the land office in San Francisco at the present time, and have not been there since I have been connected with the office.

Q. Have you had search made of your records and files in an effort to find them?

A. Yes, but I have not been able to find them.

Q. What would you say as to whether or not they are now in existence in the land department, or among the records of the company in San Francisco?

A. They are not there.

Cross-Examination.

Questions by Mr. Henry Conlin.

Q. You were made land commissioner in September, 1908, you say, of the Oregon and California Railroad Company?

A. Yes.

Q. The Oregon and California Land Company was organized in 1905?

A. That is my recollection.

Q. You had nothing whatever to do with the organization of that corporation, did you?

A. No sir.

Q. And you know nothing about the purpose for which it was organized?

A. Only what I have gathered from the records of the office.

Q. The lands which have been conveyed to that com-

pany were not lands which had been conveyed to the Oregon and California Railroad Company, were they?

A. No.

Q. They were all conveyed by individuals who held them in trust for the benefit of the Oregon and California Railroad Company?

A. Yes, sir.

Q. Those lands were sold,—some of them, were they not, by the Oregon and California Land Company?

A. Some of them have been sold, yes.

Q. Have the proceeds of those lands, at any time, been applied in any way to the payment of the mortgage held by the Union Trust Company, as trustee upon the property and assets of the Oregon and California Railroad Company?

Counsel for complainant object to the question as irrelevant, and immaterial.

Mr. Conlin: Or accounted for to the trustee.

A. Not directly, so far as I know.

Q. Well, as a matter of fact, the proceeds have not been accounted for to the trustee?

A. As to what may become of any dividends declared by the Oregon and California Land Company upon stock held by the Oregon and California Railroad Company, I do not know.

Q. That is a separate and distinct corporation, and has separate stock?

A. Yes.

Redirect Examination.

Questions by Mr. W. D. Fenton.

Q. What is the capital stock of the Oregon and California Land Company?

A. I cannot tell from recollection.

Counsel for complainant offers in evidence a certified copy of the Articles of Incorporation of the Oregon and California Land Company, and the same are received and filed in evidence, marked complainant's exhibit No. 38.

Recross Examination.

Questions by Mr. Henry Conlin.

Q. Has the Oregon and California Land Company claimed to own this land in suit here since its organization?

Counsel for complainant objects to the question as immaterial.

A. Well, the question of ownership as between the two companies as far as I know has not come up.

Q. I asked for a direct answer, Mr. McAllister,—I asked you whether or not the Oregon and California Land Company has claimed to own this land that is involved in this suit since the organization of the Oregon and California Land Company?

Counsel for complainant objects to the question as immaterial.

A. Well, the ownership of the land has been claimed to be in the Oregon and California Railroad Company. The question as to where the title should be placed is one to be adjusted hereafter so far as that goes.

Witness excused.

At this time an adjournment is taken until 2 o'clock P. M., September the 21st, 1911, at Oregon City.

Oregon City, Oregon, September 21, 1911, 2 o'clock P. M. At this time pursuant to adjournment the parties appear before the examiner, the complainant appearing by Mr. W. D. Fenton, of counsel, and the defendant appearing by Messrs. Henry Conlin and H. W. Hogue, and thereupon the following proceedings are had to-wit:

W. L. Mulvey is called as a witness for the complainant and being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination.

Questions by Mr. W. D. Fenton.

Q. State your name, age, residence and occupation.

A. W. L. Mulvey, age thirty-one, residence, Oregon City, Oregon, occupation, county clerk of Clackamas County, Oregon.

Q. I show you complainant's exhibit 6 in this case, and call your attention to the statement of assessed valuation and taxes paid on east $\frac{1}{2}$ of southeast $\frac{1}{4}$, and lots 5 and 6 of section 29, and north $\frac{1}{2}$ of northeast $\frac{1}{4}$ of section 32, both in township 1 south, range 2 east of the Willamette Meridian, and which purports to be a statement for the year, valuation, taxes paid, assessed to, tax paid by, and receipt No., relating to the assessment rolls of this county from the year 1869 to and including the year 1910, and will ask you if that is certified by you as county clerk and if that was kept up by you, and under your supervision with the original assessment rolls and records in your office, and if it is correct?

It is understood that all this evidence is taken subject to the objection by defendant, that the same is incom-

petent, irrelevant, and immaterial, and not the best evidence, and that no foundation has been laid for its introduction.

A. It was, and it is correct.

Q. Have you the assessment rolls from which this statement is made?

A. I have.

Counsel for complainant now offers in evidence the original rolls for the years 1869 to 1910, both inclusive, and asks leave to withdraw the same and to substitute a certified statement in lieu of the original, so far as it relates to the land heretofore described.

It is agreed between the parties by their respective attorneys now present that the statement,—complainant's exhibit 6 is correct, except where it shows with reference to who paid the taxes paid for the various years shown, and that in all other respects, it is admitted to be a correct statement of the assessment of those lands. Whereupon it was agreed that a further production of the original assessment rolls be waived, and that the examination of this witness be confined to an investigation as to what the records show as to who paid the taxes for the years named, whereupon counsel for complainant proceeded with the witness as follows:

Q. Please look at the assessment rolls and other records in your custody that show the taxes paid for the years entered in this statement complainant's exhibit No. 6, and produce the record which shows such payment commencing with the year 1873?

A. I have the assessment roll.

Q. Just read the assessment of this property what there is?

A. This is the property—N. $\frac{1}{2}$ of N. E. $\frac{1}{4}$, Section 32, 1 S. 2 E.—S. E. $\frac{1}{4}$, Section 29, 1 S. 2 E.—the first was eighty acres, and the next 160 acres, valuation \$800 on the first piece, the second piece \$1600. And that of course was included in all of the other land.

Q. In all the lands assessed to the Oregon and California Railroad Company for that year?

A. Yes.

Q. What is the total assessment for the year 1873,—the total assessment of this land?

A. It is not segregated.

Q. What entry, if any, is there in this assessment roll showing that this tax was paid?

A. There is the letter "P," showing that it was paid.

Q. I will ask you to state whether or not these tracts or this tract of land in controversy appears under the assessment of the Oregon and California Railroad Company of its right of way in Clackamas County, consisting of $21\frac{1}{2}$ miles in length, including the road bed, ties, rails, and fixtures, belonging to said road, valued at \$6000 per mile, being 129,000 dollars?

A. It does.

Q. What was the total taxes for that year on this property,—what was the levy,—can you tell by looking?

A. No, I cannot tell what the levy was.

Q. What was the total assessment of the company?

A. \$121,495.50.

Q. And what is the amount of taxes, which is charged

to that property,—the total amount?

A. \$2,382.44.

Q. I notice under the head of “Value of land” in the assessment of this property in dispute in red ink the figures 320 and 800,—is that an addition or an increase, or what is that, do you know?

A. I do not know.

Q. The figures that you have just given show that the \$320 is in red, and is carried into the total of 121,495.50?

A. Yes.

Q. Then the total assessed valuation as shown by this roll of this land would be \$1920?

A. Yes, sir.

Q. And the tax would be its proportion of the total tax?

A. Yes, that is right.

Q. Now, referring to this letter “P” state where that appears with reference to the assessment,—where that appears on that page of this assessment roll?

A. It appears under the same column with “Taxes paid thereon.”

Q. What is the fact as to what the record shows as to whether or not the letter “P” is in the same line as all of the taxes and assessments of the Oregon and California Railroad Company?

A. Yes.

Q. What is there below the name of the tax payer in the column of this assessment roll below the words “Oregon and California Railroad Company,” and immediately opposite this land, as described in this roll, that indi-

cates that the name of the taxpayer on this property is the Oregon and California Railroad Company?

A. The "ditto" mark.

Q. Turn to the assessment roll for the year 1910?

A. That is in the sheriff's office.

Q. Turn to the assessment roll of 1909 and read into the record what it says with reference to the payment of taxes assessed?

A. E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ and lots 5 and 6 section 29, T. 1, S. R. 2 E No. of acres of tillable land 91/149 acres. Value of non tillable land \$8,975, total value of taxable property \$8,975,—amount of state, county, school and other taxes, \$125.65—in school district No. 49, \$119, total tax \$208.65.

Q. Now, under the head of date of payment what is the entry?

A. The entry is 3-7-10.

Q. There is a dash between the figures?

A. Yes, a dash between the 3 and the 7 and the 10.

Q. What is the number of the receipt?

A. 2956.

Q. The amount paid?

A. \$202.39.

Q. What is the amount of rebate?

A. \$6.26.

Q. I show you a tax receipt of the sheriff's office—
R. B. Beatty, sheriff, March 7, 1910, and will ask you what that shows as to who paid this tax assessed to Ben Holladay and Company on that date?

A. The Oregon and California Railroad Company.

Q. Just read it, Mr. Clerk.

A. 1909, taxes assessed to Oregon and California Railroad Company paid by—No. of street—date—Clackamas County for state, school, county, road, state library, school district taxes, and the following described property—\$355.65 for the lands described—name of town, section, or lot, township or block, range—acres—total valuation total tax, cost of penalty, discount or interest, amount paid, page 754, line 13, 6 acres—Daniel Hathaway, D. L. C. total valuation \$1800—total tax \$40.50, discount or interest \$1.21, amount paid \$39.29—school district 1, \$9.40, Milwaukie tax \$5.40—state, county, road and school tax \$25.20, page 104, line 20 and 21, east $\frac{1}{2}$ of southeast $\frac{1}{4}$ and lots 5 and 6, section 29, township 1 range 2 E. 91/149 acres, total valuation \$8,975, total tax \$208.65, discount \$6.26—amount paid \$202.39—state, county, road and school tax \$125.65, page 105, line 10, west half N. E. $\frac{1}{4}$ section 32, town. 1 range 2 E. 80 acres valuation \$5000, total tax \$117.50, discount \$3.53, amount paid \$113.97—state, county, road and school taxes, \$70.00, assessed to Ben Holladay and Company—total tax \$366.65, discount \$11, amount paid \$355.65—amount Milwaukie tax, \$5.40—state, county, road, school tax \$220.85, receipt stamped R. B. Beatty, sheriff, March 7, 1910, by deputy, stamped paid R. B. Beatty, sheriff.

Q. Now what is this document that you have just read into the record,—what do you call it?

A. This is a carbon copy of the sheriff's receipt for taxes paid on this land.

Q. This assessment of the eighty acres on page 1105

involved in this roll refers to the same receipt by number?

A. It does.

Q. What is the number of the receipt?

A. 2956.

Q. Now, turn to the record showing the entry of the payment of the taxes on this property for the year 1908, and without taking the time to read the description of the premises, you may say if they are the same premises that we have just described, and what the receipt number is, and what the receipt shows?

Mr. Conlin, we have already stipulated that this correctly shows to whom this property was assessed and the only thing that there is any dispute about here is as to who paid the taxes, and what the record shows as to who paid the taxes.

Q. Then, with that understanding as to the meaning of the stipulation, just take the receipts that you have just read to the court, and state what is shown there in relation to who paid these taxes for the year 1908?

A. It shows that it was assessed to Ben Holladay and Company.

Q. Does it show there the same kind of blank you have just read into the record?

A. The same.

Q. This is the same blank that was read into the record?

A. Just the same.

Q. And what does it show by whom those taxes were paid?

A. Paid by blank.

Q. What is the date of payment?

A. March 8, 1909.

Q. What name is to the receipt?

A. R. B. Beatty, sheriff.

Q. Turn now to 1907,—what does the 1907 tax receipt on this property show?

A. It shows that it was assessed to Ben Holladay and Company and paid by the Oregon and California Land Company.

Q. To whom paid?

A. To R. B. Beatty, sheriff.

Q. What date?

A. March 14, 1908.

Q. Now, turn to 1906, what does the receipt for 1906 show, to whom this property was assessed?

A. R. Koehler, Portland.

Q. By whom paid?

A. Paid by S. P. Company.

Q. What date?

A. March 14, 1907, R. B. Beatty, sheriff.

Q. The roll shows that it was assessed to Ben Holladay and Company?

A. Yes.

Q. No, turn to the tax receipts for 1905, what does that receipt show?

A. It shows that this property was assessed to Ben Holladay and Company and R. Koehler.

Q. Paid by whom?

A. By Mr. Miller for the S. P. Company.

Q. When paid?

A. Paid September 21st, 1906, to R. B. Beatty, sheriff.

Q. Now turn to the tax receipts for the year 1904, what does that show, Mr. Clerk?

A. It shows that this land in question was assessed to Ben Holladay and Company, and paid by O. C. R. R. Co.

Q. When paid?

A. March the 11th, 1904, to J. R. Shaver, sheriff.

Q. Turn to the tax receipt for the year 1903, for this property and state what it shows as to that matter?

A. It shows that it was assessed to Ben Holladay and Company and paid by—

Q. When was it paid, and to whom?

A. March the 11, 1904, to J. R. Shaver, sheriff.

Q. What does it show with reference to any other land, besides the lands described?

A. It shows on page 920, line 16, part of Daniel Hathaway, D. L. C. T. 1 South, R. 1 E. 8 acres.

Q. Will you turn to the assessment roll for that year and see how the Hathaway tract of eight acres is assessed?

A. It is assessed to R. Koehler.

Q. Turn now to the receipt showing the payment of taxes on these lands for the year 1902,—what does the receipt show as to the payment of taxes for that year?

A. It shows that it was paid by R. Koehler.

Q. How does it read?

A. "Received of R. Koehler, \$191.67."

Q. What date?

A. 3-16-1903—March 16, 1903.

Q. What is the number of the receipt?

A. 4604.

Q. Paid to whom?

A. To J. R. Shaver, sheriff.

Q. Turn to 1901 and state what the receipt shows as to who paid the taxes on this property for that year?

A. "Clackamas County, Oregon,—received of Oregon and California Railroad Company \$156.17."

Q. What date?

A. 3-15-1902.

Q. What is the number of its receipt?

A. 3150.

Q. Who was it paid to?

A. To J. J. Cook, sheriff.

Q. Turn to the receipt for the year 1900, being receipt number 3031, and state what that shows.

A. It shows that Clackamas County, Oregon, received of O. & C. R. R. Co. \$146.56.

Q. When?

A. June 8th, 1901.

Q. To whom paid?

A. J. J. Cook, sheriff, by J. E. Jack, deputy.

Q. Turn now to the tax receipts for the year 1899, being receipt No. 5562, and state what it shows as to who paid the \$141.98 taxes due upon these lands for that year?

A. It shows that Clackamas County, Oregon, received of the Oregon & C. R. R. Co. \$141.98.

Q. What time was it paid and to whom?

A. To J. J. Cook, sheriff, by J. E. Jack, deputy, on

August 8th, 1900.

Q. Turn to the tax receipts for the taxes of 1898, and state who paid the \$151.14, taxes upon this property for that year,—the receipt being No. 2905?

A. The Oregon and California R. R. Co. paid the taxes.

Q. When and to whom?

A. On May 19, 1899, to J. J. Cook, sheriff, by J. E. Jack, deputy.

Q. Turn to receipt No. 5517 and ascertain who paid the \$128.24 due upon taxes upon these lands for the year 1897?

A. The Oregon and California R. R. Co. paid to J. J. Cook, sheriff, by J. E. Jack, deputy, on August 10th, 1898.

Q. Turn to receipt No. 3069 for the payment of \$77.14, taxes due upon this land for the assessment of 1896, and state what the tax receipt shows as to whom paid, and when?

A. It shows that they were paid by the Oregon and California R. R. Co.—5-31-1897 to G. W. Grace, sheriff, by E. H. Cooper, deputy.

Q. Turn to receipt No. 2947, and state what that receipt shows as to who paid the \$73.15, taxes due upon these lands for the assessment of 1895?

A. They were paid by the Oregon and California R. R. Co. on May 15th, 1906.

Q. What does the receipt read, how does it read?

A. "Clackamas County, Oregon, Oregon City, Oregon, May 15th, 1896, received of the Oregon and Califor-

nia R. R. Co.”

Q. Are you reading from the stub or from the receipt itself?

A. From the stub.

Q. Did the office of the sheriff at that time keep a duplicate, or carbon copy of the receipts, or only the stub?

A. Only the stub.

Q. Can you tell by turning to the assessment rolls for that year whether that receipt covered the taxes on this land in dispute?

A. The assessment roll shows that the land in question was assessed to the Oregon and California Railroad Company.

Q. And is there anything on the roll that identifies the receipt as being the receipt from the stub of which you read?

A. There is.

Q. What is that?

A. The same No. on the roll that is on the stub.

Q. In what column of the assessment roll?

A. In the column—No. of the receipt.

Q. What is the No. on this assessment roll for that year?

A. 2947.

Q. What is the No. on the stub?

A. 2947.

Q. Turn now to the assessments for the year 1894,—the taxes paid on this property amounting to \$71.40, being receipt No. 3449-50, two stubs, and state what you

have before you there as to whether it is a receipt or the stub of a receipt?

A. It is a stub of a receipt.

Q. What does the stub 3449 show as to who paid it?

A. The O. & C. R. R. Co.

Q. What is the No. of the stub?

A. 3449.

Q. Turn to 3450, what does that show?

A. 3450 shows "Received of O. & C. R. R. Co."

Q. Turn now to the receipt showing the payment of the taxes \$16.20, assessed on this property for the year 1893, being receipt No. 4035,—what does that stub show as to who paid it?

A. It was paid by O. & C. R. R. Co.

Q. When?

A. 5-12-1894.

Q. Turn to the tax receipts for 1892, being No. 2597,—turn to the assessment roll and see what it shows for the year 1893 about this property in dispute?

A. It shows that it was assessed to the O. & C. R. R. Co.

Q. How much of it was assessed,—describe it?

A. N. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of section 32, T. 1 R. 2.

Q. How many acres?

A. Eighty acres.

Q. Also what else?

A. Also E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of Section 29, T. 1 R. 2, eighty acres.

Q. What was the value?

A. \$300.

Q. What is the total value upon which the taxes were paid?

A. \$600.

Q. Now turn to tax receipt No. 2597 and receipt No. 3768, and state what they show as to who paid the taxes assessed against this property for the year 1892?

A. The S. P. R. R. Co. and the P. W. V. R. R.

Q. What is the amount of the receipt as shown by the stub in money?

A. \$3156.73.

Q. Then if I understand you, that receipt gives not only this property but other property on which taxes were paid?

A. Yes.

Q. Turn now to No. 3768 for the same year, and state what that shows?

A. It shows that the taxes were paid by the O. & C. R. R. Co.

Q. What is the amount of the taxes?

A. \$2276.23.

Q. When paid?

A. May 25, 1893.

Q. Then the lands in dispute were included in the total of taxes paid on that and other property?

A. Yes.

Q. Turn now to the assessment for the year 1891 and to tax receipt No. 1969, and state what it shows, as to who paid these taxes, and whether there is any segregation of the amount of the taxes?

A. It was paid by the O. & C. R. R. Co.

Q. Does that payment cover the assessment for these particular lands?

A. It does.

Q. Can you tell what the tax was on this property for that year?

A. I can.

Q. What was it?

A. Approximately \$114.50.

Counsel for defendant objects to the witness making a computation for the reason that there is nothing shown on the records as to that matter.

Q. What is the fact as to whether there was any segregation of the taxes paid on this particular land from other property of the Oregon and California Railroad Company?

A. There was no segregation.

Q. Is the land described there separately assessed?

A. Yes, sir.

Q. Then, in arriving at those figures you have taken the average No. of mills on the dollar of the total assessment?

A. Yes, sir.

Q. And have multiplied the assessed valuation of this property in dispute and arrived at the figures you have given?

A. I have.

Q. State what the fact is as to whether or not this receipt No. 1969, the stub of which you have referred to showing the payment of \$4189.06 on April 16th, 1892, as received from the Oregon and California Railroad Com-

pany, does or does not include the amount of taxes assessed upon these lands in dispute, and does not the number of this stub appear on the assessment roll page 125 in these words,—“Paid No. 1969” and opposite the assessment of the Oregon and California Railroad Company—on page 125 of this roll?

Counsel for defendant object to the question as incompetent, irrelevant and immaterial, and because the assessment roll speaks for itself.

A. It does.

Q. And each page of the assessment roll contains a description of the property of the Oregon and California Railroad Company upon which taxes were paid as evidenced by this stub No. 1969?

A. It does.

Q. Now, you may turn to the receipt for the year 1890, being receipt No. 1068, and state what that shows as to who paid the taxes upon these lands in dispute for that year?

A. The O. & C. R. R. Co. G. lands.

Q. What date?

A. March 24th, 1891.

Counsel for defendant objects to the question upon the ground that the records from which the witness has read does not show the payment of taxes upon the land in dispute as embodied in the question,—it simply shows the payment of some taxes, but does not show the payment of taxes upon the land in dispute.

Q. What is the amount of this receipt?

A. \$2044.71.

Q. Now turn to the assessment roll showing the taxes assessed for which this stub No. 1068 indicates a receipt for taxes assessed and paid, and ascertain what property is assessed and whether the property in this suit is described in that assessment, and included in the taxes paid as evidenced by that stub, and the amount of taxes, if you can estimate the same or compute the same, based upon the assessment roll, and the levy for that year?

A. The assessment roll includes the property in question.

Q. How is it assessed, and to whom?

A. To the Oregon and California R. R.

Q. What does the roll show, if anything, as to the No. of the receipt that evidences the payment of the taxes assessed upon the land described in this roll?

A. It shows it to be No. 1068.

Q. What was the levy for that year? or rather, what were the approximate total taxes on these lands for that year as shown by a computation that you may make the total assessment being \$580?

A. \$106.90, approximately.

Q. Why do you say approximately?

A. Because it was not segregated.

Q. And in making this computation state whether you took the total assessed valuation of the property assessed to the Oregon and California Railroad Company, and the total taxes paid as evidenced by this receipt and the No. of mills on the dollar?

A. I did.

Q. Turn now to tax receipt No. 1724 for the year 1889,

and read what that receipt shows with reference to the payment of taxes upon these lands assessed at \$1600, for that year and by whom paid and when?

A. Paid by the O. & C. R. R. Co. on March 31.

Counsel for defendant object to the question and answer for the reason that the receipt does not show the payment of taxes on these lands,—it shows the payment of some taxes.

Q. Just read Mr. Clerk, what it does say?

A. It says,—“Clackamas County, Oregon, Oregon City, March 31, 1890, received of O. & C. R. R.”

Q. How much money?

A. \$2430.54.

Q. What else does it say?

A. “In full for state, county, and school taxes for the year 1889.”

Q. What is the number of this stub?

A. 1724.

Q. Now then, can you turn to the assessment roll for 1889 and state whether the property assessed against the Oregon and California Railroad Company for that year included these lands in dispute?

A. Yes, it does.

Q. Complainant's exhibit 6 shows that this land is assessed for that year at \$1600?

A. Yes.

Q. Now, then, what is there on that roll that shows that the receipt No. 1724 is given for taxes that covered or included the taxes upon this land, if anything?

A. Well, the No. 1724.

Q. The assessment roll showed the word "Paid No. 1724—\$2430.54"?

A. Yes.

Q. Tax on track, rolling stock, depot grounds, and so forth, also paid No. 2772—\$1461.78—taxes on congressional lands?" that is correct is it not?

A. Yes.

Q. Now, the roll that you are reading from contains an assessment of these lands in dispute?

A. It does.

Q. But there is no segregation of or a separate stub, or a separate receipt of the particular lands in dispute?

A. There is not.

Q. Now, what was the approximate taxes paid on these particular lands for that year assessed at \$1600?

A. It shows it to be approximately \$41.60.

Q. You arrive at that computation from the total assessment of all the property of the Oregon and California Railroad Company and the total taxes paid that year, and make the computation from the levy?

A. I do.

Q. Turn now to the taxes for the year 1888 assessed and paid upon this property on the basis of assessment of \$1600, being receipt No. 1869, and state what that stub or copy of receipt, or whatever it is that you have shows—just read it.

A. It says: "Clackamas County, Oregon, Oregon City, March 25th, 1889, received of S. P. Co. for O. & C. R. R. Co. in cash, \$2079.15 in full for state, county and school taxes for the year 1888."

Q. Turn now to the assessment roll for that year and ascertain whether or not the same tax receipts bearing the same number was issued for taxes assessed against the O. C. R. R. Co. for the year 1888, included the property in dispute, assessed on the roll at \$1600?

A. It does.

Q. Does the assessment roll for that year show tax receipt bearing the No. 1869?

A. It does.

Q. What does it show—just read it?

A. "Paid No. 1869."

Q. What was the tax approximately on this property in dispute for that year, segregating it from the other property assessed against the Oregon and California Railroad Company out of the total taxes paid on all of this property?

Counsel for defendant objects to the question because it calls for a deduction and computation and not a statement of facts appearing upon the records.

A. Approximately \$35.20.

Q. You arrive at these figures by a computation by obtaining the number of mills on the dollar, did you?

A. Yes.

Q. By taking the total taxes paid on the property by the Oregon and California Railroad Company as shown by this roll—the total assessment valuation?

A. I did.

Q. Turn, now, to receipt No. 1693 for the year 1887, upon this property in dispute assessed at \$1600—what does that receipt show—read it?

A. It says: "Clackamas County,—Oregon City, March 27, 1888, received of A. & C. R. R. Co. in cash, \$4702.17, in full for state, county, and school taxes for the year 1887—William Knight, sheriff, of Clackamas County."

Counsel for defendant notes the same objection to this question and answer heretofore made, viz., that the assessment roll shows that the payment of some taxes does not show the payment of any taxes on the property in dispute.

It is agreed by and between the parties that the roll shows that this property is assessed with other property to the Oregon and California Railroad Company in the same way as for the previous year, and that there is no segregation of the amount of taxes, and it is agreed that a like statement obtains as to the taxes against this property for the years which will be hereafter referred to, viz., for the years 1878, 1879, 1880, 1881, 1882, 1883, 1884, 1885, 1886, 1887, and that the same conditions obtain as to the segregation of taxes,—the receipt or stub showing no segregation.

Q. State what the taxes were approximately on this land for the year 1887?

A. I will say approximately \$48.

Q. What does the assessment roll show as to the assessment for the year 1886? as to the payment of taxes, and who paid the taxes as shown by receipt No. 4904, on these lands in dispute?

A. The receipt shows: "Clackamas County, Oregon,—Oregon City, March 18th, 1887, received of O. & C. R. R. Co. in county orders \$601.98, and in cash

\$1694.24, total \$2296.22, in full for state, county, and school taxes for the year 1886.”

Q. I suppose there is no segregation on the roll of the assessment of property of the Oregon and California Railroad Company including this property in dispute for that year?

A. There is not.

Q. Is the receipt No. as shown on the assessment roll the same as on this stub?

A. It is.

Q. What is the No.?

A. 4904.

Q. What was the approximate taxes on the property in dispute assessed at \$1600 for that year?

A. I would say that the tax was approximtaily \$36.

Q. Turn to the assessment roll for the year 1885, assessed at \$1600, being tax receipt No. 1181, and state what that receipt shows as to who paid the taxes on this land included with other lands assessed to the Oregon and California Railroad Company?

A. It shows that the tax was received from the O. & C. R. R. Co. per R. Koehler, receiver.

Q. Just read the rest of the receipt.

A. “In county orders, \$1119—in cash \$783.43, total \$1902.44 in full for state, county, and school taxes for the year 1885—William Knight, sheriff for Clackamas County, Oregon.”

Q. Now, does the assessment roll for that year show the number of this receipt as No. 1181,—the receipt that you have just read?

A. It does.

Q. What was the approximate taxes on this property in dispute assessed at \$1600 for that year as shown by a computation based upon the total assessment of the Oregon and California Railroad Company for that year, including the property in dispute?

A. I would say that it was approximately \$29.95.

It is agreed by and between the parties hereto that Mr. Mulvey, the county clerk, and witness now on the stand may write a letter to the examiner making a statement of the approximate taxes assessed against this property, and by whomsoever paid from the years 1873 to the year 1884, both inclusive, and that his statement of those amounts shall be considered as what he would testify to, if interrogated at this time.

Q. Now then I will ask you to explain to the court whether or not there is anywhere in your office a record showing the payment of taxes from 1873 down to and including 1884?

A. Yes.

Q. Where did you get that information, shown in this paper, complainant's exhibit 6?

A. Got it from the tax rolls, on the margin.

Q. From the assessment rolls for the respective years?

A. Yes.

Q. Where does the word or letter "C" or the word "paid" which you have on this complainant's exhibit 6 appear on these assessment rolls for these respective years?

A. On the margin.

Q. State whether or not it appears on the same page after the extension of the total taxes referring to the property assessed against the taxpayer that appears on the roll?

A. It does.

Q. I wish you would turn to the assessment roll for the year 1880, and state how that is assessed, and is there any segregation?

A. There is no segregation, it is assessed in the name of Ben Holladay.

Q. Now, I call your attention to the fact that this assessment roll for 1880 has a column under the column "Name of tax payer" the words "O. & C. R. Co." and then "Right of way of the company" under the description of land,— "Gross value of road \$118,250—Part Hathaway D. L. C., section 36, town. 1 S. 1 E. 11.21 acres—\$400," and I will ask you if it is not a fact that "ditto" markings appear on three lines immediately below,— "ditto" markings following O. & C. R. R. Co.,—and these words appear on this roll in the name of Ben Holladay—\$2932 township 1 South, range 2 East, 160 acres, below \$11, and immediately below that, standing in the name of R. Koehler, section 32-33, town. 3 S. range 1 E. sections 4 and 5, town. 4 south, range 1 east, \$138.62, \$1000, Canby, and below that,—immediately below, the words "Oregon and California R. R. Co. L. department, page 177?"

A. Yes—ditto marks do appear under O. & C. R. R. Co. opposite the land in question.

Q. Under the words named?

A. Under the words named.

Q. What entry is there on the margin of this assessment roll that indicates a payment?

A. On the margin the words "Paid April the 5th."

Q. Where is the word "Paid" with reference to the ditto marks under O. & C. R. R. Co.,—are they opposite?

A. They are opposite.

Q. Is the word "Paid" also written opposite the name Ben Holladay and so forth, as I have read?

A. Yes.

Q. The word "Paid" appears three times on the margin opposite these ditto marks?

A. It does.

Q. Now, these other roads containing the word "Paid" as shown in complainant's exhibit 6, as I understand you are in like manner on the rolls where the property is assessed?

A. They are.

Q. Have you any receipts in this office or stubs showing from whom the taxes for those years from 1873 down to and including 1884, other than the year 1877, when there was no assessment,—showing who paid the taxes?

A. I have not.

Q. Was the assessment for the year 1877 for the whole land of the Oregon and California Railroad Company?

A. Yes.

Q. But these particular lands appear to have been omitted for that year?

A. Yes.

Q. They were not assessed to any one?

A. No sir.

Q. How does it appear that they were not assessed to any one?

A. They are not on the rolls.

Q. Not on the rolls?

A. No sir.

Counsel for complainant here states that he desires to have it appear on the record that these original records were produced by the county clerk of Clackamas County, and that they are here now for the inspection of counsel, and are offered in evidence with the understanding that they may be withdrawn and left with the county clerk of Clackamas County.

NO CROSS EXAMINATION.

Witness excused.

Thereupon the taxing of testimony herein is adjourned to be resumed at the examiner's office, room 812, Yeon Building, Portland, Oregon, September 21, 1911, at 10 o'clock A. M.

Portland, Oregon, September 21, 1911, ten o'clock A. M., at this time the parties herein appear before the examiner at 812 Yeon Building, complainant appearing by Mr. W. D. Fenton as counsel, and the defendant appearing by Messrs. Henry Conlin and H. W. Hogue, and thereupon the following proceedings are had to-wit:—

Counsel for complainant offers in evidence a certified copy of the deed of bill of sale from William Showers, dated November 19th, 1868, to Ben Holladay and Company, duly certified by the recorder of Conveyances for Clackamas County, Oregon.

The same is received and filed in evidence marked

complainant's exhibit 39.

Counsel for complainant offers in evidence the certified copy of an instrument in writing dated November 19th, 1868, executed by James Grindley to Ben Holladay and Company, and the same is received and filed in evidence, marked complainant's exhibit 40.

Counsel for complainant offers in evidence a certified copy of deed dated October 5th, 1869, executed by Gardner Elliott and Betsey S. Elliott, his wife, to Ben Holladay and Company, and the same is received and filed in evidence, marked complainant's exhibit 41.

Counsel for complainant offers in evidence a certified copy of deed from James Grindley to Ben Holladay and Company, dated May 4th, 1869, and the same is received and filed in evidence, marked complainant's exhibit 42.

Counsel for defendant objects to the introduction in evidence, of each of the preceding documents, numbered respectively complainant's exhibits 39, 40, 41 and 42, for the reason that the same are incompetent, irrelevant, and immaterial, and not the best evidence, and because no foundation has been laid.

Charles W. Eberlein is called as a witness for the defendant, and being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination.

Questions by Mr. Henry Conlin.

Q. Please state your name, age, residence, and occupation.

A. My name is Charles W. Eberlein,—I was born in

1863, about forty-seven,—my residence is San Francisco, and my occupation is that of a ranch owner.

Q. Were you at one time in the land office of the Oregon and California Railroad Company?

A. Yes sir.

Q. What position did you occupy with that company, and how and by whom were you appointed, and what were your duties?

A. I do not know that I can give the exact date, but I was a land officer of the Oregon and California Railroad Company with the title of acting land agent,—my duties were those which are ordinarily exercised by a land officer, and in addition I had charge of the Organization, examination, and straightening up of all land matters.

Q. When were you appointed acting land agent, if you know?

A. I think it was in 1903,—I would not be sure as to the date.

Q. Was it not 1904?

A. I had charge of affairs from 1903.

Q. Did you know a corporation called the Oregon and California Land Company?

A. Yes sir.

Q. Were you an officer of that company?

A. It was organized at my instance.

Q. What time?

A. I think the organization was in 1904,—I wouldn't be positive as to the date, it may have been 1905, possi-

bly. It was after the department had been moved to San Francisco, or about that time.

Q. I will ask you to state, Mr. Eberlein, in a general way, fully and completely, the origin of your connection with the Oregon and California Railroad Company, and how it was brought about, and the purpose of it,—state fully and completely the whole business.

Counsel for complainant objects to the question as irrelevant and immaterial.

A. I was sent out here by Mr. Harriman under the direct orders of Judge Cornish.

Q. What time?

A. I came here first in 1903 to Portland. I was organizing and examining, and straightening up all land affairs of the Southern Pacific, and allied lines. I came here from the Union Pacific, where I had done the same thing.

Q. Please specify and tell us completely what you mean when you say that you were sent out to organize,—what was the work that you did,—state fully?

Counsel for complainant objects to the question as incompetent, irrelevant, and immaterial.

A. To find out what the company owned, to straighten out the land department and land affairs, and to systematize it and to straighten up conditions into which they had fallen.

Q. You say you came here having been engaged in investigating and organizing the land department of the Union Pacific?

A. Yes sir.

Q. When were you there?

A. I was there in 1901 and 1902.

Q. Who was then in charge of the Union Pacific Land department?

A. Mr. McAllister was land commissioner at that time.

Q. You organized and systematized the department of which he was in charge at that time?

A. I thoroughly organized and systematized the office.

Q. After completing your employment with the Union Pacific you came out to look after and did the same thing with reference to the land department on this coast?

A. Yes sir,—I did the same thing in Texas.

Q. Well, was it a part of your duty and business to ascertain and have made a matter of record all the company lands to which the company had title?

Counsel for complainant objects to the question as immaterial.

A. Yes, we made lists of all the lands.

Q. Will you state in your own way,—to save the record and save time, if you will go ahead and state just what was done with reference to establishing record, or remaking records of the title to lands, and what was done with reference to investigating the payment of taxes upon lands, and everything pertaining to it,—state fully as you go,—just narrate the work that you did from the time you were appointed acting land agent of the Oregon and California Railroad Company?

Counsel for complainant objects to the question as in-

competent, irrelevant, and immaterial.

A. That is a pretty hard contract. My duties in regard to the land department here began before I was appointed land agent. I had general supervision of the land of the Harriman system,—of the Harriman lines of road, because my work extended from Texas to Oregon over the Union Pacific.

Q. I will ask you to confine yourself to the Oregon and California Railroad Company and the Oregon and California Land Company?

A. Well, so far as the Oregon and California Railroad Company is concerned, I was sent here first in the fall of 1902, and made just a brief examination. I had no expectation at that time of becoming associated as an officer of the road at all. My work was general organization under Judge Cornish, but things turned out so that it was thought best that I should check off the titles, and handle the thing and make an examination into all the lands to see what their condition was, and the condition of the title, and otherwise see what they could be put in shape for marketing.

Q. Did you employ a man to do that work?

A. Well, it grew into that at last,—there was a great deal more work than anticipated.

Q. Did you make an investigation of the payment of taxes upon lands of the Oregon and California Railroad Company,—those lands which the company have been paying taxes upon?

A. Yes sir.

Q. Well, for how far back,—will you kindly state as

fully as you can what you did in connection with that?

A. Mr. Cotton advised—

Counsel for complainant objects to the testimony as incompetent, irrelevant, and immaterial, and hearsay, and not the best evidence.

The witness:—You gentlemen will have to drag it out of me because I am not a very willing witness.

Q. Go on.

A. Then, I will just repeat,—that acting upon the advice of Mr. Cotton, which, by the way, was in writing.

Q. Please state who Mr. Cotton was.

A. Mr. Cotton was general attorney for the Oregon Railroad and Navigation Company, but he gave advice in regard to land matters and tax matters on the Southern Pacific, and he advised the New York office frequently,—it was through the New York office that I applied to Mr. Cotton for advice, and Mr. Cotton advised that it would be best to make search as to taxes on all company land for fifteen years back, and we thereupon organized a force to go into every county and make a thorough examination as to the taxes and to weed out such lands as had been lost to the company, or to bring suit to quiet title, that was why it took so long a time to do it.

Q. Did your tax investigation cover the title to all lands owned or claimed to be owned by the Oregon and California Railroad Company?

Counsel for complainant objects to the question as incompetent, irrelevant, and immaterial, and because the record is the best evidence.

A. Yes sir, it covered everything that the company

was supposed to own.

Q. In that connection, Mr. Eberlein, I will ask you to state if at the time you were doing this work you were the sole and exclusive officer of the railroad company in charge of its land affairs?

A. Yes sir, at that time,—at the time of this investigation.

Q. Appointed by the board of directors?

A. Yes.

Q. Did you in that investigation find that the company had been paying taxes upon land that it did not own or claim to own?

Counsel for complainant objects to the question as immaterial.

A. Yes sir.

Q. Will you kindly state as fully as you can, what were the facts about the company paying taxes upon land which the company did not own or claim to own?

Counsel for complainant objects to the question unless it is confined to these lands in suits as incompetent, irrelevant, and immaterial.

A. Yes, we found that we had been paying taxes on considerable land that we did not own.

Q. Well, how, with reference to time,—was that of long duration?

Counsel for complainant objects to the question as incompetent, irrelevant, and immaterial, unless it is confined to these lands in suit.

A. Yes, it covered considerable time, and took in a good many tracts.

Q. What I am getting at is, I do not want to ask leading questions, but I would like to know if in this investigation it was brought to your knowledge personally as a land officer of the company that the railroad company had been paying taxes upon land for many years,—many tracts of land, which the company did not own, and which it had no title to, and which it afterwards abandoned any claim to own.

Counsel for complainant objects to the question as incompetent, irrelevant, and immaterial, unless it is confined to the land in suit.

A. As near as I can understand the examination disclosed considerable land that the company did not own at the time, and to the discovery that we had been paying taxes on this land for a considerable time,—as to the time I can only state generally that my recollection is that it would extend over a considerable period of time.

Q. That is, for a number of years?

A. A number of years in some instances.

Q. The land involved in this suit as shown by the plats which have been introduced in evidence by complainant's counsel in this case and marked complainant's exhibits 1 and 2 and I will ask you to look at these plats and state whether or not you have any recollection about that piece of land,—the north $\frac{1}{2}$ of the northeast $\frac{1}{4}$ of section 32, and the south $\frac{1}{2}$ of the southeast $\frac{1}{4}$ of section 29, and lots 5 and 6 of section 29, township 1 south, range 2 east of the Willamette Meridian in Clackamas County, Oregon.

Counsel for complainant objects to the question as ir-

relevant and immaterial.

A. If this map shows the land that was known in the office as the Holladay tract,—I cannot recall the description of it.

Q. Well, that is known as the Holladay tract?

A. Well, my recollection is that it was about two hundred acres of land somewhere in that neighborhood,—located near Milwaukie.

Q. Well, what did you find as a land officer,—and acting land agent of the Oregon and California Railroad Company in making an investigation into the title of this land owned or claimed to be owned by the Oregon and California Railroad Company,—will you kindly go ahead and state all that you found as acting land agent of the Oregon and California Railroad Company, and what you did with reference to this tract of land in pursuance of the general scheme, and duty which you were assigned to do?

Counsel for complainant objects to the question as incompetent, irrelevant, and immaterial.

A. This land was what is known as the Holladay tract commonly around the office, and was one of the tracts of land carried in the office as miscellaneous land. Miscellaneous lands, I found, were scattered tracts of land all up and down the state in different places,—and different towns mostly town lots that stood in the name of different individuals,—Mr. Koehler had some,—Mr. Andrews had some, and Mr. George W. Weidler had some, and I understood,—

Counsel for complainant objects to the witness stating

what he understood as hearsay.

A. (continued)—I understood that it belonged to the Oregon and California Railroad Company or was claimed by it.

Q. Well, these particular lands, which you have referred to as the Holladay lands,—did you make any special investigation with reference to the titles to those lands, and if so, will you state what that investigation was, and all about it, and what was done with reference to it?

A. The title to all these miscellaneous lands was examined with reference to gathering them together into one ownership or one title, and the examination of this tract disclosed—

Counsel for complainant objects to this evidence as incompetent, irrelevant, and immaterial, and not the best evidence.

A. (continued)—The examination of this tract disclosed a peculiar state of title. I secured an abstract of title which I submitted to the company's attorney,—Judge Fenton.

Q. I will ask you then, in connection with that, Mr. Eberlin,—how was your attention first attracted to this piece of land,—through what investigations, or proceeding on your part?

A. I think it came up through the tax investigation.

Q. Did you find that the company had been paying taxes on this land?

A. That is my recollection that they had been paying taxes upon all this land.

Q. And from the payment of taxes you undertook to inquire into and did inquire into the title of the company to see whether or not the company was paying taxes upon land which it did not own?

A. Yes, or, which it claimed to own, but did not hold any title to.

Q. Now, go ahead.

A. I was advised that the company had no record title to this land.

Q. Who advised you of that?

A. Judge Fenton.

Q. Mr. William D. Fenton?

A. Judge William D. Fenton, attorney for the Company at that time.

Q. What position was he occupying at that time?

A. He was attorney for the Southern Pacific and had jurisdiction over legal matters connected with these lands, as I understood.

Q. And after this advice, what did you do further,—just state in your own way as fully as you can what was done by you at that time?

A. Well, the only thing that was done was to fence the land.

Q. Why did you fence the land?

It is understood that all of this testimony is taken subject to the objection heretofore made by complainant's counsel that the same is incompetent, irrelevant, and immaterial.

A. To get possession of it, as I understood.

Q. Did the railroad company have possession of it at

that time?

Counsel for complainant objects to this question as not the best evidence.

A. It was unfenced,—upon land at that time.

Q. Well, what did Mr. Fenton advise you with reference to the possession of the land?

Counsel for complainant objects to this question upon the ground that the advice is in writing, and the writing is the best evidence.

Mr. Fenton, my advice was in a letter to you, was it not?

Witness,—I think so.

Q. Those letters were left in the files of the Oregon and California Railroad company when you retired from the service?

A. No, that letter was burned.

Q. It was left among the files and afterwards burned?

A. Yes, everything was burned.

Q. (By Mr. Fenton) This letter was an official letter, addressed by one officer of the company to another about the business of the company?

A. Yes.

Q. It was in writing?

A. Yes.

Q. (By Mr. Fenton) And whatever correspondence you received from me before April 18th, 1906, was burned?

A. Yes.

Mr. Fenton,—I object to this evidence as incompetent, and not the best evidence.

Q. Well, Mr. Eberlein, you know of your own knowl-

edge that the communication referred to was burned?

A. It must have been, I cannot account for anything else,—it was in the office, and it must have been burned.

Q. And all the records of your office and correspondence were burned?

A. All this correspondence was burned.

Q. Will you kindly state as near as you can the substance and contents of this communication in which Mr. Fenton advised you to fence this land?

A. I submitted that abstract and my recollection is that the advice of Mr. Fenton at that time was that there was no record title shown, and that we should fence the land.

Q. Did Mr. Fenton advise you in any way about whether or not the company was or was not in possession of the land or claimed to be in possession of it, or had ever been in possession of it?

A. I do not recollect that he said anything of that kind.

Well, as an officer of the company at that time, did you claim to be in possession of that land, or as having had possession of that land?

Counsel for complainant objects to the question as incompetent, irrelevant, and immaterial.

A. I do not know as I understand your question exactly.

Q. Well, what possession did the company have at that time of this land?

A. No actual possession that I know of,—it was unfenced open land,—it had not been rented that I was ever

advised of,—not until after it was fenced.

Q. When was this communication from Mr. Fenton,—about what date?

A. That is something I cannot recollect.

Q. Approximately?

A. Well, it must have been in the winter of 1904, or 1905, perhaps,—after the first of January, 1905, because the fence must have been done in the spring of 1905.

Q. Did you cause the land to be fenced?

A. Yes sir.

Q. And you think that that fence was put there about 1905?

A. I think it was built about that time,—that would be my best recollection,—in the spring of 1905.

Mr. Fenton,—I think it was built in March, 1905,—I think the fence that Mr. Eberlein refers to was built under the direction of Mr. Elliott, and cost about fifty cents a rod.

The witness,—About four hundred dollars.

Q. Did you ever see or know of there being in the land department of the Oregon and California Railroad Company, any instrument purporting to have been executed by Ben Holladay and Company, or by Ben Holladay and C. Temple Emmett, or by any one else,—any instrument of any kind or character whatsoever which purported to convey the title to this land?

Counsel for complainant objects to the question as incompetent, irrelevant, and immaterial.

A. No, there was not anything of that kind, that I ever saw or heard of.

Q. Do you know positively that there ever was such a document?

Counsel for complainant objects to the question as incompetent, irrelevant and immaterial.

A. No, I cannot say that.

Q. Did you ever see it?

A. Nothing ever came up in my investigation at all, I never saw it.

Q. Do you know a gentleman named William D. Kelly?

Q. When did you first know him, and under what circumstances?

A. I have known Mr. Kelly, I think, since 1904, when he became connected with the land department.

Q. And in what way did he become connected with the land department?

A. He was there in a clerical capacity.

Q. Employed by you?

A. Employed by me.

Q. What were his duties?

A. I cannot recollect just now,—I think his duties at first were connected with the correspondence, and different matters that were assigned to him, but just what, I do not remember now.

Q. Was Mr. W. D. Kelly employed by you in the land department immediately before the great fire in San Francisco, of April 18th, 1906?

A. Yes,—Mr. Kelly was employed there and had a very honorable record up to the time of the fire.

Q. Well, can you state this, Mr. Eberlein,—did Mr.

Kelly's duties and work, which he was performing at that time place him in position where he would have anything to do with the title to this land, or with any papers or documents pertaining to it?

A. As I recollect he may have had matters referred to him to work over in a clerical way, and he might have known about these documents, but as far as I recollect his duties were for some time assigned to him, and he might have had something to do with the titles.

Q. When you put the fence around this land who paid for the fencing of this land,—the Oregon and California Railroad Company, or the Oregon and California Land Company?

Counsel for complainant object to the question as immaterial.

A. I cannot tell you, Mr. Conlin, who paid for it.

Q. Who assumed to take possession of the land by the fencing of the land,—the land company or the railroad company?

A. I do not remember whether the land company was organized at that time, but if not, it must have been organized very shortly afterwards.

Q. The testimony is that the land company was organized in 1904, and this fence was built in 1905?

A. It is very likely that the title must have been held by the Oregon and California Land Company.

Q. How long did you remain acting land agent for the Oregon and California Railroad Company?

A. Until June 1st, 1908.

Q. And you resigned and retired from the service at

that time?

A. Yes, at that date.

Cross-Examination.

Questions by Mr. W. D. Fenton.

Q. Mr. Eberlein, who was your chief clerk?

A. Mr. Henry Conlin.

Q. How long was Mr. Henry Conlin your chief clerk in the service of the Oregon and California Railroad Company, or the Oregon and California Land Company, and what were his duties?

A. Mr. Conlin was not chief clerk until I think about the time of the fire,—just what date, I cannot remember.

Q. How long did he act under you, as acting land agent as your subordinate?

A. He came to the company, I think, in the fall,—this may have to be corrected,—in the fall of 1905,—I believe, it was not a great while before the fire.

Q. How long to your knowledge did he continue with the company?

A. I cannot tell you that.

Q. Was he there when you resigned?

A. He was there when I resigned, and he took my place.

Q. Became acting land agent after you?

A. That is my understanding.

Q. Now, while he was in your employ and a subordinate of yours in the service of the Oregon and California Railroad Company and the Oregon and California Land Company, what were his duties in a general way?

Counsel for defendant object to the question as not

proper cross examination and as incompetent, irrelevant and immaterial.

A. He was at first employed in various matters around the office, and he did a great deal of organizing matters, and at the time of the fire I think he was attending to the correspondence.

Q. Did he, or did he not have access to the records and files of the Oregon and California Railroad Company, and the Oregon and California Land Company, including any document of any kind that related to the title of miscellaneous lands?

A. Oh, yes, they were open to any person in the employ there.

Q. Mr. Eberlein, I would like to know if you could recognize the abstract of title which you submitted to Mr. Fenton for his opinion as to the record title of these lands in controversy, and whether the document which I now show you prepared by the Clackamas Title & Trust Company is the abstract of title to which you referred, and upon which the opinion of Mr. Fenton was given to you in writing?

A. No, I cannot tell you as to that,—it was not in this form, I am very sure,—it was folded, and this has been folded, and it probably is the same one, but I cannot say as to that.

Q. You notice that this abstract has a continuation and that the first extension was down to December 2nd, 1907, by the Clackamas Title & Trust Company, by E. F. Riley, president,—now is that the abstract of title that was submitted to Mr. Fenton for his opinion as to the

record title?

A. Well, I cannot tell you,—is this a continuation, or is it the original?

Q. This is the original, with a continuation?

A. Well, that cannot be, that is not the date.

A. Well, this abstract that I had must have dated as far back as 1905 anyway.

Q. I am just asking you to refer to it?

Q. You do not recognize that abstract?

A. No.

Counsel for complainant offers in evidence the abstract of title shown the witness.

Objected to by defendant's counsel as incompetent, irrelevant, and immaterial, and not the best evidence.

The abstract referred to was received and filed in evidence, marked complainant's exhibit 43.

Q. I show you a letter dated October the 10th, 1907, purporting to be a letter addressed to Angel and Fisher of this city, purporting to be written over the signature of Charles W. Eberlein—(C) Acting land agent, and will ask you if you recognize that as an official communication of yours written by Henry Conlin in your name to Angel and Fisher, quoting a letter received by your office from Mr. Fenton?

Counsel for defendant objects to the question as incompetent, irrelevant, and immaterial, and because it assumes a fact that is not in evidence in this case that Henry Conlin wrote that letter.

A. When this letter was written, I was in New York at that time,—this letter was written evidently by Mr.

Conlin and Mr. Conlin may have found those facts in the office.

Q. And you not know it?

A. No. The data that is mentioned there must have been discovered two years before, and Mr. Conlin could not have been very familiar with the fact as it occurred in 1905.

Q. Do you mean to say that the letter of October 10th, 1907, quoting a letter from Mr. Fenton, that bears date in 1904 or 1905, is the letter upon which Mr. Fenton advised you as to the title to this property in question?

A. I cannot testify as to that.

Q. You cannot say whether this quoted portion of Mr. Fenton's letter is the letter that you referred to in your testimony?

A. No. Evidently Mr. Conlin, who wrote that letter, was not familiar with what had been done because it was before he became connected with the company.

Q. You know that this letter, written by Mr. Conlin, in your name, on October 10th, 1907, gave a literal quotation or purported to give a literal quotation,—in quotation marks—covering all the first page of this letter except two lines, and all the second page of this letter except four lines, and that the whole quotation purports to be from a letter written by Mr. Fenton to your office or to you,—what I am getting at is, is the advice, or opinion, which you say you received from Mr. Fenton, stated in that quotation, or was it some other letter?

A. That would be impossible for me to swear to because I do not know.

Q. That is the same land, 229.19 acres, known as the Holladay tract, that this quotation or purported quotation from Mr. Fenton's letter referred to, and that you referred to as being the land that Mr. Fenton advised you about?

Counsel for defendant objects to the question as incompetent, irrelevant, and immaterial, and not proper cross-examination.

A. I presume that this is the same tract.

Q. Now, the opinion which Mr. Fenton expressed to you was a written opinion?

A. That is my recollection.

Q. Mr. Fenton had been counsel for the Southern Pacific Company's lines in Oregon and was at that time, and had been for many years?

A. Yes sir

Q. And has remained such ever since?

A. Yes sir, as far as I know.

Q. And he was at the time also occupying the position of advisor to the acting land agent—George H. Andrews—and to Mr. R. Koehler, vice-president of the Oregon and California Railroad Company, as part of the duties pertaining to his employment?

A. That has always been my understanding.

Q. And in September, 1904, you recall the circumstance, do you, that Mr. Fenton was seriously ill and that, by the direction of Judge Cornish, you were authorized to employ counsel to look after these matters?

A. Yes sir.

Q. Whom did you employ?

A. The employment was made through Mr. Cotton—Mr. William C. Bristol.

Q. And Mr. Bristol, from that time to the time that his employment ended was attorney for you in these matters and continued to act for you?

A. Mr. Bristol acted in some matters, not all,—I believe I consulted you during the period he was acting about some matters at different times.

Q. Some general matters?

A. Possibly.

Q. That is to say where you wanted to make inquiry about matters about which you were not fully satisfied, you felt free to call upon me, and ask me anything in reference to it?

A. I felt free to call upon you for any opinion at any time.

Q. Did you ever call upon me for any other opinion with reference to the title to this land, other than the one you have referred to?

A. I do not recollect.

Q. Do you recall that this opinion,—if it was the opinion given by Mr. Fenton—was requested by you or was it an opinion which was furnished to you voluntarily by Mr. Fenton, or how did that come about?

A. My recollection of it is that the defects in the title were called to my attention by Angel and Fisher, who sent me the abstract, or asked me, I believe, in regard to getting an abstract, and I think I ordered them to get it, and I sent the abstract to you,—that is my recollection.

Q. Did Angel and Fisher order the abstract, or did you order the abstract?

A. I presume they did.

Q. Did they get the abstract for you, which you submitted to me?

A. That is my recollection.

Q. And you think it was based upon that abstract that I gave you this opinion?

A. I believe so.

Q. Do you know where that abstract is?

A. No, it was returned probably.

Q. It was returned to you?

A. I presume so.

Q. If it was it was burned?

A. It must have been burned.

Q. Angel and Fisher were acting in what capacity, and between what dates, for you?

A. Angel and Fisher came into the employment of the company I presume in the fall of 1904—that is my recollection, but I may not be correct because I have not a scrap of anything to refer to.

Q. Do you recall that I recommended them to your favorable consideration?

A. I think not.

Q. Who did?

A. I think that Angel and Fisher came into the employ through Mrs. Ann Lane, who was, I think, register of the U. S. Land Office at The Dalles, Oregon.

Q. Did you speak to me, or notify me,—Mr. Fenton, of their anticipated employment?

A. I do not recollect about that,—they were not employed as attorneys.

Q. What was their employment?

A. Their employment, if I recollect it, was to look up about the taxes.

Q. Did they not make a tax search of land in every county in the state, and particularly the land grant land, consisting of something like 3,000,000 acres?

A. Yes.

Q. Was not that their particular employment and duty?

A. I think that was it.

Q. Do you recall whether or not they made, at your instance, a personal examination of the abstract of title to this property?

A. I do not recollect that.

Q. Do you recall whether Mr. Fisher, who was a surveyor, went out upon these premises at your instance and caused a report to be made at your office by Mr. Irvin, then in their office or employ?

A. Yes, I forgot about that. He was carried on the pay roll and reported direct to Angel and Fisher.

Q. Did he not prepare a report of his investigation of these lands, and was not that report transmitted to you personally by Angel and Fisher?

A. It is possible, though I cannot remember the circumstance.

Q. Can you state the date when Angel and Fisher acted for you in respect to these matters, and particularly in respect to these lands?

A. I can only state my recollection that they were employed I think from May, 1904, and their employment lasted until late in 1904 or very early in 1905. I think that they were still doing some work when I left the country.

Q. Do you have any personal recollection of this report of Ben Irvin to Angel and Fisher, being transmitted to your office in San Francisco?

A. If I could see the report, I might recollect something about it, but I do not recollect now.

Q. Can you say whether this report or this communication or correspondence from Angel and Fisher in reference to the land in question was before or after you had requested the opinion of Mr. Fenton as to the record title of the Holladay tract?

A. My recollection is that somebody made a report on the physical character of that land, and my recollection is that it was very poor land. I know there was some doubt in my mind as to the propriety of paying out four hundred and some odd dollars to fence land that appeared to be poor land, and to which we had no title.

Q. That is, that you had no record title?

A. Yes, no record title.

Q. Would you recall the report made by Mr. Ben Irvin, a copy of which was transmitted and filed in your office, if you were to see it?

A. I might.

Q. I show you a document which will ask to have marked complainant's exhibit 44, and which purports to be a carbon copy of a report made to Angel and Fisher

by Ben Irvin—it is a duplicate report—October 30th, 1907, with a map attached, and will ask you, if you recall that as being the Ben Irvin report, which was sent to your office with reference to these lands, and the map in reference to the same?

A. Well, I will not take the time to read this over, but I am very sure that I never saw that, because at the time this was written I was in the New York office, and did not return this winter, nor until the following March.

Q. You cannot say whether it was received by your office in your absence, and examined by Mr. Henry Conlin?

A. I cannot say as to that.

Q. You have no personal knowledge of this document?

A. No. The fact of the matter is, from the time Mr. Harriman called me to the New York office to the fall of 1907, I had little or no knowledge of the details of the management of the office from that time until I discontinued my connection with the company.

Counsel for complainant offers in evidence the document last shown the witness, and the same is received and filed in evidence, marked complainant's exhibit 44.

Q. Mr. Eberlein, I think you have stated that you never saw an instrument purporting to be an instrument executed by Ben Holladay and Company or by Ben Holladay to the Oregon Central Railroad Company that related to any of the lands of that company or of these lands,—did you ever have your attention called to, or do you know of an instrument recorded at page 175 and 176

of the minute book of the Oregon Central Railroad Company, complainant's exhibit 7, which I now show you?

