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SYNOPSIS OF THE ANSWER

—OF—

The Comstock Tunnel Company

AND OTHERS

IN THE SUIT OF

Frank J. Symmes and Others

AGAINST

The Union Trust Company of New York

AND OTHERS

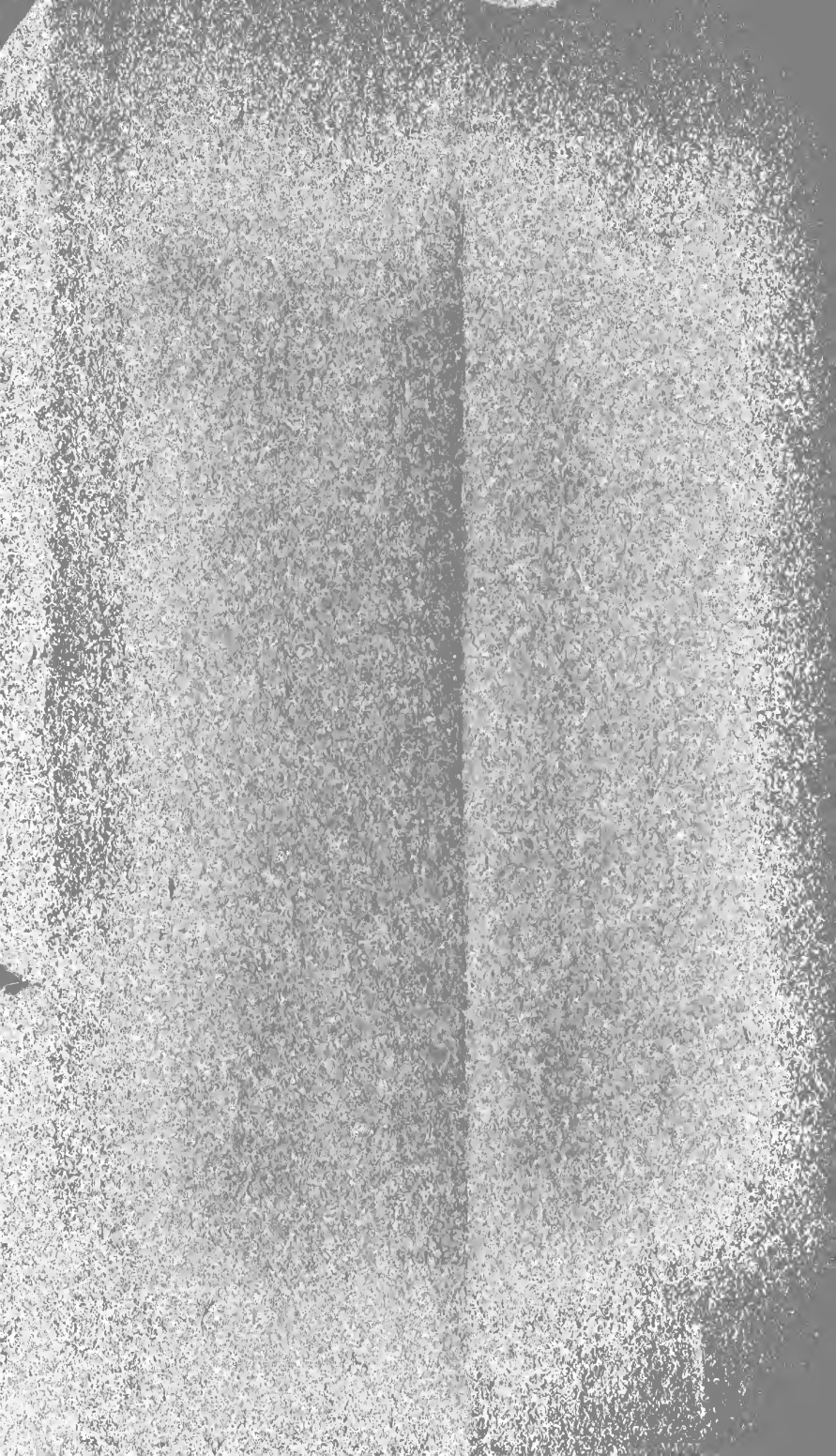
PENDING IN THE

CIRCUIT COURT OF THE UNITED STATES,

DISTRICT OF NEVADA.



1890



To the Stockholders of The Comstock Tunnel Company:

A suit in equity has been brought in the Circuit Court of the United States, District of Nevada, by Frank J. Symmes, Joseph Aron and F. H. Wheelan, claiming to be stockholders of the Sutro Tunnel Company, against the Union Trust Company of New York, the Comstock Tunnel Company, the Sutro Tunnel Company, the Trustees of the Sutro Tunnel Company, the Executive Committee of stockholders of the Sutro Tunnel Company, the Reorganization Committee, and the Guaranty Syndicate.

The main purpose of this suit, as stated in the bill of complaint, is to have it declared that The Comstock Tunnel Company holds the legal title to the rights and property formerly owned by the Sutro Tunnel Company, as the constructive Trustee of the Sutro Tunnel Company, and that, in equity, the conveyance of said title, rights and property to The Comstock Tunnel Company under and in pursuance of foreclosure proceedings against the Sutro Tunnel Company, is a mortgage to secure the payment of an alleged indebtedness of the Sutro Tunnel Company, the amount of which it is sought to have ascertained, upon an accounting which is asked for, and which ascertained indebtedness the complainants seek to have evidenced by the bonds of the Sutro Tunnel Company, which they pray that the Trustees of that Company may be ordered to issue: the effect of this would be, that the shares of stock of the Sutro Tunnel Company which complainants claim to own, and upon which they have not made the payments called for by the plan of reorganization of the Sutro Tunnel Company,

would be of the same value as the shares of the large majority of the stockholders who have, in good faith, paid their proportion in cash towards such reorganization.

The bill of complaint in this suit contains so many misstatements and misrepresentations, all of which have been widely circulated through the public press and otherwise, that I herewith give you a synopsis of the answer (retaining its language as far as practicable) of the principal defendants in the suit, which contains the first full and correct statement of *all* the FACTS involved in the controversy, that has yet appeared in print, and which, in my judgment, is in itself a complete refutation of the unwarranted charges, and fully disposes of the groundless demands, of Mr. Symmes and his fellow-malcontents.

THEODORE SUTRO,

President of The Comstock Tunnel Company.

San Francisco, Cal., April 28th, 1890.

In the Circuit Court of the United States, Ninth Judicial
Circuit, in and for the District of Nevada.

FRANK J. SYMMES and others, Complainants,

vs.

THE UNION TRUST COMPANY OF NEW YORK,
and others, Respondents.

**SYNOPSIS OF THE ANSWER OF THE COMSTOCK
TUNNEL COMPANY AND OTHERS.**

The defendants admit that any demand upon the Trustees of the Sutro Tunnel Company, to institute any action in the name of said Company, to accomplish the objects in the bill of complaint sought to be secured, would be wholly fruitless, inasmuch as all the acts of said Trustees, of which the complainants complain, so far as the same are admitted to be true by said answer, were done by them in the exercise of the utmost good faith and of their best judgment and discretion, for the interest and benefit of the Sutro Tunnel Company and all its stockholders, and inasmuch as the majority of the stockholders have co-operated with said Trustees to subserve its interest in the manner adopted by them, which was the only manner possible to subserve it; and inasmuch as in the judgment of said Trustees, the claims and pretensions of complainants, as set forth in their bill of complaint, are totally unfounded and without right, justice, or equity, and any suit or action instituted in the name of the Sutro Tunnel Company, to accomplish the objects sought to be secured by said bill of complaint, would fail, and subject said company to great injury, cost and expense.

The Sutro Tunnel Company is a corporation, formed on November 30th, 1869, under an Act of the Legislature of the State of California, entitled "An Act to provide for the formation of corporations for certain purposes," approved April 14th, 1853, and the Acts amendatory thereof and supplementary thereto. Immediately after its incorporation, it acquired, by purchase, all the rights, privileges, franchises, and property granted to Adolph Sutro and associates, their successors and assigns, by an Act of the Legislature of the State of Nevada, entitled "An Act granting the right of way and authorizing A. Sutro and his associates to construct a mining and draining tunnel," approved February 4th, 1865; and by an Act of the Congress of the United States of America, entitled "An Act granting to A. Sutro the right of way, and granting other privileges to aid in the construction of a draining or exploring tunnel to the Comstock Lode, in the State of Nevada," approved July 25th, 1866.

The capital stock of the Sutro Tunnel Company is fixed at twenty millions of dollars, divided into two million shares, at ten dollars each; and the full amount thereof was subscribed by various persons.

Every certificate of stock ever issued by said company had and has written across its face the word "unassessable;" and ever since the organization of the company, its stock has been purchased by *bona fide* purchasers for value, relying upon the representation on the face of the certificates that the stock is unassessable; and the stock has been sold and purchased in open market in various cities of the United States on such representation, and the by-laws of the company, regularly adopted, provide, and have always provided, that the stock shall be and is unassessable. Before Theodore Sutro sanctioned the plans, or any of them, hereinafter set forth, or consented to the raising of money by subscription to bonds, and before the Sutro Tunnel Company consented to the entry of any decree in the foreclosure suit hereinafter mentioned, the company asked for and obtained legal advice upon the question whether, its former representations to the effect that its stock is unassessable notwithstanding, it could levy and enforce the collection of

an assessment upon its stock; and it was advised by its attorneys that any such assessment would be of doubtful validity; and was further advised by them against such course, and acted upon the legal advice so asked and obtained; and it was and is the opinion of Theodore Sutro, and of the Trustees of the Sutro Tunnel Company, that said stock is and was at all the times herein mentioned, unassessable.

The complainant, Joseph Aron, has and had standing in his name upon the books of the Sutro Tunnel Company, at the time of the alleged transactions of which the complainants complain, 10,100 shares of said capital stock; Frank J. Symmes has and had standing in his name, since about the 31st day of December, 1887, 4250 shares; and F. H. Wheelan has and had standing in his name, since about the 10th day of November, 1888, 250 shares.

One of the principal objects of the incorporation of the Sutro Tunnel Company, was to construct a tunnel with a double track railroad therein, for the purpose of draining, ventilating, and carrying out the ore from the mines on the Comstock Lode and other lodes, in the State of Nevada.

During the progress of the construction of said tunnel, to wit: on January 4th, 1877, the Sutro Tunnel Company made and delivered to McCalmont Brothers & Company (a co-partnership composed of Hugh McCalmont, Robert McCalmont, and William Johnstone Newall) of London, England, a mortgage upon the tunnel and all branches and extensions thereof, and upon all other things, rights, franchises and property then belonging to said company, or thereafter to belong to it, during the continuance of said mortgage, to secure the payment of advances then made and thereafter to be made by McCalmont Brothers & Company, for the construction of said tunnel, and for the purposes of the business of said Sutro Tunnel Company. On the 28th day of March, 1878, the Sutro Tunnel Company made a supplemental agreement in writing, with McCalmont Brothers & Company, in which it was acknowledged that moneys had been advanced under said mortgage up to the 25th day of March, 1878, amounting in the aggregate to the sum of

\$433,965.10, and agreed that said Sutro Tunnel Company should, on or before January first, 1891, pay said sum and all further sums which McCalmont Brothers & Company, or any of them or their successors, should thereafter lend or advance to it, or for its benefit, with interest at the rate of 12 % per annum from the first day of January, 1879, payable half-yearly thereafter, the whole amount to become due and payable upon default being made in the payment of interest thereafter falling due.

