

same. It is a command which may not be disregarded, under penalty of expulsion from the order and of social ostracism. This language was employed to fortify the restraints of the other portions of the writ, and to meet the various disguises under which the command is cloaked. It was so inserted out of abundant caution, that the meaning of the court might be clear, that there should be no unwarrantable interference with this property, no intimidation, no violence, no strike. It was perhaps unnecessary, being comprehended within the clause restraining the heads of these organizations from ordering, recommending, or advising a strike, or joinder in a strike. It is said, however, that the clause restrains an individual from friendly advice to the employés as a body or individually, as to their or his best interest in respect of remaining in the service of the receivers. Read in the light of the petitions upon which the injunction was founded, I do not think that such construction can be indulged by any fair and impartial mind. It might be used as a text for a declamatory address to excite the passions and prejudices of men, but could not, I think, be susceptible of such strained construction by a judicial mind. The language of a writ of injunction should, however, be clear and explicit, and, if possible, above criticism as to its meaning. Since, therefore, the language of this particular phrase may be misconceived, and the restraint intended is, in my judgment, comprehended within the other provisions of the writ, the motion in that respect will be granted, and the clause stricken from the writ.

In all other respects the motion will be denied.

REYNOLDS et al. v. WATKINS et al.

(Circuit Court of Appeals, Sixth Circuit. March 6, 1894.)

No. 115.

1. APPEAL—ADEQUATE REMEDY AT LAW.

Where the objection that there is an adequate remedy at law is taken for the first time on appeal, the court is not obliged to entertain the same, where the subject-matter of the suit is of a class over which a court of chancery has jurisdiction.

2. INTERPRETATION OF DEED—FAMILY HOME.

A purchaser of real estate took a deed to himself, for the use and benefit of his wife and children, the sole object being to provide a family home. He subsequently obtained a divorce, the decree providing that he should be discharged from any apparent trust growing out of the deed. *Held*, that the decree was conclusive that the children were not tenants in common; that the beneficial interest of the wife and children ceased when they left the home; and that, therefore, a subsequent sale by the father to pay off mechanics' liens for improvements, of which sale he obtained confirmation by a chancery court on publication against his children, who were then nonresident minors, divested any possible interest remaining in them, even if the publication was defective.

Appeal from the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee.

This was a bill in equity, brought by Francis T. Reynolds, Rowena Reynolds, and Alma Reynolds against Anna N. Watkins and

others, to assert an alleged interest in certain real estate. There was a decree below dismissing the bill, and complainants appeal.

John D. Little, A. G. Wimbish, W. H. Bogle, and Lewis Shepherd, for appellants.

Clark & Brown, Wheeler & McDermott, and White & Martin, for appellees.

Before TAFT and LURTON, Circuit Judges, and RICKS, District Judge.

LURTON, Circuit Judge. The complainants are the sole surviving children of a marriage between John F. and Elizabeth J. J. Reynolds. They claim that, under a certain deed made by one Joseph Ruohs in 1869, they have an interest in certain valuable property situated in the city of Chattanooga, Tenn., and now in the adverse possession of the defendants. No question of jurisdiction was raised in the circuit court, but it is now, for the first time, insisted that complainants had a plain and adequate remedy at law, and that, therefore, a court of equity will not entertain this suit. An objection that the remedy at law was plain and adequate should be taken at the earliest opportunity. Yet neither consent nor negligence will confer jurisdiction in equity where none really exists, and the court may at any stage of a cause entertain such objection, or dismiss a bill *mero motu*. Yet there are cases where, if the objection of want of jurisdiction because of an adequate remedy at law be not taken in the circuit court, and be for the first time presented upon appeal, this court will not feel itself obliged to entertain an objection coming so late, especially if the subject-matter of the suit is of a class over which a court of chancery has jurisdiction, and it is competent for the court to grant the relief sought. *Reynes v. Dumont*, 130 U. S. 355, 9 Sup. Ct. 486; *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. 594. Looking to the whole of the original bill, including the transcripts of two suits in equity involving and affecting the title and interest of complainants, and filed as exhibits to the bill, we are of opinion that the interest of the complainants was so essentially of an equitable character as to constitute a controversy over which a court of equity may well assume jurisdiction. The foundation of the interest asserted by complainants is a deed made by Joseph Ruohs and John F. Reynolds, father of complainants. That deed was in these words:

"In consideration of sixteen hundred dollars, of which sum one thousand dollars is paid in hand, and three notes of this date bearing interest from date, each for two hundred dollars,—one due six months after date, and one due at twelve months after date, and one due fifteen months after date,—I, Joseph Ruohs, have this day bargained and sold, and do hereby transfer and convey, unto John F. Reynolds, in trust, for the sole and exclusive use and benefit of Elizabeth J. J. Reynolds and her children, the following described lot or parcel of land in Chattanooga, Hamilton county, Tenn.: Lot number twenty-two (22) Oak street, fronting one hundred feet on Oak street, and running back, of uniform width, to McCallie street, situate in McCallie's addition, and being the lot conveyed to Henry K. White and Elizabeth B. White, and conveyed by them to Joseph Ruohs. To have and to hold said property or lot to the said John F. Reynolds, in trust, for the sole and exclusive

use and benefit of the said Elizabeth J. J. Reynolds, and his heirs, forever, free from the contracts and liabilities of her present or any future husband. I further covenant that I am lawfully seised of said lot, have the right to convey it, and that it is unincumbered; and I further bind myself to warrant and forever defend the title to said lot to the said trustee, forever, against the lawful claims of all persons whatever. It is further provided and stipulated that said trustee may sell and convey said lot, for the purpose of changing the investment, upon the written request of said E. J. J. Reynolds, and a lien is retained upon said lot for the aforesaid unpaid purchase money.

"This June 1, 1869.

"[Seal.]

Joseph Ruohs.

"Attest:

"J. K. Kuan.

"D. M. Key."

The children of Elizabeth Reynolds, then living, were four in number. One died subsequently,—a minor, unmarried, and intestate. The other three are the complainants.

Did Mrs. Reynolds obtain any legal estate by that deed? What were the rights and interests of complainants thereunder? Were those rights legal or equitable? Did they become tenants in common with their mother, as now insisted? These questions, we think, were all answered in a most conclusive way by the chancery court of Hamilton county, Tenn., in 1872. Their father in that year filed an original bill in equity against their mother, Elizabeth Reynolds, and against themselves. The object of the bill was to obtain a divorce from Mrs. Reynolds upon the ground that she had abandoned her husband, home, and family, and was living in adulterous cohabitation with a lover in a distant western state. He also sought to have the court construe the Ruohs deed, and determine his rights and interest thereunder, and the rights and interests of Mrs. Reynolds and her children. He set out that he had paid the entire consideration for the conveyance, and had, with the approval of his wife, built on and improved the property as a home and residence; that he had personally paid for much of the improvement; and that much remained unpaid, for which mechanics' and furnishers' liens existed. He claimed that the whole arrangement was solely for the purpose of providing a home for himself, his wife and children, so long as they chose to avail themselves of it, and so long as the family relation existed. Publication was duly made for Mrs. Reynolds, as a nonresident. Her children, the complainants, were regularly served with process, and answered by guardian ad litem. Evidence was taken, and upon the hearing the court decreed: (1) That the bonds of matrimony were dissolved. (2) As to the rights of Mrs. Reynolds and her children under the Ruohs deed, the court said:

"That said Elizabeth J. J. Reynolds never had any real interest in either the purchase money or the lot; that the whole transaction—the deed and property—has been all the time under the control and power of complainant, and that the language in which the deed to said lot is couched was an ex parte arrangement of complainant, and that the object and purpose of the said deed being so drawn was to provide a family home and residence for the use and enjoyment of complainant and said Elizabeth J. J. and their children whilst the relations of husband and wife, mother and child, and father and child existed, and to be so used and enjoyed; and that said Elizabeth J. J. should

not continue to have or possess any interest in said property beyond the period of duration of the existence of such relation, and actual use and occupation of the same as a wife and mother, as aforesaid. And the court being of opinion that upon the abandonment of complainant and her said children, and elopement in adultery, by said Elizabeth J. J. Reynolds, as hereinbefore shown, that the said Elizabeth J. J. forfeited, or ceased to have, any other or further interest in said property, as such conduct, from the proof in the cause, terminated the limitation or duration of the said estate in trust for her, as appearing on the face of said deed, it is therefore, upon that branch of complainant's bill, decreed by the court that the limitation of all such estate, in equity or otherwise, as said Elizabeth J. J. Reynolds had or took under said deed of conveyance from Joseph Ruohs, No. 22, in Chattanooga, Hamilton county, Tennessee, on Oak and McCallie streets, executed on the 1st day of June, 1869, ceased to exist, and all such interest is forfeited, and that the apparent relationship of trustee and cestui que trust growing out of said deed be, and the same is hereby, declared at an end, and complainant denuded and discharged of any such apparent trust. And it further appearing that complainant has improved said lot by erecting a valuable family residence, at a cost of about three thousand dollars, the said house and lot will be used and enjoyed by him in such manner, for the benefit of himself and said children, as, in his judgment, he may decide right and proper, without being in any way accountable or liable to said Elizabeth J. J. Reynolds, or any one claiming under her."

That decree stands unreversed, and is not attacked by the present bill. With respect to that decree the contention of complainants, in their pleadings, is that it "does not purport to divest and vest title in said property, excepting as to the interest of said Elizabeth J. J. Reynolds, nor does it purport to construe or reform said deed in any way, or in any manner alter or disturb the interests in said property, as acquired thereunder by said children." To this we cannot agree. The court did construe the deed. It could only declare the extinguishment of Mrs. Reynold's interest thereunder by construing the legal and equitable rights of the beneficiaries. Looking to the circumstances under which that conveyance was made, and looking to the language in which the purposes of the conveyance were declared, the court held that "the object and purpose of the deed was to provide a family home * * * for the use and enjoyment of the said Elizabeth and their children whilst the relationship of husband and wife, mother and child, and father and child existed, and to be so used and enjoyed." This being the purpose of the deed, the court held that Mrs. Reynolds' rights and interest had terminated by the abandonment of the home, and of her relations to the family, and had thereby ceased to have any interest or rights under the deed. In view of this, the court further decreed "that the apparent relation of trustee and cestui que trust, growing out of said deed, be, and the same is hereby, declared at an end, and complainant denuded and discharged of any such apparent trust." If that decree settled anything, it was that Mrs. Reynolds and her children were not tenants in common under the Ruohs deed. Whatever their rights, they were not legal rights, and their estate not a legal estate. After that decree, it was no longer essential that Mrs. Reynolds should join her husband in a conveyance, or that his conveyance should be upon her request. It was, in substance, a case where a father bought property, and took a deed to himself for the use and benefit of his wife and children, the sole object being to

provide a family home. If the conveyance had been to Mrs. Reynolds, with the same purposes declared in favor of her children, the children would, under the well-settled law of Tennessee, have acquired no legal interest. The case of *Moore v. Simmons*, 2 Head, 545, is in point. That was a case of a deed by a father of property to a trustee for the use and benefit of several daughters of the grantor. With regard to one of them (Mrs. Simmons), the conveyance recited that the trustee was to hold the property "for the sole and proper use of Sally Simmons and her children, * * * not to be subject to the control or debts of any other person, either her husband or otherwise; the same being intended to be held in trust by said trustees for the use and benefit of the children of the said Simpson Shaw [grantor and father of Sally Simmons] and their heirs." A creditor of one of the children of Sally Simmons sought to subject the supposed interest of such child to the payment of his debt, claiming that the mother and children were tenants in common, in reality. The court said:

"We think this construction, though plausible, cannot be maintained. Taking the whole instrument together, and in view of the considerations by which it was prompted, we entertain no doubt but that the intention was to give the entire estate to the daughter, to her separate use, by which she would be enabled to support herself and children, as a family. If that were not so, but a joint interest was vested in the children, the object intended could be defeated by any creditor of the children, as is now attempted. If he intended to give the property to the latter, would he not have protected it in them, as he did that of their mother against creditors? Surely, the same reason existed for doing so. Another absurd consequence, subversive of the apparent intention, would result from that construction: If any interest passed to the children, it must be a present one, and, as such, might be demanded by a guardian, or by any child on coming of age, or marrying, with an account, perhaps, and thus defeat the prominent object, of keeping all together for the support of the family, as a unit."