A. I never saw that book before.

Q. Did you not in the performance of your duties as acting land agent, and as an officer, having general supervision of the lands of the Oregon and California Railroad Company go over the minute book of the Oregon Central Railroad Company?

A. I do not think I ever went through the minute book of that company.

Q. And you did not in the course of your employment specifically examine these minutes?

A. No.

Q. Did you have the minutes of the Oregon Central Railroad Company?

A. Not that I have any recollection of.

Q. You have no notice or knowledge of the existence of that document, if there was such a document?

A. I think not, if I did, it never made any impression upon me.

Q. Did you ever have any notice or knowledge of an instrument of date February 29th, 1876, which appears recorded in the minute book of the Oregon and California Railroad Company, April the 19th, 1876, and recorded at page 191 to 200 of complainant's exhibit 14, and known in this record as the Hoenemser mortgage agreement, and found in the minute book?

A. No, I do not think I ever heard of it.

Q. You never examined the minute book of the Oregon and California Railroad Company?

A. I never saw it that I know of.

Q. At the time you came to the coast in 1903 you came under the direction of Judge William D. Cornish, who was then vice-president of the Southern Pacific Company with offices at 120 Broadway, New York?

A. Yes.

Q. You came with instructions from Judge Cornish to consult W. W. Cotton, who was then general attorney for the Oregon Railway and Navigation Company, which might be considered to have been an affiliated Harriman line?

A. Yes, sir.

Q. And your considerations with him were of a general character, were they not?

A. I do not understand.

Q. As to the general policy that should be pursued?

A. He was already advised as to the general policy of the company, before I ever came out.

Q. When it came to the details of the work in respect to the title of the properties of the Oregon and California Railroad Company, Mr. Cotton did not himself perform any of those services, did he?

A. As to the Oregon and California Railroad Company?

Q. Yes.

A. Advised as to the general policy and as to some particular matters,—particularly in regard to taxes.

Q. But he did not undertake in his office, or by himself to make an examination of these taxes, or of the record to inspect the title?

A. No, sir.

Q. You were advised by him to employ special attorneys to represent you?

A. The only special attorney that he ever recommended was Mr. William C. Bristol.

Q. Did he advise the employment of Angel and Fisher?

A. No.

Q. Did he advise the employment of John M. Kollock?

A. No,—that was in his office,—it must be remembered that the tax matters were advised by Mr. Cotton,—he advised that search be made.

Q. But he did not make the search of them, did he?

A. No,—I had that search made,—I organized the force that made that search, but Mr. Cotton took charge of the matter of clearing up those titles,—Mr. Kollock never reported to.

Q. Is it not true, Mr. Eberlein, that Mr. John M. Kollock was employed first by Mr. Cotton to look after the bringing of certain suits to quiet title to various tracts of land from Portland to the California State line, and particularly to land grant lands?

A. I do not know. I do not think I ever had a report on these matters.

Q. About the tax titles?

A. About the tax titles, Mr. Cotton advised me in some cases where he had brought suit to quiet title, but he took charge of that matter.

Q. Those suits, if any, were brought by Mr. Kollock,

were they not?

A. I think so, or by Mr. Cotton,—Kollock was acting for Mr. Cotton,—I do not know about that, I cannot tell you.

Q. As a matter of fact, neither Mr. Kollock nor Mr. Cotton, nor anybody else ever brought any suit to quiet title to the lands involved in this controversy?

A. Regarding the taxes on this property?

Q. Yes, or otherwise.

A. I do not know.

Q. Do you remember, Mr. Eberlein, whether your tax searcher made any search of the taxes on these lands involved in this suit?

A. I presume he did.

Q. Was not that examination confined to the land grant land, and to such lands as stood in the name of George H. Andrews and Mr. Koehler and George W. Weidler?

A. Well, if they examined them, they must have examined everything.

Q. Did they make a tax search for taxes on miscellaneous lands?

A. I think so.

Q. Are you sure?

A. I am reasonably sure.

Q. Did they make a report to you?

A. I think they did.

Q. What became of this report, or these reports?

A. They must be in the office now.

Q. Was it before the fire or afterwards?

A. It was before and after the fire is my recollection.

Q. And all reports up to April 18th, 1906, were burned, were they?

A. Yes.

Q. Then any report after April 18th, 1906, must be in the office of the land commissioners?

A. Yes, sir.

Q. Now, do you know how long, Mr. Bristol acted as your attorney?

A. He acted, I believe from the late fall of 1904, that is my recollection.

Q. Up to when?

A. Up to when the United States judgeship bee was buzzing around you gentlemen.

Q. It was not buzzing around me?

A. It was buzzing around over the Harriman offices.

Q. Mr. Cotton was appointed here?

A. Yes. Now, if you can tell me when Judge Bellinger died I can tell you just about when Mr. Bristol discontinued his employment.

Q. How long after the death of Judge Bellinger was it that he discontinued his employment?

A. It must have been three or four months, I think.

Q. Did Mr. Bristol report to you, or did he report to Judge Cornish, or did he report to Mr. Cotton, or did he report to Mr. Herren, or did he report to Mr. Fenton?

A. I cannot tell you, he reported to me to some extent, and I think to Mr. Herren, and he may have reported to you, I do not know anything about it.

Q. His particular duties,—what were they?

A. His particular duties began with the tax matters. Mr. Bristol was employed at a conference in which Mr. Cotton and I were present through Mr. Cotton at the time when you were taken suddenly ill and went off to Honolulu or somewhere else, and he, at that time, gave general advice.

Q. Was he not furnished data to take care of defaulted O. & C. land contracts for the sale of land grant land, that involved some fourteen or fifteen hundred in number, that were in process of collection, or foreclosure, or cancellation at the time Mr. Andrews, secretary and acting land agent resigned September 30th, 1904?

A. His duties were largely connected with that up to the time he left the service,—that was about all he had to do.

Q. He also, under your supervision, did he not, made, or caused to be made a profile of the Oregon and California Railroad Company's railroad land in Oregon with its right of way and so forth, and caused an abstract to be submitted to Mr. Kruttschnitt, then the general manager?

A. No, sir, I think not.

Q. Did he have anything to do with that?

A. I think not.

Q. Did you do that?

A. I think that was done in the office.

Q. By you?

A. It was done under my direction.

Q. Did he have anything to do with that?

A. Nothing more, possibly than finding some data.

All those papers were sent down there, and the work was done in the department,—I remember that profile very well.

Q. Did not you direct him to cause a search to be made of all records and files of the United States Circuit Court in all cases in which the Oregon and California Railroad Company appeared at any time, and did not he make that search and report to you?

A. I do not remember, it might have been done, but I do not recollect it.

Q. Do you recall that you had examined the private titles of R. Koehler, George H. Andrews,—and George W. Weidler, and myself to see whether we held any land belonging to the company?

A. Yes, that search was made.

Q. You found no titles of any kind directly or indirectly belonging to this company, or any of the affiliated companies in my name?

A. Not that I recollect.

Q. You know there was not, do not you?

A. I do not know,—I do not know that you were included in that.

Q. Do not you remember that you did include my name in that search?

A. I might have done so, I cannot say.

Q. And it was reported that there was no such holding?

A. You never had any that I had any knowledge of.

Q. The titles that were held in the name of R. Koehler or George H. Andrews, or George W. Weidler, that had been carried by you on the tax book of the Oregon and California Railroad Company as miscellaneous lands be-

longing to that company?

A. They were carried under miscellaneous lands.

Q. There never was any question that these gentlemen held these titles in trust for the company?

Counsel for defendant objects to the question as incompetent, irrelevant and immaterial, and not the best evidence.

A. Not that I know of.

Q. You afterwards, as part of your duties, took deeds from these men to the Oregon and California Railroad Company to such lands as the general manager thought would be used for operating purposes, and to such lands as were not operating lands you took title in the Oregon and California Land Company?

A. Yes, that is about correct.

Q. The Oregon and California Land Company was incorporated as a holding company for the Oregon and California Railroad Company, was it not?

Counsel for defendant object to the question as incompetent, irrelevant, and immaterial, and as calling for a conclusion of the witness.

A. Those lands were gathered up, such as were not needed for operation, so that they might be disposed of and not be subject to the lien of the Union Trust Company.

Q. Of July first, 1887?

Counsel for defendant object to the question as incompetent, irrelevant, and immaterial, and not proper cross examination, and not the best evidence.

A. Yes.

Q. I show you a certified copy of the articles of incorporation of the Oregon and California Land Company known in this record as complainant's exhibit No. 36, and will ask you if you knew E. E. Calvin and William Krause and W. W. Cotton on October the 14th, 1904?

A. Yes.

Q. Who were they and what relation did they sustain to the Harriman lines?

A. E. E. Calvin was vice-president of the Harriman lines in Oregon, and William Krause was chief clerk in the general manager's office,—as I recollect it, with Mr. Calvin.

Q. And who was W. W. Cotton?

A. Mr. W. W. Cotton was at that time and still is, I suppose, general attorney for the Oregon Railroad and Navigation Company.

Q. And was he the same W. W. Cotton who was on October the 14th, 1904, secretary of the Oregon and California Railroad Company, and has been secretary thereafter, and now is secretary of the Oregon and California Railroad Company?

A. Mr. Cotton was made secretary I think in 1904 of the Oregon and California Railroad Company and may be still that,—I have no advice at all.

Q. I show you a letter of date April 4th, 1906, purporting to be written on your stationery as acting land agent, San Francisco, California, addressed to F. A. Elliott, which for the purpose of identification, may be marked complainant's exhibit 45,—attached to the correspondence relating to the fencing of this land by the

Anchor Fence Company, and I will ask you to look at this letter and state, if you know, in whose handwriting it is, and whether it is a letter written by someone authorized by you to write such a letter?

A. This letter is in the handwriting of Mr. George H. Stone, who was assistant to the acting land agent at that time.

Q. That letter was authorized, was it?

A. Certainly.

Q. Now, I notice a carbon copy of a letter or rather a memo signed F. A. E., addressed to you, April 2nd, 1906,—do you know who that is?

A. I presume that is Mr. Elliott.

Q. Also a letter of March 31st, signed F. A. E.

A. I did not see the letter,—that is probably F. A. Elliott,—those were his initials.

Q. Also a letter of March 29th, 1906, signed Charles W. Eberlein,—S?

A. I do not know the writer of that letter,—I think the signature is that of George A. Stone.

Q. And it was authorized?

A. Yes.

Q. Also a letter of October 7, 1905, addressed to you initialed F. A. E.?

A. That is F. A. Elliott,—I do not know anything about the letter.

Q. Did you ever see this letter of the Anchor Fence Company of March the 1st, 1905?

A. I do not remember anything about it.

Counsel for complainant offers in evidence the letters last shown the witness.

Counsel for defendant object to the same as incompetent, irrelevant, and immaterial.

The letters referred to are received and filed in evidence as one exhibit, marked complainant's exhibit 45.

Q. Now, Mr. Eberlein, you spoke about going east in 1907, and that you were in the New York office and absent from the San Francisco office for a great deal of the time, or for some time,—who was acting for you, and in charge of the office of the land department of the Oregon and California Company during that time?

A. During the fall and winter I think Mr. Conlin became assistant before I left for the east, or at that time, I wouldn't be sure about that time.

Q. Was he in your office as chief clerk?

A. He was there as chief clerk or assistant.

Q. So in your absence from the time Mr. Conlin became chief clerk up to the time that he succeeded you as acting land agent, who represented you in the business of the land department,—who acted?

A. The chief clerk under either my supervision or under the supervision of the assistant.

Q. Who was the assistant?

A. Mr. George A. Stone. I cannot remember at this time whether Mr. Stone left the employ of the company in February or March.

Q. Now, as assistant acting land agent were the duties of these men the same as yours when you were away?

A. Certainly, I could not be there all the time,—I was called to New York a very large part of the time.

Q. While you were away, Mr. Stone or Mr. Conlin acted as agent for you?

A. Yes, they were authorized at that time to do so.

Q. Did you ever know during the time you were acting land agent or an officer of the Oregon and California Railroad Company of any claim of title made by this defendant Maria d'Grubisch,—granddaughter of Ben Holladay, or any heir or member of the Holladay family?

A. I never knew who the heirs of Ben Holladay were,—I never heard of them.

Q. When did you first learn that there was a suit brought by this woman to regain these lands?

A. When I was last in San Francisco,—it was a matter of maybe six week ago, probably two months ago,—I was advised by Mr. Conlin that such a suit was on.

Q. Just give the date of your resignation as acting land agent.

A. June the 1st, 1908.

Q. Your connection with the company ceased at that time?

A. Yes.

Q. Since that time you have been living in California?

A. Part of the time.

Q. What business are you in now?

A. I am a ranch owner.

Q. A farmer?

A. Yes sir, you may call me a farmer.

Q. How did you happen to be a witness in this case?

A. By subpoena.

Q. Where were you subpoenaed?

A. Here.

Q. How did you happen to be in Portland at this time?

A. I came here because Mr. Conlin requested me,—I may say this that Mr. Conlin told me that I might be called as a witness and I wanted to go east and I preferred to be called now, rather than to be disturbed later on.

Q. Then you were requested to come here by Mr. Conlin from your home in California?

A. No, I was at Klamath Falls, where my ranch is.

Q. Are you living on your ranch at Klamath Falls?

A. Yes.

Q. Are you a citizen of the State of Oregon?

A. No, I am a citizen of the State of California.

Q. What place in California?

A. San Francisco.

Q. Are you in business in San Francisco, California?

A. No, my business is in Oregon.

Q. And you became very well acquainted with Mr. Conlin during the time he was your assistant?

A. I have known Mr. Conlin for over twenty years.

Q. You brought him to the service of the company did you not? from St. Paul?

A. No sir.

Q. How did he come?

A. I left St. Paul myself in 1901, and never heard a word of Mr. Conlin until a friend of mine Mr. Carl Taylor met me on the street in San Francisco, and told me

that Mr. Conlin was in San Francisco, and that he thought he would like to have some employment, and I told him to send him around, which he did, and I employed him.

Q. Do you know this lady, Maria d'Grubissich, complainant in this case?

A. No sir, I never heard of the party.

Q. You do not know that she was formerly called Marid d'Pourtalles?

A. I do not know about that.

Q. Do you know that she is the wife of an Austrian Count, living at Tunis, Italy?

A. I have heard so, I do not know anything about it myself.

Q. She has never written to the land department in reference to this letter, to your knowledge?

A. Never, that I heard of.

Q. You did not have any correspondence with the lady?

A. No sir.

Q. Now about this fencing that you say Mr. Fenton advised you to have made,—was not the object of that, as you understood it to more perfectly assert title to this property, under the statute of limitations?

A. I suppose, or I presume that is just what it was.

Q. At that time the company had a claim of title to the property, but no record title as you understood?

A. That is the way I understood it, and the fact that it was land that we had been paying taxes on was evidenced that the company claimed something.

Q. And it was known on the tax lists of the company

as the Holladay tract, and had been for many years?

A. Yes.

Q. And the company had been for many years paying taxes on that land?

A. That is my impression.

Q. But upon investigation it was found that the record title stood in the name of Ben Holladay and Company?

A. Yes.

Q. And in view of the fact that the timber had been cut off of this land in the early days and it had small timber on it, and what old fences, if any, were there, had rotted down, it was deemed advisable to inclose it by a new fence for that purpose?

A. It was to enclose the property and take possession of it.

Q. And the fence was put around the property to keep people from going upon the land and trespassing?

A. That was about the size of it.

Q. You had had such possession of that land as any one would have that claimed to own a piece of unenclosed land and had been paying taxes on it?

A. I suppose that it was known or understood to be railroad land,—I do not know,—I never knew anything about the land until this matter came up,—and when the question of title came up it was rather a surprise to me, and my recollection is that the land was of very little value, and it was doubtful in my mind whether, with the disability of the title, I should pay a \$400 bill for fencing a bare piece of land, whether it would justify it to pay

the bill.

Q. Did you know at that time that this property had been assessed to the Oregon and California Railroad Company from 1873 down to that time, and that the company had been paying taxes on it?

A. It might have been reported to me, but I do not recollect that.

Q. Did you know that that land, at the time that you had this fence put up, was within five or six or seven miles of the City of Portland, and that the city was growing in that direction rapidly?

A. No,—my recollection of the property at that time was that it was a very poor piece of land, and of very little value.

Q. Were you familiar with the value of land of that kind in 1905?

A. I had informed myself of the value of the land grant land,—these other lands I never saw.

Q. You did not have any knowledge of your own about which you can testify except by hearsay, as to the value of this particular land?

A. No,—absolutely none.

Q. If that land should now appear to be worth from \$250 to \$300 an acre, your judgment then, in fencing this land was the exercise of a wise judgment?

A. Well, I should have felt better about it if that were true.

Q. You do not know if that is true or not?

A. I do not.

Q. Did you know, Mr. Eberlein, that these two tracts

of land were the homesteads,—commuted by cash entry of James Grindley and Gardner Elliott in 1870 or 1869, or somewhere about that time?

A. No, I never heard about that.

Q. Your attention was never called to the consideration stated in the deeds from these gentlemen to Ben Holladay and Company for the purchase price of the land in 1859?

A. No, I never had any information about that.

Q. You never was on this land yourself?

A. No sir. During my connection with it, it was not considered of any value that I know of.

Q. Now, these miscellaneous lands that were supposed to be lands not particularly needed at the time for operating purposes which you say were taken over to the Oregon and California Land Company, and were thereafter to be sold?

A. It was to get them into position so that they could be sold.

Q. Now, as a matter of fact, Mr. Eberlein, these particular lands were never deeded to the Oregon and California Land Company?

A. No.

Q. But they were carried in the Oregon Land Company's department?

A. Yes.

Q. Did you understand how that happened to be done?

A. I can only say from my recollection of the general policy,—these miscellaneous lands did not come by any

act of Congress,—they were gathered up as I understand by gift or possibly by purchase, and for reasons which I never knew and never cared to take the trouble to look into, they were held in trust by a number of different persons, and some of them very old men,—Weidler was very old, and the idea was to get this land that belonged to the railroad company into an owner controlled by the railroad company so it could be sold. One reason for this was that the town of Medford then had begun to grow, and there were demands upon us for the sale of certain land that we had no title to, that the railroad company had no title to.

Q. The title stood in the name of some individual?

A. I do not remember, but it did not stand in the name of the railroad company, and the lands were all gathered up and put together, and any lands that were needed (Mr. Calvin or Mr. Brown passed on that question) and if there was any land needed for use in operating the railroad, they were deeded to the Oregon and California Railroad Company. I believe there were only certain lands which were deeded to the Oregon and California Railroad Company, and the rest of the lands were turned into the Land Company, to gather them together and put them in business like shape.

Q. You do not know how it came about that the Oregon and California Land Company did not get title from the Oregon and California Railroad Company or anybody to these lands in suit?

A. No, I have no idea why they didn't,—I never heard. They were included in the list of miscellaneous lands

and the fact that the record title was not in any of these different trustees was something entirely unforeseen and was something I did not know until it was brought to my attention.

REDIRECT EXAMINATION.

Questions by Mr. Henry Conlin.

Q. Mr. Eberlein, there were a great many of these miscellaneous lands, were there not in different places?

A. Yes, there were a lot of lots particularly scattered around.

Q. And the railroad company had a large land grant?

A. Yes.

Q. Upwards of two million acres?

A. Well, about two million, I think.

Q. During the time that you were acting land agent of the Oregon and California Railroad Company, did you ever yourself, cause any of the other lands of the company,—other than this tract?

A. Not by my order.

Q. Is it, or is it not a fact that the fence was put around this land at that time for the sole purpose of taking possession and claiming possession,—adverse possession in order to start the statute of limitations running and obtain title to the land in that way?

Counsel for complainant objects to the question as leading and as calling for a conclusion of the witness, and as incompetent, irrelevant, and immaterial.

A. I believe,—that was my understanding at the time that in as much as there was no record title that it would be inadvisable to stir the matter up, and that we would

just fence it, and assert our possession that way, and I presume to take advantage of the statute of limitations in that case.

Q. As a matter of fact that was the sole and only purpose of putting that fence around the land?

Counsel for complainant object to the question as leading and as calling for an opinion of the witness and as incompetent.

A. My recollection of it now is that that was my idea to get title in that way.

Counsel for defendant moves to strike out the testimony of this witness as incompetent, irrelevant, and immaterial, and as expressing an opinion of the witness.

Q. The company had never fenced any of its other land?

A. Not that I know of.

Q. Was this fence built for the purpose of making use of this land by the railroad company?

Counsel for complainant objects to the question as immaterial.

A. To lease it,—we leased it at once and got revenue from it.

Q. The company leased other lands too, did not it?

A. Oh, yes.

Q. Were they fenced?

A. Not that I know of,—the general land grant never was,—it would be utterly impossible to do that.

Q. Now, Mr. Fenton called your attention to a letter purporting to bear your signature written by me,—this letter marked complainant's exhibit 35,—at the time that

letter was written there were a great many other people employed in the land department?

A. Yes, quite a number.

Q. And several stenographers employed?

A. Yes, we had three or four,—maybe more than that.

Q. And there were divers people who attended to the correspondence and who wrote letters and dictated letters?

A. Yes.

Q. Among whom was Mr. W. D. Kelly, was there not?

A. I suppose he did.

Q. Is it not true that Mr. W. D. Kelly dictated letters to stenographers?

A. Yes.

Q. And there were others in the office who did the same thing including myself?

A. Yes, there were several who attended to different matters.

Q. And when you were present those letters were brought to you? and you affixed your own signature to them?

A. Yes.

Q. And when you were absent the letters were signed by some one whom you authorized to sign your name,—Mr. Stone or myself?

A. Yes,—it was the rule in the office that whoever dictated these letters, their initials should appear, but that don't appear to have been followed in my absence.

Q. You have testified on cross examination that this letter was written by me,—by Henry Conlin?

A. Whether it was dictated by you, I cannot say,—it is signed by you.

Q. And so far as you know there were many letters written in the office?

A. Yes, a large number of them.

Q. And these letters were prepared by divers people in the office?

A. Yes.

Q. And they were brought to your desk when you were there to be signed by you, and in your absence they were signed by whoever you designated and authorized?

A. Whoever was acting land agent at the time.

Q. You have no knowledge whether I dictated it or not, any more than I wrote your signature to it?

A. No, I cannot tell as to that.

Q. You identify that signature to the document which I now show you?

A. Yes.

Counsel for defendant offers in evidence the document last shown the witness, and the same is received and filed in evidence, marked defendant's exhibit 1.

RECROSS EXAMINATION.

Questions by Mr. W. D. Fenton.

Q. These gentlemen, who were authorized to sign your name in your absence were either Mr. Stone or Mr. Conlin?

A. Yes.

Q. And no letters went out of the office by your authority in your absence, that were not signed by one or the other?

A. They ought not to.

Witness excused.

L. F. Steele is recalled as a witness for the complainant, and having been heretofore duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. W. D. Fenton.

Q. Mr. Steele, have you looked among the records of the office of the secretary of the Oregon and California Railroad Company, where any such document would be likely to be found for the agreement of Ben Holladay and Company, recorded in the minute book of the Oregon Central Railroad Company, at pages 175 or 176 thereof, purporting to be signed by Ben Holladay and Company, and Ben Holladay and C. Temple Emmett,—the record of the instrument to which I refer is found at pages 175 and 176 of the minutes of the Oregon Central Railroad Company at Salem, entered under date of March 28th, 1870,—that is the instrument which you searched for?

Counsel for defendant objects to the question as incompetent, irrelevant, and immaterial, as calling for a conclusion and upon the further grounds specifically that the purported instrument included in counsel's statement is not shown to have ever been executed or delivered,—that it is without consideration,—that it is void for uncertainty,—that it was executed, if ever executed at all, during the time that the act of congress of June 30th, 1864,—the revenue act was enforced requiring a stamp in pursuance of schedule B of that act, and it is

not stamped as a conveyance, and that it is inadmissible and cannot be used in evidence in any court,—and that any right or cause of action which the complainant might have had or claimed to have had under or upon that document is barred by the statute of limitations of the state of Oregon and by the laches of the complainant, and upon the further grounds that the instrument as stated by counsel and claimed in the bill of complaint, was not executed as a conveyance of real property, being without a seal, and without witnesses, and without an acknowledgement,—and was not at the time it is claimed to have been made or at any time sufficient under the laws of the state of Oregon to convey the title to real property.

A. Yes sir.

Q. Were you able to find it?

A. No.

Q. Did you ever see that instrument?

A. No sir.

Q. The minute book that I have referred to is known in this record as complainant's exhibit 7,—I now call your attention to a copy of an agreement of February 29th, 1876, entered at pages 191-192-193-194-195-196-197-198-199-200 and 201 of the minute book of the Oregon and California Railroad Company, being complainant's exhibit 14, purporting to be covered by the minutes of the Oregon and California Railroad Company, held April 19th, 1876, and for convenience, known as the Hohenemser mortgage agreement, and will ask you if you have looked among the records of the Oregon and

California Railroad Company now in the custody of Secretary Cotton, for this agreement?

Counsel for defendant objects to the question as incompetent, irrelevant, and immaterial, and upon the further grounds specifically that the purported instrument included in counsel's statement is not shown to have ever been executed or delivered,—that it is without consideration,—that it is void for uncertainty,—that it was executed, if ever executed at all, during the time that the act of congress of June 30th, 1864,—the revenue act was enforced requiring a stamp in pursuance of schedule B. of that act, and it is not stamped as a conveyance, and that it is inadmissible and cannot be used in evidence in any court,—and that any right or cause of action which the complainant might have had or claimed to have had under or upon that document is barred by the statute of limitations of the state of Oregon and by the laches of the complainant, and upon the further grounds that the instrument as stated by counsel and claimed in the bill of complaint, was not executed as a conveyance of real property, being without a seal, and without witnesses, and without an acknowledgment,—and was not at the time it is claimed to have been made or at any time sufficient under the laws of the state of Oregon to convey the title to real property.

A. Yes sir.

Q. Were you or not able to find such an original or an office copy, or duplicate of the same?

A. I was not.

NO CROSS EXAMINATION.

Witness excused.

F. A. Elliott is called as a witness for the complainant, and being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. W. D. Fenton.

Q. State your name, age, residence, and occupation.

A. F. A. Elliott, Salem, Oregon, age forty-six, at the present time State Forester and timber cruiser.

Q. Were you in the employ of the Oregon and California Railroad Company in 1905, and if so, when did you go into their employment and how long did you continue in their employment, and in what capacity?

A. I was in the employ of the land department beginning with 1889, and up to May, 1907, I think.

Q. What were your duties in that service?

A. As land examiner.

Q. Who was your superior officer?

A. Mr. Andrews and Mr. Eberlein.

Q. Mr. Andrews appears to have resigned as acting land agent and his resignation became effective September the 30th, 1904,—were you in the employ of the company under Mr. Andrews while he was acting as land agent and secretary of the Oregon and California Railroad Company from 1889 down to the time he resigned?

A. Well, with the exception of probably one year, I think in '97 or '98, but with that exception I was under him all that time.

Q. Now who do you say was your immediate superior from the time of the resignation of Mr. Andrews as acting land agent up to the time you discontinued your employment?

A. Mr. Eberlein.

Q. When did you discontinue your employment?

A. I think the first of May, 1907.

Q. What were your duties in this employment?

A. Under Mr. Eberlein, and in fact some under Mr. Andrews, I was chief land examiner, having charge of all the field work in regard to their land grant.

Q. Did your duties cover an examination of what was called miscellaneous lands or was it confined principally to what was called the land grant land?

A. I made some few examinations of miscellaneous lands.

Q. As I understand you, your primary duties as land examiner related to the land grant land?

A. Yes, primarily.

Q. What were your duties as land examiner?

A. To examine and classify the lands and estimate the timber.

Q. As timber cruiser also, were you?

A. Yes.

Q. And did you have anything to do with the tract of land involved in this suit shown on complainant's exhibit 1 as homestead cash entry 641 of J. Grindley being lots 5 and 6 and the east $\frac{1}{2}$ of the southeast $\frac{1}{4}$ of section 29, and cash entry 693,—commuted homestead of G. Elliott, being the north $\frac{1}{2}$ of the northeast $\frac{1}{4}$ of

section 32, township 1 south, range 2 east of the Willamette Meridian, in Clackamas County, Oregon, and being a tract of land about two and one half miles east of Milwaukie, and about a mile and a quarter north and east of the nearest point of the Oregon and California Railroad Company's track?

Counsel for defendant objects to the question as incompetent, irrelevant, and immaterial, and not the best evidence, and leading.

Mr. FENTON: The tract of land being also known as the Ben Holladay and Company tract.

A. I had the land fenced at one time,—probably in 1905.

Q. Who fenced that land,—I mean what concern?

A. The Anchor Fence Company, of Portland.

Q. I show you complainant's exhibit 2, purporting to be a map of these lands, and showing a county road of Clackamas County, on the east side of both tracts, and showing a diagonaal road on the southeast corner of the eighty acres in section 32, and showing a section line road to Milwaukie between sections 29 and 32, and purporting to show the exterior boundaries of these two tracts of land, and I will ask you to state, if you went out on the ground before these premises were fenced in 1905?

A. I did,—we had it surveyed by the county surveyor of Clackamas County, and I went out and examined the survey and saw that the corners were established before the fencing was done.

Q. Now, what is the fact as to whether or not at that time and before this new fence was built there was any evidence of an old fence around these premises, or a portion of that fence, and if so, what is your recollection as to where these old fences were?

Counsel for defendant objects to these questions as incompetent, irrelevant, and immaterial.

A. There was a fence along the south line, or the line between the eighty and the hundred and sixty, and the fence perhaps went along the west side, but I do not remember very much about that.

Q. Where was the fence?

A. And there was some on the north line,—there was an old fence along the north line.

Q. Was there an old fence also on the south line of the eighty?

A. I am not sure about that.

Q. Do you remember the location of a site of an old saw mill on the eighty, or was your attention called to that?

A. Yes, I was thru there,—I went thru there at one time and I remember seeing the old mill site.

Q. Now, that land at that time,—what was its condition as to timber and so forth?

A. Well the timber was practically all taken off, there was some little down timber,—old logs on the ranch.

Q. To what extent was that fenced by the Anchor Fence Company, if you know,—what lines were fenced?

A. All the exterior lines.

Q. Of both tracts?

A. There was a fence on this road, (showing on map) I remember putting a gate in this road, and I think this fence came clear around this entire tract.

Q. You refer to the outside boundaries of both tracts?

A. Yes,—except this three cornered tract that was fenced up altogether.

Q. That is the fence there indicated on this complainant's exhibit 2, showing the new fence, is substantially the fence which the Anchor Fence Company built?

A. Yes sir.

Q. As you recollect it?

A. Yes.

Q. Do you remember at what price this fence was to be built?

A. I do not remember, but I think it was around fifty cents a rod,—something near that.

Q. I show you complainant's exhibit 45, purporting to be a letter of the Anchor Fence Company of March the first, 1905, addressed to F. A. Elliott, and a letter of April the 4th, 1905, addressed to F. A. Elliott, purporting to be signed, Charles W. Eberlein—(S), and a letter of April 2nd, 1906, addressed to Charles W. Eberlein, apparently signed F. A. E., and a letter of March 31st, 1906, addressed to Charles W. Eberlein, apparently signed F. A. E., and a letter of March 29th, 1906, apparently signed Charles W. Eberlein (S), and a letter of March 7th, 1905, addressed to Charles W. Eberlein, signed F. A. E., and I will ask you if you recognize the initials F. A. E. on each of these letters that I have referred to, and if so, who wrote them?

A. I do.

Q. They are your initials?

A. Yes, that is my signature.

Q. And you are the F. A. Elliott referred to in these letters?

A. Yes.

Q. I notice that these letters purporting to be signed by Charles W. Eberlein are all addressed to you,—did you receive those letters?

A. I suppose I did,—I just found them in some old files at Mr. Reece's office.

Q. And who is Mr. Reece?

A. He is field agent of the Oregon and California Railroad Company at the present time.

Q. Now, refreshing your memory from looking at these letters, purporting to be signed Charles W. Eberlein, and addressed to you, it is observed that they all relate to the "Field notes and survey of the Holladay tract," did you act upon these letters as having been received from Mr. Eberlein?

A. Yes.

Q. And you recognized them as letters from the Oregon and California Railroad Company?

A. Yes, I did.

Q. At the time you received them you acted upon them as such?

A. Yes.

Q. For the company?

A. Yes, for the company.

Q. Now, what was the average price per rod or foot

that you paid the Anchor Fence Company, if you can state?

A. Well, I see here, from these letters that it was sixty-five cents per rod, and that probably was the price that we agreed on. The contract was drawn by W. C. Bristol at that time in his office. George T. Murhead was manager of the Anchor Fence Company, and Mr. Bristol made the contract.

Q. Based upon this letter of March the 29th to you, the contract was concluded with the Anchor Fence Company?

A. Yes.

Q. Can you give the number of dollars it cost to build the fence?

A. Well, it was somewhere near five hundred dollars, I do not remember just what.

Q. Now, for whom were you acting at the time you were acting in this matter,—for what company?

A. For the Oregon and California Railroad Company under the instructions of Mr. Eberlein.

Q. Who claimed to own this land at that time?

Counsel for defendant objects to the question as incompetent, irrelevant, and immaterial and not the best evidence.

A. Mr. Eberlein, or the Oregon and California Railroad Company, claimed to own it.

Q. Did you ever know of any claim made by Ben Holladay and Company, or any of his heirs to this land?

A. No.

Q. Never heard of any did you?

A. No, I never heard of any.

Q. Can you give an idea, or are you acquainted, with the market value of land of this kind at that time in this vicinity?

A. Well, I was at that time, but at the present time I cannot say, but I remember of making a report on this land about this time. I think it was when we were getting ready to put up this fence,—the question came up, I am not quite sure, but I think I recollect a letter to Mr. Eberlein, and I think I put a value of something like \$200 an acre on it at that time.

Q. Did you ever see the report made by Ben Irwin of October 30th, 1907, to Angel and Fisher,—the letter forwarded to Charles W. Eberlein, identified in this record as complainant's exhibit 44, and offered in evidence as defendant's exhibit 1, which I now show you?

A. Not that I know of. I do not know that I ever saw that report,—I probably did not, for that was October 1907, and I was not with the company at that time.

Q. When this land was fenced up there was no timber on the land other than young growth?

A. No.

Q. What, in your opinion, is the fair market value of this land at the present time, if you know?

A. I have not been on the land since 1905, and I cannot say anything about that.

Q. Well, in 1869, or 1870, can you give the court any idea of the value of the land at that time?

A. No.

CROSS EXAMINATION.

Questions by Mr. Henry Conlin.

Q. Mr. Elliott, do you know anything about the record title to this land?

A. No, I do not think I ever looked it up at all.

Q. Did it ever come to your knowledge in any way that the record title to this land stood in the name of Ben Holladay and Company?

A. No, I do not think so,—I do not remember anything about that.

Q. So that when you say nobody ever claimed the land, you do not know anything about the record title standing in the name of Ben Holladay and Company?

Counsel for complainant object to the question as incompetent, irrelevant, and immaterial.

A. I do not know anything about that.

Q. And all you know about the company claiming the land is that they caused it to be fenced?

A. I was ordered to examine the land, and make a report on the land, and to have it surveyed, and to have it fenced, which I did.

Q. Do you know what the purpose was in fencing it?

A. I never inquired. What I was ordered to do, I generally went and done, and did not ask any questions.

Q. You know that the company had a great many other lands, did you not?

A. Yes.

Q. Did you ever know of their fencing any of their other lands?

A. Yes. Several years ago I remember putting a

wire fence around two sections. I do not remember what it was done for, but it as for the railroad company.

Q. What was that done for?

A. I do not know, I never asked any questions, but I put a wire fence around two sections of land,—railroad sections.

Q. Do you know anything about the miscellaneous lands, which the company had or what were called miscellaneous lands?

A. Very likely, I have looked over some of them.

Q. Do you know of any fencing ever having been placed upon any of the other miscellaneous lands?

A. No, I do not remember of any.

REDIRECT EXAMINATION.

Questions by Mr. W. D. Fenton.

Q. Most of these miscellaneous lands were town lots on the line of the railroad, were not they?

A. Well, there were some tracts scattered along thru the Willamette Valley. I have examined some of them, and then there were some down at Coos Bay, and some coal lands.

Q. There was a tract of land of about eight acres at Clackamas station?

A. Yes, there was.

Q. That land is not fenced?

A. No, I think not,—it was not the last I knew of it.

Q. How did you arrive at your estimate of the value of this land in 1905 at \$200 an acre?

A. From the value of land adjoining.

Q. Land across the road, and to the north is all laid

out in town lots.

A. Well, in small tracts from one to five acres, I think likely, it is worth from two to three hundred dollars an acre.

Q. Immediately west of it has been laid out in lots?

A. Yes.

Q. And they are being sold?

A. Yes.

Witness excused.

J. C. Moreland is called as a witness for the complainant, and being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION.

Questions by W. D. Fenton.

Q. State your name, age, residence, and occupation.

A. J. C. Moreland, sixty-seven—Salem, Oregon—clerk of the Supreme Court of the State of Oregon.

Q. Please state to the court if you have in your custody as clerk of the Supreme Court the judgment roll exhibits, documents, and papers in a case brought in the Circuit Court of the State of Oregon for Multnomah County by Ben Holladay and C. Temple Emmet, vs. S. G. Elliott, Gardner Elliott, T. R. Brooks, and J. B. Rogers, defendants,—the complaint in which case was filed in the Circuit Court of the State of Oregon for Multnomah County, originally on November 4th, 1869. I think it was, and after the case was at issue it was moved to Marion County on a change of venue, and in which you were appointed at the time and acted as referee, and took,

and reported the testimony and the findings of fact and your conclusions of law, and which case was afterward appealed to the Supreme Court, and resulted in a decree of that court,—a certified copy of which has been introduced in evidence in this case and marked complainant's exhibit 23, which I now hand you?

Counsel for defendant objects to the testimony as incompetent, irrelevant, and immaterial, and not the best evidence, and because no foundation has been laid.

A. I had all the papers in that case in my custody and sent them to Mr. Fenton for examination last Monday.

Q. Were these documents withdrawn by order of the chief justice of the Supreme Court?

A. The chief justice ordered me to send them.

Q. I call your attention to complainant's exhibit 24, which purports to be the original summons,—exhibit "A" in this case, and the amended complaint filed November 5th, 1869, B. L. Norden, clerk, and refiled June 19th, 1876, by D. H. Murphy, clerk, and the answer of the defendant, S. G. Elliott, filed by B. L. Norden, clerk, March 14th, 1870, and refiled June 19th, 1876, by D. H. Murphy, clerk, and replication filed April 18th, 1870, by B. L. Norden, clerk, by J. L. Davis, deputy, and refiled June 19th, 1876, by D. H. Murphy, clerk, and on which there is an endorsement on the back, marked "Memo"—Ben Holladay et al, complaint answer, and reply, and on which there is apparently the word, "Tried" or "To be tried," and will ask you if those documents were in your possession in the Supreme Court as part of the rec-

ords of this case?

A. Yes sir. They are part of the same record I spoke of.

Q. Who were these various clerks, whose file marks appear on these pleadings?

A. Ben Norden was clerk of Multnomah County,—D. H. Murphy was clerk of Marion County. The case was tried by me as referee in Multnomah County, and my report was filed in Multnomah County, but Judge Shad-duck having been of counsel in the case transferred it to Marion County for hearing on my report.

Q. The case was heard in the Circuit Court of the State of Oregon for Marion County upon your report before Judge Boise?

A. Yes.

Q. And appealed from Marion County to the Supreme Court?

A. Yes.

Q. Do you recognize these original pleadings in this case?

A. Yes sir.

Counsel for complainant now reoffers in evidence these documents referred to, and the file mark as complainant's exhibit 24 and ask leave to substitute a certified copy in lieu thereof, and to withdraw the original.

Counsel for defendant makes no objection to the withdrawal of the original and the substitution of the certified copy but objects to the same as incompetent, irrelevant, and immaterial, and not the best evidence, and because no foundation has been laid.

The documents having heretofore been filed in evidence as complainant's exhibit 24 are now considered in evidence as complainant's exhibit 24.

Q. I call your attention to a document marked complainant's exhibit 21, purporting to be a surrender or release executed by Ben Holladay and Company to the Oregon Central Railroad Company to which is attached a letter, and will ask you whether or not that was one of the exhibits produced before you as referee in that case, and which you found in the records of that case on file in the Supreme Court, and now in your custody as clerk of that court?

A. A document of this character was introduced in evidence and it is on file,—it has not my file marked on it, but it is marked filed by D. H. Murphy, and this paper is one of the papers that I found in the records of this case in the Supreme Court.

Q. Was it considered before you as referee in that case as one of the exhibits in the case?

Counsel for defendant objects to the question as incompetent, irrelevant, and immaterial, and not the best evidence, because no foundation has been laid.

A. The endorsement on here signed A. J. Cook, I recollect that that endorsement was before me and considered.

Q. Now, I call your attention to the signature on the other side of it, purporting to be Ben Holladay and Company's signature,—did you know Ben Holladay in his lifetime?

A. I knew Ben Holladay.

Q. Did you know his handwriting?

A. I did.

Q. State to the court whether or not the signature "Ben Holladay and Company" is in the handwriting of Ben Holladay?

A. Yes,—I have no doubt about it.

Q. Do you know the signature of J. E. Cole and I. R. Moores,—did you know their handwriting?

A. There was a great deal of that in that case, but it is a long time since I have looked at it,—I was not as familiar with those signatures as I was with that of Ben Holladay. I. R. Moores,—I should say that was his signature beyond question,—as to Cole's signature, I never saw enough of that to swear to it.

Q. I call your attention to the witnesses to this document,—J. H. Mitchell, and M. M. Chapman,—you knew J. H. Mitchell in his lifetime?

A. Yes.

Q. That is his handwriting?

A. Yes.

Q. Did you know M. M. Chapman, county clerk of Marion County?

A. Yes.

Q. Chapman is dead?

A. I understand so.

Q. He was commonly called Mem Chapman?

A. Yes.

Q. Do you know his handwriting?

A. I do not know his handwriting.

Counsel for complainant reoffers in evidence the docu-

ments last shown the witness and having been heretofore offered and filed in evidence as complainant's exhibit 21, and asks leave to withdraw the same and substitute a certified copy in lieu of the original.

Counsel for defendant makes no objection to the withdrawal of the original and the substitution of the certified copy, but objects to the same as incompetent, irrelevant, and immaterial, and not the best evidence, and because no foundation has been laid.

The documents are considered as received and filed, marked complainant's exhibit 21.

Q. I now show you what purports to be complainant's exhibit 22 in this case,—purporting to be an agreement made May 12th, 1868, between the Oregon Central Railroad Company, and A. J. Cook and Company, and containing on the face of it in red ink a surrender and the signatures of Ben Holladay and Company, and the Oregon Central Railroad Company by I. R. Moores, and the Oregon Central Railroad Company by J. E. Cole and witnessed in the presence of J. H. Mitchell, and M. M. Chapman, and will ask you what the fact is as to whether or not that document was before you as referee in that case as part of the documents and exhibits now in your custody as clerk of the Supreme Court in this case?

A. This has no mark of mine on it that I have seen. I think that this document was before me, but of that I cannot swear positively but it was among the papers in the case, which I found when I examined them last Sunday.

Q. And you furnished that document to Mr. Fenton

under the orders of the chief justice?

A. Yes sir.

Q. I call your attention to the purported signature of Ben Holladay and Company, and ask you if that is the signature of Ben Holladay?

A. Yes, that is Ben Holladay's handwriting.

Q. What do you say about the signature of I. R. Moores as being his?

A. I think that is the signature of Moore's.

Q. As to Cole's signature, you say you do not know that?

A. No.

Q. What do you say as to Mitchell's and Chapman's signature?

A. That is Mitchell's signature, but I do not know Chapman's signature.

Counsel for complainant now reoffers in evidence the document last shown the witness being complainant's exhibit 22 heretofore offered, and ask leave to withdraw the original and substitute a certified copy thereof.

Counsel for defendants make no objection to the withdrawal of the original and the substitution of a certified copy, but objects to the same as incompetent, irrelevant, and immaterial and as not the best evidence, and because no foundation has been laid.

Q. I call your attention to a document filed in 1874 by George L. Storey, clerk, by R. L. Durham, deputy,—in whose handwriting is that?

A. That is in the handwriting of R. L. Durham,—that is about the date that my report was filed I think,

but I am not sure.

Q. I notice the endorsement filed June 19th, 1876, D. H. Murphy, clerk, who was D. H. Murphy?

A. D. H. Murphy was clerk of Marion County.

Q. I now show you what purports to be a volume of testimony taken in that case filed November 24th, 1875, George L. Storey, clerk, by R. L. Durham, deputy, and offered in evidence by the defendant, and among others is a deposition of James Grindley, and I will ask you if you recognize that document or bound volume as a part of the testimony taken in that case and submitted for your consideration as referee, and whether this document is part of the files in this case on appeal to the Supreme Court, and now in your custody as clerk?

A. Yes,—this document was before me, and this paper has pasted on the back of it the title of the case, and that is in my handwriting, and was offered in evidence by the defendant,—that is in my handwriting, and that is part of the evidence in that case, and submitted by me to the Circuit Court.

Q. I call your attention to the file mark “Filed June 19th, 1876, D. H. Murphy, clerk,” whose handwriting is that?

A. I do not know,—I did not know Murphy well enough to swear to his handwriting.

Q. D. H. Murphy was clerk of Marion County?

A. Yes. The file mark “Filed November 24th, 1875, George L. Storey, clerk, by R. L. Durham, deputy,” that is in Mr. Durham’s handwriting.

Q. Did you know that Storey was County Clerk of

this county, and that Durham was his deputy at that time?

A. Yes sir.

Q. Did you know James Grindley, who was a witness in that case?

A. No sir. His deposition was taken in California, I think, I do not recollect James Grindley, at all.

Q. I call your attention to the deposition of James Grindley,—but I will ask you first, was James Grindley a witness before you, or was his deposition considered by you?

Counsel for defendant object to the testimony of this witness with reference to this deposition on the ground that it is apparently a deposition taken in another case between parties not parties to this suit, and that the same is incompetent, irrelevant and immaterial, and not the best evidence, and because no foundation has been laid.

A. His testimony was offered in evidence before me in the form of a deposition taken in California.

Q. Do you know where he was from?

A. I do not recollect anything about him, or where his home was.

Q. Was Ben Holladay a witness before you on the trial of that case, or was his deposition offered or used by you?

Counsel for defendant objects to the question as leading, and as incompetent, irrelevant, and immaterial and not the best evidence.

A. His deposition taken in California was offered in evidence, and his deposition was taken before me, and

reduced to writing by me.

Q. I show you a document containing this endorsement, "Introduced in evidence as deposition of Ben Holladay by the defendant S. G. Elliott, May 1, 1874, J. C. Moreland, referee," and will ask you if that is in your handwriting, and if that deposition was introduced and considered in evidence in that case before you as referee?

Counsel for defendant object to the question as leading, as incompetent, irrelevant, and immaterial, and not the best evidence, on the ground that it is apparently the deposition taken in another case and between parties not parties to this suit, and that the same is incompetent, irrelevant, and immaterial, because no foundation has been laid.

A. That endorsement you read there is in my handwriting and this deposition was offered in evidence, and was considered in that case.

Q. Where, with reference, to the records of the Supreme Court, in this case that are now in your custody was this deposition?

A. It was with the records.

Q. Was that furnished to Mr. Fenton in the same way as these other documents?

A. Yes.

Q. On the same order?

A. Yes sir.

Q. I wish you would turn to page 61 of this deposition,—being the printed deposition and read to the court that portion of this deposition beginning with question 385 on page 60, and read down to and including the

answer to question 398 on page 62?

Counsel for defendant objects to the question as leading, as incompetent, irrelevant, and immaterial, and not the best evidence, on the ground that it is apparently the deposition taken in another case and between parties not parties to this suit, and that the same is incompetent, irrelevant, and immaterial, because no foundation has been laid.

A. (Reads.)

“Q. 385. Have you not, in the course of your business, during the last two or three years, made inquiries into what men’s wages in Oregon are?”

A. Well, sir, I certainly ought to know, because the railroad has been hiring a great many men.

A. 386 Have you not made inquiries, and do you not know what the price of ties is in Oregon?

A. Yes, sir.

Q. 387 Do you not know what the price of iron is per mile, such iron as you laid down?

A. I know what it cost, sir.

Q. 388 You also know the lay of the land, and about how much grading is necessary?

A. No, sir; when it comes to the grading part, I could not tell you; I am not a practical engineer. I know nothing about grading.

Q. 389 Now, from those items of which you have knowledge, what should you say was a reasonable cost of making that twenty miles, and putting it in running order?

A. Well, I really could not tell you without going in-

to figures, and I do not know the cost of grading the road. I know the cost of iron and ties, and all that, but I do not know anything about grading.

Q. 390 Take it, then, all except the grading. Leave out the grading, as that is something you are uncertain about.

A. Well, the iron cost about eighty dollars to a ton, and it takes about eighty tons of iron to the mile. The ties, I really could not tell what they cost, because we sawed the ties for the first twenty miles. I do not know what they did cost.

Q. 391 Can not you give it approximately?

A. No, sir; for the single reason that they were sawed by our own mills, and the mills cost a great deal of money, and what would be the depreciation of the property of the mills while sawing the ties, is a thing I could not take into consideration.

Q. 392 To whom did those mills belong that you speak of?

A. The mills were built by Ben Holladay & Co.

Q. 393 Meaning by Ben Holladay & Co.—Holladay, Elliott & Emmett?

A. Two of the mills were built after we formed this co-partnership.

Q. 394 Were those mills included in the transfer from the Oregon Central Railroad Company to the Oregon and California Railroad Company?

A. I think they were, sir.

Q. 395 How much money did those mills cost?

A. I do not recollect, sir.

Q. 396 About?

A. I can not tell you. I have no recollection of the cost. I know what we have sold them for; we have sold both. They were sold by the Oregon and California, and one of the mills was sold for three thousand five hundred dollars, and I think the other was sold for the same price. I know we offered them for that. I do not know whether they sold for that or not; but they cost a very large amount of money. I would not be positive whether they were sold for that.

Q. 397 They were sold very much below the cost?

A. Oh, very much, indeed, sir.

Q. 398 About how much below the cost.

A. Well, sir, I suppose we must have lost twenty thousand dollars on the mills."

Q. Now turn to the cross examination of Ben Holladay at page 265, beginning with question 1953, down to and including the answer to question 1963, on page 269,—was that part of this deposition,—these pages and these interrogatories?

A. These pages are included, and these interrogatories are included in the deposition I have referred to.

Q. Will you read into the record that portion of the cross examination of Ben Holladay beginning with question 1953 down to and including the answer to question 1963, on page 269?

Counsel for defendant objects to the questions as incompetent, irrelevant and immaterial, and because no foundation has been laid.

A. (Reads.)

“Q. 1953. Have you purchased any property in Oregon since?

A. Yes, sir, I have purchased a considerable amount.

Q. 1954. At what expense?

A. Since when do you mean?

Q. 1955. Since the 12th of September, 1868?

A. Well, I purchased about two hundred and fifty or two hundred and sixty acres of land in East Portland.

Q. 1956. At what expense?

A. At a cost I think of about some \$70,000 or \$80,000.

Q. 1957. How was it paid for?

A. Paid for in cash. No, hold on a minute; let me give you a list of the property I own in Portland, and then you can ask what questions you please about it. I own 167 blocks in East Portland, which cost about \$70,000 to \$75,000; I do not recollect the exact amount; the present cash value is about \$1750 a block. And then I own half a block fronting the steamship wharf at Portland, worth \$10,000. And then my interest in the Dock Company Lands and mill at Portland, which is under mortgage for \$55,000; the value, however, above the liability is \$45,000; I have been very particular about this, and have got this right, because I know it. And then I own one-fourth interest in the Mitchell & Smith Addition to East Portland, which is in debt about \$10,000, and my interest in it, above the indebtedness, I value at \$20,000. Then a house, lot and furniture, with extra house and lot in the rear, at Portland, \$37,000; the Hoffman House, lot and furniture at Portland, \$10,000. In addition to the above, I have acquired in December, 1870, an interest in

the West Side Oregon Central Railroad, at a low valuation, \$100,000.

Q. 1958. That is, you value it at that?

A. Yes, sir; the work, franchise, and property. I will answer any questions at the proper time. These fourteen fractional blocks of property equal to ten blocks in Portland, which cost \$64,000, valued at \$100,000. That is all there is at Portland. Now, there is another thing—you asked me what property I owned in the East, and I see something here which I omitted; I owned an interest, bonds and stock, the amount I do not recollect, in the Atlantic and South Pacific Railroad—I think that is the name of it—which I realized for, afterwards, in cash and exchange of other stock and bonds, about \$100,000. My lots and property in Portland and East Portland are in the names of William L. Halsey, Ben Holladay, junior, and George W. Weidler. It was all bought for me, with my money, and put in their names in order to facilitate sales and transfers, as my wife was in Europe. The deeds from them to me are in my safe at Portland, but have not ever been recorded.

Q. 1959. Mr. Patterson. Have the properties you have spoken of in Oregon been paid for, and, if so, out of what fund?

A. They are paid for, sir, out of my own money, and all paid for except what you see here, which I have explained in the different items as being incumbered.

Q. 1960. Can you tell from what source the money which paid for those different pieces of property was derived?

A. The most of it, sir, was derived from drafts on the North Pacific Transportation Company. In 1868 I had one tract of land, in Kansas, of 4,200 acres, unincumbered, worth then about ten or twelve dollars an acre. Since then I have sold—I can not tell the exact amount, don't you understand,—I have sold about 1,000 or 1,200 acres of that land, and have remaining now 3,000 acres, or about that, that I value at fifteen dollars an acre or more. In Missouri, in 1868, I had one farm of 1,200 acres of land, valued then and now at about the same price—\$36,000. I had another farm of two hundred acres, then and now valued at about the same price—I do not know that there is much difference—at \$12,500 for the farm. In St. Joseph, Missouri, I had three lots and a mortgage on a lot in addition to that. I loaned the money, don't you understand, on another lot—the mortgage and the value of the property together amounting to, say \$4,500; and I also owned in Nebraska, lying on the Missouri River, a tract of 1,500 acres of land, valued at twenty dollars an acre; probably it is valued at twenty dollars now. I do not suppose it was worth so much then. Then I owned a number of lots in the town of Aspinwall, Nebraska, upon this tract of land I spoke of; I do not know how many lots, or the number of the lots, nor I do not know the value. There has been no change that I know of in this Aspinwall, Kansas, or this other property; or, if there has been any, it has been increasing. Then I own a farm in Iowa, or a tract of land of two hundred and forty acres, in 1868, and now worth, I suppose, about \$2,500. Then I owned then, and own now, one-twentieth

interest in the Lower California Land Company, the value of which I do not know, but probably it is valued at \$20,000. Then I own one-twentieth interest in the San Domingo Land Company, which is probably worth \$50,000, but I will put the value at \$25,000. Then I own a good and substantial claim against the United States Government, amounting to about \$500,000. Then I have a large number of town lots in the city of Denver, Colorado Territory, that are in litigation. I do not know the value. I own a banking house in Central City, Colorado, the title to which is in dispute. Also, three-fourths of thirty-five acres of land adjoining the City of Victoria, Vancouver Island, and a tract of land near Olympia, Washington Territory, the value of which I do not know anything about. I have also 15,000 shares in the European and Oregon Land Company, upon which I have paid an assessment of some \$8,000, I believe. Its value is nothing, that I know of. That is all, sir, that I recollect of now. I think upon reflection, that I have got a house somewhere in town that is in my own name, and I give you my word I do not know whether it belongs to me or to the North Pacific Transportation Company, but I was sued upon it, the other day, for a street assessment. Then I own a couple of lots—I do not know how valuable they are—over in Alameda. I suppose there is no value to them. Then I own 27,591 shares of stock in the North Pacific Transportation Company, valued in 1868 at about forty, and now at about fifty cents on a dollar. I also owned at New York in September, 1868, and since, 750 shares Credit Mobiler stock of the Union Pacific Railroad.

Q. 1961. When did you acquire the interest in the West Side Oregon Central Railroad Company?

A. Well, I first acquired the interest a year ago. Let's see—I should think about a year ago.

Q. 1962. At what expense?

A. At the expense, first, I suppose of about \$25,000 or \$30,000.

Q. 1963. How did you pay it?

A. I paid it in cash."

Q. When was this deposition taken,—that is, this examination of Ben Holladay that your attention has been called to?

A. It appears to have been commenced on the 25th day of December, 1870, and continued until May, 1871,—it is signed May the 12th, 1871.

Q. The particular portion of the deposition that you have been asked to read appears to have been taken May the 8th, 1871?

A. Yes, I think so.

Counsel for complainant offers in evidence with leave to submit the certified copy thereof certified to by the clerk of the Supreme Court of the State of Oregon, so much of this deposition as has been read by the witness into the evidence,—giving the caption of the case and the preamble as to where it was taken and the certificate of the officer before whom it was taken, and asks that it be considered as filed and marked complainant's exhibit 46.

Counsel for defendant objects to the same as incompetent, irrelevant, and immaterial, and not the best evi-

dence, because no foundation has been laid.

The document referred to is considered as received and filed in evidence, to be marked complainant's exhibit 46.

Q. I wish you would look at the deposition of Ben Holladay, taken in this case before you as referee, and state when it was that Ben Holladay appeared before you as a witness, giving the date?

A. April the 3d, 1871, was one time,—there two depositions of Ben Holladay,—in fact three,—two taken by me, and the printed one that was offered in evidence, and from which I have just been reading. There was another one taken in 1874, I think, down at Seaside.

Q. I call your attention to interrogatory No. 22, in the testimony of Ben Holladay taken before you April 3d, 1871, and will ask you to read to the examiner, interrogatory No. 22, and the answer thereto?

Counsel for defendant objects to the question as incompetent, irrelevant, and immaterial, and not the best evidence, because no foundation has been laid:

A. (Reads) “Int. 22d. State all the property owned
“ by the firm of Ben Holladay & Co. at the date of the
“ commencement of this suit, and its value?

“Ans. The contracts referred to, together with the
“ bonds and stocks of the Oregon Central Railroad Com-
“ pany, to which they were entitled under said contracts,
“ and all of which were then and ever since have been
“ of merely nominal value. They had no marketable
“ whatever and no real value considering all the sur-
“ roundings and circumstances of the case, the litigation
“ existing, and the impossibility of going forward with

“ the enterprise under these contracts for the reasons
“ stated. Aside from these contracts the firm of Ben
“ Holladay & Co. had nothing except two saw mills and
“ a small machine shop; also some personal property,
“ consisting of shovels, picks, cattle, etc.—the exact value
“ of which I do not know. Mr. Weidler will know as he
“ had charge of the property and can tell all about it.