On September 1st, 1880, the then Board of Trustees of the Sutro Tunnel Company adopted a resolution that interest at the rate of one per cent. per month should be allowed, and be and become payable to McCalmont Brothers & Company by the Sutro Tunnel Company, on all overdue and unpaid installments of interest, accrued, accruing and to accrue according to the tenor of said mortgage, and that such interest on interest be secured by it, the same as though expressed in the mortgage; and the Secretary of the Company was thereby instructed to enter and keep, in its books, the interest account on said mortgage, in accordance with said resolution; and he did, in fact, keep such account; and the company did, in fact, thereafter make payments of such interest on interest in accordance with said resolution, amounting to \$74,156.74.

On the 22d day of March, 1886, Hugh McCalmont and William Johnstone Newall, claiming as the survivors and successors in interest of said firm, commenced a suit against the Sutro Tunnel Company, for the foreclosure of said mortgage and of said supplemental agreement, and alleged in their complaint that on the first day of January, 1881, said company made default in the payment of interest due and owing upon the principal sum thereby secured, whereby the whole principal sum, together with the interest thereon, had become due and payable; and that there was due and unpaid, in addition to the principal sum of \$433,965.10, in said supplemental agreement, dated March 28th, 1878, acknowledged to be then due and payable, the further sum of \$563,887.42, for further advances which had been subsequently made by the plaintiffs under said agreement, be-

tween the first day of April, 1878, and the 12th day of November, 1883, making the total of the principal due, \$997,852.52, and that interest was due and unpaid upon said principal sums up to and including the first day of January, 1886, aggregating the further sum of \$604,301.96.

The amount of principal and interest claimed by said complainants to be due on the first day of January, 1886, aggregated the sum of \$1,602,154.48; and between the first day of January, 1886, and the 22d day of March, 1886, when said suit was commenced, further interest became due and was unpaid, amounting to the sum of \$34,451.69, making the aggregate amount of the claim of McCalmont Brothers & Company, for principal and interest, on the date of the commencement of their suit, \$1,636,606.17.

Said complainants prayed in their bill of complaint that the amount due under said mortgage and agreement, be ascertained, and that the Sutro Tunnel Company be decreed to pay the principal and all arrears of interest due and to become due, as in said bill of complaint alleged. They further prayed that a Receiver be appointed, with the usual powers of Receivers in like cases, and on the 31st day of March, 1886, William Johns, then Vice President of the Sutro Tunnel Company, was appointed Receiver in said cause, to receive the mortgaged property, and to hold all the estates, property, and effects of the company, and carry on, conduct, and operate the same and the business to which the same appertains, and to exercise and use the rights, privileges, and franchises forming a part thereof, for the best interests of all parties concerned, and subject to the order and direction of the Court.

On July 5th, 1886, the company made answer in said suit. The taking of evidence on behalf of the complainants, was commenced on the seventh day of October, 1886, and they introduced the resolution of September 1st, 1880, in evidence, and claimed interest at the rate of one per cent. per month on all overdue and unpaid installments of interest accrued, accruing and to accrue on said mortgage and supplemental agreement, by virtue of said resolution; and the balance claimed to be due for such interest on interest amounted, at

the time of the commencement of said suit, to the sum of \$167,529.36, so that the total amount claimed by them, for principal, interest, and interest upon interest, was, at the time of the commencement of said suit, \$1,804,135.53; no evidence was then offered or introduced on behalf of the Sutro Tunnel Company, and shortly prior to the first day of January, 1887, the evidence was closed. On the first day of January, 1887, the suit was ready for final trial, and was about to be tried, and such trial would inevitably have resulted in a decree in favor of McCalmont Brothers & Company, for the full amount claimed by them, and for the foreclosure of the mortgage and supplemental agreement, and further resulting in the entire loss of all the property of the company to it and to all of its stockholders.

Between March, 1884, and the same month of 1887, no election of Trustees was had, there never having been, during said period, a majority of the stock represented at the annual meetings. The Board of Trustees in office during said period, and prior to the 28th day of March, 1887, were of the opinion that there was no defence to the mortgage or foreclosure suit, and that foreclosure could not be delayed or avoided; the amount claimed by McCalmont Brothers & Company was so great that most of the holders of shares of stock, who also believed that there was no defence to said suit, and that the foreclosure could not be delayed or avoided, manifested little or no interest in the affairs of the company and took no steps to save its property from foreclosure.

A short time previous to January 1st, 1887, a few of the numerous stockholders, among whom were Horace H. Thayer, Otto Loewengard, Herman R. Baltzer, and Herman Stursberg, interested themselves in the affairs of the company, and consulted Theodore Sutro, an attorney, residing, and having his office, in New York City, with a view to saving its property and rights to the stockholders, as against foreclosure in favor of McCalmont Brothers & Company; as a result of such consultation, and on the advice of Theodore Sutro, a meeting of the stockholders was called for and held on the 12th day of January, 1887, in New York City. At

that meeting, stockholders, representing about 165,000 shares were present, and took the first steps towards saving the property to all the stockholders; Herman R. Baltzer, Horace H. Thayer and Otto Loewengard were appointed as an Executive Committee, to further the interests of all the stockholders who would co-operate with and join them in their efforts to save the property for such stockholders, and such Executive Committee thereafter represented and bound those stockholders, who co-operated with and joined it in its efforts, and who ratified and assented to its action. Theodore Sutro was employed as attorney by said stockholders for the purpose of protecting their rights and the rights of all other stockholders who would co-operate with and join him and them in their efforts and plans to save the property for the benefit of said stockholders, and also to take general charge of their interests and rights in the foreclosure proceedings; and it was agreed and understood between Theodore Sutro and the stockholders who employed him, that they should pay him the sum of one hundred thousand dollars as compensation for his services, on the condition precedent of his final success in preventing the foreclosure of said mortgage by and in the interest of McCalmont Brothers & Company. On his suggestion, and pursuant to resolutions adopted at said meeting, a petition on behalf of these stockholders was filed in said foreclosure suit on the 29th day of January, 1887, asking leave to intervene in said suit, in order that they might assist in any defence that could possibly be made thereto, on the ground that a majority of the then Trustees of the company were under the control of, and had been elected by, and in the sole interest of, McCalmont Brothers & Company. Messrs. Samuel M. Wilson and Edmund Tauszky, attorneys, residing, and having their offices, in San Francisco, California, were retained with Theodore Sutro, as counsel for the petitioning stockholders, to argue the application. In view of the status of said cause at that time, it was necessary to act with the utmost possible expedition, and such defences were outlined in the petition for leave to intervene, as suggested themselves to said counsel, from a cursory examination of

the bill of complaint and the mortgage and supplemental agreement, there not having been time for much deliberation as to the best method to be pursued, or for a thorough or complete examination of the facts or the law of the case; and on the 21st day of March, 1887, the petition was denied.

For the year 1887, the annual meeting of stockholders under the by-laws of the company, was to take place on the 7th day of March, 1887, at San Francisco. The meeting was, however, on the motion of Theodore Sutro, who was present, adjourned until the 28th day of March, 1887, and was held on that day, and there were represented at said meeting, a total of 1,398,829 shares, of which Theodore Sutro represented, as proxy, 999,108 shares, and Edmund Tauszky, as proxy, 24,626 shares. McCalmont Brothers & Company were also represented by proxy. An election of Trustees was held at said meeting, and Moritz Meyer, Frederick Roeding, Mountford S. Wilson, John Landers, David Cahn, William Johns, and Pelham W. Ames were elected Trustees to serve for the year thence ensuing. The last two named were elected by the vote of McCalmont Brothers & Company, and the others by the vote of the stock represented by Theodore Sutro and Edmund Tauszky.

On the 30th day of March, 1887, a meeting of the newly elected Board of Trustees was held, at which Moritz Meyer was elected President, John Landers, Vice-President, Pelham W. Ames, Secretary, Horace H. Thayer, Assistant Secretary in New York, and Theodore Sutro, attorney and counselor. Theodore Sutro was voted \$1000, and the sum of \$400 per month from April 1st, 1887, as an allowance on account, but his final compensation was understood to be contingent on his ultimate success, as hereinabove set forth, and he was so elected as the general attorney and counselor of the company, to conduct and manage its legal affairs and pending litigation, in its interest and that of its stockholders, in such manner as might appear to him to be most conducive to effect the purpose to save the property for the benefit of its stockholders.

On the fourth day of April, 1887, the company, by leave of the Court, filed an amendment to its answer in said foreclosure suit, especially denying the right or power of the company to mortgage its franchise, rights, privileges, rents, dues, tolls, issues, income, profits, books of account, and vouchers, or any other personal property, and averring that at the time of the execution of said mortgage and supplemental agreement, the members of said firm of McCalmont Brothers & Company were the holders of nearly a majority of all the shares of the capital stock of the company, and combined with other stockholders therein, whereby they controlled a small majority of the shares of stock, and by means of such control and ownership elected and controlled the Trustees and officers who had voted for and executed the mortgage and supplemental agreement, and that one of them was, while such Trustee and officer, also the agent and representative of McCalmont Brothers & Company, and acting for and on their behalf, and in their interest; and that McCalmont Brothers & Company thereby secured a provision for an exorbitant and usurious rate of interest, and derived an undue and unfair advantage, and that neither the mortgage nor supplemental agreement was the act or deed of the company, and was invalid, and pleaded that the cause of action was barred by the Statute of Limitations. The amendment was prepared and filed by Theodore Sutro and the other attorneys of the company on their own suggestion, and in the exercise of their judgment as such attorneys.

On the fourth day of April, 1887, by consent of the company, an order was made in the foreclosure suit, that the Receiver pay over to McCalmont Brothers & Company the amount of money in his hands, less the sum of \$25,000 (said sum of \$25,000 always to be retained in his hands pending said suit); and that he pay each month thereafter, the net amount remaining in his hands out of the receipts of the company, after paying the general current and operating expenses thereof, all without prejudice to the defences set up; and under said order said Receiver paid to McCalmont Brothers & Company, on the 23d day of April, 1887, the sum of \$175,000, and thereafter, out of the net income,

the further sum of \$218,000, up to the date of the purchase of the mortgage, as hereinafter set forth, making, in the aggregate, the sum of \$393,000 so paid to them.

Having in view a possible settlement and compromise, and in order to be able to execute and carry out any compromise or settlement that might be made with McCalmont Brothers & Company, the company, on the 27th day of April, 1887, appointed Theodore Sutro, its attorney in fact, for it and in its name and stead, to contract for the issuance of coupon or other bonds, in a sum not exceeding two million dollars, 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 should deem to be for the best interests of the company, and to enter into, on its behalf, and as its act and deed, all agreements and contracts which might be necessary or advisable in the premises.