In the case under consideration there was no direct conveyance of the title to the wife and children, nor, under the construction put on the deed in *Moore v. Simmons*, was the legal title charged with a trust in their favor, in such way as to vest any interest in the corpus, either in praesenti or in remainder. It fell directly under cases of the class in which the legal title vests in the grantee subject to a participation by the wife and children in the use and enjoyment of the premises as a home, while members of the family, in the grantee's lifetime. *Allen v. Westbrook*, 16 Lea, 255, and *Bunch v. Hardy*, 3 Lea, 549, are cases of trusts of like character, in which a like construction was reached. Reading the decree of 1872 in the light of these Tennessee cases, it is plain that the chancellor was of opinion that the legal title was in John F. Reynolds, subject to a participation by wife and children in the enjoyment of the property as a family home so long as he should live, and so long as they continued to be members of the family. In this view, the beneficial interest of the wife ceased when she became forisfamiliarized; and the interest of the children ceased when they departed from under the parental roof, and, in any event, upon the death of the grantee, in whom was the legal title. Whether that decree was erroneous in the matter of the construction placed upon the Ruohs

deed is now a matter of no practical interest. The decree stands unreversed, and is conclusive upon complainants, they having been parties to the cause. Subsequent to that decree, suits were brought, charging the property, under mechanics' liens for improvements put thereon by John F. Reynolds. Under decree obtained, the property was exposed to sale, and bid in by one J. C. Woodruff, for the benefit of John F. Reynolds. To meet these claims, Reynolds sold the property to William Hewitt, under whom defendants claim. Reynolds made to Hewitt a bond conditioned to make deed by a day named. Thereafter, Reynolds, under legal advice, sought to have this sale by him confirmed by the state chancery court. For this purpose he filed his original bill, in which he set out the facts as to the first suit, in which the deed to himself from Ruohs had been construed, and the subsequent facts, as above detailed. The bill then recited that: "It may be, and he is advised that he could, under said decree, and facts surrounding the case, sell said property, and pass a good title. * * * But that he is further advised that it is more safe and proper to report his said sale, * * * and have the same sanctioned and approved, * * * and direction given touching the proceeds of sale, as right and justice may require."

To that bill the purchaser, William Hewitt, was made a party defendant by actual service of process. The complainants in the present suit were also made parties defendant by publication, they being then nonresidents of the state, and minors. The regularity and validity of this publication is the principal matter of contention presented by the present bill, and has been the occasion of able and elaborate argument upon each side. A guardian ad litem was appointed, who answered and defended for the minors thus made defendants. Proof was taken. Upon final hearing the court ratified and confirmed the sale made to Hewitt, and divested all title and interest out of the complainant, John F. Reynolds, and out of the defendants, the children of his former wife, Elizabeth J. J. Reynolds, (they being the complainants in the present case), and vested title in the purchaser, "William Hewitt, his heirs and assigns, forever." Hewitt took possession in 1874, and has since sold and conveyed to the defendants now before the court. That two of the complainants are barred by the Tennessee statute of limitation of seven years is not seriously disputed. Complainant Francis T. Reynolds is now 32 years of age, and complainant Rowena is 29. Section 3461, Code Tenn (Mill & V. Ed.), bars all rights of action for the recovery of any interest in real estate, legal or equitable, unless suit shall be brought within seven years after adverse possession. By section 3451 the rights of minors are saved, by extending to them a right of action for three years after removal of such disability. This suit has not been brought within the time allowed for persons laboring under the disability of nonage at time adverse possession begun. Complainant Alma was only 23 when this bill was filed. She is, consequently, not barred. If it be assumed that the right of complainant Alma to participate, after the decree of 1872, in the use and enjoyment of this home, so long as she continued a member of the family, existed, yet that right was lost by the sale and convey-

ance of the property to meet liabilities charged upon it in improvements. If her father had made a sale for the purpose of paying off these liabilities, or to make a reinvestment, his deed would have carried a perfect fee, discharged from, and unaffected by, any trust in her behalf. If we treat the decree of 1874 as void and inoperative, as to her, for defective publication, or any other cause, still it would stand as a valid decree, as between John F. Reynolds and William Hewitt. The latter was regularly a party defendant. He was not an indispensable party, but he was a proper party, in view of his purchase from Reynolds, and the assignment to him of Woodruff's bid. The decree, as between them, operated to divest title out of John F. Reynolds, and to vest it in William Hewitt. He was not, in equity, charged with any duty as to the reinvestment of the surplus of purchase money after paying off the lien debts. The remedy as to this surplus, if any they have, is against their father, and not against the property, upon which no lien rests after payment of the purchase money. The result is that it is unnecessary to consider the many interesting questions which were discussed, involving the validity of the decree confirming the sale to Hewitt. The decree of the circuit court must, upon the grounds we have stated, be affirmed.

SYMMES et al. v. UNION TRUST CO. OF NEW YORK et al.

(Circuit Court, D. Nevada. March 5, 1894.)

No. 527.

1. CORPORATIONS—TRUSTEES—BREACH OF TRUST—FORECLOSURE OF MORTGAGE—ASSESSMENT OF STOCK.

The failure of the trustees of a corporation to levy an assessment on the stock for the purpose of paying a mortgage, and thereby preventing a foreclosure and reorganization, and a consequent extinguishment of the interest of the nonassenting stockholders, is not such neglect of duty as will enable dissenting stockholders to overturn the reorganization after it is accomplished; it appearing that the shares, on their face, purport to be unassessable, that the trustees are advised by competent attorneys that an assessment would be of doubtful legality, and that, if made, it would work injustice to many stockholders who have previously paid in money under a different plan.

2. SAME—REORGANIZATION—DISSIDENTING STOCKHOLDERS.

Under equity rule 94, one who purchases shares of stock in a corporation after a plan of reorganization has been adopted and partially carried out is not in a position to maintain a suit to set the same aside on the ground of fraud and neglect of duty by its trustees and other parties.

3. SAME—ESTOPPEL.

Stockholders who have had full knowledge of a plan of reorganization, and have given it their approval, and subscribed to its provisions in respect of part of the stock owned by them, are estopped, after the reorganization is complete, to maintain a suit, as owners of the stock on which they did not subscribe, to overthrow the same on the ground of fraud and conspiracy.

4. SAME—FRAUD—CONSTRUCTIVE TRUSTS.

Acts of the president and trustees of a corporation in promoting a plan of reorganization whereby a hostile foreclosure, which would extinguish the interest of all stockholders, is prevented, and a friendly foreclosure

substituted, which preserves to the subscribing stockholders an interest in the property, are not constructively fraudulent, and give rise to no constructive trust in favor of the old organization, when there is no actual fraudulent intent, and all parties interested are consulted, and all reasonable notice given to the widely-scattered stockholders; and this is true although a large personal profit, in the shape of a contingent fee, accrues to the president of the corporation, who is the principal promoter of the plan of reorganization.

This is a suit in equity, brought by three stockholders of the Sutro Tunnel Company, a California corporation, viz.: Frank J. Symmes, as owner of 5,000 shares of stock; Joseph Aron, as owner of 10,000 shares; and F. H. Wheelan, as the owner of 250 shares,—suing for themselves and other stockholders of said corporation,—against the Union Trust Company, a New York corporation, the Comstock Tunnel Company, a New York corporation; the Sutro Tunnel Company, a California corporation, Theodore Sutro, and 28 other individuals, comprising, (1) the trustees of the Sutro Tunnel Company; (2) the members of the executive committee of stockholders in New York; (3) the members of the reorganization committee of stockholders in New York; (4) the individuals and firms who signed what is known as the “syndicate agreement.”

The bill, among other things, charges fraud, conspiracy, and a violation of trust and confidence upon the part of the officers and trustees of the Sutro Tunnel Company, with other respondents, to defraud said corporation and its stockholders of their legal rights. The pleadings are too lengthy to attempt any detailed statement of the various allegations contained therein. The contest arises out of the transactions carried on by the respondents in their efforts to procure a settlement and adjustment of a foreclosure suit brought by McCalmont Bros. & Co. against the Sutro Tunnel Company, and the final action taken in regard thereto, the precise nature of which will sufficiently appear from the facts hereinafter stated. The general character of the suit will be understood by quoting simply the prayer of the bill, which contains forty specific allegations, and one general averment in the answer.

The prayer of the bill is: “To the end, therefore, that the said defendants may answer (but not under oath, such oath being hereby expressly waived, according to the practice of this court) all and singular the premises, and that a full accounting may be had in equity of all the indebtedness of the said Sutro Tunnel Company, and fully of all receipts and expenditures, debits and credits, which ought in equity to be considered upon such accounting; and that the said Union Trust Company be adjudged by the decree of this court to have procured the legal title to the property of said Sutro Tunnel Company in fraud of the rights of these complainants and of the said Sutro Tunnel Company; and that the conveyance thereof to said Union Trust Company be adjudged to be a cloud upon the title of said Sutro Tunnel Company to its property and franchises, which ought in equity to be removed; and that the said Union Trust Company or the said Comstock Tunnel Company holds the said conveyance and title as the constructive trustee of said Sutro Tunnel Company, and as being in equity a mortgage to secure the payment of the just indebtedness of said Sutro Tunnel Company, to be ascertained upon the said accounting, and to be evidenced by bonds of the said Sutro Tunnel Company, to be issued in accordance with the terms of said agreement of November, 1887; and that these complainants and other stockholders of said Sutro Tunnel Company who have not subscribed to said bonds be adjudged to retain and hold all their rights as stockholders of said Sutro Tunnel Company in the property thereof, subject to the payment of said indebtedness secured by the said mortgage; and that the said Union Trust Company or the said

Comstock Tunnel Company, or either of them, who may hold the legal title to the property of said Sutro Tunnel Company, be decreed to reconvey the same to the Sutro Tunnel Company; and that the trustees of said Sutro Tunnel Company be ordered to issue the bonds of said company and a new mortgage upon its property, as provided by the terms of said agreement of November, 1887; and that if the said Union Trust Company has not conveyed the said property to the said Comstock Tunnel Company, that it be enjoined from so conveying the same pending this suit; and that it be particularly restrained from paying out of the proceeds or income of said Sutro Tunnel property or franchises the sum of \$100,000, or any other sum, to Theodore Sutro, or from paying therefrom any part of the sums agreed to be paid by the members of said syndicate, either to themselves or others, as commissions or compensation under the terms of said syndicate agreement; and that said Union Trust Company be further restrained from enforcing its judgment for a deficiency against said Sutro Tunnel Company, or any part thereof; and that your orators may recover their costs herein expended against all of the defendants herein, and may have such further or other relief as the circumstances of this case may require, and as to this honorable court, sitting as a court of equity, shall seem meet and agreeable to equity and good conscience."

The answer of the Union Trust Company and all other respondents served with process, except the Sutro Tunnel Company, contains 75 allegations of admissions and denials, one of which is here quoted: "And, further answering, these defendants deny, and each denies, that the complainants, or any of them, are entitled to any relief whatsoever, in this or any court whatsoever, in the premises, and say: That complainants, and each of them, had full knowledge and notice of all of the transactions in this answer set forth, and of the intention to consummate them at the time and before any of said transactions occurred. That the said complainants, and each of them, had full and ample opportunity to subscribe for the said bonds, and had the same opportunity to subscribe therefor that the stockholders of said Sutro Tunnel Company who did subscribe therefor had; and that neither these complainants, nor any of them, nor any of the stockholders of said Sutro Tunnel Company who did not subscribe to the said bonds, made or attempted to make any objection, or took or attempted to take any exception to any of the acts or transactions herein set forth; and that neither these complainants, nor any of them, nor any of the stockholders of said Sutro Tunnel Company who did not subscribe for the said bonds, ought in equity, or otherwise, now to be permitted to make any objection or to take any exception thereto, or in any way to affect or invalidate the said acts and transactions; and that the said complainants, and each of them, and all of the stockholders of the said Sutro Tunnel Company, whether they subscribed to the said bonds or not, had at all times full and free access to all of the books papers, instruments, and records of said Sutro Tunnel Company, among which were included full minutes of all proceedings of its board of trustees, entered at the time of such proceedings, and the originals or true copies of the said syndicate agreement, and all papers pertaining thereto, filed among said records on or about said August 10, 1888, when said syndicate agreement was approved as aforesaid and showing, in detail, all of the transactions in this answer set forth, in so far as they had any relation to the said Sutro Tunnel Company or its stockholders as such; and that the said trustees of said Sutro Tunnel Company, and the officers thereof, and each of them, and particularly the said Theodore Sutro, and also the members of said executive and reorganization committees, were at all times ready and willing to give to any and all of the stockholders of the said Sutro Tunnel Company any and all information in the premises that they, or any of them, might desire, and did so whenever thereto requested. That all the transactions and acts of the trustees of said Sutro Tunnel Company in this answer set forth were had and done in good faith, and in the exercise of the best judgment and discretion of said trustees and of the officers of said company; and that said acts and transactions were the only feasible and possible means whereby the property of said Sutro Tunnel Company could at all be saved in the interest of any of the stockhold-

ers of said Sutro Tunnel Company whatsoever, and by which the foreclosure in the sole interest of said McCalmont Brothers & Company, which would have resulted in the exclusion of every shareholder of the Sutro Tunnel Company, could be prevented; and that a large majority of the stockholders of said Sutro Tunnel Company having come forward, together with said syndicate, and having, by their own efforts, and with their own funds, purchased the said McCalmont mortgage, it would not be just nor fair nor equitable that the stockholders of said Sutro Tunnel Company who failed or refused to come forward or to join in the said efforts or to advance any part of said money (the many notices, requests, and appeals on the part of said Theodore Sutro and the trustees of said Sutro Tunnel Company and said executive and reorganization committees, extending over a period of more than eighteen months, hereinbefore set forth, to the contrary notwithstanding), should share in the benefits resulting from the purchase of said mortgage and the success of said reorganization."