Q. Read interrogatory 23 and the answer thereto?

A. (Reads) “State when the firm of Ben Holladay
“ & Co. practically ceased to do business as such firm?”

“Ans. The latter part of December, 1869, when the
“ first 20 miles of road were completed.”

Q. Read the next interrogatory and the answer?

A. (Reads) “Int. 24th: State what has become of
“ the interests which the defendants Gardner Elliott and
“ T. R. Brooks had in the contracts referred to and in
“ the firm of Ben Holladay & Co.?”

“Ans. I have purchased all their interests in both
“ since the commencement of this suit. And they have
“ transferred and released all their interests in said con-
“ tracts and in the firm of Ben Holladay & Co. They
“ neither of them have any interest in them now or in
“ the result of this suit.”

Q. Read the next interrogatory and the answer?

A. (Reads) “Int. 24th:—State if you have in your
“ possession the original contracts between the Oregon
“ Central Railroad Company and A. J. Cook (so-called)
“ and A. J. Cook & Co. to wit:—of April 23rd, 1867, of
“ November 27th, 1867, another one of date May 12th
“ 1868. And which were assigned and transferred to the

“firm of Ben Holladay & Co., or attempted to be. If
“so, please furnish to the referee two copies of each
“thereof and mark them respectively “A,” “B,” “C,”
“and “D,” and attach them as a part of your answer
“to this interrogatory?”

“Ans. I have them and herewith furnish them as a
“part of this answer.”

BEN HOLLADAY.

Attest J. C. Moreland,
“Referee.”

“Memorandum.”

“I hereby certify that the annexed exhibits marked
“respectively “A,” “B,” “C,” and “D,” are copies of
“contracts furnished by Ben Holladay in answer to the
“last interrogatory to the foregoing deposition.

“April 3rd, 1871.

J. C. MORELAND

Refere.”

“EXHIBIT “A” ATTACHED TO BEN HOLLADAY’S
DEPOSITION.

“Memorandum of an agreement made this 23rd day of
“April in the year of our Lord one thousand eight hun-
“dred and sixty-seven (1867) by and between the Ore-
“gon Central Railroad Company organized under and in
“accordance with the general laws of the State of Ore-
“gon of the first part & Albert J. Cook of the second
“part.

“WITNESSETH:—

“That whereas the party of the first part own the right
“privilege and franchise of constructing, equipping and
“running a railroad from Portland in the State of Ore-

“ gon South to the California line, and whereas the par-
“ ty of the second part doth agree and hereby agrees
“ with the party of the first part to build and equip One
“ hundred and fifty miles of said railroad with all nec-
“ essary rolling stock from Portland South through the
“ Willamette Valley for the sum of Five millions Two
“ Hundred and fifty thousand dollars (\$5,250,000.00/100)
“ reckoned at gold or specie value that is to say if pay-
“ ment from time to time be made in National Currency
“ now so called it shall be in payment for so much only
“ as the same is worth in Gold at the time of such pay-
“ ment and it so shall be reckoned with anything else
“ that may be received in payment at the time of such
“ payment.

“ And the party of the second part doth further agree
“ with the party of the first part to build and equip with
“ rolling stock complete for the working of the same that
“ is to say the road shall be built upon a uniform guage
“ of four (4) feet eight (8) and one-half ($1\frac{1}{2}$) inches the
“ maximum grade not to exceed eighty (80) feet per
“ mile & a minimum curvature of ten degrees (10). The
“ width of the road bed to be eleven feet on the surface
“ and iron used shall be the best quality known as T rail
“ weighing at least forty-five pounds per lineal yard.
“ The ties shall be of the best wood to be obtained for
“ strength and durability not less than six by eight inches
“ and eight feet in length, to be laid at the rate of two
“ thousand six hundred and forty feet per mile. The
“ amount of rolling stock shall consist for the first di-
“ vision of twenty-five miles extending from Portland to

“ the French Prairie of two first class locomotives, weigh-
“ ing not less than sixteen tons each; two first class pas-
“ senger cars, two baggage or express cars. The next
“ division of about twenty-five miles reaching to Salem,
“ one first class locomotive of not less than sixteen tons
“ weight two first class passenger cars, one baggage car
“ twelve box cars and two platform cars; For the next
“ division of about twenty-five miles reaching to Albany.
“ One first class locomotive weighing not less than
“ twenty-six tons, two first class passenger cars, one
“ baggage car twelve each box and platform cars. For
“ the next division of about ten (10) miles reaching to
“ near Corvallis, one first class locomotive weighing not
“ less than twenty-six tons, two first class passenger and
“ box cars. For the next division of about thirty miles
“ to Eugene City one first class locomotive weighing not
“ less than thirty tons three first class passenger one
“ baggage and ten each box and platform cars. For the
“ last division of about thirty-five miles two first class
“ locomotive weighing not less than thirty-six tons four
“ passenger cars twenty box cars and six platform cars.
“ The contractors shall provide suitable stations and
“ turn outs at various points to be designated by the
“ company at the rate of one for every ten (10) miles
“ water tanks as often as once in every twenty miles
“ where water can conveniently be had, such locations to
“ be designated by the company. At the large towns
“ designated as the terminal of the different divisions
“ suitable buildings shall be erected for the accommoda-
“ tion of passengers and freight depots of ample size to

“ accommodate the business of the road shall be erected
“ in a substantial and durable manner also engine houses
“ of a sufficient capacity for the safe housing of all the
“ engines.”

“The contractors shall erect and furnish suitable ma-
“ chinery for a repair shop at a point designated by the
“ company. The president of the Company and the
“ Engineer of construction shall compose a commission
“ whose approval shall be necessary to the acceptance
“ of the road.”

“And the party of the second part doth agree to re-
“ ceive payment for the building and equipping said
“ one hundred and fifty miles of railroad in the com-
“ pany’s first mortgage railroad bonds payable in twenty
“ years from the date of the same with interest semi-
“ annually. PROVIDED that in case the company, while
“ the road is being constructed is unable from its re-
“ sources to pay the interest on its bonds issued to the
“ said party of the second part the same shall be pay-
“ able in the first mortgage bonds of the Company of
“ regular series and character at their par value, all said
“ bonds to be secured by a first or bottom mortgage on
“ said one hundred and fifty miles of railroad and on all
“ the rolling stock thereof and such amounts in specie
“ as the company may provide.

“And the party of the first part hereby promises cov-
“ enants and agrees with the party of the second part to
“ pay the sum of five millions two hundred and fifty
“ thousand dollars, receiveable at gold or specie value as
“ aforesaid to the party of the second part, and to its

“ assigns for constructing and equipping with rolling
“ stock said railroad from Portland in the State of Ore-
“ gon to the head of the Willamette Valley or a distance
“ of one hundred and fifty miles, and the party of the
“ first part promises covenants and agrees with the party
“ of the second part to issue or cause to be issued the
“ first mortgage gold bearing railroad bonds of the Ore-
“ gon Central Railroad Company, the payment of which
“ shall be secured by a bottom mortgage on said one
“ hundred and fifty miles thereof, and on the rolling
“ stock of the same. Interest on said bonds to be made
“ payable at the rate of seven per cent per annum as
“ aforesaid and the said party of the first part agrees
“ that said bonds shall be issued in such form and sums,
“ and to be endorsed if need be to make the same ne-
“ gotiable and satisfactory, and that the engineers em-
“ ployed are to be paid by the party of the second part
“ and shall be nominated by the party of the second part
“ if they see fit to nominate the same, and that the party
“ of the second part shall be entitled to the earnings of
“ the road until such time as the same is accepted by
“ the Company.

“ And the party of the first part further agrees to de-
“ posit in some safe bank in the State of New York des-
“ igned by the party of the second part fifteen thou-
“ sand dollars (15,000.00/100) per mile of the amount of
“ said railroad bonds to be delivered to the party of the
“ second part in payment aforesaid as the bill of lading
“ for iron rolling stock & other materials shall from time
“ to time be accepted by such Engineer PROVIDED That

“ the company shall not sell or dispose of their regular
“ first mortgage bonds at less than their par value.

“ And the party of the first part further agrees to
“ make monthly payments upon the work as approved
“ by the Engineer reserving twenty per cent of the
“ amount of work done each month until the division is
“ accepted by the Commissioners.

“ And the party of the first part further agrees to use
“ every means in their power to obtain as much cash
“ and money aid from the people of Oregon as is possible
“ for the furtherance of this enterprise.

“ And the party of the first part further agrees to
“ issue two million of preferred stock of the Oregon Cen-
“ tral Railroad Company bearing interest at seven per
“ cent per annum and deliver the same to the party of
“ the second part immediately after the signing of this
“ contract.

“ And it is further understood and agreed between the
“ parties hereto that the work shall be commenced within
“ one year after the signing of this contract and the
“ whole one hundred and fifty miles completed within
“ five years thereafter.

“ And it is also understood that the common stock
“ of the O. C. R. R. Co. shall be offered for sale to the
“ people of Oregon at ten cents on the dollar and at the
“ expiration of six months from the commencement of
“ work on the road, subscriptions at the same rate shall
“ be received from any parties whomsoever for the
“ amounts then remaining unsold.

“ In testimony whereof we Geo. L. Woods President

“ and Sam’l A. Clarke secy. on behalf of the Oregon
“ Central (end of sixth page) Railroad Company, as au-
“ thorized by the Board of Directors have hereunto af-
“ fixed our hands and the seal of said Company on the
“ part of said Company party of the first part, to the
“ foregoing contract this the twenty-third day of April
“ A. D. 1867 at the office of the Company in the City of
“ Salem, Marion County, Oregon.

“Sam’l A. Clark

Geo. L. Woods

“Secretary

President

O. C. R. R. Co.

O. C. R. R. Co.

(“Seal of O. C. R. R. Co.”)

“And for the party of the first part, Albert J. Cook
“by S. C. Elliott his Attorney in Fact.”

“Witness

“T. R. Brooks

“J. H. Parker.”

(U. S. Revenue Stamps to the amount of 35 cents cancelled.)

Counsel for complainant now offers in evidence that portion of the deposition of Ben Holladay which has been read into the record by the witness, and asks leave to substitute a certified copy thereof in lieu of the original as complainant’s exhibit 47.

Counsel for defendant objects to the introduction of the same in evidence, as incompetent, irrelevant, and immaterial, and not the best evidence.

The document referred to is considered as received and filed in evidence to be marked complainant’s exhibit 47.

Q., I now show you what purports to be the deposi-

tion of James Grindley taken in that same case and will ask you if you recognize that as the deposition of James Grindley submitted to you as referee in that case and as a part of the records on file in the office of the clerk of the Supreme Court and in your custody as such in this case?

A. I recognize this as one of the papers that was in evidence before me, and was filed by me in the office of the clerk of the Circuit Court of the State of Oregon for Multnomah County as part of the records in this case.

Q. Was that deposition of James Grindley considered by you in that case as a part of the records before you?

Counsel for defendant object to the question as incompetent, irrelevant, and immaterial, and not the best evidence.

A. Yes.

Counsel for complainant now offers in evidence the original deposition of James Grindley taken before James Grant of Boston in the County of Suffolk, State of Massachusetts, down to and including the cross examination and signature at page 172, and asks leave to withdraw the original and submit a copy of the same, certified to, by the clerk of the supreme court, as complainant's exhibit 48.

Counsel for defendant objects to the introduction of the same in evidence as incompetent, irrelevant, and immaterial, and as not the best evidence, and as leading.

The document referred to is received and filed in evidence and marked complainant's exhibit 48.

Q. I now show you complainant's exhibit 7, which purports to be the minute book of the Oregon Central Railroad Company on pages 175 and 176 of this book containing a transcript of the record of an instrument purporting to be executed by Ben Holladay and Company, and by C. Temple Emmet by Ben Holladay and the Oregon Central Railroad Company, and will ask if you will be good enough to look at the handwriting, and state in whose handwriting that is, if you know?

Counsel for defendant object to any evidence being offered concerning this document upon the ground that it is not stamped as required by law and cannot be admitted in evidence in this court.

A. That is Jack Moses' handwriting.

Q. A. J. Moses?

A. Yes.

Q. Where is A. J. Moses?

A. He is dead.

Q. How long has he been dead?

A. I would not pretend to say,—a good many years.

Q. Where did he live about that time, March 28, 1870?

A. Portland.

Q. What was his business?

A. He was employed a good deal along about that time in Mitchell, Dolph, and Simon's office.

Q. What Mitchell?

A. John H. Mitchell.

Q. What Dolph?

A. J. N. Dolph.

Q. Who were they with reference to the Oregon Cen-

tral Railroad Company, East Side?

A. They were Holladay's attorneys.

Q. Were they also attorneys for the Oregon Central Railroad Company of April 22nd, 1867?

A. Yes, sir.

Q. Were they such attorneys on March 29th, 1870?

A. Mitchell was attorney for the East Side, Oregon Central Railroad Company, I think, from its existence.

Q. Were you acquainted with the handwriting of A. J. Moses?

A. Yes sir,—I have seen a great deal of it,—have seen him write a great deal.

Q. And in your judgment that is his handwriting?

A. Yes.

Q. Do you know anyone living that knew A. J. Moses?

A. Cyrus Dolph and Joe Simon both knew him and know his handwriting better than I do.

Q. I call your attention to the deposition of Ben Holladay taken in this case September 3d, 1874, and will ask you if that deposition or testimony rather, was taken before you as referee in this case on that date?

Counsel for defendant objects to the same as incompetent, irrelevant, and immaterial, and because no foundation has been laid.

A. Yes sir, and reduced to writing by myself.

Q. State to the court whether or not that deposition is now a part of the files of this case in the Supreme Court and in your custody as clerk of that court?

A. It is.

Q. I call your attention to the signature of Ben

Holladay on page 2430, and will ask you if that is the signature of Ben Holladay?

A. Yes, that is the signature of Ben Holladay.

Counsel for complainant offers in evidence the original deposition of Ben Holladay whose signature has just been identified and asks leave to withdraw the original and substitute a certified copy in lieu thereof.

Counsel for defendant object to the same as incompetent, irrelevant, and immaterial, and not the best evidence, and leading.

The document referred to is received and filed in evidence, marked complainant's exhibit 49, with leave to withdraw the original and substitute a certified copy thereof.

Cross-Examination.

Questions by Mr. Henry Conlin.

Q. Mr. Moreland, you say you knew Ben Holladay in his lifetime?

A. Yes, sir.

Q. How long did you know him?

A. I knew him from about 1869,—the early part of 1869, when I first became acquainted with him until his death.

Q. You knew him until his death?

A. Yes, sir.

Q. He resided most of that time in Portland, did he not?

A. He was here off and on,—he resided here a great deal of the time, or was here a great deal of the time, and was away a great deal of the time.

Q. Were you well enough acquainted with him to judge of his character, as a business man, and of his ability, and learning and education, and so on?

A. Well, I saw a great deal of Ben Holladay,—that is, for three or four years,—I saw him very frequently, he was in my office very often while this case was going on, and I suppose I formed an opinion on that subject.

Q. Was he a man of business ability, learning and education?

A. He was not a man of much education except what he had picked up in the rough school of experience,—but I always regarded Ben Holladay as an exceedingly shrewd business man,—a jumper, who would take a great many chances. He was what would be known nowadays as a gambler in business.

Q. He was a man who gave careful attention to business affairs?

A. No, he trusted a great deal to others, was my experience.

Q. Did you know John H. Mitchell, formerly United States Senator from this state?

A. Yes sir, I did.

Q. He was attorney for Ben Holladay, and for the Oregon Central Railroad Company?

A. Yes, sir.

Q. Was John H. Mitchell regarded as a lawyer of ability?

A. Yes, sir.

Q. And learning?

A. Yes, sir.

Q. A man skilled in his business?

A. Yes, sir.

Q. And the practice of his profession?

A. Yes, sir.

Q. Have you ever been in the employ of the Oregon and California Railroad Company or the Southern Pacific?

A. I was in the employ of the Southern Pacific for three or four years, from about 1897 or 1898 for about two or three years.

Q. In what capacity?

A. Attorney.

Q. As attorney?

A. Yes sir, I assisted Mr. Fenton.

Redirect Examination.

Questions by Mr. W. D. Fenton.

Q. I will ask you a question which I ought to have asked in my examination in chief,—in your experience, and in your relations as referee to this suit about which you have been interrogated, do you recall ever having seen the original of this document that is set out at page 175 of this minute book, complainant's exhibit 7?

Counsel for defendant object to the question as incompetent, irrelevant, and immaterial, and because the same is not stamped as required by law to enable it to be introduced in evidence.

A. The minute book of the Oregon Central Railroad Company was brought in in that case, and I saw it, but I have no recollection of seeing any of these things in this book before today.

Q. Have you any recollection of ever having seen the original of this instrument which was dated March 28th, 1870, purporting to be signed by Ben Holladay?

A. Whether I ever saw the original of this or not I would not pretend to say at this time, but in that case it was understood that a document like this had been made, but whether this was introduced or not, I do not know.

Counsel for defendant object to the answer and move to strike out the same as incompetent, irrelevant, and immaterial, and not responsive to the question.

Q. How was it understood,—in what way,—by consent of the parties or by their counsel, or how,—what do you mean by that?

A. In the discussions that arose from time to time, in that case, it was one of the conceded facts in the case.

Q. That that document had been executed?

A. Yes, that such a document as that had been executed.

Witness excused.

G. H. Marsh is recalled as a witness for the complainant, and being heretofore duly sworn, testified as follows:

Direct Examination.

Questions by Mr. W. D. Fenton.

Q. Have you in your custody the judgment roll and papers, pertaining to the suit brought by John Nightingale, and Simon G. Elliott, plaintiffs, against the Oregon Central Railroad Company and the Oregon and California Railroad Company in the Circuit Court of the United States for the District of Oregon, ninth circuit,

and also the deposition of Ben Holladay, filed in said cause, and said court October 15th, 1879, and also the document or deposition of certified copy of the deposition of Henry Villard as part of that case?

A. I have not with me the entire judgment roll, I have a portion of the judgment roll.

Q. I call your attention to a document purporting to be a certified copy of the deposition of H. Villard, taken in that cause, and which is indexed as exhibit A,—the agreement of February 29th, 1876, between Ben Holladay and Heinrich Hohenemser et al, and will ask you if that document is part of the files in that case, and in your custody as clerk of that court?

Counsel for defendant objects to the question as incompetent, irrelevant, and immaterial, and not the best evidence, and because no foundation has been laid.

A. There is a document offered as the deposition of Henry Villard, which, with the agreement attached was introduced as an exhibit in the testimony taken before the examiner.

Q. In that case?

A. In that case of Nightingale and others against the Oregon and California Railroad Company.

Q. Who was the examiner in that case?

A. William B. Gilbert.

Q. The present presiding judge of the circuit court of appeals of this circuit?

A. Yes, sir.

Q. Is that document certified by the clerk of the district court of the fifteenth judicial district for the State of

California in and for the City and County of San Francisco?

A. Yes.

Counsel for complainant now offers in evidence the original document referred to, and asks leave to substitute a certified copy in lieu thereof, and to withdraw the original.

Counsel for defendant objects to the introduction of the same in evidence as incompetent, irrelevant, and immaterial, and not the best evidence, and because no foundation has been laid.

The document referred to is received and filed in evidence, marked complainant's exhibit 50.

Q. I now ask leave to produce the deposition of Ben Holladay, taken in that case if you have such a deposition, which appears to be filed October 15th, 1879, R. H. Lamson, clerk?

A. This is the depositon, which I now produce.

Counsel for complainant offers in evidence the certified copy of the deposition produced by the witness in evidence.

Counsel for defendant object to the same as incompetent, irrelevant, and immaterial, and not the best evidence, because no foundation has been laid.

The document referred to is received and filed in evidence, marked complainant's exhibit 51.

Witness excused.

R. Koehler is recalled as a witness for the complainant, and having heretofore been duly sworn, testified as follows:

Direct Examination.

Questions by Mr. W. D. Fenton.

Q. I show you the original deposition of Ben Holladay in the case of John Nightingale et al vs. the Oregon Railroad Company, and the Oregon and California Railroad Company, said deposition being marked filed October the 15th, 1879, and ask if you recognize the signature to that deposition as the signature of Ben Holladay?

A. That is the signature of Ben Holladay.

Counsel for complainant now reoffers the deposition of Ben Holladay heretofore offered and filed in evidence as complainant's exhibit 51.

Counsel for defendant objects to the same as incompetent, irrelevant, and immaterial, and not the best evidence, because no foundation has been laid.

The paper referred to, having already been received and filed in evidence, is considered as again filed and marked complainant's exhibit 51.

Witness excused.

G. H. Marsh is recalled as a witness for the complainant, and having heretofore been duly sworn, testified as follows:

Direct Examination.

Questions by Mr. W. D. Fenton.

Q. I will ask you if you have in your custody as part of the files of the circuit court of the United States for the District of Oregon, the affidavit of Ben Holladay filed in that case June the 2nd, 1871?

A. Yes.

Counsel for complainant offers in evidence the affidavit

of Ben Holladay and asks leave to substitute a certified copy of the same in lieu thereof, and to withdraw the original.

Counsel for defendant objects to the introduction of the same in evidence as incompetent, irrelevant, and immaterial, and not the best evidence, because no foundation has been laid.

The document referred to is received and filed in evidence, marked complainant's exhibit 52.

Witness excused.

R. Koehler is recalled as a witness for the complainant, and having been heretofore duly sworn, testified as follows:

Direct Examination.

Questions by Mr. W. D. Fenton.

Q. Mr. Koehler, I will ask you to look at this original affidavit, and state whether or not that is the original signature of Ben Holladay, which is marked filed in this case June the 22nd, 1871?

A. Yes, it is.

Counsel for complainant now reoffers in evidence the affidavit heretofore filed and marked complainant's exhibit 52.

Counsel for defendant object to the same as incompetent, irrelevant, and immaterial, and not the best evidence, because no foundation has been laid.

The document referred to is considered filed in evidence as complainant's exhibit 52.

Witness excused.

Mr. G. H. Marsh is recalled as a witness for the com-

plainant, and having been heretofore duly sworn, testified as follows:

Direct Examination.

Q. I now call your attention to the stipulation in that case,—exhibit 21, and will ask you if that was part of the records of that case in your custody that you have produced here at my request?

A. It is one of the exhibits introduced in that case.

Q. I call your attention to exhibit 10 of this stipulation, attached to it as being exhibit 10 of this document and exhibit G, and will ask you if that exhibit G and exhibit 10, both a part of that stipulation were in those files?

A. Yes, they are part of the stipulation, and are exhibits in the case.

Counsel for complainant offers in evidence this original stipulation marked on the margin exhibit 21, and purporting to be signed by W. H. Effinger, solicitor for complainant, and Bronaugh, Dolph & Simon, attorneys and solicitors for defendants, and exhibit 10, referred to in said stipulation, and ask leave to withdraw the original and substitute a certified copy thereof.

Counsel for defendant object to the introduction of the same in evidence as incompetent, irrelevant, and immaterial, and not the best evidence, because no foundation has been laid.

The document referred to is received and filed in evidence as one exhibit, marked complainant's exhibit 53.

Counsel for complainant offers in evidence a certified copy of the complaint in the case of Nightingale and

Elliott vs. the Oregon and California Railroad Company et al, objected to by counsel for defendant as incompetent, irrelevant, and immaterial, not the best evidence, because no foundation has been laid, and the document referred to is received and filed in evidence marked complainant's exhibit 54.

No Cross Examination.

Witness excused.

Charles E. Eberlein, a witness heretofore produced and sworn on the part of the defendant is recalled for further Cross Examination.

Cross Examination Continued.

Questions by Mr. W. D. Fenton.

Q. Mr. Eberlein, in your testimony in chief you said something about Mr. Kelly being in the employ of the Land Department, which Mr. Kelly did you refer to?

A. I referred to W. D. Kelly.

Q. Did W. D. Kelly have a brother, connected with and who had charge of the miscellaneous lands of the Oregon and California Railroad Company?

A. He had a brother, J. F. Kelly, who was in charge of the auditing under Mr. Young.

Q. In your department?

A. No, in Mr. Young's department.

Q. Who was Mr. Young?

A. Erastus Young.

Q. What were his initials?

A. Erastus.

Q. And what were Mr. Kelly's initials?

A. J. F.

Q. What did Mr. J. F. Kelly have to do, if anything, with the records or files of the Oregon and California Railroad Company?

A. Mr. Kelly, after the department was moved, took up the matter of fixing up the records down there of the miscellaneous lands,—he had been thru the auditing department, and had a great deal of experience in those matters.

Q. When was this,—about what time, if you remember?

A. I believe that the department was moved in 1904 to San Francisco,—that is my recollection,—I may be in error, but I think it must have been in 1904.

Q. When did Mr. Kelly have access to these records in the performance of his duty, if you recollect?

Counsel for defendant objects to the question as not proper cross examination, and as incompetent, irrelevant, and immaterial.

A. Mr. Kelly had access to all these records here. He was in the land department, and made an auditing examination for Mr. Young.

Q. Did he have access to them in San Francisco also?

A. Yes.

Q. I show you a receipt dated March 23d, 1905, being complainant's exhibit 9, and will ask you if that is your signature, and if you received the documents described in that statement at or about that time?

Counsel for defendant objects to the question as incompetent, irrelevant, and immaterial, and not proper cross examination.

A. That is my signature,—I do not remember the documents at all, but I presume they were all there,—I presume this was all checked up,—that is my signature.

Q. You are satisfied that you received all the documents listed in there?

A. Yes, I presume so.

Q. About the date it bears?

A. I presume so.

Q. Do not you recall that Mr. J. F. Kelly before the fire was your chief clerk in the land department, and had charge of such records, and especially of the miscellaneous lands, titles, and so forth, and all matters in your office under your supervision?

A. He had the title of Chief Clerk, but his work was confined as I remember it to fixing up the record of these miscellaneous lands.

Q. That was his particular duty?

A. Yes.

Q. After the fire, what relation did he sustain to your office?

A. He kept on at that job I think.

Q. For how long?

A. I do not remember when he left, probably the latter part of 1906, or early part of 1907.

Q. Was he not assistant acting land agent under you part of that time?

A. I do not remember. We had Mr. Stone as assistant,—Mr. Kelly may have been assistant, but he had the title of chief clerk at one time, I know.

Q. But you do not know whether he was acting land

agent in your absence?

A. I do not remember. It may have been that he was but he never acted in that capacity, I do not think, because Mr. Stone was there when I was not.

Q. I show you a letter, dated February 20th, 1907, purporting to be written or signed by Charles F. Eberlein, acting land agent, which, for the purposes of identification, I will ask to have marked complainant's exhibit 55, and I will ask you, if that letter went out on your stationery, by your authority, and if so, who wrote your name to that document?

A. I think that is Mr. J. F. Kelly's writing.

Q. Was that written by your authority?

A. I presume so.

Counsel for complainant offers in evidence the letter last shown the witnesses.

Counsel for defendant object to the introduction of the same in evidence, as incompetent, irrelevant, and immaterial, and not the best evidence, because no foundation has been laid.

Q. I notice in that letter that you say to Mr. Fenton: and marked complainant's exhibit 55.

Q. I notice in that letter that you say to Mr. Fenton: "I am in receipt of your letter of February 18th, 1907, enclosing the following documents:

1. "Statement No. 1 showing by counties the assessment upon Congressional Lands of the O. & C. R. R. Co. from 1891 to 1904 inclusive."

2. "Statement No. 2 showing by counties the assessed valuation of miscellaneous lands and lots formerly stand-

ing in the names of Geo. H. Andrews and R. Koehler, Trustees, together with taxes paid thereon from 1891 to 1904 inclusive.”

Do you now recollect what became of the copies that you made or that you had made as shown by that letter?

Counsel for defendant objects to the question as incompetent, irrelevant, and immaterial.

A. No, sir, I cannot tell you.

Q. Now, then, will you state to the court what the fact is, or what your recollection is, Mr. Eberlein, as to whether the information you obtained relating to these miscellaneous lands was derived from the report made to you by Mr. J. F. Kelly in the performance of his work in this respect?

Counsel for defendant objects to the question as incompetent, irrelevant, and immaterial, because no foundation has been laid.

A. It was derived in part from Mr. Kelly, and his examination made of the books of account, but a great deal of his information was supplemented by the examination made here by Angel and Fisher, I think.

Q. I show you a document which, for the purposes of identification, I will ask to have marked complainant's exhibit 56, bearing date January 10th, 1908, purporting to be addressed to Mr. Fenton, and purporting to be signed Charles W. Eberlein (C), and will ask if that letter was written by your authority?

A. Yes.

Q. Who signed that signature there,—Charles W. Eberlein?

A. That was very likely Mr. Conlin.

Q. Mr. Henry Conlin?

A. Yes, sir.

Counsel for complainant offers in evidence the document last shown the witness, objected to by counsel for defendant, as incompetent, irrelevant, and immaterial, and not the best evidence, and because no foundation has been laid.

The document referred to is received and filed in evidence, marked complainant's exhibit 56.

Q. I show you the letter of date October 10th, addressed to Mr. Fenton, purporting to be signed Charles W. Eberlein, acting land agent (C), and will ask if you recognize that letter as written from your office, and as having been signed by Mr. Henry Conlin?

Counsel for defendant objects to the question as incompetent, irrelevant, and immaterial, and not the best evidence because no foundation has been laid.

A. This was written from the office during my absence and signed by Mr. Conlin for me.

Counsel for complainant offers in evidence the letter last shown the witness, objected to by defendant's counsel as incompetent, irrelevant, and immaterial, and not the best evidence because no foundation has been laid.

The letter referred to has been received and filed in evidence and marked complainant's exhibit 57.

Q. I call your attention to a letter purporting to be written by Mr. Charles W. Eberlein per (C), dated October 11th, 1907, addressed to Mr. Fenton, which, for the purposes of identification I will ask to have marked

complainant's exhibit 58, and I will ask you if that letter was written by Mr. Henry Conlin in your name about the date it bears, and mailed to Mr. Fenton?

Counsel for complainant objects to the question as patent, irrelevant, and immaterial, and not the best evidence, because no foundation has been laid.

A. I presume it was,—it was written during my absence.

Counsel for complainant offers in evidence the letter last shown the witness.

Counsel for defendant objects to the same as incompetent, irrelevant, and immaterial, and not the best evidence because no foundation has been laid.

The letter referred to is received and filed in evidence, marked complainant's exhibit 58.

Witness excused.

Henry Conlin is called as a witness for the complainant, and being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination.

Questions by Mr. W. D. Fenton.

Q. I show you a letter, purporting to be written by Henry Conlin, acting land agent, July 27th, 1908, to W. W. Cotton secretary of the Oregon and California Railroad Company, and will ask if you were acting land agent of the Oregon and California Railroad Company at that time, and if so, when you were appointed, and how long you continued as such?

A. I was acting land agent, and my appointment was made some time early in June, 1908,—I am not sure of

the exact date, and it ended some time the latter part of September, that same year.

Q. Before that date, what relation did you sustain to the Oregon and California Railroad Company and Mr. Charles W. Eberlein, acting land agent?

A. Well, before that, I was assistant to the acting land agent.

Q. For how long were you assistant to the acting land agent?

A. I think I was appointed by Mr. Eberlein, assistant about February, 1908,—February or March.

Q. When did you first come to the service of the Oregon and California Railroad Company, and in what capacity?

A. I think it was in the month of October, 1905,—or November, I am not sure which, that I was employed.

Q. In what capacity?

A. In a clerical capacity.

Q. What were your particular duties while you were acting for Mr. Eberlein, and before you became acting land agent?

A. When I first went into the office I assisted Mr. J. F. Kelly, who was then engaged upon some work on a lot of old records, relating to right of way matters. I helped him take it up for about three weeks, I think, and then I took charge of the correspondence of the office in the land department.

Q. Did you have anything to do in any capacity with the miscellaneous lands of the Oregon and California Railroad Company? and if so, what, if anything, did you

have to do with them?

A. I had nothing directly to do with them, except as references to them might come up in the correspondence.

Q. Do you recall the fact, Mr. Conlin, that an abstract of title to the property involved in this suit was furnished to your office?

A. I recall it, from seeing a letter, or some correspondence about an abstract,—I have no definite recollection of having seen an abstract.

Q. I call your attention to these letters which have been introduced in evidence, which appear to have been sent in the name of Charles W. Eberlein, and which have the letter “C” affixed thereto,—did you write those letters for the acting land agent, Mr. Eberlein, or send them?

A. I signed them, but as to who wrote the letters, I do not know.

Q. These letters were brought to your attention for acting, and you acted upon them in the name of Mr. Eberlein, and signed the letters that have been introduced in evidence?

A. I signed the letters, and I have signed as many as a hundred or more every day, I expect, of letters that have been prepared in the office by whoever dictated them or prepared them.

Q. Now, did the land department to your knowledge ever have more than one abstract of these miscellaneous lands involved in this suit?

A. I have no independent recollection of any abstract or anything about it.

Q. Look at the letter which you wrote in which you say that you have the abstract.

A. I will say after having seen this letter that I recall now that there was some correspondence about an abstract, but further than that I have no recollection.

Q. The letter was presented to you to be approved by you was not it?

A. Well, I cannot say anything further about that than I have already said,—that these letters were prepared by people employed in the office, and that they were brought to me, and I signed them.

Q. As acting land agent for the Oregon and California Railroad, and in its employ, were you ever out on these lands in dispute?

A. No, sir.

Q. Have you ever been on the lands in dispute?

A. Yes, I was out on part of the land Sunday.

Q. You reside where?

A. In Berkeley, California.

Q. How long since you discontinued your employment with the Oregon and California Railroad Company?

A. Since a year ago last July.

Q. Who was in charge at the time you discontinued your employment?

A. B. A. McAllister.

Q. How long were you under Mr. B. A. McAllister, as land commissioner, before you quit?

A. From the time he was appointed until the 1st of July, 1910.

Q. Did you ever look after over any of the records of

the Oregon and California Railroad Company,—any of its minute books, or of the Oregon Central Railroad Company?

A. I never did, no, sir.

Q. Did you ever examine any of the corporate records of the Oregon Central Railroad Company,—I mean its minute book?

A. Not until last Saturday, when you gave me permission to examine them in Mr. Cotton's office, with Mr. Hogue.

Q. You knew that Mr. Hogue, at his request had been furnished access to these records after this action had been brought by the defendant in this case,—the case of ejectment,—you remember that, do you not?

A. Yes.

Q. That was several months ago?

A. Yes.

Q. Personally you had not seen the records until this session of the examiner for the taking of testimony in this case?

A. No.

Q. Do you know Maria d'Pourtalles now Maria d'Grubbissich, the plaintiff in the law action of ejectment vs. the Oregon and California Railroad Company, and the defendant in the equity suit now in hearing before the examiner?

A. Do I know her?

Q. Yes.

A. What do you mean?

Q. Did you know her before this suit was commenced?

A. I never met her, I have had some correspondence with her.

Q. Where does she reside?

A. I think she is living in Norway now.

Q. Where did she reside at the time you had correspondence with her, before the action of ejectment?

A. In Tunis, Algeria.

Q. How long before the commencement of this action did you ascertain that she resided at Tunis, Algeria?

A. I decline to answer any more questions upon that subject.

Q. You ascertained her whereabouts by correspondence?

A. That is a matter that relates to matters between myself and my client, and I decline to answer the question.

Q. Well, then, the defendant in this suit, and the plaintiff in the ejectment action has not been in the United States since this matter first came into your hands, has she?

A. Not to my knowledge.

Q. Did you resign your position as employee under the land commissioner, Mr. B. A. McAllister?

A. I did.

Q. You were requested to resign?

A. I was.

Q. What were your duties under Mr. McAllister, during the time you were there?

A. I was assistant land commissioner, and it would be quite difficult to define my duties, any further than that I particularly looked after matters of taxation, and

particularly with reference to trying to defeat certain actions of the Port of Coquille, in order to help the railroad company escape the taxes which they had imposed upon it.

Q. That is to say, you participated as a member of the land department in conferring with Mr. Fenton with a view of seeing whether or not the Port Coquille, or Coos Bay in which the company has a land grant, had power to levy the taxes, and you made a physical examination of the boundaries of these boards, at the request of Mr. Fenton, and the land department, and took advice in respect to that?

A. No sir.

Q. Did not you?

A. No sir.

Q. What were your duties in that respect?

A. I made no physical examination of the boundaries or any physical examination of anything further than to go once to Acme, which I think was in the Port of Siuslaw.

Q. This matter was generally under your supervision?

A. It was not under my supervision. I was instructed to do that.

Q. In the assessment and levy of these taxes you were very strongly of the opinion that it was unwise and unjust as far as the company was concerned?

A. I was.

Q. Did you ever see the original or a copy of this purported document executed March 28th, 1870, found at pages 175 and 176 of the minute book of the Oregon Central Railroad Company?

A. Did I ever see a purported copy of it?

Q. Yes, before this action was commenced.

A. No, I never did,—never heard of such a thing until I saw it in the bill of complaint.

Q. That was your first knowledge of the existence of such a purported document was when you found it in the bill of complaint in the suit in equity?

A. Yes.

Witness excused.

C. A. Dolph is called as a witness for the complainant, and having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination.

Questions by Mr. W. D. Fenton.

Q. State your name, age, residence, and occupation.

A. C. A. Dolph,—I reside in Portland, Oregon, am an attorney at law.

Q. Were you a member at one time of the firm of Mitchell, Dolph, and Smith?

A. I was never a member of the firm of Mitchell, Dolph, and Smith, I was in the office at the time, but I was never a member of the firm.

Q. I show you complainant's exhibit 24 in this case, the original of which is now here, and for which a certified copy is to be substituted, and will ask you if that is the original signature of Ben Holladay?

A. Yes, that is his signature.

Q. You knew Ben Holladay?

A. Yes sir.

Q. And you knew his handwriting and signature?

A. Yes sir.

Q. I now show you what purports to be the minute book of the Oregon Central Railroad Company,—complainant's exhibit 7 in this case, and the record of a document purporting to be signed by Ben Holladay and C. Temple Emmet by Ben Holladay, attorney in fact, and by Ben Holladay and Company, by Ben Holladay of date March 28th, 1870, and found at pages 175 and 176 of the minutes recorded in this book, being the minute book of the Oregon Central Railroad Company of Salem, of April 22nd, 1867,—but I will first ask you if you knew Andrew J. Moses?

A. I knew Andrew J. Moses.

Q. Were you acquainted with his handwriting?

Counsel for defendant objects to this testimony on the ground that the document referred to is not stamped as required by law for the conveyance of real property and is not proper to be used in a court of the United States, and that it is incompetent, irrelevant, and immaterial.

A. I was acquainted with his handwriting,—I have seen him write very frequently.

Q. I wish you would state to the court whether or not those minutes are in the handwriting of Andrew J. Moses?

A. This record here is in the handwriting of Andrew J. Moses.

Q. Where is he?

A. I cannot say,—he has been dead for several years.

Q. Where was he at the time these minutes were recorded, and in what capacity was he working if you know?

A. He was a clerk in the office of Mitchell and Dolph and afterwards of Dolph, Bronaugh, Dolph and Simon, of which I was a member,—I say clerk,—he principally did work of this kind,—copying.

Q. I call your attention to the fact that all of the minutes of the meeting of March 28th, 1870, are not in the handwriting of A. J. Moses, but part of it appears to be in the handwriting of some one else.

A. The writing at the top of this page is in the handwriting of George E. Cole.

Q. George E. Cole?

A. Yes.

Q. I call your attention to the signature of what purports to be the signature of George E. Cole, and will ask you if that is his signature?

A. That is George E. Cole's signature in my judgment,—I have seen him write very frequently.

Q. Do you know the handwriting of I. R. Moores?

A. Yes.

Q. Is that the signature of I. R. Moores to those minutes?

A. Yes, it is, in my judgment.

Q. I call your attention to the purported copy of this instrument at pages 175 and 176 and will ask you whether or not all of that is in the handwriting of A. J. Moses, and if not, in whose handwriting it is?

A. All of the record that is not in the handwriting of Mr. Moses as I take it, is in the handwriting of Mr. Cole.

Q. I call your attention to complainant's exhibit 1, being a blue print of township 1 south, range 2 east, and upon which plat is shown lots 5 and 6 and the east $\frac{1}{2}$ of

the southeast $\frac{1}{4}$ of section 29, and the north $\frac{1}{2}$ of the northeast $\frac{1}{4}$ of section 32, township 1 south, range 2 east of the Willamette Meridian, lying east of the donation land claim of Hector Campbell and Daniel Hawthorne, and being cash entry of James Grindley, 641, and cash entry 693 of Gardner Elliott, and appearing by this record to have been conveyed to Ben Holladay and Company by James Grindley, and by Gardiner Elliott and wife some time in 1868,—the original deeds of which do not appear to be here,—only the bills of sale of the timber or leases being here,—the deed from James Grindley to Ben Holladay and Company being dated May 4, 1869, and the deed from Gardiner Elliott to Ben Holladay and Company being October 5, 1869,—certified copies of which have been introduced in evidence, and marked complainant's exhibit 41 and 42,—one of which appears to have been witnessed by C. A. Dolph, and acknowledged before C. A. Dolph, notary public, and the other of which appears to have been acknowledged before F. O. McGowan, of Oregon City,—state what you know or recollect about that transaction?

Counsel for defendant objects to the question as incompetent, irrelevant, and immaterial, and not the best evidence, because no foundation has been laid.

A. My recollection is that sometime late in October, 1868, Mr. Holladay employed me to aid in the acquisition of some parcels of land, a portion of which was situated in the Hector Campbell Donation Land Claim. My memory is not very clear and distinct as to that tract. My impression is that a mill was erected there or near there that was called mill No. 2, and there was a mill No. 3

that was established about the same time.

Q. Further away?

A. I am not at this moment able to locate those mills.

Q. This mill No. 3, by the testimony in this case is shown to have been on these two tracts shown on this map?

A. There was a mill No. 3, that Mr. Holladay owned, or Holladay and Company owned, on the piece they got from Mr. Elliott.

Q. You were never on these premises personally, that you recollect?

A. I have been on a portion of them,—I have been up to the mill, but at this length of time,—something more than forty years, I cannot remember very well.

Q. Were you conversant with the agreement made the 29th day of February, 1876, between Ben Holladay of the first part, and Heinrich Hohenemser et al, known as the Frankfort Committee, and which agreement appears by copy to be attached and made a part of the deposition of Henry Villard and introduced in this record as complainant's exhibit 50, and which was used and introduced in the case of John Nightingale and Simon G. Elliott, plaintiffs, vs. the Oregon Central Railroad Company, and the Oregon and California Railroad Company, defendants, brought in the Circuit Court of the United States for the District of Oregon along about 1871?

A. I was very familiar with the agreement at the time it was made.

Q. This agreement is signed on the part of the bondholders' committee by H. Villard, as their attorney in fact, and is signed by Ben Holladay as party of the first

part in the presence of W. L. Halsey, and S. O. Putnam,—who was W. L. Halsey?

Counsel for the defendant objects to the question as incompetent, irrelevant, and immaterial, and not the best evidence because no foundation has been laid.

A. W. L. Halsey was Vice-President of the Oregon and California Railroad Company, and he was later register I think.

Q. Who was S. O. Putnam?

Counsel for defendant objects to the question as incompetent, irrelevant, and immaterial, not the best evidence, and because no foundation has been laid.

A. He was secretary of the steamship company. I was not so well acquainted with him. He lived in San Francisco.

Q. You knew Mr. Henry Villard, did you?

A. Yes, Mr. Villard came a day or two before those agreements were prepared.

Q. Who prepared this agreement, if you recollect, Mr. Dolph?

A. My brother and myself were superintending the preparation of them. There were three agreements made at the same time.

Q. This agreement that I refer to appears to be dated February 29th, 1876?

A. No, that is not the agreement to which I refer,—the agreement which I refer to, if you will allow me to explain, was in regard to the retirement of Ben Holladay from the control of the Oregon and California Railroad Company, and the substitution of Mr. Koehler,—I think his title was engineer, representing the German bondhold-

ers. Mr. Holladay, for six months, possibly a year, had sustained the nominal position of president of the road.

Q. I call your attention to pages 190 to 204, both inclusive of the minute book of the Oregon and California Railroad Company, complainant's exhibit 14 in this case, which purports to set out an agreement of February 29th, 1876, transmitting to the board of directors in a letter by Henry Villard bearing date of April 19th, 1876, and these minutes being the minutes of that meeting on that date, and in which a copy of the agreement appears and a clause therein, which among other things reads as follows:

“And the said Holladay further covenants and agrees with the parties of the second part that the books of account of the Oregon Steamship Company so far as he knows and believes are accurate and full, and that there are no debts or claims due by said company so far as he, said Holladay knows and believes, which are not fully known to M. S. Latham, and the only debts which he, said Holladay, has any knowledge or information apart from the current monthly bills and repairs and the debts of the European creditors represented by said Latham is what may be due for current salaries, supplies, and pay rolls, and said Holladay further covenants and agrees for himself, his heirs and legal representatives that he will on demand either convey to the Oregon and California Railroad Co., to the Oregon Central Railroad Company, to the Oregon Steamship Company, and to the Portland Warehouse and Dock Company, or to any of them, or else as the case may be will take all necessary legal proceedings in conjunction with said companies or any of them,

for the purpose of compelling the transfer to said companies, or any of them, of any real estate or their property, or rights, which equitably belongs to said companies, or any of them (if any such rights or properties there be) but which may now be held by or stand in the name of said Holladay, or any other person or persons or corporations in trust, having been purchased for said corporations, or conveyed to him for their use.”

Now, refreshing your memory from that excerpt, have you any recollection of that transaction?

Counsel for defendant object to this question as leading, and as not the best evidence, and not based on any matter in evidence and because the same is incompetent, irrelevant, and immaterial, and as not the best evidence, and because no foundation has been laid.

A. That agreement has reference to a transfer and a turning over of the Oregon Steamship Company, which was subsequent to the agreement which I spoke of,—the agreement which I referred to was about the 3d of August, 1874, I think. That is, I speak from memory, and it was a long time ago. There were some tracts of land, some on the west side, and some down the valley, and they were held I think by Hughes, who, I think, was some distant relation of Mr. Holladay's. And there was a number of pieces of land that had been specifically conveyed to Hughes. I do not speak of this particular piece that is in litigation,—but they were intended to be covered,—these parcels of land that were held by either Hughes or some of the retainers of Mr. Holladay.

Q. Who wrote the agreement if you know?

A. The steamship agreement?

Q. This agreement.

A. Is not that the steamship agreement?

Q. No, you had better look at this agreement,—it was the bondholders' committee agreement.

A. This was, as I recollect it, about the time that Mr. Holladay retired from his connection with any of these corporations, and about the time he went east, as I recollect it. Now that you call it to my attention, I remember distinctly that a short time before he went east he made a transfer of his property to his brother—the other property that he owned individually.

Q. Now, this copy of this agreement that is set out in this minute book appears to have been introduced in a deposition of Mr. Henry Villard, and the instrument itself is certified by James L. King, notary public, certifying that on the 11th day of September, 1877, he compared the foregoing copy of agreement of Ben Holladay, and Heinrich Hohenemse, et al, named therein, with the original thereof, in the custody of the London and San Francisco Bank, of San Francisco, California, and that the same is a full, true, and correct transcript therefrom, and the whole of such agreement. Now, on the date of this certificate, the 11th day of September, 1877, that original appears to have been in the London and San Francisco Bank of San Francisco, California, have you any recollection of that original?

Counsel for defendant objects to the question as incompetent, irrelevant, and immaterial, and not the best evidence, and because no foundation has been laid.

A. I cannot say what papers Mr. Villard had at that time. I was in San Francisco, on the date of that deposi-

tion, and staid a few days at Mr. Villard's request for the purpose of being present when the deposition was to be taken, but Mr. Bretherton, as I recollect it, came out just before the taking of the deposition, and I came away.

Q. That was Charles E. Bretherton, of London, England?

A. Yes.

Q. Then you were not able to say where that original instrument is, or may be at the present time?

A. No, I do not remember to have seen it,—I cannot say where it is now.

Q. I now show you what purports to be a stipulation in the case of John Nightingale and Simon G. Elliott, plaintiffs, vs. the Oregon and California Railroad Company and The Oregon Central Railroad Company, defendants, filed in the Circuit Court of the United States, for the ninth circuit, district of Oregon, and commenced somewhere in 1871,—the original of which has been offered in evidence in this case with the agreement that a copy be substituted in lieu of the original, to which I now call your attention, and which is known in this record as complainant's exhibit No. . . . , which is a stipulation in this case of Nightingale and Elliott vs. the Oregon Central Railroad Company and the Oregon and California Railroad Company signed by W. H. Effinger, solicitor for complainant, and Dolph, Bronaugh, Dolph, and Simon, attorneys and solicitors for defendants, and which contains this language,—“To save the expense of proving the originals of the exhibits hereinafter mentioned, and hereto attached, the parties having had an opportunity

to compare such exhibits with the originals of which they purport to be copies, it is hereby stipulated and agreed between the complainants in the above entitled suit, by W. H. Effinger, their attorney and solicitor, and the defendants, by Dolph, Bronaugh, Dolph and Simon, their attorneys and solicitors,

First. That Exhibit No. 1 hereto attached is a true and correct copy of the original Articles of Incorporation of the Oregon Central Railroad Company of Portland, Oregon, filed in the office of the Secretary of State of the State of Oregon the 21st day of November, 1866, and that the same may be read in evidence in this suit at the trial thereof and upon appeal and upon any hearing therein subject only to such objections for immateriality as might be made to the original Articles or a duly certified copy thereof if offered in evidence.” And also this further portion of the stipulation:—

“8th. That Exhibits No. 9, 10, 11, 12, 13, 14, 15, 16, 17, & 18, hereto attached which are the same as Exhibits F, G, H, K, L, M, N, O, P, & R of the answer herein are true and correct copies of what they respectively purport to be, to-wit:

And among others is exhibit No. 10:—

“**Exhibit No. 10.** Conveyance of Ben Holladay and Co. to the Oregon Central Railroad Company of Salem.” Which exhibit No. 10 of the stipulation and exhibit G of the answer in that case is a printed document bearing date March 28th, 1870, purporting to be signed by Ben Holladay and C. Temple Emmet, and Ben Holladay and Company by Ben Holladay, and which is the same document which appears at page 175, and 176 of the minute

book of the Oregon Central Railroad Company,—complainant's exhibit 7 introduced in evidence in this case,—now look at this exhibit 10 of this stipulation and exhibit G of the answer in the case of Nightingale and Elliott vs. the Oregon Central Railroad Company and the Oregon and California Railroad Company, and I will ask you to state if you have any personal recollection or knowledge or remembrance of a comparison of these originals of which exhibit 10 is a copy, and of their presence at that time, and if so, what became of that original paper,—I call your attention to the language of the stipulation, which was signed by your firm at that time, and it would seem to indicate that the original of exhibit 10 had been compared by somebody with that printed copy?

Counsel for defendant objects to the question as incompetent, irrelevant, and immaterial, and not the best evidence, and on the further ground that the purported instrument of which this is purported to be a copy is not stamped as required by the revenue laws for a conveyance of real property, and cannot be used or considered in evidence in this case, and on the further ground that it does not express any consideration for the conveyance of real property, and upon its face, it is not a conveyance of real property, and is not acknowledged as a conveyance of real property.

A. I do not believe that at this time I can call to mind the several original papers that we had, or that were copied and the copies used in pursuance of that stipulation. Those of them that are in my handwriting, I have no doubt I had them before me, but I cannot remember at this time.

Q. Can you tell from an examination of that stipulation in whose handwriting the stipulation is?

A. The stipulation is in the handwriting of my brother, J. N. Dolph.

Q. You were a member of the firm of Dolph, Bronaugh, Dolph and Simon, that signed the stipulation for the defendant?

A. I was.

Q. And J. N. Dolph, your brother, is dead and has been for a number of years?

A. Yes, and Judge Bronaugh is dead.

Q. Judge Bronaugh is dead?

A. Yes.

Q. Is there any other member of the firm surviving?

A. Mr. Simon,—he was a member of the firm at that time.

Q. Have you any present recollections of making the copy,—the printed copy exhibit 10, that is attached to that stipulation, or of having it made, or of having seen the original and of sending it to the printer, or have you any recollections upon that subject?

Counsel for defendant objects to the question as incompetent, irrelevant, and immaterial, and as leading.

A. I do not recognize this exhibit 10 as one of those that I had printed.

Q. Do you remember, or have you any recollection of having seen the original of which that purports to be a copy?

Counsel for defendant objects to the question as incompetent, irrelevant, and immaterial, and not the best evidence, because no foundation has been laid.

A. I cannot say definitely that I have seen any particular one of them, but I had seen the original a number of times I suppose.

Q. The stipulation recites that these copies are made from originals, which the parties have inspected, and this stipulation is signed by your firm?

A. I have no doubt that the exhibits were all there.

Q. You have no doubt that the originals were all there?

A. I have no doubt at all that all of the originals were there, of which copies were made. I know that matter was up at that time, and all the copies were made by longhand, as was the stipulation and the several exhibits.

Q. Do you have any personal or individual recollection of the circumstances under which that purported agreement of March 28th, 1870, was made by Ben Holladay and Company or by Ben Holladay transferring to the Oregon and California Railroad Company all of the assets of Ben Holladay and Company,—have you any individual or personal recollection as to that?

Counsel for defendant objects to the question as incompetent, irrelevant, and immaterial, and leading.

A. My recollection is a little obscure, but I would hazard the statement that they were all true, for Mr. Effinger and Judge Kelly were quite awake to the interests of Mr. Nightingale and Mr. Elliott.

Q. What I mean is as attorney, have you any personal knowledge of the fact that Ben Holladay and Company or Ben Holladay on March 28th, 1870, transferred the property that Ben Holladay and Company owned at that

time to the Oregon and California Railroad Company?

Counsel for defendant objects to the question as incompetent, irrelevant and immaterial, and not the best evidence.

A. I know the transfer was made—I know that there was a dispute about whether the two corporations could exist under the same or similar names, and the Oregon and California Railroad Company was organized to take over these things so there would not be any trouble.

Q. Who controlled the Oregon and California Railroad Company?

A. Well, Ben Holladay.

No Cross Examination.

Witness excused.

R. Koehler is recalled as a witness for the complainant, and having heretofore been duly sworn, testified as follows:

Direct Examination.

Questions by Mr. W. D. Fenton.

Q. I call your attention, Mr. Koehler, to the minute book of the Oregon and California Railroad Company—complainant's exhibit 14, and to the stockholders' annual meeting of April 9th, 1872—do you know the signature of A. G. Cunningham, secretary there to these minutes on page 67—is that his signature?

Counsel for defendant objects as incompetent, irrelevant, and immaterial.

A. I know the signature of Mr. Cunningham, and I recognize this signature which is affixed to the record of the stockholders' meeting of 1872 as his signature.

Q. I call your attention to the signatures of the vari-

ous directors to the oath of office on page 68 of this minute book, and will ask if you recognize the signature of all the parties to that document—the signature of Ben Holladay and the signatures of the other parties?

A. I recognize the signature of Ben Holladay and I. R. Moores, and W. L. Halsey, of George W. Weidler, I am not familiar with his handwriting sufficiently to testify.

Counsel for complainant offers in evidence pages 66, 67 and 68 of complainant's exhibit 14, and asks leave to substitute a copy of the same in lieu of the original, and that the original may be withdrawn.

Counsel for defendant objects to the offer as incompetent, irrelevant and immaterial, and not the best evidence.

The document referred to is considered as received in evidence with the understanding that a copy thereof be substituted in lieu of the original, to be marked complainant's exhibit 60, and that the original be withdrawn.

Q. Who was in control of the Oregon and California Railroad Company when you came here in 1874?

A. Ben Holladay.

Q. Who was the majority stockholder and president at that time?

A. Ben Holladay.

Q. Who was the majority stockholder and president at that time?

A. Ben Holladay.

Q. When did the control of the Oregon and California Railroad Company by Ben Holladay cease?

A. With the transfer of his stock about April, 1876.

Q. When, with reference to the agreement of February 29th, 1876, and what was the purpose of that agreement?

A. As I say, it was in April, 1876, and the purpose was to transfer the control of the property to the bondholders.

Q. Was that agreement of February 29th, 1876, known as the Hohenemser agreement, and the Frankfort Committee agreement?

A. Well, what is known specifically as the Hohenemser agreement, was that of April, 1876.

Q. Was that agreement acted upon and relied upon by the Oregon and California Railroad Company and by Ben Holladay?

Counsel for defendant objects to the question as leading, and as incompetent, irrelevant and immaterial.

A. Yes.

Counsel for complainant offers in evidence the certified copy of the answer of the defendant in the case of John Nightingale and Simon G. Elliott vs. the Oregon Central Railroad Company and the Oregon and California Railroad Company, in the Circuit Court of the United States for the District of Oregon, commenced some time in 1871, and so much of the exhibits attached to said answer as exhibit G, being an instrument bearing date March 28th, 1870, executed by Ben Holladay and C. Temple Emmet by Ben Holladay, attorney in fact, and Ben Holladay and Company by Ben Holladay, and asks to have the same filed as complainant's exhibit 61.

Counsel for defendant objects to the offer of the same in evidence as incompetent, irrelevant, and immaterial,

and not the best evidence, and because no foundation has been laid, and because the document referred to as of March 28th, 1870, is not stamped as was required by the revenue law of the United States in force at that time, and cannot be received in evidence as a conveyance of real property, and because there is no consideration shown for the transfer of the real property in question, or of any real property, and because any action which the complainant might have upon such document, if it were shown to have ever had any, is barred by the statute of limitations of the State of Oregon, and by the laches of the complainant.

The documents referred to are received and filed in evidence as one exhibit and marked complainant's exhibit 61.

Counsel for complainant now offers in evidence the original tax receipt of R. B. Beatty, sheriff of Clackamas County, Oregon, for the 1908 taxes upon this property in suit, paid March the 8th, 1909.

Counsel for defendant object to the same as incompetent, irrelevant, and immaterial, and because no foundation has been laid.

The document referred to is received and filed in evidence, marked complainant's exhibit 62.

Counsel for complainant offers in evidence tax receipt No. 1330, for 1909 taxes, which shows receipt paid March 7, 1910, R. B. Beatty, sheriff.

Objected to as incompetent, irrelevant and immaterial, because no foundation has been laid.

The document referred to is received and filed in evidence, marked complainant's exhibit 63.

Counsel for complainant offers in evidence, tax receipt No. 7061 for 1910 taxes upon the property in suit, showing payment March 14, 1911.

Counsel for defendant objects to the introduction of the same in evidence as incompetent, irrelevant and immaterial, because no foundation has been laid.

The document referred to is received and filed in evidence, marked complainant's exhibit 64.

