FOUNDING

OF THE

CINCINNATI SOUTHERN RAILWAY

WITH AN

AUTOBIOGRAPHICAL SKETCH

BY

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PREFACE.

With the exception of the autobiographical sketch this work is a compilation from various scattered sources. It is not a history of the efforts made before the passage of the Ferguson Act to get a railway from Cincinnati to the South Atlantic Seaboard or to the south. Incidentally allusions are made to these efforts. It begins with the drafting of the Ferguson Bill and ends with a short account of the grand banquet given by the citizens of Cincinnati on March 18, 1880, upon the opening of the Cincinnati Southern Railway for traffic between its termini, the city of Cincinnati, and the city of Chattanooga, Tennessee, a distance of 336 miles.

From the dissertation of Mr. J. H. Hollander, a student at the Johns Hopkins University, presented to the Board of University Studies for the degree of Doctor of Philosophy, I have taken and used, with his and the University's consent, the chapter on "*The Necessity of the Railway*" and that on "*Legislation and Litigation.*" After the degree was conferred on him, his dissertation was published in January, 1894, in the Twelfth Series of the Johns Hopkins University Studies, with the title, "*The Cincinnati Southern Railway, a Study in Municipal Activity.*"

Dr. Hollander spent several months in making a thorough investigation of the subject of his essay. In matter, thought and style it is believed to be unexcelled by any similar dissertation. It is regretable that there are but few copies of it left, and it is hoped that if he should prepare a supplement, giving his views of the municipal results of the operation of the railway under the lease to The Cincinnati, New Orleans & Texas Pacific Railway

Company, that his original monograph will be reprinted with it. Dr. Hollander is now a Professor of Political Economy in the Johns Hopkins University. He has made a national reputation for himself by his work for the United States Government in devising for Porto Rico a system of local taxation to meet the expenses of its domestic government which was adopted and went into force in July, 1901, and under which, with free trade with this country, that island has been greatly benefited.

For a sketch of the frequent vacillation of public opinion and the consequent delay in the completion of the railway, reference is made to a pamphlet, entitled *"The Beginnings of the Cincinnati Southern Railway,"* published by Mr. H. P. Boyden, November 9, 1901. Mr. Boyden's experience as a journalist and as City Auditor of Cincinnati amply fitted him for his task. It will repay perusal.

For laws relating to the railway, other than the Ohio Acts, published in the appendix hereto, reference is made to a compilation published by the Trustees which contains them and the Tennessee and Kentucky acts, authorizing the Trustees to exercise the powers in those states conferred on them by the Ferguson Act. As there was but a mile of the original road in Ohio, it is evident that without the Tennessee and Kentucky enabling acts, the plan would have failed, unless congress had intervened, and authorized the construction of the railway by the Trustees as a military and post road.

To the Hon. John G. Carlisle, then Lieutenant Governor of Kentucky, credit is principally due for the passage of the Kentucky acts.

For the use of the plates of the railway, as finally built, and the view of the Grand Banquet, I am indebted to the Lessee Company.

August 28, 1905.

I.

Autobiographical Sketch of E. A. Ferguson.

I was born in the city of New York, November 6, A. D. 1826. In 1830, my parents moved to the city of Cincinnati, bringing with them their two children, my elder brother, William Gribbon Ferguson, and myself, Edward Alexander Ferguson. I was educated in the public schools of this city, at Talbot's Academy and Woodward College, from which I was graduated in the English Department in June, 1843. I had also studied Latin and Greek, enough of the former to be useful as a student and practitioner of law. When I entered Woodward College my desk-mate was Charles Nordhoff, who became a noted author. Having imbibed a strong desire to become a lawyer, I entered my name with Henry Snow, Esq., of the Cincinnati Bar, who had been Professor of Languages in Woodward College while I was a student. I pursued my studies at home, my method being to read not less than thirty pages of law each week-day, except Saturday. Saturday morning I reviewed what I had previously read, and on Saturday afternoon was examined by Mr. Snow. In this way I acquired, in the course of five years, a good knowledge of the principles of law. While studying law I read history, political economy, and the best of the English Classics. One of the books that had probably the most to do in forming my opinions was the *Edinburgh Review,* the bound volumes of which I read from its first issue.

At the May term, 1848, of the old Ohio Supreme Court, on the Circuit, I was admitted to the bar; but did not commence practice until December of that year, having for the previous eighteen months taught in the public schools of Cincinnati. On September 17, 1851, I married Miss Agnes Moore, a grand-

daughter of Adam Moore, an early pioneer and a leading merchant of Cincinnati.

In April, 1852, in my twenty-sixth year, I was elected by the City Council of Cincinnati, City Solicitor. My first duty as Solicitor was to go to Columbus, Ohio, where the First General Assembly under the Constitution of 1851 was in session. A general tax law had been passed, a section of which so restricted, it was thought by the city officers, the levy for city purposes, that under it there could not be a sufficient amount raised for municipal purposes to carry on the city government. There were two bills pending for the organization and government of municipalities, one drawn by William G. Williams, the City Clerk, and introduced in the House by Benjamin T. Dale; the other drawn by William Y. Gholson, my predecessor in office, afterwards a Judge of the Superior Court of Cincinnati and the Supreme Court of Ohio, which was introduced in the Senate by Adam N. Riddle, a Senator from Hamilton County. Mr. Dale felt aggrieved that Senator Riddle had introduced the Gholson Bill without first consulting with him, as he had first introduced the Williams Bill. Mr. Dale also complained that he could not get his colleagues, the Hamilton County Delegation, who were mostly young men, to give attention to this important subject. Upon my suggestion Mr. Dale agreed that we should meet at his room in the evening and take up both bills. As the Gholson Bill was drawn by a learned lawyer, and contained provisions for the organization as well as the government of municipalities which the Williams Bill did not, we took up the Gholson Bill first, and by twenty-seven amendments taken principally from the Williams Bill, that evening prepared a new bill which became the Municipal Code of May 2, 1852.

One of the amendments repealed the restricting clause in the general tax law; another created the Police Court. This was my first experience in legislation. My term as City Solici-

tor expired in May, 1853, and soon thereafter I was retained by the Commissioners of Hamilton County as their legal adviser, and was such for about eight years. During this time a new court house, jail, lunatic asylum, and other public works were constructed, which required the drafting of bills and contracts which became the subject of litigation.

In addition to a general practice I was engaged as one of the Counsel in all the important street and steam railway cases.

In May, 1855, I went abroad on a vacation trip. While in London I visited the Courts of Law and Equity then in session and had an opportunity of listening to debates in the House of Commons. From London I crossed to the continent landing at Ostend and from thence to Brussels and the field of Waterloo, then to Cologne and through the Rhine Country into Switzerland. From Switzerland I went through France, stopping two weeks at Paris during the Exposition, returning to England and going as far north into Scotland as Edinburgh.

At the October election in 1859, I was elected one of the three Senators from Hamilton County to the General Assembly of 1860-1861. While in the Senate I drew various bills which became laws relating to the City and County government and street railways. I also drew the Bribery Act, the Canal Leasing Act, and after the outbreak of the Civil War in 1861 with the aid of General George B. McClellan, the act under which was organized the Ohio Volunteer Force. Among the Senators who afterwards became distinguished were James A. Garfield, Jacob D. Cox, and Thomas M. Key. In the House was William B. Woods, who became distinguished as a soldier, and afterwards a Judge of the Supreme Court of the United States. General Benjamin R. Cowen was Clerk of the House; two of the reporters were Whitelaw Reid, now of the *New York Tribune* and Ambassador to England, and William Dean Howells, one of the editors of *Harper's Magazine,* and a distinguished author.

After the expiration of my term as Senator in 1861, upon

the election of Charles Fox, Esq., as a Judge of the Superior Court of Cincinnati, who had been solicitor of the Cincinnati Gas Light and Coke Company, I was retained by that company in his place, and continued such for about thirty-three years.

The foregoing is a partial statement of my experience as a lawyer and legislator before drafting, in my forty-second year, the Cincinnati Southern Railway Act of May 4, 1869.

As to the part I took in the execution of the trust after my appointment as Trustee, Dr. Hollander in his review of the trust has this to say (Essay page 73):

"In the objective study of an institution, it is rarely possible to recognize personal elements. Yet any survey of the influences at work in the history of the Cincinnati Southern Railway would be imperfect without a clear recognition of the part contributed by a single personality, Mr. Edward A. Ferguson, the author of the original enabling act, and a member of the Board of Trustees since its creation. In so far as it is possible to speak of any large work as the product of a single agent, the Railway is to be associated with his name. The inception of the project, every piece of legislation, is traceable to his legal ingenuity. He is closely identified with the actual construction and ultimate disposition of the Railway, and but few details in its history fail to reveal the impress of his activity. Material interests, political preferment have been sacrificed, and a life of high possibilities devoted with rare unselfishness to this one end."

To this may be added the testimony of Mr. H. P. Boyden, in his pamphlet entitled "The Beginnings of the Cincinnati Southern Railway." On page 110 he says:

"Mr. Hollander says in his intensely interesting sketch, 'The experiment was unique as it was remarkable.' So it was as hazardous as it was unprecedented. It was not in the power of the capacity of many men to steer a straight course in the nine years from the time the building of the road was decided on to the decisive vote of 1878.

"But no one can read the history of those years as meagerly set forth in the various extracts that have been given, and call back to mind what happened in the years that came after, and fail to recognize the dominant, controlling power of one man and his consistency of purpose. The man whose ingenuity and

knowledge of the law drew the first act; who as Trustee thought out a plan for the construction of the road which was finally carried out almost to the letter; whose faith never wavered and who cheered in times of despondency; whose indomitable courage withstood attacks from fellow Trustees, from newspapers, from the wealthiest men in the city, whose steadfast conviction as to policy sustained him through criticism and objection, whose fertility of resource, capacity to meet obstacles and overcome them, whether interposed by General Assemblies or Chamber of Commerce, never failed him—Mr. Ferguson is the one above all others who, from first to last, hewed close to the line.''

II.

The Necessity of the Railway.

(By Dr. J. H. Hollander.)

During the early decades of the present century, Cincinnati was the most important commercial center of the West. In 1820, Chicago had not yet come into existence, St. Louis was a mere trader's settlement, and Louisville a modest town of some four thousand inhabitants. The traffic of the entire region drained by the Mississippi river and its tributaries was transported by water, and Cincinnati was practically the only market in which the surplus products of the South and West could be exchanged for eastern and northern manufactures. The application of steam to river navigation in the decade between 1820 and 1830 greatly strengthened and developed these natural advantages. Louisville and St. Louis rose about the same time to commercial importance, but their competition only served to stimulate the growth of the older city. Population increased from 9,642 in 1820 to 161,044 in 1860, and remained throughout this entire period the largest of any city west of the seaboard.[1] Commercial relations extended from Pittsburgh to Fort Benton, Montana, and from St. Paul to New Orleans. Particularly with the South, as a result of advantageous location

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[1] The population of the four cities, as shown by the several census reports, was as follows:

	1820	1830	1840	1850	1860	1870
Cincinnati	9,642	24,831	46,338	115,435	161,044	216,239
Chicago	——	70	4,470	29,463	112,172	298,977
St. Louis	——	5,862	16,469	77,860	160,773	310,864
Louisville	4,012	10,341	21,210	43,194	68,033	100,753

See *Report on Internal Commerce and Navigation of the United States*, 1880, p. 73.

and intimate acquaintance with the tastes and habits of southern merchants, a large and profitable business was enjoyed.

Recognizing that the natural empire of trade lay in this direction, clear-headed Cincinnati merchants early urged the improvement of existent means of communication. Already in 1835, five years after the feasibility of steam locomotion had been demonstrated, a public meeting was held for the purpose of considering the subject of railway transportation between Cincinnati and the cities of the South Atlantic. An active part was taken in the agitation which, in the following year, secured the charter of the Cincinnati, Louisville and Charleston Railway, and a memorable event in early municipal history was a wonderful illumination of the city, amid falling snow, in February, 1836, in celebration of the grant of right of way to this road by the Legislature of Kentucky. Cincinnati sent a strong delegation to "the great southwestern railroad convention," held in furtherance of the project in Knoxville, in the following July, at which delegates were present from Indiana, Ohio, Kentucky, Virginia, Tennessee, Georgia, Alabama, South Carolina, and North Carolina, and over which Governor Hayne of South Carolina presided. The proposed road was here endorsed, and a route selected from Charleston, South Carolina, along the French Broad through Cumberland to Cincinnati. The Kentucky charter required the construction of branch roads from some point in the southern portion of the State to Maysville and Louisville. This burdensome condition delayed the commencement of work until the financial crash of 1837, when, under the general industrial and financial depression, the project, with all that it promised, was for the time abandoned. Agitation for a southern railroad was renewed at intervals in Cincinnati during the next fifteen years. The constitution of Ohio permitted special acts of legislation authorizing cities, towns or townships to become stockholders in private corporations, and in the general spirit of the period, encouragement was given to various

unsuccessful railroad companies organized for the purpose of providing direct access to the South.

By the year 1850, the reaction against public works in Ohio had fairly developed. The State debt at that time amounted to over eighteen millions of dollars, and "as business enterprises both the public works and the private concerns aided by the State were failures."[1] The abuses of rash wild-cat speculations made in the mad fever for internal improvements by cities and counties throughout the State had grown very serious. Most of the stock so subscribed had become utterly worthless, and the greatest difficulty was experienced in the assessment and collection of the heavy taxes necessary to meet the bonds by which the subscriptions were paid. Legal processes had repeatedly to be employed, counties attempted repudiation, and the public credit was greatly shaken.[2] The general situation was so ominous that the Constitutional Convention which met in 1850 not only prohibited State aid of any kind to public works, but inserted, by a decisive vote of 78 to 16, the following clause in the new document:[3]

Art. VIII. Sec. 6.—"The General Assembly shall never authorize any county, city or township, by vote of its members or otherwise, to become a stockholder in any joint stock company, corporation or association whatever, or to raise money for, or loan its credit to or in aid of such company, corporation or association."

The insertion of this clause definitely removed the possibility of Cincinnati securing railroad connection by subscription to any private enterprise.

In the meantime, the local necessity for improved means of communication with the South had grown in urgency. Com-

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[1] Charles N. Morris, *Internal Improvements in Ohio;* in *Papers of the American Historical Association*, vol. iii., p. 107.

[2] *Walker* vs. *City of Cincinnati*, 21 Ohio St., 14.

[3] Poore, *Charters and Constitutions*, ii., p. 1473. For the long and interesting debate which preceded its adoption, see *Debates of Constitutional Convention of Ohio*, 1850-51, ii., p. 300 *et seq.*

mercial supremacy in the West and Northwest departed from Cincinnati with the inauguration of railroad transportation in the valley of the Mississippi. The area of trade was greatly enlarged, but the number of competing points more than proportionately increased. Three distinct lines to the sea-board brought in New York, Philadelphia, Baltimore and Boston as active competitors for trade north of the Ohio river. The Chicago and Rock Island Railroad, with connections completed in 1854, gave Chicago access to the northwestern region of Dakota, Nebraska Minnesota, and Iowa. St. Louis reached out in all directions, increasing connecting mileage in Indiana, Illinois, and Missouri from 339 miles in 1850 to 4186 miles in 1856.[1] Cincinnati responded to this general movement by active railroad construction and extension. The mileage of Ohio grew from 299 miles in 1850 to 1869 miles in 1856.[2] But the exclusive advantages that had existed with respect to water transportation no longer prevailed. The closer proximity and momentum of growth of the new cities, the ease of railroad construction in the West, more than compensated for the advantages of established industries and defined lines of trade.

In the South, Cincinnati retained a dominating position for some years longer. Railroads constructed during the early part of the decade were largely tributary to river transportation, or local lines offering little competition to river traffic. In 1859, however, the Louisville and Nashville Railroad was opened for through travel, and Louisville, the most active competitor of Cincinnati for Southern trade, was placed in direct communication with Nashville, thence by connecting roads, with Knoxville, Chattanooga, Memphis, Augusta, Charleston, and almost every important point in the South. The superior rapidity and regularity of railroad transportation at once asserted itself, and a steady

[1] *Internal Commerce of the United States*, 1882; Appendix, p. 235.

[2] *Report of Secretary of State of Ohio*, 1880, p. 625. The greater part of this was directly tributary to Cincinnati.

deflection of traffic from the river to the railroad, that is, from Cincinnati to Louisville, set in.

The graver aspect of the situation now engaged general attention. Efforts were renewed to secure the construction of an independent Southern railroad by private enterprise, but without success. It was a period of quick active speculation, with abundant opportunities for secure investment and immediate returns. The length of the proposed road, the unusual topographical difficulties of the route, the probable cost of construction, the slow development of local traffic, the certainty of bitter competition from an intrenched corporation, and the necessity for practically completing the line before profitable connections could be secured, presented difficulties to outside capital which the obvious local desirability of the road could not overcome. Various propositions were suggested to evade the constitutional prohibition of municipal aid, but these were one after another demonstrated impracticable.

In 1859, an attempt was made to stimulate private enterprise by the offer of a cash bonus to be raised by individual subscription. After some negotiation, the Cincinnati, Lexington and East Tennessee Railroad, in operation from Lexington to Nicholasville, Kentucky, proposed to extend its rails to Knoxville, Tennessee, upon the condition that the sum of one million dollars should be so provided. The Kentucky Central Railroad was already in operation between Cincinnati and Lexington, and the proposed extension would practically give Cincinnati an independent line into the heart of Southern territory. The offer was conditionally accepted, and subscription lists circulated. Many persons, whether convinced of the futility of the project, or believing that the necessary amount would be raised independently, failed to respond as expected, and after a little more than half of the entire sum had been secured, no further progress was made. Modifications of the original plan were suggested, but before anything could be accomplished the muttering

of the approaching civil storm had diverted public attention in other directions, and all agitation was abandoned.

During the war the absence of a Southern railroad was keenly felt. A direct line connecting Cincinnati with some commanding point in the South, appeared so obviously necessary to successful military operations that one of the early messages of President Lincoln to Congress urged its construction.[1] Surveys were ordered by General Burnside, and lines run by Mr. W. A. Gunn, of Lexington, Kentucky, from Nicholasville, south to the Cumberland river.[2] Somewhat later a draft of negroes was actually made for the preparation of grades. No immediate action was, however, taken by Congress, and in the excitement of immediate developments the enterprise was allowed to drop. But for the failure of local representatives to press the President's recommendations upon Congress, and the abandonment of the projected advance against Cumberland Gap, it is probable that the construction of a Southern railway would have been at least undertaken by the national government.[3]

The commercial interests of Cincinnati suffered much from the events of the war. Trade with the Southern States was practically cut off, and manufacturing and commercial interests were paralyzed. The demand for military supplies later developed feverish activity in certain industries, but the stimulus was artificial, and its evil effects were felt in the reaction which followed the close of the struggle. When business interests returned to normal development with the revival of the prostrate industrial life of the South, it appeared that the four years of strife had firmly established the deflecting tendencies of the preceding period. Just as the rich stream of immigration

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[1] *Congressional Globe*, Dec. 3, 1861; Appendix, p. 1.

[2] Mr. Gunn was subsequently appointed Chief Engineer of the Cincinnati Southern Railway and directed the preliminary surveys made for this purpose. The line, as finally located, included a portion of the earlier military survey.

[3] *Cf.* Nicolay and Hay, *Abraham Lincoln*, v., pp. 66-67.

had been diverted from the valley of the Ohio to the fertile region of the Northwest, so the new channels of trade, which the dawning revolution in means of transportation had indicated, were now permanent and predominant. By 1868, the general traffic of the North and West had passed from Cincinnati to the new cities of the Mississipppi and the Lakes,—St. Louis, Chicago, Cleveland, Toledo, and Indianapolis.

A no less critical situation was developing in the South. Years before a Southern railway had been urged as an advantageous outlet from the Ohio river to the southeastern seaboard. Such was the plan of the Cincinnati, Louisville and Charleston Railway, and the significance of the agitation of 1835-6. But now the situation had changed. Cincinnati reached the seaboard through New York, Philadelphia, and Baltimore, and sought southern territory for its own sake. Moreover, throughout the South, the river had definitely yielded to the railroad. Two large systems of railroads, embracing some 4,000 miles, had grown up,—the one extending from the southeastern seaboard in a northwesterly direction, the other bearing from the southwestern Gulf cities toward the northeast, and converging with the former in eastern Tennessee. Louisville tapped this network by means of the Louisville and Nashville, and the Nashville and Chattanooga railroads at the precise juncture of the two branches, Chattanooga, Tennessee.

The only connection of Cincinnati with the South, aside from the all-water route, was by river to Louisville, thence *via* Nashville and Chattanooga by the Louisville and Nashville Railroad. As a means of transportation in competitive trade, it was both indirect and inadequate. Shipments to a distributing point due south from Cincinnati, as Chattanooga, described a wide circuit, going successively west, south, east, and north. The legitimate difference in freight charges, other things being equal, tended to swell the stream of Louisville trade at the expense of that of Cincinnati. The Louisville and Nashville

Railroad was moreover, at that time, "a Louisville road," controlled by, and operated in the interests of Louisville merchants. Rail rates between Cincinnati and local points were made by adding the rate between Cincinnati and Louisville to the rate between Louisville and those points. Between Cincinnati and competitive points, the rates were formed by adding an arbitrary charge between Cincinnati and Louisville to the rate from Louisville to such points.[1] The facilities of the road for shipments from Cincinnati to Southern points were entirely inadequate. Through freight was delayed in Louisville, and merchants still tell of pork destined for this section, unladen at Louisville and piled up for days outside of the city. For several years the Board of Trade of Cincinnati maintained a special agent at Louisville to trace out and hurry through Southern consignments.

The disadvantages thus indicated were emphasized by the radical changes in business methods which the economic revolution in the South had effected. Formerly the needs of a large portion of the population had been uniform and supplied by the planter, who purchased his stores in the larger Southern cities and retailed them to his body of dependents. Now, however, the negro bought for himself where and what he wished. General merchandise stores sprang up at every cross-road, and Southern merchants poured into Northern centers ready to buy for cash or on short time larger and more varied supplies.[2] The natural tendency was for these buyers to stop off at Louisville, rather than continue for 150 miles to Cincinnati, where any advantage gained in purchase would be lost in additional freight charge and delay in transmission.

By the spring of 1868, the construction of an independent Southern railroad had passed from a matter of general ex-

[1] *Internal Commerce of United States*, 1880, p. 90.

[2] See *Merchant's Magazine*, vol. lvi., 1869, p. 363.

pediency to one of commercial necessity. The subject was under constant discussion in Cincinnati, and various projects of more or less impracticability were proposed. The bonus plan was revived by a proposition from the Atlantic and Great Western Railroad to acquire the Lexington and Danville Railroad and extend it in connection with the Kentucky Central to a Southern center, provided that a partial guarantee fund would be subscribed. Like the earlier attempt, this proved unsuccessful. Attention was also given to "the Dickson plan," based upon the claim that, while the State constitution forbade a municipal gift or loan to "any stock company, corporation or association," there was nothing in it to prevent such action with respect to an individual who should engage to build the road. The doubtful validity of the interpretation, and at any rate the impossibility of securing such an "individual," were soon pointed out.

The situation, to summarize, was this: Cincinnati and Louisville were active competitors for Southern trade. This trade was definitely established upon the basis of railroad transportation. Cincinnati possessed no direct railroad to the South; Louisville did. The advantages enjoyed by the former city in the era of water transportation were now held by the latter. Southern merchants dealing directly with the North were diverted from Cincinnati by the closer proximity of Louisville. The advantages of commercial traveling were minimized by inadequate transportation facilities, unreasonable delays, and arbitrary freight charges upon Southern consignments shipped *via* Louisville. Louisville, in a word, threatened to displace Cincinnati as the chief distributing point of Northern manufactures to Southern consumers. Various unsuccessful attempts had been made to secure the construction of an independent Southern road. Serious obstacles stood in the way of unaided construction by private capital; on the other hand, a specific clause of the Ohio Constitution prevented municipal

aid to private enterprises, the most feasible method of securing at least its projection.

In the winter of 1868, the remarkable proposition was first broached by Mr. Edward A. Ferguson, a skilled constitutional lawyer of Cincinnati, that, failing all other means, the city should itself construct the road. Mr. Ferguson had long felt the necessity of direct communication with the South and the improbability of private enterprise establishing it. Careful study of the constitutional limitation and related judicial decisions led him to believe that, while Cincinnati was disqualified from lending aid to private enterprise, the city was not forbidden the exercise of independent activity. The circumstances of the inception of the idea, as told by Mr. Ferguson himself, are interesting:[1]

"In July, 1868, I had been preparing a brief for an argument in the Supreme Court, in the case of *Hatch* vs. *The Cincinnati and Indiana Railroad Company,* involving the title of the company to the canal-bed, which had been appropriated for railway purposes. After the preparation of that brief I took a short vacation and went to New York City. One Sunday evening, while there, a freight agent of one of the railroads came up to certain Cincinnati merchants to give them a hint that there was to be a change of rates and that they had better hurry their shipments. This led to a talk about railway facilities at Cincinnati and about the fact that Cincinnati was losing her business; that she was being cut off from the entire trade of the Northwest; that she formerly had a large trade in Iowa, but that was leaving, or had about left her; that the great want of the city was a railroad to establish an empire of trade, and that empire of trade was the South; that was the only place for Cincinnati trade. It was lamented that, under the constitution, the city, without co-operative capacity, could do nothing toward building the road. The brief of which I have spoken had led me to consider the legal and constitutional questions which were involved in this subject of the city's building the road,—not the question so much as the case bearing upon it. I said to the gentlemen: 'You are

[1] *Report of the Commission on the Affairs of the Trustees of the Cincinnati Southern Railway, the Management of their Trust and the Disbursement of Moneys entrusted to their Care.* Cincinnati, 1879. Testimony of Mr. E. A. Ferguson, pp. 99-100. Henceforth this report will be referred to simply as, *Report of Investigating Commission.*

mistaken about the constitution of Ohio; it is not as you suppose. Under the present constitution Cincinnati can do what she could have done under the former constitution.' I instanced to them the fact that while the city of Cincinnati could not own a share in the gas company, and it was not essential to her interest that she should, as she had a contract with the present gas company, who were able to furnish gas cheaper, probably, than she could make it herself, that the city could buy the gas works and become a gas manufacturer, and supply private consumers, and that the people had voted three millions of dollars for that purpose. In other words, the prohibition was against the city being a stockholder and not against accomplishing a public object out of her own means. I wound up by saying: 'I believe, when I get home, I will draw a little bill to see what can be done under the Democratic constitution.' The constitution had been spoken of as a Democratic constitution, and all the gentlemen present, I believe, were Republicans but myself. After I returned home in the fall of that year I was taken sick, and having leisure, I thought of this project, and sat down one day to see how I could draft a bill to meet the case. I roughly sketched the first section; when I had done that, I became satisfied that it could be done.''

Some weeks elapsed before Mr. Ferguson prepared a satisfactory revision of the first draft of the bill. It was finally completed and given to the press on November 25, 1868. The measure was drawn in general terms, according to constitutional requirement, and entitled ''An act relating to cities of the first class having a population exceeding one hundred and fifty thousand inhabitants.'' Cincinnati was, of course, the only city in the State whose population reached that number.

The measure provided that, whenever the City Council of Cincinnati should pass a resolution declaring it essential to the interests of the city that a railway be provided between two designated termini, one of which should be Cincinnati, and a majority of qualified electors should have decided at a special election in favor of the construction of the railway, then the Superior Court of the city should appoint a board of five trustees, holding office during good behavior, to carry out the object of the resolution. The board of trustees so appointed were authorized

to issue bonds of such an amount and kind as might be determined, to be secured by a mortgage on the line of railway and its net income, by the faith of the city and by a tax levied annually sufficient to pay the interest and provide a sinking fund for the final redemption of the bonds. This fund should be expended in the construction of a railway with all the usual appendages, between the specified termini. For this purpose the trustees should have power to make contracts, to employ officers and agents, to acquire necessary real and personal property and franchises, to receive donations of land, money or bonds, and to dispose of the same in aid of the fund. They should keep a record of their proceedings and a full and accurate account of their receipts and disbursements, and make an annual report of the same to the City Council and whenever requested by a resolution of the same body. Compensation should be proportioned to respective services and determined by the appointing court. The trustees should not be interested either directly or indirectly in any contract relating to the railway. Whenever the city solicitor or any bondholder should have reason to believe that a trustee had failed in the faithful performance of his duty, he should apply to the appointing court for the removal of the delinquent and the appointment of a successor. A vacancy occurring in the board from any other cause should be filled in like manner. The trustees were finally empowered to rent or lease portions of the line as soon as completed, such rights to terminate on the final completion of the railway, when it should be leased on terms and conditions to be determined by the City Council of Cincinnati.[1]

[1] For the full text of the measure in the form in which it subsequently became a law, see Appendix, A.

III.

Legislation and Litigation.

(By Dr. J. H. Hollander.)

The Ferguson Bill was widely circulated and generally discussed. It was favored by the commercial bodies of the city and heartily commended by the local press. Intelligent sentiment recognized the very unusual character of the plan, but urged it as an heroic measure. A more conservative element, to whom the proposition appeared a hazardous *dernier ressort,* presented an untried alternative plan,—an amendment to the ninth article of the constitution of Ohio, so as to enable Cincinnati to lend credit to private enterprise. The Knoxville Southern Railroad was at that time contemplating a northern extension, and a liberal municipal subscription would, it was thought, secure for Cincinnati this outlet. A carefully prepared amendment was presented to the Ohio legislature immediately after that body convened in 1869, but failed of passage.

The failure of this final substitute strengthened sentiment in favor of the Ferguson plan. Formal resolutions of endorsement were adopted by the City Council, the Board of Trade, and the Chamber of Commerce. Doubt raised as to the constitutionality of the measure was allayed by eminent legal opinion. Hon. Thomas M. Cooley, the distinguished jurist and legal authority, wrote that while the constitution of Ohio forbade cities giving aid to works of public improvement, there was nothing in it to prevent local authorities from levying taxes for the construction of a railroad, when their own agencies were employed for the purpose. Such action would be in entire harmony with the

established principle and usages of local self-government. Nor did the fact that this particular railroad extended beyond Ohio vitiate the rule. The local importance of a road depends upon the local facilities it affords to travel and commerce, and not upon the question whether it is entirely within the State or not.

In April, 1869, the Ferguson Bill, with a memorial urging its passage, was presented to the General Assembly of Ohio by a joint committee of the City Council, the Board of Trade, and the Chamber of Commerce. It was introduced in the Senate and referred to the Committee on Judiciary. Conferences with friends of the measure led to the insertion of ten million dollars as the amount of the loan and seven and three-tenths per cent. as the maximum rate of interest. A clause was added, significant in the later history of the railway, prohibiting the sale of bonds at less than par. The trustees were required to enter into bond in such sum as the appointing court might direct, and a taxpayer was given co-ordinate right with a bondholder of applying for the removal of an inefficient trustee. On April 28th the bill, as thus amended, was adopted in the Senate by a vote of twenty-three yeas to seven nays. It encountered no difficulty in the House, passing by a vote of seventy-three to twenty-one, and on May 4th, the measure became a law.