The Sutro Tunnel Company filed a separate answer by Pelham W. Ames, secretary.

If difficult to make a condensed statement of the pleadings, covering 182 pages of printed matter, within the limits of an ordinary opinion, what shall be said of the facts when the testimony, independent of exhibits of almost equal length, consists of about 6,000 type-written pages and the printed briefs of counsel over 800 pages? The case cannot be thoroughly understood without full knowledge of all the conditions and causes which led to the acts of parties of which complaint is made. The order in which the transactions occurred is important in determining whether the acts were consistent with fair dealing, or whether the transactions which took place, and the conduct of the parties, were fraudulent in fact, or constitute what is known as "constructive fraud." The importance of all the questions involved in the case, and the thoroughness with which they have been argued, demand from the court more than an ordinary statement. A complete statement of the facts is not essential, but a skeleton history, in chronological order, will here be given.

The Sutro Tunnel Company, at the time of the transactions involved in this suit, consisted of 2,000,000 shares of stock of the par value of \$10 per share. On the 4th of January, 1877, it executed a mortgage or trust deed upon its property situate in Storey county, Nev., to McCalmont Bros. & Co., of London, England, to secure the payment, on the 1st of January, 1881, of the sum of \$124,321.10, for which amount it was then indebted, and for all further advances that might thereafter be made, with interest thereon at 12 per cent. per annum, payable semiannually. Further advances were from time to time made, and on the 28th of March, 1878, the amount due aggregated the sum of \$433,965.10. A supplemental agreement was then made, whereby the Sutro Tunnel Company agreed to pay said sum and all further advances that might be made, with interest, on January 1, 1891; the interest to be paid in half-yearly payments, and, if not so paid, the principal and interest to become immediately due. On March 28, 1886, a bill was filed in this court for the foreclosure of said mortgage. A receiver of the mortgaged property was appointed, and the suit was pending until October 1, 1888, when a decree of foreclosure was entered as of August 13, 1888, for \$1,420,209.46, and costs of suit, taxed at \$2,075.

At the time of the commencement, and during the pendency, of the suit, it was the general understanding of the stockholders, trustees, officers, and attorneys of the corporation that there was no legal defense that could be interposed to the suit. Many efforts were made to postpone and delay the time of trial, and divers and sundry attempts were unsuccessfully made to procure a compromise, settlement, or amicable adjustment of the suit upon such terms and conditions as would have enabled the corporation to save its property. It is charged in the bill that Theodore Sutro, when president of, and attorney for, the Sutro Tunnel Company, in utter disregard of his duty to the corporation and to its stockholders, entered into an agreement with certain of the other respondents to bring about a sale and transfer of the property of the Sutro Tunnel Company to the Union Trust Company, to be held by it for the benefit of a large number of the stockholders of the Sutro

tunnel Company and a few outside parties; that this agreement was carried out; that in consideration of such agreement he received a large pecuniary consideration, which he concealed from the trustees and stockholders of the Sutro Tunnel Company.

The alleged fraudulent acts of Sutro constitute the foundation on which this suit is based. It is therefore important to ascertain how he became connected with the transactions, and what he did in relation to the various plans that were devised for the purpose of raising money to meet the demands of the McCalmont mortgage. His first appearance was in consultation as an attorney with respondents Thayer and Baltzer and one other stockholder, who called upon him shortly after the commencement of the foreclosure suit to ascertain if anything could be done to save the property of the corporation. He promised to look into the matter, and in the fall of 1886 informed them that he could not undertake to do anything in the matter without specific authority and a direct understanding as to his compensation. On the 18th of December, 1886, respondents Thayer, Baltzer, Stursberg, Palmer, and Lowengard, and other stockholders, representing 65,360 shares of the Sutro Tunnel Company, united in signing a letter to Mr. Sutro, requesting him to act as their attorney, and, if possible, to obtain an extension of time for them to intervene in the foreclosure suit, agreeing, if he was successful, to pay him a reasonable compensation for his services. An advertisement was thereafter published in seventeen New York, three Boston, two Philadelphia, one Baltimore, and one Chicago daily papers, from the 8th to the 12th of January, 1887, as follows:

"Sutro Tunnel Company. Preparatory steps having been taken towards saving the stock of the Sutro Tunnel Company from extinction by the pending foreclosure proceedings against said company, all those owning or controlling stock therein are invited to attend a meeting to be held at the office of the Farmers' Loan and Trust Co., No. 20 William St., New York City, at 12 o'clock noon on Wednesday, the 12th inst., to devise means for concerted action. A full attendance is of the greatest importance.

"Committee of Stockholders.

"New York, Jan. 8, 1887."

At this meeting, which for convenience, after due notice, was held at Mr. Baltzer's office, a general committee of stockholders, consisting of Baltzer, Thayer, and Lowengard, was appointed, with full power to act, and Theodore Sutro was retained as attorney for the stockholders. A petition for intervention was drawn up, which, in substance, avers that McCalmont Bros. & Co. controlled a majority of the stock of the Sutro Tunnel Company, and elected a majority of the trustees, who are under their control; that said trustees have ostensibly undertaken to defend the foreclosure suit, and have filed an answer consisting only of general denials; that affirmative and meritorious defenses exist in favor of petitioners which have not been set up; that the defense to the suit is not being conducted in good faith; that there is great danger that the rights of petitioners will not be adequately protected or maintained, etc. This petition was signed by stockholders representing 165,000 shares of stock, and was filed in this court on January 31, 1887. Mr. Samuel M. Wilson and respondent Edmund Tauszky were retained with Mr. Sutro, and argued in favor of the intervention on February 10, 1887, and obtained leave of the court to have until March 2d to file their closing briefs. On the 15th of February the board of trustees of the Sutro Tunnel Company met and adopted the following resolutions: "Resolved, that it is the desire and intention of this board to give to the stockholders of this company every facility for defending the action now pending for the foreclosure of the mortgage held by Messrs. McCalmont Bros. & Co., and to that end to consent to the intervention of certain stockholders who have petitioned the court to be allowed to do so, and that the attorney of the corporation be advised of this resolution of this board. Resolved, that a committee of two members of this board, to be appointed by the chair, be authorized and directed to inform the attorneys of the stockholders who have petitioned to be allowed to intervene in said action that the board is willing to assist them in every proper way to present any defense which

they may desire to make to such action." Two days thereafter these resolutions were rescinded, and others adopted, denying that a majority of the board were under the control of the McCalmonts and declaring that the trustees wished to protect the rights of all the stockholders, and authorized the attorney of the corporation to consent to the intervention, and invite the attorneys for the stockholders to assist him in defending the foreclosure suit. On the 24th of February, Sutro left New York, and arrived in San Francisco March 2d. He immediately took active steps in endeavoring to secure sufficient proxies to enable him to control the election of the board of trustees at the annual meeting of the stockholders, to be held March 11th. He met with much difficulty in obtaining the consent of men to serve as trustees, the reason assigned for refusal being that the corporation was wholly insolvent. The annual meeting was adjourned until March 28th. At the adjourned meeting, 1,398,829 shares of stock were represented. Of this number, Mr. Sutro and Mr. Tauszky had proxies for 1,023,734 shares, and Mr. Haven, the attorney for the corporation and for the receiver, had 369,500 shares. Five trustees were elected on the proxies held by Sutro and Tauszky, viz.: Moritz Meyer, Frederick Roedig, M. S. Wilson, David Cahn, and John Landers, and William Johns, the receiver, and Pelham W. Ames, on the proxies controlled by Haven. Certain amendments to the by-laws were proposed and carried. A branch office was established in the city of New York. The offices of assistant secretary and attorney and counselor for the corporation were created, and an order passed for holding monthly meetings of the board of trustees. The following, among other, officers of the corporation were elected at a meeting held March 30th: Moritz Meyer, president; Pelham W. Ames, secretary; H. H. Thayer, assistant secretary, New York; Theodore Sutro, attorney and counselor; Union Trust Company of New York, registrars of stock in New York. Mr. Sutro was present at this meeting, and stated that he did not expect to be fully remunerated at once; that he was willing to accept a contingent fee; that if he should be successful he anticipated a reasonable compensation in the future, but he thought he should be allowed a reasonable sum for expenses. It was then voted that he should have the sum of \$1,000, and should receive \$400 per month on account from April 1, 1887. The question of his ultimate compensation was discussed by the board, but it was deemed advisable not to make any agreement of record at that time. On the 26th of April a written agreement was entered into by four of the trustees, viz. Meyer, Landers, Wilson, and Roedig, as parties of the first part, and Theodore Sutro, party of the second part, which, after reciting at length the existing condition of the affairs of the Sutro Tunnel Company, contained the following covenants: "First. The said party of the second part hereby promises and agrees to devote all his time, energy, and attention to the interests of said company and of its stockholders, both in his capacity as attorney and counselor of the company and as its general adviser, and also as its agent and representative in endeavoring to secure the said contemplated loan with a view of extricating the company from its present legal complications and financial embarrassment, and for said purposes to spend his time either in New York, California, Nevada, or elsewhere, as circumstances may require. Second. The said parties of the first part hereby promise, agree, and undertake, on behalf of said company, that in case said party of the second part shall be finally successful in settling the said foreclosure suit, or in obtaining a discontinuance thereof, or a final adjudication thereof in favor of said company, the said company shall, by vote of the said parties of the first part as trustees thereof, pay to the said party of the second part, for and as his compensation, a sum of money equivalent to five cents a share on the capital stock of said company, consisting of two million shares, namely, the sum of one hundred thousand dollars, less whatever sum or sums may in the mean time be allowed or paid to said party of the second part on account of his said services. Nothing herein shall be construed so as to make the undersigned individually liable in any respect, the covenants and promises aforesaid being made only in their character as trustees of such company."