Counsel for complainant offers in evidence tax receipt No. 4976 for 1907 taxes upon these premises showing payment by Oregon and California Land Company, March 14, 1908, to R. B. Beatty, sheriff.

Counsel for defendant objects to the same as incompetent, irrelevant, and immaterial, because no foundation has been laid.

The document referred to is received and filed in evidence, marked complainant's exhibit 65.

Counsel for complainant offers in evidence tax receipt No. 4715 for 1906 taxes, upon these lands, showing same assessed to R. Koehler, et al, paid by S. P. Co. to R. B. Beatty, sheriff, March 14, 1907.

Counsel for defendant objects to the same as incompetent, irrelevant, and immaterial, and because no foundation has been laid.

The document referred to is received and filed in evidence, marked complainant's exhibit 66.

Counsel for complainant offers in evidence a number of receipts and vouchers, signed by R. B. Beatty and other sheriffs, and asks to have the same marked as one exhibit.

Counsel for defendant objects to the introduction of

the same in evidence as incompetent, irrelevant, and immaterial, and because no foundation has been laid.

The documents referred to are received and filed in evidence as one exhibit and marked complainant's exhibit 67.

MR. FENTON: You don't require me to prove the signatures to these various vouchers.

MR. CONLIN: No.

Counsel for complainant asks leave to withdraw the original tax receipt heretofore offered in evidence, and to substitute copies thereof in lieu of the original.

Counsel for defendant make no objection to the withdrawal of the original and substituting copies in lieu thereof, but object to the introduction of the same in evidence for the reasons heretofore stated.

Witness excused.

Thereupon the taking of testimony herein is adjourned to be resumed upon notice of parties.

Portland, Oregon, Oct. 27th, 1911, 1 o'clock P. M.

At this time pursuant to agreement the parties herein appear before Geo. A. Brodie, Examiner of the above entitled Court, the complainant appearing by Mr. B. C. Dey of Counsel and the defendant appearing by Mr. H. W. Hogue, of Counsel, and thereupon the following proceedings are had, to-wit:

Counsel for defendant offers in evidence a certified copy of a deed from Gideon Tibbitts and Mary Tibbitts his wife to Ben Holladay & Co. to four acres of land, more or less, in the Gideon Tibbitts Donation Land Claim, in Multnomah County, Oregon, which is a portion of land now or heretofore occupied by the Oregon & California

Railroad Company in connection with its railroad shops, and which deed is recorded in Book "K" of the records of Multnomah County at page 588 thereof, and is dated Nov. 5th, 1870. And said copy being certified to by F. S. Fields, County Clerk of Multnomah County, Oregon.

Counsel for complainant objects to the introduction of the certified copy of said deed in evidence for the reason that the same is incompetent, irrelevant and immaterial, and for the reason that it relates to land located in Multnomah County, State of Oregon, which has nothing to do with the land involved in this suit now being tried, and has no possible relevancy to the matters in issue in this case.

The document referred to is received in evidence filed and marked defendant's exhibit 2.

Counsel for defendant offers in evidence a copy of a deed certified to by F. S. Fields, County Clerk of Multnomah County, Oregon, dated March 4, 1876, executed by Ben Holladay and wife to the Oregon & California Railway Company, and recorded in Book 29 of the records of deeds of Multnomah County, State of Oregon, at page 131 thereof, conveying all of the right, title, estate and interest of said parties of the first part to any or all of the lands and real estate situate in the County of Multnomah and State of Oregon, now in the actual possession or occupation of said party of the second part under a claim of title thereto and ownership in fee simple forever.

Counsel for complainant objects to the introduction in evidence of said certified copy of deed, because the same is immaterial, irrelevant and incompetent, and for the further reason that it deals with land in Multnomah

County, State of Oregon, whereas the land in controversy in this suit is in Clackamas County, and said certified copy of deed has no possible relevancy to the issues in this case.

The certified copy of deed referred to is received and filed in evidence, marked Defendant's Exhibit 3.

Con. E. Battin is called as a witness for the defendant and having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows, to-wit:

DIRECT EXAMINATION.

Questions by Mr. H. W. Hogue.

Q. Mr. Battin, state your name, age, residence and occupation?

A. Con. E. Battin, age 37, residence about east of Milwaukie, in Harmony District, upon a farm.

Q. Do you hold any official position?

A. I am Supervisor out there in that Road District.

Q. How long have you resided in that District or in that place?

A. Well, about 37 years with the exception of about eight years when I was away.

Q. Where were you during those eight years?

A. In the southern part of the State.

Q. When did you return to the place you now reside from Southern Oregon, what year?

A. It was in May, 1882.

Q. Have you resided at this same place where you now reside since May, 1882?

A. Yes sir.

Q. I show you complainant's exhibit 1, being a blue

print of Township 1 South, Range 2 East of the Willamette Meridian, and showing in red lines the north half of the north east quarter of Section 32 and the east half of the southeast quarter and lots 5 and 6 of Section 29, T. 1 S., R. 2 E., W. M., the former marked "G. Elliot" and the latter J. Grindley, and I will ask you if you are acquainted with the land shown within the red lines on this Exhibit 1,—are you acquainted with the land?

A. Yes sir.

Q. How long have you been acquainted with that land?

A. Well, ever since about 1882, I suppose. I perhaps knew of it before, but I was quite small up to about that time.

Q. Where is your place of residence with reference to that land marked "J. Grindley"?

A. Well, it is right about here (showing on map).

Q. Right straight east of the 160 acres, or the J. Grindley piece?

A. Yes.

Q. Does your land touch the east boundary of the J. Grindley piece?

A. Yes.

Q. For how long a distance?

A. Forty rods.

Q. How much land is there in the piece that you reside upon?

A. Forty acres.

Q. How long have you resided upon that 40 acres?

A. Well, since 1882.

Q. How often have you seen these two tracts marked

G. Elliot and J. Grindley, since 1882?

A. Well, I do not think there has been much more than a week at a time but what I have seen it every day, or seen them every day.

Q. Except on rare occasions you have seen them every day?

A. Yes.

Q. Now, have you frequently been over those pieces of land, or upon their boundaries?

A. Nearly every day, some portions of them. Yes.

Q. Has there been any time since 1882 of more than a few days at a time having elapsed without your having been all around these two pieces of land?

A. Well, I have not been around them every day, or all over them, but I have been on part of them.

Q. Every day?

A. Yes.

Q. Has there or has there not been a very considerable length of time that you have not seen the boundaries of this land?

A. No sir.

Q. You have been upon the land how frequently?

A. Sometimes every day, or every day or two or three days, I suppose.

Q. Is there a fence around these pieces of land?

A. Yes sir.

Q. About what time was it built, the present fence?

A. I do not recollect just when, I think it was around 1905 or 1906, somewhere around there, I do not recollect just the date. But that is very close to it.

Q. What kind of a fence was built at that time?

A. It was a wire,—Anchor fence.

Q. Were these two pieces of land, or either of them inclosed by any fence before this fence was built in 1905?

A. No sir.

Q. Was there any fence around this land before the present fence?

MR. DAY: That is since 1882?

MR. HOGUE: Yes, since 1882?

A. No, not since 1882.

Q. Was there any fence built by or upon the boundaries of any land adjoining these two pieces before 1905?

A. Yes there was. fl

Q. What if any fence was on the North of the Grindley piece?

A. On the Grindley piece there was a fence on the north side of it, a barbed wire fence, with one board.

Q. Do you know who built that fence?

A. A fellow by the name of John Campbell.

Q. Where did John Campbell live or own land?

A. He owned 74 acres on the north of this Grindley tract.

Q. Do you know about when he built that fence?

A. Not exactly. As near as I can recollect it was about 16 or 17 years ago.

Q. That was a barbed wire fence with one board?

A. Yes.

Q. Has there ever been any other fence along the north line of the J. Grindley piece except the fence you have just testified that Mr. Campbell built between 1882 and 1905?

A. No sir.

Q. State whether or not there was ever any fence on the boundary line between your 40 acres—the 40 acres you live upon, and the Grindley 160 acres?

A. No sir, there was not up until about, I presume 1900, when we ran a fence along the west line of our 40 acres.

Q. 1900?

A. About that time.

Q. What kind of a fence was that?

A. That was just three barbed wires.

Q. Was there any fence along that line before that?

A. No sir,—we did not put that fence on the line, we put it back 30 feet for the road there.

Q. Is that fence there still?

A. Yes.

Q. How far and in what direction is the fence that was put there in 1905 from the fence that you put there?

A. West 60 feet.

Q. Was there any fence along the east boundary line of the J. Grindley piece prior to 1905?

A. No sir.

Q. Was there prior to 1905 any fence along or near the East boundary line of the G. Elliot tract, the 80 acres?

A. No sir.

Q. Was there ever any fence upon or near the east boundary line of the G. Elliot 80 acres upon land adjoining this 80 acres upon the east?

A. I think there was a fence built there, an old brush fence, a brush and rail fence together, but it was not on

the Elliot tract.

Q. How far from the Elliot line was it, approximately, was it near or far?

A. Well, it was near it, it was not right on the line, it was perhaps 100 feet, something like that, it went on a line northeast and southwest, it was not a boundary line.

Q. Do you know who built that fence?

A. No I do not.

Q. Do you know who owned the land upon which it was built?

A. I believe a man named Ryan owned the land.

Q. You do not know whether he built the fence or not?

A. I do not.

Q. Do you know when that fence was built?

A. I do not, no sir.

Q. Was it built a long time ago?

A. It was built a long time ago.

Q. Do you know whether it was built before 1882?

A. Yes it was built a long time before 1882, but I cannot say how long.

Q. Now state whether or not there was any fence before 1905 on or near the south boundary line of the Gardner Elliot 80 acres?

A. Yes sir there was.

Q. Do you know who built that fence?

A. A man named Hall.

Q. Did he own land near the Elliot 80 acres?

A. He owned 10 acres on the south side of the Elliot tract.

Q. Where was that fence with reference to the boundary line between the Hall tract and the Elliot tract?

A. Well, his north line was the south line of the Elliot tract.

Q. Was the fence on that line?

A. Hall put the fence on the line.

Q. Did it extend the entire length of the Elliot south line?

A. No sir, as near as I recollect it goes about half way across.

Q. Which half, the east half or the west half?

A. The east half.

Q. Is there a fence on the west half?

A. There is at the present time, there was not when Hall built.

Q. Was there any fence on that part, on the West boundary of the south line of the Elliot tract before 1905?

A. No sir. Not that I recollect of.

Q. Was there any fence along the west boundary line of the Gardner Elliot tract?

A. No sir.

Q. Is there one now?

A. There is one now, yes sir.

Q. What is the nature of that fence?

A. It is a wire,—Anchor fence.

Q. That was built approximately in 1905?

A. Yes sir.

Q. Was there prior to the building of the fence in 1905 any fence along the west boundary line of the J. Grindley 160 acres?

A. No sir.

Q. What is the character and quality of these two tracts of land?

A. It is fairly good land, it is pretty gravelly land, but it is fairly good land,—not cleared up or anything,—if it was cleared up it would be fairly good land.

Q. State whether or not the character and quality of this 80 acres and this 160 acres is substantially the same as that of the average land in that neighborhood?

A. Well it is about the same,—it is practically the same. There is some better land and some poorer land, I expect.

Q. You are skilled in the business of farming, you understand farming and the cultivation of land?

A. Yes sir.

Q. Is that land capable of cultivation?

A. Yes sir.

Q. Now state whether or not it has been capable of cultivation to the same extent that it is now, ever since 1882, since you first knew it?

A. It has been with the exception that it would have been a little harder clearing then than it is now, that is the only difference.

Q. Has there been any considerable quantity of timber upon the land since you first knew it?

A. No sir, there never was any great amount on it.

Q. If the land were cleared would it be suitable for cultivation and residence?

A. Yes sir.

Q. Is it suitable for residence in its present state?

A. Yes it is.

Q. And is it or has it been suitable for residence at all times since you have known it?

A. Yes.

Q. What is the condition of the land as to being suitable for pasturage and grazing?

A. Well it is not the best, nor the poorest, I would say about an average.

Q. Average quality for the purpose of pasturage?

A. Yes sir.

Q. State what has been its condition with reference to suitability for pasturage since 1882, since you first knew it?

A. Well it was in pasture most of the time until 1905, when the fence was put around it.

Q. State what you know about the use being made of that land for pasture or grazing purposes since you first were acquainted with it?

A. Well it was open commons up to the time the present fence was put around it.

Q. Was it used by more than one person?

A. Yes, everybody allowed their horses and cattle to roam over it. There was quite a number of people had stock run over it.

Q. Was there feed for cattle on that tract at that time, all the time?

A. Yes. Of course along in the middle of the summer, of course it got pretty dry, but otherwise it was all right.

Q. Was it or was it not different from other wild land?

A. Just about the same.

Q. Can you state the names of some persons whose cattle were pastured on this land? Did you use it yourself?

A. I did, yes. I had cattle run on it, from 25 to 30 head.

Q. Who else used it that you know of?

A. Well, Ryan's folks.

Q. Ryan is the man that lived on the east of the land?

A. Yes.

Q. Who else?

A. Phillips.

Q. Where did they live?

A. They lived south of there,—and Daniels.

Q. Which direction did he live?

A. South,—and Miller.

Q. Which direction was he?

A. West.

Q. Anybody else?

A. Fuller's. There was quite a few of them.

Q. Others that you do not think of now?

A. Yes.

Q. Now state whether or not this common use for pasture, of which you speak, was continuous during all the time you were acquainted with the land up to 1905, at the time it was fenced?

A. It was, yes.

Q. How was it possible for cattle to have access to this land, across what portion of the boundary lines of

these two tracts?

A. Well at all portions until Campbell put his fence up, and Hall put his fence up.

Q. Well after those fences were built and after all the fences were built that you have spoken of, was it possible for cattle to have access to the land?

A. Yes sir, on the East and West sides it was open.

Q. In many places?

A. All the way.

Q. Was there anything to obstruct them except the fences of the adjoining owners?

A. No sir.

Q. Are you acquainted intimately with the character and condition of all the land in that neighborhood for a distance of a mile or two from these tracts?

A. Yes sir.

Q. Are the surrounding lands occupied and cultivated?

A. Mostly.

Q. Now were the surrounding lands occupied or cultivated when you first knew the land in 1882?

A. No sir.

Q. Were some of them?

A. It was on the East.

Q. Was there no cultivation or occupation of land in other directions?

A. Well not right close to it.

Q. I do not mean close to it, but take a radius of a mile around there in 1882 was there considerable part of the land cultivated and occupied?

A. Well there were small places, no large places

cleared up,—there were small places.

Q. In what way and to what extent has the occupation and cultivation increased since 1882?

A. Well it is mostly all cleared up on the east side, which was only partially cleared in 1882, and on the south side it is pretty well cleared up, and quite a little cleared on the north side.

Q. How long has the land in the vicinity of these two tracts been pretty generally cultivated?

A. Well it has been more or less for five or six or seven years.

Q. Was there a considerable part of it occupied and cleared up and cultivated in 1890, or not?

A. Well not so much as at the present time,—No, there was not very much.

Q. State whether or not the cultivation of land was very much less general in 1882 than it is now—all lands in that part of Clackamas County?

A. Well yes.

Q. And this land was no different in that respect from other land in that neighborhood?

A. No sir.

Q. How far is this land from the City of Portland?

A. I should judge about eight miles.

Q. How far is it from the line of the Oregon & California Railroad, owned and operated by the Southern Pacific Company, approximately?

A. Well I should judge between three-quarters and a mile at the closest point—at the southwest point.

Q. Is there an Electric Road running near the land?

A. Yes sir, the Cazadero line runs within less than a

quarter of a mile

Q. Which side of the land is that on?

A. It is on the northwest side, the northwest corner. It comes pretty close to it.

Q. Have you been acquainted with the ownership of the surrounding land since you have been there?

A. Well I have been up until the last few years. It has changed hands all around in there and it has been cut into small tracts so that I could not keep track of it and I did not try to.

Q. Has any land around in that neighborhood been platted or sold into small tracts?

A. Yes.

Q. Which direction?

A. North of it and west of it.

Q. Now, was the use of this land for pasturage that you have described, ever objected to by any one within your knowledge?

A. Not to my knowledge, no sir.

Q. Did you ever know of any warning being given against using it or against trespassing upon it?

A. No sir, not until up to the time the present fence was put around it.

Q. That fence inclosed it so cattle cannot get on it now?

A. Yes.

Q. Did you ever know of any acts performed by any person or persons upon or with reference to this land prior to 1905 indicating any claim to or ownership of the land?

Counsel for complainant objects to this question as incompetent and immaterial.

A. No sir.

Q. Did any one ever reside upon the land to your knowledge?

A. No sir.

Q. Did you ever know of any use being made of the land beyond the use you have described for pasturing and grazing, except the cutting of wood?

A. No sir. There was some party cut some wood on it.

Q. Did you ever know of any gravel being taken from the land?

A. Yes there was some gravel taken. There is a gravel bed on the land at the present time.

Q. Do you know who took that gravel?

A. The county took it.

Q. What county, Clackamas County?

A. Yes sir.

Q. Now have you ever known of any other use being made of the land except the uses you have described, any other use at all?

A. No sir.

Q. Is there any part of the land adjoining these tracts that is cultivated up to the boundaries of the tract?

A. Yes sir.

Q. On which side?

A. On the east, on the north and on the south.

Q. Do you know what the value of land in that neighborhood is?

A. Well, I should judge it would be in the neighborhood of \$500.00 an acre.

Q. Do you know about what it was worth in 1890?

A. I presume it was worth in the neighborhood of \$100.00 an acre.

Q. How much was it worth in 1882?

Counsel for complainant objects to the question as incompetent, irrelevant, and immaterial.

A. Well I hardly know what it was worth in 1882.

Q. Do you know what any of the land in that neighborhood was worth in 1882?

A. I do not.

Q. Do you know generally what the value of land in that neighborhood was in 1890?

Same objection.

A. Well I suppose \$100.00 an acre, some where.

Q. Were you familiar with the value of land in that vicinity in 1890?

A. Yes, I was.

Q. In most of the land in that neighborhood now fenced?

A. Yes sir, most of it is.

Q. How long has it been fenced mostly?

A. Various times.

Q. How far back can you say that most of the land in that neighborhood was generally fenced,—for how long a time?

A. Well I should judge about twelve years,—I should judge something like that.

Q. Before that time it was not fenced?

A. No. There is quite a lot on the West side that is not fenced yet, but it is cut up into town lots, I guess.

Q. The adjoining land that is fenced and has been fenced for some time, are they large tracts or small tracts?

A. Well at one time they were pretty large tracts.

Q. The tracts are smaller now?

A. Yes, a good many of them have been cut up into small tracts.

Cross-Examination.

Questions by Mr. B. C. Dey:—

Q. I understand you that this land is not cleared land, is it?

A. No sir.

Q. Never has been cultivated?

A. No sir.

Q. Stumps around on it?

A. Yes sir.

Q. All the timber has been cut off?

A. Yes sir.

Q. There is no standing timber on it now?

A. Well there is a few young firs but they practically do not amount to anything.

Q. Any brush on it?

A. Yes there is brush on it, small brush, not heavy.

Q. Scattering brush and stumps throughout the whole tract?

A. Yes.

Q. On what part of this land did the old saw mill stand?

Counsel for defendant objects to the question as not proper cross examination.

A. That was before my time.

Q. Do you know anything about this land prior to 1882?

A. No I do not. I was not old enough to remember much about it before that time. I know where the old saw mill was, but I never seen the saw mill there.

Q. The remains of the old saw mill are there?

Same objection.

A. Well a very small portion of it.

Q. Did you see these people cutting wood there?

A. I did.

Q. Did you ask them who they got permission from?

A. They told me they got it from the Railroad Company, I believe.

Q. Do you know who gave permission to Clackamas County to take gravel from the land?

A. Clackamas County did.

Q. Do you know whether they got permission from the Railroad Company?

A. No sir, I do not think they did.

Q. You do not know?

A. No I do not, I cannot say as to that. I know I did not when I was hauling gravel from there.

Q. Then you hauled gravel out of there without getting permission from anybody?

A. Yes sir.

Q. What year did Campbell build the fence on the North line of the Grindley tract?

A. I cannot tell what year it was. It was about fifteen or sixteen years ago.

Q. And when did Hall build his fence along the South line of what is commonly referred to as the Elliot piece?

A. I think it was a little later that Hall built his fence than Campbell built his. There was not very much difference in time, but I think it was a little later.

Q. You said something about a brush fence or something of the kind, when was that built? If you know?

A. I do not know, that was a long time before I came there.

Q. Is there any water on this land suitable for household purposes?

A. No not without digging for it.

Q. Never has been any as far as you know?

A. No I cannot swear to that. There was some fellows that cut some wood down there and I think they had a well, but I could not swear to it, not to be sure of it.

Redirect Examination.

Questions by Mr. H. W. Hogue.

Q. Is it possible to get water almost any where in that neighborhood?

A. Yes sir.

Q. By digging?

A. Yes, if you dig for it.

Q. Is the other land in that neighborhood similar in character and quality to the gravelly portion of this land not under cultivation?

A. Well it is just about on an average. Some places it is better land and some places it is worse.

Q. Is the other land that is similar to the gravelly portion of this land, actually cultivated in that neighborhood?

A. Yes.

Q. Actually being cultivated?

A. Yes.

Q. Is there any portion of these two tracts that is incapable of cultivation? With reasonable amount of effort?

A. No.

Recross Examination.

Questions by Mr. B. C. Dey.

Q. Have you ever examined this land carefully?

A. Well not very, no. I have been around over it a good many times.

Q. You have merely walked over it?

A. Yes.

Q. You do not know what it will grow?

A. I know by the rest of the ground around there. It will grow just about the same. It looks about the same. Just about the same kind of brush grows on it that grows on the other land in that neighborhood, and it would produce practically the same kinds of crops.

Q. Referring now to Complainant's Exhibit 1, which counsel for defendant called your attention to at the beginning of your testimony, are there any roads around this tract?

A. Yes sir, there is a road on the East of it and there is a road between the 80 and the 160.

Q. What do you call that road on the east line?

A. That is called the Battin road. A good many call it the Oregon City road, but it is the Battin road.

Q. Named after your father?

A. Yes.

Q. What do you call that road running down in the middle between Elliot and Grindley?

A. I do not know any name to it, we call it the Milwaukie road, because it runs towards Milwaukie. I do not know what the name of it is.

Q. If you were going to Milwaukie you would take that road?

A. Yes.

Q. If you were going to Oregon City you would take the Battin road?

A. Yes sir.

Q. Will you put a cross mark on that map, Complainant's Exhibit 1, about where the remains of that old saw mill are?

A. I cannot say for sure that there was ever a saw mill there.

Q. You testified awhile ago that there were the remains of an old saw mill there?

A. Well it is the remains of something, I cannot say whether it was a saw mill or a livery stable.

Q. Well mark where it was located?

A. Well it was just about right in here. (Marks on the map).

(Witness makes a little circle on the map).

Q. There are only two roads around that tract at the

present time? That is, that touch it?

A. Yes, there are only two that are around it. There is a road across the north part of the 160, but it never has been opened.

Q. Is there any land around there in about the same condition that this land is in as far as cultivation is concerned?

A. There is on the West.

Q. Lots of it, is there not?

A. Well not so awful much.

Q. What proportion of land within a radius of a mile of this land is under cultivation?

A. Do you mean on the West?

Q. In all directions?

A. Well I think quite a bit of it is in cultivation within a mile.

Q. About half of it?

A. Yes I think it would run a little better,—No about half of it, perhaps.

(Witness excused).

Orren A. Battin is called as a witness for the defendant and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:—

Questions by Mr. H. W. Hogue.

Q. State your name, age, residence and occupation?

A. Orrin A. Battin, age 44 years. I have been working on a farm most all my life. I have been down in Crook County for about six years.

Q. Where do you reside?

A. I am living on a part of that 40 acre piece that lies right East of this Grindley claim.

Q. You live on the same land that Mr. Con Battin does?

A. Yes, part of it.

Q. Is he your brother?

A. Yes.

Q. Now when did you first live upon that land?

A. Well ever since I was about four years old.

Q. Forty years ago?

A. Yes.

Q. What years were you away from the land?

A. I guess about 1901 when I went out there to Prineville.

Q. 1901?

A. Yes sir.

Q. When did you come back,—back to the 40 acres?

A. Well, I was up there six years and I have been there where I am now living ever since.

Q. You came back about 1907 or somewhere about that time?

A. Yes.

Q. Were you away from this 40 acres prior to 1882?

A. Yes sir.

Q. How long?

A. I was up in Linn County for about eight years.

Q. And your recollection of this land is from 1882 to about 1901?

A. Yes.

Q. And since 1907 somewhere around there?

A. Yes sir.

Q. What did you say your occupation is?

A. I have been farming there.

Q. Did you farm before you went away to Prineville?

A. Yes.

Q. I show you Complaintnt's Exhibit 1, a Blue Print of Township 1 S. Range 2 E. W. M. and enclosed in these red line is the North half of the Northwest Quarter of Section 32, 80 acres marked G. Elliot, and the East half of the Southeast Quarter and Lots 5 and 6 of Section 29, marked J. Grindley.—Are you acquainted with that land?

A. Yes sir.

Q. Where does the 40 acres you live upon lie with reference to that land?

A. It lies right East of the Grindley claim.

Q. How long have you been acquainted with the Elliot and Grindley pieces?

A. Ever since 1882.

Q. How well acquainted have you been with it,—how frequently have you seen it?

A. Well I see it most every day, except the time I was living at Prineville.

Q. I mean the time you lived on that 40 acres?

A. I see it every day pretty near.

Q. For what purpose did you ever go upon this land?

A. I used to have cattle running on it.

Q. State whether you frequently saw and have been around the boundaries of the land?

A. Well I have been all over the land at various

times.

Q. Were you frequently upon the adjoining land on the North and West and South?

A. Yes sir.

Q. Now what is the character of the land as to being level or hilly?

A. It is a level piece of land practically.

Q. Is it smooth or broken?

A. It is a pretty smooth piece of land, what I would call.

Q. What about cultivation, has it ever been cultivated?

A. No sir.

Q. What is its condition with reference to timber or brush?

A. Well it is covered with brush.

Q. Is there any grass on it?

A. There is a little grass that grows on it, yes.

Q. What is the character of the land with reference to usage as pasture or for grazing purposes?

A. Well it is just average pasture,—it is wild land.

Q. What use have you ever known being made of the land for grazing purposes?

A. Nothing more than it just laid out common and people used it generally.

Q. Do you know people who did use it?

A. Yes sir.

Q. Who used it that you know of, just name some of the people?

A. Well the neighborhood generally used it.

Q. Was there a considerable number of people who used it or was it a very small number?

A. Most every body that lived around close.

Q. Were there people living around close who used it?

A. Yes there was, Ryan lived there, he used it, and there was Phillips and Daniels and Millers and Fullers.

Q. Did you use it yourself?

A. Yes sir.

Q. Did you ever see at any time any considerable number of cattle on the land?

A. Yes there was cattle on it quite a good deal.

Q. How many cattle would there be sometimes on an average?

A. Well I suppose there would be 40 or 50 head of cattle on it.

Q. How many head of cattle did you ever pasture on it?

A. About 40 head I had running there.

Q. Well do you know of any other persons in the neighborhood that pastured cattle on the land at any time?

A. Well there were those that I have mentioned, they generally had from 10 to 25 head.

Q. Each, do you mean?

A. Yes.

Q. Was there cattle of people who did not live in the neighborhood of the land?

A. Yes sir, cattle would come in there from quite a ways off.

Q. Now state whether this common use of the land

for grazing purposes was or was not continuous during all the time that you lived there?

A. Yes sir.

Q. And back as far as 1882 as far as you remember?

A. Yes sir.

Q. Was the land ever completely surrounded with a fence before 1905?

A. No sir.

MR. DEY: You mean since 1882?

THE WITNESS: Yes, that is as far back as I can go.

Q. You remember the condition of the land with reference to fences in 1882?

A. Yes.

Q. Was there any fence there or any remains of any fence there at that time?

A. No sir.

Q. Was there any indications that it ever had been fenced before 1882?

A. No sir.

Q. Were you living there when this fence was built in 1905?

A. No sir.

Q. Did you find that fence there when you came back from Prineville?

A. Yes sir.

Q. Now was there any fence along or near the boundary line of these two tracts before 1905?

A. Yes sir.

Q. What portion of the boundary was there a fence,—on the North?

A. Yes sir there was a fence clear across the North

side of it.

Q. Do you know who built that fence?

A. Yes sir.

Q. Who?

A. John Campbell.

Q. Did he own any land in that neighborhood?

A. Yes he owned a strip on the North side of it.

Q. When did he build that fence if you know, approximately when?

A. Well I guess it was something like 16 years ago, of course I cannot just tell the year.

Q. You were living there at that time?

A. Yes sir.

Q. Was there any fence on the East side of either the Grindley tract or the Elliot tract?

A. No sir.

Q. None within your knowledge of that line?

A. No sir.

Q. Was there any where near the East line?

A. Yes sir there was on the Elliot tract, there was a fence very close to it.

Q. On whose land was that?

A. It belonged to Wm. Ryan, at the time.

Q. What kind of a fence was it?

A. Well part of it was a brush fence and part of it was a rail fence.

Q. Do you know when that was built?

A. No sir, I cannot tell the time, it was built before 1882.

Q. You saw it in 1882 when you first came back

there?

A. Yes.

Q. Was it then an old or a new fence?

A. Well it was practically an old fence.

Q. Was there any fence on or near the South boundary line of the Elliot tract?

A. Well there was not until the time that Hall built his fence.

Q. When was the fence built on the South line?

A. It has been about 15 or 16 years since Hall built his fence.

Q. Did he own some land on the South?

A. Yes.

Q. How far across the South boundary line of the Elliot tract did that fence run?

A. I should judge it went about half way. I do not think it went clear across.

Q. Was there a fence before 1905 on the other half of the Elliot claim that Hall did not fence?

A. No sir.

Q. Was there a fence on the West boundary of either the Elliot or Grindley tracts before 1905?

A. No sir.

Q. Now was there any time between 1882 and 1905 that cattle did not have access to all parts of this land?

A. No sir.

Q. Was the access possible at only a few places or at a large part of the boundary lines which were not fenced before 1905?

A. Well it was a large part of it.

Q. Was there any part that cattle could not get in easily except where these fences were that you have described?

A. No sir, there was no part of it that they could not get in.

Q. Did you ever know of any wood being cut on the land?

A. Yes sir.

Q. Do you know when that was?

A. Well I know somewheres near the time.

Q. State approximately whether it was five or ten or fifteen years ago, or when it was?

A. Well it has been, I judge, about in the neighborhood of fourteen years ago.

Q. Did you ever know of any gravel being taken from the land?

A. Yes sir.

Q. Have you ever known of any other use being made of either of these tracts of land except for pasture that you have spoken of and the cutting of wood and the taking of gravel?

A. No sir.

Q. Did you ever see or know of any person performing any acts in the nature of possession of the land, exclusive possession prior to 1905?

A. No sir.

Q. Did any person ever live on the land within your knowledge?

A. No sir.

Q. Did you ever know or hear of any objection to its

being used for pasture by any one?

A. No sir.

Q. Did you ever know or hear of any warning to keep off the land and not trespass?

A. No sir.

Q. Are you pretty well acquainted with all the land in the vicinity of these tracts?

A. Yes sir, I think I am.

Q. Is the land capable of being cleared?

A. Yes sir.

Q. Was there ever any time to your knowledge that it was not capable of being cleared?

A. No sir.

Q. If cleared would it be suitable for residence and cultivation?

Counsel for Complainant object to this question as incompetent, irrelevant and immaterial, and leading.

A. Yes it is subject to living on or for farming, either one.

Q. Do you know when you look at land whether it is capable of cultivation or not?

A. Yes sir.

Q. Is your knowledge as a farmer and your knowledge of land such as to enable you to determine whether land is capable of being cultivated?

A. Yes sir.

Q. And you think this land is susceptible of cultivation?

A. Yes sir.

Q. Is the character and quality of this land substan-

tially different from the general average of land in that neighborhood?

A. Well there is quite a good deal of land just the same as that.

Q. And is land in that neighborhood just the same as that being cultivated?

A. Yes sir.

Q. Successfully cultivated?

A. Yes sir.

Q. Is any of the adjoining land cultivated up to the boundary line of these two tracts?

A. It is cultivated on the North.

Q. Any other part?

A. On the East and on the South.

Q. Is the land on the West cultivated?

A. No.

Q. Is the land that you live on adjoining on the East cultivated?

A. Yes.

Q. What sort of cultivation?

A. Well it is in a pretty fair state of cultivation.

Q. What do you raise?

A. We raise garden stuff, grain and hay, etc.

Q. Is the land cultivated up to the road between you and the Grindley piece?

A. Yes sir.

Q. Is the Easterly part of your land good land?

A. Yes sir.

Q. How long have you cultivated that 40 acres?

A. Well it has been in cultivation a little over twenty

years. But that along the line between has only been cultivated about a year.

Q. Was any part of the 40 acres put under cultivation in 1882 when you first came back from Southern Oregon?

A. Yes there was about five acres in cultivation.

Q. At that time?

A. Yes sir.

Q. Well is that five acres any different in character and quality from the rest of it?

A. It is different from this Railroad land, that is this Elliot and Grindley tracts a little bit.

Q. A little bit different?

A. Yes.

Q. In what respect?

A. It is clay land,—more of a clay land, while this Grindley land and this Elliot claim is more gravelly.

Q. Is there any part of the Elliot and Grindley claims that is similar to the clay land on your 40 acres?

A. No.

Q. Is there any difference between any portion of that 40 acres or is it all alike?

A. No there is part of it,—patches on the East of this here Grindley claim that is gravelly the same as that.

Q. That is the part that you testified is now under cultivation?

A. Yes.

Q. Does that produce good results?

A. Yes.

Q. Is there any part of the Elliot tract or Grindley

tract that is not susceptible of cultivation with the expenditure of reasonable effort?

A. No sir.

Q. Is there other land in the neighborhood of these two tracts that is similar in character to this?

A. Yes sir.

Q. Is there any such land in that neighborhood that is under cultivation?

A. Yes sir.

Q. How far is that land from the City of Portland?

A. In the neighborhood of eight miles.

Q. Is that the distance in a straight line or by the road?

A. Well eight miles would put you in town by the road.

Q. Would the distance of eight miles bring you into the business part of town?

A. Yes, to the Court House.

Q. Do you mean the City limits?

A. No sir.

Q. The Southern Pacific line is not far from this tract?

A. No sir.

Q. Is there an electric line near there?

A. Yes sir.

Q. About how far is that away?

A. Well it is in the neighborhood of a quarter of a mile.

Q. Is there a station on the electric line near there?

A. Yes, but the station is not that close.

Q. Was there anything about the land as to its condition or character when you first knew it in 1832 that made it incapable or difficult of cultivation?

A. No sir.

Q. Was it any more difficult of cultivation then than the average land in that neighborhood?

A. No sir, I think not.

Cross-Examination.

Questions by Mr. B. C. Dey.

Q. This land would have to be cleared before it could be cultivated?

A. Sure.

Q. And the stumps would have to be taken off?

A. Yes.

Q. And the brush cleared off?

A. Yes.

Q. And the trees taken out such as there are?

A. Yes sir.

Q. You say you know nothing about this land prior to 1882?

A. No sir.

Q. How old were you then?

A. I was about 15 years old.

Q. How old was your brother in 1882, your brother who has just testified?

A. He was about six or seven years old.

Q. Did you ever get permission from the Railroad Company to pasture your cattle on this land?

A. No sir.

Q. Did any of the people around as far as you know?

A. No sir.

Q. You know that the Oregon & California Railroad Company claimed to own the land, did not you?

A. Yes sir.

Q. People around there generally knew that, did not they?

A. Yes sir.

Q. At all times since 1882?

A. Yes sir.

Q. The Oregon & California Railroad Company merely permitted people to pasture their cattle and stock there and never raised any objection to it?

A. No sir, there never was no objection raised.

Q. Did not some one in the later years object?

A. No sir, I cannot say anything about that.

Q. If they did, it made no impression on you?

A. No sir.

Q. You spoke of some people cutting cord wood, do you know who they were?

A. Yes sir.

Q. Who were they?

A. They were Kribbs Brothers.

Q. And you know, do not you, that they got permission from the Railroad Company to cut that wood?

A. No sir, I know nothing more than at the time I understand that they had permission to cut it. I understood that from them.

Q. That is, they told you they had permission from the Railroad Company to carry off the wood?

A. It was understood generally, I cannot say that I heard the boys say so, but then it was understood that

way.

Q. You mean that it way always regarded generally as land belonging to the old Oregon & California Railroad Company?

A. Yes sir.

Q. And it was always referred to as such?

A. Yes sir.

Q. In that neighborhood?

A. Yes sir.

Q. Now your brother who testified here placed a mark on this map at the point where the old saw mill stood, what is your idea about that?

Objected to by defendant's counsel as not proper cross examination.

A. This is on the South part of the Elliot claim,— Well I guess that would be close to it. It might be a little bit further West than that.

Q. Did you ever see that saw mill there?

A. No. It has not been there in my time.

Q. It is generally known in the neighborhood that there was a saw mill there before your time?

A. Yes sir.

Q. Where the Oregon & California Railroad Company cut its ties and lumber?

A. Yes sir.

Q. You do not know when that saw mill was built, or when its use was discontinued?

It is understood that defendant's objection above stated goes to all this testimony.

A. No.

Q. These cattle that you spoke of that you pastured on there, are the same cattle that your brother referred to?

A. Yes, the same.

Q. You owned them with him?

A. My father owned them. Of course the cattle were not turned on the land, they were just turned out and they took advantage of the pasture themselves.

Q. Is your father still living?

A. No sir.

Q. You have not attempted to pasture any cattle on that land since the fence was built in 1905?

A. No sir.

Q. And in using this land for pasture of cattle prior to the time the fence was built, you did so, understanding of course, that the land was not yours and that when the owner objected that you would have to cease pasturing your cattle there?

A. Yes.

Q. You used it merely by silent permission?

A. Yes.

Q. And if the Oregon & California Railroad Company had told you to cease pasturing your cattle there at any time prior to 1905, you would have done so?

A. Well they were only turned out, I suppose they would have been turned out just the same.

Q. You turned them out and they pastured on this land?

A. Yes sir.

Redirect Examination.

Questions by Mr. H. W. Hogue.

Q. Mr. Battin, you were asked a question about whether you knew the Oregon & California Railroad Company had a mill and cut ties on the land?

A. Yes sir.

Q. Did you ever know that the Oregon & California Railroad Company ever had a saw mill there or owned a saw mill there?

A. Well of course I only heard it in the neighborhood that the mill was there and cut ties.

Q. What ties?

A. Well it was nothing but railroad ties.

Q. Ties for what railroad?

A. I suppose for the Southern Pacific.

Q. Did you ever hear or did you ever know who cut the ties?

A. No sir I do not know who cut them.

Q. That information was common talk in that neighborhood?

A. Yes.

Q. It was to the effect that a mill had been operated there and ties had been cut for the road that is now operated by the Southern Pacific?

A. Yes sir.

Q. You do not mean to be understood as saying that you were told that the company itself ever operated a saw mill there and had done the work of cutting the ties,—you do not know who cut the ties do you?

A. Well it was considered,—I think it was spoken of

as the Southern Pacific mill, but I was not big enough to recognize anything. It was all shut down before my time.

Q. There was not any mill there when you went in there in 1882?

A. No.

Q. Do you remember anything about any mill when you first went in there?

A. Well of course there was a mill there when I was a little kid, I suppose I was along about four or five years old. But then I would not recollect anything about that.

Q. Do you remember ever seeing any mill there?

A. Yes the old mill was standing there when I was a little boy.

Q. Was the Company operating it then?

A. No.

Q. Was there any machinery in it?

A. No.

Q. It was just what was left?

A. Yes.

Q. Now how do you know that the Oregon & California Railroad Company claimed to own the land?

A. Well it was only just by general talk in the neighborhood. I never saw any patent or anything that way. I do not know of course if they had any right to it at all.

Q. Did any body representing the Railroad Company or acting for the Railroad Company ever tell you they owned it?

A. Never talked to me about it at all.

Q. Did you ever have any information relative to the ownership of the land except common talk in the neighborhood?

A. That is all, just what I picked up through the neighborhood, that is all I know about it, or about the title to it.

Q. Do you know of any actual claim being made to the land by any body?

A. No sir.

Recross Examination.

Questions by Mr. B. C. Dey.

Q. Do you know whether it was Ben Holladay & Company or the Oregon & California Railroad Company or the Oregon Central Railroad Company that had this mill there?

A. No sir, I cannot say as to that.

Q. It was just referred to as the old railroad mill, I suppose?

A. Yes.

Q. And the land was referred to as railroad land?

A. Yes, railroad land, that is just the way it was.

Further Direct Examination.

Questions by H. W. Hogue.

Q. You never knew any difference between the Oregon Central Railroad Company and the Oregon & California Railroad Company did you?

A. No, I do not know that I would recognize any difference in them as far as that is concerned.

(Witness excused).

Thereupon the taking of testimony is adjourned to be resumed on the agreement of the parties.

Portland, Oregon, October 30th, 1911, 1:30 P. M. At this time the parties herein appear before Geo. A. Brodie, Examiner of the above entitled Court at room 812 Yeon Building, the complainant appearing by Mr. B. C. Dey of counsel, and the defendant appearing by Mr. H. W. Hogue of counsel, and thereupon the following proceedings are had, to-wit:

L. Samuel Street is called as a witness for the defendant and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

Questions by Mr. H. W. Hogue.

Q. State your name, age, residence and occupation?

A. L. Samuel Street, age 27, residence No. 14 East Seventh Street, Portland, Oregon, occupation, searcher of records.

Q. What employment are you in now, with what company?

A. With the Title & Trust Company.

Q. How long have you been engaged with them?

A. I have been with the Title & Trust Company since August 15th, 1908, a little over three years.

Q. What experience had you had in searching records and titles before that?

A. I had a little over a year and a half with the Title Guaranty & Trust Company.

Q. State whether or not you are an expert searcher

of records?

A. Well I do not know as I would call myself an expert searcher of records, I am a fair searcher of records.

Q. Do you know how to search records?

A. Yes.

Q. That is your business?

A. Yes. Yes, I would call myself an expert searcher of records.

Q. You have no doubt about your ability to search records, have you?

A. No sir.

Q. I show you Defendant's Exhibit 2, being a copy of deed certified by E. S. Fields, County Clerk of Multnomah County, State of Oregon, of a deed from Gideon Tibbetts and wife to Ben Holladay & Company, dated February 5, 1870, and recorded on March 2, 1870, in Book K of the Records of Deeds of said Multnomah County, at page 588 thereof, containing a description of four acres of land, more or less, situate in Section 11, in Gideon Tibbetts Land Claim in said County and State, and I will ask you whether you know the location of the land described in that deed?

Counsel for Complainant object to any testimony being introduced in connection with the said certified copy of deed for the reason that the same is irrelevant and immaterial, and because the land described therein is in Multnomah County, State of Oregon, and has nothing to do with the land involved in this suit.

A. Yes.

Q. Have you made an examination of the records of

deeds of Multnomah County, State of Oregon, to ascertain whether or not the land described in this deed, Defendant's Exhibit 2 was ever specifically conveyed by Ben Holladay & Company by any deed of record in the Records of Deeds of Multnomah County, State of Oregon?

A. I have. And found none.

Counsel for defendant moves to strike out the latter part of the witness's answer on the ground that the answer is not responsive to the question.

Q. Have you made any examination of the records of deeds of Multnomah County, State of Oregon, to ascertain what, if any, land in said Multnomah County was ever conveyed to Ben Holladay & Company by any deed of record in said record of deeds?

A. Yes.

Q. What was the result of that examination?

A. I found only the one deed in Book K, page 588.

Q. Is that the same deed as the one of which defendant's Exhibit 2 is a certified copy?

A. Yes.

Q. What is the business of the Title & Trust Company, your employer, in what business is it engaged?

A. General abstract and trust business.

Q. Has that company an abstract plant of the official records of Multnomah County, State of Oregon?

A. Yes sir.

Q. Has it more than one plant, or set of abstract books?

A. It has two complete sets of lots and block books

from the Government down to and including July 25, 1908.

Q. What has it in the way of abstract books since that time?

A. It has one set of books since that time.

Q. Where were these two sets of books obtained?

A. One was made up by the Title Guaranty & Trust Company of Portland, Oregon, and the other one was a set, I think made by H. M. Scott, and later on O. M. Smith, and then the Security Title & Trust Company and then the Title & Trust Company.

Q. State whether the Title & Trust Company's plant shows all deeds containing any specific description of the four acres of land described in Defendant's Exhibit 2?

Counsel for Complainant objects to the question on the ground that it deals with mere copies of records and with books and records which are not the best evidence. And on the further ground that this question and this line of testimony is not material or relevant to any issue in this case.

A. It does.

Q. State whether or not the Title & Trust Company's plant shows any deed or deeds in Multnomah County, other than Defendant's Exhibit "2," which contains a specific description of the four acres described in said Exhibit "2?"

Counsel for Complainant makes the same objection to this question as noted to the last preceding question.

A. It shows no other deed.

Q. State whether or not the Title & Trust Company's plant shows all deeds of record in said Multnomah County, State of Oregon, which by any kind of a description describe or cover any part of the four acres of land described in said Defendant's Exhibit "2?"

Same objection by Complainant's counsel as last noted.

A. Yes it shows all such deeds.

Q. I show you Defendant's Exhibit "3," a copy of deed, certified to by E. S. Fields, County Clerk of Multnomah County, Oregon, Ben Holladay and wife to the Oregon & California Railroad Company, dated March 4, 1876, recorded in Book 29 of the Record of Deeds of said Multnomah County, State of Oregon, at page 131 thereof, which releases, remises and quit claims all of the right title estate and interest of said Ben Holladay and wife, of, in or to all of the land and real estate in the County of Multnomah, State of Oregon, now in the actual occupation or possession of said party of the second part under claim of title thereto or ownership therein in fee simple forever, and I will ask you whether you made an examination of the books and records and plant of said Title & Trust Company for the purpose of ascertaining whether there was among the records of deeds of Multnomah County, State of Oregon, any deed or deeds affecting any part of the four acres of land described in Defendant's Exhibit "2" heretofore shown you?

Counsel for Complainant objects to any testimony concerning this certified copy of deed and also to this question for the reason that it deals with a mere copy of the original records and the testimony of this witness is not

the best evidence and the question does not concern anything relating to the issues of this case.

A. I have made such an examination.

Q. State whether or not the examination you made of the records of the Title & Trust Company's plant shows that there are of record in said Multnomah County, State of Oregon, any deed or deeds affecting the title to any part of the four acres of land described in Defendant's Exhibit "2" and "3" or in the deeds of which they are certified copies?

Same objection as last noted.

A. The plant shows no other deed.

Q. You have already stated that the Title & Trust Company's plant shows all deeds of record in Multnomah County, State of Oregon?

A. I have.

Q. How long has the Title & Trust Company been in business in Portland, Oregon, or the Title & Trust Company and the Security Abstract & Title Trust Company its predecessor?

A. About thirty years I should judge.

Q. The corporation?

A. Well of course originally it was the Title Guaranty & Trust Company.

Q. I mean the Title & Trust Company which formerly was the Security Abstract & Trust Company?

A. Well that was a different corporation,—the plant of the Security Abstract & Trust Company and of the Title Guaranty & Trust Company were combined to make up the one firm.

Q. How long has the Title & Trust Company operated under the name of the Title & Trust Company?

A. A little over three years.

Q. How long did the Security Abstract & Trust Company operate formerly?

A. I think about ten years.

Q. State if you know approximately how many persons are employed by the Title & Trust Company?

A. Between forty and sixty.

Q. State whether or not the Title & Trust Company does a large volume of business?

A. I consider it does a large volume of business.

Q. Can you state approximately how many abstracts of title the Title & Trust Company have made by the recollection of the names or anything?

A. I do not believe I would be able to say.

Q. Do you know whether the number exceeds ten thousand?

A. Yes it does exceed ten thousand.

Q. Who is the general counsel of the Title & Trust Company?

Counsel for Complainant objects to this question and to this line of testimony as irrelevant and immaterial and as having no possible bearing on the issues of this case.

parties acting through their respective attorneys said testimony of the respective witnesses produced before me was taken down by me in shorthand writing and was afterwards transcribed by me, and I further certify that the foregoing is a full, true and correct transcript of the testimony as taken down by me in shorthand of said respective witnesses and of the whole thereof, it being understood and agreed by the respective parties that the signing of the depositions by the respective witnesses would not be required and that the same was waived.

I further certify that before proceeding with the taking of the testimony of the respective witnesses produced before me, they and each of them were by me duly sworn to tell the truth, the whole truth and nothing but the truth in answer to interrogatories to be prepounded to them by counsel.

In witness whereof I have hereunto set my seal and title of office, this 28th day of December, 1911.

Filed February 13, 1912.

A. M. CANNON,
Clerk U. S. District Court.

.....

U. S. Examiner for Oregon.

IN THE CIRCUIT COURT OF THE UNITED
STATES, FOR THE DISTRICT OF OREGON.
OREGON AND CALIFORNIA RAILROAD COM-
PANY, a Corporation,

Complainant,

vs.

MARIA DE GRUBISSICH,
nee Maria de Portales,

Defendant.

THURSDAY, SEPTEMBER 28th, 1911.

DEPOSITIONS

of

JOHN P. DUFFY, CHARLES P. LINCOLN,
and DANIEL P. EWING.

TAKEN BEFORE

HUGH SIME, NOTARY PUBLIC IN AND
FOR THE CITY AND COUNTY OF SAN
FRANCISCO, STATE OF CALIFORNIA.

Appearances:

FRANK THUNEN, Esq. on behalf of Complainant,
HENRY CONLIN, Esq. and
L. HORWITZ, Esq. on behalf of Defendant.

INDEX.

IN THE CIRCUIT COURT OF THE UNITED
STATES, FOR THE DISTRICT OF OREGON
OREGON AND CALIFORNIA RAILROAD COM-
PANY, a Corporation.

Complainant,

vs.

MARIA DE GRUBISSICH, nee Maria de Portales,
Defendant.

BE IT REMEMBERED, that pursuant to the stipulation hereunto annexed, and on Thursday, September 28th, 1911, at ten o'clock A. M. of said day at my office at No. 884 Market Street, in the City and County of San Francisco, State of California, before me, HUGH T. SIME, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn and authorized to administer oaths, etc. personally appeared JOHN P. DUFFY, CHARLES P. LINCOLN and DANIEL P. EWING, witnesses called on behalf of the Complainant in the above-entitled action, now pending in said Court, who being by me first duly sworn, to tell the truth, the whole truth and nothing but the truth, were then and there interrogated by FRANK THUNEN, ESQ., as counsel for Complainant, and HENRY CONLIN, ESQ., as counsel for defendant, and testified as follows:

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF OREGON.
OREGON AND CALIFORNIA RAILROAD COMPANY, a Corporation,

Complainant,

vs.

MARIA DE GRUBISSICH, nee Maria de Portales,
Defendant.

IT IS HERE STIPULATED, that the testimony may be taken in Shorthand by May R. Nichols, a Stenographer, appointed by Hugh T. Sime, Notary Public, and transcribed to longhand; that the deposition so transcribed shall be submitted to the witnesses for their signatures.

FRANK THUNEN,
Counsel for Complainant.

Counsel for Defendant.

JOHN P. DUFFY, being first duly sworn to tell the truth, the whole truth and nothing but the truth, was called on behalf of the Complainant, and testified as follows:

DIRECT EXAMINATION

By FRANK THUNEN, Esq:

Q. What is your name?

A. John P. Duffy.

Q. What is your present occupation?

A. Residence San Mateo, 920 Palm Avenue: occupation bookkeeper.

Q. What is your present occupation?

A. Bookkeeper of the Corporate Accounts Bureau Southern Pacific Company.

Q. Did you ever hold any position with the Oregon & California Railroad Company— Did you hold any position with the Oregon & California Railroad Company in March, 1905?

A. I kept the books for the Company under Mr. C. P. Lincoln.

Mr. CONLIN: We will note an objection to that as incompetent, irrelevant, immaterial and as leading, calling for a conclusion and not the best evidence.

Q. Did you hold any position at that time with the Oregon & California Railroad Company?

A. The books of the Company along with other

companies' were kept in the office and as part of my duties, I kept those books.

Q. What office was that?

A. The office of J. L. Willcutt.

Q. What official position did Mr. Willcutt hold in connection with the Oregon & California Railroad Company?

A. I don't know as he held any official title. He was placed in charge of the account books—he was placed in charge of the account books of the Oregon & California Railroad Company by resolution of the Board of Directors.

Mr. CONLIN: In order to save time, I would like to have it appear that we object to each question and answer as incompetent, irrelevant and immaterial, not the best evidence and no foundation has been laid for asking the question or for its introduction in the evidence.

Q. Was Mr. Willcutt the lawful custodian of the papers of the Oregon & California Railroad Company?

Mr. CONLIN: Same objection.

Mr. THUNEN: It is understood your objection goes to all question.

Q. I will call your attention to Complainant's Exhibit "18" introduced in the examination before George A. Brodie, Examiner, and I will ask you if you have any knowledge of the shipment evidenced by that exhibit? (Hands Witness Exhibit for inspection.)

A. I have.

Q. Did you have anything to do with that ship-

ment?

A. I caused that shipment to be sent to Mr. Willcutt.

Q. How did you come to do that?

A. Mr. Willcutt delegated me to go up to Portland, Oregon, and send down a lot of books and papers which they had stored in the vaults in Portland, Oregon.

Q. And what did you do?

A. I went to Portland, Oregon, in March, 1905, and this shipment is the result of that visit there.

Q. What papers and documents, if you know, were included in that shipment?

A. The vault contained all the records and account books, and vouchers, agreements, deeds and miscellaneous papers, letters-books and the like. I had them all boxed and shipped to Mr. Willcutt in San Francisco.

Q. Did you attend to that shipment, personally? Mr. Duffy?

A. Yes Sir, I did.

Q. And by whose permission were the papers delivered into your custody for the purpose of shipping?

A. Mr. Willcutt gave me a letter of introduction to Mr. Cotton telling him that he had detailed me to go to Portland, Oregon and send these papers to him.

Q. And who is Mr. Cotton?

A. Mr. Cotton is the secretary of the Oregon & California Railroad Company.

Q. And the books and papers were in Mr. Cotton's custody?

A. They were. Yes Sir.

Q. I will call your attention to Complainant's Ex-

hibit No. "16" introduced in the examination before George A. Brodie, Examiner "hands witness Exhibit "No. 16" for inspection) and I would like to go back a little and have Brodie's Exhibit "No. 18" identified and introduced as Sime's Exhibit "No. 1." (Brodie's Exhibit "No. 18" is identified and marked Sime's Exhibit "No. 1.")

Q. Have you seen that list before? (Referring to Brodie's Exhibit "No. 16.")

Mr. CONLIN: That is objected to on the ground that the list is not signed and does not appear to be a duly authenticated document and objected to on the other grounds that it is incompetent, irrelevant and immaterial, not the best of evidence and no foundation has been laid.

A. I will say that I have seen that list—if not this one, one similar to it.

Q. What is that?

A. It is an inventory of the papers which were contained in the eight boxes which I sent down from Portland, Oregon, in March, 1905, to Mr. Wilcutt in San Francisco.

Mr. CONLIN: I do not know as I have made it clear that I object to each question and answer as irrelevant, incompetent and immaterial and not the best evidence, no foundation is laid, and where there is a specific objection to be made, I will make it in addition, but that this general objection may stand to each question and answer.

Mr. THUNEN: Complainant agrees that the gen-

eral objection may be regarded as going to all questions and answers.

Mr. THUNEN: I will ask that Exhibit "No. 16," for convenience, be marked and introduced in evidence here and marked as Sime's Exhibit "No. 2" (Exhibit "No. 16" is marked for identification and introduction as Sime's Exhibit "No. 2.")

Mr. CONLIN: Same objection to the Exhibit.

Mr. THUNEN'S QUESTION: Do you know whether Mr. Willcutt received that shipment?

A. Yes Sir, I do.

Q. Do you know what became of that shipment? Is it still in San Francisco?

A. No. It was destroyed in the fire of April, 1906.

Q. Was any of that shipment saved from the fire, to your knowledge?

A. No, to the best of my knowledge and belief, outside of a few coupon books, none of that shipment was saved.

Q. And it was still in the custody of the office here at the time of the fire in 1906?

A. Yes Sir.

Mr. THUNEN: That is all.

Cross Examination.

By Mr. CONLIN:

Q. Mr. Duffy, when did you first see the instrument here marked Complainant's Exhibit "No. 18?"

Mr. THUNEN: We will object on the ground that it is not material. The exhibit is simply offered to the witness to refresh his memory as to the purport of the

receipt.

A. This particular receipt I saw this morning.

Q. You never saw it before ?

A. No Sir. This is, I understand, a copy of the original.

Q. You don't know that, do you?

A. I don't know it.

Q. And when did you first see the document offered in evidence and marked Complainant's Exhibit "No. 16?"

Mr. THUNEN: Same objection.

A. This particular one I saw this morning.

Q. You never saw it before this morning?

A. This particular one? No, I would not say that I had, but I saw one similar to it.

Q. You were in the employ of the Southern Pacific Company in the same position, the same you now are in, in 1906, were you not, in San Francisco?

A. Yes.

Mr. CONLIN: That is all. Witness is excused.

Witness, JOHN P. DUFFY was recalled and testified as follows:

DIRECT EXAMINATION ON RE-CALL.

By Mr. THUNEN:

Q. Have you any knowledge as to where the books and papers and records represented by Sime's Exhibits, "1" and "2" were kept after reaching San Francisco in 1905?

Mr. CONLIN: In addition to the general objection, we object to the question as leading and calling for a

conclusion.

A. Yes, I have. Made a careful examination; did not make a memorandum; went through the boxes and took out just what we wanted to keep at the Merchant's Exchange Building, and the rest of it was sent, I believe, to Room No. 101 in the top floor of the building at 4th and Townsend.

Q. Do you know how they were kept at 4th and Townsend?

A. I believe they remained in their boxes. We had some shelving put up there. Whether any of these got on the shelves, I could not, at this time, state.

Q. Do you know whether or not they were stored in a vault?

A. No, they were not stored in a vault. I remember very distinctly because there was a leak in the vault and we had to remove the other papers and put them up the storage room No. 101, because they had an examination of the building and the inspector in putting in a floor in the floor above, put a hole in the pipe and it leaked right into the vault and all the papers and books were mildewed and we had to take out everything at that time, at least my recollection gives it that way.

Q. Do you know or have you any independent recollection as to whether anything was saved from that room or was it all destroyed.