The Ferguson Bill was merely an enabling act, operative upon, first, the passage by the City Council of a formal resolution, declaring the construction of the railway necessary, and designating the terminal points; secondly, upon the subsequent ratification of this resolution by popular vote. A special committee of the City Council was immediately appointed to select a southern terminus. The respective advantages of Atlanta, Georgia, and Knoxville and Chattanooga, Tennessee, were discussed, the last-named city being, after mature deliberation, selected. On June 4th a resolution was passed, reciting the powers conferred by the Ferguson Act, and declaring it "essential to the interests of the said city of Cincinnati that a line of

railway, to be named the Cincinnati Southern Railway, should be provided between the said city of Cincinnati and the city of Chattanooga.'' A special election was held on June 26, 1869, at which 15,435 votes were cast ''for providing said line of railway,'' and but 1,500 ''against.'' This unanimity of sentiment stimulated subsequent proceedings. Four days later, the Superior Court of Cincinnati, upon petition of the City Solicitor, appointed a Board of Trustees, consisting of Edward A. Ferguson, the author of the act, Richard M. Bishop, ex-mayor of Cincinnati and later governor of Ohio, Miles Greenwood, William Hooper, and Philip Heidelbach,—the last three public-spirited citizens of means and influence, representing in a general way, the manufacturing, commercial and financial interests of the city. The Board was in no sense a technical body; indeed, no one of its members had, prior to his appointment, any practical experience in railroad construction. The theory of selection, in so far as theory operated, was that the variety of duties devolving upon the trust,—including the passage of complex legislation and the negotiation of large bond issues,—made it impossible to appoint a body composed exclusively of skilled engineers; that, on the other hand, the influence of but a single person of this kind upon unskilled associates would be predominant and ultimate to an undesirable degree. Accordingly, men of sterling integrity and large public spirit, enjoying unlimited public confidence, rather than experts in railroad construction, were selected for the execution of the work. The correctness or error of this policy will be discussed in another place. It is here sufficient to repeat that the composition of the Board of Trustees was, in so far, conscious and deliberate.

Before attempting the negotiation of the loan and the inauguration of actual construction, the Trustees prepared to secure enabling acts in Kentucky and Tennessee. To hasten work thereafter, an engineering department was organized, and in August, 1869, two surveying parties were placed in the field

for the purpose of conducting preliminary surveys. The problem of location was unusual in the wide latitude allowed by the absence of intermediate points,—the termini Cincinnati and Chattanooga being alone fixed,—and in the willingness of the Trustees to expend any reasonable amount of time and money to secure absolutely the best route. Directness of line was the prime consideration, subject, however, to such modifications as the topography of the country and the inducements offered by counties and landowners along the route might render desirable. Funds sufficient to meet current expenses were secured by temporary loans made with the consent of the City Council from the city treasury. The validity of this practice was affirmed in March, 1870, by a supplementary act of the General Assembly of Ohio, authorizing the City Council to advance a sum not exceeding $50,000 to the Trustees, to be repaid upon the negotiation of the construction loan.[1]

Little opposition was anticipated to the grant of right of way in Kentucky and Tennessee. Whatever rivalry or unfriendliness might exist in Kentucky was hardly expected to develop in the mere legislative franchise. Tennessee was known to be strongly in favor of the road. The importance of a northern outlet for the eastern section of the State had long been recognized, and in 1866 an attempt had been made to secure a northern connection by the incorporation in Chattanooga of the Cincinnati and Chattanooga Railway. After a preliminary survey to Emory Gap, the construction of the Cincinnati Southern was broached, and this project was abandoned.

The General Assembly of Tennessee convened in the autumn of 1869, and a bill granting right of way to the Cincinnati Southern Railway was at once introduced. It authorized the Board of Trustees to enter, survey, and acquire by gift, purchase or condemnation, land or portions of constructed railways,

[1] 67 Ohio Laws, p. 28.

in such amount as might be necessary for the construction and maintenance of the Railway. Counties and towns along the route were empowered, upon a majority vote of the qualified electors, to donate lands or moneys in aid of the construction of the road, to an amount not exceeding five per cent. of the taxable property. The trustees of the road were required to locate it within two years after the passage of the act and to complete it within five. The governor of the State might extend this latter period to ten years. The maximum transportation charges were fixed at thirty-five cents per 100 pounds and ten cents per cubic foot for freight, and five cents per mile for passengers. No discrimination should be made against the citizens of Tennessee, and the legislature reserved the right to enforce these provisions by all necessary legislation. Bondholders were secured by a statutory mortgage on the road and its net income, and failure to comply with any terms of the grant involved its forfeiture. A committee of Trustees remained in Nashville while the bill was under consideration, explaining its provisions and pointing out the local advantages to be derived from the road. The measure was strongly supported by popular sentiment, and with some slight additions became a law on January 20, 1870.

On January 7, 1870, a similar bill and memorial had been introduced into the General Assembly of Kentucky and referred to the committee on railroads in Senate and House. It immediately encountered strong opposition. Not only were sectional jealousy and local pride reluctant to grant so unusual a privilege to a city of another State, but rival interests, corporate and municipal, brought powerful influences to bear in opposition.[1] Various modifications failed to weaken hostility, and on March 1, 1870, the measure was defeated in the Senate, and four days later in the House. The influences that had

[1] *Report of Investigating Commission*, pp. 193-194.

operated were so apparent that the Board of Trustees at once prepared to renew the struggle by carrying the measure before the people of Kentucky, and making the grant of right of way a formal issue in the next legislative election. Agents were appointed in different sections of the State, and a general convention was held in the interests of the Railway at Lexington in October, 1870. Delegates were here present from many of the counties of Kentucky, as well as from Tennessee, Alabama, and Georgia. The immediate and indirect influences of the Railway were discussed in detail, and a committee appointed to arrange for public meetings throughout the State in behalf of the proposed grant. The work of agitation was actively carried on during the entire winter.

The defeat of the Kentucky bill exerted its most important influence in Cincinnati. It was the first repulse the project had thus far received, and awoke conservative taxpayers to an alarmed consciousness of the magnitude of the undertaking and the serious difficulties involved. In April, 1870, an injunction was taken out by the City Solicitor of Cincinnati, restraining the City Auditor from paying over unpaid portions of the loan of $50,000 advanced by the City Council for the immediate use of the Trustees. The petition averred that both the original and supplementary statutes were unconstitutional, and that the advance of money was a misapplication of corporate funds and in contravention of the laws governing the same. A demurrer to the petition was filed by the Mayor and City Auditor and the Board of Trustees jointly. The questions thus arising were reserved by the Superior Court of Cincinnati, and adjourned for adjudication in general term.

On January 4, 1871, the Superior Court, having had the case under advisement for several months, pronounced the Ferguson act and the supplementary measure of March, 1870, constitutional and valid, and dismissed the injunction proceedings. The

opinion,[1] rendered by Judge Alphonso Taft, with the concurrence of other members of the court, after reviewing the history of the case, declared that, independent of constitutional limitations, the construction of a railroad serving public interests is a proper purpose of municipal taxation. This had been repeatedly affirmed and enjoined by the courts of Ohio before 1851. If it were not so, the restricting clause of the State constitution adopted in that year would have been unnecessary. Not only could the General Assembly up to that time authorize a city to lend money or credit to a private corporation in order that it might build a needed railway, but it might empower the city to build the road directly, in which case the application of the public fund was not left dependent upon the good faith and discretion of a private corporation. The restricting clause of the new constitution plainly cut off the power of the legislature to authorize a city to do the first of these things. It did not, however, prevent a city, when empowered, from engaging in such work directly. A similar limitation had been placed by an earlier article of the same section upon the activity of the State; but the bare restriction against loaning money or credit to private companies had not prevented the State from accomplishing directly "any purpose whatever." Its power in this direction, that is, of making public improvements without the agency of a corporation, continued exactly as it had been before 1851. "We feel bound," the opinion continues, "to give a like construction to the sixth section (Article VIII.), which applies to cities. They cannot be authorized now, as formerly, to lend their funds or their credit to, or become members of, trading corporations, for any purpose whatever. But they can be authorized to expend their own funds in making necessary public improvements in the same manner and to the same extent as before

[1] *Walker* vs. *City of Cincinnati*, 1 Cin. Sup. Ct. Rep., 121. (For the full text of the opinion of Judge A. Taft and the concurring opinion, see Appendix "B" p. 135.)

the adoption of our present constitution." The fact that the proposed road was to extend beyond the city did not vitiate its character as a municipal work. In subscribing to the stock of railroads reaching into other States, and in erecting public works, such as an infirmary and workhouse in Hamilton county, Cincinnati had repeatedly exercised authority beyond corporate limits. Public expediency, and not municipal confines, must determine whether a particular function is within the scope of municipal taxation. Finally, while the constitutionality of the acts appeared clear of doubt, even were it otherwise, the presumption must always be in favor of the validity of the laws enacted by the State legislature, if the contrary is not demonstrated.

Fortified by this judicial victory, the Board of Trustees proceeded to renew the struggle for necessary legislation in Kentucky. During the winter months of 1870, the State had been canvassed from end to end in the interest of the project. Public meetings had been held in many of the counties, and the favorable influence of the Railway upon the development of the resources of the State emphasized. It had been shown that all the coal used in central Kentucky was floated down the Ohio river from Pennsylvania and Ohio to Covington, and then sent by rail throughout the State, and that citizens of eastern counties were thus obliged to pay from thirty to fifty cents per bushel for fuel, while great fields lay untouched within a few hours' ride. Similarly the stock-raisers of Kentucky could only reach the South indirectly *via* Nashville, and suffered heavy loss from the longer confinement of cattle which this made necessary. Most of the meetings so held terminated in the passage of resolutions instructing local representatives in the legislative bodies at Frankfort to vote in favor of the grant of right of way.

Immediately after the Kentucky legislature assembled in 1871, a second measure, known as "the McKee Bill," embodying the provisions of the previous grant, with certain minor

modifications, was introduced. The measure at once became an object of contest, and the scenes of the previous year were re-enacted. Representatives from Louisville and adjacent counties, and a well-equipped lobby, bitterly opposed the bill, while representatives of the Board of Trustees and influential citizens of Cincinnati busied themselves in its behalf.[1] After a legislative battle of two weeks, the bill was narrowly lost in the House by a vote of forty-four to forty-three, and some time later in the Senate.

Local interests and sectional jealousy had now twice defeated a grant of right of way through Kentucky. Sentiment rapidly developed in favor of seeking relief by federal legislation. In anticipation of a general law regulating the construction and dimensions of bridges across the Ohio river, a special bill had already been introduced in both bodies of Congress, authorizing the construction of a bridge according to the special plans of the Trustees. A more comprehensive measure, providing for right of way through Kentucky and Tennessee, as well as the construction of the Ohio bridge, was prepared by Mr. Ferguson, and introduced in the United States Senate and House of Representatives in February, 1871, the last month of the congressional session. A delegation of the Trustees proceeded to Washington and testified in its behalf before the committees of both bodies. The measure was reported favorably in the House and passed by a two-thirds vote. In the Senate it failed for want of time.

The outlook was now eminently discouraging. Every alternate means had been unsuccessfully tried, and nothing remained but to persist in the original endeavor. The funds in possession of the Trustees were about exhausted. An appeal in error had been taken from the decision of Judge Taft, and was then pending in the Supreme Court of Ohio. To attempt to negotiate the

[1] *Report of Investigating Commission*, p. 64.

bonds when their validity was gravely questioned was impossible. The surveying parties that had left Cincinnati in the fall of 1869 reached Chattanooga in March, 1871, after eighteen months of continuous field service, and were ordered to sell the field equipment and disband, only a small force being retained to work up the surveys. A large number of lines had been run and a thorough exploration made of a region widening out from Cincinnati to a distance of 70 miles at the Kentucky-Tennessee State line, thence converging gradually to Chattanooga. The belt of country thus enclosed formed an area equivalent to about one-third of the State of Kentucky. No route had now been considered outside this limit, as involving by excessive divergence from an air-line too great a sacrifice of directness.

In December, 1871, Chief Justice Scott, of the Supreme Court of Ohio, with the concurrence of his associates, sustained the judgment of the lower court upon the validity of the Ferguson and supplementary acts.[1] The general principles of the former decision were reaffirmed, with renewed emphasis upon the entire competence of the Legislature to authorize under the present constitution the municipal construction of public works. "The restricting clause of the constitution interdicts a business partnership between a municipality or a subdivision of the State and an individual or private corporation. It forbids the union of public and private capital or credit in any enterprise whatsoever. If it meant more than this, it would follow that municipal bodies are powerless to make any improvement, however necessary, with their own means and on their own sole account." It is the corporate interest of the municipality and not the location of the road which determines the right of taxation. Finally, the authority and duty to prevent an abuse of powers of taxation and assessment by municipal corporations is en-

[1] *Walker* vs. *City of Cincinnati*, 21 Ohio St., 14.

trusted by the constitution to the General Assembly and not to the courts of the State. The power of the legislature to authorize local taxation cannot be judicially denied, unless on the ground that the purpose for which it is exercised is not local, and the absence of all special local interest is clearly apparent.

This opinion definitely established the constitutionality of the Ferguson act and the validity of the bonds therein authorized. It removed the most reasonable ground of opposition to the measure, its alleged unconstitutionality.

During the summer and autumn of 1871, the Kentucky representatives of the Trustees maintained an active canvass in the interest of the road in sections where hostility was most pronounced. The Kentucky legislature reconvened in December, 1872, and the enabling measure was again introduced. Upon the advice of Kentucky friends of the Railway, the passage of the bill was left ostensibly to their care, the Trustees keeping advised by telegraph and correspondence of the exact situation. For several weeks the issue hung in doubt. Finally, on February 13, 1872, after "the most determined and positive opposition that was ever inaugurated against any bill before any legislature," a partial compromise was effected, various prejudicial amendments were inserted, and the bill passed. The general tone of the measure, in the form in which it became a law, was scant and grudging. Right of way was given, but laden with burdensome conditions. The Trustees were required to survey a specified route *via* Nicholasville and Danville, thence through Sparta, Tenn., to Chattanooga, and to submit it with other lines surveyed to popular selection in Cincinnati,—the road being located as thus determined. They were further obliged to pay into the State treasury of Kentucky, in addition to ordinary taxation, the sum of fifty cents for every passenger crossing the State and twenty-five cents for every person traveling a hundred miles within it; also one cent on every hundred pounds of through freight.

The construction of the Railway under such conditions seemed impossible. In Cincinnati, the amendment or repeal of the Ferguson act was accordingly urged, in connection with a substitute plan of purchasing the Kentucky Central Railroad for three million dollars and transferring it as a *quasi*-bonus to a syndicate of railroad capitalists, who should in return extend the line to some Southern center. A bill to this effect was actually introduced in the Ohio legislature, but through the vigorous opposition of the commercial bodies of Cincinnati and the likelihood of the repeal of the odious provisions of the Kentucky grant, it failed of passage. The first two of the prohibitive clauses were repealed by a supplementary act in the following session of the Kentucky legislature; the third not until February 4, 1873. The measure was then accepted by the Trustees, and the "Ohio River Bridge Act" having already become a law, all necessary enabling legislation had now been secured.

The results obtained by the surveying parties in 1869 and 1870 were worked up during the following winter and submitted to the Trustees in an exhaustive report in March, 1873. The general character of the region to be penetrated has already been referred to as one of the chief causes of the failure of private enterprise to construct the road. It was highly unfavorable to railroad construction,—wild, unsettled, difficult of access, of extremely irregular geological formation, intersected by a wide mountainous region, and cut by three great rivers and numerous smaller streams. The absence of intermediate points, and the liberal attitude of the Trustees, led the surveying parties to examine a much larger extent of territory than is usual in railroad construction.[1] Three main routes, with some twenty-six variations, were presented. The stem lines were the "Eastern," the "Central" or "Military," and the "Sparta" or "Western."

[1] It has been said that the location of no other railway in the country has been preceded by such elaborate and varied preliminary surveys. The work consumed more than two years of time, and cost $183,969.86. See *Report of Investigating Commission*, p. 8.

The "Sparta" route had only been surveyed because of the proviso in the Kentucky act. It was never seriously contemplated. The "Eastern" route, through Richmond, London, Williamsburg, and Emory Junction, penetrated a smoother country and involved easier grades and less tunneling. It had the disadvantage of greater length, and was ultimately abandoned for the "Military" route *via* Nicholasville, Somerset, Point Burnside, and Emory Junction. The three lines converged in the neighborhood of Lexington, where a choice was presented between the purchase of the Kentucky Central Railroad and the acquisition of an easement over the Newport Bridge across the Ohio river, or of the construction of a direct line and an independent bridge.

IV.

Testimony of E. A. Ferguson.

BEFORE THE SPECIAL MASTER COMMISSIONERS.)

The Superior Court of Cincinnati appointed Edward D. Mansfield, Richard H. Stone and James Pullen to take testimony in writing and report the same to the Court. The report was made February 3, 1876. Testimony of Mr. Ferguson was taken between November 9 and December 29, 1875.

Question: Please state your name, age, business and place of residence.

Answer. My name is Edward Alexander Ferguson; I am forty-nine years of age, am a lawyer by profession and practice, and I reside in the City of Cincinnati, Hamilton County, State of Ohio.

Q. State how long you have resided in this city?

A. I have resided in this city since the 4th day of November, 1830, and I have been actively engaged in the practice of law in this city since the 22nd day of December, 1848, now nearly twenty-seven years.

Q. State whether you are a Trustee of the Cincinnati Southern Railway; state when you were appointed, and when you entered actively upon the duties of your office; state the nature and character of your duties as such Trustee, what portion of your time have you devoted to the management of said road; state all you can about it?

A. I am one of the Trustees of the Cincinnati Southern Railway; I was appointed by the Superior Court of Cincinnati, on the 30th day of June, 1869, in connection with Richard M.

Bishop, Miles Greenwood, Philip Heidelbach and William Hooper, and qualified by giving bond in the sum of $100,000, on the 3d day of July, 1869. On the 6th day of July, 1869, the Trustees met and organized by choosing Miles Greenwood, President of the Board, and appointing H. H. Tatem, Secretary, and from that time forth to the resignation of Mr. Hooper on the 26th day of January, 1875, and the qualification of his successor, W. W. Scarborough, Esq., on the 19th of February, 1875, the Board of Trustees continued actively in the discharge of their duties as Trustees of said road.

As the Trustees had no funds, and did not deem it advisable to issue bonds before the necessary legislation could be obtained in Kentucky and Tennessee, they determined to apply to the City Council of Cincinnati for an advance of ten thousand dollars ($10,000) to be repaid out of the first money realized from the sale of bonds. The advance was made; the object in addition to paying the ordinary office expenses, was to put into the field surveying corps to make the preliminary surveys for the route for the line of railroad.

At a meeting on the 3d day of August, 1869, a communication was presented by W. A. Gunn, suggesting the examination of five different routes in Kentucky and of the country in Tennessee, north of Chattanooga, for the purpose of determining the propriety of actual surveys southwest of Danville, in Kentucky; he also submitted a recommendation for the organization of parties to make the preliminary surveys. Upon my motion, Mr. Gunn was employed during the pleasure of the Board, as Chief Engineer in charge of the surveys, and on motion of Mr. Heidelbach, Mr. Ernst Ruhl was employed to make the exploration of the country above spoken of, and the President was authorized to purchase the necessary outfits and instruments for the surveying parties. Additions were made to the two parties originally fitted out, from time to time, as the funds in the hands of the Trustees and interest of the road required, until

the surveys described in a report which was made about March, 1873, by the Chief Engineer in charge, Mr. Gunn, a copy of which is submitted, were completed. Subsequent to the first advance by the City Council, and prior to the 12th day of March, 1870, a second advance of $10,000 was made by the city for the same object as the first. The moneys so obtained having been about exhausted, on the 12th of March, 1870, upon my suggestion a meeting was held by the Finance Committee of the City Council and Board of Trustees. To this meeting I submitted a bill which was subsequently, on the 25th of March, 1878, passed into a law by the General Assembly of the State of Ohio. It authorized the City Council to advance to the trustees out of any fund of the City, such sum as may be necessary not exceeding $50,000 for carrying the object for which the Trustees were appointed into effect, the sum so advanced to be repaid out of the Trust Fund provided for in the original act when raised.

With this bill I also submitted a memorial to the Senators and Representatives of the County of Hamilton in the General Assembly, which was signed by the members of the Finance Committee and the Trustees present. These three amounts, aggregating $70,000, were all the moneys obtained from the city, and they were repaid on the first sale of $150,000 of the 7 per cent. bonds, in August, 1872. The memorial may be found on pages 44 and 45 of the Minute Book, No. 1, of the Board of Trustees, a copy of which memorial I here attach, marked "Exhibit A," as a part of this my deposition.

Having given a statement of the organization of the Board, the Surveying Corps, and mode in which the necessary funds were obtained from the city to enable the Trustees to carry into effect the object of their appointment, I proceed to state, under appropriate heads, the history of the execution of the trust so far as I took part in it or it came under my observation.

And first, with regard to the necessary legislation in Tennessee and Kentucky.

As the Tennessee Legislature was first to meet, the Tennessee bill was first drawn. In framing this bill it was necessary to keep in view the powers granted to the Trustees under the law of their appointment, the general law and decisions relating to railways, the laws and decisions of Tennessee, and the English law on the same subject, the last because it was supposed that from the amount of money to be raised it would be necessary to resort to English capitalists to get it. Hence, in that part of the bill relating to the security of the bondholder, the language used in the English statutes and decisions, so far as possible, was employed. The draft of the Tennessee bill, together with a memorial, was submitted to the Board on the 9th day of November, 1869, and Messrs. Bishop, Heidelbach and myself were appointed a committee to present the bill and memorial to the Legislature of that State.

Mr. Heidelbach and I went in November to Nashville, where we remained several days conferring with the members of the General Assembly whose constituents were more directly interested, and explained to them the provisions of the bill. Mr. Bishop subsequently went to Nashville, and took an active part towards securing its passage. It became a law, with some additions, on the 20th of January, 1870. The provisions of this law were accepted by the Trustees on the 1st of November, 1870. [See Minutes No. 1, page 51.]

A memorial and bill drawn with similar provisions to those of the Tennessee Bill were presented to the General Assembly of Kentucky on the 7th day of January, 1870, and were referred to the Committee on Railroads in the Senate and House. These committees met in joint session on Tuesday evening, the 25th of January, for the purpose of hearing argument from all interested. Hon. John C. Breckinridge had been retained on behalf of the Trustees, and I had been deputed also to represent them. Mr. Breckinridge and I appeared before the committee. He made an eloquent argument and explained fully the provi-

sions of the bill, and submitted certain amendments we had agreed on to obviate objections raised. On the next evening, Isaac Caldwell, Esq., of Louisville, addressed the committee on behalf of that city, in opposition to the measure. On the succeeding Monday night, the 31st of January, Mr. Breckinridge replied to Mr. Caldwell, and on the next night Mr. Caldwell responded. I was at Frankfort during these discussions, counseling and advising in regard to the measure, and preparing a brief on the constitutionality of the Ohio law under which the Trustees were appointed, Mr. Caldwell having taken the ground that it was unconstitutional.

The bill failed at this session, as it did in the succeeding year, 1871. It is proper that I should say that Mr. Bishop was at Frankfort at both sessions in 1870 and 1871, laboring zealously in behalf of the Trustees. I was not at Nashville or Frankfort except on the occasions I have mentioned; but while the bills were pending I was in constant telegraphic communication with those acting in our interest, and no amendment was accepted without my advice.

The bill which failed in 1871 was known as the McKee Bill, from having been introduced in the House by the Hon. George R. McKee, of Garrard County, Kentucky.

After the failure of the first bill in 1870, there had been passed by the Kentucky Legislature a charter for a railroad under which it was supposed the Trustees could act. Judge McKee visited Cincinnati for the purpose of learning whether this could be done, and I had a long conference with him, explaining our powers, and that what we wanted was not what is usually called a charter, but an act authorizing us to exercise in Kentucky the powers we had under the laws of Ohio. We also went over the amendments which he had offered to the first bill and others that had been suggested, and the result was that I redrafted the bill in these particulars, and as before stated he introduced it.

As there was no general act of Congress regulating the con-

struction and dimensions of bridges over the Ohio River prior to December 17, 1872, but as there had been debates in Congress and reports of the United States Engineers showing that the provisions of the act of December 17, 1872, were necessary, it was deemed prudent to have an act of Congress authorizing the Trustees to construct a bridge over the Ohio conforming to the views of the engineers. Accordingly a bill for that purpose was drawn and General Andrew Hickenlooper was sent to Washington in behalf of the Trustees to have it introduced and passed. It was introduced in the Senate by the Hon. John Sherman, and in the House by the Hon. Job E. Stevenson. While General Hickenlooper was in Washington, in January and February, 1871, it became apparent that the McKee Bill, then pending in Kentucky, would probably fail of passage, and a public sentiment was growing up in favor of applying to Congress for the necessary grant in Kentucky. Senator Sherman had introduced a bill in March of the previous year to incorporate the Cincinnati and Chattanooga Railroad Company, and named among other incorporators the Trustees of the Cincinnati Southern Railway. As the position of corporators in such a company was inconsistent with our duty as Trustees, a dispatch was sent to Senator Sherman requesting him to withdraw our names. It was thought advisable, however, that a bill should be drawn to be ready for introduction in case we failed in Kentucky. I accordingly drew a bill, which was subsequently introduced in February, 1871, in the Senate by Senator Sherman, and by Hon. Job E. Stevenson in the House. This bill embraced both the bridge over the Ohio River and the railway in Kentucky and Tennessee, and was entitled "A bill to promote the construction of the Cincinnati Southern Railway."

On the 11th of February, 1871, Messrs. Heidelbach, Bishop and myself were appointed a committee to go to Washington to procure the passage of this bill, and on the 13th of February the Board adjourned, to meet at Washington, on Friday, Feb-

ruary 17. The committee, being a majority, did go to Washington, and remained there until the adjournment, on the 4th of March. Senator Sherman and I appeared before the Committee on Commerce of the Senate, and urged the passage of his bill, and likewise prepared a communication to the committee, which will be found on pages 56, 57 and 58 of Minute Book No. 1 of the Trustees. I also appeared with the Trustees' committee, City Council committee, and one from Lexington, Kentucky, before the House Committee on Roads, etc., and addressed it, explaining the provisions of Stevenson's bill, and advocating its passage. The House Committee reported favorably, and the House passed the bill as presented, without debate, by a two-thirds vote, but it failed in the Senate for want of time.

At the session of the Kentucky Legislature, commencing in December, 1871, the McKee Bill was again introduced. By the advice of the friends of the railway in Kentucky, it was determined to leave the passage of the bill ostensibly to their care, or as it was expressed at the time, to make it a "Kentucky fight." It was necessary, however, that we should know what was being done, and I was, therefore, kept advised by telegraph and otherwise.

I think it is no more than just to myself to state that in January, February and March of 1871 and 1872, I ceased to attend at the Court-house to professional business for the purpose of securing the passage of the bills for the Southern Railway. The McKee Bill was finally passed and approved on the 13th of February, 1872. The act as passed had three objectionable provisions, and unless they were repealed the Board at once determined not to accept under it. Two of these were repealed at the session, on the 25th of March, 1872, but the other was not repealed until the 4th of February, 1873, after which the Trustees accepted the law of February 13, 1872, as amended in the form on pages 127-8, of Minute Book 1. The objectionable provisions were those requiring the Trustees to pay

an amount equal to fifty cents *per capita* for each through passenger, and twenty-five cents for each passenger for one hundred miles; to pay semi-annually into the State treasury an amount equal to one per cent. on each one hundred pounds of through freight shipped over the road, and to report the lines surveyed, and to locate the road as required by a vote of the citizens of Cincinnati. All these provisions were repealed.

In order to give the same security for the bonds by a statutory mortgage in Ohio, as is given by the Tennessee and Kentucky acts, and to provide for the occupation of streets, etc., and the appropriation of private property in accordance with the Municipal Code, and for the purpose of enabling the Trustees to make a contract for completing and leasing the entire line, the act of April 18, 1873, known as the "Wright Bill," was drawn on the 5th of February of that year, when it was known that the Kentucky act removing the restrictions which prevented the acceptance of the original act was passed. This completed the legislation deemed necessary in the three States and in Congress prior to the work of construction.

In the next place, I desire to briefly state the history of the litigation to test the constitutionality of the act of May 4, 1869, under which the Trustees were appointed, and the act of March 25, 1870, which authorized the advance of $50,000.

The petition for this purpose was filed on the 12th of April, 1870, in the Superior Court of Cincinnati, by J. Bryant Walker, the City Solicitor, as such, and as a taxpayer of the city, as plaintiff, against the city, the Trustees, and the City Auditor. To the petition a demurrer was filed, admitting its statements. On the 18th of April the questions arising on the demurrer were reserved to the General Term, where they were argued in briefs submitted by the City Solicitor, Mr. Walker, for the plaintiff, and by myself, for the defendants. On the 4th of January, 1871, the Court decided in favor of the constitutionality and validity of the acts, all the Judges concurring, and dismissed

the petition. To reverse this judgment, the plaintiff filed a petition in error in the Supreme Court, and the case was argued in that Court in October of 1871, by Messrs. Stallo & Kittredge and Scribner & Hurd for the plaintiff, and Messrs. Henry Stanbery, W. B. Caldwell and Stanley Matthews for the defendants.

I attended on behalf of the Board at Columbus during the argument, but took no part in it, except to prepare a brief of laws and authorities for the assistance of the counsel of defendants.

At the December term (1871) the Supreme Court, all the Judges concurring, affirmed the validity of the acts in question. The conclusions of the Court were announced in the latter part of December, but the opinion was not read until about February, 1872.

I have already related how the first seventy thousand dollars were obtained from the city prior to and under the act of March 25, 1870, and shall now state the subsequent financial history.

In February, 1871, it became necessary to procure more funds, and as the Board did not wish to issue bonds until Kentucky had granted the necessary authority to extend the road through that Commonwealth, it was determined to borrow from the banks in Cincinnati. I accordingly negotiated a loan of $30,000 with Mr. Perrin, President of the Third National Bank, the Trustees giving the form of obligation which was approved at the meeting of February 1, 1871, [Minute Book 1, p. 55,] all the Trustees being present except Mr. Hooper, who, I think, was in Europe. The money thus obtained being about expended, and it not being advisable to apply for further loans at that time, it became necessary to either disband our surveying parties and quit procuring rights of way along the various routes, or to devise other means for these purposes. At the meeting of the 7th of July, 1871, I submitted a form of certificate of in-

debtedness, which was adopted, the other Trustees present being Messrs. Greenwood and Bishop. A copy of this form, which will be found on page 62 of Minute Book 1, is hereto annexed marked Exhibit —, as part of my testimony. Certificates of this kind were issued to employes and persons furnishing supplies until funds were procured, when they were paid.

In January, 1872, the Supreme Court having decided in favor of the constitutionality of the acts of May 4, 1869, and March 25, 1870, it was determined to borrow $30,000 from the Third National Bank, and give an obligation in the form to be found on Page 66, Minute Book No. 1, which I had prepared. After the passage of the amendatory act of March 25, 1872, by the Kentucky Legislature, and the Trustees being assured that their objections to the original act would be removed, it was determined to issue seven per cent. currency bonds, to be dated July 1, 1872, and payable in thirty years, on July 1, 1902; and accordingly I prepared a form of bond, which will be found on Page 89, Minute Book 1, and drafted a circular, to be found on Page 101.

The bonds then sold ($150,000) were the only ones sold before the sale of seven-thirty bonds, in May, 1874. The whole ten millions were issued in this form. At the meeting of April 25, 1873, Mr. Heidelbach, Mr. Hooper and myself were appointed a committee to ascertain in New York what kind of a bond would be best negotiated, and on what terms. Mr. Heidelbach and I went to New York, where we met Mr. Hooper, on his return from Europe, and made the necessary inquiries.

On the 6th of May, 1873, Messrs. Hooper, Heidelbach and myself were appointed a committee to prepare a circular and pamphlet showing the powers of the Board, and such information as would be useful in negotiating bonds.

This committee reported on the 27th of June that they had prepared the circular dated June 1, together with the laws and decisions relating to the road. The circular was written by Mr.

Hooper. At the same meeting, June 27, 1873, Mr. Heidelbach and I were appointed a committee to ascertain in New York on what terms a loan could be made, in anticipation of the sale of bonds. While in New York we visited various bankers, who promised to make propositions, but nothing was done.

On the 2d of September the Board received telegrams and letters from New York inviting conference there in regard to the sale of seven-per-cent. gold bonds. The Board adjourned to meet in New York, and all but Mr. Greenwood went and opened a negotiation with a syndicate represented by John W. Ellis and others.