The other trustees had full knowledge of this agreement, and each admitted that the amount named was reasonable, but for personal reasons, then satisfactorily explained, declined to sign it. At a meeting of the board held April 27th the trustees ratified the acts of Sutro in employing Messrs. Wilson and Tauszky as attorneys. They also passed the following resolution: "Whereas, this board deems it necessary that this company should take immediate measures to raise a sum of money, not exceeding \$2,000,000, in order to place this company upon a sound financial basis, and for the purpose of developing its property and general interests, and as it may be advisable for the company to issue mortgage bonds for said purpose, now, therefore, resolved, that Theodore Sutro be appointed the true and lawful attorney in fact for this company, for it, and in its name and stead, to contract for the issuance of coupon or other bonds of said corporation in a sum not exceeding \$2,000,000, and at a rate of interest not exceeding six per cent. per annum, to be secured by mortgage upon all its lands and other properties of every kind for a time not exceeding thirty years, and upon such terms and conditions as he shall deem to be for the best interests of the corporation, and to enter into, on behalf of the corporation, and as its act and deed, all agreements and contracts which may be necessary or advisable in the premises,"—and authorize the president and secretary to execute a power of attorney authorizing Sutro to act for the corporation, as requested by Mr. Sutro. Sutro was voted \$2,500 to enable him to proceed under the power of attorney. During Sutro's stay in California he was diligent and zealous in his efforts to procure an extension of time to appear and defend the McCalmont suit, and had numerous consultations with opposing counsel on that subject, and discussed the probabilities of finally agreeing upon an amicable settlement of the suit. He also secured the aid of Mr. Ames, the secretary of the corporation, to try and bring about the desired results. Telegrams were sent to parties in New York and London, but all his efforts proved unavailing. On the 21st of March the court denied leave to stockholders to intervene. The case was to be tried April 4th. At that time Mr. Sutro appeared and obtained leave to amend the answer, and an extension of time was given for the taking of additional evidence. An order was also made, by consent, that the receiver should pay to the McCalmonts the amount of money in his hands, less the sum of \$25,000, and to pay each month thereafter the net amount of the receipts, without prejudice to the defense in said suit. Continued efforts were made to bring about a settlement. Sutro wrote letters to Alexander & Green, the counsel who had full charge and control of the case for the McCalmonts. These negotiations, letters, and telegrams continued for several months. On July 6, 1887, Mr. Sutro received a reply from Alexander & Green, as follows: "In answer to your letter to us, dated May 21, 1887, we beg to say that the complainants are willing to accept the following proposition made by you on behalf of your client, the Sutro Tunnel Company, the defendant herein, namely: That the tunnel company pay in cash, before the 1st day of January, 1888, the entire amount of the principal of the advances made by the complainants, together with interest thereon from the respective dates of each advance at and after the rate of 6 per cent. until the time of payment, less such sums as have already been paid, or may hereafter be paid, over by the receiver under the order of the court dated April 4, 1887, to the complainants herein; and that the cause shall continue uninterruptedly in its regular order, except that the actual trial of the cause and the issues therein shall not be moved at any term prior to January, 1888; and that if the company shall fail to pay the amount of the principal of the advances of the complainants, with interest at 6 per cent., less any deductions from the amount paid by the receiver, as aforesaid, on or before January 1, 1888, our clients shall be released from their acceptance of the proposition of settlement, and the stipulation signed in this cause shall become immediately null and void; and upon the further understanding that, in case of your failure to carry out the proposed settlement, the rights of the complainants shall not in any way be prejudiced, nor their standing in the litigation in any way affected, by reason of their

having accepted your proposition, or by reason of the signing of the stipulation herein.”

The substance of this agreement was telegraphed to the board of trustees on the 13th of July. Several of the trustees and stockholders expressed their approval of the terms. On the 16th of July the executive committee of the stockholders in New York addressed to Theodore Sutro, attorney, etc., the following letter:

“Dear Sir: The stockholders of the Sutro Tunnel Company being anxious to learn the result of your investigations into its property and affairs, and what has been accomplished on their behalf in the pending foreclosure proceedings, and also your opinion as to the best course to be pursued by them, we would respectfully request you to prepare and issue, at your earliest convenience, a detailed report about these matters.

“Yours, truly,

H. R. Baltzer, Chairman,
H. H. Thayer, Secy. & Treas.,
Otto Lowengard,

“Executive Committee of the Stockholders.”

In reply Mr. Sutro made a lengthy report, which was published in book form, consisting of 198 pages, containing, in detail, everything he had done, and setting forth in glowing colors the present and prospective value of the property owned by the corporation, and making an appeal to the stockholders to come forward and save the property for their own benefit and advantage by complying with his proposed plan to settle the litigation. The report shows: That the main tunnel was begun October 19, 1869, and had cost, up to the time of its completion, to the Comstock lode on September 1, 1878, in round figures, \$3,500,000, and that, with interest added since the beginning of the work and expenses since February, 1882, it was safe to assume that the entire cost of the main and lateral tunnels and other appurtenant property belonging to the company would amount to \$10,000,000. That the main objects of the Sutro tunnel were to drain the mines on the Comstock lode, to give ventilation, to transport ore through it from the mines to the mills (and incidentally to transport waste rock to and beyond the mouth of the tunnel, and to transport men, material, and machinery to and from the mines), and to explore, through a vast network of underground tunnels and drifts, the whole mineral belt from the mouth of the tunnel to and about and beyond the Comstock lode. That the title to this property, its rights and franchises, was derived—First, from the legislature of the state of Nevada (St. Nev. 1864-65, p. 128); and, second, from the congress of the United States (14 Stat. 242). That the first payment of royalty was made in September, 1879, and that yearly payments have since been made as follows:

From September, 1879, to March 1, 1880.....	\$ 35,732 79
“ March 1, 1880, “ “ “ 1881.....	45,498 23
“ “ “ 1881, “ “ “ 1882.....	19,177 38
“ “ “ 1882, “ “ “ 1883.....	47,627 84
“ “ “ 1883, “ “ “ 1884.....	71,515 75
“ “ “ 1884, “ “ “ 1885.....	125,622 81
“ “ “ 1885, “ “ “ 1886.....	174,183 11
“ “ “ 1886, “ “ “ 1887.....	254,009 29
Total	\$773,367 20

The prospective income is estimated at \$250,000 per year, and “likely, in the course of time, to approximate two or three times, or even ten times, said sum.” The amount of the McCalmont claim for principal, and simple and compound interest, is figured up as making a total of \$2,023,833.44, and it is stated that the costs and expenses of the receiver, and of a sale of the property, if decree should be enforced, would bring it up to \$2,300,000. The stockholders are informed that by making a cash payment of about \$1,000,000 they can accomplish the extinguishment of this debt. In the appeal to the stockholders, Mr. Sutro, among other things, said: “The best policy, unquestionably, is to settle this litigation upon the basis at which we have

now arrived. Among the plans which have been discussed for the purpose of raising money for such settlement, one was that of levying an assessment. That would be the simplest process, as it would free the company at once from debt. But, aside from other considerations against it, the Sutro Tunnel Company has never, since its existence, levied any assessment, and, in my opinion, it would be fairer not to compel the stockholders to put additional money into this enterprise without some immediate return or ample security. Moreover, I do not consider it advisable to imitate the baneful example of mining companies by establishing a precedent for levying assessments on Sutro Tunnel shares. The best plan, and the most advantageous to the stockholders, would undoubtedly be to give them the opportunity to become the creditors themselves by advancing to the company, in some proportion to the number of shares held by each, a sufficient sum of money, so that the sum total advanced by all the stockholders may be equal to what shall be required, not only for the purpose of settling the mortgage claim in suit, but of developing the company's property and resources to the fullest extent; in return for such advance made by each stockholder, the company to execute an income or other bond equivalent to the amount of each loan." And the report closes with this statement: "We think that we have done our part. The stockholders are now in a position readily to save their property. They, alone, will be to blame, should they fail to do their duty." Two thousand copies of this report were printed, and a copy was sent to every stockholder whose address could be ascertained, and to all the principal bankers, brokers, newspapers, and libraries throughout the principal cities of the United States and Europe. Advertisements were published in seventeen New York, one Chicago, one St. Louis, one Boston, one Philadelphia, and one Baltimore daily papers, requesting stockholders to send in their names to H. H. Thayer, in order that they might obtain a copy of Sutro's exhaustive report. During the summer and fall of 1887, Mr. Sutro carried on a voluminous correspondence with Mr. Ames, the secretary, and other of the trustees and prominent stockholders, as to the best method of raising money. On August 28th, Sutro wrote to Ames that he had commenced negotiations with bankers in New York, "with the idea of possibly forming some kind of a syndicate to assist in placing the loan, and have met with a fair degree of success, although so far no definite result has been reached." He subsequently wrote Mr. Ames that he must consider all letters addressed to him in his official capacity as secretary as intended for the whole board. During the months of September, October, and November, Mr. Sutro interviewed many of the prominent bankers, brokers, stockholders, and merchants in New York, and wrote several letters to others elsewhere, in relation to his plans for obtaining financial assistance, informing all parties that no definite plans had been agreed upon, but that a guaranty syndicate seemed to him to be the most feasible, and kept up his correspondence with the board of trustees, informing it of everything he was doing, and asked for broader powers to be given him, so as to enable him to meet emergencies that might arise. Additional powers were given him by a resolution passed by the board at a special meeting held October 17th. This, however, was not deemed sufficient, and Mr. Thayer, the assistant secretary, sent a telegram to the board that Mr. Sutro should be given the widest latitude and fullest discretion, and that restrictions might cause fatal delay at a critical period, and requested the board to make the fewest possible. This correspondence resulted in the passage of the following resolution by the board on October 20th: "Resolved, that full power and authority be, and is hereby, given to said Theodore Sutro to contract for and on behalf and in the name of this company for the issuance or execution by this company of any form of bonds and security, or either, of whatsoever kind or nature, and in whatever denominations, and in whatsoever amount, not exceeding in the aggregate the sum of three million dollars upon their face, and payable at such time or times that said Sutro may deem advisable or necessary, and to contract for any rate of interest to be paid upon said bonds, security, or loan, not exceeding six (6) per cent. per annum on the face value of such bonds or security, or on the amount of such loan, that to him may appear necessary or advisable, and to enter into and execute, for and on behalf of this company, and in its name, place, and stead, any

and all contracts, agreements, and guaranties for the sale of the bonds of this company, at such price or prices as he may determine upon, and also to enter into and execute any and all other contracts and agreements that he may deem necessary or advisable in the premises." Execution of such power of attorney was authorized and duly executed, and on the same day the board, after reciting the former resolution, "resolved, that it is the sense of this board that said Sutro do not make any contracts for the sale of any bonds to be issued by virtue of said power at a price lower than on the basis of fifty cents on the dollar for four per cent. bonds payable in thirty years."

During this time Sutro continued his correspondence with Ladenberg, Thaman & Co. and other parties, but they all declined to act upon the plans suggested by Mr. Sutro, upon the ground that the risk was too great and the security not good enough. After this, Mr. Sutro formulated a plan calling upon stockholders to advance the money pro rata. Thirty-five stockholders were invited to attend a meeting in New York. Nine attended, and appointed an advisory committee of four members. A general plan was agreed upon, to be perfected by the executive committee. Numerous meetings were held, which finally culminated in the adoption of a circular to the stockholders of the Sutro Tunnel Company, which was promulgated by the executive committee on the 15th of November, 1887, and which, after commending and approving the report of Sutro resolved, among other things: "That the following plan of reorganization, without foreclosure if possible, be, and the same is hereby adopted, viz.: An assessment of 50 cents per share is hereby levied and called for, in return for the payment of which stockholders shall receive first mortgage, thirty-year, nonaccumulative, 4 per cent., income bonds of the Sutro Tunnel Company at the rate of fifty per cent. of their face value, the bonds to be issued in denominations of \$1,000 and \$500, and fractional scrip to be issued for smaller amounts; principal and semiannual interest to be payable in New York or San Francisco, as may be determined; the authorized issue of these bonds to be \$3,000,000, to be secured by a first mortgage on the entire property of the company; the Union Trust Company of New York to act as trustee under the mortgage, but not more of such bonds to be issued at the present time than shall be absolutely necessary for realizing sufficient for settling the pending foreclosure suit and attendant expenses, and satisfying and canceling the existing and only mortgage on the property; the remaining bonds to be kept as a reserve fund, to be sold from time to time, if necessary, upon a unanimous vote of the board of trustees of the Sutro Tunnel Company, and the proceeds used for improving or extending the property in some of the particulars mentioned in the said report of Mr. Sutro to the stockholders, in the event that the surplus of the net income of the Sutro Tunnel Company, after all payments hereinafter mentioned, shall not be sufficient for such improvements or extensions. * * * Resolved, that copies of these resolutions be sent at once by the secretary of this committee to the attorney and to the trustees of the Sutro Tunnel Company for their approval and guidance, as presenting the plan desired by the shareholders."