A. Everything was absolutely destroyed in that room.

Q. I will call your attention to Brodie's Exhibit

“No. 50” introduced by Complainant and I will ask you to examine the part marked Exhibit “A” (hands Witness Exhibit for inspection.)

Mr. CONLIN: Is that the exhibit introduced or simply a copy.

Mr. THUNEN: It is. The clerk has certified to it.

Mr. CONLIN: That is simply the celrk’s certificate of deposition of record. It don’t make any difference to you, you understand. Mr. Thumen, you can offer it in this case and it is all subject to the decision of the Court.

Mr. THUNEN: It does not cut any figure whether it is the original or a copy, but Mr. Fenton says that it was introduced in evidence.

Mr. CONLIN: I recollect the copy of the document being introduced, but do not remember if the original was. However, as I say ,that would not interfere at this time. It would have to be decided up there. You can go on the assumption that it was, and that it will be determined up there.

Mr. THUNEN’S QUESTION:

Q. Have you ever seen that document before—referring to that portion of Brodie’s Exhibit “No. 50” which is marked Exhibit “A?”

A. No, I don’t believe I have.

Q. You have no personal recollection of its being included in that shipment of books and documents in March, 1905, from Mr. Cotton to Mr. Willcutt?

A. No personal knowledge, No. But it could be in there and I not know, because quite a lot of miscell-

aneous papers were in there.

Q. If that agreement were included in the papers at that time in the custody of Mr. Cotton, as Secretary of the Oregon & California Railroad Company, would it have been included in the shipment to Mr. Willcutt?

Mr. CONLIN: In addition to the general objection, this question is objected to as leading, calling for a conclusion and not based upon any fact in the evidence.

A. Well, that I couldn't answer one way or another, whether it was or not.

Q. Do you know if you got all the papers and documents or not?

Mr. CONLIN: Same objection to that.

A. I know I did not get all of them.

Q. Do you know whether any papers of that character, that is to say, agreements and deeds were left with Mr. Cotton?

Mr. CONLIN: Same objection to that question.

A. I don't recall just now whether they were or not.

Q. You have never seen this agreement—the agreement of which this is the copy—since the fire of April, 1906?

Mr. CONLIN: Same objection.

A. No, I have not.

Mr. THUNEN: Now, this document having been introduced as Brodie's Exhibit "50" on behalf of the Complainant, we will now offer it as a further exhibit in this proceeding and ask that it be marked Sime's Exhibit "3" and we will ask that subject to counsel's objection, it be considered as written in the record.

Mr. CONLIN: It is hardly necessary to write it in the record.

Mr. THUNEN: Yes, but we want it in the record here for the purpose of reviewing a few facts and that it may be referred to as written in the record.

Mr. CONLIN: It is already in the record.

Mr. THUNEN: We wish to adopt it in this proceeding.

Mr. CONLIN: Yes.

Mr. THUNEN: The same as the other exhibits.

Mr. CONLIN: Yes. The Defendant objects to it as incompetent, irrelevant and immaterial, not the best evidence and no foundation has been laid for its introduction.

Mr. THUNEN: We now offer as an exhibit a copy of the depositions of George W. Weidler and A. G. Cunningham certified by the clerk, taken in the same action in which the deposition of Henry Villard was taken and which has been introduced in evidence before as an Exhibit marked Brodie's Exhibit "50" and Sime's Exhibit "3." The purpose of introducing this is that the testimony is upon the same subject matter, relates to the same agreement and affects Ben Holladay and the heirs of Ben Holladay. Defendants in this suit to the same extent.

Mr. CONLIN: Was that offered up there?

Mr. THUNEN: No. We offer this as an original exhibit here.

Mr. CONLIN: The defendant objects to this offer upon the ground that it is incompetent, irrelevant and

immaterial, not the best evidence and no foundation has been laid for its introduction and that it is inadmissible under the pleadings and is not directed to any issue and does not tend to settle any issue or any allegation in the Complainant's Bill of Complaint.

Mr. THUNEN: I presume it is stipulated that, subject to that objection, the Exhibit may be considered as written into the record.

Mr. CONLIN: It goes in as an Exhibit, I suppose.

Mr. THUNEN: Yes and is marked Sime's Exhibit "4." (Exhibit is offered for identification and marked Sime's Exhibit "4.")

JOHN P. DUFFY

Subscribed and sworn to before me this 11th day of October, 1911.

HUGH T. SIME,

Notary Public in and for the City and County of San Francisco, State of California. (Seal)

CHARLES P. CONLIN being first duly sworn to tell the truth, the whole truth, and nothing but the truth was called on behalf of the Complainant, and testified as follows:

Direct Examination

(By FRANK THUNEN, Esq.)

Q. What is your name, Mr. Lincoln.

A. Charles P. Lincoln.

Q. What is your present occupation?

A. Head Clerk of the Corporate Accounts Bureau, in the Auditor's Office, Southern Pacific Company.

Q. And where.

A. Flood Building, San Francisco.

Q. You reside here in San Francisco, do you?

A. Berkeley.

Q. What was your occupation in March, 1905?

A. I was bookkeeper in the Secretary's office, in the office of the Secretary of Leased Lines of the Southern Pacific Company.

Q. What was the name of that Secretary?

A. J. L. Willcutt.

Q. Was Mr. Willcutt the Secretary of the Oregon & California Railroad Company at that time?

A. He was not.

Q. Did he hold any office with reference to the Oregon and California Railroad Company?

A. No.

Q. He did not?

A. No.

Q. Did he not perform any services for the Oregon and California Railroad Company?

Mr. CONLIN: I object to the question as leading and calling for a conclusion of the witness.

A. The Board of Directors of the Oregon and California Railroad Company appointed Mr. Willcutt the custodian of the books and records—corporate books and records, of the Oregon and California Railroad Company.

Q. Did you yourself hold any position under Mr. Willcutt?

A. Simply as book-keeper in his office and I was connected with other roads along with the Southern Pacific Railroad Company—I was assistant Secretary

of that and I think other proprietary companies of the Southern Pacific and not connected with the Oregon and California Company.

Q. As Mr. Wilcutt's assistant, did you handle any of these books and records?

A. I kept the corporate books of the Oregon and California Railroad Company.

Q. And did you keep the custody of these books for Mr. Willcutt.

A. Well, yes.

Q. I will call your attention to Exhibit "18" of Complainant's in the examination before Commissioner George A. Brodie and Marked Sime's Exhibit "1", and I will ask you to look at that. (Hands witness exhibit for inspection.) (Witness: You ask me what?) (Mr. Thunen: To examine that and tell me what it is.)

A. Yes.

Q. What does that exhibit purport to be?

Mr. CONLIN: Objected to especially as it is calling to witness a conclusion, and because the document speaks for itself what it is.

A. It shows the receipt by J. L. Willcutt of eight boxes of books and papers from Mr. W. W. Cotton of Portland.

Q. Receipt by Wells Fargo Company is it not?

A. Wells Fargo Company Receipt, yes.

Q. Do you know whether that shipment was received by Mr. Willcutt.

A. I have a distinct recollection of receiving these documents in the Merchant's Exchange Building in this

City.

Q. Did you receive them yourself?

A. Only in this way: I was in the office when the boxes arrived.

Q. You saw the boxes?

A. I saw the boxes.

Q. I will call your attention now to Complainant's Exhibit "16," in the examination before George H. Brodie, and Sime's Exhibit "2," and I will ask you what that is. (Hands witness exhibit for inspection.)

Mr. CONLIN: I note the same objection as last stated.

A. It covers what is supposed to have been the contents of box No. 1.

Mr. THUNEN: I will say that I would like the record to show that these exhibits are presented to the witnesses for the purpose of refreshing their minds as to the details of these matters to which they testify from actual memory.

Mr. CONLIN: In addition to the general objection, we object that the document is unsigned, unauthenticated and not the best evidence, and not made by the witnesses.

Q. My question relates to the entire list, Mr. Lincoln.

A. Well, this document is supposed to represent what these eight boxes contained.

Q. You received eight boxes did you?

A. Eight boxes.

Q. Do you know whether this list, represented by

this exhibit, Brodie's Exhibit "16", Sime's Exhibit "2" represents the contents of those boxes?

Mr. CONLIN: Just a moment, Mr. Lincoln, that is objected to as leading, and calling for a conclusion, not the best evidence, and not based upon any fact in evidence.

Mr. THUNEN: I asked him if he knew.

A. I don't know it to an absolute certainty.

Q. You did not make this list yourself?

A. I did not make the list myself.

Q. Did you check off the contents of the boxes against any list that you received?

Mr. CONLIN: Same objection.

A. I believe we did at that time, yes, and it is my recollection that we acknowledged receipt of these papers to Mr. W. W. Cotton at the time—by letter.

Q. In a general way, to the best of your recollection, what did these boxes contain?

Mr. CONLIN: In addition to the general objection, this is objected to as leading and calling for the conclusion of witness, and is not based upon any fact in evidence in this case.

Mr. THUNEN: I will withdraw the question temporarily.

Q. Did you examine the contents of those boxes?

A. Yes, in a general way, to enable us to check the contents against the list that Mr. Cotton sent, and to acknowledge receipt of same—this is my recollection. It is my belief, but I cannot say it for an absolute certainty, that just these particular books and paper:

were in the boxes. I recall the receipt of eight boxes distinctly. No doubt about it.

Q. What became of those eight boxes, the books and records?

A. Well—

Mr. CONLIN: We object to the question as leading and calling for a conclusion of the witness.

A. My recollection is that we kept, in the Merchants' Exchange Building, what we considered necessary in keeping up the current books at that time, and the remainder we stored.

Q. What I want to know is, are these boxes in the custody of Mr. Willcutt, at the present time?

A. No. Mr. G. L. King succeeded to the custody of the books and accounts of the Oregon & California Railroad Company, at the time of the retirement of Mr. Willcutt from the Secretaryship of leased lines of the Southern Pacific Company.

Q. When was that?

A. January 1st., 1909.

Q. When is the last time you saw any of those boxes?

A. Before the fire in April 1906. Early part of 1905.

Q. You say that Mr. King succeeded to the Secretaryship in 1909?

A. Mr. King succeeded to the Secretaryship of the Leased Lines of the Southern Pacific Company.

Q. Did that include the Oregon and California Railroad Company?

A. Not the Secretary of the Oregon & California Railroad Company, but the Board of Directors of the Oregon & California Railroad Company appointed Mr. King to take charge of the books and records, succeeding Mr. Willcutt.

Q. Did Mr. King at that time receive from Mr. Willcutt or from you, to your knowledge, these eight boxes or any of them?

A. No.

Q. Why was that?

A. Because they and their contents were destroyed in 1906 and Mr. King did not succeed Mr. Willcutt in the custody of these paper until 1909.

Q. These papers were all destroyed in 1906?

A. They were destroyed in the fire of 1906.

Q. And you have not seen any of these boxes or their contents since that time?

A. None of the boxes. It's my recollection that there were saved from the fire a few of the paid coupons and a few journal vouchers badly scorched.

Q. All the other papers were destroyed?

A. All the other papers were destroyed in the fire of 1906.

Q. You say you received those papers at the Secretary's Office? Did you retain all of them in the Secretary's office?

A. No, we kept what we thought we were apt to need and the remainder of them, it is my recollection, were sent to Fourth and Townsend streets, to be stored.

Mr. THUNEN: That will be all, Mr. Lincoln. Take the witness Mr. Conlin.

Cross Examination.

(By Mr. CONLIN):

Q. Did you ever see this before, Mr. Lincoln? (Hands witness Sime's Exhibit "1".)

A. I think not; not before today.

Mr. THUNEN: We make the same objection to questions on these exhibits, on the ground that the exhibit is in evidence and we offered them in evidence simply to refresh his memory as to the circumstances to which the receipt relates and to which he testifies from his own recollection.

Mr. CONLIN: Question.

Q. And did you ever see this paper before the present examination?

Mr. THUNEN: Same objection.

A. Not to my recollection.

Q. Do you know by whom, or when, or where, that was made?

Mr. THUNEN: Same objection.

A. No, I don't.

Q. You have no distinct recollection of any particular documents or of all the documents that were in the eight boxes that you speak of?

A. Well, of course, I had all the corporate books of the Oregon and California Railroad Company.

Q. But other than that, as to these various papers, you have no distinct recollection of what was in those eight boxes, have you, at this time?

A. No distinct recollection, no.

Q. About all you know about that transaction, Mr. Lincoln is that Mr. Willcutt received eight boxes of what purported to be papers and documents?

A. In a general way, that is all.

Q. And so far as you know, you believe that these documents were all destroyed in the great fire of 1906?

A. That's right.

Q. But you have no independent knowledge?

A. No.

Q. Except in a general way that you believe that these papers were destroyed here?

A. Well, I might say that I have absolute knowledge of that fact because what we retained in the Merchants Exchange Building, was completely destroyed and what we did not use, and consequently stored at the building at Fourth and Townsend, everybody can see was destroyed.

Q. There were a lot of documents saved in the Fourth and Townsend vault.

A. I think not.

Q. Everything was destroyed at the Fourth and Townsend building?

A. A few journal vouchers were saved in the Merchants Exchange, a very few and very badly scorched.

Q. Do you remember a man named Greathead?

A. Greathead, yes.

Q. Do you recollect whether or not he stored a

great many things in the vault at Fourth & Townsend before the fire and that they were saved?

A. No, I do not.

Q. That may have been true for all you know?

A. Yes.

Mr. THUNEN: Objected to on the ground that it is incompetent, irrelevant and immaterial and not proper cross-examination.

Mr. CONLIN: That is all.

Redirect Examination.

(By Mr. THUNEN:)

Q. I think that counsel's questions were a little misleading in one particular. He said that to the best of your knowledge those boxes contained books and documents. You know absolutely that they did contain books and documents and can state that positively, can you not?

A. That they did? (Mr. Thunen. Yes.)

A. I know they did.

Q. Do you know where or how the books and records were stored, that is, such as were kept at Fourth & Townsend, whether they were stored in a vault?

A. I only know in a general way that they were sent to Fourth and Townsend to be stored.

Q. You don't know?

A. I did not go with them.

Mr. THUNEN: That is all Mr. Lincoln.

CHARLES P. LINCOLN,

Subscribed and sworn to before me this 11th day of October, 1911.

HUGH T. SIME,

Notary Public in and for the city and county of San Francisco, State of California.

IT IS STIPULATED between counsel for both parties present at the examination that Mr. Sime need not remain present during the taking of this testimony.

DANIEL P. EWING, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, was called on behalf of the Complainant, and testified as follows:

Direct Examination.

(By FRANK THUNEN, ESQ.):

Q. What is your name?

A. Daniel P. Ewing.

Q. Where do you reside?

A. San Francisco.

Q. What is your business?

A. Assistant Secretary of the Leased and Proprietary Lines of the Southern Pacific Company., Mr. G. L. King, being the Secretary.

Q. How long have you occupied that position?

A. Since May, 1911.

Q. And how long since Mr. King was appointed Secretary?

A. January first, 1909.

Q. And as such Assistant Secretary what are your duties?

A. I have charge of all the records, deeds and agreements of the Company—of the different Com-

panies, including the Oregon & California Railroad Company. I have some records of the Oregon & California Railroad Company that were turned over by J. L. Willcutt to Mr. G. L. King—

Mr. CONLIN: (Interrupting witness). This is subject to the same general objection.

(Witness continuing) G. L. King being appointed similar papers belonging to the Oregon & California Railroad Company.

Q. And have you in the exercise of your official duties, the custody of the agreements, deeds and similar papers belonging to the Oregon & California Railroad Company?

A. Just a few.

Q. Did you receive all of such papers and documents from Mr. Willcutt?

A. All that Mr. Willcutt had in his possession at the time of his retirement were received and I checked them over.

Q. I will call your attention to that part of Brodies Exhibit "50", being Sime's Exhibit "3", which part is marked Exhibit "A" and purports to be an agreement between Ben Holladay and others, dated February 29th, 1876, and I will ask you if you have ever made a search to ascertain whether or not that document is in the custody of your office? (Hands witness Exhibit for inspection).

Mr. CONLIN: We note an objection to the question as leading, calling for a conclusion of a witness and incompetent, irrelevant and immaterial, not the

best evidence and there is no foundation for it.

A. I made a very thorough search and know that the—

Mr. THUNEN: One minute: I want to change that question. I ask you if you made a search for the original of that agreement?

A. I made a thorough search for the agreement and I know that it is not in the possession—that it is not in the custody of Mr. G. L. King, as Secretary, and myself, as Assistant Secretary, of the Leased and Proprietary lines of the Southern Pacific Company.

Q. I do not recall whether you have testified or not, as to whether Mr. King, as Secretary, or yourself, as Assistant Secretary, is the authorized custodian of the papers and documents of the Oregon & California Railroad Company?

A. Mr. King was appointed by a resolution of the board after Mr. Willcutt's retirement, but whether that has been rescinded or not I do not know. But anyhow, all the documents that was in the possession of Mr. Willcutt at the time of his retirement, was turned over to Mr. King and I checked these documents against a list that they had.

Q. Before going further, I will ask you whether you since coming into your present position with the Leased Companies, have ever seen this agreement?

A. I have seen a copy of it, a printed copy of the agreement, and read it over.

Q. You have not seen the original?

A. The original I have not seen.

Q. And I will ask you, calling your attention to Brodie's Exhibit "16", Sime's Exhibit "2", if you have checked over the papers and documents in your custody with the books, documents and papers shown in that exhibit?

A. We have a copy of this document you know, in our files, and at Mr. King's request, I checked the list against the existing papers and found absolutely none of them except a few coupons and one or two vouchers, and we were told by Mr. Duffy and others under Mr. Willcutt, that they were destroyed in the fire in April, 1906, and I know positively that none of them now exist among the records in our possession, of the Oregon & California Railroad Company.

Mr. THUNEN: Will there be any objection, Mr. Conklin, on your part, to stipulate to the fact that these various resolutions to which testimony has been given here, appointing Mr. Willcutt, Mr. King, and Mr. Ewing to their various offices, that these resolutions did clothe them with that authority.

Mr. CONLIN: It may be agreed that they occupy the positions stated, and did at the times stated. I think that will cover it.

Mr. THUNEN: Yes, that will cover it.

Cross Examination.

(By. Mr. CONLIN:)

Q. Just one question. When did you first see this (referring to Exhibit "1")?

A. I have a copy in our rooms but this is the first time I have seen this particular document. The first time I have seen it is today.

Q. Do you know where or when or by whom this was made?

A. No, but we have an exact copy in our files, a copy like this was sent down by Mr. W. W. Cotton.

Q. But you have not compared it.

A. I have not compared it, no.

Q. And this document (referring to Exhibit "1") this is the first time you have seen that?

A. Yes.

DANIEL P. EWING.

Subscribed and sworn to before me this 11th day of October, 1911.

HUGH T. SIME,

Notary Public in and for the City and County of San Francisco, State of California. (Seal)

STATE OF CALIFORNIA,

City and County of San Francisco—ss.

I, HUGH T. SIME, a Notary Public, in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, and authorized to administer oaths, etc., DO CERTIFY that the witnesses, JOHN P. DUFFY, CHARLES P. LINCOLN, and DANIEL P. EWING, in the foregoing depositions named, were by me sworn to testify the truth, the whole truth, and nothing but the truth in said cause; that said deposition was taken at the time and place mentioned in the annexed notice, to-wit: at the office of HUGH T. SIME, 884 Market Street, in the City and County of San Francisco, State of California, on the 28th day

of September, A. D., 1911, commencing at ten o'clock A. M. of said day at which time and place same was completed; that said depositions were taken in shorthand by May R. Nichols, and were afterwards transcribed by her into longhand typewriting, and after having been so transcribed to longhand typewriting, were by the witnesses carefully read over and corrected by them in such particulars as they desired, and having been so corrected by them, were by them subscribed and sworn to in my presence.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal of office, this 11th day of October, A. D., 1911.

[Seal.]

HUGH T. SIME,

Notary Public in and for the City and County of San Francisco, State of California.

Filed June 4, 1912.

A. M. CANNON,

Clerk U. S. District Court.

*In the Circuit Court of the United States for the
District of Oregon.*

OREGON AND CALIFORNIA RAILROAD
COMPANY, a corporation,

Complainant,

vs.

MARIA DE GRUBISSICH, nee MARIA DE PORTALES,

Defendant.

Stipulation.

IT IS HEREBY STIPULATED by and between

the complainant and defendant above named, by their respective attorneys, that the testimony of J. L. Willcutt, A. L. Black, and any other witnesses complainant may desire to call, and any record testimony or certified copies that complainant may desire to offer, may be taken upon oral interrogatories and may be offered and admitted in evidence by and before Hugh T. Sime, Notary Public, 884 Market Street, San Francisco, California, on Thursday, September 28th, at the hour of ten o'clock A. M. of said day, and that said testimony, when so taken, may be certified and sent to George A. Brodie, examiner appointed to take the evidence in said cause, and the same may be considered in evidence and reported by said George A. Brodie as a part of the testimony taken in said cause, subject to any objections which either party may make or desire to make and have noted at the time said testimony is taken or record evidence is offered before the said Hugh A. Sime, Notary Public, as aforesaid.

Dated September 25th, 1911.

BEN C. DEY, KENNETH L. FERDITT, and
WM. D. FERDITT,

Attorneys for Complainant.

HENRY CONLIN,

Attorney for Defendant.

List of papers sent to J. L. Willcutt March 13th, 1905.

FILED IN BOX NO. 1.

Sime's Exhibit 2

Hugh T Sime.

OREGON & CALIFORNIA RAILROAD

COMPANY:

Pay rolls, September 1870 to November 1880.

Operating Expense Ledger.

Record of pay checks paid.

Petty cash Geo. W. Weidler Cashier, O. & C. R. R. Co.

Ledger 1, Operating Expense, R. Keohler Receiver.

Petty Cash, Southern Extension.

Construction Accounts No. 1, Southern Extension.

Construction Accounts Register, Southern Extension.

Bill Record No. 1, O. & C. R. R. Co. & Ogn. & Trans-continental Co.

Press copy book statements, R. Koehler, Receiver.

1 package vouchers preliminary survey, Willamette R. R. Co.

1 package receipts to P. Schulze for land monies.

Record of Construction, Southern Extension, Ogn & Transt. Co. No. 1.

Operating accounts ledger, Ogn. & Transt. Co.

Reports to U. S. Commission of Railroads, Dec. 31, 1880 to June 30, 1903.

Reports to Interstate Commerce Commission from June 30, 1888 to June 30, 1903.

Reports to Railroad Commissioners for State of Oregon June 1887 to June 30, 1898. For year 1890 missing.

Reports of Government Aided Telegraph Lines to Interstate Commerce Commission 1892 to 1903. Year 1897 missing.

Bill Records O. & C. R. R. Co. Nos. 1 and 2.

Ledger 1871 company not known.

9 stub check books.

1 pkg Memoranda A. G. Cunningham.

FILED IN BOX NO. 1.

BEN HOLLADAY & CO.:

2 Ledgers.

2 Journals

2 Cash Books.

2 boxes vouchers 1868, 1869.

2 packages vouchers.

J. C. COOK & CO.:

1 Ledger.

1 Journal.

1 Day Book.

FILED IN BOX NO. 2.

OREGONIAN RAILROAD COMPANY:

1 Ledger.

1 Journal.

1 Cash Book "A."

Individuals and Companies Ledger.

Detail Ledger Construction, Improvement and Equipment.

Record Audited Vouchers.

Record amounts due from Agents and Conductors.

Journal Construction accounts.

Record Unclaimed wages.

Press copy book, statements Treasurers Office.

Letter press book, Traffic reports.

Letter press book, Treasurer's office.

1 box paid vouchers May to August 1890.

1 box paid vouchers September to December, 1890.

Paid checks and bank deposit book.

Check stubs Nos. 1 to 185.

Check stub Nos. 187 to 271.

Check stubs Nos. 272 to 341.

1 box miscellaneous papers Chas. W. Scott, Receiver.

Reports to Railroad Commissioners, State of Oregon,
Oregonian R. R. Co. & Southern Pacific Co. Lessee
1890 to 1893.

Reports to Interstate Commerce Commission 1890 to
1894.

1 box letters and memoranda.

Book distribution of expenses conducting transporta-
tion.

Book distribution of expenses Maintenance of Way
and General Expense.

Book distribution of expenses Maintenance of cars
and motive power.

FILED IN BOX NO. 2.

CONTRACTING & BUILDING COMPANY:

Cash book.

Journal.

Ledger.

Press copy book, vauchers and pay rolls.

Press Statements Cashier.

Press copy book letters cashier.

Bank deposit book.

Check stubs—1 to 195 and 196 to 325.

FILED IN BOX NO. 3.

PORTLAND & WILLAMETTE RAILWAY CO.:

2 Ledgers.

2 Journals.

- Cash Book "A" and another cash book.
- Bill Record.
- Operating Expense Ledger.
- Voucher Register.
- 2 Voucher records.
- Record of Bills credit.
- Disbursement ledger.
- Agents and Conductors accounts.
- Record over, shorts and damaged freights.
- Audited voucher and pay roll abstract.
- Register Unclaimed wages,, P. 12.
- Ledger balances, Individuals & Companies.
- Press copy book bills and vouchers.
- Press copy books—statements.
- Press copy book bills Nos. 101 to 230.
- Press copy book pay rolls No. 1, July 1890.
- 2 press copy books vouchers B & C.
- Press copy book Treasurers letters.
- Check stubs: 1 to 536—537 to 726—727 to 765.
- Reports to Railroad Commissioners state of Oregon
1889 to 1894.
- Reports to Interstate Commerce Commission, 1889 to
1894.
- 1 pkg. trial balances.
- 1 pkg. paid checks.
- Bank deposit book.
- 1 box paid vouchers Oct. to March 1891.
- 1 Box cash vouchers June to September, 1890.
- 3 pkgs. Journal entry vouchers.
- Record Sellwood co-operative Ferry Co.

1 box Sellwood Co-operative Ferry Co. sundry papers
FILED IN BOX NO. 3.

Ledger, Journal, Cash Book and Voucher Record,
R. Keohler, Receiver.

Press copy book, vouchers R. Koehler, Receiver.

Press copy book cashier for Receiver.

Bank deposit book R. Keohler, Receiver.

Check stubs R. Keohler, Receiver, 1 to 199½, 200 to
521, 522 to 687.

Book distribution of Expense accounts conducting
transportation.

Book distribution of expense Maintenance of Way
& Genl. Expense.

Book distribution of expense Maintenance of cars &
Motive Power.

PORTLAND AND YAMHILL COMPANY:

1 Journal, 1 Ledger.

Package journal entry vouchers.

Statements press copy book.

1 box miscellaneous papers.

Report to Interstate Commerce Commission June 30,
1893 & 4.

NORTH WESTERN CONSTRUCTION COM-
PANY:

1 Ledger.

1 Journal Monthly.

1 Cash Book.

Book pay roll accounts.

Book estimate of work on contracts.

5 packages paid vouchers March 1879 to October

1020 *The Oregon & California Railroad Co.*

1880.

- 3 packages of pay rolls.
- 1 pkg. vouchers rendered Nos. 1 to 204.
- 1 pkg. vouchers rendered Nos. 205 to 246.
- 2 packages miscellaneous statements.
- 2 pkgs. pay roll checks.

FILED IN BOX NO. 3.

WESTERN OREGON RAILROAD COMPANY:

- 1 Ledger.
- 1 Journal.
- 1 Cash Book.
- 1 monthly journal.
- 1 Agents & Conductors cash.
- 1 Journal Construction of depots.
- Payrolls November 1879 to September 1880.
- 1 pkg. checks to September 30, 1880.
- 1 pkg. bills rendered to September 30, 1880.
- 1 pkg. bills paid to September 30, 1889.
- 1 pkg. miscellaneous papers.
- 1 pkg. statements to September 30, 1880.

FILED IN BOX NO. 4.

OREGON CENTRAL RAILROAD COMPANY:

- Pay Rolls October 1871 to August 1879.
- Pay Roll check account.
- Book bill of purchasers 1869.
- Record of Right of Way.
- Memo Book, 1869.
- Book of Receipts.
- Day Book.
- Cash Book Geo. W. Weidler, cashier.

Ledger accounts agents & conductors.

Box vouchers 1868 to 1869 1 pkg. vouchers to March 1870.

2 pkgs. vouchers 1872.

2 boxes vouchers 1873.

1 box vouchers 1874.

2 boxes vouchers 1875.

2 boxes vouchers 1876.

1 box statements 1876.

1 box statements and paid checks 1878.

1 box vouchers, pay rolls and statements Jan. to Sept. 1879.

1 pkg. vouchers Sept. 1879 to Sept. 1880.

Bank deposit book and checks.

2 stub check books.

1 box miscellaneous papers.

1 box letters received.

1 sealed envelope Coupons "A".

1 sealed envelope, Coupons "B".

FILED IN BOX NO. 4.

EUROPEAN & OREGON LAND COMPANY:

Sales Book.

Letter Record.

2 Letter Record No. 2.

1 box Miscellaneous Papers.

Notes—tubs and blank notes.

Tract Book No. 1 to 5.

Plat & Tract Book, Vol 1.

PORTLAND WAREHOUSE & DOCK COMPANY:

Ledger.

Journal.

Monthly Journal.

Petty Cash.

1 pkg. sundry papers.

1 tin box, key lost contents unknown.

FILED IN BOX NO. 5.

OREGON CENTRAL RAILROAD COMPANY OF
SALEM:

4 boxes paid vouchers 1868.

6 boxes paid vouchers 1869.

1 box sundry papers, 1868-1869.

NEW YORK OFFICE RECORDS under Mr. Villard:

2 pkgs. letters sent.

2 pkgs. letters received.

2 pkgs. telegrams received.

6 filing boxes miscellaneous papers, chiefly copies.

BOXES 6 and 7.

Cancelled Oregon Central R. R. Co. bonds of July,
1871.

FILED IN BOX NO. 8.

See Vol. 3 of Minutes, Page 108.

No. 628. Final report of Reorganization Trustees.

Interest Coupons Oregon & California Railroad Com-
pany. Paid Interest Coupons Mortgage of April 15,
1870:

One package of Coupons Series No. 1.

One package of Coupons Series No. 2.

One package of Coupons Series No. 3.

One package of Coupons Series No. 4.

One package of Coupons Series No. 5.

One package of Coupons Series No. 6.

7 Books Register of Bond & Coupons mortgage of April 15, 1870.

Paid Interest Coupons Mortgage of June 1, 1881:

One filing box coupons series No. 1.

do No. 2.

do No. 3.

do No. 4.

do. No. 5.

do. No. 6.

As per lists filed in
each box.

Cancelled Interest Coupons, 2nd Mortgage of May 26, 1883.

One filing box containing coupons No. 1, bonds 1 to 1500.

One book statement of accounts London office.

Voucher book No. 1 London office.

One package containing deferred interest certificates received from the London & San Francisco Bank, London, April 30, 1880, as per list inclosed in package.

Statement of Sinking Fund by Farmers Loan & Trust Co. Trustee of mortgage of June 1, 1881.

FILED IN BOX NO. 8.

Oregon & California Railroad Company 1st Mortgage 7 per cent Bonds of April 15, 1870, paid and surrendered by Hohenemseh & Koehler, Trustees, as follows:

Surrendered in April, 1887.

Bonds of \$100 each:

1024 *The Oregon & California Railroad Co.*

No. 13586, 13646, 15105, 15125, 16287, 16288, 16479, 16480, 16678, 16690, 17278, 17324, 17731, 17837, 17838, 17839, 17840, 18185, 18186, with coupons Nos. 7 to 40 attached.

No. 16035 with coupons Nos. 8 to 40 attached.

No. 17572, 18144, 18187 with coupons Nos. 9 to 40 attached.

No. 18188 with coupons Nos. 6 to 40 attached.

Bonds of \$500 each:

No. 7762, 7789, 8623 with coupons 7 to 40 attached.

No. 8143 with coupons Nos. 10 to 40 attached.

Bonds of \$1000 each:

No. 1418, 1553, 6551 with coupons Nos. 7 to 40 attached.

No. 1759, 4317, 5914, 7423 with coupons Nos. 8 to 40 attached. Surrendered February, 1882.

Bonds of \$100 each:

No. 14695 with coupons Nos. 6 to 40 attached.

No. 14609, 14852, 14854, 14856, 14857, 14858, 14859, 14860, 16217, with coupons Nos. 7 to 40 attached.

No. 14608, 14851, 14853, 16482 with coupons Nos. 8 to 40 attached.

No. 14855 with coupons Nos. 7, 8, 9, 10 & 14 to to 40 attached.

Surrendered April, 1887.

Bonds of \$100 each.

No. 13509, 13642, 13643, 13644, 13645, 13647, 13648, 13649, 13650, 14107, 15979, 15980, 15982, with coupons Nos. 7 to 40 attached.

Bonds of \$500 each:

No. 8704, 9718, 9719, 12819 with coupons Nos. 7 to 40 attached.

No. 9140 with coupons Nos. 9 to 40 attached.

Bonds of \$1000 each:

No. 6634, 6635, 6636, 6637, 6638 with coupons Nos. 7 to 40 att.

FILED IN BOX NO. 8.

Surrendered. Bonds of \$100 each:

No. 16128 with coupons Nos. 7 to 40 attached.

No. 14684 with coupons Nos. 8 to 40 to attached.

Surrendered Bonds of \$100 each:

Nos. 14919, 15848 with coupons Nos. 7 to 40 atached.

OREGON CENTRAL RAILROAD COMPANY:

Oregon Cenrtal R. R. Co. bonds June 1, 1868, Nos. 1 to 300 cancelled.

Oregon Central R. R. Co. bonds June 1, 1868, Nos. 301 to 375 not cancelled nor certified by Trustee.

Oregon Central R. R. Co. 2nd Mortgage bonds Nos. 1 to 300, cancelled (Mutilated and in fragments).

One envelope containing cancelled coupons Nos. 5, 6, 7, 8, same bonds.

OREGON CENTRAL RAILROAD COMPANY:

Cancelled 1st mortgage bonds of April 23, 1867, as follows:

Series A, 2 to 100, \$500 each.

Series A, 1 to 250, 100 each.

Series A, 1 to 300, 1000 each.

Series B, 1 to 400, 1000 each.

Series C, 1 to 400, 1000 each.

Series D, 1 to 400, 1000 each.

1026 *The Oregon & California Railroad Co.*

Series E, 1 to 400, 1000 each.

Series F, 1 to 400, 1000 each.

Cancelled 1st mortgage bonds 7 per cent, 1 to 225.

OREGON WESTERN RAILROAD COMPANY:

1 Ledger.

1 Journal.

FILED IN BOX NO. 8.

WILLAMETTE FALLS & LOCKS COMPANY:

Paid interest coupons as follows:

Due January 1, 1881, Coupon No. 17, Bonds 1 to 200.

Due July 1, 1880, Coupon No. 16, Bonds No. 1 to 200.

Due July 1, 1881, Coupon No. 18, Bonds 1 to 200.

Petty Cash, Oct. 6th.

Letter Book Local Treasurer, June 11, 1888 to Mch. 28, 1889.

Statement of accounts etc., Ben Holladay & Co.

Oregon & California R. R. Co., Jan. 70 to Nov.

Journal O. & C. R. R. Co., Sept. 15 to May.

Journal O. & C. R. R. Co., August 74—June 75.

Day Book O. & C. Dec. 1876 to Jan. 1878.

Journal O. & C. Oct. 1874—Sept. 1877.

2 Books of Circulars.

SIME'S EXHIBIT NO. 3.

HUGH T. SIME,

Notary Public in and for the County of

San Francisco, state of California.

AGREEMENT, made the Twenty ninth day of February in the year One Thousand Eight Hundred and Seventy-Six, between Ben Holladay of Harrison, West-

chester County, New York, party of the first part and Heinrich Hohenzemser of the City of Frankfort on the Main, Prussia, Director of the Deutsche Vereino-bank in the same city, Julius Schmidt, Banker of the City of Frankfort on the Main, Paul Reingaumn, Doctor of Laws and attorney at laws of the City of Frankfort on the Main, Hermann Keohler, Merchant of the City of Frankfort on the Main, Adolph Otto, Doctor of Laws and attorney at laws of the City of Heilbronn, Kingdom

Exhibit "A" of Wirtemberg, Michael Wm. Harney, Notary Public. Benjamin, Banker of the City of Munich, Kingdom of Bavaria, Carl

Staehelin Bucknor of the City of Basle, Switzerland,

Exhibit partner in the house of Messrs. Iselin ("B") and Staehelin and Henry Villard of the

Filed City of Heidelberg, Grand Duchy of Oct. 13th, Baden, bein gowners and possessors of 1877. ten million two hundred and fifty-five

W. B. Gilbert thousand one hundred dollars (\$10,255,- Examiner. 100.) First Mortgage bonds of the Oregon and California Railroad Company, parties of the second part.

Witnessenth, In consideration of the mutual covenants and agreements hereinafter expressed the said parties have agreed and do hereby mutually agree as follows:

First, The said Holladay, sells and transfers and agrees to sell and transfer to said parties of the second part or to such persons as they may designate nineteen millions of the stock of the Oregon and California Rail-

road Company being all of the lawful issued stock of the same company, excepting only one million now held by M. S. Latham.

Second, The said Holladay in like manner sells and transfers and agrees to sell and transfer to said parties of the second part, or to such persons as they may designate a majority of the stock of the Oregon Central Railroad Company, viz: over twenty-five thousand shares thereof, the remainder being held by M. S. Latham and others.

Third, The said Holladay in like manner sells and transfers and agrees to sell and transfer to said parties of the second part or to such persons as they may designate, all of the stock of the Oregon Steamship Company, the same now standing in the name of M. S. Latham &, at the option of said parties of the second part or such persons as they may designate, the said Holladay agrees to guaranty and to fulfil said guaranty and he hereby guarantees that the benefits arising from the now existing contract or contracts for the carriage of the mails between Portland and Sitka the remainder of the time of said contract shall accrue to the Oregon Steamship Company if it elects to continue said service for the remainder of said contract term.

Fourth, The said Holladay in like manner sells & transfers and agrees to sell and transfer to said parties of the second part or to such persons as they may designate all of the stock of the Portland Warehouse and Dock Company, viz, five hundred thousand dollars and the said Holladay covenants that the title of said com-

pany to its real estate is perfect and free from liens or incumbrances, and that said company is free from floating debt and other debts, except as to a mortgage on its real estate of thirty-five thousand dollars or thereabouts which mortgage said Holladay agrees to pay and cancel out of the first moneys to be paid to him by said parties of the second part or such persons as they may designate as is hereinafter agreed. The net earnings of said last named Company up to the date of this agreement are not to belong to said parties of the second part.

Fifth, And the said Holladay agrees that any existing contracts between the Oregon and California Railroad Company, the Oregon Steamship Company and the Oregon Central Railroad Company, or either of them with the Oregon Transfer Company, shall be modified previous to the execution of this contract, by a new agreement between the proper parties to the reasonable satisfaction of the parties of the second part to these presents or of such persons as they may designate.

Sixth, The said Holladay agrees to furnish to said parties of the second part, or to such persons as they may designate on the execution hereof a full release by the North Pacific Transportation Company of all its claims, both upon the Oregon and California Railroad Company and the Oregon Central Railroad Company. That against the last named Company, being in amount about ninety thousand dollars, and until said claims are in some manner satisfactorily released the parties of the second part may retain an amount of said bonds, part of the three hundred thousand dollars herein agreed to be paid to said Holladay equal to the amount

of said claims.

Seventh, The said Holladay agrees to pay on the the execution hereof to the Oregon and California Railroad Company the amount due to it by the Portland Street Railroad Company for certain iron, being five thousand one hundred and three dollars and sixty eight cents. And said Holladay further agrees to pay on the execution hereof all other sums for which he is liable to any of the companies hereinbefore named amounting to two thousand enight hundred dollars, or thereabouts, and in some valid and effectual manner to release and waive previous to the execution hereof all claims for salary as president of the Oregon Steamship Company, and to cause the entries to his credit on this account on the books of said company to be effectually cancelled, and discharged in accordance herewith.

And said Holladay also agrees previous to the execution hereof, to waive and release his claim to additional compensation as President of the Oregon Central Railroad Company made since December twenty-first, 1875, and cause the entries to his credit on this account on the books of said company to be effectually cancelled and discharged in accordance herewith.

And said Holladay likewise agrees on the execution hereof to pay the sum of three hundred dollars towards the costs of investigating the title of the Portland Warehouse and Dock Company, to the real property sold herein. All the moneys the payment of which is herein stipulated by said Holladay shall be deducted from the first cash payment her^ein named for the properties of the Portland Warehouse and Dock Company.

Eight. And the said Holladay further covenants and agrees with the said parties of the second part, that the books of account of the Oregon and California Railroad Company, and the Oregon Central Railroad Company, are to the best of his knowledge, full, accurate, and true, and that the trial balance and monthly statement of January 1876 are as he believes full, accurate and true, and that there are no other legal and valid claims against either of said Railroad Companies of which he has any knowledge or notice, excepting only sundry small claims for rights of way, and certain claims of Hallett and Elliott which have been made known to the parties of the second part and that there are no contracts with or for salaried officers or other officers, except for the ordinary services and salaries of the current year, and that there are no contracts which do not expire at the end of each fiscal year, and which have not been made known to the parties of the second part.

And the said Holladay further covenants and agrees with the parties of the second part that the books of account of the Oregon Steamship Company, so far as he knows and believe are accurate and full and that there are no debts or claim due by said company so far as he, said Holladay knows and believes which are not fully known to M. S. Latham, and the only debts which he the said Holladay has any knowledge or information apart from the current money bills, and repairs, and the debts of the European creditors represented by said Latham is what may be due for current salaries, supplies and pay rolls. And said Holladay further covenants and agrees, for himself, his heirs and legal representatives

that he will on demand either convey to the Oregon and California Railroad Company, to the Oregon Central Railroad Company, to the Oregon Steamship Company, and to the Portland Warehouse and Dock Company, or to any of them or else, as the case may be, will take all necessary legal proceedings in conjunction with said Companies or any of them for the purpose of compelling the transfer to said Companies or any of them of any real estate or other property or rights which equitably belong to said companies or any of them (if any such property or rights there be) but which may now be held by or stand in the name of said Holladay, or any other person or persons or corporations in trust having been purchased for said corporations or conveyed to him for their use.

Ninth. And the said Holladay further covenants that, he will obtain and cause to be delivered to the Oregon and California Railroad Company, a good and sufficient deed with covenants of warranty against the acts of the grantor from one James G. Hughes to the said Railroad Company, for certain property at Junction City, and Drain Stations, and Oregon City, being all the property at said places standing in the name or under the control of said Hughes, which has heretofore been a subject of controversy between the parties to this agreement or will take such proceedings as may be necessary to secure such title.

And also that he will obtain and cause to be delivered a good and sufficient deed with full covenants of warranty from the Willamette Real Estate Company, in ac-

cordance with an existing contract for the said conveyance.

And also that he will cause to be executed and delivered to the Oregon Central Railroad Company a good and sufficient deed with full covenants of warranty, by the Portland Warehouse and Dock Company, of the depot property sold by it to said Railroad Company.

And said Holladay further agrees to execute or cause to be executed all further or other instruments or assurances which may be necessary or proper to perfect the title to any of said parcels of real estate.

Tenth. And said Holladay covenants that to the best of his knowledge and belief the Company has settled and conformed and paid all claims of one Hallett against the Oregon and California Railroad Company and that he has no valid claims against the said Company, and that in like manner all claims of said Elliott, or of Elliott and one Nightingale are invalid, and said Holladay agrees without charge to furnish the said parties of the second part for the use and benefit of the Oregon and California Railroad Company when required every assistance in his power to defend and defeat all of said claims. And said Holladay also agrees to furnish copies of all agreements of one Gaston made at the time of the compromise of his claims against the said Oregon Central Railroad Company, if the same are not already on file in the Company's office, and further said Holladay agrees on demand to give to the parties of the the second part his resignation as President of the Company herein referred to, and also to procure the res-

ignation of the Vice-presidents and Secretaries of said companies excepting only the Secretary of the Oregon and California Railroad Company, and the Secretary of the Oregon Steamship Company, which last he will obtain if possible.

Eleventh. And the said Holladay covenants and agrees not to engage directly or indirectly, whether as part owner of a vessel, or in any other way whatsoever, in any trade or business which can or shall be in conflict with the business or interests of the Oregon and California, and the Oregon Central Railroad, and the Oregon Steamship Companies, and not to erect any docks or warehouses which might come into competition with and effect injuriously the business of the Portland Warehouse and Dock Company. And the said Holladay at the time of execution hereof shall enter into a personal bond in the sum of one hundred thousand dollars in gold coin for the faithful performance of this covenant. Said covenant shall continue in full force for the term of ten years from the date hereof. But this covenant is not to be construed so as to affect the full use and enjoyment of the present charter of the steamship "California," which said parties of the second part agree shall be confirmed in its present tenor for the full unexpired term thereof, provided the same was made with the knowledge and consent of M. S. Latham for the European creditors of the Oregon Steamship Company nor shall said covenant affect the use in any trade or business not directly in conflict for the time being with the business of the Oregon Steamship Company of the

ship "Idaho" in which vessel Holladay is a part owner. But except as aforesaid this general covenant shall apply to both the "California" and "Idaho" so long as Ben Holladay retains any interest therein as owner or otherwise.

And the said parties of the second part in consideration of the premises, and of the foregoing covenants to be kept and performed by said Holladay in behalf and as the agents and representatives of bondholders of the Oregon and California Railroad Company, to the extent that they represent the said bonds as aforesaid covenant and agree with the said Holladay and with his legal representatives as follows.

Twelfth. That all of said stocks referred to in Article first and second of this agreement may be forthwith placed in the hands of the Bank of the State of New York of the City of New York as a trustee to be held by it until the delivery of the three hundred thousand dollars of bonds hereinafter more specifically referred to, whereupon the same are to be duly delivered to said parties of the second part or to such persons as they may designate. And until this surrender it is agreed between the parties to these presents that said parties of the second part, or such persons as they may designate shall have the power to vote by proxy upon all said stocks.

Thirteenth. That simultaneously with such deposit the said parties of the second part shall pay to said Ben Holladay the sum of two hundred thousand dollars (\$200,000) in gold coin of the United States less the

amount due under the mortgage on the property of the Portland Warehouse and Dock Company hereinbefore mentioned and less the payments stipulated in Article seven of this agreement and within one year thereafter the said parties of the second part, will make to said Holladay or to his assigns a further payment in like gold coin of the sum of fifty thousand dollars (\$50,000) with interest at six per cent per annum if the said Holladay shall have faithfully and strictly complied with his covenants and agreements hereinbefore expressed.

Fourteenth. And further the said parties of the second part covenant that they will within a reasonable time after the execution hereof cause to be created executed and delivered to the said Holladay or to his assigns three hundred bonds of one thousand dollars each payable in thirty years after their date (to-wit March 1876) bearing seven per cent interest payable semi-annually, principal and interest to be payable in gold, such bonds to be created and issued by the Oregon Central Railroad Company under the corporate seal of said company and to bear coupons as usual. The form and manner of the original creation and issue of said bonds to be agreed upon between the respective counsel of said Company, and the counsel of the parties hereto. The said bonds shall be secured by a mortgage of said road and in case the said parties of the second part shall hereafter secure the control of the existing bonds of the Oregon Central Railroad Company, said bonds shall be retired and cancelled, and the mortgage securing them be extinguished. But in case of such retirement, or can-

cellation of the present mortgage bonds of the Oregon Central Railroad Company said Company may create a new mortgage for a sum not exceeding seventy thousand dollars a mile, of which the aforementioned three hundred thousand dollars of bonds shall be part, upon the completed road to Junction City.

These bonds shall be issued only pro-rata as said railroad is completed, and the interest on the above named three hundred thousand dollars of bonds shall be apt legal instruments to be devised by counsel be secured by the pledge of the net earnings of the Oregon and California Railroad so far as the said parties of the second part have the right to receive or control the same as representatives of the bondholders as aforesaid, so that they shall be first applied to the payment of seven per cent interest on such three hundred thousand dollars (\$300,000) of bonds of the Oregon Central Railroad Company, before any interest is paid on any of the existing bonds of the Oregon and California Railroad Company, owned or controlled by said parties of the second part. But the rights of Salzbach Brothers are hereby expressly saved as the same are named under a certain assignment and pledge of the interest coming to the bondholders represented by the parties of the second part to scure the repayment of two hundred and fifty thousand dollars in sums not exceeding forty thousand dollars per annum.

But neither the Oregon and California Railroad Company nor the said parties of the second part shall in any wise liable directly or indirectly for the payment of the

principal of said three hundred thousand dollars of bonds nor for the payment of interest otherwise than as aforesaid.

And the said parties of the second part further covenant that in case of an arrangement by which the railroads controlled by the stocks now purchased from said Holladay or either of them shall be consolidated with any other railroad or railroads, or shall be sold to any other railroad or corporation and upon any such sale or reorganization or combination, new bonds of any kind shall be issued and paid for the road or roads now controlled under this agreement by said parties of the second part, that then and in any such case an equal number of such new bonds, or an amount, the annual interest upon which shall be equal to the interest payable to said Holladay upon the three hundred thousand dollars of bonds above referred to shall be offered to said Holladay or his assigns in exchange for the three hundred thousand dollars of new bonds hereinabove agreed to be created and paid to him, and in case such new bonds shall be equal in value to the bonds of the Central Pacific Railroad Company, or shall be guaranteed by the Central Pacific Railroad Company, or other corporations of equal financial standing, then said Holladay for himself and his assigns agrees to accept the same in exchange for the said three hundred thousand dollars of bonds.

This covenant on said Holladay's part to expire in six years from the date hereof.

And as to the rights and powers of the parties of the

second part, and those whom they represent over the net earnings of the Oregon and California Railroad Company it is now expressly stated that they represent the portion of said earnings belonging and coming to such of the holders of the first mortgage bonds of the Oregon and California Railroad Company as are represented by the parties of the second part.

Fifteenth. And the said parties of the second part further agree with said Holladay that upon the strict fulfillment of the several covenants hereinbefore expressed, and upon the condition that the financial condition of the said several companies herein named is found to correspond with the statements and accounts rendered up to the execution of this agreement in so far as he is personally responsible for the same, he the said Holladay and his associates as officers and agents whose shares in the several companies aforementioned are hereby sold, and also all other holders of stock in the several companies aforementioned whose shares are hereby sold, and the said Holladay individually shall be formally and legally discharged and released by the various companies against all accounts, agreements, guarantees, and demands incurred by them in their respective capacities to this date as far as such acts, accounts, agreement, guarantees, and demands are shown and proved by the books and public statement of the several companies herein named, and for which Holladay is liable to either of said companies, it being the intention of the parties hereto by this sale to settle and end all previous transactions between the parties afore-

said and said companies respectively including those which have hereto been disputed by said parties of the second part or of which they have had actual or constructive notice.

And also that said Holladay shall be protected from and indemnified against all liability under the contract made between said Holladay and said parties of the second part of July 1874 by means of a covenant not to sue, or other instrument sufficient to secure him from all liability thereunder, without in any manner releasing or discharging any other party.

But such instrument shall not affect the respective rights or liabilities of the said Holladay and Messieurs Salzbach Brothers under said agreement in respect of a claim made by the latter for a payment on account of interest of fifty thousand dollars or thereabouts.

Sixteenth. And said Holladay agrees in case the issue of the pending suits of one Elliott and of said Elliott and Nightingale, shall in any way injuriously affect the rights of the bondholders of the Oregon and California Railroad Company, that he the said Holladay will indemnify them for any loss or damage that they may suffer in consequence thereof.

And said Holladay further covenants that he has full right and lawful power to make and agree to make all the transfers, conveyances, and assurances hereinabove agreed upon and that he will on demand execute and secure to be executed, all further necessary transfers and assurances in order more fully to carry out the purposes of these presents, the intention of the parties hereto, being to secure to the said parties of the second part

through the transfer of the railroad stocks and the other stocks above mentioned, the substantial and absolute control of both of said corporations and their properties.

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals, the year and day first above written.

In present of

W. L. Halsey

Ben Holladay (SEAL)

S. O. Putnam

Heinrich Hohenemser

By Henry Villard, his
Attorney in fact. (SEAL)

Julius Schmidt.

S. O. Putnam

By Henry Villard, his
Attorney in fact (SEAL)

Paul Reinganum

S. O. Putnam

By Henry Villard, his
Attorney in fact (SEAL)

Hermann Koehler

S. O. Putnam

By Henry Villard, (SEAL)
his Attoreny in fact.

Adolph Otto

S. O. Putnam

By Henry Villard, (SEAL)
his Attorney in fact. (SEAL)

Michael Benjamin

S. O. Putnam

By Henry Villard, (SEAL)
his Attorney in fact.

Carl Staehelin Buchnor,

S. O. Putnam

By Henry Villard, (SEAL)
his Attorney in fact.

S. O. Putnam

Henry Villard (SEAL)

UNITED STATES OF AMERICA

STATE OF CALIFORNIA,

City and County of San Francisco—ss.

I, James L. King, a Notary Public in and for said City and County, residing therein, duly commissioned and sworn, do certify that on this eleventh day of September, A. D. one thousand eight hundred and seventy-seven, I carefully compared the foregoing copy of an agreement of Ben Holladay with Heinrich Hohenemser and others and their signatures thereto, with the original thereof, now in the possession of the London and San Francisco Bank (Limited), of San Francisco, California, and that the same is a full true and correct transcript therefrom and the whole of said original agreement.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, State of California, this eleventh day of September, A. D. 1877.

JAMES L. KING

(SEAL)

Notary Public

DEPOSITION OF HENRY VILLARD.

Sworn.

(Mr. GOULD.)

Q. When did you first go to Oregon, at what houses did you stop, and how long did you remain?

A. In the latter part of July, 1874.

Q. At what house did you stop?

A. At Holladay's house.

Q. You remained there how long?

A. One week I believe.

Q. How many times were you in Oregon, and how long did you remain each time?

A. I have been there twice, the second time last Spring, in the Spring of 1876. I remained about 2 months—yes—two months.

Q. Do you know Frederick Rodewell?

A. Yes, sir.

Q. Do you know when he visited Oregon?

A. No, sir, I do not. He has not visited since I came out here the first time, I don't believe he has, I don't know anything about his movements out there. I didn't become acquainted with him personally until I think the fall of 1875, and I don't believe he has been in the U. S. since.

Q. When did you first become acquainted with Ben Holladay?

A. I first became acquainted with him in April, 1874

Q. In connection with what affairs?

A. In connection with the interest of the bondholders of Oregon & California R. R. Co.

Q. Prior to your first going to Oregon did you meet Governor Stanford and his counsel Mr. Wilson? Did you have any conversation with him in regard to the Oregon R. R.?

A. No, sir—wait a moment—I had a conversation with Mr. Wilson but I don't know which Mr. Wilson you mean.

Q. Mr. Samuel Wilson.

A. Oh yes, he has an office just below the London

& San Francisco bank. I had a conversation with him, but I don't remember whether it was in reference to the California Pacific affair with which I had something to do at the time, or with reference to the Oregon & California R. R. Co. I don't remember. I don't believe I talked with Governor Stanford at all about the Oregon road at the time. I met Governor Stanford very frequently.

Q. On a visit to Mount Diablo?

A. No, I have never been to Mount Diablo in my life.

Q. I thought you had some party up there?

A. No, I spoke to Mr. Wilson on the subject of the California Pacific matters alone. I went to see him because the year before I came out, there was a delegation of German bond holders and they had employed him as counsel.

Q. Whom? Mr. Wilson?

A. Mr. Wilson—employed him as counsel and I naturally went to him—knowing his name before I left Germany. I am not quite sure—let me see now—I did see him in reference to the Oregon & California R. R. matters but it was simply in connection with the proposed dissolution of the European & Oregon land company. I believe that is the official title of it. There was a land company and he was counsel of that company. I had so many things at that time to look after and it is more than 3 years since it occurred so I didn't remember the circumstances at once. We wanted to get back control of the land. The lands were sold conditionally to the company and locked up. The Company was dis-

solved and could not sell the lands. Yet they had the right to sell it. Nobody else could sell it while they had that right. So I wanted the lands reconveyed.

Q. You are familiar with the assignment of the Oregon Central franchise to the Oregon California R. R. Co., are you not?

A. No, sir. You mean the old Oregon Central? No, sir. I have historical knowledge of it, that is, in connection with this case but that was anterior to my connection, 5 years I believe before I became connected with the matter & I have very little knowledge of what has occurred prior to my connection with it. I have always made it my object to confine myself to what was expected of me—to do certain things that I was expected to do as attorney of the bondholders.

A compromise was made in 1874 between the bondholders & the Oregon & California Co., therefore I made no effort to look into the history. When I came out I was on a mission of peace & of compromise, therefore I didn't look into what had been done previously to my coming.

Q. Prior to going to Oregon, did you ever meet Judge Deady?

A. I think I did. I met Judge Deady on Ralston's place. We spent a Sunday there together.

Q. And conversed with him about the railroad?

A. I have no recollection that I did, but I suppose I did.

Q. You know Mr. Theilson of Oregon?

A. Yes, sir, he is director of the O. & C. Co. and

was formerly Chief Engineer; I believe he constructed the road.

Q. Did Mr. Theilson furnish you with any statement of the cost of 200 miles of railroad constructed by Mr. Holladay commencing at Portland & terminating at Roseburgh?

A. Yes, sir.

Q. What was the amount?

A. Let me remark this: That statement was furnished to me when I was in Oregon last spring a year ago and I published it in the papers at the time. I had a particular object in doing so.

Q. You don't remember the amount?

A. No, sir, I could not tell.

Q. You could not approximate?

A. I believe it was 4, 5, or 6 millions of dollars, I could not tell at this moment at all. I got the statement of Mr. Theilson to meet a charge that the road cost only two millions of dollars. I got Theilson's statement as Chief Engineer and it was published in the "Oregonian." I did not keep a copy of it.

Q. Have you seen the printed deposition of Holladay and Latham taken in the suit of Elliott vs. Holladay?

A. I read it over once in 1874. I have not read it since.

Q. You are a member of the legal profession are you not?

A. No, sir.

Q. You were once?

A. No, sir, I read law but I am not a member of the profession. I studied law in Germany and I read law here for a year but I never practiced law.

Q. Have you had any negotiations with the Central Pacific R. R. Co. in relation to the sale of the Oregon & California R. R. to that company?

A. I have. I had some years ago. In the winter previous to my last visit to this coast. I had a number of conversations with Mr. Huntington in New York.

Q. What was the condition of the negotiation?

A. Mr. Huntington went up to Oregon himself last summer a year ago to look at the road and he came back very much indisposed to make a bargain. There is no negotiation on foot now. I have not talked for a year and a quarter with Mr. Huntington or any of the people here. We made surveys and we both found it cost too much to connect our roads with theirs. That was the end of the negotiation. There has not a word passed for a year and a quarter.