These negotiations continued from the 5th to the 15th of September, when they were broken off. Before the Board left, however, propositions from other parties had been received, but the panic which commenced on the 24th day of September put an end to all further efforts for the sale of gold bonds in New York.

Mr. Hooper having determined to return to Europe, where his family was, I was directed to prepare a letter of authority to him to negotiate in London and on the Continent, the sale of $5,000,000 of gold bonds, giving him power for that purpose to employ such agents and incur such necessary expenses as was usual in the course of such negotiations and sales. This letter will be found on page 195 of Minute Book 1. Mr. Hooper's authority was continued until July 7, 1874, when he was directed to cease his negotiations abroad. From the tenor of his letters in January, 1874, the Board became satisfied that Mr. Hooper would probably fail to effect a sale of gold bonds on such terms as would be satisfactory, and determined to try the home market for currency bonds. I had had consultations in reference to the sales of seven three-tenth currency bonds with Mr. W. W. Scarborough, and Mr. R. R. Springer, and others. As Mr. Scarborough was to be in New York in March, 1874, I requested him to make inquiry there in regard to a sale of such

bonds. On his return he wrote me the result of his inquiries. His letter was presented to the Board at the meeting of March 31, 1874, and was referred to me with power to act, and to correspond with the American Exchange National Bank of New York, and notify its President that the bank had been appointed agent to sell at par and interest $2,000,000 of 7.30 currency bonds. At the meeting the 3d of April, I submitted a letter of the bank in reply to one of the 1st, asking for further instructions, and was directed to prepare a form of advertisement for proposals for bonds, and to continue correspondence. I thought it important that Mr. Scarborough should go to New York and aid in making sale of the bonds, and was, accordingly, at the meeting of the 13th of April authorized to request Mr. Scarborough to do so, and give him such letter of instructions as might be requisite. Mr. Scarborough went to New York for that purpose, first stipulating, however, that he would receive no compensation, and to him is largely due the successful sale of the first million of 7.30 bonds. Mr. R. R. Springer also, while in New York, used his influence for the same object. At the request of the Board I went to New York in September to arrange for inviting proposals for the second million of 7.30's, which the American Exchange National Bank were authorized to sell. Before going some correspondence had taken place between the bank and myself in regard to the sale of the balance of the ten millions, and I was authorized to negotiate in regard to such sale. While in New York I was also requested to obtain a loan of $200,000 in anticipation of sales. I remained in New York on this mission during September. The conclusion was certain propositions, which resulted in a temporary loan from the bank of $200,000, and an agreement for the disposal of the balance ($8,300,000) of seven-thirty currency bonds. The agreement was made after consultation with Messrs. W. W. Scarborough and R. R. Springer, and was based upon a proposition prepared by Mr. Scarborough. [See Min. Book 2, pp. 15 and 16.]

I shall next speak of procuring rights of way, depot grounds, donation of lands, and location of road.

Prior to the passage of the first Kentucky act of February 13, 1872, the Board had received proffers of rights of way and donations from committees of citizens along the surveyed routes, but no systematic course had been pursued to secure them. At the meetings of May 7 and June 4, 1872, I submitted a series of forms of deeds for land-grants and rights of way, and also forms for rights of way and donations in aid of the fund for the construction of the road, and also a circular letter to committees tendering donations. [See Minute Book 1, pp. 73-83.] These forms, or contracts based on them, were used in Kentucky and Tennessee in securing the rights of way, land-grants, and donations. Under my direction were also prepared the forms of ordinances granting the right of way through the streets of Newport, Covington, Lexington and Ludlow; also the forms for the appropriation of lands for the railway in Tennessee and Kentucky.

Before locating the road it was necessary to ascertain upon what terms and conditions the Trustees could purchase the Covington and Lexington Railroad, the Cincinnati, Lexington and East Tennessee Railroad, known as the Lexington and Danville or Sinton road, the right to use the Newport and Cincinnati Bridge, and so much of the Louisville Short-Line as would provide an approach to it, and so much of the Covington and Lexington turnpike as it would be necessary to occupy if the ridge route was taken. In the event that the located line passed through Knoxville, it was also necessary to know on what terms the railroad known as the Knoxville and Ohio Railroad could be purchased, and whether a joint use of the right of way of the East Tennessee and Virginia Railroad could be secured.

Owing to the litigation in regard to the ownership of the Covington and Lexington Railroad, and the determination of the directors and stockholders of the old company not to take action

for its sale until after the directors had full possession of it, the negotiations for the purchase of that road were broken off by communications dated August 22 and September 2, 1873, which will be found on pages 178 and 181 of Minute Book 1. The negotiation was not renewed, as the litigation was not ended until long after the time fixed by the Kentucky act for the location and the commencement of the construction of the Southern Railway had expired. The failure of the negotiation for the purchase of the Covington and Lexington Railroad ended the negotiations for purchase of the Knoxville and Ohio road and for the joint use of the right of way of the East Tennessee and Virginia Railroad from Knoxville to Chattanooga. The negotiations for the former were between the Board of Trustees and C. M. McGhee, the manager of the road, and for the latter between Mr. R. T. Wilson, President of the company, and myself, on behalf of the Trustees.—[See Minute Book, pages 144, 145.]

The purchase of the Lexington and Danville road, and all its appurtenances and rights of way, was made by deed, accepted by the Trustees on the 20th of January, 1874, for the consideration of $300,000 of the 7 per cent. currency bonds of the city issued for the construction of the Southern Railway. The first proposition of sale was made to a meeting of the Board, April 12, 1873, the sum asked being $450,000. At a meeting held on the 17th of November, 1873, Mr. Sinton, as President of the company, made another proposition, the sum asked being $350,000. This proposition was referred to me, to ascertain whether the price named was the lowest price, and to examine the title papers to the road. The negotiation with Mr. Sinton resulted in the purchase, as above stated.

I found it necessary to go over all the proceedings of the Court authorizing the sale of the Lexington and Danville Railroad, and the proceedings of the original purchasers' charter, and the proceedings organizing the then owners of the road, the Cincinnati, Lexington and East Tennessee Railroad Company,

together with their proceedings as a company. It was also necessary that I should draft all the forms for the company's proceedings in making a sale, and the powers of attorney and proxies ratifying the sale by the stockholders and the individuals for whose benefit the road had been originally bought under the decree of the Court, and forms of petition and orders of Court perfecting the title in the company. I also drew the deed and the minutes in regard to the same, and the location of the Southern Railway over the road thus purchased, as shown in the Minute Book 1, pp. 228-236.

The negotiation for the perpetual use and right of way over the Newport and Cincinnati Bridge and its approaches was commenced by a communication submitted by me at the meeting of May 13, 1873. [Minute Book 1, page 143.]

At the meeting of the 17th of June following, the President of the Bridge Company, Alfred Gaither, Esq., submitted a communication in regard to the occupancy of the bridge, but it being thought advisable that whatever was done should be put into the form of contracts, ready for execution and acceptance by the Trustees, with the Bridge Company, the Little Miami Railroad Company, and the other railroad companies interested in the bridge and approaches and the "connection track" in Cincinnati, the matter was placed in my hands for negotiation and drafting on behalf of the Board. After several conferences in August, September, October and November, 1873, with parties in interest at Cincinnati, Columbus, New York and Philadelphia, and preparing several drafts, I presented to the Board at the meeting of the 17th of November, 1873, the letter dated the 14th, of Hon. H. J. Jewett, the general counsel for the Newport Bridge Company and the railways interested therein, inclosing modification proposed by him to my last draft of contract for the purchase of a perpetual easement over the Newport Bridge and approaches, and also the last draft of a contract for the use of the

"connection track." Copies of these final drafts and letter are hereto annexed, marked Exhibits D and H.

At the meeting of the 3d of February, 1874, I was directed to obtain further information in regard to the bridge and connection track, which I did, and reported at the meeting on the 10th of February. [See Minute Book 1, pages 246 and 251.]

The negotiation for the use of the track of the Louisville Short-line Railroad, in Saratoga street, Newport, to the bridge approach, and so far west of Newport as was practicable, was conducted by the Board, and through its consulting Engineer and attorney in Kentucky, under my directions. Messrs. Greenwood, Bishop, Hooper and myself went to Louisville about the 19th of July, 1873, and had conference with the Directors of the Short-line Road, and subsequently received communications from them, but no satisfactory proposition was ever made, and for this reason, and others stated in the declaration to the public, to be found in Minute Book 1, pp. 233-237 (a copy of which is annexed, as Exhibit J, hereto), the final location from Roberts' store to and across the Ohio River was made by way of Ludlow, at the meeting at which this declaration was ordered, held February 12, 1874, the next day, the 13th inst., being the last day of the two years allowed by the Kentucky act in which to make it. This location will be found on page 253, Minute Book 1.

The first location in Kentucky was on the 12th of December, 1873, the day on which the King's Mountain tunnel was let. It was for eighty miles from the State line north to a point about one mile west of South Danville, on the Lebanon branch of the Louisville and Nashville Railroad. [Minute Book 1, pp. 208, 209, 210.] The second location was on the 20th of January, 1874, on the day of the acceptance of the deed conveying the Lexington and Danville, or Sinton road, from the point near South Danville, to Roberts' store, in Kenton County, about twenty miles from Cincinnati. [Minute Book 1, page 235.] The third and final location was as above stated. All the resolu-

tions and papers, including the declaration to the public, necessary in making these locations were drawn by me, as were all the other papers I mention in my testimony, unless I otherwise state. This location on the ridge route required that the railroad should occupy and use for a distance of about thirty miles a large part of the road bed of the Covington and Lexington turnpike. This fact had been kept in view before locating, in obtaining right of way, and they included lands whereon to place a new road where necessary. At the meeting of November 5, 1874, I was appointed a committee to negotiate for the occupancy of the turnpike with a committee of the Directors of the Turnpike Company—Messrs. Ernst, Chambers and Stephens. A long negotiation as to the price and conditions ensued, and was closed by a proposition and form of agreement on the 5th of March, 1875. [See Minute Book 2, pages 35, 47, 147, 167, 169.]

In the event of the location of the railway as finally made, it was deemed proper to procure a right of way as far east as Freeman street, for local depot purposes, and to ascertain whether the right to use the passenger depot of the Cincinnati, Hamilton and Dayton Railroad Company could be obtained. Inquiry was accordingly made of that company, and at the meeting of December 30, 1873, a communication was received and presented containing a proposition in regard to a strip of ground thirty feet in width, beginning in the west line of the company's property, and running east about 1,200 feet to near Carr street, as shown on a map prepared by Thomas D. Lovett, the Consulting Engineer of the Trustees; also a proposition for right of way, as shown on the same map, to the passenger depot of the company, and for the use of the depot by the lessees of the Trustees. [See Minute Book 1, p. 217.] A letter was subsequently addressed on behalf of the Board to the company, which will be found on page 301, and the result of the negotiations was that

the Trustees bought this strip by deed, dated June 30, 1874, to be found on Page 349, Minute Book 1.

I should also state that I took an active part in securing the donation from the Ludlow heirs, at Ludlow, Kentucky, of land for right of way for road and inclined plane and side tracks, and for site of bridge and use of wharf, and donations of land from the Roane Iron Company and others, in Tennessee, at Chattanooga and elsewhere.

In November, 1873, the Board had become satisfied that the road would probably be located on the military route south of South Danville, and accordingly determined to advertise for proposals for constructing the King's Mountain Tunnel, the longest tunnel on the line, in Lincoln County, Kentucky, about twelve miles south of Stanford. Bids were received on the 10th of December, and an agreement for its construction entered into on the 12th, between the Trustees and Bibb & Tabler. As this was the first contract, and for the principal earthwork on the line, it was subsequently adopted as a form for all graduation and masonry. [Minute Book 1, pp. 221.] All the forms of contract used in the Department of Construction, which was organized on the 13th of January, 1874, [see Minute Book 1, pp. 225] as well as these, were drawn by me, also the provisions of the specifications necessary to conform them to the contracts. [Exhibit—, hereto attached, is the principal form.]

It was necessary that I should give special services preliminary to and in making a contract for one other work besides the King's Mountain Tunnel, namely, the Ohio River bridge. Under the act of Congress of December 17, 1872, prescribing the dimensions of bridges over the Ohio, it was necessary to submit to the Secretary of War, for his approval, a design and drawing of the proposed bridge piers and a map of the proposed location. Accordingly I prepared a memorial to the Secretary, and had General Andrew Hickenlooper appointed agent of the Board

to present the same to him, with authority to take the necessary steps to secure the requisite permission to build the bridge. [See minutes of meeting of July 6, 1874, Minute Book 1, pages 353, 354.] Objections having been made to the location of the piers and width of span, a modification was made in plans and piers, and permission given in November, 1874, by the Secretary of War for the construction of the bridge now being built.

In procuring this permission, General Hickenlooper acted under my direction and advice.

At a meeting on Tuesday, January 23, 1875, a conditional award for the construction of the Ohio River bridge was made to the Keystone Bridge Company, the price being $663,500. It was necessary, however, to agree upon the terms of the contract and certain stipulations in the specifications. The matter was placed in my hands in connection with the Consulting Engineer, and was not finally concluded until a month after the conditional award. As this contract was of great importance, and required to be carefully drawn and considered, it formed the basis for the contracts for the other bridges and trestles, the execution of which was supervised by me.

In organizing the Financial Department I prepared forms of vouchers, etc., with the aid of the Secretary and Auditor, its head.

In addition to the other special services spoken of, I have acted as the general legal counsel in the execution of the trust and in the Board from its organization to the present time.

As a member of the Board from the commencement, in July, 1869, to the date of the qualification of Mr. Hooper's successor, namely: February 19, 1875, the period which the testimony now taken covers, I took part in meetings recorded in Minute Book No. 1, of 360 pages, and Minute Book No. 2 to page 132, being present at nearly every meeting except during the months of July, August and September, 1874, preparing all the forms for

general orders of the Board, and special minutes for the use of the Secretary.

An inspection of these minutes will furnish the best testimony of the general services of the Trustees. For the greater part of the first three years, until after the passage in February, 1872, of the Kentucky Act, the Trustees as a Board had comparatively little to do, having in that time sixty meetings. [See Minute Book No. 1, pp. 27 to 70.] After that these meetings were more frequent until May 12, 1873, when in addition to the regular monthly meeting two special meetings on Tuesday and Friday of each week were ordered as necessary to transact the business of the Board.

There were also called meetings when emergencies arose, and there were services by members of the Board as committeemen, which will be found noted in the minutes.

Q. How many miles of the road are graded to this time?

A. I can not give an exact statement as to the number of miles graded, for the reason that the work is let to different contractors, but few of whom have finally completed their several contracts, and I have never made inquiry of what the aggregate number of miles of the graded road is. The road for the purpose of construction is divided into divisions and lettered from A running south from the Ohio River, each division having about forty miles. Work is in progress on all these divisions as far and including the division Letter G, which will take it to the Tennessee Valley. According to the last return of the payroll of the laborers employed by the several contractors they aggregate upward of ten thousand, and at the present rate of progress all the gradation and masonry under contract can be finished by the first day of July, 1876, with the exception of one section, No. 178, in Division G, which may take longer, owing to the nature of the tunnel on that section.

Q. Have there been any iron or steel rails delivered?

A. There have; 1,000 tons of iron rails near South Dan-

ville, from the Roane Iron Mill Company of Chattanooga, and there are also now being delivered at the same place 5,000 tons of iron rails by the Cleveland Rolling Mill Company; this latter company is also now delivering 3,000 tons of steel rails at Ludlow.

Q. Are the rails paid for as delivered, and at what price?

A. After passing inspection they are; the price is fixed by the contracts with said companies; ninety per cent. is paid when the rails pass inspection.

Q. By how much do you estimate that the cost of the road will exceed the ten millions?

A. I have never made any exact estimate. My own impression, from the beginning, has been that the road would not cost less than fifteen millions of dollars; accordingly, when I drew the "Wright Bill" in February, 1873, I drafted an additional section authorizing the issuing of five millions more of bonds, but upon the advice of influential citizens, to whom the bill was shown, this section was withheld. An estimate of the probable cost of the entire road is now being made by the Consulting or Principal Engineer, Mr. Thos. D. Lovett.

Q. Is it the purpose of the Trustees to finish the entire road to Chattanooga before any portion is used for passengers or freight?

A. It is not. With means put into our hands by an act of the Legislature authorizing an additional issue of bonds the cars can be run from the Ohio to the Cumberland River by the 1st of August, 1876, unless the work of track laying should be retarded by an unusually rainy season as the last.

Q. What number of miles can the rails contracted for lay?

A. From the Ohio River to the Tennessee Valley.

Q. Have bonds been sold at the office of the company or Trustees at 2.55 premium? If so, how many?

A. One hundred and fifty thousand of the 7 per cent. cur-

rency bonds were sold to the First National Bank of Cincinnati, in August, 1872.

Q. What further opportunity was given for the purchase of bonds at the office of the Trustees?

A. I think, on the sale of the first million of the seven-thirties, proposals were invited at the office, but if not, at the bank in Cincinnati. Proposals were received here and forwarded to New York, and some bonds were sold here through the agent in New York.

Q. Did the law mean that not less than par should be paid at the Treasury of the Trustees for each bond sold?

A. Not as I understand it. On the contrary, decisions in Ohio, so far as I know them in similar law, are to the effect that a Board like this, authorized to raise money by the sale of bonds which are commercial paper, may adopt the means necessary to effect the sale, according to the usages of the money markets of the world.

Q. If the law intended that the bonds might be sold at par, and commissions be allowed and paid, would it be in the power of the Trustees to contract for any rate of commissions, whether one, two, three, four, five per cent., or more.

A. It would not. They must for all such services pay what would be usual in the money market.

Q. What prompted the Trustees to dispose of so many bonds in such a brief space of time?

A. They had a large amount of work contracted for, and experience has shown that when you have once started a market for bonds of this character, it is better to take advantage of it. We accordingly did so, and sold the bonds.

Q. In your answer to the general question you mention the name of R. R. Springer. Did he advise or approve the sale of bonds at par, and to pay for such sale or negotiation 1½ per cent. commission?

A. I believe he did.

Q. Were the bonds sold in 1875 advertised in Cincinnati, Boston, Philadelphia or Baltimore, or any bids invited for the whole or any portion of them in either of said cities?

A. The bonds were advertised in Cincinnati, and I believe in all the other cities named in the question, as well as in New York.

Q. To whom was the 1½ per cent. commission paid?

A. It was paid to the American Exchange National Bank, of New York, and Kuhn, Loeb & Co., of New York also.

Q. Did the American Exchange National Bank of New York, or Kuhn, Loeb & Co., take any portion of the bonds to their own account?

A. Whether the American Exchange National Bank took any of the bonds to their own account or not, I don't know. I do not think they did. However, the bank was the agent of the Trustees to negotiate the sale of the bonds in New York. Kuhn, Loeb & Co. were not the direct agents of the Trustees to negotiate the sale of bonds, but the American Exchange Bank made a contract with them to sell through them $1,000,000 of seven-thirty currency bonds, and to allow them a commission of one per cent., which was to cover all their charges and expenses in making sales. They were also to have an option of selling the remainder of the seven-thirty currency bonds, amounting to $7,300,000, at the same price and rate of commission.

Q. Did the Trustees invest a large sum in United States bonds?

A. They did. I think they invested about $2,100,000.

Q. Have those bonds been sold?

A. We have still one million of United States bonds; the rest have been sold.

Q. For what reason were they sold?

A. To provide money for the current expenses of the road, and because it was supposed that the time when the most

profit could be made out of the investment of the particular class of United States bonds sold had come.

Q. Please state why no contract was made with Thos. D. Lovett as to the amount of salary or compensation to be paid him for services as Chief Engineer?

A. A contract was made, but not as to an amount. His compensation is to be fixed by the Board.

[Adjourned to Saturday, December 10, 1875, at 2 P. M.]

Q. Please name the attorneys that are now retained and under pay?

A. In Kentucky we have C. B. Simrall, Esq., our attorney and agent in the State of Kentucky. We have J. B. Beck employed as special counsel in cases for the recovery of subscriptions made to pay the right of way through Fayette County, Kentucky. He lives in Lexington. We have a law firm employed in Central Kentucky in a case growing out of the failure of Barker & Co., contractors. In Tennessee we have one attorney, C. D. McGuffey, Esq., and we have W. T. Porter, Esq., employed as attorney for the Board in Cincinnati. I have myself acted as the general leading counsel of the Board both in session and in matters requiring legal counsel when not in session.

Q. How much are they paid?

A. The attorney in Cincinnati, Mr. Porter, is paid fifty dollars per month. The attorney in Kentucky, Mr. Simrall, has been paid three hundred dollars per month, but his business is about closed, or will be about the 1st of January, 1876. I think Mr. McGuffey's pay is about three thousand dollars per annum, and his duties will be closed, or cease, about the 1st of July next. The other attorneys are paid their services as rendered.

Q. How much was paid to John C. Breckinridge?

A. I am not sure whether it was $2,000 or $3,000. It was not to exceed $3,000. General Breckinridge was originally em-

ployed as the leading counsel for Kentucky as one of the first acts of the Board after its organization, and it was expected that he would have charge of the legal affairs of the Trustees in Kentucky, but owing to the long delay in procuring the necessary legislation in Kentucky and the subsequent failure of his health, it became necessary to employ Mr. Simrall, the agent in Kentucky, to take charge of the major part of the duties that would have been performed by and under the direction of General Breckinridge.

Q. Were or are any of the attorneys for the Board related to any of the members?

A. None to my knowledge.

Q. Was the advertising the bonds in New York, Boston, Philadelphia, Baltimore and Cincinnati subsequent to the contract made for the sale of the $7,300,000 of 7.30 bonds?

A. All expenses of every nature were paid by Kuhn, Loeb & Co., except the charges of the American Exchange National Bank for services in negotiating the sale of the $8,300,000 of the 7.30 bonds. The advertisement for the sale of these bonds was made after we made the contract with the American Exchange National Bank to negotiate the sales. The Trustees never advertised the sale of the $8,300,000 7.30 bonds, either before or after the contract with the American Exchange National Bank, except through the method adopted by the contract itself.

Q. What did the Newport Bridge Company charge for their bridge?

A. As shown by the letter of Hon. H. J. Jewett, heretofore appended to my testimony, they charged $1,250,000. Subsequent to the letter of Mr. Jewett, viz., 15th of December, 1873, the bridge company, through Mr. Alfred Gaither, its President, made another proposition, a copy of which I here attach, marked Exhibit E, as a part of my deposition, and again, on the 30th of January, 1874, Mr. Gaither submitted another proposition, a

copy of which I here attach, marked Exhibit F, as a part of my deposition.

Q. How much shorter is the road now adopted than the Kentucky Central to Lexington?

A. Twenty miles.

Q. Have you formed an opinion, or has it been stated to you by engineers, of the working value of the distance thus gained?

A. It has been stated to me that it would be equivalent to $2,000,000 capital. I have not formed any opinion about it.

Q. What compensation, if any, did General Hickenlooper receive for his services in Washington for the Trustees?

A. None whatever; his expenses were paid.

Q. You say the Board adjourned on the 13th of February, 1871, to meet in Washington on the 17th of February, and that the committee of the Board appointed on the 11th of February, being a majority, did go to Washington and remained there until Congress adjourned, on the 4th of March. Where did the Board meet while in Washington, who presided and who acted as Secretary, and what was the expense?

A. The Board met at Willard's Hotel. I think Mr. Heidelbach presided, and I think likely that I acted as Secretary. I do not know what the trip cost.

Q. You say in your answer to the general question that in 1871, when the McKee Bill was about to fail in the Kentucky Legislature, "there was a sentiment growing up in favor of applying to Congress for the necessary grant in Kentucky." Where did you discover this sentiment growing up or prevailing?

A. In Cincinnati and all through Central Kentucky.

Q. Under what theory did you expect Congress to grant you the right to pass through, use and control a portion of the territories of the States of Kentucky and Tennessee, without the consent of said States?

A. I had no theory about it—it was not my theory.

Q. Have you claims on the Cincinnati Southern Railway, except for services as Trustee?

A. I have not; I do not see how I could.

Q. What do you estimate the value of your services as Trustee of the Cincinnati Southern Railway from the time of your appointment to the date of the appointment of the successor of Mr. Hooper, on the 19th of February, 1875?

A. I do not wish to put any estimate upon my services. I wish to say, however, that for counsel and legal advice given to the Board while in session I do not expect compensation, because having accepted the trust and being bound to exercise my legal knowledge in the discharge of my duties as a member of the Board, I felt bound to impart it and give professional advice to my colleagues at the sessions of the Board. In making an estimate, I think regard should be had to the kind of services performed, the magnitude of the enterprise and the time necessarily taken from other employments in which compensation could be earned.

[Adjourned. Resumed December 29, 1875, at 1 P. M.]

Q. You have testified that one million of bonds were advertised and sold. Can you tell what the entire cost in advertising, commissions, agents, etc., of selling this loan was? What was the rate per cent.?

A. The rate was about two per cent. The entire cost I can not tell; there were some small expenses attending the sale of the first million of bonds in addition to the per cent.

Q. What was the cost per cent. of the eight millions subsequently sold?

A. One and a half per cent.

Q. What was the object or policy of selling the eight millions at once, instead of dividing it?

A. Because, as I have already stated, with the amount of

contracts we had out and the necessity of pushing the work in order to have it done economically it was necessary that we should have the money on hand. The very fact of it being known that the Trustees had secured the money would enable them to make contracts at much lower rates than they otherwise could; and likewise to get the work done within a shorter period of time.

Q. Section 1 of the act of May 4, 1869, provided that said bonds shall be signed by the President of said Board, and attested by the City Auditor, who shall keep a register of the same, and shall be secured by mortgage on the line of railway and its net income. Have the Trustees complied with the law above referred to?

A. They have.

Q. If any mortgage has been made, has it been recorded, and where?

A. No mortgage deed has been drawn, but better than that has been done. The first section of the Wright Act, of April 18, 1873, and similar sections in the Kentucky and Tennessee acts, give a statutory mortgage to each of the bondholders until his interest and principal are fully paid.

Q. At what date or period did the Cincinnati Southern Railway assume such form and shape as to make the continuous supervision of the Trustees necessary?

A. About the time that two meetings a week were ordered from the date of the passage of the act of February, 1872, by the Legislature of Kentucky, the meetings of the Board were more frequent than previous to said date, and continued so until the 12th of May, 1873, when two extra meetings a week were ordered in addition to the regular monthly meetings.

Q. What prompted the Trustees to change the rate of interest of the bonds from 7 per cent. to 7 3-10 per cent.?

A. The panic of September, 1873, induced us to change

the interest from 7 per cent. to 7 3-10 per cent., so as to enable us to get money, although it is doubtful whether so large an amount could have been raised in the home market for railway purposes for a less rate of interest.

Q. To whom were the 1½ per cent. commission on sale of bonds actually paid?

A. As before stated by me, half per cent. commission was paid to the American Exchange National Bank, of New York, and the one per cent. was paid to Kuhn, Loeb & Co., of New York.

Q. What progress has been made in laying track; has any contract been awarded?

A. One mile of track on the inclined plane and through Ludlow has been laid. No track has been laid on the main line. No contract has been made for laying track.

Q. Have you examined any considerable portion of the gradation and masonry of the line of railway now finished?

A. I have not. I have only seen that portion near the city. The duties that I have had otherwise to perform, as Trustee, would have prevented me from making the examination, if I had felt competent to judge of the work. All the testimony —or rather opinion—that I have heard expressed by those whom I believe competent to judge, concur in the conclusion that the work is of the very best class, and done at very low rates. I append as an exhibit, marked "G," a table of average prices of all contract work, and make it a part of my testimony.

Q. State what donations have been made by counties, towns, and individuals, of lands for track, side track and depots, and also of money, to the Cincinnati Southern Railroad.

A. There have been donated of rights of way over two hundred miles. The Trustees have also received subscriptions for money sufficient to reimburse them for the cost of twenty miles more, making the actual right of way one hundred

feet wide donated over two hundred and twenty miles. About eighty miles have been acquired at the expense of the trust fund proper. Of the balance, about thirty-six miles in Tennessee, it is estimated that one-third will be donated, and that the remainder will be obtained at a moderate cost to the Trustees. All the right of way in Kentucky, viz: One hundred and ninety-eight and one-fifth miles, has been acquired, and is now owned by the Trustees. There have been donated by John Stanbaugh and the Roane Iron Company, twenty acres of land in Chattanooga for depot and shop purposes, and that city has also voted one hundred thousand dollars in city bonds as a bonus "to aid in the construction of the railway," for the purchase of lands, and to make improvements thereon within the city limits necessary for depots, tracks and yards. The Roane Iron Company has also given twenty acres of land at Rockwood, Roane County, Tennessee, for depot purposes, and land has been donated for depots and station grounds at about forty other different points along the line. It is believed that lands for the same purposes will be obtained at other points without cost, outside of Cincinnati. I do not think that any donations will be made in Cincinnati to the road. The Roane Iron Company has also conveyed 1,500 acres of mineral lands in Roane County, Tennessee, and various other parties have given obligations to convey about 40,000 acres of mountain lands in the vicinity of the road in Tennessee. The Engineer's estimate of what it would have cost to have acquired the right of way and depot grounds, and to have constructed the Lexington and Danville, or Sinton road, was about $600,000, while the price paid by the Trustees was $300,000 in seven per cent. currency bonds.

E. A. FERGUSON.

NOTE—The exhibits referred to are documents relating to bridge contracts and other matters, with which the people are familiar. It is not necessary for the public information to reproduce them.

V.

Testimony of E. A. Ferguson

(BEFORE THE INVESTIGATING COMMISSION.)

The Commission was appointed by the Trustees of the Sinking Fund and Board of Public Works of Cincinnati, under a joint resolution of the General Assembly of Ohio, passed April 27, 1878.