A circular was prepared by Mr. Sutro, signed, "Sutro Tunnel Co.," and issued at the same time, appealing to stockholders to subscribe liberally for the bonds upon the plan adopted by the executive committee. These documents were extensively circulated among the stockholders. Five hundred copies were sent to Mr. Ames for distribution by the board. On November 22d, Sutro wrote Ames: That there was no time to communicate with the board, and that he therefore consented to the plan explained in the circular. That subscriptions were already coming in. That immediate action was required. That there were no hopes of obtaining any further time from Alexander & Green. That he had made arrangements with the Union Trust Company to handle the bonds on the following terms: "\$1 per \$1,000 for accepting trust and countersigning bonds, and fee of counsel, not to exceed \$50, for examining mortgage, and ½ per cent. on amount of subscriptions paid in, as compensation for issuing receipts and applying proceeds. Interest will be allowed on money paid in at 2 per cent. per annum. If an extension of time beyond January 1st, 1888, is granted, the rate of interest is to be that allowed on accounts subject to 5 days' notice. If the plan fails, and the money be re-

turned to subscribers, the trust company will charge no commission and allow no interest." That large shareholders desired him to retain Everts, Choate & Beaman, as their names as counsel in examining the bonds and mortgage would give confidence to bondholders that their rights would be looked after, as contradistinguished from those of the corporation, and asked that all his acts in the premises be ratified by the board of trustees. Such action was taken by the board, and Sutro was notified thereof by telegram on November 29th, accompanied by a request that subscriptions be also taken in San Francisco. A notice of the plan of November 15th was published in the daily papers hereinbefore mentioned, and one Washington, one Denver, and one London daily paper, and a similar advertisement was published by order of the board in San Francisco and Virginia City daily papers until December 15th. Mr. Sutro was personally very active in endeavoring to get subscribers to this plan; but it soon became evident to him, as well as others, that the necessary amount of money could not possibly be raised by January 1, 1888. Early in December he commenced corresponding with Alexander & Green with a view of obtaining an extension of time. On December 21st they informed him that no further extension could be given. In the mean time, notice was extensively given by publication in the newspapers that the time for receiving subscriptions would be extended until December 29th. The subscriptions and payments, to and including December 31, 1887, were as follows:

Form.	Face Value.	Annual Subscriptions.	Payments Made.
A	\$738,601	\$364,300 50	\$78,606 10
B	72,740	36,370 00	8,294 00
Total	\$801,341	\$400,670 50	\$86,900 10

During the year 1887, under the order of this court, the receiver had paid to McCalmont Bros. & Co. a total of \$258,000. The net amount required to settle with McCalmonts, January 1, 1888, after deducting possible payments on hand, is figured at \$944,569.73. Deducting amount subscribed, \$400,670.50, left a deficiency of \$543,899.23. The failure to meet the payment as per previous agreement of settlement released McCalmont Bros. & Co., and they therefore had the right to insist upon a trial of the foreclosure suit. The amount due on the mortgage, January 1, 1888, was \$1,438,487.92. Notwithstanding this gloomy financial showing, Mr. Sutro, with unabated zeal, determined to continue his efforts to raise the amount of money necessary to make a settlement, as previously agreed upon, because, as he states, it would be some time before the trial of the suit could be reached, and because Messrs. Alexander & Green had verbally said to him that, if he brought the cash before the day of trial, they might accept it. On January 6, 1888, Mr. Sutro wrote a letter to Messrs. Zadig, Wollberg & Co., stock brokers in San Francisco (by mistake dated January 14, 1888), informing them of the progress made in raising money from the stockholders, stating that sufficient had been subscribed to make about \$400,000 in cash; that about \$600,000 more was needed,—and, among other things, said: "I have no doubt, also, that all the shareholders will eventually come in and subscribe for the bonds, but the two million shares are literally scattered all over the world, and it would take too long to go ahead on this plan under the existing circumstances. I am therefore now, as in fact I have been for the last six months, at various periods, trying to get up a guaranty syndicate who will guaranty, on certain conditions, that the balance of the bonds will be placed. If I can present such a guaranty, within a reasonable time, to the McCalmonts, I have no doubt that they will give me sufficient time within which to pay over the actual cash on the basis of settlement heretofore arrived at." In this letter Mr. Sutro asked the firm if they would not assist in the formation of such a syndicate. This letter was shown to Mr. Landers, vice president of the Sutro Tunnel Company, and he took a copy thereof on the 14th of January. On January 9th the trustees sent Mr. Sutro the following telegram: "We are dissatisfied with present aspect of affairs, and Mr. Ames leaves for New York in a day or two, in our behalf, to consult with you. Suspend all action until his arrival." Sutro replied: "I am sure that much more important Pelham

W. Ames remain at office of the company, San Fran., Cal., for the time being. What is object,—consultation? Is there anything the matter? Everything possible being done here in full accord with committee. Will telegraph if Pelham W. Ames' presence necessary. I cannot delay negotiations now pending. Wrote yesterday." The chairman of the executive committee added: "Executive committee most decidedly indorses contents foregoing telegram." Then came a reply telegram from Vice President Landers: "Theo. Sutro must comply with instructions of board of trustees of the Sutro Tunnel Co. by telegraph, and negotiations must be delayed temporarily, Pelham W. Ames leaves tomorrow."

Telegrams came, and answers went, thick and fast, and the contents of some were considered as a deathblow to any further subscriptions. Confusion reigned supreme, the price of the shares of stock decreased, and great dissatisfaction existed among the stockholders. There was great danger of an open rupture, which would result disastrously to all concerned. Ames arrived in New York, and at once proposed to take matters into his own hands, and make a proposition to the McCalmonts through Kidder, Peabody & Co. Sutro expressed his displeasure at this unjustifiable interference with his plans. Finally they mutually agreed upon a course of action which resulted in Sutro making a proposition to Alexander & Green that was signed and approved by Ames, which, if carried out, would extend the time of payment until January 1, 1891. This proposition was immediately rejected. Mr. Ames' efforts met with failure, and he thereupon sent a telegram to the vice president that "Sutro and committee are doing as much as possible to raise money. Think I cannot disturb them unless I can devise another plan. I cannot devise any." Notwithstanding this candid statement, the board advised him to make another effort, which he did, and telegraphed results as follows: "Kidder, Peabody & Co. say they will not entertain any proposition unless made by Theodore Sutro, as attorney for the company, and in writing." The next day he reiterates his former statements that Sutro and the committee are doing their best; that "their idea is to substitute a friendly, instead of a hostile, plaintiff foreclosure suit;" and he adds that he "can do nothing except through Sutro, as he is the attorney of record." He also advised that certain sums of money be remitted to Sutro without delay. On February 6th, the sum of \$2,500, previously asked for by Mr. Ames, was sent to Sutro by the trustees. Ames returned from New York with resolutions of the committee of stockholders requesting the withdrawal of the suspension of Sutro's powers, and, after he had fully explained the condition of affairs as he found them, the board, on February 15th, passed a resolution withdrawing the telegram suspending further action upon the part of Sutro. In the meantime, McCalmont Bros. & Co. had served notice that on February 20th they would move the court to fix a day for the trial of the foreclosure suit. On February 15th, Sutro issued and distributed a circular to the stockholders, notifying them of this action upon the part of the McCalmonts, and setting forth the danger of extinction of the stock unless immediate steps were taken, and the required subscriptions at once raised. Among other things he said: "Are the stockholders willing to lose the opportunity of protecting, for one million dollars, a property which has cost ten millions, and has now an income of about one thousand dollars per day, when they can save it, and impart a substantial value to their shares, by loaning their own company 50 cents per share, and receiving in return first mortgage security on this valuable property at the rate of \$1 per share?" The next day he wrote to Alexander & Green, requesting an extension of time, which was promptly refused. On February 20th the foreclosure suit was set for trial on March 27th, and thereafter was by the court continued until May 8th, to be heard before Judges Sawyer and Sabin in San Francisco. On February 25th, the board learning that Vice President Landers was about to visit New York, passed a resolution "that Messrs. Landers and Sutro consult with each other with a view to extricate the corporation from its present embarrassments." Shortly after the arrival of Mr. Landers in New York, difficulties sprung up between him and Sutro, Sutro claiming that Landers was seriously interfering with his plans, and he vigorously protested against the action taken by Landers. In a let-

ter written to Landers March 13th, Sutro said: "I therefore desire herewith to enter my written protest against either you, or any one else, through, with or for you, interfering in the work devolving, as aforesaid, solely upon me. If you, either as a shareholder or trustee of the company, desire to make any suggestions to me in regard to what individuals to see, or what plans to adopt, I will be happy to hear such suggestions, but I protest against your doing anything in the premises without my previous concurrence. As the agreement for my ultimate compensation was made conditional upon noninterference with my work as well as upon eventual success, and as I have discharged my part of the agreement to the utmost extent up to the present time, and shall so continue hereafter, I shall treat any interference as a condition broken; and I hereby notify you that, in case of failure in what I have undertaken to complete, I shall hold you and everyone so interfering, as aforesaid, personally responsible for damages,—on my own behalf to the extent of the compensation of which I originally entered upon my labors, and on behalf of the stockholders of the company whom I represent for the full loss accruing to them. * * * The various negotiations, transactions, and steps which are requisite for a successful discharge of my duties must necessarily be, to a large extent, confidential, and not open to general discussion; and in fact many of them are under the seal of secrecy. The whole work upon which I have entered is one of extreme difficulty and delicacy, and can only be successfully performed by one person, and only if that person be neither worried nor annoyed, nor his time taken up with counteracting cross purposes and interferences, emanating from his own clients or of their said trustees." On February 28th, Sutro wrote Ames, among other things: "So much, however, has been stirred up since January 1st, against my strong protest, tending to show the probability that foreclosure cannot conveniently take place in the interest of such shareholders as have subscribed or will subscribe, that it is almost impossible now to devise any means by which to influence further subscriptions; and if the Sutro Tunnel Co. goes to the wall, and every share of stock is wiped out in the interest of the McCalmonts, I, for one, shall wash my hands of all responsibility. I am now driven in the very direction which I, myself, most of all desire to avert, but which the interferences in my plans have forced upon me as a last resort, namely, to still struggle to get together some kind of a syndicate. But even that last hope is now much less likely of meeting with success than it would have been had I not been compelled to lose so much valuable time since January 1st." During the months of January, February, and April, 1888, Mr. Sutro interviewed a number of bankers, the mine owners upon the Comstock, and millionaires throughout the country, with a view of obtaining financial help, but only succeeded in getting the consent of Seligman & Co., of New York, to consider the matter. S. M. Wilson was in New York in April. Sutro fully explained to him the situation of affairs. Mr. Wilson gave it as his opinion that the McCalmont claim could not possibly be defeated; that no longer extension of time was likely to be granted; and that, as an attorney for the Sutro Tunnel Company, he advised continued efforts to have the transfer of the mortgage made from a hostile plaintiff to a party who would protect the interest of the stockholders.

On March 5th, Mr. Sutro made another proposition to Alexander & Green, in which he recites at great length the condition of affairs, and outlined a new plan of issuing bonds. In due time the answer came that his proposed plan could not be entertained. His suggestions were not agreed to, but he was informed that if he was able to pay \$250,000 in cash, and give a sufficient guaranty that the balance would be paid on or before January 1, 1889, it would be submitted, and might have a favorable consideration from the McCalmonts. On April 27th, the executive committee held a meeting, and passed certain resolutions declaring that it had been utterly impossible to obtain the necessary funds to settle the foreclosure suit, or to form a syndicate guarantying or advancing sufficient funds until the present time; that it is believed that a settlement may be effected if the money can be raised before foreclosure; that the final hearing of the suit has been peremptorily set down for May 8th, and that no further postponement thereof can be obtained,—and ordered notice to be given as follows: "To Subscribing Stock-