Q. You have taken possession of the Oregon and Cal. R. R. and Steamship Co.—the property have you? Your principals.

A. Well I don't know what to understand by taking possession.

Q. Well explain your own ideas.

A. I am president of both companies now. I am President of both Companies and therefore have control.

Q. In whose name does the property stand at present, road and vessels, etc.?

A. The stock you mean? In whose name the stock stands?

Q. Yes, that which was transferred by Mr. Holladay to the Company of which you are President. In whose name does it stand at present. Take for example the steamship?

A. I don't believe that I need to answer that question. Steamships are not in the suit at all. There is certainly no suit about them.

Mr. BRETHERTON: You need not answer the question but there is nothing we need conceal.

Mr. GOULD: We are after the whole property.

A. This was never in the partnership, the steamships. I have before my mind a number of distinct transactions, you know, separate from each other. The transaction for instance between Holladay and the Oregon & California bondholders.

Mr. BRETHERTON: Just state the names of the corporations and the owners of the stock.

A. The stock is held in trust for the benefit of parties in Europe.

Q. In both companies?

A. Yes, sir, in trust.

Q. Who are on the book of stockholders?

A. I could tell you without referring to Mr. Richard Koehler who came out with me in 1874 and located in Oregon as the agent of the bondholders. He holds a power of the bondholders under me and we have divided the stock between us as trustees, but exactly how it was divided, what number of share each has, I could not tell at this moment. There are no other stockhold-

ers in the O. & C. R. R. except myself and he holding in trust for all the Germans who are bond holders represented by the Frankfort committee and five other gentlemen holding one share each. I cannot approximate the number of these Germans.

The statement I made is in reference to the Oregon & Cal. R. R. Co. Now I come to the Steamship stock. It stands in the name—that is the bulk of it stands in the name of Milton S. Latham himself trustee.

Q. Trustee of the gentlemen in Germany?

A. Trustee for the syndicate consisting of a number of large banks and banking firms, they owning the properties.

Q. Do you remember who they are?

A. The London & San Francisco Bank, German Bank of London, London Banking Association, Middle German Credit Bank at Frankfort, Bishoffsheirn & Goldschmidt of London & Salzbach Bros. of Frankfort.

I could not tell them all because those interests are being transferred all the time.

Q. They are floating?

A. Yes, sir. I knew at the time I took charge what they were, they are all held in large blocks, say a hundred thousand dollars each.

Q. In whose name are the vessels registered?

A. In the name of the Oregon Steamship Company.

Q. The Railroad Company?

A. No, the Steamship Co.

Mr. BRETHERTON: Q. You have 6 vessels?

A. Yes, we have 6 vessels, the City of Chester, the

Ajax, the John L. Stevens, the Oriflamme, the George W. Elder, & the Gussy Telfar. The George W. Elder and the City of Chester have been purchased since Holladay's connection with the company ceased.

Mr. GOULD: Q. This stock is all held in Europe?

A. Well, yes, except a little stock which is held in Oregon—very little.

Q. Have you any copy of the assignment from the Oregon & California R. R. Co., the assignment by Holladay to the Company?

A. I have copies of the contracts with Holladay which I will furnish.

Q. Have you filed them, are they public?

A. You mean the last transaction with Holladay?

Q. We would like to have a copy of that.

A. We have them printed in German, not in English. This being a public matter, we had to call a meeting of the bondholders and submit the final transactions with Holladay to them and of course they were published in all the German papers there. I have no hesitation to furnish it but I have no copy in English. The original is in English.

Mr. BRETHERTON: Q. You translated it from English into German?

A. I did not do it. They did it in Germany.

(The following question is read over again by the Reporter: Q. Have you any copy of the assignment from the Oregon and Cal. R. R. Co., the assignment by Holladay to the Company?)

A. I will furnish copies.

Copy furnished marked Exhibit "A".

Mr. GOULD:

Q. The arrangement was to pool the earnings of the two companies?

A. No, sir.

Q. Can you give me the approximate net earnings of the two companies per annum?

A. (After referring to memorandum) What year?

Q. How many years have you had them?

A. We have had it since 1876.

Q. That would be one year and a half then? When do you end your year?

A. The first of March. The earnings of the Oregon & California R. R. Co. for the last six months were—the net earnings \$64,000.

Q. Of the two companies?

A. No, sir, the net earnings of the Oregon & California R. R. Co. for the last 6 months from now. During the previous year they were \$195,000 net.

Q. For the two?

A. For the Railroad. I give only the Railroad earnings now, nothing of the steamers. The net earnings of the Steamship Co. in the Calendar year of 1876 were \$161,000.

Q. Did you in Europe have any conversation with any gentleman, concerning Holladay's bad management of these properties?

A. Well, that I must call for explanation because you see there were about 6000 bondholders.

Q. I mean anybody, any person?

A. Certainly, a great many.

Q. Concerning his bad management?

A. Yes, hundreds and hundreds I made speeches at the bondholders' meetings.

Q. Speeches to what effect?

A. About his bad management.

Q. Enforcing what view?

A. Enforcing the view that it had been very badly managed.

Q. Were there any steps taken, did you suggest any steps to be taken in reference to his conduct?

A. No, sir, the argument made was this: that Holladay was a very bad man, and being a very bad man and having mixed up the affairs of the company he could hurt us a great deal if we went to law against him. I advised a compromise to get rid of him peacefully and avoid the litigation during which the earnings of the Company would have been lost to the bondholders or might have been lost.

Q. You refer to the compromise which resulted in the acquisition of the stock?

A. Under the first compromise Holladay had an agreement to contribute \$50,000 a year if necessary, to supplement the interest to 2 1-2 per cent.

Q. When you became stockholders—you relieved Holladay from all liability?

A. I believe we did as a stockholder, that is only as far as we are concerned. That appears in the contract.

Q. Relieved them from all liability to anybody?

A. As far as we had a claim against him as bond-

holders, the stock not having been paid up.

Q. Can you describe the property that Holladay turned over to the two companies?

A. The turning over was by the transfer of the stock.

Q. It was all in stock?

A. There were no deeds passed or any thing of the kind, simply the stock.

Q. From both corporations?

A. Of four corporations: the Oregon Central R. R. the Oregon & California R. R., the Oregon Steamship Co., and the Portland Warehouse and Dock Company.

Q. No transfer of any property itself?

A. No, sir.

Q. What was the whole amount paid?

A. To Holladay?

Q. Yes.

A. For the stock.

Q. Yes, everything.

A. For the railroad stocks we paid him \$300,000 in bonds. For the property of the Portland Warehouse & Dock Co. we paid \$250,000, but that was his private property.

Q. Does that cover the whole price?

A. Yes, sir, that is all stated in the contract, that appears in the contract, the whole of it. You will get the whole story there.

Q. In negotiating with Holladay, you were in New York I think at the time.

A. In reference to which? You know there were two contracts.

Q. Either or both.

A. Yes, I was in New York.

Q. What gentleman participated in with you in the negotiation or the conversation that led to the negotiation?

A. Nobody.

Q. Mr. Huntington or any of those?

A. No, sir, nobody. On our side I was the only one that conducted the negotiation. Mr. Holladay always had one or two persons, Mr. Barlow, who was his counsel & Mr. Halsey.

Q. You are negotiating now to sell the road to the Central Pacific Railroad Company?

A. No, sir. As I said before not a word has been passed for a year and a half between us and we don't propose and we don't want to sell it.

Q. It is a good road. What was the lowest the bonds of the Oregon & California R. R. Co. sold for in Germany?

A. That I could not tell because I had absolutely nothing to do with the whole thing until January 1874 and I had nothing to do with the negotiation of the bonds and I could not tell but I believe—my memory may deceive me—but the lowest I should think was 72. I was called in as an expert by these banks. I first went in when Mr. Norris came to Frankfort.

Q. Do you know about how many are outstanding in the hands of the original holders?

A. I have no idea; nobody can tell because the bonds are all deposited in a bank and certificates of deposit

given and the certificates pass from hand to hand. The bonds are dealt in upon 5 different bourses in Europe.

Q. Where is your power of attorney recorded?

A. It should be recorded in Portland, I believe.

Q. You have a copy of it?

A. I don't believe I have one here. I am constituted attorney in fact for all the bond holders.

The bonds are not in my custody but I represent them.

Q. Well, I want the names of the bond holders.

A. I could not give you the names.

Mr. BRETHERTON: Have you a power of attorney from the actual holders of the bonds in Europe?

A. Yes, sir.

Q. Mr. Gould wants to know what names are affixed to that?

A. The names affixed to that are the names of the Frankfort Committee and myself.

Q. How many in all?

A. There are seven.

Mr. GOULD: Q. Recite those if you please and save us the trouble to get that power of attorney.

A. Heinrich Hohenmesir, Philip B. Bonn, Paul Reingamun, Herman Koehler, Adolph Otto, Michael Benjamin, Dr. Gustav Krans and Henry Villard.

Q. What do they call themselves?

A. The Committee of the First Mortgage Bond Holders of the Oregon & Cal. R. R. Co. of these gentlemen I don't believe there are more than two in the 8 that have bonds that is that own bonds originally.

Q. Who do own the bonds?

A. That is impossible to tell. There are 5000 or 7000 bondholders and we never know, because the only contract with the bondholders is when they collect their dividends. The bonds are simply deposited and certificates are issued to bearer and they pass from hand to hand.

Q. There is a house of Messrs. Salzbach that has a large number?

A. Yes, sir.

Q. How many did they have?

A. I could not tell how many they hold—they were the house that bought the bonds. They held a large quantity when the default came.

Q. What did they sell for first?

A. 70 or 72.

Q. Was it not more than that?

A. I could not swear to it. I only know, as I said before, from what I have been told. I came in 3 years after the issue was made, the first issue & 2 years after the second issue of bonds was made in Germany.

Q. You have a large interest in these 2 corporations?

A. Myself? No, sir, I am a large bondholder, but I have only a small interest in the Steamship Company. The fact is that all the parties in interest are my business friends and I want to see them out as far as I can.

Q. The Secretary of the Oregon & California R. R. Co. furnished you a statement of the cost of the road from the books?

A. Not to me—He furnished it to the gentlemen that

came out a year before me to look into the affairs of the road. I believe that statement was published in their printed report. Yes I am quite sure it was, but the statement was not furnished to me.

Q. You have no copy of it?

A. I have a German copy of it. It was printed in Germany.

Q. Mr. Cunningham is still in the Office?

A. Yes, sir, he is still the Secretary.

Q. Did you make an examination of Mr. Cunningham's accounts to see if they were correct?

A. Yes, sir, I had one made through Mr. Koehler.

Q. Did you find out it was false?

A. No, sir. I should not have left him in the office if I had.

Q. Was there not some trouble about it? Some question?

A. No, sir. There was only this question: I reproached Mr. Cunningham as an officer of the company for giving his official assent to some acts of Holladay, which were against the interest of the company. He was bound to protect the interest of the Company and I reproached him for doing blindly the will of Holladay.

Q. Did he record in the books under his control a history of these transactions that was not true?

A. No, sir. I wish to say of the gentlemen from Frankfort heretofore alluded to that one was a banker & very experienced bookkeeper who went over the accounts of the Company thoroughly & he reported in the

documents heretofore mentioned that the accounts of the company were correct with the exception of some real estate transactions of Holladay. Of course the conclusions of this expert had weight with me in coming to a decision as regards Mr. Cunningham.

Q. What was the thing complained of. What had Holladay done as to the parties in interest, which Mr. Cunningham acquiesced in?

A. He bought a lot say for 500 or 1000 dollars, and then sold it to the company for 5 or 10,000 dollars and Mr. Cunningham made the entry.

Q. Didn't you report that Mr. Cunningham was conscious it was a false entry?

A. Mr. Cunningham knew it at the time. It was, in form, perfectly legal. The view I took was that Mr. Cunningham should have resisted it. He got no benefit of it himself.

Q. Was there more than one of those transactions?

A. There were several transfers of real estate.

Mr. BRETHERTON:

Q. You don't know anything about these things except what you have been told?

A. No, sir. I never investigated these things officially. I came out to carry out a compromise made with Mr. Norris. I was not charged with inquiring into past transactions. that was done by the gentlemen that came out a year before me. They enquired and reported and recommended a compromise. I came out here to make a definite contract with the railroad company on the basis of a preliminary compromise agreed upon at

Frankfort, between Mr. Wm. Norris the agent of Holladay, and the committee of bondholders.

When I took possession of the property and became President, the question arose in my mind, whether Mr. Cunningham ought to continue Secretary, on duly inquiring into the fact I found that Mr. Cunningham thought it was his duty to obey all Holladay's orders as President. I don't think Mr. Cunningham was benefited. He is not rich now. He might have made himself rich if he had been dishonest. I think it was simply from the mistaken idea that he had to obey the orders of Holladay and I allowed him to continue as officer of the company.

Q. The employees under Holladay are still continued?

A. Some of them, not all, most of them. The supreme control of the railroad is exercised by Mr. Koehler, who is resident agent of the bondholders and sent out for that purpose. He has been there for 3 years and there is a very strict supervision exercised since the first compromise was entered into. This gentleman Mr. Koehler was made auditor, and without his signature no expenditure could be made, not a dollar can be expended for account of the company, without his signature and without his approving of it.

Q. Have you taken any steps in reference to attempting to recover any sum of money from Mr. Latham in reference to the sale of Oregon & California R. R. bonds?

A. No, sir.

Q. You have instituted no proceedings of any kind

against him?

A. No, sir. I never was asked to institute any proceedings by any one and I know of no fact that would warrant such a proceeding.

Q. What are the names of the first committee that acted for the bondholders in Germany?

A. The majority are the same that are there now. There have been some changes in consequence of death and resignation but the majority are still the same.

Q. Do you know whether or not prior to the purchase by Messrs. Salzbach, the persons of whom they purchased, entered proceedings against Holladay and others.

A. There were a few parties in Germany that wrote very threatening letters to Salzbach, and I believe the Committee got one or two letters from dissatisfied bondholders. I cannot tell you the exact number of bonds that voted for the compromise and those that voted against it. I can't give you the figures but I have a very distinct recollection that the opposition did not represent more than 2 per cent.

Q. You don't know that the house of Salzbach bought a large number of bonds at a very low figure after this discontent was made manifest?

A. No, sir. I don't know anything of the kind. Messrs. Salzbach have relieved a great many bondholders of their bonds that came to them—poor people—and some blackmailers that wrote these threatening letters. They spent a large amount of money and relieved cases of distress and prevented trouble by buying the bonds

of these blackmailers. Of all the bonds, 10,950,000 of bonds issued, 10,700,000 are deposited today in the bank and of the balance—we don't know where they are.

Q. You don't know that proceedings of civil and criminal character were contemplated by these German bondholders, as against Mr. Holladay & others?

A. No, sir—never. Let me explain to you. The first default was made on the first of April—1873 and immediately afterwards this committee was organized at Frankfort and they sent out those two gentlemen expressly to look into the affairs of the company. When they came back in the fall of 1873 and recommended this compromise. Then Mr. Norris came abroad in the winter of 1874.

I know nothing of my personal knowledge what was done by these people prior to my becoming a member of the Committee. I found a disposition to compromise & the compromise was resolved upon when I went into the Committee. These gentlemen that came out here recommended a compromise.

Q. Prior to leaving home did not a considerable number of bondholders contemplate criminal proceedings?

A. I never heard of it Mr. Gould. I have seen something in the papers calling Holladay a very bad fellow.

Q. Is it not your belief that they did contemplate something of the kind in regard to Holladay?

A. No, sir. I never found any other disposition except that of compromise. It was in the interest of all the parties that there should be no proceedings because

there was a great deal of misplaced confidence in this matter. I mean Holladay was trusted very largely and some other parties were trusted very largely.

Q. Didn't you hear it talked about?

A. Only some poor distressed persons at Heidelberg, where I was living said, "Is not that a great rascal and he ought to be jut in jail or the penitentiary," and all that, but never on the part of any large holders of the bonds. Holladay himself was very much afraid of it I know. I urged him to go to Europe and he refused.

Q. Is any of the stock of these companies owned by Americans, any of the stock of those two corporations?

A. Yes, sir. I am one.

Q. Are you an American citizen?

A. Yes, sir, I have been an American citizen 13 years. I was naturalized in the District of Columbia in the proper Court there.

Q. How many others are there?

A. Only the Directors and some of these parties in interest Mr. Rodewall for instance; I think he is an American citizen because he lived for a great many years in New Orleans. There are some others but I can't name them.

Q. You and Mr. Koehler have the bulk of the railroad Co.'s stock?

A. Yes, sir.

Mr. Griffith: Q. Do the present bondholders propose continuing the Oregon and California R. R. through to connect with the California & Oregon road.

A. No, sir.

Q. How are the earnings of the railroad transmitted to Europe and paid to the bondholders, also the earnings of the steamship Co?

A. The earnings of the railroad are transmitted monthly to the bank at Frankfort on the Main, which acts as financial agent of the Committee of bondholders. Every six months the accumulations are divided pro rata that is, the committee declare what you may call the dividend.

Q. Now the Steamship Company how is that?

A. Since I have taken charge of the Steamship Co.'s affairs the earnings of the Steamship Co. have been used exclusively for paying for new ships. There has been no payment to the parties in interest.

Q. How many ships have you bought?

A. Two; and I am building another now.

Q. To be paid for out of the earnings?

A. To be paid for out of the earnings.

Q. What connection is here between the R. R. Co. and the Steamship Co?

A. There is no connection except the connection that is established by the unity of the management.

Q. Are the bonds or the stock of either held for the same individuals?

A. The bondholders of the railroad are owners of the Steamship stock. The bondholders bought it subject to the interest of the creditors of the Oregon Steamship Co. There is a funded debt which represents the claims of these German banks and bankers and the stock is held subject to these claims—is held by the bondhold-

ers now.

Q. Have you a contract with the Oregon Steam Navigation Co., if so what is the contract?

A. No, sir, we have no contract.

Q. Have you any contract with the Willamette Steamship Co.?

A. I don't know of any such company.

Q. Have you a lease of the warehouse and docks of that company?

A. No, sir.

Q. Where are those steamers registered?

A. They are registered at Portland, Oregon.

Q. By whom?

A. By Mr. Biles, Secretary of the company.

To each of the questions above written, after the first, Defts.' counsel objected to, as irrelevant and incompetent, calling for hearsay testimony; secondary testimony of the contents of record and written instruments, and for testimony as to matters transpiring after the commencement of this suit.

HENRY VILLARD.

Subscribed and sworn to before me this Twelfth (12th) day of September, 1887, by the above named Henry Villard.

WILLIAM HARNEY,

Notary Public, San Francisco, California.

(Notarial Seal.)

(Endorsed.)

Filed September 15, 1877.

THOS. H. REYNOLDS, Clerk

By M. J. McGrath, Dep. Clerk.

*In the District Court of the 15th Judicial District of the
State of California*

In and for the County of San Francisco.

No. 6382.

S. E. Elliott,

Plaintiff,

vs.

Ben Holladay ,et al,

Defendants.

I, Thomas H. Reynolds, County Clerk of the City and County of San Francisco and ex-officio Clerk of the District Courts of the Third, Fourth, Twelfth, Fifteenth and Nineteenth Judicial Districts of the State of California, in and for the City and County of San Francisco, State of California, in and for the City and County of San Francisco, and of the County Probate and Municipal Criminal Courts thereof, do hereby certify the foregoing to be full true and correct copies of the original deposition of Henry Villard taken before William Harney, Notary Public San Francisco, California, also of the agreement marked Exhibit "A" attached thereto on file and of record in my office in the above entitled cause. That the same constitute a full and complete exemplification of the said deposition in the said cause, and of the whole thereof.

All which I have caused to be exemplified according to the Act of Congress.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court, this Twenty fourth day of September A. D. 1877.

(SEAL)

THOMAS H. REYNOLDS.

County Clerk and Clerk of the District Court of the 15th Judicial District of the State of California, in and for the City and County of San Francisco.

I, Samuel H. Dwinelle, sole Judge of the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco, do hereby certify that said Court is a Court of Record, having a Clerk and Seal. That Thomas H. Reynolds who has signed the annexed attestation is the duly elected and qualified County Clerk of the City and County of San Francisco, and was, at the time of signing said attestation, ex-officio Clerk of said District Court. That said signature is his genuine handwriting, and that all his official acts, as such Clerk, are entitled to full faith and credit.

And I further certify that said attestation is in due form of law.

Witness my hand this twenty-fourth day of September, A. D. 1877.

SAMUEL H. DWINELLE,

Judge of the District Court of the 15th Judicial District of the State of California, in and for the City and County of San Francisco.

STATE OF CALIFORNIA,

City and County of San Francisco—ss.

I, Thomas H. Reynolds, County Clerk of the City and County of San Francisco, and ex-officio Clerk of the District Court of the Fifteenth Judicial District, in and for the City and County of San Francisco, State of

California, do hereby certify that the Honorable Samuel H. Dwinelle, whose name is subscribed to the preceding certificate, is sole Judge of the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco; duly elected and qualified, and that the signature of said Judge to said Certificate is genuine.

In witness whereof, I have hereunto set my hand and affixed the seal of the said Court, this Twenty-fourth day of September, A. D. 1877.

(SEAL) THOMAS H. REYNOLDS,
County Clerk and Clerk of said Court.

UNITED STATES OF AMERICA,

District of Oregon—ss.

I, G. H. Marsh, Clerk of the Circuit Court of the United States for the District of Oregon, do hereby certify that the foregoing copy of certified copy of deposition of Henry Villard, with Exhibit "A" thereto attached, taken before William Harney, Notary Public, in the case of S. E. Elliott vs. Ben Holladay, et al., in the District Court of the 15th Judicial District of the State of California, which said certified copy of deposition and exhibit attached thereto were introduced in evidence in the Circuit Court of the United States for the District of Oregon in cause No. 134, John Nightengale and Simon G. Elliott vs. Oregon Central Railroad Company and the Oregon and California Railroad Company, before W. B. Gilbert, Master in Chancery of said United States Circuit Court for the District of Oregon, and was filed

in said court as Exhibit "B" to the testimony taken before said Master on January 2, 1880, has been by me compared with the original certified copy of said deposition and exhibit, and that it is a correct transcript therefrom and of the whole thereof, as the same appears of record and on file at my office and in my custody.

In Testimony whereof I have hereunto set my hand and affixed the seal of said Court at Portland, in said District, this 25th day of September, A. D. 1911.

(SEAL)

G. H. MARSH, Clerk.

*In the Circuit Court of the United States
for the District of Oregon.*

In Equity.

[Sime's Exhibit No. 4.]

Hugh E. Sime Notary Public in and for the City and
County of San Francisco, State of California.

John Nightengale and Simon G. Elliott,

Complainants,

vs.

The Oregon Central Rail Road Company and the Ore-
gon and California Rail Road Company,

Defendants.

Upon this 13th day of October, A. D. 1877, before me
the undersigned Examiner in and for said Court per-
sonally appeared the above named Complainants by
W. H. Effinger Esqr. their Solicitor and the above
named Defendants by J. N. Dolph Esq'r their solicitor
and thereupon testimony is taken in said cause and pro-
ceedings had as follows —

W. B. GILBERT, Examiner.

(All testimony and proceedings omitted from this
copy except the testimony of George W. Weidler and
A. G. Cunningham.)

G. H. MARSH, Clerk.

GEORGE W. WEIDLER.

Geo. W. Weidler is called as a witness for defendants,
having been duly sworn he testifies as follows.

My name is Geo. W. Weidler. I live in Portland, am
a steamship agent. I was cashier of the firm of Ben
Holladay and Company from its formation September

12th, 1868 to January 1870. That firm was composed of Ben Holladay, C. Temple Emmett, and S. G. Elliott. There was no lack of funds of the Company to carry on the enterprise of building the Oregon Central Railroad of Salem. During that time aside from their interest in the contracts of A. J. Cook & Co. and bonds and stocks under them, the firm of Ben Holladay & Co. had in October, 1869, or at the completion of the first twenty miles and the dissolution of the firm, two saw mills, machine and repair shops, a lot of cattle and horses, carts and railroad tools. I would estimate their cash value at ten thousand dollars.

During that time I had opportunity to judge of Mr. Elliott's manner of doing business and his capacity. He was no business man whatever. The twenty miles could not have been completed within the time allowed by the act of Congress if he had continued in charge of the work. I had been of that opinion from the time he commenced the work. I expressed my opinion to Ben Holladay. After Elliott's discharge it required everything we could possibly do with money and men to complete that first twenty miles in time. I never knew of Mr. Elliott being interfered with or of any obstacle being placed in his way to prevent him from completing the road.

GEO. W. WEIDLER.

TESTIMONY OF A. G. CUNNINGHAM

A. G. Cunningham is called as a witness for Defendants, having been duly sworn he testifies as follows:

My name is A. G. Cunningham, am 58 years old. I reside in East Portland, Oregon, am the Secretary and

bookkeeper of the Oregon & California Railroad Co. and other roads. I have had upwards of forty years of experience as a bookkeeper and accountant. I have been Secretary of the Oregon & California Railroad Co. since its organization. From the latter part of October, 1869, I was bookkeeper for Ben Holladay & Co. I have in my possession the books of account of A. J. Cook & Co. they came into my possession October 4th, 1869. The books and accounts of Ben Holladay & Co came into my possession about the same time and I have them yet. I have in my possession the books of the Oregon & California Railroad Co., have had them since the organization of the Company. I have the books of the Oregon Central Railroad Co. of Salem. I have made an examination of the books of A. J. Cook & Co, with a view of ascertaining the sum total of all moneys expended by the firm of A. J. Cook & Co towards the construction of the Oregon Central Railroad from the commencement of the work by that company to the 12th of September, 1868, and I find that the books show a total expenditure on account of construction seventy thousand four hundred and sixteen dollars and sixty two cents. Total expenditures on all accounts is \$72,486.58. The difference being individual accounts. This included the purchase of machinery and everything. The bills for machinery were entered to the credit of S. G. Elliott as cash, but the bills did not all show that they were paid that is, some of the largest bills were not receipted. This amount included the payroll up to the 12th of September as shown by their books and all the outstanding in-

debtedness of A. J. Cook & Co. as shown by their books. It included eight thousand two hundred dollars of salary in excess of what the contract entitled Elliott to. Of this amount of \$72,486.58, I would state that the books showed they were owing on the 12th of September 1868, \$72,486.58 which stands on the books of A. J. Cook & Co. to sundry individuals and firms nineteen thousand **thirty seven** 88-100 dollars. A. J. Cook & Co: credited to themselves \$12,688.71. S. G. Elliott, \$53,448.70. Their books did not show any regular cash account. What I mean by regular cash account is the moneys received being entered in the cash book on the days on which they were received. A. J. Cook & Co.'s cash book showed the expenditures for a month. At the end of a month the total amount charged in the cash book as paid out was entered on the debit side of the cash book to the credit of S. G. Elliott. In that way making up the amount standing to the credit of S. G. Elliott. The effect of it was that Elliott had credited himself with everything expended by A. J. Cook & Co. and had charged himself with nothing. \$19,037.88 was the amount that the Company then owed to various persons and assumed by Ben Holladay & Co. on September 12th, 1868, and afterwards paid by them. This \$19,037.88 was over and above the \$6500.00 owing to the California Trust Company and includes balance paid to Frohmann for his interest in the contract to the extent of \$12,668.71—which was assumed by Ben Holladay & Co. and paid, and charged up at that date on account to square the transactions of A. J. Cook & Co.

I present a statement from the books of A. J. Cook & Co. showing the account of A. J. Cook & Co. as transferred to books of Ben Holladay & Co. The same is filed herewith marked Exhibit No. 41 and Exhibit No. 42, which is a statement of the outstanding indebtedness of including the purchase price refunded to Frohmann which stood on the books as a credit to Goldsmith Bros.

There was only a partial account on A. J. Cook & Co.'s books of the amounts received on bonds or otherwise by Elliott. I have examined the books of Ben Holladay & Co. with a view to ascertain the condition of the account of S. G. Elliott with Ben Holladay & Co. I present a true transcript of that account from those books. (The same is filed herewith marked Exhibit No. 43). That shows the account on October 31, 1869, balance due Ben Holladay & Co. as shown by their books this date transferred to O. & C. Railroad Co. \$828.95. That account includes an item of \$2263.09 for amounts passed to credit of A. J. Cook & Co on their books and transferred to books of Ben Holladay & Co. for which no vouchers were to be found in office and no satisfactory explanation of the expenditures could be given consequently it was charged back to Elliott's account. This statement also includes a deduction on account \$8200.00 salary credited to him for time previous to commencement of the contract and previous to Sept. 12, 1868, and on the books of A. J. Cook & Co. and transferred to books of Ben Holladay & Co. the \$200 was salary of Elliott from the 1st to the 12th of September he having

received credit in his account for the full month of September, 1868. In this account Elliott is credited with the full expenditures of A. J. Cook & Co and charged with the liabilities assumed and paid by Ben Holladay & Co. It includes the bonds received by Elliott \$38,800. reduced to gold, amounting to \$27,742.00. He had made use of a greater sum than he had charged himself with. He had received over forty thousand dollars in bonds in Philadelphia, Boston and Baltimore. This does not include profits on locomotives. The profits on sale of locomotives I am not able to state. There was no stock charged to Elliott in this account. In fact he is charged with nothing but the \$38,800 in bonds and the \$19,037.88 outstanding indebtedness referred to.

The amount of cash received by Elliott from Ben Holladay & Co. from September 12th 1868 to October 4, 1869 on account of his salary for that time and the moneys he claimed to have advanced for A. J. Cook & Co. was \$18,754.19. This was over and above all moneys paid out on account of A. J. Cook & Co. He has credit in these accounts for commissions paid on purchases in the east \$1858.80. The commissions actually paid, shown by memoranda found in the safe was \$283. and some cents.

On dissolution of the company of Ben Holladay & Co. the account of S. G. Elliott was transferred to the books of the Oregon & California Railroad Co. The balance brought to the debit of S. G. Elliott from the books of Ben Holladay & Co. was \$828.95. On May 6th, 1870 the books show by entry that date Ben Holladay

of New York paid Elliott's draft dated Washington City, January 12, 1869, \$700.00 and draft dated March 16, 1869, \$500.00. May 20th paid M. P. Bull J. P. costs \$1.85. Balance to the debit of S. G. Elliott on the books of the Oregon & California Railroad \$2030.80 as shown by this statement.

Said statement is filed herewith marked Exhibit No.

The amount that A. J. Cook credited on their books was the amount received from Goldsmith, that is the Frohmann matter.

The total amount expended by Ben Holladay & Co. including the amount paid on account of A. J. Cook in constructing the first twenty miles and surveys, right of way and grading on other portions of road, machinery, tools &c. was \$1,173,430.21. That was furnished by Ben Holladay representing the North Pacific Transportation \$544,128.96. C. Temple Emmett \$6,123.00 The balance was outstanding on credit of the firm was \$623,178.18. Of that the cost of read bed ready for ties first 21 miles was \$314,692.34, laying track equipment &c. was \$301,517.08.

The firm of Ben Holladay & Co. surrendered their contracts bonds and stock and purchase in the bonds, disposed of by Elliott Holladay himself gave bonds against them to idemnify the trustees on the mortgage. The Oregon Central Railroad Co. of Salem then cancelled the contracts took all the property of Ben Holladay & Co. including shops, mills bond & stock and real estate and agreed in consideration to pay all the expen-

ditures of Ben Holladay & Co. The Oregon Central R. R. Co. transferred all this property to the Oregon & California Co. and the O. & C. paid all these expenditures and no more.

Further hearing is adjourned until tomorrow, November 7th, 1879, at 1:30 P. M.

W. B. GILBERT, Examiner.

Upon this 7th day of November, 1879 at the hour of half past one P. M. appear the parties as of yesterday and hearing is resumed.

TESTIMONY OF A. G. CUNNINGHAM
CONTINUED

Referring to the statement of the referee in the case of Holladay & Emmett vs. S. G. Elliott, as contained in the 51st finding of fact set forth in the decree in said cause filed in this case and marked Exhibit No. 20 I would state that in the account on the books of A. J. Cook & Co. S. G. Elliott is not charged with the \$3000.00 received from Perrine, nor with the \$1500 received from Gardiner Elliott nor the \$1500.00 received from S. F. Elliott nor with the \$350.00 received from J. S. Emory, nor with the \$500.00 received from Parker, nor with the profits in locomotives, all of which the referee has charged him with in that finding and which he should be charged with in addition to the charges against him on the books of A. J. Cook & Co.

The interest of S. R. Brooks in the A. J. Cook & Co. contracts was bought by the Oregon & California Railroad Co.

This paper shown me. which purports to be articles of

agreement between S. R. Brooks and Albert J. Cook with an assignment endorsed on it from S. R. Brooks to the Oregon & California Railroad Co. which assignment is in my handwriting and of which Exhibit No is a copy, was signed by Brooks in his own handwriting in my presence after I had written the assignment across it. He received the consideration mentioned in it in gold coin. At the same time he executed by signing in his own handwriting in my presence the assignment endorsed upon the instrument in writing I now hold in my hands purporting to be an assignment of a one fourth interest in the firm of Ben Holladay & Co. to S. R. Brooks by S. G. Elliott. (The paper referred to by witness is the original of Exhibit No filed herein.)

The consideration mentioned in that assignment was paid. The consideration of three thousand dollars covers both assignments.

The whole amount of bonds issued by the Oregon & California Railroad Co. were sold and are now outstanding to the amount in all of \$10,950,000. They are now mostly owned in Germany or at the last I knew of them. There are a larger number of owners of the bonds.

The earnings of the road on an average since it was finished and they commenced operating—over and above running expenses, and making no allowance for wear & tear of road and stock would pay about 17-100 cents interest on the bonds per annum.

The money received from sale of those bonds was used in construction of the road and equipment, legal

expenses &c also for right of way, surveys, &c.

Ben Holladay & Co. ceased doing business about the first of April, 1870. That was the time of the cancellation of the Cook contract.

At that time Ben Holladay & Co held 50,161 shares of common stock & 14500 shares of interest bearing stock in the Oregon Central Railroad Co. of Salem. I would say that the stock was then worthless. It was unpaid, no assessments were ever levied upon it or paid. The stock holders were liable to pay the company any assessments that might be levied upon it.

The bonds of the Oregon Central Railroad in the fall of 1869 were entirely worthless. My principal reason for so considering them is the condition of the Company that issued them. They had no organization, no funds, no means of obtaining a land grant. Their right to their name was in dispute. The enterprise was in advance of the population and resources of the country. The enterprise of A. J. Cook & Co. could never have been carried out.

The construction of the Oregon Central Railroad under the A. J. Cook & Co. contract was not practicable. Ben Holladay & Co. would have sunk every dollar they could have raised if they had attempted to carry it out.

I have examined the original contracts of A. J. Cook & Co. of which Exhibits D 32, 33 and 40 being the contracts between A. J. Cook & A. J. Cook & Co. and the Oregon Central Railroad Co. On the 4th of October, 1869, or at all times since those contracts were worse than valueless to anybody that was bound up in them. I think all that was expended under them would have

been a total loss or worse than a total loss. The stock was held by the Company and was worthless consequently the bonds were worthless.

Besides these contracts and bonds and stocks under them, the firm of Ben Holladay & Co. at the time they ceased doing business owned some saw mill property, the machinery at the shops, some cattle, and a small amount of real estate.

The contracts, stocks and bonds then held by Ben Holladay & Co. was surrendered to the Oregon Central Railroad Co. and cancelled. Ben Holladay giving his indemnifying bond against the bonds that were out and could not be found. The bonds were ordered to be cancelled also the contracts and stock by resolution of the Oregon Central Railroad Co. of Salem on the 28th of March, 1870. The contracts were cancelled on that day. The stock of Ben Holladay soon afterwards and the bonds soon afterwards as it could be done. I have now in my possession those cancelled bonds and all the issues of the company which were cancelled except about \$3500.00 worth. The \$500.00 is a bond obtained by one Burick of Philadelphia from Elliott before the firm of Ben Holladay & Co. were formed. I think the other three bonds of \$1000.00 each are held somewhere in the east.

The interest of Gardiner Elliott in the firm of Ben Holladay & Co. was transferred to Geo. W. Weidler for Ben Holladay & Co. Three thousand dollars was paid Gardiner Elliott for it.

A. G. CUNNINGHAM.

Upon this 17th day of November, 1879, at one o'clock P. M. appear the defendants by J. N. Dolph Esqr., their attorney and plaintiffs make no appearance hearing is resumed.

A. G. CUNNINGHAM is recalled for the defendants and testifies as follows.

John Nightengale does not appear as a stockholder in any of the books of the Oregon Central Railroad Company of Salem. He never presented any certificates of stock or asked to have any entered in his name to my knowledge.

There is nothing on the books showing any transfer from Geo. L. Woods excepting one share.

Of the so-called \$2,000,000 of preferred stock claimed to have been issued to A. J. Cook or A. J. Cook & Co. at the time of the stockholders meeting of the Oregon Central Railroad Company on the 28th of March 1870 at which the Company was dissolved was represented on the books as follows. A. J. Cook & Co. 5400 shares. N. P. Perrine 100 shares. Ben Holladay & Co. 14500 shares. The Company just assumed to issue that as so much subscribed by the Oregon Central Railroad Company by George L. Woods.

The amount of stock returned to the company and marked cancelled and filed away, embraced substantially all but the portion of preferred stock standing in the name of A. J. Cook & Co.

The debts of the Oregon Central Railroad Co. of Salem were all paid in full by Ben Holladay & Co. and the Oregon & California R. R. Co. The books of the

Oregon Central Railroad Company were turned over to me as a part of the transaction at the time of the transfer. The stock was cancelled as fast as it could be done.

There never was any assessment on the stock of the Oregon Central Railroad Company of Salem nor anything paid on it.

At the time of the dissolution of the Company Elliott had gone east—I think he went about the last of October or the first of November.

All bonds of the Oregon & California Railroad Co. were sold and all were contracted for before this suit was commenced.

Heinrich Hohenemser is not a resident of the State of Oregon—he is a citizen and resident of Frankfort on the Main—in Germany. Henry Villard is a citizen of New York. Aaron Niederoffheim is a resident and citizen of Germany. Julius Schmidt, Adolph Otto, Michael Benjamin, Carl Stackelin Buchnor, F. S. Van Euirop, Wm. Coster, were all residents of Europe and the most of them of Germany. None of them at the commencement of this suit were nor are they now citizens of this State, or residents here. Faxon D. Atherton, Milton S. Latham & Wm. Norris were never citizens of Oregon to my knowledge. They were citizens of California. Wm. Norris was resident and citizen of St. Louis, Mo. when I first knew him.

None of the stockholders or pretended stockholders of the Oregon Central Railroad Company of Salem ever made any objection to the disorganization of the company or the cancellation of its bonds before the com-

mencement of this suit to my knowledge.

A. G. CUNNINGHAM.

Filed January 2, 1880.

R. H. LAMSON,
Clerk.

UNITED STATES OF AMERICA,

District of Oregon,—ss.

I, G. H. Marsh, Clerk of the United States Circuit Court for the District of Oregon, do hereby certify that the foregoing copy of caption and testimony of George W. Weidler and A. G. Cunningham, witnesses on behalf of defendants, taken before W. B. Gilbert, Master and filed in said Court on January 2, 1880, in cause No. 134, John Nightengale and Simon G. Elliott, vs. Oregon Central Railroad Company and Oregon and California Railroad Company, has been by me compared with the original thereof, and that it is a correct transcript therefrom, and of the whole of such original testimony of said witnesses taken before said Master, as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of Said Court at Portland, in said District this September 25, A. D., 1911.

(Seal)

G. H. MARSH,
Clerk.

By.....
Deputy Clerk.

Filed June 4, 1912.

A. M. CANNON,
Clerk of U. S. District Court.

[Complainant's Ex. No. 6.]

STATE OF OREGON,

County of Clackamas—ss.

I, W. L. Mulvey, being first duly sworn depose and say: That I am the duly elected, qualified and acting County Clerk of the County of Clackamas, State of Oregon; that I have in my possession and custody the tax records for said Clackamas County; that I have carefully compared the statement hereto attached with the original tax records for said Clackamas County, and that said statement is a complete, full, correct and true copy of the tax records of Clackamas County, relating to the property described in said attached statement, and of the whole thereof; that said statement covers the years 1869 to 1910 both inclusive, and shows the assessed valuation of said property, the amount of the taxes paid thereon, the name of the person or corporation in whose name the property was assessed, the name of the corporation by whom said taxes were paid, and the number of receipts issued at the time said taxes were paid.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the official seal of Clackamas County, Oregon, this 18th day of September, 1911.

W. L. MULVEY,
County Clerk.

(Seal)

Filed Feb. 13, 1912.

A. M. CANNON,
Clerk U. S. District Court.

STATEMENT OF ASSESSED VALUATION AND
TAXES PAID ON

East half of Southeast quarter and Lots 5 and 6 of
Sec. 29, and North half of Northeast quarter of Sec. 32,
both of Twp. 1S, Range 2E, W. M.

Year.	Valuation.	Taxes Paid.	Assessed to	Tax paid by	Receipt No.
1869	No record of assessment				
1870		do			
1871		do			
1872		do			
1873	\$1920	No Seg.	O. & C. R. R.	Roll shows "P"	
1874	1600	do	do	Marked "Paid" on roll	
1875	975	do	do	Marked "Paid" on Roll	
1876	970	\$17.46	do	do	
1877	No record of assessment				
1878	\$ 970	No Seg.	do	Marked "Paid" on Roll	
1879	970	do	do	do	
1880	1100	do	Ben Holladay	do (Only 160 acrs.	
1881	1600	do	O. & C. R. R.	do (ass'd.)	
1882	1600	do	do	do	
1883	1600	do	do	do	
1884	1600	do	do	do	
1885	1600	do	do	O. & C. R. R.	No. 1181
1886	1600	do	do	do	4904
1887	1600	do	do	do	1693
1888	1600	do	do	do	1869
1889	1600	do	do	do	1724
1890	4580	do	do	do	1068
1891	4580	do	do	do	1969
1892	4580	do	do	do	2597 & 3768
1893	600	No. \$16.20	do	do	4035
1894	2800	71.40	do	do	3449-50
1895	2660	73.15	do	do	2947
1896	2700	77.14	do	do	3069
1897	4580	128.24	do	do	5517
1898	4580	151.14	do	do	2905
1899	4580	141.98	do	do	5562
1900	4580	146.56	do	do	3031
1901	4600	156.17	do	do	3150
1902	4600	162.86	Ben Holladay & Co.	do	4604
1903	9200	182.94	do	do	3081
1904	9200	216.89	do	do	7723
1905	9300	194.18	do	do	7124
1906	9300	162.38	do	do	4715
1907	9300	166.89	do	do	4975
1908	11450	222.13	do	do	3423
1909	13975	316.36	do	do	2956
1910	16000	480.05	do	do	5483

Note: The years 1873 to 1884 inclusive show these lands assessed on the roll together with the operating property of the Oregon and California Railroad Com-

pany and taxes paid on the total, except for the years 1874 and 1877.

Lots 5 and 6 not included.

I hereby certify that the above is a true and correct statement as shown by the tax rolls of Clackamas County, State of Oregon, for the years named.

(Signed) J. O. STAATS,

Deputy Sheriff.

Oregon City, Sept. 15th, 1911.

*In the District Court of the United States for the
District of Oregon.*

No. 1109.

January 19th, 1885.

LAWRENCE HARRISON AND LAWRENCE
BAKER,

vs.

THE OREGON AND CALIFORNIA RAILROAD
COMPANY, THE FARMERS LOAN AND
TRUST COMPANY, The OREGON AND
TRNSCONTINENTAL COMPANY.

Now at this day comes the plaintiffs in the above entitled cause by Mr. John W. Whalley, Mr. H. H. Northrup and Mr. Paul R. Deady, their counsel and the defendant THE OREGON AND CALIFORNIA RAILROAD COMPANY by its counsel Mr. James K. Kelly and Mr. Richard Williams, and the plaintiffs upon the bill and the exhibits thereto and the written con-

sent of said defendant now filed herein, moves the court for the appointment of a proper person or persons as a receiver or receivers herein as prayd for in said bill; and it appearing to the court from said bill and consent that a receiver of the property of the defendant ought to be appointed with the power and authority hereinafter specified.

It is ordered and adjudged that Richard Koehler of Portland, Oregon, and now Vice President and manager of said defendant be and he hereby is appointed such receiver with power and authority as follows.

1.) To demand, take and receive into his possession custody and control all the property real and personal of said defendant, including its railway, rolling stock and things appurtenant thereto, together with all the books papers and accounts relating thereto and to manage, operate, and care for the same for the best interest of those concerned therein and according to the direction of this court.

(.2) To demand, collect and receive all debts and demands due or becoming due the defendant and all moneys earned in the management or operation of said railways and property and dispose of and account for the same as hereinafter provided.

(3.) To disburse and pay out all moneys received by him as aforesaid; First, to defray the ordinary and usual expenses of managing and operating said railways and property including all public charges and taxes, court expenses and counsel fees; Second to discharge and satisfy all lawful claims and demands now

existing against said defendant, that have accrued since June 21, 1884, for or on account of the operation or construction of said railways; but in the payment of such claims those incurred in the operation of the roads shall be preferred to those incurred in the construction thereof and those for wages to those for materials.

And it is further ordered and adjudged that the power and authority hereby given to said receiver shall be and is subject to the following limitations and restrictions.

(1.) He shall daily deposit all moneys received by him with the First National Bank of Portland, to be disbursed by him in payment of the expenses, claims and demands herein specified upon his check drawn thereon, in favor of the person to whom the same is due and payable; but said receiver may from time to time draw his check upon said bank in his own favor, for a sum not exceeding \$250, for the payment of small and incidental expenses and claims, for each of which, he must however take a proper voucher; and he may from time to time authorize and require the several station agents along the line of said railways to cash the checks drawn on them by said receiver or his cashier, out of any moneys in their hands, received for the transportation of freight or passengers, in payment of the wages of any or all of the employees thereon; and each of said checks when endorsed by the person in whose favor it was issued and returned by said receiver shall be considered as so much cash received and disbursed.

(2.) No expense or liability shall be incurred by said receiver for any betterments or improvements on

said railways, as are usually charged to construction account, exceeding \$1500 in any one month unless upon the special order of this court.

(.3) The net proceeds arising from the sale of the lands of said defendant shall be remitted every month to THE FARMERS LOAN AND TRUST COMPANY of New York, to be applied by it to the credit of the "Sinking Fund" of said defendant, as heretofore.

And it is further ordered and adjudged that said receiver before entering upon the discharge of his duties, shall execute and deliver to the Clerk of this Court for the benefit of whom it may concern, his bond with two or more sufficient securities in the penal sum of Seventy five thousand Dollars" to be approved by the master of this Court and conditioned for the true and faithful performance of his duties as receiver herein.

And that on the last day of March Eighteen Hundred and eighty five he shall make and file with the Clerk of this Court a written report, verified by his own oath, covering the period from the date of this order to the first day of March, and on the last day of every month thereafter for the month immediately preceeding, of the condition of the railways and property hereby committed to his care and custody, including an account of all moneys received and disbursed by him with the vouchers therefor together with such other information or suggestion as he may think proper.

And it is further ordered and adjudged that said defendant, THE OREGON AND CALIFORNIA RAILWAY COMPANY, do turn over and deliver to said re-

ceiver, all its said railway rolling stock, propetry, books papers and accounts; and the said defendant, its officers agents and servants, and each and every of them, are hereby enjoined under such penalty as may hereafter be determined, not to collect or receive any debt or demand due or owing to said defendant and not to incumber or in any wise dispose of any of the property belonging to the same.

And it is further ordered and adjudged that said receiver shall act as general manager and chief engineer of the railways and property herein mentioned and specified and perform the duties usually pertaining to such positions; but he may employ a practical engineer to aid him at a cost of not exceeding Two hundred dollars per month; And said Richard Koehler shall receive as a compensation for his services herein the sum of Six hundred dollars per month to be paid upon his own check therefor on said National Bank.

January 19th, 1885.

DEADY, J.

ORDER FOR RECEIVER,

Filed Jan. 19, 1885.

R. H. LAMSON, Clerk.

By G. G. GAMMANS, Deputy.

UNITED STATES OF AMERICA,

District of Oregon—ss.

I, G. H. MARSH, Clerk of the United States CIRCUIT Court for the DISTRICT OF OREGON, do hereby certify that the foregoing copy of Order appointing Receiver in cause No. 1109, Lawrence Har-

risson et al., vs. Oregon and California Railroad Company, et al., has been by me compared with the original thereof, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Portland, in said District this September 28, A. D. 1911.

(SEAL)

G. H. MARSH, Clerk.

Filed Feb. 13, 1912.

A. M. CANNON,

Clerk of U. S. District Court.

[Complainant's Exhibit 10.]

KNOW ALL MEN BY THESE PRESENTS that I, Richard Koehler of the City of Portland in the State of Oregon, as principal and Henry Failing and H. W. Corbett of the City of Portland and State of Oregon as sureties are held and firmly bound unto the Clerk of the Circuit Court of the United States for the District of Oregon, for the benefit of whom it may concern in the sum of Seventy-five thousand dollars (\$75,000.00) for which payment well and truly to be made we and each of us do bind ourselves jointly and severally and our respective heirs, executors and administrators firmly by these presents.

Sealed with our seals, dated the 21st day of January, A. D. 1885.

Whereas by an order of the Circuit Court of the United States for the District of Oregon bearing date

the 19th day of January, 1885 made in a certain cause wherein Lawrence Harrison and Lawrence Baker for themselves and others are complainants and the Oregon and California Railroad Company, a corporation, The Farmers Loan and Trust Company a corporation and The Oregon and Transcontinental Company, a corporation are defendants, it was ordered that Richard Koehler of the City of Portland in the State of Oregon be appointed Receiver in said cause to manage, operate and take charge of all and singular the railroads and all the property of the said The Oregon and California Railroad Company, and of all the profits, income rents and earnings thereof, and of all its moneys earned and to be earned, and to pay out and disburse such moneys for the ordinary and usual expenses of managing and operating said Railroads and property, and to deposit daily in the First National Bank of Portland, Oregon, all moneys that may or shall come into his hands as such receiver and pay the running and operating expenses of said railroads out of moneys drawn by his checks on said bank and faithfully account for all the moneys and property which shall come into his hands as such receiver, according to the orders and direction of the Court.

Now the condition of this obligation is such that if the above bounden Richard Koehler, the Receiver, shall duly account for what he shall receive, or have in charge as Receiver in said cause, and pay and apply what he shall receive or have in charge as he may from time to time be directed or ordered by the said

Court and do and perform his office of Receiver in all things according to the true intent and meaning of the aforesaid order, then this obligation shall be void or else remain in full force and virtue.

Signed, sealed and delivered in presence of Paul R. Deady.

R. KOEHLER (SEAL)

HENRY FAILING (SEAL)

H. W. CORBETT (SEAL)

DISTRICT OF OREGON—ss.

The foregoing bond of R. Koehler with Henry Failing and H. W. Corbett sureties is hereby in all respects approved.

W. B. GILBERT,
Master in Chancery.

Of the Circuit Court of the United States for the District of Oregon.

BOND OF RECEIVER.

Filed Jan. 21, 1885.

R. H. LAMSON,
Clerk.

UNITED STATES OF AMERICA,

District of Oregon—ss.

I, G. H. Marsh, Clerk of the United States Circuit Court for the District of Oregon, do hereby certify that the foregoing copy of Bond of Receiver, in cause No. 1109, Lawrence Harrison, et al., vs. Oregon & California Railroad Company, et al., has been by me

compared with the original thereof, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Portland, in said District this September 28, A. D., 1911.

[Seal.]

G. H. MARSH,
Clerk.

*In the Circuit Court of the United States, for the
District of Oregon.*

[Complainant's Exhibit 12.]

LAWRENCE HARRISON AND LAWRENCE
BAKER,

vs.

THE OREGON AND CALIFORNIA RAILROAD
COMPANY.

To the Honorables,

The Judges of the above entitled Court.

Inpursuance of the order dated January 19th, I have the honor to submit herewith my first report on the condition of the property committed to my care and custody, including an account of all moneys received and disbursed by me with the vouchers therefor; said report covering the period from January 19th to February 28th, 1885.

The bond required to be filed by me, as Receiver, was filed with the Clerk of the United States Circuit

Court on January 20th whereupon I entered upon my duties by taking possession of the property of the Oregon and California Railroad Company.

The following exhibits are filed with this report, to-wit:

Balance sheet showing the balance of the accounts in the books of the Oregon and California Railroad Company, with the following detailed statements	Exhibit A
Sundry Debit and Credit Balances	Exhibit B
Bills Receivable	Exhibit C
Audited vouchers unpaid. Prior to June 21st, '84	Exhibit D
From June 21, 1884 to January 19, 1885....	Exhibit E
Unpaid wages. Prior to June 21, 1884	Exhibit F
From June 21, 1884 to January 19, 1885....	Exhibit G
Bills Payable	Exhibit H
Locomotives	Exhibit I
Rolling stock	Exhibit J
Real Estate. East Portland Land	Exhibit K
Miscellaneous lands	Exhibit L
Southern Oregon Lands	Exhibit M
Fuel	Exhibit N
Rails and Fastenings	Exhibit O
Ties	Exhibit P
Supplies in Depots	Exhibit Q
Construction Supplies — Materials and Tools	Exhibit R
Station Furniture and Outfit	Exhibit S
General Office and New York Office Furniture	Exhibit T

Accounts for the period from January 20th
to 31st, 1885Exhibit U

Accounts for the month of February, 1885 Exhibit V

Receipts and Disbursements January 20 to
31, '85, with vouchers numbered W 1|39 Exhibit W

Disposition of Receipts for January 20|31|'
'85Exhibit X

Receipts and Disbursements for February
'85, with vouchers numbered Y. 1 to Y.
137Exhibit Y

Disposition of Receipts for February '85
with Certificate of First National Bank
regarding Balance on February 28|85

Synopsis of pending law suitsExhibit Za

And I do now report as follows to wit:

A balance of the accounts was struck off from the Company's books, which is shown by Exhibit A and carried forward into the Receiver's books, and it is the intention to continue to keep these accounts in the same manner as they have been kept heretofore.

Property of the Oregon and California Railroad Company.

The property of the Oregon and California Railroad Company comprises the following railroad lines in the State of Oregon, given in operating division, to-wit:

East Side Division from Portland to Rose-	
burg	197.7 miles
Southern Extension from Roseburg to	
Ashland	145. miles

Lebanon ranch from Albany Junction, near Albany, to Lebanon	11.5 miles
West Side Division from Portland to Cor- vallis	96.8 miles
Total.....	451. miles

This mileage, which is the actual length of the road does not exactly correspond with the total length of the operating divisions as given in some of the statements of accounts, because the latter is taken merely from center to center of station buildings of the respective termini.

To the above lines should be added the unfinished portion of the Southern Extension from Ashland (mile post 145 south of Roseburg) to the southern boundary line of the State of Oregon, respectively to the point of junction with the Oregon Division of the Central Pacific Railroad, about 29 miles in length, upon which not inconsiderable work is done; and the West Side Extension from Corvallis to Junction, about 25 miles in length, for which only the right of way is acquired and some construction material on hand.

The equipment belonging to the various divisions is shown by Exhibit I and Exhibit J.

The Company is the owner of two Congressional Land Grants, the one earned by the construction of the line from Portland to Ashland under Acts of July 25th, 1866 Vol. 14 p. 239 U. S. Statutes. June 25th, 1868, Vol. 15, p. 80. April 10th, 1869, Vol. 16, p. 47,

U. S. Statutes. The other earned by the construction of the line from Portland to St. Joseph on the Yamhill River, under Act of May 4th, 1870, Vol. 16, page 94 U. S. Statutes.

Of the property represented by these Grants I shall hereafter speak more in detail.

The Company is also the owner of parcels of real estate at various places along its lines, which are shown by Exhibits K & L. From these Exhibits there is however excluded all that real estate owned by the Company, situate at Portland and East Portland, which is considered as belonging to or used as depot grounds, and which stands in the books charged to the Construction accounts of the East and West Side Divisions. And there is also excluded such real estate, situate at Portland and East Portland, as is comprised and charged under the head of "Portland and East Portland Office and Warehouse property", all of which must be looked upon as integral parts of the railroad lines, whilst the parcels shown by Exhibits K and L may be considered as real estate which can be disposed of.

Adjacent to the line of the Southern Extension certain parcels of real estate were acquired during the time of its construction of which the deed of release of August 1st, 1884, makes mention, title to which stands as explained in said deed of release, partly in the name of the Oregon and Transcontinental Company, partly in the name of trustees. A part of these parcels are gravel pits, parcels acquired for right of way purposes, and timber lands in the Siski-

you mountains and are needed for operation and construction and cannot be disposed of except to the great injury of the Company's interest. The larger and more valuable portion of the real estate consists of town lots, and these the deed of release directs to be sold by the Oregon and Transcontinental Company, and proceeds to be applied towards payment of the floating debt. All of these parcels of real estate situate in Southern Oregon are shown by Exhibit M from which appears also within what period they were acquired and in whose name title thereto stands. No entry in the books is made owing to the clear title by the Oregon and California Railroad Company being contingent upon the extinguishment of the floating debt, when title is to pass to the Oregon & California Railroad Company.

Other assets of the Company, represented by material or supplies on hand are shown by the inventories of the fuel, rails and fastenings, ties, material in supply depots, and construction material tools and supplies, which inventories are marked respectively N, O, P, Q and R.

CONDITION OF THE PROPERTY.

The various divisions of the system were built, approximately speaking, in the following periods, to-wit:

East Side Division from 1869 to 1872.

The northern 47 miles of the West Side Division from 1870 to 1872.

The southern 50 miles of the West Side Division in

1879.

The Lebanon Branch in 1880.

The Southern Extension from 1882 to 1884.

CONDITION OF THE TRACK.

Track laid with iron rails of 50 & 56 lbs. per yard.

East Side Division, from a point about 3 miles south of Salem to Roseburg.....142.6 miles

West Side Division, from the end of Fourth Street to a point about one mile south of North Yamhill station 38.3 miles

Total.....180.9 miles

Iron rails of 35 lbs. per yard Lebanon Branch 11.5 miles

Steel rails of 50 lbs. per yard, West Side Division from St. Joseph to Corvallis.. 49.5 miles
Forward 49.5 miles

In the City of Portland 1.8 miles

Total 51.3 miles

Steel rails of 56 lbs. per yard, Portland to about 3 miles south of Salem 54.6 miles

All of the Southern Extension145. miles

West Side Division from a point about one mile south of North Yamhill to St. Joseph 7.7 miles

Total miles laid with steel258.6 miles

Total miles laid with iron192.4 miles

Percentage laid with steel57.2 per cent

Percentage laid with iron42.8 per cent

The iron rails upon the older sections of the system, except a stretch of about 12 miles from Shedd's station to a point half way between Muddy station and Harrisburg, are the rails laid at the time of the construction.