Q. Have you been, from the beginning, one of the Trustees of the Cincinnati Southern Railway?

A. I have.

Q. Are you the author of what is called the "Ferguson Bill," as it passed the Ohio Legislature?

A. Not in all respects as it passed, but I am the author of the bill.

Q. Was it modified in any material respect?

A. None—except some restrictions as to the sale of bonds at par.

Q. What particular public reasons led you to prepare that bill?

A. The first public event that I have a recollection of, in Cincinnati, was the illumination, in February, 1836, because the Kentucky Legislature had, just then, passed the charter of the road known as the Cincinnati, Louisville & Charleston Railway. It was to be a road from Charleston to some point in the interior of Kentucky, after crossing the Blue Ridge, and then to have three branches—one to Maysville, one to Louisville, and another to Cincinnati. I was a mere boy at the time, and I was thoroughly impressed with the splendor of the illumination; the

snow began to fall about dusk, and it was the most beautiful sight, of the kind, that I ever witnessed. From that time forth I have been a Southern Railway man. A Southern railroad has been the chronic want of Cincinnati. In my judgment, without a Southern railway, Cincinnati, comparatively speaking, would be a pleasant, educational, cultured town, a good place for a man of means and family to retire to. Without it, as a commercial city, relatively, Cincinnati would be nothing. Various attempts had been made, prior to my drafting this bill, to provide this want; the principal one towards it, was the one million dollar subscription, as it was called, raised in the year 1859 or '60. Mr. Samuel H. Goodin had also prepared a plan, but nothing had ever been accomplished. In July, 1868, I had been preparing a brief, for an argument in the Supreme Court, in the case of Hatch v. The Cincinnati & Indiana Railroad Company, involving the title of the company to the canal-bed, which had been appropriated for railway purposes. After the preparation of that brief I took a short vacation and went to New York City. One Sunday evening, while there, Mr. J. W. Sweeney, who was a freight agent of some of the railroads, came up to certain Cincinnati merchants, among whom, I believe, were Messrs. Clement I. Acton, George W. McAlpin, Louis Seasongood, and Benjamin May. Mr. Sweeney's visit to them was to give them a hint that there was to be a change of rates, and that they had better hurry their shipments. This led to a talk about railway facilities at Cincinnati; and about the fact that Cincinnati was losing her business; that she was being cut off from the entire trade of the Northwest; that she had formerly had a large trade in Iowa, but that was leaving or had about left her; that the great want of the city was a railroad to establish an empire of trade —and that empire of trade was the South; that was the only place for Cincinnati trade. It was lamented that under the Constitution of Ohio, the city, without co-operative capacity,

could do nothing toward building the road. The brief of which I have spoken, had led me to consider the constitutional and legal questions, which were involved in this subject of the city's building a road. Not the question so much as the case bearing upon it. I said to the gentlemen, "you are mistaken about the constitution of Ohio; it is not as you suppose. Under the present constitution, Cincinnati can do, what she could have done under the former constitution, with this difference: She can not go into partnership with anyone else to accomplish an object. Any public object which is for the city's interest can be done as well under the present constitution as under the former constitution." I instanced to them the fact, that while the City of Cincinnati could not own a share in the gas company, and it was not essential to her public interest that she should, as she had a contract with the present gas company, who were able to furnish gas cheaper probably, than she could make it herself; that she could buy the gas works and become a gas manufacturer and supply private consumers; and that the people had voted three millions of dollars for that very purpose. In other words, the prohibition was against the city being a stockholder and not against accomplishing a public object out of her own means. I wound up by saying, "I believe, when I get home, I will draw a little bill to see what can be done under this democratic constitution." The constitution had been spoken of as a democratic constitution, and all the gentlement present I belieye were republicans but myself. The next morning I met Mr. Julius Dexter in the reading room of the Fifth Avenue Hotel—he had just come from Newport. I related to him the conversation of the previous evening, and told him what I proposed to do. After I returned home in the fall of that year, I was taken sick, and having leisure I thought of this project, and set down one day to see how I could draft a bill to meet the case. I roughly sketched the first section; when I had done that I became satis-

fied that it could be done. I subsequently finished the first draft of the bill, and that was given to the public and published on the twenty-fifth of November, 1868—ten years ago last Monday, and was commended by the entire press. When the legislature convened in January, 1869, the project of changing the constitution of the State so as to enable the city to make subscriptions to a railway was presented and considered, but failed of passage; thereupon Mr. G. M. D. Bloss came to me and asked for a copy of my bill, saying that he intended to prepare an editorial for the *Enquirer,* reviving that plan, and did so; that called public attention to it. It was taken into consideration by committees of the City Council, Chamber of Commerce and the Board of Trade. The result was that it was presented to the legislature, and without my going through its entire history, on the fourth of May, 1869, became a law. I may say, that so far as any man devotes his life to an object—that from the time the bill was revised and sent to the legislature, and upon my appointment and becoming a trustee, which was without my solicitation, but at the solicitation of friends of the enterprise—I have subordinated myself to the accomplishment of the object—the building of the Cincinnati Southern Railway. I have literally given up ten of the best years of my life to it. I was forty-two years old when I wrote the bill, and I was fifty-two years old my last birthday. I have neglected my private and professional affairs to make this road a success. For three months at a time I have not gone to the court-house—that may not be literally true, but it is nearly so—that completes my statement of the public reasons that controlled me.

Q. We see that the Act provides for the appropriation of ten millions of dollars to construct the road. Did you at that time deem that sum sufficient for the purpose?

A. Of course when the bill was presented a blank was left as to the amount to be appropriated. The blank was filled with

ten millions, not upon the idea that ten millions would build the road, but that it was all that should then be provided, for two reasons: *First,* it was not good policy to so fix the sum that the people of Kentucky and Tennessee, who would be largely benefited, would feel that they should not contribute; for the Bill, as drawn and passed, had a provision for donations. *Secondly,* it would not do to appal the public with the amount of money that would probably be necessary to carry out so large a work as this must necessarily be. These were considerations which influenced the friends of the enterprise in filling the blank with $10,000,000. I myself had not given thought at that time as to how much would be required. I subsequently thought it would probably take about fifteen millions of dollars.

Q. The Act provides that the bonds to be issued should be secured by a mortgage on the line of railway and its net income, if it was probable that the ten millions would not finish the railroad, and subsequent loans for that purpose would have to be procured? Did not the provision of the Act alluded to seriously invalidate or impair the value of subsequent issues?

A. I think not; on the contrary without such a provision, I doubt whether we could have raised the money for the project at all. It is the same, however, as I believe is made for the bonds of the Central Park of New York. The money is trust money, to be devoted to a special object, and secured to the trust. What the city said when she went into the markets to invite capitalists to take the ten millions of bonds, was about this: We desire to make a loan of ten millions. We have provided a Board of Trustees, appointed by a court, irremovable except for cause, and their successors to be appointed in the same way. The money that you lend will be placed in the hands of these Trustees, to be expended by them for this purpose, and until you are repaid you will hold the road and its net income, and also have the pledge of faith of the City, and a tax to be an-

nually levied, sufficient with this net income, to pay the interest and provide a sinking fund for the ultimate payment of your money. Without these provisions—(the project being novel), the idea of the City building and owning a road, being new—I do not believe the bonds could have been sold.

Q. Did you suppose, then, that the expenditure of ten millions thus secured by mortgage, and becoming a prior lien on the road, would give such additional value to any other additions, to be subsequently issued, to make them equal in value?

A. Not particularly.

Q. Is it your opinion that if the bonds had been issued as municipal bonds simply, and not as railway bonds, that the value of them would have stood higher in the market?

A. At the first, no. Railway bonds when we made our first issue were popular bonds. For the first one hundred and fifty thousand dollars we got a little over one hundred and two from the First National Bank of Cincinnati. If we had had the necessary legislation promptly provided in Kentucky and Tennessee, all the bonds could have been readily placed in the German market at par. That is my recollection of our information obtained from Mr. Heidelbach. I know that was Mr. Heidelbach's opinion. But changes took place. The railway disasters came, and railroad bonds became unpopular. We subsequently put forth prominently, therefore the idea of municipal bonds. They are municipal bonds as much as any bonds ever issued by the city. They are the bonds of Cincinnati, just as legitimately as bonds issued for water-works or any other purpose, and stand upon the same legal footing. If the city has not the power to issue them for this purpose, she has not the power to issue them for any purpose under the laws and decisions.

Q. And you think the same of the subsequent issue of six millions and the proposed issue of two millions more?

A. I do. But there are certain requirements of our constitution which must be followed in passing laws. And the question on the last two million bill is now pending in the Supreme Court as to whether or not these requirements have been observed. It was easy enough to have done so, and I drew what is called the Lord bill, which if passed, no one could have questioned.

Q. Had you any previous experience in railroad building when you were appointed a Trustee?

A. I had not. I had only had experience as a Legislator, being on the Railway Committee in the Senate in 1860 and 1861, when what was known as the reorganization law was passed, and my experience as a lawyer.

Q. Was there among the Trustees, any division of duties, and if so, did any particular line of duty devolve upon you by any understanding?

A. The law itself made the President of the Board the acting Trustee, with such power as the Board from time to time conferred upon him, that is the only division contemplated by law, but, both as the author of the plan and as the only lawyer in the Board, and all legal questions, and all questions of policy, depending upon the plan, fell to my lot, or were referred to me.

Q. Did you take an active part in procuring Legislation in Kentucky and Tennessee?

A. My recollection is that the Tennessee Legislature met first, I therefore drew the bill for Tennessee first. In framing this bill, it was necessary to keep in view the powers granted to the Trustees under the law of their appointment, the general law and decisions relating to railways, the laws and decisions of Tennessee, and the English law on the same subject; the last because it was supposed that from the amount of money to be raised, it would be necessary to resort to English capitalists to get it, hence, in that part of the bill relating to the security of

the bond-holder; the language used in the English statutes, and decisions, so far as possible was employed. The draft of the bill, together with the memorial, was submitted to the Board on the 9th day of November, 1869, and Messrs. Bishop, Heidelbach and myself were appointed a committee to present the bill and memorial to the Legislature of that State. Mr. Heidelbach and I went in November to Nashville, where we remained several days, conferring with the members of the General Assembly, whose constituents were more directly interested, and explained to them the provisions of the bill; Mr. Bishop subsequently went to Nashville, and took an active part towards securing its passage. It became a law, with some additions, on the twentieth of January, 1870, the provisions of this law were accepted by the Trustees on the first of November, 1870, and will be found on page 5, of book No. 1, of the minutes. A memorial and bill drawn with similar provisions to those of the Tennessee bill, were presented to the General Assembly of Kentucky, on the seventh of January, 1870, and were referred to the Committee on Railroads in the Senate and in the House. These Committees met in joint session on Tuesday evening, the twenty-fifth of January, for the purpose of hearing arguments from all interested. Hon. John C. Breckinridge had been retained on behalf of the Trustees, and I had been deputed also to represent them. Mr. Breckinridge and I appeared before the Committee. He made an eloquent argument, and explained fully the provisions of the bill, and submitted certain amendments we had agreed on to obviate objections raised. On the next evening, Isaac Caldwell, Esq., of Louisville, addressed the Committee on behalf of that city, in opposition to the measure. On the succeeding Monday night, the thirty-first of January, Mr. Breckinridge replied to Mr. Caldwell, and on the next night Mr. Caldwell responded. I was at Frankfort during these discussions, counseling and advising in regard to the measure, and

preparing a brief on the constitutionality of the Ohio law under which the Trustees were appointed, Mr. Caldwell having taken the ground that it was unconstitutional. The bill failed at this session, as it did in the succeeding year, 1871. It is proper that I should say that Mr. Bishop was at Frankfort at both sessions in 1870 and 1871, laboring zealously in behalf of the Trustees, and no man ever worked harder than Mr. Bishop did. I was not at Nashville or Frankfort, except on the occasions I have mentioned; but while the bills were pending, I was in constant telegraphic communication with those acting in our interest, and no amendment was accepted without my advice. The bill which failed in 1871 was known as the McKee bill, from having been introduced in the House by the Hon. George R. McKee, of Garrard County, Kentucky. After the failure of the first bill in 1870, there had been passed by the Kentucky Legislature, a charter for a railroad under which it was supposed the Trustees could act. Judge McKee visited Cincinnati for the purpose of learning whether this could be done, and I had a long conference with him explaining our powers and that what we wanted was not what is usually called a charter, but an act authorizing us to exercise in Kentucky, the powers we had under the laws of Ohio. We also went over the amendments which he had offered to the first bill and others that had been suggested, and the result was that I re-drafted the bill in these particulars, and as before stated he introduced it. As there was no general act of Congress regulating the construction and dimensions of bridges over the Ohio river prior to December, 1872, but as there had been debates in Congress, and reports of the United States Engineers showing that the provisions of the act of December 17, 1872, were necessary, it was deemed prudent to have an act of Congress authorizing the Trustees to construct a bridge over the Ohio conforming to the views of the Engineers. Accordingly a bill for that purpose was drawn, and General Andrew

Hickenlooper was sent to Washington on behalf of the Trustees to have it introduced or passed. It was introduced in the Senate by the Hon. John Sherman, and in the House by the Hon. Job E. Stevenson. While General Hickenlooper was in Washington in January and February, 1871, it became apparent that the McKee bill, then pending in Kentucky, would probably fail of passage, and a public sentiment was growing up in favor of applying to Congress for the necessary grant in Kentucky. Senator Sherman had introduced a bill in March of the previous year to incorporate the Cincinnati & Chattanooga Railroad Company, and named among other incorporators the Trustees of the Cincinnati Southern Railway. As the position of corporators in such a company was inconsistent with our duty as Trustees, a dispatch was sent to Senator Sherman requesting him to withdraw our names. It was thought advisable, however, that a bill should be drawn to be ready for introduction in case we failed in Kentucky. I accordingly drew a bill, which was subsequently introduced in February, 1871, in the Senate by Senator Sherman, and by Hon. Job E. Stevenson in the House. This bill embraced both the bridge over the Ohio river and the railway in Kentucky and Tennessee, and was entitled "a bill to promote the construction of the Cincinnati Southern Railway." On the eleventh of February, 1871, Messrs. Heidelbach, Bishop and myself were appointed a committee to go to Washington to procure the passage of this bill, and on the thirteenth of February the Board adjourned to meet at Washington on Friday, February 17th. The committee, being a majority, did go to Washington, and remained there until the adjournment, on the fourth of March. Senator Sherman and I appeared before the Committee on Commerce of the Senate and urged the passage of his bill, and likewise prepared a communication to the committee, which will be found on pages 56, 57 and 58 of Minutes No. 1, of the Trustees. I also appeared

with the Trustees Committee (City Council Committee and one from Lexington) before the House Committee on Roads, etc., explaining the provisions of Stevenson's bill, and advocating its passage. The House Committee reported favorably, and the House passed the bill as presented, without debate, by a two-thirds vote, but it failed in the Senate for want of time. At the session of the Kentucky Legislature, commencing in December, 1871, the McKee bill was again introduced. By the advice of the friends of the railway in Kentucky, it was determined to leave the passage of the bill ostensibly to their care, or as it was expressed at the time, to make it a "Kentucky fight." It was necessary, however, that we should know what was being done, and I was, therefore, kept advised by telegraph and otherwise. The McKee bill was finally passed and approved on the thirteenth of February, 1872. The act as passed had three objectionable provisions, and unless they were repealed the Board at once determined not to accept under it. Two of these were repealed at the session, on the twenty-fifth of March, 1872, but the other was not repealed until the fourth of February, 1873, after which the Trustees accepted the law of February 13, 1872, as amended in the form on pages 127-8, of Minute Book 1. The objectionable provisions were those requiring the Trustees to pay an amount equal to fifty cents per capita for each through passenger, and twenty-five cents for each passenger for one hundred miles; to pay semi-annually into the State Treasury an amount equal to one per cent. on each one hundred pounds of through freight shipped over the road, and to report the line surveyed, and to locate the road as required by a vote of the citizens of Cincinnati. All these provisions were repealed. In order to give the same security for the bonds by a statutory mortgage in Ohio, as is given by the Tennessee and Kentucky acts, and to provide for the occupation of streets, etc., and the appropriation of private property in accordance with the

municipal code, and for the purpose of enabling the Trustees to make a contract for completing and leasing the entire line, the act of April 18, 1873, known as the "Wright bill," was drawn on the fifth of February of that year, by me; when it was known that the Kentucky act removing the restrictions which prevented the original act from being accepted had passed; this completed the legislation in the three states, and in Congress prior to the work of construction.

Q. What litigation grew out of the legislation procured, and how did it result?

A. The constitutionality of the Act of May 4, 1869, under which the Trustees were appointed, and the Act of March 25, 1870, which authorized the advance of fifty thousand dollars, was drawn in question by a petition for this purpose, filed on the twelfth of April, 1870, in the Superior Court of Cincinnati, by J. Bryant Walker, the City Solicitor, as such, and as taxpayer of the city, as plaintiff against the city, the Trustees, and the City Auditor. To this petition a demurrer was filed, admitting its statements. On the eighteenth of April, the questions arising on the demurrer were reserved to the General Term, where they were argued in briefs submitted by the City Solicitor, Mr. Walker, for the plaintiff, and by myself, for the defendants. On the fourth of January, 1871, the Court, in General Term, decided in favor of the constitutionality and validity of the Acts, all the Judges concurring, and dismissed the petition. To reverse this judgment, the plaintiff filed a petition in error, in the Supreme Court, and the case was argued in that Court, in October of 1871, by Messrs. Stallo & Kittredge, and Scribner & Hurd, for the plaintiff, and Messrs. Henry Stanbery, W. B. Caldwell, and Stanley Mathews, for the defendants. I attended the Court during the argument, and took no part in it except to prepare a brief of laws and authorities, for the assistance of the counsel of defendants. At the December term, 1871, the

Supreme Court, all the Judges concurring, affirmed the validity of the Acts in question. The conclusions of the Court were announced in the latter part of December, 1871, but the opinion was not read until about February, 1872.

Q. Taking the matter as a whole, was the legislation procured in the several States, consummated in accordance with your wishes?

A. Not altogether, but after discussion had arisen, better than I could have expected.

Q. It has become a public question whether the Trustees appointed by the Court, under the so-called "Ferguson Bill" hold office by vested tenure, that can not be changed except by death, resignation, legal process, or concurrent legislation in Ohio, Kentucky, and Tennessee. Have you any opinion upon that? If so, state it, if you feel free to do so.

A. That is undoubtedly the case. It was intended that the Trustees should hold an office that could not be changed except by death, resignation, etc. It was, undoubtedly, the understanding of the purchasers of the ten million bonds. It would be a breach, not only of contract, but of faith, to attempt any other change than that which was contemplated by the original Act. I might add that, in addition to this concurrence of the Legislatures, it would be necesary to have the concurrence of the City of Cincinnati, and each individual bondholder of the ten million of bonds. As long as the city owns the Southern Railway some amount—say half a million of dollars—of the first issue of bonds should be kept outstanding, because under them, or with them outstanding, the trust powers continue, and they become a safeguard to any hostile legislation against the road.

Adjourned until 2 P. M.

AFTERNOON SESSION.

Mr. Ferguson on the stand.

Q. Have you in your mind, the aggregate cost of Legislation, in the several States?

A. I have not; I stated this morning all that I had to do with it personally.

Q. Did you give personal attention to the numerous surveys made before the location of the line, and do you think the line adopted was the best?

A. Before any location was made, the Board went over all the various routes; I may say laboriously;—at least it was labor for me.

Q. You do not mean that you went over the ground? A. No, sir; over the preliminary surveys; how long it took I cannot now recollect, but we were at it for several nights pretty late; I know that I would get very wearied. As to the other point comprehended in the question, that can not be well answered completely. Before any selection of the route was made, we had an estimate of Mr. Gunn's, as to the probable cost of the several routes, and we had a comparison—a percentage comparison by Mr. Lovett—not of the cost in figures, but the percentage comparison. Upon considering the profiles, and this percentage comparison we determined to adopt what is known as the "Military Route," and located upon that, from the Tennessee and Kentucky State Lines, north eighty miles, to a point about one mile west of South Danville. This location was made December 12, 1873, and so far as that route is concerned I am satisfied it was the best location—at least I was satisfied then—while I have not entered into an examination of it critically since that, I am satisfied yet, that it was correct.

Q. Were there any negotiations looking to the purchase of the Kentucky Central Railroad seriously entered into; if so, please state the nature of them?

A. The purchase of the Kentucky Central Railroad was provided for by me, in the Kentucky act; and was seriously entertained at the time, and up to the period of our location, and where we would pass Lexington to the north—well, not up to that time, to be correct chronologically—but up to the time when it would have been practical to purchase that road, the matter was seriously contemplated. My personal relations with Mr. George H. Pendleton, were such that I could talk frankly with him; also, Governor Stevenson, who was largely interested in the road, and was Governor of the State of Kentucky, and it was desirable that there be no antagonism on the part of that road to our enterprise; and the extension of the Kentucky Central, had always been considered in looking for connections, and as such had always been considered, I assured Mr. Pendleton and Governor Stevenson, that they should be fairly dealt with, that no powers we should obtain from the State of Kentucky, should be exercised to the injury of their interests—that our object was to get a road from Cincinnati to the South. I maintained that spirit throughout, and after the location was made which determined that we could not take the Kentucky Central, I then put the question to Mr. Pendleton whether I had fulfilled the assurance I had given him, and he said that I had so far as was in my power. The fact about the Kentucky Central Railroad is this: If the case in the Kentucky Court of Appeals had been decided in favor of the Bowler estate, I have no doubt that the Kentucky Central Railroad would have been bought. Whether it was the best thing to do I do not pretend to say. It was like another matter, the bridge. We were governed by circumstances. The decision in the Bowler case was adverse to the Bowler estate, and that brought in the old company. The minutes of the Trustees will show that we had correspondence with them, and had replies from the officers of the old company that, while they had the decision in their favor, they had not

entered into possession of their property, and until they did they would not consider any terms of purchase. They did not come into possession of that property until long after the time had expired in which we were to make the location in Kentucky. Hence they had no property for sale, and we could not buy. When the settlement was made between the Bowler interest and the old company, one of the conditions, according to my recollection, is that the Northern terminus of that road shall be Covington. I have stated in my former testimony before the commission to fix compensation of the Trustees, and I am satisfied that it was correct—as follows: "Owing to the litigation in regard to the ownership of the Covington & Lexington Railroad, and the determination of the directors and stockholders of the old company not to take action for its sale until after the directors had full possession of it, the negotiations for the purchase of that road were broken off by communications dated August 22 and September 2, 1873, which will be found on pages 178 and 181 of Minute Book 1. The negotiation was not renewed, as the litigation was not ended until long after the time fixed by the Kentucky act for the location and the commencement of the construction of the Southern Railway had expired." Mr. Zinn came to me on one occasion, when the sale of the road was spoken of, and said that they had no power to make the same. I turned to the Kentucky law and showed him they had, and told him I had drafted a provision especially to enable them to sell the road; showing him we had the power specially put in. Section 9 of the Act of Kentucky provides for the purchase.

Q. I see in the report of May 16, 1873, made to the Board by Mr. Lovett, Consulting Engineer, of a percentage comparison of the several routes you have alluded to, in his communication he says in parenthesis: "Assuming that the Kentucky Central Road can be purchased at the old offer of three millions from

Covington to Paris, three millions three hundred and thirty thousand to Lexington.'' Do you remember any such offer?

A. No, sir, it has passed from my recollection.

Q. This paper is dated one day before that meeting in Paris. Do you know who the offer was from?

A. No, sir, I do not. Of course I have a recollection of hearing of offers. I heard of confidential offers that came from good sources—not from Mr. Pendleton; that their price was four millions of dollars. I got that some way confidentially from some person, and it was a gentleman of such standing that I knew their price would be four millions. I could not mention the name of the person now, as I do not remember.

Q. Will you state the reasons, as you understood them, why the trustees determined to build the bridge across the Ohio river, at Ludlow, instead of purchasing the use of Newport bridge; and what negotiations, if any, were had with regard to the latter?

A. The negotiation for the perpetual use and right of way over the Newport and Cincinnati bridge and its approaches was commenced by a communication submitted by me at the meeting of May 13, 1878. (Minute Book 1, page 143.) At the meeting of the seventeenth of June following, the president of the Bridge Company, Alfred Gaither, Esq., submitted a communication in regard to the occupancy of the bridge, it being thought advisable that whatever was done should be put in the form of contracts, ready for execution and acceptance by the Trustees, with the Bridge Company, the Little Miami Railroad Company, and the other Railroad Companies interested in the bridge and approaches and the ''connection track'' in Cincinnati. The matter was placed in my hands for negotiation and drafting on behalf of the Board. After several conferences in August, September, October and November, 1873, with parties in interest at Cincinnati, Columbus, New York and Philadelphia,

and preparing several drafts, I presented to the Board at the meeting of the seventeenth of November, 1873, the letter dated the fourteenth, of Hon. H. J. Jewett, the general counsel for the Newport Bridge Company and the railways interested therein, inclosing modification proposed by him to my last draft of contract for the purchase of a perpetual easement over the Newport bridge and approaches, and also the last draft of a contract for the use of the "connection track." At the meeting of the third of February, 1874, I was directed to obtain further information in regard to the bridge and connection track, which I did, and reported at the meeting on the tenth of February. (See Minute Book 1, pages 246 and 251.) The negotiation for the use of the track of the Louisville Short-Line Railroad, in Saratoga street, Newport, to the bridge approach, and so far west of Newport as was practicable, was conducted by the Board, and through its consulting engineer and attorney, in Kentucky, under my directions. I may say that the Louisville Short-Line Railroad occupied the entire line of Saratoga street, and we could not get to the bridge without going over Saratoga street or condemning an independent line. Messrs. Greenwood, Bishop and myself, went to Louisville about the nineteenth of July, 1873, and had conference with the Directors of the Short-Line Road, and subsequently received communications from them, but no satisfactory proposition was ever made. For this reason, and others stated in the declaration to the public, to be found in Minute Book 1, pages 233-237, the final location from Roberts' store to and across the Ohio River, was made by way of Ludlow, at the meeting at which this declaration was ordered, held February 12, 1874, the next day, the thirteenth inst., being the last day of the two years allowed by the Kentucky Act in which to make it. This location will be found on page 253, minute book 1. The declaration to the

public which I have mentioned I desire to be part of my testimony. It is as follows:

The Board of Trustees, of the Cincinnati Southern Railway, have this day located said railway from Roberts' Store, distant about twenty-two miles south of Cincinnati, northwardly to the northern boundary line of Kentucky, and across the Ohio river, to Horne street, Cincinnati, on what is known as the Ludlow route. In making this announcement, the Trustees deem it proper to state that they have been governed, in their selection, by the following, among other reasons:

1. The line, by this route and crossing, is the most direct between Cincinnati and the line as heretofore located in Kentucky, on what is known as the Ridge route.

2. It connects directly with all the railroads entering the city from the North, West and East, except the Little Miami, which has, however, a direct connection with the Cincinnati Southern Railway, at Walton, twenty miles out, by the Newport Bridge and the Louisville Line, a road of the same gauge as the Little Miami.

3. It is the cheapest, to construct, of any of the routes surveyed. It has no tunnels, but two high trestles, and although its grade, for the first five miles, is sixty feet, it is the same as that on the bridge approach, and can and will be operated with the same power as the latter.

4. It affords ample depot, switch and transfer grounds, and yard room, both at Ludlow and Cincinnati, for a large business, which will necessarily concentrate near the bridge approaches. In Ludlow, and along the river bank to West Covington, the Ludlow heirs and others have donated and deeded, to the Trustees, for these purposes, upward of fifteen acres, sufficient for three miles of side track.

5. It will enable the Trustees to locate the local freight and passenger depots as near the business center of the city as those of the Cincinnati, Hamilton & Dayton Railroad, without crossing streets not now obstructed by railroads.

Notwithstanding these advantages, the Trustees are sensible of the weighty arguments that can be made why they should have selected the line by Fowlers' Creek, to the Willow Run Crossing, or to the Newport Bridge. As to the first, with the means at the disposal of the Trustees, its excess in cost of the rights-of-way, both in Covington and Cincinnati, would, of itself, have been a very serious objection; but it is also liable to the double objection of not only requiring a new bridge, but a bridge at a point where the Trustees do not believe the United States au-

thorities would authorize one to be built. It would also require the entire traffic of the Southern Railway to pass across the tracks of the Cincinnati, Hamilton & Dayton Railroad, at grade at Sixth street. This route would probably have suited a majority of the people of Covington better than either of the others, as it was supposed it would afford them more convenient depot grounds, and it is the wish of the Trustees, if possible, to accommodate the wants of that growing city. While they have not been able to do so by the selection of the Willow Run crossing, they have had surveyed, and procured most of the necessary rights-of-way for a short branch, which they are advised, by their consulting engineer, will be equally good for its passenger business, and better for its manufacturing interests.

The Newport bridge route has the great advantage of rendering unnecessary for the present the construction of another bridge over the Ohio river. The Trustees are aware of the objection of important and influential interests to the construction of bridges over navigable streams, and they have been fully impressed with the respect due to the opinions of the Board of Trade and Chamber of Commerce, recently expressed in the reports of their Committees in regard to the crossing of the Southern Railway. They are, however, likewise satisfied that if the city is justified in embarking as she has in the construction of this great work it must be not only because of the convictions of her people that it is essential to her interests in order to reach the southern markets, but also that the road will place her on the principal highway between the north and the south, and lead to a largely increased railway traffic through her corporate limits by bringing the entire system of southern roads on their own gauge within them. In the judgment of the Trustees this result will follow, and will necessitate in a comparatively few years, another bridge at the west end of the city. Indeed some five years since, a charter, which has now expired, was obtained from Kentucky for that purpose by the roads coming in on the west.

Nevertheless, had the Trustees been able before the thirteenth inst., the day on which the time for the location of their road in Kentucky expires, to obtain satisfactory terms from the various companies having an interest in the Newport bridge and in the streets and approaches leading to it in Newport and in the connection track in Cincinnati so as to form a connection with the west end roads, a majority of them would have felt justified in bringing the Southern Railway across that bridge as it would have avoided the necessity of their constructing a new bridge and secured a desirable connection with both Covington and Newport. But after several months negotiation and

patient effort on their part, they were unable to obtain terms to which they thought they ought to accede.

If the panic had not intervened and suspended negotiations for a time, it is probable that a satisfactory result might have been reached with all the companies interested, unless it was with the Louisville, Cincinnati & Lexington Short-Line Railroad Company. Its demands were eventually of such a character as to preclude the possibility of entering into a contract with the others. In the contract between the bridge company and the Louisville Short-Line the former undertakes that it will not voluntarily agree to the use of the bridge by any other company without the consent of the latter. This consent could only be obtained on the following conditions:

1. The City of Newport to guarantee a second right of way to the bridge through streets parallel to Saratoga street whenever it shall have been ascertained that the business of the two roads can not be properly or satisfactorily operated upon two tracks in Saratoga street.

2. The Trustees to pay to the Short-Line Company, all expenditures incurred in securing its present track and right of way in Saratoga street, and to execute an indemnity bond to hold the Short-Line Company harmless from any further litigation arising from the use of two tracks in Saratoga street, as proposed by the Trustees.

3. The Trustees to require and convey to the Short-Line Company sufficient grounds at either end of Saratoga street to compensate said company for existing and intended turnouts upon said street as will be specified by the General Superintendent of the Short-Line Company. Unless, therefore, the Trustees assented to these conditions, which the City Council of Newport denounced as extravagant and unreasonable, and paid the sums and provided the grounds required by them at a large additional expense, which they did not feel authorized to incur, they would have been forced, if they had accepted a bridge grant, to take the risk of the result of the litigation to compel the Louisville Short-Line Company to allow the use of their bridge for their railway, and an adjustment of the approach and tracks in Saratoga street so as to adapt them to the business of the Southern Railway. The Trustees were unwilling to agree to the proposed conditions or to take this risk.

In conclusion, if the choice they have made, should prove upon further consideration to be an error, the Trustees believe that it is one to correct, which, the requisite authority in Kentucky can be obtained. By order of the Board, (Signed) M. Greenwood, President.

My belief was then, that it would cost us $2,500,000 to come into the city, through Newport, and it would not do for us to purchase the right of way over the bridge, and then have endless litigation as to a way to get to it. The Louisville Short Line, almost entirely monopolizes Saratoga street, in Newport, and without acting with them, and accepting their terms, we would have no way of getting upon the bridge; I do not want to go into a controversy about the bridge matter, but prefer to stand by the reasons given in the declaration that influenced us in coming across by way of Ludlow.

Q. You say you waited until the expiration of the time which you had to finally locate the road through the State of Kentucky, by reason of the expiration of the option. If they compelled you to decide on the location of the road, could you not have received an extension from the Governor of the State?

A. No; he had no power to make an extension of that kind; he could only extend the time of construction, and the people over there were impatient.

Q. Did you or the Board ever seriously consider the propriety of expending the ten millions in construction of the line, from Nicholasville to Chattanooga; and what objection, if there was any to this?

A. I cannot speak for the Board, for I know of no official action, or consultation that would warrant me in saying anything in regard to the members of the Board; as for myself I never thought of such a thing. My trust duty was to provide a railway from Cincinnati to Chattanooga. I was governed in my action in the expenditure of money in endeavoring to bring that result about; how that was to be accomplished, whether by the purchase of the Kentucky Central and the Sinton road, and the building of the remainder were with me practical questions to be determined as they arose.

Q. In connection with that it is the desire of this Com-

mission to ascertain if the first appropriation of ten million would have completed it between Nicholasville and Chattanooga. Could not the road be finished between those points, with the first appropriation, for the purpose of opening and working the road for the time being?

A. It would have been of doubtful legality to have done so. It would have forfeited valuable rights-of-way, and, possibly, the entire rights of the city in the State of Kentucky, and certainly created a hostility against the road which it would not have been wise to raise. As an example—the county of Scott raised forty thousand dollars, to purchase the right-of-way through that county. One of the conditions of that subscription was, that work should be commenced on the line in the county by the middle of May, 1874. Therefore the Board picked out a single section—not having the means or wishing to immediately prosecute the work, section 67, being for some eight thousand dollars, and let the contract, and the people of that county provided us nearly the entire right-of-way through the county, some eighteen miles.