holders of the Sutro Tunnel Company: Pursuant to our notice of January 12, 1888, the balance of your subscription is hereby called to be paid to the Union Trust Company, No. 73 Broadway, New York, between May 2d and May 5th next, inclusive, and you are requested to deposit your stock with said trust company, together with your temporary receipt. By such payment and deposit you will be considered as assenting to the plan of reorganization described in circulars of November 15, 1887, and April 27, 1888, which latter circular may be had by applying to room No. 123, New York Produce Exchange. Subscriptions at the rate of fifty cents are now closed." This notice was extensively advertised in various daily newspapers. The circular referred to in the notice set forth the condition of affairs, stated what would be done when the syndicate was formed, requested further subscriptions, and closed with the statement that "a compliance with the terms of this circular will be regarded as your assent to the reorganization plan, with foreclosure if necessary, and also to all the other terms of this circular, and of the circular of November 15, 1887." This circular, with a form of authorization to the Union Trust Company changing their subscriptions, was sent to every subscribing stockholder. It does not affirmatively appear that any of the circulars were sent to the trustees in their official capacity, or that any communication was sent to them by Mr. Sutro in regard thereto. It does, however, appear that their term of office was soon to expire. The annual meeting of stockholders for the election of a board of trustees was held May 3d. Prior to that meeting, Mr. Sutro, in connection with the committee of stockholders in New York, secured sufficient proxies to control the election, and he decided to make a radical change in the board. At the meeting there were stockholders personally present representing 35,973 shares. Mr. Lillenthal held the Sutro proxies, representing 1,117,889 shares, and Mr. Landers had proxies for 26,210 shares. The following trustees were elected, viz.: Theodore Sutro, Horace H. Thayer, P. N. Lillenthal, George E. Butler, Milton B. Clapp, Frederick A. Benjamin, and Edmund Tauszky. Theodore Sutro was elected president and attorney and counselor, Pelham W. Ames was reelected secretary. On May 7th the executive committee held a meeting, and prepared and adopted the following letter to Theodore Sutro: "Dear Sir: The understanding on the part of our committee of the terms upon which you undertook to defend the rights of the Sutro Tunnel stockholders in the pending foreclosure suit threatening their existence as such was that you were to receive a fee contingent upon your final success. Before you left New York for San Francisco, in February, 1887, we understood that the amount of said fee was to be one hundred thousand dollars (\$100,000), and was not to be dependent in any way upon your securing a reduction of the claim of the McCalmont mortgage or of your raising funds to satisfy said claim, but was based simply upon the condition precedent of your final success in preventing the foreclosure of said mortgage by and in the interest of the present mortgagees, and which would result in the exclusion of all the stockholders of the Sutro Tunnel Company. In presenting you this written statement of the understanding between us we desire to take the opportunity to place upon record, as well as to convey to you, an expression of our estimate and appreciation of your services in behalf of your clients, the stockholders whom we represent. We feel that these services have been arduous, exceptional, extraordinary, and distinguished, combining at once, as they have, services legal, literary, financial, and practical, requiring abilities of a superior order. Since the time when you were with difficulty persuaded to take general charge of the interests of the stockholders of the Sutro Tunnel Company and their rights in the foreclosure proceedings,—almost a year and a half ago,—you have given thereto incessant thought, untiring industry, and energy, unwavering fidelity and devotion, and a fertility of resource which have brought new life and bright prospects to financial interests which were almost universally looked upon as beyond all hope of redemption. In view of the magnitude of these interests and of the results obtained, the obligation of your clients to you can hardly, in our opinion, be estimated at its true value." The executive committee also agreed to pay Seligman & Seligman, attorneys, the sum of \$25,000 as a contingent fee for their services in relation to the syndicate. On May

8th, at a meeting of the executive committee, Messrs. Baltzer and Lowengard were nominated and appointed as the two members of this committee to serve, in accordance with the terms of the syndicate agreement, upon the reorganization committee provided for in said agreement. When the foreclosure suit was called for hearing, May 8th, after some discussion between counsel, it was mutually agreed to submit the case on briefs; the complainants to have 30 days to present the opening, the respondents to have 30 days to reply, and complainants 30 days thereafter to file closing brief. The order was so made. The syndicate agreement, which was signed and executed on June 12, 1888, reads as follows:

"Whereas, there is now pending against the Sutro Tunnel Company, a corporation organized under the laws of the state of California, a certain suit in equity in the United States circuit court for the district of Nevada, brought by McCalmont Bros. & Co., of London, to foreclose a certain mortgage upon the property of said corporation; and whereas, a certain agreement of settlement arrived at before January 1, 1888, whereby, before said date, the said mortgage claim could be settled upon payment by the said Sutro Tunnel Company to the said McCalmont Bros. & Co. of a certain sum in cash, the terms of said agreement being contained in certain letters, copies of which are set forth on pages 144 to 151, and 158 to 163, of a certain printed report by Theodore Sutro to the stockholders, which report is dated July, 1887; and whereas, said McCalmont Bros. & Co., the complainants in said suit, have, notwithstanding the expiration of said limit of time for making the aforesaid settlement, expressed their willingness to accept the same basis of settlement of their claim, and have, upon the application of the parties hereto, and in consideration of immediate cash payment, agreed to sell, assign, and transfer their said mortgage for a still lower sum than that arrived at in the aforesaid proposed settlement; and whereas, the said foreclosure suit is now about to be finally submitted for the decision of the court, and may result in a decree in favor of said complainants at an early day; and whereas, the Sutro Tunnel Company has heretofore, in conjunction with a committee of stockholders called 'executive committee' endeavored to raise the necessary sum to settle said mortgage claim, on the aforesaid basis of settlement arrived at before January last, by offering its certain bonds to its stockholders, as more fully set forth in the printed circular hereunto annexed, marked 'Schedule A,' but has failed to raise the required sum, owing to the fact that the greater part of its shareholders have not subscribed for said bonds on said plan; and whereas, about \$450,000 cash have heretofore been subscribed for, and twenty per cent. thereof paid at the Union Trust Company of New York, on the plan set forth in said printed circular, A, hereunto annexed, and of said sum over \$400,000 paid in full on the modified plan set forth in the printed circular hereunto annexed, marked 'Schedule B,' and it is believed that all of said subscriptions will shortly be made good, and the balance thereof paid in on said modified plan: Now, therefore, we, the undersigned, hereinafter called the syndicate, do hereby, each for himself, and not one for the other, covenant and agree to and with each other, and to and with Herman R. Baltzer, Otto Lowengard, Theodore Seligman, P. C. A. M. Van Weel, and Gordon MacDonald, hereinafter called the 'reorganization committee,' that we, the undersigned, do hereby form and constitute ourselves a syndicate, and do hereby guaranty payment for the bonds hereinafter mentioned to the Union Trust Company of New York, at the rate of fifty per cent. of their face value, and to the extent of the several sums set opposite our respective signatures, for the uses and purposes, and upon the terms and conditions, hereinafter set forth, namely: First. The members of the syndicate shall not be bound to their subscriptions hereto unless the Sutro Tunnel Company shall agree to do all acts, and execute all instruments, necessary and proper to the complete carrying out on its part of this agreement, nor unless the sum total of such subscriptions hereto shall amount to the sum of \$550,000, nor unless said McCalmont Bros. & Co., the complainants in said foreclosure suit, will, upon payment to them in cash of the balance due them upon the said reduced basis of settlement hereinafter mentioned, assign and transfer the mortgage and deed of trust and cause or causes of action for which the said foreclosure suit is brought, and

all other claims, demands, or causes of action, contracts, agreements, stipulations, or other obligations, if any, in their favor, against the Sutro Tunnel Company in any wise connected with said mortgage and deed of trust or said foreclosure suit to the said reorganization committee, or to such person or persons as may be appointed by said committee, to be held by said committee or its appointee for the uses and purposes and trusts hereinafter set forth; said committee or its appointee to be substituted as complainant in the pending foreclosure suit. Second. An opportunity shall at the earliest convenient date, upon proper notices, be given to the shareholders of the Sutro Tunnel Company who have not yet assented to the plans of reorganization set forth herein, and in the said annexed circulars, to assent, and pay to the Union Trust Company, in trust, an assessment at the rate of 55 cents per share; the number of said notices, and the limit of time stated in each notice, to be in the discretion of the reorganization committee: provided, however, the opportunity thus to be given to shareholders shall not absolutely cease until the expiration of not less than thirty days after the first publication of the first of said notices. Should the reorganization committee, upon the expiration of said period, grant further opportunities to shareholders to assent, it may, in its discretion, advance the rate of the assessment. It is understood and agreed that in the event of any of the present subscribing shareholders not assenting also to the plan of reorganization as herein and in annexed circular B set forth, or in the event of their assenting thereto and not paying in full the respective amounts heretofore subscribed by them, then the syndicate shall have the first option of purchasing at 50 per cent. of their face value, the bonds not paid for by said shareholders. Each assenting shareholder shall, upon payment of his assessment, present his certificate of stock to the Union Trust Co. for deposit, and shall be entitled to receive proper certificates or receipts therefor. Third. In case said assessment shall be paid upon all shares of stock of the Sutro Tunnel Co. by shareholders, or upon a sufficient number of shares, so that the syndicate shall, in their opinion, be sufficiently reimbursed for, and relieved of, their said guaranty, then said mortgage so to be assigned by said McCalmont Bros. & Co. shall be satisfied and discharged of record, and the foreclosure proceedings against the Sutro Tunnel Company under the said McCalmont mortgage shall be discontinued; and in that case the reorganization of the Sutro Tunnel Company shall be completed substantially on the plan set forth in the annexed circular marked 'A,' and in that event the syndicate shall receive from the Sutro Tunnel Company, in consideration of the aforesaid guaranty, and the aforesaid further reduction obtained from McCalmont Bros. & Co. for immediate cash payment, by way of commission, fifty thousand (\$50,000) dollars cash, and income bonds, of the description contained in said annexed circular A, to the amount of 200,000 dollars face value. The 5 or more cents which, as aforesaid, shall be paid in by assenting shareholders, over and above 50 cents per share, shall be applied on account of said commission to the syndicate, said cash to be deemed equivalent to double its amount in bonds; and the shareholders of the Sutro Tunnel Company shall receive similar bonds at the rate of one dollar face value for every 50 or more cents per share paid in, as the case may be. Fourth. In case said assessments shall not be paid upon all shares of stock of the Sutro Tunnel Company, or shall not be paid upon a sufficient number of shares, so that the syndicate shall, in their opinion, not be sufficiently reimbursed for, and relieved of, their said guaranty, then the said person or persons to whom said McCalmont Bros. & Co. shall assign their said claim in trust as aforesaid shall, upon the request of the reorganization committee, proceed with the foreclosure of said mortgage so to be assigned, sold, and transferred in trust; and in case of a decree against, and sale of, the property of the Sutro Tunnel Company, and if no competition shall arise at said foreclosure sale, said property shall be bid in by the reorganization committee for as low a sum as practicable for the benefit of the syndicate and such shareholders as shall have paid the aforesaid assessments. Thereupon a new company, with the same number of shares as the present company, shall be formed, and shares of stock and bonds of the same description contained in said annexed circular marked 'A' shall be issued in such new company, and distributed as follows: To each shareholder who shall have assented by paying in said assess-

ment (50 or more cents per share, as the case may be) there shall be issued the same number of shares as those on which he shall have assented as aforesaid, and also income bonds of the description contained in annexed circular, A, at the rate of \$1 face value for every such share of assenting stock. To the syndicate there shall be issued the same number of shares as the number of nonassenting shares, and also income bonds, of the aforesaid description, sufficient to represent the said nonassenting shares at the rate of \$1 face value for every such share of nonassenting stock; and the syndicate shall also receive, by way of commission for the guaranty herein made, and for the other considerations heretofore mentioned, the following, namely: Fifty thousand dollars cash, and income bonds of the aforesaid description of a face value of 200,000 dollars; the 5 or more cents which, as aforesaid, shall be paid in by assenting shareholders, over and above 50 cents per share, shall be applied on account of said commission to the syndicate, said cash to be deemed equivalent to double its amount in bonds. Fifth. In case competition in bidding should arise at said foreclosure sale, the reorganization committee shall, if necessary, bid as high for the property of the company as the full amount of any decree which may be obtained, with the addition of all taxable costs and disbursements, or may bid such higher figure as said committee may hereafter determine. But if the property shall be bid in by other parties, so that a reorganization of the company should become impossible, then the sum realized from said sale shall be applied in the first instance to paying all legal and other attendant expenses and disbursements of the litigation and foreclosure, and of the proposed reorganization herein-after mentioned in article 7th, and to paying the aforesaid cash and bond commission to the syndicate, the bonds to be paid for at the rate of 50 per cent. of their face value. The balance realized from said foreclosure sale shall be applied to the satisfaction of the decree, for its full amount, for the sole benefit of the syndicate and of assenting shareholders, in proportion to the number of bonds of the two million dollar issue to which they severally would have been entitled had the reorganization plan herein set forth been fully carried out; and after such payments, as aforesaid, the balance, if any, of the proceeds of said foreclosure sale, shall be distributed among all the shareholders of the Sutro Tunnel Company in proportion to the number of shares held by each. Sixth. In case subscriptions heretofore received from income bonds of the foregoing description from nonshareholders of the Sutro Tunnel Company shall be accepted under the plan set forth in annexed circular A, then bonds for such subscriptions by nonshareholders shall be issued out of the said bond commission by the syndicate, at the rate of 50 per cent. of the face value of said bonds. Seventh. It is understood and agreed that the moneys which, under this agreement, shall be paid to the Union Trust Company by the syndicate and by subscribers to the said bonds, shall be applied towards obtaining an assignment and transfer from said McCalmont Bros. & Co., for the purposes hereinbefore mentioned, of the mortgage held by them and now in suit, and that any surplus cash remaining in the hands of the reorganization committee after such payment to said McCalmont Bros. & Co. of the requisite sum, and after buying the property at foreclosure sale, in case that should become necessary or advisable, shall be applied in equal proportions to the following payments, namely: Towards paying to Theodore Sutro the sum mentioned in a certain letter addressed to him by the present executive committee of the stockholders, dated the 7th day of May, 1888, and, as appears from said letter, heretofore agreed upon as a contingent fee to be paid him as compensation for his services on behalf of the shareholders of the Sutro Tunnel Company, as chief counsel, manager, and promoter, in saving the company's property from foreclosure and sale by and in the interest of the present complainants, and which would result in the exclusion of all the shareholders of the Sutro Tunnel Company, and towards paying to Seligman & Seligman, of the city of New York, as a contingent fee, the sum mentioned and agreed upon in a certain letter addressed to them by said executive committee, dated the 7th day of May, 1888, for their services in promoting and organizing a syndicate, and their services in connection therewith, and towards paying the remaining legal and other expenses of the litigation, and of the proposed reorganization of the Sutro Tunnel Company, including the cash commission to the syndicate, and the