After the filing of said amendment to the answer, and after the taking of testimony on behalf of the company, by leave of the Court, granted on its application, and after further investigation of the defences set up, and it appearing from the testimony that McCalmont Brothers & Company had actually and in fact advanced and loaned to the company the sum of \$997,852.52, its attorneys doubted and questioned the validity or sufficiency of the defences made by it, except as to the defence to the claim for compound interest, or interest on all overdue and unpaid installments of interest, which interest upon interest the attorneys were of opinion that McCalmont Brothers & Company, could not recover, and the Trustees accordingly deemed it for the best interests of the company and its stockholders, that an effort be made to settle and compromise the litigation, if possible; and in order to effect that object, Theodore Sutro, on the twelfth day of May, 1887, opened negotiations with McCalmont Brothers & Company, through their counsel in New York City, and after numerous interviews, and prolonged correspondence, and after various propositions had been made to said complainants by said

Sutro, on behalf of the company, and rejected by said complainants, they finally, on the 12th day of July, 1887, agreed to accept a proposition made by said Sutro on the 21st day of May, 1887, to the effect that the company pay to them, in cash, before the first day of January, 1888, the entire amount of the principal of the advances made by them to it, together with interest thereon from the respective dates of each advance at the rate of six per cent. per annum until the time of payment, less such sums with like interest thereon as had then already been paid or might thereafter be paid to them, either by the Receiver under the order of the Court, made April 4th, 1887, or by the company, and that if the company should fail to pay the amount of the principal of the advances, with interest at six per cent. per annum, on or before January 1st, 1888, less any sums paid by the company and by the Receiver, as aforesaid, McCalmont Brothers & Company should be released from their acceptance of the proposition, and should be no longer bound by the agreement, and their rights should not in any way be prejudiced, nor their standing in the litigation in any way affected, by reason of their having accepted the proposition. Theodore Sutro made this settlement and compromise under and by virtue of his appointment, election and authority as attorney and counselor of the company.

In the month of July, 1887, Theodore Sutro, as such attorney, issued an elaborate report to the stockholders, in which he set forth the then condition of the company, its then present and prospective income and expenses, and his efforts up to that time in behalf of the stockholders, and suggested to and urged upon all the stockholders a plan by which each of them should subscribe to a new loan to the company, with which to cancel the McCalmont mortgage under the most favorable settlement which could be procured, which settlement had, on the 12th day of July, 1887, been procured by him, as hereinabove stated, and the terms of which, and the negotiations resulting in which, and the then status of the litigation to foreclose which mortgage, were fully set forth in the report.

Immediately after procuring the agreement for a settlement, Theodore Sutro entered into negotiations and conferred with many capitalists, bankers and moneyed men, but notwithstanding his most diligent and strenuous efforts, was unable to obtain any loan on the credit of the Sutro Tunnel Company for making the settlement; and thereupon, and with a view of assisting him, and pending his negotiations for obtaining such loan, prepared and issued his report of July, 1887.

At a meeting of the Board of Trustees of the Sutro Tunnel Company, held on the 17th day of October, 1887, the Board consented to the issuance, by the company, of non-accumulative four per cent. income bonds, and to the sale of the same at not less than fifty cents on the dollar, and provided that if Theodore Sutro, as the attorney in fact of the company, enter into agreements on its behalf for the issuance and sale of such bonds, the Board would ratify and confirm such issuance and sale, and direct and authorize the execution of the necessary powers for such purpose. At a meeting of the Board held on the 20th day of October, 1887, the power and authority of said Sutro, as such attorney in fact, under the power given him on the 27th day of April, 1887, was further extended and he was given full power and authority to contract on behalf and in the name of the company for the issuance or execution by it, of any form of bonds and security, or either, of whatsoever kind and nature, and in whatsoever 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 might deem advisable or necessary, and to contract for any rate of interest to be paid upon such bonds, security, or loan, not exceeding six per cent. per annum on the face value of such bonds or security or the amount of said loan, that to him might appear necessary or advisable, and to enter into and to execute, on behalf of the company, and in its name, place, and stead, any and all contracts, agreements and guaranties for the sale of its bonds at such price or prices as he might determine upon, and also to

enter into and execute any and all other contracts and agreements that he might deem necessary or advisable in the premises. Said Board, however, further adopted a resolution that it was the sense of the 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 a basis of fifty cents on the dollar for four per cent. bonds, payable in thirty years.

On November 15th, 1887, the Executive Committee issued and recommended to the stockholders a plan of reorganization, without foreclosure if possible, and upon the recommendation of Theodore Sutro, its attorney in fact, the Board of Trustees of the company, on the 29th day of November, 1887, adopted and agreed to carry out said plan, by which the stockholders were to be asked to subscribe the sum of fifty cents per share for first mortgage, thirty year non-accumulative four per cent. income bonds of the company, at the rate of fifty per cent. of their face value, the bonds to be issued in denominations of one thousand dollars and five hundred dollars, and fractional scrip to be issued for smaller amounts, principal and semi-annual interest to be payable in New York or San Francisco, as might be determined, the authorized issue of these bonds to be three million dollars, 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 bonds to be issued at that time than should be absolutely necessary for realizing sufficient funds for settling the then pending foreclosure suit and attendant expenses, and satisfying and cancelling 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, and the proceeds used in improving or extending the property in the event that the surplus of the net income of the company should not be sufficient for such improvements or extensions. Two subscription lists, designated as A and B, to be opened at the office of the Union Trust Company; list A to be open for subscription to shareholders only, at the rate of fifty cents per share, until De-

ember 15th, 1887; and list B to be open to shareholders and to the public generally, for receiving subscriptions to any amount, at the price of fifty per cent. of the face value of the bonds, subscriptions on this list, of shareholders appearing as such of record, December 12th, 1887, to have precedence over those of others, the right being reserved of scaling down, rejecting or closing subscriptions on list B. Each subscription on either list to be accompanied by a cash payment of ten per cent. of the face value of the bonds, to be forfeited, unless the balance of the subscription should be paid when called for. The Union Trust Company to give receipts upon payment of the amounts of subscription, which should state that the bonds, when ready and received by it, would be delivered to the subscribers, and the sums subscribed primarily used for paying off the existing mortgage; and that, unless at least enough should be finally subscribed to cancel the existing mortgage and settle the pending foreclosure suit on a basis of about \$1,000,000, which must be done before the new bonds could be issued, subscriptions were to be canceled, and all payments refunded to subscribers in full. Interest at the rate of four per cent. per annum to be allowed by the Sutro Tunnel Company on all amounts from date of payment to date of the bonds.

Full publicity and notice of this proposed plan were given, in as extensive a manner as possible, to the stockholders, by publications, notices and advertisements in newspapers published in the principal cities in this country and in Europe; and copies of the plan and forms of subscription blanks were distributed as widely as possible, and a copy thereof sent to each stockholder whose residence was known or could be ascertained, in order to give the stockholders the fullest opportunity to subscribe; and the report of Theodore Sutro, which was referred to in, and made part of, said plan, was also circulated as widely as possible, and a copy thereof was sent to each stockholder whose place of residence was known or could be ascertained, and every endeavor and exertion was made, and every possible effort used, to induce all of the

stockholders of the Sutro Tunnel Company to subscribe for the bonds, and to avail themselves of the settlement made by Theodore Sutro with McCalmont Brothers & Company, before the first day of January, 1888, when, according to its terms, as hereinbefore and in the report of Theodore Sutro stated, McCalmont Brothers & Company would be released if the same had not been complied with before that time.

The complainants, and each of them, had notice and opportunity as above set forth and described, to subscribe for the bonds, and had full means of knowledge of all the proceedings taken on behalf of the Sutro Tunnel Company and its stockholders in the premises, and could have availed themselves thereof had they seen fit so to do.

The efforts and exertions of Theodore Sutro, and also of the Executive Committee, notwithstanding, only about \$400,000 had been subscribed under this plan by stockholders representing about 800,000 shares, before the first day of January, 1888. There never was enough subscribed under this plan to compromise the mortgage claim or settle the foreclosure suit, and it not having been settled on the basis of about one million dollars, under the settlement of July 12th, 1887, previous to January 1st, 1888, and a sufficient amount not having been subscribed by stockholders, either previous or subsequent to said date, under said plan, to effect a compromise or settlement, and although the company never expressly and in terms canceled the subscriptions to its bonds, or authorized the return of any money paid thereunder, yet, the subscriptions having been conditional, and the condition never having been fulfilled, the money paid thereon never became or was the property of the Sutro Tunnel Company, and the subscriptions were *ipso facto* and in law canceled, and all the subscribers were thereupon entitled to the return of the money subscribed and paid by them; but subsequently, and before the assignment of the mortgage, as hereinafter stated, the subscribers in good faith assented to the new plan of the Executive and Reorganization Committees, hereinafter set forth, and consented that their payments on their subscriptions should be retained by the Union Trust Company of New

York, and applied to the purchase and assignment of the mortgage under the new plan for the benefit of the stockholders so assenting, and of the syndicate hereinafter mentioned. No other settlement than that which has been hereinabove mentioned, was made by Theodore Sutro or by any one else on behalf of the company, or by the company, and McCalmont Brothers & Company, at any time, either previous or subsequent to January 1st, 1888, and under the terms of the settlement of July 12th, 1887, McCalmont Brothers & Company were released therefrom, and the rights of the Sutro Tunnel Company therein, terminated, on January 1st, 1888.

Both prior and subsequent to January 1st, 1888, Theodore Sutro made every possible effort to induce McCalmont Brothers & Company, their counsel and agents, to extend the time for payment under the settlement, beyond January 1st, 1888, or to agree to some other or different plan or arrangement for the settlement or compromise of the foreclosure suit, but they wholly refused to do so.

At a meeting of the Board of Trustees of the company, held on January 9th, 1888, Pelham W. Ames, the Secretary thereof, and one of its Trustees, elected as such Trustee by the vote of McCalmont Brothers & Company, was authorized and directed to proceed from San Francisco, where the office of the company is and then was, to the Cities of New York and Boston, where Theodore Sutro and the counsel and agents of McCalmont Brothers & Company, respectively, had and have their offices, to consult with Theodore Sutro, who was then in New York, as to the best course thereafter to be pursued on behalf of the company; and on the 30th day of January, 1888, the Board authorized said Ames to interview the representatives of McCalmont Brothers & Company, and to endeavor to obtain their consent to some arrangement mutually satisfactory, which it would be possible for the company to carry out and continue its existence. Said Ames interviewed them, and both alone and with the co-operation and assistance of Theodore Sutro, endeavored to obtain such consent; but was unable to do so.

A sufficient number of subscriptions to its proposed bonds not having been obtained before January 1st, 1888, to enable the company to avail itself of the settlement of July 12th, 1887, and Theodore Sutro and also said Ames having been unable to induce the representatives of McCalmont Brothers & Company to extend the time for payment under the settlement, or to entertain any other or different plan or proposition for a settlement or compromise of the foreclosure suit; notwithstanding such failure of the stockholders to subscribe for a sufficient number of bonds to pay off the mortgage claim, and notwithstanding the fact that by the failure of the company to comply with and perform the terms of the settlement before January 1st, 1888, its rights in the matter of said settlement had terminated, and notwithstanding the failure to obtain any other settlement or compromise of the foreclosure suit, or any extension of the time for compliance with the settlement of July 12th, 1887, Theodore Sutro determined not to cease his efforts to save the property of the company to its stockholders, or to so many of them as still would subscribe to bonds, and in the hope that, even if the amount necessary to pay off the mortgage claim was only realized subsequent to January 1st, 1888, McCalmont Brothers & Company would still accept the same, according to the terms of settlement of July 12th, 1887, the subscription lists, although they had been previously closed, were reopened, and all the stockholders given full and ample time and opportunity, and repeated notice by advertisements and circulars, further to subscribe for bonds, but, nevertheless, there were subscribed by shareholders representing in all only 833,936 shares of stock, the sum of only \$416,968, prior to April 27th, 1888: the sum of \$89,839.60 had been paid, prior to said day, on account of said subscriptions, and subsequent to April 27th, 1888, all said shareholders changed the form of their subscriptions, and the payments theretofore and thereafter made, were all made under the new plan of reorganization hereinafter set forth and on the changed form of subscription as hereinafter more fully stated.