Q. I want to get from you—in case whether the Legislature had refused to grant another issue of bonds, to what practical purpose would the money have been expended?

A. The Trustees were bound to take it for granted that if this amount proved insufficient, that other means would be provided, and they were bound to keep in view the legislative action of the States of Kentucky and Tennessee. The grant to the Trustees was to build a road, not to expend a certain sum of money on a road; we were appointed, and acted upon the idea that it would be carried out in the execution of our trust. There was a time limited in the Act of Kentucky, in which this entire work was to be accomplished, subject to an extension, to be granted by the Governor. It would not, therefore, do for the Trustees to proceed upon any other idea than that the entire

work should be built. It would have been, in my judgment, in violation of their trust duty, to have done so. I may say, however, in the execution of the work, the plan of providing a road south of Nicholasville was followed, and the major portion of ten million was expended there. A reference to the contracts will show this to be the case, and that no contracts were let, north of Lexington, unless at points where there was very heavy work, except at a time when it was necessary to bring out what would be essential to the general result. Hence, when the line was opened, it was opened as a through line from Ludlow to Somerset, one hundred and fifty-eight miles.

Q. After the permanent location of the line, and your better acquaintance with the requirements of the enterprise, what opinion did you form, if any, as to the probable cost of building the road?

A. I may as well explain that in connection with what my view of building the road was. In the first place, as has already been stated, the ten millions were provided in the first act. In addition to the ten millions, it was provided that we might receive donation of lands, moneys and other property, to be a part of the trust fund for the same purpose. In other words, it was not contemplated that the ten millions would be sufficient, but that other means would be necessary, and would be obtained. In the Tennessee Law there is a provision for subscriptions by towns and counties; but the counties are poor, and only one town, viz.: Chattanooga, was able to make any donation, which was one hundred thousand dollars for terminal facilities. The Kentucky Law had a similar provision for donations of the towns along the line in the first Bill, which was subsequently taken out; we then looked for private subscriptions—for instance if the road had been located by the way of Harrodsburg, which is the county seat of a rich county, it was supposed that the county, having no railway debt, would make large donations by

voluntary subscriptions, or get a special Act authorizing it; but the road was not located through that county. I give that as an example. But the policy changed after the railway fever subsided, so that not as much was obtained as was expected. A long time elapsed in geting railway legislation, which prevented us from doing as well as was anticipated in the beginning. The influential citizens of Cincinnati, among whom was Mr. Groesbeck, and possibly other representative men, came to me and said that if the road was to go on, that it was better to let it in one entire contract, and for the Trustees not to enter upon the detail of construction, hence in drawing the "Wright Bill;" and one of the objects of the "Wright Bill" was that the Trustees might make this contract for the entire line, so that the city's trust fund or capital would be supplemented by private capital, by making a contract to complete and lease the entire line, and the provisions for that will be found in the "Wright Bill" of 1873. Then the policy would have been: the city would have provided the entire right of way, and the depot grounds received by donations and otherwise and the balance of the money necessary to finish the road. A supplementary organization would furnish and complete the road—taking a contract to lease or build the road—the city ultimately owning the road at the termination of the lease. This plan would have probably been carried out. Indeed I have every reason to say that that plan on terms, substantially the same as those contained in the form adopted May 11, 1876, would have been successful, but the panic of 1873 wiped out the railroad capitalists of the United States. I know of instances of men who were worth from five to seven millions of dollars, who after that panic were worth nothing. Therefore that plan could not be carried out, and it became necessary, unless we abandoned the enterprise, that the Board should enter upon the work, because the time within which they were required to do it was fast approaching,

viz.: February, 1874. They therefore picked out that portion of the work which they thought it would take the longest time to do, south of Nicholasville, viz: King's Mountain tunnel, and on the thirteenth of December, 1873, let a contract for it, and from that time forth, steadily pursued the policy of providing a road south of Nicholasville—not making any contracts or doing anything towards the completion of a road north of Lexington, until it was necessary to meet that which was South. After the Board had entered upon the policy of building the road—I do not know whether I am giving the policy of the board, or my own policy; I will say, however, what was done—after the Board entered upon the detail of building the road it became the policy to authorize one contract to complete and lease the road. Hence in the six million bill, as I wrote it, the second section authorized the Trustees to make a contract to complete and lease the road after its partial construction and before its final completion. That was the form of the draft as presented to the Legislature in January, 1876; but instead of passing it in that form, the second section was so changed that it prohibited the making of a contract to lease the road until six months after it was completed. That was known as the "Dirr Amendment." I believe the cars would have been running into Chattanooga six (6) months ago if the policy of the original $6,000,000 bill had not been reversed. The substance of the "Dirr Amendment" is that the Trustees are to have power to lease the whole line after its completion; but before doing so they were required to advertise six months. So, practically, we had no power to make a contract to complete and lease. That amendment was repealed April 24, 1877, when the original plan of the six million bill was restored (that gave the power to the Trustees) to make a contract for completing and leasing the whole line of railway after its partial construction and before its final completion. Under that law it was necessary

to advertise in newspapers in the cities of New York, Boston, Philadelphia and Baltimore for proposals for leasing. If the six million bill had been passed as drafted and introduced then the Trustees could have made a contract to complete and lease the whole line upon about the same terms as contained in the form of lease adopted May 11, 1878. The result would have been that the Trustees would not have laid any rails or owned any rolling stock, and would have saved a large amount of expenditure in that form. In other words, the lessees would have taken what you may call the sub-structure of a railway, viz.: The road-bed, and they would have put on what is called the permanent way. The Trustees would have provided the sub-structure, and the lessees put on the superstructure and put the road in operation. If this six million bill had passed as drawn, it is my judgment it would have completed the road and left a handsome surplus for terminal facilities. That was the idea of this six million bill; but the policy was reversed. After adopting this policy, I did not give my mind to the question of cost. In other words I did not contemplate that the city would provide all the means. I always contemplated that the city's means would be supplemented by the means of others. So, therefore, when the six million bill was drawn, and as there was no authority in Ohio authorizing such companies, I drew what was known as the Common Carrier Act.[1] That act was introduced in January, 1876, but was not passed for fourteen months; therefore, under the Legislation of 1876, and the "Dirr Amendment," we could not make a contract to complete and lease the road, and likewise there was no authority for organizing home capital for that purpose. When the Act of April 24, 1877, and the Common Carrier Act were passed, a public meeting was called at my suggestion, and out of that resulted the present Common Carrier Company. Then it was that this policy was to be carried out. This meeting was called on the

[1] See Appendix C.

eighteenth of April, 1878; the company was organized in May, I think, and was given what was intended to be a temporary license, in other words, the arrangement was temporary, the idea being that the company could enlarge its capital, and that either that it or some other company, would form a capital and take a permanent lease, under the form of the lease of May 11, 1878. As soon as the license was made to the Common Carrier Company, I immediately set to work to draft a permanent lease. I had drafted the preamble and the first few sections, when the great railway strike occurred, that killed confidence in all railroads. The railway strike came in August, and I folded up my papers, until confidence began to be restored. On the fourth of December, I submitted the first draft of a contract to complete and lease the road; for these reasons and on account of this policy, I never set to work to seriously consider the cost of the road. I may say this that under the six million bill, as it was drawn, if it had been passed, and its policy carried out, the road could have been completed at less cost than it can by the Trustees —lessees could spread the work over more time—they could take a number of years, and do things, which if the Trustees do, had better be done at once. The lessees can afford to take risks that the city cannot; they can afford to take risks in trestles, which it would not do for the Trustees to take; for instance if there should be any inherent defect in the material of a trestle, or want of good material, or good workmanship, it might be held the city was liable. Hence the Trustees could not afford to build as light or cheap structures as a lessee of the road could. That was one other reason why I was anxious that it should pass out of the hands of the Trustees.

Q. During March, 1873, the following report of surveys was made by Mr. Gunn; on the seventeenth of May, Mr. Lovett presented a written report, giving a comparison of percentage of cost of different routes, a report to which you have already al-

luded; Mr. Gunn also made a verbal statement at the same time to the Board. On the thirtieth of August, Mr. Gunn presented written estimates of the cost of the route, making the military route that was adopted, twelve million of dollars, and the following resolutions were unanimously adopted: and

Whereas, Thomas D. Lovett, Consulting Engineer, and W. A. Gunn, Chief Engineer in charge of surveys, have laid before the Board of Trustees a map, plan and profile, of said route, by the way of Nicholasville and Danville, to the State Line, in the direction of Sparta, Tennessee; and thence by the most direct and practicable route to Chattanooga; having due regard to grade, and cost of construction, which said map, plan and profile, exhibit the excavations and fills, bridges and grades, and all matters and things necessary to show the cost of construction, together with an approximate of the cost of constructing the said railway, on said route from Cincinnati to the State Line; thence in the direction of Sparta to Chattanooga; also estimates showing separately the cost of construction, not only between the said line and the other lines named, surveyed and reported by the Engineers; the last mentioned lines, are also based upon maps, plans and profiles, exhibiting the excavations, fills, bridges, grades, tunnels and all matters and things necessary to show the cost of constructing said other lines respectively; and

Whereas, said maps, plans, profiles and estimates were also accompanied with a written and printed report explaining fully the same; and

Whereas, the engineers have also laid before the Board a comparison of the costs of said routes, of their length, and grades, and an estimate of cost of said Railway; and

Whereas, the Board are now desirous of locating a part of said Railway in Kentucky. Therefore,

Resolved, by the Board of Trustees that the Cincinnati Southern Railway between the points herein described, be and the same is hereby located as follows: Commencing at a point on the State Line where the said Railway is located in Tennessee intersects said south line in the southwest corner, Whitley county near Chitwoods, Scott county, Tennessee, thence northward through said Whitley county crossing the Cumberland river at Point Burnside, thence through Pulaski county, passing near Somerset, thence through Lincoln county about one mile from Waynesburg, two miles east of Hustonville, and thence into Boyle county, crossing the Knoxville branch of the Louisville

& Nashville Railroad, to a point about one mile west of the town of South Danville, and

Resolved, that the Chief Engineers in charge of surveys be directed to prepare for filing in the County Clerk's office, of the aforesaid counties a copy of the survey locating as aforesaid, and submit the same for the inspection of this Board.

Resolved, that the further location of the Railway be postponed until the further order of this Board. Which preamble and resolutions were unanimously adopted. Now, the question is this, as to the twelve millions mentioned by Mr. Gunn in his estimate submitted to the Board on the thirtieth of August, 1873, we find no figures mentioned?

A. I suppose that there were no figures, the truth is that the rehearsal was to fulfill the provision put into the preamble of the Kentucky act. It was to fulfill this law, that was the object. My recollection is that no figures were submitted, except what Mr. Gunn submitted.

Q. Do you remember whether at any time before that, a verbal or written communication was made to the Board by Mr. Lovett of any estimate of the cost, except the percentage cost?

A. Think nothing but the percentage cost, Mr. Lovett was simply a consulting Engineer. It is due to him to say that he did not hold himself responsible for the figures, so far as they were concerned. I know that he said they were exact enough to make the percentage comparison, but he did not commit himself to the figures of Mr. Gunn; no estimate was made in money. He had just at that time entered upon or consented to become Principal Engineer. About the time we determined to enter upon the work, then Mr. Lovett, who had been Consulting Engineer, became Principal Engineer, you will find that he was then called Consulting and Principal Engineer. No, he never made any figures that I know of, at that time; we would have to spend thousands of dollars to have performed literally in an Engineer's view that preamble; but it was in the legal view that I considered it, and it was to conform to that act.

Q. If the prices which prevailed before the panic, and up

to the panic, had continued after you commenced the road, would not the cost of the road have been larger than it has turned out to be?

A. I have no doubt that it would, although, for the reasons I have given as to the policy I wished pursued, I did not contemplate the cost. I had not expected to enter upon the detail, building the road, or of continuing to build it even after the Trustees had commenced.

Q. Do you remember about the cost of the right-of-way—whether it was more or less than you expected?

A. I think is was more than was expected, but the facts in regard to the right-of-way, as I recollect them, are as follows: There have been donated, of rights-of-way, over two hundred miles. The Trustees have also received subscriptions for money, sufficient to reimburse them for the cost of twenty miles more, making the actual right-of-way, one hundred feet wide, donated over two hundred and twenty miles. About eighty miles have been acquired at the expense of the trust fund proper; of the balance, about thirty-six miles in Tennessee, it was estimated that one-third would be donated, and the remainder obtained at a moderate cost to the Trustees. The estimated cost, in Tennessee, is about fourteen thousand dollars, from Boyce's Station to Chattanooga.

Adjourned until Friday, 9 o'clock A. M.

FRIDAY MORNING, NOVEMBER 29, 1878. 9 O'CLOCK A. M.

MET PURSUANT TO THE ADJOURNMENT. COMMISSIONERS PRESENT.

E. A. Ferguson. Recalled to the stand.

Q. Do you think the purchase of the right of way over the Covington & Lexington Turnpike Company prudent and necessary?

A. I thought it both prudent and necessary.

Q. Do you think the purchase of what is called the "Sinton Road," was a judicious and economical measure?

A. At the time I was negotiating with Mr. Sinton for the purchase of that road, I had in my hands a statement made up by Mr. Lovett, which showed the value of the property to be about six hundred thousand dollars.

Q. The value of the property to the Southern Railway?

A. Yes, sir. That is to say it would have cost to have acquired the land and done the work—putting the road there as it was—six hundred thousand dollars. We had the choice of going by that route or what was known as the Harrodsburg route. Mr. Sinton said subsequently that we had surveyed all around him and scared him out of his road. It is due also to Mr. Sinton to say that throughout the negotiation he said that he had no other interest in making the sale than to get rid of the property; as he intended to dispose of what he received for the benefit of Cincinnati. He subsequently gave his portion of the purchase money to the Cincinnati Bethel. When the negotiations with the Board first commenced the price asked was four hundred and fifty thousand dollars. The purchase was made at three hundred thousand in seven per cent. bonds, first issue.

Q. Would you think it advisable, in finishing the road, to construct a line from Boyce's Station to Chattanooga, or to provide an easement over the Atlantic & Western Road from Atlanta to Chattanooga?

A. I do not suppose that the proper authority to provide an easement could be obtained if it were advisable. The road belongs to the State of Georgia, and it is in the hands of lessees who have unexpired term of about twenty years. I think the lease was originally twenty-five years, and it has run a few years. I doubt whether such an easement could be obtained; even if this could be done I should not deem it advisable. The Cincinnati Southern Railway should have its own entrance into Chat-

tanooga. It is upon this condition that the people of Chattanooga have voted the one hundred thousand dollars of bonds. The cost of providing the right-of-way from Boyce's Station to Chattanooga is estimated at only fourteen thousand dollars, and the cost of building an independent line into Chattanooga would not exceed one hundred thousand dollars. I do not think it would be so much as that.

Q. Do you understand then, that unless the road is actually built by the Trustees from Boyce's Station into Chattanooga, that the city of Chattanooga is not bound to pay this one hundred thousand dollars?

A. That is my understanding.

Q. And the city ordinance provides for that?

A. Yes, sir.

Q. This appropriation of the city of Chattanooga of one hundred thousand dollars of bonds, is not for the completion, but for improvements for terminal facilities in the city of Chattanooga?

A. Yes, sir, and to the purchase of grounds also. There have been donated thirty acres of land in Chattanooga, and that city has also voted one hundred thousand dollars in bonds as a bonus to aid in the construction and for the purchase of lands, and to make improvements thereon within the city limits necessary to be used there, such as tracks, yards, etc.

Q. Do you think the proposition made by Mr. Wilson, to divert the Southern Railway, towards Knoxville, was proper or feasible?

A. Neither proper nor feasible; the Trustees had no power to do it, and even if they had, they ought not to have done it. Mr. Wilson found on coming to the City that the Trustees had no power to deal with him.

Q. What is your idea about the railroad connections in Cincinnati, and the most suitable method of obtaining them?

A. I suppose this answer calls for my personal views about that subject. I have as yet come to no definite conclusion. I do about this matter, as I have about all others in conducting the trust, try to ascertain all the facts and hear all the arguments bearing upon the question, and then decide according to what I believe to be for the best interests of the road and City. As the road now terminates, its terminus is as it were upon a pivot; where it can be turned in any direction. But one thing I may say, as it has been and will be, undoubtedly, the policy of the Board—that is, we should by some means, probably by coming over the roads already built, to the business part of the City—accommodate the lower and business sections of the City and get as near their business as it is possible to do. This policy is expressed in a memorial submitted to the General Assembly, in March last, in a paragraph asking for further legislation and reads:

"Justice to large commercial and manufacturing interests, located in the lower and eastern part of Cincinnati, likewise requires that terminal facilities, as near to their present business houses and factories as can be obtained without too great an expenditure, should be acquired. With this view the Trustees have been in conference with the representatives of railways having depots and tracks in that portion of the City, and hope and believe that with the powers they now have, if they are empowered to take leases from the companies having the requisite grounds and rights-of-way, they can accomplish this object, and provide such other terminal grounds as will be absolutely necessary for operating the road, without the issue of the entire two millions of bonds as now contemplated."

Q. Of course you are aware that the gauge of the Southern railroads differs from that of the Northern railroads and the Cincinnati Southern Railway conforms its gauge to the Southern gauge. Do you think that more advantageous than to have conformed to the Northern gauge?

A. I do. The gauge of the Southern railroads is uniform at five feet. The Northern system is not uniform with four feet

eight and a half inches. There was at the time, of the Northern companies, a six foot gauge, four feet eight and a half inches, and four feet nine inches. The Pennsylvania is four feet nine inches. And then there was the question as to whether we should carry the Northern system, with the capital of the city from Cincinnati down into the South or whether we should bring the entire Southern system into Cincinnati, I think the latter the true policy.

Q. Do you consider it a material advantage as an attraction to Southern traffic that our bridge imposes no tax upon the freight over the Southern Railway?

A. I do. I estimate the value of the bridge franchise at a million of dollars.

Q. The franchise, apart from its actual cost?

A. Yes. Freights and passengers are charged for crossing on bridges that are owned by companies. The tolls charged upon freight in crossing the Ohio River is equivalent to the carriage of freight from fifty to one hundred miles.

Q. Do you not think it would have been more advantageous to continue the road to the Cumberland River, so as to secure the trade of that river, than to have stopped it as Somerset, just a few miles this side?

A. I do not. According to the plan of the road, and with reference to operating it, the following I understand to be the facts: the heaviest grade on the road is sixty feet to the mile; that occurs between Ludlow and Greenwood Lake; say on the first eight miles on this end of the road. At Greenwood Lake we have what are called "make-up" grounds, where there will be large yard room and track room in doubling up the freight trains as they come in and are sent away; because from that point to Lexington the grade is but twenty-four and six-tenths feet; at Lexington, the grade is fifty-two feet to the mile. This grade extends to Somerset, where the mountain grade of sixty feet

commences. South of Somerset such large trains could not be hauled, and larger engines would have probably to be used, hence Somerset is made a station at which is our round-house. It is in other words a terminus of a division, and there we have a round-house or engine house, and turn-tables and other things necessary in operating the road. Now to have continued—if it were possible to have continued the road a few miles—would have necessitated the moving backward and forward over those few miles—or else necessitated making a round-house and turn-tables upon a part of the mountain division, making a new division. I do not think we would have been justified in the expense for the Cumberland trade. Then to reach the coal trade, which was equally, if not more desirable than the Cumberland trade, the longest trestles on the road would have to be built. They were nine hundred feet long and one hundred feet high. They are not yet constructed, but they are now being constructed under the Huston Contract. As Somerset is but six miles from the Cumberland River, and a pretty good country road leads to it, the true policy, if we had had the money and had been permitted to expend it, would have been to have improved that common highway to the river if the trade would justify it for the time being. In any event there must be a haul of about three miles, unless new plans are made as has been spoken of by some parties in interest, viz.: An inclined plane, etc.; but until such things are provided there must be a haul after the teams are loaded, whether you haul one, two or three miles does not make a great deal of difference in the cost of transportation, any company operating our road could allow for this haul, just as they allow for the haul through the city and for transfers.

Q. Can you give the reason why the line of road in this city was changed from Horne street to McLean avenue?

A. It was found that the Horne street line would be too expensive, both in acquiring rights-of-way necessary to make

it and in construction and making of fills. What is called the Horne street line in this city did not follow the line of Horne street, but deflected through private property. Hence private land interests were involved, for which there would probably have been heavy land damages.

Q. Do you think it advisable on finishing our road to make such connections with southern railroads, as to give a preference to any one for business?

A. I do not. It ought to be operated as an independent trunk line so far as that is practicable in railroading. Its true policy is to treat all connecting roads alike.

Q. Is it your idea and your preference in case of a surplus remaining out of the two million appropriation, to complete the road from Boyce's Station to Chattanooga with such surplus?

A. Certainly. If there be such surplus after providing the additional facilities on the line that it will be necessary to provide, and for the requisite connections in Cincinnati, and for the growing local traffic north of Somerset. What I would do at once is to supplement the Huston Contract, by a contract to complete and lease the road upon the terms contained in the form of lease adopted by the Board on the eleventh of May, 1878.

Q. After having entered into a contract with Huston & Co., would not such a step involve litigation between Huston & Co., and the Trustees or the city?

A. Not at all. I do not propose to *supersede* the Huston contract; but I propose to *supplement* it. If you will turn to the minutes you will find my views are recorded in those minutes of the third of September. I think the best time for closing the trust which has heretofore existed, as an active trust has now come, and that there will never be a more favorable time to do so. I think the active duties of the Trustees should close, and that they should become as nearly as possible a passive Board; seeing to the execution of the contract, and the lease which is there pro-

vided for. This will of itself take some time; and the active duties of the Trustees will continue for some time to come, in seeing to the execution and providing means for the Huston Contract. The following is the preamble and the resolution to which I refer:

Whereas, work to be done under the contract with R. G. Huston & Co., does not complete the Cincinnati Southern Railway to Chattanooga, its southern terminus, nor provide for the additional facilities essential to its growing and local traffic north of Somerset, and the proper management of the line when opened as a through line:

Resolved, that proposals for building and leasing the whole line of said railway in accordance with the contract and lease adopted by this Board on the eleventh of May, 1878, be received at 12 o'clock, noon, the fourth day of November next.

Ordered, that the form of advertisements be the same as that adopted May 11, 1878, with the necessary changes of dates, and that publication be made in the following named newspapers once a week for eight weeks, in accordance with the provisions of the act of April 24, 1877, authorizing a contract for the completion and leasing of said railway. Then follows the names of the newspapers.

Q. The record shows that there have been some modifications of the Huston Contract as to the time of completion; when will the proposed penalty of one thousand dollars a day for non-completion begin?

A. It will begin, so far as I know, on the twenty-sixth of August, 1879. We can not tell what will happen between this and that time. We have complied with our contract fully, up to this date.

Q. Are there any contingencies on that point depending upon the decision of the Supreme Court as to the validity of the bonds?

A. There may be, but none have yet arisen.

Q. Do you know why Mr. Lovett's salary was not fixed at the time of his appointment but deferred until his term of service of several years had nearly expired?

A. My recollection is that Mr. Lovett came into our service about October, 1872, as Consulting Engineer, I think he continued as Consulting Engineer for about a year, when he became Consulting and Principal Engineer. When Mr. Lovett consented to act it was with some reluctance upon his part because as he told me he had determined to retire from his profession. As I understood, but not directly from him, he was in independent circumstances and it was not necessary that he should any longer pursue his profession—whether or not he would continue with us and how long, was not determined when he consented to act as consulting Engineer, hence in the resolution appointing him, it was provided that his compensation should be fixed by the Board. When we determined to procure the services of some one as consulting Engineer, the matter, I think, was referred to Mr. Hooper to make inquiry, probably not by formal resolution, but I know the fact that it was placed in the hands of Mr. Hooper to make inquiry in regard to whose services could be obtained and their qualifications. Mr. Hooper I know spoke to me personally of Mr. Lovett. Whether he was spoken of in the Board I do not now recollect. From inquiries that Mr. Hooper had made and the reputation that he got of Mr. Lovett, it was supposed that he would be as good a person and the best Engineer that we could get. Mr. Hooper was to have seen Mr. Lovett, but Mr. Lovett was absent from the City, in Massachusetts. It was Mr. Hooper's intention to see him as soon as he returned, or to write to him, but my recollection is that Mr. Hooper was then preparing to go to Europe, or some business matters prevented him from doing so. I in some way got the address of Mr. Lovett and wrote to him, to know whether or not he would be willing to take the position. I received a letter from him in which he expresed a disinclination to take it; but that he would see me on his return to the City. When he came home he called to see me, and I had a conversation with him in which I

went over the general subject, and gave him to understand that we did not know how far we would be successful in engaging in our enterprise; but we thought that the time had come when we wanted some one who had had experience in constructing a road. He spoke of the fact of his not desiring to engage in his profession, that he had retired, and that he did not wish to go into the active duties of his profession again. But I may say I persuaded him to give us such information, from time to time, as we would want, that we would not expect him to give his whole time —and that it was not necessary then, as we had not entered upon the work of construction—that we should like to have his advice from time to time, and to that he consented. He got interested in the work. In the conversation with him I know that I spoke of it to him as being a work in which he could round up his professional career—the same as Mr. Latrobe, who was a friend of his, at Baltimore, and the Engineer of the Baltimore & Ohio Road; as Edgar Thompson had in the Pennsylvania Road—that if it went on it would be a great work. The contract therefore between Mr. Lovett and the Trustees was that his compensation was to be fixed by the Board. He made no application for compensation until, I think, October, 1875; and received none, and his bills and expenses were very light according to my recollection. I believed then that Mr. Lovett had entered into this work with that view, and determined to end his professional career with the honor of having been the Principal and Consulting Engineer of the Cincinnati Southern Railway. I accordingly gave him my confidence in that belief. When the application for compensation was made no action was taken, because I think that the Board at that time was not full. It was deferred from time to time, but for what reason I could not say, unless it was that Mr. Scarborough was about to leave the Board. It was one of those things to be taken up and acted upon in full Board, and for some reason that I cannot now say, unless it was that Mr. Scarborough

was about to leave the Board, it was not acted upon. When Mr. Scarborough left for Europe we had not a full Board to pass upon it, and it was a matter which we believed should be passed upon by a full Board, and a matter that required consideration. When Judge Taft came into the Board, this subject was brought up, but Judge Taft was new to the duties, and desired time to acquaint himself with the duties of his position and the character of Mr. Lovett's service. Then we got into the excitement surrounding the six million bill, which continued until after the election in March, 1876. In the meantime Judge Taft had resigned, and Mr. Heidelbach resigned. Then Mr. Mack and Gen. Weitzel were appointed. Gen. Weitzel did not accept the position, and Mr. Schiff was appointed in his stead. These new members, of course, wished to have the same information and opportunity that Judge Taft desired, so that it was from time to time deferred, until it was fixed on the seventh of July, 1876.

Q. Do you know whether there existed in the Board, or with any members of it, any dissatisfaction with Mr. Lovett as Consulting and Principal Engineer?

A. There was dissatisfaction on Mr. Schiff's part and on my part in 1876. My confidence in Mr. Lovett was first shaken when his report in proof-sheets—I think in December or January—was presented. He did not seem to me to possess any literary power—no power of presentation, or making a proper presentation of the work. It was not that kind of a statement of the work which I thought ought to have been made by a man who had had the opportunities that he had to know all about it. I also began to feel that the work was not coming out on time, as it ought to; that there was a lack, not of engineering skill or knowledge, but of executive and administrative ability. The idea grew upon me that what Mr. Lovett needed was somebody to aid him in pushing the work. After the six million bill was passed, at

the meeting of April 21, 1876, the Consulting Engineer presented his report in regard to the most speedy and expeditious method of laying track, recommending in that behalf the purchase of rolling stock, and the appointment of Charles E. Webster as Assistant Field Engineer, which I might say was a suggestion of my own to Mr. Lovett. While I believed Mr. Lovett the proper man for this place, yet I thought he should be supplemented in the field. Hence I offered the resolution, that will be found on the minutes of April 21, as follows:

Resolved, that a Second Assistant Field Engineer be appointed, whose duty it shall be to view and report on the progress of the work of construction along the entire line, and the manner in which the Division and Resident Engineers discharge their respective duties, and also to perform such other services as may be required of him by a resolution of the Board.

Ordered, that the Second Field Engineer report monthly in writing to the Principal Engineer, and that he send a duplicate of his report to the Secretary to be laid before the Board.

I wish to say I had not lost confidence in Mr. Lovett's engineering abilities, nor in his integrity, but in his executive capacity; and likewise I thought, probably, as we were about to enter upon the track laying and the work of construction with our own machinery—we were about to lay the rails—that he was overburdened. I think Mr. Lovett took umbrage at this resolution, and especially at that part which required this field lieutenant to report to the Board. At any rate Mr. Webster was, so to speak, pigeon-holed. He was kept, instead of in the field, in the office. I thought my duty as a Trustee required that I should pursue this policy of relieving Mr. Lovett from too many duties. I did not wish, hastily, to come to the conclusion that Mr. Lovett, who had been so long connected with the work, and had that experience which no new party could have, should be given up or removed. Finding, as I say, that Mr. Webster was pigeonholed, I determined to create and organize a construction department, separating the track-laying and operating from the En-

gineer's department. Accordingly, on the eighteenth of July offered the following resolution:

Resolved, that there be created an independent department to be known as the "Superintendent's Department," with an officer to be called the "Superintendent" of the railway, whose duty it shall be to have the care and supervision of the road and machinery belonging to the Trustees, and perform all such duties as are usually performed by the Master of the road and machinery in a railroad company. Also to have charge of the force, material, engines, cars, machinery and supplies now engaged and used in track-laying.

Ordered, that all requisitions for said department be made by said Superintendent, and that the Engineer's department turn over to said Superintendent, upon his appointment, the force, materials, machinery, and supplies now in charge of the Engineer's department, including that belonging to the operating department, which is hereby abolished.

Ordered, further, that said Superintendent report directly to the Board, and that the Engineer's department furnish to him such maps, plans, specifications and assistance as may be required for the prompt and efficient performance of his duties.

Ordered, that Charles E. Webster, be and is hereby appointed Superintendent of railway, during the pleasure of the Board, at his present salary, as second assistant Field Engineer, ($2,500.00), which office is hereby abolished.

Ordered, that the Rules and Regulations, heretofore adopted by the Board, for construction trains, be carried out by the Superintendent of railway, and that the permits, therein provided for, be issued by him, instead of the Consulting Engineer.

Which was unanimously adopted—there being present at the meeting, Messrs. Greenwood, Bishop, Ferguson and Schiff.