compensation to the executive and reorganization committees mentioned in certain letters dated the 12th day of June, 1888, addressed by said committees to the Suto Tunnel Company. The balance, if any, of said fees and other attendant expenses and commissions shall be paid by the present company, or by such company as may be formed after foreclosure, in equal proportions, in cash, out of the first net earnings, after having set aside the necessary sum for paying the next due interest coupon on its bonds. Eighth. The aforesaid reorganization committee shall consist of five members, namely, Herman R. Baltzer and Otto Lowengard, who have been chosen by the aforesaid executive committee of shareholders, and Theodore Seligman, P. C. A. M. Van Weel, and Gordon MacDonald, who have been chosen by the syndicate. Said reorganization committee shall represent the assenting shareholders and the syndicate as attorneys in fact, to sign all agreements and instruments necessary and proper to be executed in the premises, to issue all notices of the foregoing plan, and otherwise to act for and on behalf of the assenting shareholders and of the syndicate in all matters necessary and proper to be done under the terms of this agreement. Said reorganization committee shall have general charge and discretion, on behalf of the syndicate and assenting shareholders, in regard to all matters connected with the proposed reorganization, and shall act upon a vote of the majority of all its members. In case of the resignation, death, or permanent incapacity of any member of said reorganization committee, the place of such member, if one of the two appointed by said executive committee, shall be filled by said executive committee, and, if one of the three members appointed by the syndicate, shall be filled by the syndicate. Ninth. As soon as the aggregate of the several sums subscribed hereto shall amount to \$550,000, the members of the syndicate shall pay the amount of their several subscriptions in cash, as required, and called by the reorganization committee. In case the full amount of the guaranty hereby made, or any part thereof, shall be made good through cash payments by shareholders of the Suto Tunnel Company, on the plan of the said assessments, as hereinbefore provided, or through bond subscriptions and cash payments by others, then said cash, as soon as received, shall be returned to the several members of the syndicate. Tenth. Interest at the rate of six per cent. per annum shall be allowed on all sums paid in cash by the syndicate from the date of payment until said cash shall be returned to the syndicate, or interest shall begin to run on the new bonds delivered to it. Eleventh. The net profit in cash or securities, or both, resulting to the syndicate in the premises, shall be divided among the members thereof in proportion to their respective subscriptions hereto. Twelfth. Any of the matters hereinbefore mentioned as to be decided by the syndicate, as such, shall be decided by a vote of a majority in interest of all the members of the syndicate. In witness whereof the members of the syndicate and of the reorganization committee have hereunto set their hands and seals, and the members of the syndicate the amount of their respective subscriptions opposite their several signatures, at the city of New York, the 12th day of June, 1888.

Amount cash.

"J. & W. Seligman & Co.....	\$135,000
"Robert Fleming (Dundee, by J. and W. Seligman & Co., Attorneys)	105,000
"P. C. A. M. Van Weel.....	100,000
"Geo. W. Stern.....	110,000
"H. Stursberg.....	25,000
"Ladenberg, Thalman & Co.....	25,000
"H. P. Goldschmidt & Co.....	15,000
"Maitland Phelps.....	10,000
"E. W. Clark & Co.....	10,000
"J. & W. Seligman & Co.....	15,000
"H. R. Baltzer.	
"Otto Lowengard.	
"Theodore Seligman.	
"P. C. A. M. Van Weel.	
"Gordon MacDonald.	

"We, the executive committee of the shareholders of the Sutro Tunnel Company, for ourselves and such stockholders as we represent, hereby assent to all the terms and conditions of the foregoing syndicate agreement.

"New York, June 12, 1888. H. R. Baltzer, Chairman.

"Otto Lowengard.

"H. H. Thayer, Secretary and Treasurer."

On the same day (June 12th) the executive committee met and approved the syndicate agreement. The members of the committee also agreed to accept, for their agreed compensation of \$15,000, the sum of \$5,000 in cash, and for the balance to purchase certificates issued by the Union Trust Company at the price of 65 cents. The members of the reorganization committee, Seligman & Seligman, and Sutro, attorneys, agreed to similar terms; and with reference to Mr. Sutro it was agreed, in consideration of such change in his compensation, that he should be "retained as president of such new company at a monthly salary of not less than five hundred dollars." These propositions were agreed to by Mr. Sutro, "without prejudice, however, to any rights or defenses of the Sutro Tunnel Company in the pending foreclosure suit against it." The facts are that Mr. Sutro received in cash the sum of \$40,000; he received bonds at \$92,000, face value, at 50 per cent., \$46,000; he received 92,000 shares of stock at 15 cents per share, \$13,800; and a further cash payment of \$200,—making a total of \$100,000. On the 21st of June, the syndicate paid to the Union Trust Company the sum of \$550,000. The amount previously paid in by the subscribing stockholders was \$397,890.50, making a total in the hands of the Union Trust Company of \$947,890.50. The Union Trust Company on the same day (June 21st) paid to the representatives of McCalmont Bros. & Co. the sum of \$800,000, and the mortgage was thereupon assigned and transferred to the Union Trust Company, which then had a balance on hand of \$147,890.50, which was transferred to the credit of the reorganization committee. It should be stated in this connection that the payments made by the receiver had reduced the amount due the McCalmonts in their offer of settlement to the sum of \$800,000, and that that sum was the amount due, independent of all sums of money paid by the receiver. On June 22d, Mr. Peckham, of counsel for the Union Trust Company, notified the trustees of the assignment of the mortgage. On July 12th, Mr. Sutro arrived in San Francisco. On July 14th, the Union Trust Company was substituted, in place of McCalmont Bros. & Co., as complainant in the foreclosure suit. The time for the Sutro Tunnel Company to file its brief had been previously extended until July 23d. On July 21st, Mr. Sutro telegraphed to Mr. Seligman, attorney for the reorganization committee, for further time, and received a telegram in reply: "Time file brief extended 30th; time stockholders subscribe present price will not be extended unless company allows decree full amount claimed be entered without delay." Mr. Sutro testified that he was in San Francisco from July 12th to October 18th, and during that time the matter of the approval of the syndicate agreement and consent to a decree in the foreclosure suit "were fully discussed and considered at great length, and almost daily, from the time of my arrival in San Francisco until these events of the approval of the syndicate agreement and the consent to the entry of the decree actually took place, both at interviews with Mr. S. M. Wilson, Mr. Edmund Tauszky, and also especially with a Mr. Jarboe, of Messrs. Jarboe, Harrison & Goodfellow, a firm of attorneys in San Francisco, and also with Mr. Philip N. Lillenthal, the vice president of the company, and also with other members of the board, and were also fully discussed and considered at meetings of the board of trustees (the dates of which appear in the records of the company prior to the taking place of these events of the approval of the syndicate agreement and consent to the decree. The discussions and consideration of these matters between Messrs. Jarboe, Lillenthal, and myself were very long, and the matters considered from every point of view, in so far as the interests of the Sutro Tunnel Company were concerned. More especially were, in these discussions, the interests and rights of the stockholders considered who had not, as yet, contributed their proportion to the sum required of them under the subscription plan. I may

say, in general, in answer to this question, that these various matters about which I have spoken were most carefully and elaborately considered and discussed, and constantly kept in view, at every interview and at every meeting of the board at which I was present at that period. I may say that the one point was always uppermost in these discussions, namely, what, under the circumstances, the board of trustees had best do to give a further chance to the Sutro Tunnel Company, and all its stockholders, to retain their property." Upon cross-examination, when questioned with reference to the employment of Mr. Jarboe, he testified: "I found, after talking to Mr. Lillenthal, that he was a man of exceptionally strong character and independent views, and he told me that he would only do what he thought was absolutely right and proper, and from every point of view, legal and otherwise, for the utmost interest of the Sutro Tunnel Company, and that he did not care whether J. & W. Seligman & Co. or any other people had gone into the syndicate; that he was a trustee of the Sutro Tunnel Company, and vice president of the company, and he would not, under any circumstances, consent to any such action unless he, at all events, was convinced, after the most careful consultation with his own counsel, and wholly independent of the counsel for the Sutro Tunnel Company, that it would be proper for him, after such advice, and in pursuance of such advice, to consent to the entry of a decree or to the approval of any syndicate agreement, or to any of the measures which came up in the course of my discussions with him after my arrival in San Francisco. I told him that I did not think it was necessary to enlist the services of Mr. Jarboe, because I took exactly the same position which he did, and would under no circumstances ask him or advise him or any one to do anything which I was not absolutely and bona fide convinced was for the absolute good, and the only hope and chance, for the Sutro Tunnel Company or its stockholders to retain the property; but that, as a matter of course, I did not stand in the way of getting all possible light on the subject, and that, if he wanted to retain Mr. Jarboe, or any attorney in San Francisco, I would be only too glad to advise with him further, or to have him advise with him independently of myself, and as often, and to any extent, that he might see fit; and in that way Mr. Jarboe was consulted about the matter by Mr. Lillenthal." The board of trustees of the Sutro Tunnel Company held meetings every day from August 6th to 10th, both days inclusive. At the meeting on the 6th, Mr. Sutro was present, and made a report, as attorney for the company, as to the status of the foreclosure suit, and among other correspondence between Mr. Sutro and Messrs. Haggin & Dibble, of counsel for complainants in the foreclosure suit, presented the following letters, viz.: First, a letter from Sutro, dated August 2d, as follows: "In answer to your favor of this morning, I desire to make the following proposition of settlement herein, subject to ratification and confirmation by the board of trustees of the Sutro Tunnel Company, and without prejudice to the rights of the defendant, should this proposition not be accepted, viz.: That the defendant consent to the entry of a decree in favor of complainants, pursuant to the terms of the mortgage in suit, on the following conditions: First, that the complainant waive all demands for interest upon interest; second, that all moneys heretofore paid by the defendant, whether on account of interest upon interest or otherwise, and also all moneys paid by the receiver herein under the order of court, up to the entry of the decree, be credited to the defendant; third, that if the defendant shall pay to the complainant, within ninety days after entry of the decree, the amount paid to the former complainants for the mortgage in suit, with the addition of such interest on said amount, attendant expenses and commissions, as may be approved by the board of trustees of the defendant, the judgment shall be satisfied of record, and, if the property of the defendant shall have been sold within said period, and shall have been bid in by the complainant, said complainant shall reconvey the same to the defendant upon like payment by the defendant; fourth, that within said period of ninety days there be given to such stockholders as have not yet subscribed for the bonds of the Sutro Tunnel Company, heretofore authorized to be issued, an opportunity to do so upon due notice, in order to raise the money with which to make the aforesaid payment, and that payment by means

of said subscriptions to said bonds shall be deemed payment by the defendant." To which Messrs. Haggin & Dibble replied, on August 4th, as follows: "We have this day (at 3:45 p. m.) received the following telegram from Wheeler H. Peckham, Esq., counsel for the Union Trust Co.: 'Sutro's offer declined. If company consent to decree with compound interest, complainant will credit all money heretofore paid by company or receiver; will accept face of decree with interest within ninety days before [from] entry of decree, without the eighteen per cent. penalty; will give stockholders ninety days' further time to assent at slightly higher rate. If this offer is not forthwith accepted, stockholders will not be given further right to assent, or, if given, it will be at much higher rate, and complainant must press for a decree forthwith, which please do;" and it was "therefore resolved that this board does not deem it to the interest of the company to accept the proposition contained in the last of the foregoing letters from the solicitors of the complainant, and rejects the same, but that it will entertain the above proposition made by the attorney of the company, but defers present consideration thereof; resolved, that the attorney of the company is hereby instructed to communicate the substance of the foregoing preamble and resolutions to the solicitors for the complainant."