The settlement of July 12th, 1887, not having been carried out by the company previous to January 1st, 1888, McCalmont Brothers & Company might, thereafter, begin to press and did press the foreclosure suit for trial, and would not grant or consent to any further postponement or delay therein; and in the opinion of the attorneys of the Sutro Tunnel Company, would have obtained a decree of foreclosure for the full amount claimed by them, excepting the interest on all overdue and unpaid installments of interest, which could not, in their opinion, be recovered by McCalmont Brothers & Company, as hereinbefore mentioned; and if anything was to be done to save the property to the company or its stockholders, or to any part of its stockholders, it was necessary that the same should be speedily done, and unless the foreclosure suit could then be compromised and settled, or the mortgage claim purchased, it would inevitably have resulted in foreclosure, and in the sale thereunder of all its property to McCalmont Brothers & Company, or to some third person, to the exclusion of *all* the stockholders, as the entire, or substantially the entire property of the company was embraced and included in the mortgage, and it had not the means or ability to pay off the same, or to redeem the property, should the same be sold. Therefore, all the circumstances considered, it was deemed for the best interests of the company and its stockholders to save the property for as many of its stockholders as possible; and it appearing impossible to obtain subscriptions from all of the stockholders, and in order to enable as many of them as possible to gain the full benefit and advantage of a settlement or purchase of the mortgage claim, if the same could still be accomplished, the Executive Committee, on the 27th day of April, 1888, issued a circular and notice to the stockholders who had subscribed to the bonds of the company, in pursuance of the plan hereinbefore mentioned, in and by which circular and notice the committee notified and informed the subscribing stockholders that stockholders representing about 900,000 of the 2,000,000 shares of the company had subscribed to the bonds, and made payments under their subscrip-

tions, and that further adjournments of the foreclosure proceedings could not be obtained, and that there then seemed no practical way to save the property of the company to it by the voluntary action of all its stockholders, and that a syndicate was forming which would contribute the pro rata amount of non-assenting stockholders on condition that the subscribing stockholders would make good their subscriptions, and that upon such payment the syndicate would be formed, and a reorganization carried out by purchase of the McCalmont mortgage, either without foreclosure, or with foreclosure and purchase of the property. That in the latter case the subscribing stockholders would receive for their subscriptions, bonds of the same amount and character as they would have received if the reorganization had been carried out without foreclosure, and that they would also receive the same proportionate amount of the total stock of the new company that they then held in the Sutro Tunnel Company, and deposited in accordance with the notice, the new company to have the same number of shares as the Sutro Tunnel Company. That the Union Trust Company would issue negotiable receipts for the shares of stock and subscriptions of subscribing stockholders, and that their subscriptions would be applied, in whole or in part, towards the purchase of the McCalmont mortgage, or towards buying the property of the Sutro Tunnel Company at foreclosure sale, in case it became necessary or advisable to adopt that plan, and towards payment of attendant expenses of litigation and reorganization, and would be held and applied for the benefit of the subscribing stockholders. That no payments would be made unless it was believed that complete success was absolutely sure, and that the moneys subscribed would be refunded in case sufficient amounts were not obtained to carry out the proposed plan. That when the syndicate would be formed, a Reorganization Committee of five members would be appointed, which committee would have general charge and discretion on behalf of the syndicate and of subscribing stockholders in regard to all matters connected with the proposed reor-

ganization, three members of the committee to be named by the syndicate, and the other members to be chosen from the Executive Committee. The Executive Committee, in this notice, called upon the subscribing stockholders to forward, between May 2d and May 5th, inclusive, next thereafter, the balance of their subscriptions, their share certificates, temporary receipts, and form of authorization in the notice enclosed, duly executed, to the Union Trust Company of New York, and further informed and notified subscribing stockholders in and by said notice that a compliance with the terms thereof would be regarded as their assent to the reorganization plan with foreclosure, if necessary, and also to all the other terms of said notice and of the notice of November 15th, 1887, issued by the Executive Committee.

Each and all the said subscribers paid in full their subscriptions to the Union Trust Company of New York, under the authorization referred to in the circular of the Executive Committee, of April 27th, 1888, which authorization said subscribers, and each of them, duly executed in writing and delivered to the Union Trust Company of New York, and in and by which authorization they, and each of them, authorized the Union Trust Company to apply, in whole or in part, the amount paid in by them, and each of them, under their several subscriptions for bonds of the Sutro Tunnel Company, made in compliance with the circular of the Executive Committee, dated New York, November 15th, 1887, as well as the balance due from them, and each of them, upon said subscription, towards the purchase of the existing mortgage, in case it should become necessary or advisable to adopt that plan; they, and each of them, understood, and so expressed themselves in said authorization, that this plan might involve foreclosure of the mortgage, purchase of the property and reorganization of the company on a new basis, with the same number of shares as the Sutro Tunnel Company; and that in case of such foreclosure and reorganization, they were to receive the same proportionate amount of stock of the new company as then held by them in the Sutro Tunnel



Company, and deposited by them with said authorization; together with the bonds of the new company as contemplated in said circulars of November 15th, 1887, and April 27th, 1888, at 50 % of their face or par value, against the payments made by them in cash; and in said authorization they, and each of them, further authorized the Union Trust Company of New York, after having applied their subscriptions as aforesaid, to pay over any balance of cash which might remain in its hands, to the Reorganization Committee thereafter to be appointed in accordance with the circular of April 27th, 1888. For the foregoing purposes, they sent therewith, original temporary receipt of the Union Trust Company of New York, together with their shares of stock and the balance of their subscriptions, with the understanding, expressed in said authorization, that they would receive from the Union Trust Company a certificate stating the above conditions, and agreeing that the moneys were to be refunded in the event that a sufficient amount to purchase or cancel the existing mortgage should not be paid in.

Moritz Meyer, Frederick Roeding, Mountford S. Wilson, John Landers, William Johns and Pelham W. Ames remained Trustees of the Sutro Tunnel Company from the 28th day of March, 1887, until the fourth day of May, 1888, and David Cahn remained a Trustee of the company until the 18th day of August, 1887, when he tendered his resignation as such Trustee, which was on said day accepted; and on the 28th day of December, 1887, Edmund Tauszky was elected to fill the vacancy thus created in the Board.

The next annual meeting of stockholders of the company was held on the fourth day of May, 1888; the total number of shares represented at said meeting was 1,161,672, stockholders actually present representing 35,973, and P. N. Lilienthal representing as proxy 1,125,699. Theodore Sutro, Philip N. Lilienthal, Edmund Tauszky, Horace H. Thayer, George E. Butler, M. B. Clapp, and F. A. Benjamin were elected the Trustees of the company at this meeting; and with the exception of F. A. Benjamin, who died on the 22d day of November, 1889, have, ever since said fourth day of May, 1888, been and now are the Trustees of the company.

The proxies so held by P. N. Lilienthal were obtained through the efforts of Theodore Sutro, and others, in the interest of the stockholders, as against McCalmont Brothers & Company, to control the election. On May 4th, 1888, a meeting of the newly elected Board of Trustees was held, at which Theodore Sutro was elected President of the company, Philip N. Lilienthal, Vice President, Pelham W. Ames, Secretary, H. H. Thayer, Assistant Secretary in New York, the Union Trust Company of New York, Registrars in New York, and Theodore Sutro, attorney and counselor.

At a meeting of the Board, held on August 6th, 1888, the salary of Theodore Sutro, as President of the company, was fixed at \$500 per month, payable from the date of his election as such, with the understanding that the monthly allowance of \$400 ordered to be paid to him on account of his compensation as attorney and counselor, on March 30th, 1887, by vote of the then Board of Trustees, should be understood to have ceased as such from the date of his election as President. He was elected President to act as such in the interest of the company and its stockholders, and in such manner as in his judgment would best secure its purposes to save its property for its stockholders as against McCalmont Brothers & Company, and to perform the duties usually appertaining to the office of President of a corporation of like character.

The sum of \$446,748.50 was finally, on or about the 21st day of June, 1888, paid in full by stockholders representing 893,497 shares of stock, who had subscribed for bonds and assented to the modified and new plan of reorganization announced in the circular and notice of the Executive Committee of April 27th, 1888, and the same was wholly insufficient to settle or compromise the mortgage claim of McCalmont Brothers & Company.

Each and all the stockholders who assented to the new plan of reorganization and paid their subscriptions to the Union Trust Company under the notice and circular of the Executive Committee, of April 27th, 1888, as well as those who assented and paid in their subscriptions under the several notices and circulars of the Reorganization Committee,

hereinafter set forth, received and accepted from the Union Trust Company, a certificate or negotiable receipt in writing, duly executed, wherein the Union Trust Company certified and acknowledged that it had received from them the number of shares of stock of the Sutro Tunnel Company therein mentioned, together with the sum also therein mentioned, in full payment of their several subscriptions for first mortgage thirty year non-accumulative four per cent. income bonds of the Sutro Tunnel Company as then existing, or of such company as might be formed in its stead in case of foreclosure; also, that the money derived from such subscriptions would be applied as contemplated in the circulars of the Executive Committee dated November 15th, 1887, and April 27th, 1888, copies of which were on file in the office of the Union Trust Company, and in accordance with the letter of authority to the Union Trust Company of the subscriber receiving and accepting such certificate or negotiable receipt; and further, that such subscriber or bearer was entitled, under the provisions of the above mentioned circulars, to the return of the shares of stock and to the delivery of such bonds of the Sutro Tunnel Company of the par value therein mentioned, in the event of reorganization without foreclosure; or to delivery of a proportionate amount of stock, and an equal amount of similar bonds of such new company as might be thereafter organized, in the event of reorganization with foreclosure; and lastly, that unless a sufficient amount should be paid in to carry out the plans embodied in the above mentioned circulars, the money subscribed and paid in would be repaid, and the shares of stock deposited, returned to such subscriber or bearer, when authorized by the Reorganization Committee, and on surrender of said certificate or negotiable receipt.

McCalmont Brothers & Company, notwithstanding the expiration of the limit of time for complying with the terms of the settlement of July 12th, 1887, hereinbefore mentioned, in the month of June, 1888, expressed their willingness to sell the mortgage claim for cash, upon the same basis as that upon which the proposed settlement

was to be carried out, and on the application of the syndicate, hereinbelow mentioned, in consideration of immediate cash payment, agreed to sell, assign, and transfer their mortgage claim for \$71,167.36, less than the sum that would have been due at said time, on the basis of the settlement of July 12th, 1887, to wit: for the sum of \$800,000.