I had found in Mr. Lovett, after this first movement, and after the organization of this track-laying department, a disposition to have his own way. Indeed there grew up a division in the Board, in regard to Mr. Lovett, and Messrs. Greenwood, Bishop and Mack, supporting Mr. Lovett, and Mr. Schiff and myself, not doing so. Mr. Lovett also took umbrage at organizing this department, and soon after tendered his resignation, I think that is the fact; the minutes will show that soon after this meeting, he tendered his resignation. The gentlemen I have named—

the majority—thinking it ought to be all under one head, Mr. Schiff and I, thinking we ought to have a separation. It is the same organization that takes place in every railroad company—that is the having of an operating department, as well as an Engineer's. When Mr. Lovett presented his resignation, it was without warning; it fixed no time in which we could find any one else; I had come to the conclusion, that our present Consulting and Principal Engineer, Mr. Bouscaren was the abler man of the two, and that we could dispense with Mr. Lovett's services, without detriment to the trust. I may say, that Mr. Lovett came to me a day or so after he tendered his resignation, and said to me, that he intended to persist in it; that he had supposed that he always had had my confidence—I am afraid I am not saying what he said—but I know that he visited me—and if it was my desire, or if I thought he ought to resign, he intended to do so that he had had my confidence, and that if I thought he ought to sever his relations, he intended to persist in his resignation. But from some reason or other, he changed his determination, as his actions were to the contrary, and so much so that the present Engineer told me, when I applied for a paper, that he had orders from Mr. Lovett, not to give out papers to any one, without his sanction; I told Mr. Bouscaren, that as a Trustee, what I asked for must be given me. I should say, that what I asked for, were not original papers on file; I would ask for a sketch of something that I wanted to aid me in my duties as Trustee; something made up, that I could use, such for instance as the map I have here, showing the progress of the work which was made in October, 1875. As I have said, Mr. Lovett did come to me and say, that if I had lost my confidence in him, he did not want to continue in the service; I gave him to understand, that I thought his usefulness was at an end. He did continue after that, however, I think until December; really a little longer than that. I probably ought to say, in justice to

myself, that in 1876, I think it was 1876, that when Mr. Schiff came into the Board—Mr. Schiff was an excellent colleague—I discovered in Mr. Lovett, what I had not known in him before, a disposition to fight nature, or to act the English Engineer—that is to say, the English Engineer fights nature, forcing her to his own plans, while the American Engineer bows to nature, he avoids in place of forcing.

Q. The Keagan tunnel for instance?

A. Yes, sir; and at the Kentucky River, where he tried to keep up a retaining wall, and here at Campbell's contract when he persisted in keeping the track in a direct line, when it should have been removed farther up into the hill, are instances of what I call the English plan. There was that element in him, which I had not discovered until about the time that Mr. Schiff came into the Board, and of course that changed my view of him as an Engineer.

Adjourned until 2 o'clock, P. M.

Afternoon Session.

PRESENT THE MEMBERS OF THE COMMISSION.

Mr. E. A. Ferguson, on the stand.

Q. Can you tell us whether any accusation has ever been made against Mr. Lovett affecting his standing in any way?

A. Soon after we commenced letting contracts, I think, a gentleman who was a large contractor and well known in the city, but not then on our line of work, came to me and said, that he had reason to believe that Mr. Lovett had shown favoritism in the letting of a contract, specifying that he had given work to a contractor for a work, which at the price named for one of the items would make a large difference, for there was likely to be a good deal of that kind of work, and there were other and lower bidders. It was a rule that I had had passed by the Board that all the bids should be preserved. I determined from the begin-

ning that all papers that came into our possession should be preserved. I immediately sent over here—the gentleman came to my office when it was on the opposite side of the street—and had all the bids brought to my office, including the bid which was the successful one—that is to say the one to which the contract had been awarded—I showed them to this man, who was able to judge, and he became satisfied that the accusation was untrue. That of course gave me additional confidence in Mr. Lovett's intentions in carrying out this work. That man subsequently became a contractor himself, and had considerable disagreement with Mr. Lovett and has now a large claim against the city; but I never heard him impugn Mr. Lovett's integrity. He came to me with this information out of friendly regard to me. That was the first accusation I heard against him. The second was in regard to the Moran & Kirwin contract. It appears that Messrs. Moran & Kirwin had been engaged in some way, with Mr. Lovett in building the Newport Waterworks, I think; I do not know that that work was let to them, but it was about the time the accusation was made against him, that I heard he had been so engaged. Mr. Hooper had said to Mr. Wright our Treasurer, that a stonemason in his employment in the building of his new residence on Walnut Hills, had related to him certain facts. This stonemason had been a subcontractor, and had been under Moran & Kirwin. He related to Mr. Hooper certain facts in regard to Moran & Kirwin, which covered an accusation that Mr. Lovett was a partner in their work on our road, and gave that as a reason for their not settling with him in any other way than they did—in the way that they did—for the reason that they could not do so without Mr. Lovett's consent. Mr. Wright said to Mr. Hooper that being an officer of the road, he was unwilling to receive this in confidence, that it was necessary for him to communicate it to me, and asked Mr. Hooper's consent and I was told of it. I went to the First National Bank and saw Mr.

Hooper, and he related to me the circumstances; I said that it was a matter that should be immediately investigated. I accordingly immediately went and saw Mr. Lovett and related to him what I had been told. I said to him very frankly that it demanded for his own good an investigation, that he should come into the Board and make the demand, and if he did not I should. He came into the meeting of the Board. I stated to the Board what I had heard, and we appointed Colonel Merrill of the United States Service, and Mr. Gunn to make the investigation; they made us a report which is on file. I say that whatever might be my moral conclusions there was no legal conclusion that there was anything wrong about Mr. Lovett. In the meantime the Moran & Kirwin contract had been completed, but not accepted, or at any rate the final estimate was not made up—it was kept in abeyance—I was determined that no payment should be made until I saw whether there was any legal grounds for not paying the final estimate. Here I will explain in regard to Mr. Lovett. We have to be very tender, in regard to him; he is absent from the country, he has no chance to cross-examine witnesses, which is due to him after so long a service to the road. By the terms of all contracts for construction, he is made the umpire between the contractors and the Trustees. He stands in this legal relation, and it is a very important thing to the Trustees. We agreed to pay what he certified was due, and the contractors agreed to take what he certified. Neither party, according to the decisions—according to the opinion of Judge Ballard, of the United States Circuit Court for Kentucky, in a very important case, which has gone to the Supreme Court, and the question is now pending in the Court of Appeals, of Kentucky, and you can see the importance of it—could impeach his (Lovett's) decision, without showing fraud upon his part. You can see, therefore, why this investigation should be made as it was, and that we should not cast, without proper evidence, any

imputation upon Mr. Lovett. It was not our business, and it is not the interest of Cincinnati, to impeach their own Judge. If, however, the investigation had shown grounds for imputation of fraud on the part of Mr. Lovett, I should certainly have required that the Moran & Kirwin estimate be not paid, but that they be put to litigate it, and that we should have an opportunity to show the facts; but the law of the case made it important that what was done should be done in the manner that it was done. Indeed, these gentlemen reported that there was no fraud. According to my recollection, those are the only two that you may call accusations; but you can readily see that any one having the position of Mr. Lovett, was liable to be talked about, and to suspicion, and to have disappointed contractors call his judgment to account. I may say, however, that, so far as my recollection and knowledge extends, that the general complaint—so general that it may almost be called universal—was, that our Engineers were too strict—both in the requirements of the work, and too limited in the amount allowed for the execution of the work. I believe that it will be found that the men who made money, possibly with a few exceptions, made it—not out of the work—but out of the stores that they kept, to supply their workmen.

Q. Did it ever come to your knowledge, or to the knowledge of the Board, so far as you know, that Mr. Lovett, in some instances, instructed the division Engineers to make more favorable estimates?

A. There was one occasion where I think that was done, to a certain extent, without the consent of the Board. I forget the name of the contractor, but the case was presented to the Board, and their action, taken upon it, will be found upon the minutes; I think it was the case of Clark. I did not know of instances where he raised the classification—at least, I did not know of the instances when they happened—if there were such, but I have

got the impression, since Mr. Lovett left our employ, that, in some instances, to save what would be a bankruptcy of the contractors and the stoppage of the work, he did raise the classification; but I did not know it at the time, and this may not be correct, as I say I have only heard of this—it is hearsay. But there are cases where, I believe, this was done, though I have no evidence of it. I have not got, with that impression, the evidence nor impression that it was done for the purpose of favoring a contractor—I mean favor him for illegitimate purposes. You know that some of this work was executed in the mountains, by men who ought to be good business men—men good enough to do the work, but not good enough men to keep store and carry on that business, and sometimes they, no doubt, took their work too low—or it was supposed they did—and it was essential that the work should go on. On the supposition that we were going on to complete the work, you can see where the work broke down, it would take a long time to organize and commence again. Once, as in the case of a mountain tunnel, we carried it on ourselves. It was only in exceptional cases, like the King's Mountain Tunnel, that we did it; we, of course, reserved the power to do it, but it was only in such an exceptional case that we exercised the power. But I have the impression that Mr. Lovett, from good motives, and under a belief that less damage would be done to continue the work by favoring the contractors by raising the classification, did so. I do not absolutely know that it was done, but if it was done, it was done in that view.

Q. When bids were brought in and opened on contracts, did you, or did the Board, so far as you know, analyze those bids in order to ascertain which was the lowest? Did they rely upon the Engineer's recommendation?

A. The method of doing business was this: There are different plans of executing works of this kind. This was done on what is known as the cash or English plan, which is de-

scribed, in fewer words and better language than I can describe it, in a little book that I have here, and I shall therefore read it. It is called "Railway Property," by J. B. Jervis, who was one of the most eminent engineers of New York, and I think the Engineer of the Erie Railway. In the fourth chapter, page 50, speaking of the methods of business, he says:

"The method of business pursued in conducting the work of construction has been widely different at different times on different railways. The plan adopted in the commencement of railways was to have maps and profiles of the line and specifications and the manner in which the work was to be done. As soon as these were prepared the work was advertised for contract and let to the lowest bidder, who was considered responsible for the undertaking. Propositions for the work received in this way were reduced to contracts, providing for the payment of the several items at certain rates. The Engineer was made the inspector and the umpire between the parties, from whose decision there was no appeal, in regard to anything pertaining to the contract, the manner of performing the work, measurement, and the estimates of quantities provided for in the contract, and the valuation of any extra work that unforeseen circumstances might call for in the course of construction. The same mode of proceeding had generally been adopted in the construction of canals. In this method the Engineer stood between the corporation and the contractor, and upon his capacity for his duties and fidelity to the parties the system very much depended. A want of confidence could not fail to produce dissatisfaction, and it is obvious that it could only be maintained by the administration of engineers of sound business experience and unquestioned fidelity of character. In the early history of railways the line was divided into sections of one or two miles, and the contracts made for the grading of each section, and for light work several sections were sometimes let in one contract." This is what I call the cash plan, and Mr. Jervis goes on to consider the other plans, and upon page 58 says, "There can be no doubt the old method of business is the best for parties who can furnish cash to build railways as an investment of funds."

In addition to what is stated here, no extra work could be done without the written consent of the Board. Mr. Lovett was placed in the position of inspector and umpire, subject to removal at any time by the Board. Now, you can see that your

question relates to his department, and, being organized upon this basis, we would trust him so long as we had confidence in his ability and fidelity, keeping the watchfulness over him that prudent business men should. We could not, and would not, undertake under this system to look into the details; for it is hard to say, when we looked below Mr. Lovett, where the thing would stop. As a consequence, our first duty was to appoint a man in whom we had confidence, both as to ability and fidelity, and require him to make his department—not to dictate to him his subordinates—let him choose his own subordinates, and hold him responsible for the conduct of his department. I was going to say that you could see, if we went below Mr. Lovett, where we would stop; for in this letting that has been spoken of there are fifty bidders, and if we could not trust Mr. Lovett we should have to go on down until we found who made the calculations. I have made a little calculation to show what it would lead to. There are thirty-five classifications in the contract. The number of bidders is fifty, and there would have to be seventeen hundred and fifty different calculations made. Now, to this number named add the number of sections, twenty-five, we would have to have gone over forty-three thousand seven hundred and fifty calculations; or, if I had stopped, being satisfied with the calculations—there being fifty bidders and twenty-five miles—I would have to make twelve hundred and fifty over-lookings or combinations to see who were the lowest bidders. If, for instance, there were twenty-five miles and fifty bidders, whose bids were to be overlooked personally by each Trustee, and we did not necessarily depend upon the integrity of the Engineering Department, when would we get through?

Q. Then I understand your answer in substance to be that the Trustees did not undertake to make personal inspection?

A. No, sir; not in this way; it would be impossible to do so.

Let me say further that Mr. Lovett would return to us his recommendation, and sometimes he would group the sections, assigning lettings to thus and so. He would explain to us why he had done so. It must have been from a determination to practice deception from the beginning, if there is anything wrong, because he would explain to the Board that probably some man was lower on some of the sections, but the man had no means to prosecute the work. Say it would be on a heavy section, and he might as a contractor, take a light section, but not a heavy section; or it would not do to put him between others, or it might be that he was a contractor who had run away from his debts, or did not bring the proper recommendations as to his ability to do the work; or that the work would not go along as it should by having alternate sections let to two sets of contractors, and there would be difficulty. In one case there was an excellent contractor—I do not wish to mention his name—I mean a man in every way right but one—that is, he was a "spreer." His ability was first-class, and he had done large amounts of work; but Mr. Lovett told us of his infirmity, and he was afraid to trust him with the particular work. But the man appealed so persistently—I do not know but his wife and friends came, saying that he was all right and would keep straight, that we finally gave him a contract. He was capable of doing the largest contracts, but we had to nurse him through; his old infirmity came upon him. In other words, we could not treat contractors as automatons, nor accept bidders because they were the lowest bidders. Sometimes other considerations would arise. The time in which the work must be done, requiring a strong party with a large force, for instance, we had work put off until we would need it; or earth-work that would fall in must be removed immediately, or when time became the essence of the thing, and it was necessary to have the matter carried through speedily, it should not be let to small parties, but to strong par-

ties who were able to carry the thing through, and we considered that true economy.

Q. We have before us a tabulation of forty bids upon one section—it is not necessary to name the section—of the forty bidders twenty bid lower than the successful bidder on the preliminary estimates that were furnished them to bid upon, and out of the twenty, sixteen of them would have done the work that was finally settled for at less price than the successful bidder. If your attention had been called to that contract at that time, would it not have been a sufficient reason, and would it not have been your duty to bring it to Mr. Lovett's notice, and require an explanation?

A. Undoubtedly; and I should have done so at once. But I took it for granted that the man we had selected for our Chief Engineer was doing his duty, and the only case in which I thought he was not doing so I brought promptly to the attention of the Board. I did not give as close attention to these matters as I should have done if I had not had other duties to perform.

Q. You are familiar with these profiles and preliminary estimates? (Showing profiles.)

A. Yes, sir; I was.

Q. These are the profiles and estimates furnished to the bidders to bid upon?

A. Yes, sir; I presume so. There was stretched on the walls in the office, at first the profiles and estimates, etc., but when we commenced making the lettings of a number of sections, we hired a room in the Trust Company building, and had one of the employes stationed there where the bidders could see, and to make any explanations that were necessary.

Q. Do you know that the contractors had any other quantities or anything else to go upon in making these bids, but those profiles and the estimate marked upon them?

A. They had these, but it was a part of our specifications that they were not to rely upon them. That each contractor was expected to go and examine the work, it was made a special stipulation, "the quantities marked upon the profiles are approximate, and will not govern the final estimate, contractors must satisfy themselves as to the nature of the soil, of the general forms of the surface of the ground, and the quantity of materials for forming embankments, or other work, and all matters which can in any way influence their contract, and no information upon any such matters derived from the maps, plans, profiles, drawings or specifications, or from the Engineer or his assistants, will in any way relieve the contractor from all risks or from fulfilling all the terms of this contract." I had that stipulation put in for legal as well as engineering reasons. I knew how these disputes had arisen, and it is one reason why we were able to carry on this work with so few litigations. I may say here that this cash plan was the principle upon which the English railways were built, also the Pennsylvania and the Baltimore & Ohio Roads. You must have a plan, and if it turns out that Mr. Lovett has practiced a deception upon us he has been astute in concealing it.

Q. Did the Board itself have any means other than the preliminary estimates presented by the engineers of calculating the costs of the work?

A. They had not. Of course they relied upon the engineers' department to furnish the preliminary and approximate estimates. I may say that I understand, in engineering, there is a difference between approximate and preliminary estimates. Approximate estimates are made by going along the line and sinking test-pits, undertaking to find out what is below, of course there could be no approximate estimates until those tests were made. When the resident and division engineers made reports, and their reports were brought to the office, and ap-

proximation could be made, as they were made in November, 1875, then we had something like an approximate estimate; but before that we could not have what is properly called an approximate estimate without test-pits and other means of arriving at what is below the surface. It was supposed that Mr. Wirth must have sunk test-pits, because he appeared to be so successful and sure in his estimate of what was there; they tell this story about him,—they say that he went to the section bid upon, or that portion upon which he bid, and he found on the farm near by, a well which was sunk to about the depth of the cut required on his work—the farmer on whose farm the well was, having sunk the well—Mr. Wirth inquired of him what the material was he had taken out of the well—which was his test-pit—being told, in that way he arrived at the conclusion that there was not much solid rock, and considerable loose rock, and he bid very low for earth-work and solid rock, and a very high price for loose rock, and thus got the contract.

Q. The engineers did not take the precaution?

A. Well, it appears that they did not drink out of that well; I of course do not know how they got that, but it is a part of the current history. In other words he found a test-pit already sunk, and he took advantage of it.

Q. Are you aware that there exists a very wide difference in the preliminary estimates and the final—of as much as fifty per cent.?

A. I have heard a street rumor and seen some notices in the newspapers to that effect, but I know nothing about it.

Q. Just look at that table (showing paper); we have worked those sections there, and have found where they run below and above.

A. I was not aware of such a result; of course I am not either called upon nor can give an explanation. It is for the Engineers' department to make such explanation as is required.

I have given my view of what was a trust duty and how it was performed.

Q. Are you aware that it was suggested to the Board, by one of its members (Mr. Scarborough), to appoint a competent person to supervise Mr. Lovett's calculations?

A. I see, by the printed testimony of Mr. Scarborough, that when he found that Mr. Wirth, as a contractor, had shown a better knowledge of his business, and made a closer estimate of his contract than Mr. Lovett, that he thought it best for the Board to secure a Supervising Engineer, with whom to consult, in order that the approximate estimate might approximate the actual cost. The subject of Mr. Wirth's contract was subsequently brought up in the Board by Mr. Scarborough; he said that he had investigated Wirth's contract; that he was satisfied that Mr. Wirth was shrewder than our Engineers; that there was no collusion, and nothing wrong about it, but that Mr. Wirth had shown superior knowledge. I have no recollection of Mr. Scarborough, after that, proposing, in the Board, to secure the services of a Supervising Engineer, nor do I believe the minutes will show any action looking to that end. Mr. Scarborough talked to me about having such an officer, and my reply was, that such an officer should be the Consulting and Principal Engineer, and that, if we were dissatisfied with Mr. Lovett, we should displace him—we should put another person in his place, and that Mr. Scarborough was not ready to do. A Supervising Engineer, I thought, would create trouble; we would have had a double-headed Engineering department, and Mr. Lovett occupying the position of umpire that he did, the true policy was if we were dissatisfied with Mr. Lovett, to put some one in his place; but that was not proposed by Mr. Scarborough—I mean, to displace Mr. Lovett.

Q. Did you take an active part in the negotiation of bonds that were issued to build this road?

A. I did.

Q. Did you think it was better to ask for a bid on the whole issue of the bonds in a lump, by addressing circulars to a few prominent houses; than to invite bids by advertising for the whole or any part?

A. I believe by our circulars we reached every one who would have seen an advertisement; or more than would have seen the advertisement, without going to the expense of making publication in the newspapers. I may say, that in doing what I did, in regard to the negotiations and sale of the bonds, I was largely controlled by the advice that I received from Mr. Scarborough, and other persons like him, of financial ability and repute. I believe what was done had the concurrence of Mr. Scarborough, and Mr. R. R. Springer. Indeed the sale of the first million of seven and three-tenth bonds, may be said to have been made through Mr. Scarborough's agency.

Q. Through whom was the larger part of the bonds sold?

A. The first million of seven and three-tenths bonds was sold through the agency of the American Exchange National Bank of New York City. After several negotiations, Mr. Hooper having determined to return to Europe, where his family was, I was directed to prepare a letter of authority to him to negotiate in London and the continent, the sale of $5,000,000 of gold bonds, giving him power for that purpose, to employ such agents and incur such necessary expenses as was usual in the course of such negotiations and sale. This letter will be found on page 591, of Minute Book 1. Mr. Hooper's authority was continued until July 7, 1874, when he was directed to cease his negotiations abroad. From the tenor of his letters in January, 1874, the Board became satisfied that Mr. Hooper would probably fail to effect a sale of the gold bonds, which the Board had determined on at seven per cent., upon such terms as would be satisfactory, and determined to try the American market for

currency bonds. I had had consultations in reference to the sales of seven and three-tenths currency bonds with Mr. W. W. Scarborough, Mr. R. R. Springer and others. As Mr. Scarborough was to be in New York in March, 1874, I requested him to make inquiry there in regard to a sale of such bonds. On his return he wrote me the result of his inquiries. His letter was presented to the Board at the meeting of March 31, 1874, and was referred to me with power to act, and to correspond with the American Exchange National Bank of New York, and notify its president that the bank had been appointed agent to sell at par and interest two millions of seven-thirty currency bonds. At the meeting, the third of April, I submitted a letter of the bank in reply to one of the first, asking for further instructions and was directed to prepare a form of advertisement for proposals for bonds, and to continue correspondence. I thought it important that Mr. Scarborough should go to New York and aid in making sale of the bonds, and was, accordingly, at the meeting of the thirteenth of April, authorized to request Mr. Scarborough to do so, and give him such letter of instructions as might be requisite. Mr. Scarborough went to New York for that purpose, first stipulating, however, that he would receive no compensation, and to him is largely due the successful sale of the first million of seven-thirty bonds. Mr. R. R. Springer, also, while in New York, used his influence for the same object. At the request of the Board, I went to New York in September, to arrange for inviting proposals for the second million of seven-thirties, which the American National Exchange Bank were authorized to sell. Before going, some correspondence had taken place between the bank and myself, in regard to the sale of the balance of the ten millions; and I was authorized to negotiate in regard to such sale. While in New York I was also requested to obtain a loan of two hundred thousand dollars in anticipation of sales. I remained in New

York on this mission during September. The conclusion was certain propositions, which resulted in a temporary loan from the bank of two hundred thousand dollars, and an agreement for the disposal of the balance, eight million, three hundred thousand dollars of seven-thirty currency bonds. The agreement was made after consultation with Messrs. W. W. Scarborough and R. R. Springer, and was based upon a proposition prepared by Mr. Scarborough. (See Minute Book 2, pages 15 and 16.) These were the negotiations as to the sale of the seven and three-tenths bonds, and covered nine millions, three hundred and thirty thousand of the first ten millions.

Q. Had you reason to believe by the examinations, that you made on the subject, that the commissions charged were reasonable? One-half of one per cent. to the American Exchange Bank, and one per cent. to Kuhn, Loeb & Co.?

A. I so believed: and I had the advice of those gentlemen of whom I have spoken, to that effect. We knew from the sale of the first million about what it would cost—that is two per cent. to make the sale of those bonds—the cost of our putting upon the market the first two millions of bonds through the American Exchange National Bank was about two per cent.

Q. Can you say whether commissions were ever paid to any other parties than the American Exchange National Bank and Kuhn, Loeb & Co.?

A. None to my knowledge or recollection.

Q. Do you think the option first given, and then the extended option given to Kuhn, Loeb & Co., was necessary or judicious?

A. I believed so then. By an extension we got additional interest on the bonds, and I think that was beneficial. As our bonds were not sold they were drawing interest; so that when we sold them we got the accrued interest.

Q. Have you had occasion in your financial experience to

study the value of options? Is it a very important item of value in regard to securities?

A. I cannot say that I have any other than the experience in this transaction.

Q. It appears by the accounts that funds at one time were furnished to the city, to the amount of one hundred and fifty-six thousand nine hundred and fifty dollars, by the Trustees on June 26, 1875, to be applied to the payment of interest on bonds which had not been provided for by the city. Has any application ever been made to the city to repay or restore that amount?

A. I do not recollect now the occasion of the advance. I really do not recollect it now, nor can I give an explanation of it now without some examination. It is one of those transactions which has passed out of my mind. My impression is that no payment has ever been asked because Mr. Scarborough claimed that up to a certain period the accrued interest realized upon the sale of bonds belonged properly to the city. It was interest we received, and therefore interest that we should pay out.

Q. Is that included in what you carried over as your balance on hand?

A. No, sir, I think not. We paid it back into the city treasury, as we looked upon it as collected for the city. I cannot now say where the dividing line was, but I think it was about May when we entered into the contracts to the extent of the ten millions. Then it was the same as if the money had been realized because of the liabilities. In this connection I would like to say in regard to the protest of Mr. Scarborough in May, 1875, against an increase of further liability on the part of the Trustees, and the opinion upon which it was based, of Messrs. Hoadley and Bates, that I did not concur in the legal conclusions of Messrs. Hoadley and Bates; and if I had, I viewed my trust duty to be such in the state of the work then

that we should go on, and if there was any risk, I was willing to put my personal fortune in peril rather than stop the work, and did so if their conclusion was right.

Q. Is it your view that in any final lease of the road which may be made, that the taxes in Kentucky and Tennessee will be borne by the lessee?

A. Yes, sir; and it is so provided for in the lease adopted on the eleventh of May, 1878.

Q. As the Common Carrier Company, so called, has been served with notice of the termination of their license on the twelfth of March, next, has any plan been suggested or matured, to run the road after that?

A. They have been served with notice under the license, which they now have, and there have been some negotiations with the Company looking to a renewal, but no definite conclusions have yet been come to. No new plan has yet been devised by the Board.

Q. Have you any opinion as to the propriety of the Trustees running the road themselves?

A. That with me is the last alternative, so long as better mode can be provided. As I have already explained, what I desire to see is a contract made to complete and lease the road.

Q. Would not that require the lessees to furnish a large sum of money?

A. Not since the Huston contract has been made. A company with a million and a quarter of dollars would have ample means to do its part.

Q. Would not the dependent position of the city in a negotiation of that sort, and where the lessee would have so large a sum of money to use, lead to less favorable terms, than if it were not so?

A. For such a road as the Cincinnati Southern Railroad, the sum in my judgment is comparatively small. I think there

will be no difficulty in obtaining the amount, if that policy should be determined upon, even among our own people, supplemented by capitalists, who have an interest in the completion of the road, and who would take an interest for the purpose of investment. The powers of the company organized under the Common Carrier Act, are ample for this purpose.

Q. Has not the road developed an earning capacity under the Common Carrier Company beyond what was generally expected on the part of the road already finished?

A. It undoubtedly has, and has rather pushed the Company than the Company pushed it.

Q. Will not the road in your estimation be very largely beneficial to the whole State of Ohio outside the City of Cincinnati?

A. Unquestionably. So much so that they should deal with it with utmost liberality, and if a new Company is formed under the Common Carrier Act should become interested in its stock—I mean individuals interested outside the city—all the manufacturing towns of Ohio are largely benefited by the construction of this road.

Q. If the people of the State, outside of the city should become sufficiently liberal in their feelings, owing to benefits derived by them from this enterprise, to bear a part of the burden, is there in your opinion anything in the constitution of the State to forbid it?

A. I have not given consideration to the constitutional question involved in this interrogatory, but I have such faith in the outcome of the road, that I do not think we will ever require—if it is wisely managed—any aid other than that which will be furnished from the leasing of the road itself.

Q. Are the suits now pending against the Trustees, in your estimation, in a favorable shape for the city?

A. They are; I have no fear of the results of any of the suits brought against the city by contractors.

Q. Has it ever come to your knowledge, or have you ever been led to suspect that money was used for corrupt purposes in any of the legislation obtained in this matter of the Southern Railway?

A. It never has. I know of nothing that occurred of that complexion, in the case. The original act contemplated and provided for legitimate expenses such as were ordinarily necessary in procuring legislation to build this road, and no other expenses for this purpose have been paid to my knowledge.

Q. Did you think it at the time of the contract with the Cleveland Rolling-mill, a judicious measure to purchase so large a quantity of rails, on the declining market, so long before they would be required for use?

A. The question is predicated upon a mistake. There was no purchase of rails; but there was a contract for the manufacture and delivery of rails, and it was made with a view to the rails being manufactured and delivered at about the time they would be required to be placed upon the road. They were made on our own specification, and they were different from other rails. It was calculated when the contract was entered into, and we were so advised by our Engineer, Mr. Lovett, that we would need that quantity of rails at the time that contract was made. It was one of those things in which as I have said, I became disappointed in Mr. Lovett. His work did not come out upon time. Hence we got the rails far in advance of the time we should have had them. It is one of the things which made me lose confidence in Mr. Lovett's judgment. I was careful at the time the contract was made, to make inquiries of Mr. Lovett, and the contract was made with reference to the amount of rails that would be needed to carry the road to the Tennessee Valley, when they would commence to manufacture, and how

fast they would manufacture and deliver, as we now know it was in advance of time. As to the decline in the market, if you will look at the number of bids, and if you will look at the opinion of the press of Cincinnati at that time, I think you will find that the universal judgment, was that we had made a very good contract. It was supposed that iron had touched bottom prices, indeed it was supposed that the Cleveland Company could not perform its contract.

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VI.

Grand Banquet.

On March 18, 1880, upon the completion of the railway, the largest banquet ever spread in the United States, up to that date was given by the citizens of Cincinnati at the Music Hall in commemoration of that event. Not less than seventeen hundred and seventy-six Southern men, leading merchants, manufacturers, politicians, governors and other invited guests sat down to this magnificent feast. The balconies were occupied by the ladies and their escorts. To the toast, "The Cincinnati Southern Railway," Mr. Ferguson responded as follows:

"The idea of a railroad connecting Cincinnati with the South was more than a generation old when the plan upon which the Cincinnati Southern Railway has been built was devised. The city was illuminated in February, 1836, in honor of it, upon the passage by the Kentucky Legislature of an act authorizing the construction of the Louisville, Cincinnati and Charleston Railroad. This illumination was one of the finest spectacles in her history, its beauty being enhanced by a fall of snow. To promote this road the first Railroad Convention known was held at Knoxville in July of the same year. Representatives from nine States were present, and among them were nearly all their prominent public men. It was presided over by the famous Governor Robert Y. Hayne of South Carolina, who became the President of the company chartered to construct it by the united action of that State and North Carolina, Tennessee and Kentucky. It is due to South Carolina to state that she was the first in the field,

and has done her part of the work. But the financial catastrophe in 1837 put an end to this scheme, and all subsequent efforts failed.

"So a generation had passed and found Cincinnati without what had become her chronic want. No great work like it had been accomplished in this country without the aid of public capital but a union of public and private capital was forbidden by the Constitution of Ohio. The idea of taking in hand, as it were, the entire wealth of the city to do it, was novel. It did not meet with the approbation of the learned of the bar nor of the contented classes, the wealthy and the cultured. In the judgment, however, of plain common sense men, and of public spirited men like the honored and worthy President of the Board of Trustees, Miles Greenwood, if there were no legal obstacle to the city's doing the whole work, it should be done, as they believed it to be essential to her future growth and prosperity. Many of them had witnessed the marvelous growth of the city, until it had five times as many people within its limits as there were within the entire Northwest, within the memory of the oldest of them. They knew this was because of the natural advantages of the city and the opening of internal communication by canals and turnpikes.

"The broadhorn and the keelboat had been superseded by steamboats, but no longer were these freighted at the city's wharf with emigrants and their supplies destined for the West and the Northwest. Rich and powerful rivals had risen like exhalations and cut off her trade. The railway and telegraph had superseded the river and the mail coach.

"Cincinnati was without a back country, and had ceased to grow. Facing her at the South was a vast empire, rich in natural resources, containing a population of 4,000,000, and penetrated by 4,000 miles of railroad converging at Chattanooga, where she could have no successful rival if the intervening

rivers were bridged and the mountains pierced by the iron way. Peace prevailed, and commerce had resumed its sway. Along the war paths it was laying its iron ways—across the desert it was digging a channel for a water way, and severing continents to unite oceans, so that the voyage by sea, like the journey by land, should be measured, not by distance, but by time.

"Plain people were aware of these things, and knew that an American city at a standstill was in the first stage of decline. Hence, in the history of popular voting, there has never been greater unanimity than upon the question whether or not the city should provide the Cincinnati Southern Railway; in a poll of nearly 17,000 votes there being but 1,500 in the negative.