These rails, and especially those upon the sections Salem to Albany (East Side Division) and Portland to Beaverton (West Side Division) show considerable marks of deterioration, and a part at least must be replaced very soon, and to enable me to do this I have petitioned your Honors, under date of February 9th, and have since received authority to buy the cargo of rails soon to arrive, as was fully set forth in said petition.

At this place it may be well to say that a similar and probably a larger supply of steel rails will be required hereafter, annually, for a number of years, until all the old iron is replaced.

The ties upon the old lines have all been exchanged once, but inasmuch as this was done gradually, as required, and the replacement having commenced in 1875 (although at that early period only on a small scale), renewals of ties on the older portions of the system, to a limited extent will be necessary this year and will increase again from year to year. It is estimated that this year about forty to fifty thousand ties may be required, which is, comparatively speaking, a small amount taking into consideration that in 1881 about 140,000 ties were required.

The roadbed is fully ballasted from Portland		
to Harrisburg	105	miles
From Roseburg south	145	miles
Lebanon Branch	11.5	miles
From Hillsboro to Corvallis and through		
the City of Portland	77.6	miles

	Total	339.1 miles

Of the remaining mileage of the East Side Division about 92 miles, all but about 20 miles is likewise ballasted, but this portion required some new ballast, the original ballasting not having been done in as substantial a manner as desirable, but, if necessary, this work can very well be deferred. The remaining 20 miles as well as the first 20 miles, of the West Side Division, ought to be ballasted as soon as circumstances will permit. It is however proper to say, that it is very difficult to get suitable ballast along or within a reasonable distance of the 20 mile section of the East Side Division, which extends from Roseburg northward to and beyond Oakland; and that the 20 mile section of the West Side Division, from Portland to Hillsboro, (formerly Oregon Central Railroad) has not been ballasted heretofore because no ballast is found along the entire first 47 miles of the West Side Division; the remaining 27 miles of said old line having been ballasted after ballast became accessible for use, by the extension of the line south to Independence.

It should also be mentioned that ballast at Inde-

pendence is accessible only for two or three months in summer, during the extreme low water in the Willamette river, this very much limiting the time during which such work can be done at a reasonable price; and that not more than about 8 to 12 miles could be done annually. In view of the present financial situation of the property no recommendation for undertaking such work during this summer is made at this time.

MECHANICAL STRUCTURES (TRESTLEWORKS, BRIDGES & CULVERTS.)

All of the truss bridges upon the East Side Division have been once renewed. The bridge across the Clackamas river however has to be again rebuilt during this summer, and some work may be required on one of the spans of the bridge across the Willamette at Harrisburg. Most of the trestleworks have been likewise renewed yet there is a limited number which still require renewal, either partly or in the whole, and this will also have to be done in part at least, during this year.

The repair work above enumerated is, in respect to labor and material, below the average of what has been required in the past few years.

Upon the older section of the West Side Division all trestlework and bridges have been renewed during the past few years and the repairs for the present year will mostly consist in the replacing of culverts.

The structures upon the lines more recently con-

structed, do not need any repairs except such as are incidental to the operation of any new line.

The structures on all divisions have recently been inspected and found in good order and safe condition.

EQUIPMENT.

The equipment is in good order and repair. It should be mentioned however, that of the locomotives the one designated as number 13 is very old and worn out and of no use, but inasmuch as the Company has provided for more than ample motive power for all business likely to offer, unless the line should become a through line, no necessity exists for its being replaced by a new one at the present time.

BUILDINGS.

The station buildings upon the old portions of the system are rather of an inferior kind. They have been kept in the same condition as they were reasonable wear and tear excepted, and although it would be desirable to make some improvements, especially at some of the principal stations, I believe that this is hardly the proper time to make any recommendations to that effect.

ACCOUNTS.

In explanation of the balance sheet as per Exhibit A remarks in reference to some of the accounts may not be out of place.

The account "Capitalized Debt" represents, substantially, the amount of unpaid interest on First

Mortgage Bonds of issue of 1870 from the time of issue to the time of cancellation in 1881, or, in other words, the loss in the operation of the road for that period.

“East Portland Lands” and “Portland and East Portland Office and Warehouse Property” represent actual cost price, whilst the value of property represented by account “Miscellaneous Lands” is based upon valuation roughly made. Neither of these accounts can therefore be considered as giving the true present value.

Referring to the schedules marked Exhibit K and Exhibit L it will be noticed that title to the largest part of the East Portland Lands (not belonging to the depot grounds) and to almost all of the lands embraced in the account “Miscellaneous Lands” is standing in the name of the undersigned.

Most of the lands lastly mentioned were donated at the time of the construction of the road with a view, so I believe, of the Company becoming the beneficiary, and were placed for that purpose in the name of a trustee or trustees, and were in 1876, when the then bondholders became owners of the property, transferred to and held by me in the same capacity, and all proceeds, rents, and issues were, as heretofore, turned over to the Company. It seems to me however more proper that the legal title to this property should be vested in the Company, and it is my intention to ask by separate petition to be allowed to convey title.

The town lots along the line of the Southern Extension have been placed on the market and sales are made by an agent of the Oregon and Transcontinental Company, Geo. H. Andrews, of Portland, is at present such agent but I am informed that the Oregon and Transcontinental Company has suspended the issuing of deeds for such of the lots as have been sold and for which the purchase price was paid, which I think could only tend to work injury to the interests of the railroad property in Southern Oregon and proper steps should be taken to insure the continuance of the sales and the issuing of deeds, (creating distrust and preventing settlements.)

Of the amount due from the Post Office Department for mail service a sum of \$5091 84|100 is in dispute.

Of the "Bills Receivable" only a trifling amount is collectable, to wit: about \$959 12|100. The balance about \$3039 80|100 are notes given as subsidy subscriptions by various parties in Linn and Lane Counties at the time of the construction of the East Side Division, and by a decision of the Supreme Court of the State of Oregon declared uncollectable. Therefore these claims have never been pressed and are now void, as I believe, under the statute of limitation and should have been written off the books.

Charges to London and San Francisco Bank and Deutsche Vereinsbank on account of dividends No. 1, 2, 3 represent unpaid dividends, account warrants No. 1, 2, 3, preferred stock for dividends declared for

the years 1881, 1882 and 1883. I am advised by counsel that payment of these funds cannot be enforced by me as Receiver.

A small balance of the construction fund, to wit: \$24.94, is in the hands of the present trustee, The Farmers Loan and Trust Company.

The Reorganization Trustees, Messrs. H. Villard, C. E. Bretherton and R. D. Peebles, have still in their possession an amount of \$500.00 which is not accounted for, and which was retained by them when settlement with the Company was made. This sum was allowed to be retained as a reserve fund for small contingent claims which might still be made against the Reorganization Trustees arising out of transactions had under their trust.

Account Hohenemser and Koehler Trustees represents a special trust fund provided for paying off such outstanding bonds of 1870 as have not been cancelled. This fund is beyond the control of the Company.

The amount of bonds outstanding in 1881 was \$23,200, since then some bonds have, I believe, been presented and paid, but I am unable to procure at this moment a statement showing the present condition of this account as the same is kept at Frankfort-on-the-Main, Germany. Request for a statement of account has been made. Most of these bonds will, in all probability, never be presented, being either in the hands of parties who do not understand the nature of the security or who do not know where to present them for payment, or being lost or destroyed.

London and San Francisco Bank account Coupons Nos. 4 and 6 represents unpaid coupons on First Mortgage Bonds, series as mentioned. This account is likewise, as I am informed by counsel, beyond control of the Company, and therefore no demand was made for the money.

The amount charged to account Assistant Treasurer, London, account coupon No. 7 shows the moneys forwarded to the London office of the Company for the purpose of being applied towards paying coupon No. 7 First Mortgage Bonds of the Company, which fell due on January 1st, 1885. Demand for this sum was made by me as Receiver, but so far without success.

Sinking Fund accounts are explained on pages 6 & 7 of Exhibit U and V.

As to the Fuel accounts, and the inventory shown by Exhibit N it is necessary to say that the measurement owing to the irregularity of the wood piles, cannot be considered as mathematically correct.

The construction material tools and supplies are shown by Exhibit R giving the different kinds of material, number or measurement and where stored. A large part of this material is in a warehouse at Ashland station, closely piled, and another part at Buck Rock tunnel, in the Siskiyou mountains, and as an inventory of this, as well as of all other construction material was only taken last Fall, under my management, and as it would have involved considerable cost to check the material, tools and supplies over again, I

deemed it best to dispense with it.

In regard to the sale of construction material, supplies and tools I have assumed that the order of February 9th, 1885, authorizes me to dispose of the same as occasion may arise. Aside from the desirability of converting into cash whatever is not likely to be useful it must be borne in mind that all material of that character will quickly depreciate in value, and that opportunity to sell does not often offer.

In connection with the supply accounts an explanation of the account "Suspense Rails and Fastenings," which is a mere book account, is desirable. As already stated the older lines of the system require considerable new material, in the shape of rails and fastenings, annually, the cost of which is a proper charge to operating expenses. Owing to our being so remote from the rail manufactories and to being compelled to exclusively ship rails around Cape Horn, by sailing vessel, it is necessary to make the purchase and shipments in large quantities, usually once a year. The Company having been almost always in straitened circumstances, there was never a large supply of rails on hand. Purchases were usually delayed as long as possible, and immediately upon arrival the material was required to be put into the track. If the amount represented by the annual shipment of rails would have been charged into operating expenses at the time when the material was received here and put in the track all of it would have come in one month's accounts and the result would have been the showing

of a considerable loss in operation. In order to distribute the charges more uniformly over the whole year, which is proper, as they really represent the supply required for the entire year, it has been the custom of the Company to charge to operating expenses monthly, certain lump sums, varying from five to ten thousand dollars, intended to cover the cost price of the annual requirements of rails and fastenings, together with freight and other charges, and to balance this charge, which is no cash expenditure, by a credit entry under the head of an account as above entitled, thus showing how much money was reserved for the purchase of the renewal of rails. To this account was then charged the actual cost price when the material was really purchased or received.

The operating expense accounts have thus been charged from Jan'y. 1st, 1884, to January 19th, 1885, with an amount of \$80,069.65 and for which the track has, so far, not received any benefit in the shape of new rails, and in order to cover the entire shipment of rails and fastenings now soon expected here, there will have to be charged into the operating expenses accounts an amount of only \$25,247.25 and credited to "Suspense Rails and Fastenings" which at the monthly installment, now fixed at \$9,000.00 covers a period of about two months and one half. This being done the operating expense accounts, sub-division, "Repair of Track" will have been charged with the full value of the cargo of rails now expected.

The net earnings heretofore reported for the period Jan'y 1st 1884 to January 19th, 1885 have been reported to that amount lower than they really would have been, had such suspense account not been kept. The money thus credited to "Suspense" is not on hand. It was used for paying off a part of the floating debt, but applying it in that way left the debt, on account of the Starbuck contract, to the amount as now shown.

As to the sundry debit accounts it should be stated that certain of these assets are counter balanced by credited vouchers unpaid in favor of the same persons or corporations, as fully appears by the detailed statements shown by Exhibits D and E.

Regarding the liabilities of the Company I would state. The issue of preferred and common stock and of First and Second Mortgage Bonds appears from the balance sheet and need no comment. The liability for outstanding bonds, issue of 1870, as well as interest Coupons 1 to 6 of Bonds of the same issue, is explained in connection with the Hohenemser-Koehler Trust found.

The liability to holders of European and Oregon Land Company stock refers to an award made to said stockholders by arbitration in 1874, to reimburse them for certain expenses incurred by the European and Oregon Land Company, at the time when it, by contract with the Oregon and California Railroad Company, had become the owner of the lands granted to the Oregon and California Railroad Company by the United States, and which lands were then retransferred to the Railroad Company. I am advised

by counsel that this claim is now debarred, ten years having expired and no payments having been made to the individuals holding European and Oregon Land Company stock.

Account "Reserve for deferred interest certificates Nos. 7 and 8 of 1870 shows the liability of the Company for outstanding deferred interest certificates issued in place of coupons Nos. 7 and 8 of bond issue of 1870 said certificates having been convertible into common stock, but were never presented for exchange.

The "Adjustment Account Lease and Contract" shows the benefit accrued to the Railroad Company under the deed of release of August 1st 1884 taking the Second Mortgage Bonds into account at par.

LAND GRANTS.

Grant referring to East Side Division.

The maps of definite location have been filed in the office of the Secretary of the Interior for the entire line to the south boundary of the state, and for about three-fourths of a mile beyond the same, the point of junction with the Oregon Division of the Central Pacific Railroad, agreed upon between the Chief Engineers of both companies. The lands adjacent to this entire line have been withdrawn from market. The road has been examined by the Commissioners and accepted by the President as far south as 45 miles south of Roseburg. There remains therefore, of the line constructed, still to be examined and accepted a section of exactly 100 miles.

The Company had already made application for the appointment of Commissioners for the examination of this section, but the President of the United States has not acted upon the request. I deem it therefore desirable to renew the request.

There is not sufficient information at my command to give reliable data regarding the number of acres and the value of the lands inuring to the Grant.

The following is based upon approximate estimates:

Number of acres withdrawn from mar-

ket in favor of the Company about	3,002,318	acres
Of which there is patented	323,060	acres
Selected	325,387	acres
Sold	195,635	acres
Remaining unsold	2,806,682	acres

Application for patents of lands have been repeatedly made but within the last few years the Department of the Interior has not issued any patents. I think it is necessary to urge this matter.

At this place it will be best to refer to the Land Grant accounts shown in the general balance sheet, as they cannot be understood without some explanations.

In the month of August, 1880, a rough estimate was made of the number of acres likely to inure to the Grant for the section of the line from Portland to Roseburg which was ascertained to be about 1,718,478 acres and which were estimated to be of the value of \$886,336.00 by allowing for arable lands a

price of \$2.00 per acre, for pasture lands 50 cents per acre and for timber lands 20 cents per acre (because remote). These prices were put down as the actual prices if all the lands would or could be sold at once, for cash, and I believe were not far out of the way, if considered that a large amount of the area of the grant is almost inaccessible as long as the country is not opened up more than at present. Against this amount the sales made have been credited, thus showing the value of the remaining grant to be the amounts as now shown by the balance sheet to which ought to be added the amount under "Contracts Receivable," representing unpaid amounts on sales made on time.

In estimating the value of the grant south of Roseburg on the basis of the value thus ascertained for the part of the grant north of Roseburg by merely considering the number of acres likely to inure in comparison with the acreage north of Roseburg an additional value of about \$450,000 might be put down.

Of the grant made to the Oregon Central Railroad Company to which the Oregon and California Railroad is successor, the unearned portion, to-wit: For the line from a point near Forest Grove to Astoria has recently been declared forfeited by Act of Congress. The balance of the grant adjacent to the line from Portland to St. Joseph has been earned by actual construction: the line has been examined by commissioners and accepted by the President of the Unit-

ed States and part of the acreage earned has been selected. No patents however have ever been received, although application has been made for the same.

Approximate estimate of lands withdrawn from market and inuring to the grant for

road built gives	237,000 acres
Of which selected	67,675 acres
Of which already sold	28,706 acres
Remaining therefore unselected	169,324 acres
And unsold	208,293 acres

The Company had also made a limited number of contracts for sale of lands belonging to the line from Forest Grove to Astoria, said contracts stipulating however that, in case the Company should not get the lands, the purchase money without interest is to be returned. The moneys received under said contracts were kept in a special fund, a part of which is now in my custody and the balance of which I expect to get within a short time. It will be necessary for me to make a special application for being permitted to refund said money, after official certificates are received from the General Land Office defining the boundary line between the earned and the forfeited portion of the grant.

EXISTING CONTRACTS.

There are in operation two contracts with the Western Union Telegraph Company: One for the East Side and one for the West Side Division providing for keeping in repair and for extension of the telegraph lines; for the furnishing of additional fa-

cilities when required and for free transmission of all telegraphic messages pertaining to business of the railroad company within the state of Oregon and to the amount of \$9,000 annually (figured at half rates) over all the Western Union Telegraph lines within the United States and setting forth a number of minor stipulations.

A contract heretofore in force with Wells, Fargo & Co. for the carrying of express matter, has been abrogated, but by injunction the Railroad Company is bound to continue to furnish, pending litigation, to Wells Fargo & Co. the same facilities as it had furnished under said contract. The compensation paid by Wells, Fargo & Co. for the services rendered seems to me inadequate and to require readjustment, and it is my intention to present at a later time a petition to have the same readjusted.

The contracts with the Oregon Transfer Company provide for the delivery of freight from and to all the depots of the Oregon and California Railroad Company within the limits of the Cities of Portland and East Portland. One of these contracts referring to business of the East Side Division stipulates for its termination in 1886 or sooner, at the option of the Railroad Company, "in case through connection by Railroad should be made between the Cities of Portland and East Portland and any point in the States of California and Nevada or the territory of Utah, with a railroad in said states or territory forming through connection by rail with the eastern states or California."

The opening of the Northern Pacific Railroad for through business was considered by the Railroad Company as the contingency provided for in said contract upon the happening of which the contract could be discontinued and notice to that effect was given. The Oregon Transfer Company however contended that the proviso referred to does not apply in the case of the opening of the Northern Pacific Railroad; that it will only become effective if connection is made so as to make the Oregon and California line a part of a through line. As a matter of fact the Railroad Company has continued to pay compensation for services rendered by the Transfer Company as would have accrued if said contract was still in force, and by advice of counsel I continue to pay to the Oregon Transfer Company as provided by said contract assuming that the time had not arrived when the same could have been terminated by the Railroad Company.

The contract with said Oregon Transfer Company referring to the business of the West Side Division, runs until the year 1889.

Last year a contract was made with the Pullman Palace Car Company for the furnishing of sleeping cars. Under this contract it is expected to have, shortly, a daily line of sleepers running between Portland and Ashland, which is necessary for fostering overland travel to California. The contract is of a form frequently used between the Pullman Palace Car Company and Railroad Companies. It provides,

in substance, for the furnishing of the cars by the Palace Car Company, which undertakes to keep and maintain the cars as to their interior appointments, whilst the Railroad Company agrees to maintain the running gear and outside finish. The Pullman Company is entitled to the collection of the extra fare for the use of the car by passengers, the Railroad Companies having an option to acquire one-half interest in said cars and their earnings by paying one half of cost price, said option to be exercised within five years from the date of the contract. Pending the arrival of the cars specially built for the Oregon and California Railroad Company, one car running twice a week has been temporarily put on, for which the usual mileage charge is 3 cents per mile, is paid to the Pullman Company, the latter keeping the cars in repair.

Traffic agreements with the Oregon Railway and Navigation Company are in force regarding interchange of business between the Oregon and California Railroad lines and the lines of the Oregon Railway Company, Limited, leased by the Oregon Railway and Navigation Company. Under said agreement the Oregon and California Railroad Company transports all freight and passengers destined to or originating on the narrow gauge lines from the points of intersection to Portland or vice-versa, at rates below those given in the tariffs.

These agreements I believe to be beneficial, not only to both Railroad Companies but also to the farm-

ing and business communities along the narrow gauge lines. It is a question whether these agreements can be continued beyond May 21st 1885 in view of the law enacted during the past session of the Legislature of the State of Oregon, commonly known as the Hoult Railroad bill.

The contract entered into by the Oregon and California Railroad Company in conjunction with the Oregon Railway and Navigation Company and the Northern Pacific Railroad Company with the Northern Pacific Terminal Company needs mention. It was made for the purpose of providing for the three Railroad Companies' terminal facilities at Portland, East Portland and Albina, but owing to the changed relative positions of the transportation lines, and no doubt, also in consequence of the changed financial situations of all, the plans contemplated were only partially carried out and leaves matters in a very unsatisfactory state.

Under said contract the Terminal Company, it seems to me, was bound to furnish, within a reasonable time, terminal facilities for the various Railroad Companies, but, so far, it has failed to furnish such, for the Oregon and California Railroad, as are required, thus compelling the latter to continue to provide such terminal facilities at its own expense.

Of the facilities created by the Terminal Company there is for use of the Oregon and California Railroad, jointly with the Oregon Railway and Navigation Company, nothing but a small passenger depot at East Portland, representing a value of about \$10,-

000. or less. It should be mentioned, however, that the Oregon and California Railroad has used at various times, but to a very limited extent, the freight car transfer which is considered to be a temporary arrangement, built only pending the construction of a bridge across the Willamette river.

In pursuance of the contract entered into the Oregon and California Railroad Company did, in good faith, transfer and sell, for a consideration of \$200,000.00, a large portion of its real estate situate in Couch's Addition to the City of Portland commonly known as the "Couch Lake property," recovered from Ben Holladay, and it is now placed in the very undesirable position of not possessing sufficient real estate at Portland of its own, for doing, on its own ground, its terminal business, should there be an increase of traffice on the West Side Division, which may reasonably be expected.

Under this contract the Oregon and California Railroad Company is bound to pay a rental equal to 20 per cent of the interest and sinking fund charges on the bonds of the Northern Pacific Terminal Company, together with 20 per cent of the taxes, insurance, and other charges and general expenses, which altogether amounts at the present issue of bonds and considering the cost of an independent management of the Terminal Company's affairs at New York and at Portland, to about \$42-45000 and this annual charge will in all probability increase by further expenditures of money.

Rental equal to 20 per cent of the interest of outstanding Terminal Bonds, on behalf of the Oregon and California Railroad Company, was paid by the Oregon and Transcontinental Company under the provisions of the lease of May 25th, 1883, until December 31st, 1883, but said rental due July 1st, 1884 and January 1st, 1885, was not paid by the Oregon and Transcontinental Company nor was it paid by the Oregon and California Railroad Company, but, in conformity with the terms of the contract with the Terminal Company, the amount thus due and payable was paid in equal parts by the Oregon Railway and Navigation Company and Northern Pacific Railroad Company, who now make claim against the Oregon and California Railroad Company for reimbursement, together with interest, all of which claims amounted on January 19th '85 to about \$35,-358.00.

The contract provides, in case default in the payment of rental is made, for the forfeiture of the rights of the defaulting party in and to said contract and privileges after default has existed for thirty days, without however relieving the defaulting party of any obligations incurred under the contract.

So far as known to me no notice of forfeiture has ever been served on the Oregon and California Railroad Company and I do not know whether it is the intention of any of the other parties to the contract to exercise whatever rights in that respect the contract may give to them.

The contract provides in case of dissatisfaction amongst the parties thereto, for arbitration and I have information of the Northern Pacific Railroad Company having already made a move in that direction to bring about a readjustment of the proportion of charges to be borne by the three Railroad Companies. I believe but am not quite certain, that the former President of the Oregon and California Railroad had joined in such a move. I am of the opinion that such arbitration should be had. I shall have to bring up the matter of claims of the Northern Pacific Terminal Company in a special petition, as I shall be called upon to pay rental under said contract for the period during my receivership, the first installment falling due on July 1st, next, and, as I cannot look upon this rental, even if a just liability, as a proper item of operating expenses. I have submitted this matter to counsel for an opinion as to the legal position and rights of the Oregon and California Railroad in reference to this contract.

Speaking of the relation of the Oregon and California Railroad to the Northern Pacific Terminal Company it should be mentioned that an exchange of property at East Portland was contemplated the two parties mentioned and that an agreement had already been drawn up. In view of the unsettled relations, and in view of the fact that the terms of said agreement, although just to both parties, are more beneficial to the Terminal Company than to the Railroad Company, I suggest that the execution of said agree-

ment on the part of the Oregon and California Railroad Company be, for the present at least, suspended.

In Exhibit Za, I submit a synopsis of the pending law cases as of January 19th, 1885, so far as they do not refer to the present suit and suits arising out of it, with a memoranda showing changes up to the date of this report.

MATTERS PERTAINING TO THE ORGANIZATION OF THE COMPANY.

Upon the subject of the organization of the Company I have to state that I have knowledge of the changes recently made in the corporate officers of the Company as follows, to-wit:—

Geo. H. Hopkinson, London, President.

Vice H. Villard, resigned.

C. E. Bretherton, London, Assistant Treasurer.

Vice H. H. Tyndale, resigned.

Geo. H. Andrews, Second Vice President.

Vice R. Koehler, resigned.

W. W. Bretherton, Secretary.

Vice Geo. H. Andrews, resigned.

FLOATING DEBT.

Leaving aside such liabilities as refer to bond interest or to transactions had and matters not directly connected with the operation or the construction of the road and leaving aside the claim of \$446,000 made by the Oregon and Transcontinental Company, I find the floating debt to be \$360,271.10, consisting of the following items, to-wit:—

Audited vouchers prior to June 21st 1884..\$	40,756.16
Audited vouchers June 21st, '84, to Jany 19th, '85	83,140.80
	<hr/>
	123,896.96
Unpaid wages prior to June 21st, 1884	18,525.17
Unpaid wages prior to June 21, '84, to Jany. 19th, 1885	69,779.47
Salary vouchers unpaid	2,559.10
Bills payable	40,393.83
Car mileage accoun t.....	90.82
Foreign Ticket account	1,242.42
O. R. & N. Co. Narrowgauge Traffic acct.	1,421.77
Sundry Credit Balances	8,044.66
	<hr/>
Total	\$265,954.20
Add, Rail Contract Account	94,316.90
	<hr/>
Total	\$360,271.10

which includes the amount payable for the cargo of rails and fastenings, but which does not include claims for rental for terminal facilities at Portland, about \$50,550.00 nor does it include certain claims of the Oregon Railway and Navigation Company and Northern Pacific Railroad Company made for services alleged to have been rendered prior to June 21, '84 and which cannot exceed \$15,000 thus making the total floating debt on January 19, 1885, (except the \$446,000 claimed by the Oregon and Transcontinental Company) about \$425,821.10. There may be

claims still preferred, but I believe, they cannot be large, and other claims for which suits are now pending may be adjudicated.

As an offset against this amount might be put certain assets, but as to how much of these and when the same can be collected I am unable to say at present.

Leaving aside again the claims for rental of terminal facilities, and those claims of the Oregon Railway and Navigation Company and Northern Pacific Railroad Company above referred to as well as the rail contract account, all of which, together, sum up \$159,866.90, the floating debt is \$265,954.20. Of this amount there is accrued prior to June 21st, 1884, \$61,169.70, represented by claims as shown in detail by Exhibits D and F and by items as follows: John Haily \$540. Hospital dues \$3.90 and O. R. & N. traffic balance \$1,344.47. Deducting these amounts leaves a debt accrued since June 21, 1884 of \$204,784.50 which may be subdivided in wages & salaries

.....	72,338.57
Other claims, i. e., for material and supplies furnished or services rendered	92,052.10
Bills payable, given for supplies and material furnished	20,393.83
Bills payable for construction work	20,000.

Three of the bills payable, to-wit, those in favor of Wm. Barlow, E. J. Thomas and E. W. Whipple and Bros., as shown by Exhibit H, which gives also the date when executed, when due and rate of interest,

have been given for material which was received by the Company after June 21, 1884, and was either used in whole or in part or is still on hand. There is no doubt that these rates were merely given as evidence of indebtedness and of an agreement to postpone payment, but the parties were required to sign vouchers upon which they receipted in full to the Company.

The note executed by the Company, given to McBean and Jeffery is for tunnel work. The contract for this work was made with said firm by the Oregon and California Railroad Company on June 20th, 1883, i. e. prior to the time the latter actually surrendered possession of all its property to the Oregon and Transcontinental Company under the Lease and Construction Contract dated May 25th 1883, but said documents are to be construed as of date of January 1, 1883. The balance due to the contractors after work had been ordered stopped by the Oregon and Transcontinental Company was ascertained prior to the date of the Indenture of Release of June 21st, 1884, but, so I presume, the liability thus ascertained was assumed by the Oregon and California Railroad Company by virtue of said Indenture of Release. Upon request of the contractors and for the purpose of deferring the payment, a note was given by the Oregon and California Railroad Company bearing date August 11th, 1884, to become due December 1st, 1884. The contractors signed a receipt in full for all claims against the Company. As most of the work

was done under the Oregon and Transcontinental Company there is a question whether under the order of January 19th, authority is conferred on me to pay. It seems however that the action of the contractor, accepting the note, debars them from looking to the Transcontinental Company for payment and that they have now a claim against the Oregon and California Railroad accrued since June 21, 1884.

MANAGEMENT OF THE PROPERTY UNDER THE RECEIVER.

At the date of my taking charge of the property the cash in hands of the Treasurer of the Oregon and California Railroad Company was turned over to me, amounting to \$1,695.81. I made, as soon as it could be done, demand for the funds in hands of the Assistant Treasurer in New York and London and in the hands of other parties, but so far have not succeeded in getting any of the moneys, except \$148 16|100 part of the small balance as shown in the hands of the Assistant Treasurer in New York.

Regarding the funds remitted to the London office which amounted to \$112,500 and which were remitted for the purpose of being applied towards payment of coupon No. 7 First Mortgage Bonds due January 1st, 1885, reply was received from the Assistant Treasurer and also from members of the Board of Directors residing in England constituting the "Finance and Construction Committee of the Oregon and California Railroad Company," to the effect that these

funds had previously been lodged with certain persons and could not be transferred to me, and I have not, so far, succeeded in getting the same under my control. The same applies to the amount of \$8,073.67 with which the Assistant Treasurer is charged.

The London office of the Company was notified that I, as Receiver, was not authorized to pay in future any salaries or expenses, and requested to turn over to me the property and documents. I am now informed by letter from the Assistant Secretary that the lease for the office will not terminate until mid-summer; that the office furniture which appears on the books as having cost \$490.00 is of too small a value to bear the expense of shipment, and that although the salaries of all the officers of the Company have been stopped by it, except a small salary which is to be allowed to the Assistant Secretary it is deemed necessary to continue to have an office in London, and that for the services of the Assistant Secretary, as well as for office rent and other incidental expenses, an allowance should be made.

In this connection I deem it proper to state the fact that almost all of the capital stock of the company, except a small number of shares, is held in Europe and therefore an office in London seems to be not only desirable but essential. As to the amount required for that purpose the Company should speak for itself, by its officers, by application of its counsel to your Honors.

The office at New York was closed. There were

two rooms rented, the lease terminating only on May 1st 1885 and as the rental will be a just claim against the Railroad Company I considered it prudent to leave for the present, all the furniture and papers in said office in charge of an agent. This will not entail any expense except a small salary to the agent. I have had an inventory taken of the furniture and papers of the New York office. The inventory of the furniture is shown on Exhibit T. The New York office was for a great number of years the office of the executive head of the Company and quite an amount of papers have accumulated, amongst which there are, or may be, a number of important documents and letters which I have given orders to sift and arrange.

OPERATION OF THE ROADS.

Regarding the earnings and operating expenses I beg leave to refer to the detailed statements of accounts marked as Exhibits U and V. The earnings as shown therein in detail are as follows:

For the period January 19th to 31st, gross

receipts	\$ 41,397.32
Operating expenses	24,204.82
Net earnings	17,192.50

For the month of February:

Gross earnings	\$70,170.75
Operating expenses	59,064.22
Net earnings	11,106.53

Total net earnings\$ 28,299.03

Comparison with corresponding months of last year can only be made for February no figures having been worked out for the corresponding fraction of the month of January, 1884.

It is necessary to call special attention to the manner of reporting the gross freight earnings. As stated in a preceding part of this report, The Oregon Transfer Company receives and delivers freight, on behalf of the railroad, at Portland; it receives therefor a tonnage compensation which is borne by the Railroad and which represents a portion of the traffic rate. This is rather an unusaul custom, most transportation lines adding such drayage charges to their rates. In order to enable comparison with accounts of other lines, as well as for statistical purposes, the amount thus payable monthly for transfer or drayage is deducted from the gross earnings and the figures thus reported in the statements just referred to are clear of the same.

The gross earnings for February are \$8,173.68 more than last year, the mileage operated about 8 miles more; the expenses are nearly \$9,000 higher, but the expense account includes, this February, an installment of \$9,000 for renewal of rails, (\$7000 for East Side and \$2,000 for West Side Division), whilst, owing to the small receipts, nothing was charged in February 1884.

Passenger business was much lighter than last year, freight better, but still unsatisfactory; of the increase of \$15,000 in freight there appears about one half on the West Side Division.

For the fractional month of January 20|31st, 1885 \$3000 was charged for renewals of rails.

On pages 16 and 17 of Exhibit U and pages 16 and 17 of Exhibit V is shown the amount of work done which it is customary to charge to construction account, giving also the character of the work, amounting, for January to\$503.60
 For February to..... 269.22

 Total\$772.82

Only a small part of this sum is actual cash expenditure; the larger amount represents charges of material on hand, used for the purposes above stated and merely transferred from one account to another.

RECEIPTS AND DISBURSEMENTS.

In Exhibits W & Y I show the receipts and disbursements separated for the two periods, January 19th to 31st and for the month of February, which are accompanied by the proper vouchers, and to which the following remarks apply.

Cash received from all sources, including balances turned over to me by the Treasurer of the Oregon and California Railroad Company.

For the period January 19th to 31st	\$ 50,027.99
Disbursed during said period	13,239.09
	<hr style="width: 10%; margin-left: auto; margin-right: 0;"/>
Balance on hand January 31st	36,788.90
Received during the month of February....	84,329.03
	<hr style="width: 10%; margin-left: auto; margin-right: 0;"/>
Total	\$121,117.93

Disbursed during the month of February 37,906.05

Balance on hand February 28th\$ 83,211.88

Divided as follows:

In First National Bank.....\$69,048.56

In office 14,163.32

The balance as shown in First National Bank to the credit of the Receiver's account does not exactly correspond with the amount actually in bank. Upon Exhibit Z is a certificate of the First National Bank, showing amount to my credit on February 28, and an explanation about the difference between the accounts, showing a certain number of cheques drawn by me, given by numbers and amounts and in whose favor, which had not been presented to the bank for payment; also an explanation that the balance in office at that date consisted mostly of cheques and could not be deposited because received after banking hours.

Of the disbursements made there are for current operating and management expenses \$29,896.66.

For services prior to January 19th but accrued since June 21st, 1884, \$21,248.48.

Those for wages for the month of December and for the period January 1st to January 19th, 1885, refer to employees discharged or who left the service. There was altogether still due for back wages and salaries, \$55,487.72|100.

My having to provide for taxes, which require about \$45,000 and not having completed my arrange-

ments for the loan of \$106,000. I deemed it imprudent to make further payments, but shall now be able to commence.

Payments made on account of the floating debt other than those for back wages amount to \$7,-594.40|100.

Although these payments should not have been made at this time, under a strict interpretation of the order of January 19th, I considered that I was vested with sufficient discretionary power to make the same, as I looked upon these payments as cases of emergency, trusting that the explanation here made would obtain for me the required sanction from your Honors.

The ticket balance due to the Central Pacific Railroad Company was paid because that Company suggested to stop selling coupon tickets between San Francisco and Portland, which would have tended to diminish the travel overland and injured the property, while nothing would have been gained except deferring for a few months the disbursement of a few hundred dollars, which disbursement I was authorized to make at a later date.

The same argument applies to the ticket balance paid to the California and Oregon Stage Company.

Regarding the payment of the note of the Oregon and California Railroad Company in favor of Satterlee, Bostwick and Martin, Insurance Agents for \$6,-141 14|100 I would say that I was compelled to have insurance policies changed and made payable to myself as Receiver. The premium for insurance for one

year, terminating August 28th, had all been paid except this amount for which a note was given; and under advice by counsel I deemed it prudent and felt justified in making this payment which, if not paid, might have led to complications. Aside from these payments there appear a few more in small amounts, aggregating \$233 91|100. These items represent partly, payments made by agents prior to my taking charge as Receiver for which the receipts were however in transit and in order to relieve the agents accounts, I included them in Receiver's Disbursements; the remainder refers to payments for gas, water, taxes, and for similar items for the month of January, which could not be very well deferred.

Since writing this report I have received account regarding the Hohenemser-Koehler Trust fund, showing that only \$10,300 of First Mortgage Bonds of 1870 are still outstanding.

I. R. Koehler, being first duly sworn say on oath that I am the Receiver named in the foregoing report, and that said report is true, as I verily believe.

R. KOEHLER,

Subscribed and sworn to before me a Notary Public, this 31st day of March, 1885.

[Seal.]

F. G. EWALD,
Notary Public.

Filed March 31, 1885.

R. H. LAMSON,
Clerk.

UNITED STATES OF AMERICA,

District of Oregon—ss.

I, G. H. Marsh, Clerk of the United States Circuit Court for the District of Oregon, do hereby certify that the foregoing copy of Receiver's First Report, in cause No. 1109, Lawrence Harrison, et al., vs. Oregon & California Railroad Company, et al., has been by me compared with the original thereof, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Portland, in said District this September 28, 1911, A. D., 19.....

[Seal.]

G. H. MARSH,
Clerk.

Filed Feb. 13, 1912.

A. M. CANNON,
Clerk of U. S. District Court.

1. Oregon and California Railroad, R. Koehler, Receiver.

Schedule of Lands showing property represented by account "East Portland Lands."

1. Title in Oregon and California Railroad Company.

Multnomah
County.

North $\frac{1}{2}$ of Block 1. Frush Square—East Portland.

Lots 6 and 7, Block 6. Frush Square—East Portland.

Lots 5, 6, 7 and 8, Block 1. Frush Square—East Portland.

Lots 5, 6, 7, and 8, Block 36, East Portland.

Lots 5, 6, 7, and 8, Block 37, East Portland.

Lots 5, 6, 7 and 8, Block 38, East Portland.

II. Title in name of R. Koehler.

Lot 2, Block 2—Frush Square—East Portland.

Lots 1 and 4, Block 5—Frush Square—East Portland.

Lot 1 Block 7—Frush Square, N. E. Corner of I and 2nd St.

Lot 1, Block 7—Frush Square, S. E. Corner of I and 2nd St.

Lots 1 and 2, Block 66, East Portland.

Lots 1, 2, 3 and 4, Block 67, East Portland.

Lots 3 and 4, Block 68, East Portland.

Lots 1, 2, 3 and 4, Block 69, East Portland.

Lots 1, 2, 3 and 4, Block 70, East Portland.

1. Oregon and California Railroad, R. Koehler, Receiver.

Schedule of Lands showing property represented by "Miscellaneous Land" Account.

I. Title in Oregon and California Railroad Company.

Clackamas
County

Clackamas County,
Town of Milwaukee.

Block 4, Lots 9 and 10 (1, 2, 3, 4 and 11 fractional.)

Block 5, Lot 1, fractional.

80 acres South of Milwaukee, comprising the North half of the North East quarter of Section 32, T. 1 S,

R. 2 E. W. M.

149 90|100 acres South of Milwaukee, comprising the East half of the South East quarter and Lots 5 and 6 of Section 29, T. 1 S., R. 2 E. W. M.

Marion Marion County
County Town of Jefferson.

Block 16, Lots 4, 5, 6 and 7.

Block 17, Lots 8, 9, 10, 11, 12, 13, 14.

Block 29, Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14.

Block 33, Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13,
14.

Lane Lane County.
County

160 acres, comprising the North East $\frac{1}{4}$ of Sec. 33,
T. 17 S. R. 6 W.

160 acres, comprising the North half of the South-
west quarter and South half of the Northwest quarter
of Sec. 27, T. 18 S. R. 5 W.

1. Miscellaneous Lands account (Continued.)

Title in Oregon and California Railroad Company.

Washington Washington County
County Town of Hillsboro.

Block 3, Lots 9, 10, 11 and 12.

Block 8, Lots 7, 8 and 9.

II. Title in name of R. Koehler.

Multnomah Multnomah County
County

Portland Homestead Association tract.

Block 8, Lots 2 and 3.

Block 9, Lot 4.

Block 10, Lot 1.

Clackamas County,
Town of Milwaukeee.

Clackamas

County

Block 3, Lots 1, 2, 3 and 4.

Block 4, Lots 5, 6, 7 and 8.

Block 5, Lots 2 and 3 and fractional lot 4.

Block 6, Lots 1, 2, 3 and 4.

Block 7, Lot 2 and fractional Lots 1 and 3.

One (1) acre Adjoining the Town of Canemah, to-wit; Beginning at a point on the South West Side of First Street in the Town of Canemah, 80 feet from the bank of the Willamette River, and thence S. 56 degrees W. 106 feet along the line of land formerly owned by the Canemah Lumbering Company, thence S. 21 degrees E. 50 feet along the line of said premises, thence on a line Easterly to a point on the West side of First Street at the intersection of the North West line of Main Street 100 feet more or less, thence Northerly on the West side of First Street 80 feet more or less to beginning corner, containing one-half acres more or less.

And also Beginning at the North East corner of a triangular piece of land, adjoining the town of Canemah formerly belonging to William Fouts, and being the tract above described, and thence S 56 degrees W. 106 feet, thence South 21 degrees E. 50 feet, thence South 75 degrees W. 156 feet to the bank

Clackamas of the Willamette river, thence Easterly County. by the Meanderings of this River to a point bearing North 21 degrees W. from beginning corner, thence S. 21 degrees E 80 feet to beginning corner, containing one half acre more or less. Said two parcels of land lying adjoining and constituting the property known as the Canemah Mill Property.

Town of Canby.

- Block 4, Lots 9, 10, 11 and 12.
- Block 5, Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12.
- Block 6, Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12.
- Block 7, Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12.
- Block 8, Lots 3, 4, 5, 6, 7, 8, 9, 10, 11, 12.
- Block 9, Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12.
- Block 11, Lots 1, 2, 3, 4, 5.
- Block 12, Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12.
- Block 13, Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12.
- Block 14, Lots 7, 8, 9, 10, 11, 12.
- Block 19, Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12.
- Block 20, Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12.
- Block 22, Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12.
- Block 23, Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12.
- Block 24, Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12.

Clackamas

County Lands adjoining Canby.

To-wit: Beginning at the northerly corner of the Depot grounds of the O. and C. R. R. at Canby where the South line of First Street intersects the East line of A Street; thence N. 27 degrees W. 50 feet; thence

N. 63 degrees E. along South line of lands sold to P. Lee, 886 feet more or less to the Eastern boundary of lands conveyed by Geo. W. Weidler to R. Koehler Oct. 22, 1875; thence S. 27 degrees E. 100 ft. to the North line of the 100 foot Right of Way of the O. and C. R. R.; thence S. 63 degrees W. parallel with and 50 feet distant from the center line of said R. R. 886 feet more or less to the Easterly boundary of said Depot grounds; thence N. 27 degrees W. 50 feet to the beginning—Also beginning at a point bearing S 27 degrees E. 188 feet distant at right angles to the center line of the O. and C. R. R. and being the Easterly corner of said Depot grounds; thence N. 63 degrees E. 886 feet more or less to the Easterly boundary of lands conveyed by Weidler to Koehler as aforesaid; thence N. 27 degrees W. along said East boundary line 138 feet to the Southerly line of 100 ft. Right of Way of said R. R.; thence along said Right of Way line S. 63 degrees W. 886 feet more or less to said Depot grounds; thence along said Depot grounds S. 27 degrees E. 138 feet to the beginning— Also beginning at a point where the West line of G street intersects the South line of 3d Street extended, being the SE corner of a tract of land sold by R. Koehler to M. J. Walgamot—thence Southwesterly along the South line of said Walgamot's land and the South line of 3d Street extended 1960 feet more or less to the West boundary of lands conveyed by Weidler to Koehler as aforesaid; thence South 860 feet more or less to a point due West of the S. E. corner of Don. Land Claim No. 48; thence East 2310 feet to the SE cor-

ner of Claim 48; thence North 1040 feet more or less to a point distant from the center line of the O. and C. R. R. at right angles thereto 188 feet; thence N. 63 degrees E. parallel with said R. R. center line 710 feet more or less to the Southernmost corner of said R. R. Depot grounds; thence N. 27 degrees W. 138 feet; thence S. 63 degrees W. parallel with said R. R. center line and 50 feet distant therefrom 800 feet to the West line of G Street extended, thence along said West line of G Street 730 feet to the beginning— All of th three above described tracts containing 72 acres be the same more or less.

Marion Marion County
 County Town of Hubbard.
 Block 5, Lots 1, 2, 3, 4, 5, 6, 7, 8.

Marion
 County Town of Gervais.
 Block 1, Lots 1, 2, 3, 4, 5, 6, 7, 8.
 Block 3, Lots 1, 2, 3, 4, 5, 6, 7, 8.
 Block 5, Lots 1, 2, 3, 4, 5, 6, 7, 8.
 Block 7, Lots 1, 2, 3, 4, 5, 6.
 Block 9, Lots 1, 2, 3, 4, 5, 6, 7, 8.
 Block 11, Lots 1, 2, 3, 4, 5, 6, 7, 8.
 Block 13, Lots 1, 2, 3, 4, 5, 6, 7, 8.
 Block 15, Lots 1, 2, 3, 4, 5, 6, 7, 8.
 Block 17, Lots 1, 2, 3, 4, 6.
 Block 18, Lots 1, 2, 3, 4, 5, 6, 7, 8.
 Block 19, Lots 1, 2, 3, 4, 5, 6, 7, 8.
 Block 20, Lots 1, 2, 3, 4, 5, 6, 7, 8.
 Block 21, Lots 1, 2, 3, 4, 5, 6, 7, 8.
 Block 22, Lots 1, 2, 3, 4, 5, 6, 7, 8.

- Block 23, Lots 2, 3, 4, 5, 6, 7.
- Block 29, Lots 1, 2, 3, 4, 5, 6, 7, 8.
- Block 31, Lots 1, 2, 3, 4, 5, 6, 7, 8.
- Block 33, Lots 1, 2, 3, 4.
- Block 35, Lots 1, 2, 3.
- Block 38, Lots 2, 3, 4.
- Block 39, Lots 1, 2, 3, 4, 5.
- Block 40, Lots 1, 2, 3, 4, 5, 6, 7, 8.
- Block 42, Lots 1, 2, 3, 4, 5, 6, 7, 8.
- Block 43, Lots 1, 2, 3, 4, 5, 6, 7, 8.
- Block 45, Lots 1, 2, 3, 4, 5, 6, 7, 8.
- Block 47, Lots 1, 2, 3, 4, 5, 6, 7, 8.
- Block 49, Lots 1, 2, 3, 4, 5, 6, 7, 8.
- Block 52, Lots 6, 7, 8.
- Block 53, Lots 5, 6, 7.
- Block 54, Lots 1, 2, 3, 4, 5, 6, 7, 8.
- Block 55, Lots 1, 2, 3, 4, 5, 6, 7, 8.
- Block 56, Lots 1, 2, 3, 4, 5, 6, 7, 8.
- Block 57, Lots 1, 2, 3, 4, 5, 6, 7, 8.
- Block 58, Lots 2, 3, 4, 5, 6, 7, 8.
- Block 59, Lots 3, 4, 5, 6, 7, 8.
- Block 60, Lots 1, 2, 3, 4, 5, 6, 7, 8.
- Block 63, Lots 1, 2, 3, 4, 5, 6, 7, 8.
- Block 65, Lots 1, 2, 3, 4, 5, 6, 7, 8.
- Block 67, Lots 1, 2, 3, 4, 5, 6, 7, 8.
- Block 68, Lots 1, 2, 3, 4, 5, 6, 7, 8.
- Block 69, Lots 1, 2, 3, 4, 5, 6, 7, 8.
- Block 71, Lots 1, 2, 3, 4, 7, 8.
- Block 75, Lots 1, 2, 3, 4, 5, 6, 7, 8.
- Block 74, Lots 2, 3, 4.

Block 76, Lots (1 and 2 fractional.)

Block 77, Lots 1, 2, 3, 4 (6, 7, 8, fractional.)

Block 79, Lots (1, 2, 3, 4, fractional.)

Town of Brooks.

Block 1, Lots 1, 2, 3, 4.

Block 2, Lots 1, 2, 3, 4.

Block 3, Lots 1, 2, 3, 4.

Marion

County Brooks (Continued.)

Block 4, Lots 1, (2 and 3, fractional.)

Block 5, Lots 1, (2, fractional.)

Block 6, Lots 1, 2, 3, 4.

Block 7, Lots 1, 2, 3, 4.

Block 8, Lots 2, 3, 4.

Town of Turner.

Block 1, Lots 5, 6, 7, 8.

Block 3, Lots 1, 2, 3, 4.

Block 9, Lots 1, 2, 3, 4, 5, 6, 7, 8.

Block 13, Lots 3, 4, 5, 6.

Block 15, Lots 7 and 8.

Block A, Lots 4, 5, 6.

Block B, Equal to 4 lots.

Town of Marion.

Block 3, Lots 2, 3, 4, 5, 6, 7, 8.

Block 6, Lots 1, 2, 3, 4, 5, 6, 7, 8.

Block 7, Lots 1, 2, 3, 4.

Block 8, Lots 2, 3, 4.

Block 9, Lots 1, 2, 3, 4, 5, 6, 7, 8.

Block 10, Lots 1, 2, 3, 4.

Block 11, Lots 1, 2, 3, 4, 5, 6, 8.

Block 12, Lots 1, 2, 3, 4, 5, 6.

Block 14, Lots (1, 2, 3, 4, fractional), 6, 7, 8.

Block 15, Lots 1, 2, 3, 4.

Block 16, Lots 1, 2, 3, 4, 5, 6, 7, 8.

Block 17, Lots 1, 2, 3, 4, 5, 6, 7, 8.

Block 18, Lots 1, 2, 3, 4, 5, 6, 7, 8.

Block 19, Lots 1, 2, 3, 4, 5, 6, 7, 8.

Block 20, Lots 1, 2, 3, 4, 5, 6, 7, 8.

Block 21, Lots 1, 2, 3, 4, 5, 6, 7, 8.

Block 22, Lots 1, 2, 3, 4, 5, 6, 7, 8.

Block 23, Lots 1, 2, 3, 4, 5, 6, 7, 8.

Marion Marion (Continued).

County

Block 24, Lots 1, 2, 3, 4, 5, 6, 7, 8.

Block 25, Lots 1, 2, 3, 4, 5, 6, 7, 8.

Block 26, Lots 1, 2, 3, 4, 5, 6, 7, 8.

Block 27, Lots 1, 2, 3, 4, 5, 6, 7, 8.

Block 28, Lots 1, 2, 3, 4, 5, 6, 7, 8.

Block 29, Lots 1, 2, 3, 4, 5, 6, 7, 8.

Beginning at a point where the West line of First Street (Town of Marion), extended Southerly intersects the South line of lands conveyed by Geo. W. Weidler to R. Koehler, Oct. 22, 1875, and distant 115 feet from the center line of the O. and C. R. R. at right angles thereto; thence Northerly along the West line of 1st Street 210 feet more or less to a point distant 30 feet Southerly from the S. E. corner of Block 6 in said town, thence Westerly parallel with said Block 6, 280 feet thence Northerly parallel with said Block 6, 290 feet to the S. E. corner

of land sold to Siler; thence Westerly along Siler's South line to the West boundary of lands conveyed to R. Koehler as aforesaid; thence Southerly along said West boundary to the S. W. corner of said lands 680 feet more or less; thence Easterly along South boundary of said lands to the point of beginning—containing 11 acres more or less.

Also all that portion of the lands conveyed to R. Koehler as aforesaid lying East of the O. and C. R. R. right of way limits and South, East and North of the Town of Marion as laid out and recorded in Marion County records—containing 10 acres be the same more or less.

All of said lands including the townsite of Marion being originally a portion of Donation Land Claim No. 58. Notification No. 1129, in Section 33, T. 9 S. R. 2 W. W. M.

Town of Jefferson.

Block 8, Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14.

Block 12, Lots 6, 7, (5, 8, 9, 10, 11, 12, 13, 14, fractional.)

Block 16, Lots 1, 2, 3.

Block 17, Lots 1, 2, 3, 4, 5, 6, 7.

Block 18, Lots 6, 7, 8, 9, 10.

Jefferson (Continued.)

Marion

County

Block 20, Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14.

Block 24, Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14.

Block 26, Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12.

ing in Linn County, State of Oregon, beginning nine (9) chains and seventy-five (75) links South of the Northwest corner of Pason S. Clark's Donation Land Claim, notification No. 2855. Claim No. 45, T. 15 S, R. 4 W.; thence South 10.25 chs.; thence East 7.67 chains; thence North 7.09 chs.; thence N. 67 degrees W. 8.00 chs. to the place of beginning, containing Six and Sixty four one hundredths (6.64) acres.

Also, Lots 1, 2 and 3 in Section 3 in T. 16 S., R. 4 W. and Lot 5 and the N. E. $\frac{1}{4}$ of the S. E. 1-4 of Section 34, T. 15 S. R. 4 W. W. M., containing One hundred and fifty six and twenty one hundredths (156.20) acres.

Also, Beginning 16 chs. South and 9.43 chs. West of the quarter section post on line between Sections 15 and 22, T. 15 S. R. 4 W.; thence West 10.58 chs.; thence North 11.51 chs.; thence East to the West boundary of the Harrisburg Mill property; thence in a South Easterly direction with said boundary to the place of beginning, containing Eleven (11) acres more or less.

Lane

County

Lane County.

All that piece or parcel of land, situate, lying and being in Lane County, State of Oregon, commencing at N. E. corner of Donation claim of Jesse Severn, Notification 2872, in Section 18, T. 15 S. R. 4 W.; thence running East 9.10 chs.; thence South 19.23 chs.; thence West 9.10 chs.; thence North 19.23 chs. to place of beginning containing Seventeen and fifty

one hundredths (17.50) acres more or less, being the Northern party of Lot No. 1 in Section 18, T. 15 S., R. 4 W.

Also, beginning at 3.50 chs. South of the South East corner of the S. W. quarter of the S. W. quarter of Section 34, T. 15 S., R. 4 W.; thence North 43.50 chs.; thence S. 24 degrees E. 21 chs.; thence West 1.60 chs.; thence South 14.21 chs.; thence S. 59 degrees, E. 3 chs.; thence South 25 degrees E. 5.40 chs.; thence East 1.48 chs.; thence North 16.43 chs.; thence S. 58 degrees E. 8 chs.; thence South 16 chs.; thence West 20 chs., to the place of beginning, situate, lying and being in Section 34, T. 15 S. R. 4 W. and Section 3, T. 16 S., R. 4 W., County of Lane and State of Oregon.

Also, Lot 4 in Section 11 and Lots 1, 2 and 8 in Section 10, T. 16 S., R. 4 W. W. M., containing Ninety-three and forty-four one hundredths (93.44) acres, in the County of Lane and State of Oregon.

Also, commencing at the N. E. corner of the Donation claim of Wm. Brice and wife, Notification 2890, in Township 16 S., R. 4 W., thence running South 13.45 chs.; thence West 13.45 chs.; thence North 13.45 chs.; and thence East 13.45 chs. to the place of beginning, all in Section 10, T. 16 S., R. 4 W., containing Eighteen (18) acres more or less in the County of Lane and State of Oregon.

Also, the South quarter of the North West quarter of the South West quarter of Section 17, and the South half of the West half of the South East quar-

ter (Lot 7), of the North West quarter of Section 16, all in T. 15 S., R. 4 W. containing in all Twenty (20) acres, more or less, in the County of Lane and State of Oregon.

Also, the North half of the North East quarter of the North East quarter of the South West quarter of Section 16, T. 15 S., R. 4 W. W. M., containing five (5) acres in the County of Lane and State of Oregon.

Also, twenty (20) acres from off the East end of that certain tract of land lying in the County of Lane and State of Oregon known and described as follows:

Commencing at the N. W. corner of Section 32, T. 15 S., R. 5 W.; thence South eighty rods; thence West twenty rods; thence South eighty rods; thence East twenty rods; thence North Six rods; thence East eighty rods; thence North One hundred and fifty-four rods; thence West eighty rods to the place of beginning, containing Eighty-Seven (87) acres more or less.

Also, the N. E. quarter of the N. E. quarter of Section 16, T. 18 S., R. 3 W., containing Forty (40) acres of land more or less in the County of Lane and State of Oregon.

Also, the South half of the South half of the N. E. quarter of Section 2, T. 19 S., R. 4 W., containing Forty (40) acres of land in Lane County and State of Oregon.

Also, the Donation claim of Alexander Wood and wife, being the claim numbered 54, notification 5079, being a part of Section 4 in T. 18 S., R. 5 W., bounded

and described as follows; beginning at a point 2.62 chs. East of the North West corner of said Section 4, in T. 18 S., R. 5 W.; thence South 53.92 chs.; thence East 59.37 chs.; thence North 53.85 chs.; thence West 59.35 chs. to the place of beginning, containing Three hundred and Nineteen and Eighty Six one hundredths (319.86) acres of land. Also, the Donation claim of Samuel Wingat and wife, being notification numbered 7970 and designated as the South half of the Northeast quarter and the East half of the South East quarter and Lots numbered 1 and 2 of Section 5 and the South half of the North East quarter and the North East quarter of the North East quarter and Lot numbered 1 of Section 8, all in T. 18 S., R. 5 W., containing Three hundred and twenty and Sixty two one hundredths (320.62) acres, all in the County of Lane and State of Oregon.

Town of Irving.

Block 1, Lots 1, 2, 3, 4, 5.

Block 2, Lots 1, 2, 3, 4.

Block 3, Lot 4.

Block 5, Lots 1, 2, 3, 4, 5, 6, 7, 8.

Washington County.

Washington County. Town of Reedville.

County.

Block 1, Lots 1, 2, 3, 4, 5, 6, 7, 8.

Block 2, Lots 1, 2, 3, 4, 5, 6.

Block 3, Lots 1, 2, 3, 4, 5, 6, 7, 8.

Block 4, Lots 1, 2, 3, 4.

1150 *The Oregon & California Railroad Co.*

Oregon and California Railroad—R. Koehler, Receiver.

Schedule of miscellaneous lands sold by contracts to various parties, for which the title is still in R. Koehler.

Clackamas Town of Canby.
County.

Block 4, Lots 7 and 8, to Edwin M. Horsford, Oct. 13-84.

Block 11, Lots 7, 8, 9, 10, 11, 12, to J. L. Thrapp, Oct. 8-84.

Block 14, Lots 1, 2, 3, 4, 5, 6, to Isaac Thornton, Dec. 6-83.

Block 3, Lots 4, 5, 6, 7, 8, 9, to Wm. Knight, May 1-83.

Block 1, Lots 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, to Knight Bros., Dec. 20-78.

24.32|100 acres adjoining Canby on the West to Chas. Knight, Mar. 17-77.

Marion Town of Gervais.
County.

Block 59, Lot 2 to Mary Michael, April 15-84.

Block 51, Lots 5, 6, 7, 8, to John B. Bromlette. June 26-76.

Block 53, Lots 3 and 4, to A. Wunch and P. Scharbach, Oct. 1-75.

City of Albany.

Block 23, Lot 5 to Geo. Patterson, July 12-84.