On the 12th day of June, 1888, Theodorè Sutro succeeded in obtaining the following subscriptions from the following named persons and firms, to wit:

J. & W. Seligman & Co.	\$150,000
Robert Fleming.....	105,000
P. C. A. M. Van Weel.....	100,000
George W. Stern.....	110,000
H. Stursberg	25,000
Ladenburg, Thalmann & Co.....	25,000
H. P. Goldschmidt & Co.....	15,000
Maitland Phelps & Co.....	10,000
E. W. Clark & Co.....	10,000
	\$550,000

and said persons and firms constituted themselves a syndicate, and made said subscriptions pursuant to an agreement entered into between them on the 12th day of June, 1888, which agreement is called "The Syndicate Agreement," and provided that the members of the syndicate should guarantee payment for \$1,100,000, face value of the bonds to be issued under the new plan of reorganization, to the Union Trust Company of New York, at the rate of 50 % of their face value, and to the extent of the several sums subscribed by the members of the syndicate, and whereby Herman R. Baltzer, Otto Loewengard, Theodore Seligman, P. C. A. M. Van Weel, and Gordon Macdonald, were constituted a Reorganization Committee, and whereby the guaranty of the syndicate was conditioned that McCalmont Brothers & Company, should, upon payment to them, in cash, of the balance due them upon the reduced basis of settlement, assign and transfer the mortgage and causes of action, if any, in their favor, against the Sutro Tunnel Com-

pany, to the Reorganization Committee, or such person or persons as it might appoint, to be held in trust for the syndicate, and subscribers only to the bonds to be issued pursuant to the new plan of reorganization; said committee or its appointee to be substituted as complainant in the foreclosure suit; it was provided in and by the syndicate agreement, that an opportunity should at the earliest convenient date, upon proper notices, be given to the shareholders of the Sutro Tunnel Company who had not as yet assented to the plans of reorganization set forth in the syndicate agreement and in the notice and circular of April 27th, 1888, hereinbefore referred to and stated, to assent thereto, the number of 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 should not absolutely cease until the expiration of not less than thirty days after the publication of the first of said notices. It was further provided in and by the syndicate agreement, that if the payments therein provided should be made upon all shares of stock of the Sutro Tunnel Company, by shareholders, or upon a sufficient number of shares so that the syndicate should, in its opinion, be sufficiently reimbursed for and relieved of its guaranty, then the McCalmont mortgage should be satisfied of record, but not otherwise; all stockholders thereafter assenting and subscribing to bonds to be required to pay five cents or more per share, over and above the original rate of subscription of fifty cents per share, to be applied toward cash payment to the syndicate on account of a commission of bonds of the face value of \$200,000, provided in the agreement to be paid to it, said cash to be deemed equivalent to double its amount in bonds, and if payments of fifty cents or more per share should not be made upon all the shares or upon a sufficient number so that the syndicate should in its opinion be sufficiently reimbursed for and relieved of its guaranty, then the mortgage should be foreclosed; and if no competition should arise, the property should be purchased in trust for the syndicate, and for such assenting shareholders as

should have made the payments on their shares, and that thereupon a new company should be formed, with the same number of shares as the Sutro Tunnel Company, and shares of stock and bonds should be issued by such new company, and distributed as follows: to each assenting shareholder of the Sutro Tunnel Company, who should have made said payment on his shares, the same number of shares as those on which such payment should be made, and also income bonds of the new company of the same description as those which were to be issued by the Sutro Tunnel Company under the agreement of November 15th, 1887, at the rate of one dollar, face value, for every such share of assenting stock; and that to the syndicate there should be issued the same number of shares of stock in the new company as the number of non-assenting shares of the Sutro Tunnel Company who had not consented to make said payment, and also income bonds of the same description sufficient to represent said non-assenting shares at the rate of one dollar, face value, for every such share of non-assenting stock, beside the sum of \$50,000 in cash and income bonds of the same description of the face value of \$200,000 to be paid as commission and compensation for its guaranty; and in case of competition in bidding at said sale, that the full amount of the decree and costs should be bid, and if reorganization should become impossible by reason of such competition and purchase in the interest of other parties, that the sum realized from the sale should be applied, first, to the payment of the expenses and disbursements of the litigation and foreclosure and of the proposed reorganization, and of the commission to the syndicate of the sum of \$50,000 in cash and of 50 % of the face value of the \$200,000 in bonds; second, 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 to which each would have been entitled, in the event of reorganization; third, the remainder, if any, to be distributed among all the shareholders of the Sutro Tunnel Company, in proportion to the number of shares held by each. It was further agreed that the moneys to be paid by the syndicate

under their guaranty, and by subscription to the bonds should be applied toward obtaining an assignment and transfer of the McCalmont mortgage; and the surplus towards paying to Theodore Sutro, as the contingent compensation theretofore agreed upon 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 McCalmont Brothers & Company, which foreclosure and sale would have resulted in the exclusion of all shareholders of the Sutro Tunnel Company, the sum of \$100,000; and towards paying to Seligman & Seligman as a contingent fee, for services in promoting and organizing the syndicate, and their services as counsel in connection therewith, the sum of \$25,000, and toward paying the Executive Committee of stockholders, the sum of \$15,000, and toward paying the Reorganization Committee the sum of \$10,000, and toward paying all other expenses of litigation, and of the proposed reorganization of the Sutro Tunnel Company, including the cash commission of \$50,000 to the syndicate; the balance, if any, of said fees, expenses and commissions to be paid out of the first net earnings of the Sutro Tunnel Company or of such company as might be formed after foreclosure, after providing for the next due interest coupon on the bonds; and that in case the full amount of the guaranty made, or any part thereof, should be made good through cash payments by the shareholders of the Sutro Tunnel Company, or through bond subscriptions and cash payments by others, then the cash advanced by the syndicate under its guaranty, should be returned to the several members thereof; interest at the rate of six per cent. per annum to be allowed on all sums paid in cash by the syndicate, from the date of payment until said cash should be returned to it or until interest should begin to run on the new bonds delivered to it; the net profit in cash or securities, or both, resulting to the syndicate, to be divided among its members in proportion to their respective subscriptions thereto.

Notwithstanding the most strenuous and protracted efforts made by Theodore Sutro and others prior to June 12th,

1888, it was impossible to obtain other or more favorable terms and conditions from the syndicate, or from any of the members thereof, or from any other bankers or capitalists, or from any person or persons whatsoever, upon the syndicate or any other plan upon or whereby the guaranty or loan required for making the purchase or any settlement of the mortgage, or upon or whereby any sum, or loan, or guaranty whatsoever could be obtained, and there was no way or means possible or open to the Sutro Tunnel Company, or its stockholders, or any of them, to avail itself or themselves of the opportunity to purchase the mortgage claim upon the beneficial terms of the settlement with McCalmont Brothers & Company, otherwise than to accept the terms and conditions of the syndicate agreement; and the plan therein set forth was the only one that appeared to the parties entering into the same, at all feasible, under the circumstances in which the company was then placed; for, owing to the financial straits in which it found itself at the time the syndicate agreement was entered into, it was bound to avail itself of any means, tending to save itself from the loss of its entire property through foreclosure in the interest of McCalmont Brothers & Company; and the terms and conditions of and contained in the syndicate agreement were the best possible terms and conditions that could be obtained at that time and were fair and reasonable, all the circumstances considered. Owing to the character of the business transacted by the Sutro Tunnel Company, and its varying and uncertain income, the syndicate, in making its guaranty and cash payment of \$550,000, and in advancing the larger portion of the money necessary to the purchase of the McCalmont mortgage, did so at great risks; and it was therefore proper and just that it should be correspondingly compensated therefor. None of said demands or claims are now chargeable to or made against the Sutro Tunnel Company, but were justly chargeable to it in the event of non-foreclosure of its property, and were incurred by its authority, by the approval of the syndicate agreement only in so far as it relates to non-foreclosure of the property, at a meeting of the Board of

Trustees held on the 10th day of August, 1888, at which meeting the Board authorized the officers of the company to execute, and it did, through its officers, on August 10th, 1888, execute, in duplicate, its approval of said syndicate agreement, in the following words, to wit: "In consideration of one dollar, receipt whereof is hereby acknowledged, and for other good and valuable consideration, the Sutro Tunnel Company hereby agrees to do all acts and to execute all instruments necessary and proper to the complete carrying out, on its part, of the foregoing agreement, in so far as said agreement relates to non-foreclosure of the property of said company." This approval was the only approval of the syndicate agreement ever given by the company, and was the only manner, and it was only to that extent, that it ever became or was a party thereto.

On the 21st day of June, 1888, the sum of \$800,000 was paid by the Union Trust Company of New York to the owners of the McCalmont mortgage with the moneys subscribed and paid by the stockholders assenting to the new plan of reorganization, and by the syndicate, under its agreement; that is to say: the whole amount actually paid for the mortgage consisted of money which was subscribed by shareholders of the Sutro Tunnel Company to the bonds proposed to be issued under the new plan of reorganization, and of money subscribed and advanced by the syndicate, under its guaranty, and all of which money was the property of the subscribers, and no part of it was the money or property of the Sutro Tunnel Company; and in consideration of said payment, the owners of the McCalmont mortgage transferred and assigned the same to the Union Trust Company of New York on said 21st day of June, 1888. The Union Trust Company, acting as Trustee under an agreement made between it and the Reorganization Committee, pursuant to which it was to receive the amounts paid in on subscriptions to the bonds, and by the terms of which subscriptions under the aforesaid authorizations it was to apply the same as directed, paid the amount subscribed by said stockholders and by the syndicate, in consideration of said transfer and

assignment of the mortgage to it, and received and accepted the transfer and assignment, in trust for said stockholders and the syndicate, and not otherwise.

The sum for which the mortgage was transferred and assigned to the Union Trust Company, in trust as aforesaid, was on the same basis of settlement as that set forth in the report of Theodore Sutro, of July, 1887, less the further sum of \$71,167.36, reduction obtained on the application of the syndicate for immediate cash payment, as hereinabove stated.

Immediately upon the purchase of the McCalmont mortgage, and under date of June 21st, 1888, the Reorganization Committee caused advertisements to be inserted in the principal newspapers throughout the United States and Europe, and printed circulars to be widely distributed, and a copy to be sent to each stockholder of the Sutro Tunnel Company whose address was known or could be ascertained, wherein and whereby notice was given to the stockholders who had not assented to the plans of reorganization, that a syndicate had been formed which had guaranteed the subscription to the bonds and had advanced the balance of the money necessary to purchase the McCalmont mortgage. That this mortgage was now held by the Union Trust Company of New York, in trust for the syndicate and assenting stockholders, and was in a position for the necessary proceedings to be taken for immediate foreclosure. That although the success of the reorganization was secured by the guaranty of the syndicate, a further opportunity to the stockholders to save their shares had been obtained from the syndicate under the terms of the agreement with them; that stockholders who had not yet assented to the plans might save their stock by subscribing under the terms of the circulars of the Executive Committee dated respectively November 15th, 1887, and April 27th, 1888, copies of which were enclosed and made part of said notice and circular, except that a penalty of five cents per share was then imposed so that the cost of subscription would be fifty-five cents for each share of assenting stock instead of fifty cents per share as theretofore; that sub-

scriptions at the rate of fifty-five cents per share of assenting stock could be made, and the amounts thereon paid to the Union Trust Company, up to July 11th, 1888, at 3 P.M. Said stockholders were further requested in this notice and circular to sign an authorization which was enclosed therein, and it contained directions about paying their subscriptions and depositing their shares, and they were notified therein that they would receive negotiable receipts of the Union Trust Company, entitling the holder, upon completion of the reorganization, to the same number of shares of stock as then deposited by him and new first-mortgage four-per-cent. income bonds, in the proportion of one dollar for each fifty-five cents cash then paid, and that by complying with the terms of this circular such stockholders would be regarded as having assented to all the terms and conditions of the circulars of the Executive Committee dated respectively November 15th, 1887, and April 27th, 1888; the form of negotiable receipt referred to in the foregoing circular was the same as that hereinbefore, and the form of authorization was the same as that hereinafter, set forth. By subsequent notices and circulars, the time for stockholders to subscribe and assent as aforesaid was further extended by the Reorganization Committee.