"The requisite authority having been obtained from Kentucky and Tennessee, the work of construction was ready to begin, when the panic of 1873 came, and it seemed as if once more the hope long deferred was to be blasted. Publicly the Trustees were advised to abandon the enterprise, and privately powerful influences were brought to bear upon the author of the plan to induce him to drop it. Indeed, it was only by the use of a little finesse that the first contract, that for King's Mountain tunnel, was let in December, 1873. And then the Trustees had no funds, and did not own the site of the portals to the proposed tunnel. Thereupon four of them—Messrs. Greenwood, Heidelbach, Bishop and Ferguson—borrowed on their own credit $5,000, bought the site and commenced the work.

"You, our guests, have traveled its length of 336 miles, crossed its great bridges and passed through its twenty-seven tunnels, have witnessed and can testify what has been done in the construction of the Cincinnati Southern Railway in the six years which have since elapsed. You have seen its graceful trestles, easy curves, nowhere a single reverse one, its low grades and substantial permanent way—this marvel of the engineer's skill in linking nature to civilization. The road has

been well made, and it will stand. It is nearly fifteen centuries since the Roman legions withdrew from Britain, but in the England of to-day you can trace the Roman highways. This Union, which God grant may be perpetual, may dissolve, and its States become discordant, but through all mutations of government this more than Roman highway will exist to attest the greatness of the city that built it.

"Although it has been built to serve the purposes of trade, it will have a higher and nobler use. As its trains pass back and forth like a shuttle in a weaver's loom, they will form a web of union between States heretofore separated by mountain barriers. Those who have been strangers will become neighbors, New ties, not of interest alone, but of affection, will be created, and sectional antipathy will give place to a feeling of love for a common country and the institutions founded by an illustrious ancestry. Guaranteed by these institutions in that due admixture of liberty and law which constitutes freedom, we may look forward with renewed confidence to the enlargement of the trade and manufactures of Cincinnati until she shall rival Florence in its palmiest days in the wealth and munificence of her citizens, the adornment of her parks and public places, the grandeur and beauty of her public and private structures, and as the home and patron of art, science and letters. Her strong men will be her merchant and manufacturing princes, and whether their messages are borne by the iron horse with his 'heart of fire and breath of flame' or the chained lightning, the tidings will be peaceful and peaceful victories. Inspired by these thoughts, I believe I give voice to the sentiment of your hosts tonight when I say to you, their guests, 'You have come home.'"

VII.

Municipal Results.

(Extract from Dr. J. H. Hollander's Dissertation.)

"The industrial activity of Cincinnati, as of the ordinary American city, is twofold in character, conveniently described as 'productive' and 'distributive.' By 'productive' is meant manufacturing establishments largely engaged in the conversion of raw materials. 'Distributive' industries embrace so-called 'jobbing' interests, or those employed in the wholesale distribution of commodities of local and other manufacture. The two activities are nowhere sharply separated, and in many industries are entirely merged. For the mere purpose of indicating the influence exerted upon each activity, the distinction however holds.

"The immediate influence of the Railway upon the distributive interests of Cincinnati was to open up a wide range of new territory, to provide prompter transportation and better shipping facilities, and to place freight rates upon a more equitable basis. Large sections of the South from which the city had before been cut off were practically thrown open by the traffic arrangements effected upon the completion of the Railway, as hereinafter described. In addition, a wide region, undeveloped but rich in lumber and mineral wealth, was directly penetrated. Manufacturing towns and mining settlements sprang up along the line of the road, and Chattanooga underwent transition from a village to a city. The development of this section, forced for a while, but now proceeding along slower

and more normal lines, has influenced the commercial interests of Cincinnati in marked though indeterminate degree.

"Immediately upon the opening of the Railway, though tariff rates were established to southern, southeastern and southwestern points as far as Havana and Texas, a system of car exchanges with railroads penetrating the territory bounded by the Mississippi, the Gulf of Mexico and the Atlantic was arranged, and Cincinnati shipments placed without break of bulk or transfer in all southern markets. The absorption of the lessee company by one great trunk line, and later association with a second, have enlarged these opportunities, and as far as access to southern territory by means of railroad transportation is concerned, the present facilities of Cincinnati shippers are unrivaled."

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APPENDIX A.

Text of the Ferguson Act.

AN ACT RELATING TO CITIES OF THE FIRST CLASS HAVING A POPULATION EXCEEDING ONE HUNDRED AND FIFTY THOUSAND INHABITANTS. (66 Ohio Laws, p. 80.)

SECTION 1. *Be it enacted by the General Assembly of the State of Ohio,* That whenever, in any city of the first class having a population exceeding one hundred and fifty thousand inhabitants, the city council thereof shall, by a resolution passed by a majority of the members elected thereto, declare it to be essential to the interest of such city that a line of railway, to be named in said resolution, should be provided between termini designated therein, one of which shall be such city, it shall be lawful for a board of trustees, appointed as herein provided, and they are hereby authorized to borrow, as a fund for that purpose, not to exceed the sum of ten millions of dollars, and to issue bonds therefor in the name of said city, under the corporate seal thereof, bearing interest at a rate not to exceed seven and three-tenths per centum per annum, payable at such times and places, and in such sums, as shall be deemed best by said board. Said bonds shall be signed by the president of said board, and attested by the city auditor, who shall keep a register of the same, and shall be secured by a mortgage on the line of railway and its net income, and by the pledge of the faith of the city, and a tax, which it shall be the duty of the council thereof annually to levy, sufficient, with said net income, to pay the interest and provide a sinking fund for the final redemption of said bonds; provided that no money shall be borrowed on bonds issued until after the question of providing the line of railway specified in the resolution shall be submitted to a vote of the qualified electors of said city, at a specified election to be ordered by the city council thereof, of which not less than twenty days notice shall be given in the daily papers of the city; and further provided, that a majority of said electors, voting at such election, shall decide in favor of said line of railway. The returns of said election shall be made to the city clerk, and be by him laid before the city council, who shall declare the result by a resolution.

The bonds issued under the authority of this section shall not be sold or disposed of for less than their par value.

SECTION 2. If a majority of the votes cast at said election shall be in favor of providing the line of railway as specified in the first section, it shall be the duty of the solicitor forthwith to file a petition in the superior court of said city, or, if there be no superior court, then in the court of common pleas of the county in which said city is situate, praying that the judges thereof will appoint five trustees, to be called the trustees of ——railway (the blank to be filled with the name given to the railway in the resolution); and it shall be the duty of said judges to make the appointment, and to enter the same on the minutes of the court. They shall enter into bond to the city in such sum as the court may direct, with one or more sufficient sureties, to be appointed (approved) by the court, conditioned for the faithful discharge of their duties. The bond so taken shall be deposited with the treasurer of the corporation for safekeeping.

SECTION 3. The said trustees and their successors shall be the trustees of the said fund, and shall have the control and disbursement of the same. They shall expend said fund in procuring the right to construct, and in constructing a single or double track railway, with all the usual appendages, including a line of telegraph between the termini specified in the said resolution; and for the purposes aforesaid shall have power and capacity to make contracts, appoint, employ and pay officers and agents, and to acquire, hold and possess all the necessary real and personal property and franchises, either in this state or in any other state into which said line of railway may extend. They shall also have power to receive donations of land, money, bonds and other personal property, and to dispose of the same in aid of said fund.

SECTION 4. The said trustees shall form a board, and shall choose one of their number president, who shall also be the acting trustee, with such power as the board may by resolution from time to time confer upon him. A majority of said trustees shall constitute a quorum, and shall hold regular meetings for the transaction of business, at their office in the city under whose action they are appointed, but they may adjourn from time to time to meet at any time and place they may think proper. They shall keep a record of their proceedings, and they shall cause to be kept a full and accurate account of their receipts and disbursements, and make a report of the same to the city auditor annually, and whenever requested by a resolution of the city council. No money shall be drawn from said fund but upon the order of said board, except their own compensation, which shall be paid out of the same upon the allow-

ance of the court appointing them, and shall be proportioned according to their respective services.

SECTION 5. Said trustees shall have power to take such security from any officer, agent or contractor, chosen, appointed or employed by them, as they shall deem advisable. They shall not become surety for any such officer, agent or contractor, or be interested directly or indirectly in any contract concerning said railway. They shall be responsible only for their own acts.

SECTION 6. Whenever the city solicitor of any city under whose action a board of trustees has been appointed as herein provided, shall have reason to believe that any one of said trustees has failed in the faithful performance of his trust, it shall be his duty to apply to the court that appointed said trustee, by petition, praying that such trustee be removed, and another appointed in his place; and when a vacancy shall occur in said board from any other cause, it shall be filled in like manner. If the said city solicitor shall fail to make application in either of the foregoing cases, after request of any holder of the bonds issued by said trustees or by a taxpayer of the corporation, such bondholder or taxpayer may file a petition in his own name on behalf of the holders of such bonds for like relief, in any court having jurisdiction, and if the court hearing the action shall adjudge in favor of the plaintiff, he shall be allowed as part of his costs, a reasonable compensation to his attorney.

SECTION 7. Whenever in the construction of a line of railway as herein provided, it shall be necessary to appropriate land for the foundation of the abutments or piers of any bridge across any stream within or bordering upon this state, or for any other purpose, or to appropriate any rights or franchises, proceedings shall be commenced and conducted in accordance with the act entitled "An act to provide for compensation to the owners of private property appropriated to the use of corporations," passed April 3, 1852, and the acts supplementary thereto, except that the oath and verdict of the jury and the judgment of the court shall be so varied as to suit the case.

SECTION 8. Whenever there shall be between the termini designated in any resolution passed under this act, by a railroad already partially constructed, or rights of way acquired therefor, which can be adopted as part of the line provided for in said resolution, the trustees of said line may purchase the said railroad and right of way and pay for the same out of the trust fund.

SECTION 9. The said trustees shall have power, as fast as por-

tions of the line for which they are trustees are completed, to rent or lease the right to use and operate such portions upon such terms as they may deem best; but such rights shall cease and determine on the final completion of the whole line, when the right to use and operate the same shall be leased by them to such person or company, as will conform to the terms and conditions which shall be fixed and provided by the council of the city by which the line of railroad is owned.

SECTION 10. The city council of any city passing a resolution as provided in the first section, may appropriate and pay to the said trustees, out of the general fund of said city, such sum as may be necessary for defraying the expenses of the election, and said sum shall be repaid out of said trust fund when raised.

SECTION 11. This act shall take effect on its passage.

APPENDIX B.

Opinion of the Superior Court of Cincinnati.

In General Term, January 4, 1871.

J. Bryant Walker, Solicitor of the City of Cincinnati, and a Taxpayer of Said City,

Plaintiff,

versus

The City of Cincinnati, Chas. H. Titus, Auditor, and William Hooper, Miles Greenwood, Richard M. Bishop, Philip Heidelbach and E. A. Ferguson, Trustees of the Southern Railway,

Defendants.

TAFT, J. This suit is brought for an injunction against the city and the Trustees of the Cincinnati Southern Railway. The petition recites the act of the Legislature, passed May 4, 1869, to authorize the appointment of trustees and the construction of the road, and the issuing of bonds of the city to the amount of ten million dollars for that purpose; alleges the appointment of the trustees under the act, and recites the proceedings of this Court, as recorded, in relation to said appointment, stating that the Trustees have organized and obtained an office; that they have procured the consent of the Legislature of Tennessee to build the road through that State, and applied to the Legislature of Kentucky for a like consent; that the Ohio Legislature have passed another act, of March 25, 1870, supplementary to that of May 4, 1869, authorizing the city to advance fifty thousand dollars to the Trustees for the purpose of carrying into effect the object of their appointment, to be repaid out of the bonds to be issued under the original act; that the Auditor has appropriated a portion of said fund, and there remains a part unappropriated; that the acts above mentioned are unconstitutional and void, and the advance of this money a misapplication of the public funds and not a proper corporate use, and asking an injunction.

The defendants have demurred.

We have thus presented for our consideration the constitutionality of those acts by which the city of Cincinnati has been authorized to construct the Southern Railroad, and to expend money preliminary to its construction by surveys and other preparations for the work.

That the Legislature regarded the road as a matter of public concern to the city, and a proper work to be carried through by taxation on city property, is shown by the enactment of the law authorizing the issue of the bonds to build it, and the levy of the tax to pay the interest thereon; and that the people of Cincinnati entertain a like opinion is also evinced by the popular vote, as well as by the proceedings of the legislative body of the city.

The importance of this project, as a Cincinnati project, and its public character as a subject of taxation, are questions, therefore, which have already been decided by those most deeply concerned, and by those who have been especially and primarily intrusted with their decision; and it would require a clear case against the opinions of the city and State Legislatures, thus unequivocally expressed, to justify the Court in contradicting them in its finding on this point.

It has been held by our Supreme Court that the construction of a railroad might be a proper subject for the taxation of a municipal corporation, independent of, and prior to, the restriction in our present constitution, and the issue of bonds and the levy of taxes to pay the interest on them, was enforced by a writ of mandamus since the constitution of 1851 was adopted, the act under which the subscription was made having been passed prior to the change in the constitution. If the construction of a railroad had been a purpose beyond the scope of municipal taxation, the restriction in the new constitution upon the power of a city to lend its credit or otherwise assist a private corporation in its construction, would not have been required.

The form in which such aid was granted, usually, was by lending bonds or money to the corporation which was constructing it, or by subscribing to its capital stock. The railroad company was a private corporation, and operated its road for its own profit, but the public derived large incidental advantages from its use. In this State, it has been several times decided, that a municipal corporation had an interest in such a work to justify a municipal tax to aid in carrying it through. (2 O. S., 607, 647, 649; 14 O. S., 472, 479.)

If, then, the restriction in the present constitution against the aiding or subscribing to the stock of railroad companies by towns, cities, and counties had been omitted the Legislature might have authorized such aid to railroad corporations. (*Cass* vs.

Dillon, 2 O. S., 608; *Cincinnati, Wilmington & Zanesville Railroad Company* vs. *Commissioners of Clinton County*, 1 O. S., 77; *Fosdick* vs. *Village of Perrysburg*, 14 O. S., 473.)

It evidently follows, from these repeated adjudications, that, if the Legislature, under the old Constitution, instead of authorizing municipal corporations to aid private corporations in constructing railroads, by the issue of bonds, or subscription to the capital stock of such companies, had authorized a city itself to construct a railroad deemed of public importance to such city, and indispensable to its welfare, it would have been constitutional. The same reason would have justified both methods of securing the same object.

It would have been at least as constitutional to have authorized the city to build the road, as to have authorized it to loan money to a private corporation, in order that it might build it. By the latter plan, the accomplishment of a public purpose through the application of the public funds, was left dependent upon the good faith and discretion of a private corporation, whose legitimate object was profit to its individual stockholders. This has long been regarded as objectionable.

The restriction in the present constitution which is supposed to prohibit the act authorizing the city of Cincinnati to build its Southern Railroad, is contained in the sixth section of the eighth article, which provides "that the General Assembly shall never authorize any county, city, town, or township, by a vote of the citizens or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever, or to raise money for, or to loan its credit to, or in aid of any such company, corporation, or association."

This restriction plainly cuts off the power to authorize cities to loan their credit to railroad companies or take stock in them. The power to authorize the city itself to construct such an improvement, however, is not mentioned.

By the fourth section of the same article, it is provided, that "the credit of the State shall not, in any manner, be given or loaned to, or in aid of, any individual, association, or corporation whatever, nor shall the State ever hereafter become a joint owner or stockholder in any company or association in this State or elsewhere, formed for any purpose whatever."

Prior to the adoption of the constitution, "it was competent for the Legislature, under the constitution of 1802, to construct works of improvement on behalf of the State," as did the Ohio canal, "or to aid in their construction, by subscribing to the capital stock of a corporation for that purpose," as it did in the case of the Cincinnati and Whitewater Canal Company, "and to levy taxes to raise the means, or by an exercise

of the same power to authorize a county or township to subscribe to a work of that character running through or into such county or township, and to levy a tax to pay the subscription,'' as was held in the case of *C. W. & Z. R. R. Company* vs. *Clinton County,* 1 O. S., 77, and *S. & I. R. R. Company* vs. *North Township,* 1. O. S, 105; also several other cases, as 1 O. S., 153; 2 O. S., 608; 7 O. S., 327; 8 O. S., 394; 14 O. S., 472, 479, and still in other cases, which need not be cited, but which leave no doubt on this question, in the State of Ohio.

Nothing can be clearer than that this restriction upon the State is limited to its loaning its credit to companies or corporations, and to its ''becoming a stockholder in any company.'' It can not be contended that the provision intended to prohibit the State itself from accomplishing directly, ''any purpose whatever.'' The extent of the restriction is that the State shall neither lend its funds to, nor become a member of, a private corporation for any purpose whatever. Its power to make necessary public improvements without the agency of corporations remains as it was before; and what it was before, we have seen, was not doubtful.

We feel bound to give a like construction to the sixth section, which applies to cities.

They can not be authorized now, as formerly, to lend their funds or their credit to, or to become members of trading corporations, for any purpose whatever. But they can be authorized to expend their own funds in making necessary public improvements, in the same manner and to the same extent as before the adoption of our present constitution.

In our opinion it follows logically, and unavoidably, from the decisions of our own State, and indeed from the current of authorities in other States, that these acts are constitutional. Upon a careful examination of our present constitution and a comparison of it with the constitution of 1802, and the adjudications of our courts under it, the case appears to our minds clear of doubt.

If, however, the case were doubtful, we should not be justified in pronouncing the acts of the Legislature void. The presumption must always be in favor of the validity of the laws enacted by the State Legislature, if the contrary is not clearly demonstrated.

The incompatibility must be clear, to warrant the setting aside of an act of the Legislature duly passed. *C. W. & Z. R. R.* vs. *Commissioners of Clinton County,* 1 O. S., 823; *Lehman* vs. *McBride,* 15 O. S., 591; 10 O., 235; 11 O. S., 641.

In *Lehman* vs. *McBride,* our Supreme Court declared ''that

while it was the right and the duty of judicial tribunals to give full force and effect to the organic law of the State, and, therefore, to declare null and void any attempted acts of legislation which contravene the limitations imposed by the constitution upon Legislative power, yet such judicial interference can not be justified in doubtful cases."

Such is the uniform current of judicial authority. Mr. Cooley, in his work on Constitutional Limitations, lays down the same rule, pages 87 and 88.

It was said in the case of *Sharpless* vs. *Philadelphia,* 21 Penn. St., 164, which arose from an attempt to resist a tax levied to pay a railroad subscription, that an act resting in the discretion of the Legislature will be pronounced void, "only when it violates the constitution, palpably, plainly and in such a manner as to leave no doubt or hesitation in our minds."

And in *Cheney* vs. *Hooser,* 9 B. Monroe, 345, the Court declared that a "tax must be considered valid, unless it be for a purpose in which the community taxed has palpably no interest."

We are at liberty to use our judgment as to what is judicious for the State to enact, or for the people of the city to vote. Can we assume judicially that the people of this city have no interest in the Southern Railroad, contrary to the solemn act of the Legislature, whose duty it was to pass on this very question, and contrary to the vote of the people? Is this a case in which we can hold that the State Legislature has clearly gone beyond its authority? We think not.

The objection has been suggested that the Southern Railroad is to extend a great distance from Cincinnati, and beyond the limits of the State of Ohio. The objection is plausible. But power has often been granted to cities to operate beyond their corporate limits in order to secure something essential to their welfare. The city of New York was authorized to bring the water of the Croton river, a distance of forty miles, at a cost of $11,000,000; nor can we suppose that the exercise of such authority for such a purpose would have been prevented, if the Croton aqueduct had crossed the line of a State.

Cincinnati has, in several instances, exercised authority granted by the Legislature to make costly improvements beyond the corporate limits. The House of Refuge was built under such a law. The Infirmary was beyond its limits, also the Work-house.

The city was authorized to expend funds in the purchase of stone coal in the mines which are not located within the corporation, but in different States, "and in all the necessary agencies for the procuring, transporting, delivery of said coal,"

to the city, for the purpose of protecting the cities against exorbitant prices in the time of scarcity.

Cincinnati, under a law of the Legislature, loaned to the Ohio & Mississippi Railroad Company, whose improvement lay principally beyond and outside of the State of Ohio, a large sum of money, and afterwards exchanged its bonds for the stock of the company.

Under a like law of the Legislature, the city of Cincinnati has already invested $150,000 in the railroad from Cincinnati to Lexington, in the same general direction as that contemplated for the Southern Railroad, and altogether outside the State of Ohio.

If there were a lake of good water on the south side of the Ohio river, and if the Legislature and the city itself were of the opinion that the welfare of the city required that an aqueduct should be constructed by the city to draw pure and wholesome water from that source, and the proper legislation were had in Ohio and Kentucky, it can not be doubted that the city could raise the money by taxes under the authority of such legislation, to do the work.

The fact that it is expected that the Southern Railroad will extend beyond the State line a much longer distance, or that it is not water which is to be drawn by it to Cincinnati, does not change the principle. We do not say that this principle could not be so abused as to require the interposition of the judiciary to restrain it. But we have no evidence on which we can so find in the present case.

The opinion of Judge Cooley in the case of the *People* vs. *Salem*, in the Supreme Court of Michigan, is not inconsistent with the decision we now make. That opinion decided that the levy of a tax to raise money to give to a railroad company either by loan, or by subscription, to the capital stock, to help construct its road, is not a proper use for the taxing power, because it is giving the public fund to a private corporation. 9 Am. Law. Reg., 487.

It has no application to a case where the municipal corporation itself constructs a public work essential to its own welfare, as the learned Judge has himself declared in an opinion published since that decision, in which he says "that the power of cities in Ohio to construct works of internal improvement, with Legislative permission, has been settled by judicial decision," and "that there is nothing in the present constitution of Ohio designed to prevent the local authorities from levying taxes for the construction of railroads where their own agencies are employed for the work."

Indeed, the opinion coincides entirely with that which we

have expressed. Nor is the case of *Whiting* vs. *The Sheboygan Railroad Company* in the Supreme Court of Wisconsin, as published in 9 Am. Law Reg., 156, in conflict with our opinion as now announced.

In that case, Dixon, Judge, giving the opinion of the Court, held that a municipal corporation could not, under the constitution of that State, loan its funds to a railroad corporation, although he expressed the opinion that it might subscribe to the capital stock of the company, because it became to that extent owner of the improvement, and such ownership made it public property.

It is not necessary that we should consider any such distinction. But we may add that we have found no authority, and have been referred to none, inconsistent with the principles we have expressed.

Upon the whole case, we hold that "the act relating to cities of the first class, having a population exceeding one hundred and fifty thousand inhabitants," passed May 4, 1869, and the act of March 25, 1870, supplementary thereto, both of which are recited in the petition, are constitutional and valid—in which opinion we are unanimous.

STORER, J. It might be supposed in a case of so much importance, that each of the Judges would announce an opinion; but Judge Taft had so exhausted the subject, and given the individual views of his associates so fully, combining them with his own, that it is scarcely necessary they should do more than to subscribe to his opinion.

There was one idea, however, it might be proper to refer to here, by the way of illustration, as it was suggested when the case was before the judges in the consulation room. Suppose it was necessary to build a bridge across the Ohio river at this point, could not the Legislature authorize the city of Cincinnati to build it, provided the State of Kentucky would permit the abutments on that side to be put up? It did not appear to the Court there could be any doubt on that point.

HAGANS, P., J. The present case has been under advisement with the general term, since the month of October; the whole subject has been most carefully considered, in view of the magnitude and importance of the questions involved, as well as the discussion of them that has been had, not only before the Court but elsewhere. The result reached is entirely satisfactory to each member of the Court.

APPENDIX C.

Common Carrier Act.

(74 Ohio Laws, 84.)

AN ACT authorizing the organization of common carrier companies.

SECTION 1. *Be it enacted by the General Asembly of the State of Ohio,* That any number of persons, not less than five, may associate and become a body corporate with the powers in this act granted, upon complying with requirements thereof.

SEC. 2. The persons so associating shall, under their hands and seals, make a certificate, which shall specify as follows:

First: The name to be assumed by the corporation and by which it will be known.

Second: The amount of capital stock necessary, and the amount of each share.

Third: The name of the place and the county in which the principal office of the company will be kept.

Fourth: That the purpose of associating is to become a common carrier company.

Said certificate shall be acknowledged before a notary public or justice of the peace, and certified by the clerk of the Court of Common Pleas, and shall be forwarded to the Secretary of State, who shall record and carefully preserve the same in his office, and a copy thereof, duly certified by the Secretary of State under the great seal of the State of Ohio, shall be evidence of the existence of such corporation.

SEC. 3. When the foregoing provisions have been complied with, the persons named as corporators in said certificate, their associates, successors and assigns, shall be deemed a body corporate; and said corporation shall have power to make and use a common seal, and the same to alter and renew at pleasure; to sue and be sued, plead and be impleaded, defend and be defended, contract and be contracted with, and acquire and convey at pleasure all such real and personal estate as may be necessary and convenient to carry into effect the objects of the incorporation.

SEC. 4. Said corporation shall also have the following powers:

First: To make all contracts that it shall be lawful for natural persons to make, for the carriage of persons and the storage, forwarding, carriage, and delivery of property, but subject to the same liabilities.

Second: To lease and to hold and operate any line of railway and its appendages, either before or after its completion, owned by a municipal corporation of this State, and any railway connected therewith lying without this State, and such portion of any railroad within this State as may be necessary for the convenient dispatch of the business of the corporations organized under this act.

Third: To construct or complete and equip any railway and its appendages which it is authorized to lease.

Fourth: To borrow money not exceeding its authorized capital stock, at a rate of interest not exceeding seven and three-tenths per cent. per annum, and execute bonds or promissory notes therefor, payable in gold or lawful money, in sums of not less than one hundred dollars, and, to secure the payment thereof, may mortgage or pledge its property then or thereafter acquired, and its income and franchises including the franchises of being a corporation, provided that no mortgage bonds shall be sold at less than par in lawful money without the consent of a majority in interest of the stockholders, given at a meeting of the stockholders, or in writing.

SEC. 5. The business and property of such corporation shall be managed and conducted by a board of directors, consisting of not less than five stockholders, who shall be chosen, except at the first election, after such notice, and at such time and place within the county where the principal office of the company is kept, and for such term as shall be provided for the by-laws. Immediately after their election, the trustees shall elect one of their number president of the corporation, and may appoint such other officers and agents as they may deem necessary. They shall have power to make such rules and regulations and by-laws as may be necessary for the management of the affairs of the corporation.

SEC 6. Subscriptions to the capital stock shall be paid in such installments, at such times and places, and to such persons as may be required by the board of directors. Each share shall be the personal property of the holder, and shall entitle him to one vote at all elections and meetings of the stockholders, to be given in person or by proxy.

SEC. 7. The stockholders of every corporation organized under this act, shall be liable for the dues of the same over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum equal in amount to such stock.

SEC. 8. The persons named in the certificate of incorporation, or any committee of them, not less than three, shall be commissioners to open books for subscriptions to the capital stock at such time and place as they shall deem proper, after giving ten days' notice by publication in some newspaper of general circulation in the county in which the company's principal office is to be kept. Full and equal opportunity shall be given to all persons desiring to subscribe for stock to do so, and in case more than the authorized capital shall be subscribed, a proportional allotment omitting fractions shall be made among the subscribers.

Upon ten per cent. of the stock being subscribed, said commissioners shall give notice by ten days' publication as hereinbefore provided, to the stockholders to meet at a time and place to be designated, and hold an election of directors, who shall continue in office until the time fixed for the annual election and until their successors are chosen and qualified.

SEC. 9. Any company heretofore or hereafter incorporated or organized under the laws of this State, may subscribe for or become the owner of stock in the corporations authorized by this act: Provided, that before any such subscriptions shall be made, the directors of the company subscribing shall be authorized to make the same by a vote of the majority in interest of the stockholders, or obtain their consent thereto in writing.

SEC. 10. Whenever any company organized under this act shall, in the opinion of the Directors thereof, require an increased amount of capital stock, they shall, if authorized by the holders of a majority in interest of the stock, file with the Secretary of State a certificate setting forth the amount of such desired increase, and thereafter such company shall be entitled to have such increased capital as fixed by said certificate.

SEC. 11. Any association or company of not less than five persons, formed for the purpose of being a common carrier company, may be organized into a corporation pursuant to the provisions of this act, with the same powers, privileges and rights as if originally organized and incorporated under the same.

SEC. 12. This act shall take effect and be in force from and after its passage.

Passed April 12th, 1877.

APPENDIX D.

Memorandum of Agreement between the Trustees of the Cincinnati Southern Railway and the Cincinnati Southern Railway Company, WITNESSETH:

WHEREAS, The said Trustees have about completed that portion of the Cincinnati Southern Railway lying between Ludlow and Somerset, 160 miles long, with an incline plane at Ludlow reaching to the Ohio River, and a line of telegraph between the same places, and

WHEREAS, Said Trustees have power, by virtue of the act under which they are appointed, to rent or lease the right to use and operate such portions of said railway as may be completed upon such terms as they may deem best, and

WHEREAS, Said Trustees deem it their trust duty and the interest of Cincinnati to provide for the travel and traffic likely to arise along the completed portion of said railway, and from its connections, it is agreed as follows:

First: That the said Trustees, for the consideration hereinafter stated, hereby give and grant to the said company a determinable license, with the rights, following, viz.:

1. To pass and repass and have full and free ingress, egress and regress, with its engines, cars, officers, agents and servants, to, over, upon and along the main and side tracks, turn-outs, switches, turn-tables, water and fuel stations, and all the other conveniences, and into and out of the grounds, depots, stations, stables, shops, and other appendages, of said portion of said railway.

2. To use the line and telegraph as now constructed between the aforesaid points, and the offices, batteries, instruments and other conveniences connected therewith, by its own officers, agents and servants, for commercial and railway business, but subject to the right of said Trustees, their officers and agents, to have their official messages sent over the same free of charge, which the said company agrees to do.

3. To stretch and maintain additional wires on the posts erected along said line, between said points, and to establish new offices and facilities for the business passing over the same.

But all the foregoing rights shall be subject to the following rules and regulations:

I. The said portion of said railway shall be operated, and the locomotives, cars and trains thereon run under the direction of a Superintendent of Transportation, to be appointed by said company, who, together with the Superintendent of said railway, appointed by said Trustees, shall from time to time establish such uniform rules and regulations for the passage of locomotives, cars and trains, and the use of grounds, depots and other appendages, as will tend to the most efficient working of said portion of said railway for all purposes, giving preference, however, to travel and traffic over construction, supply and repair trains, except in cases of emergency; provided, that such rules and regulations shall at all times be subject to the approval of said company and said Trustees; and if they can not agree as to the rules and regulations so to be established, the subject matter of difference shall be subject to arbitration as hereinafter provided.

II. The railway business shall in all cases have preference over all other business on the wire now up.

Second: Said Trustees to furnish to said company during the first three months of this license, fuel, water, and such railway supplies as they may have at cost to them, and at like cost to make such repairs of engines and rolling stock as the means now at their command will allow; but at any time after said period of three months, said Trustees shall have the option of requiring said company to furnish its own fuel, water and railway supplies, and to make its own repairs of engines and rolling stock, and, in case said Trustees shall exercise their said option, the fuel, railway supplies and the tools and materials in the repair shops shall be taken by said company at a valuation to be made by said Superintendent of Transportation and said Superintendent of Railway, and, if they can not agree, by an umpire chosen by them, and if said Trustees should, after said option is exercised, continue to have construction and repair trains, the said company shall furnish to said Trustees at cost, fuel, water and such railway supplies as said company may have, and shall at like cost to said company make such repairs of said Trustees' engines and rolling stock as the means at command of said company will allow. Said company shall also, after the exercise of said option, have the use and control by its own officers, agents and servants of all fuel and water stations, and the pumps, engines and fixtures appurtenant thereto, and shall keep the same in repair.

Third: Said Trustees shall allow and hereby grant the said company the use of two of their engines, Nos.——and forty

of their flat cars, to be hereafter designated, and said company accepts the same on the following terms:

That it will keep and return the same in as good order and repair as the same may be when delivered to it, natural wear and tear excepted; and in case of the loss or destruction of any of them, it will replace the same, or pay the fair value thereof, to be ascertained by the arbitrators hereinafter provided.