UNITED STATES OF AMERICA,

District of Oregon—ss.

I, A. M. Cannon, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing copy of Exhibits "K" and "L" as filed with the Receiver's First Report in the case of Lawrence Harrison et al. vs. the Oregon & California Railroad Company, has been by me compared with the original thereof, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland in said District this March 15th, 1912.

[Seal.]

A. M. CANNON,
Clerk.

By F. H. Drake,
Deputy Clerk.

(Portion of Exhibit L.)

L.

1. OREGON AND CALIFORNIA RAILROAD
R. KOEHLER, RECEIVER.

Schedule of Lands showing property represented by
"Miscellaneous Land" Account.

I. Title in Oregon and California Railroad Company.

Clackamas Clackamas County
County. Town of Milwaukee.

- Block 4, Lots 9 and 10 (1, 2, 3, 4 and 11, fractional).
- Block 5, Lot 1, fractional.

1152 *The Oregon & California Railroad Co.*

80 acres south of Milwaukee, comprising the north half of the northeast quarter of Section 32, T. 1 S., R. 2 E. W. M.

149 90|100 acres south of Milwaukee, comprising the east half of the southeast quarter and Lots 5 and 6 of Section 29, T. 1 S. R. 2 E. W. M.

Filed March 31, 1885.

R. H. LAMSON,
Clerk.

UNITED STATES OF AMERICA,

District of Oregon—ss.

I, G. H. Marsh, Clerk of the United States Circuit Court for the District of Oregon, do hereby certify that the foregoing copy of portion of Exhibit L to Receiver's First Report in cause No. 1109, Lawrence Harrison et al. vs. Oregon and California Railroad Company, et al. has been by me compared with the original thereof, and that it is a correct transcript therefrom, and of the whole of such original portion of said report, as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Portland, in said District this September 28, A. D., 1911.

[Seal.]

G. H. MARSH,
Clerk.

Filed Feb. 13, 1912.

A. M. CANNON,
Clerk U. S. Court.

[Complainant's Exhibit 13.]

*In the Circuit Court of the United States for the
District of Oregon.*

IN THE MATTER OF THE PETITION OF R.
KOEHLER, Receiver,
of
THE PROPERTY OF THE OREGON and CALI-
FORNIA RAILROAD COMPANY.

No. 1109.

November 28, 1888.

Now on this day comes on for hearing the petition of R. Koehler, heretofore appointed receiver of the property of the Oregon and California Railroad Company, praying for his final discharge from said trust, and after hearing Mr. John W. Whalley, of counsel for the petitioner; and it duly appearing to the Court, that in pursuance of the order of this court, bearing date November twelfth, eighteen hundred and eighty-eight, that said receiver has paid over to the Oregon and California Railroad Company, the amount of fifteen thousand nine hundred and thirty-nine dollars and sixty cents, the proceeds of land sales for the months of March, April and May and from June sixth to June eleventh, eighteen hundred and eighty-eight, and that he has further paid the fee of the Master for his services in examining and reporting upon his accounts, the sum of one thousand dollars; and that he has also caused to be published a notice in the Daily Oregonian newspaper, being the notice provided for

in said order, requiring persons holding receiver's checks, to present the same for payment, within three months, to the First National Bank, and that if the same be not there presented for payment, the moneys to meet the same will be withdrawn, and thereafter said checks must be presented to the Oregon and California Railroad Company for payment; that he has also paid to the Oregonian for advertising said notice, the amount of fourteen dollars and forty cents; that he has also paid to the Clerk of this Court, the remaining costs and accruing costs in this cause, amounting to twenty dollars; and that he has paid the residue of moneys in his hands to the Oregon and California Railroad Company, amounting to four thousand six hundred and fifteen dollars and one cent, after first providing the necessary funds to be left in the First National Bank, as in said order directed, and that he has taken receipts and filed vouchers for all these payments, with the Clerk of this Court; It is therefore ORDERED and ADJUDGED that said R. Koehler be, and he is hereby, finally discharged from his said trust.

Deady, J.

ORDER DISCHARGING RECEIVER.

Filed Nov. 28, 1888.

R. H. Lamson, Clerk.

By D. W. Stevens, Deputy.

UNITED STATES OF AMERICA,

District of Oregon—ss.

I, G. H. Marsh, Clerk of the United States Circuit

Court for the District of Oregon, do hereby certify that the foregoing copy of Order discharging Receiver, in cause No. 1109, Lawrence Harrison, et al. vs. Oregon & California Railroad Company, et al., has been by me compared with the original thereof, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Portland, in said District this September 28, A. D., 1911.

[Seal.]

G. H. MARSH,

Clerk.

Filed Feb. 13, 1912.

A. M. CANNON,

Clerk of U. S. District Court.

[Complainant's Exhibit 21.]

Memorandum of an agreement made this 23rd day of April in the year of our Lord One thousand eight hundred and sixty seven (1867) by and between the Oregon Central Railroad Company organized under and in accordance with the general laws of the State of Oregon, of the first part & Albert J. Cook of the second part.—

WITNESSETH, That whereas the party of the first part own the right, privilege and franchise for constructing, equipping and running a railroad from Portland in the State of Oregon South to the California line: and whereas the party of the second part doth agree and hereby agrees with the party of the

first part to build and equip one hundred and fifty miles of said railroad, with all necessary rolling stock from Portland South through the Willamette Valley for the sum of Five Millions Two Hundred and Fifty Thousand Dollars (\$5,250,000.00) reckoned at gold or specie value, that is to say, if payment from time to time be made in national currency, now so called it shall be in payment for so much only as the same is worth in gold at the time of such payment, and so it shall be reckoned with any thing else that may be received in payment, at the time of such payment.

And the party of the second part doth further agree with the party of the first part to build and equip with rolling stock complete for the working of the same, that is to say the road shall be built upon a uniform gauge of four (4) feet eight (8) and one-half ($\frac{1}{2}$) inches, the maximum grade not to exceed eighty feet (80 ft.) per mile, & a minimum curvature of ten degrees (10 degrees). The width of the roadbed to be eleven feet on the surface, the iron used shall be the best quality known as T rail weighing at least forty five pounds per linear yard. The ties shall be of the best wood to be obtained for strength and durability, not less than six by eight inches, and eight feet in length, to be laid at the rate of two thousand six hundred and forty feet per mile. The amount of rolling stock shall consist, for the first division of twenty five miles, extending from Portland to the French Prairies of two first class locomotives weighing not less than sixteen tons each: Two first class passen-

ger cars, two baggage or express cars. The next division of about twenty miles reaching to Salem, one first class locomotive of not less than sixteen tons weight, two first class spassenger cars, one baggage car twelve box cars and two platform cars. For the next division of about twenty five miles reaching to Albany, one first class locomotive, weighing notless than twenty six tons, two first class passenger cars, one baggage car, twelve each box and platform cars. For the next division of about ten (10) miles reaching to near Corvallis, one first class locomotive weighing not less than twenty six tons, two first class passenger and six box cars. For the next division of about thirty miles t oEugene City, one first class, locomotive weighing not less than thirty tons, three first class passenger, one baggage and ten each box and platform cars. For the last division of about thirty five miles, two first class locomotives weighing not less than thirty six tons, four passenger cars twenty box cars and six platform cars.

The contractors shall provide suitable stations and turn outs at carious points to be designated by the Company at the rate of one for every ten (10) miles, water tanks as often as once in every twenty miles where water can conveniently be had: Such locations to be designated by the Company. At the large towns designated as th etermini of the different divisions, suitable buildings shall be erecte dfor the accommodation of passengers and freight, depots of ample size to accommodate th ebusiness of the road shal lbe

erected in a substantial and durable manner, also engine houses of a sufficient capacity for the safe housing of all the engines.

The contractors shall erect and furnish suitable machinery for a repair shop at a point designated by the Company. The president of the Company and the engineer of construction shall compose a commission whose approval shall be necessary to the acceptance of the road.

And the party of the second part doth agree to receive payment for the building and equipping said one hundred and fifty miles of railroad, in the Company's first mortgage railroad bonds, payable in twenty years from the date of the same with interest semi-annually. PROVIDED, that in case the company while the road is being constructed, is unable from its resources to pay the interest on its bonds issued to the said party of the second part, the same shall be payable in the first mortgage bonds of the Company of regular series and character at their par value. All said bonds to be secured by a first or bottom mortgage, on said one hundred and fifty miles of railroad and on all the rolling stock thereof. And such amounts in specie as the company may provide. And the party of the first part hereby promises, covenants and agrees with the party of the second part to pay the sum of five millions two hundred and fifty thousand dollars receivable at gold or specie value as aforesaid, to the party of the second part or to its assigns, for constructing and equipping with rolling stock

said railroad from Portland in the State of Oregon to the head of the Willamette Valley or a distance of one hundred and fifty miles, and the party of the first part promises, covenants and agrees with the party of the second part to issue or cause to be issued the first mortgage, gold-bearing railroad bonds of the Oregon Central Railroad Company, the payment of which shall be secured by a bottom mortgage, on said one hundred and fifty miles thereof, and on the rolling stock of the same. Interest on said bonds to be made payable at the rate of seven per cent per annum as aforesaid: And the said party of the first part agrees that said bonds shall be issued in such form and Sums, and to be endorsed if need be to make the same negotiable and Satisfactory: And that the engineers employed are to be paid by the party of the Second part: And shall be nominated by the party of the Second part if they see fit to nominate the same. And that the party of the second part shall be entitled to the earnings of the road until such time as the same is accepted by the Company.

And the party of the first part further agrees to deposit in some safe bank in the State of New York designated by the party of the second part, fifteen thousand dollars (\$15,000.00|100) per mile of the amount of said railroad bonds to be delivered to the party of the second part, in payment aforesaid as the Bills of Lading for iron rolling stock & other materials shall from time to time be accepted by such engineer. PROVIDED: That the company shall not

sell or dispose of their regular first mortgage bonds at less than their par value.

And the party of the first part further agrees to make monthly payments upon the work as approved by the engineer, reserving twenty per cent of the amount of work done each month until the division is accepted by the commissioners.

And the party of the first part further agrees to use every means in their power to obtain as much cash and money aid from the people of Oregon as is possible for the furtherance of this enterprise.

And the party of the first part further agree to issue two millions of preferred stock of the Oregon Central Railroad Company bearing interest at seven per cent per annum and deliver the same to the party of the second part immediately after the signing of this contract.

And it is further understood and agreed between the parties hereto, that the work shall be commenced within one year after the signing of this contract and the whole one hundred and fifty miles completed within five years thereafter.

And it is also understood that the common stock of the O. C. R. R. Co. shall be offered for sale to the people of Oregon at ten cents on the dollar and at the expiration of six months from the commencement of work on the road subscriptions at the same rate shall be received from any parties whomsoever for the amounts then remaining unsold.

In testimony whereof we Geo. L. Woods, Presi-

[Seal.]

S. G. ELLIOTT,

In presence of Walter Van Dyke.

(Endorsement on back.)

1st Contract, Filed Nov. 24, 1875.

GEO. L. STORY,

Clerk.

By R. L. Durham, Deputy.

In consideration of the Sum of one dollar to me in hand paid, by S. G. Elliott, of San Francisco, the receipt whereof is hereby acknowledged, I do hereby transfer, assign forever, all my right, title, or interest in and to the within instrument.

Witness my hand and seal, this second day of May A. D., 1867.

ALBERT J. COOK.

In presence of W. D. Litchfield.

Filed June 19th, 1876.

Internal Revenue 5c cancelled.

D. H. MURPHY,

Clerk.

(Endorsement on first page.)

In consideration of one Dollar paid by each of the parties hereto by the one to the other and the receipt whereof is by each of the parties hereto hereby acknowledged and in consideration of other valuable considerations moving from each to the other. It is hereby agreed between the Oregon Central Rail Road Company and Ben Holladay & Co., parties to the within contract that the within contract be and the same is hereby cancelled, set aside and held for naught.

Witness the hand of Ben Holladay & Co., and the Oregon Central Rail Road Company by the signatures of I. R. Moores, President, and George E. Cole, Secretary thereof and the seal of said Corporation attached this 29th day of March, A. D., 1870.

BEN HOLLADAY & CO.,
Oregon Central Rail Road Company,
By I. R. Moores, President.

Witness present,
J. H. Mitchell,
M. N. Chapman,

OREGON CENTRAL RAILROAD COMPANY,
By Geo. E. Cole, Secretary.

Seal—Oregon Central Railroad Company Incorporated 1867.

Memorandum of an Agreement made this 12 day of May in the Year of our Lord One Thousand Eight Hundred and Sixty Eight by and between "The Oregon Central Railroad Company" organized under and in accordance with the general laws of the State of Oregon of the First Part and the firm of A. J. Cook & Co., of the Second part:

WITNESSETH, That whereas the party of the First Part own the right, privilege and franchise for constructing, equipping and running a railroad from Portland in the State of Oregon, South, to the California line, and, WHEREAS, the said company of the First Part did contract with the party of the Second Part to build one hundred and fifty miles of the road, commencing at Portland and extending up to

Willamette Valley a distance of One Hundred and Fifty miles, said road to be completed within five years from the date thereof; and WHEREAS the party of the First Part are desirous of extending the road to the State line between Oregon and California and as a means of securing the early completion of the same have entered into the following agreement with the Said firm of A. J. Cook & Co., upon the following terms.

Internal Revenue five cents cancelled.

The party of the Second Part doth agree and hereby agrees with the party of the First Part to build and equip two hundred and ten miles of said railroad, more or less, to or near the State line, with all necessary rolling stock from the head of the Willamette Valley, commencing at the terminus of the first division of one hundred and fifty miles, and to continue the construction of the same to the South boundary line of Oregon. As soon as the first division shall be completed, for the Sum of Twelve millions, one hundred and twenty eight thousand dollars, (\$12,128,000) reckoned at gold or specie value, that is to say, if payment from time to time be made in national currency, now so called, it shall be in payment for so much only as the same is worth in gold at the time of such payment. And so it shall be reckoned with anything else that may be received in payment at the time of such payment.

5 cent Internal Revenue stamp cancelled.

And the Party of the Second Part doth further

agree with the party of the first Part to build and equip with rolling stock complete for the working of the same, that is to say, the road shall be built upon a uniform guage of four (4) feet, eight (8) inches and one half ($\frac{1}{2}$). The maximum grade not to exceed 80 feet per mile, except twelve (12) miles through the Canon, which twelve (12) miles of grade shall not exceed one hundred (100) feet per mile: and a minimum curvature of (10) ten degrees: The width of the road-bed to be eleven feet on the surface.

The iron used shall be the best quality known as "T" rail, weighing at lest fifty pounds per linear yard: the ties shall be of the best wood to be obtained for strength and durability, not less than six by eight inches, and eight feet in length, to be laid at the rate of two thousand six hundred and forty, (2,640) per mile.

The amount of rolling stock shall consist of ten first class locomotives, weight not less than twenty five tons each,—to be furnished at the rate of one for every twenty miles,—and twenty five first class passenger cars,—furnished at the rate of one for every ten miles,—four baggage cars, forty box cars and twenty platform cars.

Internal Revenue 5 cents.

The contractors shall provide suitable stations and turn outs at various points to be designated by the Company, at the rate of one for every ten miles. Water tanks as often as one in every twenty miles when water can conveniently be had. At the large towns

suitable buildings shall be erected for the accommodation of passengers and freight, also engine houses of a sufficient capacity for the housing of all the engines.

The President of the Company and the Chief Engineer of construction shall compose a commission whose approval shall be necessary to the acceptance of the road, and the contractors shall have the right and free use of the railroad from Portland to the extreme Southren terminus for the transportation of all the material required in said work, also, as well, all men, horses, mules, cattle, sheep, hogs and provisions of any and every kind required by said party while constructing said road: also all iron, iron rails, bars, castings, spikes, chains, switches, machinery, frogs, car wheels, and all timbers for bridges, trestle work, cattle guards, cross ties and timbers for all depots, stations, and all other material required or to be used, with everything else required by said contractors in the construction of said road, until said two hundred and ten miles of said road, or reaching to the California line, be it more or less, has been completed at the same rate per mile.

5 cents Internal Revenue stamp cancelled.

And the party of the Second part shall be entitled to the earnings of the road until each Section of twenty (20) miles is accepted by the company.

And the party of the First Part, promises, covenants and agrees with the party of the second part, to issue, or cause to be issued the first mortgage, gold bearing railroad bonds of The Oregon Central Rail-

road Co. the payment of which shall be secured by a bottom mortgage on said two hundred and ten miles, or reaching to the California line, be it more or less, and on the rolling stock of the same, interest on said bonds to be made payable at the rate of seven per cent per annum as aforesaid, and the said party of the first part agrees that said bonds shall be issued in such forms and sums and to be endorsed if need be to make the same negotiable and satisfactory, and that the engineers employed are to be paid by the party of the second part, and the party of the second part shall be entitled to the earnings of the road until such time as the same is accepted by the company.

Internal Revenue Five Cents cancelled.

And the party of the First Part further agrees to execute a mortgage of thirty two thousand dollars per mile (\$32,000), as a first mortgage on the whole distance of two hundred and ten miles (210) commencing at the terminus of one hundred and fifty miles at the head of the Willamette Valley, extending to the State line between Oregon and California and also to execute a second mortgage for twenty five thousand seven hundred and fifty two (\$25,752) dollars per mile.

The party of the first part promise and agree to execute the first mortgage bonds at the rate of twenty five thousand (\$25,000) dollars per mile, and deliver one million dollars of the same to the party of the second part as soon as the said party of the second part shall report themselves in readiness to enter

upon the commencement of the construction of the road, under this contract, and exhibit satisfactory evidence that they have purchased materials and stock equal in value to the amount of bonds so issued, and to make advancement of bonds at the rate of twenty five thousand (\$25,000) dollars per mile, for a distance of fifty miles in advance of work on the road whenever the party of the second part may request the same and give evidence as required above, as to the purchase of materials, or of work performed. And to make monthly settlements upon the report of the Chief Engineers, reserving only one tenth part of the amount reported to be due by said Engineer, until a distance of twenty miles shall be completed, when the company shall pay the full amount of fifty seven thousand seven hundred and fifty two dollars per mile to said party of the second part as provided in the first part of this contract.

It is understood that the company will exert itself to obtain aid from the State of Oregon to assist in the building of this road.

It is further agreed that the stock shall be increased to eleven millions of dollars and three millions of preferred stock shall be executed and delivered to the contractors as soon as the first distance of One Hundred and fifty miles shall be completed.

The stock shall be in the following form, to wit:

No.	Second Series	Shares
Capital	The Oregon Central Railroad Company,	
Stock	Salem, Marion County,	
\$10,000,000	State of Oregon, April,	
	1868.

\$3,000,000

Preferred
Stock

(non-assessable)

Gold

Interest

bearing.

This certifies that Albert J. Cook & Co. are entitled to—shares of the Capital Stock of The Oregon Central Railroad Company, transferable on the Books of the Company subject to the provisions of the By Laws, by endorsement hereon and

surrender of this certificate. The holder of this second

Series Certificate is entitled to 7 per cent yearly

(Vignette) interest in gold upon the amount of \$3,-

\$8,000,000 000,000 advanced by the contractors as

Common or a working capital under the second

Assemble Contract in the construction of the

Stock Company's road. Said Second Series

certificates of stock are issued as collateral security

for that amount and to be non-assessable, the

Internal Revenue 5 cents cancelled.

.....Shares payment of which is secured by

.....Each a Resolution in the following form

“Resolved, by the Board of Directors of The

Oregon Central Railroad Company, that the Presi-

dent and Secretary are hereby requested to execute

\$3,000,000 of non assessable Preferred Stock,, and de-

liver the same to the Contractors as part payment for

the construction of the road, and as a collateral se-

curity for moneys advanced by said contractors as a

working Capital, said stock to be non- assessable and

to bear interest at the rate of 7 per cent per annum,

payable in gold coin, and then is hereby set apart as

a sufficient amount out of the net earnings of the

second division of the road, extending from the end of the first division of to the Oregon State line, to pay the same.

(Vignette.)

Secretary

President.

The parties hereto agree that the terms of this contract shall come in force as soon as the first One Hundred and fifty miles shall be completed and that it shall be completed within five years from that date.

And in relation to all the terms, stipulations, covenants and agreement of the foregoing contract, it is hereby expressly agreed, that on the completion of the present contract for 150 miles of road, it shall be optional with the O. C. R. R. Company, party of the First Part hereto, to surrender to the contractors the road herein provided for and assign to them all the rights of the company therein, in which case the said contractors shall accept the same in full satisfaction of all claims arising under this contract as against said company, or their road of 150 miles so now being constructed, and all facilities, within their power shall be extended by Said O. C. R. R. Company to enable said contractors to hold, own and operate said extension of said road under the laws of Oregon.

I. R. MOORES,
President O. C. R. R. Co.

Witnessed by

Geo. Anderson,

E. D. Lawl.

S. A. CLARKE,

Secretary O. C. R. R. Company,
A. J. Cook & Co.

Seal.—Oregon Central Railroad Co., Incorporated
1867.

5c Internal stamp cancelled.

(Endorsed on the first page:)

In consideration of One Dollar paid by each of the parties hereto by the one to the other and the receipt whereof is by each of the parties hereto hereby acknowledged and in consideration of other valuable considerations moving from each to the other, It is hereby agreed between The Oregon Central Railroad Company and Ben Holladay & Co., parties to the within contract that the within contract be and the same is hereby cancelled set aside and held for naught.

Witness the hands of Ben Holladay & Co., and the Oregon Central Railroad Company by the signatures of I. R. Moores, President and George E. Cole, secretary thereof and the seal of said corporation attached this 29th day of March A. D., 1870.

BEN HOLLADAY & CO.

Oregon Central Railroad Company,
By I. R. Moores, President.

Witness present

J, H. Mitchell,
M. H. Chapman.

Oregon Central Railroad Company,
By Geo. E. Cole, Secretary.

Seal—(Oregon Central Railroad Co., incorporated,
1867.)

5c Internal Revenue stamp cancelled.

STATE OF OREGON,

County of Marion.

I, J. C. Moreland, Clerk of the Supreme Court of the State of Oregon, do hereby certify that I have compared the foregoing copy and Memorandum of Agreement of date, May 12, 1868, and Memorandum of Agreement made the twenty-third day of April, 1867, with the originals thereof, on file as Exhibits in the case of Ben Holladay and C. Temple Emmet, Plaintiffs vs. S. G. Elliott et al, Defendants, now on file in the office of the Clerk of the Supreme Court, and in my custody.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court, this twenty-fifth day of October, 1911.

J. C. MORELAND,
Clerk Supreme Court.

Filed Feb. 13, 1912.

A. M. CANNON,
Clerk of U. S. District Court.

[Seal.]

[Complainant's Exhibit 23.]

JOURNAL SUPREME COURT, MONDAY July
7th, 1879. FIRST JUDICIAL DAY.

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. Faker, Sheriff and Ex-Officio Bailiff.

WHEREUPON on Friday, 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 \$38,000, 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.

Eight, 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 insolvent; 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 and 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 copart-

nership 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 partnership 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 per-

mitted 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 off 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. E. MORELAND, Clerk.

Filed Feb. 13, 1912.

A. M. CANNON,
Clerk U. S. Court.

[Complainant's Exhibit 24.]

Geo. A. Brodie, U. S. Examiner

This Indenture made this twelfth day of September in the year one thousand eight hundred & sixty eight, between Ben Holladay, of the City & State of New York, of the first part; C. Temple Emmett, of the City of San Francisco, State of California, of the second part; & Simon G. Elliott, Portland, State of Oregon, of the third part.

WITNESSETH: That the said parties have entered into, & formed, & do hereby enter into and form, a co-partnership, for the purpose of constructing, equipping,

and operating one or more Rail Roads, in the State of Oregon, and the States territories adjacent thereto.

And it is mutually agreed, and covenanted between and among the said parties as follows, to-wit: That the said co-partnership shall be known and shall transact all their business, by and under the Style and Firm name of Ben Holladay & Co.

2nd—That the interest of the said Ben Holladay, in the said co-partnership, shall be Twenty four fortieths (24-40) parts thereof—That the interest of the said C. Temple Emmett in the said co-partnership, shall be Ten Fortieths (10-40) parts thereof—And that the interest of the said Simon G. Elliott, in the said Co-partnership, shall be Six Fortieths (6-40) parts thereof—

3rd—That no member of the said Co-partnership, shall sell or dispose of his interest therein, or any of the assets thereof, or in any contract or securities which the said Co-partnership may hold, without first giving the refusal thereof, to the remaining partners, who shall have the option jointly or severally, to purchase & take the same, at the price which any stranger to these presents is willing to pay therefor—

4th—This Co-partnership shall exist for Five years, from this date, unless sooner terminated by mutual consent—

AND WHEREAS, the parties hereto are about to purchase & take an assignment of all the contracts now subsisting between The Oregon Central Rail Road Company, of the one part, & A. J. Cook, of the other part & between the Oregon Central Rail Road Company, of

the one part, & A. J. Cook, & Company, of the other part for the construction and equipment of the Rail Road 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 allowance out of his own private means, any money towards the work undertaken, by this Co-partnership, under the said contracts; but the said Simon G. Elliott shall be charged with, & shall account for, his proportion of the expense of the said work, whenever the Co-partnership shall have realized, under & by virtue of the said contracts, or any of them, sufficient moneys to cover the outlays & expenses incurred & paid by this Co-partnership, in & about the said work—

AND IT IS FURTHER understood & witnessed: That the said Simon G. Elliott, is hereby appointed the General Superintendent of the work of Constructing, equipping, & operating the said Oregon Central Rail Road, under the said contracts, AND, that he is to receive therefor a salary of Five hundred dollars per month, payable in Gold Coin of the United States—

IN TESTIMONY WHEREOF the parties have hereunto set their hands and seals the day & year first above written—

(Signed)	BEN HOLLADAY	(SEAL)
	C. TEMPLE EMMETT	(SEAL)
	S. G. ELLIOTT	(SEAL)

Sealed and delivered in the presence of Geo. W. Weidle.

(Endorsement on back of original)

Copy Contract of
of Co-partnership

BETWEEN

Ben Holladay,
C. Temple Emmett.
Simon G. Elliott.

BEN HOLLADAY & CO
Exhibit "A."

Filed June 19 1876.

D. H. Murphy, Clerk.

*In the Circuit Court of the State of Oregon
for County of Multnomah.*

Amended Complaint.

Ben Holladay and C. Temple Emmett,

Plaintiffs,

vs.

Simon G. Elliott, Thaddeus R. Brooks, Gardner Elliott,
J. B. Rogers,

Defendants.

These plaintiffs Ben Holladay and C. Temple Emmett for cause of amended complaint herein aver that heretofore to wit; on or about September 12th 1868. These plaintiffs and the Defendant Simon G. Elliott entered into copartnership by written articles of that date under the firm name of BEN HOLLADAY AND COMPANY and for the purpose of constructing, equipping and operating one or more Rail Roads in the State of Oregon and the states and Territories adjacent thereto; that by the terms of such articles of copartnership: The interest of each member thereof in such firm was as follows, : to-wit: Ben Holladay (24-40) Twenty four fortieths. C. Temple Emmett Ten Fortieths (10-40),

and Simon G. Elliott, Six fortieths (6-40). That prior to the date of such copartnership articles, a corporation had been incorporated under a general Incorporation law of the State of Oregon, known as the Oregon Central Railroad Company, for the purposes of building and operating a Rail Road between Portland in the State of Oregon and the California line on or near the Stage route leading from Portland to Sacramento, through the Willamette, Umpqua, and Rogue river Valleys. That prior to the date of such articles of copartnership, certain contracts had been entered into by such corporation in writing as follows: The said Simon G. Elliott, having falsely and fraudulently represented to such corporation, that he Elliott was the agent and attorney in fact of one A. J. Cook, whom he represented to be a wealthy Rail Road contractor and builder residing in the State of Massachusetts: The said Rail Road corporation aforesaid entered into a contract for the construction of the first One hundred and fifty miles of its said road, with the supposed A. J. Cook, and in his name, such contract however being made really with the defendant Simon G. Elliott, he Elliott representing himself to be, and in such contract acting as the attorney in fact of said A. J. Cook, and which contract bore date about theday of April 1867, and the said defendant herein did afterwards and prior to the date of copartnership herein, still representing himself an agent and attorney in fact of said A. J. Cook and others whom he represented to constitute the firm of A. J. Cook & Co. enter into supplemental contracts to the one aforesaid with such corporation, and did also enter into an-

other contract with such corporation for the construction and equipping of the balance of the said Rail Road— And these plaintiffs aver that at and prior to the date of the articles of copartnership aforesaid, and in order to induce these plaintiffs to enter into such copartnership. The defendant Simon G. Elliott, did falsely and fraudulently represent to these plaintiffs that he the defendant was an experienced Rail Road builder and well qualified as such to superintend the construction of a Rail Road and operate the same, and at the same time and for the same purpose and for the further purpose of inducing such firm when organized to purchase and take an assignment of all the contracts original and supplemental, so entered into by said Oregon Central Rail Road Company with A. J. Cook and A. J. Cook & Co. This Defendant did falsely and fraudulently and with intent to deceive and defraud the plaintiffs, represent to these plaintiffs that the said A. J. Cook and the said firm of A. J. Cook & Co. had large and valuable interests in the said contracts aforesaid: consisting of valuable bonds and stock issued to them by such corporation. The Oregon Central Rail Road Company under the contracts aforesaid and standing to the credit on the books of A. J. Cook & Co. and large and valuable machinery and material necessary to be used in the construction of such road, and did falsely represent to these plaintiffs that he defendant had full power and authority to sell transfer and convey to the firm aforesaid all of the said contracts and all the interests, rights, and property of the said A. J. Cook & Co. including bonds of said Oregon Central

Rail Road Company to the amount of about Seven hundred and seventy five thousand dollars and the said defendant at the time aforesaid, and in order to induce these plaintiffs to enter into such copartnership and purchase said contracts and interest aforesaid, falsely and fraudently represented to these plaintiffs: That the work of construction was so far advanced on the said Rail Road from Portland, Oregon, to Salem in Oregon; That the same for such distance could be completed ready for the iron rails for an additional cost and expense of \$40,000—and that he as superintendent of the construction thereof, could complete the same for such sum, and these plaintiffs aver that by reason of all said representations on the part of the defendant Simon G. Elliott, (each and all of which these plaintiffs aver were and are false, and made with the intention on the part of defendant to deceive and defraud these plaintiffs, by inducing them to enter into such copartnership and purchase such contracts and interests aforesaid)— These plaintiffs and the defendant did on the day aforesaid enter into writiten articles of copartnership a copy of which is hereto attached marked exhibit “A” and made a part hereof, and these plaintiffs aver that the said A. J. Cook as they are informed and believe is and was a myth and a fictitious person, and the said defendant Elliott in making the contracts aforesaid, and in transferring the same to the firm of Ben Holladay & Co. did fraudently and falsely personate such fictitious person, and did falsely represent that he had a power of attorney from said A. J. Cook & Co. authorize him to make such

contracts and to sell and dispose of the same as hereinbefore and hereinafter stated, and these plaintiffs aver, that relying upon the said representations of the defendant at the time of entering into such copartnership—The said firm of Ben Holladay & Co. did purchase of, and from—The said A. J. Cook, and A. J. Cook & Co.—The defendant acting as the agent and attorney in fact of such alleged person and firm in making sale—The said contracts and all the interests of the said firm believing as these plaintiffs did at the time, that defendant had full power and authority, as he represented he did have to make such sale and transfer believing as they did—That said firm of A. J. Cook & Co. were the real owners of all said bonds of said Oregon Central Rail Road Company, To-wit: The sum of \$775,000—thereof, except the sum of about \$38,000—thereof which had been negotiated for machinery as alleged by defendant Elliott which assignment and transfer were made to the firm of Ben Holladay & Co—by defendant as the attorney in fact of A. J. Cook, and as attorney in fact of A. J. Cook & Co.—But these plaintiffs aver the fact to be that said A. J. Cook & Co—were not, at the date of such articles of copartnership, the owners of all said bonds, amounting to \$775,000.00-100, in coin, payable Twenty years after date, with interest thereon, at Seven per cent per annum, payable semi-annually, as represented to these plaintiffs, by the defendant S. G. Elliott: But defendant S. G. Elliott held prior to such date, sold and disposed of a large amount of such bonds, to divers other persons, the exact amount of which these plaintiffs cannot now tell, but

expect to be able to ascertain, before a final hearing of this suit: which fact, as to the disposition of such large amount of such bonds, the defendant S.G. Elliott, studiously concealed from these plaintiffs, at the time of entering into such copartnership, but on the contrary, falsely and fraudently reepresented that A. J. Cook & Co. were the sole owners of the whole amount thereof, To wit: \$775,000.00-100, as aforesaid, less the said \$38,000.00-100—and the defendant S. G. Elliott, has wholly failed to deliver said large amount of such bonds, to the firm of Ben Holladay & Co.—or to these plaintiffs. To the great damage of said Firm, and of these plaintiffs—The only bonds that had been issued by the Oregon Central Rail Road Company prior to such articles of copartnership, were \$775,000.00-100; All of which had been issued to A. J. Cook & Co. And all which amount, the defendant S. G. Elliott, represented falsely to these plaintiffs, were then held by said A. J. Cook & Co. and included in the said transfer to Ben Holladay & Co. save and except Thirty eight bonds, amounting to Thirty eight thousand dollars thereof; which the defendant S. G. Elliott, claimed he had negotiated for materials and machinery. But plaintiffs aver, that in addition to such 38 bonds, other large amounts thereof, had been disposed of, prior to such sale of Ben Holladay & Co. and none of which have ever been accounted for by defendant—and these plaintiffs aver that, since the date of such articles of copartnership and during the past year, the firm of Ben Holladay & Co. have been compelled, in order to prepare the first twenty miles

of said road, leading immediately South of Portland ready for the ties, to expend over One hundred thousand dollars, in coin, under the management and control of defendant S. G. Elliott, as superintendent of construction and it will yet require an expenditure of over forty thousand dollars, in coin, to prepare the balance of the road between Portland and Salem ready for the ties—

And these plaintiffs further complaining, aver: That the defendant S. G. Elliott, was and is, wholly incompetent and unfit for the position as general superintendent of the construction of a Rail Road, and did not and does not have any real theoretical or practical knowledge of such business; And all his representations to these plaintiffs, in that regard, as hereinbefore stated, were and are false and fraudulent: And by reason of such incompetency, these plaintiffs and the said firm of Ben Holladay & Co. have suffered great damage by reason of unwise and unreasonable expenditure of money under his direction and management and by reason of the work on such road being retarded, through his defendants want of knowledge and his willful misconduct as one of the partners in such firm—and these plaintiffs further complaining herein, aver that the said Oregon Central Rail Road Company, in which the firm of Ben Holladay & Co. are the principal Stockholders is under the laws of Congress entitled to a large and valuable land grant from the General Government consisting of 12,800 acres of land per mile for each mile of its road from Portland in Oregon to the California line, provided such corporation shall complete the first twenty miles of its road, and put

the same in running order on or before Dec. 25, 1869

Yet the defendant Simon G. Elliott, as superintendent of the work of construction on such Twenty miles, and with the intention of injuring and defrauding these plaintiffs, who were furnishing all the means to carry on such work, did during the months of July and August and September of this year—studiously manage and conduct the work on such twenty miles, in such a manner—so as to prevent if possible the completion of the said Twenty miles within the time prescribed in the cast of Congress, and did at divers times and on divers occasions during such months say to his confidential friends that such was his intentions, and that his object in doing so was to disable these plaintiffs, and the firm of Ben Holladay & Co. from carrying out their said contract. And in order that the contracts for constructing and equipping such Rail Road, shall pass into other and different hands, and with a view upon the part of defendant of obtaining a larger interest in such contracts and by reason of all which conduct on the part of defendant as one of the partners in the firm of Ben Holladay & Co. these plaintiffs and such firm have been injured and damaged in the sum of One Hundred thousand dollars, and these plaintiffs being informed of the gross incompetency of defendant, as well also of his willful intention to retard such work as aforesaid, and of his other fraudulent practices as herein stated, did on the day of October, 1869, discharged defendant for such reasons from the position of general superintendent of the work

of construction on such road—And these plaintiffs further complaining, aver that as a part of the consideration of the sale and transfer to the firm of Ben Holladay & Co.—That said firm agreed to and with defendant that when the accounts were finally made up and the balance correctly ascertained, that the defendant should receive the obligation of the firm of Ben Holladay & Co for the amount of money furnished by defendant prior to date of their copartnership to the firm of A. J. Cook & Co. in the event of the construction of such Rail Road prior to that date, less the amount that defendant had received, on such amount:—That afterwards and before such accounts could reasonably be made up or correctly ascertained:—This defendant fraudulently represented to these plaintiffs and to the firm, that there would be a large amount thus found due aforesaid on a correct settlement of such accounts, and these plaintiffs relying on such representations to be true advanced and paid to defendant in all about the sum of \$9000.00-100, coin—That since such payments have been made an investigation of the said accounts and on moneys advanced and received, demonstrate the fact that defendant had prior to such sale and transfer to Ben Holladay & Co. and prior to the date of the articles of copartnership aforesaid, received from the members of said firm of A. J. Cook & Co. and for the proceeds arising from the sale of materials and machinery belonging to such firm much more than an amount equal to all the moneys ever advanced or paid by defendant for such firm:—That defendant had purchased Four (4) Locomotives for the said firm

of A. J. Cook & Co. for about the sum of \$..... in currency:—The exact amount plaintiffs do not know, and afterward defendant sold said Locomotives for the sum of about \$.....in currency:—The exact amount of which these plaintiffs do not know being an advance of several thousand dollars over and above original cost and all expenses, and received the money thereof to his use, and never accounted for the profit thereof. To wit: about \$.....: The exact amount of which plaintiffs do not know in all over and above all cost and charges:—It being a part of the contract between plaintiffs and defendant at the entering into such copartnership, that the new firm should assume and pay all the just indebtedness of the firm of A. J. Cook & Co. in Oregon, and these plaintiffs and the firm of Ben Holladay & Co. had a right to have the profits on such machinery and material applied to the payment of the debts of said firm of A. J. Cook & Co. and not to the private use of the defendant:—And this defendant in failing to give the said firm of A. J. Cook & Co. and the firm of Ben Holladay & Co. credit for such sums was and is guilty of a gross fraud:—Wherefore these plaintiffs aver that they were induced to enter into such articles of copartnership, through the gross fraud of defendant:—And the defendant has by virtue of the facts herein stated, been guilty of a gross violation of such articles of copartnership:—And has been and is guilty of gross frauds towards these plaintiffs, to their great damage:—To wit: In the sum of \$100,000.00-100, One hundred thousand dollars:—And these plaintiffs aver that since the date of such co-

partnership these plaintiffs have furnished large sums of money in the construction of the said Oregon Central Rail Road and incurred large liabilities:—That the defendant Simon G. Elliott, is now justly indebted to these plaintiffs on a correct accounting for moneys which he has overdrawn as aforesaid:—That since entering into such copartnership the defendant Simon G. Elliott has sold and transferred to the defendant Thaddeus R. Brooks, a One fortieth interest, being in all a one third of his original interest in the firm of Ben Holladay & Co. and said Brooks and said Gardner Elliott are each now an owner of a One fortieth interest in such firm of Ben Holladay & Co. on the terms and conditions however to such extent that said defendant Simon G. Elliott originally held such interests as hereinbefore stated:—And plaintiffs aver, that since the filing of the original complaint herein, these plaintiffs have discovered and aver the fact to be, that some four days since the defendant Simon G. Elliott, and the defendant J. B. Rogers fraudulently confederated together with intent to defraud these plaintiffs: And, in pursuance of such fraudulent confederation, the defendant Simon G. Elliott, executed and delivered to defendant Rogers a bill of sale of all his, Elliott's personal property; Multnomah County, Oregon, consisting of his furniture and household goods, and other valuable personal property, of about the value of \$5000.00-100, and the defendant Rogers now has all such property in his possession, in this County, and is threatening and is about to sell and dispose of the same, with intent to defraud plaintiffs: Such bill of sale

or pretended transfer of said property, being wholly without consideration and a sham and wholly void and plaintiffs ascertain said defendant Rogers and the said defendant Simon G. Elliott, and the said Gardner Elliott are transient and irresponsible persons, and wholly insolvent and without means to respond to any judgment; or decree that may be obtained against them: And unless restrained by the order of the Court the defendant Rogers, confederating as aforesaid will so dispose of said property; to the great and irreparable injury and damage of said plaintiffs. That the defendant Simon G. Elliott is about to dispose of all his property with intent to defraud these plaintiffs, out of the sums he is justly owing them as aforesaid—That these plaintiffs have no adequate remedy at law, and unless the defendant Simon G. Elliott, is restrained from disposing of his property these plaintiffs will be rendered remediless both at law and in equity for the great injury and damage they have sustained,—as aforesaid. Wherefore these plaintiffs pray for a preliminary order of injunction restraining the defendant Simon G. Elliott from disposing of any part of his property until a final decree herein and that the defendant Simon G. Elliott be compelled to discover a full true and specific statement by his answer to this bill of the following facts:

1st. The place of residence of A. J. Cook.

2nd. The name of each individual member of the firm of A. J. Cook & Co. at the time of the formation of the copartnership of Ben Holladay & Co. and the place of residence of each.

3rd. What disposition has been made of the \$775,-

000.00-100. of the bonds of the Oregon Central Railroad Company issued to A. J. Cook & Co. prior to date September 12 1868—If any were sold prior to such date or negotiated to whom, and for what purpose and for what prices:—

4th. To what particular persons and when did defendant S. G. Elliott furnish moneys for the firm of A. J. Cook & Co. and to what extent, and for what purpose.

5th. What amount did defendant S. G. Elliott receive back from the members of the firm of A. J. Cook & Co. and when did he receive it and from whom.

6th. From whom did defendant S. G. Elliott purchase the four locomotives referred to in his complaint “and how much did he pay for the same and when did he pay it, and in what kind of money did he pay it:—and to whom did he sell such Locomotives, and when did he sell them and how much did he receive therefor and in what kind of money did he receive it: and what disposition did he make of such proceeds.

7th. That he state particularly as to all amounts of money he has received from the sales of mills,—machinery and materials originally purchased for and belonging to A. J. Cook & Co.—In detail and the sum total, and what disposition has been made of such proceeds.

8th. That he discover and produce to plaintiffs with his answer herein the alleged original power of attorney from the alleged A. J. Cook to him—and from A. J. Cook & Co. to him authorizing him to make and transfer the contracts referred to in this complaint.

9th. That he answer fully in regard to every allegation in this complaint. And these plaintiffs pray further

that a final accounting may be had between the plaintiffs and the defendant in regard to such partnership transactions—and the interest of the defendant S. G. Elliott may be decreed to be liable and holden for all claims and damages due from him to these plaintiffs in such final accounting—and for a dissolution of said firm of Ben Holladay & Co.—and for judgment and decree herein against the defendant S. G. Elliott for all moneys wrongfully received as aforesaid by defendant from these plaintiffs and for their damages sustained as aforesaid by reason of the fraudulent and wrongful acts of defendant S. G. Elliott—To wit: The sum of One hundred thousand dollars, and the said plaintiffs further pray that the order of injunction herein prayed for may issue against the said J. B. Rogers, restraining him, his agents, employees, and all others acting by, through, or under his authority, from selling or disposing of or otherwise interfering with the property herein above described, or the proceeds thereof, which he claims under said bill of sale, or otherwise, from the said Simon G. Elliott, wherever found in said County and State till the further order of the Court—And plaintiffs pray for such other and further relief as may be meet with equity and good conscience, and for costs and disbursements.

MITCHELL DOLPH & SMITH,

Attys. for Plffs.

STATE OF OREGON,

County of Multnomah—ss.

I, Ben Holladay, being duly sworn say that I am one

1200 *The Oregon & California Railroad Co.*

of the plaintiffs herein, that the foregoing amended complaint is true as I verily believe.

BEN HOLLADAY.

Subscribed and sworn to before me this 5th day of
November A. D. 1869.

C. A. DOLPH,
Notary Public for Oregon.

(Endorsed on the back.)

In the Circuit Court of the
State of Oregon for the
County of Multnomah.

Ben Holladay & C. Temple Emmett
Plffs.

vs.

Simon G. Elliott et al.
Defendants.

Amended Complaint.
Mitchell, Dolph & Smith,
Attys for Plffs.

Filed Nov. 5, 1869.

B. L. Norden, Clerk
By J. R. Riley, Deputy.

To file.

Filed June 19th 1876
D. H. Murphy, Clerk

*In the Circuit Court of the State of Oregon
For the County of Multnomah—ss.*

Ben Holladay & C. Temple Emmett,
Plaintiffs

vs.

Simon G. Elliott, Thaddeus R. Brooks, Gardner Elliott,
& J. B. Rogers,

Defendants.

To Simon G. Elliott, Thaddeus R. Brooks, Gardner
Elliott & J. B. Rogers, Defendants.

IN THE NAME OF THE STATE OF OREGON,
You are hereby required to appear and answer the
amended complaint filed against you in the above entitled
action within ten days from the date of the service of
this Summons upon you, if served within this County,
or if served in any other county of this State, then within
twenty days from the date of the service of this Sum-
mons upon you; and if you fail so to answer, for want
therof, the Plaintiff will take judgment against you
for the sum of \$100,000.00-100 & for the costs and dis-
bursements in this action; and will apply to the court
for the relief demanded in said amended complaint at
the next Term thereof for said State & court. To wit:
the November Term A. D. 1869.

Mitchell, Dolph & Smith.

Attorneys for the Plaintiffs.

(Endorsed on back of Summons.)

STATE OF OREGON,

Multnomah County—ss.

I hereby certify that I served the within Summons
within said State and County, this 5th day of Novem-
ber, 1869, on the within named J. B. Rogers (After dili-
gent search S. G. Elliott was not to be found within said
County) by delivering a copy thereof, prepared and cer-
tified to by me, as Sheriff, together with a copy of com-

plaint, and affidavit for Injunction prepared and certified to by B. L. Nordene Clerk of said county, to him, in person.

A. O. ZIEBER

Sheriff of Multnomah County, Oregon.

By B. Z. Holmes, Deputy.

Shffs Fees 4.40.

(Endorsement on back of Summons.)

In the Circuit Court of the State of
Oregon, for the County of Multnomah.

Ben Holladay & C. Temple Emmett

Ptffs.

vs.

S. G. Elliott et al

Defts.

Original Summons.

Mitchell, Dolph & Smith,
Attys for Plaintiffs.

Filed June 19, 1876.

D. H. Murphy, Clerk.

Filed Nov. 5, 1869.

B. L. Norden, Clerk.

To file and return

Received the within Nov. 8, 1869.

Returned this 10th day of Nov 1869 the within named Defendant not to be found in my County.

Wm. Chance,

Sheriff Clatsop County, Oregon.

*In the Circuit Court of the State of Oregon
for the County of Multnomah.*

Ben Holladay and C. Temple Emmett, Plaintiffs.

vs.

S. G. Elliott and others, Defendants.

Answer of S. G. Elliott.

Now at this day comes S. G. Elliott of the said firm of Ben Holladay & Co. & Defendant above named & for separate answer—shows & alleges as follows—

This Defendant admits that on or about the 12 day of September 1868, the Plaintiffs and this Defendant entered into copartnership under & according to the terms of the writing of which a copy is appended to the complaint marked "Exhibit A."

This Defendant denies that he made any false or fraud— or fraudulent representations to said corporation called the Oregon Central Rail Road Company concerning said A. J. Cook, or concerning the matter of this Defendant's being an agent for said A. J. Cook.

Defendant denies that he falsely or fraudulently at any time represented to the Plaintiffs that he was an experienced Rail Road builder etc. as alleged in the amended complaint, with the intent & for the purpose of inducing said firm when organized to take an assignment of said contracts with A. J. Cook & A. J. Cook & Co. which Plaintiffs mention in their complaint.

But as to all those allegations of the complaint the Defendant says the Oregon Central Rail Road Company did as stated in the complaint enter into bona fide contracts with A. J. Cook & A. J. Cook & Co. for the construction of their Rail Road from Portland Oregon southward to the California line, and said A. J. Cook

& A. J. Cook & Co had at & prior to the formation of the said copartnership of Ben Holladay & Co. entered upon the work of constructing said road, & had procured a large amount of material, tools, machinery, etc. necessary and proper in the construction of said road & have expended large sums of money therein. And Defendant avers that the Plaintiffs had been prior to the formation of said contract of copartnership long acquainted with Defendant personally, and knew well his standing and reputation as a Rail Road Builder and were well & fully informed concerning all the affairs & business of said A. J. Cook & A. J. Cook & Co respecting said contracts.

And Defendant further avers that the proposals to form the copartnership of Ben Holladay & Co. came from the Plaintiffs, and the Plaintiffs for many weeks prior to the formation thereof were anxious, & very importunate to have the same formed, & after knowing all that any one knew about the relations and affairs of said A. J. Cook & A. J. Cook & Co. of their own motion and desire & without any inducements being held out to them by this Defendant entered into said contract of copartnership, and assumed the obligations & undertakings incident to the assignment of said contracts of Cook & Cook & Co with the Oregon Central Rail Road Company.

This Defendant denies that he did at any time, in order to induce the Plaintiffs or said firm of Ben Holladay and company to purchase said contracts make any false or fraudulent representations whatever concern-

ing the conditions & affairs of said A. J. Cook & A. J. Cook & Co under said contracts.

Denies that he intended to or that he did deceive or defraud the Plaintiffs in any particular whatever.

This Defendant denies, that he made any false representations whatever to the Plaintiffs or either of them concerning his power & authority to sell & convey the property of said A. J. Cook & A. J. Cook & Co. but avers concerning that matter that the Plaintiff Emmett was & is a lawyer by profession, and that both said Emmett & said Holladay fully understood all the facts relating to Defendant's authority & were satisfied therewith.

This Defendant denies that he made any false or fraudulent representations to the Plaintiffs whatever concerning the extent to which said work of construction of said road had advanced from Portland to Salem **or concerning** the cost of completing the same ready for the rails. But on the contrary Defendant avers that the Plaintiffs themselves were present on the track of said road some weeks prior to the execution of said contract of copartnership, & had every opportunity to examine the work & did examine it, & were fully & truly advised by Defendant concerning said matters. And Deft denies that he did represent to Plffs that the work of constructing said road from Portland to Salem could be completed ready for the rails for \$40,000.

Defendant denies that any of his statements to the Plaintiffs concerning said road & the work done or to be done thereon were or are false or made with the intent to deceive or defraud the Plaintiffs.

Defendant denies that said A. J. Cook is or was a myth or fictitious person,— and Deft denies that in, making and in transferring said contracts to the firm of Ben Holladay & Co. the Deefndant falsely did personate said Cook, or did falsely represent that he had a power of attorney for the transaction of such business as aforesaid regarding said contracts.

This Defendant denies that said firm of Ben Holladay & Co. did purchase said contracts from A. J. Cook & A. J. Cook & Co. relying on the representations of this Defendant.

This Defendant denies the allegations of the complaint to the effect that A. J. Cook & A. J. Cook & Co. were not the owners of all said bonds, except the 38 sold by them prior to Sept. 1868—and avers that all his representations to the Plaintiffs at & prior to the formation of the firm of Ben Holladay & Co. concerning said bonds were true—and the Plaitniffs before said copartnership was entered into knew & fully understood, or had the means of knowing & fully understanding all the facts concerning all of said bonds.

Defendant denies that he had or has sold said bonds more than the \$38,000 worth admitted in the complaint, and denies that he studiously concealed any matter relating thereto, at any time from the Plaintiffs.

This Defendant denies that he has failed at all to deliver to said firm of Ben Holladay & Co. or to the Plaintiffs any bonds whatsoever, to the damage of the said firm & of these Plaintiffs in any sum whatsoever.

This Defendant denies that he has failed to account

for any bonds or property of said A. J. Cook or A. J. Cook & Co. in or to which the Plaintiff had a such an interest as entitled them to any account.

As to the allegations that the firm of Ben Hollaady & Co. have been obliged since the date of said agreement or copartnership to extend on the first twenty miles of said road over \$100,000, or what amount, this Defendant cannot answer at the present time for the reason that the Plaintiffs have the books of the concern & the accounts and vouchers, and this Defendant for the want of sufficient knowledge or information concerning said matters denies said allegation of the complaint.

This Defendant denies that he was or is wholly incompetent & unfit for the position of general superintendent of the construction of said Rail Road—denies that he did not, or does not have any real theoretical or practical knowledge of such business, & denies that his representations to Plaintiffs in that behalf are or were false. Denies that by reason of such incompetency or any failure or incompetency of this Defendant the Plaintiffs or said firm of Ben Holladay & Co. have suffered any damages, or that the work on said road has been retarded by any act, omission or lack on the part of this Defendant.

This Defendant denies that he had any intent at any time to defraud or injure the Plaintiffs—denies that he did at any time studiously manage & conduct the work on the first 20 miles of said road in such a manner as to prevent or that he intended to prevent the completion of said twenty miles within the time prescribed in the

acts of Congress. Denies that he did at any time say to his confidential friends that such was his intention or that it was his object to disable these Plaintiffs & the firm of Ben Holladay & Co. from carrying out their said contract, or in order that their contract for construction of said road might pass into other & different hands, with a view on his part of obtaining a large interest in said contracts, & Defendant denies that by any act, or omission of his the Plaintiffs have been injured or damaged in the sum of \$100,000 or any sum whatever.

This Defendant admits that on or about the 4th day of October 1869 he was discharged from the position of General Superintendent of Construction, but he denies that he was so discharged by reason of any misconduct or incompetency on his part.

This Defendant denies that he made any fraudulent or false representations to the Plaintiffs or to said firm of Ben Holladay & Co. concerning the accounts of said A. J. Cook & A. J. Cook & Co. or that on account of any representations of the Defendant concerning the same the Plaintiffs advanced to him \$9000 coin or any sum whatever which was not due him—Denies that he received more than \$6500 from the firm of Holladay & Co.

This Deft denies that is has been, or can be found on a proper & true adjustment of his accounts with A. J. Cook & A. J. Cook & Co. that this Defendant has received more cash from & out of the concern of A. J. Cook & Co. than he had put into it.

This Defendant denies that he failed to render ac-

count of said sale of said four locomotives—Denies that the Plaintiffs do not know the exact amount of said accounts—both the sums paid on purchase & received on sale of said locomotives.

This Defendant denies that he is required or in law or equity ought to pay over & allow to the Plaintiffs the amount of profits on said locomotives, and denies that the firm of Ben Holladay & Co. have any rights to such profits.

This Defendant denies that in any matter relating to the property & affairs of A. J. Cook & Co he has been guilty of any fraud whatever towards the Plaintiffs.

Denies that by any fraud of Defendant the Plaintiffs were induced to enter into such articles of copartnership. Denies that he has violated the articles of copartnership or been guilty of any frauds whatever to the damage of the Plaintiffs \$100,000 or any sum whatever.

This Defendant denies that he is in any event indebted to the Plaintiffs in any sum whatever.

Denies that at any time he & J. B. Rodgers confederated together with intent to defraud the Plaintiffs—admits that he made a bill of sale of his personal property to said Rodgers, but denies that the same was fraudulent, on the contrary Deft avers that said sale was in good faith & for a valuable consideration.

Deft denies that Deft S. G. Elliott, Gardner Elliott, & J. B. Rodgers are transient and irresponsible persons.

Wherefore Deft prays judgment for his costs and disbursements.

Logan J & K & W. F. Trimble
for Deft. S. G. Elliott.

Multnomah County.

I, E. D. Shattuck, being duly sworn say that the Deft S. G. Elliott making the above answer is absent from the State of Oregon & cannot for that reason verify this reply & I am his attorney & for him say I verily believe that the foregoing answer is true. E. D. Shattuck.

Subscribed and sworn to before me this 14th day of Feb'y 1870. B. Killin

Notary Public for Oregon

Endorsed with Notary Seal.

B. Killin.

(Endorsed on back of original.)

Circuit Court

Holladay & Emmett

vs.

S. G. Elliott & others

Answer of S. G. Elliott

Filed March 14, 1870,

B. L. Norden, Clerk.

L. J. & K. & W. F. T. for Deft.

Filed June 19th, 1876.

D. H. Murphy, Clerk.

*In the Circuit Court of the State of Oregon
for the County of Multnomah*

Ben Holladay and C. Temple Emmett, Plaintiffs,

vs.

S. G. Elliott and others, Defendants.

The plaintiffs for replication to the answer of S. G. Elliott filed herein deny that said A. J. Cook and A. J. Cook & Co. had prior to the formation of the copartnership of Ben Holladay & Co. procured a large amount of material tools machinery etc necessary or proper in the construction of said road or that he or they had expended large sums of money therein—and that they had been prior to the formation of said Contract of Copartnership long acquainted with defendant personally or that they at all knew his debts standing or reputation as a railroad builder or that they or either of them were well or fully informed concerning the affairs or business of said A. J. Cook or A. J. Cook and Company—respecting said contracts but plffs aver that they relied solely on the representations of the debt S. G. Elliott in reference to the same which was the only means of knowledge they had and all of which representations were false and fraudulent as in Complaint stated: And they deny that the proposals to form the copartnership of Ben Holladay & Co. came from the plaintiffs for many weeks, or at all prior to the formation thereof, deny that they were anxious, or importunate to have the same formed—but plffs aver that its proposition came from debt and he was importunate to make such arrangements.

Deny that they knew, or could know, all that any one knew about the relations or affairs of said A. J. Cook, or A. J. Cook & Co. except as stated to them by debt. Deny that they of their own motion and desires and without any inducements being held out to them by Defend-

ant S. G. Elliott entered into such Articles of Copartnership or assumed the obligations or undertakings incident to the assignment of said Contracts of Cook, & Cook & Company with the Oregon Central Rail Road Company—but plffs aver that all said arrangements entered into on the part of plffs were induced wholly and solely by false and fraudulent representations of Deft S. G. Elliott as in Complaint stated. Deny that plffs or either of them fully understood or knew all the facts relating to defendants authority as the alleged aganst of A. J. Cook & A. J. Cook & Co.

Plaintiffs deny that they were for weeks or even over the track of the Rail road referred to in this case or that they ever examined it had every opportunity to examine the work or that they were fully or truly advised by Deft concerning said matters—plffs admit that they had been on certain small portions of such track but not over the whole track or any large portion of it but relying on the representations of Deft S. G. Elliott that he was a Competent Engineer and Rail road builder plffs reposed confidence in Deft and in his judgment and representations neither of these plfts being Engineers, and not being competent to judge of the estimates necessary to finish such road to Salem.

Wherefore these plfts averring that all and singular the matters and things alleged in their Complaint are true—they pray as in such Complaint for a dissolution and settlement of such copartnership.

Mitchell & Dolph

J. R. Attys for plfts.