At or about the same time, to wit: under date of June 22d, 1888, Theodore Sutro, as President of the Sutro Tunnel Company, caused circulars to be printed and distributed as widely as possible, and a copy to be sent to each stockholder whose address was known or could be ascertained, wherein he called attention to the report issued by him in July, 1887, and to the repeated notices sent out by the Executive Committee, and to a further appeal to the stockholders by him, dated February 15th, 1888, and gave notice that nearly one-half of the shareholders had subscribed and paid for their proportion of the bonds, and notified the stockholders who had failed to subscribe, that by reason of such failure and of the impossibility of obtaining any further adjournments in the litigation, and as the latter promised to result in a decree in favor of the plaintiffs at an early date, he (they) had been driven to

the necessity of obtaining the assistance of a guaranty syndicate in order to gain time within which delinquent shareholders might still protect their shares and property; that as a result of this condition of affairs, the McCalmont mortgage, and all rights thereunder in the suit to foreclose the same, had been transferred to the Union Trust Company of New York, in the interest of subscribing shareholders and of the syndicate, who, with the aid of a Reorganization Committee, would give all stockholders a final opportunity to subscribe for the bonds; that unless *every* shareholder who had not already done so would now act promptly, there was no reasonable prospect that the foreclosure and sale of the property for the sole benefit of subscribers could be averted; he also called attention to the prosperous condition of the company, aside from the pending litigation, and explained how the sum realized under the proposed new loan represented by the proposed bonds would be applied, and made a statement of receipts and operating expenses, and of the prospects of the property.

On the 14th day of July, 1888, the Sutro Tunnel Company consented that an order might be made in the foreclosure suit, substituting the Union Trust Company as complainant in place of William Johnstone Newall, surviving partner of McCalmont Brothers & Company, and that all further proceedings might be taken therein, under the title "Hugh McCalmont et al. (Union Trust Company of New York, substituted), Complainant, v. The Sutro Tunnel Company, Defendant," and on said day an order was made accordingly; and on the ninth day of August, 1888, the Trustees of the company, acting upon the advice of Theodore Sutro, its President and general attorney, and upon the advice of Samuel M. Wilson, Edmund Tauszky and other attorneys, and deeming it for the best interests of the company and its stockholders, as the only possible means of obtaining further time and a final opportunity for its stockholders to subscribe for the bonds on the new plan of reorganization, and thereby to assist in saving the property for itself and for themselves, consented to the entry of a decree in favor of the Union Trust Company,

pursuant to the terms of the mortgage, upon the following conditions:

1. That the Union Trust Company waive all claims for interest upon interest.

2. That all moneys theretofore paid by the Sutro Tunnel Company, whether on account of interest upon interest, or otherwise, and also all moneys paid by the Receiver under order of Court, up to the entry of the decree, be credited to the company, on account of the sum due in pursuance of the terms of the mortgage.

That in addition to the foregoing terms upon which said decree should be entered, the Union Trust Company should stipulate and agree as follows:

That if by means of funds to be realized from subscriptions to the unsubscribed balance of the authorized bonds of the Sutro Tunnel Company, of the aggregate face value of two million dollars, by such of its stockholders as had not as yet subscribed thereto, together with the sum which had already been realized from subscriptions by its stockholders, 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, if any, which should have been paid over by the Receiver up to the expiration of said ninety days, with the addition of such interest, attendant expenses, and commissions as might be approved by said Board, that then the judgment and decree should be discharged and satisfied of record; and that if the property of the company should have been sold within said period, and should have been bid in by the Union Trust Company, it should reconvey the same to the Sutro Tunnel Company, upon a like payment by it.

It was a further condition of said consent that during said period of ninety days there be given to such stockholders as had not as yet subscribed for the bonds, an opportunity to do so, upon due notice, at the rate of 55 % of their face value, for the first thirty days, and at the rate of

60 % of their face value for the remaining sixty days, in order to complete the full sum necessary to make the above mentioned payment, and that payment from the money realized from said subscriptions, should be deemed payment by the Sutro Tunnel Company.

The Board of Trustees on said ninth day of August, 1888, authorized and directed Theodore Sutro, and the other solicitors of the company, to enter into a stipulation and agreement with the solicitors for the Union Trust Company accordingly, and on the tenth day of August, 1888, they did so; and on the 13th day of August, 1888, an order was made in said cause that judgment and decree be entered pursuant to such consent and stipulation.

On the first day of October, 1888, the Union Trust Company obtained a decree of foreclosure of the mortgage for the sum of \$1,420,209.46, with interest thereon at the rate of ten per cent. per annum from the 13th day of August, 1888; this sum was the principal of the sums advanced by McCalmont Brothers & Company to the Sutro Tunnel Company, and secured by the mortgage, and interest thereon at the rate of twelve per cent. per annum from the respective dates of advances, up to the 13th day of August, 1888, less all sums theretofore paid by the company, whether on account of interest upon interest, or otherwise, and also less all moneys paid by the Receiver under the orders of the Court, to the former complainants, and to the substituted complainant, up to the 13th day of August, 1888; it was ordered in said decree that the same be entered as of August 13th, 1888, and the same was so entered. The amount for which it was rendered and entered, was the just and true amount owing by the Sutro Tunnel Company on the 13th day of August, 1888, as hereinabove stated; and neither the decree nor the amount thereof included any compound interest or interest on any overdue and unpaid installments of interest whatsoever, as it had been contended and claimed by the original complainants should be contained in any decree which might be made in their favor, and as by the resolution of September 1st, 1880, of the then Board of Trustees of the Sutro Tunnel Company, had been voted

and conceded to them; and in arriving at the amount for which said decree should be entered, the sum of \$74,156.74, which had in fact been paid to McCalmont Brothers & Company by the Sutro Tunnel Company, prior to the commencement of the foreclosure suit, on account of such interest upon interest, was deducted from the amount due, and credit given therefor to the company.

In order to afford all the stockholders an opportunity to take advantage and avail themselves of the conditions upon which, and in order to secure which, the consent to the entry of said decree had been given, and thereby to assist in saving the property of the Sutro Tunnel company for itself and themselves, Theodore Sutro and the Trustees immediately caused advertisements to be inserted in the principal newspapers in the Cities of New York and San Francisco, and printed circulars to be distributed as widely as possible and sent to every stockholder whose address was known or could be ascertained, whereby notice was given to such of the stockholders as had not yet subscribed to bonds, that judgment had been entered in the long pending suit for foreclosure of the mortgage in favor of the complainant therein; that one condition of the judgment, however, was, that all the shareholders who had not yet subscribed to the bonds should have ninety days from October 1st, 1888, to save their interest in the property, by paying for the first thirty days, 55 cents, and for the next succeeding sixty days, 60 cents per share, on all shares owned by them, for which they would receive bonds at the rate of \$1 for each 55 or 60 cents so subscribed; that any shareholder who would not subscribe for these bonds within said period of ninety days, must necessarily lose his interest in the property of the company, and also that for further information, application could be made at the offices of the company in the Cities of San Francisco and New York.

About the same time, and under date of October 3d, 1888, the Reorganization Committee caused advertisements to be inserted in the principal newspapers throughout the United States and Europe, and printed circulars to be widely distributed, and a copy to be sent to each stockholder whose

address was known or could be ascertained, whereby notice was given to the stockholders that a decree of foreclosure against the company had been entered, and that the property of the company would be sold at an early day, and that a *final* opportunity was given to stockholders to save their stock by subscribing under the terms of the circulars of the Executive Committee, dated respectively November 15th, 1887, and April 27th, 1888, (copies of which were enclosed, and made part of said notice and circulars,) except that the cost of subscription had been changed, and that stockholders would be allowed to subscribe at the following rates, to wit: 55 cents per share, assenting until November 3d, 1888, at 12 M., and 60 cents per share, assenting thereafter, until January 2d, 1889, at 3 P.M. That subscriptions at the rates of fifty-five cents and sixty cents respectively, per share, of assenting stock, could be made and the amounts thereon paid in to the Union Trust Company of New York, during the periods above mentioned; and stockholders were further requested in this notice and circular to sign an authorization (which is hereinafter set forth), and which was enclosed therein, and this circular furthermore contained directions about paying their subscriptions and depositing their shares of stock and notified them that they would receive the negotiable receipt of the Union Trust Company of New York (which has been hereinbefore set forth), entitling the holder, upon completion of the reorganization, to the same number of shares of stock as then deposited by him, and new first mortgage four per cent. income bonds in the proportion of one dollar for each fifty-five or sixty cents cash, as the case might be, then paid, and that by complying with the terms of this circular such stockholders would be regarded as having assented to all the terms and conditions of the circulars of the Executive Committee, dated respectively November 15th, 1887, and April 27th, 1888.

Each and all of the stockholders who paid in their subscriptions under and assented to the new plan of reorganization after June 21st, 1888, and under the notices and circulars of the Reorganization Committee, herein set forth, duly executed in writing, and delivered to the Union Trust Com-

pany of New York, an authorization in which they stated that they handed therewith to it the certificates for the number of shares of stock of the Sutro Tunnel Company therein mentioned, duly assigned, and also the sum therein mentioned, in payment, at the rate therein mentioned, for bonds of the face or par value therein mentioned, of the Sutro Tunnel Company or of such company as might be thereafter organized in its stead, pursuant to the circulars of the Executive Committee, dated November 15th, 1887, and April 27th, 1888, and they and each of them therein and thereby authorized and requested the Union Trust Company to pay the amount over to the Reorganization Committee.

The number of shares represented by subscriptions to bonds was 1,448,012, and defendants have not any information or belief upon the subject as to whether the balance of shares, or how many of them, are owned or held by any person or persons, as many of said shares have been lost and destroyed.

The property of the Sutro Tunnel Company, excepting certain blocks of land in the town of Sutro, was bid in by the Union Trust Company, at a sale thereof had under the decree, on January 14th, 1889, for \$1,325,000, and on the 18th day of July, 1889, said sale was confirmed by order of the Court, and a deed of the property was, on the 2d day of August, 1889, executed thereunder by the Special Master appointed by the Court, to the Union Trust Company; the sale was had after repeated adjournments and due public notice thereof, as provided by law, and was open to any one who might wish to bid for or purchase the property.