Fourth: Said Trustees to keep and maintain said portion of the railway in sufficient order and repair for the business likely to arise along the line of the same during the existence of this license, and to provide such temporary depots, platforms, engine and station-houses and repair shops as may be necessary for said business, as soon as it can be conveniently done.

Fifth: The foregoing license to continue until sixty days after the making of a contract by said Trustees with said company, or other parties, for the completion and leasing of the whole line of the said Cincinnati Southern Railway, when the same shall terminate; and in case said Trustees should not make such a contract, they shall have the right at any time to terminate said license upon serving written notice of their intention so to do at the principal office of said company six months before the day fixed in said notice for the termination of said license.

Sixth: At the expiration of said license, or other termination of the same, except by the default of said company, said Trustees shall provide for the reimbursement of the said company's outlay, at its election, as follows:

I. That the persons or company taking said contract and lease, or otherwise succeeding said company in its operation of said railway, shall take at a fair valuation all the engines and other rolling stock and personal property of said company, and shall assume all such time contracts for the carriage of freight and passengers, or other contracts of a like nature, as may have been sanctioned by said Trustees. The said valuation shall be made by a majority of five valuers, to be chosen two by each of the aforesaid parties, and the fifth by said Trustees.

II. Or that the said persons or company shall for said engines, rolling stock, and other personal property, return or pay to said company an amount which shall equal with the net earnings of said company, the amount of its cash capital actually paid in, together with interest thereon at the rate of ten per centum per annum from the date of payment in, and shall assume all such time contracts for the carriage of freights and passengers or other contracts of a like nature as shall have been sanctioned by said Trustees.

Seventh: In case a dispute shall arise under the last article between said company and the persons or company taking a con-

tract to complete and lease said railway, or otherwise succeeding said company in its operation of the same, said dispute shall be determined by a majority of said Trustees, and their determination shall be final between the said parties, who shall abide by and perform the same.

Eighth: No other license for traffic or travel over the portion of said railway shall be granted to any other persons or company, to take effect during the existence of the foregoing license, but the same shall be exclusive as to traffic and travel, except as to so much of said railway as lies between Lexington and Nicholasville, to run over which for a period of sixty days with passenger trains, and for ninety days for freight or mixed trains, dating from the 1st day of May in each case, a license, determinable on ten days' notice, has been granted to the Kentucky Central Railroad Company, and said Trustees agree to give said notice whenever requested by said Cincinnati Southern Railway Company.

Ninth: The said company shall furnish and keep in good order and repair sufficient locomotives and other rolling stock to run daily (Sundays excepted) such trains as will do the business of said portion of said railway promptly, and shall run the same with its own agents; and in case said company shall fail so to do, the said Trustees shall have the right to terminate this license by serving at the principal office of said company written notice of their intention to terminate the same for this cause, ten days before the day fixed in said notice, provided that in case the said company dispute their default, the matter of difference shall be submitted to arbitrators, as hereinafter provided.

Tenth: No locomotive or other rolling stock shall be run by said company on said portion of said railway that is not in good order and repair, and any such rolling stock not in good order or repair so run on the same, and not removed therefrom after reasonable notice, shall be liable to be treated as *damage feasant.* But nothing herein shall be construed into a duty upon the part of said Trustees to exercise their rights.

Eleventh: A tariff for freight and passengers shall be agreed upon between said company and said Trustees, and may be changed from time to time by like agreement, and in case of difference the matter in dispute shall be referred to arbitration as hereinafter provided.

Twelfth: Said company shall keep regular books of account in the most approved form for railway accounts, and use all the most approved forms for the freight and passenger business upon said portion of said railway, and the business of said telegraph line done under this license, and shall render within the first ten days of each month, monthly statements to said

Trustees, showing its entire receipts and expenditures under this license; and the said Trustees, by themselves or agents, shall have free access to all books and freight and passage lists, and other writings appertaining to the business done under this license, and may, at their own cost, put their agents on any and all trains, or in any office, depot or place, to test the correctness of all accounts.

Thirteenth: Said company shall, during the continuance of this license, do every act and thing that may be by law required of or be obligatory upon it or said Trustees, in respect to the operation and use of said portion of said railway by said company, including the keeping and rendition of all accounts and reports that shall be by law required, either making and returning the same to the authorities of the State, or furnishing all the data in its possession to enable the said Trustees to make the same, and in all cases, as the law may require.

Fourteenth: Said company shall keep and save said Trustees harmless from any and all damages arising out of their running their locomotives and cars under this license, and caused by the negligence or default of said company's agents and servants.

Fifteenth: And in consideration of the covenants and agreement of said company, said Trustees agree to allow said company to retain so much of the net earnings from the business done under this license as shall amount to the rate of ten per centum per annum on its paid-up cash capital from the date of payment, and ten per centum on the balance of said net earnings, the remainder to be paid over to said Trustees as and for rent, for the use of said engines and rolling stock of said Trustees and said portion of said railway and telegraph line. The first account of said net earnings shall be made up to and inclusive of the 30th day of June, 1877, and thereafter quarterly during the existence of this license. A statement thereof shall be delivered to the Secretary and Auditor of said Trustees at their office in Cincinnati within ten days after the same is required to be made up, and at the same time the Trustees' share shall be paid over to them. If, at the expiration of this license, or other termination of the same, except by the default of said company, it should happen that the net earnings in any quarter are not sufficient to pay said company the rate of ten per centum per annum on its paid-up cash capital from the date the same is paid in, then the said Trustees shall repay said company out of their share of said net earnings the amount deficient, provided that no such repayment shall be made of any deficiency happening after the 1st day of January, 1878, nor any existing at the termination of this license through the default of said company,

as provided in the ninth article, in which case the said account shall be made up to the date of such termination and be delivered within ten days thereafter, when the share of said Trustees shall be paid over.

Sixteenth: It is also agreed that all the questions of difference arising between the parties hereto in relation to the true construction of this agreement or otherwise in reference to the rights of the parties under the same, except as to the right of said Trustees to determine disputes under the sixth article, as provided in the seventh article hereof, shall upon the written demand of either party, be submitted to the arbitration of three disinterested arbitrators, two of whom shall be experienced and skilled in railroad management, to be selected as follows: one by each party and the third by the two so chosen; but if either party shall fail to appoint an arbitrator on its or their part within ten days after written notice of the selection of one by the other party, then the arbitrator selected by the party giving notice shall select the second, and the two thus chosen shall choose the third, and the award of said arbitrators, or a majority of them thus selected, shall be final and conclusive between the parties hereto. The said arbitrators shall meet at Cincinnati, and, on notice to the parties, proceed without being sworn, to hear and determine the controversy; and if it relates to the manner of using said portion of said railway, or the rules and regulations herein provided for, or the tariff for freight or passengers, said arbitrators shall have power to award and determine the manner of such use and the proper rules and regulations to be observed and the proper tariff to be fixed, and to direct either party to do all such acts as may be necessary or expedient to carry their award into effect. And they shall also have power to award and determine that for each default or evasion of their rules and regulations, or their award as to the manner of using the said portion of the said railway, that the party in default shall pay to the other such sum or sums as and by way of liquidated damages as they or a majority of them shall appoint, and they shall likewise have power to determine the amount and the party to pay the costs of the arbitration. And it shall be a good and complete bar to any action at law, or suit in equity founded on any matter which by the provisions of this contract might have been submitted to such arbitration, that no demand for the same had been made; or that the same had been submitted to arbitration under this agreement, and that said arbitration was still pending; or that an award had been made and performed.

Seventeenth: And each of said parties covenants with the other that it will keep and perform all the stipulations of this

agreement to be by it or them kept and performed, and that they will not evade or violate the same, and particularly that said company will deliver its engines and other rolling stock and property to the persons or company taking the contract to complete and lease the whole line of said railway, or otherwise succeeding said company as hereinbefore provided, upon the determination and award of the Trustees as provided in the seventh article hereof, and that in case of a refusal so to do, and in case of a termination of this license through the fault of said company as herein provided in the ninth article, will remove its said engines and other rolling stock and property from said portion of said railway, and will not attempt to interfere with or interrupt the use of the same by other licensees or lessees of said Trustees.

Eighteenth: The said Trustees hereby agree to extend the foregoing license to such other portions of the said railway and telegraph as they may complete out of their own funds, upon condition that all the stipulations and covenants of this agreement shall apply with equal force and effect to said extension.

IN WITNESS WHEREOF, the said Cincinnati Southern Railway Company has caused its corporate seal and the signature of its President to be hereunto affixed; and the said Trustees have caused Miles Greenwood, President of the Board, to sign this agreement in triplicate on their behalf as such Board, and not individually, on the ——— day of ———, A. D. 1877.

Note to appendix D.

Under the fifth clause of the foregoing license the Trustees terminated the same and granted a new license to The Cincinnati Railroad Company, a new company organized under the Common Carrier Act. The provisions of the new license were substantially the same as the foregoing, the principal exception being that but seven per cent. of the net earnings were allowed to be retained by the company. This license terminated upon the lease of the road to The Cincinnati, New Orleans and Texas Pacific Railway Company, October 11, 1881, a company also organized under the Common Carrier Act.[1]

[1]See Appendix C.

APPENDIX E.

Form of Lease prepared by E. A. Ferguson and adopted by the Trustees, December 18, 1880. The rental clause which was to form Article II was laid over for future consideration. This form of lease was drawn after a careful study of all the principal forms of lease obtainable, such as the Pittsburgh & Fort Wayne Company's lease to the Pennsylvania Railroad Company and the lease of the Little Miami Railroad Company. All the principal provisions of the final form of lease to the Cincinnati, New Orleans and Texas Pacific Railway Company, which was the work of the joint action of the Board of Trustees of the Railway and the Board of Trustees of the Sinking Fund of Cincinnati, were taken from this form. (See Minute Book 7, pages 453-467.)

FORM OF LEASE.

This lease made between the TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY, *party of the first part, and*
party of the second part,

WITNESSETH:

Recital of powers of Trustees.

WHEREAS, The said Trustees were appointed under and by virtue of an act of the General Assembly of the State of Ohio, passed on the fourth day of May, in the year eighteen hundred and sixty-nine, entitled "An act relating to cities of the first class having a population exceeding one hundred and fifty thousand inhabitants," with authority given in said act *and the acts supplementary thereto* to borrow money and to issue bonds therefor in the name and under the corporate seal of the city of Cincinnati, and with power to expend said money in procuring the right to construct and in constructing a single or double track railway with all the usual appendages, including a line of telegraph between the city of Cincinnati and the city of

Chattanooga, in the State of Tennessee, to be called and known as "The Cincinnati Southern Railway," and with power and capacity for the purpose aforesaid to make contracts, to acquire, hold and possess all the necessary real and personal property and franchises, either in the said State of Ohio or into any other State into which said line of railway might extend, and with other powers in said acts expressed, among which is the power to lease the whole line of said railway after its final completion, and

WHEREAS, The said Trustees under and by virtue of the powers given them in the aforesaid acts of the General Assembly of the State of Ohio, and under and by virtue of certain acts passed by the General Assembly of the Commonwealth of Kentucky, and the General Assembly of the State of Tennessee, consenting to the said Trustees exercising the powers given them by the said Ohio acts within their respective jurisdictions, have constructed and completed the said line of railway extending from the city of Cincinnati to the city of Chattanooga; therefore

It is hereby mutually agreed between the said Trustees and the said second party as follows:

ARTICLE I. The said Trustees, for and in consideration of the rents, covenants and agreements hereinafter mentioned, reserved and contained, on the part and behalf of the party of the second part to be paid, kept and performed, have granted and leased for the term hereinafter stated and fixed, the said line of railway known as the Cincinnati Southern Railway, with all its appendages, and the works and conveniences of the said railway, such as offices, stations, shops, sheds, depots, car houses and other buildings, bridges, viaducts, tunnels, arches, piers, abutments, embankments, approaches, ways, aqueducts, culverts, sewers, drains, wharves, yards, fences, telegraph posts and wires, tracks, turnouts and turntables, and the rights of way and lands belonging to or hereafter acquired by said Trustees, whereon the said and other like works and conveniences used or to be used in constructing, maintaining, or operating said railway are or may be placed, together with all such rights and franchises held by the said Trustees as may be necessary to enable the said party of the second part to carry out and perform the provisions hereof, and to operate and conduct the business of said premises hereby leased. **Grant of term.**

TO HAVE AND TO HOLD the said line of railway and its appendages unto the said party of the second part, successors and assigns, from the delivery of possession under this lease as hereinafter provided, for and during and until the first day of January, in the year one thousand, nine hundred and six, the said party of the second part, successors and assigns, yield-

ing and paying therefor unto the said party of the first part, their successors and assigns, every year during the term hereby granted the rent hereinafter specified, and keeping and performing all and singular the covenants and agreements hereinafter set forth to be by the said party of the second part kept and performed; it being understood and provided, however, that these presents are subject to the rights granted to the Cincinnati Railroad Company by a determinable license hereinafter referred to.

Rental clause.

ARTICLE II. The annual rent hereby reserved shall be and consist of the sums in this article specified; and the same shall be paid in lawful money of the United States of America by the party of the second part to the party of the first part at the times and place and in the manner following:

ARTICLE III. The said party of the second part hereby covenants and agrees with the said party of the first part as follows:

SECTION 1. That by or before the first day of July in the year one thousand, eight hundred and ninety-eight————will make the entire railway with its structures, appendages, outfits and equipment, equal to the best of the first class single track railways in the United States at that time, but the foregoing shall not be held to include the contract work now let by the Trustees.

SEC. 2. That before possession is given under this lease, the said second party shall pay to the said first party, or secure to be paid to the satisfaction of the said first party, the value of all locomotives, rolling-stock, machinery, tools, implements, furniture, fuel, material, cross-ties, rails, telegraph poles, and other railway supplies, which shall then belong to said party of the first part, who shall thereupon, assign, transfer and deliver the same to the said party of the second part for use upon the said leased railway. The value of said property shall be ascertained by a majority of five valuers, to be chosen as follows: two by each of the aforesaid parties, and the fifth by the four so chosen.

SEC. 3. And whereas, the said Trustees by a certain memorandum of agreement, made between them and the Cincinnati Railroad Company, dated on the ninteenth day of May in the year one thousand, eight hundred and seventy-nine, to which reference is hereby made for the terms and conditions of the same,granted to the said railroad company a determinable license, with the rights therein stated, upon which is that said Trustees upon the expiration of said license or other termination of the same, should provide for the reimbursement of the said company's outlay, and the assumption of its contracts as in the tenth article of said agreement is provided. Now the said party

of the second part, hereby undertakes and agrees, to carry out, fulfill and observe the obligations of the said Trustees, as in said tenth article provided, and to submit to arbitration any dispute arising out of said article as provided by the said article of said agreement.

SEC. 4. And whereas, the said Trustees, have sanctioned a certain agreement, dated on the sixth day of September, A. D. 1879, between the Western and Atlantic Railroad Company, and the said Cincinnati Railroad Company, for the use of the track of the Western and Atlantic Railroad between Boyce's Station, and Chattanooga, for two years from December 1, A. D. 1879, at a rental payment to said first named company of two hundred and fifty dollars per month, and have likewise entered into the following agreements.

First: An agreement entered April 11, A. D. 1880, between the Marietta & Cincinnati Railroad (as re-organized), the said Cincinnati Railroad Company, the Trustees of the Cincinnati Southern Railway, and the Cincinnati and Baltimore Railroad Company, providing for connection tracks and freight depot accommodations in Cincinnati.

Second: An agreement dated April 2, A. D. 1880, between The Cincinnati, Indianapolis, St. Louis and Chicago Railroad Company, the said Cincinnati Railroad Company and the Trustees of the Cincinnati Southern Railway, providing for a connection track accommodation in Cincinnati.

Third: An agreement dated July 31, A. D. 1880, between the same parties named in the second clause thereof, providing for a connection track with the grain elevator of the said Cincinnati, Indianapolis, St. Louis and Chicago Railroad Company in Cincinnati.

Fourth: An agreement dated July 31, A. D. 1880, between the same parties named in the second clause hereof, providing for a car track transfer on the grounds of the said Cincinnati, Indianapolis, St. Louis and Chicago Railroad Company in Cincinnati, to all of which agreements reference is hereby made for the terms and conditions of the same,

Now the said party of the second part hereby undertakes and agrees to carry out, fulfill and observe all the obligations of the said Trustees and the said Cincinnati Railroad Company, as in said agreements provided.

ARTICLE IV. The said second party further covenants and agrees with said first party, as follows:

SECTION 1. That will keep the said line of railway supplied with rolling-stock and equipment so that the business of the same shall be preserved, encouraged and developed, and that the same shall at all times be done with safety and ex-

To supply rolling stock sufficient to do business.

pedition, and the public be accommodated in respect thereto with all practicable conveniences and facilities, and that all future growth of such business as the same may arise, or be reasonably anticipated, shall be fully provided for and secured; and that all reasonable efforts shall be used to maintain, develop and increase the business of said line of railway.

To save Trustees harmless, etc.

SEC. 2. That will pay and save the first party harmless from the payment of any costs, expenses, claims, liabilities, damages and demands whatsoever, arising out of the possession, management and operation of said line of railway, and its appendages, or any part thereof, the said second party taking upon the same duties, liabilities and obligations in respect thereto as if had become the owner therof, and doing every act and thing that may be by law required of, or be obligatory upon or said Trustees, their successors and assigns.

To make repairs and deliver up road in good condition.

SEC. 3. That will, whenever needed, do all repairs, replacements and renewals on the said line of railway and its appendages, and maintain, preserve and keep the same and every part thereof in thorough repair, working order and condition, and at the end or other sooner termination of this lease, will redeliver and surrender up the same in the condition in which they are required to be put and kept by this lease; but this covenant and the liability of said second party thereunder shall be subject to the following exceptions. In case it shall happen that any of the spans or the bridges, over the Ohio, Kentucky, Cumberland, New or Tennessee rivers or the viaduct across the South Fork of Green river, or any of the viaducts exceeding one hundred feet in heighth, shall be carried away or destroyed by a tornado, the said second party shall not be required to renew or replace the same, but such renewal or replacement shall be done by the said Trustees; and in case the said Trustees shall fail to so renew or replace the same within a reasonable time, the said second party shall have the right so to do, and charge the cost thereof to the said Trustees, which sum, with lawful interest thereon from the date of delivery to said Trustees of an account of said cost, said second party shall and may deduct from the rent herein reserved until the same be fully repaid.

To pay all taxes.

SEC. 4. That will, as often as the same shall become due, pay and discharge any and all taxes, assessments, duties, imposts and charges whatsoever which shall or may be levied, assessed or imposed during the term hereby granted by any governmental or lawful authority whatsoever upon said leased railway and its appendages, or any part thereof, or upon any business or earnings, or income of the same, or by reason of the ownership thereof, it being the true intent and meaning of

this section that all governmental charges upon the aforesaid property or income therefrom which may be imposed by or under any governmental authority capable of enforcing such charges against or through said property, or the corporation owning or the party leasing the same, shall be assumed and satisfied by the party of the second part, however the forms thereof may change during the term hereby granted.

SEC. 5. That will not change the gauge of the said railway, or any part thereof, nor add or lay any other gauge thereon without the written consent or license of the said first party, nor will assign this lease or underlet the said line of railway, or any part thereof, without the like written consent or license; and a license or consent as aforesaid to do either of the acts aforesaid shall not wholly release the said second party from this covenant, but every such license or consent shall be a waiver or release so far only as respects any act done according to the terms expressed in such license or consent.

Lessees not to change gauge nor to assign or underlet without license

SEC. 6. That will not enter into any contract with any fast freight or other company, the effect of which will be to diminish the gross receipts or mileage properly due and proportionally earned for passage over said line of railway; and all contracts for the passage over said line or any part thereof of the engines or cars of any other person or company shall be so made as to inure to the mutual benefit of both parties hereto.

Contracts with fast freight and other companies to inure to mutual benefit of both parties.

SEC. 7. That will not discriminate against the citizens of Cincinnati in carrying freight or passengers on said line of railway, nor against freight or passengers from other railroads terminating in said city, but will charge and receive only the same and no more for the same services in transporting to and from said city freight and passengers going to or coming from one of said roads that charge or receive from those going to or coming from any other of said roads.

Lessees not to discriminate against Cincinnati and roads terminating therein.

SEC. 8. That will keep and perform all the stipulations and covenants of this lease, to be by kept and performed, and that will not evade or violate the same, and particularly that will well and truly pay, or cause to be paid, the rent herein reserved at the times and in the manner herein provided. That will abide by and perform the awards of the arbitrators herein provided for, that upon the expiration of this lease, will deliver engines, rolling-stock, railway supplies and other personal property to the persons or company succeeding in operating said railway as hereinafter provided in Article 10, and that in case of a refusal so to do, and in case of a termination of this lease through default as herein provided will deliver to said Trustees, said engines, rolling-stock, railway supplies and other personal property used

To keep covenants and pay rent.

in operating said railway, to be held and disposed of to other licensees or lessees of said railway and that will not attempt to interfere with or interrupt the use of the same by such licensee or lessees, or by said Trustees.

Recital of duties of Trustees

ARTICLE V. Inasmuch as the said Trustees will, under this lease, have the settlement of the rentals herein reserved, the enforcement, if necessary, of any breach of this agreement by the said second party, and the exercise of the powers vested in said Trustees to acquire additional land and rights for said railway, and its appendages, the said second party agrees and covenants with said first party, as follows:

Lessees to pay annual sums to keep up organization of Trustees.

SECTION 1. That will allow and pay without deduction from the rent herein reserved, as part of the expenses necessary in conducting the trust devolving on said Trustees, and for the compensation of such officers and agents as they may appoint, such sums as shall from time to time be fixed and allowed by the Court appointing said Trustees, provided that the amount so to be paid shall not exceed twelve thousand dollars ($12,000) per annum, payable in four equal quarter-yearly installments, on the first days of January, April, July and October in each and every year.

To keep an office in Cincinnati and provide rooms for Trustees.

SEC. 2. That will during the continuance of this lease keep an office in the city of Cincinnati, which shall be the principal office of said second party, and be open at all reasonable hours and times for the transaction of the business of said leased railway, and shall reserve and furnish in said office, free of charge, two suitable and convenient rooms, with a proper and safe fire-proof vault for the use of the said Trustees and their officers, and that will likewise furnish, free of charge, suitable rooms for offices for such agents as by the laws of Kentucky and Tennessee said Trustees may be required to keep.

Provide Trustees with passes and inspection car.

SEC. 3. That will issue annual free passes on the line of railway hereby leased to the said Trustees and their officers and agents, and provide, furnish and transport along the same, free of charge, four times a year upon the demand and for the use of said Trustees, a suitable and convenient car, for the inspection of said leased line of railway, and its appendages.

Forfeiture clause for non-payment of rent or breach of covenants.

ARTICLE VI. In case the said party of the second part shall at any time or times hereafter, during the term herein granted, fail or omit to pay the rent herein reserved or provided to be paid by the said party of the second part, or any part of such rent, when the same shall become payable, as herein specified, or in case the said party of the second part shall fail or omit to keep and perform the covenants and agreements herein contained, or any of them, and shall continue in default in respect to the performance of such covenant or agreement for the period

of ninety days, then, and in either and in every such case, it shall be lawful for the said party of the first part, at their own option, and without having made any legal or formal demand for such rent, to enter into and upon the said railway and premises hereinbefore leased, and any and every part thereof and remove all persons therefrom; and from thenceforth the said leased railway and premises with the appurtenances thereof, and all additions and improvements which shall or may have been made to the same, to have, hold, possess and enjoy; and upon such entry for non-payment of rent or breach, or non-performance of any covenant or agreement herein contained, to be by the said party of the second part observed or performed, all the estate, right, title, interest, property, possession, claim and demand whatsoever of the said party of the second part, in or to the said leased railway and premises, or either or any part of either thereof, shall wholly and absolutely cease, determine, and become void, anything herein contained to the contrary in anywise notwithstanding; but in case of re-entry, as aforesaid, the rent reserved herein, and the several installments thereof, shall be apportioned, from the time of the last preceding payments of such installments up to the time of such re-entry, and such portion thereof as would have been payable in respect to the intervening time, if the whole period in respect to which such installments were payable had elapsed, shall be deemed and taken to be due and payable, and the same shall be paid by the said party of the second part; and it is further declared and agreed that such re-entry shall not waive or prejudice any claim or right of the party of the first part, to or for damages against the party of the second part on account of such non-payment of rent, or non-performance or breach of the terms of this lease, and all such claims and rights are hereby expressly preserved to the said part of the first part.

And it is further expressly agreed, that a new power of re-entry shall arise in each and every forfeiture, breach or default as herein provided, notwithstanding the waiver of any prior right of re-entry or forfeiture respectively, and in like manner as if such right of re-entry or forfeiture had been the first right of re-entry or forfeiture under the foregoing provisions for re-entry; provided, that before said right of re-entry shall be exercised, the same shall be ascertained and determined by arbitrators as hereinafter provided, unless such determination shall be prevented by the act of the said second party.

Warrant of attorney in case of forfeiture.

And to facilitate and secure the enforcement of this article and condition, the said party of the second part does hereby irrevocably appoint the HONORABLE ALPHONSO TAFT, or any other attorney or counselor at law who may have been admitted to

practice in the Supreme Court of the United States, and at that time be authorized to act by the party of the first part, with authority, in the name and on behalf of the said party of the second part, to appear in any suit or suits or actions, brought by the party of the first part against the said party of the second part, to recover possession of the said leased railway and premises or the appurtenances thereof, or any part of the same, or to recover any installment of rent or any part thereof then overdue, in any Court or Courts having jurisdiction, to waive the issuing or service of process therein, to confess judgment in the same, and to waive all error and right of appeal.

Provision for terminal facilities at Cincinnati and Chattanooga.

ARTICLE VII. AND WHEREAS, it will be necessary in the proper management and operation of said line of railway, to provide lands in the city of Cincinnati for work-shops, depots and other terminal facilities and rights of way thereto, and

WHEREAS, There is vested in said Trustees by the laws of the said States of Ohio, Kentucky and Tennessee, a continuing power to acquire or to enter upon, take and appropriate such lands or rights of way as may be necessary for the purposes aforesaid, or for the purpose of changing the location or grade, or substituting other works or conveniences for those originally designed or constructed, or to provide additional side tracks or other appendages for the proper management and operation of the said railway, it is therefore further mutually agreed between the parties hereto as follows:

At the expense of lessees.

SECTION 1. That whenever it shall be found necessary, to change the location or grade, or substitute other works or conveniences for those originally designed or constructed, or to provide additional sidetracks or other appendages, the said Trustees shall and will, upon the request of said second party, at the proper cost and expense of the said second party, and without any deduction from the rents and other payments herein reserved and to be paid by said second party, acquire or enter upon, take and appropriate such lands and rights as may be necessary for the purpose aforesaid; provided, however, that no change of location shall involve a departure from the general route originally selected by said Trustees.

At the expense of trust fund.

SEC. 2. That said Trustees shall and will out of their trust funds provide lands in the city of Cincinnati for workshops, depots, and other terminal facilities and rights of way thereto; provided that said Trustees shall, as between the parties hereto, be the sole judges of the location and extent of such lands and rights and the amount to be expended therefor.

SEC. 3. Nothing in this instrument shall be so construed as to prevent the said first party from selling and conveying any

superfluous lands or land which may become unnecessary for the maintenance, use and operation of said line of railway.

Superfluous lands may be sold.

ARTICLE VIII. And for the better assuring, leasing and confirming the estate, title, and interest of the party of the second part in the property hereby leased and assigned, and intended to be passed by this instrument, the said party of the first part hereby agrees with the party of the second part, that at any time hereafter, and as often as may be required by the party of the second part, the said party of the first part will do such acts and make such further assurances in the law as the party of the second part shall by counsel learned in the law be reasonably advised, are necessary for, or tending to, the better carrying out of the objects of the parties hereto.

Covenant for further assurance.

ARTICLE IX. It is also mutually agreed that all questions of difference arising between the parties hereto in relation to the construction of this agreement, or as to whether there has been a forfeiture or right of re-entry under article six of the same, or otherwise in reference to the rights of the parties under this lease, shall, upon the written demand of either party, stating in such demand, the question or questions claimed to be in dispute, be submitted to the arbitration of five disinterested arbitrators, who are neither citizens nor taxpayers of the City of Cincinnati, to be selected as follows:

Arbitration clause

Two by each party, and the fifth by the four so chosen, but if either party shall fail to appoint arbitrators on or their part within ten days after written notice of the selection of two by the other party, then the arbitrators selected by the party giving notice, shall select the other two, and the four thus chosen, shall choose the fifth, and the award of said arbitrators, or a majority of them thus selected, shall be final and conclusive between the parties hereto, their successors and assigns. The said arbitrators shall meet at Cincinnati, and on notice to the parties, proceed, after being sworn, to hear and determine the controversy, and if it relates to any matter other than a forfeiture or right of re-entry, they shall have power to direct either party, to do all such acts as may be necessary or expedient to carry their award into effect, and if it relates to a forfeiture, or right of re-entry, as provided for in Article 6, and they shall adjudge and award that there has been a forfeiture or right of re-entry, they, or the majority concurring in such award, shall have power, and the said party of the second part, does hereby irrevocably appoint them or the majority of them concurring aforesaid, as attorneys in fact, with authority in the name and in behalf of the said party of the second part, to execute and deliver to the party of the first part a surrender of this lease, and all rights under the same, and with power and au-

thority to take possession of and deliver to said Trustees the engines, rolling-stock, railway supplies and personal property of said second party used in operating said railway to be held and used for the purpose of operating said railway until said Trustees can dispose of the same, after a valuation to be made by a majority of five valuers, to be selected and appointed by said arbitrators, or the majority of them concurring as aforesaid, to such persons or company as they may lease or license the use of the railway to; provided, that if said Trustees shall not dispose of said engines, rolling-stock, railway supplies and personal property within days after they shall have taken possession of the same, then and in that case said Trustees shall pay upon said valuation from the date of taking possession, interest at the rate of per centum, per annum, payable monthly until the same are disposed of as aforesaid, when said Trustees shall pay to the said second party, the amount realized by them, together with any accrued interest thereon, and the difference, if any there be, between the amount so realized, and said valuation. And said arbitrators shall also have power to determine and award the amount, and the party to pay the cost of arbitration.

ARTICLE X. Upon the determination of this lease, except by the default of the said second party, said Trustees shall provide for the reimbursement of said second party's outlay for engines, rolling-stock, railway supplies, and other personal property then on hand, and used in operating said railway as follows:

The persons of company succeeding said second party in operating said railway shall take, and said second party hereby agrees to transfer and deliver to such persons or company, all the engines, rolling-stock, railway supplies, and other personal property at a fair valuation to be made by a majority of five valuers, two of whom shall be chosen by said second party, and two by said persons or company, and the fifth by the four so chosen; but if either party shall fail to appoint valuers on or their part within ten days after written notice of the selection of two by the other party, then the valuers selected by the party giving notice, shall select the other two, and the four thus chosen, shall choose the fifth. The first four valuers so chosen, shall meet at Cincinnati, within ten days after their selections to choose the fifth one, and in case they shall not within forty-eight hours after they assemble, select the fifth valuer, then the Trustees shall select him. The amount of said valuation shall be paid upon the transfer and delivery of the aforesaid property unless the parties shall otherwise agree.

ARTICLE XI. It is hereby expressly declared and agreed by and between the parties hereto, that this lease, and all the articles,

covenants, agreements, terms and conditions thereof, shall be binding on the parties hereto respectively, and their respective successors and assigns, and that upon the cessation of the powers of the said Trustees, the covenants and agreements with them shall pass to and be kept and performed with the City of Cincinnati, her successors and assigns, the same as if said city was expressly named therein.

Agreement to bind successors and assigns.

IN WITNESS WHEREOF, ETC.