The records of the board do not show that any reference was made to the syndicate agreement at this meeting, but on the next day the record shows that a letter from Messrs. Haggin & Dibble had been received, in reply to the decision of the board, the day before, "which substantially assents to Mr. Sutro's previous proposal, except that they ask that the syndicate agreement be ratified, and that the price at which stockholders will be allowed to subscribe is stated." At the meeting held August 9th, the following letter was read, placed on file, and spread upon the minutes of the board:

"San Francisco, August 6, 1888.

"To the Board of Trustees of the Sutro Tunnel Company—Gentlemen: In accordance with your request for our written opinion and advice on the following matters we herewith state: First. That in our opinion the levying of an assessment upon the shares of the stock of the Sutro Tunnel Company issued as unassessable would be of doubtful validity. We therefore advise against such course. Second. That in our opinion the proposed settlement of the foreclosure suit pending against the company set forth in the annexed preambles and resolutions is for the best interests of the company and its stockholders. We therefore advise the board to make such settlement. Yours, truly,

S. M. Wilson,
 "Theodore Sutro,
 "Edmund Tauszky,
 "Of Counsel for the Company."

Whereupon, the following resolutions were adopted: "Whereas, the attorney of this company has laid before this board certain correspondence between himself and the solicitors of the Union Trust Company of New York, the present complainant in the pending foreclosure suit against the company, looking to a settlement thereof; and whereas, this board deems it for the best interests of this company and its stockholders, and is advised by its counsel, to wit, by S. M. Wilson, Theodore Sutro, and Edmund Tauszky, to make such settlement on the following conditions, viz.: That this company consent to the entry of a decree in favor of said complainant, pursuant to the terms of the mortgage in suit, provided—First, that the complainant waive all claims for interest upon interest; second, that all moneys heretofore paid by this company, whether on account of interest upon interest or otherwise, and also all moneys paid by the receiver herein, under order of court, up to the entry of the decree, be credited to this company on account of the sum due in pursuance of the terms of the mortgage: Now, therefore, resolved, that this board hereby consents that a decree shall be entered in accordance with said terms, and the attorneys of the company are hereby directed to consent to such entry."

At the meeting held on the 10th of August the letter of Mr. Peckham, dated June 22, 1888, notifying the company of the assignment of the McCalmont mortgage to the Union Trust Company, was read and spread upon the min-

utes, together with various other letters and documents relating to the matter. The board, after reciting the facts that Sutro, under his power of attorney, consented to the syndicate agreement in so far as it relates to non-foreclosure; that the Union Trust Company had advanced the necessary funds, not subscribed by the stockholders, with which to effect the transfer of the mortgage to the Union Trust Company; and that "one of the conditions of the proposed settlement of the pending foreclosure suit against the Sutro Tunnel Company is that this board should ratify and approve the aforesaid syndicate agreement: Now, therefore, resolved, that the said syndicate agreement is hereby ratified and approved in so far as it relates to nonforeclosure of the property of this company." At the date of this ratification the subscriptions and payments of the stockholders were as follows:

Rate.	Form.	Number of shares.	Payments.
50c.	A	878,772	\$439,386
	B		5,342
55c.		377,807	207,793 85
Totals		<u>1,256,579</u>	<u>\$652,521 85</u>
Deduct 5c. penalty			18,890 35
			<u>\$633,631 50</u>

On the same day (August 10, 1888) a stipulation was entered into that a decree be entered in the foreclosure suit in favor of the Union Trust Company for \$1,419,544.22, that being the full amount due on the mortgage after deducting all sums of money paid thereon by the Sutro Tunnel Company and by the receiver. The order of the court for a decree of foreclosure in pursuance of this stipulation was made on the 13th of August, though not entered until October 1, 1888. The interest from the 10th to 13th of August was added, and the decree was for \$1,420,209.46, and declared to be a lien upon the mortgaged property, which was ordered to be sold by the United States marshal, who was appointed master for that purpose. On October 1st, Mr. Sutro prepared the following advertisement: "The Sutro Tunnel Company hereby gives notice to such of its stockholders as have not yet subscribed to its bonds that judgment has been entered in the long-pending suit for foreclosure of mortgage in favor of the complainant. One condition of said judgment, however, is that all the shareholders who have not yet subscribed to the new bonds of the company shall have 90 days from October 1, 1888, to save their interest by paying, for the first 30 days, 55 cents, and, for the next succeeding 60 days, 60 cents, per share, on all shares owned by them, for which they will receive the new bonds of the company at the rate of \$1 for each 55 or 60 cents so subscribed. Any shareholder who does not subscribe for these bonds within this period of 90 days must necessarily lose his interest in the property of the company. All subscriptions, together with the shares, properly indorsed, must be sent to the Union Trust Company, No. 73 Broadway, New York. For circulars and further information apply to the offices of the company, 320 Sansome street, San Francisco, and Room 123, Produce Exchange, New York,"—which was by the order of the board of trustees published in the New York, San Francisco, and Virginia City papers, once a week, for three weeks. The next day Mr. Sutro issued a circular to the stockholders, explaining more in detail the condition of affairs, giving a statement of the receipts and disbursements of the company for a number of years, and closing with the suggestion that the "new bonds will be a desirable investment." The trustees ordered 3,000 circulars to be printed, and a copy sent to each stockholder, who had not subscribed to bonds, whose address was known, and to be generally circulated by the president, which was done. On October 3d, the reorganization committee issued a circular to the stockholders, embodying substantially the same terms stated in the advertisement of Sutro, and the same statements as contained in the Sutro circular, and closing as follows: "By complying with the terms of this circular you will be regarded as having assented to all the terms and conditions of the said circulars of the executive committee dated, respectively, November 15, 1887, and April 27, 1888." This circular was ex-

tensively advertised. The final results of the subscriptions show that the total amount paid in was \$750,741.25, which, after making the reductions on account of penalties, etc., left the amount \$723,998.50. The total number of shares of the Sutro Tunnel Company represented in the subscriptions was 1,447,997, leaving the number of shares that did not subscribe at 552,003.

On January 14, 1889, due and proper notice having been previously given, the master sold the property of the Sutro Tunnel Company, under the decree of the court, to the Union Trust Company for \$1,325,000, that being the highest bid therefor. The master in due time made his report, and the court ordered that the report and sale "be absolute and binding forever, and that they stand as in all things ratified and confirmed." The master was ordered to execute a deed to the purchaser, which was accordingly done, on the 2d day of August, 1889. On August 31, 1889, the Comstock Tunnel Company was incorporated, under the laws of the state of New York, with a capital stock of \$4,000,000, divided into 2,000,000, shares of the par value of \$2 each. On October 10th, Mr. Theodore Sutro was elected president, and H. H. Thayer secretary and treasurer, of this corporation. On October 19th, the Union Trust Company deeded to the Comstock Tunnel Company all the property purchased by it at the foreclosure sale, and the Comstock Tunnel Company executed a mortgage to the Union Trust Company to secure the payment of the bonds of the company to an amount not exceeding \$3,000,000. The Comstock Tunnel Company issued \$2,139,000 face-value bonds, which were distributed as follows:

To subscribing stockholders	\$1,448,012
To subscribers who were not stockholders.....	10,594
To the syndicate.....	538,394
To Theodore Sutro	92,000
To Seligman & Seligman.....	25,000
To H. H. Thayer	5,000
To Otto Lowengard	5,000
To Gordon MacDonald	5,000
To P. C. A. M. Van Weel.....	5,000
To H. R. Baltzer	5,000

Total bond issue, face value..... \$2,139,000

On December 12, 1889, a decree for the deficiency in the foreclosure suit, amounting to \$101,365.13, was regularly entered. The property of the Sutro Tunnel Company, consisting of certain real estate not included in the mortgage, was subsequently sold under a judgment obtained by the state of Nevada for delinquent taxes, to the Comstock Tunnel Company for \$789.97.

R. E. Houghton (Wm. F. Herrin and H. L. Gear, of counsel), for complainants.

Edmund Tauszky and W. E. F. Deal (Pierson & Mitchell and Pillsbury & Blanding, of counsel), for respondents.

HAWLEY, District Judge (after stating the facts as above). The legal questions involved in this case may be classified under four heads: (1) Jurisdiction; (2) failure of trustees to levy an assessment; (3) position of complainants, and their participation in the plans formulated by Sutro; (4) questions relating to charges of fraud, conspiracy, and violations of trust and confidence.

1. Respondents contend that this court has no jurisdiction of this case (1) because none of the complainants or respondents are residents or citizens of the state of Nevada, and there are aliens, and also citizens of the same state, on both sides of the controversy; and (2) that the doctrine of ancillary jurisdiction is not applicable to the facts of this case. After the filing of the an-

swers, the respondents moved the court to dismiss the bill upon the same grounds. This motion was heard before the circuit judge, and by him denied in a brief opinion, as follows:

"This is a motion to dismiss the bill for want of jurisdiction, on the ground that some of the complainants and respondents are citizens of the same state, and some of the parties on both sides are aliens. The bill is filed, however, to set aside a decree, in the same court, of foreclosure of a mortgage and sale, and confirmation of the sale, of the Sutro tunnel, on the ground of various frauds alleged, by means of which the proceedings are said to have been accomplished. I think that this is but an appendage of, or a suit supplementary and ancillary to, the prior suit. It is but a renewal and continuation of the prior litigation. It is within the cases of *Dewey v. Gas Coal Co.*, 123 U. S. 329, 8 Sup. Ct. 148; *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27; *Pacific R. Co. v. Missouri Pac. Ry. Co.*, 111 U. S. 505, 4 Sup. Ct. 583; *Johnson v. Christian*, 125 U. S. 643, 8 Sup. Ct. 989, 1135; *Railroad Co. v. Soutter*, 2 Wall. 440, 510; and *Jones v. Andrews*, 10 Wall. 327. Indeed, the suit could not well be effectually prosecuted in any other court. The court has jurisdiction under these authorities. Let the motion to dismiss be denied."

I therefore decline to review this question.

2. The first question presented by respondents relates to the failure of the trustees of the Sutro Tunnel Company to levy an assessment upon its shares of stock. It is charged in complainants' bill that the trustees wholly disregarded their duty to raise, by lawful assessment upon the shares of the company, the sum required to complete the payment for the McCalmont mortgage, and, in violation of their duty, consented to the guaranty of its bonds by the syndicate, and authorized Theodore Sutro, at his instigation and request, to stipulate with the Union Trust Company for the entry of the decree of foreclosure, and for the sale of all the property of the Sutro Tunnel Company. After setting out at length the provisions in the syndicate agreement that if the necessary amount of money was raised by the subscriptions of the stockholders, or if the Sutro Tunnel Company should pay to the Union Trust Company, "within ninety days after the actual entry of the decree, the amount paid to the former complainants for the mortgage in suit, less the amount which should have been paid over by the receiver up to the expiration of said 90 days, * * * that then the said judgment and decree should be discharged and satisfied of record," etc., the bill further avers "that the said board of trustees allowed the said ninety days to elapse without levying any assessment upon the stock of said Sutro Tunnel Company to repay the amount advanced by said syndicate for the purchase of said mortgage, and allowed the said property of said Sutro Tunnel Company to be sold under said decree, and allowed the time for redemption under said decree to expire, and allowed the sale of said property to be confirmed, without redeeming the said mortgage, pursuant to said stipulation or otherwise, or lawfully providing any means for said redemption, as it might and ought to have done by assessment upon the stock of said company."

It is difficult to see why the charge of neglect of duty in this respect should be made against the trustees in office in 1888, in-