The Trustees of the Sutro Tunnel Company allowed the ninety days to elapse without levying any assessment upon the stock of the company to repay the amount advanced by the syndicate for the purchase of the mortgage, and allowed the property of the company to be sold under the decree, and allowed the time for redemption thereunder to expire, and allowed the sale of the property to be confirmed without redeeming the same. But neither the Trustees nor the company could have lawfully, or by assessment upon the stock, or otherwise provided any means for such redemption, for the

company had no means and the full amount necessary to make the payment according to the terms of said consent was not subscribed within said ninety days, or within any time; and the Board could not levy any valid assessment upon the stock, as herein explained, and neither the Board nor the company could prevent the property from being sold under said decree, nor could either of them redeem it from such sale, nor could they prevent confirmation of the sale without redemption.

The bid was made by, and the sale and deed were made to the Union Trust Company, not on its own account, but as the appointee of the Reorganization Committee, appointed by the syndicate and Executive Committee, and as an intended and actual trustee for the syndicate, and for the stockholders who had subscribed for bonds under the new plan of reorganization.

The sale to the Union Trust Company left an actual and *bona fide* judgment in its favor for a deficiency against the Sutro Tunnel Company, in the sum of \$101,365.13, bearing interest at the rate of 7 per cent. per annum from the 14th day of January, 1889, which deficiency judgment was entered on the 11th day of December, 1889, and the Union Trust Company was of right and in justice and equity entitled thereto; and the indebtedness of the Sutro Tunnel Company, under the mortgage, to the extent of \$1,325,000, was paid and discharged by the purchase of its property by the Union Trust Company, as above stated.

The only indebtedness of the Sutro Tunnel Company now existing is the amount of said deficiency judgment in favor of said Union Trust Company; and no accounting whatsoever is necessary to ascertain the same, it being of record in Court, and the remaining real property of the Sutro Tunnel Company will be sold in partial satisfaction of the deficiency judgment, as of right it may be.

The Receiver acted as such until the 21st day of October, 1889, and received all receipts from the property up to said date, and paid over to the Union Trust Company all such receipts, less the general current and operating expenses of the Sutro Tunnel Company, and less the sums ordered

by the Court to be paid to other persons, or for other purposes, and the amount so paid over to the Union Trust Company is \$213,920.96; said receipts, less the above expenses and payments, were paid over statedly to the Union Trust Company subsequent to August 4th, 1888, and under an order made by the Court on said 4th day of August, 1888, to be applied in accordance with said order, as payments upon the McCalmont mortgage, until the sale of the property under the decree, on the 14th day of January, 1889, and thereafter, under and pursuant to the decree.

The members of the syndicate could not have been reimbursed from the subscriptions to the bonds, and from the income of the property, and from funds received and paid over by the Receiver, or from any source, without any foreclosure or sale of the property. They did not arbitrarily insist upon foreclosure and sale. They paid at the rate of 50 cents cash for each share of stock and each \$1 face value in bonds to be received by them under the plan of reorganization, the same as all other subscribers prior to June 21st, 1888, and they and the subscribers merely exercised their rights in having the Union Trust Company, to whom the mortgage had been assigned in trust for them, obtain the decree and foreclosure, and purchase the property.

The members of the syndicate have advanced, under their guaranty, the sum of \$550,000, and have been reimbursed for said advance from subscriptions by assenting stockholders, and not otherwise, in the sum of \$277,257.50, and no more, which sum of \$277,257.50 has been paid by stockholders upon their subscriptions under the new plan of reorganization, since the purchase of the McCalmont mortgage, to wit: since June 21st, 1888, towards repaying the advances made by the syndicate, leaving the sum of \$272,742.50 advanced by it under its guaranty, for which it has not been reimbursed.

Under the syndicate agreement and plan of reorganization, any new company thereafter to be formed was to have two million shares of stock, and the stockholders of the Sutro Tunnel Company, subscribing for the bonds, were entitled to receive a number of shares in the new company

equal to the number of shares upon which they had subscribed to the bonds, and mortgage bonds to be issued by the new company in the amount equaling the face value of their subscriptions to the bonds; and the syndicate was entitled to receive the balance of shares in the new company, equivalent to the number of shares of the Sutro Tunnel Company upon which it had guaranteed the payment of fifty cents per share for bonds, and, in return for fifty cents cash paid by it in place of shareholders who had failed to make such payment on each share of stock held by such shareholders, it was entitled to receive mortgage bonds to be issued by such new company in an amount equaling the number of shares held by stockholders so failing; and it was furthermore entitled to receive \$200,000 in bonds at their face value besides \$50,000 cash as commission for its original guaranty, as hereinabove stated.

The Comstock Tunnel Company was organized under the laws of the State of New York, on the 30th day of August, 1889, with two million shares of capital stock, of the par value of two dollars each, for the purpose of carrying into effect the terms of the syndicate agreement, and the reorganization plan, and as a result thereof, and a large majority of the shareholders in interest of the Sutro Tunnel Company have become shareholders in The Comstock Tunnel Company.

The sum of \$800,000 of the aggregate amount subscribed by stockholders under the new plan of reorganization, and by the syndicate, under its guaranty, was used to pay for the McCalmont mortgage, and the balance of said subscribed sums and a portion of the amount paid over to the Union Trust Company by the Receiver were used to pay for the attendant expenses of litigation and reorganization; and The Comstock Tunnel Company, after its incorporation and organization, was, and now is, wholly free from any and all debts whatsoever, excepting only its said bonded indebtedness, which amounts to \$2,139,000 in bonds at par, and which bonds were issued in pursuance of said plan of reorganization; and The Comstock Tunnel Company had in its treasury, at the time of its organization, the sum of about \$125,000.

On the 19th day of October, 1889, under date of September 1st, 1889, the Union Trust Company conveyed and sold unto The Comstock Tunnel Company all the property and rights and franchises which it acquired under the decree of foreclosure and sale of the property of the Sutro Tunnel Company; and said property, franchises and rights so conveyed to The Comstock Tunnel Company are held by it under the terms and conditions of the reorganization plan as its property; and on said 19th day of October, 1889, under date of September 1st, 1889, The Comstock Tunnel Company mortgaged said property, franchises and rights to the Union Trust Company as security for the bonds which have been issued, by The Comstock Tunnel Company to the members of the syndicate, and to the other shareholders of The Comstock Tunnel Company who are such of the shareholders of the Sutro Tunnel Company as had subscribed to the bonds.

The success of the reorganization is entirely due to the efforts and labors of Theodore Sutro, and his associates and assistants, acting under his direction and supervision; when in January, 1887, he entered upon the task of endeavoring to save the property of the Sutro Tunnel Company to it and its stockholders, as against foreclosure in the interest of McCalmont Brothers & Company, the prospects of succeeding in the undertaking appeared almost hopeless; at that time it was the opinion of the then Board of Trustees of the Sutro Tunnel Company, and also of most of its stockholders, and also of attorneys and persons generally, who had interested themselves in the matter, that there was no defense to the McCalmont mortgage, or to the foreclosure suit, and that foreclosure could not be delayed or avoided; also, that no assessment could be levied upon the stock of the Sutro Tunnel Company, and that even if an assessment could be levied, it could not be collected, owing to the fact that the stockholders then had so little faith in its future prospects; the Sutro Tunnel Company had absolutely no credit in the financial world, and it appeared almost a hopeless undertaking to endeavor to inspire sufficient confidence in the minds of any persons to induce them to loan it any amount of money: the compensation of Theodore

Sutro was to be entirely contingent upon his success in preventing foreclosure in the interest of McCalmont Brothers & Company, as against the stockholders of the Sutro Tunnel Company, and the services to be rendered by him were not only to be professional services as an attorney and counselor at law, in the defense of the foreclosure suit, but, in the event that foreclosure could not be avoided, as it appeared it could not be, also services in obtaining sufficient moneys to settle or compromise, or purchase the mortgage claim of McCalmont Brothers & Company, which, on the date of the commencement of the foreclosure suit, to wit: on March 22d, 1886, amounted to \$1,636,606.17, and, with the addition of interest upon interest, as claimed by McCalmont Brothers & Company, amounted to \$1,804,135.53: he rendered these services on behalf of the Sutro Tunnel Company and its stockholders; the undertaking required and occupied nearly his entire time and attention during the past three years, to the almost entire exclusion of all other professional business and engagements: he obtained subscriptions to bonds and the guaranty of the syndicate, and realized upon the subscriptions and guaranty over \$1,000,000 in cash: his employment involved the responsibility connected with the chief direction, management and supervision of the litigation, reorganization, property and affairs of the Sutro Tunnel Company and its stockholders, and necessitated, on his part, several journeys to California and Nevada, and prolonged absences from the City of New York, where he during all of said times resided and had his office: all these facts and circumstances considered, the sum agreed to be paid to him as such contingent compensation for the services so to be rendered and rendered by him, was only reasonable and moderate.

With the view of relieving the syndicate of a portion of its guaranty, and of thereby furthering and promoting the plan of reorganization of the Sutro Tunnel Company, without foreclosure, hereinbefore set forth, Theodore Sutro, by special agreement with the syndicate, undertook and agreed to accept, and did, in fact, thereafter accept, two-thirds of his contingent compensation of one hundred

thousand dollars, in securities issued in pursuance of the plan of reorganization, and the balance of one-third in cash, less all sums theretofore paid him on account of his services as attorney and counselor of the Sutro Tunnel Company, and of its stockholders.

Seligman & Seligman, who were to receive twenty-five thousand dollars, as a contingent fee for their services in promoting and organizing the syndicate, and for their services as counsel in connection therewith, and the members of the Executive Committee of stockholders, who were to receive fifteen thousand dollars for their services, and the members of the Reorganization Committee, who were to receive ten thousand dollars for their services, also with the view of relieving the syndicate of a portion of its guaranty; and of thereby furthering and promoting the plan of reorganization of the Sutro Tunnel Company, without foreclosure, by special agreement with the syndicate, all undertook and agreed to accept, and did in fact thereafter, accept two-thirds of their compensation, in securities issued in pursuance of the plan of reorganization, and the balance of one-third in cash; and the compensation agreed to be paid to them, and accepted by them, was reasonable and just, in view of the services rendered, and the risks and responsibilities assumed by them.

Theodore Sutro, who is a Trustee and President of the Sutro Tunnel Company, is also a Trustee and President of The Comstock Tunnel Company, and is receiving a salary from the last mentioned company, but on the 24th day of October, 1889, the Board of Trustees of the Sutro Tunnel Company ordered all salaries theretofore paid by said company to its officers and employees, to cease, and the Sutro Tunnel Company has, since said date, not paid any salary to any of its officers or employees; and has not since the 1st day of August, 1889, paid any salary to Theodore Sutro; and prior to October 24th, 1889, he wrote to the Sutro Tunnel Company from New York, and notified it, that he would not make any claim for salary as President thereof from the time of his election as President of The Comstock Tunnel Company, to wit: from the 10th day of October, 1889.

Horace H. Thayer, who is a Trustee and assistant Secretary of the Sutro Tunnel Company, is also Secretary of The Comstock Tunnel Company, and is receiving a salary as such Secretary, from The Comstock Tunnel Company; but since October 24th, 1889, he has not been under salary, and has received no salary since the 1st day of August, 1889, as assistant Secretary of the Sutro Tunnel Company, or otherwise, and has claimed none subsequent to the 10th day of October, 1889.

The defendants deny 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 the answer set forth, and of the intention to consummate them, at the time and before any of said transactions occurred. The complainants, and each of them, had full and ample opportunity to subscribe for said bonds, and the same opportunity that the stockholders of the Sutro Tunnel Company who did subscribe therefor had, and neither complainants, nor any of them, nor any of the stockholders of the Sutro Tunnel Company who did not subscribe for the bonds, made or attempted to make any objection, or took or attempted to take any exception, to any of the acts or transactions in the answer set forth; and neither complainants, nor any of them, nor any of the stockholders of the Sutro Tunnel Company who did not subscribe for the 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: complainants, and each of them, and all of the stockholders of the Sutro Tunnel Company, whether they subscribed to the bonds or not, had at all times full and free access to all of the books, papers, instruments, and records, of the 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 syndicate agreement, and all papers pertaining thereto, filed among said

records on or about August 10th, 1888, when the syndicate agreement was approved, and showing in detail, all of the transactions in the answer set forth, in so far as they had any relation to the Sutro Tunnel Company, or its stockholders as such; and the Trustees of the Sutro Tunnel Company, and the officers thereof, and each of them, and particularly Theodore Sutro, and also the members of the Executive and Reorganization Committees, were at all times ready and willing to give to any and all of the stockholders of the Sutro Tunnel Company, any and all information that they or any of them might desire, and did so, whenever thereto requested. All the transactions and acts of the Trustees and officers of the Sutro Tunnel Company in the answer set forth, were had and done in good faith, and in the exercise of their best judgment and discretion, and said acts and transactions were the only feasible and possible means whereby the property of the Sutro Tunnel Company could at all be saved in the interest of any of its stockholders whatsoever, and by which foreclosure in the sole interest of McCalmont Brothers & Company, which would have resulted in the exclusion of every shareholder of the Sutro Tunnel Company, could be prevented; and a large majority of the stockholders of the Sutro Tunnel Company having come forward, together with the syndicate, and having by their own efforts and with their own funds purchased the McCalmont mortgage, it would not be just, fair, nor equitable, that the stockholders of the 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 Theodore Sutro and the Trustees of the Sutro Tunnel Company and the 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 the mortgage and the success of the reorganization.

The defendants state, on information and belief, that the complainants, and each of them, did in fact, assent to and subscribe for the bonds to be issued, and did comply

with all the conditions required, under the plan of reorganization, whereby the mortgage was purchased and foreclosed, and The Comstock Tunnel Company organized, and that they paid their subscriptions and directed the money paid by them thereunder to be applied to the foregoing purposes, and that the complainants have confederated and conspired together to bring, and have brought this suit, in bad faith; defendants further say that the bill of complaint does not contain any matter of equity entitling the complainants, or any of them, to any relief against the defendants, or any of them.

The defendants deny, and each of them denies, any and all manner of unlawful combination, confederacy, and conspiracy, wherewith they are, or any of them is, by the complaint charged, and deny, and each denies, generally and specifically, each and every, all and singular, the allegations, matters, and things in the bill of complaint contained, and not in the answer well and sufficiently answered, confessed, traversed and avoided, or denied.

All of which matters and things the defendants are, and each of them is, ready and willing to aver, maintain, and prove.

EDMUND TAUSZKY,
W. E. F. DEAL,

Solicitors for said Defendants.

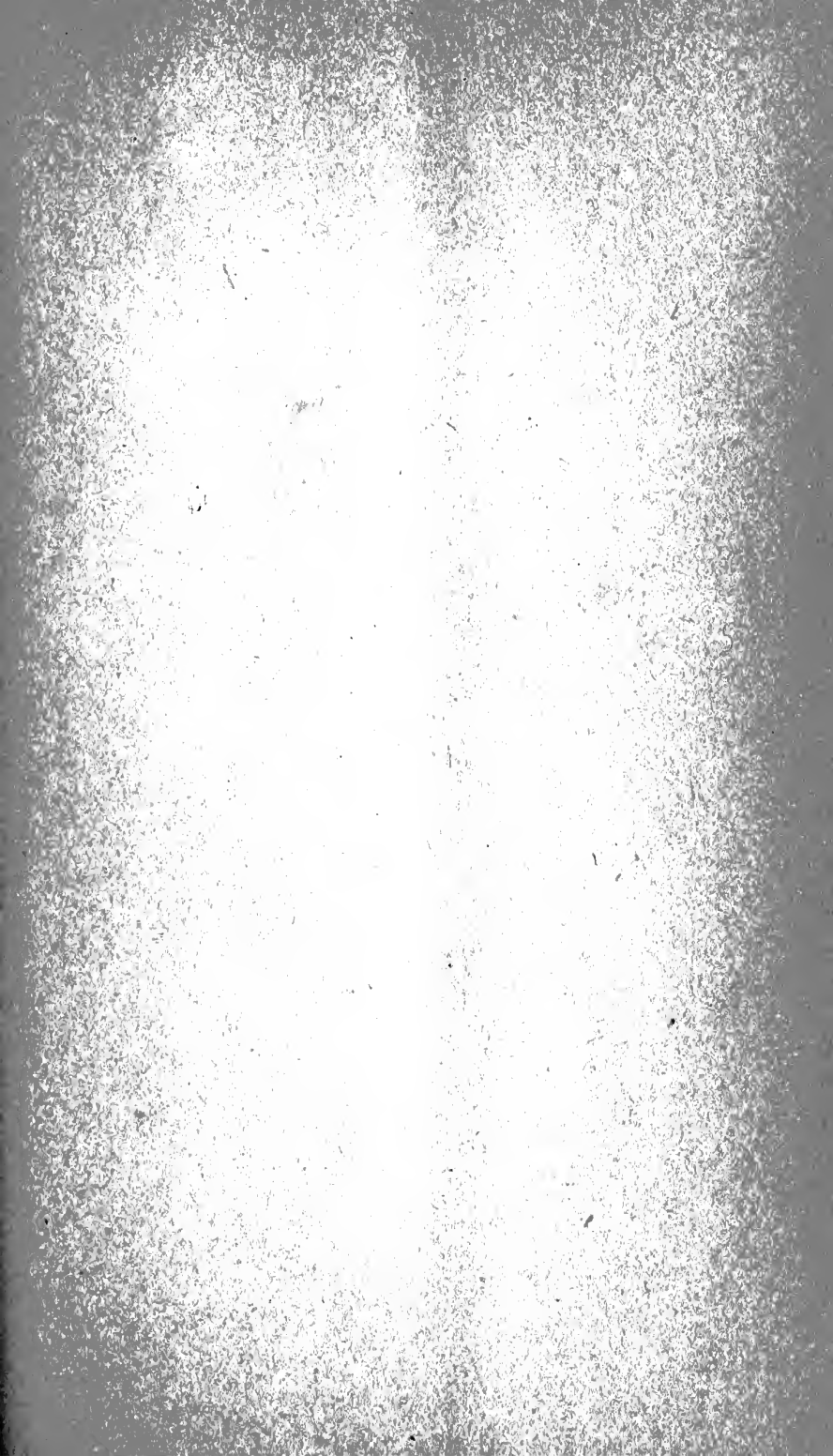
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WHEELER H. PECKHAM,

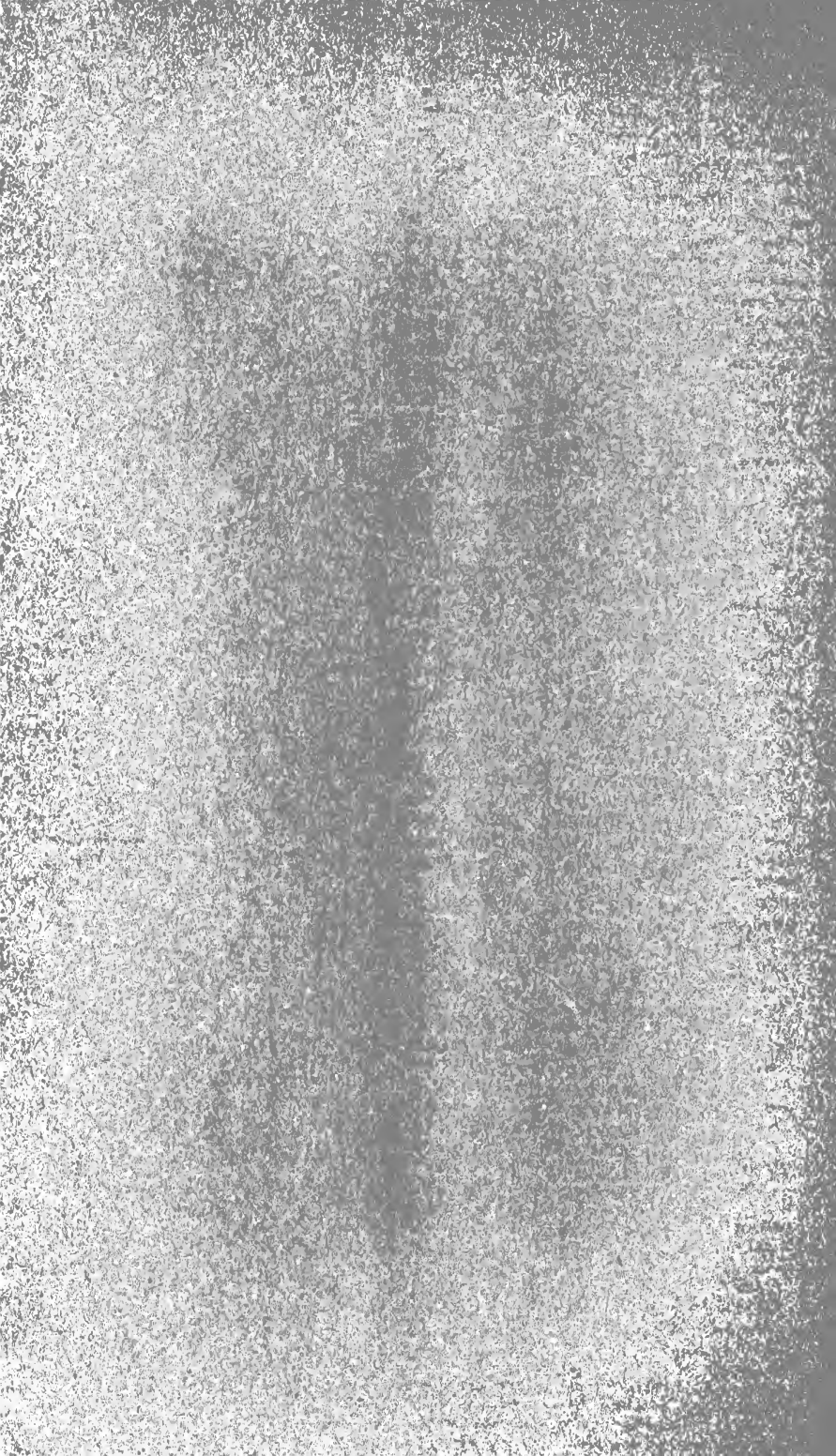
Of Counsel.

I hereby certify the foregoing to be a correct synopsis of the answer of said defendants.

EDMUND TAUSZKY,
Solicitor for said Defendants.

San Francisco, Cal., April 28th, 1890.





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